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[B-170836, B-170940]

Bids—Late—Return to Sender—Bid Consideration

The return unopened to the bidder of its late bid that had been forwarded by certified mail, where prior to bid opening a modifying telegram had been received, without compliance by the certifying officer with the late bid regulations that require the bidder to be notified and given an opportunity to furnish the original certified mail receipt and that require mail delivery information to be obtained from the post office in order to determine the acceptability of the late bid in accordance with the criteria in paragraph 2-3033(a) of the Armed Services Procurement Regulation, was unjustified. Notwithstanding the possibility of tampering with a bid once it leaves the Government's custody, late bids unjustifiably returned are not *prima facie* unacceptable; and on the basis of proof that the late bid should have been timely delivered, and that the sealed bid envelope had not been opened, the late bid may be considered for award. Prior conflicting decisions are modified.

Bids—Late—Prior Telegram Referring to Bid

Receipt before the opening of bids of a telegraphic notice advising that the bid is en route, or of a telegram modifying the bid, does not constitute a basis for accepting the bid received after the opening of bids. Whether the bid should be considered as an acceptable late bid depends upon whether the bid meets the requirements of the late bid regulations set forth in paragraph 2-303 of the Armed Services Procurement Regulation.

Bids—Late—Mail Delivery Evidence—Certified Mail

The mere fact that the delivery of test mailings subsequent to a bid opening involved more time than reported by the postmaster of the delivering post office to be normal delivery time does not render incorrect the statement of the destination post office concerning *normal* delivery time on the bid opening date.

To the Secretary of the Navy, November 2, 1970:

Reference is made to letter 0211C/RP:kam of October 13, 1970, from the Naval Facilities Engineering Command, regarding the protests made in connection with the award of a contract under invitation for bids N62470-71-C-0005, covering the performance of janitorial services for the period of November 1, 1970, through October 31, 1971, at the Navy Public Works Center, Norfolk, Virginia.

Bids were scheduled for opening at 2 p.m., September 17, 1970. Just prior to opening, a telegram was received from Royal Services, Inc., increasing the discount in the bid to 8½ percent. No bid was received from Royal Services by the bid opening time. Of the bids received at the scheduled time, the one from Springfield White Castle Co. in the amount of $431,555.60 was the lowest.

The next day, September 18, 1970, at 10:55 a.m., the Royal Services bid was received. It was mailed back to the bidder the same day with a notice that it was returned unopened because it was received too late for the scheduled bid opening. That afternoon an award was made to Springfield White Castle Co.

Royal Services learned of the return of its bid over the telephone the same day and complained to the contracting office. Also the same day, a letter was sent to the contracting office formally protesting the ad-

ministrative action. On September 22, 1970, Royal Services received a telephone call from the contracting office instructing it to return the bid. According to an affidavit recently made by a secretary employed by Royal Services, the oral telephone instructions were received by her about an hour to an hour and a half after the bid was received on September 22 and she immediately mailed the bid back to the contracting office. The secretary states further in the affidavit that Mr. Rosenbloom, the company president, and Mr. Mayfield, the general manager, were absent from the office during the day on September 22 and that during the time the bid was in the office after having been returned by the procuring activity, it was entirely within her control and was not tampered with in any way and was remailed to the procuring activity in the same condition in which it was received. The envelope returning the bid is postmarked September 22, 1970, and marked airmail. Other markings on the return envelope show it was received at 1:05 p.m. on September 25, 1970.

The bid envelope is a preaddressed Government-furnished envelope. It has been stamped "AIR MAIL SPECIAL DELIVERY" in two places on the front. There is affixed to the envelope a metered postmark showing that it was mailed from Jacksonville, Florida, on September 16, 1970. There is also affixed to the envelope a certified mail sticker. On the reverse of the envelope is a postmark covering part of the flap and the back indicating it was received in the Special Delivery section of the Norfolk, Virginia, Post Office, at about 7:30 p.m. on September 17, 1970.

After Royal Services learned by telephone that its bid was being returned, it sent the contracting office the original officially postmarked certified mail receipt showing that the bid was mailed to the contracting office in Norfolk, Virginia, from Jacksonville, Florida, at 2:40 p.m. on September 16, 1970, and letters from the Jacksonville Post Office to the effect that the bid should have reached Norfolk by 12:50 a.m. on September 17, 1970, and should have been in the first delivery that day.

Although the award was made to Springfield White Castle on September 18, 1970, performance under the contract was not to commence until November 1, 1970. About the middle of October, the contracting office issued a stop order against the award to permit our Office to consider the matter.

Receipt before the opening of bids of a telegraphic notice advising that the bid is en route or of a telegram modifying the bid does not constitute a basis for accepting the bid received after the opening of bids. B–149288, July 31, 1962; and B–153780, June 4, 1964. Whether the bid should be considered as an acceptable late bid depends upon

whether the bid meets the requirements of the late bid regulations set forth in paragraph 2–303 of the Armed Services Procurement Regulation (ASPR). In the immediate case, the contracting officer did not comply with ASPR 2–303.6, which requires that a bidder be notified of the late receipt of his certified mailed bid, and also that he be provided with an opportunity to furnish the original certified mail receipt to determine the time of mailing. Neither did the contracting officer comply with ASPR 2–303.3(d) providing that the normal time for mail delivery shall be obtained by the procuring activity from the post office serving the activity. The purpose of these regulations is to obtain information for the purpose of determining whether the late bid is acceptable under the criteria in ASPR 2–303.3(a) providing for consideration of late bids sent by certified mail, if it is determined that the lateness was due solely to a delay in the mails.

In a number of decisions, our Office has expressed reservations that a late bid should be considered for award after it has been returned to a bidder even when the return was improper. See B–122060, December 21, 1954; 41 Comp. Gen. 404 (1961); B–156052, March 22, 1965; B–158257, February 10, 1966; B–162035, August 25, 1967; B–169468, May 27, 1970; B–169263, June 1, 1970. However, in 41 Comp. Gen. 807 (1962), where a hand-carried bid had been wrongly returned to the bidder, our Office discounted the fact that the bidder had thereby gained an opportunity to decide after the disclosure of other bids whether to resubmit his bid. This was because the action of the Government, not that of the bidder, was responsible for any option the bidder may have gained. This option is no different than the choice of action any late bidder may exercise to his benefit. Under the late bid regulations (see ASPR 2–303.6), the bidder may, or may not, furnish the original certified mail receipt after all bids have been opened and disclosed. Whether he furnishes the receipt that is necessary to establish that the bid was mailed timely is completely within his control. This choice that the bidder has in the case of a late certified mailed bid is provided for in the regulations because in many cases the late arrival of the bid is not due to the bidder's fault, but to the fault of the post office. We see no reason for applying a different principle where a late bidder, because of the improper return of the bid by the contracting office, has been deprived of the opportunity provided for in ASPR to furnish evidence of timely mailing. This is especially true where, as here, there is still an opportunity to verify the timeliness of the certified mailing of the bid. We note in this regard that a stop order was issued against the contract awarded to Springfield White Castle.

Under the procurement regulations, information concerning the normal time for mail delivery is to be obtained from the delivering post office. The Norfolk Post Office has furnished information to our Office that the bid of Royal Services should have been delivered timely. Our Office has confirmed this informally with the Delivery Services Officer, Washington Regional Office, Delivery Services Branch of the Post Office and Delivery Services Division. While it may be that delivery of test mailings subsequent to the bid opening involved more time than that reported by the postmaster of the delivering post office to be normal delivery time, such fact does not render incorrect the statement of the destination post office. In B–156101 dated May 4, 1965, we held:

> Concerning the reliability of the statement of the Louisville postmaster as opposed to your experience involving mail between the points in question, the regulation requires that the evidence of delivery time be obtained from the postal officials at the post office serving the purchasing activity. Whether normal mail handling schedules, as stated by a responsible post office official, are consistently maintained in actual operations is not in our view a proper subject of inquiry under the regulations here in question. It must be presumed that a prospective bidder inquiring of the postal authorities as to when a bid should be mailed in order to be delivered on time would be advised on the basis of the normal schedules, and we believe that the bidder would be entitled to rely upon that advice. On the same basis we believe that the regulation correctly requires that full credence be given by the contracting agency to the statement of the postal authorities as to normal time for mail delivery. Furthermore, the mere fact that mail transmitted between the points in question subsequent to the bid opening date did not reach the bid opening office within a specified times does not render incorrect the statement of the Louisville postmaster concerning *normal* delivery time on the bid opening date.

We are, of course, concerned that once a bid has left the custody of the Government, there exists an opportunity for tampering with the bid. Therefore, our Office submitted the bid envelope to the Post Office Department Crime Laboratory for an examination to determine whether the envelope had been opened and resealed. The examination report from the Crime Laboratory Assistant Director states:

> Examination of the submitted envelope with the aid of a microscope and under ultra-violet light disclosed no evidence of added mucilage and malalignment of the upper and lower sections of the Special Delivery postmarking stamps. Also, no fiber disturbances were observed except in the confined area of the cellophane tape which was used to mend an obvious tear.
>
> Significance of the tear is discounted as evidence of tampering because of its localized extent and consequent impediment for removal of the contents. The explanation offered for the tear is that this portion of the flap had become stuck before the envelope was used for mailing and that the tear occurred when the flap was raised to insert the contents for mailing. This tends to be supported by the fact that there is a double crease at the top of the envelope, the original of which corresponds with the placement of the lower edge of the torn piece.
>
> Summarizing, examination of the submitted envelope disclosed that evidence of tampering to gain entry into the envelope for removal of the contents after original sealing is lacking.

In view of the Crime Laboratory report, our Office is satisfied the envelope contains the same bid as originally submitted by Royal Services.

Inasmuch as the Post Office is capable of furnishing reasonable assurances that a sealed envelope has not been tampered with, and in light of what we have said above, we will not consider that late bids unjustifiably returned to bidders are *prima facie* unacceptable.

Accordingly, in the circumstances, the bid of Royal Services may be considered for award.

[B-145804]

Compensation—Overpayments—Waiver—Aliens

The authority in 5 U.S.C. 5584 to waive erroneous payments of compensation made to employees of the executive agencies is applicable to non-United States citizens employed by the United States in foreign areas, as the term "employee" as used in section 5584 means an employee as defined in 5 U.S.C. 2105: that is, an individual appointed in the "civil service," which constitutes all appointed positions in the executive, judicial, and legislative branches of the Government, except positions in the uniformed services (5 U.S.C. 2101(1)). Therefore, a Philippine citizen, properly appointed to a position in the executive branch to perform a Federal function supervised by a Federal employee, is an employee under 5 U.S.C. 5584 and entitled to the waiver of erroneous compensation payments without regard to the fact the employment is under a labor agreement with the Philippine Government.

To the Secretary of the Navy, November 3, 1970:

We refer to letter of your office dated August 24, 1970, with enclosures, requesting our decision whether the waiver provisions of 5 U.S.C. 5584 are applicable to non-United States citizens employed by the United States in foreign areas. Specifically, your inquiry concerns Philippine citizens employed by the United States in foreign areas under detailed labor agreements negotiated with the Philippine Government.

Generally, the provisions of 5 U.S.C. 5584 authorize, under certain conditions, the waiver of erroneous payments of pay made to employees of executive agencies. The term "employee" as used in section 5584 means an individual defined as an "employee" in 5 U.S.C. 2105 which provides in part as follows:

(a) For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section; or

(E) the head of a Government controlled corporation;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The term "civil service," appearing in (a)(1), above, means all appointive positions in the executive, judicial, and legislative branches of the Government, except positions in the uniformed services. 5 U.S.C. 2101(1).

The fact that a person is not a citizen of the United States has no bearing on his status as an "employee" under the above definition. Thus, if an individual is properly appointed to a position in the executive branch, is engaged in the performance of a Federal function, and is supervised by a Federal employee, he is an "employee" within the meaning of 5 U.S.C. 5584. Moreover, we do not regard the labor agreements previously referred to as affecting such a determination. Your question is answered accordingly.

[B-165816]

Leaves of Absence—Military Personnel—Excess Leave Accrual—"Continuous Period" Interruptions—Hostile Fire Pay Area Duty

The right of a member of the uniformed services to accumulate 90 days' leave under 10 U.S.C. 701(f) while serving on board a ship which operates in a designated fire area for a continuous period of at least 120 days, during which time he is entitled to the special pay authorized in 37 U.S.C. 310(a), is not affected by the fact that the ship to which assigned operates in and out of a designated hostile fire area. Since crewmembers qualify for hostile fire pay for each month of the 4-month period of duty in a hostile fire area, the "continuous period" requirement in section 701(f) for accruing excess leave is satisfied, provided the absence during any part of the 120 days from the designated area is for periods of less than a calendar month.

To the Secretary of the Navy, November 3, 1970:

Further reference is made to letter dated September 3, 1970, from the Assistant Secretary of the Navy (Financial Management) requesting a decision whether, under the circumstances stated, a member of a uniformed service who is entitled to special pay under 37 U.S.C. 310(a) for a continuous period of 120 days can accumulate 90 days' leave under 10 U.S.C. 701(f), "while he is serving on board a ship which is operating in a designated hostile fire area and is absent from such area only for periods of less than a calendar month during any one month or more for which he was entitled to hostile fire pay." The request was assigned Submission Number SS-N-1093 by the Department of Defense Military Pay and Allowance Committee.

The Assistant Secretary states that the ship on which duty is performed was not assigned to a hostile fire area under orders contemplating an assignment in the area of at least 120 days but does in fact operate in and out of the area for 120 days. A representative situation of certain Navy ships deployed for duty in a hostile fire pay area is described in the Assistant Secretary's letter as a ship which, while de-

ployed overseas, operated in and out of the designated hostile fire area for 5 consecutive months. Members aboard that ship during that period received hostile fire pay for all 5 months. It is stated that at no time during such period was the ship out of the designated hostile fire area for more than 3 weeks.

The authority for members of the Armed Forces to accumulate up to 90 days of leave—30 days in excess of the 60 days authorized in 10 U.S.C. 701(b)—is contained in subsection (f) of section 701, Title 10, U.S. Code, as added by the act of January 2, 1968, Public Law 90–245, 81 Stat. 782, which provides as follows:

> (f) Under uniform regulations to be prescribed by the Secretary concerned, and approved by the Secretary of Defense, a member who serves on active duty for a continuous period of at least 120 days in an area in which he is entitled to special pay under section 310(a) of title 37 may accumulate 90 days' leave. Leave in excess of 60 days accumulated under this subsection is lost unless it is used by the member before the end of the fiscal year after the fiscal year in which the service terminated.

Regulations implementing the above law provided in paragraph IV A, Department of Defense Instruction No. 1327.4, March 20, 1968, that personnel who serve on active duty for a continuous period of at least 120 days after January 1, 1968, in an area in which they are entitled to special pay under the provisions of 37 U.S.C. 310(a) may accumulate 90 days' leave at the rate of 2½ days per month for each month of such service. Article 3020120, Bureau of Naval Personnel Manual, is to the same effect and includes an appropriate provision relating to loss of such excess leave if not used within the stated time limitation.

In our decision of February 19, 1969, 48 Comp. Gen. 546, cited in the Assistant Secretary's letter, we considered several questions raised in an addendum to Department of Defense Military Pay and Allowance Committee Action No. 426, with respect to the implementation of Public Law 90–245 by the above-mentioned Department of Defense Instruction of March 20, 1968. Question A of the addendum asked what constitutes "a continuous period of at least 120 days in an area in which * * * [a member] is entitled to special pay under section 310(a) of title 37," in considering situations involving brief interrupted service as the result of medical evacuation, service imposed temporary duty outside the designated area, emergency leave, etc.

After considering the hostile fire pay entitlements provisions in 37 U.S.C. 310(a) and implementing regulations contained in Table 1–10–1, Rule 1, Department of Defense Military Pay and Allowances Entitlements Manual, we said that since hostile fire pay for members on permanent duty in a designated hostile fire area accrues on a monthly basis, we agreed with the Committee's view that the "continuous period" for accruing excess leave continued through absences

from the designated area for periods of less than a calendar month.

A right to accumulate 90 days' leave under 10 U.S.C. 701(f) accrues to a member who "serves" on active duty for a "continuous period" of at least 120 days in an area in which he is entitled to special pay under 37 U.S.C. 310(a). Concerning entitlement of Navy personnel aboard ship to accrue excess leave while operating in a hostile fire area, the following remarks were made during the course of hearings on H.R. 1341 (which became Public Law 90-245); "Mr. Morgan. Now, does this apply to Navy personnel aboard ship that are there for less than a year? I think the cutoff is 120 days? Commander Jex. 120 days; yes sir." See page 5466 of hearings [No. 28] dated October 4, 1967, Subcommittee No. 3, House Armed Services Committee. We find nothing in the law or the regulations which would require, as a prerequisite for accruing excess leave, that the ship's orders contemplate an assignment in the hostile fire area of at least 120 days.

In line with our answer to question A in 48 Comp. Gen. 546, 550, it is our view that so long as the ship operates in and out of the designated hostile fire area for at least 120 days and the crewmembers of that ship qualify under the law and regulations for hostile fire pay for each month of that 4-month period, the "continuous period" requirement in 10 U.S.C. 701(f) for accruing excess leave would be satisfied, provided the absence during any part of the 120 days from the designated area is for periods of less than a calendar month. For the reasons indicated, crewmembers of the ship in the situation presented in the Assistant Secretary's letter would be entitled to accumulate up to 90 days' leave. The question presented is answered in the affirmative.

[B-170675]

Compensation—Wage Board Employees—Conversion to Classified Positions—Rate Establishment

When an employee's wage board position is changed by agency action to the General Schedule while he is working a night shift, the basic rate of pay preserved to the employee under section 539.203 of the Civil Service Regulations includes the night differential, as it is a "rate of pay fixed by * * * administrative action" within the contemplation of section 539.202(c), defining "rate of basic pay." The inclusion of the night differential in establishing the employee's General Schedule rate of pay does not preclude the receipt of the prescribed 10 percent night differential so long as he remains on the night shift, but the differential is not to be included in the employee's retirement and life insurance base.

To the Chairman, United States Civil Service Commission, November 4, 1970:

This is in reference to your letter dated August 21, 1970, requesting our decision on whether we concur in your view that night differential

may be included in the "rate of basic pay" for the purposes of section 539.203 of the Civil Service Regulations.

It is stated in your letter that an agency has requested an interpretation of sections 539.202(c) and 539.203 of your regulations as applied to an employee who is working a night shift when his position is changed by agency action from the wage system to the General Schedule.

Section 539.203 provides for preserving the employee's rate of basic pay under such circumstances, or for increasing it to the next step of the General Schedule grade if it falls between two steps. Section 539.202(c) defines "rate of basic pay" as "the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind."

You say that you find no record to show that the subject of night rates was specifically considered in the issuance of these regulations; but as the differential for a regular tour of duty at night has consistently been held to be a part of basic pay (23 Comp. Gen. 962 (1944); 24 *id.* 39; 155; 189 (1944); 550 (1945); 26 *id.* 212 (1946), you believe that the correct interpretation of section 539.202(c) would include night differential in "the rate of pay fixed by * * * administrative action." You point out that the regulation could be amended to deal with this element specifically, but the present regulation will have to be applied to conversions which have already occurred.

It is stated further that in the instances about which you have been asked, the night differential in the wage positions was 10 cents per hour. The inclusion or exclusion of night differential in the conversion would make a difference of one step in the General Schedule grade to which the positions were converted. You recognize that whatever step of the General Schedule the employee is placed in, he will receive a 10 percent night differential so long as he remains on the night shift but point out that differential is not included in the retirement and life insurance base.

In view of the foregoing, you propose to advise the agency that for the purpose of preserving an employee's rate of basic pay under section 539.203, the "rate of basic pay" in a wage position includes the night differential paid him in that position. In addition, you propose to advise the agency that inclusion of the night differential in the rate of basc pay for the purpose of determining the employee's rate in the General Schedule will not preclude his receipt of the prescribed 10 percent night differential in the General Schedule position.

We have no objection to your advising the agency along the lines proposed.

[B-131836]

Family Allowances—Separation—Type 2—Ship Duty—Ashore Effect

Navy members who travel during 48 hours of liberty, 72 hours if a holiday is involved, from the place of ship overhaul to the home port of the ship to visit dependents and return at Government expense pursuant to Public Law 91-210, do not forfeit entitlement to the $30 per month Family Separation Allowance, type II, authorized in 37 U.S.C. 427(b) for members separated from their dependents while on board ship for a continuous period of more than 30 days. The legislative history of Public Law 91-210, enacted as beneficial legislation to permit members to travel at Government expense from a place of vessel overhaul to home port to visit dependents, evidences no intent to deprive a member of other benefits by reason of a short visit with dependents on the usual type of Navy liberty.

To the Secretary of the Navy, November 5, 1970:

We again refer to letter of September 24, 1970, from the Assistant Secretary of the Navy (Financial Management) requesting a decision as to the entitlement of shipboard members to Family Separation Allowance, type II, when they travel from the place where the ship is undergoing overhaul to the home port of the ship to visit dependents and return at Government expense pursuant to Public Law 91-210, 37 U.S.C. 406b, and the travel is performed in a single period of liberty. The request was assigned submission No. SS-N-1096 by the Department of Defense Military Pay and Allowance Committee.

The Assistant Secretary says that Public Law 91-210, approved March 13, 1970, provides new transportation entitlements at Government expense for shipboard members of the uniformed services from the place a ship is undergoing overhaul to the home port of the ship and return, provided the member's dependents are residing at the home port of the ship. He says that these entitlements were implemented by the Joint Travel Regulations, Volume 1, by the addition of Part O to chapter 6, and that implementation by the Navy was accomplished by the issuance of Naval Message 311947Z of March 31, 1970 (ALNAV 05) which was superseded by SECNAV Instruction 7220.67 dated July 21, 1970. He states that both the ALNAV and the SECNAV Instruction provide, in pertinent part, that the transportation entitlements will be utilized in conjunction with normal leave or liberty.

The Assistant Secretary says that in view of decisions 43 Comp. Gen. 332 (1963) and 43 Comp. Gen. 748 (1964) it is clear that a member's entitlement to Family Separation Allowance, type II, does not terminate when he visits his dependents at the home port in connection with authorized leave. He points out, however, that the 1964 decision also provides that when a member is visiting his dependents in connection with "compensatory absence"—which is described as "a lumping together of several liberties"—the member's entitlement to

Family Separation Allowance, type II, terminates during the period of the visit and he does not again qualify for the allowance until he returns to the vessel and thereafter serves the required period of 30 days.

In view of the holding in the 1964 decision the Assistant Secretary says that doubt exists as to the entitlement to Family Separation Allowance, type II, when a single period of liberty is involved in connection with travel of a member from place of overhaul to home port and return for the purpose of visiting dependents residing at the home port.

As an example, mention is made of a ship with home port at Newport, Rhode Island, which is undergoing inactivation at Boston, Massachusetts. Members whose dependents reside in Newport are granted weekend liberty. They travel in a privately owned vehicle from Boston to Newport on Friday after working hours and return to Boston on Sunday evening. The Assistant Secretary says that under Public Law 91–210 and paragraph M6701 of the Joint Travel Regulations, the operator of the automobile is entitled to reimbursement for travel from Boston to Newport and return at 5 cents per mile for trips performed during the intervals specified in the statute. The question is presented, however, whether entitlement to Family Separation Allowance, type II, of the driver and passengers terminates on Friday and does not accrue again until after the 30-day qualifying period beginning on Sunday has expired. In view of the substantial number of personnel attached to ships scheduled for inactivation in the near future, the Assistant Secretary requested our early consideration of the problem.

So far as is pertinent here, 37 U.S.C. 427(b) provides for a Family Separation Allowance of $30 per month, designated by the services as type II, for periods when there is an enforced separation of the member and his dependents including when "he is on duty on board a ship away from the home port of the ship for a continuous period of more than 30 days."

In 43 Comp. Gen. 748 (1964) there was considered the entitlement to this allowance for members of the Coast Guard permanently assigned to isolated units or stations who are required to serve at their stations for continuous short periods not exceeding 21 days each followed by an interval of compensatory absence not exceeding 7 days. We pointed out that the granting of such compensatory absence is authorized by 14 U.S.C. 511, and that implementing regulations contained in Coast Guard Personnel Manual provide that such compensatory absence is a form of liberty granted to personnel on light ships, at light houses, and other aids to navigation.

Those regulations further provide that compensatory time is not a right to any individual but is authorized for the purpose of maintain-

ing the efficiency of the service by providing a method of compensating any individual for normal liberties lost through serving at isolated units. Since under those provisions it was evident that, generally, for at least 1 full week of each month of their assignment, these members can rejoin their dependents who were authorized to move at Government expense to the area in which the isolated duty station is located, we held that there is not an enforced separation for an extended period of time as contemplated by 37 U.S.C. 427(b). That decision also mentions that such compensatory time and leave may be authorized consecutively.

Public Law 91–210, approved March 13, 1970, amended chapter 7 of Title 37, U.S. Code, by adding a new section 406b. That section provides that under regulations prescribed by the Secretary concerned a member of the uniformed services who is on permanent duty aboard a ship which is being overhauled away from its home port and whose dependents are residing at the home port of the ship is entitled to transportation, transportation in kind, reimbursement for personally procured transportation, or an allowance for transportation as provided in section 404(d)(3) of that chapter for round trip travel from the port of overhaul to the home port on or after the thirty-first, ninety-first, and one hundred and fifty-first calendar day after the date on which the ship enters the overhaul port or after the date on which the member becomes permanently attached to the ship, whichever date is later.

The legislative history of the measure shows that a member would not be entitled to the transportation where he had been attached to the ship "for less than 30 consecutive days." Page 5, Senate Report No. 91–665 to accompany H.R. 8020. That report also shows it has been the practice for the members to travel from the vessel to the home port at personal expense on "available weekends." Presumably, this refers to liberty travel.

With respect to liberty, paragraph 3030100–1, Bureau of Naval Personnel Manual, provides that liberty, as defined in Navy Regulations, is authorized absence of a member from a place of duty not chargeable as leave. It further provides that liberty may not be taken in conjunction with leave and that it may be granted by commanding officers at any time for a period of 48 hours or less and that this period may be extended to 72 hours if it includes a holiday proclaimed by the President or authorized by the Secretary of the Navy. It further provides that in certain circumstances liberty may be granted for as much as 96 hours.

Our holding in 43 Comp. Gen. 748 that a period of compensatory absence under 14 U.S.C. 511 and Coast Guard regulations, permitting a member to be with his dependents a full week each month,

would terminate his entitlement to Family Separation Allowance, type II, was based on the long period each month that he would be with his dependents. Apparently, the Navy has no similar provision.

Public Law 91–210 was enacted as beneficial legislation to permit members to travel at Government expense from the place of overhaul of the vessel to the home port to visit their dependents. There is nothing in the legislative history of the law to indicate any intention to deprive a member of other benefits by reason of such a short visit with his dependents on the usual type of Navy liberty.

Accordingly, if entitlement otherwise exists, we would not be required to object to the continuation of Family Separation Allowance, type II, where members are granted liberty for not to exceed 48 hours (72 hours if a holiday is included) for the purpose of visiting their dependents. There would be no transportation entitlement, however, where, as in the example presented, the vessel is undergoing inactivation rather than overhaul. See decision of October 26, 1970, 50 Comp. Gen. 320, to the Secretary of Defense.

[B–169874]

Bids—Two-Step Procurement—Second Step—Deviating From First Step

The determination to open the late bid received on one of two technical proposals submitted under the first step of a two-step procurement and found acceptable, even though the equipment offered did not meet all the details of the specifications, was proper since the delay in delivery of the bid received more than 24 hours before bid opening was due to Government mishandling. Although the bid was accompanied by a covering letter and unsolicited descriptive literature at variance with the specifications, it is nevertheless a responsive bid; for it is inconceivable that the low bidder, who had qualified under the first step, would disqualify itself in the second step and, therefore, the deviating material is viewed as an attempt to identify which of the two accepted first-step proposals was being priced in the second step.

To Gilbert A. Cuneo, November 5, 1970:

Reference is made to your letter of October 21, 1970, and previous correspondence, protesting against an award to the Kearney & Trecker Corporation under invitation for bids F09603–70–B–4970 issued by Warner Robins Air Materiel Area (WRAMA), Georgia.

The subject invitation is the second step of a two-step procurement for two machining centers with an option for a third. In the first step, Kearney & Trecker submitted one technical proposal based upon the Milwaukee-Matic Series Eb and another upon the Modu-Line 3630. Kearney & Trecker submitted descriptive literature, brochures, photographs, and specifications with the proposals. The proposals were evaluated and after some amendment changes had been accepted by Kearney & Trecker, both of its proposals were approved by WRAMA,

and Kearney & Trecker was provided with an invitation to bid on the second step. Proposals submitted by Pratt & Whitney, Inc. and the Ex-Cello-O Corporation were also approved for bidding in the second step.

All three companies bid on the second step, although the Kearney & Trecker technical proposals for alternate equipments were both acceptable, it bid on the basis of furnishing only one type of equipment in the second step. As noted above, the second step solicited bids for two machines and an optional third machine. Kearney & Trecker's bid was low in the amount of $150,011.70 for the first machine, $149,908.70 for the second machine, and $149,796 for the optional machine. Pratt & Whitney prices for the items were $160,329.60, $160,172.60, and $159,322.80, respectively. Ex-Cello-O bid $251,525 on all three items.

Pratt & Whitney protested against acceptance of the Kearney & Trecker bid on three alternative grounds:

(1) that Kearney & Trecker's first-step technical proposal for the equipment bid upon did not meet the specification requirements;

(2) that enclosures accompanying the bid qualified it;

(3) that it is a late bid.

It is contended that the first-step technical proposal for the equipment bid upon did not meet the Government specifications in a number of respects. In connection with the variable speed requirement, it is pointed out that paragraph 3.4.6 of the specifications provides:

Spindle. The spindle shall be provided with means of varying its speed throughout the range of speeds specified for the machine classification shown in Table I. Speed changes may be accomplished by use of a stepchange transmission in conjunction with an AC motor, by use of variable speed DC motors with limited gear changes, by use of direct-connected variable speed DC motor drive by an AC motor with variable speed belt drive or by use of variable speed hydraulic motor. * * *

In that regard, it is noted that Kearney & Trecker proposed using a two-speed hydraulic motor with a 16-step gearbox which will result in an output of 32 speeds. It is stated that the two-speed hydraulic motor in the Kearney & Trecker machine does not meet the requirement of the specifications for a "variable" speed hydraulic motor capable of varying the spindle speeds throughout the range of 100 to 2,000 RPM as stated in table I of the specifications. It is stated further that the number of speed variations is less than that intended by the specifications and will not meet the needs of the procuring activity.

However, the specifications did not state the number of speed variations and the 32-speed capability of the Kearney & Trecker machine during technical evaluation of proposals in the first step was determined to be satisfactory; and technical personnel have advised our

Office informally that the 32-speed capability will be sufficient. Further, the specification stated the speed changes "may" (not shall) be accomplished by the alternative methods listed. Therefore, we believe that the Kearney & Trecker machine met this specification requirement.

Moreover, even if it can be said that the Kearney & Trecker proposal did not meet all the details of the quoted portion of paragraph 3.4.6 of the specifications, such fact would not significantly affect the responsiveness of the proposal if the procuring agency is satisfied, as it apparently is, that the essential requirements of the specification will be met. See paragraph 2–503.1(e) of the Armed Services Procurement Regulation which provides that first-step proposals which fail to conform to the "essential" requirements or specifications are nonresponsive and are to be categorized as unacceptable.

Another respect in which it is contended the Kearney & Trecker proposal did not conform to the specifications is the full floating zero requirement. In that regard, it is pointed out that the ordering data stated that a full floating zero is required. The Air Force responded that Kearney & Trecker indicated compliance with the requirement in paragraph 3.3.8 of the specification it submitted with the technical proposal. The Air Force relied upon the fact that paragraph 3.3.8 stated:

Full Zero Shift. Means shall be provided so that the zero reference point may be adjusted over the entire range of the controlled axis. Once established, this reference point shall remain in the control memory until a desired change is instituted. By manually returning the slides to within .040" of the home positions and depressing the zero axis position buttons, the machine shall automatically resynchronize to the standard grid.

You contend that the Air Force has confused full floating zero with full zero shift. In that regard, you point out that Roberts and Prentice observed in appendix "C" of *Programming for Numerical Control Machines* that it is common to confuse these features. However, we observe that in drawing a distinction between full floating zero and full zero shift, appendix "C," attached to your letter of September 10, 1970, states that a floating zero machine "has no fixed reference point (or zero point) on the machine table" and that in a floating zero control "the zero is 'established.'" We note the similarity of that language to that in paragraph 3.3.8 which states that "the zero reference point may be adjusted over the entire range of the controlled axis" and speaks of the zero reference point being "established." We therefore believe that the Air Force position that Kearney & Trecker proposed a full floating zero feature, representing a technical determination which we are unable to dispute, is controlling. You have also pointed out that paragraph 3.3.8 speaks of the "controlled axis" and you state that this refers to the XZ axis and that the Kearney & Trecker machine is not

capable of adjusting the reference point for the "Y" axis. However, we observe that paragraph 3.3.2 states that "The control system shall control single movement or multiple movements of three axes (X, Y & Z)." It thus appears that the "Y" axis is one of the controlled axes.

Another respect in which it is contended the Kearney & Trecker proposal did not conform to the specifications is with reference to the spindle speed and feed rate coding requirement. In that regard, it is pointed out that the ordering data furnished under paragraph 6.2 of the specifications provides:

> Speed and feed rate coding shall conform to Electronics Industries Association (EIA) Standard RS-274 or National Aerospace Standard (NAS) 955.

It is stated that the industry standards provide that the speed be expressed at least as a three-digit number, whereas the Kearney & Trecker equipment will only operate on a two-digit code. Although the industry standard uses permissive language in setting forth the digit requirement, it is contended that the above-quoted statement in the ordering data that the speed and feed rate coding "shall conform" to the industry standards makes the permissive language of the industry standards mandatory. However, the Air Force has reported that two-digit coding would be adequate for its needs and Air Force technical personnel who prepared the ordering data have advised us informally that despite the use of the words "shall conform" in the ordering data, it was actually intended at the time of preparation of the ordering data that the permissive aspect of the industry standards with respect to the speed and feed coding should prevail. However, even if the language of the ordering data should be construed to require a three-digit code, paragraph 5 of the letter request for technical proposals provided that offerors could propose deviations to the requirements of the specification; paragraph 6 encouraged proposals presenting "different basic approaches;" and paragraph 7 stated that among other factors the criteria for evaluating technical proposals would include "operational suitability." Therefore, it was apparent that proposals would not necessarily be evaluated on the basis of strict compliance with all the details of the specification and the acceptance of two-digit operation does not appear improper in the circumstances. See 46 Comp. Gen. 34 (1966) and B-168138, February 17, 1970.

It has also been contended that the machine proposed by Kearney & Trecker does not have axis inversion capability as required by the specifications. Kearney & Trecker did request in the technical proposal that the requirement be deleted, but subsequently withdrew the request in writing during the first step.

Another contention is that the Kearney & Trecker machine does not have an integrated circuit design as required by the specifications.

However, the Kearney & Trecker proposal contained a statement that the latest generation of controls employing integrated circuitry is offered.

Finally, it is stated that the Kearney & Trecker brochure and photograph describe a three-axis center, whereas the specifications require four axes. However, Kearney & Trecker has offered four axes. The Government ordering data states, "In lieu of that specified in Table I the rotary table shall be automatic tape controlled (4th axis) with capabilities of positioning to any one of 360,000 divisions or positions in 0.001 degree." The literature submitted by Kearney & Trecker as a part of the proposal stated, "Full 4-axis simultaneous contouring capability is offered in conjunction with the 360,000 position index table and the Position/Contouring options."

In view of the foregoing, the technical determination made that Kearney & Trecker's first-step proposal was acceptable does not appear to have been inconsistent with the requirements stated in the first step of the procurement.

This brings us to the question whether the second-step bid was an acceptable late bid and, if so, whether it was a qualified bid that should be rejected. The scheduled bid opening time was 10 a.m., Monday, May 18, 1970. At that time, the bid from Pratt & Whitney was the only bid received by the contracting officer. The bid from Kearney & Trecker was not received by the contracting officer until 10:45 a.m. that day. However, it had been received in the mailroom of the activity on the previous day, Sunday, May 17, 1970, at 9 a.m. The delay in delivering the bid to the contracting officer was attributed to the absence of mail distribution at the base over the weekend and to the time involved on Monday morning in distributing mail which had accumulated over the weekend. Since the bid had been received in the mailroom more than 24 hours before the scheduled bid opening time, the delay in receipt by the contracting officer was determined to be due to mishandling by the Government after receipt at the installation. Here the bid was received at the installation the morning of the day before the bid opening. In 42 Comp. Gen. 508 (1963), we considered a case where the bid was received at the installation at 5:20 a.m. the same morning as the bid opening scheduled for 10:30 a.m., but was not delivered to the bid room until after bid opening. We held in that case that the late receipt of the bid at the bid room was due solely to mishandling by the Government. In that connection, at page 512, it was stated:

* * * In fact, if bids invited to be sent by mail are to be required to be at a particular room or office by the time set for opening, although deliveries of mail by postal employees must be made at a different point, we feel that the Government owes to all prospective bidders a duty to establish procedures calculated to insure that the physical transmission of bids from the one place to the other will not be unreasonably delayed. * * *

In view thereof, the determination to open the late bid from Kearney & Trecker does not appear to have been improper.

The bid from Kearney & Trecker was accompanied by a letter which, insofar as pertinent, stated:

> Enclosed is our response to the subject bid request. We are pleased to quote our standard MILWAUKEE-MATIC Series Eb Machining Center.
> We have included our standard proposal covering the pricing for the machine and all options, along with a brochure which contains a photograph of the Series Eb. We have also enclosed two [2] copies of all manuals normally supplied with the machine.

It is contended that Kearney & Trecker qualified its bid by the statement in the letter that it is quoting the "standard" Milwaukee-Matic Series Eb Machining Center and by the literature and manuals supplied with the bid. In that regard, it is contended that the literature submitted with the bid does not conform in all respects to the Government requirements and demonstrates an intention to furnish something other than the Government's requirements. Further, it is contended that information contained in the manuals which were required to be submitted with the bid demonstrated that the machine will not meet the Government requirements. In that regard, it is pointed out that the manuals were required to be submitted as commercial data which the invitation stated was required "for evaluation." You have cited a number of decisions of our Office for the proposition that a bid is required to be rejected as nonresponsive when literature, unsolicited or not, submitted with the bid shows an intent to qualify the bid or creates an ambiguity as to what the bidder intends to furnish. Those decisions deal with the usual formally advertised procurement—not a two-step procurement.

As indicated above, the first-step proposal of Kearney & Trecker, as modified, was approved as acceptable. Therefore, we believe that the statements made by Kearney & Trecker in its cover letter transmitting its bid under the second step must be read against that background. As pointed out in 45 Comp. Gen. 221, 224 (1965), it is inconceivable that a qualified bidder would go to the effort and expense of preparing an acceptable technical proposal in the first step only to disqualify itself in the second step by deviating from its accepted technical proposal. In the circumstances, we do not believe that the cover letter or the unsolicited literature submitted with the bid should be construed as an attempt to impose any kind of restriction upon the first-step proposal that was approved, but rather should be construed as an attempt to identify which of the two accepted first-step proposals it was pricing in the second step. Although the manuals were required to be submitted with the bid for evaluation, AFPI 71-531-(19), which was supplied by amendment to the invitation, indicates that the manuals were for the purpose of "determining the technical

adequacy and accuracy of such data." Thus, it may be said that the manuals were not intended for use in determining whether the machine meets the specifications. Therefore, any deviation in the data contained in the manuals does not, in our view, constitute a qualification fatal to the bid. In that connection, we note that AFPI 71-531-(19)A, which also was a part of the invitation, provides that the manuals may be supplemented to incorporate minor changes to be acceptable for Air Force use.

In view of the foregoing, the protest is denied.

[B-168024]

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

The service charge levied on each ton of refuse deposited at a county incinerator by Federal agencies or their contractors, which is not imposed on residents or non-Federal tax-exempt users including State agencies where the cost of operation and maintenance of the incinerator is borne by general tax revenues and the county's authority to levy the tax is doubtful, is in the nature of a tax to which the United States (U.S.) is immune; and the placement of the U.S. in a separate category from other property tax-exempt entities for the purpose of imposing the charge is an unreasonable and discriminatory classification on the part of the county and, therefore, the payment of the charge is unauthorized. However, payment of the charge may continue to be made under contracts including the charge and providing for refund upon resolution of the matter.

States—Municipalities—Services to Federal Government—Payment Based on *Quantum* of Services

A reasonable charge by a political subdivision based on the *quantum* of direct service furnished, and which is applied equally to all property tax-exempt entities, need not be considered a tax against the United States, even though the services are furnished to the taxpayers without a direct charge, provided the political subdivision is not required by law to furnish the service involved without a direct charge to all located within its boundaries, such as fire and police protection.

To the Secretary of the Army, November 9, 1970:

Reference is made to the letter dated August 4, 1970 (reference JAGT 1970/7082), from the Acting Assistant Secretary of the Army (Installations and Logistics), requesting our decision as to the propriety of payment of a charge levied by Arlington County, Virginia, on each ton of refuse deposited at the county's incinerator by Federal agencies or their contractors.

As described in the letter, the facts giving rise to the problem are:

Refuse generated by Department of the Army installations located in Arlington County, Virginia (e.g., Fort Meyer) is picked up at the installations by contractors under Department of the Army contracts. The contractors, in turn, deposit the refuse at an incinerator operated by the County for disposal. The County levies a charge of $7.36 per ton for refuse deposited at the incinerator by Federal agencies or their contractors. The County does not levy any charge at the incinerator against any party except Federal agencies and their contractors. It is understood that all individuals, other than Federal agencies and

their contractors, receive incinerator services without special charge; and that the cost of the incinerator services is absorbed by the general tax revenues of the County. The United States exercises exclusive legislative jurisdiction over the Army installations (e.g., Fort Meyer) involved. The Department of the Army contractors, of course, must recognize this County charge as one of their costs for bidding purposes under the contracts; and accordingly the economic burden of the charge is passed on to the United States.

The issue here is whether the Federal Government is liable for payment of the incinerator service charges assessed by the county.

Citing decisions of this Office, the Acting Assistant Secretary takes the position that where a charge for services is levied against a Federal agency, and the service involved is furnished free to other residents, the cost of which is absorbed from the general tax revenues of the county or municipality, the charge is considered to be in the nature of a tax imposed against the Government, which charge would be improper for the Federal agency to pay.

The Arlington County incinerator is owned and operated for the convenience and health of county residents. The cost of operating and maintaining the incinerator is borne by general tax revenues. However, the county imposes a charge for refuse deposited by Federal agencies or their contractors, but not against other users of the incinerator. Thus, non-Federal tax-exempt institutions, including agencies of the Commonwealth of Virginia, are not required to pay the incinerator service charge. It is apparently the county's position that the amount billed is not a tax but rather a service charge based upon the *quantum* of service rendered to the Federal Government.

We have held, in effect, that where a direct charge for services is levied against a Federal agency and the service involved is furnished to other residents of the political subdivision without a direct charge (i.e., the cost of the service is absorbed from the general tax revenues of the political subdivision involved), the direct charge is in the nature of a tax against the Federal agency and the United States is immune therefrom. See 49 Comp. Gen. 284 (1969). *Cf.* B–131932, March 13, 1958; B–129013, September 20, 1956; 35 Comp. Gen. 311 (1955); and 24 *id.* 599 (1945).

It has also been held that a charge made by a State or a political subdivision of a State or a service rendered or convenience provided is not a tax. Fair and reasonable compensation for a service rendered or a facility used is not a tax. See *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877); *Transportation Co.* v. *Parkersburg*, 107 U.S. 691 (1882); *Huse* v. *Glover*, 119 U.S. 543 (1886); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288 (1887); 24 Comp. Dec. 45 (1917); 1 Comp. Gen. 560 (1922); 9 *id.* 41 (1929); 18 *id.* 562 (1938); 29 *id.* 120 (1949); 31 *id.* 405 (1952); 34 *id.* 398 (1955); and 42 *id.* 246 (1962). *Cf.* 42 *id.* 653 (1963).

We have carefully reviewed all our prior decisions in this area and

are now of the view that a reasonable charge by a political subdivision based on the *quantum* of direct services actually furnished and applied equally to all property tax-exempt entities need not be considered a tax against the United States, even though the services in question are provided to the taxpayers of the political subdivision without a direct charge, provided the political subdivision is not required by law to furnish the service involved—without a direct charge—to all located within its boundaries—such as fire and police protection.

In the instant case, there is no question but that the Federal Government is receiving a service, the charge for which is based on the *quantum* of the services furnished, and there is nothing in the present record to indicate that the charge is unreasonable. However, it does not appear that the charge in question is levied against other property tax-exempt users of the incinerator. Thus, the incinerator charge as presently imposed discriminates against the Federal Government in favor of other property tax-exempt entities.

It is well settled that municipal ordinances must be uniform, fair, and impartial in their operation and must not be discriminatory, arbitrary, or capricous; and that any classification must be based on natural distinctions and must bear a reasonable relationship to the object of the legislation. See 37 Am. Jur. "Municipal Corporations," S. 158; *Standard Oil Co.* v. *City of Charlottesville*, 42 F. 2d 88 (1930); *City of Fredericksburg* v. *Sanitary Grocery Co., Inc.*, 190 S.E. 318 (1937); 110 ALR 1195; and *Virginia Electric and Power Co.* v. *Commonwealth*, 194 S.E. 775 (1938). In our view the placement of the United States in a separate category from other property tax-exempt entities for the purpose of imposing incinerator service charges is an unreasonable and discriminatory classification on the part of Arlington County. *Cf. Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 383–387 (1960). In that case it was held that where lessees of real property from the State or its political subdivisions are exempt from the payment of a tax on their leaseholds, it is discriminatory to require lessees of the Federal Government to pay such tax.

Also, it is not clear that Arlington County has authority to impose an incinerator service charge. It is stated in the Acting Assistant Secretary's letter that:

> It appears that no ordinance of the County officially authorizes or permits the charge here involved. However, it is understood that an item for revenues from the incinerator charges in a certain amount appears in the County budget.

A review of the Code of the County of Arlington—particularly chapter 10, entitled "Garbage, Refuse, and Weeds"—by this Office has similarly failed to turn up an ordinance authorizing the charge. Without an ordinance authorizing a service charge, we fail to see how the county may impose one.

Moreover, it is not clear from an examination of the Code of Virginia whether the governing body of Arlington County has the authority to enact an ordinance imposing a charge for the use of its incinerator, or at least imposing a charge on the United States alone for such services.

In light of the foregoing, we must conclude that payment of the charge in question by your Department to Arlington County is unauthorized. However, it appears that Federal agencies and their contractors have been paying incinerator charges to the county since 1951. Also, the Acting Assistant Secretary advises that new contracts for picking up refuse at Army installations in the county contain –

> * * * a special contract provision requiring the inclusion of the charge in the contract price; entitling the Government at its election, to direct contractor to litigate the validity of the charge (with reimbursement to contractor for reasonable legal fees); and providing for the refund by contractor to the Government of any refunds received by contractor from the County.

Accordingly, we would have no objection to your Department continuing to make payments under such contract provision to the contractors involved, pending early resolution of the matter by appropriate action by your Department under the contract provision or otherwise.

[B–170268]

Bids—Two-Step Procurement—Use Basis—Injunction to Prevent

An offeror who was granted a court injunction to prevent the opening of bids and the award of a contract under a two-step procurement, and who protested the use of the two-step method to obtain a ship's hull side blast-cleaning unit, stating the Navy was required pursuant to paragraphs 3-108 and 3-214 of the Armed Services Procurement Regulation to negotiate a sole source contract with it as the developer of the unit, has no basis for objection. The Secretary only has authority to determine that a sole source procurement to avoid duplication of investment and effort is justified, and the evidence did not warrant invoking his authority; and as the conditions prescribed in paragraph 2-502(a) of the regulation for the use of the two-step method of procurement existed, the determination to use this method was within the cognizance of the procurement officers.

Contracts — Specifications — Amendments—Furnishing Requirement

The requirement in paragraph 2-208(a) of the Armed Services Procurement Regulation (ASPR) that amendments to invitations for bids must be sent to everyone to whom invitations had been furnished has reference to amendments issued under the competitive system prior to the opening of bids; and, therefore, an amendment issued after the closing date for the receipt of technical proposals to the only two concerns out of 37 potential suppliers solicited under the first step of a two-step procurement who had responded to the Request for Technical Proposals (RFTP) was proper and in accord with ASPR 3-805.1(e), relative to changes occurring in requirements during negotiations. In fact, if the firms who had not responded to the RFTP had been furnished copies of the amendment and responded, the provisions of the "Late Proposals and Modifications" clause would be for application.

Bids — Two-Step Procurement — Use Basis — Administrative Authority

While the second step of the two-step method of procurement is conducted under the principles of formal advertising pursuant to paragraph 2–503.2 of the Armed Services Procurement Regulation, the first step of the procedure, in furtherance of the goal of maximized competition, contemplates the qualification of as many technical proposals as possible under negotiation procedures; and as this two-step procedure is intended to extend the benefits of competitive advertising to procurements which previously were either negotiated competitively or negotiated on a sole source basis, the determination how to best satisfy the Government's requirements is within the ambit of sound administrative discretion, and the use of the two-step procedure will not be questioned when supported by the record.

To Arnold & Porter, November 9, 1970:

Reference is made to your letters of August 18 and September 4, 1970, protesting on behalf of The Wheelabrator Corporation (Wheelabrator) against the two-step formal advertising method of procurement used under solicitation No. N00600–70–B–0478, issued by the United States Navy Purchasing Office, Washington, D.C. We also have Wheelabrator's letter of July 22, 1970, concerning this procurement. The August 24, 1970, report of the Navy contracting officer was furnished to you for your consideration and by letter of September 4 you submitted for our consideration your comments on the Navy position as expressed in the report. However, for the purposes of our discussion, we believe it is necessary to restate essential parts of that report.

On January 9, 1970, the Navy Purchasing Office received a requisition which requested the procurement of a ship's hull side blast-cleaning unit for the Norfolk Naval Shipyard. The contracting officer determined in light of information and requirements contained in the requisition and collateral information developed during discussions with the shipyard that, while the specifications were not adequate for procurement by conventional formal advertising, there existed all of the conditions prescribed by paragraph 2–502(a) of the Armed Services Procurement Regulation (ASPR) for the use of the two-step formal advertising method.

Subsequently, on April 22, 1970, the first step of the procurement, a request for technical proposals (RFTP) N00600–70–B–0478, in the format prescribed by ASPR 2–503.1, was furnished to 37 potential suppliers including two firms known to have already constructed cleaning units similar to the unit required. In addition, the procurement was synopsized in the Department of Commerce Business Daily. The RFTP required that technical proposals be received at the Navy Purchasing Office by 4:30 p.m., June 2, 1970.

In response to RFTP–0478, four technical proposals were received from two prospective contractors, one from the Pangborn Division of

The Carborundum Company (Pangborn) and three from Wheelabrator. The proposals were forwarded for technical evaluation on June 3, 1970, and the technical review of the proposals received revealed that each offeror (Wheelabrator and Pangborn) had submitted a technical proposal which was reasonably susceptible to being made acceptable without affecting a basic change to the proposal as submitted.

As reported, certain changes were made in the specifications during the conduct of negotiations of the technical proposals and amendment No. 0001 was issued on June 24, 1970, to Wheelabrator and Pangborn and the date for receipt of revisions to the technical proposals already submitted was extended to July 2, 1970. Subsequently, after technical review of the proposals as amended and clarified through discussions with each offeror, it was determined that Wheelabrator and Pangborn had submitted acceptable technical proposals. Thereafter, on August 3, 1970, the second step of the procurement, invitation for bids (IFB) No. N00600–70–B–0478, was issued pursuant to ASPR 2–503.2 to Wheelabrator and Pangborn. However, Wheelabrator by telegram of August 6, 1970, notified the contracting officer that it did not plan to respond to the IFB and returned its copy of the solicitation to the contracting officer.

Wheelabrator then filed suit on August 17, 1970, in the United States District Court for the District of Columbia (*The Wheelabrator Corporation* v. *John H. Chafee, Secretary of the Navy, and Margaret S. Anderson, Contracting Officer, U.S. Navy Purchasing Office*, Civil Action No. 2437–70), for an injunction and other relief against the opening of bids and the award of a contract under this solicitation. The plaintiff's complaint filed in the case shows that one of the purposes in seeking an injunction was to prevent an award of the contract thereby preserving plaintiff's right of protest to the Comptroller General. A temporary restraining order was granted on August 17; and on August 31, 1970, the court issued a preliminary injunction which prohibits the opening of bids or making an award under the second step of the solicitation. The court further set the date of November 16, 1970, for a hearing on the merits of Wheelabrator's complaint.

The arguments advanced by Wheelabrator in its protest before our Office are essentially the same as those presented to the court which it adopted in reaching the following "Conclusions of Law":

2. The record shows that there is substantial question as to the legality of defendants' action in procuring the portable ship hull cleaner pursuant to the method of "two-step formal advertising" and that there is a substantial likelihood that upon final hearing plaintiff will establish that defendants' action is erroneous and unlawful.

In substance, Wheelabrator is challenging the determination made by the contracting officers in selecting the "two-step" mode of procurement and is urging that the circumstances involved and that applicable procurement law and regulations require, in lieu thereof, a "negotiated sole-source buy" from it. In this regard, it is argued that Wheelabrator is the only technically available source for a portable ship hull cleaner which it describes as a novel and unique product; that it made a heavy investment (of more than $200,000) over a developmental period of over 12 years; and that it acquired elaborate tooling and developed the experience and skills to produce the machine. In view of this background, it is maintained that the Navy, with whom the corporation worked in developing a successful product, should have negotiated a production contract with Wheelabrator pursuant to ASPR 3–108 and 3–214. These sections authorize the negotiation of initial production contracts for specialized equipment which require substantial initial investment or extended period or preparation for manufacture.

Further, it is pointed out that award of a contract when the protest of Wheelabrator is being considered by our Office would abridge its right to a determination of its protest against any award under the second step of the procurement.

The procurement authority and responsibilities of the military agencies are codified in chapter 137 of Title 10 of the United States Code. Implementation of these statutory provisions, insofar as concerns the questions raised here, is contained in ASPR 1–201.13, 1–304.2 and 1–402, which provide in pertinent part as follows:

1–201.13 *Procurement* includes purchasing, renting, leasing, or otherwise obtaining supplies or services. It also includes all functions that pertain to the obtaining of supplies and services, including description but not determination of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

* * * * * * *

1–304.2

* * * * * * *

(1) Where practical, procurement shall be competitive using performance or other specifications, including purchase descriptions, which do not contain data developed at private expense to which the Government does not have unlimited rights. Procurement on this basis will normally not provide items of identical design. However, it frequently is not necessary that items of identical design be purchased. There are two methods of competitive procurement which may provide items of the same or of similar design and suitable performance. One of these is purchase by two-step formal advertising. * * *

* * * * * * *

1–402 Authority of Contracting Officers. Contracting officers at purchasing offices (see 1–201.24) are authorized to enter into contracts for supplies or services on behalf of the Government, and in the name of the United States of America, by formal advertising, by negotiation, or by coordinated or interdepartmental procurement * * *

The courts have recognized that the authority of the Government to purchase is broad and comprehensive, extending not only to the sub-

ject matter of the purchase but also to the mode of purchase. In *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1, 58, 320 F. 2d 345 (1963), the Court of Claims stated at page 348:

> * * * general legislation empowering, in broad terms, a government agency to procure and to make contracts normally covers all phases of that process—from the solicitation of bids or proposals, to the making of the contract, through its administration and performance, to its completion or termination. "The power to purchase on appropriate terms and conditions if, of course, inferred from every power to purchase." Priebe & Sons v. United States, 332 U.S. 407, 413, 68 S.Ct. 123, 127, 92 L.Ed. 32 (1947). Unless the Congress has prohibited the agency from entering some phase of the contractual process (or using some otherwise lawful method of contracting), a grant of wide and general authority to contract and procure will extend to all reasonable phases and methods. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 114 ff., 74 S.Ct. 403, 98 L.Ed. 546 (1954); Public Utilities Comm. of California v. United States, 355 U.S. 534, 540–543, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); Paul v. United States, 371 U.S. 245, 251 255, 261–263, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963); United States v. Penn Foundry & Mfg. Co., Inc., 337 U.S. 198, 214–216, 69 S.Ct. 1009, 93 L.Ed. 1308 (1949) (opinion of Mr. Justice Douglas). * * *

We do not agree with the position advanced that because of Wheelabrator's investment of time and money in the development of a portable ship's hull side blast-cleaning unit, the Navy was required, as matter of law, to negotiate a production contract with it to the exclusion of other manufacturers of ship's hull cleaning machines. Under the procurement statute, competitive bidding is the cornerstone of Federal procurement policy. *United States* v. *Warne*, 190 F. Supp. 645 (1960). Negotiation is a permissive exception to competitive advertising only when the preferred method is not feasible or practicable. As required by ASPR 1–404, no negotiated contract shall be entered into until the determinations and findings under section III, parts 3 and 4 with respect to the circumstances justifying negotiations and with respect to any use of a special method of contracting have been made.

Turning specifically to ASPR 3–214, an implementation of 10 U.S.C. 2304(a)(14), it should be noted that this authority may be invoked only if the Secretary of the Navy determines that the technical or special property would "require a substantial initial investment or an extended period of preparation for manufacture and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property." It is evident that unless such a determination is made by the Secretary, no authority exists to negotiate a contract under this exception. Under 10 U.S.C. 2310(b) such determination "shall be based on a written finding by the person making the determination * * *, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)–(16) of section 2304(a)." Such a determination is not delegable and when made by the Secretary it is final pursuant to 10 U.S.C. 2310(a).

Hence, the contracting officer here involved could not, on his own volition, invoke this authority which is vested in the Secretary subject only to the limitations on its use set out in ASPR 3–214.3. Since we may assume from the record that the conditions prescribed by ASPR 3–214 did not exist with respect to the purchase of a portable ship's hull cleaner, we are aware of no basis upon which it could be validly concluded that the procurement is presently amenable to the cited negotiation authority.

Turning now to the applicability of the two-step formal advertising method to the instant procurement, it is contended that not all of the necessary conditions listed in ASPR 2–502(a) for use of the two-step method were present in connection with this procurement. That section reads as follows:

(a) Two-step formal advertising shall be used in preference to negotiation when all of the following conditions are present, unless other factors require the use of negotiation, *e.g.*, 3–213;

(i) available specifications or purchase descriptions are not sufficient definite or complete or may be too restrictive, and the listing of the salient characteristics in a "brand name or equal" description would likewise be too restrictive, to permit full and free competition without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to insure mutual understanding between each source and the Government;

(ii) definite criteria exist for evaluating technical proposals, such as design, manufacturing, testing, and performance requirements, and special requirements for operational suitability and ease of maintenance;

(iii) more than one technically qualified source is expected to be available;

(iv) sufficient time will be available for use of the two-step method; and

(v) a firm fixed-price contract or a fixed-price contract with escalation will be used.

Specifically, wheelabrator asserts that conditions (ii) and (iii) were not present in this procurement.

An examination of the request for technical proposals (step one) reveals that definite criteria for evaluating technical proposals were set forth as follows:

CRITERIA FOR TECHNICAL EVALUATION

1. Each technical proposal will be reviewed and evaluated to determine conformance with the purchase description, with particular consideration given to performance (cleaning rate, including unit maneuverability), method by which contact is maintained between the blast mechanism enclosure and the ships' hull, all operational safety features and air pollution control.

2. Based on the review of the technical proposals, selections for acceptability will be made of bidders who can provide a system (abrasive side-blast-cleaning unit) in complete conformance with the Purchase Description.

Attached to and made a part of the first step is a purchase description which detailed the Navy's requirements as to design, performance, components, additional features, and quality conformance. Also included with the purchase description is a sketch of component parts and their relationship with the drydock and with the ship's hull. We

must therefore conclude that condition (ii) does in fact exist as to this two-step procurement.

Condition (iii) of ASPR 2-502(a) relates to the expectation of reasonable competition from more than one technically qualified source. Of course, this expectation was realized when the Navy received proposals from two qualified sources. Whether the other source is in fact a responsible prospective contractor is for the Navy to determine under the criteria set out in ASPR 1-903. In any event, the competition required by ASPR 2-502(a) was obtained; however, we note that such competition was not continued in the second step because Wheelabrator refused to submit a bid under its accepted technical proposal. Under such circumstance, the diminution of competition may be said to be attributable solely to Wheelabrator. Thus, we have an anomaly in that the matter complained of was generated by the action of the complainant itself.

You also assert that amendment No. 1 to the RFTP should have been issued to each of the 37 firms originally solicited and that this failure was in contravention of ASPR 2-208(a) requiring that amendments to invitation for bids be sent to everyone to whom invitations have been furnished. This provision clearly has reference to amendments issued under the competitive bidding system prior to the opening of bids. *Cf.* ASPR 3-505. Amendment No. 1 was issued after the closing date for the receipt of technical proposals to the only two concerns which had submitted technical proposals. This first step, as contemplated by ASPR 2-502, is a negotiation process whereby, through discussions, changes, etc., a technical proposal is found to be acceptable. There is for application, therefore, ASPR 3-805.1(e) which provides that when, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change shall be made in writing as an amendment to the request for proposal and a copy shall be furnished to each prospective contractor. Since only two firms, Pangborn and Wheelabrator, had submitted technical proposals prior to the closing date of step one, the Navy properly determined to issue the amendment to the two responding offerors. In any event, had the other 35 firms originally solicited been furnished copies of the amendment and proposals were forthcoming from some of these firms, there would be for application the provisions of the "Late Proposals and Modifications" clause with its attendant considerations. See ASPR 3-506. We therefore must reject this point of protest.

We obtained the Navy comments on your letter of September 4, 1970, which we believe adequately support its actions under this procurement. They are as follows:

1. a. Wheelabrator states that NAVSHIPS forced the Contracting Officer to use two-step formal advertising.

b. The Contracting Officer, not the requiring activity, decides which method of procurement to use. Here, the Contracting Officer determined that while the specifications were not adequate for procurement by conventional formal advertising, all the conditions for use of two-step formal advertising set forth in ASPR 2-502(a) were present. Accordingly, the Contracting Officer chose to use that method of procurement in her sole discretion.

2. a. Wheelabrator states that the solicitation of thirty-seven potential suppliers was "wholly unrealistic and does not in any way establish or indicate the actual number of firms who could reasonably have been expected to have technical qualifications necessary to construct the portable ship hull cleaner."

b. The Navy did not expect that all the concerns solicited would submit technical proposals. However, the Navy did hope to encourage competition by inviting all known potential suppliers to submit proposals as determined by the sources listed on the requisition and the bidders list maintained at the Navy Purchasing Office for bidders of similar or related equipments.

3. a. Wheelabrator states that "to the best of our knowledge, Vacu-Blast has never built an airless blasting machine."

b. The Navy's position is simply that Vacu-Blast was a potential contractor for the type of equipment requested under the Navy solicitation.

4. a. Wheelabrator states that "to the best of our knowledge, . . . (Vacu-Blast) could not achieve the cleaning rates specified in . . . the request for technical proposals."

b. This is speculative and raises a question that could only be resolved by evaluation of a technical proposal received in response to the Navy solicitation.

5. a. Wheelabrator states that Vacu-Blast's failure to submit a technical proposal indicates that it has never built a cleaning unit similar to that required.

b. This is entirely speculative. Vacu-Blast might have had many reasons for not submitting a proposal in response to the Navy solicitation.

6. a. Navy's statement "that 'the abrasive blast unit being procured is a combination of two industrially proven techniques, namely steel plate abrasive cleaning and recovery and reclaiming of used abrasive media'" is a "gross oversimplification" of a "highly sophisticated technical effort . . ."

b. The Navy's position is that blast cleaning as well as the recovery and reclaiming of shot are processes which have been used for many years. The equipment called for would require marrying of the two sophisticated processes in one unit.

7. a. Navy's statement that two cleaning units including one made by Vacu-Blast are now in operation is misleading. The Navy knows or should know that the Vacu-Blast unit is incapable of meeting the cleaning rates specified by the Navy.

b. The Navy is cognizant of the Vacu-Blast Corporation having worked toward the development of equipment for the type of operation being sought under the RFTP prior to 1960. The Navy does know that two units have been constructed for ships' hull blast cleaning are now in operation (both lack the refinement required by the subject requirements). These units have been constructed by (1) Wheelabrator in the United States, and (2) Vacu-Blast in England.

8. a. Navy's contention that the only innovation involved in constructing the required blasting unit is the marrying of the blasting heads to the maneuvering device "oversimplifies the technical difficulties and degree of effort required successfully to construct the machine specified . . ."

b. No over-simplification was intended. The Request for Technical Proposals was calculated to bring out the resolution of any technical complexities involved in this requirement.

9. a. "Navy's inability to provide the General Accounting Office . . . with a detailed factual showing supporting its conclusory contentions relating to the technical effort required to construct this machine underscores the absence of definite criteria with which the Navy can evaluate different technical proposals . . ."

b. The Navy's RFTP described the equipment being sought in accordance with a Purchase Description set forth in the RFTP and also states that each technical proposal would be reviewed and evaluated for conformance with that Purchase Description.

10. a. "Vacu-Blast specializes in air blast cleaning, which . . . would be incapable of meeting the cleaning rates specified . . ."

b. This is a matter which was to be resolved by evaluation of the technical proposals received in response to the Navy's request under the subject solicitation.

11. a. Navy personnel did not repeatedly caution Wheelabrator to "also look toward a commercial market for potential sales."

b. Wheelabrator is not the only company in this field nor is the Navy the only potential user. It is the Navy's position that when Wheelabrator approached the Navy with a proposed device, the Navy informed Wheelabrator that they should consider their commercial market as the Navy would look for competition on any procurement they might make for such a device.

12. a. Cleaning device requested by Navy "could not be used by commercial shipyards because of weight and space limitations."

b. The Navy's position is that the device in principle could be used by commercial shipyards.

13. a. Navy's statement that the Wheelabrator Corporation submitted unsolicited proposals is erroneous. Proposals submitted were solicited by the Navy.

b. The Navy's position is that for a long period of time the Navy has had a need for such a device as was described in the RFTP. To the extent that various companies made proposals to meet the Navy's requirement, the Navy encouraged the submission of such proposals but no proposals were solicited until the subject RFTP.

14. a. Navy's statement that Wheelabrator's submission, on 9 May 1969, of suggested specifications for an "airless blast ship hull cleaning machine" was unsolicited is erroneous. This submission was requested by the Navy.

b. Wheelabrator knew that the Navy was attempting to draft specifications for a hull blast cleaning device for a period of time and in 1969 Wheelabrator was given the oportunity to comment on the Navy's draft specifications. Wheelabrator responded by submitting a draft specification of their own as comment.

15. a. Navy's interest in the development of the portable ship hull cleaner was more than "passive and minimal."

b. The Navy has long had an interest in obtaining such a device when it was determined to be technically and economically feasible.

16. a. "Navy's suggestion that Wheelabrator cooperated with the Alabama Dry Dock and Shipbuilding Company in the development of the . . . cleaner is incorrect. Wheelabrator was already substantially along in the development and construction of the machine, when Alabama Dry Dock afforded Wheelabrator a place to test the machine."

b. The Navy stands by its position that Wheelabrator cooperated with Alabama Dry Dock and Shipbuilding Company in the development of the cleaner, i.e. Alabama Dry Dock afforded Wheelabrator a place to test their machine.

The two-step formal advertising method utilized here is intended to extend the benefits of competitive advertising to procurements which previously were either negotiated competitively or negotiated on a sole source basis. While the second step of this procedure is conducted under the principles of formal advertising (ASPR 2-503.2), the first step, in furtherance of the goal of maximized competition, contemplates the qualification of as many technical proposals as possible under negotiation procedures.

Our office has sanctioned the use of the two-step procurement procedure. See 40 Comp. Gen. 35, 37 (1960), where we noted that the antecedent regulations of the present two-step procedure were promulgated at the suggestion and recommendation of the Subcommittee for Special Investigations of the House Armed Services Committee. See Report on Study of Armed Services Procurement Act, June 15, 1957, page 652, *et seq.* See, also, 40 Comp. Gen. 40 (1960); *id.* 514

(1961); 46 *id.* 295 (1966); and 48 *id.* 49 (1968). Moreover, we have consistently held that the determination of how best to satisfy the Government's requirements is within the ambit of sound administrative discretion, and we will not substitute our judgment for that of the agency when that discretion, as here, has been properly exercised. 48 Comp. Gen. 62, 65 (1968). In 40 Comp. Gen. 514 (1961), we held that an administrative determination to use the two-step procedure because of the insufficiency of technical data to meet the requirements of a single-step advertised procurement was one within the cognizance of the procurement officers, who are better qualified to review and determine the qualitative requirements of the agency, and that such determination when supported by the facts would not be questioned.

On the record before us, we find no valid basis under the law or implementing regulations to object to the use of the two-step method of formal advertising.

Your protest is therefore denied.

[B-170999]

Contracts—Negotiation—Prebid Conference Requirement

The mandatory requirement to attend a prebid conference contained in a request for proposals for the purpose of explaining an extremely complex project may not be considered a condition precedent to the submission of a proposal, as conditions or requirements that tend to restrict competition are unauthorized unless reasonably necessary to accomplish the legislative purposes of the contract appropriation involved or are expressly authorized by statute. To satisfy the maximum competitive requirements of the Federal Procurement Regulations, a prospective offeror who failed to attend the conference should be permitted to submit a proposal and given a copy of the prebid transcript. However, the date for the receipt of proposals having passed, a new closing date should be set to enable the firm denied an opportunity to participate to submit a proposal, and responding offerors to revise proposals.

To the Administrator, General Services Administration, November 10, 1970:

Reference is made to a report, dated October 27, 1970, from the General Counsel, responding to the protest of Computer Network Corporation (Comnet) against a mandatory requirement to attend a prebid conference provided for in request for proposals (RFP) No. GS-00B-795, issued by the General Services Administration (GSA).

The RFP, covering the development of a management information system for building operations, was issued on August 14, 1970. We are advised that the closing date for proposals was October 30, 1970, i.e., 30 days after the required prebid conference. With respect to the prebid conference, the RFP states:

A pre-bid conference for all interested Offerors will be held by the Public Buildings Service, General Services Administration. It is a requirement that interested Offerors attend this conference.

We are advised that attendance at the prebid conference was considered a condition precedent to the submission of a proposal. Comnet did not attend the prebid conference due to an oversight on its part and hence is precluded by GSA from submitting a proposal. Upon rejection of its request for a general waiver of the prebid conference attendance requirement, Comnet protested to our Office alleging that the requirement is unfair and precludes competition.

By way of response, the report states that mandatory attendance at the prebid conference was not intended to limit or restrict competition and neither law nor regulation prohibits such a requirement. In support of the mandatory attendance requirement, the report contains the following justification:

> * * * The basic reason for the prebid conference and mandatory attendance was that we felt it absolutely necessary to verbally explain to all interested firms the systems concept we had developed and as best we could what we expected the contractor to do. Because of the extremely complex nature of the project, we felt that it was impossible to do this by any other means. Further, we felt it especially important that all firms be present to hear and present any questions that might arise and to participate in the "give and take." * * *
>
> Our intent in holding a mandatory prebid conference was to provide all interested firms with information we felt was essential in order for them to submit intelligent offers. * * *

Undoubtedly, the requirement for mandatory attendance was motivated by what GSA believed to be the best interests of the Government. Nonetheless, we are of the opinion that the requirement does unnecessarily restrict competition.

It is contended by the protestant and conceded in the report that the conceptual framework set out in the RFP is far from a finite set of specifications. Given this fact, we think there is merit in Comnet's further contention that the prebid conference would not produce finite specifications by itself and without the need of negotiations. Moreover, even if the prebid conference did produce such a result, we still fail to see why attendance at the conference should be considered a condition precedent to the submission of a proposal, especially since we have been informally advised that the entire conference proceedings including the "given and take" portion were reduced to writing and could have been made available to all offerors.

Although it is maintained that neither law nor regulation prohibits the mandatory attendance requirement, we are unaware of any statute or regulation which authorizes mandatory prebid conferences as a condition to bidding or proposal submission. Our Office has consistently held that conditions or requirements that tend to restrict competition are unauthorized unless reasonably necessary to accomplish the legislative purposes of the contract appropriation involved or are expressly authorized by statute. See 42 Comp. Gen. 1 (1962) and the decisions referred to therein. While not pertinent to this procurement, paragraph

3–504.2 of the Armed Services Procurement Regulation (ASPR) prescribes procedures for preproposal conferences. That section provides in pertinent part as follows:

(a) * * * Adequate notice shall be given to prospective offerors so that all who wish to may arrange for representation. * * *

* * * * * * *

(c) All prospective offerors shall be furnished identical information in connection with the proposed procurement. Remarks and explanations at the conference shall not qualify the terms of the solicitation and specifications. All conferees shall be advised that unless the solicitation is amended in writing it will remain unchanged and that if an amendment is issued, normal procedures relating to the acknowledgment and receipt of solicitation amendments shall be applied. A complete record shall be made of the conference.

The foregoing language contemplates voluntary attendance at preproposal conferences and our Office has held that this ASPR provision provides no basis for disqualifying from competition an offeror who fails to attend a scheduled preposal conference. See B–164675, September 17, 1968; also see B–170884, October 19, 1970. Moreover, we believe that subparagraph (c) properly states the effect to be given to any remarks and explanations made at a conference such as here in question.

In view of the above, we conclude that the failure to attend the prebid conference properly may not be used as a basis to deny Comnet an opportunity to submit a proposal. While it may be that adequate competition would exist without the benefit of a proposal from Comnet, such fact would not justify a denial of competitive opportunity to Comnet. The regulatory requirement for maximum competition would not be served unless that opportunity is extended to Comnet. See sections 1–1.301–1, 1–3.101(b)(c), and 1–3.101(d) of the Federal Procurement Regulations (FPR).

Accordingly, Comnet should be permitted to submit a proposal under the RFP for evaluation pursuant to the criteria prescribed therein. Since we understand that all questions and answers at the prebid conference were reduced to writing, we suggest that Comnet be provided with a copy of the transcript. However, we note that the closing date for receipt of proposals was October 30, 1970. In view thereof, it will be necessary to advise all responding offerors that they have an opportunity to submit revised proposals. We suggest that the new closing date provide sufficient time for Comnet to submit a proper proposal. See FPR sec. 1–3.805–1; 50 Comp. Gen. 215, September 24, 1970.

[B–170178]

Bids—Acceptance Time Limitation—Extension—Protest Determination

Where the second low bidder, during the period for accepting its bid, filed a protest with the United States General Accounting Office as to the unaccept-

ability of the low bid, consideration of its bid submitted under an invitation for bids on electronic equipment is not precluded because the bid acceptance period was extended only after the acceptance date had expired, since the filing of the protest tolled the expiration of the bid acceptance period until after the resolution of the protest. As no other bidder is eligible for award, the integrity of the competitive system is not involved; and, therefore, there is no "compelling reason" to reject the second low bid. However, in future procurements should an award be delayed until after the expiration of a bid acceptance period, the procedures prescribed in sections 1-2.404-1(c) and 1-2.407-8(b)(2) of the Federal Procurement Regulations should be followed.

To the Secretary of Transportation, November 12, 1970:

Reference is made to the report dated October 13, 1970, with enclosures, from the Associate Administrator for Administration, Federal Aviation Administration (FAA) regarding the before-award protest of Electronics and Manufacturing Corporation (EMC), against award to any bidder other than itself under solicitation for bids (IFB) No. WA5M-0-0748B1, issued by the FAA, Equipment Purchase Branch, Washington, D.C. EMC also protested any cancellation of the subject invitation.

The subject solicitation was issued on May 8, 1970, for instrument landing system (ILS) remote monitor receivers. Seven bids were received and opened on June 18, 1970. The low bid was submitted by Dorsett Electronics and the second low bid was submitted by EMC.

In a telegram to our Office dated June 29, 1970, EMC protested the award of a contract to anyone other than itself. EMC contended that a late bid submitted by Dorsett Electronics, the low bidder, was not responsive to the advertised requirements.

It is reported that the FAA contracting officer reviewed the bid submitted by Dorsett Electronics and made the determination that the bid, although received after opening, was eligible for consideration because of a delay in the mail for which the bidder was not responsible. A further determination was made, however, that the Dorsett bid was not responsive because of its failure to quote a price for all items as required by the solicitation evaluation and award provisions.

The solicitation provided for a bid acceptance period of 60 calendar days unless a different period was inserted by the bidder. EMC inserted a bid acceptance period of 20 days, which it was entitled to do under the terms of the solicitation. As the procurement was being processed for award to EMC in the estimated amount of $205,503, it was noted that EMC's 20-day bid acceptance time had expired on July 8, 1970. At the contracting officer's request made on July 27, 1970, EMC, by letter dated July 29, 1970, extended its period for bid acceptance until August 30, 1970. By telegram of September 9, 1970, to FAA, EMC advised that its protest telegram of June 29, 1970, to our Office had extended its bid acceptance period until its protest had been resolved; but in any event, until October 30, 1970. Subsequently, by tele-

gram dated October 28, 1970, EMC extended its bid acceptance period to December 30, 1970.

The contracting officer takes the position that no award can be made to EMC under the subject invitation because the 20-day acceptance period provided in its bid had expired and that EMC's protest with our Office did not serve to extend the 20-day acceptance period. Since EMC's bid acceptance period expired on July 8, 1970, the contracting officer is of the opinion that neither the protest to our Office nor the contracting officer's subsequent solicitation or acceptance of an extension of bid acceptance time served to negate this fact or change the legal position of the parties. We are advised that the FAA intends to resolicit the requirements since all bids have expired.

We do not agree with the contracting officer's position. We do not consider EMC's bid as having expired at the expiration of its 20-day acceptance period, since prior to the expiration of such period EMC sent a telegram dated June 29, 1970, to our Office, protesting "the award of a contract under FAA procurement WA5M-0-0748B1 to anyone other than ourselves." We consider this telegram as effective to extend the acceptance period of this bid until the propriety of the protest has been resolved. See B-154236, June 26, 1964. Further, the record indicates that EMC has granted periodic extensions of its bid acceptance time to December 30, 1970. The fact that the first extension was not requested prior to the expiration of the original 20-day period does not alter the conclusion we reach in view of EMC's protest telegram to our Office of June 29, 1970.

Moreover, it appears that the contracting officer failed to comply with FPR secs. 1-2.404-1(c) and 1-2.407-8(b)(2), which provide in pertinent part as follows:

> (c) Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for readvertisement.
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> * * * * * * *
>
> (2) * * * In addition, when a protest against the making of an award is received and the contracting officer determines to withhold the award pending disposition of the protest, the bidders whose bids might become eligible for award should be requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance (with consent of sureties, if any) to avoid the need for readvertisement. * * *.

Under the provisions of this regulation, the contracting officer should have requested EMC to extend the time for acceptance of its bid prior to the expiration of its initial 20-day bid acceptance period. We suggest that appropriate steps be taken to assure future compliance with the above-cited regulations.

We understand informally that several of our decisions are relied on in support of the contracting officer's position. Those decisions reported at 42 Comp. Gen. 604 (1963), 46 *id.* 371 (1961), and 48 *id.* 19 (1968), have been carefully considered and we conclude that they are inapplicable here. None of the cited decisions involved protests which were filed in our Office during the stated acceptance periods of the bids. In fact, the decision in 42 Comp. Gen. 604 resulted from a request of the Post Office Department for an advance decision as to whether an award *should* be made to a low bidder whose 20-day bid acceptance had expired. We distinguished that decision in 46 Comp. Gen. 371–373 where we held:

* * * While we question whether the time limitation was solely for the protection of the bidder during the period from bid opening until expiration of the acceptance period set out in the bids, it is clear that expiration of the acceptance period operated to deprive the Government of any right to create a contract by acceptance action and to confer upon the bidder a right to refuse to perform any contract awarded to him thereafter. Thus, since the only right which is conferred by expiration of the acceptance period is conferred upon the bidder, it follows that the bidder may waive such right if, following expiration of the acceptance period, he is still willing to accept an award on the basis of the bid as submitted. We have so held. B–143404, November 25, 1960; 42 Comp. Gen. 604, 606. * * *.

The decision in 42 Comp. Gen. 604 involved a low bidder who also offered a 20-day acceptance period. We said in that decision:

* * * An award to that bidder [the low bidder], however, raises the question whether the integrity of the competitive bidding system would best be served in the present procurement by making such award to the low bidder who permitted its bid to expire prior to granting an extension or to Armstrong, the next low bidder, which extended its bid acceptance period before expiration of its bid. * * *.

Since no other bidder other than EMC is otherwise eligible for award, there is not involved here any compromise of the integrity of the competitive bidding system as was the case in the cited decision.

Therefore, and notwithstanding any indications to the contrary in prior decisions of our Office, we conclude that the filing of a bid protest during the acceptance period of the bid has the effect of tolling, until the effective date of our decision, the bid acceptance period offered by the protestant.

In view of the foregoing considerations, and since no "compelling reason" exists to reject EMC's bid and cancel the invitation (see 46 Comp. Gen. 371, 374), an award should be made to EMC under the subject solicitation, if proper in other respects.

[B–170527]

Bidders—Qualifications—Tenacity and Perseverance—Imputed to Successor Concern

The lack of tenacity and perseverance known to two principals of a delinquent concern in September 1969, when they first undertook to reorganize the concern,

although they did not acquire formal control until April 1970, at which time they assumed the administration and management of the reorganized corporate entity and changed its operating personnel, may be imputed to the new owners from September 1969, as they then could have cured the contract delinquencies even without a novation of the delinquent contracts. Therefore, a negative preaward survey of the new concern, low under a request for proposals to furnish bomb release units, which was based on its predecessor's lack of tenacity and perseverance shou d be reevaluated under paragraph 1-903.1(iii) of the Armed Services Procurement Regulation; and if adverse, referred to the Small Business Administration.

To the Secretary of the Air Force, November 13, 1970:

We refer to a letter dated August 26, 1970, and enclosures, from the Chief, Contract Placement Division, Directorate Procurement Policy, DCS/S&L, submitting for our consideration a report on the protest of Thompson Manufacturing Company, Incorporated, under request for proposals No. F08635-70-R-0213, issued by the Armament Development and Test Center, Eglin Air Force Base, Florida.

Thompson submitted the lowest price of the 17 proposals received; and the contracting officer requested a preaward survey of the company by the Defense Contract Administration Services Region (DCARS), Phoenix, with joint participation by cognizant representatives from the Armament Development and Test Center (ADTC), and the Directorate for Procurement and Production (WRAMA). The joint preaward survey was conducted on July 15, 1970, and a recommendation of "No Award" was received. The basis stated by the survey team for this recommendation is set forth as follows:

1. The following comments are made regarding the on-site preaward survey performed on Thompson Manufacturing Company on 15 July 1970. Thompson offered very little documentation in support of this PAS: therefore, the comments below are based on conversation with the contractor's management personnel.

a. Contractor does not now presently have the production capability to perform this contract. Contractor gave his verbal assurance that machines and facilities were available; however, the types and quantities of machines, size and type of facilities required, and other requirements were not known by the contractor. Contractor has evidently done little planning regarding production facilities, as is necessary for a program of this type and magnitude.

b. Contractor failed to produce or describe a production control plan to demonstrate the ability to control component and subassembly flow toward the assembly and delivery of completed bomb racks on schedule. Little, if any, production planning has been done. The requirement to deliver 219 bomb racks, composed of several hundred components and subassemblies per month requires planning to a much greater depth than demonstrated by the contractor.

c. Contractor did not have on hand precision test equipment or gauges necessary for the quality control requirements of this procurement. He did not demonstrate an understanding of the quality control requirements. The ability to hire the necessary QC personnel and buy the precision measuring equipment was not proved.

d. Contractor demonstrated lack of understanding of the tolerance study requirement. His estimate of 200/hrs was not considered adequate. His proposed use of the company general manager for this study meant the loss of middle management for the first five weeks of the contract. No resume of this man was presented to the team to substantiate his previous experience/background. This man also became the head of Engineering Department during the PAS team visit. Thus the integrity of the proposed personnel plan was considered questionable.

e. Contractor did not have contract administration personnel for this contract. His ability to hire same was not proved.

f. Contractor did not demonstrate an effective configuration management plan, nor did he prove he had controls to insure traceability of components, engineering release, engineering change orders, accountability of engineering data or retrievability of configuration data. Contractor's lack of experience with the assembly of end items as complicated as this bomb rack casts serious doubts on his ability to effect a configuration management plan sufficient for this procurement.

g. DCAS DD375 Production Progress Reports for the past 24 months show a consistent delinquency of approximately 40% on contracts. When asked what attempts to correct this situation had been done, Mr. Thompson stated he and his brother had assumed active top management responsibilities in lieu of past existence as inactive investors. Facts indicated that since their assumption of above mentioned positions in September 1969, no decrease in delinquencies had occurred. For the past six months, delinquencies averaged 43%. The Thompson brothers further stated that management emphasis in the case of delinquencies was not wasted on low profit contracts, but rather emphasis was placed on profitable ones.

h. Contractor failed to demonstrate an effective inventory control program. On-site inspection of his MER Breech production line revealed breeches in several states of completion stored together with no apparent rhyme or reason. There was no paperwork evident which described the manufacturing operations previously performed or to be performed. Similar practices on the numerous parts in the BRU-3A/A would almost surely preclude attainment of any required schedule.

2. The following factors, revealed to the PAS team members by DCASD, Phoenix personnel, are considered to be particularly grave circumstances in light of the importance of this procurement.

a. Contractor has repeatedly been delinquent on previous contracts, averaging 43% delinquent in the previous six months. This procurement has been delayed twelve months already. Any additional delays in the delivery of BRU 3A/A bomb racks cannot be tolerated.

b. Contractor has repeatedly failed First Article Acceptance Tests on previous contracts. FAAT failure on the BRU-3A/A would likely result in delivery schedule slippages which would be unacceptable. Contractor's lack of experience with similar hardware could aggravate this problem, requiring additional time to trace down and resolve the cause of failure.

c. On many of those contracts that contractor completed "on schedule" schedule extensions were requested for monetary consideration. This fact is not reflected in the delinquency figures but is further evidence of contractor's lack of perseverance and tenacity.

d. Contractor's being on the NAVCEL since 1 July 1969 shows further irresponsibility.

3. Based on the above, a negative pre-award survey is recommended."

Thereafter, on July 27, 1970, the contracting officer made the following written findings and determination of nonresponsibility concerning Thompson:

1. Thompson Manufacturing Co, Inc submitted a proposal in response to Request For Proposal F08635-70-R-0213 calling for 3,128 BRU-3A/A Bomb Release Units for the F111 Aircraft and services to perform a complete evaluation of the technical data package furnished with the RFP. Thompson's proposal was the lowest in price of a total of 17 proposals received.

2. Subsequent to the receipt of the proposals, an evaluation revealed that Thompson's proposal was otherwise eligible to be considered for an award provided a Determination of Responsibility could be made by the Contracting Officer DCASD Phoenix. Arizona was requested to perform a Pre-Award Survey (PAS) of Thompson Manufacturing Co, Inc. The purpose of the PAS was to determine Thompson's capability to perform under the terms of the proposed contract. Participating in the PAS were representatives from DCASD Phoenix, ADTC/ADAFG (Buying Office) and ADTC/ADLEZ/AIDLEC (Engineering Offices), and a representative from the Directorate for Procurement and Production, WRAMA.

3. By message 222019Z Jul 70, DCASD Phoenix advised that Thompson Manufacturing Co., Inc. has been given an unsatisfactory rating for Factors 5 and 12 (Purchasing and Subcontracting and Performance Record) of the PAS and recommended that no award be made to Thompson.

4. It has been ascertained by the undersigned Contracting Officer that Thompson Manufacturing Co, Inc has a history of poor performance as evidenced by previous negative Pre-Award Surveys. Thompson currently appears on the Navy Contractor Experience List under Category D indicating "that supplier is now delinquent in current contract performance or has a history of delinquency in past contract performance."

In view of the above Findings, the undersigned Contracting Officer determines that Thompson Manufacturing Co. Inc is nonresponsible inasmuch as Thompson has failed to meet the minimum standards for a responsible contractor as set forth in ASPR 1-903.1(iii) and is therefore ineligible for an award.

The record indicates that the SBA erroneously interpreted the contracting officer's filing of the findings and determination in accordance with ASPR 1-705.4 (c)(vi), as revised by Defense Procurement Circular (DPC) #75 dated December 10, 1969, as a request for a Certificate of Competency. By letter dated July 31, 1970, SBA advised AFSC, Eglin Air Force Base, that the final date for processing the COC would be the close of business on August 20, 1970. However, on August 5, 1970, the SBA Regional Office, San Francisco, advised AFSC of the following:

This is in confirmation of telephone conversations which took place on August 4 and 5, 1970, between Mr. Dyster, myself, and Mr. Cumiskey of my office. The Contract Officer's determination of nonresponsibility for lack of tenacity and perseverance as it relates to the proposal of Thompson Manufacturing Company, Inc., Phoenix, Arizona, under RFP F08635-70-R-0313 will not be appealed by SBA.

A review of the information submitted by your office discloses that the determination was based on the delinquency record on contracts held by the Thompson International Company which is referred as a predecessor of Thompson Manufacturing Company, Inc. The pre-award survey states on page 3 of Part II—Financial Capability—that Thompson International Corporation, a public corporation, sold its Aerospace Division to the new company known as Thompson Manufacturing Company, Inc. It further states that the principals of Thompson International Corporation, Darrow and Stanley Thompson, are also principals of the new company which is not public. On the basis of the responsibility of continuing management from one company to the other, SBA decided as noted above. * * *

Thompson, in its letter of protest against the contracting officer's determination that the company is nonresponsible for lack of tenacity and perseverance, contends that the prior unsatisfactory performance by its predecessor company, Aerospace Division of Thompson International Corporation, should not now be imputed to them personally or to the newly organized corporate entity because of the limited extent to which the Thompson brothers participated in the actual management and operation of such Division. It is further alleged that Thompson International Corporation is a corporate conglomerate engaged in such diverse interests as loans, construction, insurance real estate, and financing, through five corporate subsidiaries. In addition to the corporate subsidiaries, Thompson International had three oper-

ating Divisions, one of which (Aerospace Division) bid on, was awarded, and performed numerous Government contracts. It is explained that a decision was made as early as September 1969, that Thompson International should dispose of this Division; however, since several thousands of dollars of assets were involved, and since Thompson International was a "reporting company" under appropriate S.E.C. regulations, it took until April 1970 to audit the consolidated company and make the actual transfer of assets and assumptions of liabilities. Since April 1, 1970, the Thompson brothers, as sole owners of Thompson Manufacturing Company, Incorporated, have been the administrators and direct managers of the new company and have changed the operating personnel, stating that "only one person employed in September 1969, was retained in the new company and he was given in the new company, no autonomy and no authority to commit the company in any significant area without direct authority from one of the Thompsons." It is also alleged that on April 1, 1970, when Thompson Manufacturing Company took over the delinquent contracts for Aerospace Division, the over-all contracts were 64 percent delinquent. On May 1, 1970, the percentage was 55; on June 1, 41 percent; on July 1, 26 percent; on August 1, 42 percent and on September 1, 20 percent. On September 10, 1970, 3 of 15 percent contracts were technically delinquent. One of those was in dispute and had been for almost a year and a half, and represents one-half of the dollar amount of work in the delinquent category.

In our decision to you 49 Comp. Gen. 600, March 18, 1970, we stated in part the following:

> While we recognize that a contracting officer's determination of a bidder's responsibility involves the exercise of a considerable range of discretion, where the bidder is a small business concern the contracting officer's determination of responsibility is subject, so far as concerns capacity and credit, to the authority of SBA under section 8(b)(7) of the Small Business Act, Public Law 85-536, 15 U.S.C. 637(b)(7), to certify to Government procurement officers with respect to the capacity and credit of a small business to perform a specific Government contract. We have held that a determination of nonresponsibility of a small business concern on the basis of a record of substantial delivery delinquencies without referral to SBA for certification of the concern's capacity and credit is unjustified absent a finding, based on substantial evidence, that the delinquencies arose out of something other than capacity and credit and are therefore not within the scope of a SBA certification. 43 Comp. Gen. 298 (1963). We stated that a limitation on the authority of the contracting officer in determining the responsibility of a small business bidder resulted from the certification authority vested in SBA and that such limitation could not be overcome by simply concluding that the reasons for the contracting officer's negative determination belong in the category of factors which could not be covered by the SBA certification.

A review of the above-quoted determination by the contracting officer in this case, and the supporting documentation in the accompanying file, shows that the finding in paragraph 3 covering the unsatisfactory rating for Factors 5 and 12 (Purchasing and Subcon-

tracting and Performance Record), is based upon language contained in the preaward survey which states:

> 2. A formal review of the contractor's Purchasing and Subcontracting System has not been performed. It is evident from an examination of current and Past Performance Records on Prime Government contracts that deficiencies and inadequacies exist in his system. His high rate of delinquencies were primarily caused by late issuance of Purchase Orders and lack of aggressive follow up. This factor is considered to be unsatisfactory.

It is apparent that the determination of the contracting officer is based upon delinquencies under contracts entered into by Thompson International and it does not appear to be determinable from the preaward survey what consideration was given to contracts entered into by the new company as a basis for such determination.

From the facts set forth by the record, as cited herein, there is no question but that the performance record of Thompson International was poor; and such evidence, in our opinion, would have been sufficient to support the contracting officer's findings and determination that Thompson International was not a responsible bidder within the meaning of the procurement regulations.

The question for our determination, therefore, is whether the sale of the Aerospace Division to two officers of the parent firm, subsequent to the award of the contracts on which the parent firm was delinquent, without a novation of such delinquent contracts, has so changed the structure of the business that the new corporation should not be charged with the delinquencies attributable to the parent firm.

Office of Counsel cites several of our decisions wherein our Office has held that in evaluating the responsibility of a bidder, in instances where a firm establishes a poor record of performance and is then incorporated with little or no change in management, the new corporation may properly be held nonresponsible based upon the prior firm's poor record. B–156897, July 21, 1965. Similarly, a contracting officer may properly consider the deficient performance of a corporation which subsequently continues performance under a trustee in bankruptcy, the fact that the two "are legally separate entities does not necessarily mean that in determining the responsibility of one it is not proper to consider the performance of the other." B–168209, February 2, 1970. There can be no doubt that poor management may be the proper basis for a finding of nonresponsibility. B–157203, December 29, 1965. The lack of perseverance and tenacity of a corporate official can be imputed to a corporation. B–163485, August 6, 1968.

The facts in the present case are not the same as those in any of the decisions cited. Here, there is alleged to have been a nearly complete change in operating management of the business entity concerned. We think the basic question involved in such a situation, so far as the imputation of past delinquencies to the new management is concerned,

is whether or not the new operating managers have demonstrated sufficient tenacity and perseverance since their assumption of management responsibilities to create confidence in their present ability to perform the proposed contract in a satisfactory manner.

It seems clear that prior delinquencies of any business entity should not be imputed to it after it is acquired by persons who had no prior connection with its management. This is not to say that the new management should not be held responsible for its actions in attempting to cure existing delinquencies for which it assumes responsibility, but this must be measured in terms of action or inaction by the new management.

Where there has been no change in higher corporate control, or where the same higher management controls both the old and the revamped business entity, we believe it is proper to require demonstration of adequate tenacity and perseverance by the new operating management to show that prior deficiencies in these areas have been cured.

In the instant case, the record indicates that the present owners and managers of Thompson Manufacturing Company, Incorporated, actually became aware of the delinquencies of the Aerospace Division of Thompson International Corporation in August or September 1969. There is nothing in the record before us to indicate that they were not then given authority to take whatever steps were necessary to cure those delinquencies, despite the fact that they did not formally acquire ownership of the Aerospace Division until April 1, 1970. Consequently, we believe it is proper to impute to the Thompson Manufacturing Company any lack of tenacity and perseverance since September 1969. So far as concerns any deficiency in this regard prior to that time, we believe it should not be imputed to the Thompson Manufacturing Company unless it can be shown that the present owners had control over the Aerospace Division during the period involved.

In view of our conclusions, we believe a new evaluation should be made as to the responsibility of the Thompson Manufacturing Company under paragraph 1-903.1(iii) of ASPR. If the new evaluation is adverse, we believe it should again be referred to the SBA for possible appeal under the regulations.

We are forwarding for your consideration a copy of additional material received by us since your report of August 26, 1970.

[B-170725]

Transportation — Dependents — Military Personnel — Debarment From Station—Restriction Removed Prior to Member's Arrival

An Air Force officer whose dependents incident to his permanent change of station from overseas to a restricted area within the United States are moved to a selected

home, upon learning when he arrived at the restricted duty station that the restriction had been removed prior to his transfer, is entitled under the authority of paragraph M7005–4, item 4, of the Joint Travel Regulations to a monetary allowance in lieu of transportation for the travel of his dependents from the home selected to his new duty station on the basis the officer was on duty at the new station when the restriction on the travel of his dependents was removed. Similar claims made before or after this decision may be paid.

To Captain D. F. Adams, Department of the Air Force, November 17, 1970:

We refer to your letter dated June 22, 1970, with attachments, forwarded here by letter of August 27, 1970, from the Department of Defense Per Diem, Travel and Transportation Allowance Committee (Control No. 70–43), in which you request an advance decision as to the propriety of payment to Major John P. Wilz, USAF, of a monetary allowance in lieu of transportation for his dependents' travel from Eau Claire, Wisconsin, to Durand, Wisconsin, and from Durand to Keesler Air Force Base, Mississippi, in December 1969.

By Special Order No. AE–135, dated October 2, 1969, Major Wilz was directed to proceed on or about November 14, 1969, on a permanent change of station from his overseas station to 3413 Instructor Squadron (Air Training Command), Keesler Air Force Base, Mississippi 39534. The orders stated that the gaining duty station had been declared a restricted area by authority of Chief of Staff Message 231226Z August 69, and that the officer had elected to ship household goods and move dependents to 610 East Prospect, Durand, Wisconsin.

Major Wilz and his dependents left Izmir, Turkey, on November 24, 1969, traveling together to Washington, D.C., from where his dependants proceeded to Eau Claire and then to Durand, Wisconsin (arriving there on December 1, 1969). Major Wilz traveled to Keesler Air Force Base where, upon arrival, he says he learned that it was no longer a restricted duty station.

On December 9, 1969, Major Wilz was issued orders by the Commander, Keesler Air Force Base (Special Order TA–3913) authorizing his dependents to proceed from Durand, Wisconsin, to that base. He says he then drove to Wisconsin in a leave status and brought his dependents to his station. This travel was completed on December 29, 1969.

Chief of Staff, Air Force Message 231226Z August 1969, announced that Keesler Air Force Base had been declared a restricted duty station. It provided that until further notice, travel of dependents and shipment or storage of personal property would be governed by the provisions of paragraph M7104 and M8304 of the Joint Travel Regulations. Chief of Staff, Air Force Message 062232Z November 6, 1969,

announced the termination of the restriction on travel of dependents and shipment of household goods to that base.

Major Wilz has said that he was not informed of the removal of the restricted status of Keesler Air Force Base prior to his departure from Turkey. Message 100750Z March 1970, Headquarters 1141st Special Activities Squadron, confirms the member's statement and indicates that the message terminating the restriction had not been received prior to his departure from his overseas station.

Major Wilz contends that his claim for dependents' travel should be paid, as he complied with his orders, which precluded their travel to his new permanent duty station, permitting travel to a designated place, and he was not notified of removal of the restriction prior to the travel.

You say that no specific authority can be found within the Joint Travel Regulations authorizing entitlement to travel to an alternate designation when the reason for originally providing such authority was rescinded prior to the member's departure.

Specifically, you wish to know:

a. Is this voucher proper for payment? and
b. Since this will be a recurring situation, would future similar claims also be proper for payment?
c. Would payment be proper for similar travel performed to alternate destinations prior to your decision?

Pursuant to 37 U.S.C. 406, paragraph M7005 of the Joint Travel Regulations, as herein pertinent, provides that when a member is transferred by permanent change-of-station orders to a restricted area, and the old duty station is located outside the United States and his dependents are located outside the United States, he will be entitled to transportation of dependents to any place in the United States that the member may designate.

Paragraph M7005 provides, in addition:

4 SUBSEQUENT ENTITLEMENT. When a member is:

* * * * * * *

4. on permanent duty in a restricted area on the date the restriction against travel of dependents to the member's permanent duty station is removed; he will be entitled to transportation of dependents from the place his dependents are located on * * * the date of change of condition in item * * * 4, * * * to the current duty station of the member * * *.

Paragraph M1150–17 of the regulations defines a "restricted area" as "any area into which the entry of dependents has been prohibited, temporarily or permanently, by order of competent authority."

When Major Wilz' orders directing his permanent change of station to Keesler Air Force Base were issued, it was a restricted facility. On the basis of these orders, his dependents were transported from

Izmir, Turkey, an unrestricted area, to 610 East Prospect, Durand, Wisconsin, their designated place of residence. In our opinion, the changed status of the base, effective prior to commencement of travel, which was unknown to the order-issuing authority or to Major Wilz, did not serve, insofar as Major Wilz was concerned, to remove the restriction indicated in his orders on the travel of his dependents to that base. As far as he is concerned, the restriction may be viewed as having remained in effect until he arrived at Keesler Air Force Base, when he was informed that it was no longer a restricted station.

Therefore, it may be considered that Major Wilz was on duty at Keesler Air Force Base when the restriction on the travel of his dependents to that base was removed. Since his dependents traveled to Durand at the same time he traveled to his new duty station, it is concluded that he is entitled to a monetary allowance for their travel from Durand to his new duty station under authority of paragraph M7005–4, item 4, of the regulations.

In addition to allowances for transportation from Durand, Wisconsin, to Keesler Air Force Base, Mississippi, the enclosed voucher for $176.85 includes a monetary allowance of $4.35 for travel from Eau Claire, Wisconsin, to Durand, Wisconsin. This amount was not paid on the initial claim for transportation allowances from Izmir, Turkey, to Eau Claire and Durand, Wisconsin, as this distance exceeded that from Izmir, Turkey, to Keesler Air Force Base.

Travel from Izmir, Turkey, to Durand, Wisconsin, having been performed in accordance with paragraph M7005, the member is entitled to an allowance based on the distance between these locations (less the travel to Eau Claire obtained with transportation requests), not subject to the limitation of the distance from Izmir, Turkey, to Keesler Air Force Base.

Therefore, payment of the voucher submitted, which is enclosed, is authorized if otherwise correct. We would not be required to object to the payment of similar claims based on travel performed before or after this decision for travel of the member's dependents en route to a designated place which had been completed before the member or the order-issuing authority received any information that the restriction on travel of dependents to the new duty station had been removed.

[B–169452]

Contracts—Increased Costs—Additional Work or Quantities—Dissallowance of Claim

A claim submitted for consideration under the settlement authority in 31 U.S.C. 71 for additional compensation to cover a required correction in the printing of

a technical publication, which had been disallowed by the contracting officer and an appeal to the disallowance denied by the administrative officer, may not be paid on the basis prior uncorrected orders had been accepted, where the record shows the contractor agreed to correct the error without cost to the Government, and a supplemental agreement providing a charge for the work—insertion of fold-ins in the publication in indicated sequence—has reference to future orders. Furthermore, an alleged subsequent oral agreement may not be considered, as the review is restricted to the record before the contracting agency at the time the head of the agency rendered his decision.

To Masters, Gardner & Associates, November 19, 1970:

Reference is made to your letters of May 26 and 27, 1970, requesting that our Office review the May 4, 1970, decision of the Public Printer which denied the appeal of Litho Press, Inc., from the contracting officer's disallowance of a claim for additional compensation for work on print order 557, program 827–S. The effect of the request is to submit the claim to this Office for consideration under our settlement authority, 31 U.S.C. 71.

The Government Printing Office (GPO) awarded on June 27, 1968, to Litho Press purchase order 42000, jacket 343–672, for the printing and binding of technical publications to be ordered by the Department of the Air Force during the period July 1, 1968, through June 30, 1969. The specifications provided that during the term of the purchase order there would be about 3,740 orders ranging from about 90 to 450 per month. The specifications included the following requirement relating to "Fold-ins":

* * * On most orders the fold-ins are to be collated in proper sequence and gathered following last page. *When so indicated on individual print orders, fold-ins are to be inserted into manuals in proper location and sequence as indicated on instruction sheet accompanying negatives and/or copy.* [Italic supplied.]

Under the purchase order, there was issued on November 21, 1968, print order No. 557 of program 827–S calling for the publication of 1,100 copies of a book on the 1F–111 program. On the print order form, under "fold-ins," there appears the number 363 followed by an asterisk. On the lower portion of the form following an asterisk there is the statement, "FOLDINS PER ASSEMBLY SHEET." The assembly sheet lists each page number in the book in sequence. Certain of the page numbers are preceded by the symbol "F," designated on the assembly sheet as "foldout."

The books were delivered to the Air Force in December 1968 and January 1969. They were subsequently rejected as unacceptable after payment had been made. The basis for the rejection is contained in a letter dated February 6, 1969, from Headquarters Tactical Air Command, Langley Air Force Base, Virginia, listing the following deficiencies:

(1) books are dated July 5, 1968, although printed in December 1968;
(2) pages are out of numerical sequence;
(3) 89 pages are missing.

Item (2) had reference to the fact that fold-ins were furnished as a group at the back of the book instead of interleaved in sequence throughout.

Litho Press in a letter dated February 7, 1969, to the GPO contracting officer stated that it would correct the deficiencies and return the books at no additional expense to the Government. It stated at a conference in Dallas, Texas, attended by GPO and Air Force representatives, that the criticism was directed not so much against the missing pages in the book as it was against the folding and collating of fold-ins. In that regard, the letter stated:

> The remark was made that this order was "the straw which broke the camel's back," but I feel that it was not the missing pages in this book as much as the overall subject of folding and collating foldins. Again, I regret that errors were made in the assembly of this very complex publication. Its production also came during our period of uncontrollable absenteeism and we were attempting to meet an accelerated shipping date. We will do anything asked of us to rectify this error at no cost to the Government.

Following meetings on February 5, 6, and 7, 1969, regarding the inadequate production of the F–111 publication, a memorandum of understanding of the joint Air Force and GPO investigation was prepared. The memorandum stated that the publication was totally inadequate; that it was agreed that the GPO would direct the contractor to reprint and distribute the book at no additional cost to the Government; that the fold-ins in "future" publications would be interposed in the text as required by the print order and attached assembly sheets; and that the Air Force would request a contract supplement to provide for reverse folding of fold-ins as necessary. Headquarters Air Force Systems Command, by letter dated February 24, 1969, requested GPO to issue a supplement to the contract for program 827–S on the grounds that Litho Press had indicated that it would not provide reverse folding of the fold-ins without such a supplement.

Subsequently, GPO issued supplement No. 1, dated March 10, 1969, providing changes with respect to the preparation and insertion of fold-ins in the text. The supplement also stated:

> * * * On approximately 95% of the orders the contractor will be required to collate the fold-ins in proper sequence and insert into text in proper location, as indicated on instruction sheet accompanying negatives and/or copy. On the remaining orders the contractor will be required to collate fold-ins in proper sequence and gather after the last text page.

Additional changes were provided for inserting the fold-ins in the text in sequence. The contractor signed the supplement, but before doing so inserted a notation as follows:

> It is understood by and agreed to by the U.S. Government Printing Office and Litho Press, Inc. that any additional pricing items or price adjustments to this Program 827-S contract shall be retroactive to and include any orders delivered on or after February 6, 1969, which were produced and delivered in accordance with the agreement on February 6, that all orders in preliminary stages of production would be produced within the scope of the revised specifications requiring that all fold-ins be inserted into text pages per assembly sheet and verbal instructions from representatives of the Air Force.

This note was initialed by the contractor and the supplemental agreement was signed by the contracting officer for GPO.

The contractor corrected the defective work on order 557 after February 6, 1969, and made delivery on March 19, 24, and 29, 1969. Subsequently, the contractor submitted a voucher for an additional $11,969.10 for the work. The contractor based the claim upon the contract supplement. The claim was considered by the Director of Purchases and denied on the basis that the specifications required the fold-ins to be inserted in the text in sequence and that the contract supplement was not applicable to order 557. The denial was sustained by the Public Printer upon appeal.

Your brief sets forth arguments in favor of the allowance of the above claim. You state that the original contract differed from the supplemental agreement with regard to fold-ins and that the exact reverse of the pertinent original contract provision was substituted in the supplemental agreement. Further, you state that the negotiations between the representatives of the Air Force, GPO, and the contractor leading up to the supplemental agreement established that the supplemental was to be effective on February 6, 1969, and was to cover specifically print order No. 557. In addition, it is stated that all 191 of the prior print orders, containing the same language "FOLD-INS PER ASSEMBLY SHEET," were all delivered and accepted with the fold-ins collated in proper sequence and gathered following the last page; and that is an indication that the Government and the contractor concurred that the fold-ins were to be furnished in that manner on order 557. Also, it is stated that the assembly sheet furnished to the contractor reflects that no special instructions of any kind were given to the contractor with reference to print order No. 557 by the ordering agency.

The basic question is whether the contractor was required to furnish the fold-ins in sequence throughout the text without additional cost. Although the specifications in the purchase order under which

the print order was issued stated that on "most orders" the fold-ins would be furnished after the last page, the specifications specifically provided that the instructions on the print orders as to location and sequence of fold-ins were to be followed. It follows that if "most orders" would provide for fold-ins at the end of the text, then some fold-ins would not be so inserted. As indicated above, the print order referred the contractor to the assembly sheet and the latter designated the location of the fold-ins in the text. We, therefore, cannot agree with your position that the original contract and the print order and the assembly sheet taken together did not require the collating and insertion in numerical sequence of fold-ins throughout the text.

While the ordering agency may have been remiss in accepting fold-ins on prior orders at the end of the text, when otherwise required, the fact remains that the instructions were specific as to order 557. Although after the incident with order 557, GPO agreed to a contract supplement to provide that 95 percent of the orders would require fold-ins to be located in the text, the contractor was not harmed by the original provision since the previous orders it had furnished with the fold-ins at the end of the text had been accepted without exception. Under the original language, the ordering agency was entitled to request at least some of the orders to have fold-ins in the text. Therefore, it was not inappropriate to require fold-ins in the text in connection with order 557.

The question then becomes whether it was agreed by the contract supplement to reimburse the contractor for inserting the fold-ins in place in the text on order 557. The note added to the supplemental agreement by the contractor states that it was to apply to all orders in "preliminary" stages of production on February 6, 1969. As to what was meant by this language is probably best illustrated by the contractor's own statements made in its letter of February 7, 1969, immediately after the meeting with GPO and Air Force personnel on order 557. As that portion of the letter, quoted above, indicates, the contractor pointed out that folding and collating was the major problem on order 557 and that it would do anything to correct the error at no cost to the Government. It did reserve a right in the letter to be paid for collating, but that was stated with respect to "all future orders." In that connection, it stated:

"Mr. Goltz requested and we agreed to (1) start immediately to fold all foldins with accordion-type folding and (2) collate foldins in page sequence according to the Reproduction Assembly Sheet.

* * * * * * *

* * * As mentioned above, we told Mr. Goltz that we would follow these instructions on all future orders. Of course, we will request a contract supplement to include a pricing item for this additional service since it was not anticipated in our original bid, but we will do this at a later date.

We believe that the February 7, 1969, letter reflects the agreement of the contractor to correct order 557 without cost to the Government and also that the charges in the contract supplement would apply to future orders. The note in the supplement must be read in the light of these statements which would indicate no intent to charge for correcting order 557.

Further, we might point out that contrary to the allegation in your letter of May 26, 1970, the Chief of the GPO Procurement Section by affidavit has denied being a party to an oral agreement with the contractor that any additional costs incident to correcting order 557 would be borne by the Government or provided for in the supplemental agreement. In any event, our review is restricted to the record that was before the contracting agency at the time the head of the agency rendered the decision. Therefore, we must deny the request in the May 26 letter for an opportunity to present evidence to rebut the Chief of the Procurement Section if contrary to your allegation.

We find no legal basis to pay an additional amount for the work contained in print order No. 557 and the claim therefore is denied.

[B-170922]

Officers and Employees—Transfers—Service Agreements—Government *v.* Particular Agency Service

In view of *Finn* v. *United States*, 192 Ct. Cl. 814, to the effect that a Government agency does not have the authority under 5 U.S.C. 5724(i) to require an employee to sign an agreement to remain in the service of the agency for 12 months following the effective date of transfer, the holding in 46 Comp. Gen. 738 that agreements executed under section 5724(i) require an employee to remain with a particular agency rather than "in the Government service" no longer is for application, with the exception of the last paragraph concerning the taking of appropriate collection action if an employee fails to remain in the Government service 12 months.

Officers and Employees—Service Agreements—Manpower Shortage Category

The agreements which appointees to manpower shortage positions execute pursuant to 5 U.S.C. 5723(b), to remain in the service of the agency to which appointed or assigned for 12 months unless separated for reasons beyond their control which are acceptable to the agency, should be revised to require only that the employee remain in the Government service, as the language of section 5723(b) is substantially the same as section 5724(i), which has been construed in *Finn* v. *United States*, 192 Ct. Cl. 814, to require only that an employee agree to remain "in the Government service" for a period of 12 months rather than in the service of a particular agency.

To Maurice F. Row, United States Department of Justice, November 20, 1970:

Your letter of September 29, 1970, with enclosures, requests our decision whether Mr. Edward L. Nowak, a former employee of the Federal Bureau of Investigation, is entitled to refund of all amounts collected from him on account of his breach of a transfer agreement executed under 5 U.S.C. 5724(i).

In connection with a transfer of official station Mr. Nowak signed an agreement to remain in the service of the FBI for 12 months following the effective date of his transfer. However, Mr. Nowak violated the terms of that agreement by accepting a position with the U.S. Army Corps of Engineers prior to the expiration of his agreed-upon period of service with the Bureau. Consequently, Mr. Nowak was required to reimburse the Bureau for the costs of his transfer.

Mr. Nowak has requested refund of the amounts collected from him on the basis of *Finn* v. *United States*, 192 Ct. Cl. 814. In view of our decision of April 14, 1967, published at 46 Comp. Gen. 738, you question whether refund may be made to the employee.

In 46 Comp. Gen. 738 we held that agreements executed under 5 U.S.C. 5724(i) may require the employee to remain with the particular agency concerned rather than "in the Government service." However, the *Finn* decision holds that a Government agency does not have authority under subsection 5724(i) to require an employee to sign an agreement to remain in the service of that particular agency for 12 months following the effective date of his transfer. In view of that decision, which now is final, the holding in 46 Comp. Gen. 738 no longer is for application, except for the last paragraph thereof concerning the taking of appropriate collection action if the employee fails to remain in the Government service for 12 months. Accordingly, the voucher by which Mr. Nowak has requested refund of the amounts collected from him may be certified for payment if otherwise correct. That voucher is returned herewith.

It follows from the above that employees of the Bureau no longer should be required to agree to remain in the service of the FBI in connection with their transfers.

In addition to the above, you ask whether the language of agreements executed by appointees to manpower shortage positions should be revised to require only that the employee remain "in the Government service" rather than "in the service of the Federal Bureau of Investigation." In that respect, subsection 5723(b) of 5 U.S.C. provides:

(b) An agency may pay travel and transportation expenses under subsection (a) of this section only after the individual selected or assigned agrees in writing to remain in the Government service for 12 months after his appointment or assignment, unless separated for reasons beyond his control which are acceptable to the agency concerned. If the individual violates the agreement, the money spent by the United States for the expenses is recoverable from the individual as a debt due the United States.

The above-quoted language is substantially the same as that appearing in subsection 5724(i) which was construed by the Court of Claims in *Finn* v. *United States*, *supra*. In that decision the Court stressed the fact that the language of subsection 5724(i) requires only that the employee agree to remain "in the Government service." It is our opinion, therefore, that agreements executed under 5 U.S.C. 5723(b) may require only that the employee remain in the Government service.

[B–170966]

Transportation — Automobiles — Military Personnel — Advance Shipments

The shipment of privately owned vehicles prior to the receipt of permanent change-of-station orders by members of the uniformed services may be authorized on the basis the phrase "ordered to make a change of permanent station" in 10 U.S.C. 2634(a), the authority for the transportation of motor vehicles, is identical to the phrase used in 37 U.S.C. 406(a) to authorize the transportation of a member's dependents, pursuant to which paragraph M7000, item 8, of the Joint Travel Regulations (JTR) provides for the transportation of dependents in advance of orders when supported by a certificate by appropriate authority stating that the member was advised prior to the issuance of the change-of-station orders that such orders would issue. Accordingly, the JTR may be amended to authorize the advance shipment of motor vehicles under the same circumstances as is provided by paragraph M7000, for the advance transportation of dependents.

To the Secretary of the Army, November 30, 1970:

By letter of September 23, 1970, the Assistant Secretary of the Army has requested a decision whether Volume 1, Joint Travel Regulations, may be amended to provide authority for the shipment of privately owned vehicles in advance of orders on the same basis as is authorized for shipment of household effects. The requests has been assigned Control No. 70–44 by the Per Diem, Travel and Transportation Allowance Committee.

Paragraph M8015, item 1, Joint Travel Regulations, authorizes the advance shipment of household goods because of emergency, exigency of the service, or service necessity. The Assistant Secretary says, however, that the Joint Travel Regulations do not now contain authority for the shipment of privately owned vehicles prior to the receipt of permanent change-of-station orders except in connection with:

a. The early departure of dependents from a member's overseas duty station under unusual or emergency conditions.
b. The official report that a member is in a casualty status.
c. Evacuation of dependents from an overseas duty station.

The Assistant Secretary says further that it has been suggested that the proposed amendment would be advantageous since it would decrease the inconvenience many members experience because they are frequently required to use leave while waiting at a port for the arrival of their privately owned vehicles. It would also decrease the personal cost of transshipment of the vehicle which arrives after the member has been required to depart the port area in order to report at the new duty station on the date required by the orders. Doubt as to the validity of the proposed amendment is occasioned by our decisions in 45 Comp Gen. 544 and 577 (1966), holding that there is no authority for the forwarding of a privately owned vehicle at Government expense under orders which are subsequently amended, canceled, or revoked.

Prior to June 30, 1932, privately owned automobiles of civilian and military employees of the Government were moved at Government expense on a permanent change of station as part of their household and personal effects. See, for example, 2 Comp. Gen. 601 (1923); 5 Comp. Gen. 5 (1925). Section 209 of the act of June 30, 1932, however, provided that after June 30, 1932, no law or regulation authorizing or permitting the transportation at Government expense of the effects of officers, employees, or other persons, shall be construed or applied as including or authorizing the transportation of an automobile. These provisions are presently codified in section 5727(a) of Title 5 of the United States Code as follows:

> Except as specifically authorized by statute, an authorization in a statute or regulation to transport the effects of an employee or other individual at Government expense is not an authorization to transport an automobile.

Insofar as we are aware, the only statutory provisions authorizing the transportation of an automobile as part of the personal effects of an employee are contained in 37 U.S.C. 554 (military personnel) and 5 U.S.C. 5564 (civilian employees) authorizing the transportation of household effects of missing persons. The early movement provisions of the regulations referred to in the Assistant Secretary's letter are based upon those provisions and 37 U.S.C. 406(h).

The general statutory authority for the transportation of motor vehicles of members of the uniformed services on permanent change of station is contained in section 2634 of Title 10, U.S. Code, 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.

When the Secretary concerned, or his designee, determines that a replacement for that motor vehicle is necessary for reasons beyond the control of the member and is in the interest of the United States, and he approves the transportation in advance, one additional motor vehicle of the member may be so transported.

(b) In this section "change of permanent station" means the transfer or assignment of a member of the armed forces from one permanent station to another. It includes the change from home or from the place from which ordered to active duty to first station upon appointment, call to active duty, enlistment, or induction, and from last duty station to home or to the place from which ordered to active duty upon separation from the service, placement upon the temporary disability retired list, release from active duty, or retirement. It also includes an authorized change in home yard or home port of a vessel.

Section 406(b) of Title 37, United States Code, provide that, "In connection with a change of temporary or permanent station," a member of the uniformed services is entitled to the transportation of baggage and household effects within weight allowances prescribed by the Secretaries concerned. Since those provisions authorize the movement of household effects "in connection with" a change of station, we have not questioned the regulatory provisions, presently paragraph M8015–1 of the Joint Travel Regulations, providing for such movement in certain cases prior to the issuance of orders when the movement is in fact in connection with a change of station.

The provisions of 10 U.S.C. 2634 quoted above, however, do not provide for the transportation of an automobile in connection with the change of station but authorize such transportation only when a member is "ordered to make a change of permanent station." In view of the difference in the statutory provisions and the express prohibition in 5 U.S.C. 5727(a) against the movement of an automobile as household effects, except as may be authorized by statute, we find no legal basis for a conclusion that the household effects early movement regulations may be made applicable to the transportation of automobiles and your question is answered in the negative.

The phrase "ordered to make a change of permanent station" in section 2634(a) is identical with that used in section 406(a) of Title 37, United States Code, authorizing the transportation of a member's dependents when he is "ordered to make a change of permanent station." We have not questioned the validity of paragraph M7000, item 8, Joint Travel Regulations, promulgated pursuant to section 406(a), authorizing the transportation of dependents in advance of orders when supported by a certificate by appropriate authority stating that the member was advised prior to the issuance of change-of-station orders that such orders would be issued. Accordingly, we would not object to an amendment of the Joint Travel Regulations providing authority for the advance shipment of a motor vehicle of a member of the uniformed services on change of permanent station under the same circumstances as is provided by paragraph M7000, item 8, for the advance transportation of dependents.

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