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[B-170525]

Buy American Act—Applicability—Contractors' Purchases From Foreign Sources—Effect

A procedure that invites bidders and offerors to furnish surgical steel blades made from either domestic carbon steel or imported stainless steel without indicating preference, leaving the determination of the availability of domestic steel to bidders or offerors, is a defective procedure as the composition of the steel selected for the end product is, under the definition in paragraph 6-001 of the Armed Services Procurement Regulation, a component of the end product and subject to the restrictions of the Buy American Act, 41 U.S.C. 10a-d. Therefore, when carbon steel is available, the restrictions of the act may not be waived for a product manufactured in the United States from foreign steel. Furthermore, a determination to exempt an item from the restrictions of the act must, in accordance with ASPR 6-103.2(a), be included in the solicitation.

Contracts—Buy American Act—Foreign Products—Nonavailability Determination

An award to the high bidder offering a surgical steel blade manufactured in the United States from imported stainless steel, based on the erroneous determination the item is a domestic source end product as defined in paragraph 6-101(a) of the Armed Services Procurement Regulation under the rule in ASPR 6-001(d) relating to the nonavailability of domestic steel, rather than an award to the low bidder proposing to use similar steel and manufacture the blade abroad—considered a foreign end product—will not be disturbed, as the award was made under the mistaken belief held by all participants that only the use of the imported steel was authorized, notwithstanding the availability of domestic carbon steel. Furthermore, adding the 50-percent differential prescribed by ASPR 6-104.4(b) displaces the low bid.

To the Director, Defense Supply Agency, October 1, 1970:

We refer to the protest of Propper Manufacturing Company (Propper), which was submitted by letter of August 3, 1970, and supplemental correspondence from its attorney, Professor Gilbert J. Ginsburg, against the method used by the Defense Personnel Support Center (DPSC) to evaluate bids and proposals for the furnishing of surgical blades required to conform with Interim Federal Specification GG-H-0080a(DSA-DM), December 27, 1967. The protest was the subject of a report forwarded by letter dated September 4, 1970, DSAH-G, from your Assistant Counsel.

The specific evaluation factor with which the protest is concerned is the application of the provisions of the Buy American Act, 41 U.S.C. 10a-d, as implemented by the Armed Services Procurement Regulation (ASPR). The procurement solicitations involved are identified as invitation for bids (IFB) DSA120-70-B-1142, issued in January 1970; request for proposals (RFP) DSA120-71-R-0378, issued August 14, 1970; and RFP DSA120-71-R-0249, also issued on August 14, 1970. Award has been made under the IFB, but the period for submission of proposals under both RFP's has been extended to October 2, 1970.

The specification covers surgical knife handle and blade sets in various sizes and types, and the items are required to be interchange-

able with other handles and blades. The provisions relating to material which may be used in the items permit a choice of three materials for the handles and either of two compositions of high grade steel, carbon steel, or high chromium stainless steel for the blades.

Under IFB DSA120-70-B-1142, two bids were received by DPSC, one from Propper and the other from Rudolph Beaver, Inc. (Beaver). Both bids offered blades made of stainless steel of foreign origin. Beaver, who proposed to import the steel and manufacture the blades in the United States, quoted a unit price of $9.36. Propper, who proposed to furnish blades completely manufactured in England, quoted unit prices of $7.38 with import duty and $6.45 without duty.

During the period the bids were under evaluation, DPSC gave consideration to whether stainless steel of United States origin is available and ultimately decided that such steel either is not manufactured in the United States or is not manufactured domestically in sufficient and reasonably available commercial quantities and of a satisfactory quality. In the circumstances, DPSC took the position that blades manufactured in the United States of imported stainless steel should be considered as domestic source end products as defined in ASPR 6-101(a) and under the rule set forth in ASPR 6-001(d) relating to nonavailability in the United States of articles, materials, or supplies, while blades manufactured outside the United States of similar steel should be considered as foreign end products. As applied to the procurement advertised in the IFB, Propper's bid, after addition of the 50-percent price differential prescribed by ASPR 6-104.4(b) for application to bids offering foreign end products, was higher than Beaver's bid.

On April 23, 1970, DPSC accorded Propper a conference regarding the procurement, at which the Government's position was explained. Following the conference, Propper submitted to DPSC a letter dated May 22, 1970, in which request was made for a deviation from the ASPR evaluation requirements with respect to bids offering blades made of foreign source stainless steel, which would either eliminate the use of any differential or apply only a 6-percent differential to a bid offering blades manufactured outside the United States.

In its letter Propper asserted that allowing a bid to be considered as domestic merely because of the place of manufacture is not logical or desirable from the standpoint of Government policy. In addition, as precedent for dispensing with any differential for evaluation purposes, there was cited the authority contained in ASPR 6-102.2(b), relating to the balance of payments program policy with respect to defense procurements, under which the 50-percent price factor ap-

plicable to foreign bids may be disregarded pursuant to proper authorization where the low domestic bid will involve substantial foreign expenditures or the low foreign bid will involve relatively substantial domestic expenditures. Further, it was urged that by granting the requested deviation the Government would realize a sizeable financial saving annually and might even receive a bid from Swann Morton, an English concern which is said to be the largest manufacturer of surgeons' blades in the world. Such benefits, it was contended, would justify the deviation.

DPSC responded to the request in a letter dated July 8, 1970, which included the following statements:

For a time there was speculation as to the possible availability of stainless steel manufactured by United States sources. Apparently, however, it has since been conceded that such steel either is not manufactured in the United States or is not manufactured domestically in sufficient and reasonably available commercial quantities and of a satisfactory quality. Under these circumstances, the Government's position has been that blades manufactured in the United States of imported stainless steel would have to be considered United States end products under the nonavailable components rule set forth in ASPR 6-001(d), whereas blades manufactured outside the United States of similar steel would be considered foreign end products.

Since our April meeting and your subsequent letter, the problems involved in the procurement of surgical blades have been further analyzed and evaluated, with the result that a slightly revised procurement approach has had to be adopted. The change has resulted from a realization that the current specification covering surgical blades (Interim Federal Specification GG-H-0080a, dated 27 Dec. 1967) allows fabrication of blades from either of two steel compositions—stainless steel as defined in 3.1.2.2 or carbon steel as defined in 3.1.2.1 of the specification, and the further circumstance that carbon steel manufactured in the United States is readily available. Under the revised approach, solicitations for surgical blades will invite offers on an alternative basis. Offerors will be requested to submit separate prices on blades manufactured of carbon steel and blades manufactured of stainless steel. The solicitation will advise offerors that in the event any bid is submitted for blades manufactured in the United States of carbon steel manufactured in the United States, any other bids contemplating the use of foreign steel, either carbon or stainless, will be considered foreign, regardless of whether the blades offered by such other bids are to be manufactured in or outside the United States. If no bids are received for blades manufactured of domestic steel, all bids for blades to be manufactured in the United States will be given preference over bids involving manufacture outside the United States in accordance with ASPR 6-104.4 evaluation procedures.

Since the Government's requirements can be met by the furnishing of other than stainless steel (available foreign only), the need to solicit bids on an alternative basis is apparent. The Buy American Act precludes the purchase of foreign products for use in the United States if domestic products of a satisfactory specification quality are reasonably available in sufficient commercial quantities at reasonable cost. Therefore, it is important that the solicitation inquire into the availability of domestic products.

It is conceivable that a solicitation calling for bids based on alternative steel compositions might result in the submission of bids offering only blades manufactured of foreign steel by both domestic and foreign manufacturers. In such a situation, as mentioned above, bids offering blades of domestic manufacture would be given preference, in evaluation, over bids offering blades of foreign manufacture. Only in these circumstances would your letter presentation, urging consideration of a deviation from the evaluation procedures of ASPR 6-104.4, be relevant. It would not be relevant in a procurement situation involving, on the one hand, bids for blades manufactured in the United States of domestic steel and, on the other hand, bids for blades manufactured outside the United States of foreign steel, since, in this situation, it would not be possible to

show a relatively substantial foreign expenditure by the low domestic bidder or a relatively substantial domestic expenditure by the low foreign bidder (which would be the only circumstances on which a deviation request could be predicated (see ASPR 6-102.2(b)).

In any event, the possibility of our giving serious consideration to your suggestion regarding deviation from prescribed evaluation procedures is presently remote. As by reference to the last cited ASPR paragraph will appear, deviations from the normal evaluation procedures are for consideration only where major procurements (i.e., over $250,000) are involved. This monetary limitation is applicable to individual procurements and not, as your letter apparently suggests, to the total annual dollar value of surgical blade procurements. The fact is that individual procurements of surgical blades by DPSC heretofore have fallen far short of the indicated $250,000 limitation, and it is not anticipated that any individual procurement will approach this dollar amount in the future.

In keeping with the advice contained in the above letter, DPSC made award to Beaver as the low bidder offering a domestic end product. Further, the policy in question has been followed in connection with the two pending procurements under the RFP's, negotiation of which has been authorized pursuant to the authority in 10 U.S.C. 2304(a)(7) relating to purchases and contracts for medicine or medical supplies. In this connection, each RFP includes, in addition to the Buy American Act clause prescribed by ASPR 6-104.5, the following pertinent language:

Reference is made to paragraph 3.1.2 of Interim Federal Specification GG-H-0080A (DSA-DM) dated 27 December 1967, which provides that the surgical knife blades called for in this solicitation may be fabricated of either Composition A (carbon steel) or Composition B (chromium stainless steel) material. Offerors are encouraged to submit separate prices on blades manufactured of Composition A material and blades manufactured of Composition B material. Bids offering material (either Composition A or Composition B) of foreign origin shall indicate the amount of any applicable import duty. This information may be shown either by quoting duty-inclusive prices with an indication as to the amount of duty included therein or by quoting duty-exclusive prices and stating the amount of duty applicable thereto. If any offer for domestic composition A blades is received, all offers involving the use of foreign steel of either composition A or B material will be considered foreign, whether or not the blades are manufactured in the United States. If no offer for domestic composition A blades is received, all offers for blades manufactured in the United States will be given preference over offers for blades manufactured outside the United States in accordance with Armed Services Procurement Regulation 6-104.4 evaluation procedures.

For the purpose of consideration of the protest, the following provisions are quoted from the Buy American Act clause:

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

* * * * * * *

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

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

* * * * * * *

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

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

In the protest filed by Propper with our Office, while no request is made that the award to Beaver under the IFB be rescinded since it was made in the apparent belief by both Propper and DPSC that the specification authorized use of stainless steel only, the propriety of the method of bid evaluation under the IFB and as proposed under the two RFP's is questioned. In this regard, it is contended that steel is the component of the end product blades, and that since carbon steel is available in the United States, all foreign source steel must be regarded as a foreign source component and the bids or offers evaluated accordingly without regard to the place of manufacture of the end product.

In support of such position, the contention is made that the DPSC procedure leaves the determination of availability of the domestic components to the bidders, a result which it is claimed frustrates the Buy American Act. Under such procedure, it is charged, domestic manufacturers who proposed to use foreign stainless steel could "freeze out" a domestic manufacturer of carbon steel by agreeing to buy only foreign (cheaper) stainless steel and still retain a 50-percent competitive bidding advantage over foreign end product manufacturers. Accordingly, it is urged that the foreign component (i.e., stainless steel) should be regarded as foreign at all times, regardless of the place of manufacture of the end product, in order to protect domestic producers of carbon steel even when no bidder offers an end product made of steel produced in the United States, and procurement of an end product comprised of foreign source steel is therefore necessary.

The contracting officer has made statements indicating that specification stainless steel is not domestically obtainable. As to domestic source carbon steel, the contracting officer reports that in a recent negotiated procurement one of three offers received by DPSC was from a source offering an end product of domestic carbon steel, who indicated that a similar price would have been quoted had stainless steel, presumably of foreign manufacture, been offered. In refutation, the contracting officer points out that Propper, who offered blades of foreign source stainless steel manufactured outside the United States, was still the lowest offeror even with addition of the 50-percent foreign item evaluation factor, and therefore received the contract on August 18, 1970. The contracting officer therefore contends that this procure-

ment experience evidences that fears regarding a "freeze out" of domestic component producers under the circumstances described in the protest are unfounded.

In justification of DPSC's policy to make the determination regarding availability of domestic source steel on the basis of the bids or offers actually received by DPSC in a given procurement, the contracting officer states that such policy is a practical one, for when no bids or offers offering an end product manufactured of domestic material are received, as a matter of fact the domestic material is not available to the Government *for that particular procurement.*

So far as is pertinent to the protest, the Buy American Act (41 U.S.C. 10a) provides that—

> Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, * * * only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use.

ASPR 6–001, relating to foreign purchases, includes the following pertinent definitions:

> (b) "Components" means those articles, materials, and supplies, which are directly incorporated in end products.
>
> * * * * * * *
>
> (d) "United States end product" means an unmanufactured end product which has been mined or produced in the United States, or an end product manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all of its components. * * * A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

ASPR 6–101(a) defines "domestic source end product" in substantially the same language as is quoted above from the Buy American Act clause which is included in the two RFP's in question.

ASPR 6–103.2(a), entitled "Nonavailability in the United States," reads as follows:

> (a) The Buy American Act does not apply to articles, materials, or supplies of a class or kind which the Government has determined are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. Certain items determined to be exempt under this exception are set forth in 6–105. Supplies not listed may be excepted only after a written determination has been made by the contracting officer. Each determination shall also include a reference to the Buy American Act (41 U.S.C. 10 a–d), a description of the item or items being procured, the unit, quantity, and estimated delivered cost, a brief statement establishing the necessity for the procurement and the nonavailability of a similar item or items of domestic origin. A signed copy of the determination shall be made a part of the contract file. When a determination has been made that the restrictions of the Buy American Act are inapplicable for the end products being purchased,

notification to this effect shall be included in the solicitation and contract. [Italic supplied.]

Under the procurement specification, either carbon steel or high chromium stainless steel may be used in the blades, and no preference is stated for one composition over the other. Clearly, therefore, the composition of the steel selected by the particular offeror or bidder for the end product offered to the Government is, under the definitions in ASPR 6–001, the component of the end product. The question then arises whether, when only one of the compositions is domestically available, an end product made of the alternative composition may be exempt from the restrictions of the Buy American Act by reason of the fact that such end product is manufactured in the United States from a component not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. We believe, for the reasons stated below, that the answer must be negative.

Under the provisions of ASPR 6–103.2(a) quoted above, a requirement for exemption of an item from the restrictions of the Buy American Act is the nonavailability of a similar item or items of domestic origin. Since the similarity of the blades in question, whether made of carbon steel or chromium stainless steel, is undeniable, it is our view that whenever either of the two compositions of steel is available from a domestic source or sources, any end product made of either composition obtained from a foreign source must be regarded as a foreign end product for evaluation under ASPR 6–104.4 regardless of whether the end product is manufactured in the United States.

The record indicates that chromium stainless steel of domestic source is not available for manufacture of the blades, whereas domestic carbon steel was offered in the August 1970 procurement which was awarded to Propper. In the circumstances, it would appear that sufficient domestic carbon steel may be available for the manufacture of blades in quantities to meet the Government's requirements.

In addition, we call your attention to the fact that ASPR 6–103.2(a) requires that notification of a determination excepting an item from the restrictions of the Buy American Act be included in the solicitation and that there is no provision in the regulation for the making of a determination with respect to a particular procurement *after* the opening of the bids or offers, and on the basis of the results of the competition.

For the reasons stated, it is our view that the procedure contemplated by the provision in question is not sanctioned by the procurement regulations and the provision should therefore be deleted from the current RFP's.

While we are mindful that the award to Beaver under IFB DSA120–70–B–1142 was not made in accordance with the ASPR prescribed procedures, we do not believe that the interests of the Government dictate its cancellation since it was made in good faith and Propper, the only other bidder, does not urge that the award be rescinded.

A copy of this decision is being furnished to Propper by letter of today to its attorney.

The file which accompanied the Assistant Counsel's letter of September 4 is returned.

[B–169148]

Contracts—Research and Development—Price Factor

Under a solicitation issued pursuant to 10 U.S.C. 2304(a)(11), inviting proposals on a cost-plus-a-fixed-fee basis for research and development services to maintain a wind tunnel, an award on the basis of price alone was justified where both offers received were technically acceptable, as the concepts in paragraphs 3–805.2 and 4–106.5(a) of the Armed Services Procurement Regulation that price alone is not the controlling factor relate to situations where the favored offeror is significantly superior in technical ability and resources. Although the award was not illegal because of failure to continue discussions with all offerors in a competitive range when an amendment changed the "initial proposal" requirements of the solicitation and to request "best and final" offers, and failure to specify all evaluation factors, such deficiencies should be avoided in future negotiated procurements.

To the Secretary of the Air Force, October 6, 1970:

Reference is made to a letter dated April 9, 1970, with enclosures, from the Chief, Contract Placement Division, Director of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, and a letter of June 1, 1970, received here on June 24, 1970, with enclosures, from the Deputy Director of Procurement Policy, Deputy Chief of Staff, Procurement and Production, to Headquarters, USAF (AFSPPLA), all furnishing reports on the protests of Systems Research Laboratories, Inc. (SRL), against the award of a contract to Technology Incorporated (TI), under request for proposals (RFP) No. F33615–70–R–1588, issued by the Aeronautical Systems Division, Wright-Patterson Air Force Base, Ohio.

The RFP, issued on November 26, 1969, pursuant to 10 U.S.C. 2304(a)(11) invited proposals on a cost-plus-a-fixed-fee basis for research and development services commencing on February 17, 1970, for a 3-year period in connection with the maintenance of the Aerospace Research Laboratories' (ARL) hypersonic wind tunnel facility. Paragraph 14 of the general instructions for preparing proposals provided in pertinent part:

a. Because of the nature of the work, the majority of research and development procurements from this Directorate will not be formally advertised but will be negotiated. The Contracting Officer will select the best overall proposal, based

on the technical merit, cost, and other factors. In most instances technical factors are of primary importance. The Government reserves the right to negotiate with any contractor and to reject, as the Government's interest may appear, any and all quotations and proposals received, or to waive any minor informality in connection therewith.

b. The term "negotiation" as used herein shall not be interpreted as meaning that Offerors will be given the opportunity to revise or lower their original quotation or otherwise modify their original proposal. Offerors are cautioned to review carefully all terms and conditions and specifications of this Request for Proposal prior to submission of bids. *This procurement may be awarded without discussion of proposals received; therefore, proposals should be submitted on the most favorable terms, from a price and technical standpoint, which the Offeror can submit to the Government.* The Contracting Officer may consider Offeror's original proposal as final without extending the privilege to modify or revise quotation or conduct further negotiations.

Proposals were received from two of the eight sources solicited by the December 29, 1969, closing date. Contemporaneous with the receipt of proposals, the using activity prescribed weighted values applicable to each factor to be used in the technical evaluation of proposals. On December 30, 1969, the contracting officer requested a technical evaluation of the proposals of SRL and TI from the Fluid Dynamics Facilities Research Laboratory, ARL. The technical evaluation team reported on January 12, 1970, that both proposals were considered to be technically acceptable. The team assigned the following point scores, on a 100-point scale:

Systems Research Laboratories	84 points
Technology Incorporated	78 points

Due to funding cuts, the stated performance time was reduced from 3 years to 2 years. It is reported that on January 22, 1970, the two technically acceptable proposers were requested by amendment 2 to revise their cost proposals to conform to the 1-year reduction in performance time by February 5, 1970. Revised proposals were submitted timely by SRL and TI. TI revised its price downward to reflect a reduced level of effort based on a 2-year program. The revised proposal of SRL contained the following statement:

As you are aware SRL has proposed to provide personnel who have had a number of years of direct experience with the facilities and requirements of the Fluid Dynamics Facilities Research Laboratory and have therefore been specifically trained to operate this complex equipment. Considerable training is required before operating personnel become proficient with this complex and hazardous facility. We have, consequently, based our labor costs upon these individuals. In the event that the Government does not choose to utilize these fully trained personnel, SRL can offer personnel who meet the requirements as stated in the RFP but who do not have the direct experience "on the job." This would result in a reduction of costs. Another approach could be to realign staff assignment, accelerate reassignment, etc. The above options are available for discussion. * * *

The estimated costs to the Government, including fees, of the revised proposals were as follows:

Systems Research Laboratories	$742,486
Technology Incorporated	719,800

Without negotiations with either SRL or TI, contract No. F33615–70–C–1447 was awarded to TI on February 16, 1970.

One of the principal bases of the protest concerns the SRL allegation that the contracting officer placed a "higher emphasis on cost than is permitted by the regulations," referring specifically to the provisions of paragraph 3–805.2 of the Armed Services Procurement Regulation (ASPR). That section discusses the selection of a contractor for a cost-reimbursement type contract and requires that "estimated costs of contract performance and proposed fees should not be considered as controlling since, in this type of contract advance estimates of cost may not provide valid indicators of final actual costs." The section continues as follows:

> * * * There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (1) the lowest proposed cost, (2) the lowest proposed fee, or (3) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost over-runs. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and appropriate to the work to be performed (see 3–808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government.

Since the subject contract is one for the procurement of research and development services, there is for consideration also ASPR 4–106.5(a) which deals with the evaluation of price and costs in the selection of a research and development contractor. That provision reads in part:

> While cost or price should not be the controlling factor in selecting a contractor for a research or development contract, cost or price should not be disregarded in the choice of the contractor. It is important to evaluate a proposed contractor's cost or price estimate, not only to determine whether the estimate is reasonable but also to determine his understanding of the project and ability to organize and perform the contract. * * *

In response to SRL's allegation that the lower cost estimate submitted in the technically inferior TI proposal was considered as controlling, we are advised that the technical differences in the two proposals did not warrant the incurrence of additional costs that would have been occasioned by accepting SRL's proposal. In fact, the technical evaluation team considered the difference in point scores to be insignificant. Although SRL had been the only contractor at the facility since the commencement of operations in 1959, a highly advantageous factor in the opinion of the evaluators, the technical evaluation team determined that TI was capable of performing in accordance with the requirements of the contract. In this regard, we are advised that:

* * * Both bidders were rated relatively high which indicated a high technical capability to perform the requirements of the contemplated contract and the additional 6 point rating assigned to the Systems Research Laboratories' proposal did not justify the expenditure of additional money. The 78 point rating assigned to the Technology Incorporated proposal established that they were quite capable of performing the required work, and to place undue emphasis on the 84 point rating of Systems Research Laboratories would have been superfluous to the requirements of the Aerospace Research Laboratories and did not warrant the expenditure of additional funds.

Where, as here, two offerors are essentially equal as to technical ability and resources to successfully perform a research and development effort, the only consideration remaining for evaluation is price. In such a situation, we believe that the lower priced offer represents an advantage to the Government which should not be ignored. Indeed, ASPR 4–106.4 makes it clear that awards should not be for capabilities that exceed those determined to be necessary for successful performance of the work. We view the award to TI as evidencing a determination that the cost premium involved in making an award to SRL, based on its slight technical superiority over TI, would not be justified in light of the acceptable level of effort and accomplishment expected of TI at a lower cost. The concepts expressed in ASPR 3–805.2 and 4–106.5(a) that price is not the controlling factor in the award of cost-reimbursement and research and development contracts relate, in our view, to situations wherein the favored offeror is significantly superior in technical ability and resources over lower priced, less qualified offerors. Although we find that this aspect of the SRL protest is without merit, our review has disclosed deficiencies in the RFP and the negotiation process thereunder.

SRL contends that the award of this contract without negotiations or discussions with either of the two offerors violated the provisions of ASPR 3–805.1.

ASPR 3–805.1(a), in pertinent part, reads as follows:

(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors (including technical quality where technical proposals are requested) considered, * * *

The contracting officer denies the necessity for discussions with the offerors in the circumstances of this case, relying on ASPR 3–805.1(a)(v), which permits an award on an initial proposal basis without discussions in the case of:

procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. *Provided, however,* that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. * * *

Also, the contracting officer states that he had more than 10 years of cost experience available for use to assure reasonable prices and that competition existed between the two offerors. Specifically, the contracting officer points to paragraph 14b of the general instructions as authorizing an award without negotiations. However, SRL believes that the contracting officer was required to conduct discussions with SRL upon receipt of its February 5, 1970, revised proposal wherein "discussion" was specifically requested. The contracting officer states that he felt it unnecessary to pursue this revised offer as a possible alternate proposal because it would not have been in the best interests of the Government to consider a reduction of the technical excellence of a proposal. Also, it was felt that it would have been unfair for a prospective contractor to reduce its fee in order to obtain a Government contract.

It should be noted at this point that the Staff Judge Advocate cites our decision, B–165337, March 28, 1969, wherein we held that the submission of revised proposals at the behest of a procuring agency constituted "discussions" within the meaning and intent of 10 U.S.C. 2304(g) as implemented by ASPR 3–805.1. He therefore concludes that discussions were, in fact, held with both proposers. We further held in that case that where "discussions" have taken place with proposers who have made revisions in price, award may no longer be made on the basis of an initial proposal. There, as here, award was made on the basis of a "revised proposal" rather than on an "initial proposal" basis.

Since, in effect, written discussions were initiated with the two offerors through the submission of revised proposals, thereby precluding "initial proposal" award basis, there is for consideration whether negotiations were effectively closed on February 5, notwithstanding SRL's request for discussion of the options outlined in its letter of that date.

ASPR 3–805.1(a) requires that, after receipt of initial proposals, discussions be conducted with all responsible offerors within a competitive range. That regulation imposes an affirmative duty to negotiate unless the award is made on the basis of initial proposals and, in this case, that was not done. Rather, discussions through the medium of amendment 2 were held with both offerors. ASPR 3–805.1(b), in addition to prohibiting auction techniques, provides in part:

* * * Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see (a) above) *shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals must be submitted by that date.* All such offerors shall be informed that any revision received after such date shall be treated as a late proposal in

accordance with the "Late Proposals" provisions of the request for proposals. (In the exceptional circumstances where the Secretary concerned authorizes consideration of such a late proposal resolicitation shall be limited to the selected offerors with whom negotiations have been conducted.) In addition, all such offerors shall also be informed that after the specified date for the closing of negotiation no information other than notice of unacceptability of proposal, if applicable (see 3-508), will be furnished to any offeror until award has been made. [Italic supplied.]

ASPR 3-506(h) states:

(h) The normal revisions of proposals by selected offerors occurring during the usual conduct of negotiations with such offerors are not to be considered as late proposals or late modifications, but shall be handled in accordance with 3-805.1(b).

The regulations read together provide that, with certain exceptions not applicable here, negotiations must be conducted with all offerors in a competitive range who shall be offered an equitable opportunity, prior to the date established for the close of discussions, to submit normal revisions to their proposals resulting from negotiations. Here, "discussions" were held with both offerors through the submission of revised proposals and both offerors had an equal opportunity to submit revisions to their respective proposals by February 5, 1970. But the amendment did not specifically request offerors to submit their "best and final" offers reflecting the change in performance time. Neither did it state affirmatively that February 5, 1970, would be the closing date for negotiations; and lastly, it did not advise that negotiations were being conducted under revised requirements.

In our opinion, amendment 2 only extended the date set for receipt of proposals and inferentially apprised offerors that cost and manning estimates in their initial proposals may not be responsive to revised requirements. Although amendment 2 was deficient in the above respects, we believe that the record demonstrates that both SRL and TI viewed the amendment as fixing February 5 as the cutoff date for negotiations.

Further, we believe that the revised proposal of SRL—the contractor who has satisfactorily performed on the project for 11 years—may have been worthy of consideration as to whether negotiations should have been reopened with both offerors on the reduced requirements. Since the amendment changed the "initial proposal" requirements, we believe that such circumstance should have generated an inquiry into the feasibility and necessity for further negotiations. We find it difficult to understand how a proposal revision of a current contractor wherein a specific invitation for discussion is made may be disregarded especially when the offeror's revision points to possible cost savings based on suggested staff level changes. However, in view of the wide discretion vested in the contracting officer in determining the nature and scope of negotiations, we cannot say, as a matter of law,

that his failure to reopen negotiations constituted a clear abuse of discretion.

The RFP contained a statement of work and incorporated a "RFP Booklet No. 2" entitled, "INSTRUCTIONS FOR THE PREPARATION OF PROPOSALS FOR THE DIRECTORATE OF R&D PROCUREMENT." The front page of this booklet contains the following:

> The purpose of this booklet is to standardize and simplify the preparation of proposals for research and development procurement. It has been prepared in accordance with current Air Force procurement policies and practices. This booklet is intended to indicate the minimum requirements for the preparation and submission of your proposal. Elaboration for the purposes of clarity and emphasis is not objectionable. This booklet is intended to be general in nature with application to many programs. Although it is intended as a guide, subject to modification as required for each individual program, its content and its intent shall be adhered to whenever possible.

However, no specific evaluation factors directly pertinent to the particular research and development effort were set out in this RFP. Rather, the general guidelines stated in part II of the booklet were to be followed in preparing a proposal in response to the statement of work in the RFP. Implicit in the procurement of goods and services is the necessity for furnishing adequate information to prospective offerors of the Government's needs and requirements and how offerors are to respond to those needs and requirements. See ASPR 3-501(a). Also, we have held that both evaluation criteria and the relative importance assigned to each factor of evaluation should be stated in the RFP. Especially pertinent is our decision of October 13, 1969, 49 Comp. Gen. 229, to you. There we stated that if a point evaluation formula is to be used, offerors should be informed as to the evaluation factors and the relative importance to be attached to each factor. We went on to state:

> The record of the subject procurement indicates that, while the amended RFP in paragraph 33 stated the Government's requirements in broad, general terms, the technical reasons advanced for rejection of Berkeley Scientific Laboratories, Inc. proposal appear to indicate the application of rather detailed and rigid requirements. It is our view that the mere statement in paragraph 33 that "Greatest emphasis shall be placed on the following criteria in the order listed," does not suffice to sufficiently inform offerors of the actual evaluation factors used, or of the relative weights attached to each factor. While we have never held, and do not now intend to do so, that any mathematical formula is required to be used in the evaluation process, we believe that when it is intended that numerical ratings will be employed offerors should be informed of at least the major factors to be considered and the broad scheme of scoring to be employed. Whether or not numerical ratings are to be used, we believe that notice should be given as to any minimum standards which will be required as to any particular element of evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. * * *

The deficiencies in the RFP and negotiation procedures do not, in our opinion, justify the conclusion that the award was patently illegal. However, we strongly recommend that corrective measures be

taken to assure that the above-discussed deficiencies will not occur in the future.

[B-164786]

Compensation—Postal Service—Rates—Highest Previous Rate—Postal Reorganization Act Increases

The increase in rates of basic compensation authorized by the Postal Reorganization Act, approved August 12, 1970, to take "effect on the first day of the first pay period which begins on or after April 16, 1970," and to provide 108 percent of the compensation rates in effect prior to the enactment of the act, may be extended by regulation to employees who transferred to the Post Office Department prior to August 12, 1970, without regard to the "highest previous salary rule" stated in section 531.203(c) of the Civil Service Regulations issued pursuant to 5 U.S.C. 5334(a) and 5338, thus preserving the salary rates of the transferred employees in accord with those salary increase acts that over the years contained provisions to overcome the restrictions of the "highest previous salary rule"—a rule that continues to apply to employees transferred on and after August 12, 1970.

To the Postmaster General, October 7, 1970:

On September 10, 1970, the Deputy Postmaster General requested our advice concerning the extent of authority granted the Postmaster General under section 9(a) of the Postal Reorganization Act, Public Law 91-375, approved August 12, 1970, 84 Stat. 719, 784, 39 U.S.C. 1003 note, which provides:

> The Postmaster General, under regulations made by him, shall increase the rates of basic pay or compensation of employees in the Post Office Department so that such rates will equal, as nearly as practicable, 108 percent of the rates of basic pay or compensation in effect immediately prior to the date of enactment of this Act. Such increases shall take effect on the first day of the first pay period which begins on or after April 16, 1970.

The Post Office Department proposes to issue regulations under the above provision whereby an employee who transfers or has transferred to the Post Office Department from another Government agency after the first day of the first pay period beginning on or after April 16, 1970, may be employed at a grade and pay step commensurate with the grade and pay step he held in his previous position with his basic compensation increased by 8 percent effective at the time of transfer.

The question is raised as to whether the existing "highest previous salary rule" precludes the issuance of regulations as proposed.

As pointed out in the submission section 531.203(c) of the Civil Service Regulations—issued pursuant to 5 U.S.C. 5334(a) and 5338—provides:

> * * * when an employee is transferred * * * the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate * * *

The submission refers to 26 Comp. Gen. 368 (1946), which, as modified by 26 Comp. Gen. 530 (1947), is to the same effect as the above-cited regulation. Additionally, with respect to the application of the high-

est previous rate in the context of a retroactive salary increase, the submission refers to 31 Comp. Gen. 166 (1951); *id.* 320 (1952); 34 *id.* 691 (1954); 38 *id.* 188 (1958); 44 *id.* 171 (1964); and B–169686, May 22, 1970. Those decisions hold, concerning the retroactive provisions of salary increase acts, that such acts be applied—in the absence of statutory provision to the contrary—to reflect the salary status of each employee under the increased rates as if such rates had been in force and effect at the time of any change in his status.

The Deputy Postmaster General states that if section 9(a) of the Postal Reorganization Act did not confer authority on the Postmaster General to make the proposed regulation to implement the pay increase, some employees who transferred to the Post Office Department after April 16, 1970, might be required to have a reduction in their pay steps and thus lose part or all of the 8-percent increase. The submission notes that the problem as such will cease on or before August 12, 1971, 1 year after approval of the Postal Reorganization Act. At such time the postal service will have authority to classify and fix pay of postal employees without regard to 5 U.S.C. 5334 and other provisions of the Classification Act. See 39 U.S.C. 410, 1003 as contained in section 2 of the Postal Reorganization Act.

The proposed regulation would put newly transferring employees in a position of equality with persons employed by the Post Office Department prior to the first day of the first pay period beginning on or after April 16, 1970, as well as permitting the Department to avoid the necessity of reducing the pay step of any employee because of a post-April 16th transfer.

We note that over the years several salary increase acts have contained specific provisions to overcome the general rule as stated in our decisions previously referred to. The purpose of such provisions has been to preserve steps in grade or salary rates which would have prevailed if the personnel actions, such as transfer and promotion, had occurred prior to the effective dates (retroactive period) of the salary increase acts. In other words, the acts prescribed the rules to be followed in certain situations in converting from one pay act to another. For example, see the provisions of the Postal Revenue and Salary Act of 1967, 81 Stat. 613–648, 39 U.S.C. 4252.

Accordingly, our view is that the regulations proposed are similar to rules previously set forth by statute and are clearly authorized without regard to the "highest previous rate rule" by reason of the delegation of authority to you in that respect.

However, we wish to point out that in concluding you are authorized by virtue of the regulatory authority vested in you to grant a full 8-percent pay increase to employees transferring to the Post Office Department at the beginning of the first pay period on and after

April 16, 1970, without regard to the highest previous rate rule, we are referring only to those employees who have transferred prior to August 12, 1970, the enactment date of the act. We do not consider the authority to regulate with respect to increasing the pay of postal employees on the rolls of the Department prior to the enactment date of the act as being sufficiently broad to reach the question of determining the manner in which the pay of those persons transferring to the Department on and after August 12, 1970, will be established. For such persons, the highest previous rate rule would be applicable.

[B-166772]

Post Office Department—Mails—Transportation—Emergency Contracts

The authority in 49 U.S.C. 1375(h) to use air taxi mail service contracts in the event of an emergency caused by flood, fire, or other calamitous visitation may not be exercised upon the occurrence of any unforeseen event which renders normal mail transportation facilities unavailable, such as the sudden loss of an RPO train schedule, or an unexpected closing of an airport runway causing certified air carriers to temporarily suspend service at the airport; for under the "ejusdem generis" rule of construction, the general words "calamitous visitation" are restricted by the particular terms "flood or fire," and the term "calamity" supposes a continuous state produced by natural causes. Nonconforming existing contracts should be terminated as soon as practicable, and any temporary arrangements made under the Postal Reorganization Act should be terminated when the emergency ceases.

To the Postmaster General, October 7, 1970:

By our letter of May 13, 1970, B-166772, we advised you that it had come to our attention that the Post Office Department had awarded many emergency contracts for air taxi service for the transport of mail, purportedly under the authority of section 405(h) of the Federal Aviation Act of 1958, approved August 23, 1958, Public Law 85-726, 72 Stat. 762, 49 U.S.C. 1375(h), in cases where it did not appear to us that such authority was properly applicable; expressed our view that said provision of law required some sort of a major disaster which would disrupt regular postal transportation service before the authority granted thereby could be exercised; and requested your views upon several questions.

In response to our inquiry, the letter dated July 30, 1970, signed by Mr. Louis A. Cox, your Deputy General Counsel, advised that you do not interpret the cited statute so narrowly as to exclude all but natural disasters, and stated as follows:

A nationwide rail strike, or a strike affecting a substantial number of domestic air carriers, such as occurred in the late summer of 1966, is calamitous insofar as the transportation and delivery of mail are concerned. We believe that any unforeseen event, which renders normal mail transportation facilities unavailable for the duration of the emergency, warrants use of this contracting authority to the extent that transportation modes other than aircraft cannot maintain the normally attainable level of service.

Without undertaking a defense of every emergency contract entered into, we continue to believe that such events as the sudden loss of an RPO train schedule, the unexpected closing of an airport runway, causing certificated air carriers to temporarily suspend service at that airport, and events of similar impact upon normal mail transportation patterns, warrant use of the Postmaster General's authority to contract for air transportation for the emergency period.

The letter did not answer the specific questions presented, but stated that, in view of the legal questions raised concerning the use of emergency contracts for air taxi mail service, it had been arranged that no such contracts will be executed without the approval of the General Counsel's office, not only as to the substance and form of the contract, but as to the facts which are deemed by the contracting officer to constitute an emergency.

We are pleased to note that greater care will be used in the future in entering into such "emergency" contracts. However, while we agree that the incidents cited in the two paragraphs of the letter of July 30, 1970, quoted above, may constitute "emergencies," we cannot concur in your contention that all of them warrant the exercise of the authority granted by 49 U.S.C. 1375(h).

Section 405(h) of the Federal Aviation Act of 1958, *supra*, 49 U.S.C. 1375(h), provides in part here pertinent as follows:

In the event of emergency *caused by flood, fire, or other calamitous visitation*, the Postmaster General is authorized to contract * * *. [Italic supplied.]

Obviously, this provision contemplates not merely an "emergency," but a particular type or kind of emergency—that is, one "caused by flood, fire, or other calamitous visitation" which disrupts regular postal transportation service.

An examination of the legislative history of the Federal Aviation Act of 1958 and its predecessor, the Civil Aeronautics Act. of 1938, approved June 23, 1938, ch. 601, 52 Stat. 973 (which contained identical language in section 405(k) at 52 Stat. 997), has failed to disclose any indication of the intent of the Congress in enacting the quoted language. However, in *Jones* v. *Williams*, 45 S.W. 2d 130 (1931), the Supreme Court of Texas made the following comments concerning the meaning of the word "calamity":

* * * The word "calamity" indicates or supposes a somewhat continuous state, produced not usually by the direct agency of man, "but by natural causes, such as fire, flood, tempest, disease," etc., Webster's Revised Unabridged Dictionary, by G. and C. Merriman Co., edited by Dr. Noah Porter, of Yale University.

Crabb's English Synonymes in part says:

"The devastation of a country by hurricanes or earthquakes, and the desolation of its inhabitants by famine or plague, are great calamities. * * * A calamity seldom arises from the direct agency of man; the elements or the natural course of things are mostly concerned in producing this source of misery to men."

Moreover, it should be noted that the words "other calamitous visitation" in the quoted portion of the statute are preceded by the words

"flood, fire, or * * *." In this connection, it is stated in 82 C.J.S. Statutes 332b as follows:

> Under the rule of construction known as "ejusdem generis," where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. * * *
>
> Under this rule or doctrine general words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms; general terms which follow specific ones are limited or restricted to those specified, and will not include any of the classes superior to that to which the particular words belong. * * *
>
> The rule finds application and has frequently been applied where such terms as "other," "any other," "others," "or otherwise," or "other thing" follow an enumeration of particular classes, and where this occurs such words are to be read as "other such like," and are construed to include only others of like kind or character.

Hence, it is our view that the authority granted in section 405(h) of the Federal Aviation Act of 1958, *supra*, may not be exercised upon the occurrence of any unforeseen event which renders normal mail transportation facilities unavailable for the duration of the emergency, sudden loss of an RPO train schedule, and unexpected closing of an airport runway causing certificated air carriers to temporarily suspend service at that airport, as stated in the letter of July 30, 1970. We believe that, as a general rule, the word "calamity" must be defined along the lines indicated in *Jones* v. *Williams*, *supra*, and that the "calamitous visitation" must be of the same nature as the flood and fire stipulated in the statute; that is produced not usually by the direct agency of man, but by natural causes, which would include among other things, tempests, hurricanes, earthquakes, and other major disasters arising generally from natural causes. We agree that there might be a few major occurrences caused by the direct agency of man rendering mail transportation facilities unavailable which would warrant an exception to such general rule on a case-by-case basis and that a nationwide rail strike might be one. Many of the contracts we reviewed, however, not only would not meet this test, but would not even comply with your extremely broad interpretation of section 405(h).

With regard to our decision of January 29, 1968, B–162766, referred to in the letter of July 30, 1970, you are advised that such decision involved a bid protest and only the question of the validity of the protest was decided therein. No question was raised as to the authority of the Post Office Department to execute the contract under the provisions of 49 U.S.C. 1375(h) in the circumstances there existing, and such question was neither considered nor decided. Hence, such decision has no bearing here.

In the future, the authority granted by section 405(h) should be exercised only in circumstances conforming with our interpretation

as set out above, and the duration of contracts so executed must be limited to such periods as emergency services may be required to maintain mail service because of the inadequacy of other facilities caused by such emergency. Moreover, any such contracts still in effect which were not executed in circumstances conforming with the above interpretation, as well as any such contracts which may remain in effect after the emergency has ended, should be terminated as soon as practicable. We recognize that the new postal service will be authorized under 39 U.S.C. 5001 as revised by the Postal Reorganization Act, Public Law 91-375, to make arrangements on a temporary basis for the transportation of mail when, as determined by the postal service, an emergency arises, but such arrangements are also required to be terminated when the emergency ceases. See also 39 U.S.C. 5402(c).

[B-170794]

Pay—Retired—Increases—Entitlement

An Air Force officer subject to mandatory retirement on January 8, 1970, under 10 U.S.C. 8921, and pursuant to the Uniform Retirement Date Act, 5 U.S.C. 8301, scheduled to retire February 1, 1970, who was continued on active duty until May 25, 1970, to determine his eligibility for disability retirement under 10 U.S.C. 1201, is not entitled to retired pay computed at the increased pay rates prescribed by Executive Order No. 11525, dated April 15, 1970, for members on active duty January 1, 1970, in view of the restrictions by the Secretary of Defense to the effect the retroactive pay increases do not apply to persons who became entitled to retired or retainer pay after December 31, 1969, but before April 15, 1970, a prohibition that relates to the officer's January 8, 1970, mandatory retirement date. However, for active duty performed before or after January 8, the officer is entitled to active duty pay computed at the increased rates prescribed in the Executive order.

Pay—Retired—Increases—Entitlement

An Air Force officer whose mandatory retirement date under 10 U.S.C. 8916 was April 11, 1970, and pursuant to the Uniform Retirement Date Act, 5 U.S.C. 8301, he is retired on May 1, 1970—a date that may not be considered because of the restrictive provisions of 5 U.S.C. 8301(b), in applying Executive Order No. 11525, dated April 15, 1970, which retroactively prescribes the pay increases authorized by the act of December 16, 1967, and the Federal Employees Salary Act of April 15, 1970—is subject to the restrictions imposed by the Secretary of Defense in implementing the order to the effect the retroactive pay increases do not apply to persons who became entitled to retired or retainer pay after December 31, 1969, but before April 15, 1970, and, therefore, the officer's retired pay is for computation on the basis of the active duty pay rate in effect on April 11, 1970, the date of his mandatory retirement; but he is entitled for active duty performed after December 31, 1969, to the higher pay rate provided by the Executive order.

To Major N. C. Alcock, Department of the Air Force, October 7, 1970:

Your letter of August 25, 1970, requests an advance decision concerning the computation of the retired pay of two Air Force officers whose mandatory retirement dates were prior to April 15, 1970, but whose active duty was terminated after April 15, 1970, the date of

Executive Order No. 11525 prescribing new rates of basic (active duty) pay. Your request for decision was assigned Air Force Request No. DO–AF–1094 by the Department of Defense Military Pay and Allowance Committee.

Under the provisions of 10 U.S.C. 8921, Colonel Robert E. Templeman, SSAN, 564–09–4292, was subject to mandatory retirement on January 8, 1970, after completing over 29 years of service for basic pay and, by orders dated August 20, 1969, was originally scheduled for retirement on February 1, 1970, applying the Uniform Retirement Date Act, 5 U.S.C. 8301. A possible disabling physical condition was discovered 3 weeks prior to his retirement date and his retirement orders were revoked. Colonel Templeman was continued on active duty until May 25, 1970, when he was retired for disability by orders dated May 19, 1970, under the provisions of 10 U.S.C. 1201 with 40-percent disability.

It is stated that, because of the ruling in decision of September 17, 1969, B–153784, his retired pay was computed on the rates of basic pay in effect on his mandatory retirement date of January 8, 1970; that is, on the basic pay rates that became effective on July 1, 1969, as increased by the retired pay increase factor which became effective November 1, 1969, pursuant to 10 U.S.C. 1401a(d).

Executive Order No. 11525, dated April 15, 1970, adjusted the monthly basic pay for members of the uniformed services on active duty effective January 1, 1970, as authorized by the act of December 16, 1967, Public Law 90–207, 81 Stat. 649, 37 U.S.C. 203, and the Federal Employees Salary Act of 1970, Public Law 91–231, 84 Stat. 195, and delegated to the Secretary of Defense the authority to prescribe other rules for the payment of retroactive compensation for the uniformed services. Paragraph 3 of the April 21, 1970, Memorandum of the Deputy Secretary of Defense implementing Executive Order No. 11525, provides:

> A person who became entitled to retired pay or retainer pay after December 31, 1969, but before April 15, 1970, is not entitled to any increase in retired or retainer pay by virtue of that Order.

You say that Colonel Templeman's release from active duty and his first day of entitlement to retired pay were both *after* April 14, 1970, although his mandatory retirement date was after December 31, 1969, and before April 15, 1970, and that, except for being continued on active duty for disability retirement processing, he would have been mandatorily retired under 10 U.S.C. 8921 and 5 U.S.C. 8301(a) with retired pay effective February 1, 1970.

You suggest that the converse of the quoted statement from the Memorandum of the Deputy Secretary of Defense is that a person who "became entitled" to retired or retainer pay *after* April 14, 1970,

is entitled to retired pay computed on the basis of the increased rates of active duty pay authorized by Executive Order No. 11525. You say that such an interpretation would seem to depend, in turn, upon whether a member retired under Colonel Templeman's circumstances "became entitled" to retired pay after April 14, 1970, within the meaning of the quoted Memorandum.

While Colonel Templeman was retired under the provisions of 10 U.S.C. 1201 on May 26, 1970, his mandatory retirement date under the provisions of 10 U.S.C. 8921 was January 8, 1970. Subsection (a) of 10 U.S.C. 8921 provides as follows:

(a) Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of colonel shall be retired, except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade or on the thirtieth day after he completes 30 years of service computed under section 8927(a) of this title, whichever is later. However, if his name is carried on the list of officers recommended for appointment to the regular grade of brigadier general, he shall be retained on the active list while his name is so carried.

Subsection (b) of section 8921 authorizes the Secretary of the Air Force to defer the mandatory retirement of officers in certain categories. It does not appear that Colonel Templeman falls within any of the categories there mentioned.

Section 8301 of Title 5, U.S. Code, provides:

(a) Except as otherwise specifically provided by this title or other statute, retirement authorized by statute is effective on the first day of the month following the month in which retirement would otherwise be effective.
(b) Notwithstanding subsection (a) of this section, the rate of active or retired pay or allowance is computed as of the date retirement would have occurred but for subsection (a) of this section.

Formula 1 in 10 U.S.C. 1401 provides, insofar as is here material, that a member of the uniformed services retired for disability pursuant to 10 U.S.C. 1201 or 1204 computes his retired pay on the monthly basic pay of the grade to which entitled under 10 U.S.C. 1372 or "to which he was entitled on the day before retirement or placement on temporary disability retired list," whichever is higher. In a case involving an officer subject to mandatory retirement on September 18, 1962, under the provisions of 10 U.S.C. 3916 (which are similar to the provisions in 10 U.S.C. 8921) who was retained in an active status beyond that date for physical evaluation and was placed on the permanent disability retired list November 1, 1962, under the provisions of 10 U.S.C. 1201, we said in decision of May 25, 1964, 43 Comp. Gen. 742, 744, notwithstanding the positive provisions of formula 1 in 10 U.S.C. 1401, that—

In the absence of a provision exempting officers found to be physically disqualified for further active duty, from the positive requirements of section 3916(a), we find no legal basis for crediting an officer with any period of service after the mandatory date of his retirement for basic pay purposes in computing his retired pay. *Of.* 41 Comp. Gen. 375. The fact that the Army failed

to accomplish his retirement on the date required by law would not seem to add to his rights in any way with respect to computing the amount of retired pay to which he is entitled.

In the decision of September 17, 1969, to which you refer, the officer was subject to mandatory retirement under 10 U.S.C. 8916, on April 24, 1969, with retirement effective May 1, 1969, pursuant to 5 U.S.C. 8301(a). However, because of pending physical evaluation actions his retirement date was extended to July 2, 1969, when he was retired by reason of physical disability under 10 U.S.C. 1201. We there said that under the provisions of 10 U.S.C. 8916(a) and 5 U.S.C. 8301(a) the mandatory retirement date of the officer was May 1, 1969, and that unless some other provision of law permitted his retirement on or after July 1, 1969, the restrictive provisions of 5 U.S.C. 8301(b) would preclude use of the higher rate of active duty basic pay which became effective July 1, 1969, and that the computation of his retired pay would be required to be based on the active duty rates of pay that were in effect on April 24, 1969, notwithstanding the provisions of 10 U.S.C. 1401 for computing disability retired pay on the rates of active duty basic pay in effect on the date of disability retirement.

It appears that the mandatory retirement date for Colonel Templeman under the provisions of 10 U.S.C. 8921 and 5 U.S.C. 8301 was February 1, 1970. We know of no provision of law under which the mandatory requirements of 10 U.S.C. 8921 and 5 U.S.C. 8301 may be disregarded. Hence, it is our opinion that the retired pay of an officer falling within those provisions of law is computed on the rates of pay in effect on the date the conditions of those sections are met. It is our further opinion that paragraph 3 of the Memorandum of the Deputy Secretary of Defense dated April 21, 1970, providing that a person "who became entitled to retired pay or retainer pay after December 31, 1969, but before April 15, 1970," relates to the mandatory retirement date prescribed by 10 U.S.C. 8921 and 5 U.S.C. 8301. Accordingly, it is our view that Colonel Templeman's retired pay must be computed on the basic pay (July 1, 1969 rates) in effect on his mandatory retirement date January 8, 1970.

The mandatory retirement date of Lieutenant Colonel Frank S. Raggio, SSAN 571-03-9778, under 10 U.S.C. 8916 was April 11, 1970. Pursuant to that provision of law and 5 U.S.C. 8301(a) he was retired effective May 1, 1970. He was not retained on active duty for disability retirement processing or retirement beyond the date required by 10 U.S.C. 8916 and 5 U.S.C. 8301(a), nor was there a deferment of retirement under the provisions of 10 U.S.C. 8916(b).

You say that Colonel Raggio's retired pay was computed on the July 1, 1969, basic pay rates, as adjusted, on the basis of the ruling in 38 Comp. Gen. 5 (1938) to the effect that retired pay is required

to be computed as of the date retirement would have occurred except for the restrictive provisions of the Uniform Retirement Date Act (5 U.S.C. 8301(b)), and that the rulings in 43 Comp. Gen. 742 (1964) and B–153784, September 17, 1969, and October 27, 1969, involving computation of retired pay where a basic pay increase intervened between the mandatory retirement date and the actual date of retirement, were also considered.

You say, however, that a question has arisen as to whether Colonel Raggio may be considered to have become "entitled to retired pay" after April 14, 1970, within the meaning of the Memorandum dated April 21, 1970, and whether the Memorandum in effect superseded the provisions of 10 U.S.C. 8916, the mandatory retirement statue, and 5 U.S.C. 8301(b) "as the effect of those statutes is construed by the decisions cited." In other words, you ask whether Colonel Raggio is entitled to retired pay computed on the basis of the rates established by Executive Order No. 11525.

As noted in the similar case of the officer involved in our decision of September 17, 1969, B–153784, Colonel Raggio was subject to mandatory retirement under 10 U.S.C. 8916 on April 11, 1970, with retirement effective May 1, 1970, pursuant to 5 U.S.C. 8301. In our opinion, the restrictive provisions of 5 U.S.C. 8301(b) preclude the use of the higher rate of active duty basic pay which became retroactively effective on January 1, 1970, and that therefore the computation of his retired pay is required to be based on the active duty rates of pay that were in effect on April 11, 1970.

There is nothing in the act of December 16, 1967, Public Law 90–207, or in the Federal Employees Salary Act of 1970, Public Law 91–231, which authorizes the computation of retired pay contrary to the provisions of 10 U.S.C. 8916 and 5 U.S.C. 8301. While the 1967 law and the 1970 law authorized payment of retroactive active-duty pay increases to members of the uniformed services and employees, respectively, in the active service of the United States on the dates of enactment of such laws, it should be noted that section 5 of Public Law 91–231 provides that retroactive pay, compensation, or salary shall not be considered as basic pay for the purposes of the civil service retirement law or any other retirement law or retirement system.

There appears to be no basis to question the right of Colonel Templeman and Colonel Raggio to active duty pay for active service performed after December 31, 1969, whether before or after their respective mandatory retirement dates of January 8 , 1970, and April 11, 1970, computed at rates of active duty pay prescribed in Executive Order No. 11525.

[B-170513]

Contracts—Payments—Withholding—Protect Interests of United States

Withholding 10 percent from the progress payments due on each job order until the expiration of the 60-day guarantee period prescribed in a Master Contract for Repair and Alteration of Vessels is not required where the work is performed in accordance with contract terms and the redelivered ship accepted by the Government. The express warranty clauses in the contract neither excuse nor suspend the obligation to make payment after the contractor completes work under each job order, nor does the payment clause require the expiration of the warranty period before payment is made; and neither of the clauses prescribe additional work, but rather affix liability in monetary terms or through corrective action by the contractor for prior acts or omissions for 60 days after completion of the work covered by a job order.

To the Secretary of the Navy, October 8, 1970:

Reference is made to a letter of September 14, 1970, concerning the request by Sun Shipbuilding and Dry Dock Company as to the legality of the Fourth Naval District's action in withholding 10 percent of each job order price until the expiration of the guarantee period provided for in their Master Contract for Repair and Alteration of Vessels (MSR contract) No. N62787-70-C-0004.

The MSR contract with Sun is a standard, uniform Department of Defense (DOD) contract published in Appendix F-200.731 of Armed Services Procurement Regulation (ASPR) and is mandatory for use by DOD for ship repair work. The Fourth Naval District is responsible for administering the work done pursuant to job orders issued under Sun's MSR contract. Under the payments clause of the contract, clause 8, the Fourth Naval District has been withholding 10 percent of the job order price under recent job orders until the expiration of the 60-day period established in clause 10, Liability and Insurance, and clause 11, Guarantees. Sun questions the legality of this action when the repair work has been performed in accordance with the other contract provisions and the ship has been redelivered to the Government.

The payments clause, clause 8, and clauses 10 and 11 of the contract provide in relevant part:

CLAUSE 8 PAYMENTS

(a) Progress payments (which are hereby defined as payments prior to completion of work in progress under any job order) shall be made as the work progresses upon the submission by the Contractor of invoices therefore in such form and with such copies as the Contracting Officer may prescribe. Such invoices may be submitted semi-monthly or more frequently if expenditures by the Contractor warrant. No progress payment will be required under this clause upon invoices aggregating less than $5,000. Such progress payments shall be made upon the basis of the value, computed on the price of the job order, of labor and materials incorporated in the work, materials suitably stored at the site of the work, and preparatory work already completed, all as estimated or approved by the Contracting Officer, less the aggregate of any previous payments. For the purpose of enabling the Contracting Officer to make such estimates or give such approval, the Contractor will furnish to the Contracting Officer, upon

request, such reports concerning expenditures on the work to date as may be requested.

(b) In making such progress payments, there shall be retained ten per cent of the amount estimated or approved by the Contracting Officer pursuant to paragraph (a) above *until final completion and acceptance of all the work covered by the job order.*

(c) * * *

(d) Upon completion of the work under a job order *and final inspection and acceptance thereof* and upon submission of invoices thereforein such form and with such copies as the Contracting Officer may prescribe the Contractor shall be paid for the price of the job order, as adjusted pursuant to Clause 6 hereof, less the amount of all previous payments. (Emphasis supplied) :

(e) * * *;

CLAUSE 10. LIABILITY AND INSURANCE

(a) * * *

(b) The Contractor shall be responsible for and make good at his own cost and expense any and all loss of or damage of whatsoever nature to the vessel (or part thereof), its equipment, movable stores and cargo, and Government-owned materials and equipment for the repair, completion, alteration of or addition to the vessel in the possession of the Contractor, whether at the plant or elsewhere, arising or growing out of the performance of the work, except where the Contractor can affirmatively show that such loss or damage was due to cause beyond the Contractor's control, was proximately caused by the fault or negligence of agents or employees of the Government, or which loss or damage the Contractor by exercise of reasonable care was unable to prevent; *provided*, that the Contractor shall not be responsible for any such loss or damage discovered after redelivery of the vessel *unless* (*i*) *such loss or damage is discovered within sixty* (*60*) *days after redelivery of the vessel* and (ii) such loss or damage is affirmatively shown to have been the result of the fault or negligence of the Contractor.

(c) The Contractor indemnifies and holds harmless the Government, its agencies and instrumentalities, the vessel and its owners, against all suits, actions, claims, costs or demands (including, without limitation, suits, actions, claims, costs or demands resulting from death, personal injury and property damage) to which the Government, its agencies and instrumentalities, the vessel or its owner may be subject or put by reason of damage or injury (including death) to the property or person of any one other than the Government, its agencies, instrumentalities and personnel, the vessel or its owner, arising or resulting in whole or in part from the fault, negligence, or wrongful act or wrongful omission of the contractor, or any subcontractor, his or their servants, agents or employees; *provided*, that the Contractor's obligation to indemnify under this parargaph (c) shall not exceed the sum of $300,000 on account of any one accident or occurrence in respect of any one vessel. Such indemnity shall include, without limitation, suits, actions, claims, costs or demands of any kind whatsoever, resulting from death, personal injury or property damage *occurring during the period of performance of work on the vessel or within 60 days after redelivery of the vessel*; * * *

(d) * * *

(e) * * *

(f) * * * [Italic supplied];

CLAUSE 11. GUARANTEES

In case any work does or materials furnished by the Contractor under this contract on or for any vessel or the equipment thereof shall, within 60 days from the date of redelivery of the vessel by the Contractor, prove defective or deficient, such defects or deficiencies shall, as required by the Government, be corrected and repaired by the Contractor or at his expense to the satisfaction of the Contracting Officer; *provided*, however, that with respect to any individual work item incomplete at the redelivery of the vessel the guarantee period shall run from the date of completion of such item. The Government shall, if and when practicable, afford the Contractor an opportunity to effect such corrections and repairs himself, but when, because of the condition or location of the vessel or for any other reason, it is impracticable or undesirable to return it to the Contractor, or the Contractor fails to proceed promptly with any such repairs as directed by the Contracting Officer, such corrections and repairs shall be effected at the Contractor's expense at such other locations as the Government may de-

termine. Where corrections and repairs are to be effected by other than the Contractor, due to nonreturn of the vessel to him, the Contractor's liability may be discharged by an equitable deduction in the price of the job. The Contractor's liability under this clause shall, however, in no event extend beyond the correction of such defect or deficiency or payment for the cost thereof; *provided*, however, that nothing in this clause shall be deemed to limit the responsibility of the Contractor under Clause 10 hereof or relieve him of his liability under that clause. At the option of the Contracting Officer, defects and deficiencies may be left in their then condition, and an equitable deduction from the job order price, as agreed by the Contractor and the Contracting Officer, shall be made therefor. If the Contractor and the Contracting Officer fail to agree upon the equitable deduction from the job order price to be made, the dispute shall be determined as provided in Clause 17 hereof.

Clause 10 is essentially an express warranty by the contractor against damages to persons or property for a period extending 60 days after redelivery of the vessel. Clause 11 similarly is an express warranty against defects in the work for the same period of time. The usual effect of such express warranty clauses is to suspend the *finality* of payment until the expiration of the warranty period. *Cf. Market Equipment, Ltd.*, ASBCA#9639, 65-1BCA#4608, and *Oxygen Equipment & Service Company*, ASBCA#10137, 65-2BCA#4870. However, we are unaware of any general basis for ruling that an express warranty in a contract excuses or suspends the obligation to make payment after a contractor has completed performance. Clause 8, Payments, of the Sun's contract provides for full payment after completion of the work and final inspection and acceptance by the Government. The payments clause does not expressly state that the warranty periods under clauses 10 and 11 must also have expired. Nor do either of those clauses prescribing additional contract work to be performed by Sun. Rather, they affix liability either in monetary terms or through corrective action for prior acts or omissions by Sun.

While the Government's rights under the inspection clause and under express warranty clauses are normally held to be cumulative, see *General Electric Company*, IBCA#442-6-64, 65-2 BCA#4974, we can perceive no reservation in the inspection clause, clause 5 of the contract, which provides that inspection shall not be effective until the warranty periods have expired. Paragraph (c) of clause 5 provides that in addition to rights under clause 11 the Government shall have the right to inspect the work at all times during performance and reject, require correction, or correct at the contractor's expense *any defects discovered prior to redelivery of the vessel.* In short, when the Government accepts redelivery of the vessel without reservation, it is accepting the contractor's work under the inspection clause and is presumed to have exercised its right to inspect that work. Clauses 10 and 11 neither provide for inspection nor require that if the Government does in fact inspect the work that such inspection will be binding and final on the Government. Those clauses simply extend the con-

tractor's liability for certain matters for 60 days after completion of the contract work. Therefore, we believe the final inspection and acceptance referred to by the payments clause is that required under the inspection clause of the contract.

We recognize that the withholding of 10 percent of Sun's contract price for 60 days might not be inequitable. However, while each contract must be interpreted according to its particular terms and clauses, we believe the conclusion that express warranties in a contract suspend the contractor's right to payment, in the absence of express language to that effect, would be applicable to other contracts containing similar warranty provisions. Clearly, where a warranty period extends for 1 year or more, withholding a portion of the contract funds for such time is a significant and financially important matter to contractors.

Accordingly, we do not believe 10 percent of the contract funds may legally be withheld under Sun's MSR contract until the expiration of the 60-day period provided in clauses 10 and 11 of the contract.

[B-164515]

Compensation—Wage Board Employees—Increases—Retroactive—Separated Employees

Wage board employees who are no longer on Government rolls when regulations issue to implement the Monroney Amendment, Public Law 90-560, approved October 12, 1968, 5 U.S.C. 5341(c), which authorizes equating Federal wage board employees having special skills with comparable positions in private enterprise in wage survey areas outside the local wage survey area, are entitled to a retroactive wage adjustment on the basis the action is corrective and required by the act, rather than the grant of a wage increase within the meaning of 5 U.S.C. 5344, and the retroactive wage increases should be viewed as the proper salary rates of the employees for the purposes of separation. If the whereabouts of a former employee is unknown, notification of entitlement should be sent to his last known address; and if the employee has died, the notice should be mailed to the last known address of his widow.

To the Chairman, United States Civil Service Commission, October 9, 1970:

This is in reference to your letter of August 5, 1970, requesting a decision concerning former employees' entitlement to retroactive pay under pay schedules adjusted in accordance with section 5341(c) of Title 5, United States Code.

Subsection (c) of section 5341 of Title 5, United States Code, known as the Monroney Amendment, was added by Public Law 90-560, approved October 12, 1968, 82 Stat. 997, and authorizes a procedure whereby special skills for unusual job requirements applicable to Federal wage board employees in a particular wage survey area which are not found in local private enterprise in that area, can be evaluated or

equated with comparable positions in private enterprise in wage survey areas outside the local wage survey area.

It is stated in your letter that on July 14, 1970, the Civil Service Commission issued its regulations implementing section 5341(c), *supra*, and these regulations apply to all surveys ordered or in process on or after October 12, 1968, including a survey ordered but for which resulting pay schedules had not been put into effect by October 12, 1968.

The effect of this law as to retroactive adjustment of pay schedules and the question raised, are set forth in your letter as follows:

> Because application of the law will require retroactive adjustment of pay schedules issued after October 12, 1968, there is no question that each employee on the agency's rolls on the date the adjusted pay schedule is issued will be entitled to have his pay adjusted retroactively back to the effective date of the adjusted schedule to the extent that he was subject to the wage schedule during the retroactive period on the basis that the adjusted schedule was the only legal schedule in existence during this period.
>
> However, for former employees who would have been entitled to retroactive payment if they had been on the agency's rolls on the date of issuance of the adjusted schedule, the question is raised as to their entitlement to retroactive pay under the adjusted schedules. * * *

We have been advised that wage schedules have been issued subsequent to October 12, 1968, based upon wage surveys ordered or in process on or after that date. Such wage schedules, however, were issued without including therein the elements required by 5 U.S.C.A. 5341(c). Apparently, such elements were not included because of the necessity to resolve the manner in which they were to be applied. It is the increases resulting from the utilization of wage scales in other areas as required by 5 U.S.C.A. 5341(c) that give rise to the questions here involved. The question as to whether former employees are entitled to retroactive pay under the adjusted schedule becomes particularly significant, you say, in view of the very long retroactive period and the large number of employees who have been separated during this period because of reductions in force. It is pointed out in your letter that section 5344 of Title 5, United States Code, sets out which employees are entitled to retroactive payment "by reason of an increase in rates of basic pay" as referred to in 5 U.S.C. 5343. However, you do not believe that this statute is applicable since what is involved here is not a delay with regard to a normal increase in basic pay but a delay in the application of a different statute which requires the issuance of an adjusted schedule. The view is therefore expressed that it would appear that each former employee who was entitled to pay under the original wage schedule would be entitled to retroactive pay under the adjusted wage schedule. Our views are requested on the following questions:

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1. Is there any objection to allowing retroactive pay to all former employees who were entitled to pay under an original wage schedule when that original wage schedule is adjusted upward by the issuance of the first wage schedule under 5 U.S.C. 5341(c)?

2. If there is an objection to full retroactive pay as referred to in Question 1, what former employees are entitled to retroactive pay by the issuance of the first wage schedule under 5 U.S.C. 5341(c)? We are, in this regard, concerned over distinctions in the cause for the former employee's separation, i.e., separated to enter the armed forces, separated by transfer to another Federal or District of Columbia Government agency, separated by reduction in force or death, or separated by resignation.

3. What obligation does the agency owe to trace former employees so as to pay them the retroactive amount determined to be due? Is the agency required to do more than send a notice of entitlement to the former employees' last known address when his exact whereabouts is unknown, or when it is known that he has died, to his widow's last known address?

Sections 5343 and 5344 of Title 5, United States Code, are as follow:

§ 5343. Effective date of pay increase

Each increase in rates of basic pay granted, pursuant to a wage survey, to employees whose pay is fixed and adjusted under section 5341 of this title is effective as follows:

(1) If the wage survey is made by an agency, either alone or with another agency, with respect to its own employees, the increase is effective for its employees not later than the first day of the first pay period which begins after the 44th day, excluding Saturdays and Sundays, following the date on which the wage survey was ordered to be made.

(2) If the wage survey is made by an agency, either alone or with another agency, and is used by an agency which did not participate in making the survey, the increase is effective for the employees of the agency which did not participate in the survey not later than the first day of the first pay period which begin after the 19th day, excluding Saturdays and Sundays, following the date on which the agency which did not participate receives the data collected in the survey necessary for the granting of the increase.

§ 5344. Retroactive pay

(a) Retroactive pay is payable by reason of an incerase in rates of basic pay referred to in section 5343 of this title only when—

(1) the individual is in the service of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increase; or

(2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period.

The above section would preclude payment to former employees if an *adjustment* of wage schedules (schedules issued on the basis of surveys ordered or in process on or subsequent to, but without regard to, Public Law 90–560) to now meet the requirements of Public Law 90–560 is viewed as an "order granting the increase" since the date the adjustment was ordered would be determinative. We do not believe, however, that an adjustment required to meet the new statutory procedures should be so viewed. The original wage schedules were not in accordance with Public Law 90–560, and therefore employees then on the rolls were in some instances not being properly compensated under the law. In such circumstances an increase in pay of the position is to be regarded as a correction required by Public Law 90–560, rather than as an order granting an increase in pay within the meaning of

5 U.S.C. 5344. Thus, such correction would relate back to the date on and after October 12, 1968, of an order granting a general increase in pay pursuant to a wage survey. It follows that each former employee who was on the rolls on the date of such original order would be entitled to retroactive pay. The retroactive pay increases to which the former employees are entitled should be viewed as the salary rates for all purposes at the time of their separation from the service. See B–168346, December 30, 1969.

In view of the foregoing, question No. 1 is answered in the negative. By reason of that answer, question No. 2 does not appear to require an answer. With regard to question No. 3, the sending of a notice of entitlement to the former employee's last known address when his exact whereabouts is unknown, or when it is known that he has died, to his widow's last known address, will suffice insofar as notification of the retroactive pay. See, in this connection, B–115800, December 8, 1964.

[B–154218]

Pay—Retired—Foreign Residence Effect

An Air Force master sergeant retired under 10 U.S.C. 8914 with over 20 years of service, who during those years retained his Canadian citizenship and returned to Canada to reside when he retired, is entitled to be retired with retired pay as authorized in Formula C, 10 U.S.C. 8991. The member, permitted to enlist as an alien and to be sworn in without restrictions pursuant to 10 U.S.C. 8253(c), was accepted without restrictions and he became a "regular enlisted member of the Air Force" within the purview of 10 U.S.C. 8914, entitled upon retirement to be a member of the Air Force Reserve with the obligation to perform active duty until his service credits equal 30 years of both active and inactive service; and, therefore, so long as his allegiance status remains unchanged, his Canadian residency does not constitute a bar to receipt of retired pay.

To N. R. Breningstall, Department of the Air Force, October 13, 1970:

Further reference is made to your letter (file reference RPT), dated July 2, 1970, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $317.68 in favor of Master Sergeant Robert A. A. Vanderburgh, 381–30–9622, USAF, retired, representing retired pay for the month of June 1970, which has been withheld because of the circumstances described in your letter. Your letter was forwarded to this Office by letter from the Office of the Deputy Assistant Comptroller for Accounting and Finance of the Air Force dated July 10, 1970, and has been assigned Air Force Request No. DO–AF–1086 by the Department of Defense Military Pay and Allowance Committee.

You state that the member, a citizen of Canada, entered the United States at Detroit, Michigan, on January 31, 1949, under NSA application No. 1–317229; that alien registration No. 7116798 was assigned to

him; and that he was retired as a master sergeant, USAF, on June 1, 1970, under 10 U.S.C. 8914, after completing 20 years, 10 months and 10 days' active service. It is further stated that he did not acquire United States citizenship, that he retained his Canadian citizenship, and that he presently resides in Canada.

You now question Sergeant Vanderburgh's right to receive retired pay, citing 44 Comp. Gen. 51(1964) and B-157646, dated October 5, 1965, as having possible application. You state that there is no "loss of citizenship" in the present case as that term is used in 44 Comp. Gen. 51 and that he is not a retired officer within the meaning of B-157646. You indicate that for the purpose of retaining a military status and performing such required active duty after retirement as may be prescribed by law, you fail to see any distinction between situations involving loss of United States citizenship after retirement, and not being a citizen at the time of retirement.

In 44 Comp. Gen. 51, in response to the question as to whether the retired pay of an enlisted member of a Regular component of the Armed Forces who is retired for length of service or physical disability is in any way affected if he is an alien and becomes a permanent resident of a foreign country, we stated that:

> * * * we find no basis for questioning the right to retired pay of a retired alien enlisted member of a Regular component of the Armed Forces, because of his residence in a foreign country, in the absence of some provision of law or regulation affecting his right in such circumstances. * * *

It was also held in that decision that:

> * * * While citizenship is not a requirement in all cases for enlistment in the Regular establishments of the Armed Forces, if an enlisted man is a citizen it would seem that a loss of his citizenship as a result of his own voluntary action by acquiring citizenship in a foreign country would be inconsistent with his oath of enlistment to bear true faith and allegiance to the United States (10 U.S.C. 501) and thus would be so repugnant to his status as a member of the Armed Forces as to warrant the termination of his retired pay. * * *

Section 8914, Title 10, U.S. Code, provides that upon retirement an enlisted member of the Regular Air Force becomes a member of the Air Force Reserve with the attendant obligation to perform such active duty as may be prescribed under law until his service credits, both active and inactive as a member of the Air Force Reserve, equal 30 years.

Both a citizen and an alien are required to take an oath of allegiance to the United States upon entry into military service. Since the provisions of 10 U.S.C. 8253(c) permit an alien to enlist in the U.S. Air Force under the circumstances there prescribed and be sworn in without restriction, the Government accepts him without reservations and without regard to his status as an alien. He then becomes a "regular enlisted member of the Air Force" within the purview of 10 U.S.C. 8914 and upon meeting the eligibility requirements there pre-

scribed, he is entitled to be retired with retired pay as authorized in Formula C, 10 U.S.C. 8991. In the absence of a provision of law barring the payment of retired pay to an alien or indicating that lack of citizenship is inconsistent with his status as retired member of the Regular Air Force, it would appear that so long as his allegiance status remains unchanged following retirement, the fact that he chooses to reside outside the United States following retirement would not in and of itself constitute a bar to the receipt of retired pay. See B–144694, dated February 14, 1961. Compare 43 Comp. Gen. 821 (1964), in which a similar conclusion was reached with respect to a naturalized American who returned to the country of his birth following his retirement.

Accordingly, on the record before us, we find no basis for questioning the right of Sergeant Vanderburgh to receive retired pay and the voucher submitted with your request is returned herewith for payment, if otherwise correct.

[B–169077]

Contracts—Data, Rights, etc.—Disclosure—Restrictive Markings—Timely Request

The cancellation of an invitation to furnish repair parts for a naval vessel propeller system, an invitation accompanied by drawings submitted individually over a long period of time in connection with the procurement of the system, and the proposed sole source purchase of the parts from the supplier of the system on the basis the restrictive legend requested on the drawings was made within 6 months of final delivery of the data package, goes beyond the authority of the contracting officer under paragraph 9–202.3(d)(1) of the Armed Services Procurement Regulation, which in providing that data received without a restrictive legend if not alleged to be proprietary within 6 months of delivery is considered to have been furnished with unlimited rights, requires the time limitation to be applied to each data submission, and the request having been untimely received, cancellation of the invitation was not justified.

Contracts—Data, Rights, etc.—Status of Information Furnished

Where a restrictive lengend was not attached to drawings at the time of initial transfer to the Government and a legend had not been authorized within 6 months of submission of the data as provided by paragraph 9–202.3(d)(1) of the Armed Services Procurement Regulation, the Government in partially publishing the drawings violated no contractual restriction, nor is the Government liable on the basis the contractor furnishing the drawings had an obligation as licensee to protect the trade secrets of the licensor. However, a restrictive legend could be authorized for the unpublished drawings by obtaining a deviation pursuant to ASPR 9–202.3(a) to the 6 months' time limitation in ASPR 9–202.3(d)(1) for attaching a restrictive legend.

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

This is in reference to the protest by counsel for Baldwin-Lima-Hamilton Corporation (BLH) against the cancellation of invitation for bids N00104–70–B–1283, issued by the Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania, and the proposed sole source procurement of the items involved from the Bird-Johnson Company. This matter was the subject of two reports from the Deputy Com-

mander, Purchasing, Naval Supply Systems Command, reference 0232, dated April 1 and June 1, 1970.

The basic question presented for our consideration is whether Bird-Johnson asserted proprietary rights in its manufacturing drawings in a timely manner, so as to authorize the contracting officer to place a restrictive legend on the data and thereby preclude their use in a competitive procurement.

The record shows that under contract N151-24352A(X), dated June 16, 1966, with the Philadelphia Naval Shipyard, Bird-Johnson was supplying a controllable pitch propeller system of its own commercial design (hereinafter referred to as the KaMeWa system) for installation in three vessels. The canceled invitation, which is the subject of this protest, represented the initial procurement for inventory (repair parts) of propeller blades and various shafts in support of the KaMeWa system. This invitation was accompanied by drawings received by the Government during 1967 from Bird-Johnson without restrictive markings, and subsequently passed on to SPCC without restrictive markings during April 1968. The record indicates that on or about September 25, 1969, Bird-Johnson advised the Philadelphia Naval Shipyard that the company inadvertently neglected to affix a proprietary legend to the data which it had submitted, and was still in the process of submitting. By letter of November 25, 1969, the contracting officer advised of his determination that Bird-Johnson was not required to give the Government more than limited rights to the technical data, apparently because the data pertained to items developed at private expense. On the basis that Bird-Johnson requested placement of a restrictive legend on the data within 6 months of *final* delivery of the data package, the contracting officer allowed a proprietary legend to be affixed on the data. The record shows that SPCC issued the invitation and drawings on December 8, 1969, and that it was advised subsequent thereto that the drawings were considered proprietary to Bird-Johnson. Accordingly, the referenced invitation was canceled on February 13, 1970, and SPCC now proposes to award a contract to Bird-Johnson on a sole source basis.

The 1966 contract with Bird-Johnson contained the standard clause entitled "Rights in Technical Data (February 1965)" which states, in pertinent part, that the Government shall have limited rights in technical data pertaining to items developed at private expense *provided* that each piece of data to which limited rights are to be asserted is marked with the prescribed legend. The clause further states that no legend shall be marked on, nor shall any limitation on right of use be asserted to, any data which the contractor has previously delivered to the Government without restriction.

With respect to unmarked technical data, Armed Services Procurement Regulation (ASPR) 9–202.3(d)(1) provides as follows:

(d) *Unmarked or Improperly Marked Technical Data*
(1) Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, the contracting officer may permit the contractor to place a restrictive legend on such data within six months of its delivery if the contractor demonstrates that the omission of the legend was inadvertent and the use of the legend is authorized.

Under the referenced contract, Bird-Johnson was required to furnish one set of reproducible drawings with a list of content for each category of data within 52 weeks after award, with 9 additional weeks allotted for Government approval. Microfilm of the drawings was also required. The contract further provided that four prints of all plans should be submitted for approval 12 weeks after award of contract; that the Shipyard would require 9 weeks for approval; and that complete delivery of updated reproducibles and microfilm should be made 31 weeks after approval.

The record indicates that after commencement of work under the contract, all the drawings could not be completed and submitted for approval within the 12-week period set forth in the contract. The administrative report states also that Shipyard technical personnel, because of a heavy workload, would have had difficulty in reviewing the drawings within 9 weeks. Accordingly, Bird-Johnson and the Shipyard agreed informally, without modifying the contract, that Bird-Johnson should submit each drawing and each drawing revision as completed. Revisions could be made by the Shipyard as soon as possible without being limited to 9 weeks for review. It is stated that as a result of the agreement, the submission of drawings, approvals, and resubmission of revised drawings stretched out in time from September 1966 to September 1969. None of these drawings bears a proprietary legend. The final set of reproducible drawings, with a list of content for each category, was forwarded to the Shipyard on January 22, 1970. Each drawing in this set bears a proprietary legend and a Shipyard approval stamp. The microfilm was expected to be delivered to the Shipyard before the end of May 1970.

Counsel for BLH has taken the position that the request of Bird-Johnson to place a restrictive legend on the drawings submitted in advance of the final set was made more than 6 months after submission of those drawings without any restriction, and therefore was not timely; that the data received without a restrictive legend must be deemed to have been furnished with unlimited rights (ASPR 9–202.3(d)(1)); and that there is no justification for cancellation of the subject invitation, or for the proposed sole source procurement.

It is the position of counsel for the Shipyard that the standard provision in the Bird-Johnson contract, which prohibits the use of a

proprietary legend or the assertion of proprietary rights by the contractor in any data previously delivered without restriction, is inapplicable. He notes that each drawing submitted by Bird-Johnson with its technical proposal at the time the agency solicited proposals contained a proprietary legend. He states that as of November 25, 1969, delivery of the technical data had not been completed; that is, the final complete set of reproducible and the microfilm had not yet been delivered, and, consequently, had not been "previously delivered to the Government without restriction" as contemplated by the standard data clause provisions. In his opinion, to construe the above prohibition as applying to any *unit* of data delivered rather than to the first complete data package, would result in subjecting certain drawings to unlimited rights and others to limited rights, which ASPR and the parties could never have intended. It is observed by Counsel that it would be punitive, inequitable, and would work a forfeiture if Bird-Johnson's proprietary rights in data were lost because of an inadvertent omission. Counsel's belief stems from the fact that the KaMeWa system was developed at private expense and the contract's data clause provides for the acquisition of only limited rights in such data. Lastly, he states that pursuant to ASPR 9-202.3(d)(1) the contracting officer properly allowed Bird-Johnson to restrict the use of its data, since it is only practical and reasonable to interpret the 6 months' provision for placing a restrictive legend on previously unmarked data as inapplicable while the contractor is still delivering data under the contract.

In letters received here from Bird-Johnson and its counsel, the company in effect affirms the Navy's position. It also argues that the Government should have been aware of the company's rights and obligations to protect the trade secrets in the KaMeWa data by virtue of Bird-Johnson's status as a licensee of such data from A. Johnson & Company, Inc., and, in any event, the Government is now on notice of this fact and cannot now claim unlimited rights. A. Johnson has also affirmed Bird-Johnson's position in this regard. Bird-Johnson further argues that it made a timely request to place a restrictive legend on its data and that the contract data clause provision which precludes asserting rights in data previously delivered without restriction should not be invoked here, since it believes that pursuant to section 2-401 of the Uniform Commercial Code delivery of title to data was not effected until the company completed performance with reference to the entire data package. Moreover, Bird-Johnson believes that delivery can occur only if both parties join in it and their minds concur, and that in this case delivery was not made since the drawings were not, and could not be, considered final until after the sea trials because of the possibility

of changes in the data up until that time. The company also argues that the contracting officer's determination of November 25, 1969 (that the Government is entitled only to limited rights in data), cannot be reversed, citing *General Electric Co.* v. *United States*, 188 Ct. Cl. 620, 412 F. 2d 1215 (1969), and predecessor cases including *Bell Aircraft Corp.* v. *United States*, 120 Ct. Cl. 398, 100 F. Supp. 661 (1951), affirmed per curiam, 344 U.S. 860 (1952).

After considering the arguments presented, we believe it is apparent that, pursuant to ASPR 9-202.3(d), the data submitted without a proprietary legend, and used in this procurement, must be deemed to have been furnished to the Government with unlimited rights. The resulting question therefore is whether the contracting officer was authorized to permit a subsequent restriction in the circumstances outlined above. We feel that, as a matter of law, the contracting officer acted beyond his authority in placing a restrictive legend on the data originally submitted without restriction, since more than 6 months transpired after the contractor relinquished and transferred possession of the data to the Government. While final delivery of the entire data package, and the sea trials, may have occurred within 6 months of the contracting officer's actions, we see no basis for construing the 6 months' limitation in the cited regulation as a limitation which begins to run only upon final delivery of the complete data package. It is our opinion that the construction suggested by Navy counsel and Bird-Johnson is inconsistent both with the standard data clause provision requiring each piece of data to which limited rights are to be asserted to be so marked, and with the regulation requiring data received without a restrictive legend to be deemed to have been furnished with unlimited rights.

In arguing that the relationship between the parties in the present case is such that disclosure to the Government was protected, Bird-Johnson relies on Milgrim, *Trade Secrets*, section 5.03[1][b], which states that an express contractual restriction is an effective means of protection against competitive use of trade secrets. While counsel contends that under the terms of Bird-Johnson's contract with the Government, disclosure of the drawings is prohibited, it is also clear that under the terms of the contract Bird-Johnson may require the Government to restrict its use of data only if the prescribed legend has been attached. Since a restrictive legend was not attached to the drawings at the time of their initial transfer to the Government and since a legend had not been properly authorized and attached at the time the drawings were published as part of the canceled invitation, we perceive no basis for concluding that the Government's publication violated any contractual restriction.

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Bird-Johnson also cites section 5.03[4] of the above treatise, which states that there are circumstances in which courts recognize privileged communications between suppliers and purchasers, and contends that it must be assumed the present relationship is one of confidentiality. In support of this proposition, there is cited the decision in *Pressed Steel Car Co.* v. *Standard Steel Car Co.*, 60 A. 4 (1904). In that case, there was no express limitation on the part of the supplier as to the use to be made of the prints in question, nor was there an expressed restriction placed upon the ownership. Nevertheless, it was held that under the circumstances the purpose for which the prints were delivered was clearly understood by all parties and the purchaser's release of the prints to a competitor of the supplier resulted in a clear violation of the trust and confidence in which the prints were received. We believe, however, that the case presently before us is properly distinguishable, since the contract clause expressly imposes an obligation upon the Government to restrict its use of the drawings only if the prescribed legend has been attached.

Bird-Johnson also contends that the Government cannot claim unlimited rights in the data since it should have been aware, and is now on notice, of Bird-Johnson's rights and obligations to its licensor to protect the trade secrets in the KaMeWa data. The company has submitted copies of various license agreements through which it obtained the data; and we note that while Bird-Johnson agreed to maintain the trade secrets so long as the information was not generally accessible or known to the public, it was nonetheless authorized to disclose and grant sublicenses to the data subject to similar conditions. In this regard, we see no basis for requiring the contracting officer in the instant procurement to have presumed at the time the data was received without proprietary markings that such data contained trade secrets which were still unpublished, or that the Government had not received them under an unlimited use license. Rather, since Bird-Johnson failed to mark its data with a proprietary legend, we feel the contracting officer could reasonably have assumed under the circumstances that Bird-Johnson had acquired the right to provide unlimited rights in data, either through an amendment to its license to the data or by virtue of the general accessibility to such information by the public. Moreover, it is noted that copies of the license agreements were provided the Government prior to award for the express purpose of establishing compliance with certain security regulations of the United States and did not establish any understanding between the parties to modify the data rights provided for in the standard contract data clause.

Bird-Johnson states that, in any event, the Navy's present knowledge of the company's contentions relative to the data precludes the Navy from now claiming unlimited rights to use the data. In this re-

spect, counsel relies on Milgrim, *supra*, which follows the general rule of section 758 of the *Restatement*, Torts. This section generally provides that once an innocent user of a trade secret has notice of the secrecy and that the disclosure to him was a breach of duty to another, or a mistake, the innocent party is liable for further use or disclosure unless he has in good faith paid value for the secret or has so changed his position that to subject him to liability would be inequitable.

While this would appear to be a correct statement of the law of torts, it has been held that the Federal Tort Claims Act exempts claims arising out of interference with contract rights. In any event, the tort would lie in the wrongful acquisition of the trade secrets, and one who has lawfully acquired a trade secret may use it in any manner without liability unless he acquired it subject to a contractual limitation or restriction as to its use. If the licensee's use exceeds that permitted by the license, the licensor's remedy might lie only in contract, and not in tort. See *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145 (1951). It is clear in the present case that under its license agreements Bird-Johnson could legally grant sublicenses to the data to Bird-Johnson customers and did in fact contract to disclose such data to the Government. Therefore, the Government, being entitled to the data, has lawfully acquired it, and since a restriction was not timely placed upon the use of such data, it cannot be said that there is any contractual limitation or restriction on its use.

It has been recognized that the nature of a trade secret is such that, so long as it remains a secret, it is valued property to its possessor, who can exploit it commercially to his own advantage. But once a trade secret is published, the rest of the world may have the right to copy it. *Underwater Storage* v. *United States Rubber Co.*, 371 F. 2d 950 (1966), certiorari denied, 386 U.S. 911. As explained above, the drawings in our opinion were lawfuly disclosed to the Government under its contract with Bird-Johnson, and such drawings were thereafter lawfully and in good faith published by the Government to its potential suppliers. Although we have held that a single *wrongful* disclosure does not end an owner's proprietary rights (42 Comp. Gen. 346, 354 (1963)), in the instant case there was no wrongful disclosure, and we believe that in the circumstances the drawings in question are now in the public domain. In this connection, it should be noted that the drawings were not tortiously acquired by the Government or by its privies, and there is no basis for imposing upon the Government any contractual obligation to restore a protected status to the four drawings which have already been published.

Bird-Johnson has cited our decision in 42 Comp. Gen. 346 (1963) as a basis for requiring limited use of data in this case. We do not feel that decision is pertinent, since the trade secrets there were contained

in data marked with a restrictive legend, and the inventor had previously disclosed his invention to the Government pursuant to the terms of a Government form requiring protection against unauthorized disclosure.

In view of the contractual and regulatory provisions which specifically deal with the problem in the instant case, we do not agree with Bird-Johnson's contention that section 2.401 of the Uniform Commercial Code (dealing with passing of title), or its argument that delivery was not effected, are relevant and controlling.

We have noted the point raised and the authority cited by Bird-Johnson for the proposition that the contracting officer's decision to permit the contractor to place restrictive legends on unmarked drawings cannot be reversed. However, in the cases cited by Bird-Johnson, the contracting officers were found to possess the actual authority required to make their decisions, whereas in the present case the contracting officer's authority was expressly limited by the procurement regulation as discussed above, and, a legal matter he failed to act within his authority.

Bird-Johnson has also cited our decision B–170468, dated September 8, 1970, for the proposition that a significant degree of finality must be attached to the administrative position in matters involving proprietary information. In view of that decision, it is argued that we should not object to any action by the Navy taken in accordance with its decision that the drawings are proprietary to Bird-Johnson. A careful reading of that decision, however, permits no basis for doubt that the administrative position to which we accorded finality was that on the purely factual question of whether Air Force had, or had not, used data which was proprietary to the protesting bidder in preparing its specifications. In the present case, however, there is no factual dispute. Rather, the question is one of law, which this Office is required to resolve on the basis of applicable law and regulations.

While we must therefore conclude that the Government's use of the four drawings in question in a competitive procurement was proper, and that cancellation of that procurement in favor of a sole source procurement with Bird-Johnson would now be improper, it is our understanding that, in addition to those drawings published with the canceled invitation, the Navy was furnished some 200-odd drawings on which Bird-Johnson had not placed a restrictive legend, and which have not as yet been published by the Government. With respect to the future use of those unpublished drawings, which we are advised pertain to the most critical and significant aspects of the KaMeWa System, we note that the attachment of a restrictive legend could properly be authorized by obtaining a deviation, pursuant to ASPR

9–202.3(a), to the 6-months' time limit in ASPR 9–202.3(d)(1) for attaching a restrictive legend on such unmarked and unpublished data. We therefore suggest that consideration be given to the desirability of such action.

The files submitted with the reports are returned.

[B–170303]

Pay—Saved—Temporary Promotions

Upon the acceptance of a permanent appointment pursuant to 10 U.S.C. 5579 as an ensign in the Medical Service Corps, Regular Navy, and the termination of the temporarily held rank of lieutenant (jg) to which appointed subsequent to serving under a permanent appointment as a line ensign, the officer is not entitled to saved pay, for not having suffered a reduction in pay "because of his former permanent status"—also that of ensign—he is unable to meet the criteria in 10 U.S.C. 5579(d) for eligibility to have the higher pay and allowances received under the temporary appointment as lieutenant (jg) saved to him.

To Lieutenant (jg) C. W. Baker, Department of the Navy, October 13, 1970:

Further reference is made to your recent letter concerning the action taken by our Claims Division in settlement dated March 19, 1970, which disallowed your claim for the difference in pay and allowances between that of an ensign and that of a lieutenant (jg) for the period September 30, 1968, to August 1, 1969.

It appears that on March 10, 1967, you accepted a permanent appointment as ensign, line, United States Navy, to rank from that date; that on July 9, 1968, you were temporarily appointed to the grade of lieutenant (jg) with date of rank and effective date of July 1, 1968; and that on August 7, 1968, you were permanently appointed an ensign in the Medical Service Corps, Regular Navy, to rank from August 1, 1968, which appointment you accepted on September 30, 1968. This latter appointment was made pursuant to 10 U.S.C. 5579.

Your pay records, opened July 1, 1968, show that you were paid active duty pay and allowances as a lieutenant (jg) from July 1, 1968, to September 29, 1968, and pay and allowances as an ensign beginning September 30, 1968, and extending through June 30, 1969, as shown by the latest pay record on file before us.

Your claim was disallowed by the Navy Finance Center, Cleveland, Ohio, and by our Claims Division, substantially for the reason that you did not suffer any reduction in pay and allowances because of your former permanent status as an ensign within the meaning of 10 U.S.C. 5579(d).

You say that "the fact that I had a permanent appointment conveyed upon me permanent status." You express the view that since you were receiving the pay and allowances of a lieutenant (jg) you

met the criteria in 10 U.S.C. 5579(d) for saved pay; namely, former permanent status and a reduction in pay from lieutenant (jg) to ensign. You ask to be advised as to the meaning and intent of section 5579(d), particularly the phrase "because of his former permanent status."

Under section 5579 of Title 10, U.S. Code, the Secretary of the Navy is authorized to prescribe regulations governing original appointments of otherwise qualified persons in the Medical Service Corps of the Regular Navy in the grade of ensign, except as there indicated. Subsection (d) of section 5579 provides that "An officer appointed under this section from the Regular Navy may not suffer any reduction in the pay and allowances to which he was entitled at the time of his appointment because of his former permanent status." This provision was derived from section 207 of the Army-Navy Medical Services Corps Act of 1947, 61 Stat. 734, 738, which provision contains slightly different language (from 10 U.S.C. 5579(d)), in that it saved such an officer from any reduction in pay and allowances to which he was entitled "by virtue of his permanent status."

Language similar to the above section 207 of the 1947 act (10 U.S.C. 5579(d)) was considered by this Office in decision of February 18, 1955, B–121744, pertaining to section 404(j) of the Officer Personnel Act of 1947, 61 Stat. 872. The officer involved in that decision accepted a permanent appointment as ensign, United States Navy, on September 10, 1954. On September 9, 1954, he held a permanent status of chief machinist's mate (enlisted pay grade E–7). He actually had been serving on active duty under a temporary appointment as a commissioned warrant officer at that time and had been receiving pay and allowances in warrant pay grade W–3, with over 14 years' service.

In the decision of February 18, 1955, it was pointed out that section 404(j) of the 1947 act clearly provided that an officer appointed for limited duty in accordance with section 404(a) of the same act is saved only from any reduction in pay and allowances to which entitled at the time of such appointment "by virtue of his permanent status." We said that an officer so appointed for limited duty is not saved from any reduction in pay and allowances to which he was entitled at the time of such appointment but only from a reduction in the pay and allowances to which he was then entitled by virtue of his permanent status in the Navy.

Since, at the time of the officer's permanent appointment as an ensign, he was in receipt of the greater pay and allowances of his temporary rank as a commissioned warrant officer, we said that he was not then entitled to pay and allowances by virtue of his permanent status in the Navy (enlisted pay grade E–7), either on a saved

pay basis under other provisions of law, or otherwise. We concluded that the officer was entitled only to the pay of his permanent grade as ensign. See, also, decision dated March 5, 1951, 30 Comp. Gen. 363, concerning the effect of the same statutory provision. The reasons indicated in those decisions are equally applicable in determining the effect of the provision of law which is applicable in your case.

At the time you were permanently appointed as ensign in the Medical Service Corps of the Navy, you were in receipt of the greater pay and allowances of your temporary rank of lieutenant (jg). Hence, you were not "entitled" at the time of that permanent appointment to any pay and allowances because of your "former permanent status" in the Regular Navy within the meaning of 10 U.S.C. 5579(d). It follows that you were not entitled under section 5579(d) to saved pay based on your temporary rank of lieutenant (jg) after September 29, 1968, which appointment apparently was terminated on that date, the date preceding the acceptance of your permanent appointment as an ensign in the Medical Service Corps. Accordingly, the disallowance of your claim is sustained.

[B-170388]

Bidders—Qualifications—Financial Responsibility—Evaluation

Under a request for proposals that contained a "Submission of Financial Data" clause and was issued pursuant to the public exigency authority in 10 U.S.C. 2304(a)(2), the contracting officer, in accepting the recommendation of a Contractor Evaluation Board based on inadequate financial data that the low offeror was financially nonresponsible, avoided the information-gathering duty prescribed by the Defense Contract Financing Regulation, part 2, appendix "E" of the Armed Services Procurement Regulation, notwithstanding the urgency of the procurement. Because of the doubtful findings and the wide disparity between the two offers received, further negotiations should have been conducted before awarding a contract to the high offeror who initially had not complied with the clause. Although the nearly completed contract will not be disturbed, future responsibility determinations should be adequately supported.

Contracts—Disputes—Conflict Between Administrative Report and Contractor's Allegations

Where there is a dispute between a contracting officer and a proposed contractor relative to matters that are not part of the written record, in accordance with the policy of the United States General Accounting Office (GAO), the dispute must be resolved in favor of the contracting officer, as GAO is unable to resolve questions of credibility apart from the written record and must therefore defer to the administrative agency.

To the Secretary of the Army, October 15, 1970:

By letters dated August 6 and September 9, 1970, the Assistant General Counsel, Headquarters United States Army Material Command, Washington, D.C., furnished our Office with administrative reports on the protest of Filtron Company, Inc., against the determination of the Washington Procurement Division (WPD), United

States Army Electronics Command (USAECOM), that the firm was nonresponsible for financial reasons and could not be awarded a contract under request for proposals No. DAABO9-70-R-0068. Award under the solicitation was made on June 26, 1970, to Ray Proof Corporation.

The following facts are pertinent to our consideration of the protest. The request for proposals was issued on June 10, 1970, pursuant to the authority in 10 U.S.C. 2304(a)(2) to negotiate when the public exigency will not permit the delay incident to formal advertising. A determination and finding citing on "03" UMMIPS priority designator supports the decision to negotiate; we also note that award by June 30 was considered to be necessary because of funding considerations.

Offers were requested for furnishing and installing electromagnetically shielded doors and frames for the Pentagon Telecommunications Center on or before 120 days after date of the award document. The solicitation contained the following provision relative to the submission of financial data:

SUBMISSION OF FINANCIAL DATA: If the bidder/offeror has not previously furnished this Division with a copy of a *certified Balance Sheet and Profit and Loss Statement, current within six months from the date of submission of his bid/proposal, such financial data must be furnished with the bid/proposal, in order to establish proof of financial responsibility. Where data as indicated above have been furnished, the bidder/offeror will indicate by checking below that data previously furnished reflects current position of company. The failure of any bidder/offeror to furnish such evidence may be deemed by the Contracting Officer to be sufficient grounds to determine that bidder/offeror is not a responsible bidder/offeror, due to noncompliance with this provision.

*BIDDER/OFFEROR CHECK ONE:

☐ The bidder/offeror represents that the financial data previously furnished reflects the current financial condition of the company.
☐ Certified Balance Sheet and Profit and Loss Statement is attached.

Of the 12 sources solicited, only Filtron, with a proposed price of $42,950, and Ray Proof, with a proposed price of $75,905, responded by the June 19, 1970, opening date. The Government's estimate for the work was $113,000. Filtron is a second-tier subsidiary of Liquidonics Industries, Inc.; the intervening parent, H. O. Boehme Company, Inc., is not connected administratively or operationally with Filtron. With respect to the submission of financial data, Filtron checked the block, above, indicating that it had previously furnished financial data which was current and also identified Liquidonics as its parent. Ray Proof, on the other hand, made no response to the clause and did not furnish current data complying with the clause. Upon investigation, it was determined that the only financial data on file at WPD for Filtron was for its fiscal year ending June 30, 1968. This data was considered obsolete by the contracting officer.

In accordance with its established procedures, WPD requested on June 23 that the Contractor Evaluation Board (CEB), United States Army Electronics Command, Philadelphia, evaluate Filtron's financial responsibility. No data was sent with the request since it was hoped that CEB would have more current financial information on file. In any event, the contracting officer states that WPD anticipated forwarding any additional information it received to CEB.

On June 24, technical negotiations were conducted with both offerors and, in this regard, Filtron's initial proposal was considered technically unacceptable. The contracting officer advises that because of Filtron's low price he planned to conduct price negotiations with the firm to insure that it was not "buying in." Negotiations were never held in view of subsequent events. Both Filtron and Ray Proof were requested to submit current financial data and were advised that prompt responses would be required. Later, on June 24, each firm was advised by telegram than 12 noon of June 26 was the closing date for the receipt of proposal revisions.

On June 25, a contract specialist at WPD telephoned CEB to determine the status of its review of Filtron's financial responsibility. His signed memorandum of that conversation is as follows:

1. On 25 June 1970 * * * [the contract specialist] and * * * [the quality assurance member] and * * * [the financial member] of the Contract Evaluation Board, Philadelphia discussed the written request sent to the CEB on 23 June 1970. The discussion was conducted telephonically. The subject of the discussion was the financial responsibility of the Filtron Company, a subsidiary of Liquidonics Industries Inc. Prior to this discussion CEB had been furnished financial data on Liquidonics Industries and also Ray Proof Inc., the other offer in this procurement.

2. During the discussion * * * [the financial member] of the CEB stated that the financial position of Liquidonics Industries was very bad. * * * [The financial member] requested that he be provided with financial data on the subsidiary, Filtron Company. * * * [The financial member] went on to say that he wanted this data for record only. * * * [The financial member] stated that the Filtron Company could not be approved as financially responsible with a parent firm (Liquidonics Industries) being in such bad financial condition. In short * * * [the financial member] said that he would not approve Filtron anyway but he would like to have their financial data for the record.

3. At this point the discussion turned to the financial responsibility of Ray Proof Inc. * * * [The quality assurance member] stated that Ray Proof Inc. was financially responsible, however, he needed a written request to approve them in writing. * * * [The contract specialist] stated that he would send the written request that day.

The following entries were indorsed on this memorandum by the contracting officer and Chief, WPD, respectively:

On the basis of the findings of the CEB cited above, the undersigned contracting officer will determine the Filtron Company to be a non-responsible offeror. Steps will now be take to perform the necessary preaward approvals in order to award the resulting contract to the only other offer received.

* * * * * * *

I concur with the action to be taken as stated above by Contracting Officer.

As a result of our request for information concerning the substance of the conversation, CEB members prepared a memorandum dated August 24, 1970, which states, in part, that:

On 25 June 1970 * * * [the contract specialist], Washington Procurement Division, telephoned CEB at USAECOM/Phila. and talked with * * * [the quality assurance member] and * * * [the financial member], members of CEB. * * * [The contract specialist] asked if the Board had received a request for evaluation of financial responsibility of subject company. * * * [The financial member] told * * * [the contract specialist] that the written evaluation request, for an evaluation in the financial area only, was received at CEB on 24 June 1970 but that this request did not include a financial statement on Filtron. When * * * [the contract specialist] asked * * * [the financial member] whether or not he * * * could provide verbal approval, * * * [the financial member] replied that based upon available data in-house the case looked like a financial turn down but that a written evaluation could not be made until a later financial statement on Filtron was received.

Both firms submitted timely responses by the June 26 closing date and award was made later that day to Ray Proof. Filtron's revised proposal was hand-carried to the contract specialist by its regional manager on the morning of the 26th. Included in its submission was a two-page "Statement of Income and Deficit" for its fiscal year ending June 30, 1969.

Notice of award to Ray Proof, in accordance with paragraph 3-508.3 of the Armed Services Procurement Regulation (ASPR), was mailed to Filtron on June 29, but was not received until July 2, 1970. On June 30, Filtron's regional manager called the contracting officer to determine the status of the procurement. He was advised of the award of the contract and that Filtron was determined to be nonresponsible for financial reasons. This information was communicated to Filtron's president, who also spoke with the contracting officer. Both representatives disputed the determination and the contracting officer was advised that Filtron intended to protest the matter. Such action was taken by telegram dated July 2. (This telegram was not received by the contracting officer until July 7.)

On July 6, 1970, Filtron's regional manager inquired whether WPD had received its protest. The substance of the ensuing conversation is a matter of dispute which, in accordance with our policy, we resolve in favor of the contracting officer's version of the conversation. The contracting officer states that:

* * * [The regional manager] notified me that a telegram had been transmitted to me by the Filtron home office requesting the award to Ray Proof be stopped. He also informed me additional financial data further supporting their financial position could be furnished. I advised * * * [the regional manager] any such additional financial data would be reviewed and any reconsiderations that could legally be made as to "suspending" the contract with Ray Proof would be made, if such reconsiderations were valid. However, at no time did I promise * * * [that] I would hold up the procurement with Ray Proof, as alleged * * *. In view of the new financial information * * * [the regional manager] said would be forthcoming, I told him that in my opinion, he did not have a basis for a protest until all "new" documents were submitted. If he received any encouragement that any review of additional financial data would

result in suspension of the Ray Proof award, it was not intended. In a later conversation on this same date * * * [the regional manager] indicated the Filtron home office was withdrawing their telegraphic protest pending any reconsiderations of additional financial data.

In an affidavit submitted to our Office, the regional manager states that during the conversation the contracting officer requested that Filtron return the contracting officer's letter of June 29; submit additional unaudited financial data not more than 6 months old; and that Filtron should withdraw its protest. The regional manager further states that the contracting officer indicated that he would "hold up the contract" if this was done.

In his supplemental administrative report of August 28, the contracting officer reaffirms his position and observes that: "I cannot conceive of any company official accepting any Contracting Officer's telephonic statement that 'Filtron should withdraw their telegraphic protest of award to Ray Proof.' "

On July 7, Ray Proof was telephonically notified of the possibility of a protest and asked if it would incur any costs under the contract during the next 10 days. Ray Proof indicated that it was unlikely that it would incur costs during the period, but that it would notify the contracting officer if circumstances changed.

On the same day, both the telegram of protest and the telegram of July 6 were received by the contracting officer. On the morning of July 7, Filtron's regional manager hand-carried to the contracting officer an unaudited balance sheet and statement of operations for the period ending December 31, 1969. The contracting officer states that at this time he told the regional manager than since this information was received after award, he could only accept the additional financial data and forward it to the appropriate agency for any consideration that might legally be made. (Copies of the financial information were mailed to CEB that day.) The contracting officer also determined that no stop order would be issued because of the asserted urgency of the project and the fact that no formal protest was pending.

CEB's formal recommendation of nonresponsibility dated July 8, 1970, also took into consideration the data furnished on July 7. Its determination was formally adopted by the contracting officer on July 13, and by letter of July 14 Filtron was advised of the results.

On July 15 the contracting officer received a letter dated July 9 from Liquidonics Industries, Inc., Filtron's parent, enclosing its financial statement as of March 31, 1970. By letter of July 16, to Liquidonics, the contracting officer enclosed a copy of the July 14 letter and advised that the statement would be retained for WPD use and would also be distributed to appropriate agencies for use in any future procure-

ments. Gadsby & Hannah, counsel for Filtron, protested the matter to our Office on July 20, 1970.

We have acknowledged that the determination of a prospective contractor's responsibility is a matter reserved initially to the sound discretion of the contracting officer, and our Office will not disturb the administrative judgment unless it is shown—by clear and convincing evidence—to be fraudulent, arbitrary, capricious, so grossly erroneous as to imply bad faith, or not supported by substantial evidence. We are concerned here with the question whether the contracting officer failed to establish a substantial factual basis for his determination. At the core of our inquiry are two evidentiary obstacles that a prospective contractor must overcome when its responsibility is in issue: first, it must "demonstrate affirmatively" its responsibility; second, doubt as to productive capacity or financial strength which cannot be resolved "affirmatively" requires a determination of nonresponsibility. See ASPR 1-903. We are asked to sustain the contracting officer's decision in this case on either or both of these grounds.

Both the Assistant General Counsel, AMC, in his letter of August 6, 1970, and the contracting officer's legal advisor, in a memorandum submitted with the initial administrative report, emphasize that Filtron did not furnish current financial data prior to award, and that it had the burden of providing such data. The legal advisor specifically draws attention to the "Submission of Financial Data" clause and the caveat therein that the failure to furnish a certified balance sheet and profit and loss statement current within 6 months may be deemed sufficient grounds for a determination of nonresponsibility. Our decision, 39 Comp. Gen. 895 (1960), is cited by the legal advisor with reference to Filtron's obligation to affirmatively establish its responsibility and whether opportunity should have been afforded Filtron to correct informational deficiencies.

The cited case involved a multimillion dollar advertised procurement for air transportation services. Included in the invitation was a requirement that bidders submit with their bids all information relevant to an evaluation of their current financial ability. Also, bidders were cautioned to have any data pertinent to their financial ability, not already on file at the administrative agency, available at the time the bidder's facility was visited by a capability survey team. Notice was given that "THE ADEQUACY OF BIDDER'S ARRANGEMENTS TO ASSURE THAT IT WILL BE ABLE TO PERFORM ANY RESULTING CONTRACT WILL BE CONSIDERED BY THE CONTRACTING OFFICER IN DETERMINING THE RESPONSIBILITY OF THE BIDDER FOR PURPOSES OF AWARD."

After a thorough preaward survey of the protestant's facility, no award was recommended due to financial instability; thereafter, the matter was referred to the Small Business Administration which declined to issue a certificate of competency. Subsequent to filing its protest with our Office, the firm's financial position was reevaluated by the Air Force, and the prior judgment affirmed. The reevaluation demonstrated that there would be insufficient working capital to satisfactorily insure performance of the contract. The protestant contended before our Office that it was incumbent on the administrative agency to advise it of the amount of additional working capital which would be required before the company could be considered financially capable and urged that it be afforded a further opportunity to cure the deficiencies. In this context, we made the following responses:

> It is our opinion that these provisions of the invitation provided adequate notice to all bidders that the burden of providing adequate financing to assure successful completion of the contract was placed upon the bidder, and that bid prices would be evaluated in conjunction with information on available finances for the purpose of determining that a bidder's financial position would provide reasonable assurance that the bidder could complete the contract upon payment of the amount bid. Both the initial evaluation * * * and the reevaluation subsequent to such submission appear to have been directed to such determination.
>
> * * * * * * *
>
> * * * [W]hether any further opportunity should be afforded the low bidder at this time to correct financial deficiencies must, in the absence of clear and convincing evidence of error, be left to the sound discretion of the contracting agency. Under the circumstances in this case we are unable to say that the failure or refusal by the Air Force to advise the company of the extent to which its finances are deficient or to permit the company additional time and opportunity to correct such deficiency would constitute an abuse of discretion. In the absence of such abuse, there would appear to be no sound basis upon which this Office could justify the imposition of further requirements in this area * * *.

We do not believe that it can fairly be said that our comments concerning the effect of the invitation provision in 39 Comp. Gen. 895, *supra*, have any pertinency to the "Submission of Financial Data" clause involved here. The contrasts are striking. In its submission of August 20, 1970, counsel for Filtron has, we believe, placed in proper perspective the net effect of administrative reliance on this provision:

> Filtron employs a fiscal year ending June 30. Like other firms its size, it does not have its quarterly or six-months' statements audited by independent certified public accountants. At the time offers were due (19 June 1970), its current fiscal year was not yet complete. Its most recent certified financial statement was dated 30 June 1969, Ray Proof was more fortunate: its fiscal year ends 31 March and current audited financial data could be supplied.
>
> As * * * [WPD] must see it, neither Filtron or Ray Proof can be technically responsible but for six months in the year, assuming that Ray Proof also prepares but one audited statement at the end of its fiscal year. * * * [WPD] will enjoy the benefits of competitive bidding on electromagnetically shielded enclosures only during the months of July, August and September. For two additional quarters there exists the possibility of sole source procurement. In the first quarter of the year, all requests for offers or bids must of necessity fall upon financially non-responsible ears. Unhappily for Filtron, offers were due in the second quarter, one of its black-out periods.

It might also be asked why Filtron did not object to the clause, or indicate its inability to comply and offer alternative data. The following answer from Filtron's counsel in its letter to us of August 20 seems to represent an adequate justification for its action:

> * * * Filtron is now successfully performing a $444,000 contract with * * * [WPD] for the construction of shielded enclosures in the Pentagon (DAAB09-69-C-0015). That large and important contract was awarded to Filtron on 8 August 1968, even though that solicitation also required certified financial data current within six months of the proposal date (19 July 1968) and Filtron had on file with * * * [WPD] only its certified fiscal 1967 financial statement, *which was 13½ months out of date.* * * * [WPD] behavior, therefore, is strangely inconsistent. One should note that the fiscal 1967 "stale" financial data showed a net loss of $166,094, while more current data for fiscal 1968 would have shown net income of $156,875. If certified data within six months were really important to * * * [WPD], one would think * * * [WPD] would insist upon it for large contracts rather than small contracts and when "stale" data on hand at * * * [WPD] showed a loss rather than a profit.

Filtron's lack of concern with the clause is plausible, and prior to June 26 there is no indication in the record that its attention was directed by WPD to anything other than the clause. A determination of a prospective contractor's financial nonresponsibility based solely on this clause is inconsistent with the Defense Contract Financing Regulations, part 2, appendix "E," which ASPR 1-903.1(i) clearly indicates are controlling when questions of "adequate financial resources" are in issue. In response to our informal inquiry, the contracting officer advises that use of the clause was required by USAECOM procurement instructions, but that the clause has been eliminated by a new mandatory procedure for the preparation of solicitations, effective July 1, 1970. Unfortunately, the elimination of the clause came too late for Filtron, but it did have a measureable impact on WPD's willingness to investigate Filtron's responsibility.

There is, however, a dispute as to what information was given to Filtron's regional manager on June 26 by WPD's contract specialist relative to the adequacy of the financial data submitted. The contracting officer states that:

> * * * They were advised at this time that the 30 June 69 statement was still not adequate for a determination of financial responsibility and were requested to submit a more up-to-date statement, if such were available. At this time Filtron was told that any new data submitted may or may not have a bearing in the consideration of an award to their firm, since, they had up to this point, been given every opportunity to present their most current financial data. They were aware of the extremely short time in which an award was to be made. They had been made cognizant of this fact during negotiations held on 24 June.

The contracting officer's understanding of what information was communicated to Filtron by the contract specialist is contested in the regional manager's affidavit of August 20. Specifically, he avers that "At no time was I informed that the most recent certified annual report of Filtron would not adequately fulfill the requirement that data showing the current financial status of the company be submitted."

Resolution of this dispute is not material to the issue raised and, as we have indicated, we are not able to resolve questions of credibility apart from the written record, and we must defer to the administrative agency. We must observe, however, following the rationale suggested by the contracting officer with respect to the dispute concerning withdrawal of Filtron's initial protest, that if the contract specialist relayed the information suggested, the absence of an immediate protest by Filtron to the contracting officer is wholly inconsistent with its subsequent actions.

Admittedly, 39 Comp. Gen. 895, *supra*, and other decisions recognize, as do the regulations, that a bidder has the duty to provide information; however, the decision quite plainly suggests that a prospective contractor must be afforded a reasonable opportunity to provide such information. Moreover, to assert on the basis of the cited case that a contracting officer has no duty to indicate what information is necessary, one must ignore completely the thoroughness of the administrative agency's investigation. Indeed, we believe that it is clear from ASPR that the administrative agency, that is, the contracting officer, has a correlative information-gathering duty that cannot be avoided, and that this duty has a direct relationship to the existence of reasonable doubts as to financial capacity. See ASPR 1–902 and 1–905.

Incident to this information-gathering duty, it seems clear that in the area of financial ability the type of information necessary and the scope of the contracting officer's duty will vary with the circumstances of each case. The Defense Contract Financing Regulation, part 2, appendix "E," of ASPR is quite specific in this connection. See ASPR appendix E–213 and E–214.

A reading of appendix "E" leads us to the conclusion that the financial strength of a prospective contractor bears a direct correlation to the amount of financial information and degree of analysis necessary in a particular case and that if upon initial examination the prospective contractor's financial ability is doubtful, there is a greater need for information and analysis.

Nevertheless, it must be conceded that the urgency of a particular procurement and the need to reach a prompt decision must also be considered. We recognize that in light of an asserted urgency, the prospective contractor may be required to sustain a greater informational burden, with a corresponding diminution of the contracting officer's duty. See, e.g., B–159960, December 8, 1966. From our review of this record, we are not persuaded, however, that the contracting officer attempted to comply with the applicable regulations.

The contracting officer has emphasized that under USAECOM Standard Procurement Operating Procedures he was required to se-

cure CEB's recommendation, and that his "determination of nonresponsibility was made principally on the basis of the report from the USAECOM Contractor Evaluation Board * * *; however, all information available to me at the time of award was utilized in reaching that determination." Conceding that the contracting officer was required to refer the matter to CEB, we cannot agree that such referral dispensed with the necessity for further action on his part. We agree, as the contracting officer's legal advisor points out, that a contracting officer may obtain information and advice from experts in areas where he may have little or no specialized knowledge; however, he may not avoid his responsibility in the decision-making process. In our opinion, his participation is even more essential in cases of asserted urgency. The USAECOM Standard Operating Procedures emphasize this view.

No administrative attempt was made to relate Filtron's financial position to the circumstances of the procurement and to afford it an opportunity to resolve the asserted "doubts" about its financial ability to perform. This, in our view, was erroneous and prejudicial to Filtron's posture as both a contractor and as a prospective contractor.

Commenting on the contract specialist's memorandum of the conversation with CEB on June 25, the contracting officer states in his supplemental report that:

> * * * While the memorandum for record of 25 June 1970, signed by * * * [the contract specialist] and accepted by the Contracting Officer, does not fully address every word that was passed during the telephone conversation referred to * * * the overall financial position of Filtron was carefully considered and that consideration, in conjunction with the financial position of its parent organization, Liquidonics, was condensed into the information contained in the signed memorandum for record. If time had been allowed for a complete Defense Contract Administration Services Region preaward survey and analysis of Filtron's and Liquidonics' financial position, then the adoption of the telephone turn down by the Contractor Evaluation Board would not have been a part of this procurement. * * *

Again, we do not believe that the asserted urgency of the procurement eliminated the need for setting forth all the bases for the nonresponsibility determination. See ASPR 1-904.1. With respect to the overall financial condition of Filtron, and the resultant "doubt," the CEB members' August 24 memorandum indicates that based on commercial credit reports Filtron's payment record with vendors was considered to be unsatisfactory and, further, that its financial condition was being aggravated by its intervening parent, H. O. Boehme, Inc., and by Liquidonics Industries, Inc. The ultimate conclusion drawn from CEB's examination is perhaps best stated in its internal working papers:

FINDING

COMPANY'S ABILITY TO OBTAIN MATERIALS IN A TIMELY MANNER IS DOUBTFUL.

In our view, this "Finding" cannot be sustained on the record before our Office. We recognize that the contracting officer did not have access to much of this information; nevertheless, he had a duty to attempt to resolve this doubt, and we can think of no more appropriate way than by conducting negotiations with both offerors. In this regard, the legal advisor's reliance on 37 Comp. Gen. 703 (1958) for the proposition that such action was unnecessary is without merit. Emphasizing the disparity between Filtron's low offer of $42,950 and Ray Proof's offer of $75,905, the following excerpt from that decision is advanced:

> * * * In view of the wide disparity of bid prices between those submitted by your firm and those of the other bidders, the matter of the financial responsibility of your firm was particularly important. * * * 37 Comp. Gen. 703, at 704.

We agree. The case does not, however, suggest that after discovering the disparity, there is no need to explore its significance. We also note that in that case the prospective contractor was determined to be nonresponsible only after he "refused or failed to furnish information" necessary for a Small Business Administration certificate of competency determination.

Therefore, on the record now before us, we conclude that the contracting officer's determination of nonresponsibility was not supported by sufficient evidence and a finding that Filtron was, in fact, a responsible prospective contractor for this procurement would have been proper. We believe that the records of your Department should be appropriately noted in this regard.

Since we are informally advised that Ray Proof will complete performance under the contract within the next 3 weeks, remedial action is thus precluded in this case. However, we recommend that appropriate steps be taken to assure that future responsibility determinations be adequately supported by a factually complete record.

[B-170593]

Transportation—Dependents—Military Personnel—Missing, Interned, Etc., Members

The dependents of a member of the uniformed services in a missing status as defined in 37 U.S.C. 551(2), who have been furnished transportation for themselves and their household and personal effects incident to the member's entry into a missing status, may not again be furnished transportation while the member's status remains unchanged, 37 U.S.C. 554 requiring a change of status for entitlement to transportation; and a change from one classification to another within the "missing status" category, defined as missing; missing in action; interned in a foreign country; captured, beleaguered, or besieged by a hostile

force; or detained in a foreign country against a member's will, does not constitute a change within the meaning of section 554, and therefore regulations may not be promulgated to authorize additional transportation incident to a missing status.

Transportation—Dependents—Military Personnel—More Than One Movement

When the status of a member of the uniformed services is changed from one to the other of the three categories specified in 37 U.S.C. 554—dead, injured, or absent for a period of more than 29 days in a missing status—the transportation of dependents and of household and personal effects may be furnished incident to each change in the status of the member in accordance with 35 Comp. Gen. 399 (1956).

To the Secretary of the Army, October 15, 1970:

Further reference is made to letter of July 30, 1970, from the Office of the Assistant Secretary of the Army (Deputy for Reserve Affairs) requesting a decision whether under law and current regulations dependents of a member in a missing status as defined in 37 U.S.C. 551(2), having once been furnished transportation for themselves and their household and personal effects incident to the member's entry into a missing status, may again be furnished with transportation while the member's status remains unchanged. The request has been assigned PDTATAC Control No. 70–41, by the Per Diem, Travel and Transportation Allowance Committee.

It is stated in the letter of July 30, 1970, that, in several instances, such transportation has been furnished on the premise that unforeseen circumstances, arising after arrival of the dependents at the original point selected at the time the member first entered a missing status, justified further movement to another place under 37 U.S.C. 554(b) and (d). It is stated in the letter that nothing contained in 37 U.S.C. 551 through 558 would appear to restrict the authority of the Secretary concerned in that respect. Also, it is stated that while paragraphs M7152–2 and M8352–3, Joint Travel Regulations, limit transportation in those cases to only one movement in connection with each official status report, there is nothing in the regulations to restrict the reissuance of such reports on a periodical or other basis even though there was no change in the status of the member concerned.

If the answer to the basic question is in the negative, decision is requested as to whether the regulations may be amended to provide for the additional transportation. Also our views are requested as to the propriety of relocating dependents and household and personal effects in cases where "a member reported dead * * * was thereafter found to be in a missing status, or *vice versa*, or a member reported in one missing status was thereafter found to be, or changed to, another missing status," if authorized or approved by the Secretary concerned, or his designee, and there is a reasonable relationship between the circumstances of the dependent and the requested destination.

Section 554 of Title 37, United States Code, provides in material part as follows:

(b) Transportation (including packing, crating, drayage, temporary storage, and unpacking of household and personal effects) may be provided for the dependents and household and personal effects of a member of a uniformed service on active duty (without regard to pay grade) who is officially reported as dead, injured, or absent for a period of more than 29 days in a missing status—

(1) to the member's official residence of record;

(2) to the residence of his dependent, next of kin, or other person entitled to custody of the effects, under regulations prescribed by the Secretary concerned; or

(3) on request of the member (if injured), or his dependent, next of kin, or other person described in clause (2), to another location determined in advance or later approved by the Secretary concerned, or his designee.

When he considers it necessary, the Secretary concerned may, with respect to the household and personal effects of a member who is officially reported as absent for a period of more than 29 days in a missing status, authorize the nontemporary storage of those effects for a period of one year, or longer when justified.

(c) When a member described in subsection (b) of this section is in an injured status, transportation of dependents and household and personal effects authorized by this section may be provided only when prolonged hospitalization or treatment is anticipated.

(d) Transportation requested by a dependent may be authorized under this section only if there is a reasonable relationship between the circumstances of the dependent and the requested destination.

Subsection (b) specifies three statuses for which transportation may be furnished, "dead, injured, or absent for a period of more than 29 days in a missing status." Accordingly, in reply to the request for our views as to the propriety of furnishing transportation when a member's status is changed from one to the other of those three statuses, you are advised that legally transportation may be furnished incident to each such change. 35 Comp. Gen. 399 (1956).

As to the basic questions, section 551(2) of Title 37 defines "missing status" as the status of a member of a uniformed service who is officially carried or determined to be absent in a status of (A) missing; (B) missing in action; (C) interned in a foreign country; (D) captured, beleaguered, or besieged by a hostile force; or (E) detained in a foreign country against his will. By definition, therefore, each of categories (A) through (E) is included in the term "missing status" for the purposes of 37 U.S.C. 554 and thus a change from one of these categories to another effects no change in that status.

The present regulations governing the transportation rights here concerned are contained in chapters 7 (dependents), 8 (household goods), and 11 (privately owned motor vehicles), of the Joint Travel Regulations. The pertinent provisions of these regulations authorize the transportation of dependents, household goods, and privately owned motor vehicles of a member on active duty (without regard to pay grade) who is officially reported as dead, injured, absent for a period of 30 days or more in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered

by a hostile force, besieged by a hostile force, or detained in a foreign country against his will.

These regulations appear to have been issued to implement the conclusion reached in 35 Comp. Gen. 399, which considered the provisions of section 12 of the Missing Persons Act, as then amended, 50 U.S.C. App. 1012. Under those provisions, each of the stated dead, injured, or absent categories was considered to be a different status for the purposes of the transportation concerned.

While the provisions of section 554 of Title 37, United States Code, were derived from section 12 of the Missing Persons Act, as amended, the present provisions relating to the absent classes are materially different. No longer does each of these classes constitute a separate status; each is now included in the status of "absent for a period of more than 29 days in a missing status."

Accordingly, it must be concluded that under the present provisions in 37 U.S.C. 551 and 554, transportation of dependents, household effects, and privately owned motor vehicles of members of the uniformed services is authorized only when the member is officially reported either as dead, injured (with prolonged treatment anticipated), or absent for a period of more than 29 days in a missing status. A change from one classification to another within the single "missing status" category defined in 37 U.S.C. 551(2) (for example, a change from missing in action to interned in a foreign country) would provide no legal basis for such transportation. Clearly, the issuance of a report which does no more than continue a member in a "missing status" would not fulfill the legal requirement that a change in a member's status must occur before such transportation may be authorized.

It is our view, therefore, that there is no legal authority for the promulgation of regulations providing for more than one movement of the dependents, household effects, and motor vehicle of a member who is absent in a "missing status" so long as that status remains unchanged.

We will not question cases where additional movements have been authorized in these cases in the past. However, the applicable provisions of the Joint Travel Regulations should be revised to clearly conform to the limits of the statutory authority provided by 37 U.S.C. 551 and 554.

[B-170595]

Contracts—Subcontracts—Bid Shopping—Listing of Subcontractors

The omission of the addresses of subcontractors listed by a prime contractor in a bid submission is a minor informality that may be waived under section 1-2.405 of the Federal Procurement Regulations when the contracting agency can independently determine the omitted addresses from readily available information—contractor register, telephone directories, agency records—as well as from personal knowledge. Since the incompleteness of the bid did not result in an ambiguity that requires clarification by the bidder, no possibility of bid shopping exists, nor is the bid nonresponsive on the basis the bidder was given "two bites at the apple." The extent to which a contracting agency will extend its search for similarly named firms is a discretionary matter; and if the discretion is abused, a protest could be filed with the United States General Accounting Office.

To Pepper, Hamilton & Scheetz, October 16, 1970:

Reference is made to your letters of August 12 and September 24, 28, and 30, 1970, on behalf of Zinger Construction Company, Inc., protesting against the award of a contract to Gramercy Contractors, Inc., by the General Services Administration (GSA), Public Buildings Service, for Project No. 98493.

The referenced project was for modifications to the Postal Concentration Center at Long Island City, New York. The three bids received by the bid opening date of August 11, 1970, were as follows:

Gramercy Contractors, Inc	$1,037,882
Zinger Construction Co., Inc	1,143,795
Braverman Construction Co., Inc	1,182,000

Bidders were required by clause 9 of the "Special Conditions" of the invitation for bids (IFB) to list certain subcontractors. In this connection, paragraphs 9.1, 9.4, and 9.12 provide:

9.1 For each category on the List of Subcontractors which is included as part of the bid form, the bidder shall submit the name and address of the individual or firm with whom he proposes to subcontract for performance of such category, *Provided* that the bidder may enter his own name for any category which he will perform with personnel carried on his own payroll (other than operators of leased equipment) to indicate that the category will not be performed by subcontract.

* * * * * * *

9.4 Except as otherwise provided herein, the successful bidder agrees that he will not have any of the listed categories involved in the performance of this contract performed by any individual or firm other than those named for the performance of such categories.

* * * * * * *

9.12 If the bidder fails to comply with the requirements of subparagraphs 9.1 or 9.2 of this clause, the bid will be rejected as nonresponsive to the invitation.

The "Supplement to Bid Form," as submitted by Gramercy, provided as follows:

Listed below are the names and business address as required by the "Listing of Subcontractors" paragraph of the Special Conditions;

Category	Names and business address	Portion of category (as applicable)
DEMOLITION	J & J Salvage	
STRUCTURAL STEEL	Spigner	
ROOFING, INSULATION & SHEET METAL	Schwartz Rfn'g	
DOORS	North American	
DECKING & SIDING	Beers Steel	
CONCRETE	Gramercy Cont. Inc.	
BITUMINOUS PAVEMENT	Pope	
ELECTRICAL	Wickham	

NOTE.—The listing of an individual or firm (whether a subconcontractor or the bidder) who does not meet the requirements of the Specialist or Competency of Bidders Clauses in the specifications, wherever applicable, may be grounds for rejection of the bid.

Immediately after bid opening, Zinger Construction Company informed GSA that Gramercy's bid did not include addresses for the firms listed in the "Supplement to Bid Form." Gramercy, on the afternoon of August 11, 1970, shortly after bid opening, submitted a separate "Supplement to Bid Form" containing complete names and addresses for the subcontractors it had originally submitted.

The basis of your protest is that Gramercy's bid is nonresponsive because of the firm's failure in its original "Supplement to Bid Form" to list the addresses for the listed names or to indicate whether the listed names were individuals or firms. You argue the listing of subcontractors by a bidder must bear sufficient clarification on the face of the bid so as to positively identify the proposed subcontractors, and that the procuring activity is not alowed to consult a new subcontractor listing submitted after bid opening to determine responsiveness. You have, as to each name on Gramercy's original list, alleged such vagueness or ambiguity as to preclude its positive identification without the procuring activity having to resort to extraneous sources.

You also contend that if Gramercy's bid is accepted, the firm would be given "two bites at the apple," and you have stated the following:

No legal authority should be required to point out the obvious opportunities for fraud or favoritism if, after all of the bids are opened, a bidder is given the

opportunity to amplify or clarify its bid. If Gramercy is allowed to supplement its listing of subcontractors in an attempt to show that there was no ambiguity and this becomes the policy of the G.S.A., in the future could not a bidder, seeing that his bid was far below that of the second bidder and thinking that he made an error or " left too much money on the table," supplement his listing of subcontractors to make it appear that there was an ambiguity or that the subcontractor listed was not the well-known subcontractor which everyone expected but rather a subcontractor who had a history of defaults on Government projects or a subcontractor who was a known security risk, thereby causing the Contracting Officer to reject the bid. In other words, after seeing the amount that all other bidders bid, the apparent lowest bidder would then have another bite of the apple to amplify his listing of subcontractors by a supplementary letter in a manner which would either make his bid responsive or nonresponsive, depending on the particular result desired.

You argue that with a name like "Pope," listed by Gramercy for "Bituminous Pavement," if Gramercy had not wanted this contract after bid opening it could have claimed Pope was an organization with a completely different name from Pope Construction Corporation, which had as its President or Operating Officer a man named Pope, or Gramercy could have in the alternative formed a new corportation, with no prior contracting experience, named it "Pope Industries, Inc.," knowing all the time the contracting officer would find the firm nonresponsible and reject Gramercy's bid as a result thereof.

It is the position of GSA that the purpose of the subcontractor listing requirement is to prevent, after bid opening, the apparent low bidder from bid shopping to secure subcontracts at cut-rate prices for performance of the principal categories of work, and that the furnishing of addresses of those listed ordinarily serves only to facilitate the administrative determination of the apparent low bidder's responsibility, insofar as that must be determined in terms of subcontracted work under the provisions of Federal Procurement Regulations (FPR) 1-1.310-5 and 1-1.310-11. The agency contends that in only one factual situation would the addresses constitute a critical and necessary part of the listing. That would occur where two or more firms operated under such substantially similar names that, without the address specifically identifying one of them, the bidder might be free to bid shop among the firms operating under such similar names.

In the present procurement, however, it is GSA's position that it was able to refer to the Contractors Register, phone directories, city directories, agency records, and personal knowledge of procuring officials, and thus identify beyond any reasonable doubt the full names and addresses of the listed subcontractors. GSA therefore contends that Gramercy, without having included the addresses, has nevertheless sufficiently identified its proposed subcontractors so as to enable the contracting officer to enforce the requirement that Gramercy subcontract only with those named in its bid. GSA argues that since it can enforce paragraph 9.4 of the invitation, quoted above, and can therefore prevent bid shopping by Gramercy, the omission is a minor infor-

mality which can be waived under the following provision of FPR 1-2.405:

> A minor informality or irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, quality or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. The contracting officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive such deficiency, whichever is to the advantage of the Government * * *

We would agree with your contention that if Gramercy was given "two bites at the apple" its bid should have been found nonresponsive, but we do not believe the record supports such a conclusion. The procuring activity in our opinion took every reasonable precaution to assure itself that no other firms under the names as initially submitted by Gramercy existed for the purposes of performance of this contract for the respective subcontracting categories involved. The procuring activity for this purpose considered the 1970 Contractor Register, telephone directories, agency records, and personal knowledge of the subcontracting firms listed.

In our opinion, where a contractor has entered incomplete names and/or addresses for subcontractors, the procuring activities' first responsibility is to insure that such incompleteness does not create any ambiguity as to the subcontractors who will perform the work in the listed categories. If such incompleteness results in an ambiguity which requires clarification by the bidder, the bid must be found nonresponsive. If however, the agency is able to determine there is no other similarly named readily available firms in the particular subcontractor category under consideration, no ambiguity exists and there is no reason for the bid to be rejected. Since under these circumstances the agency will award to the bidder based on its own independent determination as to whom the bidder proposes to subcontract with, no possibility of bid shopping exists.

As previously indicated, shortly after bid opening Gramercy supplied a list of subcontractors with the full names and addresses of the firms on the original list. There is, however, no indication GSA needed this list to resolve any ambiguities in Gramercy's bid. In this respect, you have mentioned the agency could not identify "J & J Salvage" listed for "Demolition" without examining Gramercy's supplemental subcontracting list. Although the administrative report does indicate the contracting officer examined the supplemental list, it appears he would have independently located "J & J Salvage" in the 1971 Manhattan Directory if he had not received the supplemental list from the bidder in the meantime. The methods used by the agency to deter-

mine if similar names existed for the names listed for the respective subcontractor categories would have in due course been applied to the "J & J Salvage" listing.

You also contend that Gramercy was allowed to amend its bid by changing "J & J Salvage" to "Jimo Wrecking." This occurerd, in your opinion, when the procuring activity determined "J & J Salvage" to be "J & J Salvage, c/o JIMO Wrecking, 6919 8th Avenue, Brooklyn, New York," which was the address listed in the supplemental subcontracting list submitted by Gramercy. The record indicates in this respect that after examining the 1971 Manhattan Directory which listed a "J & J Salvage" at 444 Riverdale Avenue, Brooklyn, New York, and finding that this address only had a telephone answering service where messages could be left for the firm at the 8th Avenue address, the procuring activity determined there was only one "J & J Salvage." In our opinion, whether the firm is considered to be "J & J Salvage" or "J & J Salvage, c/o Jimo Wrecking" at the 8th Avenue address, the same result attains.

You have further contended that "Wickham," as listed by Gramercy under the "Electrical" subcontractor heading, cannot be located in either the August 20, 1970, edition of the Bronx telephone directory nor the 1970 Contractors Register. We do not feel it is material that Wickham Contracting Company be listed in either of these sources since the procuring activity was already familiar with Wickham Contracting Company from previous contracts the firm had performed with GSA. The procuring activity could not locate, and you have presented no evidence that there might be, another Wickham in the electrical contracting business.

You have also suggested that the contracting officer would not have been able to locate "Beers Steel" listed by Gramercy for "Decking & Siding" unless he was specifically directed to look at the curtain wall section of the 1970 Contractors Register, since Beers Steel Building Corporation is not listed in the directory under the category of roof decking. We find no evidence of anyone directing the contracting officer to look under this section and it should be noted that the Index to the 1970 Contractors Register lists Beers Steel Building Corporation and advises one to examine the "Steel Building-Pre-Engineers" and "Curtain Walls" portions of the directory for the listings of this firm.

You have mentioned that under "Spigner," listed by Gramercy under "Structural Steel," both A. Spigner Iron Works and Spigner & Sons, Structural Steel Co., Inc., are listed at the address of 349 Metropolitan Avenue, Brooklyn, New York. The agency report indicates that, although this firm has been known as Spigner & Sons Iron Works,

as well as other names in the past, in reality the only firm doing this type of business at the listed address is Spigner & Sons Structural Steel Co., Inc. We note in this respect that Zinger Construction Company listed North American Iron and Steel Company, Lindenhurst, New York, under the subcontractor category "Doors" and you have now informed us that North American Door Co., Inc., Lindenhurst, New York, is really the name of this firm since it has purchased North American Iron and Steel Company. Since you have submitted this information to show Zinger's bid was responsive, although Zinger listed in its bid a predecessor firm, we feel the same argument applies to the "Spigner" listed in Gramercy's bid. In either case there is only one company and the procuring activity is able to sufficiently identify the firm to which the contractor proposes to subcontract from the bid as submitted.

It is, as you indicate, always a possibility that some firm with a similar name for one of the subcontracting categories might be located outside the geographic area considered by the contracting officer. Nevertheless, in our opinion, some discretion must be left with the contracting agency involved to determine how far it will extend its search for a similarly named firm, since it is the agency most familiar with the distance of subcontracting firms from the project which contractors would normally consider subcontracting with for the type and dollar amount of the project involved. If a contractor feels the contracting officer is abusing his discretion in this respect, he could always protest such abuse to this Office.

Since we feel the defects in Gramercy's listing of subcontractors did not prevent positive identification of the proposed subcontractors by the procuring activity, we do not believe rejection of Gramercy's bid is required. We have held that minor deficiencies in regard to subcontractor listing requirements may be waived in appropriate circumstances (see B–169974, August 27, 1970; B–157279, August 17, 1965); and we feel that under the circumstances presented by this case, waiver of the defects as minor informalities should be permitted under section 1–2.405 of the Federal Procurement Regulations.

For the above reasons, your protest must be denied.

[B–170757]

Officers and Employees—Severance Pay—Eligibility—Employee on Military Duty

The fact that a civilian Air Force technician was on required active military duty in the Air Force Reserve when his installation was transferred does not disqualify him for severence pay, as the employee has restoration rights to his civilian position at the place where his office has been relocated, or he may decline a transfer and become eligible for severance pay on the basis of being in-

voluntarily separated from the civil service. The employee declining a transfer should be given a paper restoration to establish his pay scale and his involuntary separation made of record, the date of restoration to be the date the employee applied for restoration, and the involuntary separation date, the date he informed the agency he would not accept reassignment.

To the Chairman, United States Civil Service Commission, October 16, 1970:

We refer to your letter of September 1, 1970, with enclosures, concerning the entitlement to severance pay of an individual who was on active military duty when the event occurred which would have entitled him to severance pay had he been in a civilian status at the time.

The individual was an Air Reserve Technician, required to be a member of the Air Force Reserve in order to hold his civilian position at Stewart Air Force Base in New York. The military airlift group to which he was assigned was called to active duty. While he was on active duty, Stewart Air Force Base was closed and the group transferred to Hamilton Air Force Base in California. He has since been honorably separated from active military service, and has been told by his former personnel office that he is not entitled to severance pay because he was in military service when the base was closed.

Under section 550.705 of the Commission's severance pay regulations, an employee who is separated because he declines to accept assignment to another commuting area is entitled to severance pay if the proposed assignment is the result of, or in connection with, a transfer of function or reduction-in-force situation. If the employee had remained in his civilian position, he would have automatically qualified to receive severance pay if he had declined to go with his job to California.

Our view is that an employee who has entered the military service from a civilian position to which he has restoration rights has the same option (upon making application for reinstatement in his civilian job) as other employees. In other words, he has a right to be reinstated in the civilian service at the place where his office was transferred or may decline to do so and thus become eligible for severance pay on the basis of being involuntarily separated from the civilian service. It would seem to us that actually the individual should be given a paper restoration to establish his pay scale and his involuntary separation then made of record.

You refer to 5 CFR 353.402, which indicates that an individual with restoration rights is entitled to be restored as soon as possible after his application for restoration is received in the agency but not later than 30 days after receipt of his application. You ask whether the severance pay would begin to run upon his application being made for restoration or the 30th day after the application is received. As

indicated above, if a paper restoration and involuntary separation be processed, then the severance pay would run from the date fixed as the date of such separation. We see no reason in the instant case as to why the individual's restoration could not be fixed as of the date he made application for restoration, and his involuntary separation date fixed as of the date he informed the agency he did not desire to accept assignment in California.

[B–170635]

Bids—Modification—Ambiguous

A telegraphic modification of a bid on Government surplus property, which read "Increase Item 13 bid $8,900," is an ambiguous modification, as it can be interpreted to increase the original bid "by" $8,900 or "to" $8,900; and the telegram, therefore, should be disregarded in determining the highest bidder on the item. The telegraphic bid modification reasonably susceptible of two varying interpretations, one only making the bid price high, it would be prejudicial to other bidders to permit the bidder who created the ambiguity to select after bid opening the interpretation to be adopted.

To the Administrator, General Services Administration, October 19, 1970:

Reference is made to a letter dated September 10, 1970, with enclosures, from your General Counsel, furnishing a report on the protest of Greenstein and Solotke, attorneys at law, on behalf of Lang and Epstein, against the proposed consideration by the General Services Administration (GSA), Region 5, of a telegraphic modification to a bid submitted by the American Waste & Wiper Company in response to sales invitation No. 5DPS–71–4, issued by the Sales Branch, Personal Property Division, Chicago, Illinois.

The sales invitation requested bids—to be opened at 10:30 a.m. (local time), on July 8, 1970—for the purchase from the Government of, among other items, 1,988 coils of steel strapping ½-inch wide, item 13. At the scheduled bid opening time, 18 bids on item 13 were opened in the Business Service Center; and in attendance, among others, were representatives of Epstein and the American Waste & Wiper Company. It is reported that American Waste & Wiper submitted a bid of $6,161.61 for item 13 which was modified by a teletype message received at 8:31 a.m. on July 8, 1970, and read "INCREASE ITEM 13 BID $8,900"; and that a hand-carried letter marked "Addendum to Sale No. 5DPS–71–4" was received by the Business Service Center at 10:18 a.m. on July 8, 1970, which confirmed the teletype message stating "INCREASE ITEM 13 BID $8,900." It also is reported that the sales specialist prior to reading of the bids assembled all of the papers pertaining to the American Waste & Wiper bid and announced that its original bid of $6,161.61 on item 13 had been timely

modified by teletype and letter to a bid of $8,900. The foregoing was the sales specialist's immediate impression and interpretation of the modification made by American Waste & Wiper, and no objection to the $8,900 announced bid was made by the representative for American Waste & Wiper who was present at the bid opening. Thereafter, the bid of Epstein was read and announced as $15,010 for item 13.

The record indicates that at the termination of the reading of all the bids a representative of American Waste & Wiper asked that his company's bid on item 13 be corrected and announced as $15,061.61 for that item. This request was immediately protested by Epstein's representative, who asked that a legal interpretation of the modification be made by the GSA regional counsel.

The teletype modification was submitted to the regional counsel for his interpretation and it was his opinion that the teletype modification did increase the bid of American Waste & Wiper on item 13 to $15,061.61 and that it was, therefore, proper to make an award on that item in that amount. It is reported that counsel's opinion was based on a longstanding interpretation of this type of wording in Government contracting and that no other conclusion could be reached. Upon being informed of the regional counsel's interpretation, Epstein verbally and in writing protested the decision of the regional counsel. It is reported that an award on item 13 is being held in abeyance pending a decision by our Office on Epstein's protest.

In their letter of August 17, 1970, the attorneys for Lang and Epstein contend that the bid of American Waste & Wiper, as modified by its teletype of July 8, 1970, constituted a multibid and, therefore, was not responsive to the sales invitation. We do not agree with this contention because paragraph 10 of the Special Instructions to Bidders provides that bids may be modified by written or telegraphic notice prior to the time set for opening.

The question for consideration here is whether the teletype modification was completely clear as to the intended revised amount of the bid of American Waste & Wiper on item 13. In his report, the Chief, Sales Branch, Personal Property Division, states that the clear wording of the modifying wire "INCREASE ITEM 13 BID 8,900" shows not a bid of $8,900, but an increase in that amount, and that any other interpretation would in effect add the word "to" before the dollar amount. It also is stated that this form of modification either increasing or decreasing bids is frequently used in procurement situations and that it is a manner of modification protecting the sealed bid principle, although the use of the word "by" before the dollar amount would be preferred.

In his letter of September 10, 1970, the General Counsel states that

Webster's New International Dictionary (second edition) defines "increase," the transitive verb, as follows:

"To augment, or make greater in bulk, quantity, extent, value, or amount, etc.; *to add to*; to enhance, * * * " (Italics supplied.)

It is therefore concluded by the General Counsel that the teletype modification should be interpreted as adding $8,900 to the original bid, and not as increasing the bid to $8,900.

Within that definition of the word "increase," it may also be validly said that the bidder meant "to add to" the original bid on item 13 an amount sufficient to make the revised bid total $8,900. We do not agree with the administrative position that the only conclusion which may be reached is that the original bid of American Waste & Wiper was to be increased "by" $8,900. Since its original bid on item 13 was in the amount of $6,161.61, we are of the opinion that the teletype modification could reasonably be interpreted also as an instruction to increase its original bid to $8,900. In this connection, American Waste & Wiper states in its letter of September 18, 1970, to our Office, that it would have been illogical for the firm to have revealed its revised total bid price for item 13 prior to the time set for opening of bids. While it might have been illogical for the bidder to have revealed its revised bid price for item 13 in its teletype modification, we cannot say that the modification has only one logical meaning.

It is our opinion that, at the very least, American Waste & Wiper submitted an ambiguous teletype modification. We believe that where a telegraphic bid modification is reasonably susceptible of two varying interpretations and the bid price would be high under one interpretation but not under the other, it would be prejudicial to other bidders to permit the bidder who created the ambiguity to select after bid opening the interpretation to be adopted. See 40 Comp. Gen. 393 (1961). As we held in B-167584, October 3, 1969:

* * * Any clarification or explanation of the bidder's intention by extraneous information after bid opening would violate the rule that responsiveness must be ascertained from the bid itself. To give the bidder an option after bid opening to become eligible for award by agreeing to abide by the invitation or to preclude award by insisting on adherence to its offer, provides an unfair advantage over those bidders whose bids conformed in every way to the invitation and were left without options. Such an advantage is contrary to the purpose of the statutes governing public procurement. 38 Comp. Gen. 819.

Accordingly, since the teletype bid modification is ambiguous, it should be disregarded by the sales activity in determining the highest bidder on item 13 of the subject sales invitation.

[B–155375]

Agriculture Department—Milk Indemnity Program—Contamination of Milk

The milk indemnity payments authorized by Public Law 90–484 to be made to dairy farmers who are directed to remove milk from commercial markets because the milk contained residues of chemicals registered and approved for use by the Federal Government, may not be allowed pursuant to Public Law 91–127 when the milk is removed as a result of a farmer's willful failure to follow procedures prescribed by the Government. When a dairy farmer predicates his milk indemnity claim on compliance with procedures for use of DDT pesticides on cottonfields sprayed from airplanes, it is not sufficient that it cannot be proved the farmer was at fault; but rather to receive indemnity payments for the contaminated milk, the burden is on the farmer to establish that he was not at fault.

To the Secretary of Agriculture, October 21, 1970:

Reference is made to letter of July 14, 1970, from Assistant Secretary Clarence D. Palmby, concerning a question as to the eligibility of a dairy farmer for milk indemnity payments authorized by Public Law 90–484, 82 Stat. 750, under the circumstances described therein.

It is reported that, in the case in question, milk produced by McNair Investment Company, doing business as McNair Farms and hereinafter referred to as McNair, was ordered removed from the market because it was found to contain residues of DDT. McNair produces cotton as well as feed for its dairy cattle and, while it uses DDT on its cotton, McNair states that at no time was DDT used on its dairy feeds. Nevertheless, laboratory analyses of the dairy feeds grown by McNair showed substantial residues of DDT and apparently such feeds were the source of contamination of the milk.

It is stated that McNair, as well as neighboring farms, applied DDT aerially to cottonfields and the feeds became contaminated as a result of drifting of such aerial applications. The Department of Agriculture, however, is unable to determine whether or not the contamination of McNair's milk is attributable to its own applications of DDT to its cottonfields or to its neighbors' applications of DDT to their cottonfields. In some instances, the neighbors' cottonfields were as close or closer to McNair's fields of dairy feed than were McNair's cottonfields.

The milk indemnity program originally was authorized by section 331 of the Economic Opportunity Act of 1964, and amendments thereto extended such authorization. Public Law 90–95, 81 Stat. 231, then re-enacted and extended such authority, which again was last re-enacted and extended by Public Law 90–484. In pertinent part, Public Law 90–484, 7 U.S.C. 450j, is identical with such earlier authorizations and reads as follows:

* * * the Secretary of Agriculture is authorized to make indemnity payments, at a fair market value, to dairy farmers who have been directed since January

1, 1964, to remove their milk from commercial markets because it contained residues of chemicals registered and approved for use by the Federal Government at the time of such use * * *.

Funds to finance the program during the 1969 crop period here involved were provided by the Department of Agriculture and Related Agencies Appropriation Act, 1970, Public Law 91-127, 83 Stat. 244, 255. With respect to such funds it is specifically provided in that act that—

* * * none of the funds contained in this Act shall be used to make indemnity payments to any farmer whose milk was removed from commercial markets as a result of his willful failure to follow procedures prescribed by the Federal Government.

It is stated that at the time of its use by McNair and its neighbors, DDT was registered and recommended for use by the Department of Agriculture for the control of cotton insects. Agriculture Handbook No. 331, entitled "Suggested Guide for the Use of Insecticides to Control Insects Affecting Crops, Livestock, Households, Stored Products, Forests, and Forest Products—1968," which was effective with respect to 1969 crops, suggests the use of DDT on cotton. It warns against grazing livestock in cottonfields treated with DDT and, under the heading "Avoiding Harmful Residues in or on Food and Feed," contains the following sentence:

Avoid drift of insecticide sprays or dust to nearby crops or livestock, especially from applications by aircraft and other power equipment. Do not allow poultry, dairy animals, or meat animals to feed on plants or drink water contaminated by drift of insecticides.

The Assistant Secretary states that in the initial review of McNair's request for payment, the request was denied on the basis that the Department could not make a finding that the milk became contaminated through no fault on the part of McNair. McNair has now requested review of your Department's findings on the basis that it had used the DDT according to the recommendations of the Department and had used reasonable care in the application of the DDT and contends that its feed, and thus its milk would have become contaminated even if it had not used any DDT. McNair has also produced evidence that water which was used for its cattle and obtained from the city of Laurinburg also contained some residues of DDT.

The Assistant Secretary advises that McNair's representatives have presented information indicating that they have carefully complied with the procedures prescribed by the Federal Government in using DDT pesticides on cottonfields. As matters now stand, however, the Department is unable to determine that McNair did not follow the procedures prescribed by the Federal Government in using DDT pesticides on cottonfields and, likewise, is unable to determine under

the circumstances described above, that the contamination of McNair's milk resulted through no fault of its own.

Accordingly, and since similar cases may arise in any area where cotton farming and dairy farming are carried out in close proximity, our views are requested as to whether or not indemnity payments may be made to McNair in this matter.

As stated above, Public Law 90–95, approved September 28, 1967, re-enacted the provisions of the earlier indemnity measure originally contained in section 331 of the Economic Opportunity Act of 1964. The legislative history of Public Law 90–95 discloses that extension of the program was made largely to cover cases, such as the one here under consideration, where cotton farmers used airplanes to spray their cottonfields and some of the spray drifted onto the contaminated nearby feed fields (for dairy herds) of other farmers.

In discussing the matter on the floor of the House, the question was raised whether the farmer or the spraying firm which caused damage by drifting should pay for such damages. In reply to that question, Mr. Stubblefield, a member of the House Committee on Agriculture having jurisdiction over the legislative proposal, assured the questioner that—

> In the case of dairy farms, the dairy farmer would have to establish the fact that he was not negligent in the use of the pesticides before he could receive any payment whatsoever.

See 113 Cong. Rec. 25724.

While McNair, as well as its neighbors, may have followed the procedures prescribed for use of DDT on cottonfields so that their own cotton crops were not damaged, in view of the fact that some drifting is probable when DDT is applied aerially, and the legislative history, anyone who applies DDT aerially in the vicinity of his own feed fields has the burden of proving that there was no drifting (on his dairy feed fields) through his fault from such application. This is particularly so in view of the departmental warning to avoid drift of insecticide sprays or dust to nearby crops, especially from applications by aircraft and other power equipment.

Consequently, we do not believe it sufficient that it cannot be proved that McNair was at fault, but rather in order to receive indemnity payments for its milk the burden is on McNair to establish that it was not at fault. This would be true even though McNair's neighbors' aerial applications of DDT to their fields may have been a contributing factor to such contamination. While as noted above, McNair contends that its feed would have become contaminated even if it had not used

any DDT, the converse could also be true, i.e., McNair's feed would have become contaminated even if its neighbors had not sprayed their fields with DDT.

Accordingly, in view of the law, its legislative history, and the administrative instructions on the use of insecticides, it is our view that McNair is not legally entitled to receive indemnity payments for its contaminated milk, since on the basis of the present record McNair has not established that it was not at fault.

[B-167647]

Pay—Service Credits—Inactive Time—Coast Guard Military Personnel

Inactive Naval Reserve cadet or midshipman time served before July 1949 by a Regular Coast Guard officer or enlisted man retiring either for years of service under 14 U.S.C. 291, 292, 354, or 355, for age pursuant to 14 U.S.C. 293 or 353, or for disability as provided in chapter 61, Title 10, U.S. Code, is not allowable for the purpose of retirement. Section 291, in providing for the voluntary retirement of commissioned officers after 20 years of service requires such service to have been "active service;" the word "service" in sections 292, 354, and 355, authorizing voluntary retirement for commissioned officers after 30 years, and for enlisted men after 30 or 20 years, has been interpreted since 1948 as "active service;" sections 293 and 353 in providing for compulsory retirement at age 62 make no reference to years of service; and under 10 U.S.C. 1208 disability retirement is computed on the basis of active service.

Pay—Retired—Computation—Multiplier Credit

Although inactive Naval Reserve cadet or midshipman time served before July 1949 by a Regular Coast Guard officer or enlisted man retiring either for years of service, for age, or for disability, may not be credited for the purpose of retirement, the service counts for multiplier credit and in accordance with 14 U.S.C. 423, the years of service are to be computed under 10 U.S.C. 1405(4), due to the fact that pursuant to 10 U.S.C. 1333 such service is "service (other than active service) in a reserve component of an armed force." However, full-time credit may not be given the inactive service in determining the multiplier factor under 14 U.S.C. 423 and 10 U.S.C. 1405(4), since the service is subject to the computation method provided in 10 U.S.C. 1333(4).

Pay—Service Credits—Inactive Time—Coast Guard Military Personnel

In crediting the inactive Naval Reserve cadet or midshipman service performed before July 1949 by a Regular Coast Guard officer or enlisted man for retirement purposes, there is no distinction to be drawn between the status of a "Cadet, MMR, USNR," or a "Midshipman, MMR, USNR," inasmuch as persons having either status are regarded as members of the U.S. Naval Reserve.

To the Secretary of Transportation, October 21, 1970:

Further reference is made to letter dated August 12, 1970, from the Assistant Commandant, United States Coast Guard, requesting our views in the case of Captain J. W. Yager, 4297, USCG, as to the treatment to be accorded a period of inactive duty as a cadet, Merchant

Marine Reserve, U.S. Naval Reserve, from February 19, 1940, until July 17, 1942, for retirement and retired pay purposes.

The letter states that Captain Yager is now on active duty and that while attending the Massachusetts Maritime Academy at Boston, Massachusetts, he was appointed as a cadet, Merchant Marine Reserve, U.S. Naval Reserve, on February 19, 1940, and continued in that status, on inactive duty, until July 17, 1942, when he was discharged from the U.S. Naval Reserve. The letter states further that Captain Yager desires to retire for years of service from the Coast Guard as soon as maximum retirement benefits are reached. It is also stated that there are five other Coast Guard retired officers that have similar service, with the difference being they had been appointed midshipmen in the U.S. Naval Reserve.

In order to be able to properly advise these officers, the letter of August 12, 1970, requests our views with regard to certain questions there presented. The first question is as follows:

a. Should such period of inactive Naval Reserve Cadet (or Midshipman) service be properly allowable to a regular Coast Guard Officer or enlisted man retiring either for years of service (14 U.S.C. 291, 292, 354, 355), or age (293, 353), or disability (Chapter 61, Title 10, U.S. Code), generally as inactive reserve time served before July 1949?

The sections of Title 14, U.S. Code, referred to in question "a" relating to retirement for years of service provide as follows:

291. Voluntary retirement after twenty years' service

Any regular commissioned officer who has completed twenty years' active service in the Coast Guard, Navy, Army, Air Force, or Marine Corps, or the Reserve compenents thereof, including active duty for training, at least ten years of which shall have been active commissioned service, may, upon his own application, in the discretion of the President, be retired from active service, with retired pay of the grade with which retired.

292. Voluntary retirement after thirty years' service

Any regular commissioned office who has completed thirty years' service may, upon his own application, in the discretion of the Secretary, be retired from active service with retired pay of the grade with which retired.

354. Voluntary retirement after thirty years' service

Any enlisted man who has completed thirty years' service may, upon his own application, in the discretion of the Commandant, be retired from active service, with retired pay of the grade or rating with which retired.

355. Voluntary retirement after twenty years' service

Any enlisted man who has completed twenty years' service may, upon his own application, in the discretion of the Commandant, be retired from active service, with retired pay of the grade or rating with which retired.

14 U.S.C. 291 provides for voluntary retirement of commissioned officers who have completed 20 years of "active service." Therefore, inactive service as a cadet or midshipman in the Merchant Marine Reserve, U. S. Naval Reserve, is not creditable in determining eligibility for retirement under that section.

Sections 292, 354 and 355 of Title 14, U.S. Code, do not specify active service; these sections refer only to *service*. The interpretation to be given to the term "service" in connection with certain retirement statutes was discussed in 28 Comp. Gen. 57 (1948). At page 62 of that decision it was stated that:

> * * * Heretofore, where statutes have required a person to complete a specified number of years of "service" (or "active service") before he can qualify for retirement and the retired pay benefits authorized therein, such statutes generally have been regarded as restricted to persons who have completed the required number of years of *active* service. * * *

Paragraph 12-C-2 of the Coast Guard Personnel Manual, 1967 edition, captioned, "SERVICE CREDITABLE FOR QUALIFYING FOR RETIREMENT" lists only "Active service" as being creditable for that purpose, with certain exceptions not material here. In the circumstances, the conclusion appears to be required that "inactive service" as cadet or midshipman, Merchant Marine Reserve, U.S. Naval Reserve, is not creditable in determining eligibility for retirement under 14 U.S.C. 291, 292, 354, and 355.

Concerning retirement for age, sections 293 and 353 provide as follows:

> 293. Compulsory retirement at age of sixty-two
>
> Any regular commissioned officer, except a commissioned warrant officer, who has reached the age of sixty-two shall be retired from active service, with retired pay of the grade with which retired.
>
> 353. Compulsory retirement at age of sixty-two
>
> Any enlisted man who has reached the age of sixty-two shall be retired from active service, with retired pay of the grade or rating with which retired.

Neither of the above-quoted sections makes reference to years of service. They only provide that either an officer or an enlisted man upon reaching the age of 62 shall be retired. Therefore, discussion of the creditability of service as a cadet or midshipman, Merchant Marine Reserve, U.S. Naval Reserve, is not necessary in determining eligibility for retirement under these statutory provisions.

Chapter 61 of Title 10, U.S. Code, deals with disability retirements. For the purposes of chapter 61, service is computed under 10 U.S.C. 1208, which provides as follows:

> 1208. Computation of service
>
> (a) For the purposes of this chapter, a member of a regular component shall be credited with the service described in clause (1) or that described in clause (2), whichever is greater:
>
> (1) The service that he is considered to have for the purpose of separation or mandatory elimination from the active list.
>
> (2) The sum of—
>
> (A) his active service as a member of the armed forces, a nurse, a reserve nurse after February 2, 1901, a contract surgeon, a contract dental surgeon, or an acting dental surgeon;

(B) his active service as a member of the Environmental Science Services Administration or the Public Health Service; and

(C) his service while participating in exercises or performing duties under sections 502, 503, 504, and 505 of title 32.

(b) A member of the armed forces who is not a member of a regular component shall be credited, for the purposes of this chapter, with the number of years of service that he would count if he were computing his years of service under section 1333 of this title.

Under subsection (a) (2) of section 1208, it appears clear that inactive service as a cadet or midshipman, MMR, USNR, may not be credited in the computation of years of service for a member of a regular component of the armed services. In the absence of a clear statement of facts in a particular case in which consideration of subsection (a) (1) would be pertinent, no opinion is expressed as to the applicability of that subsection. Under subsection (b) a member, who is not a member of a regular component, may be credited with the same service that he would be able to count if he were computing his years of service under 10 U.S.C. 1333. Inasmuch as question "a" and the factual situation presented seem to apply to members of the Regular Coast Guard, discussion of the creditability of service under section 1333 for members who are not members of a Regular component is not necessary under this question. The creditability of inactive cadet or midshipman service under 10 U.S.C. 1333 is discussed in the answer to question "c."

Question "b" reads as follows:

b. In the event of an affirmative answer, would this time count for longevity and hence under 14 U.S.C. 423, for multiplier, once qualification for retirement is had, either on the basis of years of service, age, or disability, as above mentioned?

Since an affirmative answer was not given to question "a", no answer is required to question "b."

Question "c" reads as follows:

c. If an affirmative answer cannot be given, should such period of Cadet (or Midshipman) service count for multiplier credit under 14 U.S.C. 423 and 10 U.S.C. 1405(4), for members of the Coast Guard retiring for age or years of service, or disability, as above mentioned?

Section 423, Title 14, U.S. Code, provides as follows:

423. Computation of retired pay

The retired pay of a grade or rating shall be computed at the rate of 2½ percent of the sum of the basic pay of that grade or rating, and all permanent additions thereto, including longevity credit, to which the officer or enlisted man concerned was entitled at the time of retirement, multiplied by the number of years of service that may be credited to him under section 1405 of title 10. In the case of an officer whose retired pay is computed on the pay of a grade for which basic pay is not based upon years of service the retired pay shall be 2½ percent of his basic pay in the grade in which serving at the time of retirement multiplied by the number of years of service for which he would be entitled to

credit in the computation of pay on the active list had he been serving in the grade of captain at the time of his retirement. A fractional year of six months or more shall be considered a full year in computing the number of years of service by which the rate of 2½ percent is multiplied.

As stated in the above-quoted statutory provisions, the years of service to be used in the multiplier are to be computed under 10 U.S.C. 1405, which provides in pertinent part as follows:

1405. Years of service

For the purposes of section 1401 (formula 4), 3888(1), 3927(b)(1), 3991 (formula B), 6151(b), 6323(e), 6325(a)(2) and (b)(2), 6381(a)(2), 6383(c)(2), 6390(b)(2), 6394(h), 6396(c)(2), 6398(b)(2), 6400(b)(2), 8888(1), 8927(b)(1), or 8991 (formula B) of this title, the years of service of a member of the armed forces are computed by adding—

* * * * * *

(4) the years of service, not included in clause (1), (2), or (3), with which he would be entitled to be credited under section 1333 of this title, if he were entitled to retired pay under section 1331 of this title.

For the purpose of this section, a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

Section 1333, 10 U.S. Code, provides in pertinent part as follows:

For the purpose of computing the retired pay of a person under this chapter, his years of service and any fraction of such a year are computed by adding—

* * * * * * *

(4) 50 days for each year before July 1, 1949, and proportionately for each fraction of a year, of service (other than active service) in a reserve component of an armed force, in the Army or the Air Force without component, or in any other category covered by section 1332(a)(1) of this title except a regular component;

and by dividing the sum of that addition by 360.

In line with the rationale of the holdings in 47 Comp. Gen. 221 (1967) and 49 Comp. Gen. 356 (1969), which deals with the computation of years of service under 10 U.S.C. 1333, inactive service as a cadet, Merchant Marine Reserve, U.S. Naval Reserve, or midshipmen, Merchant Marine Reserve, U.S. Naval Reserve, may be credited under 10 U.S.C. 1405(4), due to the fact that under 10 U.S.C. 1333 such service is "service (other than active service) in a reserve component of an armed force, * * *." Question "c" is answered in the affirmative.

Question "d" is as follows:

d. To the extent that 10 U.S.C. 1405(4) is applied to Coast Guard retirements, is such period of Cadet (or Midshipman) service properly counted as inactive reserve time subject to the years of service computation of 10 U.S.C. 1332, or may it count full time for multiplier purposes?

The provisions of 10 U.S.C. 1332 relate to the computation of years of service in determining entitlement to retired pay under chapter 67 of Title 10, U.S. Code, not years of service in determining the multiplier factor to be used in computing retired pay under 14 U.S.C. 423 and 10

U.S.C. 1405(4). The reference to "any other category covered by section 1332(a)(1) of this title" in section 1333(4) is without significance in this case since it appears that inactive cadet-midshipman service in the Merchant Marine Reserve, U.S. Naval Reserve, is not one of the "other" categories covered by section 1332(a)(1).

The period of inactive cadet or midshipman service may not be given full-time credit for the purpose of determining the multiplier factor under 14 U.S.C. 423 and 10 U.S.C. 1405(4), since such service is creditable only under section 1333(4) and is therefore subject to the computation contained in that section and only the result of that computation may be included under section 1405(4) for multiplier purposes. Question "d" is answered accordingly.

Question "e" is as follows:

e. In any of the above questions, is any distinction to be drawn between the status in the U.S. Naval Merchant Marine Reserve, of Cadets or Midshipmen?

Sections 1 and 318 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1185, provided for the inclusion of the Merchant Marine Reserve as a part of the Naval Reserve. Title 34, Code of Federal Regulations, 1940 Supplement, section 6.1208 entitled "Composition of the Merchant Marine Reserve," included the designation "Cadets, Merchant Marine Reserve, designated as such for officers training for classes D–M or E–M." Thus it will be seen that those persons designated "Cadets, Merchant Reserve," were in fact members of the Naval Reserve. Section 6.2104(c) of the 1940 supplement stated as follows:

(c) Aviation cadets and cadets, Merchant Marine Reserve, shall be appointed by the Secretary of the Navy to serve during the pleasure of the Secretary of the Navy. Appointments to the grade of midshipman will be made only during times of threatened emergency, in accordance with instructions issued by the Bureau of Navigation in separate publication.

It is understood that in June 1941, the Secretary of the Navy, established a classification as Midshipman, Merchant Marine Reserve, U.S. Naval Reserve, and that all cadets appointed after August 1942, in the United States Merchant Marine Cadet Corps and State Maritime Acadamies, were appointed as Midshipman, Merchant Marine Reserve. In the 1943 cumulative supplement to Title 34, Code of Federal Regulations, the applicable part of section 6.1208, was changed to read "Midshipman, Merchant Marine Reserve, designated as such for officer training for class D–M or E–M." No mention was there made of cadets. It appears that subsequent to August 1942 the designation "Midshipman, MMR, USNR," replaced "Cadet, MMR, USNR." However, for the purposes of the questions here involved, it appears that the matter of whether an individual was a "Cadet, MMR, USNR," or a "Midship-

man, MMR, USNR," is of no importance, inasmuch as persons having either status were properly regarded as being members of the U.S. Naval Reserve.

Accordingly, question "e" is answered in the negative.

[B-168296]

Pay—Retired—Disability—Disability Found Prior to Eligibility for Promotion

Where the disability retirement orders of an Air Force major carried out the recommendations of a Physical Evaluation Board who had found the officer permanently disabled and unfit to perform the duties of his office, the promotion of the officer to the temporary grade of lieutenant colonel within 3 months prior to the effective date of his retirement was without effect and inconsistent with governing Air Force regulations; and since the officer's disability was not discovered as a result of a physical examination for promotion to bring the promotion within the purview of 10 U.S.C. 1372(4) and entitle him to retire at the higher grade, there is no authority for the payment of retired pay to the officer computed on the grade of lieutenant colonel.

To Major N. C. Alcock, Department of the Air Force, October 22, 1970:

Further reference is made to your letter of July 8, 1970 (file reference RPTI), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $1,402.68 in favor of Lieutenant Colonel Vernon A. Cartwright, retired, representing the difference in retired pay between the grade of lieutenant colonel and that of major for the period May 1, 1969, through April 30, 1970, in the circumstances disclosed. Your letter was forwarded here under date of July 24, 1970, by the Deputy Assistant Comptroller for Accounting and Finance and has been assigned Air Force Request No. DO-AF-1090 by the Department of Defense Military Pay and Allowance Committee.

In our decision of January 6, 1970, B-168296, to which you refer, we considered the claim of Colonel Cartwright for the difference in retired pay between that computed on the pay of the grade of major and that of a lieutenant colonel for the month of May 1969. As reported in that decision, the officer appeared before a USAF Physical Evaluation Board on August 24, 1967, which board found him to be 20 percent permanently disabled and recommended his permanent retirement. It was further reported that on September 20, 1967, the Promotion Selection Board met and authorized his promotion to the grade of lieutenant colonel effective November 20, 1967.

Under orders dated September 22, 1967, the officer was to be retired by reason of physical disability in the grade of major effective February 1, 1968. By orders dated November 20, 1967, however, he was

promoted to the temporary grade of lieutenant colonel effective that date. Thereafter, the original retirement orders of September 22, 1967, were revoked by orders dated January 15, 1968, and the officer was retired in the grade of lieutenant colonel effective February 1, 1968. The orders of January 15, 1968, did not change the type of retirement (physical disability) nor the effective date of retirement.

In the above decision we quoted, in pertinent part, paragraph 1603, Air Force Manual 35–4—which, as noted, makes a member ineligible for temporary promotion to the grade of major or above on the date retirement or separation for physical disability is approved—and paragraph 17e, Air Force Regulation 36–89, dated September 2, 1964 (governing the temporary promotion of commissioned and warrant officers)—which makes a member ineligible for promotion above the grade of first lieutenant where the date of retirement is within 2 years of the convening date of the selection board that would normally consider the promotion.

In the light of those regulations, we concluded that the promotion of Colonel Cartwright announced in orders dated November 20, 1967, was without effect in view of the retirement orders dated September 22, 1967. We went on to say, however, that this would not preclude the officer's entitlement to the grade of lieutenant colonel if it is determined that he met the requirements of 10 U.S.C. 1372(4).

Section 1372(4) of Title 10 provides that, unless entitled to a higher grade under some other provision of law, any member of an armed force who is retired for physical disability (under 10 U.S.C. 1201) is entitled to the grade equivalent to the temporary grade to which he would have been promoted had it not been for the physical disability for which he is retired, if eligibility for that promotion was required to be based on cumulative years of service or years of service in grade and the disability was discovered as a result of his physical examination for promotion.

You state that it has been determined that the officer failed to meet the requirements of 10 U.S.C. 1372(4), citing as authority a letter dated January 16, 1970, from the Air Force Military Personnel Center, Randolph Air Force Base, Texas, wherein it is stated "Since the Air Force does not give physical examinations for temporary promotions, we do not believe the provisions of 10 USC 1372(4) would apply in Lt Col Cartwright's case." You invite attention, however, to a letter dated November 18, 1966, from the Air Force Chief of Staff to the major commands which you say reduced the 2-year requirement in paragraph 17e, AFR 36–89, cited above, to 90 days provided the basic eligibility criteria were met.

You say that since Colonel Cartwright had more than 90 days

remaining when the promotion board met on September 20, 1967, he was allegedly considered qualified for promotion. You expressed the view that his promotion to lieutenant colonel on November 20, 1967, may have been valid, unless the provisions of paragraph 1603, AFM 35–4, or other provisions of AFR 36–89 would render him ineligible. It seems to be your view that the cited regulations bar a promotion once an officer is determined to be physically unfit to perform the duties of his office or grade, even though on a selected list for promotion.

The change in policy announced in Air Force Chief of Staff letter of November 18, 1966, is currently contained in paragraph 26 of Air Force Regulation 36–89, dated March 31, 1969, which reads as follows:

> 26. Officers Ineligible for Promotion. An officer is ineligible for promotion if he does not meet the basic eligibility criteria announced by HQ USAF, or if he is in one of the following categories:
> a. An officer with an established date of release from EAD, separation, or retirement within 90 days of the convening date of the selection board that would normally consider him. If his date of separation is established after the selection board has convened, but is within 90 days of the date the board convened, the board action concerning him is without effect.

Paragraph 26c of the same regulation provides that an officer is ineligible for promotion if he is "An officer whom the Secretary of the Air Force has determined unfit because of physical disability to perform the duties of his office or grade."

Since it has now been administratively determined that Colonel Cartwright's case does not bring him within the purview of 10 U.S.C. 1372(4), that provision of law is viewed as being inapplicable in this case.

While it seems to be Air Force policy, as stated in paragraph 26 of Air Force Regulation 36–89, that officers being retired or released from active duty are eligible for promotion unless their retirement or release date is within 90 days (instead of 2 years) of the selection board's convening date, we find nothing in that policy which would make an otherwise ineligible officer eligible for promotion. Where, as here, a determination has been made that the officer is unfit because of physical disability to perform the duties of his office or grade, it is our view that the cited regulations do not authorize the officer's promotion.

As stated above, on August 24, 1967, a Physical Evaluation Board found Colonel Cartwright to be permanently disabled and recommended his permanent retirement. The retirement orders of September 22, 1967, retiring him in the grade of major, carried out the Physical Evaluation Board's recommendation. We find nothing in the record to indicate that the finding of permanent disability by the Physical

Evaluation Board was ever changed prior to the officer's retirement on February 1, 1968. It is our view that the promotion orders of November 20, 1967, promoting the officer to the temporary grade of lieutenant colonel were inconsistent with the cited regulations and were without effect.

Accordingly, it is concluded that there is no authority for payment of retired pay to Colonel Cartwright computed on the grade of lieutenant colonel. The voucher and supporting papers will be retained here.

[B-170531]

Military Personnel—Missing, Interned, Etc., Persons—Housetrailer Transportation

The transportation of a housetrailer at Government expense for the dependents of a member of the uniformed services in a missing status, as defined in 37 U.S.C. 551(2), may not be provided in the absence of specific authority. 37 U.S.C. 554, in authorizing the transportation of the dependents and the household and personal effects of members in a missing status, does not expressly provide for the transportation of a housetrailer or a mobile home—and the words "personal effects" as used in the section may not be construed as including a housetrailer—and 37 U.S.C. 409, in providing for a trailer allowance in lieu of the transportation of baggage and household goods, and the payment of a dislocation allowance, restricts entitlement to the member, or in case of his death to his dependents, and makes no provision for payment in the event the member is in a missing status.

To the Secretary of the Army, October 23, 1970:

Further reference is made to letter of July 28, 1970, from the Deputy for Reserve Affairs requesting a decision as to the legality of transporting a housetrailer at Government expense for the dependents of a member of a uniformed service when the member is in a missing status. The request was assigned PDTATAC Control No. 70-40 by the Per Diem Travel and Transportation Allowance Committee.

In the letter the Deputy says that a casual reading of the current language in paragraph M10002, Joint Travel Regulations, would appear to authorize the movement of a housetrailer at Government expense when a member is in a missing status. He says it has been recommended, however, that that paragraph be amended to specifically provide for the movement of a housetrailer under such circumstances but that doubt exists as to whether an amendment of that nature can be accomplished legally.

The Deputy points out that although 37 U.S.C. 554, which provides for the travel and transportation of dependents and household effects of members in a missing status, appears to authorize practically the same entitlements to travel and transportation allowances as is authorized for a member on permanent change of station, there is no specific provision therein covering a housetrailer. Also, he says that 37 U.S.C.

409, which contains the statutory authority for transportation of a housetrailer, appears to restrict the entitlement to those cases where a member is entitled to transportation of baggage and household effects under section 406. Specifically, the Deputy requests our decision as to whether the words "personal effects" as used in section 554(a) may be construed as including a housetrailer for the purpose of transporting it when a member is in a missing status as defined in section 551(2).

Section 409 of Title 37, U.S. Code, provides that under regulations prescribed by the Secretaries concerned, and in lieu of transportation of baggage and household effects or payment of a dislocation allowance, a member of the uniformed services, or in the case of his death his dependents, who would otherwise be entitled to transportation of baggage and household goods, may transport a housetrailer or mobile dwelling within the continental United States, within Alaska, or between the continental United States and Alaska, for use as a residence. Paragraph M10001 of the Joint Travel Regulations defines housetrailer as a residence designed to be moved overland.

Section 409 stems from section 303(c) of the Career Compensation Act of 1949, 63 Stat. 813, which was the basic authority for the payment of the various classes of travel and transporation allowances authorized for members of the uniformed services. Originally no trailer allowance was included in the statute, and in the absence of such provision there was no authority to reimburse a member for the cost of transporting a trailer or his household effects in the trailer.

Concerning this view, it has long been held that housetrailers are not household goods or personal effects. 32 Comp. Gen. 154 (1952); *id.* 367; *id.* 451; *id.* 567 (1953). See, also, *In Re Sorensen's Estate*, 115 P. 2d 241 (1941) and *In Re Armour's Estate*, 99 A. 2d 374 (1953).

Thereafter, section 303(c) was amended by the Career Incentive Act of 1955, 69 Stat. 18, 22, 37 U.S.C. 253(c). The amendment provided authority under which a member who resides in and transports a housetrailer or mobile dwelling within the continental United States on a permanent change of station can receive a trailer allowance not to exceed 20 cents a mile.

In 35 Comp. Gen. 581 (1956) we held that the trailer allowance authorized under section 303(c) of the Career Compensation Act of 1949, as amended by the 1955 act, was payable only to a service member and it may not be paid to his dependent for movement of the trailer by the dependent after the service member's death. As a result of this decision, by the act of March 17, 1958, 72 Stat. 37, the Congress amended section 303(c) to authorize the payment to dependents of members who die on active duty of an allowance for moving a housetrailer in lieu of transportation of baggage and household goods.

Therefore, the trailer allowance provisions currently in 37 U.S.C. 409 authorize transportation of a housetrailer by the member himself or, in the case of his death, by his dependents.

Section 554(b), chapter 10 of Title 37, U.S. Code, provides that transportation (including packing, crating, drayage, temporary storage, and unpacking of household and personal effects) may be provided for the dependents and household and personal effects of a member of a uniformed service on active duty (without regard to pay grade) "who is officially reported as dead, injured, or absent for a period of more than 29 days in a missing status." Such transportation may be provided to the member's official residence, to the residence of his dependents, or as otherwise provided.

Section 554 had its origin in section 12 of the Missing Persons Act, approved March 7, 1942, 56 Stat. 143, 146, formerly contained in 50 U.S.C. App. 1012. Section 12 contained no authorization for the shipment of either a privately owned vehicle or a housetrailer by or for dependents of persons in a missing status. Thereafter, section 12 was amended by the act of August 29, 1951, 65 Stat. 207, and the act of October 19, 1965, 79 Stat. 992, to provide for transportation at Government expense of privately owned vehicles of missing or deceased members. No similar provision, however, has been enacted for the shipment of a housetrailer or mobile home by the dependents of persons in a missing status.

In enacting chapter 10 of Title 37, U.S. Code, the Congress specified the pay and allowances and travel and transportation benefits authorized in the case of a member in a missing status and only these benefits are payable, if otherwise proper, incident to such a status. 44 Comp. Gen. 657 (1965). In 47 Comp. Gen. 556 (1968), a case involving analogous circumstances, we considered the question whether payment of dislocation allowance authorized under 37 U.S.C. 407 could be made to dependents upon relocation of the household by dependents of a member in a missing status. We said that neither section 554 nor section 407 contains any provision for payment of dislocation allowance incident to a member's missing status. We concluded that, in the absence of a specific authorization, payment of dislocation allowance is not authorized in such circumstances. See, also, 44 Comp. Gen. 522 (1965).

Since section 554 limits entitlement to those specific travel and transportation allowances there mentioned and authority to transport housetrailers or mobile homes is not one of the allowances expressly designated, and since the words "personal effects" as used in that section may not be construed as including a housetrailer for the purpose

of transporting it when a member is in a missing status, we are of the view that no authority exists for the payment of trailer allowance in such a situation.

The question is answered accordingly.

[B–163798]

Travel Expenses—Military Personnel—Ship Assignments—Ship Overhaul *v.* Inactivation Away From Home Port

The transportation benefits prescribed by Public Law 91–210, approved March 13, 1970, 37 U.S.C. 406b, for members of the uniformed services permanently attached to ships being overhauled away from home port, whose dependents reside at the home port, may not be extended to the personnel of ships being inactivated away from the home port to authorize reimbursement for round trip travel to visit dependents residing at the home port. Although the act does not define "overhaul," and its meaning is not reflected in the legislative history of the act, since the Navy's definition of "overhaul" does not include the inactivation of a ship, the benefits of the act may not be extended to personnel of ships being inactivated away from home port. However, no exception will be taken to payments already made.

To the Secretary of Defense, October 26, 1970:

It has come to our attention that payments under the provisions of Public Law 91–210, 37 U.S.C. 406b, are being made for round trip transportation of personnel of ships being inactivated away from their home port.

As examples of cases being encountered, we have received copies of five travel vouchers and supporting documents for payments to crewmembers of the U.S.S. *Yorktown* (CVS-10), home port, Norfolk, Virginia, which is being inactivated at Boston, Massachusetts. We are informed that the Boston Navy Finance Office processed 108 of these vouchers, totaling $6,159.20, in May 1970. These are included in the account of the Brooklyn Regional Finance Center.

Section 406b of Title 37, United States Code, added as a new section to chapter 7 of that title by section b(1) of Public Law 91–210, approved March 13, 1970, provides as follows:

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 this 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: *Provided, however,* That in no event shall the amount of reimbursement for personally procured transportation or allowance for transportation exceed the cost of Government-procured commercial round trip air travel.

The law was originally proposed as part of the Department of Defense Legislative Program for the 90th Congress, and the Department of the Navy represented the Department of Defense in the legislative proceedings on the proposal. Testimony on H.R. 8020, 91st Congress, taken before Subcommittee No. 2, Committee on Armed Services, House of Representatives, on March 25, 1969, at pages 591 to 596, shows the purpose of the bill (enacted as Public Law 91–210) was, as the law provides, to entitle a member of the uniformed services, whose dependents are residing at his home port, to Government-owned or procured round trip transportation to and from that home port when the member is permanently attached to a ship which is "being overhauled" at a location away from the home port. The annual cost to the Navy was estimated to be $754,000.

Chief of Naval Personnel Message N07220, April 16, 1970, states that, for the purpose of entitlement to the transportation authorized by section 406b, the term "overhaul" is defined as applicable to any ship directed to be at a port other than the home port, for the specific purpose of performing maintenance. The message also states that, if otherwise entitled, members attached to ships undergoing regular overhaul, interim overhaul, restricted availability, inactivation, and tender availability, are qualified. Excluded from eligibility are vessels performing maintenance while deployed and vessels homeported in the United States, which are contemplated to operate continuously overseas for 1 year or longer, while so deployed. The definition of overhaul, it is stated, "is not to be confused in any way with definition of overhauls for other purposes" contained in Navy Regulation Article 2026. The message further states that its contents were approved by the Per Diem, Travel and Transportation Allowance Committee of the Department of Defense. The message clearly constitutes a legal conclusion as to the meaning of the term "overhaul" as used in the statute.

Article 2026–7, United States Navy Regulations, defines "regular overhaul" as an availability for the accomplishment of general repairs and alterations at a naval shipyard or other shore based repair activity, normally scheduled in advance and in accordance with an established cycle. Article 2050 states that a ship leaving a repair activity upon completion of its overhaul normally shall be ready for war service.

In construing statutes, words and phrases should be given their plain, ordinary and usual meaning unless a different purpose is manifest by the statute itself. See *Champa* v. *Consolidated Finance Corp.*, 110 NE 2d 289, 36 ALR 2d 185. The law contains no definition of the word "overhaul," and there is no consideration of its meaning reflected in the legislative history.

In *Holloway* v. *Wheeler*, Tex. Civ. App., 261 S.W. 467, 468 (1924), a non-maritime case, the court defined overhaul as "to examine thoroughly with a view to repairs." Similar definitions are found in the *International Maritime Dictionary* (1948); *The Oxford English Dictionary* (1961); *Black's Law Dictionary*, 4th Edition (1951); and *Corpus Juris Secondum*, at page 542, volume 67. *Ballentine's Law Dictionary*, Third Edition (1969), defines overhaul as "to repair completely; to recondition." On the record there appears no basis for a conclusion that the term was intended in any different sense in Public Law 91–210.

Since the generally accepted Navy definition of overhaul at time of enactment of Public Law 91–210 was the definition contained in Article 2026 of the Navy Regulations, it appears reasonable to assume that the estimated annual cost to the Navy of the legislation, $754,000, did not include any amount based on travel of personnel of vessels undergoing inactivation.

We find no sound basis for the view that the term "overhaul" as used in Public Law 91–210, includes ship inactivation. During inactivation, some maintenance may be performed incident to the process of withdrawing the ship from active service. However, the essence of such activity is to prepare a ship for storage, and not to repair, recondition, or prepare a ship for combat or for continued active service. There is no intention, in such cases, of returning the ship to a home port for further service and we understand that, commencing with the inactivation procedure, the Navy begins to transfer the members serving on the ship to other stations and duties.

The duration of any particular duty assignment to a ship in such cases would appear to depend on the manpower needs of the Navy and not on the length of the inactivation period. It is our opinion, therefore, that overhaul cannot include inactivation under the general meaning of the term or its general usage in the Navy and that the definition contained in Chief of Naval Personnel Message NO7220, insofar as it relates to inactivation, goes beyond the scope of Public Law 91–210.

Hence, we conclude that there is no legal basis for applying the provisions of, or extending the benefits of, 37 U.S.C. 406b to personnel of any ship undergoing inactivation away from its home port. While we will not take exception to payments of the type involved heretofore made to or on behalf of personnel of ships which have been or are being inactivated if the payments are correct in other respects, no further payments of this type should be made.

An early reply, setting forth the steps taken to implement this decision, will be appreciated.

[B-43917]

Congress—Employees—Restaurant Employees—Alien Employment Prohibited

The special deposit accounts established under 40 U.S.C. 174k(b) and 174j-4, with the Treasurer of the United States by the Architect of the Capitol as manager of the House and Senate restaurants, constitute permanent indefinite appropriations for use similar to a revolving fund in view of the fact the funds otherwise would be for deposit as miscellaneous receipts; and the funds do not lose their identity as appropriated funds, because funds appropriated for the contingent expenses of the House and Senate are deposited and disbursed from the accounts. Therefore, since the restaurant employees are paid from funds considered appropriated funds, the restriction in Public Law 91-144, against the payment of compensation from appropriated funds to other than United States citizens, prohibits the employment of aliens by the restaurants. Overrrules B-43917, August 30, 1944, relative to special deposit accounts; but pursuant to 5 U.S.C. 5533, restaurant employees are now exempt from the dual compensation prohibition.

To the Acting Architect of the Capitol, October 28, 1970:

Reference is made to letter of August 25, 1970, from your general counsel requesting our opinion as to whether section 502 of Public Law 91-144, approved December 11, 1969, 83 Stat. 323, prohibiting the payment of compensation from appropriated funds to an employee unless he is a citizen of the United States, is applicable with respect to the employees of the House and Senate restaurants. The question arises since applications for employment by the restaurants have been received from aliens who do not fall within the exceptions enumerated in the statute.

The restaurants are managed by the Architect of the Capitol as an agent of the Senate or the House of Representatives under authority of section 208 of the First Supplemental Civil Functions Appropriation Act, 1941, 54 Stat. 1056, 40 U.S.C. 174k, as to the House Restaurant, and Public Law 87-82, approved July 6, 1961, 40 U.S.C. 174j-1 to 7, as to the Senate Restaurants.

Section 174k(b) of Title 40, United States Code, provides as follows:

(b) Special deposit account; appropriations.

There is established with the Treasurer of the United States a special deposit account in the name of the Architect of the Capitol for the House of Representatives Restaurant, into which shall be deposited all sums received pursuant to such resolution or resolutions and from the operations thereunder and from which shall be disbursed the sums necessary in connection with the exercise of the duties required under such resolution or resolutions and the operations thereunder. Any appropriation hereafter made from the Treasury of the United States for such restaurant shall be a part of the appropriation 'Contingent Expenses, House of Representatives, Miscellaneous Items,' for the particular fiscal year involved and each such part shall be paid to the Architect of the Capitol by the Clerk of the House of Representatives in such sum as such appropriation or appropriations shall hereafter specify and shall be deposited by such Architect in full in such special deposit account.

A special deposit account for the Senate Restaurants was established by section 4, Public Law 87–82, approved July 6, 1961, 40 U.S.C. 174j–4, which contains language almost identical to that in 40 U.S.C. 174k(b).

Since employees of the restaurants are paid from these special deposit accounts, aliens may not be employed in the restaurants and paid from the special deposit accounts if the funds therein are comprised of appropriated funds.

It seems evident that, in the absence of authority to deposit receipts from operations of the restaurants into the special deposit accounts, such receipts would be for depositing into the Treasury as miscellaneous receipts as required by section 3617, Revised Statutes, 31 U.S.C. 484. Consequently, it is our view that the provisions for depositing such receipts in the special deposit accounts and authorizing their disbursement for restaurant operations constitutes, in effect, permanent indefinite appropriation of such funds for use similar to a revolving fund. See 35 Comp. Gen. 436 and 615 (1956). Furthermore, the fact that funds from the appropriations for contingent expenses of the House and the Senate are deposited into the special deposit accounts and disbursement then made from such accounts does not in our view cause them to lose their identity as appropriated funds. The special deposit accounts merely serve as convenient accounting devices in conducting the financial transactions of the restaurants.

Accordingly, you are advised that in our opinion the funds in the special deposit accounts must be considered to be appropriated funds and thus should not be used to pay compensation to aliens employed in the Senate and House restaurants.

As stated in your letter, we held in our decision of August 30, 1944, B–43917, that funds in the special deposit account for the House Restaurant and in an earlier similar account for the Senate Restaurants were not appropriated funds. Thus the prohibition against the payment of salaries from appropriated funds to employees holding more than one position as set out in section 6 of the act of May 10, 1916, 39 Stat. 120, as amended (now repealed), was not applicable to employees of the House and Senate Restaurants. Nevertheless, for the reasons stated above, we now are of the view that such funds properly must be considered to be appropriated funds.

While such earlier decision therefore will no longer be for application, it should be noted that the employees of the House and Senate restaurants specifically have been exempted from the revised dual compensation provision contained in title III of Public Law 88–448, approved August 19, 1964, now codified in 5 U.S.C. 5533.

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