Decisions of The Comptroller General of the United States

VOLUME 50 Pages 601 to 702

MARCH 1971

WITH

INDEX DIGEST

JANUARY, FEBRUARY, MARCH 1971

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300102000

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1971

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402
Price 25 cents (single copy); subscription price: $2.25 a year; $1 additional for foreign mailing.

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[B-169627]

Transportation—Rates—Export—Through Rate—Bills of Lading Status

The fact that the commercial bill of lading covering the shipment of radio equipment from Canada to California for export was required to be converted to a Government bill of lading and a second Government bill of lading was issued for the California to Australia part of the shipment does not preclude the application of the lowest available rate to determine the charges from California to Australia and the recovery from the ocean carrier of an overcharge that is the difference between local and overland rates for ocean freight and which includes wharfage and hauling charges. The export nature of the shipment was known to the carriers, and but for the requirement to use United States Government bills of lading, a through export bill of lading would have issued, and, furthermore, under the Government bills of lading, the shipment was made subject to the terms and rates of commercial shipments.

To the General Steamship Corporation, Ltd., March 1, 1971:

We have for consideration an overcharge of $1,250.40 collected by your company. The overcharge is the difference between the local rates and lower overland rates for ocean freight, including all of the wharfage and hauling charges collected from the shipper. Our request for refund (Form No. 1003) was issued to you on March 21, 1969, and you declined to refund for the reasons stated in your letter of May 15, 1969, to our Transportation Division.

The request for refund concerns a shipment consisting of three carloads of radio equipment and antennas, part of which were mounted on a trailer vehicle. The total weight of the shipment was 54,225 pounds with a volume of 6,525 cubic feet. The cargo was loaded aboard the M/S CUMULUS at Pier 143 in Wilmington Harbor on November 16, 1967, and the General Steamship Corporation issued an ocean bill of lading bearing reference to Export Declaration No. 135107. The consignee of the shipment is shown on the bill of lading as the officer-in-charge, DGO Telemetry Station, Northern Territory Command, Larrakeyah Barracks, Darwin, Northern Territory, Australia. This bill of lading, issued in memorandum form, makes reference to Government bill of lading (GBL) D-5332570, which was issued by the National Aeronautics and Space Administration (NASA) on November 1, 1967. Bill of lading D-5332570 shows that the cargo was received by the "RECEIVING CLERK—BERTH 143 PACIFIC AUSTRALIA DIRECT LINE S/S CUMULUS)."

The inbound billing was covered by a commercial bill of lading converted to GBL E-8508639 which shows that this cargo originated at Churchill, Manitoba, Canada, was consigned to the General Steamship Co., for "SS CUMULUS, Pier 143," moved direct by railroad

and was delivered in care of the United States Despatch Agency at Pier 143, Wilmington, California, on November 13, 1967.

Presumably, because no inbound reference was shown on the outbound billing you computed freight at the local rate of $84.75 per measurement ton, $13,824.84, plus heavy lift charges of $447.18; wharfage of $163.13; and handling of $219.31, producing total freight of $14,654.46 for transportation to Brisbane, Australia, plus $5,165.39 for freight from Brisbane to Darwin. No question exists with respect to this latter item of $5,165.39. Since our Transportation Division established that the cargo originated at Churchill, Manitoba, and traveled all rail to Pier 143, Wilmington, California, the charges were revised to the lower overland basis of rates, that is, $79.25 per measurement ton, resulting in charges of $12,927.66, plus $447.18 heavy lift charges. The overland rates include wharfage and handling; hence, you were requested to refund the $163.13 wharfage and $219.31 handling charges as well as the excess through charges which you collected.

Your reason for declining to make the requested refund of $1,250.40 is that, as stated in your letter of May 15, 1969, the overland rates apply only if the railroad has issued a through export rail bill of lading. You state further that the Southern Pacific Railroad has declined to remit its share of the overcharge and you enclose a copy of the Southern Pacific's letter to you dated May 9, 1969, and a copy of the tariff page stating conditions under which the carrier will issue through export bills of lading.

The facts regarding this shipment show that railroad cars CN556351, CN472604 and CN661043 were loaded at Fort Churchill, Manitoba, and switched to the Canadian National Railway on or about October 30, 1967. We have obtained two of the three waybills issued to cover the movements of these cars, waybill Nos. 100756 and 100757. The waybills show that the cars were consigned to: "PACIFIC AUSTRALIA DIRECT LINE C/O SS CUMULUS LOS ANGELES HARBOUR." In the body of the waybills the following notation is found: "FINAL DESTN SYDNEY NEW SOUTH WALES AUSTRALIA."

The commercial bill of lading is not available, apparently being retained by the Southern Pacific Company, since Government bill of lading E–8508639 was issued February 1, 1968, by the U.S. Despatch Agency, to convert the commercial bill of lading. The Government bill of lading makes reference to Southern Pacific Freight bills "W/B 100757,756,758." The consignee's certificate of delivery is accomplished showing that the cars were received at Wilmington by the U.S. Despatch Agency on November 13, 1967. That same day, the U.S. Despatch

Agency booked the cargo and ordered the cars to Pier 143, where the S/S CUMULUS was loading. Two weeks earlier on November 1, 1967, while the shipment was en route from Churchill, Manitoba, to Wilmington, California. NASA issued bill of lading D-5332570 to cover the voyage from Wilmington to Darwin, Northern Territory, Australia. As previously stated, receipt of the shipment for the vessel is shown to be by the "RECEIVING CLERK—BERTH 143 PACIFIC AUSTRALIA DIRECT LINE, S/S CUMULUS," and bill of lading D-5332570 shows the total volume of the cargo to be 6,525 cubic feet and the weight to be 54,225 pounds. This is exactly the cube and weight shown on the export billing instructions by the U.S. Despatch Agency on November 13, 1967, the day the cars arrived in Wilmington.

Thus, the following facts are established: (1) the shipment moved from Churchill, Manitoba, via all rail direct to Pier 143 at Wilmington on billing that showed the shipment was for export to Sydney, Australia; (2) the shipment at no time left the possession of the carriers; and (3) the Government bill of lading covering the voyage from Wilmington to Darwin, Australia, was issued *prior* to the time the shipment left the possession of the railroad at the port of exportation. Reference to Government bill of lading D-5332570 is shown on the U.S. Despatch Agency's export billing instructions and on the memorandum ocean bill of lading issued at Los Angeles on November 16, 1967.

We believe these facts show that both the originating rail carrier, the Canadian National Railway at Churchill, Manitoba, and the ocean carrier were fully informed of the export nature of the shipment, and that it was for transportation beyond Pier 143, Wilmington, California. Under these circumstances we also believe that but for the fact that United States Government property was involved and United States Government bills of lading were required a through export bill of lading would have been issued by the Southern Pacific Company at Wilmington in accordance with Part 1, Item 760 of Tariff No. 29-N, set forth in the copy of the tariff page furnished with your letter of May 15, 1969.

In accordance with applicable Government regulations, the commercial bill of lading for the movement from Churchill, Manitoba, to Wilmington, California, was converted to Government bill of lading E-8508639. A second Government bill of lading to cover the voyage from Wilmington to Australia was issued 2 weeks before the shipment arrived in Wilmington. Conditions 2 and 3 on the back of the Government bill of lading provide:

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

3. Shipment made upon this bill of lading shall take no higher rate than would be charged had the shipment been made upon the uniform straight bill of lading, uniform express receipt, or other forms usually provided by carriers for commercial shipments.

Accordingly, the use of the Government bills of lading pursuant to required standard Government procedures does not preclude the application of the lowest available rate to determine the charges for the voyage from Wilmington, California, to Australia. We again request that you refund the $1,250.40 found overpaid on this shipment; the refund should be made promptly to avoid other collection procedures for the recovery of the overpayment.

[B-171326]

Pay—Retired—Concurrent Military Retired and Civilian Service Pay

Although the civilian position held by a retired officer of a Regular component of the uniformed services in the United States Army Special Services Agency, Europe—a local nonappropriated fund activity—is a position subject to the reduction of retired pay prescribed by 5 U.S.C. 5532(b), a reduction is not required in the officer's retired pay as the reduction would exceed the amount the officer receives from his civilian employment with an additional reduction in retired pay, a result that is not within the contemplation of the Dual Compensation Act of 1964, for it is unreasonable to require the retired officer to accept a smaller amount after employment in a civilian position with the Government than the amount of retired pay he was receiving before that time.

Statutory Construction—Legislative Intent—Statute as a Whole

When giving effect to the plain meaning of words in a statute leads to an absurd or unreasonable result clearly at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed.

To the Secretary of the Army, March 5, 1971:

There is before this Office for consideration the claim of Colonel Asa C. Black, United States Army, retired, which is based on the collection action being taken against him as a result of a determination by Army authorities that his employment with the United States Army Special Services Agency, Europe, in a local national nonappropriated funds position during the period November 6, 1967, through June 4, 1969, was employment by the United States Government within the purview of the dual pay provisions of law contained in 5 U.S.C. 5531–5537.

Section 5531(2) of Title 5 provides:

(2) "position" means a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a non-appropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia.

Section 5532(b) provides, in pertinent part, that:

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder if any. * * *

We do not question the determination made by the Department of the Army that Colonel Black held a position within the meaning of section 5532(b) during the above-mentioned period. While he also appears to take the same position, he objects to the conclusion that because of the dual pay situation which resulted from his employment during the period December 6, 1967, through August 31, 1969—his employment from June 5 through August 31, 1969, apparently was in a "USNAF position with the Operations Division" of the above-mentioned agency—his retired pay should have been reduced in the amount of $7,904.06. Since that amount exceeds by approximately $3,000 the pay he received from his civilian employment, it appears that the collection of that sum will have the net effect of reducing the compensation from his civilian employment to zero and requiring an additional reduction of approximately $3,000 in his retired pay. It appears that no dual pay situation was involved during the first 30 days of his part-time employment, that is, during the period November 6 to December 5, 1967. See section 5532(c)(2).

Although a literal interpretation of the language used in 5 U.S.C. 5532(b) may seem to require the action taken by the Department of the Army in this case, it is our view that the Congress did not intend that any retired officer of a Regular component of a uniformed service should receive a smaller amount (total of retired pay plus civilian compensation) after accepting a civilian position with the Government, then the amount of retired pay he was receiving before that time. It appears reasonably clear that in permitting dual pay, the Congress must have intended that such pay would increase or, at the very least, would not reduce the income of the officer involved at the time he accepted the civilian employment.

The courts have often held that when giving effect to the plain meaning of words in a statute leads to an absurd or unreasonable result clearly at variance with the policy of the legislation as a whole, the purpose of the statute, rather than its literal words will be followed. *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966). See also *United States* v. *American Trucking Association, Inc.*, 310 U.S. 534 (1940), and *Takao Ozawa* v. *United States*, 260 U.S. 178 (1922).

The general purposes of the Dual Compensation Act of 1964—now codified in 5 U.S.C. 5531–5537—as expressed by the Committee on Post Office and Civil Service, House of Representatives, on page 2 of Report

No. 890, November 7, 1963 (to accompany H.R. 7381, 81st Congress, 1st session), were to codify all existing dual compensation and dual employment laws into one law, which would be relatively simple to interpret and administer; would eliminate the hardships caused individuals as a result of good faith misunderstandings of the application of the law; and would provide equitable treatment for all retired military personnel with respect to their employment in Federal civilian positions.

The prime function of earlier dual compensation provisions involving retired military personnel was to put a limitation on the total amount of compensation or pay which may be paid to a retired military member who accepts a civilian position with the Government. In section 212 of the 1932 Economy Act, 5 U.S.C. 59a (1952 ed.), one of the statutes repealed by the 1964 act, that limitation was fixed at $3,000 per year (later increased to $10,000). It was phrased in terms of civilian salary, plus sufficient retired pay to equal the statutory limitation. If the civilian salary exceeded the limitation and retired pay was less, no right accrued to retired pay. If the retired pay exceeded the limitation, the person concerned could elect to receive retired pay. Whatever the circumstances, he could not get less than his retired pay. Thus, both a maximum and a minimum were put on the total amount a retired member could receive by accepting a civilian job with the Government.

The intent of the Congress as to this type of situation was made clear in the 1932 act and since the intent of the 1964 act was to incorporate the 1932 act and other laws into one law which would provide fair treatment to retired military personnel, it would appear improper to impute to the Congress an intent to change the law in a manner which could produce results which seem utterly unfair.

Where, as here, an officer's retired pay exceeds the dual pay limitation prescribed in the statute, collection of an amount from his retired pay which is in excess of the compensation received in connection with his civilian employment would, in effect, require the untenable conclusion that he must not only work with no compensation at his civilian job, but must forfeit part of his retired pay, as well and thus, in effect, pay the Government for the right to render services to it in a civilian capacity. We are unwilling to conclude that Congress could have intended that result. *Cf.* 44 Comp. Gen. 266 (1964).

To the extent that anything said in 47 Comp. Gen. 185, September 27, 1967, is in conflict with the views expressed above, that decision no longer will be followed.

It is noted that the letter of April 17, 1970, to Colonel Black from the United States Army Finance Center, indicated that $200 a month

is being deducted from his retired pay. Such action should be terminated when a total equal to the amount of civilian compensation he received during the period December 6, 1967, to August 31, 1969, has been collected. Colonel Black is being furnished a copy of this decision.

[B-171767]

Pay—Retired—Advancement on Retired List—Pay Adjustment

Members of the uniformed services advanced in grade on the retired list without regard to whether their active duty service in a higher grade was in a temporary or permanent grade or whether the satisfactory service was in the same service from which retired may be paid adjustments in retired pay from date of retirement, even though the required administrative approval of satisfactory service was made more than 10 years subsequent to retirement, for under the rule that a claim which by statute is not payable until its validity is determined by a designated agency does not accrue until the determination of validity has been made, the members' claims for adjustment of their retired pay are not barred by the act of October 9, 1940, as the 10-year statute of limitation began to run from the date of the administrative determination of entitlement to the higher grade and not the date of retirement.

Statutes of Limitation—Claims—Date of Accrual—Administrative Determination

Since a claim which by statute is not payable until its validity is determined by a designated agency does not accrue until the determination of validity has been made, it is not barred until 10 years after the administrative determination is made and, therefore, the application of the act of October 9, 1940, the 10-year statute of limitation, does not take effect until secretarial approval of the advancement of members on the retired list without regard to whether the satisfactory active duty service was in a permanent or temporary grade, or in the service from which retired. Readjustment payments that had been disallowed may be paid administratively, as well as future claims, whether the retirement was for disability or under 10 U.S.C. 8964, and notwithstanding the member's higher grade was in the service from which retired, and the order effecting a change to the higher grade constitutes the date of administrative determination of satisfactory service in the higher grade when issued on the same day as the determination.

To Lieutenant Colonel N. C. Alcock, Department of the Air Force, March 8, 1971:

Your letter of December 31, 1970, requests a decision concerning the application of the act of October 9, 1940, ch. 788, 54 Stat. 1061, 31 U.S.C. 71a, 237, to the payment of adjustments in retired pay when members of the uniformed services are advanced in grade on the retired list. Your request for decision has been assigned Air Force Request No. DO-AF-1110 by the Department of Defense Military Pay and Allowance Committee.

In decision of March 23, 1970, 49 Comp. Gen. 618, we held that where an existing statute authorizes the computation of the retired pay of a member of an armed service on the basis of the pay of a grade in which the member had served satisfactorily (as determined by

proper authority) which is higher than the grade on which he is otherwise entitled to compute his retired pay, payment of retired pay computed on the pay of that higher grade will be passed to credit in disbursing officers' accounts without regard to whether that grade was a temporary or permanent grade, subject to the above-cited act of October 9, 1940. We further stated that such action in any particular case will depend upon an appropriate administrative determination as to satisfactory service where such determination is required by the applicable statute.

Our decision of March 23, 1970, followed a series of decisions by the United States Court of Claims, including the cases of *Friestedt* v. *United States*, 173 Ct. Cl. 447 (1965), and *Miller* v. *United States*, 180 Ct. Cl. 872 (1967), wherein the court reached conclusions which were not in agreement with views expressed in earlier decisions of this Office with respect to the interpretation of statutes concerning the highest temporary and permanent grade in which retired members had served satisfactorily on active duty and the "same service" rule enunciated by this Office in a number of decisions beginning with our decision of May 3, 1950, 29 Comp. Gen. 437.

The above-cited decisions of this Office precluded the administrative payment of retired pay based upon certain higher permanent grades held in the same service and higher grades held in an armed service different than that from which retired. Presumably, because of such decisions the armed services did not advance retired members on the retired list to a higher grade, which the Court of Claims held to be authorized, until our decision of July 8, 1966, 46 Comp. Gen. 17, with respect to certain disability retirements and our decision of March 23, 1970, 49 Comp. Gen. 618, with respect to retirements generally where advancement in grade upon retirement was authorized by statute.

Your letter refers to two cases where members theretofore retired for disability were advanced on the retired list in 1968 and 1969 to a higher permanent grade in which the cognizant Secretary determined the member had served satisfactorily. In one case member A was retired for disability in 1944 in the grade of private (E–1) and was paid retired pay as a private first class (E–2) pursuant to the act of May 7, 1932, ch. 171, 47 Stat. 150, and section 203(e) of the act of June 29, 1948, ch. 708, 62 Stat. 1086, effective June 29, 1948. He was advanced on the retired list to the grade of technical sergeant (E–6) retroactive to retirement date on August 30, 1968, as authorized by our decision of July 8, 1966, 46 Comp. Gen. 17.

Member A's claim for the difference between the retired pay of grades E–6 and E–2 was allowed in the amount of $8,538.36 for the

period October 30, 1958, through September 30, 1968, by settlement of our Claims Division dated August 12, 1969. That settlement disallowed that part of his claim which covered the period June 29, 1948, through October 29, 1958, for the stated reason that it was barred by the act of October 9, 1940, because it related to a period which was more than 10 years prior to the date of receipt of such claim in our Office on October 30, 1968.

Member B was retired for disability on August 29, 1958, in the grade of airman first class (E–4). On August 22, 1969, he was advanced on the retired list to master sergeant (E–7) retroactive to retirement date. His claim for the difference between the retired pay of grades E–7 and E–4 was allowed by our Claims Division in the amount of $4,592.05 for the period September 25, 1959, through September 30, 1969. His claim for the period August 30, 1958 through September 24, 1959, was disallowed by our Claims Division for the stated reason that his claim for the period prior to September 25, 1959, was barred by the act of October 9, 1940.

You request decision whether the above claims for the periods more than 10 years prior to their receipt in the General Accounting Office are barred by the 1940 act.

In decision of May 16, 1955, 34 Comp. Gen. 605, we held that a claim which by statute is not payable until its validity is determined by a designated agency does not accrue until the determination of validity has been made and, hence, that such a claim is not barred by the act of October 9, 1940, until 10 years after such administrative determination is made.

In decision of March 3, 1959, B–138417, we held that, since the Secretary of the Navy did not advance the retired enlisted member of the Navy there involved to chief boatswain, the highest temporary grade satisfactorily held by him, until February 7, 1949, his "right to retired pay on the basis of that higher grade could not legally have accrued until February 7, 1949," and that therefore his claim for adjustment in his retired pay for the period beginning March 1, 1946, based on such advancement, which was first received in this Office on February 13, 1958, was not barred by the act of October 9, 1940.

In decision of September 29, 1970, B–170331, we said that since an enlisted member of the Coast Guard retired in grade E–6 was not entitled to compute his retired pay on the grade of E–7 "unless and until a proper administrative determination of satisfactory service in the higher grade is made, his right to retroactive adjustment will accrue as of the date of such determination and the act of October 9, 1940, will not be applicable."

You suggest that the action of our Claims Division in disallowing that part of the above-cited claims for the period more than 10 years before receipt thereof in the General Accounting Office is inconsistent with the above-cited decisions and vouchers covering the disallowed portions thereof are submitted for reconsideration as to propriety of payment.

The above-cited decisions are for application with respect to the cases of the retired enlisted men here involved. Since their right to retired pay based on the higher grade was dependent upon their advancement on the retired list on August 30, 1968, and on August 22, 1969, respectively, their claims were timely filed. Accordingly, payment of the submitted vouchers is authorized and they are returned herewith for payment, if otherwise correct.

You say that there are numerous other similar claims now pending at various stages and ask that the following additional related questions be answered in order to establish guidelines for handling these and other types of cases:

a. Will it be necessary, on those cases where the Claims Division has disallowed that portion accruing prior to ten years from receipt date in GAO, to resubmit vouchers for such disallowed amounts to your Claims Division for approval, prior to any supplemental settlement by this office?

b. May future cases, which have not yet been submitted to the Claims Division, be settled here without approval by your Claims Division?

c. Does the date of the Secretarial order effecting change to a higher grade on the retired list constitute the date of an administrative determination of satisfactory service in the higher grade within the meaning of that term as used in B–170331, 29 September 1970, insofar as the Act of 9 October 1940 is involved?

d. Would your answer in the two attached cases (or to any of the preceding questions) be different if the individuals involved were retired for reasons other than physical disability and advanced on the retired list under 10 U.S.C. 8964 after 30 years active and retired service?

e. Would your answer likewise be different if the member held such higher grade in the service from which he retired (or in its predecessor for those retired from the Air Force) as opposed to a higher grade held in another branch of service?

On the basis of the foregoing discussion, questions "b" and "c" are answered in the affirmative and questions "a," "d" and "e" are answered in the negative. The affirmative answer to question "c" is based on the assumption that the Secretarial order effecting a change to a higher grade is issued on the same day an administrative determination of satisfactory service in the higher grade is made. See B–170331, September 29, 1970.

[B–171321]

Officers and Employees—Training—Expenses—Meals and Room at Headquarters

The cost of catering services furnished by a hotel located in the District of Columbia to a conference held pursuant to the Government Employees Training Act, 5 U.S.C., Chapter 41, and considered a proper administrative expense when

necessary to achieve the objectives of a training program, may be paid, the prohibition in 40 U.S.C. 34 regarding the procurement of hotel room accommodations in the District of Columbia in the absence of an express appropriation for the rental of space for Government use in the District having no application, even though the cost of using the hotel facilities are included in the catering charges, as the cost of the space is merely a cost item included by the hotel in fixing catering charges and the rental of space *per se* is not involved.

To Floyd F. Terranova, United States Department of Agriculture, March 9, 1971:

This is in reply to your inquiry of November 17, 1970, whether you may certify for payment a bill in the amount of $8,427.02 from the Washington Hilton, a hotel located in the city of Washington, District of Columbia, for catering services rendered the Agricultural Research Service, U.S. Department of Agriculture.

The services of the hotel were obtained incident to a Science and Educational Training Conference on Professional Growth and Development conducted by the Agricultural Research Service pursuant to the Government Employees Training Act, now codified in chapter 41 of Title 5, United States Code. The hotel, as reflected by the bill and supporting documents, catered five luncheons and three dinners and rendered other related and incidental services for the conference. The services were provided on the basis of a purchase order, No. RB–7862–ARS–71, October 9, 1970, which called for catering services (luncheons, dinners, and coffee breaks) for 180 people during the period October 12 through October 16, 1970, at the stipulated price of $9,155.30 for the job. It appears that less than 180 persons attended the conference, a fact reflected in the amount of the bill.

The furnishing of subsistence incident to the conduct of a training program under the Government Employees Training Act has been recognized as a proper administrative expense where it is determined that the providing of meals, even though an employee is not in a travel status, is necessary to achieve the objectives of the training program. See 39 Comp. Gen. 119 (1959); B–165242, October 3, 1968.

Herein the justification for the procurement of the catering services is explained as follows:

* * * In order to achieve the goals of the S & E Training Conference on Professional Growth and Development, it was necessary to establish and maintain several conditions. One of the most important of these conditions was the establishment of an environment which required, stimulated, and fostered communication among participants and helped them identify with each other.

In order to develop this communication and sense of identity, the Conference was structured so that participants would interact as often as possible. A minimum of "free time" was structured into the agenda. The interchange afforded during meals was an important and necessary element in the design of the conference. These meals were to promote a natural mixing of conference participants in an informal environment. The amount of time available for meals had to be kept to a minimum so that the agenda would proceed as scheduled. This need for time required that participants dine together. In addition, the meals were also working

sessions. It was planned that participants would discuss their problem assignments during meals, and for those sessions where speakers were scheduled, interact with the speakers and each other. For these reasons it was determined not to be feasible to excuse conference participants for meals outside of the training environment, but in the best interest of the Government to have the required meals catered. The requirement consisted of furnishing all services attendant to catering the conference, i.e., materials such as tables, chairs, china, silver and food to serve 180 people for five luncheons, three dinners and five coffee breaks. As provided by section 10 of the Government Employees' Training Act, Public Law 85-507, appropriated funds may be used to cover the necessary expenses including meals of employees in training. (Reference 39 CG 119) * * *.

That the training session was held in the District of Columbia gave rise to doubt of the propriety of certifying this claim for payment. In connection therewith you refer to a sentence in a decision of this Office involving a training program conducted in the District of Columbia, 49 Comp. Gen. 305 (1969). Therein, as quoted in your letter, it was stated:

* * * Concerning the procuring of hotel service and facilities and furnishing them, in kind, to participant trainees who are in a travel status, we see no legal objection to such procedure provided the accommodations are not situated in the District of Columbia and that the procedure is administratively determined to be an appropriate means of incurring necessary training expenses.

The quoted statement, particularly regarding the District of Columbia, had reference to the procurement of hotel room accommodations. It was predicated on 40 U.S.C. 34, prohibiting in the absence of an express appropriation therefor the rental of space for Government use in the District of Columbia. This is abundantly clear from a subsequent statement in the decision with reference to statutory authority for the training of military personnel:

* * * In view of such authorities the procurement of and the furnishing of rooms to military personnel—provided it is not space rented in the District of Columbia—would be authorized if necessary for full participation in the training and reimbursement therefor from available military appropriations would be proper.

Undoubtedly there is included in the catering (meal) charges of the Washington Hilton the cost of space, i.e., the cost of using the hotel facilities. However, the inclusion of the cost of space—among other costs—by the hotel in fixing its normal catering or meal charges does not require the conclusion—at least in this case—that the rental of space is involved, since the cost of space would be merely one of the cost items included by the hotel in fixing its catering charges. We therefore do not consider the present situation within the purview of 40 U.S.C. 34. That being so and as it is administratively explained that because of the unique objectives of the training conference Government facilities were not adequate for the purpose, and of the various commercial facilities in the greater Washington area—where it was considered desirable to hold the conference—only the Washington Hilton Hotel could accommodate a group of 180 people during the required

period of October 12 through October 16, we perceive no substantial legal basis for withholding payment on this claim.

Accordingly, you are advised that you may properly certify for payment the sum of $8,427.02 claimed.

[B-171915]

Claims—Assignments—"Financing Institutions" Requirement—Pension Funds

The assignment of moneys to become due from the United States under a lease agreement may be made to the Public Employees' Retirement System and the State Teachers' Retirement System of the State of California using trust funds to furnish permanent financing for a building being constructed for the Government. The Systems qualify as "financing institutions" within the purview of the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, as nothing in the act indicates the exclusion of pension funds, and the primary function of the trust corpus, together with the trustees, is the investing of the assets of the trust. However, the act limits assignment to one party, "except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing."

To Lillick, McHose, Wheat, Adams & Charles, March 10, 1971:

We refer to your letter dated February 5, 1971, with enclosures, on behalf of Russell & Associates-Fresno, Ltd. (Russell), requesting our opinion as to whether the State of California, Public Employees' Retirement System and the State of California, State Teachers' Retirement System are "financing institutions" within the purview of the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203.

You state that Russell entered into a lease agreement on May 28, 1970, with the General Services Administration, Public Buildings Service, under which Russell is constructing and will lease to the United States Government an Internal Revenue Service Center (Center), in Fresno, California. You state further that this Center has been under construction for several months and Russell is now in the process of completing its financing arrangements. In this regard, it is stated that Russell has entered into an agreement with the State of California, Public Employees' Retirement System and the State of California, State Teachers' Retirement System (Systems) whereby the Systems will furnish the permanent financing for the project upon its completion and acceptance by the Government. Under this agreement, you state the systems will purchase Russell's promissory note secured by a first trust deed on the facility from the First National Bank of Minneapolis (Bank), which will furnish the interim, or construction, financing.

Both the Bank and the Systems require assignments of moneys to become due to Russell from the Government under the lease as a condition of their respective financings. As a condition of the interim loan,

the Bank requires a binding agreement by the Systems to purchase the interim loan from the Bank when the Government has taken possession and accepted the facility. Before issuing such a commitment, the Systems require confirmation that they in fact qualify as "financing institutions" within the purview of the Assignment of Claims Act of 1940.

You describe the function of the Systems as follows:

> The State of California Public Employees' Retirement System is instituted under the California Public Employees' Retirement Law. (Calif. Government Code, Sections 20000 et seq.) Its function is to collect contributions from public employees of the State and agencies within the State, administer and invest the moneys so collected, and pay retirement benefits. In discharging said function it invests in, among other things, obligations secured by mortgages on real property. (37 Opinions of the California Attorney General 92). A copy of the most recently available Annual Report of the Retirement System is forwarded herewith.
>
> The State of California State Teachers' Retirement System is instituted under the State Teachers' Retirement Law. (Calif. Education Code, Sections 13801 et seq.) Its function is to collect contributions from teachers of public schools in the State, administer and invest the moneys so collected, and pay retirement benefits. In discharging said function it invests in, among other things, obligations secured by mortgages on real property. A copy of the most recent available Annual Report of this System is forwarded herewith.

The Assignment of Claims Act provides that moneys due or to become due from the United States under a contract providing for payments of $1,000 or more may be assigned to a "bank, trust company, or other financing institution" if certain conditions not at issue here at met.

We stated at 40 Comp. Gen. 174, 175 (1960) as follows:

> The assets of pension trusts, as with insurance companies, are increasingly being invested in long term secured loans. Nothing appears in the legislative history of the act indicating any Congressional intent that pension trust funds shou'd be excluded: nor does any reason appear, either from the purpose of the act or the interests of any of the parties to the transaction, for excluding them. In this instance, Article V of the Trust Agreement sets out as a primary duty of the trustees the investment and reinvestment of pension principal and income in loans, securities and property. We held in 36 Comp. Gen. 290 that pension trust funds may be used for loans secured by an assignment pursuant to 31 U.S.C. 203. We conclude, therefore, that the assignment may not be regarded as invalid by reason of the source of funds for the loan in consideration for which the assignment is made providing the assignee qualifies as a "financing institution" under the act.
>
> A financing institution is one which deals in money as distinguished from other commodities as the primary function of its business activity. 22 Comp. Gen. 44. Such institution may be an individual or a partnership as well as a corporate organization. 20 Comp. Gen. 415.

We stated further that the trust corpus, together with the trustees, whether individual, corporate or otherwise, having as a primary function the investing of assets of the trust, may be regarded as a financing institution within the meaning of the Assignment of Claims Act. We find no reason to distinguish between a private corporate pension trust involved in our decision quoted above and those for employees of the State of California as presented in the instant case.

Accordingly, we find no basis in the facts presented to conclude that the Systems would not be a proper assignee under 31 U.S.C. 203. However, please note that under the language of the statute the assignment shall not be made to more than one party "except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing."

[B-158097]

Transportation — Automobiles — Military Personnel — Containership Ocean Transportation

The cost of the overland movement of privately owned motor vehicles of members of the uniformed services incident to their shipment overseas pursuant to 10 U.S.C. 2634 when a member is ordered to make a permanent change of station may be paid from appropriated funds where the vehicles are placed in containers some distance from shipside, as this kind of service is within the scope of section 2634 relating to the use of "American shipping services." Also there is no objection to an ocean carrier accepting containerized cargo at a port from which it does not operate a containership and transporting the vehicle for its own convenience and at its own expense to another port from which it operates the containership, where the overall cost to the Government is as if the vehicle moved by water from the port to which delivered.

Transportation—Automobiles—Military Personnel—Land Transportation

The authority in 10 U.S.C. 2634 for the shipment at Government expense of privately owned vehicles of members of the uniformed services ordered overseas on a permanent change of station does not permit the land movement of vehicles from one port to another in order to utilize U.S.-flag shipping—and although it is permissible to ship vehicles by water at Government expense from one port to an alternate port for transshipment to U.S.-flag carriers, prudent management should require owners to deliver their vehicles to the ports from which U.S.-flag shipping is available—nor is the land movement of vehicles between two ports authorized under section 2634 where the vehicle is delivered to a port from which no ocean transportation is reasonably available.

Transportation—Automobiles—Military Personnel—Authority—Scope

Where the transportation services accorded the privately owned vehicles of members of the uniformed services transferred overseas under permanent change of duty station orders is a joint one by ocean and land carriers, the movement cannot be characterized as an "American shipping service" under 10 U.S.C. 2634, and the service, therefore, is unauthorized, even though more economically than port-to-port water transportation. Also beyond the scope of the section is the inland movement of vehicles to permit use of water-land transportation by U.S.-flag carriers and United States land carriers in order to obviate use of foreign flag, port-to-port water transportation. The authorization for shipment of privately owned vehicles at Government expense is limited to transportation by water and such inland movements as are necessarily incidental to the water transportation and capable of being performed by ocean carriers as bona fide "shipping services."

To the Secretary of the Navy, March 12, 1971:

Further reference is made to letter of October 20, 1970, from Mr. John W. Warner, Under Secretary of the Navy, concerning overland movements of privately owned motor vehicles of military personnel (POVs). Approval is sought for payment for the following kinds of overland movements:

1. the movement of a motor vehicle between the staging area of a port and a ship pursuant to loading and discharging operations;
2. the overland movement of a motor vehicle between two ports when one or more of the following conditions are met:
   a. where such movement is required to utilize U.S.-flag shipping;
   b. where the ocean carrier offers such movement without additional charge in lieu of moving the vehicle on his ship;
   c. where no ocean transportation is reasonably available from the port where the vehicle is delivered;
   d. where such movement combined with the costs of the connecting water movement is less expensive than uti'izing direct water service from the port where the vehicle is delivered.

Current statutory authorization for the shipment at Government expense of privately owned vehicles of servicemen is codified as section 2634 of Title 10 of the United States Code and reads, in pertinent part, as follows:

(a) When a member of an armed force is ordered to make a change of permanent station, one motor vehicle owned by him and for his personal use or the use of his dependents may, unless a motor vehicle owned by him was transported in advance of that change of permanent station under section 406(h) of title 37, be transported, at the expense of the United States, to his new station or such other place as the Secretary concerned may authorize—
   (1) on a vessel owned, leased, or chartered by the United States;
   (2) by privately owned American shipping services; or
   (3) by foreign-flag shipping services if shipping services described in clauses (1) and (2) are not reasonably available.

It will be seen that the statutory authorization is phrased in terms of transportation on "a vessel owned, leased, or chartered by the United States," or "by privately owned American shipping services," or by "foreign-flag shipping services." At one time the authorization was limited to transportation on "a vessel owned by the United States" or on "a Government-owned vessel." See, for example, sections 4748, 6157 and 9748, Title 10, United States Code, Supp. IV, 1952 Edition. Because the authorization has since been broadened to include transportation by "American shipping services," and by "foreign-flag shipping services" in some circumstances, it has been argued that congressional use of the term "shipping services," rather than "ships" or "vessels," indicated that the authorization was meant to include something more than mere pier-to-pier, port-to-port water transportation.

The argument seems plausible and we are inclined to view the statutory language as encompassing not only transportation by water but also such inland transportation service as is necessarily incidental to

transportation by water if it is customarily or usually available from and performed by ocean carriers and can thus be characterized as an American or foreign-flag shipping service. With this view in mind, we discuss below the various inland movements referred to in Mr. Warner's letter.

The movement of a motor vehicle between the staging area of a port and a ship pursuant to loading and discharging operations is said to be required in order to use the new containership method of ocean transportation for shipment of POVs. In the past, these vehicles were delivered by the owners at their expense to shipside for loading aboard conventional breakbulk vessels at port of origin and delivery was accepted by the owners at shipside at port of destination. Now, however, because of the rapid changeover by ocean carriers from breakbulk operations to containership operations, the availability of breakbulk vessels is declining while the availability of containerships is increasing.

In these circumstances, in order to ship POVs by water, it is often necessary to utilize containers, and stowage of the vehicles in the containers must be performed in a terminal area located some distance from shipside. Thus an overland movement from the point at which the vehicle is placed in the container to the point at which the container can be loaded aboard the vessel is required. A specific illustration of this situation is the proposal by Matson Navigation Company to move POVs from the military terminal in Oakland, California, to the company's containership terminal at a charge of fifty cents per measurement ton (page 3 of Mr. Warner's letter). We believe a service of this kind is within the scope of the statutory authorization relating to use of "American shipping services" and thus may properly be paid for from appropriated funds.

Another problem relating to the use of the containership method for ocean transportation of POVs arises from the fact that containerships usually are operated from a limited number of major ports. Whereas conventional breakbulk vessels often call at several different ports in order to load or discharge cargo, it is customary for the containership to operate from a major port with the cargo moving to the ship from other ports and places by feeder ship or conventional land transportation facilities. It sometimes happens, therefore, that an ocean carrier may accept containerized cargo at a port from which it does not operate a containership and thereafter transport the cargo for its own convenience and at its own expense to another port from which it does operate a containership.

A specific illustration of this situation is the proposal by Container Marine Lines and United States Lines to move POVs overland from the Army Terminal in Philadelphia to New York for loading aboard

a containership, with the overall cost to the Government being the same as if the cargo had been moved by water from the Port of Philadelphia (page 4 of Mr. Warner's letter). Since this service is performed by the ocean carrier at its own expense and for its own convenience, we see nothing in the current statutory authorization for the transportation of POVs at Government expense that would prohibit use of such service if it is available. As to whether such transportation can be lawfully performed by an ocean carrier under existing regulatory statutes, we express no opinion.

In the case of inland movement of POVs at Government expense from one port to another port solely because such movement is required in order to utilize U.S.-flag shipping, it is our opinion that such transportation is not authorized unless it can be obtained from an ocean carrier under circumstances similar to those discussed above. In other words, it is our opinion that the current statutory authorization does not permit shipment under Government contracts with land carriers from one port to another port in order to use U.S.-flag ships. It would, of course, be permissible to ship POV's by water at Government expense from one port to an alternate port for transshipment to U.S.-flag carriers. However, prudent management considerations would seem to dictate that POVs would be required to be delivered at the owners' expense to the ports from which U.S.-flag shipping is available. Similarly, it is our opinion that land movement of POVs at Government expense (unless available as a legitimate ocean carrier "shipping service") from a port from which no ocean transportation is reasonably available is not authorized under the statute.

Finally, the letter refers to inland movements which are part of water-land transportation between ports in circumstances where the cost of the water-land movement is less than the cost of port-to-port water transportation or where such water-land movement will permit use of U.S.-flag shipping (for the water movement) in lieu of port-to-port water transportation by foreign-flag shipping. A specific illustration of a situation where water-land transportation costs were lower than port-to-port water transportation costs is that considered in our opinion dated March 25, 1966, 45 Comp. Gen. 608, referred to in Mr. Warner's letter. There the Alaska Steamship Company and the Alaska Railroad had offered a joint service for transportation of POVs by water from Seattle, Washington, to Whittier, Alaska, thence by rail to Anchorage, Alaska. Because the service was a joint one by the ocean carrier and the railroad and thus could not be properly characterized as an "American shipping service," we held that the service was unauthorized even though it was more economical than the port-to-port water transportation then available. We adhere to the conclusion reached in that decision.

As to the inland movement of POVs to permit use of water-land transportation by U.S.-flag carriers and United States land carriers, in order to obviate the use of foreign-flag, port-to-port water transportation, we believe such transportation also is beyond the scope of the current authorization. Illustrative of the problem is your proposal to ship POVs from Europe via U.S.-flag vessels to Gulf Coast ports, thence by land to the Port of Seattle, Washington. It is said that at present port-to-port water transportation from Europe to the Port of Seattle is available only in foreign-flag ships. Transportation now is available by U.S.-flag carriers to Gulf Coast ports, thence by overland transportation facilities to Seattle, at an overall cost approximating the port-to-port water transportation costs of foreign-flag carriers.

In these circumstances, it is suggested that such water-land transportation should be utilized in order to afford a reduction factor in the present balance-of-payments situation between this country and other nations. The argument clearly has merit but unfortunately the present authorization for shipment of POVs at Government expense is, in our opinion, limited to transportation by water and to such inland movements of POVs as are necessarily incidental to such water transportation and capable of being performed by ocean carriers as bona fide "shipping services."

To summarize: The inland movement of POVs described hypothetically in Mr. Warner's letter under categories 1 and 2.b may, in our opinion, be properly paid for from appropriated funds if the movements are performed by ocean carriers as a necessary incident to the transportation of the POVs by water. The inland movement of POVs described hypothetically under categories 2.a, 2.c, and 2.d may not be paid for from appropriated funds unless such services are available from ocean carriers in circumstances where such services reasonably may be considered as available American or foreign-flag "shipping services." Payment for the latter categories of services, while possibly desirable from the standpoint of economic and balance-of-payment considerations, would, in our opinion, require legislative changes in the current statutory authorization.

[B–171384]

Contracts—Negotiation—Changes, Etc.—Specifications—Propriety of Changes

Under a request for proposals for Fleet Computer Programming Services, which was modified to remove as an evaluation factor the cost of failing to award the contract to the current contractor and a possible organizational conflict of interest because one of the offerors was performing as a subcontractor on a program to be analyzed by the new contractor, and to revise the program's man-hours, the con-

tinuation of negotiations during which prices were disclosed does not constitute prohibited auction technique as no competitive advantage resulted to any offeror and the technique *per se* is not inherently illegal. The substantial changes in requirements and in the computer industry justified the amendments to the solicitation issued pursuant to paragraph 3-805.1(e) of the Armed Services Procurement Regulation and the continuation of negotiations, therefore, the last prices submitted may be opened and considered.

To the Secretary of the Navy, March 12, 1971:

Reference is made to the administrative reports dated December 10, 1970, and enclosures, from the Deputy Commander, Purchasing, Naval Supply Systems Command, file No. SUP 0232, and the reports dated March 2, 1971, with enclosures, from the Assistant Director, Purchase Division, Washington Navy Yard, concerning request for proposals N00600-71-R-5083 issued on September 18, 1970, by the Navy Purchasing Office, Washington, D.C. Protests in connection with this procurement have been lodged by Computer Sciences Corporation and ITT Data Services, two of the proposers who submitted acceptable technical proposals.

The solicitation requested proposals for Programming Services for the Fleet Computer Programming Center, Atlantic, for 1 year with options for 2 succeeding years. The schedule set out 18 labor categories representing types of personnel to be provided by the contractor. For each category, the estimated hourly requirements by year were set out for performance in the contractor's facility (approximately 50 percent) and in the Government's facility, each on straight time and overtime. The price for evaluation purposes was to be determined by multiplying the applicable hourly rate by the estimated requirements. Proposals were to be submitted by close of business on November 2, 1970. A preproposal meeting was held with all interested offerors on October 2, 1970.

Prior to the preproposal meeting, the contracting office ascertained that under the terms of the current contract, the Government would have to pay the incumbent contractor, ITT Data Services (ITT), allocable relocation and severance pay costs, estimated at $200,000, in the event ITT Data Services did not receive a follow-on contract. Since the cost would be incurred by the Government, the contracting officer determined that it would be in the Government's best interest to consider such cost in evaluating proposals. This conclusion was conveyed to the prospective offerors at the preproposal meeting. Amendment 001 was issued on October 8, 1970, adding the above finalization costs ($200,000) as a factor in the evaluation of price proposals "of each offeror with the exception of the present contractor [ITT]." In addition, attached to the amendment were a series of questions and answers pertaining to the procurement which were presented at the preproposal meeting.

Five timely proposals were received from the following firms:

Computer Sciences Corporation, Field Services Division (CSC)
General Electric Company (GE)
Integrated Systems Support, Inc. (ISS)
ITT Data Services (ITT)
PRC Data Services, Inc. (PRC)

The proposals were forwarded for technical review to the Fleet Computer Programming Center, Atlantic, at Dam Neck, Virginia, for whom the services sought were to be performed. As a result of the technical review, completed on November 10, 1970, the proposals of ITT and ISS were considered technically acceptable. The proposals of GE and PRC were found to be unacceptable due to deficiencies in their proposals. The CSC proposal was found technically acceptable as to the terms of the solicitation. However, the proposal revealed that CSC was responsible as a subcontractor, under an existing contract known as the AEGIS program, for developing a program which is to be analyzed and commented upon under the support contract solicited here. Thus, the possibility of a conflict of interest was presented if CSC became the contractor.

During the period November 12–19, 1970, discussions were held with all offerors, who were then given an opportunity to revise their technical and pricing proposals. In view of the situation respecting CSC and the AEGIS program, each offeror was requested by letter dated November 19, 1970, (a) to state whether it is or will be performing any work, either as a prime contractor or a subcontractor, which will be subject to review under the proposed contract, and (b) to identify such work by contract number, customer, and date of award. This letter also advised that revised proposals could be submitted up to the close of business on November 25, 1970.

Each proposer responded to the letter of November 19, 1970. PRC provided additional information in support of its initial response. GE, ITT, CSC and ISS also responded timely. The additional information was forwarded to the requiring activity for further evaluation. Upon review of the information, the PRC proposal was found acceptable. GE indicated that no additional information would be provided in support of its initial response; therefore, the GE proposal continued to be regarded as unacceptable. ITT, PRC and ISS took the opportunity to reduce their price proposals.

CSC reaffirmed its initial pricing proposal and responded to the question of its possible conflict of interest as a major subcontractor under AEGIS if it became contractor under this solicitation. In its letter CSC advised the Navy that it had filed a protest with our Office predicated on the following points: (1) restricting the request for

information to the AEGIS program only is discriminatory to CSC, since there are many other programs of probable involvement during the 3-year life of this contract; (2) the question of potential conflict of interest should have been included in the original solicitation when each proposer could have made a judgment prior to proposal preparation; and (3) the AEGIS conflict of interest question contains no reference to Armed Services Procurement Regulation (ASPR) or Department of Defense directive and has no legal basis. In addition, in connection with the Navy's request for "Information Concerning Possible Conflicts of Interest," CSC replied that an organization separate from that engaged in the AEGIS program would perform this contract; that it has in the past operated in a possible conflict of interest environment without incident; that contractor and Navy level of commands exist over CSC in the AEGIS program and a Navy level of command exists in the proposed contract, thus establishing a bulwark between the two CSC organizations; and that the prime contractor under the AEGIS program is not required to deliver until a date long after completion of this contract.

In its protest letter of November 25, 1970, to our Office, CSC contended that (1) neither the prime contract nor subcontract in the AEGIS program restricts CSC from seeking or performing any effort such as required in the subject solicitation; (2) the Navy letter of November 19, 1970, restricts the request for information to the AEGIS program notwithstanding other programs exist where potential contractors are performing work similar to AEGIS, in a prime contractor capacity; (3) the $200,000 evaluation factor provides the incumbent contractor with preferential treatment and a nonvalid competitive advantage.

In its report dated December 3, 1970, to the Navy Purchasing Office on the revised proposals, the procuring activity, as indicated above, evaluated the PRC proposal, in view of the additional information submitted, as technically acceptable. The GE proposal remained unacceptable. The CSC reply concerning possible conflict of interest was reviewed in detail and it was concluded that not withstanding the CSC comments, a possible conflict of interest situation did exist in connection with the AEGIS program. In addition, the report reviewed all other computer programs that would come within the scope of the current procurement and determined that none of the offerors was "currently performing work which would involve possible conflict of interest under this solicitation." The report also offered two possible methods of resolution of the situation: (1) remove the AEGIS program from the solicitation, which would require a separate contract and tend to reduce the cost advantage of the current offerings, and

(2) use civil service personnel on the AEGIS effort, which was not recommended for stated reasons.

After reviewing the above report, the contracting officer recommended to our Office that the CSC proposal be rejected on the basis that work assignment under the solicitation would create an inherent organizational conflict of interest.

By telegram of July 18, 1971, ITT protested award to anyone other than itself. ITT contends that CSC on information and belief is barred by reason of conflict of interest; that notwithstanding the filing of a "best and final offer" on November 25, 1970, CSC is seeking to engage in further negotiation with the Navy which will give CSC an unfair advantage; and that the CSC proposal is not responsive to the solicitation since it has not obtained firm commitments with 85 percent of prospective personnel prior to bidding as requested by the request for proposals.

By letter dated February 8, 1971, ITT submitted additional matter in support of its earlier telegram. This letter states that in January 1971, CSC submitted a confidential statement to the Assistant Secretary of the Navy (Installations and Logistics) raising issues concerning the procurement not previously raised to our Office; that other offerors did not comply with the requirements of the solicitation concerning employees to be assigned to the project; that Navy's "finalization costs" set at $200,000 for evaluation purposes, is grossly underestimated; that a proper figure would be one in excess of one millon dollars; that Navy unilaterally negotiated with CSC after submission of best and final offers; and that CSC is disqualified because of its conflict of interest.

In an effort to resolve the situation, the contracting officer directed a letter dated February 10, 1971, to all acceptable offerors, revising the solicitation to:

> a. Delete all reference to services in connection with the AEGIS program.
>
> b. Revise the requirement that one-half of the work would be performed in contractor provided space and one-half in Government provided space to provide that all work would be performed in Government provided building space.
>
> c. Set forth the revised estimates of man-hours resulting from the changes effected in a and b.
>
> d. Require information relating to potential conflict of interest either as prime contractor or subcontractor in any of 13 programs listed in the revision.

The letter also afforded the offerors an opportunity to revise their proposals both as to pricing and technical aspects.

Both ITT and CSC protested this action by the Navy. ITT reiterated the earlier bases of protest and stated that the deletion of AEGIS is inconsistent with an earlier Navy statement that such action would be undesirable and that costs of the program would be increased. ITT also stated that the solicitation is materially deficient in failing to specify the relative weights attached to evaluation criteria and in its failure to indicate the relative importance of technical as against cost considerations.

CSC contends there is no valid basis for reopening negotiations since the amendments are of insignificant consequence; that reopening negotiations is tantamount to conducting an auction since it believes all offerors are aware of the CSC low price offer; that cost information submitted with earlier proposals is easily adaptable to the insignificant changed requirements, including the deletion of the requirement for an offsite facility, since onsite figures have already been submitted and the procurement is on a time and material basis.

On February 22, 1971, CSC filed an action against the Secretary of the Navy in the United States District Court for the District of Columbia, Civil Action No. 406–71, to enjoin the Navy from proceeding with this procurement. Certain price proposals were revealed in the proceeding. As a result of this disclosure, the Navy, on February 23, 1971, in the interest of fairness disclosed the initial and amended price proposals of all offerors who were also advised that revisions to technical and price proposals would be accepted until March 1, 1971. On the following day, the Navy issued a further modification, as follows:

As indicated in the pre-proposal conference and in confirmation of same, all proposals will be evaluated as set forth below: Section D. Para. 2. Evaluation of proposals is amended as follows:

TECHNICAL

A. Evaluation of technical proposals for acceptability will be based on the following criteria:

(1) The contractor's experience, competence, and record of performance in the areas discussed above.
(2) Proposed staffing plan.
(3) Qualifications of the personnel to be assigned to perform the work.
(4) The extent to which the Government can rely on assignment to work under the proposed contract, of the personnel whose résumés were submitted.

PRICE

B. All proposers are hereby notified that if a technical proposal is deemed by the Government to be technically acceptable then the Government will consider price to be the predominant factor in making a contract award.

The date and time for receipt of revisions to proposals remains 4:30 p.m., 1 March 1971. All other terms and conditions of the solicitation, as amended, remain in effect.

Following the above modification, on February 24, 1971, CSC protested the action by the Navy, maintaining that the Navy is conducting

an "auction," which is prohibited by ASPR 3-805.1(b) and our decisions. On February 25, 1971, ITT submitted a statement reiterating its earlier protest notwithstanding the latest revision. It also points out that the latest revision appears to change the evaluation emphasis from performance to price. ITT urges that the revision requires another round of proposals for a number of reasons including the following:

a. ASPR and the policy of our Office require the reopening of negotiations.

b. Deletion of AEGIS project requires spreading of indirect costs over a smaller base.

c. Deletion of the requirement for an offsite facility requires readjustment of indirect costs.

d. Performance of the contract is to start at a much later date than contemplated when earlier proposals were submitted.

e. Evaluation criteria are changed.

In a supplemental letter, CSC urged that the use of the "finalization" costs as a factor ($200,000) in evaluation is improper, since this payment is only deferred if ITT is the successful offeror in the current procurement; that negotiations were not conducted with CSC following the closing date of November 25, 1970; and that there would be no organizational conflict of interest as to the AEGIS project and this procurement if CSC is awarded the contract.

By letter dated March 3, 1971, ISS objected to CSC's protests and offered reasons why the latest revision to the solicitation should be allowed to stand and new price proposals (submitted March 1, 1971, but secured unopened pending this decision) required by reason of the revised requirements. Essentially, ISS argues that the elimination of 36,928 hours and the contractor-provided facility, and the deterioration in economic conditions in the computer software industry since November 1970, would have a significant effect on prices.

This matter arose with but a single issue—whether there would be an organizational conflict of interest if CSC was the successful offeror, because it is a subcontractor on the AEGIS program.

The conflict of interest question becomes academic if the latest revisions are permitted to stand, with the option to submit new technical and price proposals. The question of relative weights of evaluation factors would also become academic since it is provided in the latest revision that if a technical proposal is deemed acceptable, the Government will consider price to be the predominant factor in making award.

CSC has argued that since the AEGIS program constitutes only 3 percent of the work under this procurement, its deletion can be classified as "de minimis." CSC urges also that the cost impact of the other revisions can be determined from the proposals already submitted, rendering the revision insignificant and not requiring further negotiations or price proposals. ITT estimates AEGIS as 10 percent of the work and of extreme significance in the allotment of indirect costs.

While we can appreciate the CSC position as to each individual item of the revision, we must reach a different conclusion on the aggregate effect of all the changed requirements. The reduction of the estimated number of man-hours (36,928) required for the revised program and the elimination of the contractor-provided facilities for one-half of the work force must necessarily have some impact on the indirect costs of the several offerors. Whether this impact is great or small, we have no way of knowing. This is a matter of individual allocation of overhead rates and other indirect costs.

As already noted, one of the other parties, ISS, also maintains that the economic situation with regard to availability of employees and wage rates has so changed as to make the November 1970 price proposals unrealistic at the present time. We appreciate that this factor would not have any immediate effect on those offerors with firm contractual commitments with current employees. Yet it must be conceded that there is a significant change in the requirements. How substantial the change is can be determined only by opening the latest proposals. We, therefore, conclude that the Navy's call for new price proposals in conjunction with the latest revisions is justifiable and not contrary to law or regulation. See ASPR 3-805.1(e) which clearly contemplates the issuance of an amendment to the solicitation when a material change is effected in the course of negotiations. While it may be possible to evaluate proposals to reflect the amended requirements by simply multiplying the appropriate wage rates in the November 25 proposals by the man-hours now deemed appropriate, this would not accurately reflect possible changes in indirect costs.

Nor do we find that opening the procurement to a third round of negotiations constitutes an auction or use of auction techniques. In this connection, in a report dated March 2, 1971, the Navy Purchasing Office commented:

> The amendment of 10 February 1971 was issued at a time when no public or private announcement about prices had been made. There was no intent on the part of the Government by issuing this amendment to conduct an auction, nor was it an auction technique in view of the changes in the solicitation. Computer Sciences Corporation, the low offeror, was the only firm that had any pricing information. Disclosure of prices was subsequently made by Computer Sciences Corporation, first by the letter which this correspondence answers, and second when that firm publicly disclosed them in open court. In the interest of fairness to all parties, prices for all offerors were announced by this office on 23 February 1971. The climate for an auction was finally created by the protestant.

We have stated that "There is nothing inherently illegal from a procurement standpoint in an auction * * *." 48 Comp. Gen. 436, 541 (1969). However, our Office has never approved any procedure whereby information which would give an unfair competitive advantage to any proposer would be disclosed during the negotiation process. Each situation must be judged in the light of the particular circumstances. Here it does not appear that the contracting office disclosed the price proposals until after CSC had revealed them in its court proceedings. We do not concede that an "auction technique" was used in this situation. However, if it were, it was instituted by CSC.

Accordingly, we conclude that the latest round of revised proposals scheduled for submission by March 1 may properly be opened and considered. In our view, ITT's position that yet another round of proposals is required, need not be considered at this time since the results of the latest round may dispose of the issues raised.

A copy of this decision has been forwarded to counsel for each of the proposers whose technical proposals have been found acceptable.

[B–170536]

Contracts—Labor Stipulations—Nondiscrimination—Affirmative Action Programs

The responsibility for reviewing equal employment opportunity (EEO), compliance having been assigned by the Secretary of Labor in implementing Executive Order No. 11246, to agencies on the basis of industrial classification, the General Services Administration properly reviewed EEO compliance by the low bidder on the linoleum portion of its invitation for bids and relied on the information furnished by the agency responsible for determining compliance by the low bidder on floor tiles. Although pursuant to 41 CFR 60–1.40(a) a prime contractor is required "to develop a written affirmative action compliance program for each of its establishments," the administrative determination that lack of *de facto* control by the floor tile contractor of a subsidiary excludes compliance as to that subsidiary is accepted as valid in the absence the determination was arbitrary, capricious, or not supported by the evidence.

Agents—Of Private Parties—Authority—Contracts—Signatures

Under the rule that there is no prohibition to furnishing proof of agency after bid opening—although requiring bidders to submit such proof before bid opening is recommended to avoid challenges from other bidders—the confirmation after bid opening of an employee's authority to bind his employer was properly accepted and the bid considered responsive, entitling the low bidder to a contract award.

To the Apache Flooring Company, March 15, 1971:

This is in reply to your letter of July 22, 1970, and subsequent communications, relative to your protest against the award of General Services Administration (GSA) contract No. GS–10S–29014 to Armstrong Cork Company, under invitation for bids No. SEAS–0227.

The invitation was issued on January 14, 1970, for bids on indefinite quantities of floor tile and linoleum for the period March 15, 1970, through March 14, 1971. Armstrong was the low bidder as to Group II, Categories A and B, and received the award on February 24, 1970. Apache was the low bidder on Groups I–A, IV, and V, but did not receive its award under the same solicitation until March 5, 1970.

You contend that the award to Armstrong was illegal since the signature appearing on the Armstrong bid was invalid at the time of bid opening. You also allege that in awarding the contracts GSA accorded Armstrong preferential treatment in that Armstrong was not required to commit itself to furnishing an affirmative action compliance program for each of its establishments, whereas you received your award only after you had been compelled to sign a commitment to submit such plans within 30 days. You request the suspension of payment to Armstrong on the basis that the company is now in default of its contract because it has failed to develop an affirmative action plan for each of its establishments as required by the contract. You further contend that GSA has continued to accord Armstrong preferential treatment by failing to enforce equal employment opportunity (EEO) requirements against Armstrong while requiring adherence by Apache to the EEO provisions of its contract.

It is noted that the questions regarding the validity of the signature appearing on the Armstrong bid and the fairness of the preaward compliance reviews were considered by the United States District Court for the District of Columbia in *Apache Flooring Company* v. *Robert L. Kunzig, Administrator of General Services Administration*, Civil Action No. 729–70. While the action was subsequently dismissed without prejudice, in a previous denial of your "Motion for Injunction Pendente Lite" the court stated as a conclusion of law:

> E. L. Michener was authorized to sign the offer which Armstrong submitted to defendant, and evidence of his authority so to do was duly furnished defendant prior to the award of the contracts involved in this cause. Armstrong's offer was responsive to defendant's solicitation.

The court also made the factual finding that "Plaintiff has not proven that defendant has shown favoritism to Armstrong with respect to the contract herein."

Executive Order No. 11246, September 24, 1965, as amended, sets forth policies regarding equal employment opportunity. Under section 201 of the order the Secretary of Labor is authorized to adopt rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes of the order in Government contracts. Pursuant to regulations existing until October 24, 1969, responsibility for reviewing EEO compliance was assigned to the agency doing the largest contract dollar volume with the contractor at the

time the last compliance report was filed. GSA has advised us that based on such dollar volume, it had the compliance responsibility for Apache, but not Armstrong. On October 24, 1969, the Department of Labor issued Order No. 1 in which it assigned compliance responsibility according to industrial classifications rather than dollar volume. Standard Industrial Codes (SIC) were developed and GSA was assigned compliance responsibility for Code 50–59, Wholesale and Retail Trade. Apache, therefore, continued to be within the compliance responsibility of GSA. The Department of the Interior (Interior) was given responsibility for Code 30, Rubber and Plastic Products, which, as explained below, was believed to cover the Armstrong facility which manufactured floor tile.

We have been advised by GSA that on February 6, 1970, requests for EEO preaward clearances were received by the Contract Compliance Staff, GSA, for the procurement of vinyl, asbestos and asphalt floor tile from Armstrong Cork Company, Lancaster, Pennsylvania, and Apache Flooring Company, Scottsdale, Arizona. Since GSA had compliance responsibility for Apache and the proposed contract involved more than $100,000, a review of the compliance status of Apache (on the basis of information currently available to GSA) was made pursuant to section 5–12.805–1(c)(3) of the GSA Procurement Regulations. As a result of this review GSA advised you by letter of February 27, 1970, that although your company had performed several Government contracts an examination of GSA files failed to indicate that an affirmative action plan was on file for your firm. Contractors with 50 or more employees and a contract of $50,000 or more are required by 41 CFR 60–1.40(c) to develop such plans within 120 days from the commencement of the contract. Accordingly, GSA requested a commitment that you would submit affirmative action plans for your establishments within 30 days. In this connection we are advised by GSA that its treatment of Apache was identical to its treatment of other firms under the same or similar circumstances. The record does not indicate that you objected to GSA's request, and although you provided that agency with affirmative action plans it is reported that those plans were not acceptable. In addition, we have been advised that as of October 13, 1970, the date of the initial administrative report, you had not provided GSA with acceptable affirmative action plans for all of your establishments.

The SIC listing for Armstrong facilities in Lancaster showed three locations coded as follows:

Liberty Street—	249 (GSA)
Liberty & Mary Streets—	249 (GSA)
New Holland Avenue—	307 (Interior)

448–350 O—71——3

Since Code 249 is assigned to lumber and wood products, and Code 307 to rubber and plastic products, it was concluded that the commodity being purchased was covered under rubber and plastic products and that the EEO compliance review was therefore the responsibility of Interior.

In this respect your protest points out that Armstrong's bid actually listed the bidder's address on page one of the bid as "Liberty and Charlotte Streets, Lancaster, Pennsylvania." You argue that the plant was assigned to GSA since it had produced cork tile—a wood product—falling under Code 249. You further argue that the Armstrong facility at New Holland Avenue did not produce asphalt and vinyl asbestos tile and was not owned by Armstrong at the time of GSA's clearance in February 1970. Granting, *arguendo*, that your version of the facts is correct, we find no evidence that these facts were or should have been apparent to the GSA Contract Compliance Staff at that time, and since the SIC listings for Armstrong in Lancaster do not show a listing for Liberty and Charlotte Streets, it does not appear that the Contract Compliance Staff was remiss in its actions in this connection.

You also state that page 11 of the Armstrong bid showed facilities located at Lancaster, Pennsylvania; Kankakee, Illinois; Jackson, Mississippi; and South Gate, California, as inspection points for the items which were bid upon. It appears that the latter three facilities were coded as the responsibility of GSA and that GSA had not recognized this at the time of the EEO clearance. However, we find no evidence of bad faith on the part of the contracting officer from the fact that the GSA Contract Compliance Staff was not advised of the inspection points of the supplies. The record shows that on the information in its possession the Contract Compliance Staff properly requested advice from Interior as to the compliance status of Armstrong and was advised that pursuant to the applicable regulation, 41 CFR 60–1.20(d), no preaward review of Armstrong's compliance posture was required of Interior since the award would involve a contract of less than $1,000,000. In its report to this Office, GSA expressed the belief that Interior had no adverse information concerning the compliance status of Armstrong and, based on this clearance, the award was made to Armstrong for those items on which it was the low bidder.

Under 41 U.S.C. 253(b) awards are required to be made to the low, responsive and responsible bidder. Here, the bids of Apache and Armstrong were responsive, those firms were determined to be responsible contractors by GSA, and both companies received the contracts for which their bids were low. Although different administrative actions were involved in evaluating the EEO compliance posture of the two firms, we believe the reasons for the divergent actions are

adequately explained above. In any event, such actions were subsequent to the bidding, without effect on the competition, and we do not find therein any firm basis on which we can hold that Armstrong's contract is so clearly illegal as to require its cancellation.

It is also your position that Armstrong is now in default of its contract since it has failed to develop an affirmative action plan for each of its establishments as required by 41 CFR 60–1.40(c). Under paragraph (4) of the equal employment opportunity clause, which was incorporated into the subject contracts by reference, the contractor agrees to comply with the provisions of Executive Order No. 11246 and of the rules, regulations, and relevant orders of the Secretary of Labor. You state that GSA has accorded Armstrong preferential treatment by its failure to enforce EEO requirements against Armstrong while requiring adherence by Apache to the EEO provisions of its contract. Specifically, you argue that Armstrong's contract and the applicable regulations of the Secretary of Labor required that firm to develop a written affirmative action compliance plan for each of its establishments within 120 days from the commencement of its contract and that this requirement must be construed, for several reasons, to include the Thomasville Furniture Industries, Inc., the E & B Carpet Mills and the Empire Carpet Corporation, which are all Armstrong subsidiaries. You submit that Armstrong is in default of its contract since the record shows that the company failed to develop a plan for its Thomasville Furniture facilities.

The question of whether Armstrong is in default of its contract for the above reason is for consideration in the first instance by the contracting agency. Pursuant to 41 CFR 60–1.6 each agency is primarily responsible for obtaining compliance with the EEO requirements, and pursuant to 41 CFR 60–1.1 the procedures set forth in that regulation govern all disputes relative to a contractor's compliance with his obligations under the EEO clause, regardless of whether or not his contract contains a "Disputes" clause. The question of whether Armstrong's affirmative action commitments require submission of a plan for its Thomasville facilities has been considered by GSA, and it is the position of GSA that an affirmative action plan is not required for the Thomasville facilities. We provided you with a copy of a GSA legal memorandum dated January 28, 1971, to this effect. That memorandum set out the Department of Labor guidelines used for determining whether an affirmative action plan must be filed on a subsidiary corporation by reason of the parent corporation's contract with the Government. One of the primary guidelines cited therein is that in order to impose the requirement the parent corporation must have a *de facto* day-to-day exercise of control over the operations of the other corporation, as contrasted with potential control. In this connection, GSA

found that while Armstrong has potential control over the day-to-day operations of Thomasville, it does not actually or actively exercise such control. It further found that each of the corporations acts in its daily operations as an autonomous separate corporate entity.

The GSA findings and decision were reviewed by the Department of Labor (see 41 CFR 60–1.24(c)(1)) and by its letter dated February 26, 1971, the Solicitor of Labor advised you that GSA had appropriately applied Labor's guidelines for determining such matters, and that the Department could not conclude that GSA's findings and conclusions are erroneous. With your letter of March 8, 1971, to this Office you submitted considerable material which you contend amply demonstrates the intimate control of Thomasville by Armstrong, and you request that we decide whether Armstrong is in compliance with its contractual requirements for affirmative action plans.

In essence, you contend that the provisions of 41 CFR 60–140(a), which requires each prime contractor to "develop a written affirmative action compliance program for each of its establisments," cannot properly be interpreted so as to exclude those subsidiaries or "establishments" of the prime contractor over which the prime contractor does not exercise *de facto* control. The regulation in question does not define the term "establishments." However, as indicated above, under the terms of paragraph (4) of the EEO clause which is required to be included in contracts such as Armstrong's (41 CFR 60–1.4(a)) the contractor agrees to comply with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to Executive Order No. 11246. The regulation quoted above (41 CFR 60–1.40(a)) is issued pursuant to Executive Order No. 11246, and 41 CFR 60–1.44 provides that rulings under, or in interpretations of, such regulations shall be made by the Secretary of Labor or his designee.

Under such circumstances, this Office must accept the interpretations of the officials charged with the administration of the contract provisions and the resolution of disputes arising out of those provisions unless it is clearly and convincingly demonstrated that they are arbitrary, capricious, or not supported by substantial evidence. While the literal language of 41 CFR 60–1.40(a), as quoted above, does not permit the exclusion of any "establishments" of a prime contractor, we believe it is apparent from a reading of the regulations as a whole that such a strict interpretation is not intended. Thus, 41 CFR 60–1.5(b)(2) provides that the Director, Office of Federal Contract Compliance, or his designee, may exempt from the requirements of the equal opportunity clause any of a prime contractor's facilities which he finds to be in all respects separate and distinct from activities

of the prime contractor which are related to the performance of the contract, if such exemption will not interfere with or impede effectuation of Executive Order No. 11246. We believe the Department of Labor guidelines, as set out in GSA's legal memorandum of January 28, 1971, and affirmed in the Department of Labor's letter of February 26, 1971, to you, are consistent with the provisions of 41 CFR 60–1.5(b)(2). Accordingly, we see no valid basis on which to disagree with that portion of the Department of Labor's guidelines which sets out lack of *de facto* control by the contractor over the operations of one of its subsidiaries as a valid basis for exempting such subsidiary from the requirements of the equal employment opportunity clause.

Concerning the question of whether Armstrong does, in fact, exercise *de facto* control over Thomasville, we have reviewed the evidence and arguments developed by GSA, as well as those which you submitted. Based upon such review we must conclude that there was substantial evidence to support the conclusion reached by GSA and concurred in by the Department of Labor. Accordingly, we see no valid basis on which to object to GSA's refusal to require Armstrong to submit an affirmative action plan for its Thomasville facilities.

Finally, you assert that the contract was illegally awarded to Armstrong, on the basis that an invalid signature was affixed to Armstrong's bid by an employee, Mr. E. L. Michener, who was not an officer of the company at the time the bid was submitted. You point out that the only evidence of authority in the possession of GSA at the time of bid opening was a Standard Form 129 which listed Mr. E. L. Michener, Manager, Sales Administration, Floor Division, as one of three persons authorized to sign bids, offers and contracts for the Armstrong Cork Company, but that this form, having been signed by Mr. Michener, was a self-serving declaration and of no legal effect. While, subsequent to bid opening, a vice president of Armstrong has confirmed Mr. Michener's authority, you contend that since such evidence was prepared after bid opening it cannot be accepted.

You cite our decision 49 Comp. Gen. 527, March 2, 1970, in support of your contention, however, that decision specifically modifies the prior rule requiring the submission of evidence of an agent's bidding authority before bid opening, which you advocate. In that decision we stated "We see no reason to prohibit the furnishing of proof of agency after bid opening," although we still advise agents to submit proof of agency before bid opening to avoid challenges from other bidders and related problems. Also, while we recognize that the court proceedings in this matter was dismissed without prejudice, we think it is significant that the court, in denying your above motion for a

preliminary injunction, concluded that Armstrong's bid was responsive to the Government's solicitation. We therefore have no objection to the acceptance of Armstrong's bid as submitted by Mr. Michener.

For the reasons stated, your protest must be denied.

The file forwarded with your letter of March 8 is returned as requested.

[B-172046]

Contracts—Labor Stipulations—Davis-Bacon Act—Suspension

The discarding of all bids for the construction of family housing at a military installation under an invitation that contained the prescribed minimum wage rates determined by the Secretary of Labor for laborers and mechanics in accordance with the Davis-Bacon Act, 40 U.S.C. 276a, because of Presidential Proclamation 4031, dated February 23, 1971, which suspended the act, and the reissuance of the invitation without the requirements of the act were actions in the public interest within the meaning of 10 U.S.C. 2305(c), and the Proclamation was the compelling reason contemplated by paragraph 2-404.1 of the Armed Services Procurement Regulation that justified cancellation of the invitation for bids.

To the Quiller Construction Company, Inc., March 15, 1971:

Reference is made to your telegrams dated March 1 and 3, 1971, protesting the cancellation of invitation for bids (IFB) No. DACAO5-71-B-0105, by the United States Army Engineer District, Sacramento, Corps of Engineers.

The IFB was issued on January 12, 1971, with a bid opening date of February 4, 1971, for the construction of 100 units of family housing at Fort Huachuca, Arizona. In accordance with the Davis-Bacon Act, 40 U.S.C. 276a, the IFB specifications contained the prescribed minimum wage rates determined by the Secretary of Labor to be payable for the various classes of laborers and mechanics employed at the construction site. Your firm submitted the lowest bid under the IFB. However, the IFB was canceled on March 1, 1971, by the procuring activity. Subsequently, on March 5, 1971, the project was readvertised under IFB No. DACAO5-71-B-0153 without Davis-Bacon Act provisions.

The basis for the procuring activity's action was the issuance of Presidential Proclamation 4031, dated February 23, 1971, 36 Federal Register 3457-8, in which the President suspended the provisions of the Davis-Bacon Act as to all contracts entered into on or subsequent to the date of the proclamation, which, in pertinent part, states:

Section 6 of the Davis-Bacon Act provides:

"In the event of a national emergency the President is authorized to suspend the provisions of this Act."

WHEREAS I find that a national emergency exists within the meaning of section 6 of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended, 40 U.S.C. 276a).

> NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, do by this proclamation suspend, as to all contracts entered into on or subsequent to the date of this proclamation and until otherwise provided, the provisions of the Davis-Bacon Act of March 3, 1931, as amended, and the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act;
>
> And I do hereby suspend until otherwise provided the provisions of any Executive Order, proclamation, rule, regulation or other directive providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act;

On February 24, 1971, the Assistant Secretary of Defense, Installations and Logistics, in implementation of the proclamation, suspended the Davis-Bacon Act requirements contained in the Armed Services Procurement Regulation (ASPR) and directed that "In all formally advertised procurements where bids have been opened and contracts not awarded, cancel the invitation for bids and resolicit omitting the Davis-Bacon Act requirements."

Section 2305(c) of Title 10 of the United States Code provides that all bids received in response to a formally advertised solicitation may be rejected when it is in the public interest to do so. This statutory provision is implemented by ASPR 2–404.1 which provides that, after the bids have been opened, cancellation of a solicitation is permissible if "there is a compelling reason to reject all bids and cancel the invitation." Further, ASPR 2–404.1(b)(viii) states that cancellation of a solicitation after bid opening, but prior to award, is justified where "cancellation is clearly in the best interest of the Government." Also, paragraph 10(b) of the instructions to bidders in IFB–0105 permits the Government to reject all bids when in its interest to do so.

It is our view that the suspension of the provisions of the Davis-Bacon Act by the President constitutes justification for the rejection of all bids under the original invitation.

Accordingly, your protest is denied.

[B–164515]

Compensation—Wage Board Employees—Coordinated Federal Wage System—Compensation Adjustments

Employees in a wage area converted to the Coordinated Federal Wage System in July 1969 who subsequent to consolidation in November 1969 with another wage area became entitled to the higher wage rates retroactively prescribed by the "Monroney Amendment," 5 U.S.C. 5341(c), may be paid the higher rates from the retroactive effective date of the amendment to the date their wage area was consolidated but not beyond that date, for to do so would require giving retroactive effect, contrary to the general rule, to the October 2, 1970, salary retention provision added to the Coordinated Wage System to provide for indefinite salary retention for employees adversely affected by changes in wage area boundaries.

To the Chairman, United States Civil Service Commission, March 19, 1971:

This is in further reference to your letter dated January 20, 1971, in which you state that you have been asked for advice on the effect of the retroactive application of the "Monroney Amendment," 5 U.S.C. 5341(c), on current rates of employees in a wage area which has since been consolidated with another wage area, the former rates as increased under the Amendment being higher than the regular rates in the consolidated area. Our decision is requested, under the circumstances hereinafter related, whether the higher rates to which the employees have now become retroactively entitled to the date of the consolidation may be continued beyond that date.

It is stated in your letter that in July 1969 the Wichita Falls, Texas, wage area was converted to the Coordinated Federal Wage System. In November 1969, it was consolidated with the Southwestern Oklahoma wage area. You say that a determination has been made that the former Wichita Falls area qualified for application of the "Monroney Amendment" to that area for a period before the November 1969 consolidation. This, it is said, will result in establishing rates of pay for the affected employees which are higher than the scheduled rates of the consolidated wage area.

You point out that at the time of the consolidation there was no instruction under the Coordinated Federal Wage System providing specifically for pay retention upon consolidation of areas. However, effective October 2, 1970, a provision was adopted for the System which provides indefinite salary retention for employees adversely affected by changes in wage area boundaries. Implementing instructions were set forth in a letter of October 2, 1970, to all lead agencies, and we note such instructions are incorporated in section S8-8 of Federal Personnel Manual Supplement 532-1. In addition to the foregoing provision for retention, you state that section S10-10a(c) [S10-10a(3)] of FPM Supp. 532-1 provides, and has provided since September 1968, for a 2-year pay retention in instances where an employee "moves between converted wage areas."

You say that if application of the "Monroney Amendment" had not been delayed the Commission believes that the need for a pay-retention provision upon consolidation of areas would have become apparent earlier. The consolidation of the Wichita Falls—Southwestern Oklahoma areas is the first under the Coordinated Federal Wage System in which the problem has developed.

In view of the foregoing, you request a decision on the following:

May the higher rates to which the employees have now become retroactively entitled to the date of the consolidation be continued beyond that date? If they

may not be continued indefinitively to the extent provided by the letter of October 2, 1970, may the consolidation be treated as a move of the employees between wage areas under Section S-10-10a(c) [S10-10a(3)] of FPM Supplement 532-1?

We have held that the granting of salary retention benefits to wage board employees who are demoted or changed through no fault of their own may be granted prospectively by regulation if determined to be in the public interest, 44 Comp. Gen. 476 (1965). However, the regulations issued in September 1968 granting salary retention benefits for wage board employees relate to movement of employees between wage areas, and must be viewed as not applicable to situations such as here involved. Thus, if employees whose salaries were decreased because of consolidation of areas prior to October 2, 1970, are to be granted wage retention benefits, it would have to be predicated on the giving of retroactive effect to the regulations effective October 2, 1970. We do not view the "Monroney Amendment" as covered in our decision of October 9, 1970, 50 Comp. Gen. 266, which held that retroactive increases thereunder were corrections required by law, as a sufficient basis for giving retroactive effect to the regulations of October 2, 1970, contrary to the general rule in that respect. 46 Comp. Gen. 214 (1966); B-160843, March 13, 1967.

We fail to see any real connection between the granting of retroactive increases in salary under the "Monroney Amendment" and the granting of retroactive retained pay rights upon consolidation of wage areas. Your first question is answered in the negative, and by reason thereof the second question does not require consideration.

[B-170682]

Contracts—Negotiation—Evaluation Factors—Cost of Changing Contractors

In the evaluation of offers under a request for proposals to furnish professional architectural and engineering services, the application of a transition cost factor to the offer of the only contractor who had not previously performed the services without apprising offerors that this factor would be utilized in effecting award of a contract thus eliminating the contractor who was the lowest priced responsible offeror from competition was unwarranted and the action was inconsistent with sound procurement policy which dictates that offerors be informed of all evaluation factors and the relative importance of each factor, nor was the waiver of transition costs for the successful offeror because of available qualified personnel justified. Therefore, since the award was patently erroneous and without regard to the established principles of competitive negotiation, the contract should be terminated.

To the Postmaster General, March 19, 1971:

We refer to a letter dated January 26, 1971, from the Director, Office of Procurement, Bureau of Facilities, and prior correspondence, re-

porting on the protests of H. L. Yoh Company (Yoh), and Consultants and Designers, Inc. (C&D), against the awards of contracts to Unidex Systems Corporation (Unidex) and Vollmer Associates (Vollmer), under request for proposals (RFP) No. NC-1-71, issued by the Bureau of Facilities, Procurement Division, Supply Branch, Washington, D.C.

The RFP was issued on June 30, 1970, pursuant to a determination and findings under 41 U.S.C. 252(c)(4), as implemented by Federal Procurement Regulations (FPR) 1-3.204, which authorizes the negotiation of contracts for personal or professional services.

The RFP requested offers for furnishing professional architectural and engineering services for the period from September 1, 1970, through June 30, 1971, by the closing date of July 13, 1970. Previous contracts with Vollmer, Yoh, and Unidex for furnishing these services were scheduled to expire on August 31, 1970. Vollmer was furnishing support services for the Offices of Construction and Design. Yoh was supplying support services for all regional offices except Chicago and Washington, D.C., while Unidex was furnishing support services for the Office of Design and the regional office in Washington, D.C. Under item I of the RFP, covering the Office of Design, offerors were invited to submit prices on an hourly rate basis for furnishing an estimated 126,000 man-hours of professional effort, together with overtime and premium rate prices. Item II, covering the Office of Construction, involved 199,000 estimated man hours and requested hourly prices as to these man-hours, plus overtime and premium time. We note that award of these two items was made to Vollmer on August 11, 1970, as the lowest offeror as to these two items. Upon review, we find no legal basis upon which to question this award.

Our concern is directed to the circumstances and conditions under which the award of item III was made to Unidex.

Item III covers professional services for various regional offices excluding, *inter alia*, Chicago and Washington, D.C., involving 89,440 estimated man-hours plus overtime and premium time. Under this item, the contractor was required to "provide support services by technically qualified personnel." Exhibit "A" of the RFP listed the necessary positions to be filled by the successful contractor's personnel (e.g., Architect, Civil Engineer, Mechanical Engineer, etc.) along with a one sentence description of the work to be performed by each person. The RFP's "Schedule of Work to be Performed" detailed the contrac-

tor's duties in his performance of the contract. The following offers were received from seven responsible offerors:

Vollmer	$670,335.00
C&D	673,982.40
Fairchild-Hiller	711,336.00
Blandford	733,096.00
Yoh	760,697.60
Unidex	778,481.60
TAD	862,935.00

Each of the foregoing offerors was given an opportunity to submit a best and final offer by August 5, 1970. The offeror's prices as reflected in the modifications to their proposals were as follows:

Vollmer	$644,882.00
C&D (no change)	673,982.40
Fairchild-Hiller (no change)	711,336.00
Unidex	714,969.55
Blandford (no change)	733,096.00
Yoh (no change)	760,697.60
TAD (no change)	862,935.00

Since the contract awarded to Vollmer for items I and II required a substantial increase over the number of man-hours under its previous contract, the Department did not believe that such firm could employ a sufficient number of personnel for the regional offices. Therefore, Vollmer was eliminated from consideration in making an award under item III. Both the second and third low offerors, C&D and Fairchild-Hiller, were considered to have met the standards of responsible prospective contractors. We are advised that while both of these firms had successfully performed contracts for private concerns, as well as State and Federal agencies, neither firm had performed contracts for supplying professional and support services for the Department. Therefore, award of the contract under item III to either of these offerors was not considered to be in the best interests of the Department because of the lack of experienced personnel and the training which would be necessary for new personnel. In view of the foregoing, Unidex, as the fourth low offeror, was selected for award on August 7, 1970, whereupon further negotiations with that firm resulted in a reduction in their revised price from $714,969.55 to a contract price of $700,000.

The RFP failed to apprise offerors of the specific evaluation factors to be utilized by the procurement officials in effecting the awards of the contracts. In 49 Comp. Gen. 229, 230 (1969), in consonance with our decisions wherein we stated that sound procurement policy dictates that offerors be informed of all evaluation factors and the relative importance of each factor, we stated:

> * * * we believe that notice should be given as to any minimum standards which will be required as to any particular element of evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. * * *

See B-170181, February 22, 1971, and cases cited therein; and FPR 1-3.802(c), which requires that proposals shall contain the information necessary to enable a prospective offeror to prepare a quotation properly.

The procurement officials introduced, subsequent to the close of negotiations, a transition cost factor into the evaluation process. This factor when applied to the offer submitted by C&D, resulted in the award of item III to Unidex. Prior to the introduction of this cost factor, C&D, as the lowest responsible offeror, was in line for award. Since the propriety of introducing the transition cost factor into the evaluation process is the primary issue raised by both protestants, it is necessary to consider the justification advanced by your Department for use of this factor.

It is reported that the recruitment, relocation, and training of new personnel in Post Office standards and procedures for the professional and support services desired would involve a minimum of 3 months. Due to the fact that current projects are in varying stages of completion, the transfer of responsibilities for these projects from experienced to inexperienced personnel was not considered to be prudent. It was recognized, however, that the Department would receive some benefits from services of a firm not thoroughly familiar with Post Office standards and procedures during the initial training period. Therefore, an estimated transition cost factor of "in excess of $150,000" was added to the low offer of C&D. Transition costs were not considered applicable in the case of Unidex and Yoh since those firms had supplied professional and support services to the Department for several years and had experienced employees who were available for assignment to departmental projects under the RFP.

C&D argues that the use of this factor, which was the only basis upon which the Post Office refused to award the contract to the firm, was unrealistic, since "the facts of record showed that neither C&D nor Unidex had men in the regional offices at the time of the award." Yoh, the then incumbent contractor at the regional offices involved in

the procurement, asserts that the "Post Office should logically have considered a training period for Unidex."

Our Office has had occasion to consider a procurement wherein there was utilized a transition cost evaluation factor which had not been set forth in the solicitation. In B-167249, January 19, 1970, we made the following pertinent remarks:

> We must agree with the contracting officer that he could not have computed the proposals of contractors other than EAI by adding a cost factor for the changeover of contractors—an evaluation factor which was not set out in the solicitation. To hold otherwise would not only allow a procuring activity to choose any amount it felt would compensate for the changeover in contractors, but would directly conflict with the decisions of this Office that all evaluation factors must be clearly spelled out in the invitation. See 49 Comp. Gen. 295 (B-167473, November 12, 1969; 49 Comp. Gen. 229 (B-167175, October 13, 1969); B 166213, July 18, 1969. To comply with these decisions, if it is considered financially advantageous to maintain an incumbent contractor, a specific dollar amount should be spelled out in the solicitation so that the incumbent contractor competitors would be informed of the financial value to the Government of not changing contractors.

The record strongly suggests that the transition cost factor has never been regarded by the cognizant procurement officials as a reasonably reliable estimate of costs associated with the changeover of contractors. In this regard, we quote from a departmental report of September 24, 1970:

> Although we are satisfied that there are transition costs, we have doubts that they are as high as originally estimated.

This same report cites a figure "in excess of $150,000," while the memorandum of award appears to support a different figure for evaluation which is not readily ascertainable from that memorandum. Moreover, the memorandum of award states that "the ultimate effects on the construction and mechanization programs of the Department which could result from contracting with new firms cannot be measured in the terms of dollars." We have held that costs which may be difficult to definitize should not be used in evaluation except after a thorough study of the pros and cons offered by interested parties, establishment of proper criteria for the use of the factor, and specific notice thereof in the solicitation. See 45 Comp. Gen. 434, 435 (1966). In this regard, we have emphasized the necessity for exactitude in the establishment of a specific cost evaluation factor. 49 *id.* 98, 101 (1969). Additionally, it appears from the record that there was an unequal application of the transition cost factor which ultimately resulted in the award to Unidex. We are advised that "No consideration was given to transition costs with respect to Unidex." It is true, as the protestants argue, that Unidex was not the incumbent contractor in the regional offices to be staffed under item III. However, the procurement officials urge that

the failure to assess some amount of transition costs against Unidex was due to the fact that Unidex had a sufficient number of qualified and experienced employees available for immediate assignment. On the one hand, in response to the argument of Yoh, the then incumbent and higher priced offeror than Unidex, that transition costs should have been applied against Unidex, the contracting officials argue that Unidex hired 76 percent of Yoh's employees in performing the contract. Yet, in response to the argument of C&D, the then lowest priced responsible offeror, that it had offered to utilize the incumbent Yoh's employees in its revised proposal, those same officials stated that there was no assurance that C&D could have hired Yoh's employees to perform item III services. This line of reasoning appears to be wholly unwarranted and inconsistent under the circumstances. The fact that Unidex had the qualified personnel available for possible assignment did not justify the waiver of transition costs insofar as Unidex was concerned, particularly when it is conceded that Unidex would have had some minimal transition period. Moreover, it appears from the record that Unidex hired a major portion of the incumbent's personnel subsequent to the award of the contract. It is clear that, at the very least, relocation for Unidex personnel could have been expected, as well as a period of familiarization with the projects in progress at the regional offices. Therefore, it may be concluded that the failure to apply a transition cost factor to the offer of Unidex placed Unidex in a favored competitive position vis-a-vis the other competitive offerors.

In addition to the foregoing, it would seem that the transition cost factor itself was prejudicial to the competitive position of offerors who were unaware of the existence of such factor or that the factor would be a determinative element in the negotiation process. In 49 Comp. Gen., *supra*, a sole-source secretarial determination and findings was broadened to permit the submission of a proposal by another interested firm; however, "an evaluation factor was provided with respect to any proposal from the new source to cover additional costs resulting from the furnishing of units different than the sole-source design." Subsequently, but before the date fixed for receipt of proposals, interested firms were advised that the amount of the evaluation factor would be $40,000. A firm interested in submitting a proposal as a new source of supply requested information as to the method of computing this $40,000 cost evaluation factor. The request was denied by the procurement activity. Thereafter, in submitting a revised price proposal, this firm recognized that certain costs would be applicable, but "expressed the view that the factor utilized was grossly overestimated and indicated a willingness to discuss the matter during negotiation." The contracting officials requested a decision from our Office as to whether

an award might be made without further discussion or negotiation. We concluded that "Since the objective of the procurement statute and implementing regulations is to assure that the award of a negotiated contract will be made to that responsible offeror whose offer is most advantageous to the Government, price and other factors considered, we do not believe that an otherwise eligible offeror should be denied the opportunity to discuss the elements of an evaluation factor which is directly prejudicial to its competitive position."

Unlike the instant procurement, however, the offerors involved in the cited decision were fully informed as to the existence of a cost evaluation factor prior to the submission of their offers. Although we recognized in that decision that the determination of evaluation factors is an administrative responsibility, we observed that:

> * * * the presence or absence of an evaluation factor and the amount thereof can have an impact upon the prices offered and in that sense can affect one of the essential terms (price) of the contract * * *

In the circumstances of this procurement, the addition of a transition cost factor to the price offered by C&D but not against the Unidex offered price operated to the competitive disadvantage of C&D who had its price increased by approximately 22 percent and to the competitive advantage of Unidex whose price was not affected thereby. Keeping in mind C&D's assertion that the transition cost factor is, in essence, a fiction, and Yoh's claim that Unidex should have been assessed some measure of transition costs, the following observation from our above-cited decision is pertinent:

> * * * We recognize that opportunity for such discussion might not have resulted in any change in the amount of the evaluation factor, but the offeror, at least, might have satisfied itself, before submitting a revised offer, of the correctness of the administrative position or, in the absence thereof, would have had an opportunity to show the procurement activity wherein it may have erred. * * *

We believe that once the contracting officials determined that a transition cost factor was essential to the evaluation of offers, all offerors within a competitive range should have been advised of the introduction of such factor into the evaluation process, together with advice as to its amount and the method whereby it was computed. Such being the case, it is our opinion, in consonance with FPR 1.3–805.1, that discussions relating to the composition, applicability and impact of the transition cost factor should have been conducted with all competitively situated offerors. Had offerors been afforded an opportunity to submit price revisions after discussions conducted in the spirit of the regulations, the successful offeror under item III might well have been an offeror other than Unidex.

The foregoing defects in the negotiation process represent, in our opinion, serious and substantial deviations from the regulatory re-

quirements regarding the competitive negotiation of contracts. The use and application of the transition cost factor on a unilateral basis effectively removed C&D, the low responsible offeror, from contention for award. As for Yoh, the failure to assess any transition costs in the case of Unidex worked to its competitive disadvantage by making Unidex's offer the lowest evaluated offer.

We therefore conclude that the award of item III to Unidex was patently erroneous and without regard to the established principles of competitive negotiation. We strongly recommend that such contract be terminated without delay. We note in this regard that "the Department would not contemplate award of any contract in the event cancellation is directed" due to the fact "that in the interest of efficiency and economy, we would accelerate our program to develop full in-house capacity in this area."

Both protestants have made allegations concerning the possible improper conduct of a former Post Office Department official with regard to this procurement. We have examined the report of the Bureau of the Chief Postal Inspector in this regard and we have no comments to offer with respect thereto insofar as our review of this procurement is concerned.

Enclosed is a copy of our decision of today to the attorneys for C&D, wherein we hold that the award of items I and II of the RFP to Vollmer need not be disturbed.

[B-171589]

Travel Expenses—Overseas Employees—Hired Overseas—Residence in United States, Etc.

The travel and transportation expenses of a newly appointed employee from a foreign country may be paid by Canal Zone agencies if the employee at the time of appointment had a place of actual residence in the United States, its territories or possessions. However, as 5 U.S.C. 5722 authorizes the payment of such expenses only from the employee's place of actual residence at the time of appointment, reimbursement may not exceed that which would have been allowed the employee for travel and transportation from his place of actual residence in the United States, its territories or possessions.

Canal Zone—Employees—Hired Overseas—Residence in United States, Etc.

A former employee of the Canal Zone Government whose place of actual residence was in California, but who at the time of his appointment was temporarily residing in Costa Rica, and who had transported his household goods to Costa Rica in his own truck prior to signing an employment agreement, which he signed in Costa Rica prior to his travel to the Canal Zone, may be reimbursed travel and transportation expenses from Costa Rica to the Canal Zone in accordance with the provisions of Office of Management and Budget Circular No. A-56, but he may not be reimbursed the expenses of moving from California to Costa Rica since these expenses were not incurred in anticipation of his appointment in the Canal Zone.

Officers and Employees—Overseas—"Actual Residence"

The term "actual residence" is not defined in 5 U.S.C. 5722 or implementing regulations, which authorize travel and transportation expenses for new appointees to posts of duty outside the continental United States, and is for determination from the facts of each case. Although the term as used in section 5722 generally would be understood to mean the place at which an appointee physically resides at the time of his appointment, the term may include the "legal residence" or "domicile" of an employee.

To the Governor of the Canal Zone, March 23, 1971:

This is in reply to a letter of February 18, 1971, from former Governor Leber requesting our decision on questions involving the interpretation of 5 U.S.C. 5722 as it relates to the travel and transportation allowances of new appointees to posts of duty outside the continental United States.

Governor Leber's letter reads in part as follows:

> Former section 7 of the Administrative Expenses Act of 1946, as amended (now codified at 5 U.S.C. 5722) authorizes the payment by a Government agency of the "travel expenses of a new appointee and transportation expenses of his immediate family and his household goods and personal effects *from the place of actual residence at the time of appointment* to the place of employment outside the continental United States." [Italic supplied.]
>
> As is further provided in this section an agency may pay expenses of a new appointee, his immediate family and household goods only after the individual selected for appointment agrees in writing to remain in Government service for a specified period.
>
> A specific case on which your ruling is requested relates to a claim from a former employee of the Canal Zone Government whose place of actual residence was in California, but who at the time of his appointment was temporarily residing in Costa Rica. He is claiming reimbursement of his estimated actual expenses and per diem in transporting his household goods from California to Costa Rica in his own truck, and after an apparent interval of several months, the travel and transportation of himself, his family and household goods from Costa Rica to the Canal Zone. No transportation agreement was signed prior to transporting the goods from California to Costa Rica. However, a transportation agreement was signed by him in Costa Rica prior to his travel from there to the Canal Zone. He is requesting reimbursement of these expenses as a recruitment travel expense. The employee subsequently completed the agreed period of service and was repatriated to California at Government expense.
>
> Up to the present time we have recruited our non-local hire employees only from the United States, its territories and possessions. It is not clear to the Canal agencies whether or not we would have the authority to recruit and pay the travel and transportation expenses of employees, their immediate families and household goods from other geographic locations such as neighboring countries in Latin America or other foreign areas, in a case where the employee at the time of appointment had "a place of actual residence" in the United States, its territories or possessions.

Our decision has been requested as to whether the employee in the case cited is precluded from receiving reimbursement for expenses incurred between California and Costa Rica since no transportation agreement was signed prior to the departure of the employee. Our decision is also requested as to whether under 5 U.S.C. 5722 the Canal agencies may pay the travel and transportation expenses of a newly appointed employee from a foreign country if the employee at the time of appointment has a place of actual residence in the United

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States, its territories or possessions and, if so, whether the amount allowable is limited to the costs for travel from the place of actual residence.

The term "actual residence" is not defined in the law or implementing regulations and is for determination from the facts of each case. See 29 Comp. Gen. 526, 527 (1950). The term as used in the statute generally would be understood to mean the place at which the appointee physically resides at the time of his appointment. However, we have recognized that, in a proper case, the term may include the "legal residence" or "domicile" of the employee. 26 Comp. Gen. 488, 492 (1947).

We have held that under section 7 of the Administrative Expenses Act of 1946 travel and transportation expenses of an appointee may be paid from a foreign country to a post of duty outside the continental United States. See B-107059, January 10, 1952. Ordinarily an employee recruited for assignment outside the continental United States is entitled to travel and transportation expenses upon separation only to the country of actual residence at time of assignment to such duty. See B-160029, October 4, 1966. However, we have also held that the travel and transportation expenses of an employee recruited at a place of temporary residence may be paid from that location to his overseas duty station and, after a tour of duty, to his permanent residence. See B-124492, September 21, 1955. While this decision involved a temporary residence in the United States and home leave entitlement, we see no reason why it cannot be applied to a situation involving the appointment of an individual at a temporary residence in a foreign country for a single tour of duty overseas.

With respect to the claim of your former employee for travel and transportation expenses to the Canal Zone, we understand that none of the expenses from California to Costa Rica were incurred in anticipation of his appointment in the Canal Zone. In view thereof and since he actually was appointed from Costa Rica, there appears no basis for allowing travel and transportation expenses from California to Costa Rica. See B-127944, June 28, 1956. However, since he had an actual residence in the United States at the time of his appointment we see no objection to payment of travel and transportation expenses from Costa Rica to the Canal Zone in accordance with the provisions of Office of Management and Budget Circular No. A-56.

In answer to your general questions the Canal agencies may pay the travel and transportation expenses of a newly appointed employee from a foreign country, if the employee at the time of appointment has a place of actual residence in the United States, its territories or possessions. However, as 5 U.S.C. 5722 authorizes the payment of

such expenses only from the employee's place of actual residence at the time of appointment, reimbursement may not exceed that which would have been allowed the employee for travel and transportation from his place of actual residence in the United States, its territories or possessions. See 26 Comp. Gen. 322 (1946).

[B-171643]

Subsistence—Per Diem—Travel by Trailer, Truck-Camper, Etc.

A claim for per diem by a postal employee in lieu of subsistence in connection with the use of a truck-camper instead of a hotel or motel room while on a field assignment may be paid pursuant to section 6.2(e) of the Standardized Government Travel Regulations which provides for a per diem allowance for travel by means of a privately owned trailer, for although a truck-camper is not a trailer it is a temporary living unit and may, therefore, be viewed as within the regulations for purposes of approving a per diem allowance, and the allowance not having been approved in advance may under the regulation be post approved.

To the Director, Postal Service Management Institute, March 23, 1971:

Reference is made to your letter of December 31, 1970, enclosing two travel vouchers covering the periods November 2 to November 13, 1970, and November 17 to November 25, 1970, in the total amounts of $495.65 and $267.70, respectively, in favor of Mr. James O. Flanagan, an employee of the Post Office Department.

The vouchers include a claim for per diem in lieu of subsistence in connection with the use of a truck-camper instead of a hotel or motel room while on field assignment for the Field Instruction Division of the Postal Service Management Institute. You state that the Atlanta Postal Data Center has indicated that it has never processed a claim of this nature; also that Mr. James L. O'Toole, Chief, Field Instruction Division, is of the opinion that the claim should be paid in the amount Mr. Flanagan would normally expend for lodgings in any given city. In view thereof you request a ruling be made on the matter by this Office.

The claimant by letter dated January 28, 1971, furnished this Office additional information. He advised us so far as here pertinent that:

> The U.S. Postal Service is presently, and for the past year has been, involved in presenting a supervisory training course that is conducted in specified cities throughout the nation. This instruction varies with the size of the city (i.e., number of supervisors in any City post office), but a minimum stay is 13 weeks. I am a Team Chief with 3–5 trainers, moving from city to city, as needed. This is only one of six such teams so operating.
>
> Specifically, last year I was temporarily duty assigned in Cleveland, Ohio, St. Louis, Missouri, Des Moines, Iowa, and Madison, Wisconsin, from about April 1st to the end of November.
>
> Our present basis of "time off" is a three-day week end every other week end without provision for quarters when away from the temporary duty station. This implies the necessity of packing up and storage of personal items, and moving out of a hotel room every other week end.

My resolving this almost unacceptable, but continual situation was to initially rent a truck-camper from St. Louis, to use in Madison and Omaha. In so doing, I am able to maintain a usable personal office space, immediately accessible to my books and references, greatly improve the security of my belongings (every other week end), enjoy a consistency in my own bed, and I am able to transport fragile government equipment from city to city, and yet be flexible enough to fly to other cities for brief visits without incurring duplicate housing for such times.

My intent is to submit on a voucher only for the nights I am sleeping in, i.e., using, the camper. For this usage I am asking the approved housing rates.

Since the November submission of the two travel vouchers in question, I am convinced this is an almost ideal solution, and I am proceeding to *purchase*, rather than rent the camper that I may use same in my next location—Harrisburg, Pennsylvania.

I would be interested in knowing if owning a unit vs. renting would substantially alter the situation or the decision, as this may eliminate a second submission in the very near future.

Section 6.2(e) of the Standardized Government Travel Regulations provides that per diem allowance for travel by means of a privately owned trailer may be authorized or approved. See our decision B-169536, July 2, 1970. See also 28 Comp. Gen. 341 (1948). A truck-camper, while not a trailer, is a temporary living unit and as such may be viewed as within the regulations for purposes of per diem allowance. *Cf.* section 1.2(g) of Office of Management and Budget Circular No. A-56, defining "House trailer" as meaning all types of mobile dwellings constructed for use as residences and designed to be moved overland, either by being *self-propelled* or towed.

You have not furnished information by way of a copy of the employee's travel order or otherwise as to what rate of per diem he was entitled to had he used the usual lodging facilities. However, the regulation referred to above appears to contemplate that when a trailer is used for lodging without being authorized in advance, the agency may post approve a proper per diem allowance on that basis. B-169536, *supra*.

The vouchers are returned herewith for handling in accordance with the above.

[B-171669(1)]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, Etc., Determinations—Union Agreement Effect

A reissued invitation for bids (IFB) to perform custodial services which provided for the application of the Service Contract Act of 1965, and contained a revised wage determination by the Department of Labor and a "Successor Employers' Collective Bargain Obligations" clause that recognized the incumbent contractors union bargaining agreement is not restrictive of competition and an award may be made to the lowest responsive and responsible bidder pursuant to 10 U.S.C. 2305(c). The inclusion in the IFB of the Service Contract Act clause and the revised determination was in accord with 29 CFR 4.6, and the amendment to the IFB to provide for the revised wage determination conformed to paragraph 2-208 of the Armed Services Procurement Regulation,

even though the revision was not received at least 10 days before bid opening as required, since sufficient time was provided for acknowledgment of the amendment.

Contracts—Labor Stipulations—Minimum Wage Determinations—Not Guarantee of Labor Costs

The issuance of a wage rate determination by the Department of Labor constitutes a finding that the rates specified are the rates prevailing in the locality, and the inclusion of the determination in an invitation for bids or a contract is not a representation by the Government that labor may be obtained by the contractor at the specified rates and, therefore, each bidder has the burden of ascertaining probable labor costs.

Contracts—Labor Stipulations—"Successor Employer" Doctrine

The inclusion in an invitation for bids of the language regarding the National Labor Relations Board *Burns* decision, 182 NLRB No. 50, on the effect of existing collective bargaining agreements of employers upon successor employers does not require bidders to be bound by an existing labor agreement as the Government made no commitment regarding the effect of the decision but left the matter to the bidders to decide. It was not improper to place bidders on notice of the *Burns* decision and the incumbent contractor's union bargaining agreement and as the language used was merely advisory, the invitation was not ambiguous. The extension of the existent bargaining agreement beyond the contract period is not prohibited by the procurement statutes, and whether the agreement is enforceable against a followup employer is for the courts to decide.

Antitrust Matters—Labor Organizations

The jurisdiction to enforce the antitrust statutes lies with the Department of Justice and the United States General Accounting Office is without authority to issue a determination respecting the applicability or violation of the statutes. However, under 15 U.S.C. 17, labor organizations engaged in lawful pursuits are exempted from the restrictions of the antitrust statutes.

To Millar & Fallin, March 24, 1971:

We refer to your protest by letter dated January 12, 1971, on behalf of Royal Services, Inc. (Royal), against any award under invitation for bids (IFB) DAAD05-71-B-0116, issued December 11, 1970, by Aberdeen Proving Ground, Department of the Army. The procurement involves performance of custodial services for a period of 1 year, and it is your position that the solicitation needs clarification, as discussed below.

The requirement was first advertised under IFB DAAD05-71-B-0068, dated September 24, 1970, which included notice that the Service Contract Act of 1965 (41 U.S.C. 351) applied to the contract together with the related clause prescribed by Armed Services Procurement Regulation (ASPR) 12-1004 making mandatory payment of no less than wage rates and fringe benefits set forth in an attached wage determination issued by the Department of Labor pursuant to the act. The determination, identified as "Wage Determination No. 69-20 (Rev-2)" dated January 12, 1970, specified a minimum hourly wage

of $1.96 for janitors, porters and cleaners as well as certain fringe benefits.

As amended October 2, 1970, the IFB included the following pertinent language:

2. SUCCESSOR EMPLOYERS' COLLECTIVE BARGAINING OBLIGATIONS

a. A recent decision of the National Labor Relations Board (NLRB) establishes the responsibility under the National Labor Relations Act of a successor employer to recognize and bargain collectively with the union designated by the employees, and to abide by the collective bargaining agreement which was negotiated by the union and the predecessor employer, even though the successor employer may not have been a party to that agreement or may not have agreed to be bound by it. The requirement that a successor employer abide by the collective bargaining agreement in existence at the time he becomes a successor employer is new.

b. The cases which led to the NLRB decision developed the following test to establish the successor's obligations to abide by the existing collective bargaining agreement.

(1) That there be a collective bargaining agreement;

(2) that the successor hires a substantial number of his predecessor's employees; and

(3) that the successor perform essentially the same work as was performed by the predecessor.

c. The NLRB decision may have pertinence to many Army procurements; specifically, ongoing service contracts such as aircraft maintenance contracts, flight instruction contracts, foreign language instruction contracts and installation maintenance and janitorial service contracts, where generally the successor contractor hires substantially, or in toto the work force of his predecessor and continues performing the same service.

2A. NOTICE OF COLLECTIVE BARGAINING OBLIGATION

All bidders are hereby put on notice that the National Labor Relations Board has ruled that successor contractors may be bound, under certain circumstances, by the collective bargaining agreement between the employees' union and a predecessor contractor. Notice is hereby given to bidders that there is an agreement in existence which may be subject to the above ruling. Copies of this agreement are on hand in the Procurement Division, Bldg. 314, Aberdeen Proving Ground, and if required, will be furnished upon request.

The Contracting Officer makes no representations as to the correctness of the NLRB ruling or as to the validity of the existing collective bargaining agreement. It is the responsibility of each bidder to obtain all relevant information prior to preparation of bids.

The union bargaining agreement executed by the incumbent contractor, Kahoe Supply Company (Kahoe), and Amalgamated Municipal Employees Local Union 1231 and its affiliate, Laborers International Union of North America, was effective as of July 30, 1970, and it covered employees, other than supervisory employees, engaged in performance of services, such as are involved in the instant procurement, at Aberdeen Proving Ground. The agreement covers periods extending beyond the basic period for which Kahoe holds the current contract and provides for payment of wage rates by a follow-on contractor at rates which would be higher than the rates Kahoe would be required to pay if its existing contract were to be extended.

On October 19, 1970, bids were opened. Of the eight bids received, Royal's bid was lowest. Royal, however, in a letter dated Novem-

ber 9, requested withdrawal of its bid on the basis of misunderstanding and mistakes relating to the Kahoe union agreement, wages, etc. Further, in a letter dated November 11, Royal asserted, among other things, that Kahoe's agreement was unfair and possibly illegal since it restricts the competitive bidding system.

While Royal's protest, and a separate protest by Kahoe on different grounds, were pending, the Government's requirements were changed in that janitorial services in one of the major tenant activities were deleted entirely, and the frequency of janitorial tasks in all of the remaining buildings was reduced. In the circumstances, the procuring activity determined that the requirements should be readvertised under revised specifications. All bidders were so notified by letter of November 19, 1970.

IFB B–0116 included the revised procurement requirements and carried the same provisions as IFB B–0068, as amended, with respect to applicability of the Service Contract Act of 1965 and the January 12, 1970, wage determination attached to the IFB, as well as notice of the NLRB decision on successor contractor obligations under incumbent contractor union bargaining agreements and of the existence of Kahoe's agreement in this case.

On January 6, 1971, the date specified in IFB B–0116 for the opening of bids, the procuring activity was notified by the Department of Labor that a revision to the wage determination included in the IFB was being issued effective as of January 6. The procuring activity accordingly deferred the opening of bids, and on January 8 a telegraphic amendment was sent to all prospective bidders advising that the January 12, 1970, wage determination revision was superseded by the January 6, 1971, revision; that the only change made by the latest revision was in the minimum hourly wage rate, which was increased from $1.96 to $2.08; and that bid opening was accordingly extended to January 31, 1971. All of the firms which submitted bids acknowledged the amendment prior to the extended bid opening time.

On January 13, bids were opened. Springfield Building Maintenance, Inc. (Springfield), who was not a bidder under the original IFB, was lowest with a bid of $626,901.72. Royal was second low with a bid of $671,268.48, and the remaining eight bidders quoted prices ranging from $673,204 to $857,086.

You charge that the procedures employed in this procurement violate the Sherman and Clayton Antitrust Acts, 15 U.S.C. 1, and 12; confuse bidders; frustrate the bidding procedures; and circumvent the Service Contract Act of 1965. More specifically, you state:

(a) It is not proper for the Army to indicate to bidders that the rate in the union contract should be followed.

(b) It is not proper for a lame duck contractor to execute a contract with a union providing for preferential wage treatment.
(c) It is not proper to amend a contract without 10 days lead time ASPR 18-206.
(d) If the contractors are not permitted to follow the wage determinations in the invitations and rely on same, then either no wage determination should be made or at least contractors not be put on notice by the government of a conflicting set of wages.
(e) If GAO does not consider these matters and place in proper priority the relationship of a bidder under the NLRB's Burns decision, as compared to his duty under the Service Contracts Act, bidders will be so confused that the bids will be much higher and lame duck contractors will enter into contracts that will cause bidders to consider wage rates so high that the bids will be out of sight and the Service Contracts Act of no effect.
(f) Royal's bid in the instant contract would be a lot lower if it were permitted to rely on the new wage determination and had not been put on notice of the union contract attached to the former amendment to the former solicitation.

The contracting officer maintains that the IFB properly included the Service Contract Act of 1965 clause and the current Department of Labor wage determination; that the IFB also properly included notice of the recent NLRB decision on the effect of incumbent contractor collective bargaining agreements on successor contractors; and that sufficient time was allowed for bidders to amend their bids after notice of applicability of the superseding wage determination of January 6, 1971.

With further reference to the telegraphic amendment of January 8, the contracting officer states that such action was taken with due consideration of the provisions of ASPR 2-208, relating to supply and service contracts, and was based upon a determination that extension of bid opening to January 13 would provide sufficient time for bidders to receive, acknowledge and amend their bids. Further, the contracting officer urges, since all bidders did timely acknowledge receipt of the amendment without claiming that insufficient time had been allowed therefor, such period was adequate.

The jurisdiction to enforce the provisions of the antitrust statutes lies with the Department of Justice. 21 Comp. Gen. 56 (1941). Since our Office is without authority to issue a determination respecting applicability or violation of such statutes, we will not undertake to express an opinion thereon in this case. However, we call your attention to the language of 15 U.S.C. 17 concerning exemption from the restrictions of the antitrust statutes of labor organizations engaged in lawful pursuits.

As to the applicability of the Service Contract Act of 1965 to the procurement, the regulations issued by the Department of Labor in implementation of the act, pursuant to 41 U.S.C. 353, are published at 29 CFR, part 4. Contracts for custodial and janitorial services are listed in 29 CFR 4.130 with various other types of service contracts which are covered by the act. Under 29 CFR 4.6, such contracts (and any bid specification therefor) are required to include appropriate

clauses providing, among other things, for payment to service employees of no less than the minimum wages and fringe benefits specified in applicable wage determinations issued by the Department of Labor, as provided in the act, and made part of the procurement solicitation and related contract. Pursuant to such provisions, the procuring activity was required to include in IFB B–0116 the Service Contract Act clause and the currently effective Department of Labor wage determination, which, as of the date IFB B–0116 was issued, was the January 12, 1970, revision of Wage Determination No. 69–20.

As to the procedures which were employed by the procuring activity in connection with the issuance of the IFB amendment to incorporate the wage determination revision which became effective on the date of bid opening, the governing regulations are ASPR 2–208, relating to amendments in general to IFB's for supplies and services (not ASPR 18–206, which relates only to contracts for construction), and 29 CFR 4.5(b) and ASPR 12–1005.3(a)(2), relating to the use in service contracts of preaward revisions of wage determinations.

ASPR 2–208 reads as follows:

Amendment of Invitation for Bids

(a) If after issuance of an invitation for bids, but before the time for bid opening, it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation, such changes shall be accomplished by issuance of an amendment to the invitation for bids, using Standard Form 30 (see 16–101), whether or not a pre-bid conference is held. The amendment shall be sent to everyone to whom invitations have been furnished and shall be displayed in the bid room.

(b) Before issuing an amendment to an invitation for bids, the period of time remaining until bid opening and the need for extending this period by postponing the time set for opening must be considered. Where only a short time remains before the time set for bid opening, consideration should be given to notifying bidders of an extension of time by telegram or telephone. Such notification shou'd be confirmed in the amendment.

(c) Any information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders, as an amendment to the invitation, whether or not a pre-bid conference is held, if such information is necessary to the bidders in submitting bids on the invitation or if the lack of such information would be prejudicial to uninformed bidders. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

Both 29 CFR 4.5(b) and ASPR 12–1005.3(a)(2) provide for the use in bid solicitations of wage determination revisions which are issued prior to award; however, revisions received by the contracting agency later than 10 days before the opening of bids shall not be effective except where the agency finds there is a reasonable time to notify bidders of the revision.

While ASPR 2–208 does not fix a minimum period prior to bid opening which must be allowed for consideration of an IFB amendment, we have construed a similarly worded provision in the Federal Procurement Regulations (FPR 1–2.207) as requiring that sufficient

time elapse between issuance of the amendment and bid opening to enable *all* bidders to consider and timely acknowledge the amendment. 45 Comp. Gen. 651 (1966). In the instant case, the ten bidders, of whom Royal was one, who responded to the IFB also timely acknowleged the amendment. In addition, the record does not show that any of such bidders, or any of the other 25 prospective bidders to whom the amendment was transmitted, complained to the procuring activity that the 5 days allowed for acknowledgement were not sufficient for consideration of the amendment. In the circumstances, we are unable to conclude that the 5 days in question did not constitute the reasonable time contemplated by ASPR 2-208.

We are mindful that under 29 CFR 4.5(b) and ASPR 12-1005.3(a)(2) the procuring activity could have disregarded the January 6, 1971, wage determination revision since the activity did not receive the revision at least 10 days before the scheduled bid opening. However, since only one change was effected by the revision, we do not view the decision of the procuring activity to include the revision in the IFB by amendment and to extend the time of bid opening accordingly as other than a reasonable exercise of the discretion accorded to the activity under such regulations.

As to the issue of entitlement of bidders to rely on the wage rate determination, your attention is directed to the clear language of the Service Contract Act clause to the effect that the specified wage rates are but *minimum* rates. The issuance of a wage rate determination constitutes a finding that the rates specified therein are the rates prevailing in the locality, and the inclusion thereof in an invitation for bids or a contract does not constitute a representation by the Government that labor may be obtained by the contractor at such rates. *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954); 48 Comp. Gen. 22 (1968). Each bidder, therefore, had the burden of ascertaining for itself its probable labor costs. B-167250, November 13, 1969.

Turning now to the propriety and effect of inclusion in the IFB of the language regarding the National Labor Relations Board *Burns* decision, 182 NLRB No. 50, on the effect of existing collective bargaining agreements of employers upon successor employers and of notice that Kahoe, the incumbent contractor at Aberdeen Proving Ground, has such an agreement, we find nothing in such language which could be construed as a requirement that bidders agree to be bound by Kahoe's agreement. On the contrary, we believe that the second paragraph of the notice of Kahoe's agreement leaves no doubt that the Government made no commitment regarding the effect of the *Burns* decision but left such matter to the bidders to decide. It is our view,

therefore, that while the procuring activity was not obligated to place bidders on notice of the *Burns* decision and the incumbent contractor's union bargaining agreement, its action in this regard was not improper and did not render the invitation ambiguous, the language in question being merely advisory. B–170101, September 22, 1970.

While it well may be, as you have stated, that Royal's bid would have been lower had it not been on notice of the existing union agreement, there is no indication that Royal or any other bidder did not make its own determination regarding the effect of the *Burns* decision freely, or that any related mistake was made in its bid as the result of such decision.

Regarding the propriety of execution by Kahoe of a union bargaining agreement extending beyond its basic contract period, our Office is not aware of any restriction in the procurement statutes or regulations which would preclude such agreement. Whether the agreement would be enforceable against a follow-on employer, however, is a matter for the courts to decide. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). See, also, *Potter* v. *Emerald Maintenance, Inc.*, Civil Action No. 70–L–36, United States District Court for the Southern District of Texas, Laredo Division, October 29, 1970, in which the court gave consideration to the *Burns* successor employer doctrine in relation to a competitively awarded contract for services at a Government installation and declined to issue an injunction against the follow-on contractor in keeping with such doctrine in the absence of a decision by NLRB, or the courts, evidencing full consideration of the Service Contract Act of 1965 and the Government procurement statutes in similar circumstances.

In line with the foregoing, we are unable to conclude that the IFB is restrictive of competition, and we therefore see no legal objection to the making of an award thereunder to the lowest responsive and responsible bidder, as contemplated by 10 U.S.C. 2305(c). While your protest is therefore denied, your attention is invited to the enclosed copy of our decision of today to the Secretary of the Army respecting withdrawal of the low bid of Springfield.

[B–171669(3)]

Contracts—Labor Stipulations—"Successor Employer" Doctrine

A bid submitted under an invitation that incorporated the Service Contract Act clause prescribed by paragraph 2–1004 of the Armed Services Procurement Regulation, which provided for the application of the pertinent Department of Labor wage determination, and included information relating to "Successor Employers' Collective Bargaining Obligations"—information the bidder overlooked in preparing the bid—may be withdrawn under the mistake in bid principles enunciated in *Ruggiero* v. *United States*, 420 F. 2d 709, to the effect the law of mistaken

bids includes mistakes which are inexplicable, and the rule does not turn on any fault or ambiguity in the specifications nor need the contractor be free from blame. Therefore, since the bidder was entitled to give consideration to the impact of the union agreement upon performance costs, and the bid may not be corrected as the agreed union rates were not a factor in bid preparation, the bid may be withdrawn from consideration.

To the Secretary of the Army, March 24, 1971:

We refer to letter dated February 4, 1971 (AMCGC-B), from the Assistant General Counsel, Headquarters Army Materiel Command (AMC), forwarding for consideration by our Office a request by Springfield Building Maintenance, Inc. (Springfield), for correction or withdrawal of its low bid under invitation for bids (IFB) DAAD05-71-B-0116, issued December 11, 1970, by Aberdeen Proving Ground, Aberdeen, Maryland. The basis for the request is that Springfield made a mistake in computing its probable labor costs for performance of the janitorial services covered by the proposed requirement contract over a period extending from date of award through January 31, 1972.

The procuring activity first advertised for the required services under IFB DAAD05-71-B-0068, dated September 24, 1970, which contemplated a contract covering the period November 1, 1970, through October 31, 1971. After bids were opened on October 19, 1970, however, there was a substantial change in the Government's requirements, which led to the discarding of the bids and readvertisement of the procurement under IFB B-0116. Springfield was among the sources to which the procuring activity transmitted copies of IFB B-0068 and related amendments, but Springfield did not submit a bid under that solicitation.

Both IFB's informed bidders that the Service Contract Act of 1965, 41 U.S.C. 351 note, would apply to the contract and incorporated the Service Contract Act clause prescribed by Armed Services Procurement Regulation (ASPR) 12-1004, which requires payment by the contractor of no less than the wage rates and fringe benefits set forth in the applicable wage determination issued by the Department of Labor and attached to the IFB. As of January 6, 1971, the applicable minimum wage rate for janitors was determined by the Department of Labor to be $2.08 per hour, an increase of 12 cents per hour over the rate in effect from January 12, 1970, through January 5, 1971.

In addition, both of the IFB's included the following pertinent language:

SUCCESSOR EMPLOYERS' COLLECTIVE BARGAINING OBLIGATIONS

a. A recent decision of the National Labor Relations Board (NLRB) establishes the responsibility under the National Labor Relations Act of a successor employer to recognize and bargain collectively with the union designated by the employees, and to abide by the collective bargaining agreement which was

negotiated by the union and the predecessor employer, even though the successor employer may not have been a party to that agreement or may not have agreed to be bound by it. The requirement that a successor employer abide by the collective bargaining agreement in existence at the time he becomes a successor employer is new.

b. The cases which led to the NLRB decision developed the following test to establish the successor's obligations to abide by the existing collective bargaining agreement:

(1) That there be a collective bargaining agreement;

(2) That the successor hires a substantal number of his predecessor's employees; and

(3) That the successor perform essentially the same work as was performed by the predecessor.

c. The NLRB decision may have pertinence to many Army procurements; specifically, ongoing service contracts such as aircraft maintenance contracts, flight instruction contracts, foreign language instruction contracts and installation maintenance and janitorial service contracts, where generally the successor contractor hires substantially, or into, the work force of his predecessor and continues performing the same service.

NOTICE OF COLLECTIVE BARGAINING OBLIGATION

All bidders are hereby put on notice that the National Labor Relations Board has ruled that successor contractors may be bound, under certain circumstances, by the collective bargaining agreement between the employees' union and a predecessor contractor. Notice is hereby given to bidders that there is an agreement in existence which may be subject to the above ruling. Copies of this agreement are on hand in the Procurement Division, Bldg. 314, Aberdeen Proving Ground, and if required, will be furnished upon request.

The Contracting Officer makes no representations as to the correctness of the NLRB ruling or as to the validity of the existing collective bargaining agreement. It is the responsibility of each bidder to obtain all relevant information prior to preparation of bids.

The wage rate for janitors in the collective bargaining agreement between the incumbent contractor, Kahoe Supply Company (Kahoe), and its employee unions was $1.96 per hour effective July 31, 1970, through October 31, 1970. For periods subsequent to October 31, 1970, the agreement had two separate sets of wage rates, one to apply in the event the Government exercised its option to extend the contract with Kahoe beyond October 31, 1970, and the other to apply to any contractor who received a contract after October 31, 1970, pursuant to competitive bidding. For Kahoe, under an extension of its existing contract, the $1.96 wage rate would apply through October 31, 1971, and effective November 1, 1971, the wages for janitors would be payable at three rates, i.e., $2.10 for an entry step, $2.17 for a first longevity step, and $2.25 for a second longevity step. For a competitively awarded contract, the $2.10 rate and related longevity step rates were to be effective from November 1, 1970, through the pay period including December 31, 1970. Effective the first pay period after January 1, 1971, the rates would be increased to $2.35 for the entry step, $2.42 for the first longevity step, and $2.50 for the second longevity step, and effective the first pay period after January 1, 1972, the rates would be further increased to $2.55 for the entry step, $2.62 for the first longevity step, and $2.70 for the second longevity step. All wage rates

in the agreement are subject to the minimum wage requirements of the Service Contract Act and to addition of 6 cents per hour in lieu of health and welfare payments.

On January 13, 1971, the ten bids received in response to IFB B–0116 were opened. Springfield's estimated total cost of $626,901.72 was lowest. Royal Services, Inc. (Royal), with a bid of $671,268.48, was second low bidder, and Royal has indicated that its price was based on the wage rates provided in Kahoe's union bargaining agreement. The eight remaining bids ranged from $673,204.56 to $857,086.92.

In light of the sizeable price variance between Springfield's bid and the other bids, the procuring activity requested Springfield to verify its bid. In a letter dated January 14, 1971, Springfield advised the contracting officer that Springfield had obviously made a mistake in the preparation of its bid. In this connection, Springfield stated that while it was aware of the information included in paragraph 3, page 19, relating to the National Labor Relations Board decisions on the matter of successor employer obligations, Springfield failed to turn the page back sufficiently in reading the IFB to note the succeeding paragraph advising of the existence of a union bargaining agreement between Kahoe and its employee unions. Accordingly, Springfield stated, it did not consider the possibility that such an agreement might be in effect and might be binding on Springfield and proceeded to estimate its labor costs on the basis of the wage rate stated in the Department of Labor wage determination.

The letter also indicated that Springfield first became aware of Kahoe's union agreement in a telephone conversation of the same date with the procuring activity. (AMC advises that Springfield did not request a copy of the Kahoe union agreement from the procuring activity in connection with either of the IFB's.)

Worksheets furnished by Springfield as evidence of its mistake show that Springfield estimated that 93 janitors would be required for the contract work, and the related labor cost was computed at an hourly rate of $2.20 multiplied by 175, the number of work hours estimated for each janitor per month. Springfield explained that the $2.20 rate is based on the $2.08 hourly wage rate specified in the Department of Labor wage determination plus 6 cents per hour for health and welfare benefits and an additional 6 cents per hour to cover job classification differentials.

In light of its mistake, Springfield requests a correction in its bid to increase the price to a yearly total of $693,783.48 less 2½ percent prompt payment discount to allow for increased labor costs under Kahoe's union agreement. Springfield's recomputation of its labor cost shows an hourly rate of $2.48 for janitors, which includes $2.42 minimum rate plus 6 cents for differentials, and an increase of 12.7

percent in previously estimated costs for an additional supervisor and for vacations. In the event correction is denied by the Government, Springfield requests that it be permitted to withdraw its bid without prejudice.

Headquarters, AMC, takes the position that Springfield has made a mistake in judgment and therefore should be awarded the contract at its original bid price. Further, AMC urges that no information has been furnished by Springfield that a different bid price was intended at the time the bid was submitted, and while it appears that a mistake was made, it is attributable to the failure of Springfield to read the information in the IFB.

AMC further states that there is grave question whether the rates in Kahoe's collective bargaining agreement would be binding on a successor contractor since it appears that the union agreement was not executed in good faith. This statement, AMC has explained, relates to the apparent intent by Kahoe to deter the Government from securing competition for a contract for performance of the services in question after expiration of the basic period of Kahoe's existing contract.

In addition, AMC cites *Potter* v. *Emerald Maintenance, Inc.*, United States District Court for the Southern District of Texas, Civil Action No. 70–L–38, involving circumstances such as are present in this case, in which the court declined to issue an injunction which would have been tantamount to enforcement against a follow-on service contractor at an Air Force installation of the predecessor contractor's union bargaining agreement providing for higher wages after expiration of the basic contract period.

Where a bidder discovers that he has made a mistake in his bid and furnishes evidence of such mistake to the contracting officer, even after bid opening, but before award, he is not bound by his bid. Further, the law of mistaken bids is made for those mistakes, among others, which are perfectly inexplicable. This rule does not turn on any fault or ambiguity in the Government specifications, and, on the other hand, the contractor need not be free from blame. *Ruggiero* v. *United States*, 190 Ct. Cl. 327, 420 F. 2d 709, at pages 713 and 716 (1970). What is involved [in a case in which a mistake in bid is claimed or apparent before acceptance by the Government] is the overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed as something he ought to know, that the bid is based on or embodies a disastrous mistake and accepts the bid in face of that knowledge. *Chernick* v. *United States*, 178 Ct. Cl. 498 (1967), 372 F. 2d 492.

We are mindful that the mistake which is involved in this case is different from that which is usually encountered in mistake in bid cases, in that the oversight on the part of the bidder involves not a specification requirement which must be met by the contractor but a possible obligation, under an agreement to which the Government was not a party, imposition of which is dependent upon whether the unions are successful in having the Kahoe agreement enforced by proper authority. Nevertheless, all bidders were entitled to give consideration to the impact of the union agreement upon their performance costs, and it is evident that Springfield, admittedly through its own negligence, unintentionally failed to consider the agreement in computing its bid. More important, Springfield has shown that it would have quoted a price substantially in excess of the second low bid had Springfield been aware of the union agreement wage rates.

In the circumstances, it is our view that the principles enunciated by the court in the *Ruggiero* case preclude acceptance by the Government of Springfield's bid at the price submitted, notwithstanding Springfield was negligent in failing to read all parts of the IFB as cautioned in paragraph 2 of Standard Form 33A, Solicitation Instructions and Conditions, before preparing its bid. The factor remaining for determination, therefore, is what relief should be granted to Springfield, i.e., correction of the bid or withdrawal.

The exception to the making of a change in bid after opening which permits correction of a bid upon establishment that the bidder actually intended to bid an amount other than that reflected in the bid does not extend to permitting recalculation of a bid to include factors which the bidder did not have in mind when the bid was prepared and submitted. 17 Comp. Gen. 575, 577 (1938). Since Springfield has stated that consideration of the Kahoe union agreement wage rates was not a factor in the preparation of its bid, it is apparent that the price stated in the bid was the intended price and that the price of $693,783.48 to which Springfield now seeks to have its low bid corrected is the recalculated price based on information obtained after bid opening. There is no question, however, that a mistake was made, and the Government may not, in good faith, accept the bid as submitted. Accordingly, the bid may be withdrawn from consideration for award. 41 Comp. Gen. 289 (1961).

The file which was forwarded by AMC is returned.

In addition, we enclose copies of our decisions of today to the attorneys for Royal Services, Inc., the second low bidder, and to Kahoe, the incumbent contractor, denying their respective protests against any award under IFB B–0116 on the basis that the solicitation is

fatally defective. These protests were the subject of reports forwarded by letter dated February 3, 1971, from the Deputy General Counsel, Headquarters AMC. The two files which accompanied the letter are also enclosed.

[B-169174]

Highways—Construction—Federal-Aid Highway Programs—Relocation Costs—Replacement to be Similar Design

As the replacement highway bridge over the Cross-Florida Barge Canal is required to be constructed in accordance with section 207(c), Public Law 87-874, October 23, 1962, which limits construction of a replacement facility to the State design standards that apply to roads of the same classification, determined on the basis of traffic existing at the time of the taking, the approval by the Corps of Engineers of two two-lane bridges to be constructed at Government expense in lieu of the existing two-lane highway in order to accommodate future growth constitutes a betterment of the facility in contravention of section 207(c) and, therefore, the funds available to the Corps may not be used to construct the second bridge, whether or not the design standard was in actual practice or published. However, State standards that provide for a range of traffic rather than projeced future traffic count are acceptable.

To the Secretary of the Army, March 25, 1971:

Reference is made to letter of September 4, 1970, from Mr. Robert E. Jordan, III, Special Assistant to the Secretary of the Army (Civil Functions), replying to our letter to you of March 19, 1970, concerning the Cross-Florida Barge Canal project. In our letter of March 19, we questioned the authority of the Corps of Engineers to construct with Federal funds a second two-lane bridge for U.S. Highway No. 19, State Road 55, where that highway crosses over the canal.

The facts which constituted the basis for our inquiry are as follows:

The Cross-Florida Barge Canal (CFBC) project was authorized by Public Law 675, 77th Congress, approved July 23, 1942, 56 Stat. 703, 15 U.S.C. Prec. 715 which provided for the construction of a high-level lock barge canal from the Saint Johns River across Florida to the Gulf of Mexico in accordance with plans set forth in a letter of the Chief of Engineers dated June 15, 1942. This letter subsequently was published in House Document No. 109 of the 79th Congress.

By letter of June 17, 1964, the Florida State Road Department submitted to the Canal Authority of the State of Florida (the agency empowered by the State to act as the official local cooperative agency for the project) a proposed Memorandum of Agreement between the Canal Authority of the State of Florida (therein referred to as the Corporation) and the Florida State Road Department relative to certain proposed modifications which were contemplated where the

CFBC intersects and crosses the right-of-way of U.S. Highway No. 19, State Road 55, Citrus County, Florida.

Pertinent provisions of the proposed Memorandum of Agreement were as follows:

2. Develop or cause to be developed complete construction plans and specifications, acceptable to the Department, commensurate with standard Department specifications and design criteria, which by reference becomes a part thereof, for the construction of a two-lane highway and high level bridge and appurtenances over the proposed Barge Canal, said plans to be adaptable to an ultimate four-lane section * * *.

* * * * * * *

6. The Corporation also agrees that at such time as the Department deems it necessary to four-lane State Road 55 within the limits of this project, the Corporation will construct, or cause to be constructed, the additional roadway and high level bridge and bridge appurtenances and related structures within the limits of the Project at no cost to the Department.

The Manager, Canal Authority, submitted the proposed agreement to the District Engineer, Jacksonville District Corps of Engineers, on June 19, 1964, for his comments. By letter dated June 24, 1964, the Jacksonville District office commented on the proposed Memorandum Agreement, in part, as follows:

The most objectionable language is contained in subparagraph 6 on page 2, which, in essence, would commit the Canal Authority to build an additional high-level bridge and roadway without cost to the State Road Department when and if the department deems it necessary to four-lane State Road 55. On the assumption that the Canal Authority would not desire to commit itself on a bridge matter that ordinarily would be at project cost. I will elaborate on the Federal responsibilities. The authority and obligation of the Federal Government to relocate highways made necessary by the construction of a project are contained in the Project Document and in paragraph 207(b), Public Law 86-645, approved July 14, 1960, which is quoted herein.

"That, for such water resources project, under construction or to be constructed, when the taking by the Federal Government of an existing public road necessitates replacement, the substitute provided will as nearly as practicable serve in the same manner and reasonably as well as the existing road. The Chief of Engineers is authorized to construct such substitute roads to design standards comparable to those of the State in which the road is located. *for roads of the same classification as the road being replaced. The traffic existing at the time of the taking shall be used in the determination of the classification.*" [Italic supplied.]

In this instance the words "for roads of the same classification as the road being replaced," and "The traffic existing at the time of taking shall be used in the determination of the classification" are the key to the problem herein. The case is somewhat similar to Case B-144887, dated 16 March 1961, Decisions of the Comptroller General [40 Comp. Gen. 520], which pertained to whether the Corps of Engineers was responsible for constructing a relocation to Interstate standards, and established guidelines which we follow. In the instance of the road discussed herein, U.S. 19, the 1963 traffic count furnished by the State Road Department was 4,045 vehicles per day with a projection of 8,600 per day in 1985. The State Road Department Roadway Design Manual does not specifically cover the point of traffic density on a daily basis when they go from a two-lane to a four-lane facility, but they have informed us that they are guided by the AASHO Design Manual which states that for rural highways in flat country a four-lane highway should be provided for traffic counts between 5,000 and 20,000 vehicles per day. It is the policy of the Corps of Engineers to consider the traffic count on the "date of taking" which to our knowledge, will not have reached 5,000 vehicles per day at that time.

We are cognizant of the fact that the State Road Department has a four-lane program for U.S. 19 and is actually four-laning the highway some distance both north and south of the project referred to in its resolution, but we do not believe that the State has established its entitlement to a four-lane facility at this time. Furthermore, we are of the opinion that the two-lane bridge proposed for U.S. Highway 19 is all that can be provided under our regulations, and that the Cross-Florida Barge Canal Project cannot assume any responsibility whatsoever for the additional bridge that would be required when and if the highway is four-laned in this vicinity.

By letter of October 20, 1964, the District Engineer advised the State Highway Engineer, Florida State Road Department, that the proposed Memorandum of Agreement had been rewritten to delete any reference to the development of right-of-way maps for an ultimate four-lane, divided highway, for the reason that this requirement exceeds that for which the United States is legally responsible. He advised also that paragraph 6 of section I had been deleted as this provision was contrary to Federal law and that to agree to provide a second two-lane bridge at a later date would be a betterment.

The State Highway Engineer replied on October 27, 1964, in part, that as the State presently had ample right-of-way to accommodate a proposed four-lane highway and it was the intent to build such a facility in the immediate future, the Department believed that the Corps of Engineers should provide for the proposed four-lane bridge at that time, or should agree that at such time as the Department deems it necessary to four-lane State Road 55, the Corps will construct the additional roadway and high-level bridge at no cost to the State.

The District Engineer again advised the State Highway Engineer on November 2, 1964, that the Corps could only provide for a replacement of the existing facility in accordance with section 207(b) of Public Law 86-645.

The District Engineer also enclosed with his letter a copy of our decision of March 16, 1961, 40 Comp. Gen. 520, referred to above, and stated with respect thereto that:

* * * This decision indicates that the Chief of Engineers is precluded from participation in the cost of such relocation beyond that essential to constructing a substitute highway for traffic existing at the time of taking; and furthermore, the Comptroller General found that Section 207(b) in providing for substitute roads "to design standards comparable to those of the State in which the road is located, for roads of the same classification as the road being replaced," renders a "manifestation of intent" policy obsolete. We realize that the Comptroller General's opinion inclosed specifically dealt with the problem of constructing U.S. Highway 30 in Oregon to Interstate System criteria, but we feel that it brings out very well the principles involved in the case at hand. Again I must state that the Corps of Engineers can only provide a two-lane facility crossing the Cross-Florida Barge Canal on State Road 55 (U.S. 19).

Because it was apparent from the exchange of correspondence that an agreement on the bridge could not be reached, the District Engineer referred the matter to the Chief of Engineers through the Division Engineer on November 20, 1964, and requested that the position of the

Jacksonville District be reviewed and an opinion rendered so the Florida State Road Department could be notified of the Corps' final position.

By first indorsement, dated December 8, 1964, the Division Engineer concurred in the position of the District Engineer that the basis for replacement should be strictly in accordance with section 207(b).

However, by second indorsement, dated December 28, 1964, the Chief of Engineers advised the Division Engineer as follows:

Based on a 1963 traffic count of 4,045 vehicles per day, a 1964 traffic count of 4,400 vehicles per day and the Florida State Road Department Standards of good engineering practice, it is determined that the relocated segment of U.S. Route 19 crossing the Cross-Florida Barge Canal near Inglis, Florida, should be designed to a four-lane classification. As this is the standard to which the State is currently rebuilding the road, further negotiation with the State Road Department should be on that basis.

Accordingly, on January 5, 1965, the Jacksonville District Engineer advised the State Highway Engineer of the Chief of Engineers' determination that an additional two-lane bridge could be constructed at a later date as a project responsibility. He advised also that Advance Notice on the construction of the first two-lane bridge had been issued and bids would be opened on February 9, 1965. In order to allow for phasing in construction of the second two-lane bridge with the actual widening of this highway to four lanes, the District Engineer requested that the Corps be furnished a schedule for this highway work.

Based on the Chief of Engineers' determination to provide a second two-lane bridge for U.S. Highway No. 19, whenever the Florida State Road Department deems it necessary, the District Engineer executed contract No. DA-08-123-CivEng-65-70, dated February 9, 1965, between the United States of America and the State Road Department of Florida which provides, in part, for the following:

Article 1. *Obligations of the Government.* a. To construct a two-lane highway, including high level bridge and appurtenances thereto, in accordance with plans and specifications attached hereto * * *. The facilities provided for in this paragraph shall be hereafter designated as the "First Bridge."

b. Upon completion of the First Bridge and upon request by the Owner to commence, within a period of one year after such request or within 120 months after the date of this contract, whichever occurs first, construction of a second two-lane highway and high-level bridge and appurtenances thereto along the route indicated on the attached plans hereinabove referred to, for the purpose of four-laning State Road No. 55 (U.S. Highway No. 19); said construction to be generally in conformity with plans and specifications of the high-level bridge, appurtenances, and two-lane highway referred to as the First Bridge. * * * The facilities provided for in this paragraph shall hereinafter be designated the "Second Bridge."

Approximately 4 years later on April 16, 1969, the Florida State Road Department advised the District Engineer that the State's present schedule of construction called for the widening of State Road 55 to four lanes (U.S. Highway No. 19) in the vicinity of the CFBC in

fiscal year 1972–1973 but could be revised to fiscal year 1971–1972 if funds were available.

Section 207(b) of Public Law 86–645 was amended and renumbered section 207(c) by Public Law 87–874, approved October 23, 1962, and now reads as follows (33 U.S.C. 701r–1(c)):

> For water resources projects to be constructed in the future, when the taking by the Federal Government of an existing public road necessitates replacement, the substitute provided will, as nearly as practicable, serve in the same manner and reasonably as well as the existing road. The head of the Agency concerned is authorized to construct such substitute roads to design standards comparable to those of the State, or, where applicable State standards do not exist, those of the owing political division in which the road is located, for roads of the same classification as the road being replaced. The traffic existing at the time of the taking shall be used in the determination of the classification. In any case where a State or political subdivision thereof requests that such a substitute road be constructed to a higher standard than that provided in the preceding provisions of this subsection, and pays, prior to commencement of such construction, the additional costs involved due to such higher standard, such Agency head is authorized to construct such road to such higher standard. Federal costs under the provisions of this subsection shall be part of the nonreimbursable project costs.

According to the letter of the District Engineer, Jacksonville District Corps of Engineers, dated June 24, 1964, cited above, the design standards followed by the State of Florida and applicable in this case are those set out in the American Association of State Highway Officials Design Manual which, he states, provides for four-lane facilities when the daily traffic count is between 5,000 and 20,000 vehicles per day. Accordingly, since the daily traffic count at the time of taking was less than 5,000 vehicles it appeared to us that the construction of the second two-lane bridge on U.S. Highway 19 would contravene the express provisions of section 207(c). By letter of March 19, 1970, we requested your views on the legality of the Corps financing of the second bridge.

In his reply of September 4, 1970, the Special Assistant to the Secretary agrees that if the traffic count at the time of the taking is used to classify the road and the published State standards for the determined classification were applied, the Corps would be authorized to construct but one two-lane bridge at Federal expense. He points out, however, that some States' published standards incorporated design features to handle anticipated future traffic, while other States' published standards (such as in Florida) did not incorporate future growth, although the practices in these States in separately estimating future growth, resulted also in their roads being designed for future traffic increases. Thus, when section 207(c) was applied with reference only to the published standards, as was proposed by the District Engineer in this case, the result was that the type of substitute road depended not on the State's practice, but on the way it had chosen to express its practice.

This has resulted in some States receiving, without cost, roads better than those replaced, with other States having to contribute funds for similar improvements.

Because of this inequity it is stated that the Chief of Engineers evaluated the situation in the Florida case, and, in effect, recognized the State's practice (not published in the design standard) of including projection for future growth. Further, it is stated to be the position of the Chief of Engineers that the term "design standards," reasonably construed, has reference to the practice of the State as evidenced not only by its published geometric standards but also the means it employs, given a particular traffic count, use, and locality of a road, in determining what type of original or replacement road it would build.

Because of this position and the reported State practice of using traffic projection, separate and apart from the published State standards to justify four-lane highway construction, it is stated that prior to the issuance of authorization of December 28, 1964, further inquiry was made regarding the State practice. Concerning such inquiry the State Highway Engineer thereafter reported that 1964 existing traffic of 4,400 vehicles per day at Inglis should be projected to 11,200 per day for 1985 in accordance with their present practice of using projection in conjunction with the AASHO Design Manual (which provided for a four-lane facility for traffic counts between 5,000 and 20,000 vehicles per day) to determine the number of lanes to be provided. He again reiterated that the State had no formal regulation concerning design based on projected traffic but that good engineering practice was followed. It is reported that the State obtained a 1985 traffic estimate by resort to gasoline consumption increase during the period 1954–1964, consistent with State policy to obtain more accurate projection based on gasoline consumption locally, area growth, population growth and so forth.

However, in order to be assured of the practice of the State in using projected traffic to arrive at a proper four-lane design standard, inquiry was made as to whether the State had installed four-lane highways in replacing two-lane facilities with traffic count of 5,000 vehicles per day or less. The State has indicated that there are other cases, for example U.S. 27 was four-laned from Palmdale to Clewiston between 1963 and 1965 with an average daily traffic count of under 4,000 and between Tallahassee and the Georgia line during the same period with a count of 2,500 vehicles per day. In view of the foregoing indicia of a State practice of including projected traffic to enter the AASHO design standard for a four-lane facility and since traffic at

time of taking was used as the basis for projection to enter the AASHO Manual, it was determined that a proper basis existed for authorizing a four-lane replacement facility. Furthermore, as previously indicated, the State was currently demonstrating its design standard for the highway in question by constructing four lanes on segments of the highway both north and south of the canal crossing and by acquiring much of the necessary right-of-way for the entire length of highway from the Georgia line to St. Petersburg.

Accordingly, it is stated to be the view of the Special Assistant to the Secretary that the facts and circumstances of this case are considered sufficient under criteria in 40 Comp. Gen. 520 (1961) and the Corps' interpretation of the States' standards to warrant allowance of the second bridge as part of the four-lane replacement facility. In other words, it is his view that the State practice in design standard application validated the State's insistence upon a four-lane substitute facility and, therefore, provision of the second two-lane bridge does not contravene section 207(c).

The decision referred to above, 40 Comp. Gen. 520, concerned the question whether Highway U.S. 30 in Oregon, a two-lane highway with a daily traffic count of 3,000 vehicles, should be replaced at Federal expense with a four-lane highway as required by Interstate standards for roads incorporated into the Interstate System. In the course of that decision we stated—

> * * * it is readily apparent, since the State of Oregon has adopted the Interstate standards for U.S. 30 highway, that a technical argument can be made for replacement of U.S. 30 to Interstate standards by the Corps, under the plain wording of the portion of section 207(b) referred to. But this technical argument must fail for two reasons. First, the statute sets forth as a basis for determining the classification of a State's highways that the traffic existing at the time of the taking shall be used. While U.S. 30 has been classified as an Interstate highway, the design standards adopted for such classification relate to 1975 rather than current traffic; and such classification is, therefore, meaningless so far as the application of section 207(b) is concerned. * * *

Subsequently the Oregon design standards for highways carrying traffic of 3,000–5,000 vehicles were discussed and it was noted that Oregon State Highway Department officials advised that such standards were merely guidelines and that in each particular highway relocation or improvement a prospectus is prepared which gives the design standards to be used as a roadbed section, the number of traffic lanes, the type of interchanges and other criteria. To demonstrate such new standards attention was invited to the fact that Oregon was then constructing the North Santiam Highway out of Salem to the standard of the modified interstate classification then proposed for U.S. 30.

While the evidence of record was such that we could not render an opinion with respect to the design criteria to be followed in calculating the costs for which the Corps of Engineers would be liable we stated that—

> * * * if the State of Oregon wishes to impose design criteria of standards higher than those contained in the published documents referred to, the State should be required to show, at the very least, that the higher design criteria have been and are being maintained on comparable roads.

As previously indicated, this statement followed a discussion of the State design standards for highways carrying 3,000–5,000 vehicles and was made after we had stated in such decision, as quoted above, that where a highway is classified by the use of design standards which relate to projected future traffic rather than current traffic, such classification is meaningless insofar as the application of section 207(b) is concerned. Consequently such quoted statement did not refer to design criteria based on projected future traffic but referred rather to the standards to which the State would then construct a road to accommodate a daily traffic count of 3,000 vehicles, i.e., a road which could handle between 3,000 and 5,000 vehicles daily.

A similar matter involving standards for anticipated traffic was considered in 41 Comp. Gen. 255 (1961) wherein it was stated, in effect, that in the relocation of a road the use of superior design standards based on anticipated future traffic constituted betterments the excess cost of which must be borne by the State inasmuch as the legal obligation of the Corps of Engineers is to provide relocated highways designed only to existing State standards for traffic volume at the time of taking. In our view there is a distinction between projecting future traffic on a case-by-case (i.e., a road-by-road) basis to determine the classification of a road and incorporating into design standards features that will enable a road to handle a range of traffic (such as between 5,000 and 10,000 vehicles daily). That is to say, there is a difference between design standards which provide that all new roads in a State with an estimated daily traffic count between certain ranges (e.g., between 5,000 and 10,000 cars per day) shall be built to certain standards and those design standards which provide for using the current daily traffic count as a base and then projecting future traffic over a 20-year period on a road-by-road basis to determine the classification of each road to be constructed and the standards to which it will be built.

Where traffic is projected on a case-by-case (road-by-road) basis, the traffic at the time of the taking would not be determinative of the classification of the road; rather the projected future traffic would be the controlling factor as to the classification and the design standards

to which the road would be constructed. In our opinion section 207(c) does not contemplate the use of projected future traffic to determine the classification and the design standards to which a relocated road is to be constructed. In the other situation mentioned above traffic at the time of the taking would be the controlling factor and all highways (relocated or proposed new highways) with the same current traffic count (estimated or actual) would be given the same classification and, hence, constructed to the same design standards. An example of this would be where roads with a daily traffic count of between 5,000 and 10,000 vehicles are required by the State standards or practice to be built to certain standards. In such a case if the current daily traffic count is only 6,000 vehicles and the road is built to standards which will enable it to handle up to 10,000 vehicles, it may be said that the standards incorporate features to handle anticipated future traffic. However, these standards would be applicable across the board to all roads in the State and there would be no projection of traffic on a case-by-case basis to determine the classification of any one road. Under standards providing for a projection of traffic to determine road classifications, two roads with the same traffic count at the time of the taking might be given different classifications based on the projected traffic count. As indicated above this would not be consistent with section 207(c) and, in our opinion, would be in violation of such section insofar as the use of Federal funds is concerned to pay the excess construction costs incurred to build the highway to meet the needs of the projected future traffic.

Further, to hold that in the relocation of a road the new road may be constructed at Federal expense to standards designed to accommodate future traffic would for all practical purposes eliminate almost any situation in which a State could be required to contribute to the cost of betterments—as required by section 207(c)—particularly if the traffic volume were to be projected over the number of years that the highway could be expected to be serviceable.

In light of the foregoing it is our view that whether a State, in either its published standards or in its actual practice, projects future traffic to determine the classification of a road, the Corps may not pay any construction costs (in relocating a highway) related to providing for the projected future traffic, since the road classification in such case would not be based on the traffic count at the time of the taking (as required by section 207(c)) but rather on some projected future traffic count.

As indicated above, however, Federal funds may be used to construct relocated highways to a State standard or practice which provides for using the current daily traffic count to determine the road

classification, even though the standards or practice provide for construction of roads which will handle a range of traffic so that such standards or practice may be considered to incorporate features to handle anticipated future traffic.

Accordingly, since it appears from the present record that construction of the second bridge was based on a projected traffic count and not on the traffic count at the time of the taking, such bridge is not authorized to be constructed with funds available to the Corps of Engineers.

[B-169913]

Contracts—Negotiation—Requests for Proposals—Defective—Predetermined Resources for Performance

A request for proposals to operate an Air Force facility overseas issued pursuant to the authority in 10 U.S.C. 2304(a)(6) to negotiate contracts for services outside the United States that failed to disclose predetermined minimum resource levels was defective and contributed to the rejection of all but the highest priced offer as technically unacceptable on the basis that sufficient resources to perform were not demonstrated, and although the contract awarded was contrary to the "competitive negotiation" requirements of 10 U.S.C. 2304(g), because of the essentiality of the procurement, it will not be disturbed. However, although an offeror's judgment of resources needed to perform is a major factor in determining capacity to perform and may be considered in determining a competitive range, an agency must also meet its obligation by disclosing minimum needs to insure maximum competition.

To the Secretary of the Air Force, March 26, 1971:

We refer to a letter dated September 4, 1970, with enclosures, from the Chief, Contract Placement Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, furnishing our Office an administrative report on the protests of Universal American Enterprises, Inc., and Pacific Architects & Engineers, Inc. (PAE), against the award of a contract to Trans-Asia Engineering Associates, Inc., under request for proposals No. F62272-70-R-0027, issued by the Bangkok Area Procurement Office. This report was supplemented by letter, with enclosures, dated November 9, 1970. Pertinent portions of the administrative report of September 4, 1970, were made available to Universal and Steptoe & Johnson, counsel for Trans-Asia, for comment; and replies were received from each by letters dated October 24 and 19, 1970, respectively.

The following facts supported by the record are pertinent to our consideration. The solicitation was issued on March 12, 1970, to 12 sources pursuant to the authority in 10 U.S.C. 2304(a)(6) to negotiate contracts for "services to be procured and used outside the United States and the Territories, Commonwealths, and possessions." Three additional sources, one of which was Universal, requested and received

solicitations a few days after issuance. The solicitation, as amended, requested firm fixed prices on a 1-year and on a 3-year basis for furnishing operation and maintenance services at specified Air Force facilities in Thailand. Five proposals were received by the April 11, 1970, closing date. An examination of the abstract of proposals indicates that the following prices were submitted:

	1-year	3-year
PAE	$1, 832, 856	$5, 317, 704
Universal	1, 877, 424	5, 632, 272
Trans–World Airlines	2, 179, 284	6, 216, 408
Tumpane Co. Inc.	2, 344, 468. 00	6, 932, 507. 00
Trans-Asia	2, 452, 010. 38	7, 369, 199. 80

Upon technical evaluation, Trans-Asia was selected as the only acceptable source. All other proposals were rejected as technically unacceptable, and by letters dated May 2, 1970, each unacceptable offeror was so advised by the contracting officer. On May 9, 1970, negotiations were conducted and concluded with Trans-Asia. By telegram of May 24, 1970, Universal protested the matter to our Office; on June 10, 1970, we were advised, in accordance with paragraph 2–407.8 (b) (2) of the Armed Services Procurement Regulation (ASPR), that award had to be made because of the urgency of the procurement. Award was made to Trans-Asia on June 13, 1970, for $2,413,308 and covers a period of 1 year (July 1, 1970, through June 30, 1971), with options to renew for 2 additional years.

The basic question presented by both protests is whether the contracting officer's decision to conduct negotiations solely with Trans-Asia was contrary to the "competitive negotiation" requirements of section 2304(g) of Title 10, United States Code, as implemented in ASPR 3–805. From our review of the record, we must conclude that the protests are meritorious. Since we are advised that uninterrupted performance of the work under this contract is essential to the critical missions of all Air Force bases in Thailand in support of the Southeast Asia conflict, it would not be in the best interest of the United States to disturb the award. But for this justification our Office would not have hesitated in directing termination of the contract awarded to Trans-Asia. The supplemental report of November 9, 1970, states that due to a change in requirements, it is not intended to exercise the options to Trans-Asia's contract. We must add, as Universal urges, that should the requirements again change, any attempt to exercise the contract options would be objected to by our Office.

An undated "Narration of Procurement Action," signed by the contracting officer and the buyer, advances two reasons for the determinations of unacceptability: first, the narration cites "inadequately stated salary rates," which it is said would preclude obtaining and retaining the highly qualified personnel necessary for performance of the contract; second, great emphasis is placed on the failure of each of the protesters to comply with predetermined minimum resource levels (men, vehicles and radios) established in a 30-page document entitled "Technical Evaluation Standards, Thailand Utilities O&M Contract (RFP F62272-70-R-0027)," which was not made a part of the solicitation. With respect to the deficiencies in the resource levels, the tender of insufficient personnel is most heavily relied on. The contracting officer and the Chief, Contract Placement Division, have relied on these defects to support a conclusion that the proposals were not, as stated in the supplemental report of November 9, "within a competitive range from a technical point of view." We also note that in other portions of the record the proposals are labeled "technically non-responsive." Further, in an undated document entitled "Facts & Findings," the contracting officer quotes a digest of our decisions B-168190 (1) and (2) of February 24, 1970, in support of this proposition, and we are asked to conclude that these defects demonstrate a lack of understanding of the work.

The cited cases involved protests from two offerors which were not within a competitive range because their proposals were "technically unacceptable." Admittedly, after a review of the record, we concluded that the rejection was not an abuse of discretion; however, two significant differences between the cited cases and the instant case are worthy of mention: first, four firms were determined to be within the competitive range; second, resolution of the protests involved the disposition of disputed technical questions. Here, the question for resolution is not whether the four rejected proposals were so technically insufficient as to preclude meaningful negotiations, but whether the solicitation was so structured as to render the submission of acceptable initial proposals extremely doubtful. The answer to this question does not involve complex factual issues which require a special expertise to unravel.

ASPR 3-805.1, implementing 10 U.S.C. 2304(g), *requires* that written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. Numerous decisions of our Office recognize that the contracting officer has broad discretion in determining which offerors are in a competitive range. This discretion is not, however, without limits. A proposal is to be considered within a competitive range unless

it is so high in cost or so inferior technically that the possibility of meaningful negotiations is precluded. 47 Comp. Gen. 252 (1967); 45 *id.* 417 (1966). The decision to reject a particular proposal quite clearly cannot be divorced from a consideration of the factual context of the particular case. As a general approach, however, we have expressed the view that when the application of a mandatory requirement of a solicitation results in the elimination of all but one proposer, and its price is, initially, substantially in excess of the price of another proposer, the spirit and intent of 10 U.S.C. 2304(g) would not be served without further discussion to determine whether the other proposal, or proposals as the case may be, can be improved to meet the requirement. 47 Comp. Gen. 29, 53 (1967). Moreover, we believe that where, as here, inadequacies in the solicitation contribute to the elimination of all but one proposal from the competitive range, further discussions are essential. *Cf.* 48 Comp. Gen. 314 (1968). In this regard, instead of directly disclosing in the solicitation the predetermined resource levels, a more oblique approach was chosen.

The Chief, Contract Placement Division, draws attention to part I, section "D," and attachment 2 of the solicitation, which provide in part as follows:

Part I Section D Technical Proposal Specifications

(1) This proposal encompasses the operation and maintenance of critical utility plants and systems vital to the support of the USAF mission, health and welfare of USAF personnel and safety of aircraft operation throughout Thailand.

(2) Successful fulfillment of the requirements of this contract is contingent upon the contractor's ability to mobilize, by 1 July 1970, and *maintain a competent and dedicated workforce* to satisfy long range logistics planning, precise day to day operation and maintenance, and the ability to respond to unexpected failures. [Italic supplied.]

Attachment 2—Maintenance Power Plants/Equipment.

2. Other Requirements.

a. The contractor shall maintain a dedicated workforce at each designated base, at all times, capable of accomplishing all preventive maintenance, periodic inspections, repairs, overhauls, records maintenance and material control in support of all power plants and generators designated by paragraph II of the Statement of Work as a function of the base.

His letter of November 9, 1970, advises that "dedicated," as that term is used in the solicitation, means personnel permanently assigned to a position. It is urged that the use of this term viewed in the context of the solicitation's scope of work requirement for continuous operation or 99-percent reliability at the various installations would make the resource requirements obvious.

The "Technical Evaluation Standards," however, contain two and one-half pages of clear elaboration of the premises used by the contracting agency to arrive at the resource levels; that is, to give specific meaning to the terms "dedicated, continuous operation and 99% reliability." Because of the failure to set out the evaluation criteria con-

tained in the "Technical Evaluation Standards," it is our view that the failure of four of the offerors to discover the predetermined resource levels may as easily be attributed to vagueness and ambiguities in the solicitation as to a lack of understanding of the work.

We have recognized in cases of this nature that, while performance of the services requested—not the total number of resources provided—is the basis for the resulting contract, an offeror's judgment of the resources necessary is a major factor in determining the capacity of a firm to perform. See, e.g., B–166705, July 30, 1969. It is an "other factor" which may be considered in determining the existence of a competitive range. Obviously, a determination of the resources necessary to perform the work requires discerning judgment. Because of variables, such as the type and caliber of the personnel proposed, judgments may legitimately differ. This is true whether it is the offeror or the Government making the judgment. While it is appropriate to test an offeror's understanding of the work by requesting its judgment, we see no reason why the Government should not disclose its position to assist offerors in the preparation of proposals. This disclosure may properly take the form of realistic estimates, which may include an indication of maximum and minimum levels. However, where, as here, the contracting agency treats the failure of an offeror to meet predetermined levels as a matter of "responsiveness," it is incumbent on the contracting agency to clearly disclose in the solicitation its determination of what is required. In this context, such disclosure is, in our view, an integral part of the Government's obligation to state its minimum needs.

We strongly urge that action be taken to avoid recurrence of the foregoing circumstances and to insure that maximum competition is obtained in future procurements of services of this nature.

[B–171340]

Compensation—Overtime—Travel Time—Administratively Controllable

An employee performing a Sunday through Thursday tour of duty who when directed on Wednesday to travel 100 miles to report for temporary duty at 8 a.m. Saturday, travels on Friday and returns on Saturday instead of traveling Thursday and Sunday, regular workdays, is not entitled under 5 U.S.C. 5544(b) to overtime compensation for the travel time, which having been administratively controllable may not be considered employment. Even if the Saturday work was held to be administratively uncontrollable, in view of the advance notice to the employee, two other requisites must be met to qualify the travel time as hours of work—an official necessity for the services and at least two successive off-duty days of travel, and the travel requirement was not met by the employee.

To Beecher F. Lewis, United States Department of the Interior, March 26, 1971:

Further reference is made to your letter dated November 12, 1970 (reference SPA–FMF), and enclosures, requesting a decision as to the propriety of payment of a voucher in the amount of $54.95 in favor of Emil J. Borup, an employee of the Southwestern Power Administration (SPA), representing overtime pay for time spent in travel.

Mr. Borup says that on Wednesday, September 16, 1970, his supervisor instructed him to be at the Idalia, Missouri, substation at 8 a.m. on Saturday, September 19, 1970, a distance of approximately 100 miles from his official station, to take care of some switching which could not be scheduled during the week because it involved opening transmission circuit and the power loads were too great during the week to permit this to be done. He traveled by Government vehicle from his official station, Jonesboro, Arkansas, to Sikeston, Missouri (near Idalia), on Friday, September 18, 1970, from 4 p.m. to 8 p.m. in order to perform the scheduled work on Saturday morning. Due to inclement weather the work was canceled. He was credited with 1 hour "show-up" time from 6:30 a.m. to 7:30 a.m., Saturday, September 19, 1970, and he returned to Jonesboro traveling from 12 noon to 3 p.m. the same day.

Since Mr. Borup had worked 40 hours from Sunday, September 13 through Thursday, September 17, he was not scheduled to work on Friday, September 18 and Saturday, September 19. Thus, his supervisor submitted overtime daily work reports for him covering 4 hours on September 18 and 4 hours on September 19. On September 21 authorization for overtime work and compensation for the 8 hours involved was approved by the Deputy Administrator. He was paid overtime for 1 hour "show-up" time for September 19 from 6:30 a.m. to 7:30 a.m. However, overtime compensation for the time spent in traveling was administratively denied for the reason that since he was notified in advance of the "scheduled" switching the event was considered to be administratively controllable by his office and therefore cannot be considered as employment. The voucher represents a reclaim of the amount withheld from payment.

It is provided in 5 U.S.C. 6101(b)(2) that:

> To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

Section 5542, subchapter V or Title 5, United States Code, provides for the payment of overtime compensation for hours of work officially ordered and approved in excess of 40 hours in an administrative

workweek. Subsection (b) of that section, as amended by Public Law 90–206, approved December 16, 1967, provides in pertinent part as follows:

(b) For the purpose of this subchapter—

* * * * * * *

(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

* * * * * * *

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

In the instant case the requirement that the work had to be scheduled for performance on a Saturday (the employee's off-duty day) might be said to have been administratively uncontrollable. However, that fact alone is not sufficient where there is ample advance notice of the date services will be needed to qualify related overtime travel hours as hours of work. Two other requisites must be met--(1) there must exist an official necessity in connection with the administratively uncontrollable event, and (2) the scheduled start of the event must require travel during a period of at least two successive off-duty days. In other words, assuming an official necessity is present, then if the employee's travel during regularly scheduled hours would result in payment of at least 2 days of additional per diem in lieu of subsistence for off-duty days prior to the beginning of the scheduled event, travel may be required during off-duty hours and be regarded as resulting from an uncontrollable event. See B–169078, April 22, 1970. Here the employee could have been scheduled to travel Thursday afternoon during his regular duty hours. Although Friday and Saturday were his off-duty days, it does not appear that 2 additional days of per diem in lieu of subsistence would have been payable from the time he would have had to depart on Thursday afternoon until 8 a.m. Saturday morning, the time he was scheduled to perform the work.

With respect to the return travel on Saturday rather than on Sunday, the employee's next regular workday, there is no showing of an official necessity for his immediate return on Saturday. Accordingly, it is our view that Mr. Borup's travel time may not be considered to be work under the provisions of 5 U.S.C. 5544(b)(2)(B)(iv) for which overtime compensation is payable. See also B–164353, October 21, 1969; B–168948, April 8, 1970; B–170409, October 15, 1970; and B–170683, November 16, 1970.

The voucher, with attachments, is returned herewith and may not be certified for payment.

[B-171537]

Pay—Retired—Disability—Active Duty Recall—Subsequent Retirement

An Air Force officer who was placed on the temporary disability retired list in the grade of major effective June 1, 1968, recalled under 10 U.S.C. 1211 to active duty in the temporary grade of lieutenant colonel for 1 day, June 30, 1970, with date of rank from July 19, 1968, and then retired for years of service under 10 U.S.C. 8911 in the grade of lieutenant colonel effective July 1, 1970, is entitled to payment of the difference in retired pay between the grades of lieutenant colonel and major for the months of June and July 1970, since prior to July 1, 1970, the officer satisfied the requirements of 10 U.S.C. 1211(a)(1). The officer's entitlement to retired pay at the higher grade for the 2 months involved is not under 10 U.S.C. 8963(a), as he only "served" 1 day in the temporary grade, but under 10 U.S.C. 8961, which authorizes an officer to retire in the grade he "holds" not the grade in which he "served" on date of retirement.

To Lieutenant Colonel N. C. Alcock, Department of the Air Force, March 26, 1971:

Further reference is made to your letter of November 19, 1970 (file reference RPTI), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $253.50 in favor of Lieutenant Colonel Robert E. Cann, USAF, retired, representing the difference in retired pay between the grade of lieutenant colonel and that of a major for June and July 1970, under the circumstances there disclosed. Your letter was forwarded here under date of December 11, 1970, by the Deputy Assistant Comptroller for Accounting and Finance and has been assigned Air Force Request No. DO-AF-1107 by the Department of Defense Military Pay and Allowance Committee.

The record shows that by retirement orders dated April 26, 1968, Major Cann, Regular Air Force, was released from active duty on May 31, 1968, and placed on the temporary disability retired list in the grade of major effective June 1, 1968. By Special Order AB-1143 dated May 26, 1970, the officer, having been found physically qualified, was removed from the temporary disability retired list and was recalled to active duty in the grade of lieutenant colonel (temporary) for one day effective June 30, 1970.

By retirement orders dated May 25, 1970, the officer was to be released from active duty on June 30, 1970, and retired for years of service (10 U.S.C. 8911) in the grade of lieutenant colonel effective July 1, 1970. Thereafter, by orders dated June 8, 1970, the officer was reappointed to the active list of the Regular Air Force under 10 U.S.C. 1211 in the grade of lieutenant colonel with date of rank July 19, 1968, and lieutenant colonel USAF (temporary) with date of rank July 19, 1968, with the notation on the orders that he remain assigned to his present organization and station.

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You quote section 1211(a) of Title 10, U.S. Code, and you refer to the holding in our decision of August 30, 1967, 47 Comp. Gen. 141. You say that doubt also exists as to whether the officer is entitled to retired pay in the grade of lieutenant colonel under section 8961 of Title 10. You express the view that he would not be entitled to retired pay in the temporary grade of lieutenant colonel under section 8963.

Section 1211(a) of Title 10, provides in pertinent part that, with his consent, any member of the Army or Air Force whose name is on the temporary disability retired list and who is found to be physically fit to perform the duties of his office, grade, or rank shall:

(1) if a commissioned officer of a regular component, be recalled to active duty and, as soon as practicable, may be reappointed by the President, by and with the advice and consent of the Senate, to the active list of his regular component in the regular grade held by him when his name was placed on the temporary disability retired list, or in the next higher regular grade;

In our decision of August 30, 1967, 47 Comp. Gen. 141, cited above, we considered several questions concerning the applicability of certain provisions of law including 10 U.S.C. 1211(a), in the case of those members of the Regular components of the Army and Air Force who are subject to removal from the temporary disability retired list because of fit-for-duty determinations but who, being otherwise qualified, desire to retire under other statutory provisions rather than being returned to active duty. In answering questions 1, 2 and 3 in the negative, we said at pages 144 and 145:

* * * it is readily seen why a reappointment in the case of an officer and reenlistment in the case of an enlisted member, together with an actual recall to active duty as required by the statute, is necessary if the individual concerned is to be returned to active duty and regain his former status on the active list of his uniformed service. It would appear, therefore, that when the name of a member of the Regular Army or Regular Air Force is required to be removed from the temporary disability retired list other than for the purpose of transfer to the permanent disability retired list or separation from the service, his retired status is terminated and he has no active status. In the absence of some statutory provision authorizing the placement of such a member on a retired list, we are of the opinion that he must be reappointed or reenlisted, as the case may be, and placed on the active list of his Regular component as provided in 10 U.S.C. 1211 in order to establish a proper basis of eligibility for retirement under other applicable statutory provisions.

The above decision stands for the proposition that unless a member of a Regular component, whose name is removed from the temporary disability retired list, meets all the requirements of 10 U.S.C. 1211 applicable to him, no proper basis would exist for retiring him under some other statutory provision.

A Regular or Reserve Air Force commissioned officer who is retired or to whom retired pay is granted, is entitled to a retired grade equal to the highest temporary grade in which he served on active duty satisfactorily, as determined by the Secretary of the Air Force, for not less than 6 months. See 10 U.S.C. 8963(a). Unless entitled

to a higher retired grade under some other provision of law, section 8961 of Title 10 provides that a Regular or Reserve of the Air Force who retires other than for physical disability, retires in the Regular or Reserve grade that he "holds" on the date of his retirement.

It would seem that at the time the retirement orders of May 25, 1970, were issued there was some basis for questioning their validity since the officer had not then been recalled to active duty, nor had he been reappointed to the active list of the Regular Air Force as a lieutenant colonel. However, he was recalled to active duty by orders which were issued on the following day. Also, your attention is invited to the fact that on May 12, 1970, Robert E. Cann's nomination to the grade of lieutenant colonel was confirmed by the United States Senate. See page S. 7060, Congressional Record dated May 12, 1970 (116 Cong. Rec. 15142).

Since under the retirement orders the officer was not to be retired until July 1, 1970, and since prior to that time he was recalled to active duty and reappointed to the active list of the Regular Air Force in the grade of lieutenant colonel, the officer may be considered as having met the requirements of 10 U.S.C. 1211(a)(1).

In view of the fact that the officer was ordered to active duty in his temporary grade of lieutenant colonel and "served" only one day in that grade, he is not entitled under 10 U.S.C. 8963(a) to have his retired pay computed on the basis of such temporary grade. However, under the language in section 8961 of Title 10, an officer is entitled to retire in the Regular or Reserve grade that he "holds," not the grade in which he "served," on the date of retirement. Since there appears to be no basis for questioning that the officer in this case held the permanent grade of lieutenant colonel in the Regular Air Force on the date of his retirement, he is entitled under section 8961 to have his retired pay computed on the active duty pay of that grade.

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

[B–170038]

Contracts—Negotiation—Evaluation Factors—Manning Requirements

Although in the evaluation of offers, the information secured from a manning chart may be considered an "other factor" in determining whether an offeror is within a competitive range for the purposes of conducting the meaningful discussions required by 10 U.S.C. 2304(g), the price factor of an offer may not be disregarded and, therefore, an award of a contract to other than the lowest offeror, who had submitted an acceptable manning chart, under a request for proposals to furnish mess attendant services for 1 year with a 2-year renewal option was improper, but cancellation of the award is not required as it was made in good faith and on the basis of prior misinterpretations of the phrase

"price and other factors considered." However, the option should not be exercised and proposals resolicited under revised procedures, communicated to offerors and indicating the factors on which an award will be based.

To the Military Base Management of New Jersey, March 29, 1971:

Reference is made to your telegram of June 29, 1970, and subsequent correspondence concerning your protest under request for proposals (RFP) N00421-70-R-7568, issued by the Naval Air Station, Patuxent River, Maryland, on March 4, 1970, for mess attendant services for the period from July 1, 1970, to June 30, 1971, with an option for renewal for 2 years. The RFP stated that a firm, fixed-price contract would be awarded.

Section 11.2, Meal Hours and Estimated Number of Meals, of the RFP requested offerors to quote on three "options" for the services as follows:

11.2 Meal Hours and Estimated Number of Meals

a. Contractor requested to quote on the following options:

		Hours
Option 1:		
Breakfast	0600-0745	1. 75
Dinner	1100-1230	1. 50
Supper	1530-1745	2. 25
Night Meal	2300-0030	1. 50
Total		7. 0
Option 2:		
Breakfast	0400-0900	5. 0
Dinner	1030-1230	2. 0
Dinner—Sandwich line	1230 -1400	1. 5
Supper	1530-1730	2. 0
Night Meal	1730-0100	7. 5
(Weekend/Holiday Brunch)	0600-1400	.....
Total		18. 0
Option 3:		
Breakfast	0500-0830	3. 5
Dinner	1030-1300	2. 5
Supper	1530-1930	4. 0
Night Meal	2200-0030	2. 5
(Weekend/Holiday Brunch)	0600-1300	.....
Total		12. 5

The prices for the options on monthly and annual bases were to be inserted in spaces provided for such information on page two of the RFP. There is no indication in the record to show that offers were evaluated on other than option three.

Section 5.0, Notice to Offerors, of the RFP required all offerors to submit manning charts with their proposals in accordance with a format set forth in Attachment A of the RFP to show the estimated number of personnel required to perform the services for each half hour of a representative weekday and weekend day.

Additionally, section 9.36 of the RFP provided that the manning levels proposed by the contractor would become a part of the contract as follows:

9.36 Staffing Levels (Number of Employees)

The staffing levels entered by the Contractor on the Manning Charts (Attachment A) shall become an integral part of the contract, and the Contracting Officer may require that this staffing level be fulfilled should performance of this contract fall below acceptable standards. The Contractor may be required to make monetary adjustments for any manhours less than those specified, should the Contracting Officer determine that a less than satisfactory level of performance is caused by personnel staffing below that set forth in Attachment A, Manning Charts. *Notwithstanding the foregoing, the Contractor is responsible in any event for supplying sufficient personnel to perform the contract satisfactorily.* [Italic supplied.]

On April 9, 1970, the closing date set for receipt of proposals, proposals were received from eight offerors, including your concern, Manpower, Inc., and Dynamic Enterprises, Inc. After review of the offers, the contracting officer determined that the estimated manhours proposed by all the offerors to accomplish the work were less than the minimum considered necessary to perform the services. Accordingly, all offerors were advised that the Government's estimates were 538 hours for weekdays and 389 hours for weekend days, and were asked to submit revised proposals by May 22, 1970. All concerns responded by that date with revised proposals.

On the basis of the revised proposals received on May 22 the record indicates that the contracting officer concluded a fixed-price "oral" award with Manpower on June 8, 1970, although your company had submitted a price for the services which was $50 a month lower than Manpower proposed.

Subsequently, the contracting officer divulged Manpower's price to all other offerors, presumably on the basis that such action was required by Armed Services Procurement Regulation (ASPR) 3–508.3(a)(iv) quoted, as follows:

3–508.3 Post-Award Notice of Offerors.

(a) Promptly after making all awards in any procurement in excess of $10,000, the contracting officer shall give written notice to the unsuccessful offerors that their proposals were not accepted, except that such notice need not be given where notice has been provided pursuant to 3–508.2(a). Such notice shall include:

* * * * * * *

(iv) the items, quantities, and unit prices of each award; provided that, where the number of items or other factors makes the listing of unit prices impracticable, only the total contract price need be furnished; * * *

On June 9, 1970, Dynamic Enterprises, Inc., contacted the contracting officer and complained that the RFP did not contain the estimated number of monthly meals to be provided under the contract and that if negotiations were not reopened Dynamics would lodge a protest with

this Office in the matter. The record indicates that the contracting officer was subsequently directed to reopen negotiations and convey the estimated number of monthly meals to all offerors. The contracting officer accomplished this on June 11, 1970, and advised all offerors that any revisions to their proposals should be submitted by June 12, 1970.

Thereafter, you submitted a revised proposal which made your offer considerably lower in price than the revised proposal submitted by Manpower. In view thereof, the contracting officer mailed an award for the services to your concern on June 15, 1970.

This Office received a protest from Manpower on June 15, 1970, in which Manpower protested the public disclosure of its revised price which formed the basis of the June 8 "oral" award made to the concern. The company contended that such disclosure, when viewed in the context of the reopened negotiations concluded on June 12, 1970, constituted an unauthorized "auction" technique and maintained that the award to your company should therefore be canceled.

Presumably because of the protest the MBM contract was terminated by the procuring activity in late June 1970 and the "oral" award originally made to Manpower on June 8, 1970, was reinstated. As noted above, the Manpower price for this award was $50 a month more than the comparable price you proposed.

On June 29, 1970, you protested the termination of your June 15 contract. The essential thrust of your protest involves the proposition that it was improper for the procuring activity to effect an award to Manpower at a higher price when there was no indication that the procuring activity considered your manning proposal to be deficient. You also maintain that the procuring activity should have considered Manpower's offer to be nonresponsive because it failed to list man hours by function for each half hour period, as contemplated by the manning schedule format, and instead listed only lump-sum totals. Furthermore, you state that Manpower's offer should be considered nonresponsive because it took credit for certain contracts performed by its franchisees, but failed to identify a contract of its franchisee which you state was terminated for default. Accordingly, you request that we direct either cancellation of the Manpower contract and award to your concern, or a reprocurement of the remaining services.

With respect to your contention that Manpower's offer should have been considered nonresponsive since its manning schedule failed to list man hours by function for each half hour period, the pertinent provisions of the RFP are sections 5.0(a) and 9.36, which read as follows:

Section 5. NOTICE TO OFFERORS

(a) All offerors shall submit with their proposal, Manning Charts in the format of Attachment A, showing the estimated number of personnel required in each space each half hour of a representative weekday and weekend day to sat-

isfactorily perform the contract services. Nothing in this section, or elsewhere in this contract shall be construed as limiting the Contractor's responsibility for providing sufficient personnel to accomplish all of the requirements set forth herein.

9.36 *Staffing Levels (Number of Employees)*

The staffing levels entered by the Contractor on the Manning Charts (Attachment A) shall become an integral part of the contract, and the Contracting Officer may require that this staffing level be fulfilled should performance of this contract fall below acceptable standards. The Contractor may be required to make monetary adjustments for any man-hours less than those specified, should the Contracting Officer determine that a less than satisfactory level of performance is caused by personnel staffing below that set forth in Attachment A, Manning Charts. Notwithstanding the foregoing, the Contractor is responsible in any event for supplying sufficient personnel to perform the contract satisfactorily.

While Attachment A, to which reference is made in both of the sections quoted above, was obviously constructed so as to elicit information from offerors relative to their proposed staffing at half hour intervals, and such information was apparently intended for use (as you contend) in evaluating the offer, there is no provision in the RFP that an offeror's failure to submit all of the information contemplated by Attachment A would render his offer nonresponsive, or would otherwise require or result in rejection of his offer. In view thereof, and since the *total* number of man hours per each half hour period is set out on Manpower's Attachment A, and such information would appear to preclude any competitive bidding advantage to Manpower and apparently is considered sufficient by the procuring activity for contract administration purposes, we are unable to conclude that the deficiencies in Manpower's manning schedule would require or justify cancellation of its contract.

Your belief that Manpower's offer was nonresponsive because it failed to list certain contracts on which its franchisee defaulted is based upon information contained in a letter dated April 17, 1970, submitted with Manpower's offer in which the statement is made that "Manpower, Inc., has never defaulted a contract in our 22 years of business. Over 400 contracts successfully completed." You point out that elsewhere in the same letter Manpower lists contracts which were performed by various of its franchisees, and that one of such franchisees defaulted on a Government contract in December 1969. You contend that, since Manpower takes credit for contracts completed by its franchisees it should also assume responsibility for their defaults, and that its failure to do so in its letter of April 17 renders its offer nonresponsive.

It is our opinion that the information relative to contract completions and defaults, as set out in Manpower's letter of April 17, is for consideration in determining whether Manpower is a responsible offeror, rather than in determining whether Manpower's offer is responsive. Assuming that your advice relative to a default by one franchisee

is correct, the question raised thereby would be whether such information, if known to the contracting officer at time of award, would have required or supported a determination that Manpower, Inc., was not a responsible offeror. Since we are unable to conclude that one default in 400 contracts would require or support such a determination we must reject this portion of your protest.

With respect to that part of your protest which questions the award to Manpower at a higher total price than the price offered by MBM, the administrative reports submitted to our Office by the Navy in response to your protest state that the procuring activity considered an award to Manpower as most advantageous to the Government, notwithstanding the lower price submitted by your concern, since Manpower offered the "greatest total hours to meet the requirements at the lowest cost." Additionally, it is reported that the contracting officer determined that the "number of hours offered by Manpower provided the confidence necessary to assure adequate service on the basis of a standard of satisfactory. [sic]." We understand this to mean that a division of the estimated number of man hours in the manning schedules, into the lum-sum bid prices resulted in a lower price per man hour for Manpower than for your concern.

ASPR 3-805.1, which prescribes the negotiation procedures to be applied in the selection of offerors for negotiation and award, is an implementation of 10 U.S.C. 2304(g). That provision of law reads as follows:

> (g) In *all negotiated procurements* in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, *proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: Provided, however,* That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion. [Italic supplied.]

The quoted statute obviously contemplates that, in a negotiated procurement, procurement officials are to determine a competitive range, or a series of competitive ranges, for evaluation of the submitted proposals based on an analysis of price and "other factors," so that meaningful discussions may be conducted with those concerns submitting proposals within such ranges. In this connection our Office has noted that the information to be secured from an offeror's manning chart for the award of a mess attendant services contract is an "other

factor" in determining whether the offeror is within a competitive range for purposes of conducting discussions with that concern. B–167685, October 21, 1969.

In the instant procurement it is our opinion that the manning schedule must also be considered in the context of a factor other than price. Conceding that consideration of the manning schedule would be proper in determining whether the offer was responsive (i.e., whether the offeror proposed to adequately staff the operation in a manner contemplated by and acceptable to the procuring activity) it is our further opinion that an award should have been made to that responsible offeror who, in addition to submitting an acceptable manning schedule, had also submitted the lowest total price. In this connection, see 43 Comp. Gen. 353, 370 (1963) and 41 Comp. Gen. 484, 491 (1962), holding that Congress has denied the authority to negotiate contracts at premium prices in order to obtain supplies or services of superior quality.

We must therefore conclude that the subsequent use of acceptable manning schedules to determine the lowest price per estimated man hour, and the resulting award to Manpower on that basis, was improper. Since there is nothing in the record to indicate that your manning schedule was not acceptable, or that you were not considered a responsible bidder, and since your total bid price was lower than that of Manpower, we must conclude that the award to Manpower was improper.

The remaining question is whether the action of the contracting officer, in awarding a contract to Manpower was so plainly or palpably illegal as to require its cancellation. See *John Reiner and Company* v. *United States*, 163 Ct. Cl. 381 (1963), cert. denied, 377 U.S. 931 (1964); *Coastal Cargo Company, Inc.* v. *United States*, 173 Ct. Cl. 259 (1965); *Warren Bros. Roads Co.* v. *U.S.*, 173 Ct. Cl. 714 (1965). As indicated therein the question of whether the contracting officer was acting in "good faith" in making the award is a pertinent factor in determining whether the award is palpably illegal, and the factors which influenced the contracting officer's decision are material considerations in determining whether the award was made in good faith or whether it must be considered plainly illegal. In the instant case the record indicates that the contracting officer sought and obtained advice of Command Counsel before making the award. Additionally, it appears from the record in this, as well as other current protests involving the procurement of identical services at other Navy bases, that the phrase "price and other factors considered" in 10 U.S.C. 2304(g) was

rather generally interpreted as permitting award to other than the low responsive and responsible offeror if a slightly higher offeror included a significantly higher number of estimated man hours in his manning schedule. In view thereof, we are unable to conclude that the contracting officer was acting in other than good faith, or that there was no reasonable basis for his action, in awarding a contract to Manpower. Additionally, there is nothing in the record to indicate that Manpower had actual or constructive notice that it was not entitled to the award under the procedures followed in this type of procurement, or that it did not accept the award and proceed with performance in good faith. In view thereof, your request that the contract be canceled must be denied.

However, because of the number and nature of the questionable procedures which were followed in this procurement, we question whether the Government has received the benefits of full and free competition; and we are therefore advising the Secretary of the Navy by letter of today, that the options under Manpower's contract should not be exercised, and that proposals for services for the next fiscal year should be resolicited under revised procedures which will more fully advise offerors of the negotiation procedures to be followed and the factors on which an award will be based.

[B-170206]

Contracts—Negotiation—Evaluation Factors—Manning Requirements

The rejection under a request for proposals to furnish mess attendant services of the current contractor on the basis of deficient manning charts without informing the contractor that the written advice as to proposed manpower hours had been misinterpreted by the contractor in its reply to concern price whereas its offer was considered outside the competitive range prevented meaningful negotiations with the contractor. The failure to inform offerors of all the evaluation factors to be considered and the relative weight of each factor although not conducive to obtaining proposals offering maximum competition and the most reasonable prices, the circumstances of the award do not disclose abuse of discretion by the contracting officer on any basis for imputing bad faith on his part so as to affect the legality of the contract awarded and, therefore, the award will not be disturbed.

To Dynamic Enterprises, Inc., March 29, 1971:

Further reference is made to your letter of June 27, 1970, sent through the contracting officer, and subsequent correspondence to our Office protesting the award of a contract to Military Base Management, Inc. (MBM), under Solicitation No. N00204-70-R-0029, issued

by Naval Air Station, Pensacola, Florida. This procurement is also the subject of a protest filed by Manpower Incorporated, of Jackson, Mississippi.

The subject RFP, issued on March 16, 1970, solicited offers for furnishing labor and materials to perform mess attendant services in Subsistence Building 122 at the Naval Construction Battalion Center, Gulfport, Mississippi, during the period July 1, 1970, through June 30, 1971.

Section 5.0(a) of the RFP provided that:

SECTION 5.0—NOTICES TO OFFERORS

(a) All offerors shall submit with their proposal, a Manning Chart in the format of Attachment A, showing the estimated number of personnel required in each space each half hour of a representative weekday to satisfactorily perform the contract services. Nothing in this section, or elsewhere in this contract shall be construed as limiting the Contractor's responsibility for providing sufficient personnel to accomplish all of the requirements set forth herein.

With respect to the manning chart, section 9.36 of the RFP provided that:

9.36—Staffing Levels (Number of Employees)

The staffing levels entered by the Contractor on the Manning Charts (Attachment A) shall become an integral part of the contract, and the Contracting Officer may require that this staffing level be fulfilled should performance of this contract fall below acceptable standards. The Contractor may be required to make monetary adjustments for any manhours less than those specified, should the Contracting Officer determine that a less than satisfactory level of performance is caused by personnel staffing below that set forth in Attachment A, Manning Chart. Notwithstanding the foregoing, the Contractor is responsible in any event for supplying sufficient personnel to perform the contract satisfactorily.

Ten firms submitted offers in response to the solicitation. Review by the contracting officer and the Food Service Officer indicated that further negotiations were required with the offerors in order to resolve uncertainties in the offers submitted. At this time it was noted that the manning charts issued with the solicitation were misleading in that a separate chart was furnished for the weekday period of Monday through Friday, and one for the weekend day period of Saturday, Sunday, and holidays. However, section 11.7(a)(1) of the specifications required operation of four serving lines on Saturday, as was required Monday through Friday, the only difference being that it was estimated that a fewer number of meals would be served on Saturday. Therefore, by letter of May 8, 1970, all offerors were specifically informed of this discrepancy and were furnished revised manning charts marked "Weekday Monday through Saturday" and "Weekend day Sunday/Holiday," and were allowed to submit revised

proposals. All offerors except your company revised their manning charts, and the proposals were then as follows:

Offeror	Yearly Amount (Net)	Total Hours of Manning Offered Yearly
Manpower of Jackson	$239, 932. 80	108, 720
JCM Corporation	266, 109. 63	109, 820
Industrial Maintenance	269, 310. 00	95, 127. 5
John Chrisman & Associates	270, 832. 00	116, 957
Space Services of Georgia	271, 080. 00	123, 840
Dynamic Enterprises	280, 530. 00	116, 126. 5
Military Base Management	297, 000. 00	127, 075
Worldwide Services	299, 248. 06	129, 507
Webster Contractors	303, 857. 00	121, 762. 5
Diversified Services	321, 588. 00	131, 410

In his report to our Office the contracting officer advised that after review of the final offers he concluded that the unrevised offer of Dynamics did not meet the solicitation requirements in that its manning charts indicated none of the serving lines would be staffed during the Saturday breakfast period from 0600 to 0715 and sufficient manning was not provided to man four serving lines during the dinner period from 1130 to 1245 on Saturday. Consequently, he determined that MBM had proposed the most advantageous offer to the Government, price and other factors considered, since "of all the acceptable offers, MBM's proposal offered more hours at less cost as compared to the other acceptable offers," and award was made to MBM on June 24, 1970. By letter of the same date, the contracting officer advised your firm of the award to MBM and stated "Your proposal was unacceptable because of insufficient manning. Deficiencies were evident in all cleaning and food handling areas on Saturdays, and in the vegetable preparation room, the passageways, heads, offices, back dock and bake shop areas."

The basis of your protest is primarily that the contract was negotiated in bad faith in that the Contracting officer's letter of May 8, 1970, indicated your proposed manning schedules was acceptable to the Government, but the contracting officer later rejected your proposal because of the reasons stated above. You also contend that the contracting officer should have advised you that your interpretation of the May 8 letter was incorrect.

The letter of May 8 advised in pertinent part:

* * * It should also be noted that while *estimated meal breakdown reflects* substantially fewer meals on Saturdays, Section 11.7(a)(1) requires operation of four (4) serving lines on Saturday as is required Monday thru Friday.

Your proposal has been evaluated and we feel that either a proposal revision or detailed explanation in one area is necessary.

1. It does not seem reasonable that you can profitably furnish the number of hours proposed at your present price offer. In order to prevent placing your firm in a very precarious financial position based on your present proposal, please submit your rationale supporting the hours proposed at the present price offer.

Certain information relating proposed manhours to the Government's estimate has been inadvertently disclosed to some firms. This makes it necessary for the Government to so advise all offerors if undue competitive advantage is to be avoided. You are cautioned that this information release is not intended as a precedent for negotiating mess attendant contracts generally, and is made necessary only in the interest of competing firms who are not privy to such data. Accordingly you are advised that your proposed weekday manhours were approximately 93% of the minimum amount originally estimated by the Government as being required to satisfactorily perform the required services. * * *

By letter dated May 15, 1970, you responded to the aforementioned letter as follows:

You mentioned that our manhours totaled only 93% of the Government's original estimate, but did not state that our proposal required revision in this area. We have inferred, then, that the manning charts submitted are fully adequate for the work required, and indicate technical competence and understanding of the project. The charts were carefully prepared, and reflected, among other things, the experience gained from our operation of that building for over a year and a half. Our staffing, combined with our experience, capability, and determination, will provide an outstanding service. As in the past, should the price offered and/or the staffing shown be inadequate, we will provide the service regardless. If there is a deficiency in either, the loss will be that of Dynamic and not that of the Navy.

Then after explaining how the hours you offered were "cost out," and the amount available for premium pay, overhead, general and administrative expenses, and profit, you stated:

* * * That amount is determined by judgment, however, and is based on many considerations. It is recognized that through the option clause we have an opportunity to operate three years if the service is of sufficiently high quality. During the past five years, Dynamic has at a large number of locations been able to perform contracts in an outstanding manner at substantial savings from the original manning charts. While we do not commence a contract with this intent, it would not be proper to price proposals without recognizing this experience as a factor. Taking all business as a whole, were we to compute costs without such consideration, we would in the long run be charging the government more than a reasonable price for services performed. The government would thereby be denied one of the principal benefits of contract versus in house services.

The contracting officer considers that the inferences drawn by Dynamics from the May 8 letter are unwarranted from a reading of the context of the letter as a whole, and that the burden was more properly on your firm to contact the contracting officer before the clos-

ing date for submission of revised proposals so as to resolve any doubts. To this, you observe:

> * * * Even if the burden is, as suggested by the contracting officer, on Dynamic Enterprises, then Dynamic Enterprises more than fully met that burden in its letter of May 15. It is felt that that letter is more than clear in this regard. The time allowed to clarify any misunderstanding was more than adequate, as the Dynamic letter was sent 18 days before the closing of negotiations and 46 days before the commencement of the contract.
>
> Clearly had these alleged inadequacies in the staffing chart offered by Dynamic Enterprises been pointed out, they would have been corrected. They were sufficiently minor in nature that the same price would have been offered, and is offered, with the corrected manning charts.

You also contend in your initial protest letter that the Food Service Officer at Gulfport is a personal friend of the owners of MBM, which may have caused his opinion concerning the proposals to be biased in favor of that company. Later, you indicate that this statement was in the nature of a request for investigation by Government officials who were in a position to obtain conclusive knowledge of the facts. In this regard, by affidavit of July 24, 1970, the Food Service Officer denies knowing the owner of MBM or having ever met or communicated with him. In view thereof, and in the absence of evidence sufficient to show that the contracting officer's statement is incorrect, we see no basis for your contention that the Food Service Officer was biased in favor of MBM.

Turning then to the merits of your protest, in B-167685, October 21, 1969, in which we denied a protest of an award to your firm, we stated:

> In a negotiated procurement, the rules of formally advertised, competitive bidding, such as the requirement for award to the lowest responsive, responsible bidder, are not controlling and a contracting officer may take into consideration all factors deemed essential to the procurement goal. We view the information to be secured from an offeror's manning chart as an aid to the contracting officer in determining whether the offeror is within a competitive range for negotiation purposes. In this procurement, moreover, the manning chart represented the offeror's basic approach to performing the required services. The goal of this negotiated procurement was to procure services from a responsible source at fair and reasonable prices which are calculated to result in the lowest ultimate overall cost to the Government. See paragraph 3-801.1 of the Armed Services Procurement Regulation (ASPR). In addition, ASPR 3-806(a) states that "The objective of the contracting officer shall be to negotiate fair and reasonable prices in which due weight is given to all relevant factors, including those in 3-101." ASPR 3-101 states that when negotiations are entered into due attention shall be given to a number of factors, including "consideration of the soundness of prospective contractors' management of labor resources, including wage rates, number of workers and total estimated labor hours." ASPR 3-101(xv). Thus, it is evident that the determination of an appropriate level of manning necessary to perform the work under a proposed procurement is a legitimate and proper subject for negotiation. See B-166705, July 30, 1969.

We believe the above statement is equally applicable to the present situation. Further, we believe that in keeping with this rule, a more definitive statement should have been contained in the solicitation

advising offerors the exact role the manning charts were to play in the evaluation of offers, especially in view of the fact that offerors presently are advised that, notwithstanding the number of manning hours offered, the contractor is responsible in any event for supplying sufficient personnel to perform the contract satisfactorily, and are cautioned against placing undue emphasis on contract manning as the principal evaluation criterion. In this regard, we have held that sound procurement policy requires offerors to be informed of all evaluation factors and of the relative weights to be attached to each factor, B–167983, March 11, 1970. Therefore, we feel that the failure to so advise offerors in the instant procurement was not conducive to obtaining proposals offering the maximum competition and most reasonable prices.

While we do not question the contracting officer's final determination that your manning schedule was deficient in the specified areas of operation, we agree with your interpretation of the May 8 letter, i.e., that the requested explanation of your proposal was only in the area concerning pricing. We think that if meaningful negotiations were to be conducted, the contracting officer should have advised your firm that your interpretation of this letter was in error and that your then current offer was considered to be outside the competitive range.

It is our view, however, that the circumstances surrounding the award to MBM do not disclose such a clear abuse of discretion by the contracting officer, or that there is any basis for imputation of bad faith on his part, so as to affect the legality of the contract awarded to MBM. In view thereof we see no adequate basis for directing cancellation of MBM's contract and, to the extent your protest requested such action it is denied.

We are, however, advising the Secretary of the Navy that in the light of the questionable negotiating procedures used, exercise of the option in the contract awarded would be considered improper by our Office, and that offers for the services for next year should be resolicited under revised procedures which will more fully advise offerors of the factors on which an award will be based.

[B–169278, B–170840]

Contracts—Specifications—Qualified Products—Requirement—Waiver

The award of a contract for a road grader to the second low bidder offering a qualified product grader with a superior engine which was not listed on the applicable Qualified Products List as required by the appropriate Federal speci-

fication, and was modified by the contracting agency on the basis the superior engine that exceeded the minimum needs of the Government was essential for the area in which it was to be used, violated section 1-1.1101 of the Federal Procurement Regulations. Although an award should not have been made to the nonresponsive bidder since delivery and payment have been made, corrective action is precluded. Notwithstanding section 1-1.305.1 requires the use of Federal specification, exceptions are permitted, and since the Qualified Products List item is inadequate for the road grader needed, the agency may deviate from the Federal specifications by complying with the conditions in section 1-1.305-3.

To the Secretary of the Interior, March 30, 1971:

Reference is made to letter dated November 30, 1970, from the Deputy Assistant Secretary for Administration, and prior correspondence from the Director of Survey and Review, concerning the protests of The Galion Iron Works & Mfg. Co. under invitations for bids Nos. P-0-159 (B-169278) and P-1-91 (B-170840), issued by the Bureau of Land Management (BLM), Portland, Oregon, for road graders.

Invitation No. P-0-159, issued on December 4, 1969, solicited bids for furnishing one road grader, type I, size 5, in accordance with Federal Specification 00-G-630c as modified by BLM Equipment Specification No. 37. The Federal specification provided that the graders be Qualified Products List (QPL) items. Bidders were required to submit with their bids fully completed questionnaires on the technical details of the grader proposed to be furnished. Three bids were received and opened on December 30, 1969. Galion was the apparent low bidder at a price of $19,900 and the second low bidder was the Trail Equipment Company (Trail) at a bid price of $25,830. After evaluation of bids, the contracting officer concluded that the T-500A grader offered by Galion did not meet the technical requirements and on January 23, 1970, award of contract No. 53-500-CTO-233 was made to Trail. The grader has been delivered and accepted.

Galion protested against the award made under invitation No. P-0-159 on the basis that the unit offered by Trail did not meet the advertised specifications. Specifically, it contends that the BLM specifications made the procurement restrictive and proprietary to some manufacturers.

We note that BLM specification No. 37 provides that the desired road grader would be used in eastern Oregon (rough and mountainous country) and in elevations between 3,000 and 6,000 feet above sea level at temperature ranges between minus 25° F. and plus 125° F. Further, we observe that the weight and engine volume displacement specified in BLM specification No. 37 were consistent with the hard use expected for the grader, and that the specification by its terms was not restricted to one manufacturer. We found nothing of record to

indicate that the Trail unit was nonconforming on that Galion's bid was not fairly evaluated in the light of the advertised requirements. On the record, we find no reason to disagree with the determination that Galion's bid was nonresponsive.

Galion also contends that the Trail WABCO 440–H grader as powered by a Cummins H–743–C 160 engine was not on the applicable QPL. The initial administrative report of April 23, 1970, advised that the data submitted by Trail with its bid contained a statement that the Cummins H–743–C 160 engine offered with the 440–H grader had passed QPL test KM3–1. However, by letter of June 23, 1970, Galion was advised by the Acting Director of Survey and Review that its statement that the WABCO 440–H grader with the Cummins H–743–C 160 engine was not on the QPL was correct, and that the statement in the April 23 report was in error. The letter further advised that the bid submitted by Trail stated correctly that the WABCO 440–H grader "with GM power has passed the QPL Test."

While the Acting Director was aware of the fact that the WABCO–Cummins engine combination was not on the QPL, he believed it could be accepted—

> * * * Since the basic WABCO 440H grader was a qualified product, and since Paragraph 6.3 of the Federal specification indicates that qualification testing applies to the "basic grader and accessories," it was felt that use of the optional larger, better Cummins engine, in place of the standard GM 4–71 engine, was acceptable since it exceeded the technical requirements of the solicitation and the Federal specification. * * *

Galion was further advised that since the Cummins engine was a superior option to the basic grader, it was the Acting Director's opinion that the requalification of the WABCO 440–H grader with the Cummins engine was not required. We do not agree. It is evident from an examination of Federal specification 00–G–630c, as modified by BLM Equipment Specification No. 37, and from the content of the technical questionnaire that the road grader proposed to be furnished, together with its engine, must be listed on the applicable QPL. Insofar as is applicable here, QPL 00–G–630 shows a type I, size 5 grader, manufactured by the Westinghouse Air Brake Company, and designated as a model 440–H with GMC engine 4–71. While Trail offered the QPL model 440–H grader, it did not offer an engine appearing on this QPL. In fact, we have noted that Trail, in submitting its bid, answered "No" in responding to the invitation question "Does your bid, including the equipment, materials, or supplies offered, comply with the 'Specifications and Provisions' in this advertisement in every particular?"

Section 1–1.1101 of the Federal Procurement Regulations (FPR), which is governing in this circumstance, provides:

> (a) Whenever qualified products are to be procured only bids or proposals offering products which have been qualified prior to the opening of advertised

bids or the award of negotiated contracts shall be considered in making an award. * * *

The award of a contract on the basis of a bid offering a product not listed on the applicable QPL, where the bidder, as here, affirmatively stated that its offered product was on the list when, in fact, it was not, violated the above-quoted provision. Since Trail's bid as submitted was nonresponsive to the advertised requirements, it should not have been considered for award. *Cf.* 43 Comp. Gen. 839 (1964). While the Cummins engine offered with the 440–H grader may have exceeded the minimum needs as stated in the invitation, the fact remains that Trail offered a bid for a road grader on the QPL with an engine which was not qualified for use with that grader. Since delivery and payment have been made, our Office is precluded from taking any corrective action on the procurement under invitation No. P–0–159.

It has been reported that the contracting officer canceled invitation No. P–1–91, but proposes to readvertise on other than QPL specifications because there is no grader on the QPL that would meet the special service requirements in rugged, high altitude, wide temperature variation, and mountainous country.

FPR sec. 1–1.305–1 provides that "Federal Specifications shall be used by all executive agencies, * * * in the procurement of supplies and services covered by such specifications, except as provided in §§ 1–1.305–2 and 1–1.305–3." Section 1–1.305–3 states:

> When the essential needs of an agency are not adequately covered by an existing Federal Specification, and the proposed purchase does not come within the exceptions described in § 1–1.305–2, the agency may authorize deviations from the Federal Specification; * * *

If the QPL specifications are not adequate for BLM needs, as represented, there is authority under the foregoing regulations for the agency to deviate from a Federal specification, provided there is compliance with the conditions set forth in the subsections of 1–1.305–3.

[B–170421]

Post Office Department—Star Route Contracts—Readjustment Compensation—Method of Computation

The unilateral change by the Post Office Department from a so-called "operating ratio method" to a new formula to determine the readjustment of compensation under star route contracts pursuant to 39 U.S.C. 6423 whereby increases in profit are governed exclusively by additional capital expenditures incurred through purchase or maintenance of capital goods is not prohibited by the statute, and the denial of an adjustment is not considered a dispute concerning a question of fact within the meaning of the "Disputes" clause of the contract. Although section 6423 gives a star route contractor the right to ask for a readjustment of compensation and to expect a reasonable return, the Postmaster General has the discretionary authority to determine that the operating ratio method con-

verts a star route contract into an undesirable type of cost-plus contract whereby profit is allowed as a percentage cost.

To the Peoples Cartage, Incorporated, March 30, 1971:

Reference is made to your letters to this Office dated November 5, November 20, 1970, and January 19, 1971, and attachments to these letters, in which you claim that the Post Office Department acted improperly in changing the method of computing readjustments in contract price under the provisions of 39 U.S.C. 6423, which state as follows:

> (a) The Postmaster General with the consent of the contractor may readjust the compensation under a star route * * * contract for increased or decreased costs occasioned by changed conditions occurring during the contract term which could not reasonably have been anticipated at the time—
> (1) the original bid was made; or
> (2) the bond for a renewed contract was executed. * * *

The record shows that in June 1967 seven of your star route contracts were renewed for a period of 4 years each. Section 9(b) of the General Provisions in each of those contracts provides in substance for readjustment of compensation under the contract at the request of the contractor, as provided in 39 U.S.C. 6423. Section 9(b) further provides that a denial of such readjustment shall not be considered a dispute concerning a question of fact within the meaning of the "Disputes" clause of the contract. Also, Section 9(c) of the General Provisions provides for adjustment of compensation to reflect union agreements or statutes or regulations which become effective during the contract term, and section 11 provides for release of the contractor from the contract "under certain circumstances involving undue hardship to the Contractor."

It appears that in April 1969 you filed application for increased compensation under section 9(b) and 39 U.S.C. 6423. You report that in the past it had been the practice to allow a profit based on approximately the same ratio as existed when the contract was bid or renewed; but that this time you were notified by the Post Office Department (in late 1969) that the adjustment would be based on a new formula whereby increases in profit are governed exclusively by additional capital expenditures incurred through purchase or maintenance of capital goods, rather than the so-called "operating ratio method." As a result approximately $11,900 of the $51,160 per annum increase which you requested was disallowed.

You then filed an appeal with the Post Office Department (POD) Board of Contract Appeals. On August 14, 1970, the appeal was dismissed without prejudice (POD BCA No. 441) because of the specific language in section 9(b) of the General Provisions which excludes

application of the Disputes procedure to section 9(b) denials. You subsequently filed an appeal with our Office, as suggested by the Board of Contract Appeals.

As stated in your appeal to the Board, you believe that the "operating ratio method" is the proper way to determine the compensation adjustment for the following reasons:

a. It is common practice in the motor carrier industry to determine costs and rates applicable, using the operating ratio principle.
b. The Interstate Commerce Commission specifically refers to the operating ratio in dealing with rates and reports of carriers under their jurisdiction.
c. It is my understanding that P.O.D. "Regional Instructions" on pay adjustments dated Oct. 3, 1967, Filing No. 521–1 takes into consideration on Page 25 the entire question of the operating ratio, specifically referring to common carrier statistics. If there have been any changes to these instructions, other than previously mentioned, we are unaware of them.
d. In recent years, as the larger contractors such as Peoples Cartage became prominent, it was required that the amount of profit be submitted as part of the cost estimate when bidding. The operating ratio was always used by our company when submitting this information. It is interesting to note that many changes have taken place on Form 5478, and that these forms previously did not even have an item marked "profit" which probably accounts for some of the confusion concerning the Operating Ratio.
e. The ratio is a proper method of determining profit especially during periods of inflation because as costs increase, more dollars in the form of profit or retained earnings are necessary to conduct your business, and this can only occur if a proper ratio is maintained, even then, you never maintain the ratio during periods of inflation; because in applying the ratio in the motor carrier industry, it is always applied in arrears.
f. Since we are a Corporation, it is a generally accepted method of determining a return on our investment. When the Post Office Department curtails service, it has been and is done on a pro rata basis. Profit is also on a Pro Rata basis, as we are not allowed to keep the original dollar amount of profit as submitted with the bid, a one sided interpretation of the law, as is the case in the filing of our new application on Star Route 25010.

In addition, you contend that since the operating ratio method was used when your contracts were renewed, the Post Office Department should not be permitted to unilaterally change the procedure to the contractor's detriment during the contract period.

The Post Office Department concedes that section 6423 was intended to give a star route contractor the right to ask for readjustment and to expect a reasonable return for his work. However, the Department contends that the readjustment was clearly committed to the discretion of the Postmaster General and was to be processed under such regulations as he may prescribe (62 Stat. 477). Since 1948, when the law was enacted, a number of different methods of readjustment have been used by the Postmaster General. In 1964 the Post Office started to use the operating ratio method as an alternate to the Consumer Price Index (CPI) basis previously used. Finally, in 1969 the current method was adopted. The operating ratio method appears to have been abandoned because it came to be viewed as a means of converting the star route contract into an undesirable type of cost-plus contract whereby profit was allowed as a percentage of cost.

We agree that the operating ratio method does have the aspect of a cost-plus-a-percentage-of-cost type contract. In any case, our review of the legislative history of the statute confirms the Post Office Department's interpretation of its discretionary authority to make these readjustments. In B–78175, September 16, 1948, we reviewed the history of the then new legislation and we concluded that the Postmaster General in his discretion may adjust a star route contract so that the contractor will not only be relieved from any loss but will receive a reasonable return under the contract. Our decision did not indicate, however, that profit should be readjusted on the basis of any particular method. In 48 Comp. Gen. 719 (1969), we held that a new contract was created as a result of a section 6423 readjustment. This conclusion was confirmed in B–165493, dated December 29, 1970.

Consistent with the statute and our decisions, we see no basis upon which we could require the Department to accept the readjustment in compensation which you urge. Section 6423 provides that the readjustment must be mutually agreed upon. The fact that a new method of computing the readjustment was adopted by the Post Office Department after your contracts were renewed does not change the situation. As stated by the Post Office Department in its reply to your appeal, the statute does not provide for a method or formula for computing readjustments, nor does the contract. The Department does recognize that when a contractor files application for a readjustment under section 6423, the amount accepted by the Postmaster General should permit a "reasonable return" to the contractor for his work. In this regard, we note the statement of the Board concerning your readjustments that the contracting officer has offered new terms "* * * which take into account in some way operating ratio and profit."

Based on the record before us, we do not find the method used by the Post Office Department in computing section 6423 adjustments for your contracts to be contrary to law. Your references to other methods used by the Post Office Department, or by the Interstate Commerce Commission in dealing with rates and reports of carriers, are not relevant to a section 6423 situation. Accordingly, your request that we direct the Postmaster General to use your suggested method for determining the section 6423 readjustments for your contracts is denied.

[B–170498]

Bids—Buy American Act—Foreign Product Determination—Comparison of Foreign and Domestic Component Costs

In the evaluation under paragraph 6–104.4 of the Armed Services Procurement Regulation of microwave transistors of foreign make to be used in electronic equipment solicited under a request for proposals to determine if the price dif-

ferential imposed by the Buy American Act (41 U.S.C. 10a–d) should be considered, the transistors were properly held to be a domestic source end item as evidenced by the offeror's entry of "none" in the block entitled "Excluded End Products" of the Buy American Certificate, in view of the fact the cost—materials, labor, and other items of expense—of the power unit manufactured in-house and its case, which together with the transistor comprise the amplifier, exceed the cost of the foreign transistor, therefore, constituting the amplifier as a domestic source end product within the meaning of the Buy American Act.

Bids—Buy American Act—Buy American Certificate—Acceptance

Where an offer is accepted from an offeror who excludes no products from the Buy American Certificates, or otherwise indicates he is not offering a domestic source end item, the general acceptance of the certificate by contracting officials is proper since the offeror is legally obligated under the contract to furnish the Government a domestic source end product, and compliance with that obligation is a matter of contract administration which has no effect on the validity of the contract award.

Bids—Buy American Act—Foreign Product Determination—Cost Information

Although the cost information which procuring activities obtain when the domestic source of the item offered is questioned under the Buy American Act (41 U.S.C. 10a–d), need not be made public as a part of the bid, an agency should obtain sufficient information to ascertain that foreign materials constitute less than 50 percent of the cost of those materials directly incorporated in the item being procured.

To Avantek, Inc., March 30, 1971:

We refer to your protest by letter of July 29, 1970, against the award by the Departments of the Army and Navy of certain contracts to Watkins-Johnson Company (WJ) for the furnishing of electronic equipment. The procurements are identified as requests for proposals (RFP) DAHCO7–70–R–0185 and RFP DAHCO7–71–R–0002, issued by the Army Security Agency (ASA), Vint Hill Farms, Virginia, and request for quotations (RFQ) NOO173–70–Q–M766, issued by the Naval Research Laboratory (NRL), Washington, D.C.

The substance of your protest is that WJ uses transistors of foreign make in its equipment, the cost of which, you state, runs from 70 to 80 percent of the total cost of all of the components incorporated in the equipment, thereby requiring evaluation of Watkin's offers as foreign offers to which a price differential should be added for the purpose of evaluation under the provisions of Armed Services Procurement Regulation (ASPR) 6–104.4. When thus evaluated, you claim, Watkins would not be the low offeror on any of the procurements in question.

The Department of the Army has informed our Office that RFP DAHCO7–71–R–0002 has been canceled. Accordingly, only the remaining two procurements will be considered in this decision.

You state that under existing procurement practices, when a protest is made to a procuring activity that a particular bidder or offeror may be offering a foreign source end product as defined in the Buy American Act (41 U.S.C. 10a–d) clause incorporated in the procurement solicitation pursuant to Armed Services Procurement Regulation (ASPR) 6–104.5, the investigating Defense Contract Administration Services Region (DCASR) accepts as fact the unsupported statement of the particular bidder or offeror that it is not using foreign made components or that the cost of the foreign components which the producer is using comprises less than 50 percent of the total cost of all components used in the end product. In such circumstances, you claim, a verbal protest to the procuring activity against the acceptance of the questioned bid or offer is ineffective.

In line with the above, you urge that the procurement procedures be revised to require DCASR to request from the producer whose bid or offer is challenged a list of parts used in the end item, to verify the cost of such parts, and to clearly interpret the ASPR provisions relating to components in terms of material cost rather than the end item price. You further recommend that in those cases which involve protested awards a final source inspection be required to insure that any foreign components in the items to be shipped to the Government account for less than 50 percent of the total component cost.

With reference to the ASA procurement under RFP DAHCO7–70–R–0185, pursuant to which WJ was awarded contract DAHCO7–70–C–0243 for preamplifier assemblies, you state that the local DCASR office (DCASR-Burlingame, California), in response to a request by ASA for investigation regarding the use of foreign parts in the WJ equipment, simply reported to ASA that the representation by WJ that the foreign parts used by WJ did not comprise 50 percent of the cost of all components was valid. As to the Navy procurement, award of which is being withheld pending our decision on your protest, you state that NRL was similarly advised by DCASR that the procurement item, a low-noise microwave transistor amplifier with integral power supply, is not considered foreign under the ASPR provisions. We understand that the items under the ASA and NRL procurements are essentially the same and they both will be referred to as amplifiers.

The records made available to our Office on both of these procurements show that the solicitations specifically provided that the contracts would be subject to the provisions of the Buy American Act clause set forth in ASPR 6–104.5, which includes the following pertinent language:

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

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

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

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

* * * * * * *

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954. So as to alleviate the impact of Department of Defense expenditures on the United States balance of international payments, bids offering domestic source end products normally will be evaluated against bids offering other end products by adding a factor of fifty percent (50%) to the latter, exclusive of import duties. Details of the evaluation procedure are set forth in Section VI of the Armed Services Procurement Regulation.)

In the proposal submitted by WJ in response to the ASA solicitation, WJ made the entry "None" in the block entitled "Excluded End Products" beneath the Buy American Certificate on page 2 of the Standard Form 33 bid form, thus indicating that no end product was excluded from WJ's certification that each end product to be delivered would be a domestic source end product as defined in the Buy American Act clause. WJ's proposal was accordingly evaluated as a domestic offer and, so evaluated, it was low for the items which were awarded to it.

The NRL solicitation Standard Form 18, provided space on its face for offerors to furnish the city and country of origin "if the material you are offering is foreign made." WJ's low quotation carried no entry in this space, nor was there any indication elsewhere in the quotation as to the foreign product content of the equipment offered by WJ. The quotation was therefore regarded as a domestic offer for evaluation purposes.

The reports furnished to our Office by the Departments of the Army and Navy with respect to your protest of July 29, 1970, include reports by DCASR-Burlingame stating that DCASR representatives visited WJ's plant and discussed the respective procurements with WJ's contract administration personnel; reviewed purchase orders, cost data, and specifications; and made a visual examination of the microwave transistor amplifiers and the components which are di-

rectly incorporated into the amplifiers. In addition, representatives of our San Francisco Regional Office have also visited WJ and have inspected its records and observed the amplifiers and the foreign source microwave transistors which WJ uses in the manufacture of the amplifiers required under these procurements. Further, our representatives have also conferred with WJ's transistor supplier and with DCASR and have verified the respective foreign and domestic component costs as reported by DCASR.

The information thus obtained by DCASR and our Office is, of course, proprietary to WJ and was submitted on a confidential basis. While we may not divulge any specific cost data, you are advised that our evaluation of the cost information requires the conclusion that the cost of only one of the domestic components, the power unit which is manufactured in-house by WJ for the subject procurements, nearly equals the cost of the microwave transistors, which are the only foreign made parts in the WJ amplifiers. When the cost of power unit is combined with the cost of the case, another domestic component of the amplifier, the total cost of these two domestic components exceeds the cost of the foreign transistors, thus constituting the amplifier a domestic source end product, as defined in the Buy American Act clause even if the transistors classify as components as you contend.

In your letter of July 29, 1970, you compare the estimated cost of the transistors with the estimated cost of materials and/or components used in the manufacture of a typical amplifier. A component is defined in the Buy American Act clause as meaning those articles, materials and supplies which are directly incorporated into the end products, and the comparative cost of the domestically manufactured components and the foreignly manufactured components serves as the basis for determining whether a manufactured article being acquired under a contract can be classified as a domestic source end product. Although you included in your computations the cost of labor to machine and assemble the case for the amplifier (which case you seem to accept as being a domestic component and estimate its cost at $50), you did not include labor and manufacturing costs for other components of the amplifier. As indicated above, it is our view that the power unit may also be reasonably considered as being directly incorporated in the amplifier, and is therefore a component of that end product within the meaning of the Buy American Act clause. In this connection we understand that the power assembly, while composed of individual electrical parts, is incorporated into a metal case or shell, is identifiable as a distinct unit, may be used separately, and serves the basic

function of the power supply of the amplifier. In such context we believe the amplifier's power unit may be compared with the electric motor which was viewed as a component of the circulating pump unit considered in our decision which is reported at 46 Comp. Gen. 813 (1967).

It is obvious that in purchasing components, the price paid for the components includes, in addition to the cost of materials, the cost of the labor and other items of expense related to the manufacture of the components. As to the components which a Government contractor manufactures in-house, it is equally apparent that the expenses incurred in producing those items constitute as much a part of the cost of the components as the cost of the materials used therein. In this case, therefore, in determining the cost of the power unit in WJ's amplifiers, we have included, under the principle enunciated in 39 Comp. Gen. 695 (1960), as elements of the cost of that component not only the cost to WJ of the materials used therein but also its costs for labor, plus overhead and general and administrative rates, as approved by the Defense Contract Administration Area, Palo Alto, California. When so computed, the cost of the power unit component and the cost of the case are sufficient to constitute the WJ amplifier a domestic source end product.

As to the general acceptance of the Buy American Certificate by contracting officials, we have held that where an offer is accepted from an offeror who excludes no products from the certificate or otherwise indicates that he is not offering a domestic source end item, the offeror is legally obligated under its contract to furnish the Government a domestic source end product, and compliance with that obligation is a matter of contract administration which has no effect on the validity of the contract award. B-150652, July 19, 1963; B-153899, September 24, 1964; 47 Comp. Gen. 624, 626 (1968).

In line with the foregoing, we find no objection to the award to WJ of either the ASA contract or the proposed NRL contract, and your protest against such awards is therefore denied.

As to the information which procuring activities should obtain when the domestic source of the item offered is questoned, we have stated that detailed cost information need not be made public as a part of the bid. 39 Comp. Gen. 695, 699 (1960). We believe, however, that the agency should obtain sufficient information to ascertain that foreign materials constitute less than 50 percent of the cost of those materials directly incorporated in the item being procured. We are therefore calling this matter to the attention of the contracting agencies involved in your protests.

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or sex, which is expressly prohibited by 5 U.S.C. 7154(b) and 5 CFR 713.202, as she qualified for a GS–11 position and was assigned and performed work warranting a GS–11 classification, correction of personnel action and adjustment in pay is legally justified on basis original classification and appointment as GS–9 was illegal, and corrective action is not viewed as retroactive promotion such as ordinarily is prohibited by law. 581

Double

Civilian and disability compensation

Regular Air Force sergeant retired pursuant to 10 U.S.C. 8914, who while employed as civilian in Federal Govt. loses use of finger, is not entitled to concurrent payment of civilian disability compensation and military retired pay on basis the compensation would be paid for permanent partial disability and not temporary total disability, thus bringing payment within exception to dual payment prohibition contained in 5 U.S.C. 8116(a). In application of limitation in sec. 8116(a), there has been no recognition of distinction between temporary and permanent disability, as statute makes no such distinction insofar as concurrent receipt of military or naval retired pay is concerned, and legislation would have to be enacted to permit concurrent payment of retired pay and disability compensation. 491

Concurrent military retired and civilian service pay

Reduction in retired pay

Not required

Although civilian position held by retired officer of Regular component of uniformed services in U.S. Army Special Services Agency, Europe—local nonappropriated fund activity—is position subject to reduction of retired pay prescribed by 5 U.S.C. 5532(b), reduction is not required in officer's retired pay as reduction would exceed amount officer receives from civilian employment with additional reduction in retired pay, result that is not within contemplation of Dual Compensation Act of 1964, for it is unreasonable to require retired officer to accept smaller amount after employment in civilian position with Govt. than amount of retired pay he was receiving before that time. 604

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Dual Compensation Act

Disability "as a direct result of armed conflict," etc.

Conclusion that exemption provision in Dual Compensation Act (5 U.S.C. 5532(c)) to requirement that retired pay of Regular officer must be reduced when employed as civilian by Federal Govt. (5 U.S.C. 5532 (b)) applies only if retirement was direct result of armed conflict, or was caused by instrumentality of war in wartime, is justified on basis of legislative history of provision and its longstanding administrative interpretation; and, therefore, *Mross* v. *United States*, 186 Ct. Cl. 165, holding that disability—perforated eardrum—that was war-incurred but was not disabling and did not constitute significant factor in officer's retirement met requirements of exception to dual compensation restriction will not be followed as case is based on particular facts involved. 480

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Traveltime

In administration of inspection and grading programs, when events are not within control of Dept. of Agriculture, and Agricultural Commodity Grader is required to travel 8½ hours on Sunday to report for duty at 8 a.m. on Monday to inspect and checkload shipment of peanut butter being purchased by Dept., travel is compensable at overtime rates prescribed in 5 U.S.C. 5542(b)(2)(B), as travel could not have been scheduled within employee's regular hours. Fact that Govt. is reimbursed for all costs incurred in providing inspection and checkloading services has no bearing on employee's entitlement to payment of overtime for services performed 519

Under Agricultural Marketing Act of 1946 (7 U.S.C. 1622), Dept. of Agriculture is required to perform inspection and grading services when products are shipped or received in interstate commerce; and, therefore, required services are not within control of Dept. to enable scheduling of inspector's travel during regular duty hours. Therefore, Agricultural Commodity Grader whose travel could not be scheduled during regular duty hours is entitled to be compensated for travel at overtime rates prescribed by 5 U.S.C. 5542(b)(2)(B) 519

Traveltime

Administratively controllable

When employee of Dairy Division of Division of Consumer and Marketing Services of Dept. of Agriculture is ordered to travel on Sunday in order to attend two national milk hearings scheduled during week, one on Monday morning and other on Friday, requirement in Administrative Procedure Act, 5 U.S.C. 554(b), which provides that convenience of participants should be considered in fixing time and place for hearings, does not remove scheduling of hearings from Dept.'s control, for while provision imposes rule of reasonableness upon agency's freedom in scheduling hearings, it does not require hearings to be scheduled at any particular time. Therefore, traveltime of employee is not traveltime within meaning of 5 U.S.C. 5542(b)(2)(B) that is compensable as overtime 519

Traveltime of Food Inspector in Consumer Protection Program of Division of Consumer and Marketing Services of Dept. of Agriculture, performed from 9 p.m. Sunday until 4 a.m. Monday—hours outside regular tour of duty—in order to relieve inspector who had been granted nonemergency annual leave, is not compensable as overtime since in scheduling annual leave the need for relief inspector should have been considered and travel of relief inspector scheduled within regular duty hours. Also, return travel of relief inspector outside regular tour of duty was not required by event that could not be scheduled or controlled administratively; and, therefore, return travel from inspection site is not compensable under 5 U.S.C. 5542(b)(2)(B) as overtime 519

Employee performing Sunday through Thursday tour of duty who when directed on Wednesday to travel 100 miles to report for temporary duty at 8 a.m. Saturday, travels on Friday and returns on Saturday

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Overtime—Continued
Traveltime—Continued
Administratively controllable—Continued
instead of traveling Thursday and Sunday, regular workdays, is not entitled under 5 U.S.C. 5544(b) to overtime compensation for traveltime, which having been administratively controllable may not be considered employment. Even if Saturday work was held to be administratively uncontrollable, in view of advance notice to employee, two other requisites must be met to qualify travel time as hours of work—an official necessity for services and at least two successive off-duty days of travel, and travel requirement was not met by employee---------- 674
Status
Waiting for transportation
Dept. of Agriculture employee returning from performing temporary duties of Agriculture Commodity Grader, whose air flight was delayed, is entitled under 5 U.S.C. 5542 to compensation for "usual waiting time" for interrupted travel that is prescribed by Federal Personnel Manual, which means time necessary to make connections in ordinary travel situation, consistent with performance of travel as expeditiously as possible, with extension of time for heavy holiday traffic and inclement weather, minus time for eating and rest. As traveltime that cannot be scheduled or controlled qualifies for work, employee whose regular tour of duty is 8 a.m. until 4:30 p.m., having traveled from 3:10 a.m. to 10:30 a.m. on Thanksgiving Day, is entitled to payment at overtime rate from 3:10 a.m. to 8 a.m. and at holiday premium pay rate from 8 a.m. to 10:30 a.m---------- 519
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Retroactive
Appointment correction
Upon determination that employee who received excepted Schedule B appointment at grade GS–9 was discriminated against because of race or sex, which is expressly prohibited by 5 U.S.C. 7154(b) and 5 CFR 713.202, as she qualified for a GS–11 position and was assigned and performed work warranting a GS–11 classification, correction of personnel action and adjustment in pay is legally justified on basis original classification and appointment as GS–9 was illegal, and corrective action is not viewed as retroactive promotion such as ordinarily is prohibited by law---------- 581
Wage board employees
Coordinated Federal wage system
Compensation adjustments
Employees in wage area converted to Coordinated Federal Wage System in July 1969 who subsequent to consolidation in November 1969 with another wage area became entitled to higher wage rates retroactively prescribed by "Monroney Amendment," 5 U.S.C. 5341(c), may be paid higher rates from retroactive effective date of amendment to date their wage area was consolidated but not beyond that date, for to do so would require giving retroactive effect, contrary to general rule, to Oct. 2, 1970, salary retention provision added to Coordinated Wage System to provide for indefinite salary retention for employees adversely affected by changes in wage area boundaries---------- 635

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Wage board employees—Continued

Increases

Retroactive

Wage adjustments

In retroactive application of Monroney Amendment wage schedule, 5 U.S.C. 5341(c), pursuant to U.S. Civil Service Bulletin No. 532-9, dated Sept. 23, 1970 when comparison of individual wage payments evidences previous wage schedule payments were less than employee is entitled to under Monroney Amendment, employee should be paid difference; and if previous payment was greater than amount due under amendment, employee may retain difference. However, where comparison of individual payments shows that underpayments equal overpayments, no payment is due employee..... 495

CONTRACTS

Amounts

Estimates

Requirements contracts. (*See* Contracts, requirements)

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Awards

Cancellation

Erroneous award

Bid evaluation base

In evaluation of offers under request for proposals to furnish professional architectural and engineering services, application of transition cost factor to offer of only contractor who had not previously performed services without apprising offerors that this factor would be utilized in effecting award of contract thus eliminating contractor who was lowest priced responsible offeror from competition was unwarranted and action was inconsistent with sound procurement policy which dictates that offerors be informed of all evaluation factors and relative importance of each factor, nor was waiver of transition costs for successful offeror because of available qualified personnel justified. Therefore, since award was patently erroneous and without regard to established principles of competitive negotiation, contract should be terminated..... 637

Cancellation not required

Award of contract for road grader to second low bidder offering qualified product grader with superior engine which was not listed on applicable Qualified Products List as required by appropriate Federal specification, and was modified by contracting agency, on basis superior engine that exceeded minimum needs of Govt. was essential for area in which it was to be used, violated sec. 1–1.1101 of Federal Procurement Regs. Although award should not have been made to nonresponsive bidder since delivery and payment have been made, corrective action is precluded. Notwithstanding sec. 1–1.305.1 requires use of Federal specifications, exceptions are permitted, and since Qualified Products List item is inadequate for road grader needed, agency may deviate from Federal specifications by complying with conditions in sec 1-1.305–3..... 691

Labor surplus areas

Certificate of eligibility

Validity

Although first preference labor surplus certificate of eligibility furnished by small business concern was invalid as bidder had no plant in

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Validity—Continued
labor surplus area at time certificate was issued, plant being acquired month after award of set-aside portion of procurement for detecting sets to concern on basis of labor surplus preference, award need not be canceled as it is voidable at Govt.'s option rather than void *ab initio*, since it was made in good faith as contracting officer was required to accept certificate in absence of pre-award protest or evidence of error on face of certificate, which prospectively located plant in surplus labor area, and also contracting officer properly waived omission of plant's address in surplus labor area as minor deviation---------- 559
Legality
Federal Highway Administration, Dept. of Transportation, in awarding cost-plus-a-fixed-fee contract for Urban Traffic Control System (UTCS) to offeror that had prepared specifications for system under research and development study, did not violate any mandatory regulations, since Federal Procurement Regs. do not contain organizational conflicts of interest provision and Dept. has not issued specific rules governing conflicts of interests, and even if Administration was subject to Dept. of Defense Directive 5500.10, "Rules for the Avoidance of Organizational Conflicts of Interest," which it is not, Directive is not self-executing and would not apply in absence of notice to prospective contractors and inclusion of restrictive clause in contract. Moreover, whether UTCS program represents judicious, as distinguished from legal, expenditure of public funds would not affect legality of contract-- 565
Small business concerns
Bid bond principal deviation
Low bid submitted under total small business set-aside for Air Force Base construction project which bore three names of joint venture shown in bid bond accompanying bid, but was signed by president of only small business concern involved, may not be awarded to either joint venture or small business concern on basis two large business firms had associated with small business concern only for purpose of obtaining bid bond. As to joint venture, there was none at time of bid submission or opening, and subsequently submitted information could not create joint venture for purpose of bid ratification—even if it could, joint venture as large concern would be ineligible for award, nor would award to small concern be proper as bid bond named joint venture as principal-- 530
Bids, generally. (*See* Bids)
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Conflicts of interest prohibitions
Negotiated contracts. (*See* Contracts, negotiation, conflicts of interest prohibitions)
Research and development contracts. (*See* Contracts, research and development, conflicts of interest prohibition)
Cost-plus
Basis for award
Cost-plus-a-fixed-fee contracts authorized by 41 U.S.C. 254(b) may be used when head of agency determines that such method of contracting

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Cost-plus—Continued
Basis for award—Continued
is likely to be less costly than other methods or that it is impractical to secure property or services of kind or quality required without use of cost or cost-plus-a-fixed-fee or incentive type contract; and since administrative determination is afforded finality by 41 U.S.C. 257(a), there is no legal basis to require cancellation of contract simply because it is cost reimbursement type of contract 565
Evaluation factors
Advantage to Government
Selection of contractor for negotiation of cost-plus-award-fee type contract for support services at Kennedy Space Center that are being performed under expiring contract without binding selected contractor to "successor employer" doctrine that would impose terms of current collective bargaining agreements with incumbent union employees was valid exercise of discretion granted to contracting agency to award contract that will be most advantageous to Govt., since there is neither statutory nor judicial requirement that contractor who succeeds prior contractor in performance of service for Govt. at Govt. installation assume predecessor contractor's bargaining agreement with its union employees; moreover, selected contractor proposes to recognize bargaining representatives of incumbent employees 592
Deliveries
Defective supplies, etc.
Government inspection prior to delivery
Approval by contracting agency of press proof of artwork for plastic litter bags submitted by contractor in accordance with specification requirements, notwithstanding word "Boundary" was misspelled as "Boundry," estops agency from denying payment to contractor on basis bags were defective within contemplation of par. 5(d) of Standard Form 32; and, therefore, Govt.'s acceptance was not conclusive, since inspection and approval of press proofs of artwork was separate from inspection and acceptance intended under par. 5(d) concerned with latent defect that cannot be discovered by inspection. Whether or not offer of contractor to furnish labels with word "Boundary" correctly spelled for attachment to bags is accepted does not affect agency's obligation contract price 534
Failure to meet schedule
Interpretation of "Time for Delivery" provision
Interpretation of "Time for Delivery" provision in contract for court reporting and transcription service of hearings before National Transportation Safety Board, Department of Transportation, is question of law and not of fact for resolution under "Disputes" clause of contract. Requirement to deliver transcripts originating outside of Washington, D.C., to Docket Section of Board, located in Washington, within 10 days, means transcripts must be in custody of specified office within 10 calendar days from date of hearing, and mere fact of mailing transcripts before expiration of 10-day period does not constitute full compliance with delivery clause 513

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Labor stipulations

Davis-Bacon Act

Suspension

Discarding of all bids for construction of family housing at military installation under invitation that contained prescribed minimum wage rates determined by Secretary of Labor for laborers and mechanics in accordance with Davis-Bacon Act, 40 U.S.C. 276a, because of Presidential Proclamation 4031, dated Feb. 23, 1971, which suspended act, and reissuance of invitation without requirements of act were actions in public interest within meaning of 10 U.S.C. 2305(c), and Proclamation was compelling reason contemplated by par. 2–404.1 of Armed Services Procurement Reg. that justified cancellation of invitation for bids..... 634

Minimum wage determinations

Not guarantee of labor costs

Issuance of wage rate determination by Dept. of Labor constitutes finding that rates specified are rates prevailing in locality, and inclusion of determination in invitation for bids or contract is not representation by Govt. that labor may be obtained by contractor at specified rates and, therefore, each bidder has burden of ascertaining probable labor costs.... 648

Nondiscrimination

Affirmative action programs

Responsibility for reviewing equal employment opportunity (EEO), compliance having been assigned by Sec. of Labor in implementing E.O. No. 11246, to agencies on basis of industrial classification, General Services Administration properly reviewed EEO compliance by low bidder on linoleum portion of its invitation for bids and relied on information furnished by agency responsible for determining compliance by low bidder on floor tiles. Although pursuant to 41 CFR 60–1.40(a) prime contractor is required "to develop a written affirmative action compliance program for each of its establishments," administrative determination that lack of de facto control by floor tile contractor of subsidiary excludes compliance as to that subsidiary is accepted as valid in absence determination was arbitrary, capricious, or not supported by evidence.. 627

Service Contract Act of 1965

Minimum wage, etc., determinations

Union agreement effect

A reissued invitation for bids (IFB) to perform custodial services which provided for application of Service Contract Act of 1965, and contained revised wage determination by Dept. of Labor and "Successor Employers' Collective Bargaining Obligations" clause that recognized incumbent contractor's union bargaining agreement is not restrictive of competition and award may be made to lowest responsive and responsible bidder pursuant to 10 U.S.C. 2305(c). Inclusion in IFB of Service Contract Act clause and revised determination was in accord with 29 CFR 4.6, and amendment to IFB to provide for revised wage determination conformed to par. 2–208 of Armed Services Procurement Reg., even though revision was not received at least 10 days before bid opening as required, since sufficient time was provided for acknowledgment of amendment..... 648

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"Successor employer" doctrine
Selection of contractor for negotiation of cost-plus-award-fee type contract for support services at Kennedy Space Center that are being performed under expiring contract without binding selected contractor to "successor employer" doctrine that would impose terms of current collective bargaining agreements with incumbent union employees was valid exercise of discretion granted to contracting agency to award contract that will be most advantageous to Govt., since there is neither statutory nor judicial requirement that contractor who succeeds prior contractor in performance of service for Govt. at Govt. installation assume predecessor contractor's bargaining agreement with its union employees; moreover, selected contractor proposes to recognize bargaining representatives of incumbent employees 592
Inclusion in invitation for bids of language regarding National Labor Relations Board *Burns* decision, 182 NLRB No. 50, on effect of existing collective bargaining agreements of employers upon successor employers does not require bidders to be bound by existing labor agreement as Govt. made no commitment regarding effect of decision but left matter to bidders to decide. It was not improper to place bidders on notice of *Burns* decision and incumbent contractor's union bargaining agreement and as language used was merely advisory, invitation was not ambiguous. Extension of existent bargaining agreement beyond contract period is not prohibited by procurement statutes, and whether agreement is enforceable against followup employer is for courts to decide 648
Bid submitted under invitation that incorporated Service Contract Act clause prescribed by par. 2-1004 of Armed Services Procurement Reg., which provided for application of pertinent Dept. of Labor wage determination, and included information relating to "Successor Employers' Collective Bargaining Obligations"—information bidder overlooked in preparing bid—may be withdrawn under mistake in bid principles enunciated in *Ruggiero* v. *U.S.*, 420 F. 2d 709, to effect law of mistaken bid includes mistakes which are inexplicable, and rule does not turn on any fault or ambiguity in specifications nor need contractor be free from blame. Therefore, since bidder was entitled to give consideration to impact of union agreement upon performance costs, and bid may not be corrected as agreed union rates were not factor in bid preparation, bid may be withdrawn from consideration 655
Labor surplus area awards. (*See* Contracts, awards, labor surplus areas)
Mistakes
Allegation before award. (*See* Bids, mistakes)
Modification
Change orders
Within scope of contract
Value engineering change substituting solid state tuners for electromechanical tuners intended as replacement components for Electronic Countermeasures Sets properly was effected by issuance of change order to sole producer of sets since competitive procurement was not required as change was within changes clause contained in letter contract for tuners and does not constitute "cardinal change" within meaning of 10 U.S.C. 2304(g) and par. 3-805 of Armed Services Procurement Reg.

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Modification—Continued
Change orders—Continued
Within scope of contract—Continued
Change also is in accord with rule in *Keco Industries, Inc.* v. *United States*, 364 F. 2d 838, that in determining whether change is within general scope of contract, consideration should be given to both magnitude and quality of change and whether original purpose of contract had been substantially altered 540
Star route contracts. (*See* Post Office Department, star route contracts)
Negotiation
Awards
Cancellation
In evaluation of offers under request for proposals to furnish professional architectural and engineering services, application of transition cost factor to offer of only contractor who had not previously performed services without apprising offerors that this factor would be utilized in effecting award of contract thus eliminating contractor who was lowest priced responsible offeror from competition was unwarranted and action was inconsistent with sound procurement policy which dictates that offerors be informed of all evaluation factors and relative importance of each factor, nor was waiver of transition costs for successful offeror because of available qualified personnel justified. Therefore, since award was patently erroneous and without regard to established principles of competitive negotiation, contract should be terminated 513
Changes, etc.
Specifications
Propriety of changes
Under request for proposals for Fleet Computer Programming Services, which was modified to remove as evaluation factor cost of failing to award contract to current contractor and possible organizational conflict of interest because one of offerors was performing as subcontractor on program to be analyzed by new contractor, and to revise the program's manhours, continuation of negotiations during which prices were disclosed does not constitute prohibited auction technique as no competitive advantage resulted to any offeror and technique *per se* is not inherently illegal. Substantial changes in requirements and in computer industry justified amendments to solicitation issued pursuant to par. 3-805.1(e) of Armed Services Procurement Reg. and continuation of negotiations, therefore, last prices submitted may be opened and considered 619
Competition
Adequate
Determination of date to be specified for receipt of proposals is matter of judgement properly vested in contracting agency; and where record evidences that 40-day period for submission of proposals on Urban Traffic Control System to Federal Highway Administration, Dept. of Transportation, was adequate for any offeror who had interest in project, as well as experience, knowledge, systems expertise, and capability sufficient to meet requirements contained in request for proposals, it is concluded date specified for submission of offers was not arbitrarily or capriciously selected, nor was date unduly restrictive of competition for procurement 565

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Manning information
Rejection under request for proposals to furnish mess attendant services of current contractor on basis of deficient manning charts without informing contractor that written advice as to proposed manpower hours had been misinterpreted by contractor in its reply to concern price whereas its offer was considered outside competitive range prevented meaningful negotiations with contractor. Failure to inform offerors of all evaluation factors to be considered and relative weight of each factor although not conducive to obtaining proposals offering maximum competition and most reasonable prices, circumstances of award do not disclose abuse of discretion by contracting officer on any basis for imputing bad faith on his part so as to affect legality of contract awarded and, therefore, award will not be disturbed 686
Resources available for performance
Request for proposals to operate Air Force facility overseas issued pursuant to authority in 10 U.S.C. 2304(a)(6) to negotiate contracts for services outside United States that failed to disclose predetermined minimum resource levels was defective and contributed to rejection of all but highest priced offer as technically unacceptable on basis that sufficient resources to perform were not demonstrated, and although contract awarded was contrary to "competitive negotiation" requirements of 10 U.S.C. 2304(g), because of essentiality of procurement, it will not be disturbed. However, although offeror's judgment of resources needed to perform is major factor in determining capacity to perform and may be considered in determining competitive range, agency must also meet its obligation by disclosing minimum needs to insure maximum competition 670
Discussion with all offerors requirement
Nonresponsive proposals
When proposal is determined upon initial evaluation to be outside competitive range, there is no requirement in accordance with sec. 1-3.805-1(a) of Federal Procurement Regs. to conduct further discussions concerning deficiencies of proposal, section requiring that after receipt of initial proposals, written or oral discussions should be conducted only with responsible offerors "who submitted proposals within a competitive range" 565
Failure to solicit proposals from all sources
Fact that several sources experienced in traffic control systems were not solicited to submit offers by Federal Highway Administration, Dept. of Transportation, under request for proposals, does not establish that adequate competition and reasonable price were not obtained, since in resolving questions concerning adequacy of solicitation of supply sources the propriety of particular procurement must be determined from Govt.'s point of view upon basis of whether adequate competition and reasonable prices were obtained and not upon whether every possible supply source was offered opportunity to bid or submit proposal 565

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Conflicts of interest prohibitions
Under request for proposals for Fleet Computer Programming Services, which was modified to remove as evaluation factor cost of failing to award contract to current contractor and possible organizational conflict of interest because one of offerors was performing as subcontractor on program to be analyzed by new contractor, and to revise the program's manhours, continuation of negotiations during which prices were disclosed does not constitute prohibited auction technique as no competitive advantage resulted to any offeror and technique *per se* is not inherently illegal. Substantial changes in requirements and in computer industry justified amendments to solicitation issued pursuant to par. 3–805.1(e) of Armed Services Procurement Reg. and continuation of negotiations, therefore, last prices submitted may be opened and considered---- 619
Evaluation factors
Cost of changing contractors
In evaluation of offers under request for proposals to furnish professional architectural and engineering services, application of transition cost factor to offer of only contractor who had not previously performed services without apprising offerors that this factor would be utilized in effecting award of contract thus eliminating contractor who was lowest priced responsible offeror from competition was unwarranted and action was inconsistent with sound procurement policy which dictates that offerors be informed of all evaluation factors and relative importance of each factor, nor was waiver of transition costs for successful offeror because of available qualified personnel justified. Therefore, since award was patently erroneous and without regard to established principles of competitive negotiation, contract should be terminated---- 637
Criteria
Where solicitation is deficient in not providing reasonably definite information as to relative importance of evaluation criteria or factors set out in request for proposals, and sufficiency of information is not questioned prior to submission of proposals, and record does not establish that any offeror was placed at competitive advantage or disadvantage by inadequacy of information, deficiency is not sufficiently material to disturb contract award---- 565
Manning requirements
Although in evaluation of offers, information secured from manning chart may be considered "other factor" in determining whether offeror is within competitive range for purposes of conducting meaningful discussions required by 10 U.S.C. 2304(g), price factor of offer may not be disregarded and, therefore, award of contract to other than lowest offeror, who had submitted acceptable manning chart, under request for proposals to furnish mess attendant services for 1 year with 2-year renewal option was improper, but cancellation of award is not required as it was made in good faith and on basis of prior misinterpretations of phrase "price and other factors considered." However, option should not be exercised and proposals resolicited under revised procedures, communicated to offerors and indicating factors on which award will be based---- 679

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Negotiation—Continued

Evaluation factors—Continued

Manning requirements—Continued

Rejection under request for proposals to continue mess attendant services of current contractor on basis of deficient manning charts without informing contractor that written advice as to proposed manpower hours had been misinterpreted by contractor in its reply to concern price whereas its offer was considered outside competitive range, prevented meaningful negotiations with contractor. Failure to inform offerors of all evaluation factors to be considered and relative weight of each factor although not conducive to obtaining proposals offering maximum competition and most reasonable prices, circumstances of award do not disclose abuse of discretion by contracting officer on any basis for imputing bad faith on his part so as to affect legality of contract awarded and, therefore, award will not be disturbed 686

"Successor employer" doctrine

Selection of contractor for negotiation of cost-plus-award-fee type contract for support services at Kennedy Space Center that are being performed under expiring contract without binding selected contractor to "successor employer" doctrine that would impose terms of current collective bargaining agreements with incumbent union employees was valid exercise of discretion granted to contracting agency to award contract that will be most advantageous to Govt., since there is neither statutory nor judicial requirement that contractor who succeeds prior contractor in performance of service for Govt. at Govt. installation assume predecessor contractor's bargaining agreement with its union employees; moreover, selected contractor proposes to recognize bargaining representatives of incumbent employees 592

Late proposals and quotations

Acceptance in Government's interest

Propriety of considering two proposals under amendment to small business set-aside for fin assemblies that changed quantities and delivery rates—one proposal from concern whose late offer had been rejected, other from concern whose proposal under amendment was initial offer which is being considered for partial award of proposed low combination award—will not be questioned. Two late offerors having expended considerable time and effort in competing for procurement, and urgent need for supplies not warranting reopening of negotiations, desirability of applying late bid concept to negotiating area in these circumstances appears appropriate even though, generally, untimely submitted initial proposals will not be admitted into award competition 547

Requests for proposals

Ambiguous

Although it is incumbent upon Govt. agency to state material requirements of procurement in clear and unambiguous manner, should any aspect of solicitation require clarification, good faith and observance of spirit of competitive solicitation, as well as sound business practice on part of competitors for Govt. contracts, dictate that appropriate time for detailed examination of any provision considered to be ambiguous or confusing should be prior to time specified for submission of proposals or bids, and any unresolved ambiguities should be subject of timely protest .. 565

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Requests for proposals—Continued
Defective
Predetermined resources for performance
Request for proposals to operate Air Force facility overseas issued pursuant to authority in 10 U.S.C. 2304(a)(6) to negotiate contracts for services outside United States that failed to disclose predetermined minimum resource levels was defective and contributed to rejection of all but highest priced offer as technically unacceptable on basis that sufficient resources to perform were not demonstrated, and although contract awarded was contrary to "competitive negotiation" requirements of 10 U.S.C. 2304(g), because of essentiality of procurement, it will not be disturbed. However, although offeror's judgment of resources needed to perform is major factor in determining capacity to perform and may be considered in determining competitve range, agency must also meet its obligation by disclosing minimum needs to insure maximum competition 670
Submission date
Determination of date to be specified for receipt of proposals is matter of judgment properly vested in contracting agency; and where record evidences that 40-day period for submission of proposals on Urban Traffic Control System to Federal Highway Administration, Dept. of Transportation, was adequate for any offeror who had interest in project, as well as experience, knowledge, systems expertise, and capability sufficient to meet requirements contained in request for proposals, it is concluded date specified for submission of offers was not arbitrarily or capriciously selected, nor was date unduly restrictive of competition for procurement 565
Options
Not to be exercised
Procedural deficiencies in procurement
Although in evaluation of offers, information secured from manning chart may be considered "other factor" in determining whether offeror is within competitive range for purposes of conducting meaningful discussions required by 10 U.S.C. 2304(g), price factor of offer may not be disregarded and, therefore, award of contract to other than lowest offeror, who had submitted acceptable manning chart, under request for proposals to furnish mess attendant services for 1 year with 2-year renewal option was improper, but cancellation of award is not required as it was made in good faith and on basis of prior misinterpretations of phrase "price and other factors considered." However, option should not be exercised and proposals resolicited under revised procedures, communicated to offerors and indicating factors on which award will be based 679
Payments
Propriety
Propriety of Forest Service of Dept. of Agriculture to use appropriation entitled "Forest Protection and Utilization" for payment of plastic litter bags is for determination on basis of whether contract involved is reasonably necessary or incident to execution of program or activity authorized by appropriation. If no other appropriation provides more specifically for items such as litter bags, appropriation may be used to satisfy contract ... 534

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Protests

Timeliness

Although it is incumbent upon Govt. agency to state material requirements of procurement in clear and unambiguous manner, should any aspect of solicitation require clarification, good faith and observance of spirit of competitive solicitation, as well as sound business practice on part of competitors for Govt. contracts, dictate that appropriate time for detailed examination of any provision considered to be ambiguous or confusing should be prior to time specified for submission of proposals or bids, and any unresolved ambiguities should be subject of timely protest 565

Requirements

Minimum quantities

Request for proposals to furnish requirements for 10 different types of diesel-electric generator sets, that stated Govt.'s best estimate of total quantities needed but did not, because of lack of funds, guarantee purchase of minimum quantities, contemplates requirements-type contract within meaning of par. 3–409.2(b) of Armed Services Procurement Reg., and use of such contract is valid since there is no evidence Govt.'s estimate of probable needs was arrived at in bad faith, and agreement to procure all requirements without stating minimun guarantees constitutes adequate consideration. However, when funds are available and needs can be ascertained with reasonable certainty, use of more definite type contract would be assurance that firm minimum quantities, commensurate to maximum extent with estimated requirements, will be ordered 506

Research and development

Conflicts of interest prohibitions

Federal Highway Administration, Dept. of Transporation, in awarding cost-plus-a-fixed-fee contract for Urban Traffic Control System (UTCS) to offeror that had prepared specifications for system under research and development study, did not violate any mandatory regulations, since Federal Procurement Regs. do not contain organizational conflicts of interest provision and Dept. has not issued specific rules governing conflicts of interests, and even if Administration was subject to Dept. of Defense Directive 5500.10, "Rules for the Avoidance of Organizational Conflicts of Interest," which it is not, Directive is not self-executing and would not apply in absence of notice to prospective contractors and inclusion of restrictive clause in contract. Moreover, whether UTCS program represents judicious, as distinguished from legal, expenditure of public funds would not affect legality of contract 565

Sales

Generally. (*See* **Sales**)

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

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Specifications

Conformability of equipment, etc., offered

Technical deficiencies

Negotiated procurement

Request for proposals to operate Air Force facility overseas issued pursuant to authority in 10 U.S.C. 2304(a)(6) to negotiate contracts for services outside United States that failed to disclose predetermined minimum resource levels was defective and contributed to rejection of all but highest priced offer as technically unacceptable on basis that sufficient resources to perform were not demonstrated, and although contract awarded was contrary to "competitive negotiation" requirements of 10 U.S.C. 2304(g), because of essentiality of procurement, it will not be disturbed. However, although offeror's judgment of resources needed to perform is major factor in determining capacity to perform and may be considered in determining competitive range, agency must also meet its obligation by disclosing minimum needs to insure maximum competition 670

Qualified products

Effect of specification revision

Administrative determination that change in weight of webbing for parachutes to be procured from Qualified Products List (QPL) did not invalidate existing test data or require requalification of manufacturers already on QPL was proper where modification was not cause of rejecting sample parachutes submitted for qualification under invitation canceled and reissued; and fact that cause for failure of parachute samples to pass drop test cannot be determined does not impose duty on Govt. to pinpoint failure where unreasonable expenditure of time and money would be involved, nor may conditional qualification be approved on basis contractor is not relieved from complying with drawings and specifications 500

Production line certification propriety

Proposed "NASA Microelectronics Reliability Program" that would establish Qualified Products List for microcircuits and require production line certification of manufacturers prior to procurement although restrictive of competition is considered acceptable on basis of agency need since testing of microcircuits to determine extremely high level of quality and reliability assurance demanded by space program is either impossible or impractical and criticality of product justifies prequalification procedures. Therefore, restriction on competition resulting from program is not unreasonable or invalid restriction in conflict with 10 U.S.C. 2304(g) and 10 U.S.C. 2305(a) and (b). However, as line certification is departure from normal procedures, right is reserved to give matter further consideration 542

Requirement

Waiver

Award of contract for road grader to second low bidder offering qualified product grader with superior engine which was not listed on applicable Qualified Products List as required by appropriate Federal

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Qualified products—Continued
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specification, and modified by contracting agency, on basis superior engine that exceeded minimum needs of Govt. was essential for area in which it was to be used, violated sec. 1-1.1101 of Federal Procurement Regs. Although award should not have been made to nonresponsive bidder since delivery and payment have been made, corrective action is precluded. Notwithstanding sec. 1-1.305.1 requires use of Federal specifications, exceptions are permitted, and since Qualified Products List item is inadequate for road grader needed, agency may deviate from Federal specifications by complying with conditions in sec. 1-1.305-3 691
Voidable
Void distinguished
Although first preference labor surplus certificate of eligibility furnished by small business concern was invalid as bidder had no plant in labor surplus area at time certificate was issued, plant being acquired month after award of set-aside portion of procurement for detecting sets to concern on basis of labor surplus preference, award need not be canceled as it is voidable at Govt.'s option rather than void *ab initio*, since it was made in good faith as contracting officer was required to accept certificate in absence of pre-award protest or evidence of error on face of certificate, which prospectively located plant in surplus labor area, and also contracting officer properly waived omission of plant's address in surplus labor area as minor deviation 559
COURTS
Court of Claims
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Acceptance
Application limited
Conclusion that exemption provision in Dual Compensation Act (5 U.S.C. 5532(c)) to requirement that retired pay of Regular officer must be reduced when employed as civilian by Federal Govt. (5 U.S.C. 5532(b)) applies only if retirement was direct result of armed conflict, or was caused by instrumentality of war in wartime, is justified on basis of legislative history of provision and its longstanding administrative interpretation; and, therefore, *Mross* v. *United States*, 186 Ct. Cl. 165, holding that disability—perforated eardrum—that was war-incurred but was not disabling and did not constitute significant factor in officer's retirement met requirements of exception to dual compensation restriction will not be followed as case is based on particular facts involved 480
Criminal Justice Act of 1964
Attorney fees
Appropriation chargeable
Accounting procedure employed by Administrative Office of U.S. Courts with respect to paying court-appointed attorneys under provisions of Criminal Justice Act of 1964 from appropriation current at time

COURTS—Continued Page

Court of claims—Continued

Attorney fees—Continued

Appropriation chargeable—Continued

of appointment regardless of date voucher, subject to court review, is submitted, may not be revised to make payment from appropriation current at time voucher is approved in order to eliminate holding obligated appropriation account open beyond close of normal fiscal year. Contractual obligation for payment of attorney occurs at time he is appointed, even though exact amount of obligation remains to be determined; and pursuant to secs. 3732 and 3679, R. S., and 41 U.S.C. 11, 31 *id.* 665(a), *id.* 712a, fee payable is chargeable to appropriation for fiscal year in which obligation was incurred---------- 589

Decisions

Mross *v.* United States, 186 Ct. Cl. 165. (*See* **Compensation, double, exemptions, Dual Compensation Act, disability "as a direct result of armed conflict," etc.**)

DISTRICT OF COLUMBIA

Contracts

Personal service contracts

Contracts with District of Columbia Urban Corps, part of D.C. Govt., and similar Urban Corps and other organizations, including profit-making organizations, in other localities may not be entered into by Federal agencies for purpose of recruiting students and dealing with educational institutions because type of services contemplated can be performed more economically and feasibly by their own personnel. Even if contract arrangement were permitted with D.C. Urban Corps, "override" payable would constitute reimbursement to D.C. Govt. that is barred by sec. 601 of Economy Act of 1932 (31 U.S.C. 686); moreover, any payment received would be for deposit into Treasury of U.S. to avoid augmentation of D.C. appropriation used to fund Corps---------- 553

Leases, concessions, rental agreements, etc.

Prior appropriation necessity

Cost of catering services furnished by hotel located in Dist. of Columbia to conference held pursuant to Govt. Employees Training Act, 5 U.S.C. Ch. 41, and considered proper administrative expense when necessary to achieve objectives of training program, may be paid, prohibition in 40 U.S.C. 34 regarding procurement of hotel room accommodations in Dist. of Columbia in absence of express appropriation for rental of space for Govt. use in District having no application, even though cost of using hotel facilities are included in catering charges, as cost of space is merely cost item included by hotel in fixing catering charges and rental of space *per se* is not involved---------- 610

EDUCATION

Colleges, schools, etc. (*See* **Colleges, schools, etc.**)

Scholarships

Reserve Officers' Training Corps program. (*See* **Military Personnel, Reserve Officers' Training Corps, scholarship benefits**)

EQUAL EMPLOYMENT OPPORTUNITY

Contract provision. (*See* **Contracts, labor stipulations, nondiscrimination**)

EQUIPMENT Page

Automatic Data Processing Systems

Computer service

Evaluation propriety

Under request for proposals for Fleet Computer Programming Services, which was modified to remove as evaluation factor cost of failing to award contract to current contractor and possible organizational conflict of interest because one of offerors was performing as subcontractor on program to be analyzed by new contractor, and to revise the program's manhours, continuation of negotiation during which prices were disclosed does not constitute prohibited auction technique as no competitive advantage resulted to any offeror and technique *per se* is not inherently illegal. Substantial changes in requirements and in computer industry justified amendments to solicitation issued pursuant to par. 3-805.1(e) of Armed Services Procurement Reg. and continuation of negotiations, therefore, last prices submitted may be opened and considered 619

ESTOPPEL

Against Government

Rule

Approval by contracting agency of press proof of artwork for plastic litter bags submitted by contractor in accordance with specification requirements, notwithstanding word "Boundary" was misspelled as "Boundry," estops agency from denying payment to contractor on basis bags were defective within contemplation of par. 5(d) of Standard Form 32; and, therefore, Govt.'s acceptance was not conclusive, since inspection and approval of press proofs of artwork was separate from inspection and acceptance intended under par. 5(d) concerned with latent defect that cannot be discovered by inspection. Whether or not offer of contractor to furnish labels with word "Boundary" correctly spelled for attachment to bags is accepted does not affect agency's obligation for contract price 534

FEDERAL CREDIT UNIONS

Property lost or damaged

Disposition of moneys received in settlement

Moneys received from carriers by National Credit Union Administration (NCUA) in settlement for goods lost or damaged in transit that were shipped in connection with operations of Administration should be deposited for credit to account of Administration and not general fund of Treasury since miscellaneous receipts rule (31 U.S.C. 484) is not for application, as operating funds of NCUA are not provided by annual appropriations but by fees and assessments upon credit unions pursuant to 12 U.S.C. 1755, which provides for deposit of collections from credit unions with Treasurer of U.S. for credit to account of Administration ... 545

FEES

Meetings. (*See* **Meetings, attendance, etc., fees**)

FUNDS

Appropriated. (*See* **Appropriations**)

Federal grants, etc., to other than States

"Federal share"

What constitutes

Limitation in Economic Opportunity Act (42 U.S.C. 2754(b)) requiring that work-study grant agreements with institutions of higher education provide that "Federal share" of compensation of students

FUNDS—Continued Page
Federal grants—Continued
"Federal share"—Continued
What constitutes—Continued
employed in College Work-Study Program will not exceed 80 percentum of compensation paid to students, pertaining only to payments from grants made by Office of Education to institutions and not to payments made by other Federal agencies where students are employed, employing agencies may bear larger portion than 20 percent of student earnings so that grant funds may be spread over greater number of students. Whether agency should pay social security tax on its contribution to student's salary, and if so in what amount, is for determination by Commissioner of Internal Revenue Service 553
Miscellaneous receipts. (*See* Miscellaneous Receipts)
Trust
Financing building construction for Government use
Assignment of moneys to become due from U.S. under lease agreement may be made to Public Employees' Retirement System and State Teachers' Retirement System of State of California using trust funds to furnish permanent financing for building being constructed for Govt. The systems qualify as "financing institutions" within purview of Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, as nothing in act indicates exclusion of pension funds, and primary function of trust corpus, together with trustees, is investing of assets of trust. However, act limits assignment to one party, "except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing" 613
GENERAL ACCOUNTING OFFICE
Jurisdiction
Antitrust matters
The jurisdiction to enforce antitrust statutes lies with Dept. of Justice and U.S. General Accounting Office is without authority to issue determination respecting applicability or violation of statutes. However, under 15 U.S.C. 17, labor organizations engaged in lawful pursuits are exempted from restrictions of antitrust statutes 648
GRANTS
To other than States. (*See* Funds, Federal grants, etc., to other than States)
GRATUITIES
Reenlistment bonus
Extension of enlistment
More than one
Effective date of aggregate extension
Upon reextending reenlistment for 1 year 4 months, effective July 2, 1971, member of uniformed services who at time he first extended enlistment for 10 months, effective Mar. 2, 1970, was not entitled to bonus, is subject to sec. 2(a) of E. O. No. 11525, which prohibits increase in payment of reenlistment bonus to member whose entitlement occurred after Dec. 1969 and before Apr. 15, 1970. Even though member's bonus entitlement is based on July 1971 extension of enlistment, for purpose of payment the day before member began serving on first extension corresponds to statutory date "of discharge and release" contained in 37 U.S.C. 308(a); and aggregate reenlistment became effective Mar. 2, 1970, requiring reenlistment bonus to be computed on basis of 1969 pay scale 515

GRATUITIES—Continued Page
Reenlistment bonus—Continued
Extension of enlistment—Continued
Pay increase rate applicability
Member of uniformed services who had been paid reenlistment bonus based on 1969 pay scale for 2-year extension of enlistment, effective Mar. 15, 1970, may only be paid upon subsequent reextension of enlistment for 1 year, effective Mar. 15, 1972, on basis of 1969 pay scale, since reenlistment bonus rate is governed by sec. 2(a) of E.O. No. 11525, under which bonus payment for first extension was limited to 1969 pay scale; and since by virtue of 10 U.S.C. 509 second extension placed member "in exactly the same status as though he originally extended his enlistment for the aggregate of all the extensions" on Mar. 15, 1970, payment for 3-year aggregate reenlistment bonus is restricted to 1969 pay scale by sec. 2(b) of E.O. No. 11525 515
HIGHWAYS
Construction
Federal-aid highway programs
Relocation costs
Replacement to be similar design
As replacement highway bridge over Cross-Florida Barge Canal is required to be constructed in accordance with sec. 207(c), Pub. L. 87-874, Oct. 23, 1962, which limits construction of replacement facility to State design standards that apply to roads of same classification, determined on basis of traffic existing at time of taking, approval by Corps of Engineers of two two-lane bridges to be constructed at Govt. expense in lieu of existing two-lane highway in order to accommodate future growth constitutes betterment of facility in contravention of sec. 207(c) and, therefore, funds available to Corps may not be used to construct second bridge, whether or not design standard was in actual practice or published. However, State standards that provide for range of traffic rather than projected future traffic count are acceptable 661
JOINT VENTURES
Small business status
Low bid submitted under total small business set-aside for Air Force Base construction project which bore three names of joint venture shown in bid bond accompanying bid, but was signed by president of only small business concern involved, may not be awarded to either joint venture or small business concern on basis two large business firms had associated with small business concern only for purpose of obtaining bid bond. As to joint venture, there was none at time of bid submission or opening, and subsequently submitted information could not create joint venture for purpose of bid ratification—even if it could, joint venture as large concern would be ineligible for award, nor would award to small concern be proper as bid bond named joint venture as principal .. 530
LEASES
District of Columbia. (*See* District of Columbia, leases, concessions, rental agreements, etc.)
LEGISLATION
Construction. (*See* Statutory Construction)

MEETINGS Page

Attendance, etc., fees

Federally sponsored meetings

Military personnel

Registration fees incurred by member of uniformed services while on temporary duty, incident to attendance at meeting, conference, or workshop sponsored by Federal agency, may be reimbursed to member from appropriations available to Dept. of Defense for travel expenses under appropriate Departmental regulations when member is otherwise properly directed by orders of competent authority to attend meeting in temporary duty status; but since Federal agency meeting is not meeting of technical, scientific, professional, or similar organization within contemplation of 37 U.S.C. 412, approval of Secretary of Defense required by sec. 412 is not necessary 527

MILITARY PERSONNEL

Dislocation allowance. (*See* **Transportation, dependents, military personnel, dislocation allowance**)

Household effects

Transportation. (*See* **Transportation, household effects, military personnel**)

Meetings

Attendance, etc., fees. (*See* **Meetings, attendance, etc., fees**)

Pay. (*See* **Pay**)

Reenlistment bonus. (*See* **Gratuities, reenlistment bonus**)

Reserve Officers' Training Corps

Prior military training

Excused service

Students enrolled in Reserve Officers' Training Corps (ROTC) under 10 U.S.C. 2107, which authorizes scholarship benefits, may on basis of conclusion in 46 Comp. Gen. 15 be considered to be within purview of 10 U.S.C. 2108(c), and Secretary concerned may excuse them from all or part of General Military Course (GMC) requirements, and students are eligible to receive financial benefits of scholarship award. Therefore, scholarship may be offered and all or part of GMC waived for incoming college freshman designated to receive 4-year ROTC college scholarship; college student enrolled as transfer from another institution during freshman or sophomore year; and student currently enrolled at institution but in ROTC program during freshman or sophomore year 486

Scholarship benefits

Military training

If student successfully completes first 2 years of 4-year Senior Reserve Officers' Training Corps course for admission to advanced training prescribed in 10 U.S.C. 2104(b)(6) by reason of prior military education and training, 6 weeks' field training or practice cruise provision of section is not preliminary requirement for admission to "advanced course"—last 2 years of college—where student qualifies for excusal of General Military Course under 10 U.S.C. 2108(c) 486

Application of 10 U.S.C. 2108(c), providing for Secretary concerned to excuse all or part of General Military Course requirements for students enrolled in Reserve Officers' Training Corps, is not limited to scholarship program provided in 10 U.S.C. 2107, but excusal authority extends as well to advanced training program prescribed in 10 U.S.C. 2104. Student who is eligible for excusal on basis of previous education, military experience, or both, insofar as Reserve Officers' Training Corps Vitalization

MILITARY PERSONNEL—Continued Page
Reserve Officers' Training Corps—Continued
Scholarship benefits—Continued
Military training—Continued
Act of 1964 (10 U.S.C. 2101-2111) is concerned, is eligible for financial benefits provided in either 10 U.S.C. 2104 or 10 U.S.C. 2107, if he otherwise qualifies 486
Retired
Civilian service
Civilian disability compensation and military retired pay
Regular Air Force sergeant retired pursuant to 10 U.S.C. 8914, who while employed as civilian in Federal Govt. loses use of finger, is not entitled to concurrent payment of civilian disability compensation and military retired pay on basis the compensation would be paid for permanent partial disability and not temporary total disability, thus bringing payment within exception to dual payment prohibition contained in 5 U.S.C. 8116(a). In application of limitation in sec. 8116(a), there has been no recognition of distinction between temporary and permanent disability, as statute makes no such distinction insofar as concurrent receipt of military or naval retired pay is concerned, and legislation would have to be enacted to permit concurrent payment of retired pay and disability compensation 491
Retired pay. (*See* Pay, retired)
Retirement
Temporary disability retirement
Active duty subsequently
Air Force officer who was placed on temporary disability retired list in grade of major effective June 1, 1968, recalled under 10 U.S.C. 1211 to active duty in temporary grade of lieutenant colonel for 1 day, June 30, 1970, with date of rank from July 19, 1968, and then retired for years of service under 10 U.S.C. 8911 in grade of lieutenant colonel effective July 1, 1970, is entitled to payment of difference in retired pay between grades of lieutenant colonel and major for months of June and July 1970, since prior to July 1, 1970, officer satisfied requirements of 10 U.S.C. 1211(a)(1). The officer's entitlement to retired pay at higher grade for 2 months involved is not under 10 U.S.C. 8963(a), as he only "served" 1 day in temporary grade, but under 10 U.S.C. 8961, which authorizes officer to retire in grade he "holds" not the grade in which he "served" on date of retirement 677
Temporary lodging allowances. (*See* Station Allowances, military personnel, temporary lodgings)
MISCELLANEOUS RECEIPTS
Special account *v.* miscellaneous receipts
Property damage collections
Moneys received from carriers by National Credit Union Administration (NCUA) in settlement for goods lost or damaged in transit that were shipped in connection with operations of Administration should be deposited for credit to account of Administration and not general fund of Treasury since miscellaneous receipts rule (31 U.S.C. 484) is not for application, as operating funds of NCUA are not provided by annual appropriations but by fees and assessments upon credit unions pursuant to 12 U.S.C. 1755, which provides for deposit of collections from credit unions with Treasurer of U.S. for credit to account of Administration 545

NONDISCRIMINATION Page

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

Requirement

Appointments

Upon determination that employee who received excepted Schedule B appointment at grade GS–9 was discriminated against because of race or sex, which is expressly prohibited by 5 U.S.C. 7154(b) and 5 CFR 713.202, as she qualified for a GS–11 position and was assigned and performed work warranting a GS–11 classification, correction of personnel action and adjustment in pay is legally justified on basis original classification and appointment as GS–9 was illegal, and corrective action is not viewed as retroactive promotion such as ordinarily is prohibited by law 581

OFFICERS AND EMPLOYEES

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

Concurrent receipt of two benefits

Although civilian position held by retired officer of Regular component of uniformed services in U.S. Army Special Services Agency, Europe—local nonappropriated fund activity—is position subject to reduction of retired pay prescribed by 5 U.S.C. 5532(b), reduction is not required in officer's retired pay as reduction would exceed amount officer receives from civilian employment with additional reduction in retired pay, result that is not within contemplation of Dual Compensation Act of 1964, for it is unreasonable to require retired officer to accept smaller amount after employment in civilian position with Govt. than amount of retired pay he was receiving before that time 604

Death or injury

Disability compensation, etc.

Military retired pay

Regular Air Force sergeant retired pursuant to 10 U.S.C. 8914, who while employed as civilian in Federal Govt. loses use of finger, is not entitled to concurrent payment of civilian disability compensation and military retired pay on basis the compensation would be paid for permanent partial disability and not temporary total disability, thus bringing payment within exception to dual payment prohibition contained in 5 U.S.C. 8116(a). In application of limitation in sec. 8116(a), there has been no recognition of distinction between temporary and permanent disability, as statute makes no such distinction insofar as concurrent receipt of military or naval retired pay is concerned, and legislation would have to be enacted to permit concurrent payment of retired pay and disability compensation 491

Dual compensation

Concurrent military retired and civilian service pay. (*See* **Compensation, double, concurrent military retired and civilian service pay**)

Overseas

"Actual residence"

The term "actual residence" is not defined in 5 U.S.C. 5722 or implementing regulations, which authorize travel and transportation expenses for new appointees to posts of duty outside continental U.S., and is for determination from facts of each case. Although term as used in sec. 5722 generally would be understood to mean place at which appointee physically resides at time of appointment, term may include "legal residence" or "domicile" of employee 644

OFFICERS AND EMPLOYEES—Continued Page

Overseas—Continued

Hired overseas

Residence in United States, etc.

Travel and transportation expenses of newly appointed employee from foreign country may be paid by Canal Zone agencies if employee at time of appointment has place of actual residence in U.S., its territories or possessions. However, as 5 U.S.C. 5722 authorizes payment of such expenses only from employee's place of actual residence at time of appointment, reimbursement may not exceed that which would have been allowed employee for travel and transportation from place of actual residence in U.S., its territories or possessions..... 644

Former employee of Canal Zone Govt. whose place of actual residence was in California, but who at time of appointment was temporarily residing in Costa Rica, and who had transported his household goods to Costa Rica in his own truck prior to signing employment agreement, which he signed in Costa Rica prior to travel to Canal Zone, may be reimbursed travel and transportation expenses from Costa Rica to Canal Zone in accordance with provisions of Office of Management and Budget Cir. No. A–56, but he may not be reimbursed expenses of moving from California to Costa Rica since these expenses were not incurred in anticipation of his appointment in Canal Zone..... 644

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

Per diem. (*See* **Subsistence, per diem**)

Severance pay

Reassignment refused

Refusal of civilian employee to accept order of reassignment to another geographical area, made for best interests of Govt., constituting insubordination within meaning of delinquency and misconduct as contemplated by sec. 550.705 of Civil Service Regs., employee is not entitled to severance pay under 5 U.S.C. 5595, which is authorized for employee separated "through no fault of his own" when he declines to accept assignment to another commuting area in connection with transfer of functions or reduction in force and therefore loses his job because of technological innovations and improved efficiency, or closing or curtailment of Federal installations..... 476

Indication in Standard Form 57, Application for Federal Employment, that applicant would not accept employment outside state of residence does not make him as Federal employee immune from reassignment, as purpose of Form 57 is to inform appointing officers and not to embody contract of employment; and, therefore, condition imposed in employment application does not entitle employee who refuses to accept reassignment outside initial state of employment in interests of Govt. to severance pay authorized in 5 U.S.C. 5595 for employees involuntarily separated from service through no fault of their own..... 476

Separation status

Distinction between separations involving transfer of function or reduction-in-force situation and declination of reassignment situation is that in first situation the primary purpose of employee's transfer is to meet responsibility to employee, whereas second situation is ordered reassignment of employee for good of service—first situation involves declination of offer; the second, refusal to follow order. Fact that equal

OFFICERS AND EMPLOYEES—Continued Page
Overseas—Continued
Separation status—Continued
treatment for employment purposes is accorded to employees in both situations under Displaced Employee Program provided by sec. 350.301 of Civil Service Regs. does not negate distinction to require equal treatment of employees in both situations for serverance pay purposes..... 476
Training
Expenses
Meals and room at headquarters
Cost of catering services furnished by hotel located in Dist. of Columbia to conference held pursuant to Govt. Employees Training Act, 5 U.S.C. Ch. 41, and considered proper administrative expense when necessary to achieve objectives of training program, may be paid, prohibition in 40 U.S.C. 34 regarding procurement of hotel room accommodations in Dist. of Columbia in absence of express appropriation for rental of space for Govt. use in District having no application, even though cost of using hotel facilities are included in catering charges, as cost of space is merely cost item included by hotel in fixing catering charges and rental of space *per se* is not involved..... 610
Travel expenses. (*See* **Travel Expenses**)
Traveltime
Overtime. (*See* **Compensation, overtime, traveltime**)
Wage board employees
Compensation. (*See* **Compensation, wage board employees**)
PAY
Active duty
Subsequent to temporary disability retirement
Effect on retired pay
Air Force officer who was placed on temporary disability retired list in grade of major effective June 1, 1968, recalled under 10 U.S.C. 1211 to active duty in temporary grade of lieutenant colonel for 1 day, June 30, 1970, with date of rank from July 19, 1968, and then retired for years of service under 10 U.S.C. 8911 in grade of lieutenant colonel effective July 1, 1970, is entitled to payment of difference in retired pay between grades of lieutenant colonel and major for months of June and July1970, since prior to July 1, 1970, officer satisfied requirements of 10 U.S.C. 1211(a)(1). The officer's entitlement to retire pay at higher grade for 2 months involved is not under 10 U.S.C. 8963(a), as he only "served" 1 day in temporary grade, but under 10 U.S.C. 8961, which authorizes officer to retire in grade he "holds" not the grade in which he "served" on date of retirement..... 677
Civilian employees. (*See* **Compensation**)
Retired
Advancement on retired list
Evidence of satisfactory service in another service
Rule in 49 Comp. Gen. 618 to effect that members of armed services would be entitled to retired pay based on pay of higher grade, whether temporary or permanent, in which member served satisfactorily, even though higher grade was in other than service from which he retired, is equally applicable to Army members, notwithstanding 10 U.S.C. 3963(a), under which members are retired, seems to require that

PAY—Continued Page

Retired—Continued

Advancement on retired lists—Continued

Evidence of satisfactory service in another service—Continued

qualifying service be in Army, since that section, as well as 10 U.S.C. 8963(a), involved in ruling, have common legislative source. Under 10 U.S.C. 3963(a), Secretary is authorized to determine qualification for higher pay; and, therefore, there is no objection to administrative settlement of retroactive retired pay due that is not barred by 31 U.S.C. 71a, and 10-year limitation period begins to run after final administrative determination of satisfactory service 586

Pay adjustment

Members of uniformed services advanced in grade on retired list without regard to whether their active duty service in higher grade was in temporary or permanent grade or whether satisfactory service was in same service from which retired may be paid adjustments in retired pay from date of retirement even though required administrative approval of satisfactory service was made more than 10 years subsequent to retirement, for under rule that claim which by statute is not payable until its validity is determined by designated agency does not accrue until determination of validity has been made, members' claims for adjustment of their retired pay are not barred by act of Oct. 9, 1940, as 10-year statute of limitation began to run from date of administrative determination of entitlement to higher grade and not date of retirement 607

Since claim which by statute is not payable until its validity is determined by designated agency does not accrue until determination of validity has been made, it is not barred until 10 years after administrative determination is made and, therefore, application of act of Oct. 9, 1940, 10-year statute of limitation, does not take effect until secretarial approval of advancement of members on retired list without regard to whether satisfactory active duty service was in permanent or temporary grade, or in service from which retired. Readjustment payments that had been disallowed may be paid administratively, as well as future claims, whether retirement was for disability or under 10 U.S.C. 8964, and notwithstanding member's higher grade was in service from which retired, and order effecting change to higher grade constitutes date of administrative determination of satisfactory service in higher grade when issued on same day as determination 607

Concurrent military retired and disability compensation

Prohibition

Conclusion that exemption provision in Dual Compensation Act (5 U.S.C. 5532(c)) to requirement that retired pay of Regular officer must be reduced when employed as civilian by Federal Govt. (5 U.S.C. 5532(b)) applies only if retirement was direct result of armed conflict, or was caused by instrumentality of war in wartime, is justified on basis of legislative history of provision and its longstanding administrative interpretation; and, therefore, *Mross* v. *United States*, 186 Ct. Cl. 165, holding that disability—perforated eardrum—that was war-incurred but was not disabling and did not constitute significant factor in officer's retirement met requirements of exception to dual compensation restrictions will not be followed, as case is based on particular facts involved 480

PAY—Continued Page

Retired—Continued

Concurrent military retired and disability compensation—Continued

Prohibition—Continued

Regular Air Force sergeant retired pursuant to 10 U.S.C. 8914, who while employed as civilian in Federal Govt. loses use of finger, is not entitled to concurrent payment of civilian disability compensation and military retired pay on basis the compensation would be paid for permanent partial disability and not temporary total disability, thus bringing payment within exception to dual payment prohibition contained in 5 U.S.C. 8116(a). In application of limitation in sec. 8116(a), there has been no recognition of distinction between temporary and permanent disability, as statute makes no such distinction insofar as concurrent receipt of military or naval retired pay is concerned, and legislation would have to be enacted to permit concurrent payment of retired pay and disability compensation 491

Although civilian position held by retired officer of Regular component of uniformed services in U.S. Army Special Services Agency, Europe—local nonappropriated fund activity—is position subject to reduction of retired pay prescribed by 5 U.S.C. 5532(b), reduction is not required in officer's retired pay as reduction would exceed amount officer receives from civilian employment with additional reduction in retired pay, result that is not within contemplation of Dual Compensation Act of 1964, for it is unreasonable to require retired officer to accept smaller amount after employment in civilian position with Govt. than amount of retired pay he was receiving before that time 604

Disability

Active duty recall

Subsequent retirement

Air Force officer who was placed on temporary disability retired list in grade of major effective June 1, 1968, recalled under 10 U.S.C. 1211 to active duty in temporary grade of lieutenant colonel for 1 day, June 30, 1970, with date of rank from July 19, 1968, and then retired for years of service under 10 U.S.C. 8911 in grade of lieutenant colonel effective July 1, 1970, is entitled to payment of difference in retired pay between grades of lieutenant colonel and major for months of June and July 1970, since prior to July 1, 1970, officer satisfied requirements of 10 U.S.C. 1211(a)(1). The officer's entitlement to retired pay at higher grade for 2 months involved is not under 10 U.S.C. 8963(a), as he only "served" 1 day in temporary grade, but under 10 U.S.C. 8961, which authorizes officer to retire in grade he "holds" not the grade in which he "served" on date of retirement 677

Physical examination for promotion determination

Major in Air Force Reserves, who before recommended promotion to grade of lieutenant colonel could take effect was retired under 10 U.S.C. 1201, effective July 9, 1970, with 80-percent disability, and who had undergone two physical examinations, one in connection with "projected voluntary retirement," other incident to disability retirement, is not entitled to retired pay computed at higher grade, as disability for which officer was retired was not found to exist as result of physical examination for promotion within meaning of 10 U.S.C. 1372(3), nor are examinations within purview of *Brandt* v. *United States*, 155 Ct. Cl. 345, holding that where physical examinations in connection with promotion and retirement are given close together, physical disability can be said to be result of examination for promotion 508

PAY—Continued Page

Retired—Continued

Grade, rank, etc., at retirement

Service in higher rank than at retirement

Rule in 49 Comp. Gen. 618 to effect that members of armed services would be entitled to retired pay based on pay of higher grade, whether temporary or permanent, in which member served satisfactorily, even though higher grade was in other than service from which he retired, is equally applicable to Army members, notwithstanding 10 U.S.C. 3963(a), under which members are retired, seems to require that qualifying service be in Army, since that section, as well as 10 U.S.C. 8963(a), involved in ruling, have common legislative source. Under 10 U.S.C. 3963(a), Secretary is authorized to determine qualification for higher pay; and, therefore, there is no objection to administrative settlement of retroactive retired pay due that is not barred by 31 U.S.C. 71a, and 10-year limitation period begins to run after final administrative determination of satisfactory service 586

Members of uniformed services advanced in grade on retired list without regard to whether their active duty service in higher grade was in temporary or permanent grade or whether satisfactory service was in same service from which retired may be paid adjustments in retired pay from date of retirement, even though required administrative approval of satisfactory service was made more than 10 years subsequent to retirement, for under rule that claim which by statute is not payable until its validity is determined by designated agency does not accrue until determination of validity has been made, members' claims for adjustment of their retired pay are not barred by act of Oct. 9, 1940, as 10-year statute of limitation began to run from date of administrative determination of entitlement to higher grade and not date of retirement. 607

Since claim which by statute is not payable until its validity is determined by designated agency does not accrue until determination of validity has been made, it is not barred until 10 years after administrative determination is made and, therefore, application of act of Oct. 9, 1940, 10-year statute of limitation, does not take effect until secretarial approval of advancement of members on retired list without regard to whether satisfactory active duty service was in permanent or temporary grade, or in service from which retired. Readjustment payments that had been disallowed may be paid administratively, as well as future claims, whether retirement was for disability or under 10 U.S.C. 8964, and notwithstanding member's higher grade was in service from which retired, and order effecting change to higher grade constitutes date of administrative determination of satisfactory service in higher grade when issued on same day as determination 607

PERSONAL SERVICES

Private contract *v.* Government personnel

Employment recruiting

Contracts with District of Columbia Urban Corps, part of D.C. Govt., and similar Urban Corps and other organizations, including profit-making organizations, in other localities may not be entered into by Federal agencies for purpose of recruiting students and dealing with educational institutions because type of services contemplated can be performed more economically and feasibly by their own personnel.

PERSONAL SERVICES—Continued Page

Private contract *v.* Government personnel—Continued

Employment recruiting—Continued

Even if contract arrangement were permitted with D.C. Urban Corps, "override" payable would constitute reimbursement to D.C. Govt. that is barred by sec. 601 of Economy Act of 1932 (31 U.S.C. 686); moreover, any payment received would be for deposit into Treasury of U.S. to avoid augmentation of D.C. appropriation used to fund Corps..... 553

POST OFFICE DEPARTMENT

Star route contracts

Readjustment compensation

Method of computation

The unilateral change by Post Office Dept. from so-called "operating ratio method" to new formula to determine readjustment of compensation under star route contracts pursuant to 39 U.S.C. 6423 whereby increases in profit are governed exclusively by additional capital expenditures incurred through purchase or maintenance of capital goods is not prohibited by statute, and denial of adjustment is not considered dispute concerning question of fact within meaning of "Disputes" clause of contract. Although sec. 6423 gives star route contractor right to ask for readjustment of compensation and to expect reasonable return, Postmaster General has discretionary authority to determine that operating ratio method converts star route contract into undesirable type of cost-plus contract whereby profit is allowed as percentage cost..... 694

PROPERTY

Public

Damage, loss, etc.

Recovery disposition

Moneys received from carriers by National Credit Union Administration (NCUA) in settlement for goods lost or damaged in transit that were shipped in connection with operations of Administration should be deposited for credit to account of Administration and not general fund of Treasury since miscellaneous receipts rule (31 U.S.C. 484) is not for application, as operating funds of NCUA are not provided by annual appropriations but by fees and assessments upon credit unions pursuant to 12 U.S.C. 1755, which provides for deposit of collections from credit unions with Treasurer of U.S. for credit to account of Administration.... 545

REGULATIONS

Implementing procedures

Monroney Amendment

Wage adjustments

In retroactive application of Monroney Amendment wage schedule, 5 U.S.C. 5341(c), pursuant to U.S. Civil Service Bulletin No. 532–9, dated Sept. 23, 1970, when comparison of individual wage payments evidences previous wage schedule payments were less than employee is entitled to under Monroney Amendment, employee should be paid difference; and if previous payment was greater than amount due under amendment, employee may retain difference. However, where comparison of individual payments shows that underpayments equal overpayments, no payment is due employee. 495

RESERVE OFFICERS' TRAINING CORPS

(*See* **Military Personnel, Reserve Officers' Training Corps**)

ROADS AND TRAILS Page

(*See* Highways)

SALES

Bids

Mistakes

"Apparent on face of bid" requirement

Bid on surplus steel bars offering unit and extended prices that were incompatible with footage shown in sales invitation, and which was verified as intending to buy steel at total bid price reflected in bid, thus making it highest bid received, may not be accepted. While both DSAM Disposal Manual and par. 2–406.2 of Armed Services Procurement Reg. authorize correction of clerical mistake "apparent on the face of the bid," since error could have occurred in either unit or bid price, mistake is not apparent, as intended bid cannot be ascertained from bid itself; and bid correction, even if pecuniarily advantageous to Govt., would be harmful to competitive system 497

STATION ALLOWANCES

Military personnel

Temporary lodgings

Delayed departure no fault of member or dependents

Additional temporary lodging allowance provided by par. M4303–2e(2), Joint Travel Regs., when departure of member with dependents from overseas duty station is delayed beyond 10-day period of entitlement through no fault of member or dependents, should not have been paid to member whose departure was delayed awaiting court-martial proceedings, since charges of misconduct against member established prima facie that he was not without fault for delay. Therefore, there was no entitlement to allowance for period during which charges were pending, and member would be eligible to receive allowance only if exonerated from blame. However, having been found guilty—and it is immaterial if charges were made in civil action or under Uniform Code of Military Justice—erroneous allowance payments would be for recoupment but for fact administrative regulations were not clear 537

STATUTES OF LIMITATION

Claims

Date of accrual

Administrative determinations

Since claim which by statute is not payable until its validity is determined by designated agency does not accrue until determination of validity has been made, it is not barred until 10 years after administrative determination is made and, therefore, application of act of Oct. 9, 1940, 10-year statute of limitation, does not take effect until secretarial approval of advancement of members on retired list without regard to whether satisfactory active duty service was in permanent or temporary grade, or in service from which retired. Readjustment payments that had been disallowed may be paid administratively, as well as future claims, whether retirement was for disability or under 10 U.S.C. 8964, and notwithstanding member's higher grade was in service from which retired, and order effecting change to higher grade constitutes date of administrative determination of satisfactory service in higher grade when issued on same day as determination 607

STATUTES OF LIMITATION—Continued Page
Claims—Continued
Date of accrual—Continued
Retired pay
Members of uniformed services advanced in grade on retired list without regard to whether their active duty service in higher grade was in temporary or permanent grade or whether satisfactory service was in same service from which retired may be paid adjustments in retired pay from date of retirement, even though required administrative approval of satisfactory service was made more than 10 years subsequent to retirement, for under rule that claim which by statute is not payable until its validity is determined by designated agency does not accrue until determination of validity has been made, members' claims for adjustment of their retired pay are not barred by act of Oct. 9, 1940, as 10-year statute of limitation began to run from date of administrative determination of entitlement to higher grade and not date of retirement. 607
STATUTORY CONSTRUCTION
Legislative intent
Statute as a whole
When giving effect to plain meaning of words in statute leads to absurd or unreasonable result clearly at variance with policy of legislation as whole, purpose of statute rather than its literal words will be followed 604
SUBSISTENCE
Per diem
Travel by trailer, truck-camper, etc.
Claim for per diem by postal employee in lieu of subsistence in connection with use of truck-camper instead of hotel or motel room while on field assignment may be paid pursuant to sec. 6.2(e) of Standardized Govt. Travel Regs. which provides for per diem allowance for travel by means of privately owned trailer, for although truck-camper is not trailer it is temporary living unit and may, therefore, be viewed as within regulations for purposes of approving per diem allowance, and allowance not having been approved in advance may under regulation be post approved 647
TRANSPORTATION
Automobiles
Military personnel
Authority
Scope
Where transportation services accorded privately owned vehicles of members of uniformed services transferred overseas under permanent change of duty station orders is a joint one by ocean and land carriers, movement cannot be characterized as "American shipping service" under 10 U.S.C. 2634, and service, therefore, is unauthorized, even though more economically than port-to-port water transportation. Also beyond scope of section is inland movement of vehicle to permit use of water-land transportation by U.S.-flag carriers and U.S. land carriers in order to obviate use of foreign flag, port-to-port water transportation. Authorization for shipment of privately owned vehicles at Govt. expense is limited to transportation by water and such inland movements as are necessarily incidental to water transportation and capable of being performed by ocean carriers as bona fide "shipping services" 615

TRANSPORTATION—Continued Page

Automobiles—Continued

Military personnel—Continued

Containership ocean transportation

Cost of overland movement of privately owned motor vehicles of members of uniformed services incident to their shipment overseas pursuant to 10 U.S.C. 2634 when member is ordered to make permanent change of station may be paid from appropriated funds where vehicles are placed in containers some distance from shipside, as this kind of service is within scope of sec. 2634 relating to use of "American shipping services." Also there is no objection to ocean carrier accepting containerized cargo at port from which it does not operate containership and transporting vehicle for its own convenience and at its own expense to another port from which it operates containership, where overall cost to Govt. is as if vehicle moved by water from port to which delivered... 615

Land transportation

Authority in 10 U.S.C. 2634 for shipment at Govt. expense of privately owned vehicles of members of uniformed services ordered overseas on permanent change of station does not permit land movement of vehicles from one port to another in order to utilize U.S.-flag shipping and although it is permissible to ship vehicles by water at Govt. expense from one port to alternate port for transhipment to U.S.-flag carriers, prudent management should require owners to deliver their vehicles to ports from which U.S.-flag shipping is available—nor is land movement of vehicles between two ports authorized under sec. 2634 where vehicle is delivered to port from which no ocean transportation is reasonably available..... 615

Bills of lading

Commercial converted to Government

Ocean freight

The fact that commercial bill of lading covering shipment of radio equipment from Canada to California for export was required to be converted to Govt. bill of lading and second Govt. bill of lading was issued for California to Australia part of shipment does not preclude application of lowest available rate to determine charges from California to Australia and recovery from ocean carrier of overcharge that is difference between local and overland rates for ocean freight and which includes wharfage and hauling charges. Export nature of shipment was known to carriers, and but for requirement to use U.S. Govt. bills of lading, a through export bill of lading would have issued, and, furthermore, under Govt. bills of lading, shipment was made subject to terms and rates of commercial shipments..... 601

Dependents

Military personnel

Dislocation allowance

First duty station

Place where member of uniformed services reenlisted after discharge from last duty station with no further assignment contemplated is place from which be was ordered to active duty within meaning of

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel—Continued

Dislocation allowance—Continued

First duty station—Continued

par. M9004–1, item 1, of Joint Travel Regs., which provides that dislocation allowance will not be payable in connection with permanent change-of-station travel performed from home or from place from which ordered to active duty to first permanent duty station upon reenlistment; and, therefore, member transferred on temporary duty for hospital treatment is not entitled to dislocation allowance to relocate his household incident to his transfer to the hospital since hospital was his first permanent assignment under reenlistment 473

Hospital transfers

Since under par. M7004–5 of Joint Travel Regs. a member of uniformed services whose dependents had moved at Govt. expense "as for a permanent change of station" incident to his assignment to hospital for extended treatment would be entitled to further transportation of dependents upon his transfer from hospital to permanent duty station, he would also be entitled to dislocation allowance upon relocation of his household incident to transfer from hospital 473

Navy officer detached from duty overseas and assigned to hospital "for study and treatment if indicated and appearance before a Medical Board and pre-retirement physical examination," who before moving his dependents home maintained them for short period in vicinity of hospital until he was placed on temporary disability retired list, is entitled to dislocation allowance, since par. M9003–3a, Joint Travel Regs., providing allowance incident to hospital transfer applies to officer and not par. M9004–1, item 2, which prohibits payment of allowance in connection with separation, release from active duty, placement on disability retired list, or retirement, since at time officer's orders were issued there was only possibility of retirement or transfer to temporary disability retired list 579

Household effects

Military personnel

Replacement for effects damaged or destroyed

Replacement items for household effects of members of uniformed services assigned in Europe, which were destroyed by fire before delivery was effected, may not be shipped at Govt. expense, authority in 37 U.S.C. 406(b) to ship household effects at Govt. expense incident to change of station relating to effects possessed by member on effective date of orders, or effects acquired shortly thereafter in exceptional circumstances, and before they are turned over to transportation officer or carrier for shipment, at which time member's shipping rights are exhausted, even though original shipment is damaged or destroyed in transit. Moreover, to authorize replacement shipments under 37 U.S.C. 406 would provide duplicate transportation benefits, since compensation paid pursuant to 31 U.S.C. 241 for destroyed property includes cost of transportation 556

TRANSPORTATION—Continued Page

Rates

Export

Through rate

Bills of lading status

The fact that commercial bill of lading covering shipment of radio equipment from Canada to California for export was required to be converted to Govt. bill of lading and second Govt. bill of lading was issued for California to Australia part of shipment does not preclude application of lowest available rate to determine charges from California to Australia and recovery from ocean carrier of overcharge that is difference between local and overland rates for ocean freight and which includes wharfage and hauling charges. Export nature of shipment was known to carriers, and but for requirement to use U.S. Govt. bills of lading, a through export bill of lading would have issued, and, furthermore, under Govt. bills of lading, shipment was made subject to terms and rates of commercial shipments 601

TRAVEL EXPENSES

Overseas employees

Hired overseas

Residence in United States, etc.

Travel and transportation expenses of newly appointed employee from foreign country may be paid by Canal Zone agencies if employee at time of appointment had place of actual residence in U.S., its territories or possessions. However, as 5 U.S.C. 5722 authorizes payment of such expenses only from employee's place of actual residence at time of appointment, reimbursement may not exceed that which would have been allowed employee for travel and transportation from place of actual residence in U.S., its territories or possessions 644

Former employee of Canal Zone Govt. whose place of actual residence was in California, but who at time of appointment was temporarily residing in Costa Rica, and who had transported his household goods to Costa Rica in his own truck prior to signing employment agreement, which he signed in Costa Rica prior to travel to Canal Zone, may be reimbursed travel and transportation expenses from Costa Rica to Canal Zone in accordance with provisions of Office of Management and Budget Cir. No. A–56, but he may not be reimbursed expenses of moving from California to Costa Rica since these expenses were not incurred in anticipation of his appointment in Canal Zone 644

WORDS AND PHRASES

"Actual residence"

The term "actual residence" is not defined in 5 U.S.C. 5722 or implementing regulations, which authorize travel and transportation expenses for new appointees to posts of duty outside continental U.S., and is for determination from facts of each case. Although term as used in sec. 5722 generally would be understood to mean place at which appointee physically resides at time of appointment, term may include "legal residence" or "domicile" of employee 644

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