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[B-168729]

Bids—Late—Mishandling Determination—Bids Received at One Place for Delivery to Another Place

A bid sent by certified mail that was not directed to the bid opening room or did not list the information required by the invitation, and which although timely delivered to the mailroom, as shown by a Post Office Department form considered acceptable documentary evidence, was not identified until after bids were opened, may be considered on the basis that failure to recognize from the corporate name and size of the envelope that the envelope contained a bid constitutes Government mishandling, and that the lapse of time between receipt, opening, and delivery of the bid was unreasonable for certified mail, and the fact that a price alteration was uninitialed does not require rejection of the low bid where the intended bid price is not in doubt and remained low, and there is no indication the bidder had an opportunity to reclaim and alter the bid.

To the Kaiser Steel Corporation, August 3, 1970:

By telegram dated January 29, 1970, and later correspondence, you protested the award of a contract to Emco Porcelain Enamel Company, Inc. (Emco), under invitation for bids No. DAAA25-70-B-0171, issued by the United States Army, Frankford Arsenal, Philadelphia, Pennsylvania, on the grounds that the Emco bid was inexcusably late, was opened prior to being received in the bid room, and contained uninitialed price alterations.

The subject invitation, as amended, was for the procurement of 3,300,000 M2A1 Ammunition Boxes and the time set for the opening of bids was November 12, 1969, at 11:00 a.m. By that time, bids had been received from six bidders including Kaiser but not including Emco. The Emco bid, sent by certified mail as required by the invitation and by Armed Services Procurement Regulation (ASPR) 2-303.2, was opened by Army personnel in the Frankford Arsenal mailroom at 1:30 p.m. on November 12, 1969, 2½ hours after bid opening, and upon its identification as a bid, was immediately forwarded to the bid receiving room, arriving there at 2:09 p.m. Pursuant to ASPR 2-303.6, Emco was provided an opportunity to prove that its bid had been submitted in a timely manner and was therefore eligible to be considered for award. On the basis of the information provided, primarily in the form of a letter from the postmaster of the Port Chester, New York Post Office, the mailing place of the Emco bid, to the effect that the Emco bid had been mailed within sufficient time to assure timely arrival, the contracting officer concluded that the Emco bid was delayed because of Government mishandling and was therefore for consideration in accordance with ASPR 2-303.2(iii).

Although the Kaiser bid was initially evaluated as low on item 002 of the three-item invitation and award was actually made to Kaiser for that item, it was later determined that an error had been made in the evaluation of freight charges with respect to the Emco and Kaiser bids with the result that the Emco bid was actually the lowest received

on item 002. Thereafter, the award made to Kaiser was officially canceled and on January 13, 1970, contract No. DAAA25-70-C-0385 was awarded to Emco at a total contract price of $2,214,675, with performance by Emco continuing to date.

In view of your contention that the Emco bid contained incurable defects, you request that the Emco contract be canceled and that the contract initially awarded to Kaiser be reinstated.

The undisputed facts concerning the lateness issue are that the Emco bid, addressed to "U.S. Army, Frankford Arsenal, Tacony and Bridge Streets, Philadelphia, Pa. 19137," was mailed on November 10, 1969, by certified mail, receipt number 45358, and was actually delivered to the Frankford Arsenal mailroom at 7:15 a.m., November 12, 1969, 3¾ hours before the 11:00 a.m. bid opening time and 6¼ hours before the envelope containing the bid was opened at 1:30 p.m. in the mailroom. In reaching the conclusion that the lateness of the Emco bid should be excused on the ground of Government mishandling, the contracting officer and the buyer, in a "Determination of Late Bid" dated November 20, 1969, stated as follows:

> Envelope was received at Frankford Arsenal 0730 on 12 Nov 69 and even though not identified as a Bid, the corporate name and the size of the envelope should have apprised someone in the mail room that envelope could contain a Bid.
>
> Envelope was not opened for identity until 1340 on 12 Nov 69, which appears to be an unreasonable lapse of time for opening certified mail. If envelope had been opened within 2 hours after receipt, identified Bid could have been hand carried to Bid Opening Room in sufficient time for 11:00 AM opening.

We have been advised by the Department of the Army that the normal procedure for handling incoming bid mail at Frankford Arsenal is that upon receipt of incoming mail at approximately 7:45 a.m., registered, certified, and insured mail—"accountable mail"—is separated from other mail and held in a restricted area. Thereafter, envelopes properly identified as containing bids are processed and forwarded to the Frankford Arsenal Procurement Directorate. Next, the remaining registered, certified, insured, and other mail is immediately processed in that order. It is reported that the volume on November 12, 1969, was heavy because the preceding day was a holiday. However, although overall volume was apparently heavy, we are advised that only 19 pieces of registered mail were received on the day in question. Additionally, according to DD Form 434, Record of Accountable Mail, for November 12, 18 pieces categorized as "insured and certified" were received, nine of which, including the Emco envelope, were ultimately determined to contain bids. Therefore, the total of all "accountable" mail received on November 12, including bids, did not exceed 37 pieces. We are further advised that two employees were detailed on November 12 to process accountable mail and that no other duties customarily interrupt the processing of incoming mail.

It is your contention generally that any mishandling of the Emco bid by Government personnel was not the "sole" cause of lateness as contemplated by ASPR 2–303.3 inasmuch as the Emco bid envelope was not addressed to the attention of the bid opening room nor did it list the invitation number and the date and time of opening as required by the invitation. You maintain that had the Emco bid been properly addressed, it would have received priority treatment and been timely delivered to the bid opening room. You therefore conclude that the incomplete address caused, or at least contributed to, the lateness of the bid and that the Emco bid should have been rejected as inexcusably late.

Additionally, you contend that the Emco bid envelope was actually not received at the Frankford Arsenal mailroom until 1:30 p.m. because it was not time-stamped until that time. Although apparently conceding that the bid envelope was actually received at 7:15 a.m., as evidenced by Post Office Department Form 3883, it is your position that that form cannot be used to evidence the actual time of receipt because ASPR 2–303 and paragraph 8 of Standard Form (SF) 33A, attached to the invitation, require that the installation time stamp or other documentary evidence be used as evidence of the time of receipt. You contend that the other documentary evidence referred to by the regulation and SF 33A "may be considered only where the best and primary evidence stipulated by the regulation—the installation's time stamp—is not available for examination under the circumstances." You also contend that in any event the Post Office Department form is "testimonial" rather than "documentary" evidence.

To accept this additional rationale would be to allow so-called "rules of evidence"—the purpose of which ultimately is merely to permit the achievement of reasonable certitude concerning the occurrence of past events—to prove as a fact that which is not a fact. Post Office Department Form 3883, a photocopy of which is a part of the administrative file, lists 7:15 a.m., November 12, 1969, as the hour and date of delivery of the mail listed thereon and is signed by a Post Office Department employee and by an individual identified by the form as the agent of the addressee, Frankford Arsenal. Neither ASPR 2–303.2(iii), dealing with the consideration of late mailed bids for award, nor paragraph 8 of SF 33A establishes any grade or level of "best evidence" as between the installation's time stamp and any appropriate Post Office Department forms. Rather, both state only that timely receipt should be determined by "examination of an appropriate date or time stamp (if any) of such installation, *or* of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it." Finally, the term

"documentary evidence" is defined by Black's Law Dictionary, Fourth Edition, as "Evidence supplied by writings and documents of every kind in the widest sense of the term; evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances"—a definition which applies equally to the Frankford Arsenal time stamp as to the Post Office Department form. [Italic supplied.]

We must disagree with your position that the Emco bid should have been rejected as inexcusably late. It is true that ASPR 2-303(iii) requires that any lateness in delivery to the bid opening room after timely delivery to the Government installation must be caused "solely" by Government mishandling and that had Emco properly addressed its bid envelope, it would in all probability have reached the bid opening room in time. However, notwithstanding these facts, it is our conclusion that but for Government mishandling after receipt at the Frankford Arsenal mailroom, the Emco bid as well as all other "accountable" mail delivered on November 12 would have been opened sufficiently before 11:00 a.m. to permit routing to the bid opening room before that time.

In this regard, as indicated above, not more than 37 pieces of accountable mail were received for processing by two clerks at 7:30 a.m. on November 12. Considering the fact that approximately 3½ hours remained after receipt of incoming mail in the mailroom before bid opening at 11:00 a.m., all that would have been required of the two clerks assigned to the processing of incoming mail to have processed all of the "accountable" mail before 11:00 a.m. would have been for each clerk to have handled roughly five pieces of mail each hour. Inasmuch as processing apparently entails merely the opening of envelopes for purposes of ascertaining their ultimate destinations there would appear to be little question but that the Emco bid should have been identified as a bid sufficiently before 11:00 a.m. to allow its timely delivery to the bid opening room notwithstanding the fact that it was not identified as a bid, and that its late receipt was therefore due solely to Government mishandling.

Support for this position is found in a similar case, B-162390, November 20, 1967, wherein the failure to list the date and time of opening on a bid envelope resulted in the envelope not receiving expedited handling which would have assured timely receipt but where the late receipt was actually caused not by the omitted information but by a missed pickup by the base mail delivery service. In that decision, our Office concluded that the late delivery was caused by the missed pickup rather than the failure to set out the required information on the bid envelope. That decision stated:

> * * * while it may be inferred that the Wyle Laboratories bid would have received expedited delivery if the date and time of the scheduled opening had been placed on the bid envelope in accordance with paragraph 5(a) of the solicitation instruction, we cannot agree, as you contend, that the failure to supply this information is, in the instant situation, relevant to the determination that the bid was mishandled under the established delivery procedures. Clearly, the lack of such information did not contribute to the failure of the delivery truck personnel to effect timely delivery of the Wyle Laboratories bid.

It is equally as clear, in our opinion, that the lack of the required bid information in the instant case did not contribute to the failure of the mailroom personnel to handle the incoming mail with normal expedition.

On the question of the uninitialed price alteration, a visual inspection of the original Emco bid reveals that item prices of $1.75 and $1.74 were initially quoted for subitems (a) and (b) of invitation item 002. These item prices were changed to $1.747 and $1.737 by the application of a white corrective substance to the original prices and the typing over of the new reduced prices. The changes were not initialed. Visual inspection of the Emco bid also reveals, because of incomplete coverage of the original prices by the corrective substance, that only the one change was made. Additionally, the reduced prices are obviously typed by typewriter using the same type face as was used for the original prices.

It is your position that the Emco bid was nonresponsive because the invitation alterations were not initialed by the person signing the bid and because it is not clear, in your estimation, whether the alterations were in fact made before the bid opening time of 11:00 a.m. With regard to your first contention, our Office has held on many occasions that the failure to initial bid changes is a minor informality so long as there is no question as to the amount intended. In this regard, the following statement was made in 49 Comp. Gen. 541, March 5, 1970:

> * * * we have consistently held that if a bidder fails to initial an erasure in the bid price, but the erasure and correction leave no doubt as to what the intended bid price is, such a bidder has made a legally binding offer, acceptance of which would consummate a valid contract which the bidder would be obliged to perform at the offered price. Under such circumstances we have concluded that the requirement for initialing changes is a matter of form which may be considered an informality and waived in the interest of the Government. See B-149134, September 20, 1962; B-147106(2), September 25, 1961; B-148081, March 5, 1962; B-148560, April 10, 1962; and B-159376, August 2, 1966.

You maintain, however, that because the Emco bid was not received in the bid opening room until 2½ hours after bid opening, it cannot be said with certainty that the price changes were made before bid opening. In substantiation of this contention you point out that the Emco bid was opened before being delivered to the bid opening room at 1:30 p.m. but that neither the signature and position of the person opening the bid nor an explanation by the official designated for the purpose of opening bids of the facts surrounding the opening was

written on the envelope, as required by ASPR 2–401(b). This gives rise, in your opinion, to the possibility that the bid came back into Emco's hands after bid opening but before delivery to the bid opening room with the concurrent possibility that the changed prices could have been inserted at that time to the detriment of the integrity of the competitive bidding system and the prejudice of other bidders.

The cases quoted and cited above require that any alterations in bid prices be made before bid opening in order to be acceptable. However, we do not share your fear that the changes in this instance could have been made after bid opening. In our opinion, the facts of record reasonably establish that the Emco bid remained unopened until 1:30 p.m. when it was time-stamped by the Frankford Arsenal mailroom. In this regard, while the envelope was not annotated in precisely the manner contemplated by ASPR 2–401(b) it contained, in addition to the 1:30 p.m. time stamp, the following notation: "opened in MR for Routing Purpose. T.J.L. DAAA25–70–B–0171." The reasonable import of this notation, in our opinion, is that the envelope was not opened before being stamped at 1:30 p.m. The envelope also was time-stamped in the contracting office at 2:09 p.m. However, there is no indication that there was time or opportunity for Emco to reclaim and alter its bid in the 39 minutes during which the envelope was opened, identified as a bid, and forwarded to the contracting office.

Finally, had the questioned changes not been made in the Emco bid, it still would have been evaluated as low according to the contracting officer. Since there is no prohibition against a reduction in price by the low qualified offeror even after bid opening (because there is no prejudice to other bidders) there is no necessity to conclusively establish that the initialed changes were in fact made before bid opening. See 37 Comp. Gen. 251, 254 (1957).

In accordance with the above considerations, therefore, we must conclude that the Emco bid was an acceptable late bid and that neither the fact that it was opened out of the presence of the proper official nor the fact that price changes were uninitialed served to render it unacceptable. Accordingly, we conclude that award was properly made to Emco as the low responsible and responsive bidder.

[B–170247]

Bids—Late—Telegraphic Modifications—Delay Due to Western Union

A bid reduction received at a base exchange telegraph office operated under contract for Western Union, which although timely received could not be delivered before the opening of bids as the telephone line to the procurement office was busy, may not be considered in determining the low bid. Both the invitation pro-

visions and paragraph 2-303 of the Armed Services Procurement Regulation provide for consideration of a late telegraphic modification when the delay is due to Government mishandling but preclude consideration of late telegraphic bids or modification when the delay is caused by the telegraph company, and under the contract, the post exchange, an instrumentality of the United States for some purposes, and its employees act as an agent of Western Union, and the delay, therefore, is attributable to Western Union and the price reduction may not be considered.

To the Secretary of the Air Force, August 5, 1970:

Reference is made to letter AFSPPLA of July 6, 1970, from the Chief, Contract Placement Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, requesting a decision whether the late telegraphic bid modification received from J. R. Youngdale Construction Company under invitation for bids No. F26600-70-B-0064, issued by the Base Procurement Division, Nellis Air Force Base, Nevada, is for consideration in determining the low bid.

Both Youngdale and Longley Construction Co., Inc., the otherwise low bidder, have presented statements of protest to the contracting office. Youngdale has contended that the late telegraphic bid modification should be considered and Longley that it should not.

The invitation for bids scheduled the bid opening for 3:30 p.m., May 4, 1970. The three bids opened at that time were as follows:

J. R. Youngdale Construction Co.	$200,000
Longley Construction Co., Inc.	194,498
M.M.C., Inc.	194,500

After the bid opening, a Youngdale representative inquired by telephone as to the bids received. After being advised of the amount of the Youngdale bid and the other bids, he responded that his company had sent a wire at 12:05 p.m. reducing the bid to $189,766. Later the same day, this was confirmed by telephone by Mr. Youngdale. In view of the representations made, the Nellis Air Force Base Exchange Annex which operates a Western Union station was contacted and it advised that the telegram had been received. Arrangements were made for the telegram to be picked up the next morning.

An investigation was made of the circumstances surrounding the late receipt of the telegram by the Base procurement office. The investigation disclosed that the telegram arrived in the Base Exchange telegraph office at 12:35 p.m. on May 4, 1970, which was almost 3 hours before the bid opening. Within about the next 3 hours and 10 minutes the Base Exchange employee who received the telegram from the telegraphic equipment attempted to notify the procurement office twice and that employee's assistant attempted it once, but the procurement office telephone line was busy on each occasion and they were unsuccessful in reaching that office. In that connection, it is disclosed that

the Base Exchange telegraph office shares a single telephone with three other busy offices so the telephone is not always available and that the telephone at the procurement office is a three-line rotary, but all three lines are often in use.

The Nellis Air Force Base Exchange has a contract with Western Union to operate with Exchange personnel a telegraph office at the Base Exchange Annex as an agent of Western Union. In operating the telegraph office the Exchange follows the same procedure as Western Union in furnishing telephonic notice of the receipt of telegraphic messages. This is as agreed between Western Union and the Exchange. Under the procedure, after the telegraphic office receives a telegraphic message, an attempt is made to notify the addressee by telephone of the contents. If unsuccessful, repeated attempts are made throughout the day. If contact is not made by the end of the day the written telegram is placed in the Base distribution system.

The invitation for bids included Standard Form 22, "Instructions to Bidders." Article 5(d) of the "Instructions to Bidders" provided:

> Modifications of bids already submitted will be considered if received at the office designated in the invitation for bids by the time set for opening of bids. Telegraphic modifications will be considered, but should not reveal the amount of the original or revised bid.

In addition, article 7(a) of the "Instructions to Bidders," as revised by certain deletions provided in article 28 of the additional instructions, indicated in the following quotation of article 7(a) by dashes typed over the deleted words, provided:

> Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of bids will not be considered unless: (1) They are received before award is made; and either (2) they are sent by registered mail or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained, and it is determined by the Government that the late receipt was due solely to delay in the mails, for which the bidder was not responsible; or (3) if submitted by mail (or by telegram if authorized), it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation: *Provided*, That timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. * * *

The deletions made paragraph (a) conform substantially to the paragraph provided for use by Armed Services Procurement Regulation (ASPR) 2–306.

The following sections of ASPR also are pertinent:

> 2–303.2 *Consideration for Award.* A late bid shall be considered for award only if it is received before award and, (i) if submitted by mail, the circumstances outlined in 2–303.3 are applicable; or (ii) if submitted by telegram (where authorized), the circumstances set forth in 2–303.4 are applicable.
> 2–303.3 *Mailed Bids.*

(a) *Circumstances Permitting Consideration for Award of a Late Mailed Bid.* A late mailed bid received before award may be considered for award only if:

* * * * * * *

(ii) it was received at the Government installation in sufficient time to be received at the office designated in the invitation by the time set for opening and, except for delay due to mishandling on the part of the Government at the installation, would have been received on time at the office designated. The only evidence acceptable to establish timely receipt at the Government installation is that which can be established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt at such installation (if readily available) within the control of such installation or of the post office serving it.

* * * * * * *

2-303.4 *Telegraphic Bids.* A late telegraphic bid received before award shall not be considered for award, regardless of the cause of the late receipt, including delays caused by the telegraph company, except for delays due to mishandling on the part of the Government in its transmittal to the office designated in the invitation for bids for the receipt of bids, as provided for bids submitted by mail (see 2-303.3(a)(ii)).

* * * * * * *

2-304 Modification or Withdrawal of Bids.

(a) Bids may be modified or withdrawn by written or telegraphic notice submitted so as to be received in the office designated in the invitation for bids not later than the exact time set for opening of bids. * * *

* * * * * * *

2-305 Late Modifications and Withdrawals. Modifications of bids and requests for withdrawal of bids which are received in the office designated in the invitation for bids after the exact time set for opening are "late modifications" and "late withdrawals," respectively. A late modification or late withdrawal shall be subject to the rules and procedures applicable to late bids set forth in 2-303. * * *

Article 7(a) of the "Instructions to Bidders" provides for application of certain portions of the late bid provisions to telegraphic bids, modifications, or withdrawals when telegrams are authorized for use. This is consistent with ASPR 2-303.2, providing for consideration of late telegraphic bids when telegrams are authorized, and ASPR 2-305, providing that the late bid provisions are applicable to late bid modifications. Modifications of bids by telegram are authorized both by article 5(d) of the "Instructions to Bidders" and ASPR 2-304. See B-159596, November 18, 1966, upholding the application of late bid provisions to telegraphic bid modifications despite the contention that invitation language similar to that used in the immediate case limited consideration of telegraphic modifications to those received at the designated office by the bid opening time.

The above regulations and articles read together are interpreted by us as providing that a late telegraphic bid modification is for consideration when the telegraphic modification arrives at the Government installation before bid opening and the failure to arrive on time at the office designated in the invitation is due to mishandling on the part of the Government in its transmittal to the office designated in the

invitation for bids. In that regard, ASPR 2–303 precludes consideration of late telegraphic bids or modifications when the delay is caused by the telegraph company.

In view of the foregoing, the basic question is whether the late delivery of the telegram was attributable to delay by Western Union or to mishandling "on the part of the Government." We recognize that post exchanges and nonappropriated fund activities have been held to be instrumentalities of the United States for some purposes (*Standard Oil Company of California* v. *Johnson, Treasurer of California*, 316 U.S. 481 (1942); *United States* v. *Holcombe*, 277 F. 2d 143 (1960); *Elm Spring Farm, Inc. et al.* v. *United States*, 127 F. 2d 920 (1942); *United States* v. *Howell*, 318 F. 2d 162 (1963)) but we do not believe that the principle of those decisions is applicable here. The contract between the Western Union Telegraph Company and the Nellis Air Force Base Exchange stipulates that the agreement stemmed from Western Union's desire to furnish the necessary services in connection with telegrams, etc. Also, it is specifically provided in the contract that the Exchange is to "act as the agent" for Western Union at the Base, and we think it reasonably follows that exchange employees likewise are agents of Western Union. For these reasons we think that the telegraph office in question is a Western Union office notwithstanding its location in a base exchange and its operation by exchange employees.

In the circumstances, we conclude that the delay was attributable to the telegraph company and therefore the late telegraphic bid modification received from J. R. Youngdale Construction Company should not be considered.

[B–170098]

Pay—Retired—Waiver for Civilian Retirement Benefits—Revocation

A retired member of the uniformed services whose military service upon retirement from civilian employment is not used to establish his civil service annuity eligibility but is only used in the computation of the annuity to increase the amount payable, may withdraw his waiver of retired pay and have the pay reinstated as no double benefit would result from the same service by terminating the use of the military service to compute the civil service annuity and reinstating the retired pay, and 5 U.S.C. 8332(e) provides that a civil service retirement does not affect the right of an employee to retired pay, pension, or compensation in addition to an annuity payable upon retirement from the Federal civilian service.

Social Security—Coverage—Retired Military Personnel—Employment by Federal Government

When a retired member of the uniformed services employed as a civilian becomes eligible for old age and survivor insurance benefits under the Social Security Act, 42 U.S.C. 402, the withdrawal of his waiver of military pay and the exclu-

sion of his military service from the computation of his civil service annuity would not result in the payment of a double benefit if the military service had not been used to establish civil service annuity eligibility but was used only in the computation of the annuity amount payable.

To the Secretary of Defense, August 11, 1970:

Reference is made to letter dated June 18, 1970, from the Assistant Secretary of Defense (Comptroller) transmitting for decision Department of Defense Military Pay and Allowance Committee Action No. 443 involving the following questions:

1. If military service is not used to establish eligibility for a Civil Service annuity, but is used in the computation of such annuity, may the waiver of retired pay be withdrawn, the Civil Service annuity reduced, and retired pay be reinstated?
2. Would the answer be the same if military service is excluded from the computation of the Civil Service annuity when the individual becomes entitled to receive Social Security benefits?

An employee may qualify for a civil service annuity with as little as 5 years of Federal civilian service. 5 U.S.C. 8333(a). Military service may be credited to an employee but if he is awarded retired pay on account of such military service, it may not be credited unless the retired pay is awarded on account of a service-connected disability incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in line of duty during a period of war, or under chapter 67 of Title 10, U.S. Code. 5 U.S.C. 8332(c). A civil service retirement does not affect the right of an employee to retired pay, pension, or compensation in addition to an annuity payable for such a retirement. 5 U.S.C. 8332(e). An individual entitled to an annuity may decline to accept all or any part of the annuity by a waiver signed and filed with the Civil Service Commission and the waiver may be revoked in writing at any time. 5 U.S.C. 8345(d).

We have held that a former Member of Congress is not entitled to receive military retired pay in addition to civil service annuity where his military service was used to establish his eligibility for an annuity. 41 Comp. Gen. 460 (1962). *Cf.* 49 Comp. Gen. 581, March 11, 1970.

The holding in 41 Comp. Gen. 460 was based on the conclusion that the Congress did not intend that a retired officer should receive a double benefit based on the same service. However, if the counting of military service is not necessary to establish eligibility for a civil service annuity and such service is used only in the computation of the annuity to increase the amount thereof, no double benefit would result if computation on that basis should be terminated and retired pay be reinstated. In such circumstances, and in view of the provisions of 5 U.S.C. 8332(e), we see no reason why the person concerned may not withdraw his waiver of retired pay and have such pay reinstated. The first question is answered in the affirmative.

The second question is understood to have reference to a situation in which military service has been used to increase an annuitant's annuity, but has not been used to establish eligibility for that annuity.

Section 8332(j) of Title 5, U.S. Code, provides for the exclusion of military service performed after 1956 if the individual or his widow is or would be eligible for old age and survivor insurance benefits under the Social Security Act (42 U.S.C. 402), based upon his wages and self-employment income. If, when the individual concerned becomes eligible for social security benefits, he withdraws his waiver of military retired pay and his military service is excluded from the computation of his civil service annuity, no double benefit by way of payment of civil service annuity and military retired pay would appear to result from the reinstatement of such retired pay.

Accordingly, the second question is answered in the affirmative.

[B–170212]

Compensation—Downgrading—Saved Compensation—Temporary Promotions

An employee demoted from GS–5, step 9, to GS–4, step 10, with salary retention pursuant to 5 U.S.C. 5337, who accepts a temporary promotion and then returns to the same grade to which initially demoted has not forfeited entitlement to the salary retention authorized for 2 years by section 5337, the retention period to commence on date of demotion, September 16, 1968. The temporary promotion did not affect the running of the salary-retention period, as the employee by virtue of the temporary promotion is not considered as having become "entitled to a higher rate of basic pay by operation of" the classification law within the meaning of 5 U.S.C. 5337—a bar to salary-retention coverage.

To the Chairman, United States Civil Service Commission, August 11, 1970:

This is in further reference to your letter dated June 29, 1970, requesting a decision on whether an employee receiving a retained rate under 5 U.S.C. 5337 loses entitlement to the retained rate by accepting a temporary promotion to the same grade and step from which demoted or higher, and then being returned to the grade to which originally demoted.

It is stated in your letter that in one instance two employees are hesitating to accept temporary promotions because of the doubt, and that in another instance an employee has protested an administrative denial of salary retention under the following circumstances:

* * * the employee was demoted effective September 16, 1968, from GS–5, step 9, $7265 per annum, to GS–4, step 10, with salary retention. In December, 1969, she applied for a GS–5 position advertised as being filled on a temporary basis and was selected. Before the promotion was effected she was advised that if she accepted it she would lose her salary retention. She was promoted December 28, 1969, to GS–5, step 9, $7824 per annum. The activity is now being disestablished,

and she was placed on the Reemployment Priority List at the GS–5 and GS–4 levels. She accepted a GS–4 position at another activity in the same department, but was first returned to her permanent GS–4 position, her salary being set as GS–4, step 10, $7608 per annum (the regular salary rate) on the basis that she had forfeited her entitlement to salary retention when promoted temporarily to the GS–5 position. * * *

You state that it would appear to be reasonable to apply the same principle that was applied in 30 Comp. Gen. 82 (1950) to entitlement to within-grade increases when an employee is temporarily promoted and then returned to his permanent grade. Further, you believe that an employee need not be considered as having become "entitled to a higher rate of basic pay by operation of" the classification law, within the meaning of the salary-retention provision, 5 U.S.C. 5337, by virtue of having been temporarily promoted, and that it would be in the interest of the Government as well as employees to permit temporary promotions without affecting the running of a salary-retention period.

We agree with your view and for the reasons stated above that temporary promotions need not be viewed as affecting the running of the salary-retention period. Thus, in the example quoted above the salary-retention period would commence September 16, 1968, the effective date of the demotion, and end, if otherwise proper, 2 years therefrom without regard to the intervening temporary promotion.

[B–169760]

Station Allowances—Military Personnel—Temporary Lodgings—Advance Return of Dependents from Overseas

The temporary lodging allowance payable to a member of the uniformed services on the basis he incurs more than normal expenses for the use of hotel accommodations and public restaurants for a prescribed period immediately preceding departure from an overseas station on a permanent change of station may not be authorized incident to the advance return of a member's dependents under 37 U.S.C. 406(e) and (h), as the temporary lodging allowance is a permanent station allowance that may not be used to supplement the transportation allowances prescribed by subsections 406(e) and (h) for the movement of dependents, baggage, and household effects in unusual or emergency circumstances, or when the Secretary concerned determines the movement is in the best interest of the member, his dependents, or the United States without regard to the issuance of change-of-station orders.

To the Secretary of the Navy, August 13, 1970:

Further reference is made to letter dated April 23, 1970, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision whether the Joint Travel Regulations may be amended to authorize temporary lodging allowance in those cases where dependents are authorized advance return to the United States under the provisions of 37 U.S.C. 406 (e) and (h). The request was assigned Control No. 70–26 by the Per Diem, Travel and Transportation Allowance Committee.

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In his letter the Assistant Secretary states that it has been recommended that paragraphs M4303–1 and M4303–2e(1) of the Joint Travel Regulations be amended to provide for entitlement to temporary lodging allowance in those cases where dependents, under the provisions of paragraphs M7102, M7103, or M7105, are authorized advance return to the United States, or are returned to the United States under the provisions of paragraph M7104 or M7108. He says that in support of the recommendation it was stated that incident to such authorized transportation for dependents, a member incurs hotel expenses under the same circumstances as he would if the dependents traveled later incident to permanent change-of-station orders and therefore should be entitled to the temporary lodging allowances whenever his dependents are required to occupy hotel or hotel-like accommodations and utilize public restaurants pending their return to the United States at Government expense.

The Assistant Secretary says that the statutory authority for advance return of dependents under the provisions of the Joint Travel Regulations referred to above is either 37 U.S.C. 406(e) or 37 U.S.C. 406(h) and such authority appears to extend only to transportation of dependents and household goods and in one instance to shipment of a privately owned vehicle.

The Assistant Secretary refers to our decision of November 13, 1969, 49 Comp. Gen. 299, in which the question presented was whether the Secretaries concerned have the authority to amend the Joint Travel Regulations to provide entitlement to temporary lodging allowance when the dependents of a member of the uniformed services move from an overseas residence incident to receipt of notice that the member is in a status as set forth in 37 U.S.C. 554(b).

He states that in the decision the opinion was expressed that in view of the legislative history as to the station allowances to be continued while a member is in a missing status and since a member in such status could not be ordered to make a permanent change of station, there is no legal authority to provide for the payment of temporary lodging allowances in such cases. Also, he says that it was stated in that decision that the temporary lodging allowance accrues only incident to an ordered change of permanent station and is not payable to everyone but is payable only to those members who must temporarily use hotel or hotel-like accommodations and public restaurants as a consequence of change of permanent station orders.

In his letter the Assistant Secretary says that while the decision of November 13, 1969, involved the Missing Persons Act (37 U.S.C. 554(b)), question arises as to whether the principle enunciated therein would also apply to the advance return of dependents under the pro-

visions of 37 U.S.C. 406(e) and (h) since there is no permanent change of station involved.

Section 406(a) of Title 37, U.S. Code, provides that a member who is ordered to make a change of permanent station is entitled to transportation in kind for his dependents, to reimbursement therefor, or to a monetary allowance at a prescribed rate not exceeding the rate authorized under section 404(d) of the statute.

Section 406(b) provides that in connection with a change of temporary or permanent station, a member is entitled to transportation of baggage and household effects, or reimbursement therefor, within prescribed weight allowances. Also, section 406(c) provides that the allowances authorized by subsections (a) and (b) (incident to a change of station) are in addition to those authorized by sections 404 and 405 and subject to regulations prescribed by the Secretaries concerned. Section 406(c), however, is limited to subsections (a) and (b).

As an exception to the change-of-station requirements in subsections (a) and (b), subsections (e) and (h) of section 406 provide for the movement of dependents, baggage, and household effects in unusual or emergency circumstances or when the Secretary concerned determines it to be in the best interest of the member or his dependents and the United States, without regard to the issuance of change-of-station orders. Those subsections provide that incident to such movements, the Secretaries concerned may prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, as authorized under subsection (a) or (b).

As indicated in our decision of November 13, 1969, 49 Comp. Gen. 299, temporary lodging allowances, insofar as departure from the station is concerned, are authorized for the purpose of partially reimbursing a member for the more than normal expenses incurred at hotel or hotel-like accommodations and public restaurants necessarily used for prescribed periods immediately preceding departure from the overseas station on a permanent change of station. Paragraph M4303 of the regulations. While it is payable to members incident to the use of the enumerated transient lodging and subsistence facilities as a consequence of change of permanent station orders, it is a permanent station and not a transportation allowance. As in the case of the other station allowances it supplements the basic allowances for quarters and subsistence and not the transportation allowances.

Subsections (e) and (h) of section 406 of the statute provide for the allowances payable incident to the movement of dependents and household effects in the special circumstances there set forth and we are of the opinion that the allowances payable incident to movements

under those subsections are limited to the specific allowances there authorized. Only transportation allowances are authorized for such movements.

Accordingly, the question presented is answered in the negative.

[B–124074]

Maritime Matters — Subsidies — Construction-Differential — Rate Applicable

The construction-differential subsidy rate ceiling applicable to subsidy grants made pursuant to the Merchant Marine Act of 1936, as amended, is pursuant to title V of the act, and its legislative history, determinable by the rate in force at the time a ship construction contract is awarded and not at the rate in effect at the time administrative action is taken to effectuate the grant and, therefore, for contracts entered into prior to the reversion of the temporary subsidy rate of 55 percent of domestic bid prices to 50 percent, the applicable construction-differential subsidy rate is the higher rate, even though final administrative action was not taken before the subsidy rate revision downward.

To the Secretary of Commerce, August 17, 1970:

Reference is made to your letter dated May 28, 1970, requesting a decision whether we concur in an opinion of the General Counsel of the Maritime Administration which concluded that the statutory construction-differential subsidy rate ceiling applicable to subsidy grants under eight contracts already entered into, but where final administrative action has not yet been taken, is the 55 percent rate in effect at the time each of the contracts was awarded. Section 502(b) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1152(b), has provided for the past several years a temporary subsidy rate ceiling of 55 percent of the domestic bid prices. After June 30, 1970, this ceiling reverted to 50 percent of the domestic price.

The General Counsel states that the reason for his opinion is that title V of the Merchant Marine Act contains contracting authority which essentially authorizes the granting of subsidy under statutory terms in force at the time of contracting. It is stated that all eight contracts involve subsidy granted under section 504 of title V, 46 U.S.C. 1154, which reads, in part, as follows:

> [The Secretary] may approve such bid and become a party to the contract or contracts or other arrangements for the construction of such proposed vessel and may agree to pay a construction-differential subsidy in an amount determined by the [Secretary] in accordance with section 502 of this title . . . .

It is stated that the foregoing language authorizing the granting of subsidy has as its focal point the contracting authority for the granting of subsidy, including the provision for an agreement to pay subsidy in an amount determined in accordance with section 502. In order to have a definitive agreement which represents the full under-

standing of the parties, the statutory provisions for determining the amount of subsidy must be those provisions in force at the time the contract is awarded. Applying the statute in force at the time of award clearly is the only way the contracting parties will know the legislative terms which will govern the particular contract.

Whether subsidy is granted under section 502, 46 U.S.C. 1152, with Government construction and sale of the vessel to the owner at the estimated foreign cost, or under section 504 with the owner financing its share, an essential feature of the authority to grant the subsidy is this power given to contract. This power to contract is the vehicle by which the grant is expressed. The statute in force at the time of contracting provides the legislative basis for the agreement between the Government and the owner.

The significance assigned by Congress to the moment of contracting is demonstrated by the language which was chosen to amend section 502 to increase the CDS ceiling to 55 percent of the domestic price, and to provide that the increase would have retroactive application. This amending language was enacted as Public Law 86-607, approved July 7, 1960.

Section 2, 46 U.S.C. 1152 note, thereof read as follows:

> The amendment made by this Act shall be effective only with respect to *any contract entered into not later than two years after the date of enactment of this Act* under the provisions of section 502 of the Merchant Marine Act, 1936, with respect to the construction of the vessel, the keel of which was laid after June 30, 1959, and the Federal Maritime Board may, with the consent of the parties thereto, modify *any such contract entered into prior to the date of enactment of this Act* to the extent authorized by the amendment made by this Act. [Italic supplied.]

The foregoing language makes the application of the amendment depend upon the date the contract is signed. This is shown in two ways. In the first place, it is provided that the amendment is effective as to any contract entered into not later than 2 years after the date of enactment. In the second place, it is provided that, to the extent authorized by the amendment, the Federal Maritime Board could modify a contract entered into prior to the date of enactment. In both cases, the date of contracting is the circumstance upon which the application of the amendment turns. This legislative action increasing the CDS ceiling to 55 percent reflects a congressional intent in the construction subsidy program to establish the date of contracting as the event which fixes the statutory formula for determining the amount of the subsidy grant.

This congressional intent is further reflected in Public Law 87-877, approved October 24, 1962, which, among other things, continued, by section 1 thereof, the 55 percent CDS ceiling to June 30, 1964. Section

5 of Public Law 87-877 established the basis for the application of the continued 55 percent ceiling. Section 5 read as follows:

> The amendment made by the first section of this Act shall be effective only with respect to contracts entered into with respect to (a) construction of a vessel, the keel of which was laid after June 30, 1959, or (b) the reconstruction or reconditioning of a vessel, *the shipyard contract for which was* entered into after June 30, 1959, and the Secretary may, with the consent of the parties thereto, modify any such contract entered into prior to the date of enactment of this Act to the extent authorized by the amendment made by this Act. [Italic supplied.]

Here too, Congress, in continuing the 55 percent CDS ceiling, set limits on the application of the ceiling in terms of the date of contract signing, just as had been done in Public Law 86-607 which initially increased the ceiling from 50 percent to 55 percent. The significance assigned to the date of contracting is shown by a comment in Conference Report No. 2556 dated October 12, 1962, to accompany H.R. 11586. The comment is as follows:

> Section 5 of the conference substitute conforms in substance to section 3 of the bill as passed the House, which simply provided that the ceilings on the construction differential contained therein would be applicable with respect to both new construction and reconstruction and reconditioning contracts, in all cases where keels were laid or *contracts signed* subsequent to June 30, 1959. U.S. Cong. and Admin. News, 87th Cong., 2d sess., 1962, page 4023. [Italic supplied.]

The new Maritime legislative program embraced in H.R. 15424 will not affect the CDS ceiling which, under existing provisions of section 502(b) of the act, automatically reverted to 50 percent after June 30, 1970. However, the bill does contain declining CDS percentages, e.g., 45 percent for fiscal year 1971 and 43 percent for fiscal year 1972, which are goals to be achieved in the implementation of the new program. Although the proposed legislation will not change the existing mandatory ceiling provisions, section 34(a) of H.R. 15424 as passed by the House of Representatives on May 21, 1970, highlights the approach which Congress has followed to establish the date of contracting as determinative of whether or not amending legislation will apply to any particular contract. Section 34(a) reads as follows:

> The amendments made by this Act shall not affect any contract with the Secretary of Commerce or his delegate that is in effect on the date of enactment of this Act.

This language will make it clear that the proposed legislation will not apply to any contract signed before the enactment of such legislation.

We concur with the opinion of the General Counsel of the Maritime Administration that the construction-differential rate ceiling applicable to subsidy grants under contracts entered into prior to July 1, 1970, but where final administrative action has not yet been taken, is the 55 percent rate in effect at the time each of the contracts was awarded.

[B-170213]

Officers and Employees—Overseas—Dependents—Evacuation—Special Allowance Payments

Under the broad authority in 5 U.S.C. 5523(b), the special allowances, prescribed by the Standardized Regulations incident to the evacuation of the dependents at an overseas post of duty, may be paid to an employee in behalf of dependents who are not at his post at the time of an evacuation but who are directly affected by the orders. However, as payments of the additional allowances for unusual expenses must be attributable to a post evacuation order, when dependents are absent for personal reasons at the time an evacuation order issues, with no intention of returning to the post for the duration of the evacuation, the employee is not entitled to the special allowance, having incurred no unusual expenses; but if an absent dependent is prevented from returning by reason of the evacuation order issued during his absence, the unusual expenses incurred are payable from the time the intended return is blocked.

Officers and Employees—Dependents—Separation Allowances—Special *v.* Maintenance

The separate maintenance allowance paid at a lower rate than the special allowance authorized when dependents are evacuated from the overseas post of an employee, involves situations where dependents are not permitted to reside at an employee's post under circumstances known well in advance to allow for reasonable planning and, therefore, serves a different purpose than the special allowances authorized incident to the evacuation of dependents who, intending to reside at the employee's post, are prevented from so doing by an emergency under circumstances which do not permit the orderly planning of an employee's household. Furthermore, section 262.32 of the Standardized Regulations prohibits the payment of a separation allowance for a period that is less than 90 days—a limitation that does not apply to the special allowance.

To the Administrator, Agency for International Development, August 17, 1970:

There has been referred to our Office the matter of the claim of the United States against Jack A. Irish while an employee of the Agency for International Development, Department of State.

The claim against Mr. Irish according to the record now before us arises from a payment to him of $2,046 representing a special allowance for the period August 18, 1967, through December 31, 1967. Mr. Irish at the time was at his assigned post, Kinshasa, in the Congo. His wife had left the post on December 14, 1966, to return to the United States pending the birth of her second child, a daughter, born on April 24, 1967. Thereafter, Mrs. Irish and the children returned to Belgium and were there on August 18, 1967, when the Department of State authorized the evacuation of dependents at post and banned return travel to those not at post. The U.S. Mission at Kinshasa authorized as part of the evacuation orders payment of special allowance to Mr. Irish in behalf of his dependents.

The payment was later determined by the Agency for International Development to be in error. The Embassy at Kinshasa in authorizing

the payment interpreted the definition of "evacuee" as contained in the Department of State Emergency and Evacuation Manual to include Mr. Irish's dependents. That manual at section 324.12 reads:

324.12 Definitions

* * * * * * *

a. Evacuated employee

Evacuated employee means (1) employees evacuated from the post, and (2) all other employees whose pay cards are, or were, in the possession of the evacuated post at the time of the evacuation. The latter may include (a) employees on temporary duty at other posts or in the Department, (b) transferred employees, (c) employees on home leave or absent from the post on annual leave, and (d) employees in transit to or from the post at the time the post is being evacuated.

The allowance paid to Mr. Irish is administratively referred to as a special cost-of-living allowance. The reference to "cost-of-living" apparently stems from the provision of the Standardized Regulations (Government Civilians, Foreign Areas) at section 013 which in pertinent part provides:

* * * when the Secretary of State determines that unusual circumstances exist, the head of an agency may grant special quarters, cost-of-living, and representation allowances in addition to or in lieu of those authorized in these regulations.

Chapter 600 of the Standardized Regulations provides for evacuation payments. Section 614 shows Agency for International Development to have adopted the regulations approved by the Secretary of State. Section 600/105(e) of such regulations reads:

"Evacuated employee" means an employee who is evacuated from his post of assignment or who is ordered to be evacuated but cannot be evacuated because of reasons beyond his control.

The Agency for International Development states that the Department of State has interpreted the above definition to cover only those dependents who are physically evacuated from the post, and in lieu thereof regard a separate maintenance allowance as payable for those dependents who were not physically evacuated from the post but are affected by the evacuation order. In Mr. Irish's case the $2,046 payment was set off by $1,229.44—the amount allowed for separate maintenance—leaving $1,176.56 which Mr. Irish has been requested to pay.

We note that the above-cited references to both the Department of State Emergency and Evacuation Manual and the Standardized Regulations define evacuated employee. Dependents as such are not specifically included; however, we are advised that the administrative determinations concerning Mr. Irish's dependents are based on the assumption that dependents are considered as though they were included in the cited definitions.

Sections 600/130 and 131(b) of the Standardized Regulations under the title "Special Allowances" read:

130 Purpose of Special Allowances

Special allowances specified in sections 131 and 133 are paid to evacuated employees to offset any direct added expenses which are incurred by the employee as a result of his evacuation or the evacuation of his dependents.

131(b) Subsistence Expense Allowance

Unless otherwise directed by the Secretary of State, a subsistence expense allowance for the evacuated employee or his dependents shall be determined at applicable travel per diem rates for the safehaven post or a station other than the safehaven post which has been approved by appropriate authority. Such subsistence expense allowance shall be paid as of the date following arrival and may continue until terminated under these regulations. The daily amount of the subsistence expense allowance shall be:

(1) The maximum rate of travel per diem for the employee and each dependent who is 11 years of age or over; and one-half such rate for each dependent under 11 years of age. This prescribed maximum rate shall be paid for a period *not to exceed* the first 30 days of evacuation.

(2) After expiration of the 30-day period and if the evacuation has not been terminated, the subsistence expense allowance shall be computed at 60 percent of the rates prescribed in subparagraph (1). This prescribed rate shall be paid until a determination is made by competent authority that subsistence allowances are no longer authorized but may not exceed in any case 180 days after the evacuation.

(3) The daily rate of the subsistence expense allowance actually paid an employee shall be either the maximum rate determined in accordance with 1 and 2 above, or a lower rate if, in the judgment of the authorizing officer, such lower rate would be more in keeping with the employee's necessary living expenses.

In summary, the question is whether the applicable regulations—Chapter 600 of the Standardized Regulations—preclude payment of the special allowance to or on behalf of those dependents who were not physically evacuated from the post, but were absent from the post for specified reasons and were precluded from returning to post by the evacuation order.

The Agency for International Development urges that the departmental interpretation is unduly restrictive, and refers to 5 U.S.C. 5523(b), the statutory authority for evacuation payments, which reads, in pertinent part:

* * * An employee in an Executive agency may be granted such additional allowance payments as the President determines necessary to offset the direct added expenses incident to the evacuation.

Our view is that the statutory authority is sufficiently broad to permit special payments to those employees in behalf of their dependents who are not at the post at the time of evacuation but who are directly affected by it. Additionally, we do not find any provision in the Standardized Regulations which necessarily limits payment of the special allowances for those persons physically evacuated from a post.

However, we believe the regulations implicitly require with respect to payment of the special allowances for unusual expenses incurred

as a result of post evacuations that such unusual expenses be directly attributable to a post evacuation order. Where dependents of an employee are absent for personal reasons from a post at the time orders are issued for its evacuation and they have no intention of returning to the post for the duration of the evacuation, it may not reasonably be said that the evacuation has occasioned any unusual expense. On the other hand, where an absent dependent fully intends to return to a post but is precluded from so doing primarily by reason of an evacuation order issued during his absence, it would seem to follow that unusual expenses incurred from the time the intended return is blocked are primarily the result of the order.

It may be argued that separate maintenance allowance which the Department may authorize serves the same function as the special allowance although at a lower rate. Payment of a separate maintenance allowance would appear to involve situations where the dependents of an employee are not permitted to reside at the employee's post but under circumstances where such fact is known well enough in advance to allow for reasonable planning. The special allowance for evacuation situations, however, would seem to be applicable where the employee's family fully intends to reside at his post but is precluded therefrom by an emergency under circumstances which do not permit orderly planning of the employee's household.

Moreover, it has been noted that section 262.32 of the Standardized Regulations prohibits a separate maintenance allowance where the period of separation is less than 90 consecutive calendar days under conditions otherwise warranting the allowance. The special allowance is not so limited. If any allowance is to be paid on account of dependents in circumstances similar to those of Mr. Irish but during periods of separation of less than 90 days, such payments would apparently have to be the special allowance.

In the instant case, the record does not show why Mrs. Irish failed to return to the Congo. We understand that there is significant indication that she chose to remain in Belgium solely for personal reasons unrelated to the post evacuation order involved. However, in line with the foregoing, we would not object to cancellation of the Government's claim against Mr. Irish for $1,176.56 or an appropriate portion thereof, if a review of the circumstances in question were to result in an administrative determination that, from a particular point in time, Mrs. Irish's failure to return to her husband's post was primarily tied to the evacuation order and that she was required to incur unusual expenses.

A copy of this decision is being furnished the Secretary of State.

[B-168090]

Vessels—Crews—Compensation—Increases—Retroactive

Where a new labor-management agreement is not reached prior to the expiration of the old agreement, the retroactive compensation adjustment under the new agreement is considered a "practice" in the maritime industry within the contemplation of 5 U.S.C. 5342(a), which establishes the compensation of crewmembers employed aboard research vessels. However, in addition to this criteria, section 5342(a) requires as a basis for retroactive payment of compensation that an administrative determination be made that the adjustment would be in the public interest, and as a union agreement providing for wage adjustments within 30 days of a MSTS announcement is based on a determination that a retroactive adjustment would not be in the public interest, retroactive effect may not be given to wage increases granted by 5 U.S.C. 5342(a) while the provision remains in force.

To the National Vice President, National Maritime Union of America, August 18, 1970:

Your letter of March 4, 1970, with enclosures, requests our decision whether the Bureau of Commercial Fisheries, Department of the Interior, has authority to give retroactive effect to wage increases granted under 5 U.S.C. 5342(a).

You advise that the National Maritime Union of America is the exclusive bargaining representative for all unlicensed, nonsupervisory crewmembers employed aboard the research vessels "UNDAUNTED" and "OREGON II." The pay of such employees is administratively established under 5 U.S.C. 5342(a) which provides:

(a) Except as provided by subsection (b) of this section, the pay of officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c) (8) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

You state that the Bureau of Commercial Fisheries maintains that it does not have authority to grant retroactively effective wage increases under the current agreement with your union. However, you contend that under section 5342(a) and our decision at 30 Comp. Gen. 356 (1951), the Bureau does have authority to increase wages retroactively so that such increases will be effective concurrently with similar increases granted in the maritime industry. In support of your view you have furnished evidence showing that other Government agencies have granted retroactive wage increases to vessel employees under existing agreements with your union.

In 30 Comp. Gen. 356 (1951), cited in your letter, we held that retroactive payments of compensation may be made under the authority of section 202(8) of the Classification Act of 1949 (now 5 U.S.C. 5342(a)) provided such payments are in accord with a maritime industry practice and it is administratively determined to be in

the public interest to follow such practice. Note that there are two conditions specified in that ruling. Not only must there be evidence that the action in question is, in fact, a "practice" in the maritime industry, but there must also be a determination by the administrative office that it is consistent with the public interest to follow such practice. The decision by no means compels an agency to follow every practice prevailing in the maritime industry.

We have been advised that compensation adjustments in the maritime industry generally are made effective on the date following expiration of an existing labor-management agreement. Thus, in cases where a new agreement is not reached prior to the expiration of the old agreement, the compensation adjustments under the new agreement are retroactively effective. It appears, therefore, that retroactive payment of compensation has become a "practice" in the maritime industry. In accordance with our decision (30 Comp. Gen. 356) such practice may be followed under 5 U.S.C. 5342(a) provided the necessary public interest determination is made by the proper administrative officials.

The agreement between your union and the Bureau of Commercial Fisheries specifically provides that wage adjustments will become effective "within 30 days of announcement by MSTS of changes in the MSTS Pacific Schedule." (Wage and Premium Pay Schedule No. 4 of Supplemental Agreement No. 2, effective August 4, 1969.) We presume such provision is based upon an administrative determination that, in light of the manner in which wages and adjustments are calculated, it is not consistent with the public interest to give retroactive effect to wage increases. In view thereof we must conclude that, so long as the provision remains in force, there is no basis for making wage increases retroactively effective.

[B-169669]

Indian Affairs—Contracting with Government—Preference to Indian Concerns

The grant of preferential treatment by negotiating a contract without competition with a dairy corporation that is 51 percent owned by persons of Indian descent; that is located 30 miles from an Indian reservation, but will employ Indian help; and that is financed by a Small Business Administration loan, conforms to the reasonable criteria established to accomplish the purposes of the so-called Buy Indian Act (25 U.S.C. 47), to acquire products and services from Indian industry, and to the loan criteria established by the Administration. The fact that the minority owner is a non-Indian and will furnish the expertise and managerial ability does not impute that the firm is a "straw" organization or is unqualified as an Indian industry. Therefore, the firm may be considered eligible if prior to award it obtains the required interstate shipper's permit.

To the Associated Dairy Products Company, August 18, 1970:

This is in reply to your telegram of April 28, 1970, protesting the proposed procurement of milk and dairy products by the Bureau of Indian Affairs (BIA), Navajo Area, Gallup, New Mexico, from MOD Dairies, Inc. (MOD) of Cortez, Colorado.

The record before us shows that the Department of the Interior intends to restrict competition to MOD by negotiating a 1-year contract with it to supply milk and ice cream for use in certain BIA schools, since the Department considers the firm eligible for preferential treatment under the so-called Buy Indian Act (hereafter referred to as the act). You have questioned the propriety of this decision for several reasons discussed below, and you express doubt as to the ability of MOD to meet the contract requirements.

The act referred to is section 23 of the act of June 25, 1910, 36 Stat. 861 (25 U.S.C. 47), which provides as follows:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

You question the propriety of granting preferential treatment to MOD under this act, since only 51 percent of the company's stock is owned by persons of Indian descent while the remaining stock is owned by an outside organizer who is not an Indian. Furthermore, you note that the MOD plant is financed directly by a Small Business Administration (SBA) loan and you allege that no principal has invested money in it. You state that it could not be the intent of the act to apply in such circumstances. It is your belief that the contract cannot help the Navajo Tribe since the plant is located 30 miles off the reservation, and you further contend that restricted negotiation will result in a higher price which would reduce monies available for other needed projects.

In a report to this Office, the Department of the Interior has advised that the Commissioner of Indian Affairs, under the authority delegated to him by the Secretary of the Interior, has instructed that whenever it is possible to do so, products and services shall be acquired from individual Indians or organizations which qualify as Indian industry. The Commissioner's instruction, dated August 22, 1968, provides a definition of Indian industry which includes, in pertinent part, firms controlled by Indians, of which at least 51 percent of the ownership is by Indians, irrespective of location or of the labor force employed. Furthermore, a firm either may be engaged in the manufacture or sale of the product desired or, if not actually engaged at the time of the Government's requirement, it must be qualified to commence and properly perform such activity upon award of a contract.

In addition, this instruction states that the Bureau's objectives should be carried out as efficiently under the act as they would be otherwise, adhering to specification standards, quality of work performed, and economy.

It is clear that the above-quoted statute confers a considerable degree of discretion upon the Secretary of the Interior in purchasing the products of Indian industry. In the absence of a clear abuse of such discretion, there is no basis for objecting to the preference given pursuant to the act. See 37 Comp. Gen. 368 (1957) and B-167841, December 18, 1969. The Department of Interior advises that it does not condone the setting up of "straw" organizations which merely appear to be Indian industries but, on the other hand, it does not consider a firm to be a "straw" organization or unqualified as an Indian industry, merely because a minority owner is a non-Indian and will furnish the expertise and managerial ability for the business. While the record indicates that certain Indians who were employees of BIA and who owned part of the company in 1969 relinquished either ownership in the corporation or their position with BIA to avoid a conflict of interest, we are advised that BIA has verified that MOD presently meets the established ownership and other criteria for qualifying as an Indian industry.

In our opinion, we find the above criteria for determining what will qualify as an Indian industry, specifically the requirement for 51 percent ownership by Indians, to be reasonably within the proper exercise of the discretion conferred by the act.

With respect to your observation that the MOD plant is being financed by SBA, we note that this arrangement does not necessarily disqualify MOD under the established criteria. Moreover, the record shows that SBA required, as a condition to the loan, that 10 percent of the approved project costs be raised by the borrower and that such sums be expended first. We also note that the loan has been secured by a first deed of trust on certain real property; by a first lien on the company's machinery, equipment, and furniture presently owned and to be acquired; and that the principals have personally guaranteed the outstanding balance of the loan in accordance with their interest in the corporation. Furthermore, under the terms of the loan agreement the company is required to submit satisfactory evidence to SBA that it has $50,000 in cash to be used as initial working capital, in addition to any funds necessary for any capital improvement to be paid by MOD.

With respect to your contention that a contract with MOD cannot help the Navajo Tribe because it is located 30 miles off the reservation and that the higher price paid to MOD will reduce monies available for

other needed projects, the Department points out that a considerable number of Indians, possibly as many as one hundred, will be employed in various jobs. Also, the Department advises it is not contemplated that higher prices will be paid to MOD than the going prices in the area involved.

You question the capabilities of MOD to perform the contract on several grounds. These are, generally, the firm's lack of experience, its capacity to meet the distance travel requirements for delivery of the products, and its ability to qualify for an interstate shipper's permit.

The Department states that it recognizes the risks inherent in a new business undertaking, but that BIA would not be of any real assistance if it waited until an aspiring Indian group got a business under way and fully operational before dealing with it. Furthermore, BIA is prepared, at least in the beginning, to exert some effort to help this fledgling Indian organization to make a success of its contract and business. BIA believes that the non-Indian minority owner has the expertise and managerial ability for conducting the business. With respect to MOD's capacity for meeting delivery requirements, considering the plant's distance from the schools, the Department advises that the plant is located approximately 20 miles from the northeast corner of the Navajo Reservation, and that MOD will be faced with the same problems in meeting identical delivery schedule requirements as would face any other contractor. We have been informally advised by the Department that MOD has access by rental to as many trucks as it will need to effect satisfactory delivery. While you state that the firm will not be able to qualify for an interstate shipping permit since the firm is not in operation, the Department has advised that inspections by the State Public Health Service are made after the plant is completed and operational but prior to the processing of milk products. It is reported that MOD's plant is in the final stages of completion and will be ready for inspection by approximately the second week in August and will be ready to process milk products thereafter. In this regard, however, we have suggested to the Secretary of the Interior by letter of today that a contract should not be awarded until the required permit has been issued to MOD, since the Commissioner, BIA, has directed that Indian firms not actually engaged in the manufacture or sale of the product desired must be qualified to commence and properly perform such activity upon award of a contract.

For the reasons stated, we find no legal basis for objecting to the Department's decision to procure dairy products from MOD without obtaining competition, provided that prior to award the company obtains the necessary interstate shipper's permit and is determined by the Department to be otherwise capable of performing the contract.

[B-170215]

Economic Opportunity Program—Enrollees—Training—District of Columbia Government—Status for Leave Purposes

Enrollees in a work-training program conducted by the District of Columbia government under title I, part B, of the Economic Opportunity Act of 1964, who are given appointments as employees of the District government and, therefore, are covered by the Annual and Sick Leave Act of 1951, upon transfer to Federal positions may have the unused annual and sick leave balances accumulated and accrued as District employees transferred to their Federal positions, and their service with the District used to establish annual-leave-earning categories, for although officers and employees of the District of Columbia government are not Federal employees, they are specifically included in the Annual and Sick Leave provisions of 5 U.S.C. 6301 *et seq.*

To the Chairman, United States Civil Service Commission, August 18, 1970:

This is in further reference to your letter of June 29, 1970, requesting a decision on the question of whether individuals employed by the District of Columbia in a work-training program under title I, part B, of the Economic Opportunity Act of 1964, 78 Stat. 508, 42 U.S.C. 2701 note,who were appointed as employees of the District government, may upon transfer to Federal positions be credited with the unused annual and sick leave balances accumulated and accrued in that employment and be credited with the service in determining annual-leave-earning categories.

Section 112, in part B, title I of the act, 42 U.S.C. 2732, provides that the Director of the Office of Economic Opportunity shall assist and cooperate with State and local agencies and private nonprofit organizations "in developing programs for the employment of young people in State and community activities." Section 113, 42 U.S.C. 2733, authorizes the Director to enter into agreements for payment of part or all of the cost of a State or local program if he determines, among other things, that enrollees in the program will be "employed either (A) on publicly owned and operated facilities or projects, or (B) on local projects sponsored by private nonprofit organizations * * *."

Section 114(b), 42 U.S.C. 2734(b), provides as follows:

> Enrollees shall be deemed not to be Federal employees and shall not be subject to the provisions of laws relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

It is stated in your letter that in 1965 the Director of Personnel of the District of Columbia government informed the Commission that the District government would participate in a work-training program under title I, part B, of the above-cited act and that a decision had been made that enrollees would be given appointments as employees of the District government, and that in reply thereto the

Commission expressed the opinion that such employees would be covered by the Annual and Sick Leave Act of 1951 (5 U.S.C. 2061 note), although not by the Classification Act of 1949 (5 U.S.C. 1071 note), because the funds from which they were paid were covered by statutory authority to set their pay by agreement. Some of these employees, you say, have now been transferred to Federal agencies, and a question has been raised as to whether their sick and annual leave balances are transferable to the Federal positions, and whether their service with the District of Columbia is creditable toward establishing annual-leave-earning categories. It is your position that the appointments with the District of Columbia government were legal and that the answer to both questions should be affirmative.

It is well established that officers and employees of the District of Columbia government, a municipal corporation, are not generally regarded as Federal employees. 17 Comp. Dec. 153 (1910); 26 Comp. Gen. 484 (1947). Hence, the provisions of section 114(b) would not adversely affect the employment rights of enrollees appointed by the District of Columbia government. Sections 112 and 113 clearly indicate that the program shall be carried out through State and local agencies, and enrollees will be employed thereby. Therefore, we see no objection to the appointment of the enrollees as employees of the District of Columbia government incident to its participation as an authorized agency under the work-training program. In view thereof, and since employees of the District of Columbia are specifically included in the annual and sick leave provisions of 5 U.S.C. 6301 *et seq.*, we agree with your view that sick and annual leave balances are transferable to the Federal positions and that the service with the District of Columbia is creditable toward establishing annual-leave-earning categories.

[B–170368]

Pay—Increases—Comparable to Classified Employees—Adjustment

Although members of the uniformed services are authorized pay increases by Public Law 90–207, dated December 16, 1967, whenever the general schedule of compensation for Federal classified employees is increased, the Secretary of Defense in implementing the Federal Employees Salary Act of 1970, under the authority of section 2(b) of Executive Order No. 11525, having determined that a member is not entitled to an increase pursuant to the 1970 act unless he was in an active duty status on the date of its enactment—April 15, 1970—a Naval Reserve officer injured while on active duty for training from March 9 to March 22, 1970, who continues on the basis of disability to receive the benefits provided by 10 U.S.C. 6149(a) and 37 U.S.C. 204(i), through April 14, 1970, not having been in an active duty status on April 15, 1970, is not entitled to a retroactive increase.

424-252 O - 71 - 5

To Lieutenant Commander D. W. Cromer, Department of the Navy, August 18, 1970:

Further reference is made to your letter dated May 26, 1970, your reference 7220 NFO:BSN DWC:sm, requesting an advance decision in the case of Lieutenant Commander David W. Jaynes, USNR-R, 613645/1315, as to the treatment to be accorded his pay for active duty for training from March 9, 1970, through March 22, 1970, and subsequent payments based on disability from March 23, 1970, through April 14, 1970, said to have been under the authority of 10 U.S.C. 6148(a), in applying the retroactive provisions of the Federal Employees Salary Act of 1970, Public Law 91-231, April 15, 1970, 84 Stat. 195, 5 U.S.C. 5332 note. Your letter was forwarded to this Office by the Director, Navy Military Pay System, under submission No. DO-N-1085, assigned by the Department of Defense Military Pay and Allowance Committee.

The questions on which a decision is requested are as follows:

(a) May the disability benefits paid LCDR Jaynes under the authority of reference (b) [10 U.S.C. 6148(a)] be considered ". . . pay, compensation or salary . . ." to an ". . . individual in the service of the United States . . ." so as to entitle him to a retroactive salary adjustment for the period 23 March 1970-14 April 1970?

(b) Will an affirmative answer to the above serve to also authorize retroactive adjustment for the period of Active Duty for Training, 9 March 1970-22 March 1970?

You state that Commander Jaynes was ordered to perform active duty for training from March 9, 1970, through March 22, 1970. Enclosed with your letter is a copy of the orders dated February 13, 1970, which directed him to report for active duty for training on March 9, 1970, for not to exceed 14 days. In a communication from the Chief of Naval Air Reserve Training to Commander Jaynes, dated March 31, 1970, enclosed with your letter, it is reported that Commander Jaynes was injured on March 14, 1970. The communication also states that under the provisions of 10 U.S.C. 6148(a), it had been determined that he suffered a disability in the line of duty, while in a status of active duty for training, and was deemed to have been in the active naval service on the date the injury was incurred. It is stated further that during the period of his disability, Commander Jaynes was entitled to receive the benefits provided by 10 U.S.C. 6148(a) and 37 U.S.C. 204(i). You report that an adjustment was made in his pay from April 15, 1970, "at the rates established by" the 1970 act.

10 U.S.C. 6148(a) provides as follows:

(a) A member of the Naval Reserve, the Fleet Reserve, the Marine Corps Reserve, or the Fleet Marine Corps Reserve who is ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed, or the beneficiary of such a member who dies from such an injury, is entitled to the same pension, compensation, death gratuity, and hospital benefits as are provided by law or regulation in the case

of a member of the Regular Navy or the Regular Marine Corps of the same grade and length of service. For the purpose of this subsection, a member who is not in a pay status shall be treated as though he were receiving the pay and allowances to which he would be entitled if serving on active duty.

37 U.S.C. 204(i) provides:

(i) A member of the Naval Reserve, Fleet Reserve, Marine Corps Reserve, Fleet Marine Corps Reserve, or Coast Guard Reserve is entitled to the pay and allowances provided by law or regulation for a member of the Regular Navy, Regular Marine Corps, or Regular Coast Guard, as the case may be, of corresponding grade and length of service, under the same conditions as those described in clauses (1) and (2) of subsection (g) of this section.

Clauses (1) and (2) of subsection (g) provide as follows:

(1) he is called or ordered to active duty (other than for training under section 270(b) of title 10) for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed.

It appears that Commander Jaynes is entitled to the benefits and pay and allowances granted by the above-quoted statutory provisions. However, it must be noted that neither of those sections provides that those members in receipt of such benefits shall be in an active duty status. This Office, in considering the status of members of Reserve components in similar circumstances and under similar provisions of law, has held that although a member of a Reserve component, who is ordered to active duty and who is disabled in the line of duty by injury while so employed, is entitled to pay and allowances while hospitalized and while awaiting action on his retirement proceedings if such proceedings are instituted, the laws authorizing payment of these benefits do not place him in active military status while he is receiving such benefits. See 41 Comp. Gen. 706 (1962), and B–153332, March 16, 1964.

Commander Jaynes was ordered to active duty for training commencing on March 9, 1970, for a period of not to exceed 14 days. Therefore, under the rule in the cited decisions, he had no active duty status after March 22, 1970, even though he was entitled to active duty pay and allowances after that date and such entitlement continued on and after April 15, 1970.

An increase in the monthly basic pay of members of the uniformed services, whenever the general schedule of compensation for Federal classified employees is increased, is authorized by section 8(a) of the act of December 16, 1967, Public Law 90–207, 81 Stat. 649, 654, 37 U.S.C. 203 note. Section 8(b)(2) of that act provides that any such increase shall carry the same effective date as that applying to compensation adjustments provided general schedule employees. Therefore, when the Federal Employees Salary Act of 1970 authorized an increase in the rates of compensation for general schedule Federal

classified employees, the President issued Executive Order No. 11525, dated April 15, 1970, effective January 1, 1970, which in section 1 set forth the new rates of monthly basic pay for members of the uniformed services. Section 2 of the same Executive order provides as follows:

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

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

Section 5(a) of the 1970 act provides as follows:

(a) *Retroactive pay, compensation, or salary shall be paid by reason of this Act only in the case of an individual in the service of the United States (including service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this Act,* except that such retroactive pay, compensation, or salary shall be paid—

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

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

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

In accordance with section 2(b) of Executive Order No. 11525, the Deputy Secretary of Defense issued a memorandum dated April 21, 1970, for the Assistant Secretary of Defense (Comptroller) prescribing rules implementing that order. Rule 2 of the memorandum provides, in pertinent part, that:

2. A person is not entitled to any increase in his basic pay by virtue of that Order for any period before April 15, 1970 unless he was on active duty on that date. * * *

The benefits mentioned in 10 U.S.C. 6148(a) do not include pay and allowances. The act of September 7, 1962, Public Law 87-649, 76 Stat. 494, eliminated the words "pay and allowances" from section 6148(a) of Title 10. Those benefits were incorporated in 37 U.S.C. 204(i) by virtue of section 1 of Public Law 87-649.

In the circumstances shown above, it appears that Commander Jaynes was properly furnished hospital benefits under 10 U.S.C. 6148(a). However, under the 1970 act and the regulations issued thereunder he was entitled to a retroactive increase in pay and allowances

prior to April 15, 1970, only if he was in an active military status on that day. Nothing contained in 37 U.S.C. 204 or 10 U.S.C. 6148(a) warrants a conclusion that he continued in an active duty status after such status terminated on March 22, 1970, under the orders of February 13, 1970. Your questions are answered accordingly.

[B-160778]

Contracts—Labor Stipulations—Davis-Bacon Act—Classification of Workmen—Erroneous

The classification of workmen who installed "Orangeburg" fiber ducts as a conduit for underground electrical wiring as laborers under a contract including a wage determination for electricians and laborers, and a disputes clause was a violation of the Davis-Bacon Act, 40 U.S.C. 276a, and the referral of the erroneous classification to the Secretary of Labor under the disputes clause when the contractor disagreed with the contracting officer's determination based on the prevailing area practice but refused to submit contrary evidence did not violate the contract or prejudice the contractor because it had not been advised of the referral, and the Secretary's confirmation, even though based on the record only, that the classification was erroneous—a determination that is not subject to review—entitles the laborers who were not supervised by a journeyman electrician to a wage adjustment as electricians and not electrician apprentices.

To the Southwest Engineering Company, Inc., August 19, 1970:

Further reference is made to your letter dated July 31, 1969, and subsequent correspondence, in effect, requesting that we review your claim in connection with the installation of fiber duct at the McConnell Air Force Base, Wichita, Kansas, under contract No. DA-23-028-ENG-7904. This claim arises because of the contracting officer's decision to withhold the sum of $410.47 covering alleged violations of the Davis-Bacon Act, 40 U.S.C. 276a. The sum so withheld, representing unpaid wages due to 13 workers, was forwarded to our Office by the Department of the Army for disposition in accordance with the Davis-Bacon Act.

The contract under which your claim arises was awarded on April 20, 1966, and was for the construction of an approach lighting system for the McConnell Air Force Base, Wichita, Kansas, for the lump sum of $191,119. The scope of the work to be done under the contract included earthwork, concrete work, underground electrical ducts and manholes, transformer vault, generator room and control tower modification, 250 kw generating unit, and installation of certain Government-furnished equipment. The installation of the underground ducts is the particular portion of the work under consideration here. Work on the ducts covered the period from July 1, 1966, through November 16, 1966.

This work was performed at the McConnell Air Force Base, which is located in Sedgwick County, Kansas, southeast of the city limits of Wichita, Kansas. The contract provided for the installation of

either fiber or asbestos-cement duct for the underground electrical conduits, and you elected to install fiber duct, sometimes referred to as "Orangeburg." All of the fiber duct was installed by laborers, who were paid at a $2.15 hourly rate. The laborers were supervised by a foreman who was not an electrician. The contract in this case included Wage Determination No. AE-10-064 with two modifications. The minimum wage set forth therein for electricians was $4.65 per hour, plus certain fringe benefits, while the minimum rates set forth for laborers was $2.15 per hour for "Heavy and Highway Construction." You estimate that 80 percent of the actual labor involved in the installation of the underground duct, which is the particular portion of the work under consideration here, was used in placing, puddling, and leveling concrete around the fiber duct and that "concrete puddlers" were included in the Wage Rate Schedule under the classification of "laborers." Your claim arises solely out of installation of the fiber duct, and is not concerned with the subsequent placing of wires in the duct.

Clause 1 of Standard Form 19-A, attached to and forming a part of the contract, sets forth the Davis-Bacon Act, 40 U.S.C. 276a, requirements as they pertain to mechanics and laborers employed or working directly upon the site of work.

Clause 6, "Disputes," of the contract's General Provisions provides that the contracting officer shall decide disputes concerning questions of fact arising under the contract which are not settled by agreement and for an appeal by the contractor from such a decision to the head of the agency. However, clause 49 of the contract's General Provisions, "Disputes Concerning Labor Standards" (Jan. 1965), provides as follows:

> Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor. (ASPR 7-603.26).

The record indicates that you classified the workmen who placed the duct as laborers and paid them $2.15 per hour, the predetermined rate for laborers as set forth in the wage determination. When this was called to the attention of the contracting officer, he conducted a survey on August 23 and 24, 1966, of six companies which had installed fiber duct in the Wichita area. This survey showed that four of the five companies which had installed fiber duct as a conduit for electric wires had used electricians to perform both the joining of the duct and the puddling of cement. The fifth company advised that it had used electricians working with laborers to perform the work,

while the sixth company advised that it had only installed fiber duct as conduit for telephone lines and had used laborers for both the joining and puddling operations.

On September 20 the contracting officer advised you of the survey, and of his conclusion that the survey had not produced evidence of a substantial practice in the area of using laborers to install fiber duct to encase electrical wiring. You were offered the opportunity to furnish evidence that such a substantial practice did exist, either currently or within a reasonable period prior thereto. By letter dated September 23, you declined to submit such evidence, claiming that the burden of proof should rest with the "complainant or accuser."

By letter of October 5 the contracting officer referred to the previous correspondence, again advised you of his inability to locate evidence of a substantial area practice of using laborers, and further advised as follows:

> As a consequence, unless you can furnish specific evidence that it is a prevailing practice to use laborers to place fiber duct at McConnell Air Force Base, and to pay such employees at the laborer rate, you will be expected, as a contract obligation, to pay the laborers or mechanics, who have placed or will place fiber duct under your contract, as a minimum, the hourly rate prescribed for electricians in the schedule of classifications and wage rates in your contract.

The record does not indicate that you responded in any manner to the letter of October 5, and on November 17, 1966, the contracting officer (apparently acting under the Disputes clause of your contract), issued Findings of Fact and a final decision which concluded that your workmen who installed the duct should have been paid electricians' wages, and which directed you to reclassify such workers and to make restitution of the difference between electricians' wages and the wages actually paid. You appealed this decision to the Armed Services Board of Contract Appeals on November 21.

On March 7, 1967 the Corps of Engineers, apparently in recognition of the provisions of clause 49 of the contract's General Provisions, and the corresponding Department of Labor regulations published at 29 CFR 5.12, requested an interpretation by the Secretary of Labor. This request was accompanied by a file which consisted of the following:

1. Copies of the correspondence between you and the contracting officer dated September 20, September 23, and October 5, 1966, referred to above.
2. A copy of the report on the area practice survey made under the direction of the contracting officer.
3. A copy of the Findings of Fact by the contracting officer and a copy of the contracting officer's final decision letter of November 17, 1966.

4. A copy of ASPR 18-706, which requires that the opinion of the Secretary of Labor be obtained in appeals of the type here involved.

Based upon this record, and without affording you further opportunity to present evidence of a substantial practice of using laborers to install fiber duct used for encasing electrical wiring, on April 5, 1967, the Solicitor of Labor advised the Corps of Engineers as follows:

> On the basis of local labor standards, as reflected in your report, it is our conclusion that the installation of fiber duct used as a conduit for underground electrical wiring under the above contract falls within the kind of work comprising the contract classification of electricians and electricians' apprentices.

On August 8, 1968, after considering this determination by the Department of Labor, the provisions of clause 49 of your contract, and the pertinent regulations of the Department of Labor, the ASBCA dismissed your appeal with the following statement:

> * * * the Secretary of Labor having rendered a determination which is final and not subject to review, this Board lacks jurisdiction therein.

Thereafter, you submitted your claim to this Office.

It is our view that, having agreed to the inclusion of clause 49 in your contract, the referral of the dispute to the Department of Labor on March 7, 1967, was proper, and you are bound by the decision rendered by the Solicitor of Labor unless such decision was arbitrary, capricious, or unsupported by substantial evidence. 41 U.S.C. 321. While our review of your claim must therefore be limited to this aspect of the dispute, we are inclined to the view that the first question to be answered is whether the failure of the Department of Labor to solicit evidence from you, and its subsequent action in rendering a decision based solely on the record submitted by the Corps of Engineers, is sufficient in itself to render the decision arbitrary.

While it is our opinion that a contractor should generally be advised when a referral is made to the Department of Labor in disputes of this nature, we find no such requirement in either the applicable regulations or in your contract. In view thereof, and since you had been given adequate opportunity to present evidence to the contracting officer and had declined to do so, we cannot conclude that the failure to advise you of the referral to the Department of Labor was a violation of the Corps' obligations to you under the contract, or was necessarily prejudicial to your rights. While the Department of Labor regulations (29 CFR 5.11b) do provide for notice and hearing when certain circumstances are present and a Federal agency requests a hearing, such circumstances do not appear to have been involved in the instant dispute. Accordingly, and since the record forwarded to the Department of Labor included copies of the contracting officer's

letters of September 20 and October 5, 1966, giving you the opportunity to submit evidence, together with a copy of your letter of September 23, 1966, declining such opportunity, we find no valid basis on which to consider the Solicitor's decision arbitrary solely because it was based only upon the record forwarded by the Corps of Engineers.

Further, while you submitted evidence to the Corps which indicated use of laborers to install ducts, it appears that such evidence was not received until after the Solicitor rendered his decision. We therefore do not believe such evidence can properly be considered by this Office in deciding your claim.

The remaining question would appear to be whether, on the basis of the record before him, the Solicitor of Labor's determination can be considered arbitrary, capricious, or unsupported by substantial evidence.

As indicated above, the survey conducted by the contracting officer showed that four out of the five contractors had extensive experience in installing fiber duct as a conduit for electrical wiring, and that all of those contractors used electricians for the installation work. With respect to the fifth contractor, McBride Electric Company, the survey report reads as follows:

Comments: I presented our problem to Mr. McBride and he advised that his firm was primarily a residential electrical contractor, but they were entering the commercial and industrial field. He stated that his firm was non-union and his firm normally does not do this type of underground duct work. However, he did state that if his firm would be involved in this type of work, which they will, and have in the past, that he would definitely assign an electrician that would closely work with one or two laborers to install the duct. The electrician would be there to see that the work was completed and would possibly do most or all of the slipping together of the joints of the duct.

The sixth company surveyed indicated it used laborers for the installation of fiber duct; however, the company's only installation was for the purpose of housing telephone, rather than electrical, wires. The Solicitor apparently ignored the practice of this company because of its lack of experience with electrical wire installation, and under the circumstances we are unable to disagree with such action.

Based upon our review of the record before the Solicitor, we must therefore conclude that there was substantial evidence to support a determination that it was the prevailing area practice to use electricians for the installation of fiber duct as a conduit for electrical wires. Further, we are unable to conclude from such review that the record would have required or supported a conclusion that there was a substantial practice in the area of using laborers, either separately or under the supervision of electricians, for such installation. *Cf.* B–147602, January 23, 1963. Accordingly, we must concur in the Solici-

tor's decision that installation of the fiber duct "falls within the kind of work comprising the contract classifications of electricans and electricians' apprentices."

There remains only the question of whether the wages of the laborers you employed in the installation should be adjusted to conform with that paid electricians, or that paid electricians' apprentices. In this connection, all of the evidence of record indicates that electricians' apprentices are only used for installation of fiber duct when they are under the supervision of and assisting journeymen electricians in the installation. Since you did not employ a journeyman electrician at any time in the installation work, it follows that you cannot now claim that you could have used only apprentices for the installation, or that your laborers should now only be entitled to have their wages adjusted to that of apprentice electricians.

Accordingly, we must conclude that the laborer wages paid to such workers must be adjusted to the wages of journeymen electricians, and your claim for payment of the monies withheld to cover such underpayments must therefore be denied.

I am today directing that such monies be distributed to the underpaid employees.

As requested, we are returning the file of documents submitted in support of your claim.

[B-167198]

Compensation—Withholding—Union Dues—Discontinuance

A timely mailed revocation of a dues allotment to an employee organization made pursuant to 5 U.S.C. 5525, which was received in the payroll office on Monday, March 2, the first workday after the March 1 deadline set by the Civil Service Commission, 5 CFR 550.308, constitutes compliance with the regulation under the rule that when an act is to be performed by a certain date and the last day of the period falls on a Sunday, the requirement is complied with if the act is performed on the following day. Therefore, the discontinuance of the allotment having become effective at the beginning of the first full pay period following the March 1 deadline, the dues deducted subsequent to the revocation are for collection from the employee organization and repayment to the employee.

To Robert J. Schullery, Department of Transportation, August 19, 1970:

This will refer to your letter dated May 26, 1970, in which you request a decision as to whether a revocation of authorization to deduct dues of an employee organization from the pay of Mr. Thomas M. Lane may be considered to have been in compliance with the governing statutory regulation 5 CFR 550.308(e). The question arises because the revocation was received in the agency payroll office on Monday, March 2, 1 day after the deadline of March 1 (a Sunday) set by the regulations.

Nothing in the law, section 5525 of Title 5 of the United States Code, which provides authority for deductions of organization dues from agency payrolls, 42 Comp. Gen. 342 (1963), establishes any criteria as to the effective dates on which individual employees may authorize or revoke authorizations of deductions from their pay for particular purposes. However, as your letter points out, the regulations promulgated by the Civil Service Commission, 5 CFR 550.308, provide, with respect to discontinuance of allotments, as follows:

§ 550.308 Discontinuance of allotment.

An agency shall discontinue paying an allotment when:

* * * * * * *

(e) The written revocation of an allotment for the payment of dues as authorized by 550.304(a) (5) is received in the employee's payroll office either by March 1 or September 1 of any calendar year. In this case the agency will discontinue the allotment at the beginning of the first full pay period for which a deduction would otherwise be made either after March 1 or September 1, as appropriate * * *

We have interpreted the regulations to mean that when a revocation of authorization for withholding organization dues is received after March 1 of any year the allotment may not be discontinued before the following September 1 and, likewise, a revocation received after September 1 will not be effective until March 1 of the following year. 49 Comp. Gen. 97 (1969).

In the case you present, the deadline date of March 1, 1970, for revocation of dues deduction fell on a Sunday. Mr. Lane, who is employed at Logan Field, Billings, Montana, executed his notice of revocation and mailed it on February 25, 1970, to the payroll office, which we understand to be located at Kansas City, Missouri. This was sufficiently in advance of March 1 to assume, reasonably, that it would be received in the payroll office by that date. However, it was not received until Monday, March 2. It is the view of the employee and of the Assistant Regional Counsel that the receipt of the revocation on Monday, the first workday after the due date on Sunday, constituted compliance with the above-cited regulation and that the deductions should have been discontinued beginning with the first pay period in March.

The courts have held that when a power may be exercised or an act performed up to and including a given day of the month it may generally, when that day happens to fall on a Sunday, be exercised or performed on the succeeding day. *Street* v. *United States*, 133 U.S. 299, 306 (1890); *Monroe Cattle Company* v. *Becker*, 147 U.S. 47, 55, 56 (1893); *Sherwood Brothers, Inc.* v. *District of Columbia*, 113 F. 2d 162, 163 (1940); *Simon* v. *Commissioner of Internal Revenue*, 176 F. 2d 230, 232 (1949); *Armstrong* v. *McGough*, 247 S.W. 790 (1923). Although we find no decision of this Office in which this rule has been applied to the regulation in question here, it has been recognized in other some-

what similar situations. See 20 Comp. Gen. 310 (1940); B-104419, dated September 21, 1951, and B-108143, dated February 29, 1952.

Accordingly, we believe that in this case receipt of the revocation of authorization in the payroll office on Monday following the March 1 deadline date may be considered as compliance with the regulation. Thus it follows that Mr. Lane's revocation of authorization for deduction of organization dues from his pay became effective at the beginning of the first full pay period after March 1, 1970. The amount of the deductions, which we assume the employee organization has received, should be collected back from such organization and paid to Mr. Lane.

[B-167259, B-167003, B-167846]

Contracts—Negotiation—Evaluation Factors—Firefighting Contracts—Factors Other Than Price

The authority in section 1-3.805 of the Federal Procurement Regulations to negotiate research and development, or cost-reimbursable, or special service contracts without price competition based solely on a determination that a particular contractor would furnish services of a higher quality than any other contractor, does not cover the selection of air tanker operators by the Forest Service to fight forest fires as such service is not within the categories contemplated by the regulation for exception to price competition, and the failure to include price as a factor of contractor selection violates the spirit and intent of the Federal Property and Administrative Services Act and implementing regulations. Although it would not be in the best interest of the Government to disturb the contracts awarded and options exercised, price inclusion in future offers will be required. B-157954, December 15, 1965, modified.

Contracts—Negotiation—Competition—Prices

While the rigid rules applicable to formally advertised procurements generally require award to the lowest (price) responsive, responsible bidder, the flexibility inherent in the concept of negotiation permits an award to be made to the best advantage of the Government, price and other factors considered. Therefore, the utilization in "competitive negotiation" of price as a factor in the selection of a contractor will not adversely affect the selection of a qualified contractor by the Forest Service for the performance of firefighting services.

To the Secretary of Agriculture, August 19, 1970:

Reference is made to a report from the Director, Office of Plant and Operations, dated March 10, 1970, submitted in response to our letter of February 5, 1970, concerning a possible defect in the current Forest Service negotiation procedures because of the absence of any consideration of price in the selection of air tanker contractors for the various nationwide regions.

The report states that detailed cost studies performed by the Forest Service have assured use of air tanker operators at reasonable prices for provided services. However, as the Forest Service acknowledges, in the *selection* of an operator for a contract, price is not a consideration. This situation is amply demonstrated by certain language contained in the Region 3 standard letter request for technical proposals which,

after admonishing offerors not to include prices when submitting their proposals, states as follows:

* * * If *after evaluation* your firm is determined to be the best qualified for a base or bases we will then enter into price negotiation with you. [Italic supplied.]

The Forest Service has contended that the procedures in question are in accordance with the Federal Procurement Regulations (FPR). Specifically, reliance is placed upon the first section of FPR 1–3.805 which provides:

The procedures set forth in this § 1–3.805–1 are generally applicable to negotiated procurement. However, they are not applicable where their use would be inappropriate, as may be the case, for example, when procuring research and development or special services (such as architect-engineer services) or when cost-reimbursement type contracting is anticipated (see § 1–3.805–2). While the lowest price or lowest cost to the Government is properly the deciding factor in source selection in many instances, award of a contract properly may be influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors.

The implementation of this section, by operation, would obviate, *inter alia*, the consideration of price in the selection of a contractor.

In our decision, B–157954, December 15, 1965, which approved the current Forest Service regulations under review governing the selection of air tanker operators, we subjected the then proposed regulations, in part, to the criteria set forth in FPR 1–3.102. That section provides that, during the course of negotiations, due attention should be given to listed factors including "Comparison of prices quoted * * *."

In 43 Comp. Gen. 353 (1963), we had occasion to consider and rule on the propriety of a civilian agency negotiating and awarding a contract for the processing and sale of sealskins to an offeror assigned the highest technical rating based on its proposal without the consideration of price in the selection of a contractor for award. Although we recognize the difference between the processing and sale of sealskins as opposed to the selection of an operator to suppress fires which may destroy valuable Government forests, the method of evaluation and award was similar to the current procedures used by the Forest Service to select the "best qualified" air tanker operators. We stated in the cited decision that FPR required price competition in the procurement of services and for the consideration of offered prices in determining whether a contract award to a particular contractor would be in the best interest of the Government. We concluded that the solicitation and consideration of competitive prices were material requirements in such procurements to be complied with in order to establish a valid contract award.

In reaching this conclusion, we referred to and discussed pertinent FPR provisions, including the predecessors to the above-quoted FPR

1–3.102 and FPR 1–3.805. We reviewed the legislative history preceding the passage of the Armed Services Procurement Act of 1947, now codified at 10 U.S.C. 2304 *et seq.*, since the legislative history of the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, which FPR implements, indicated an intention to extend the same procurement principles of the military departments to the civilian agencies. In conclusion, we construed the history as prohibiting the negotiation of contracts without price competition based solely on a determination that, as here, a particular prospective contractor would furnish services of a higher quality than any other prospective contractor.

The Court of Claims in *Schoenbrod* v. *United States*, 187 Ct. Cl. 627, 410 F. 2d 400 (1969), reached a conclusion in consonance with our holding in 43 Comp. Gen. 353, *supra*, involving the same procurement.

The Forest Service position is that the requirement for proposals in the selection of air tanker operators to include price does not apply since consideration of price as a factor would not be appropriate. FPR 1–3.805–1 is cited in support of that position. Clearly, the services here involved cannot be characterized as research and development. Also, the resulting contracts are not of the cost-reimbursement type. The only remaining exception to the stated procedures provided by FPR 1–3.805 applies to special services, such as architect-engineering services. However, we do not believe that the contracts here in question properly should be viewed as being covered by that exception. In any event, our Office has expressed the view that the selection of architect-engineer services on the basis of technical qualification alone, does not permit the price competition contemplated and required by 10 U.S.C. 2304(g). 46 Comp. Gen. 556 (1966). See 46 Comp. Gen. 191 (1966) and 47 *id.* 336 (1967), wherein we expressed the same view with regard to research and development and cost-reimbursement procurements. Although 46 Comp. Gen. 556, *supra*, reviewed provisions of 10 U.S.C. 2304(g) which governs procurement by the armed services under the implementing Armed Services Procurement Regulation, for the reasons stated above, we reach a similar conclusion with regard to procurements by the civilian agencies of the Government under 40 U.S.C. 471 *et seq.*, and the implementing FPR.

Also, congressional policy and intent in this general area recently has been crystallized by the passage of Public Law 90–500, codified in 10 U.S.C. 2304(g), which requires that proposals solicited in negotiated procurements *include price.*

Therefore, we must conclude that the failure of the current Forest Service regulations to require that offers solicited include price, to be utilized as a factor in the selection of air tanker operators, violates the

spirit and intent of the Federal Property and Administrative Services Act and implementing FPR. In view of the impending fire season, we do not believe that it would be in the best interest of the Government to disturb the contract awards and options exercised for the 1970 fire season. See 45 Comp. Gen. 71 (1965) and 47 *id.* 448 (1968). However, options for the 1971 fire season should not be exercised. See 48 Comp. Gen. 593 (1969). Current Forest Service regulations, now being revised, should be supplemented to provide for price consideration consistent with this decision commencing with the 1971 fire season.

In accordance with our regulations codified at 4 CFR 20, we invited comments with respect to the possible nonexercise of the 1971 options from the 22 air tanker operators performing under current Forest Service contracts, and the National Air Tankers Association, which represents 19 of those operators. We have received and carefully considered comments received from 14 of the operators, and a brief submitted by the Association's General Counsel. All but one of the comments received favored the continued maintenance of the current Forest Service negotiation procedures which do not utilize competitive pricing in the selection of air tanker contractors.

Many of these comments expressed the fear, as did the Forest Service, that, in effect, the inclusion of price in proposals would cause a return to formal advertising which would engender the undesirable type of competition that was one of the reasons for the adoption of the current Forest Service regulations. It is not our intention to require a return to the strict procedures of formal advertising. See the last sentence of FPR 1–3.805–1, *supra.* In this connection, we have consistently held that *all* factors deemed essential to the accomplishment of a negotiated procurement should be taken into consideration in effecting the awards of contracts. See 40 Comp. Gen. 508 (1961).

Moreover, we have never required that the award of a contract be made to the lowest priced offeror under a negotiated procurement without regard to other appropriate factors. See B–167374, October 6, 1969, and cases cited therein; B–164715, October 24, 1968, and cases cited therein. For further clarification of our position in this regard, we quote from our letter B–152306, September 15, 1967, in response to a similar allegation that the utilization of price as a factor in the selection of a contractor under a negotiated contract would necessitate a return to formal advertising:

> The "competitive negotiation" contemplated by Public Law 87–653 [10 U.S.C. 2304(g)] is clearly distinguishable from "competitive bidding" or price competition under the formal advertising for bids statutes. While the rigid rules applicable to formally advertised procurements generally require award to the lowest (price) responsive, responsible bidder, the flexibility inherent in the concept of negotiation permits an award to be made to the best advantage of the Government, "price and other factors considered." Negotiation permits,

and indeed requires, the contracting officials of the Government to consider these "other factors" of the procurement, which, in a proper case, may result in an award to one offeror as opposed to another less qualified offeror submitting a lower price. You suggest that "once competitive price figures have been submitted, they almost always dominate all other considerations." However, the award of an architect-engineer contract may and properly should be influenced by a proposal which promises the greatest value to the Government in terms of possible performance, ultimate productibility and other factors, rather than the proposal offering the lowest price or probable cost and fixed fee. We believe that the contracting officials are as concerned about securing quality services as are the architect-engineers and that the exercise of skill and mature judgment in negotiating contracts will preclude the award of contracts on the basis of price alone to the ultimate disadvantage of the Government.

Although we can appreciate the current contractors' claims that their respective business positions will be adversely affected if the 1971 options are not exercised, the contracts involved do not provide for automatic renewal of the options. They provide that renewal is permissive and requires the agreement of the Government. Also, the current air tanker contractors will have the opportunity to compete for the award of contracts for the 1971 fire season and future fire seasons under the proposed revised regulations which should require that price be included in all proposal submission for the award of air tanker service contracts. Our decision B–157954, *supra*, is amplified in consonance with this decision.

[B–169633]

Contracts—Negotiation—Cutoff Date—Reopening of Negotiations

Where offers received under a request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), relative to contracting for experimental, developmental, or research work, were unacceptable and individual conferences were held with all offerors to clarify the requirements for the procurement of a System-Multiplex-Analog, Data Acquisition Record and Reproduce Facility, and to give each contractor an opportunity to justify any deviation offered and to modify the proposal submitted, the reopening of negotiations to inform offerors in a competitive range of the specification changes negotiated at the individual conferences after the date set for final offers that incorporated conference agreements was a proper means of correcting suspected and discovered deficiencies in the negotiation process and of overcoming the presumption of unfairness raised because of the inability of one offeror to meet the specifications.

To the Secretary of the Army, August 20, 1970:

Reference is made to letter AMCGC–P, with enclosures, dated June 30, 1970, from the Assistant General Counsel, Headquarters, Army Materiel Command (AMC), and supplemental information received on July 16, 1970, furnishing a report on the protest of Data-Control Systems, Inc. (DCS), against the conduct of negotiations under request for proposals (RFP) No. DAAA21–70–R–0207, issued by Procurement and Production Directorate, Picatinny Arsenal, Dover, New Jersey.

Since no award has been made of this negotiated procurement, and since a copy of this decision will be forwarded to offerors, we must restrict our recitation of the facts. Paragraph 3–507.2 of the Armed Services Procurement Regulation (ASPR); 49 Comp. Gen. 98, 99 (1969).

The RFP was issued on November 24, 1969, under the contracting officer's determination and findings made pursuant to 10 U.S.C. 2304 (a)(11), which authorizes the negotiation of contracts when contracting for experimental, developmental, or research work. Offers were solicited for the procurement of a System-Multiplex-Analog, Data Acquisition Record and Reproduce Facility, "which is designed to provide a method of increasing the capabilities of existing government equipment currently being utilized for recording test data." The specifications called for a discriminator of frequency modulated signals. December 24, 1969, was established as the date for receipt of offers. Subsequent to receipt of offers, the contracting officer submitted them to the activity's technical segment for evaluation. The technical segment determined that none of the offers were acceptable as submitted since the offerors either took exception to the specifications, exceeded requirements, tendered options, or submitted ambiguous proposals.

In view of this information, contracting officials held individual conferences with all offerors during the first week of February 1970 to effect a technical review of each proposal to "clarify the requirements for the system, give each contractor an opportunity to justify any deviations offered, and, following understanding reached, give contractor the opportunity to make any necessary modifications to his proposal." By letter of February 10, 1970, offerors were requested to submit all changes and clarifications to their proposals resulting from agreements reached at the conferences and to "include any price change by reason of any such modifications * * *, and that the total price be your best and final offer. February 20, 1970, was fixed as the date for receipt of revisions. Revised proposals were received timely from all offerors. They were submitted for technical evaluation. On February 26, 1970, an offer was determined to be in line for award.

On March 9, 1970, a decision was made by the Arsenal to reopen negotiations for the purpose of advising all offerors in writing, in accordance with Armed Services Procurement Regulation (ASPR) 3–805.1(e), of changes to the RFP's specifications negotiated at the individual conferences. Negotiations were reopened by telegram of March 10, 1970, requiring the submission of a revised best and final offer along with acceptance of the listed changes to the specifications.

The offerors submitted timely responses via revised proposals accepting the listed changes to the specifications. A review of this round of price negotiations revealed that the previous low offeror remained the low offeror. Subsequently, certain offerors expressed the opinion to the Arsenal that the system offered by another proposer did not comply with the RFP's specifications. An evaluation by the technical segment of the Arsenal advised the contracting officer that the alleged deficiencies were not material to the overall performance of the system.

DCS alleges that other offerors have been permitted the opportunity to offer an inferior product utilizing a lower quality pulse-averaging (PA) type discriminator rather than its system which offers phase-lock loop (PLL) type discriminator. The protestant states that although, admittedly, the technique of discrimination permitted by the performance specifications permits the offer of either type of discriminator, the specifications preclude the offer of its system utilizing the PA discriminator, and that any such offer would not substantially comply with the specifications. Therefore, DCS, by necessity, was required to offer its higher quality PLL discriminator to its prejudice.

While refuting the allegations of DCS concerning improper negotiation conduct during the course of the procurement, AMC has advised that it cannot recommend award to a particular offeror. AMC believes that the current inability of DCS to offer its system utilizing a PA discriminator raises a presumption of unfairness which should, if possible, be eliminated by further negotiations. Therefore, AMC feels that all offerors should be informed as to the areas wherein their proposals are deficient in order to make the competitive negotiation process meaningful and effective. In this regard, AMC states that:

> * * * it is submitted that the most reasonable course of action to take in order to resolve the problems presented by this protest would be to reopen negotiations, clarify specification requirements where necessary, clarify with the offerors any deviations from the specification (to include permitting * * * [the protestant] to offer their pulse averaging system if they so desire), and again request best and final offers as to price. * * *.

We note that the technical evaluators have determined that the deviations, from the specifications contained in all of the proposals submitted, are considered to be minor, insignificant, and of no material effect on the overall performance of the proposed system. Notwithstanding DCS's allegations in this regard, we find no basis to object to the determination of the Arsenal to extend further negotiation opportunity to all offerors in a competitive range.

We have recognized that the negotiation process is of necessity flexible in that the contracting agencies have wide discretion in determining the nature and scope of negotiations. See 47 Comp. Gen. 279, 284 (1967). Our review of the record reveals that all competitive offerors were treated impartially and fairly during the course of nego-

tiations. Each such offeror had equal opportunity for discussion and submission of revisions as required by 10 U.S.C. 2304(g) and the implementing regulations, particularly ASPR 3-805.1(b). In view of the expressed bases of the recommendation to reopen negotiations, we agree with that recommendation. This is in consonance with the decisions of our Office where we have directed the reopening of negotiations as a means of correcting suspected and discovered deficiencies in the negotiation process. See, e.g., 49 Comp. Gen. 98, *supra*, at pages 100-101; 48 *id.* 536, 542 (1969).

[B-169429]

Contracts—Negotiation—Evaluation Factors—Point Rating—Disclosure of Evaluation Base

In awarding a contract to the highest offeror under a request for proposals to conduct a survey of minority firms on the basis of a point rating that was not structured to inform offerors of the evaluation criteria to be used and the relative importance of each factor, and without giving other offerors in a competitive range the opportunity to discuss the weaknesses, excesses, or deficiencies of their original proposals as required by section 1-3.805-1 of the Federal Procurement Regulations, the principles of negotiated competitive procurement were not observed. However, the contract having been completed, it would not be in the best public interest to take any remedial action; but to insure that the Government will obtain the most advantageous contract available in future procurements, such procedures should be corrected.

Contracts—Negotiation—Cutoff Date—Reopening of Negotiations

Since to properly terminate the close of negotiations, offerors must be advised that negotiations are being conducted; asked for their "best and final" offer and not merely to confirm a prior submission; and informed that any revision of a proposal must be submitted by the common cutoff date, the cutoff date prescribed by section 1-3.805-1(b) of the Federal Procurement Regulations is considered an essential and not a *de minimis* requirement, and the purposes of establishing a common cutoff date would be frustrated if a proposal revision were permitted after a common cutoff date without opening new negotiations on the basis that this procedure would be favorable to the Government.

To the Director, Office of Economic Opportunity, August 21, 1970:

Further reference is made to the protest of Urbanetics, Inc., against the award by the Office of Economic Opportunity of fixed-price contract No. BOO-5099 to Sam Harris Associates, Ltd. (Harris) for a survey of minority manufacturing firms. This matter was the subject of reports dated May 4 and 21, 1970, with supporting documents from the Associate Director for Administration, and the Office of the General Counsel.

The record shows that the subject contract was awarded under request for proposals (RFP) No. PD-012, which was issued on January 20, 1970, pursuant to the authority set forth in Federal Procurement Regulations (FPR) 1-3.210(a)(13). The contracting officer

had determined that adequate specifications could not be drafted to obtain the requirement on a formally advertised basis.

The RFP stated that a firm fixed-price award was contemplated but that alternate proposals would be considered. The specific work requirements to be accomplished and the criteria for evaluating proposals were set forth in the RFP as follows:

Specific:

The Contractor shall provide all necessary qualified personnel, facilities, materials, and services (including travel and per diem) required to identify and collect data on minority manufacturing firms throughout the continental United States with the capacity to produce products and services required by cooperating government procurement agencies. Identification of these firms shall be limited to those located in urban and rural poverty areas with coordination from Small Business Administration and Office of Economic Opportunity. The Contractor shall develop an equitable distribution of the firms between urban and rural areas.

In performance of this contract, the Contractor shall conduct the following work:

1. Evaluate not less than three hundred (300) minority business enterprises utilizing Exhibit "A" attached hereto.

NOTE: The Contractor shall notify each firm being evaluated that under no circumstances should it believe that the submission of this data makes it eligible to receive a federal subcontract.

2. Prepare a listing of as many firms as possible including name, address, telephone, product line or major line, and where possible list last contract and the product line furnished to the Federal Government, list equipment on hand and the capacity of this equipment. Exhibit "A" shall be used for this listing.

3. Collaborate and coordinate Contractor's efforts through consultations with OEO personnel and Small Business Administration officials charged with the administration of Section 8(a).

4. Submit materials, reports and lists weekly during the operation of the contract and at the end of the contract period submit to the Contracting Officer, Office of Economic Opportunity and Small Business Administration twenty (20) copies of a final report, within ten (10) days after completion of the contract.

Technical proposals will be evaluated pursuant to the following factors:

1. Demonstration of an understanding of the objectives, goals, and major concepts of the study.

2. Prior experience and capability of the Offeror's staff in performing work of the type required by this request for Proposals.

3. Technical qualifications and capability of the staff assigned to this project.

The contracting officer states that 11 companies submitted proposals by the closing date of February 9, 1970, and the following six were determined to be acceptable and within a competitive range:

1. Sam Harris Associates, Ltd.
2. Transcendental Corporation
3. Urbanetics, Inc.
4. Roy Littlejohn Associates, Inc.
5. BLX Group, Inc.
6. Koba Enterprises, Inc.

The selection panel, which consisted of four OEO employees and three Small Business Administration employees, evaluated the Harris proposal as follows:

Sam Harris Associates, Ltd.

This contractor won our nomination to do the subject survey of minority businesses because we feel that they will produce a more accurate and reliable product. The strength of this proposal is in:

1. The quality of the personnel
2. The proposed procedure

Sam Harris, who will give 30 percent of his time to this project, Walter Cooper and Ted Ledbetter are three of the most experienced and knowledgeable people in the area of minority enterprise. They have been involved with the major business development programs of SBA, EDA and OEO's Title IV program. Ken Brown, project manager, has experience with McKinsey and Company and as director of Economic Research for the New York City Department of Commerce and industrial development. The backgrounds of the other project participants add up to the most experienced and knowledgeable staff of any of the proposed staff of any of the proposed projects, by far.

In addition, the methodology of this proposal offers a much better chance of having a reliable quality than any other of the proposals reviewed. The contractor will use ten (10) in-house surveyors who will be deployed throughout the country. They will hold interviews *directly* and on-site with the firms. Each of those surveyors is to conduct three to five business surveys per week. The surveyors will personally observe the operations of the firms and make their presentation in proposed supplemental reports which each member would submit in addition to the questionnaire. The reports would include information on the physical facilities, the estimated capacity and the ability of the firms to produce quality products based upon uniformly prepared criteria for evaluating such firms.

The information submitted by the team members to the Washington headquarters would be reviewed by a panel of three professional persons with expertise in this area. This panel would be available for solving all problem cases in-house whenever these occur. The procedure issues consistent information and eliminates the necessity for training a large number of subcontractors staffs over which the prime contractor has no control.

We recognize that Harris has bid above the allocated price. There are three areas of effort which we feel can be cut in the negotiation. They are:

1. The requirement to identify additional products. (last item in Task #3—page III–7)
2. Identification of grouping of manufacturing firms for integrative production re'ationships (Task #5 first sentence, first paragraph—page III–9).
3. The proposal calls for weekly trips back to Washington for project staff. We do not think that more than four trips per staff member are necessary. Of course, it may be that given per diem, etc., the cost to the government will not be much affected by eliminating this travel.

In any event, we think that the Harris proposal is considerably superior to its nearest rival and some extra cost to assure uniformity of survey results is warranted.

In subsequent negotiations Harris deleted from its proposal the three areas shown above. Additionally, Harris reduced the number of researchers from 10 to eight and changed its proposal from a cost-reimbursement type to a fixed-price basis.

The record indicates that representatives of the other five concerns in the competitive range were also contacted concerning their offers and given 24 hours to submit revisions to their proposals. The negotiator states that the negotiations with these concern were "preliminary" and did not involve any price discussions. Although it appears that the proposals of Urbanetics and the other four concerns were considered weak in the area of obtaining uniform survey results, in that they proposed to rely excessively on third parties for the research

duties or did not propose to use sufficient researchers in the field for collecting the data, the record indicates that those offerors were not informed of such weaknesses. Urbanetics was the only offeror which failed to submit a proposal revision, however, only Harris and Transcendental were regarded as having made substantial changes in their proposals.

In regard to the negotiations which took place with Urbanetics, the contract negotiator states that he asked a representative of the concern if he cared to make any change in his proposal. The representative stated that he did not know where any changes could be made, and that Urbanetics would not revise its proposal.

A point system was used to rate the proposals which was based on points assigned to each evaluator's choice for first (20), second (15), third (10), and fourth (5). This resulted in rankings as follows:

Contractor	1st	2nd	3rd	4th	Total
Sam Harris	40	45	10	0	95
Transcendental	40	30	0	0	70
Littlejohn	0	15	40	0	55
B L K	0	30	0	15	45
Urbanetics	40	0	0	0	40
Koba	20	15	0	0	35

The prices after negotiations were:

1. Urbanetics	$38,042.62
2. Roy Littlejohn	40,734.00
alternate	40,224.00
3. BIX Group	50,036.00
4. Transcendental	53,161.00
5. Koba Enterprises	56,411.00
6. Sam Harris	75,000.00

It is reported that further price negotiations were conducted with Harris on the basis of total dollars, and its price was reduced to $72,000. It is also reported that negotiation of price did not take place with other firms because no other technical proposal, as originally submitted or as modified, was determined to be technically equivalent to the Harris proposal.

Pursuant to the determination that Harris had submitted the best proposal, an award was concluded with that concern for a firm fixed-price contract of $72,000 on March 23, 1970, which was in excess of the $60,000 originally allocated for the procurement. We have been informally advised that performance of the contract was completed in late June in accordance with the 90-day period of performance stipulated in the RFP.

Urbanetics protested the award to this Office claiming that the areas in which its proposal was considered technically deficient were not fully set forth in the RFP as requirements or as evaluation factors. In addition, the company maintains that no meaningful negotiations ever took place between it and OEO, and that it should have been advised of the alleged deficient areas of its proposal.

The decisions of this Office have consistently held that an RFP must advise offerors of all evaluation factors and of the relative importance of each factor. 49 Comp. Gen. 229 (1969); B-169645, July 24, 1970; B-167054, January 14, 1970. In the instant case it is the apparent position of your agency that all work requirements and evaluation factors were stated as fully as possible at the time the solicitation was issued, and that your agency did not desire to restrict the approaches an offeror could consider in accomplishing the work by listing detailed specifications in the RFP. However, we note that the Harris proposal was considered superior partly because the company proposed to hold on-site interviews with the firms, observe their facilities and operations, and submit supplemental reports containing information in addition to the information called for by Exhibit A of the RFP.

In such connection the Harris proposal states:

> Since as we have noted the approach which we would propose to utilize is diagnostic and analytical in nature, we deem it necessary to obtain more information than reflected in the questions itemized in Exhibit A to the RFP for this proposal. Although we would not alter the basic format of the questionnaire, it seems that the instrument should be modified and/or an approach adopted which would permit much more information to be obtained during an interview and permit supplementation by observational analyses. The refinement of the suggested survey instrument and the development of observational methods required to make the survey sufficiently analytical to obtain the objectives stated earlier would be accomplished during the first three weeks of the project.
>
> We deem it necessary to not only seek additional information from the interviewees but to also observe the production, and assess the adequacy of management, the productive facilities and other factors which would influence the potential for expanded production. An example of the additional information which we consider necessary to obtain during the interview includes but is not limited to:
>
> Age and health conditions of management personnel as well as their related prior business, employment and training experience.
>
> The age of the firm; its annual growth (both in dollar volume and employment) since its inception and the major factors which have contributed to its growth, as well as an identification of what are considered to be impediments to further growth.
>
> The average volume of inventory, the peaks and troughs in the production cycle; the methods used to finance inventory; the quality of the work force; the type of training provided as well as an indication of whether the employees are unionized.
>
> A listing of equipment by type, age, and fair market value for existing firms as well as new businesses.
>
> The nature of quality control methods and the adequacy of supervision, physical facilities, and plant layout as well as the accessibility of the plant's location to major rail and truck routes.

> An identification of the firm's indebtedness, i.e., long-term and short-term; its access to long- and short-term credit; its relationship to its creditors, i.e., credit rating; and the maximum size of the line of credit which it has been able to obtain.
>
> An assessment of the firm's excess productive capacity and management's opinion about the maximum extent to which it could expand production within a six months' period of time given its existing physical facilities, the availability of land and a maximum of a 20 percent increase in capital for equipment, modification of its productive facilities and the financing of inventory.

In addition to seeking the above information through interviews, the personnel conducting the survey would, on the basis of predetermined criteria, make judgments about the firm's management, the efficiency of operations, plant layout, quality of work force and financial capacity to support an expanded level of production. Additionally, the survey personnel would identify operational deficiencies, management weaknesses, deficiencies in the firm's capital structure and other obstacles which would have to be overcome before the firms could meet performance standards required by government contracts. * * *

The specific work requirements of the RFP clearly showed that the information specified in Exhibit A should be obtained and used as the basis for evaluating and listing the minority firms. Paragraph 11 of Exhibit A required identification of the person from whom the information was obtained. The RFP did not indicate that on-site observations were either expected or desired or that such a procedure would be a factor for consideration in the evaluation. It further appears that your agency was in agreement with Harris that on-site surveys, and information in addition to that specified in Exhibit A, would be beneficial in accomplishing the agency's needs and that your agency was willing to make additional payment for the extra efforts involved. We believe therefore that the RFP should have been amended so that all procedures and information deemed essential to proper performance of the contract would have been shown, in order that the proposals and their evaluation could have been based on uniform requirements and criteria.

Since it appears that on-site surveys by contractor personnel were actually considered necessary by your agency for obtaining the uniformity and reliability needed in the reports, and such a procedure warranted the payment of a higher contract price, we are not persuaded by the statements in the report of May 21 indicating that all of the six proposals were acceptable; that the evaluation criteria were not changed; and that on-site surveys were not set out in the specifications because the offerors were expected to specify the manner in which the work would be accomplished. Likewise, we reject the argument advanced in the report that negotiations with the offerors for on-site surveys would have been prejudicial to Harris, and would in effect be taking the benefit of its thinking, experience, and expertise, and giving it to others. The proposition of on-site interviews and observations of manufacturing plants and their operations does not present a new method of acquiring data or of making evaluations. The Harris pro-

posal in offering such an approach, introduces neither a technical break-through nor a novel concept for obtaining the requirements specified in the RFP. Also, it appears from the Harris proposal that the actual basis for conducting on-site interviews and surveys was for the primary purposes of obtaining data other than that required by Exhibit A.

FPR 1-3.805-1 requires that discussions be conducted with all offerors within a competitive range, price and other factors considered. It is a well-established principle in Federal procurements that such discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements. 47 Comp. Gen. 336 (1967). When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their weaknesses, excesses or deficiencies in order that the contracting officer may obtain that contract which is most advantageous to the Government. We have stated that discussions of this nature should be conducted whenever it is essential to obtain information necessary to evaluate a proposal or to enable the offeror to upgrade the proposal. Thus, where an offeror failed to pass a benchmark test, that factor alone should not have precluded discussions to determine whether the proposal could be improved. 47 Comp. Gen. 29 (1967). Moreover, we have held that meaningful discussions must be conducted with concerns in a competitive range even in the negotiation of research and development contracts where the offeror's technical approach and experience are of critical importance, and conformity with detailed specifications is not the standard for award. B-168485, March 30, 1970.

Additionally, we note that the RFP did not inform the offerors of the relative importance of the evaluation factors. The decisions of this Office have consistently held that such omission is contrary to the dictates of sound procurement policy. See 50 Comp. Gen. 59 (1970), and other decisions to the same effect cited therein.

Regarding the statements in the report of May 21 defending the award to the highest offeror, and the lack of price negotiations with the competitive offerors, on the basis that although the competitive proposals were acceptable they were not technically equivalent to the Harris proposal and price negotiations with the other offerors would have served no useful purpose since no other proposal was being considered for award, your attention is directed to 43 Comp. Gen. 353 (1963). After referring to the legislative histories of the Federal Property and Administrative Services Act, 40 U.S.C. 471 note, and the

Armed Services Procurement Act of 1947, 41 U.S.C. 151 note (1952 ed.), it is stated at pages 370 and 371 of the decision:

> Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, S. Rept. No. 571, 80th Congress, as follows:
>
> The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated.
>
> As indicated by the legislative history of the Federal Property and Administrative Services Act, 40 U.S.C. 471 note, that act was intended to extend the same procurement principles to civilian agencies of the Government as had previously been conferred upon the military departments by the Armed Services Procurement Act of 1947. See page 6, H. Rept. No. 670, and page 5, S. Rept. No. 475, 81st Congress.
>
> The rejection by the Congress of this request for negotiation authority must therefore be construed as a prohibition against the negotiation of contracts without price competition, where the failure to obtain price competition is based solely upon a determination by the contracting agency that a particular prospective contractor will deliver supplies and/or services of a higher quality than any other contractor. 41 Comp. Gen. 484.

Accordingly, we must conclude that the subject contract was awarded under procedures which failed to observe established principles of negotiated competitive procurement. Since the contract was completed in June we do not believe it would be in the public interest for this Office to undertake remedial action in the matter. However, we are calling this procurement to your particular attention so that appropriate action will be taken to insure that in future procurements the RFP's are prepared, negotiations are conducted, and evaluations are made in accordance with such established principles. Furthermore, any numerical rating system established or used by your agency should be structured to ensure that the evaluation criteria and their relative importance are set out in RFP, and that proposals are in fact evaluated in accordance with such criteria.

In furtherance of our mutual interest in the full observance of sound procurement policies, the following matter is also brought to your attention.

The report of May 21 states that all offerors were given an equal time to revise their proposals but that a common cutoff date for negotiations was not prescribed since the promulgation of such a date would have allowed some concerns more time to prepare revisions than other offerors. It also expresses the view that "In any event, the requirement for a common cutoff date should be considered *de minimis*." In this connection FPR 1–3.805–1(b) provides, in pertinent part:

> Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see § 1–3.805–1(a)) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date.

We have held that a similar provision in ASPR 3-805.1(b) requires the establishment of a common cutoff date to properly close negotiations. 48 Comp. Gen. 536. Any suggestion that a common cutoff date for all offerors concerns a trivial matter should be dispelled by the holding in our recent decision of July 2, 1970, 50 Comp. Gen. 1.

The report of May 21 also indicates that a proposal revision favorable to the Government should be considered even if submitted after the common cutoff date. If such action were permitted, without opening up new negoiations for all offerors in the competitive range, it is apparent that the purposes for establishing a common cutoff date for the close of negotiations would be frustrated. In this connection our Office has held that to properly terminate the close of negotiations all offerors must be advised that negotiations are being conducted; that offerors are being asked for their "best and final" offer, and not merely to confirm their prior submission; and that any revision to their proposal *must* be submitted by the common cutoff date. B-167417, September 12, 1969.

The material forwarded with the reports of May 4 and 21, 1970, is enclosed together with a copy of our letter of today to Urbanetics.

[B-170407]

Military Personnel—Record Correction—Existing Record Basis Only

The fact that a Correction of Military Records Board on April 11, 1969, directed a change of records pursuant to 10 U.S.C. 1552, to show that an Air Force captain had not been twice passed over for promotion to the temporary grade of major, and that if selected for promotion by the next regularly scheduled board, the promotion was to be effective from the date the first selection board convened, although at the same time denying his request for promotion, does not entitle the officer promoted pursuant to 10 U.S.C. 8442 and 8447(b) on June 27, 1969, effective February 20, 1968, to increased pay prior to June 27, 1969, for until promoted, no date could be established for the commencement of higher pay, and the Correction Board limited to making changes in an existing record, its attempt to control the future contingent event of a promotion is not within the purview of 10 U.S.C. 1552.

To Major N. C. Alcock, Department of the Air Force, August 24, 1970:

Reference is made to your request dated November 5, 1969 (file reference CF), for an advance decision as to the propriety of making payment on a voucher in the gross amount of $1,606.75 in favor of Major Robert N. Olson, 501-16-3457, representing the difference between the pay of a major, 0-4, and that of a captain, 0-3, for the period February 20, 1968, through April 10, 1969, resulting from the correction of the officer's records under 10 U.S.C. 1552. Your request

was forwarded here under date of July 16, 1970, by the Deputy Assistant Comptroller for Accounting and Finance and has been assigned Air Force Request No. DO–AF–1059 by the Department of Defense Military Pay and Allowance Committee.

The record shows that pursuant to 10 U.S.C. 1552 the officer's records were corrected as set forth in memorandum dated April 11, 1969, from the Assistant Secretary of the Air Force to the Chief of Staff, directing, in pertinent part, as follows:

2. The pertinent records of the Department of the Air Force, relating to ROBERT N. OLSON, FR 55373, be corrected to show that he was not considered and passed over for promotion to the temporary grade of Major by the selection boards which convened on 17 August 1967 and 8 July 1968; that the said member be considered for promotion to the temporary grade of Major by the next regularly scheduled selection board convened to consider officers of his grade and length of service; and further, that if selected by the next regularly scheduled board that he be promoted effective the same date he would have been promoted had he been selected for promotion by the 17 August 1967 selection board.

* * * * * * *

4. So much of the application of ROBERT N. OLSON, FR 55373, before the Air Force Board for the Correction of Military Records, as relates to his request for promotion to the temporary grade of Major and removal of the notation "Sel Bds Sec (T) 8 July 1968" appearing in the left margin of Company Grade Officer Effectiveness Report, AF Form 77, for the period 22 June 1967 to 31 May 1968, be, and it hereby is, denied.

Since the member's request for promotion to the temporary grade of major was specifically denied, you say that no payment for promotion was made. However, you state that the directive purports to set an effective date of promotion if and when accomplished. You further state that this was not viewed as a "correction of records" since "existing records did not include an effective date of promotion that could be corrected."

By paragraph 1, Special Order AB–1476, dated June 27, 1969, Department of the Air Force, Washington, Captain Olson was promoted to the temporary grade of major, USAF, under the provisions of 10 U.S.C. 8442 and 8447(b) "effective 20 February 1968, with date of rank 17 September 1967." The order cites as authority Air Force Regulation 36–89 and 10 U.S.C. 1552, including the record correction action of April 11, 1969.

It is disclosed, also, that in response to a request from the Air Force Accounting and Finance Center, Denver, Colorado, recommending that Major Olson's military records be further corrected to show that he was promoted to the temporary grade of major effective February 20, 1968, the Executive Secretary of the Air Force Board for the Correction of Military Records in a memorandum dated October 9, 1969, stated:

Further corrective action is not required to create entitlement to the pay of a major from 20 February 1968. The terms of the Directive were designed to provide for such pay.

The usual case of this nature provides only for retroactive date of rank; however, in this case it was specifically intended that the promotion be effective for all purposes, including pay, from 20 February 1968.

You express the view that while the intent of the Correction Board is clear, the payment is considered questionable for the reasons indicated by you. Since the promotion was in fact accomplished by a promotion order dated in June 1969 showing an effective date of February 20, 1968, you ask whether the latter date may be considered the effective date for pay purposes.

Sections 8442 and 8447(b) of Title 10, U.S. Code, cited in Special Order dated June 27, 1969, as authority for the promotion made, provide for the temporary appointment of commissioned officers in the Air Force as there indicated. Under the provisions of section 8451(a) of Title 10, an officer who is promoted to a temporary grade is considered to have accepted his promotion "on the date of the order" announcing it, unless he expressly declines the promotion. Subsection (a) further provides that an officer so promoted is entitled to the pay and allowances of the higher grade "from that date," unless entitled to them from an earlier date "under another provision of law."

Air Force Regulation 36–89, cited in the promotion orders here involved, prescribes the objectives, policies, and procedures for temporary promotion of commissioned and warrant officers on extended active duty through the grade of colonel. Paragraph 5 (formerly paragraph 6) of the current regulation provides that a promotion is effective the date of the promotion order. Under the provisions of Rule 6, Table 1–2–2, Department of Defense Military Pay and Allowances Entitlements Manual, the effective date of increase in pay and allowances is the date of orders announcing promotion or a date shown in special orders confirming verbal orders.

It has been our view that since 10 U.S.C. 1552 authorizes the Secretary of the department concerned to "correct" any military record, any action taken under that section, if it is to give rise to a right to the payment of money, must, without exception, be a change of facts as set out in the original record, or an addition to, or a deletion of some of, those facts—such change, addition, or deletion being necessary to establish a proper basis to support the payment. See 39 Comp. Gen. 178 (1959) and 45 *id.* 538 (1966). See, also, *Haislip* v. *United States*, 152 Ct. Cl. 339 (1961).

As shown above, the Correction Board specifically denied the officer's request for promotion to the temporary grade of major. The Correction Board, however, did correct his records to show that he was not considered and passed over for promotion to the temporary grade of major by the selection boards which convened on August 17, 1967, and July 8, 1968, and directed that he be considered for promotion to

the temporary grade of major by the next regularly scheduled selection board convened to consider officers of his grade and length of service. In the event of selection for promotion by the next regularly scheduled board, the Correction Board further directed that the officer be "promoted effective the same date he would have been promoted had he been selected for promotion by the 17 August 1967 selection board."

The selection of the officer for promotion to the higher grade was contingent on the determination of the selection board and that board had the authority to either promote the officer or pass him over. Until the board actually selected him for promotion no date could be established as a date on which his pay at the higher rate commenced.

It seems to us that the Correction Board was attempting to assert authority to partially control a future and contingent event by directing a retroactive date for promotion purposes. As indicated above, the Board's authority is limited to making changes in an existing record. Since there was no effective date for promotion purposes prior to the selection board action, which could be corrected or changed as the case may be, we do not view the Correction Board's action in this respect as coming within the purview of 10 U.S.C. 1552. Also, the effective date of the orders of June 27, 1969, for pay purposes is controlled by Rule 6, Table 1–2–2, of the Military Pay and Allowances Entitlements Manual, cited above. It is our view that in the absence of further action by the Correction Board correcting the officer's record to show that he was promoted on February 20, 1968, the date shown in the promotion orders, there is no authority for payment of increased pay prior to June 27, 1969, the date of the orders announcing his promotion.

Accordingly, payment is not authorized and the voucher and supporting papers will be retained here.

[B–139703]

Courts—Costs—Government Liability—Indigent Persons—Appropriation Chargeable

The psychiatric examination of a criminal defendant to determine his mental competency to understand the proceedings against him or assist in his own defense authorized by subsection (e) of the Criminal Justice Act of 1964, 18 U.S.C. 3006 A(e), providing for investigative, expert, or other services necessary to an adequate defense to 18 U.S.C. 4244, and the subpoena of witnesses at no cost to the defendant authorized under Rule 17(b) of the Federal Rules of Criminal Procedure when a defendant is financially unable to pay the fees of the witness whose presence is necessary to an adequate defense are distinct services for payment purposes. Services pursuant to the 1964 act are payable by the Administrative Office of the United States Courts and those rendered in accordance with Rule 17(b) are payable by the Department of Justice.

Appropriations—Availability—Indigent Persons—Court Costs

The cost of a psychiatric examination of an indigent criminal defendant for the purpose of establishing insanity at the time an offense is committed is payable

from the funds appropriated for the implementation of the Criminal Justice Act of 1964 by the Administrative Office of the United States Courts, and the cost of an examination to determine a defendant's mental competency to stand trial for the purposes of 18 U.S.C. 4244 is an expense to be borne by the Department of Justice in accordance with the guidelines issued by the Judicial Conference of the United States in recognition of the distinction between the two purposes served by a psychiatric examination. Where an examination serves a dual purpose, the cost to determine competency to stand trial should be borne by Justice and the additional expense to determine insanity at the time of the offense to the Criminal Justice Act appropriation.

Courts—Criminal Justice Act of 1964—Psychiatric Examinations

The fee payable to a psychiatrist, appointed on an indigent defendant's motion to conduct a mental examination, for testifying at the trial is payable by the Administrative Office of the United States Courts from appropriations made to implement the Criminal Justice Act of 1964, as the psychiatrist testified as an expert witness and not as a lay witness whose fees are prescribed by Rule 17(b) of the Federal Rules of Criminal Procedure. The purpose of the 1964 act is to assure adequate representation in the Federal courts of accused persons with insufficient means, and the end product of an adequate defense is not infrequently representation at trial, and that is so for the consulted expert as well as for counsel.

Courts—Criminal Justice Act of 1964—Expense Limitation

Where the expert services authorized by subsection (e) of the Criminal Justice Act of 1964 are requested by an indigent defendant's counsel, and the expenses incurred exceed the $300 maximum allowable under the act, the Department of Justice is not obligated under Rule 17(b) of the Federal Rules of Criminal Procedure to pay all or part of the expenses. A proper approach to the limitation imposed by the act is not to disregard the limitation but to amend subsection (e) of the 1964 act.

Courts—Probational Proceedings—Psychiatric Examinations

Where a probationer charged with violation of his probation conditions moves for a psychiatric examination, the examination fee is payable by the Department of Justice when the psychiatric services involve an 18 U.S.C. 4244 proceeding to determine the defendant's mental competency for the purpose of continuing the hearing for the revocation of the probation.

Courts—Probational Proceedings—Right to Legal Representation

In view of *Mempa* v. *Rhay*, 389 U.S. 128 (1967), involving the right to counsel in a probation revocation coupled with a deferred sentencing proceeding, 45 Comp. Gen. 780 (1966), need no longer be considered controlling in connection with proceedings involving deferred sentencing, whether or not such proceedings are coupled with a revocation of probation, but the decision remains in effect insofar as simple revocation of probation proceedings are concerned. Whether the cost of the psychiatric examination is for payment under the Criminal Justice Act or under 18 U.S.C. 4244, depends on the purpose of the examination; that is, whether it is intended to establish the insanity of the defendant at the time of the offense or serves as a tool for his defense.

To the Attorney General, August 25, 1970:

This is in response to a request dated April 9, 1970, from the Assistant Attorney General for Administration, for our views on a number of questions concerning the respective financial responsibilities of the Administrative Office of the United States Courts and the Depart-

ment of Justice for psychiatric and other expert services in proceedings involving persons within the purview of the Criminal Justice Act of 1964, 18 U.S.C. 3006A.

The Criminal Justice Act of 1964, which became effective August 20, 1965, seeks to provide adequate representation for persons without financial means who are accused of Federal crimes other than petty offenses. The act provides for the compensation of appointed counsel and the financing of necessary defense services other than counsel. To carry out the legislative program, appropriations are authorized to the United States Courts and payments are made under the supervision of the Director of the Administrative Office of the United States Courts.

The questions submitted involve the relationship of subsection (e) of the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e), providing for "investigative, expert, or other services necessary to an adequate defense," to 18 U.S.C. 4244, providing for psychiatric examination of a criminal defendant to determine his mental competency to understand the proceedings against him or to assist in his own defense, and to Rule 17(b) of the Federal Rules of Criminal Procedure, providing for subpoena of witnesses at no cost to the defendant "upon an ex parte application of a defendant * * * showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense." Section 4244 and Rule 17(b) have generally been considered to involve the financial responsibility of the Department of Justice. See 39 Comp. Gen. 133 (1959); B–132461, August 27, 1957. The questions, in the consideration of which we were informed of the views of the Administrative Office of the United States Courts and the Department of Justice, are discussed below in the order presented.

1. Where an indigent criminal defendant has moved that a psychiatrist be appointed to examine him, either for the purpose of establishing insanity at the time of the offense or incompetency to stand trial, or both, is the Department or the Administrative Office responsible for payment of the psychiatrist's *examination* fee?

The Judicial Conference of the United States has recently issued guidelines for the implementation of the Criminal Justice Act. The chapter on authorization and payment for investigative, expert, and other services contains the following policy statement under the heading "Psychiatrists, Psychologists, etc.":

Payment for services rendered by the aforementioned experts are made either by the Department of Justice or the Administrative Office. When the purpose of the examination is to determine the defendant's mental responsibility at

the time of the alleged offense, said services should be paid from funds appropriated for the implementation of the Criminal Justice Act by the Administrative Office. When the purpose of the examination is to determine the defendant's mental competency to stand trial, said expense is to be borne by the Department of Justice. Guidelines for the Administration of the Criminal Justice Act (March 1970), Chap. III, par. B2.

The quoted guideline recognizes a distinction between a clearly defense service psychiatric examination under subsection (e) of the Criminal Justice Act, to determine the defendant's mental responsibility at the time of the alleged offense, and a section 4244 psychiatric examination resulting in a report to the court on the defendant's mental competency to stand trial. We consider this distinction to be valid notwithstanding that the motion for examination comes from the defense. For, as pointed out by Professor Oaks in a report to the Judicial Conference of the United States and the Department of Justice:

* * * The examining psychiatrist [under section 4244] is directed to report to the court the results of his interviews and examinations of the defendant. Clearly, this is not a defense tool as much as a method for the court to determine a defendant's competency to stand trial. The scope of the examination is limited to that narrow question; while findings material to a defense of insanity may be produced by the examination, that is not its major purpose. Moreover, the fact that the psychiatrist reports to the court rather than to defense counsel severely restricts the utility of the examination as a defense tool. The Criminal Justice Act in the Federal District Courts, Senate Committee on the Judiciary, 90th Cong., 2nd sess., page 216. (Committee Print.)

Moreover, a proceeding under section 4244 is "non-adversary in character, unless and until the psychiatric report reflects a mental condition which calls for a hearing and examination by the Court of the appellant's competence." *Caster* v. *United States*, 319 F. 2d 850, 852 (1963). See also *Stone* v. *United States*, 358 F. 2d 503 (1966).

We do not consider the Criminal Justice Act to in any way affect the established financial responsibility of the Department of Justice for a mental competency examination in a section 4244 proceeding. The responsibility stems from the Mental Defectives Act which promulgated section 4244 and has a long line of legislative recognition extending into the present. See B–132461, August 27, 1957; Public Law 83–195, 67 Stat. 373; Public Law 91–153, 83 Stat. 403, 408. Also, in keeping with the guideline and as previously indicated, we consider an examination on motion of the defendant for the purpose of establishing insanity at the time of the offense as involving the Criminal Justice Act and thus for payment by the Administrative Office from funds appropriated for the implementation of that act.

In the event of a defense motion for a psychiatric examination for the dual purpose of determining competency to stand trial, a section 4244 purpose, and insanity at the time of the offense, a Criminal Justice Act purpose, it would appear that as the initial determination must

be that of the competency of the defendant to stand trial, the basic expense should be borne by a Department of Justice appropriation and any additional expense for the purpose of determining insanity at time of offense should be charged to the Criminal Justice Act appropriation. This is understood to be in essence the existing established practice of resolving financial responsibility of a dual-purpose examination situation. See Department of Justice Memo No. 355, August 26, 1963.

2. Where a psychiatrist appointed on an indigent defendant's motion has conducted a mental examination and later testified at trial, is the Department or the Administrative Office responsible for the psychiatrist's witness fee?

The answer to the question turns on whether the fee of the expert witness, as opposed to the prescribed statutory fees of a lay witness, is for payment under the Criminal Justice Act, particularly subsection (e) of the act, or Rule 17(b), Federal Rules of Criminal Procedure.

We are of the view that the fee of a psychiatrist called to testify on behalf of an accused entitled to expert services under subsection (e) of the Criminal Justice Act is for payment pursuant to that act. The purpose of the act is to assure adequate representation in the Federal courts of accused persons with insufficient means. It defines representation in subsection (a) as including "counsel and investigative, expert, and other services necessary to an adequate defense." Subsection (e) states: "Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an ex parte application." We do not read the phrase "investigative, expert, or other services necessary to an adequate defense" as being limited to such services "necessary to the preparation of the defense," a suggestion advanced by the Administrative Office of the United States Courts. The end product of an adequate defense is not infrequently representation at trial, and that is so for the consulted expert as well as for counsel. Furthermore, we find the history of the act so persuasive as to warrant the conclusion that it preempts the payment of expert witness fees to the exclusion of the general provisions of Rule 17(b), notwithstanding the $300 fee limitation in subsection (e) of the act. It is the legislative history of that very limitation which makes inescapable the foregoing conclusion.

The phrase "investigative, expert, or other services necessary to an adequate defense" in subsection (e) with reference to services other than counsel was contained in the draft of a bill proposed in the report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (Allen Committee), sub-

mitted February 25, 1963. Poverty and the Administration of Federal Criminal Justice, Washington: 1963. The committee's commentary describes such services as including "investigatory services, access to expert witnesses, transcripts of proceedings, and the like." Page 149. Particularly pertinent is the statement in the body of the report: "The present practices make no adequate provision for psychiatric witnesses or other expert testimony when required by defense counsel in the defense of accused." Page 32.

The $300 fee limitation in subsection (e) of the act originated as a floor amendment in the House of Representatives. The amendment, offered by Mr. Poff, limited compensation for services other than counsel to $500 in the case of a felony and $300 in the case of a misdemeanor. The proposed amendment invoked the following discussion:

Mr. POFF. Mr. Chairman, as will be seen, the amendment is addressed to that section of the bill which concerns itself with authority to provide financing to the attorney appointed or assigned to employ expert or investigative services which might be necessary to the perfection of an adequate defense.

Immediately above the language proposed, on the same page the committee saw fit to place a limitation upon the total compensation which the assigned or appointed counsel could obtain. In the case of a felony the maximum is to be $500 and in the case of a misdemeanor the maximum is to be $300.

It seemed to me only appropriate that a similar overall limitation should be placed upon the investigator employed by the counsel, or upon the expert witness employed by the counsel to examine into the factual evidence involved and later to testify in the case.

This alone is what the amendment would do.

I read the pertinent language in order to make a parenthetical explanation. Beginning on line 18 the language is:

The court which authorized the services shall direct the payment of reasonable compensation to the person who rendered the services.

Then follows the language of the amendment:

"*Provided, however*, That such compensation shall not exceed $500 per person in case of a felony and $300 per person in case of a misdemeanor.

Mr. Chairman, it is the intent of the amendment that the court which is to be empowered, by the first part of the sentence, to determine the amount of compensation, should take into account the amount of time consumed by the investigator or the expert witnesses.

To buttress that intent we find in the following sentence the language:

> A claim for compensation shall be supported by an affidavit specifying the time expended.

Mr. Chairman, for the purpose of legislative history I repeat that it is the intent of the amendment to urge the judge who will decide what is reasonable compensation to apply a time yardstick similar to the time yardstick which is to be applied to the services of appointed or assigned counsel.

Mr. CAHILL. Mr. Chairman, will the gentleman yield?

Mr. POFF. I yield to the gentleman from New Jersey.

Mr. CAHILL. The gentleman recognizes, does he not, that many experts have a regular per diem fee which they charge for appearances in court regardless of the time that they may spend in court. In other words, a qualified medical witness may charge $100 or $200 for a court appearance even though he may spend only 30 minutes in the courtroom. Is it the thought of the gentleman that when a doctor appears in furtherance of defense of a criminal case he should be paid on the basis of the actual hours spent in a courtroom, on the same basis as a lawyer would be paid—to wit, $15 per hour—rather than paid a per diem which he might ordinarily receive in a court case when the defendant had a paid counsel?

Mr. POFF. Mr. Chairman, in response to the gentleman's question, it is my strong conviction, first of all, that the practicing attorney owes a responsibility to his community to perform some services gratis. We have heretofore asked him to assume the entire burden in that regard. This legislation is intended to make it possible to lighten his burden. At the same time may I say I think it is the burden of the practicing doctor to assume some of the responsibility to his community which a criminal trial entails. I would think that the judge in determining what was reasonable compensation would be guided by the time yardstick and the dollar yardstick which this legislation lays down for the practicing attorney.

Mr. CAHILL. And that generalization would apply to all experts that were brought into the case, in addition to the medical experts?

Mr. POFF. In addition to the witnesses, those who are employed as investigators who may not be called later as witnesses.

See also 110 Cong. Rec. 447. The committee of conference in reporting on the House amendment stated:

The Senate version of the bill placed no limit on fees payable for services other than counsel; as amended in the House, the bill would limit the fees payable for such services to $500 per person in felony cases and $300 per person in misdemeanor cases. The House approach has been accepted. However, because the conferees find no reason to differentiate between the fees payable in a felony case and a misdemeanor case, they recommend a uniform maximum fee, and recommend that the lower of the figures suggested by the House be made applicable. It is therefore provided that, exclusive of reimbursement, the fee payable to each person who renders services other than counsel in a case, or to an organization for each service of an employee, shall not exceed $300. H. Rept. No. 1709, 88th Cong., 2d sess., pp. 6–7.

In view of the foregoing, our answer to the question is that the Administrative Office of the United States Courts is responsible for the psychiatrist's witness fee.

3. Where expert services of the type contemplated by the Criminal Justice Act are requested by an indigent's counsel, but the expenses incurred exceed the maximum allowable under the act, is the Department obligated under Rule 17(b) to pay all or part of the expenses?

As may be gathered from our response to question 2, particularly with regard to the legislative history of the maximum limitation of subsection (e) of the act, we are of the opinion this question requires a negative answer. We are not unmindful that subsequent to the effective date of the Criminal Justice Act expert witnesses have been supoenaed under Rule 17(b), but we see little, if any, justification for ignoring the limitation on the fee of an expert set forth in subsection (e) of the act. It would appear that the proper approach to difficulties the limitation may occasionally cause is to amend the subsection. A bill which would permit payment in excess of the limitation when warranted has passed the Senate May 1, 1970, and is currently before the House. S. 1461, 91st Cong., 2d sess. See also H.R. 9687, 91st Cong., 1st sess.

4. Where a probationer charged with violation of his probation conditions moves for a psychiatric examination, who is responsible for payment of the examination fee?

Illustrative of the situation giving rise to the question is the case of *United States* v. *Dennis C. Posey*, USDC Dist. of Nev., Docket No. LV–1199. The defendant was sentenced to a 5-year term of probation on September 20, 1965. At a hearing held December 17, 1969, on a petition for revocation of probation, the defendant's appointed counsel moved for an examination of his client by a qualified psychiatrist. The court granted the motion and in doing so ordered the designated psychiatrist to "report to this court in writing within 30 days hereof the findings as to whether the defendant is presently mentally incompetent so as to be unable to understand the proceedings currently pending against him, or so as to be unable to assist his counsel." The court further ordered the United States attorney to furnish the appointed psychiatrist with such information as he has available "concerning the defendant's medical and psychiatric background and the nature of the charges pending against him." Aside from the question of whether probation revocation hearings are within the coverage of the Criminal Justice Act, a question which was raised in the present context but will be separately discussed, it appears that the psychiatric services with which the question under consideration is concerned necessarily involve a section 4244 proceedings to determine whether the hearing for revocation of probation should go on. A section 4244 proceedings may occur "after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation * * *."

Accordingly, and in view of our answer to the first question, we are of the opinion that the Department of Justice is responsible for the payment of the examination fee where the purpose of the examination is the same as in the *Posey* case. See B–132461, August 27, 1957.

The memoranda of the Administrative Office of the United States Courts and the Department of Justice discuss in connection with the last question the impact of *Mempa* v. *Rhay*, 389 U.S. 128 (1967), involving the right to counsel in a probation revocation coupled with a deferred sentencing proceeding, upon our decision 45 Comp. Gen. 780 (1966), wherein we held:

> In light of the inherent differences between revocation of probation proceedings and the criminal trials from which they follow it is our opinion, in the absence of any positive indication of congressional intent in the matter, that the Criminal Justice Act of 1964 which is directed toward the constitutional right to legal representation for defendants in criminal cases may not properly be construed as being applicable in the probation revocation situation.

The Assistant Attorney General for Administration states that a recent decision of the District Court of Delaware (*United States* v. *Gast*, 297 F. Supp. 620 (1969)) holds that the Supreme Court's decision in *Mempa* "effectively overruled" our 1966 decision (45 Comp. Gen. 780).

Our 1966 decision covered both simple probation revocation proceedings and probation revocation coupled with deferred sentencing proceedings. We indicated in that decision that we could see little difference between the two proceedings, and that we considered neither type proceeding a criminal proceeding. However, it appears from the *Mempa* case that a simple probation revocation proceeding can be distinguished from any proceeding which also includes deferred sentencing. The Supreme Court appears to consider a deferred sentencing as part of the original criminal proceeding and, hence, that the person involved is entitled to counsel at such a proceeding, whether or not it is coupled with a revocation of probation.

The *Gast* case involved a revocation of probation coupled with a deferred sentencing. Thus, the *Gast* case was governed by the holding of the Supreme Court in the *Mempa* case. However, in the *Gast* case the the court quoted the following language by the Supreme Court in the *Mempa* case:

> * * * a lawyer must be afforded at *this* proceeding whether it be labeled a revocation of probation or a deferred sentencing. * * * [Italic supplied.]

On the basis of this language the court, in effect, implied *Mempa* might be applicable to a simple revocation proceeding.

The paragraph in which the last-quoted language appears reads, in full, as follows:

> In sum, we do not question the authority of the State of Washington to provide for *a deferred sentencing procedure coupled with its probation provisions.* Indeed, it appears to be an enlightened step forward. All we decide here is that a lawyer must be afforded at *this proceeding whether it be labeled a revocation of probation or a deferred sentencing. We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding.* [Italic supplied.]

It is clear from the quoted paragraph that the reference to "this proceeding" is directed at a proceeding involving deferred sentencing coupled with revocation of probation. The Supreme Court held that at such a proceeding counsel must be furnished whether the proceeding be labeled a revocation of probation or a deferred sentencing. Thus the *Mempa* case did not involve a simple revocation of probation hearing, i.e., a case where the individual involved had been sentenced, then placed on probation, and was subsequently charged with violation of probation. Further, in *Holder* v. *United States*, 285 F. Supp. 380 (1968)—involving a simple revocation of probation proceeding—the court stated:

> The Petitioner contends that *Mempa* v. *Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L.Ed. 2d 336 (1967), is controlling. The *Mempa* case *is clearly distinguishable.* Mempa, an indigent, was not provided counsel at a Washington State revocation of probation hearing. The Supreme Court held that he was entitled to counsel as a matter of right. The Court reasoned that the Petitioner was involved in a *Gideon* type *criminal proceeding* where substantial rights of the "criminal ac-

cused" could be affected. *The Washington Statute provided for "deferred sentencing". Mempa was entitled under Washington law to withdraw his plea of guilty at anytime prior to sentencing.* Thus, an attorney might have been beneficial at this deferred sentencing process. *In contrast, the Petitioner under the Federal Probation Act had already been sentenced and could not have withdrawn his plea of guilty at the revocation hearing.*

The second legal right Mempa may have lost without counsel was the right to appeal from a plea of guilty, which can only be taken in Washington after sentence is imposed following revocation of probation. Again this is not a right our Petitioner is entitled to in a Federal revocation hearing. [Italic supplied.]

The court then held that in a simple revocation of probation proceeding (i.e., one not involving deferred sentencing) a person is not entitled to court appointment of counsel as a matter of right. See also to the same effect *Splawn* v. *Fitzharris*, 297 F. Supp. 44 (1969), which cites the *Holder* case.

While the *Mempa* case does, no doubt, undermine the basis of our decision in 45 Comp. Gen. 780 (1966), insofar as probation proceedings coupled with deferred sentencing are concerned, we still consider our 1966 decision controlling insofar as simple revocation of probation proceedings are concerned, i.e., revocation of probation proceedings not coupled with deferred sentencing. (As you no doubt are aware, there are currently pending two bills (S. 1461 and H.R. 9687) to extend the Criminal Justice Act to defendants charged with a violation of probation.) However, in view of the Supreme Court's decision in the *Mempa* case, our decision of 1966 (45 Comp. Gen. 780) need no longer be considered controlling in connection with proceedings involving deferred sentencing, whether or not such proceedings are coupled with a revocation of probation. Of course, whether the cost of a psychiatric examination in such a proceeding is for payment under the Criminal Justice Act or under 18 U.S.C. 4244, depends on the purpose of such examination. See our answer to the first question.

[B-170074]

Contracts—Specifications—Restrictive—Particular Make—Description Availability

The low bidder under a total small business set-aside for a brand name or equal product who submitted descriptive data of the "or equal" item after bid opening—data not publicly available prior to bid opening—was properly rejected as being nonresponsive on the basis that the descriptive data could have been specially prepared after bid opening for the procurement, thus giving the bidder control over the responsiveness of his bid after bid opening—a situation readily distinguishable from the acceptable one of permitting a bidder to furnish, after bids are opened, descriptive material in existence and publicly available prior to the opening of bids.

Contracts—Specifications—Restrictive—Particular Make—Description Availability

Since the "Brand Name or Equal" clause permits a purchasing activity to consider other information reasonably available to it in determining whether an "or equal" product is equal to the brand name item, and nothing in the clause

precludes a bidder from making descriptive data in existence prior to bid opening—such as a published catalog—available to the procuring activity after bid opening—use of preexisting data to secure details of the product offered by a bidder obliged to furnish the model indicated in his bid does not create the objectionable situation where a bidder could make a nonresponsive bid responsive after bid opening. However, the procuring agency has no obligation to go to the bidder after bid opening, or to make any unreasonable effort to obtain descriptive data. Contrary dictum in B-158601, May 2, 1966, and other similar cases, is not the rule.

To J. W. Burress, Incorporated, August 25, 1970:

This is in reference to the letter of June 15, 1970, on behalf of Henderson Engineering Company, Incorporated (Henderson), which is protesting against the rejection of its bid on invitation for bids No. N00189-70-B-0139, issued on April 17, 1970, by the Naval Supply Center (NSC), Purchase Department, Norfolk, Virginia. The procurement was a total small business set-aside.

Item No. 1 under section E on page 6 of the invitation was described as follows:

Air Dryer, heaterless type, Model HPS-60 as manufactured by Kahn & Co., Inc. Hartford, Connecticut, or equal

The quantity specified was two each of the units.

Section F on page 6 of the invitation sets forth the salient characteristics of item No. 1. Also under this section bidders were required to insert the manufacturer's name, brand, and model number of the item which the bidder was offering. On the bottom of page 6 bidders were warned to comply fully with the provisions set forth in Armed Services Procurement Regulation (ASPR), clause 1-1206.3(b), entitled "Brand Name or Equal," shown under section C of the invitation.

Paragraph (c)(1) of the "Brand Name or Equal" clause under section C on page 4 of the invitation provided as follows:

(c) (1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the Invitation for Bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include

specific references to information previously furnished or to information otherwise available to the purchasing activity.

Bids were opened on May 7, 1970, and the bid from Henderson was low at $7,880. The bid from Kahn and Company, Incorporated, was second low at $9,390.

Henderson's bid indicated that it was offering "Sahara" model "HL–12–3500" manufactured by "Henderson Eng. Co." The report from the contracting officer states that Henderson's bid was not accompanied by any descriptive data or information. In this connection, the contracting officer has forwarded a copy of Henderson's bid, which we are advised is the exact bid submitted by that concern.

In accordance with the "Brand Name or Equal" provision, quoted above, the contracting officer attempted to ascertain if information regarding the equipment offered was reasonably available. The effort to ascertain this information included a check of the NSC Technical Department's library of published commercial brochures, which we are advised produced negative results and an inquiry to NSC's Small Business Specialist (SBS).

A memorandum prepared by the SBS dated June 19, 1970, indicates that descriptive data on the equipment offered in Henderson's bid was received by the SBS on May 12, 1970, which was after bid opening, and that the SBS forwarded this information to the contracting officer. This descriptive information was submitted under Henderson's letterhead and apparently was prepared by Henderson after opening specifically for this procurement.

The contracting officer rejected Henderson's bid as nonresponsive since the bid offered an "equal" product in lieu of the brand name product and the bidder failed to furnish descriptive material with the bid.

It was determined that the data furnished by Henderson after opening could not be considered, and the contracting officer has advised that without descriptive data it could not be established whether the product Henderson was offering was equal to the brand name product. Award was made to Kahn and Company, Incorporated, on June 3, 1970.

The "Brand Name or Equal" clause permits the purchasing activity to consider "other information reasonably available" to it in determining whether an "or equal" product is equal to the brand name item. There is nothing in the "Brand Name or Equal" clause which would preclude a bidder from making descriptive data which was in existence prior to bid opening, such as a published catalog, "available" to the procuring activity after bid opening. The bidder already is obligated

to furnish the model indicated in his bid and the pre-existing descriptive material merely gives the details of the product offered; therefore, this is not a situation where a bidder is permitted to make a nonresponsive bid responsive after bid opening. If the catalog is one which is publicly available prior to bid opening, the bidder merely becomes an instrument for furnishing the pre-existing data to the procuring activity, and it does not seem material to us whether the descriptive material is furnished to the procuring activity by the bidder or is otherwise obtained by the procuring activity. This, however, is not meant to indicate that the procuring activity has any obligation to go to the bidder after opening to obtain descriptive data on an "or equal" product or to expend other unreasonable efforts to obtain the data. To the extent that the dictum in B-158601, May 2, 1966, and the dictum in other similar cases is inconsistent with this view, such dictum should not be considered as the rule regarding whether the procuring activity may consider descriptive information on an "or equal" product furnished by a bidder after opening.

In the instant case we must agree with the procuring activity's decision that Henderson's descriptive data furnished by this bidder after opening should not be considered. In this regard it was not shown to the procuring activity that the descriptive material furnished by Henderson after opening was descriptive data which was publicly available prior to bid opening, and there is nothing to show that the descriptive material furnished by Henderson after opening was not specially prepared by this bidder after opening for this specific procurement. This situation is readily distinguishable from the one where a bidder furnishes descriptive material which was in existence and publicly available prior to bid opening. If a bidder were permitted to furnish other than pre-existing publicly available descriptive data, the bidder would have control over the responsiveness of his bid after bid opening. In view of the fact that without the descriptive data furnished by Henderson after opening it could not be determined whether Henderson's offer was equal to the brand name item, we find no basis to question the rejection of Henderson's bid.

For these reasons Henderson's protest is denied.

[B-170448]

Bids—Delivery Provisions—Packaging and Packing Requirements—Deviation Acceptability

A low alternate bid offering to use polyethylene bags with Kraft paper overwrap in lieu of cartons to ship fuel-resistant baffle material satisfying the packaging and packing requirements set forth in the applicable military specifications and in-

cluded in the invitation for bids, neither of which spelled out the type of material or construction of the container, was a responsive bid, acceptance of which was proper. The invitation for bids did not require use of fiberboard cartons and the military specifications require only that materials be packed in a manner to insure acceptance by a common carrier and provide protection against damage during shipment. Furthermore, the overwrapped polyethylene bags constitute "containers" within the meaning of the "Glossary of Packaging Terms" and paragraph 1-1204 of the Armed Services Procurement Regulation.

To the Firestone Tire and Rubber Company, August 25, 1970:

We refer to your protest by telegram dated April 3, 1970, as supplemented by subsequent communications, addressed to the Defense General Supply Center (DGSC), Defense Supply Agency (DSA), Richmond, Virginia, against the award of a contract to The Goodyear Tire and Rubber Company (Goodyear) under invitation for bids (IFB) DSA-400-70-B-5277, issued February 4, 1970.

The procurement item is fuel-resistant baffle material for use in aircraft fuel tanks to suppress explosions. The material is to be furnished in accordance with Military Specification MIL-B-83054 (USAF), June 26, 1968. Scott Paper Company (Scott), whose plant is located at Fort Wayne, Indiana, is the only manufacturer of the material.

The procurement requirements were set forth in four items. On Items 1 through 3, which involved a total quantity of 416 units, bids were requested f.o.b. destination for shipment to Warner Robins Air Force Base, Robins, Georgia, on or before June 9, 1970. On Item 4, which covered a quantity of 5,000 units, an f.o.b. origin price was requested with delivery to be made in five monthly shipments in specified increments over the period August 17 through December 31, 1970.

For the purpose of evaluation of Item 4, Atlanta, Georgia, was specified as the tentative destination, and bidders were advised that only land transportation would be used. The estimated shipping data for such purpose was set forth on page 12 of the bid schedule as follows:

ESTIMATED SHIPPING DATA (1968 DEC)

For computing unit transportation costs, each bid (or proposal) will be evaluated by adding to the bid (or proposal) price all government transportation costs to the said destination(s) based on the estimated shipping data shown below.

DATA PER SHIPPING CONTAINER

Bid Item No.	Max. Gross Wt. per Shpg. Ctnr.	No. & Name of Bid Unit per Shpg. Ctnr.	Type of Shpg. Ctnr.	Max. Size (inches) per Shpg. Ctnr.	Shipping Character
4	250 lbs.	4 SH	Fiberboard Carton	L84″xW 44″xH 36″	Sheets in Cartons

A provision on page 16 of the bid schedule stated, with respect to preparation for delivery, "Item(s) shall be preserved, packaged and packed level C/C in accordance with the specification cited in the item description." In this connection, Military Specification MIL-B-83054 provides as follows:

5. PREPARATION FOR DELIVERY

5.1 *Preservation and packaging.* Preservation and packaging shall be Level A or C as specified (see 6.2).

* * * * * * *

5.1.2 *Level C.* Preservation and packaging shall be sufficient to afford adequate protection against deterioration and physical damage during shipment from the supply source to the first receiving activity for immediate use, or for controlled humidity storage. This level may conform to the suppliers commercial practice when such meets the requirements of this level.

5.2 *Packing.* Packing shall be Level A, B, or C as specified (see 6.2).

5.2.3 *Level C.* Buns shall be packed in containers in a manner to insure acceptance by common carrier and will afford protection against physical and mechanical damage during shipment from the supply source to the first receiving activity for immediate use. Shipping containers shall comply with Uniform Freight Classification Rules and Regulations or other carrier regulations as applicable to the mode of transportation.

* * * * * * *

6. NOTES

* * * * * * *

6.2 *Ordering data.* Procurement documents shall specify the following:

* * * * * * *

d. Levels of packaging and packing required (see section 5).

On March 6, 1970, the four bids received by DGSC were opened as scheduled. Goodyear's bid quoted a unit price of $75.38 for Items 1 through 3 and a unit price of $73.26 for Item 4 with a reduction of $.70 per unit for waiver of first article approval tests (i.e., $74.68 for Items 1 through 3 and $72.56 for Item 4). In addition, Goodyear offered a further reduction of $.96 per unit (i.e., $73.72 for Items 1 through 3 and $71.60 for Item 4) in line with the following notation entered on page 12 of its bid:

Page 16 of schedule under "Preparation For Delivery" calls out Preservation Packaging and Packing to be Level C/C IAW Spec Mil-B-83054 which we interpret to mean Standard Commercial Domestic Pack.

This item is normally packed in Polyethylene Bags, each bag having its own marking identification. Three (3) sheets are then overwrapped with Kraft wrapping to protect during shipment with marking as required by Paragraph 5.3 of Spec Mil-B-83054.

Prices quoted are based on supplying three (3) sheets per domestic shipping carton, however, if we are permitted to ship Standard Commercial Domestic Pack as indicated above which omits the shipping carton a reduction of $.96 per sheet will apply.

All of Goodyear's prices were net.

Your bid, offering a discount of 2 percent 20 days, quoted a unit price of $76 on Items 1 through 3 ($74.48 after discount) and a

unit price of $73.58 on Item 4 ($72.11 after discount). On page 8 of your bid you indicated that you had supplied the same procurement item to DGSC under contract DSA–400–70–C–3542, dated January 21, 1970; however, you offered no decrease in unit price for waiver by the Government of first article approval tests.

With waiver of first article approval tests and with acceptance by DGSC of polyethylene bags with Kraft overwrapping as compliance with the Level C packaging and packing requirements, Goodyear's bid was evaluated as lowest. Accordingly, all four items were awarded to Goodyear under contract DSA–400–70–C–4364, dated March 18, 1970, and the delivery schedule was reduced in keeping with the waiver of first article approval tests provisions.

In your telegram dated April 3 to DGSC, you protested that you were the low responsive bidder and that the award to Goodyear was not proper since the alternate bid on which the award was based did not offer the container required by the military specification and was therefore nonresponsive.

The contracting officer denied your protest in a letter dated April 9, 1970. The letter directed your attention to the language of paragraph 5.2.3 of Military Specification MIL–B–83054 providing for Level C packing and requiring that shipping containers comply with Uniform Freight Classification (UFC) Rules and Regulations or other carrier regulations as applicable to the mode of transportation. The letter also pointed out that in neither the military specification nor the IFB was the type of material or construction of "containers" spelled out. Further, the contracting officer stated that Item 77797 UFC, which relates to transportation of cellular plastics in sheets and various other shapes, permits shipment of the procurement item "in packages" for less than carload (LCL) and loose for carload (CL) and cited Rule 5, section 1(c) UFC for the provision that articles "in packages" will be accepted for transportation in any container other than trunks or in any shipping form other than in bulk, loose, in tank cars or on skids other than lift truck skids, providing such container or form of shipment will render the transportation of the freight reasonably safe and practicable.

By letter dated May 11, you appealed the decision of the contracting officer on the basis that data in the IFB indicated, or at least implied, the intention of the procurement agency that cartons be used for packaging. In this connection, you stated that it has been standard practice to ship the procurement item to the Government

in cartons as is presently done under your existing contract (DSA-400-70-C-3542), under which you claim a suggestion by you that the overwrap method be permitted was rejected by DGSC. You further stated that if the Government had intended to permit use in this procurement of an overwrap or wrapper, the term "cartons" would not have been used in the shipping data on page 12 of the IFB. Therefore, you claim, the use of the term "cartons" in the shipping data substantiates your position as to the Government's intent to procure the material in cartons.

With specific reference to the UFC, you asserted that shipment of the material "in packages" is permitted under the UFC only if contract specifications do not specify otherwise. In this case, you claimed, the contract specification definitely calls for containers and cartons, both of which are fully covered in the UFC in addition to wrappers and are distinguished therefrom.

Finally, you argued that since the term "overwrap" is defined in Webster's Dictionary as a flexible printed or transparent wrapper applied over a container, the overwrap proposed by Goodyear does not qualify as a container and therefore renders nonresponsive the bid offering such overwrap as the exterior container. You accordingly requested that the award to Goodyear be canceled.

In a letter dated June 11, the contracting officer affirmed the prior decision denying your protest. With respect to the use of the term "cartons" in the shipping data set forth on page 12 of the IFB, the contracting officer informed you that the Estimated Shipping Data Clause did not impose a requirement that cartons be used but merely informed bidders of the data to be used in the evaluation of f.o.b. origin bids. As to the specification requirements, the contracting officer directed your attention to the fact that the military specification refers only to containers, not cartons. Accordingly, the contracting officer maintained, the use of polyethylene bags with Kraft paper overwrap was not prohibited in this procurement.

Concerning your statement that DGSC had refused you permission to use overwrapped polyethylene bags in lieu of cartons under your contract DSA-400-70-C-3542, the contracting officer enclosed for your information a copy of a wire in which DGSC informed you that the use of polyethylene bags with Kraft paper overwrap would be acceptable as to the quantity of baffle material for which the delivery requirement was urgent; that since your contract required Level A/B packing (cartons), the authorization by the Government for the use of the over-

wrapped polyethylene bags constituted a change under your contract; and that any savings resulting from such change should enure to the Government's benefit. The letter observed, however, that prior to shipping the quantity for which the authorization to use overwrapped polyethylene bags had been issued, you were able to obtain the cartons necessary for Level A/B packing and therefore did not use such bags.

In requesting that DGSC refer the matter to our Office for consideration, you made no rebuttal to the contracting officer's statements concerning the Level C packing and packaging requirements nor did you offer any additional arguments to support your protest. You urged, however, that there is sufficient time available for cancellation of the major portion of Goodyear's contract and for award to you as the low responsive bidder.

In its report to this Office, DGSC adheres to its position that the IFB did not require the use of fiberboard cartons. In this regard, the contracting officer contends that paragraph 5.2.3 of the military specification requires only that the material be packed in a manner insuring acceptance by a common carrier and protection against damage during shipment. Further, the contracting officer states, the quantities of material covered by Items 1, 2, and 3 were accepted by the carrier without exception in the overwrapped polyethylene bags used by Goodyear, and no complaints have been received from the consignees.

In further support of the premise that the overwrapped polyethylene bags used by Goodyear constitute containers, the contracting officer cites from "Glossary of Packaging Terms" (published by Packaging Institute, Inc., copyright 1955) the following definitions:

container—A non-specific term for a receptacle capable of closure. (See SHIPPING CONTAINER; CONSUMER PACKAGE; other specific container classes: BOX; DRUM; BARREL; PAIL; CAN; BAG; CARTON; REEL; SPOOL; COLLAPSIBLE TUBE; BOTTLE; JAR; GAS CYLINDER; etc.) [Italic supplied.]

package—(1) One unit of a product, uniformly processed, wrapped or sealed in a sheath or container. (See PACKAGE, UNIT.) (2) A quantity of items boxed or wrapped for storage or shipment. (3) A container in which a product is packed. (4) (verb) To make up into a package. (See PACKAGING.) (5) A unit of 112 sheets of tinplate of any size or gauge.

The file made available to our Office by DSA includes a letter dated July 10, 1970, from Goodyear stating that the information set forth in the notation on page 12 of Goodyear's bid had been verified by Goodyear with its supplier, Scott Paper Company, before preparation of the bid. Further, Goodyear enclosed with its letter a copy of a price schedule from Scott, which describes the packaging of the item as

"Polyethylene bags with paper overwrap. Corrugated overwrap or boxes for LTL shipments * * * additional."

In addition to the definitions cited by the contracting officer, the "Glossary of Packaging Terms" includes the following pertinent definitions:

bag—A preformed container made of flexible material, generally enclosed on all sides except one which forms an opening that may or may not be sealed after filling. May be made of any flexible material, or multiple plies of flexible materials, or a combination of two or more materials, such as paper, metal foil, cellulose and plastic films, textiles, etc., any of which may be coated, laminated or treated in other ways to provide the property required for the packaging, storing and distribution of a product. Also, *sack*. Although often used as a synonym for bag, the term *sack* generally refers to the heavier duty or shipping bags.

container, flexible—A package or container made of flexible or easily yielding materials that, when filled and closed, can be readily changed in shape, or bent manually, without the aid of tools. Term normally applies to containers made of materials of less than 0.010 inch total thickness, such as paper, plastic films, foils, etc., or combinations thereof.

Armed Services Procurement Regulation (ASPR) 1–1204(a) provides that all Department of Defense (DOD) supplies, materials, and equipment shall be afforded the degree of preservation, packaging, and packing required to prevent deterioration and damage due to the hazards to which they must be subjected during shipment, handling, and storage. ASPR 1–1204(b) provides that requirements for preservation, packaging, and packing shall be stated in terms of DOD levels, such as Level A, Level B, etc., and that when a commodity specification is used for procurement, the required levels of preservation, packaging, and packing contained in such specification shall also be stated in the procurement document.

Defense Supply Agency Regulation (DSAR) 4145.7, relating to preservation, packing, and marking of items of supply, describes the DOD packing and packaging levels, the requirements of which are more stringent for Levels A and B than for Level C. Paragraph 8(a) of the regulation leaves the selection of the level of protection to the item managers. Paragraph 10 provides that where standards, specifications, purchase descriptions, packaging data sheets/cards, and other authorized instructions contain options for the selection of methods, materials, or procedures for specific levels of protection, and choice is the prerogative of the Defense element concerned, the operation which provides adequate protection at the lowest cost will be selected.

Paragraph 6.c., DSAR 4145.7, defines Level C packaging and packing as follows:

c. *Level C.* The degree required for protection under known favorable conditions during shipment, handling and limited tenure of storage. Preservation-packaging and packing designated Level C shall be designed to protect items against physical and environmental damage during known favorable conditions of shipment, handling and storage. In general, the following criteria will determine the requirements of level C.

(1) Limited handling during transportation and intransit storage.
(2) Limited shock, vibration and static loading during the transportation cycle.
(3) Controlled warehouse environment for temporary periods.
(4) Effects of environmental exposure during shipment and intransit delays.
(5) Stacking and supporting superimposed loads during shipment and temporary storage.
(6) Item characteristics require no special or peculiar preservation-packaging and/or packing provisions.

The requirements set forth in Military Specification MIL–B–83054 for Level C packaging and packing of the baffle material are (1) packing in containers in a manner to insure acceptance by a common carrier; (2) provision of adequate protection against physical and mechanical damage during shipment; and (3) compliance of the shipping containers with UFC rules and regulations or other carrier regulations as applicable to the mode of transportation. Such requirements, in our view, accord with the criteria prescribed by paragraph 6.c., DSAR 4145.7. Accordingly, and since Level C was the choice of the procuring agency, acting pursuant to paragraph 10, DSAR 4145.7, and the level was stated in the IFB, as required by ASPR 1–1204(b), bidders were required to meet only the Level C requirements for both packaging and packing.

Turning now to the type of container required by the Level C provisions in the military specification, we see nothing in the language thereof which could be construed as either requiring cartons or excluding overwrapped polethylene bags. Conversely, under paragraph 5.2.3 of the military specification the shipping containers were required to comply either with the UFC rules and regulations or with other applicable carrier regulations. In this connection, as the contracting officer has pointed out, Item 77797 of the UFC calls for shipment of the baffle material "in packages," and section 1(c) of Rule 5 of the UFC specifically provides for acceptance of materials authorized to be shipped "in packages" in "any container other than trunks." In addition, the excerpts of definitions quoted above from the "Glossary of Packag-

ing Terms" clearly indicate that bags are considered by the packaging industry to be containers of flexible material. In light of such factors, we are unable to concur with your position that cartons are the containers required by the specifications.

With respect to your charge that the use of the word "carton" in the estimated shipping data set forth on page 12 of the IFB evidenced the intent of DGSC to procure the baffle material packed in cartons, we note that the language of the provisions above the estimated shipping data, which related only to Item 4, leaves no doubt that the data were stated solely for the purpose of placing bidders on notice as to the transportation costs to be added by the Government for evaluation purposes to the f.o.b. origin bid prices of Item 4. Accordingly, we concur with the position of DGSC that such provisions may not be construed as imposing a requirement for the use of cartons for the packaging and packing of the quantities covered by any of the four procurement items.

In line with the foregoing, it is our view that the overwrapped polyethylene bags offered by Goodyear in its alternate bid, which bags had been used by Scott, the supplier of the baffle material, for commercial shipment of the material prior to the procurement in question, satisfy the Level C packaging and packing requirements set forth in the military specification and included in the IFB. We therefore concur with the determination of DGSC that Goodyear's alternate bid was responsive to such requirement.

For the reasons stated, we find no legal basis to justify cancellation of Goodyear's contract and making of an award to you for Item 4. Your protest is therefore denied.

[B–170470]

Pay—Missing, Interned, Etc., Persons—Pay Increases

The widow and designated beneficiary of an Air Force captain held to be in a missing in action status from March 28, 1969, until that status was terminated on March 19, 1970, on the basis of evidence establishing his death, may be paid the increase in basic pay provided by the Federal Employees Salary Act of 1970, and implemented by Executive Order No. 11525, for the period January 1, 1970, the retroactive effective date of the act, through March 19, 1970, absent a contrary determination under 37 U.S.C. 556(c) by the Secretary of the Air Force. While the Department of Defense Memorandum implementing the Executive order permits a retroactive increase in pay for any active service performed in the case of a person "who died" after December 31, 1969, but before April 15, 1970, such authority together with section 5 of the salary act on which it is based is considered to have reference to a termination of pay because of death.

To Major N. C. Alcock, Department of the Air Force, August 28, 1970:

Further reference is made to your letter dated June 30, 1970, which was forwarded here by letter dated July 24, 1970, from Headquarters United States Air Force, requesting an advance decision as to the propriety of payment of a voucher in the amount of $200.66 in favor of Mrs. Phyllis A. Belcher, widow and designated beneficiary of Major Robert A. Belcher, deceased, covering difference in basic pay for the period January 1, 1970, through March 19, 1970, pursuant to Executive Order No. 11525, dated April 15, 1970. Your submission has been assigned Air Force Request No. DO–AF–1089 by the Department of Defense Military Pay and Allowance Committee.

Copy of DD Form 1300, Report of Casualty, forwarded with your letter discloses that Major Belcher was held to have been in a missing in action status from March 28, 1969, until that status was terminated on March 19, 1970, the date on which evidence was received in the Department of the Air Force which was considered sufficient to conclusively establish his death. You say that your research has not revealed any decisions covering payment of the increased rate of basic pay pursuant to the Federal Employees Salary Act of 1970, approved April 15, 1970, Public Law 91–231, 84 Stat. 195, 5 U.S.C. 5332 note, pertinent to missing, missing in action, or captured personnel whose status is terminated by retroactive declaration of killed in action.

Since your question relates to the propriety of crediting the member's pay account with an item of pay during a period he was carried in a missing status, it would appear that authority to make a final determination as to such a credit vested in the Secretary of the Air Force or his designee. See 37 U.S.C. 556(c). However, it is our view that payment is authorized for the reason indicated below.

Section 2 of Executive Order No. 11525 reads as follows:

> SEC. 2 (a) A person who became entitled after December 31, 1969, but before the date of enactment of the Federal Employees Salary Act of 1970, to payment for items such as lump-sum leave, reenlistment and variable reenlistment bonus, continuation pay, any type of separation pay, or six months death gratuity, shall not be entitled to any increase in any such payment by virtue of this order.
>
> (b) Authority to prescribe other rules for payment of retroactive compensation shall be exercised for the uniformed services by the Secretary of Defense. Entitlement to retroactive pay under such rules shall be subject to the provisions of section 5 of the Federal Employees Salary Act of 1970, and shall conform as nearly as may be practicable to the provisions of Section 7 of the Act of December 16, 1967, 81 Stat. 654.

Memorandum from the Deputy Secretary of Defense for the Assistant Secretary of Defense (Comptroller), dated April 27, 1970, issued pursuant to Executive Order No. 11525 provides in pertinent part as follows:

> A person is not entitled to any increase in his basic pay by virtue of that Order for any period before April 15, 1970 unless he was on active duty on that date. However, a person who became entitled to retired pay or retainer pay after December 31, 1969, but before April 15, 1970 or who died during that period, is entitled to a retroactive increase in basic pay for any service he performed during that period for which he was entitled to basic pay. In the case of a person who died during that period, any increase in basic pay that is payable under this Order shall be paid to the person determined under section 2771 of title 10, United States Code. * * *

Section 552 of Title 37, U.S. Code, provides in pertinent part as follows:

> (a) A member of a uniformed service who is on active duty or performing inactive-duty training, and who is in a missing status, is, for the period he is in that status, entitled to receive or have credited to his account the same pay and allowances, as defined in this chapter, to which he was entitled at the beginning of that period or may thereafter become entitled. * * *
> (b) * * * Notwithstanding the death of a member while in a missing status, entitlement to pay and allowances under subsection (a) of this section ends on the date—
>
> (1) the Secretary concerned receives evidence that the member is dead; or
>
> (2) that his death is prescribed or determined under section 555 of this title.

For the purpose of crediting pay and allowances to a member under 37 U.S.C. 552(a), (b), the date upon which the Secretary concerned receives evidence that he is dead is the controlling date notwithstanding the fact that an earlier date is determined by competent evidence to be the actual date of death. While the above-quoted memorandum issued pursuant to Executive Order No. 11525 permits a retroactive increase in pay to be paid in the case of a person "who died" after December 31, 1969, but before April 15, 1970, we think that those regulations and section 5 of the Federal Employees Salary Act of 1970 on which they are based, have reference to a termination of pay between those dates because of death of the member and thus that memorandum would cover a situation such as here involved. Since Major Belcher's right to basic pay ended on March 19, 1970, because of his death, a retroactive increase in such basic pay would appear to be proper under the 1970 law and the memorandum of April 27, 1970, for the period January 1 to March 19, 1970.

Accordingly, the voucher, which is returned, would appear to be proper for payment in the absence of a determination under 37 U.S.C. 556(c) to the contrary.

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