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[B-157389]

Clothing and Personal Furnishings—Special Clothing and Equipment—Hazardous Occupations—Safety Glasses

The holding in 42 Comp. Gen. 626 that in the absence of a showing that an employee was unable to furnish a prescription from which safety glasses could be made, or that a prescription could not be made from the glasses an employee normally wears, the cost of eye refraction examinations was not for payment by the Government does not preclude such examinations where the employee has not previously worn glasses or where it is administratively determined an existing prescription is inadequate, and the general practice of the Air Force of providing refraction examinations under its occupational vision program established pursuant to 5 U.S.C. 7903, and 29 U.S.C. 668(a) should be discontinued and AFR 160-112 amended to clarify that refraction examinations may be authorized at Government expense only where the employee had previously not worn glasses or his present prescription or glasses are inadequate.

To the Secretary of the Air Force, June 1, 1972:

Reference is made to our letter of January 21, 1972, B-157389, to you concerning that element of the Air Force occupational vision program, as set forth in AFR 160-112 (12 June 1961, with change 1 dated 22 June 1967), which authorizes eye refraction examinations for civilian employees who are to be supplied with prescription safety eyewear. Under paragraph 3 of the regulation such examinations are provided, without cost to the employee, through Government medical facilities or by contract with private refractionists. We noted that under paragraph 14b an existing prescription for corrective lenses may be accepted in lieu of a new refraction examination if minimum visual standards are met by that prescription. However, we indicated our impression that the general practice under AFR 160-112 is to provide such examinations in all cases, while acceptance of an existing prescription is considered only at the request of an employee.

We expressed reservations concerning the propriety of the Air Force practice in light of our decision at 42 Comp. Gen. 626 (1963), which approved the expenditure of appropriated funds to purchase prescription safety eyewear but declined to extend such authority to payment of eye refraction examinations in connection therewith absent a showing that an adequate prescription could not be otherwise obtained. We indicated that the Department of the Army in its regulations (AR 40-5) treats eye refraction examinations for safety glasses as the responsibility of the employee. In view of the foregoing, we requested a response to the following questions:

1. Does the Air Force follow a general practice of providing refraction examinations for civilian employees who require prescription safety eyewear?

2. If so, how is this practice justified, particularly in view of our decision at 42 Comp. Gen. 626?

3. Is there any reason why the Air Force program should not be modified by making application of paragraph 14b of AFR 160–112 mandatory?

4. Are there any circumstances in which application of paragraph 14b would not serve to render the provision of refraction examinations unnecessary?

By letter dated March 24, 1972, from Walter A. Willson, Office of the General Counsel, Department of the Air Force, we are advised that the Air Force does generally furnish refraction examinations under the circumstances described herein. The basic position of Air Force is stated by Mr. Willson as follows:

> * * * The Air Force practice rests, in the final analysis, on the need to obtain reasonable assurance that prescription safety glasses being provided at Government expense are in fact fully suitable for their intended purpose. The Surgeon General of the Air Force has determined that, in the absence of such assurance, acceptance of preexisting prescriptions is inadvisable from both a medical as well as a safety standpoint. It is his professional judgment that the relatively small additional expense of a current examination is more than offset by the additional degree of protection against the dangers inherent in eye hazardous environments. Were this requirement to be relaxed, there would be a significant increase in the risk of visual impairment, damage to Government property and even physical injury to the employee and his co-workers. * * *.

Mr. Willson distinguishes our decision at 42 Comp. Gen. 626 on the basis that there was no indication therein of an administrative determination that considerations of safety and employee well-being required that prescription safety eyewear be ground only from very recent prescriptions, or that a degree of control over examinations be retained. On the other hand, it is stated that the Department of the Air Force had made such determinations with respect to its occupational vision program. Finally, concerning the possibility of making mandatory paragraph 14b of AFR 160–112, it is stated in the enclosure to Mr. Willson's letter that:

> The Department of the Air Force would prefer to avoid acceptance of "outside" prescriptions as a general rule. It is not advisable from a medical or safety standpoint to utilize a prescription which a visually deficient worker has obtained in the past, when equipping him with prescription safety glasses for eye-hazardous work. The Air Force has an obligation to protect the interest of the Government and of fellow workers of the employee involved, as well as those of the employee himself. This obligation cannot be fulfilled unless all measures reasonably available are utilized to assure that the visually deficient employee in an eye-hazardous job is not a hazard to himself or his fellow workers and is not further impairing his vision. To this end, the regulation prescribes initial eye examinations and periodic eye examinations and permits the Air Force a degree of control over the conduct of the examination.

Our decision at 42 Comp. Gen. 626 approving the provision of prescription safety eyewear for the protection of visually deficient employees in eye-hazardous jobs, was based upon section 13 of the act approved August 2, 1946, ch. 744, 60 Stat. 809, reenacted and codified at 5 U.S.C. 7903, which states in part:

§ 7903. Protective clothing and equipment.

Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. * * *.

In addition, section 19(a) of the Occupational Safety and Health Act of 1970, approved December 29, 1970, Public Law 91-596, 84 Stat. 1609, 29 U.S.C. 668(a), requires each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program. See also, 5 U.S.C. 7902. Thus the authority of the Air Force to supply prescription safety eyewear where necessary for the protection of employees is unquestioned.

As to the cost of the eye refraction examinations, in 42 Comp. Gen. 626 we held, in effect, that in the absence of a showing that the employee involved was unable to furnish a prescription from which prescription ground safety glasses could be made, or that a prescription could not be made from the employee's present glasses (i.e., from the glasses he normally wears), the cost of eye refraction examinations was not for payment by the Government.

Our holding in that case was not intended to preclude eye refraction examinations at Government expense for visually deficient employees requiring prescription safety glasses in those instances where the employee involved had not previously worn glasses or where incident to a visual survey an employee's existing prescription was administratively determined to be inadequate(i.e., visually deficient). 42 Comp. Gen. 626 is clarified accordingly. However, to the extent that AR-160-112 authorizes eye refraction examinations at Government expense without requiring an administrative determination as to the adequacy of the employee's existing prescription (or glasses), it is our view that the regulation in question should be amended so as to make clear that eye refraction examinations for prescription safety glasses may be authorized at Government expense only in those instances where the employee involved had not previously worn glasses or where it is administratively determined that his present prescription (or glasses) is inadequate.

[B-175024]

Delegation of Authority—Heads of Agencies to Subordinates—Expenditure Approval—Training Programs

The authority to approve for payment on an individual basis the expenditures that are incurred in the administration of the training program established by the Selective Service System pursuant to the Government Employees Training Act (5 U.S.C. 4101-4118), and to establish criteria for payment, may be delegated by the Director of Selective Service, and a directive to this effect issued, notwithstanding neither the language of the Training Act nor the implementing regulations do not expressly provide for delegation since sections 4103, 4109(a),

and 4105(c) of Title 5 U.S. Code in assigning to agency heads responsibility for the establishment of training programs and for oversight of such programs sanction delegation of authority by agency heads in connection with the development and conduct of agency training programs.

To the Acting Director, Selective Service System, June 1, 1972:

Further reference is made to a letter of January 19, 1972, from Mr. Curtis W. Tarr, former Director of Selective Service, requesting our decision as to whether he might lawfully delegate authority to approve for payment such training course expenditures as are appropriate in the administration of the training program established by the Selective Service System pursuant to the Government Employees Training Act, approved July 7, 1958, Public Law 85–507, 72 Stat. 327, reenacted and codified at 5 U.S.C. 4101–4118.

The act provides for the establishment of employee training programs by the heads of Federal agencies, and authorizes payment of the expenses of such training. In the course of and incident to the establishment of a training program for employees of the Selective Service System, Mr. Tarr desired to delegate to certain officers the approval for payment of such training course expenditures as are appropriate to achieve the objectives of the program. This delegation of authority would be accomplished by means of a proposed directive to provide in substance as follows:

* * * Payment of Training Expenses
Within the authorization for establishing a training program and the fiscal limitations for payment of expenses for such training program as determined by the Director, the Manpower Administrator is hereby designated to approve for payment such training course expenditures as are appropriate to achieve the objectives of the training program.
The Training Manager is designated as Alternate to act in the above capacity. * * *.

We have been informally advised that the intent of the proposed directive is to confer authority both to approve training course expenditures on an individual basis, and to establish criteria for general application with respect to the payment of training costs. The submission was stated to be based upon the following considerations:

It appears that neither the language of the Act itself nor that of the implementing [Civil Service Commission] regulation carries any provision for the delegation of authority as is contemplated by the proposed order. In this connection, there is also for consideration the following Comptroller General decisions: A–32849, December 20, 1930, 10 Comp. Gen. 273; B–11241, July 16, 1940, 20 Comp. Gen. 27; B–15898, May 21, 1941, 20 Comp. Gen. 797; B–156058, February 26, 1965, 44 Comp. Gen. 518. The thrust of these decisions appears to be that the authority established in the head of an agency by a statute may not be delegated in the absence of an express provision for such delegation.

Under 5 U.S.C. 4103, "the head of each agency" is required to "establish, operate, and maintain a program or programs, and a plan or plans thereunder, for the training of employees in or under the

agency * * *." This section further states that each training program and plan shall, *inter alia*—

> * * * provide for adequate administrative control by appropriate authority * * *.

With reference to training expenses, 5 U.S.C. 4109(a) specifies those payments which may be made by "the head of an agency, under the regulations prescribed [by the Civil Service Commission] under section 4118(a)(8) of this title * * *." In addition, 5 U.S.C. 4105(c) provides:

> In order to protect the Government concerning payment and reimbursement of training expenses, each agency shall prescribe such regulations as it considers necessary to implement the regulations prescribed under section 4118(a)(8) of this title.

The above-quoted statutory provisions clearly assign to agency heads responsibility for the basic establishment of employee training programs, and for general oversight with respect to such programs. On the other hand, we believe that these provisions by their specific terms sanction delegations of authority by agency heads in connection with the development and conduct of agency training programs. Thus 5 U.S.C. 4103 provides for adequate administrative control "by appropriate authority." Moreover, 5 U.S.C. 4105(c) specifically requires that "each agency" prescribe regulations with respect to payment and reimbursement of training expenses.

The implementing regulations promulgated by the Civil Service Commission pursuant to 5 U.S.C. 4118(a)(8) are consistent with this construction of the statute. See 5 CFR 410.101–410.902. Thus, for example, 5 CFR 410.301(a) provides:

> The head of an agency shall determine the policies which are to govern the training of employees of the agency. These policies shall be set forth in writing and include a statement of the broad purposes for which training will be given and of the assignment of responsibilities for seeing that these purposes are achieved.

Compare 5 CFR 410.302(b)(1) and (2), which implicitly recognize delegations of authority.

In our letter to Mr. Tarr of March 8, 1972, we informed him that we had requested the views of the Civil Service Commission with respect to this matter. In response to our request, Mr. Anthony L. Mondello, General Counsel of the Civil Service Commission stated in a letter of April 25, 1972, which sets forth the position of the Civil Service Commission as follows:

> I am enclosing a copy of a footnote which appeared in the Federal Personnel Manual until it was inadvertently deleted during a revision. This footnote nevertheless still accurately reflects the view of the Civil Service Commission on this matter and we intend to reinsert it in the FPM at our next opportunity. It states that unless otherwise provided, references to the responsibilities and authorities of department "heads" do not restrict the authority of a department head to

delegate to subordinate officials the powers vested in him. In the light of this I am of the view that there would be no objection to the proposed delegation.

The full text of the footnote referred to by Mr. Mondello appeared in chapter T–1–5 of the Federal Personnel Manual (TS 629, dated March 25, 1959) as follows:

> The [Government Employees Training] Act, Executive Order 10800, the Commission's regulations, and other material in this Chapter make numerous references to the responsibilities and authorities of department "heads." Unless [otherwise] provided, these references do not restrict the authority of a department head to delegate to subordinate officials the powers vested in him. (See 5 U.S.C. 22a. [now 5 U.S.C. 302].)

For the reasons stated, it is our conclusion that the proposed delegation of authority may lawfully be undertaken.

[B–175166]

Public Health Service—Commissioned Personnel—Retired Pay—Foreign Government Employment

A retired member of the Regular component of the Commissioned Corps of the Public Health Service (PHS) who notified the Service of his intent to accept employment with the Canadian Department of Agriculture and inquired whether his retired pay would be affected if he became a Canadian citizen is not eligible to receive retired pay unless his employment is approved by Congress, by virtue of Article I, Section 9, Clause 8 of the United States Constitution and Executive Order No. 5221, although in view of B–51184, August 2, 1945, he may retain payments made. The status of officers of the Commissioned Corps of PHS is like that held by Regular commissioned officers of the armed services who are subject to the constitutional provision and, therefore, pursuant to 44 Comp. Gen. 130, the PHS officer may not receive retired pay while employed by the Canadian Government without congressional consent. B–51184, August 2, 1945, overruled.

To the Secretary of Health, Education, and Welfare, June 1, 1972:

Further reference is made to letter dated February 2, 1972, from the Assistant Secretary for Administration and Management, in which certain questions are presented for decision concerning the retired pay of Mr. R. Edward Bellamy, a retired member of the Regular component of the Commissioned Corps of the Public Health Service, who is now employed by the Canadian Department of Agriculture.

The letter states that Mr. Bellamy retired from the Regular component of the Commissioned Corps of the Public Health Service under the provisions of section 211(a)(3) of the Public Health Service Act (42 U.S.C. 212) on August 1, 1967, and that he began to receive retired pay under the provisions of section 211(a)(4)(A) of the Public Health Service Act (42 U.S.C. 212(a)(4)) in the amount of 57½ percent of the basic pay of the Director grade (0–6) with over 22 cumulative years of service.

It appears that following his retirement Mr. Bellamy moved to Canada and was employed by the Canadian Department of Agriculture. It is indicated in the letter of February 2, 1972, that prior to

his retirement Mr. Bellamy wrote to the Communicable Disease Center of the U.S. Public Health Service regarding his proposed retirement and move to Canada. It is also indicated that, although specific inquiry was not made concerning the propriety of accepting employment with a foreign government while in receipt of retired pay, the Public Health Service was put on notice of his intent to accept employment with the Canadian Government.

It is further indicated that, on June 27, 1971, Mr. Bellamy wrote to the Public Health Service inquiring whether his retired pay would be affected if he became a Canadian citizen.

The Assistant Secretary states that on researching the issue of foreign employment, our decisions of May 1, 1962, 41 Comp. Gen. 715, and September 11, 1964, 44 Comp. Gen. 130, relating to foreign employment of retired members of the armed services, were found. It is indicated that, if the principles set forth in these cases involving retired members of the armed services apply to Mr. Bellamy, a retired member of a uniformed service, Mr. Bellamy would owe the United States an amount of money equal to the salary he has received from the Canadian Government. It is also indicated that it is believed he would also lose any future entitlement to retired pay from the United States so long as he remains in the employ of the Government of Canada and that Mr. Bellamy's retired pay has been suspended pending a ruling by the Comptroller General.

The following questions are presented for decision:

1. Are retired members of the United States Public Health Service Commissioned Corps ineligible to receive retired pay from the Public Health Service while working for a foreign government unless such employment is approved by the Congress, by virtue of Article I, Section 9, Clause 8 of the United States Constitution and Executive Order No. 5221?

Our attention is invited to the provision of 42 U.S.C. 212(c) that retired commissioned officers may be involuntarily recalled to active duty only when the Commissioned Corps has been made part of the armed services.

Question 2 is as follows:

2. If the answer to question one above is in the affirmative, would Congressional approval of Mr. Bellamy's foreign employment at some future date reestablish his right to receive retired pay both before and after the granting of such approval?

In B-51184, August 2, 1945, this Office replied to a question concerning what effect employment by the Government of Haiti would have on the retired pay of the retired medical director of the Public Health Service. That letter stated that, while the record was not clear, it was presumed he was a retired commissioned officer and that we were not aware of any Federal statute prohibiting payment of an annuity to a retired employee while holding and accepting the salary of a non-

Federal office or position including an office or position under a foreign government. No reference was made therein to Article I, section 9, clause 8 of the United States Constitution. Apparently, the rationale applied in that opinion was that the status of personnel of the Public Health Service was generally regarded as civilian with a retired status comparable to that of retired civilian employees of the United States Government. Upon examination of the laws pertaining to commissioned officers of the Regular component of the Public Health Service in light of the above-mentioned constitutional provision, it is our view, however, that the conclusion reached in the opinion of August 2, 1945, was incorrect and it will no longer be followed.

While the Public Health Service is not an armed service, the Commissioned Regular Corps and Reserve Corps of the Public Health Service are similar in nature to the commissioned officers corps of the armed services. Regular commissioned officers of the Public Health Service are appointed by the President with the advice and consent of the Senate, 42 U.S.C. 204, as are Regular officers of the armed services. 10 U.S.C. 3284, 5572, and 8284. Provisions relating to the pay and allowances of both the commissioned officers of the Public Health Service and the armed services are set forth in Title 37 of the United States Code.

The provisions pertaining to the retirement of commissioned officers of the Public Health Service, 42 U.S.C. 212, are similar to those pertaining to the armed services, 10 U.S.C. 3911, 3918, 8911, 8918, 6322, and 6323, with the computation of retired pay based on identical principles. 42 U.S.C. 212(a)(4), 10 U.S.C. 3991, 8991, 6323 and 6325. Retired commissioned officers of the Regular Corps as well as commissioned officers of the Reserve Corps of the Public Health Service may be recalled to active duty voluntarily and involuntarily (42 U.S.C. 212(c)), as is the case with Regular commissioned officers of the armed services. Also, it is noted that regulations in 42 CFR 21.261 (issued pursuant to 42 U.S.C. 216) make retired commissioned officers subject to the disciplinary actions specified in that title. This provision would appear to be analogous to the provision of law that retired commissioned officers of the armed services are subject to the Uniform Code of Military Justice. 10 U.S.C. 802(4).

It is our opinion, therefore, that officers of the Regular component of the Commissioned Corps of the Public Health Service must be viewed as holding a status like that held by Regular commissioned officers of the armed services.

It is well established that an officer of the Army who is retired from active service is still in the military service of the United States. *United States* v. *Tyler*, 105 U.S. 244 (1881); 10 U.S.C. 3075. Similarly, this Office has consistently held that certain members of the armed

services receive retired pay by virtue of their status in the military service. See 23 Comp. Gen. 284 (1943), 37 Comp. Gen. 207 (1957), 38 Comp. Gen. 523 (1959), and 41 Comp. Gen. 715 (1962).

Article I, section 9, clause 8 of the Constitution of the United States provides as follows:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

The Judge Advocate General of the Army has held that retired commissioned officers of the Army hold offices within the meaning of the constitutional provisions in question, since "the officers and enlisted men on the retired list" are a part of the Regular Army. See Digest of Opinions of The Judge Advocate General of the Army, 1912–1940, pp. 10–11; 10 U.S.C. 3075. Likewise, The Judge Advocate General of the Navy has held that retired officers of the Navy hold an office within the meaning of that constitutional provision. C.M.O. 3–1934 and C.M.O. 5–1934, 19 (2 Compilation of Court Martial Orders, 1916–1937, at 1866 and 1844); C.M.O. 4–1943, 116. This Office has also held that in certain cases retired members of the armed services hold an office within the meaning of the above-cited constitutional provision. See B–152844, December 12, 1963; 44 Comp. Gen. 130 and 227 (1964).

We perceive no substantial difference between the status of retired commissioned officers of the Regular Corps of the Public Health Service and the status of retired commissioned officers of Regular components of the armed services. Therefore, in the absence of an authoritative judicial decision to the contrary, it is our view that retired Regular officers of the Public Health Service do hold an office within the meaning of Article I, section 9, clause 8 of the Constitution of the United States, and therefore, the holding in 44 Comp. Gen. 130 (1964) applies to to the retired pay of such officers.

Executive Order 5221, November 11, 1929, provides as follows:

> It is hereby ordered that no officer or employee in the executive branch of the United States Government, regardless of whether he is on annual leave or leave without pay, shall be employed with or without remuneration by any foreign government, corporation, partnership or individual, that is in competition with American industry.

The interpretation given to the meaning of the word "office" as applied to Article I, section 9, clause 8 of the Constitution is equally applicable to the term "officer" as used in the Executive order.

Accordingly, question 1 is answered in the affirmative.

The Constitution specifically authorizes Congress to regulate foreign employment by officers of the United States. Therefore, Congress may authorize Mr. Bellamy's foreign employment. His right to receive

retired pay as a Public Health Service officer for any particular period of time will depend upon the terms and conditions which the Congress may prescribe. See, for example, H.R. 9118, 92d Congress. Relief from liability for payments made for that period prior to congressional approval of his employment could be included in the congressional action. For example, see S. 3295, 92d Congress. Question 2 is answered accordingly.

In view of the conclusion stated in our opinion of August 2, 1945, B–51184, mentioned above, the payments of retired pay that have been made to Mr. Bellamy, if otherwise correct, will not be questioned because of his employment by the Canadian Government. However, further payments of retired pay, including the payments withheld pending decision by this Office, are not authorized while he continues working for the Government of Canada unless such employment is approved by the Congress.

[B–175428]

District of Columbia—Courts—Expense Reimbursement to United States

The phrase "all other miscellaneous expenses" in section 173(b) of the District of Columbia (D.C.) Court Reform and Criminal Procedure Act of 1970, which amends the act of June 30, 1906 that provided for reimbursing the United States a percentage of expenditures made for the expenses of the U.S. District Court for D.C. (47 U.S.C. 204), to prescribe a 30-month phase-out period of the reimbursement procedure at reduced percentage rates, is construed to include reimbursement for the salaries of the U.S. District Court judges, the court clerk and other nonjudiciary or support personnel, and magistrates, as well as fees and expenses of court-appointed counsel, and the expenses for which the funds in the judiciary appropriation acts are available, on the basis that from 1906 to 1971, the D.C. reimbursed the U.S. pursuant to 47 D.C. Code 204 and the annual judiciary appropriation act provisions, and the 1970 act only phased out the program.

To the Executive Officer, District of Columbia Courts, June 1, 1972:

Your letter dated March 9, 1972, concerns the type of expenses required to be reimbursed to the United States by the Executive Officer of the District of Columbia Courts under section 47–204 of the District of Columbia Code. On March 30, 1972, we wrote to the Director of the Administrative Office of the United States Courts, who is responsible for preparing the estimates of expenditures necessary for the maintenance and operation of the United States courts, for his views on the matter. The Director's views were furnished to us in a letter dated April 5, 1972.

Subsection (b) of section 173 of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91–358, 84 Stat. 473, 592, amends section 7 of the act of June 30, 1906, as amended, 47 D.C. Code 204 (henceforth the act), to provide that during the 30-month period beginning on the effective date of the act

the Executive Officer of the District of Columbia Courts shall reimburse the United States for certain expenditures made for the expenses of the United States District Court for the District of Columbia. Reimbursement is to be at a rate of 40 percent of such expenditures for the first 18 months and 20 percent for the remainder of the period. The expenditures for which reimbursement is to be made, as set forth in 47 D.C. Code 204(a)(2), as amended by the 1970 act, are those for "fees of witnesses, fees of jurors, pay of bailiffs and criers (including salaries of deputy marshals who act as bailiffs or criers), and *all other miscellaneous expenses* of the United States District Court for the District of Columbia." [Italic supplied.]

You request a decision of this Office as to the kind of expenses contemplated in the phrase "all other miscellaneous expenses" in 47 D.C. Code 204(a)(2). In particular you ask:

(1) Is the Executive Officer of the District of Columbia Courts required to reimburse the United States for a percentage of the following:
(a) salaries of United States District Court judges;
(b) salaries of the court clerk and other non-judicial or support personnel;
(c) salaries of magistrates;
(d) fees and expenses of court-appointed counsel.
(2) What expenses are considered "miscellaneous expenses?"

A provision similar to the one in question was first enacted in section 7 of the act of June 30, 1906, ch. 3914, 34 Stat. 763, and as amended appeared in 47 D.C. Code 204. This code provision, prior to its amendment by the above-cited 1970 act, read as follows:

Sixty per centum of the expenditures for all of the expenses of the United States District Court for the District of Columbia mentioned below, to wit, fees of witnesses, fees of jurors, pay of bailiffs and criers, including salaries of deputy marshals who act as bailiffs or criers, and *all miscellaneous expenses of said court*, shall be reimbursed to the United States from any funds in the Treasury to the credit of the District of Columbia: *Provided*, That estimates for like expenditures for each fiscal year shall be submitted to the Commissioners of the District of Columbia for transmission with the annual estimates of the District of Columbia. [Italic supplied.]

Pursuant to 28 U.S.C. 601 *et seq.*, the Director of the Administrative Office of the United States Courts is required to pay certain expenses of the United States Courts. The applicable Judiciary appropriation acts make funds available for this purpose. From 1906 to 1971, the District of Columbia has been required, by the provisions of 47 D.C. Code 204 and by provisions consistently included in the Federal Judiciary appropriation acts, to reimburse to the United States a percentage of these expenditures made for the District Court of the United States for the District of Columbia. See for example, section 402 of the Judiciary Appropriation Act, 1971, Public Law 91-472, dated October 21, 1970, 84 Stat. 1057, which provides:

SEC. 402. Sixty per centum of the expenditures for the District Court of the United States for the District of Columbia from all appropriations under this

title and 30 per centum of the expenditures for the United States Court of Appeals for the District of Columbia from all appropriations under this title shall be reimbursed to the United States from any funds in the Treasury to the credit of the District of Columbia.

The appropriations in this and similar acts were available to pay the salaries of judges, the salaries of supporting personnel, fees and expenses of court-appointed counsel, fees of jurors, and travel and other miscellaneous expenses.

As noted, since 1906, the law has contained reimbursement provisions, in one form or another, similar to those in the 1970 District of Columbia court act. It is reasonable to assume from this that the Congress was aware, and approved, of the interpretation which had consistently been given to these provisions by the District of Columbia and the appropriate Federal agency. Although the legislative history of the 1970 act does not discuss or explain the phrase "miscellaneous expenses," in the absence of legislative history to the contrary, we must assume that Congress intended that the phrase "all other miscellaneous expenses" in the 1970 act should be given the same interpretation that it has had since 1906. In other words, it is our view that in enacting section 173(b) of the 1970 act, the Congress did not intend to cause any change—except as to the gradual phase out thereof—in the reimbursement procedure which has been in effect since 1906. Thus, we note that the first section of 47 D.C. Code 204(a) continues in effect, until the day before the effective date of the act, the same reimbursement procedure at the same percentage rate (i.e., 60 percent) that had been required by the former provisions of 47 D.C. Code 204 and the most recent appropriation provisions and that the change in this procedure after the effective date of the act is the gradual phase out of that procedure over the succeeding 30-month period. In this regard, the Director of the Administrative Office states that since the enactment of the provision in the 1906 act, the phrase "miscellaneous expenses" has been interpreted by both the District of Columbia and the United States Judiciary to include the compensation of United States judges sitting in the District of Columbia.

Accordingly, we feel that during the 30-month designated phase out of the scheme of reimbursement, the Executive Officer of the District of Columbia Courts is required to reimburse the United States, in the percentages provided by the law, for expenditures made for those types of expenses of the United States District Court for the District of Columbia for which, pursuant to 47 D.C. Code 204 (prior to its amendment by the 1970 act) and the annual Judiciary appropriation act provisions, it has traditionally reimbursed the United States. This would appear to include the salaries of the United States District Court judges, salaries of the court clerk and other nonjudiciary or sup-

port personnel, salaries of magistrates, fees and expenses of court-appointed counsel, and other expenses for which the funds appropriated in the Judiciary appropriation acts are available. Your questions are answered accordingly. A copy of this decision is being sent to the Director of the Administrative Office of the United States Courts.

[B-175461]

Bids—Information Status—Submitted After Bid Opening

The low bid submitted on a "brand name" basis under a small business set-aside requiring the component parts of tent frames and doors to be furnished on a "Brand Name or Equal" basis is not a nonresponsive bid because the bidder secured price quotations on the parts after bid opening and after the contracting agency had contacted the manufacturer—which according to the record was not an improper interference—as the bid on its face complied in all material respects to the invitation for bids, and the fact that the bidder could not anticipate furnishing the brand name item at bid opening time is a matter of responsibility and not bid responsiveness for the significant time to determine ability to perform is not at bid opening time but at the time of scheduled performance, and the contractor if unable to perform would be subject to a default termination and liability for excess costs.

Contracts—Protests—Procedures—Compliance

Although in not giving the unsuccessful bidder notice of the determination to make an award of a contract while a bid protest was pending with the United States General Accounting Office (GAO), the contracting agency failed to comply with section 20.4 of the GAO bid protest procedures (4 CFR 20.4), GAO has no authority either to impose time limits on contracting agencies for reports on protests or to regulate the withholding of award. However, it is hoped agencies will incorporate the protest procedures and standards into their regulations. Furthermore, the agency's determination that an early award was necessary to take advantage of the low bid before it expired in order to avoid accepting the next low bid at a substantial increase, and the mailing of a "no award" notice after award was not contrary to the Armed Services Procurement Regulation, which in Paragraph 2-407.8(b)(3) does not require notice to be given prior to award.

To Sellers, Conner & Cuneo, June 1, 1972:

This is in reference to your letter of March 22, 1972, and subsequent correspondence regarding the protest of Magline, Incorporated, against award of a contract under invitation for bids (IFB) DSA100-72-B-0847, issued January 17, 1972, by the Defense Personnel Support Center, Defense Supply Agency (DSA), Philadelphia, Pennsylvania.

The invitation, a small business set-aside, was for quantities of ten frames and tent frame doors, with several component parts to be procured on a "Brand Name or Equal" basis. Magline bid on an "or equal" basis after it was unable to obtain a quote from the Joy Manufacturing Company, the brand name supplier for six of the component parts. The only other bidder, Brooks & Perkins, Incorporated, submitted a bid that was more than $193,000 lower on a "brand name" basis, even though Joy had also declined to provide it with a quotation.

After the bid opening on February 8, 1972, Magline questioned the Brooks & Perkins' bid in view of Joy's refusal to quote on the component parts. Joy was then contacted by a representative of the Army agency that prepared the specification. On February 21, 1972, Joy telephoned prices for the component parts to Brooks & Perkins and confirmed the quotation by telegram of February 23. Magline then filed a protest with the contracting officer, alleging that Brooks & Perkins' bid was nonresponsive and that the Government improperly intervened in the bidding process to the prejudice of Magline. The contracting officer denied the protest, and Magline then filed a protest with this Office on March 16, 1972. The contract was awarded to the low bidder on April 13, 1972.

The primary issue raised by this protest is whether the Brooks & Perkins' bid was nonresponsive because at the time of bid opening the company could not furnish the brand name items on which its bid was based. You claim the bid was clearly nonresponsive because in fact there was no brand name item available upon which a bidder could base an offer, and any bid offering the brand name items could not conform to the IFB. While you admit that the bid conformed "in form only" to the IFB, you assert that it must conform in fact as well, and that it did not do so here.

We agree with you that bid responsiveness involves conformity in all material respects to the provisions of the solicitation. A bid, to be responsive, must be one that binds a bidder to all the terms of an invitation. As we said in 49 Comp. Gen. 553 (1970):

> * * * the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive. * * *

Applying that test to this case, we think the contracting officer was correct in treating this matter as one of bidder responsibility rather than as one of bid responsiveness. It is clear that the bid, on its face, complied in all material respects to the IFB. It is equally clear that acceptance of the bid would result in a valid contract that would bind Brooks & Perkins to furnish Joy components. Thus, we fail to see how Brooks & Perkins' lack of a valid quotation from Joy at time of bid opening could render its bid nonresponsive.

We believe this is more a matter of bidder responsibility, since it clearly involves the bidder's ability to carry out the contractual promise to furnish products with the specified brand name component parts. The significant time with respect to the ability to successfully perform is not bid opening but scheduled performance. 46 Comp. Gen. 326

(1966); 47 *id.* 539 (1968). Accordingly, Brooks & Perkins could properly arrange for a quote from Joy subsequent to bid opening. In this respect, the contracting officer requested the preaward survey team to put special emphasis on the low bidder's ability to obtain the brand name components, and the survey report indicated that Brooks & Perkins did in fact have the necessary quotations from brand name suppliers. Of course, had the preaward survey revealed that the potential contractor could not obtain the brand name parts, the contracting officer could have properly determined Brooks & Perkins to be nonresponsible. See B–174919, April 17, 1972, in which we held that a bid conforming to the delivery requirements of an invitation was responsive, notwithstanding the factual impossibility of the bidder's meeting that schedule, and that such impossibility was a matter of responsibility.

The only case you cite in support of your contention of bid nonresponsiveness, 50 Comp. Gen. 530 (1971), involved the submission of a bid or a small business set-aside by what was represented to be a joint venture when in fact the joint venture did not exist at time of bid opening. We noted that the name on the bid document differed from the name on the bid bond, and that award of a contract "would not result in an enforceable contract as contemplated by the procurement statute and regulations." 50 Comp. Gen. 530, 534. We think that case is clearly distinguishable and has no bearing on the instant situation.

We think the facts of this case are similar to those reported in the *Appeal of Magnusonics Industries, Inc.*, GSBCA–1620, December 10, 1965. In that case the contract called for delivery of certain brand name items. The contractor proposed to furnish "or equal" items, claiming it inadvertently omitted to indicate "or equal" in its bid. The Board upheld the subsequent default termination, noting that the contractor was required to perform in accordance with the terms of the contract. Similarly, if Brooks & Perkins could not deliver the brand name items it bid on in the instant case, it would be subject to a default termination and liability for excess costs.

With respect to the Government's intervention in the bid process, you claim that the Defense Supply Agency, upon receipt of information from Magline that Joy would not quote, proceeded to qualify the Brooks & Perkins' bid. You assert that at the behest of the contracting officer, an official of the United States Army Natick Laboratories contacted Joy and prevailed upon it to make its component parts available to Brooks & Perkins. In support of this assertion, you furnished a copy of an internal memo from Magline's purchasing department, which states that the Manager of Marketing and Administration for Joy Manufacturing Company advised a Magline official that "one of his

Branch Managers was asked by someone from the Government at Natick, Mass. Lab to provide a quotation." The contracting officer, however, denies that there was any intervention by the Government. He furnished, with his administrative report, a sworn statement from the Natick official, which states the following:

Mr. Earl Melville, Technical Operations, DPSC, called me in February 1972 to inquire about other sources for the electrical lighting and wiring components under Specification MIL-F-40132D. Mr. Melville was under the impression that Joy Manufacturing Company, the stated source on the Government drawing for these items, was no longer producing the items cited on NLABS Drawing 5-4-588. He inquired if other sources for these items were available.

I contacted Mr. Edgar Hubert, Sales Representative for Joy Manufacturing Company to determine if Joy still made the specified components. Mr. Hubert returned my call after checking with the Joy Manufacturing Company headquarters and informed me that the company still fabricated and stocked the respective items but did not furnish quotations on relatively large procurement actions because management decided not to incur the costs of preparing quotations inasmuch as they had never received an order under a large Government procurement action. The company felt that it was not in a competitive position for such procurements and saw no reason to incur the costs of preparing quotations.

The file also contains a letter dated March 23, 1972, from Brooks & Perkins which states:

As has previously been stated, our Estimating Department generated a detailed cost estimate, utilizing a mixture of estimated prices based on our past cost records on this tent frame plus any new quoted prices which arrived in time to be included in the final price work up.

Our bid was mailed on February 4, 1972 and based on using brand name products. After bid mailing, we were advised by our Purchasing Department that Joy Manufacturing had replied that they could not quote competitively on the wiring harness.

We mentioned the fact to Miss Callahan that one of the brand name vendors was deferring from quoting but that we hoped to work something out.

Our Purchasing Agent, Mr. Neil McLean, contacted the local Joy Manufacturing representative, Mr. Bill Thorup, of J. Kinnear & Company, and together they called Mr. E. N. Baker, Sales Manager of Joy Manufacturing Company. Mr. Baker advised that they had never received any orders on this item except on one occasion from Mag Aerospace and ourselves, and he did not feel that they could compete with Mohawk Electronics who had received all of the previous business from the major supplier of this tent frame. Mohawk would never quote to us on this item. We advised Mr. Baker that we had based our quotation on previous Joy Maufacturing prices to us, and he agreed to quote us.

Since we believe that the Brooks & Perkins' bid was fully responsive to the invitation, we cannot view the actions of the Government officials involved in this procurement as attempts to make a nonresponsive bid responsive after bid opening. In addition, we cannot conclude, on the basis of this record, that there actually was improper Government interference. In this respect, we think the following comments included in a supplemental report dated May 5, 1972, from DSA are relevant here:

Whether efforts by Brooks & Perkins (Brooks), or the Government, or both, motivated Joy Manufacturing Co. (Joy) to quote on its brand name item is not clearly established. Information furnished in a sworn statement by Mr. Siegel discloses no improper action on the part of the Government. Even if Government

representatives had persuaded Joy, whose product was identified by name in the specification, to continue to provide the item as a component and to quote to the low bidder before award, such action would clearly be in the best interests of the United States, could not affect the responsiveness of bids, and would be no more than would have been done if the nonavailability of the item were brought to the attention of the Government before bid opening, after bid opening, or after award, for any bidder or contractor.

Finally, you object to the awarding of a contract to Brooks & Perkins while this protest was pending. You state that Magline was not given notice of the agency's decision to make the award as required by Armed Services Procurement Regulation (ASPR) 2-407.8(b)(3) and by section 20.4 (4 CFR 20.4) of the GAO bid protest procedures.

ASPR 2-407.8(b)(2) requires that "a notice of intent to make award" be furnished the Comptroller General when a protest is pending, and that advice as to the status of the case should be obtained. ASPR 2-407.8(b)(3) provides that an award should not be made during the pendency of a protest unless the contracting officer determines that an urgent requirement exists, that delivery will be unduly delayed if award is not made, or that a prompt award will otherwise be advantageous to the Government. That section further provides that if an award is made under such circumstances, the contracting officer "shall give written notice of the decision to proceed with the award to the protester * * *." Our bid protest procedure states that an award shall not be made prior to a ruling by the Comptroller General "unless there has first been furnished to the General Accounting Office a written finding by the head of the agency, his deputy, or an Assistant Secretary (or equivalent), specifying the factors which will not permit a delay in the award * * *."

In its letter of April 7, 1972, forwarding the administrative report on the protest, DSA stated that Brooks & Perkins' bid was extended to April 15, 1972, but that it might not be extended beyond that date, thereby requiring an early award to protect the substantial price difference in the two bids. DSA furnished you with a copy of that letter. On April 13, 1972, an official of DSA contacted our Office by phone to advise that prompt award appeared necessary because the bid would expire on April 15. On April 20, we received a letter dated April 18, 1972, from the DSA Assistant Counsel advising that award was made on April 13, 1972, because the low bidder "would not extend its bid beyond 15 April 1972 and a substantial increase in price would be involved in an award to the next low bidder." We are also advised by the supplemental report of May 5, 1972, that the notice of "no award" was mailed to Magline on April 18, 1972, in accordance with normal procedures under ASPR 2-407.8(b)(3). DSA correctly points out that this section does not require notice to be given prior to award.

We do not believe the recited facts support your assertion that the provisions of ASPR were not followed. While we think it is clear that the provisions of 4 CFR 20.4 were not complied with, the preamble to Title 4 of the CFR states that the GAO "has no authority either to impose time limits on contracting agencies for reports on protests or to regulate the withholding of award," and we expressed the hope that agencies will incorporate our procedures and standards into their own regulations. Since the administrative action complained of was not contrary to the provisions of ASPR, we do not find any basis for disturbing the award.

For all of the foregoing reasons, your protest must be denied.

[B-174842]

Bids—Alternative—Failure To Bid on Alternate—Bid Rejection Unjustified

The requirements award under an IFB soliciting base and alternate bids for motor vehicle parts pursuant to the concept of a contractor-operated on-base parts store, which asked for separate discounts in the base bid on common and captive parts and a single discount in the alternate bid on the parts, should be terminated for the convenience of the Government and an award offered to the low bidder on the base bid since the bidder's failure to bid on the alternate items did not justify rejection of its low base bid as the bid covered all the work contemplated, nor is the bid invalid because a 90 percent discount was offered on the captive parts, as the unusually high discount does not evidence the submission of an unbalanced bid, a mistake, or the future intent to transfer parts during contract performance to the lower common parts category. Moreover, in the absence of an IFB provision, it was inappropriate in the evaluation of the alternate bid to consider an unliquidated cost reduction to administer one discount.

General Accounting Office—Recommendations—Implementation

A recommendation for corrective action—the termination of a contract for the convenience of the Government and an award to the low, responsive bidder—requires the contracting agency under section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, to submit written statements of the action taken with respect to the recommendation to the House and Senate Committees on Government Operations not later than 60 days after the date of the recommendation, and to the Committees on Appropriations in connection with the first request for appropriations made more than 60 days after the date of the recommendation.

To the Secretary of the Air Force, June 5, 1972:

Reference is made to letter LGPM dated February 14, 1972, with enclosures, from the Chief, Contract Management Division, Directorate, Procurement Policy, Deputy Chief of Staff, Systems and Logistics, and supplemental documentation supplied subsequent thereto, all reporting on the protest of Pensacola Electric Garage, Inc. (Pensacola), against the award of a contract to East Bay Auto Supply Inc. (East Bay), under invitation for bids (IFB) No. F08651-72-B-0089, issued by Eglin Air Force Base (Eglin), Florida.

For the reasons hereinafter stated, we recommend that the contract awarded to East Bay be terminated for the convenience of the Government since the record establishes that award was made to other than the low responsive bidder and that award of the procurement be made to Pensacola, if that firm, the low bidder, is willing to accept the award at its bid price and it is determined to be a responsible prospective contractor. See 51 Comp. Gen. 62 (1971). In making this recommendation, we requested, received and considered the views of East Bay, in accordance with our bid protest regulations (4 CFR 20.2). Furthermore, we would appreciate advice of whatever action is taken on our recommendation.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, 31 U.S.C. 1172. In view thereof, your attention is directed to section 236 of the act which requires that you submit written statements of the action taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

The IFB requested bids on a requirements contract for the furnishing to Eglin of commercial parts and accessories for motor vehicles and other equipment specified therein under the concept of a contractor-operated, on-base motor vehicle parts store (COPARS) for the period of January 1 through December 31, 1972. The schedule of items in the IFB solicited bids on base bid and alternate bid bases. The base bid set forth Government estimates of parts consumption representing the total annual anticipated requirements at retail value of three types of parts (common, captive and rebuilt) to which bidders were to cite separate discounts. The alternate bid called for a single discount for common and captive parts, while requesting a separate discount only for rebuilt parts. Both the base and alternate bid required an hourly rate for operation of the parts store during nonduty hours for an estimated 80 hours. In addition, the IFB supplied the following definitions:

e. Rebuilt Part. A used, unserviceable part that has been reconditioned to become a serviceable part.

* * * * * * *

h. Common Part. A part that is produced by more than one manufacturer thereby becoming available from more than one source of supply in the competitive commercial replacement parts system. (For example, if a particular part for an International vehicle must be obtained from International or their dealers, the part is "captive." However, if the part or a substitute part also can be

obtained from other manufacturers or dealers, the part is common regardless of where it is obtained. A seal for a Ford vehicle which can be obtained from sources other than the Ford parts distribution system is "common" even though the box it comes in may be marked "FOR FORD MODEL ———— YEAR ————."

i. Captive Parts. A part (1) manufactured or controlled by a single source and available only from the manufacturer or his dealers and (2) not available under the provisions of paragraph h above. A common part requested by the Government by brand name becomes a captive part.

Section "D" of the IFB, entitled "EVALUATION OF BIDS," reads as follows:

Bids will be evaluated and award based on the lowest aggregate of the Net Amounts of either Items Ia, Ib(1), Ib(2), Ic(1), Ic(2), and II of the BASE BID OR NET AMOUNTS of Items Ia, Ib, and II of The Alternate Bid. All net amounts (Item I) will be the Government's estimate less the discount offered. FAILURE TO BID ON EVERY ITEM IN THE BASE BID AND EVERY ITEM IN THE ALTERNATE BID WILL CAUSE REJECTION OF BID.

ONLY ONE CONTRACT WILL BE AWARDED FROM THIS SOLICITATION.

Pensacola submitted the low bid on the base bid items amounting to $277,847.40 after considering prompt payment discounts, but failed to bid on the alternate items. The Eglin contracting officer rejected the Pensacola bid primarily because it failed to bid on the alternate items as required by section "D," quoted above. Whereupon, the contract was awarded to East Bay on November 19, 1971, as the lowest responsive bidder on the basis of its alternate bid in the aggregate net amount of $302,264.72. Pensacola protested the award to our Office on the ground that, as low bidder in accordance with the evaluation section of the IFB, it was entitled to the award, and that it was not necessary to submit an alternate bid to be responsive to the advertised requirements.

The Eglin contracting officer supports, in detail, the rejection of the Pensacola bid and explains the basis for requiring bids on the two bases as follows:

Other DOD activities have encountered difficulties when COPARS contracts have been awarded which contain separate and different discounts for "common" and "captive" parts. Misclassification of "common" parts as "captive" was noted as a major deficiency in contracts audited by the Auditor General, as reported in AFSC (PPPR) letter to this center dated 28 August 1970. An "across-the-board" discount on common and captive parts has been suggested as a better method of procurement in several instances (for example, the report from the World-Wide Command Procurement Conference in 1969). Because of this, and since it is recognized that a consolidated discount should afford a better overall price to the government by reducing the contractor's administrative time and by reducing cost of auditing by government personnel, it was decided that bids on the current solicitation be obtained that way. Because of the possibility that no bids would be submitted on an "across-the-board" discount unless required, and since it was uncertain whether it would be a lower net cost if bids were offered in that manner, it was decided to require bids on both bases; that is, with the "common" and "captive" discounts separately as a base bid, and consolidated as an alternate bid.

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* * * This amount [total dollar value] is an estimate for the one year contract period, and as such, there is no way to determine exactly what monetary difference will actually result from the award in this manner. * * *

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* * * There is no way to determine a dollar figure that the government will save by awarding on the basis of the combined discounts; but without doubt, the cost of administration and audit will be significantly reduced. * * *

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* * * the bid submitted by Pensacola Electric Garage is considered to be unbalanced and as such, award to that firm would have required an extensive evaluation in considering their responsibility if the bid had been otherwise responsive. It should be noted that the discount offered on Items Ib(1) captive parts for sweeping and fire fighting equipment was 90% and Ib(2) other captive parts was 90%. The other bids on Item Ib(1) ranged from 0% to 45% and Ib(2) from 10% to 45%. Records on previous COPARS bids at this center indicate that discounts bid on other captive parts have never been higher than 60%. A tabulation of statistics (compiled by the Air Force Logistics Command/AFLC) on COPARS contracts as furnished to attendees of the World-Wide Major Command Staff Procurement Conference in 1969 indicates no discount being offered on captive parts in excess of 50% while the average offered for the 87 contracts represented is 9.67%. Based on this, and common knowledge regarding price listed automotive parts it is the opinion of the contracting officer that the 90% discount is below cost and as such would be indicative of a mistake in bid or some intention on the part of the bidder to move a significant portion of "captive" parts into the "common" category during performance of the contract. Again it should be noted that the discount offered by Pensacola Electric Garage, Inc. for "common" parts was 30% while the award to East Bay Auto Supply results in a 45% discount being obtained on "common" parts.

We do not believe that the failure of Pensacola to submit an alternate bid justified rejection, even though the IFB clearly required a bid on the alternate items. There can be no doubt that Pensacola, in accordance with the above-quoted section "D" of the IFB, submitted the lowest evaluated bid. We have held that the failure of a bidder to respond to a request for prices on an alternate constitutes no basis, sufficient in itself, to require rejection of a bid. The conclusion to be drawn from decisions of our Office in situations such as this, when a bidder fails to bid on a required alternate, is that the bid should not be rejected where, as made, it covers the entire work contemplated under the resultant contract. See B–175055, March 28, 1972, and cases cited therein. Nothing has been proffered by Eglin contracting officials which detracts from the conclusion that Pensacola would have been legally required to perform all work under the contract, as required by the IFB.

In this regard, we do not subscribe to the contracting officer's consideration of evaluation factors other than price to justify the rejection of the Pensacola bid, i.e., an unliquidated reduction of the Government's costs of administration and audit if a contract with a single discount for common and captive parts were awarded. We have held that a cardinal rule of competitive bidding procedures requires that the invitation for bids must advise bidders of any factor other than bid price which is to be considered in determining the low bidder. See 45

Comp. Gen. 433, 435 (1966). Therefore, if Eglin felt that consideration of reduced administration costs, which could reasonably be quantified by an award on the alternate items was a factor to be considered, the IFB should have set forth the administrative cost saving to be used in bid evaluation. See 47 Comp. Gen. 233, 234, 235 (1967); 50 *id.* 447, 454 (1970); and paragraph 2-201(a) Sec. D(i) of the Armed Services Procurement Regulation (ASPR) which calls for the insertion in an IFB of "a statement of the exact basis upon which bids will be evaluated and award made, to include any Government costs or expenditures (other than bid prices) to be added or deducted." In the absence of such a statement of administrative cost savings in the IFB, it is inappropriate to consider administrative costs in the evaluation of bids for award. See B-172107(1), July 19, 1971.

Furthermore, we do not concur with the contracting officer to the effect that Pensacola's offer of an unusually high discount for the captive parts evidences the submission of an unbalanced bid, a mistake, or some future intention to transfer parts during contract performance to the lower discount common parts category. The possibility of mistake is obviated by the fact that, in a letter to our Office, Pensacola, through its attorney, verified the bid with intelligent reference to the high discount for captive parts. As for any possible attempt by Pensacola during contract performance to subvert its high discount, we invite your attention to the fact that the provisions of the IFB and appropriate Air Force regulations covering COPARS matters provide contract administration techniques and procedures, which, if properly implemented, will prevent any such subversion.

On the matter of unbalancing, we quote from our decisions in 49 Comp. Gen. 330, 335 (1969), and *id.* 335, 343-344 (1969), with respect to our views expressed on prior COPARS procurements:

> As to the matter of unbalanced bids generally, it is our view that it is in the best interest of the Government to discourage, through appropriate invitation safeguards, the submission of unbalanced bids based on speculation as to which items are purchased in greater quantities. 38 Comp. Gen. 572 (1959). However, bid unbalancing *per se* does not automatically operate to invalidate an award of a contract to a bidder. See B-161928, August 8, 1967. Further, the IFB provided for separate discounts on common parts and captive parts at the option of the bidders, and there is no evidence that Dover's discounts on these two kinds of parts constituted irregularity of such a substantial nature as to affect fair and competitive bidding. See B-164736, December 2, 1968. (We note that the MAC proposal to eliminate this problem of unbalanced bids by requiring bidders to cite only one discount for both common and captive parts in a revised IFB may effectively eliminate this problem.)
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> The fact that a bid may be unbalanced does not render it nonresponsive, nor does such factor of itself invalidate an award of a contract to such bidder. As was stated by the Court in *Frank Stamato & Co.* v. *City of New Brunswick*, 90 A. 2d. 34, 36 (1952), "There must be proof of collusion or of fraudulent conduct on the part of such bidder * * * or proof of other irregularity of such substantial nature as will operate to affect fair and competitive bidding." There-

fore, where a bidder has confirmed a bid which appears to be unbalanced and there is no indication that the bid is not as intended or evidence of any irregularity, we have held that the bid may be accepted if it is otherwise the lowest acceptable bid and the bidder is responsible. 38 Comp. Gen. 572, 574 (1959); B-161928, August 8, 1967; B-164736, December 2, 1968, affirmed June 10, 1969. See, also, our decision 49 Comp. Gen. 330 of today (on the Dover case) to the Secretary of the Air Force.

We have been informally advised by the contracting officer that the estimates utilized in the IFB were based on the best information available, taking into account past parts consumption experience and projected future requirements for the contract term. Since the quantities used by Eglin in the IFB represent a reasonable and bona fide estimate of probable requirements, the fact that Pensacola has submitted a high discount for captive parts at its own risk does not invalidate the bid. See B-168205(1), June 30, 1970, at page 11. Further, there is no prohibition against a bidder submitting a bid which will result in a contract eventually performed at an unprofitable price. See B-173487(1), December 10, 1971. Moreover, we observe that no evidence has been presented which establishes that Pensacola's method of bidding would not, in fact, result in the lowest cost to the Government with reference to the price differential between the firm's bid and that submitted by the contractor. See B-172789, July 19, 1971. In conclusion on this point, we find that the submission of the 90-percent discount by Pensacola for captive parts furnished no basis for the rejection of the firm's bid.

We note with interest that your Department has taken steps to avoid the separate discount problem by requiring, in the absence of cogent and convincing reasons to the contrary, a single discount for captive and common parts in future COPARS contracts.

For all of the aforegoing reasons, we conclude that the Pensacola bid should not have been rejected.

[B-86148]

Appropriations—Availability—Music

Expenditures for incentive-type music scientifically programmed, such as the MUZAK system, may be considered "necessary expenses" since the music tends to raise the level of employee morale and increase employee productivity by creating a pleasantly stimulating and efficient work atmosphere that results in savings to the Government and, therefore, the funds appropriated to the Bureau of Public Debt, United States Treasury Department, may be used to make monthly rental payments to the MUZAK Company for the incentive-type music played in the space occupied by the Bureau in a privately owned building, which space was equipped with the MUZAK system prior to occupation by the Bureau. B-86148, dated November 8, 1950, overruled.

To the Secretary of the Treasury, June 6, 1972:

Reference is made to letter of April 5, 1972, from the Commissioner, Bureau of Public Debt, asking our opinion as to whether funds appropriated to the Bureau for salaries and expenses may be used to make monthly payments of $61 to the MUZAK Company, Washington, D.C.

It is explained that these payments would be for incentive-type music being played in space in the privately owned Washington Building which space is already equipped with the MUZAK system, including 31 speakers installed at the expense of the previous tenant. The speakers are all located in the central work area rather than in private offices.

The Commissioner states that many of the employees working in the space involved are engaged in routine accounting and clerical operations and that such kind of work, although necessary to accomplish the objectives of the Bureau, can result in a certain amount of boredom and he calls attention to the fact that many commercial banks, life insurance companies, and other business organizations use MUZAK because they have found that scientifically programmed music tends to raise the level of employee morale by creating a pleasantly stimulating and efficient atmosphere during the workday. The use of scientifically programmed music, he states, would have a similar impact on Bureau employees, especially those who perform the more routine work.

The Commissioner notes that in our decision of November 8, 1950, B–86148, we ruled that expenditures of the type considered herein would not be proper in the absence of legislative authorization more specific than that provided for "necessary expenses," but urges that in the case of the Bureau the nominal cost of renting the MUZAK equpment would be more than offset by employee morale and productivity, and requests our concurrence in his determination that the rental payments constitute "necessary expenses" in carrying out the Bureau's activities.

In the case referred to by the Commissioner, the equipment had been installed and in contending that the expenditures made for such installation and the furnishing of incentive music constituted "necessary expenses" it was administratively stated that the playing of such music had resulted in a lessening of fatigue, tension, distraction, errors, and in an increase in production and job interest, with an overall increase in production efficiency, and that, conversely, the discontinuance of the music would reduce production, increase costs, and adversely affect the morale and efficiency of the employees. Also, it was pointed out that a large number of private industries used incentive music thereby

indicating that such firms must have found that the music resulted in increased production and reduced costs.

Upon reexamination of our earlier decision we now are inclined to agree that the considerations in that case presented a reasonable basis for the administrative view that expenditures for incentive music constituted "necessary expenses" under the appropriation there involved. Accordingly, since the Commissioner has determined that—based on factors such as the improvement of employee morale, increased employee productivity and resulting savings to the Government—the proposed expenditures constitute "necessary expenses" of the Bureau, we will not now question such determination.

[B-175771]

Pay—Readjustment Payment to Reservists on Involuntary Release—Involuntary Release Factor Requirement

Although a retired Commander, USNR, had 28 years, 6 months, and 28 days of service for basic pay purposes and 11 years, 8 months, and 29 days of active service when he was released from active duty under 10 U.S.C. 6389 because he twice failed of selection for promotion, and who because he had not reached age 60 was placed on the retired list without retired or readjustment pay meets the continuous active duty requirement of 10 U.S.C. 687 on the basis his service from December 11, 1962, to July 1, 1971, was not interrupted by a break in service of more than 30 days is, nevertheless, not entitled to readjustment pay because neither his transfer to the Retired Reserve in lieu of discharge or the expiration of his active duty orders on the day he was transferred to the Retired Reserve pursuant to 10 U.S.C. 6389 is considered to be an involuntary release from active duty within the purview of 10 U.S.C. 687.

To Lieutenant C. R. Davies, Department of the Navy, June 7, 1972:

This refers to your letter dated March 28, 1972, with attachments, which was forwarded here by second endorsement dated April 17, 1972, of the Director, Navy Military Pay System, requesting an advance decision as to the legality of payment of readjustment pay to Commander Ernest Elliott, USNR, retired, 429 158/383-12-1209, under the circumstances in his case. Your request has been assigned Submission No. DO-N-1153 by the Department of Defense Military Pay and Allowance Committee.

The record shows that, except for short periods of training duty for inactive duty not exceeding 30 days at any one time, Commander Elliott served on active duty from December 11, 1962, until July 1, 1971, when he was released from active duty. On that date, he had 28 years, 6 months and 28 days of service for basic pay purposes and 11 years, 8 months and 29 days of active service.

On March 24, 1971, the Chief of Naval Personnel advised Commander Elliott that having twice failed of selection for promotion to the grade of captain and being considered as having completed at

least 26 years of total commissioned service on June 30, 1971, his retirement or discharge was required effective July 1, 1971, under the provisions of 10 U.S.C. 6389. He was therefore given an opportunity to elect retirement without pay for the reason that he could not then qualify for non-Regular retirement under chapter 67, sections 1331-1337, U.S. Code, because he had not reached age 60.

On April 20, 1971, Commander Elliott advised the Chief of Naval Personnel that he had submitted his request to be placed in the Retired Reserve and requested that he be considered for immediate recall from the Retired Reserve effective July 1, 1971, and that he be assigned to the billet he had been filling. His request was not approved and he apparently has been placed on the retirement list without retired pay or readjustment pay. By letter dated September 9, 1971, he requested review of his case to determine his entitlement to readjustment pay.

In letter dated January 28, 1972, the Chief of Naval Personnel raised the following questions:

a. May a member on temporary active duty, with frequent short periods of inactive service, be considered to be on continuous active duty as required by the law, 10 USC 687, for entitlement to readjustment pay?
b. May a member who is required by 10 USC 6389 to be transferred to the Retired Reserve in lieu of discharge be considered involuntarily released from active duty as required by 10 USC 687 for entitlement to readjustment pay?
c. May a member whose temporary active duty orders expire on the day that he was transferred to the Retired Reserve pursuant to 10 USC 6389 be considered as being involuntarily released from active duty as required by 10 USC 687 for entitlment to readjustment pay?

In view thereof, you have referred the matter here for advance decision as to whether your office may make the payment of readjustment pay to Commander Elliott.

Pursuant to 10 U.S.C. 687, a member of a Reserve component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately prior to his release, at least 5 years of continuous active duty, is entitled to a readjustment payment computed as therein prescribed. It is further provided that a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days.

Section 6389, Title 10, U.S. Code, as pertinent to Commander Elliott, provides that an officer in an active status in the Naval Reserve in the permanent grade of lieutenant commander or above who is considered as having twice failed of selection for promotion to the next higher grade shall, if qualified, be given an opportunity to request transfer to the appropriate Retired Reserve and if he is not so transferred, he shall be discharged from the Naval Reserve if he has com-

pleted a period of total commissioned service equal to 26 years in the case of a commander.

The reason for the numerous short tours of active duty in Commander Elliott's case is not apparent from the record. However, his service from December 11, 1962, to July 1, 1971, was not interrupted by a break in service of more than 30 days and under the plain terms of the law is considered as continuous. Question *a* is therefore answered in the affirmative. *Cf.* 39 Comp. Gen. 223 (1970).

The purpose of 10 U.S.C. 687 and prior laws in authorizing readjustment payment was to provide some compensation to career reservists in readjusting to civilian life when their active duty careers are terminated involuntarily. An elimination such as is required by 10 U.S.C. 6389 is an action beyond the control of the member involved and for the purposes of 10 U.S.C. 687 generally may be considered to be an involuntarily release from active duty.

Such fact alone, however, does not establish entitlement to readjustment pay. Thus, in our opinion a reservist whose temporary duty orders expire on the day he is transferred to the Retired Reserve pursuant to 10 U.S.C. 6389 is not released from active duty involuntarily within the purview of 10 U.S.C. 687. Question *b* is answered accordingly.

A transfer to the Retired Reserve pursuant to 10 U.S.C. 6389 does not render an otherwise voluntary release from active duty involuntary. There appears to be no statutory prohibition against Commander Elliott's serving on active duty with his consent subsequent to his transfer to the Retired Reserve, and we have been advised informally that there is no Navy regulation prohibiting a recall to active duty in such cases. While Commander Elliott was not accepted for an additional tour of active duty, for which he volunteered, it is noted that on April 20, 1971, he requested immediate recall from the Retired Reserve effective July 1, 1971, and that he be assigned to the Ninth Naval District in a temporary duty status for recruiting matters, the billet which he was then filling.

Thus, even if neither the law nor the regulations precluded further active duty after July 1, 1971, his application for additional active duty was not unconditional and nonacceptance of such offer did not render his release from active duty "involuntary" within the meaning of 10 U.S.C. 687. Accordingly, question *c* is answered in the negative. See *Henneberger* v. *United States*, 185 Ct. Cl. 614 (1968) and 187 Ct. Cl. 265 (1969).

Payment of readjustment pay to Commander Elliott is not authorized and the papers received with your letter will be retained here.

[B-175696]

Bonds—Bid—Sufficiency

A bid bond submitted in the required amount of $52,351.58, which constituted 20 percent of the bid total ($261,757.90), but an attachment to the bond limited the surety's obligation to an amount not to exceed $50,000, is a valid bond that binds the surety in the amount of $50,000, and the low bid may be considered, notwithstanding the bond did not equal the required penal amount, since pursuant to section 1-10.103-4(b) of the Federal Procurement Regulations when the amount of a bid guarantee equals or is greater than the difference between the bid price and the price in the next higher acceptable bid ($272,956), the failure to submit a sufficient bid guarantee may be waived. Although the general rule is that an agent who exceeds his authority may not bind the principal, where the difference between the contract as authorized and the contract as made is a difference in amount, an exception is recognized and the principal is liable upon the contract as it was authorized. B-148309, March 19, 1962, overruled.

To H. E. Hansen, United States Department of Agriculture, June 12, 1972:

We refer to letter of April 4, 1972, your reference 6320, requesting a decision concerning the validity of a bid bond submitted by Midwestern Pacific Corporation (MPC) in response to invitation for bids (IFB) No. R9-72-32, for road and bridge construction in Chequamegon National Forest, Wisconsin.

A bid bond amounting to 20 percent of the bid total was required under the IFB. The low bid in the amount of $261,757.90 was submitted by Midwestern Pacific (MPC); the second low bid in the amount of $272,956 was submitted by Koshak Construction Co., Inc. (Koshak). Included with the bid of MPC was a bid guarantee from the Summit Insurance Company of New York (Summit) for 20 percent of the bid amount, or $52,351.58. However, the authority of Summit's attorney-in-fact was limited by an agreement attached to the bond to obligate the surety to amounts not to exceed $50,000.

The question presented for our consideration is whether the bond is valid. If the bond is enforceable in the penal sum of $50,000, the failure of the bond to equal the penal amount required (in this case $52,351.58) would not require rejection of MPC's bid. Under section 1-10.103-4(b) of the Federal Procurement Regulations the failure of a bidder to submit a sufficient bid guarantee may be waived where, as here, "the amount of the bid guarantee submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid."

As a general rule, an agent who exceeds his powers in making an unauthorized contract does not bind the principal either by the contract as made or as it would have been made had the agent acted in accordance with his authority. However, where the only difference between

the contract as authorized and the contract as made is a difference in amount, an exception is recognized and the principal is liable upon the contract as it was authorized. Restatement, Second, Agency sec. 164; also see *Pogue* v. *Bank of Lake Village*, 464 S.W. 2d 49 (1971); *Lachmiller* v. *Lachmiller Engineering Company*, 301 P. 2d 288 (1956), and cases cited therein.

Accordingly, we consider the bid guarantee submitted with MPC's bid to be valid and to obligate Summit in the amount of $50,000. Our decision B–148309, March 19, 1962, to the contrary, is overruled.

[B–173146]

Contracts—Data, Rights, Etc.—Subcontractors—Government's Status

The proprietary data, drawings of a laser system, furnished by a subcontractor as part of Phase I of the "Pave Nail Program" for the modification of the OV–10 aircraft, which became the basis for the procurement of Phase II, was not wrongfully used by the Government where the drawings were not identified as a trade secret or bore no proprietary legend, had previously been furnished without limitation, and were difficult to categorize as proprietary, as the Government is entitled to disclose and use technical data purchased for value from the prime contractor without restriction or knowledge of a third party's proprietary rights. Furthermore, the Comptroller General will not adjudicate disputes regarding violations of proprietary rights which arise under arrangements to which the Government is not a direct party, and until such rights are established in courts, there is no justification to disturb any program or grant any relief to a protesting party.

Contracts—Protests—Subcontractor Protests

Unless a prime contractor is acting as a purchasing agent, the bid protest procedures of the United States General Accounting Office (GAO) do not provide for the adjudication of protests against subcontract awards made by prime contractors. Furthermore, where the award of a subcontract has been made and neither fraud nor bad faith on the part of the contracting officer in approving the award is alleged, the possibility of finding adequate justification to support cancellation of the subcontract is so remote that consideration of such protests under GAO's bid protest procedures would be unwarranted. However, in the audit of the prime contract, attention will be given to any evidence indicating the cost to the Government was unduly increased because of improper procurement actions by the prime contractor. Furthermore, when a prime contractor is not acting as a Government agent, the bid preparation expenses of the subcontractor are not reimbursable.

To Morgan, Lewis & Bockius, June 15, 1972:

This is in response to your protest on behalf of the Korad Department of Union Carbide Corporation relating to a subcontract for lasers awarded on May 28, 1971, to The Martin Marietta Corporation by LTV Electrosystems, Inc. (LTV–E), under its prime (cost-reimbursable) contract with the United States Air Force.

Essentially your protest is made on two grounds. First, you contend that the solicitation's specifications and drawings issued by LTV–E incorporated your proprietary data. You also have questioned the pro-

priety of the award to Martin for several reasons pertaining, generally, to the competitive nature of this procurement.

The protest relates to a program, referred to as the "Pave Nail Program," the general purpose of which is to make a number of modifications to the OV–10 Aircraft. The laser, one system within the program, has been designated and is referred to hereafter, as a part of the "Pave Spot System." During Phase I of the Pave Nail Program, LTV–E was the prime Air Force contractor responsible for systems integration and Varo, Inc., was a first tier subcontractor for major Pave Spot components, including the laser. As a part of Phase I LTV–E was required to furnish the Air Force a proposal which was to, and in fact did, form the basis for procurement by LTV–E in Phase II for the various systems. Varo, in turn was required under Phase I to provide LTV–E the necessary drawings for the Pave Spot System to be procured for and integrated into Phase II.

It is your position that the solicitation's Specifications and Drawings, Figure 3.2–1, Sheets 1 and 2, incorporated extensive design data from your proprietary interface drawing. You state that Varo tasked Korad to redefine the interface on the oral assurance Korad would get the Phase I laser contract. It is alleged the work product of this effort appears in Korad interface drawing 910188–651, Revision A, and Korad specification control drawing 270094, Revision A, both of which were furnished Varo with limited rights during August 1970. It is noted in your protest that since the Phase I laser contract was awarded to Martin on October 11, 1970, you were not compensated for your effort and that by letter of October 13, 1970, you requested return of the drawings which was effected by Varo on October 16. You take the position that Varo drawing 675–052, dated October 12, 1970, from which the specification figure 3.2–1 was taken, is an exact overlay copy of Korad drawing 910188–651, Revision A, with the restrictive legend removed. Accordingly, it is alleged that the use of Varo drawing 675–052 in the Phase II solicitation by LTV–E exceeds the limited rights to your drawings which you relinquished to Varo and you request, irrespective of whether the subcontract is canceled, that we find you entitled to the fair value of the proprietary drawings used by LTV–E for Phase II.

The Air Force report in this matter presents several reasons for the Department's conclusion that there was no wrongful use of your data by the Air Force. Briefly stated, the reasons given in the report are that the alleged proprietary drawing does not disclose anything that can be classified as a trade secret and that interface drawings, in general, are difficult to categorize as proprietary, particulary since such drawing could not have been produced

exclusively by Korad without previous guidelines regarding pod shape, size, etc. The contracting officer also contends that a drawing, marked Varo SK580–9065, which was furnished by Varo without limitation prior to the August 1970 date, is similar to the one in the solicitation which you claim is proprietary. Furthermore, the Air Force states that at no time did the Government receive the Korad drawing with a proprietary legend attached from either Varo or LTV–E under either of Varo's Pave Spot contracts or under the Pave Nail contract with LTV–E. While LTV–E has reported that the solicitation data which you allege to be proprietary was extracted from Varo drawing 675–052, the record shows that this drawing was furnished by Varo with unlimited rights as required by its subcontract. The Air Force report also points out that notwithstanding your responses dated April 15, 20, 23 and May 10, 1971, to the April 5 solicitation by LTV–E, no exception to the utilization of the data in the solicitation was taken until sometime thereafter and that your protest to this Office was made after award of the subcontracts to Martin.

We believe it is significant and controlling for purposes of this decision that the Air Force obtained the alleged proprietary drawing without a proprietary legend attached pursuant to a contract with LTV–E and proceeded in good faith to allow the drawing to be used as contemplated, that is, for solicitation of competitive offers for the item under Phase II. Moreover, at the time LTV–E received the Varo drawings and used them in the Phase II solicitation, it had no notice of any proprietary rights, actual or alleged, in the drawings involved. We have held that the Government is entitled to disclose and use for any purpose technical data which it purchases for value from a contractor (prime) without restriction and without notice of another (third) party's proprietary rights in the data. See B–156727, October 7, 1965, B–165111, February 26, 1969, and the authorities cited therein.

In addition, the Comptroller General will not adjudicate disputes regarding violations of proprietary rights arising under arrangements to which the Government is not a direct party (e.g., Varo's relation with Korad) and until such rights have been established in courts, or otherwise, we are not justified in disturbing any program or granting any relief to the protesting party. B–156727, October 7, 1965. You have noted that in our decision B–166022, May 22, 1969, we did not require cancellation of the contract but pointed out the statutory authority to the Secretary involved for administrative settlement of the clear breach of confidence found in that case. However, that decision must be distinguished from the present situation in that the data there involved had been directly furnished to the Government, it had been marked with a proprietary legend when received by the Gov-

ernment, and the Government had assured the protestor by letter that its proprietary rights would be protected. Accordingly, your claim for the value of the drawings is disallowed.

In connection with that portion of your protest questioning the competitive aspects of LTV–E's selection of Martin for the award of the subcontract for lasers on May 28, 1971, the bid protest procedures of this Office in effect at that time, 4 CFR 20.1–20.3 (as well as those for current application, copy enclosed) did not provide for the adjudication of protests by bidders against subcontract awards made by prime contractors who are not acting as purchasing agents for the Government. While we have, on occasions, entertained such protests, we believe that in situations such as are present in the instant procurement—where the prime contractor is not acting as a purchasing agent, and where the award has been made and neither fraud nor bad faith on the part of the contracting officer in approving the award is alleged—the possibility of finding adequate justification to support cancellation of the subcontract is so remote that consideration of such protests under our bid protest procedures would be unwarranted. While we will, of course, give appropriate attention in our audit functions involving the prime contract to any evidence indicating that the cost to the Government was unduly increased because of improper procurement actions by the prime contractor, in view of the foregoing we must decline to pass upon the merits of your protest against the award of the subcontract to Martin.

We must also deny your request that this Office direct the Air Force to pay Korad its bid preparation expenses since, irrespective of the merits involved, we are not aware of any authority (and you have cited none) which would permit the expenditure of Federal funds for expenses incurred by a bidder in responding to a solicitation by a prime contractor issued in its capacity as a private concern and not as an agent of the Government.

[B–175758]

Trailer Allowances—Pullman Rail Car—Status as Mobile Dwelling

A Pullman rail car converted and used as a residence by a member of the uniformed services qualifies as a mobile dwelling under Paragraph M10001–1 of the Joint Travel Regulations—which defines a "house trailer" as a mobile dwelling constructed or converted for use as a residence and designed to be moved overland, either self-propelled or by towing, that contains the household goods and personal effects of a member and his dependents—and the member is entitled to the trailer allowance prescribed by 37 U.S.C. 409, which contemplates payment on a mileage basis for overland travel, since there is no indication in section 409 that the allowance is not applicable to a privately owned Pullman car transported overland by rail, and subject to tariff charges, as well as to highway movements.

To the Secretary of the Army, June 15, 1972:

Reference is made to letter dated March 20, 1972, from the Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting decision whether a Pullman rail car converted and used as a residence of a member of the uniformed services may be considered a housetrailer or mobile dwelling so as to entitle a member of the uniformed services to a trailer allowance under the provisions of the Joint Travel Regulations, Volume 1, Chapter 10. The letter indicates that while technically the Pullman rail car would fall within the definition of a housetrailer, as currently contained in the Joint Travel Regulations, doubt exists as to whether within the spirit and intent of the law it can be so considered.

It is explained that the converted Pullman car is being used as a residence by the member; that the car is presently located at the Oceanport Siding, Fort Monmouth, New Jersey, where it had been pulled by a railroad locomotive engine; and that the car has two master bedrooms with shower and commode, one double bedroom with washbowl and commode, living room, dining room, kitchen with sink and refrigerator, complete air conditioning, and connections for hookup to public power.

The statute authorizing trailer allowances, 37 U.S.C. 409, provides that under regulations prescribed by the Secretaries concerned and in lieu of transportation of baggage and household effects or payment of dislocation allowance, a member of the uniformed services, or in the case of his death his dependent, 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, by one of the following means:

(1) transport the trailer or dwelling and receive a monetary allowance in place of transportation at a rate to be prescribed by the Secretaries concerned, but not more than 20 cents a mile;
(2) deliver the trailer or dwelling to an agent of the United States for transportation by the United States or by commercial means; or
(3) transport the trailer or dwelling by commercial means and be reimbursed by the United States subject to such rates as may be prescribed by the Secretaries concerned.

However, the statute limits the allowable costs of transportation under clauses (2) and (3) to the lesser of "(A) the current average cost for the commercial transportation of a housetrailer or mobile dwelling; (B) 74 cents a mile; or (C) the cost of transporting the baggage and household effects of the member or his dependent plus the dislocation allowance authorized in section 407 of this Title [37 U.S.C. 407]."

Paragraph M10007 of the Joint Travel Regulations prescribes that the method of computing distances for mileage purposes will be based on highway distances shown on tables and maps appearing in the Rand-McNally Standard Highway Mileage Guide or the Official Table of Distances (AR 55–60/AFM 177–135/Nav So P–2471) computed in accordance with the instructions appearing in those publications. Paragraphs M10004(3) and M10007 provide that when the trailer is required to be moved over a circuitous route by directives, regulations, or local laws, the authorized distances will be computed via the route necessarily used in transporting the trailer but caution that to determine the lower ceiling of allowances a comparison of items 1 and 3 in paragraph M10004(3) is necessary. The highway distances in both Rand-McNally and the Official Table of Distances are based on highway distances as distinguished from rail route distances.

Paragraph M10001–1 of the Joint Travel Regulations, the regulations prescribed by the Secretaries concerned, defines housetrailer as follows:

1. HOUSETRAILER. The term "housetrailer," as used in this Chapter, means a mobile dwelling constructed or converted for use as a residence and designed to be moved overland, either self-propelled or by towing. It includes all household goods, personal effects, and professional books, papers, and equipment contained in the trailer and owned or intended for use by the member or his dependents.

The allowance for the movement of a housetrailer or mobile home was first enacted as an amendment to section 303(c) of the Career Compensation Act of 1949, 37 U.S.C. 253(c) (1958 ed.), by section 2(13) of the Career Incentive Act of 1955, 69 Stat. 22, which authorized an allowance of not to exceed 20 cents per mile under regulations prescribed by the Secretary concerned. The act did not distinguish between the amount paid to members who transported their homes themselves and the amount paid to those who employed commercial movers to transport such homes. However, the services presently limit the rate of payment to a member who transports his own housetrailer or mobile home to 11 cents a mile (paragraph M10006, Joint Travel Regulations).

Subsequent amendments continued the maximum rate of 20 cents per mile in the event the member himself transports the trailer and increased the commercial rate ceiling to 36 cents (Public Law 87–374, act of October 4, 1961, 75 Stat. 804), then to 51 cents (Public Law 88–406, act of August 7, 1964, 78 Stat. 383) and finally to 74 cents, which is the current law (Public Law 90–246, act of January 2, 1968, 81 Stat. 782, 37 U.S.C. 409). Thus, while the statute authorizes the movement of a housetrailer or a mobile dwelling, payment of the allowance largely is on a mileage basis which contemplates overland travel.

The legislative history of the basic law and subsequent amendments shows that the purpose of the trailer allowance provisions was to

authorize the Secretaries to prescribe appropriate regulations to provide a mileage allowance to a member who transports his trailer or mobile dwelling for use as a residence in lieu of shipping his household goods and payment of authorized dislocation allowance. It was believed that the cost to the Government would be much less by awarding the mileage allowance than it would be by payment of a dislocation allowance and shipping the member's household effects by private carrier under the prescribed limitations. See Senate Report No. 125, 84th Congress, 1st session, to accompany H.R. 4720, which became the Career Incentive Act of 1955.

The legislative history also shows that the increases in trailer allowance have to a great extent been determined on the basis of the rates charged by carriers for movement of mobile homes and housetrailers as published in the tariffs filed with the Interstate Commerce Commission. It is noted that such rates generally vary according to the size of the trailer and the previous allowances of 36 cents and 51 cents were considered quite inadequate for the transportation of the larger trailers. See Senate Report No. 1189, 88th Congress, 2d session, to accompany H.R. 8954 which became Public Law 88-406, act of August 7, 1964.

Since the Pullman car is owned by the member, it would be considered a privately owned car. The Interstate Commerce Commission has held that the term privately owned car, where not defined in tariffs, obviously means a car owned by others than carriers. And apparently a private car owned by an individual would be subject to the tariff charges on privately owned cars. *Use of Private Passenger Train Cars*, 155 I.C.C. 775, 788 (1929). This private car (Pullman) has been converted by the member into a mobile dwelling. Broadly defined, a "mobile home" is a dwelling or abode where people live and is capable of movement or being moved. *Reetz* v. *Ellis*, 186 So. 2d 915, 918 (1966).

As stated above, the maximum allowances for transporting a trailer or mobile home are fixed by law and regulations. The language of both are sufficiently broad to cover both a trailer or mobile home designed to be moved overland either by rail or by highway. Therefore, considering the purpose for which the statutes were enacted and since there is nothing in 37 U.S.C. 409 or the legislative history of the statutes from which it was derived to indicate any intent that it was not to be applicable to a mobile dwelling transported overland by rail (as well as highway movement), it is our view that under the law as presently constituted a privately owned Pullman rail car converted for use as a residence would qualify as a mobile dwelling for the purpose of trailer allowance. See *Delaney* v. *Moraitis*, 136 F. 2d 129, 132 (1943).

[B-175777]

Bidders—Debarment—Procedure—Guidelines Established in Court Decision

A contractor on the Joint Consolidated List of Debarred, Ineligible, or Suspended Contractors in a suspended status whose bids and proposals were rejected under numerous ship repair solicitions pursuant to the holding in 51 Comp. Gen. 703, to the effect the rejection of the bid of a suspended contractor without the issuance of a written determination of responsibility (ASPR 1-904.1(iv)) and referral to the Small Business Administration (ASPR 1-705.4(c)(vi)) was in the best interest of the Government, is not entitled to the reconsideration of his status on the basis of the retroactive guidelines established by the United States Court of Appeals for the District of Columbia in Civil Action No. 72-1392, to prevent unfairness in utilizing ASPR 1-605 suspension procedures, and the validity of the contractor's continued suspension depends upon conformance with the guidelines established in the court decision.

To vom Baur, Coburn, Simmons & Turtle, June 15, 1972:

Further reference is made to your protest on behalf of Horne Brothers, Incorporated, against the award of contracts to other firms under nine solicitations, issued by the Supervisor of Shipbuilding, Conversion and Repair, United States Navy, Portsmouth, Virginia.

The nine solicitations, which are identified below, called for bids or proposals for repair or conversion work on various United States Navy ships. Horne Brothers' unsolicited bid or proposal under each of the solicitations was rejected because on December 14, 1971, Horne Brothers was placed on the Joint Consolidated List of Debarred, Ineligible, or Suspended Contractors, in a suspended status, and it was not considered in the best interest of the Government to consider its offers.

In its report dated May 17, 1972, the Navy has furnished the following resume of the nine solicitations:

(b) RFP N62678-72-R-0261. This RFP was issued for work on the USS RIGEL (AF-58) during a restricted availability from 15 March 1972 until 31 March 1972 (enclosure (1), TAB A). By letter dated 13 March 1972, the Contracting Officer cancelled this RFP for the convenience of the Government (enclosure (1), TAB B).

(c) RFP N62678-72-R-0273. This RFP also concerned work on the USS RIGEL (AF-58) during a restricted availability, this time from 11 March 1972 until 2 April 1972 (enclosure (2), TAB A). Job Order No. 334/72 dated 11 March 1972 was awarded to R. R. Allen, Inc., Norfolk, Virginia (enclosure (2), TAB C), and the work thereunder was 100% complete on 21 April 1972 (enclosure (10)). Protestant's unsolicited proposals under this RFP, and the one described in (b) above, were rejected by letter dated 10 March 1972 on the grounds of the above-discussed suspension action (enclosure (2), TAB D).

(d) RFP N62678-72-R-0303. This RFP concerned work on the USS COLUMBUS (CG-12) during a restricted availability from 1 April 1972 until 15 April 1972 (enclosure (3), TAB A). Job Order No. 355/72 dated 30 March 1972 was awarded to Associated Naval Architects, Inc., Portsmouth, Virginia (enclosure (3), TAB C), and the work thereunder was 100% complete on 18 April 1972 (enclosure (10)). Protestant's unsolicited proposal was rejected by letter dated 30 March 1972 on the ground of the above-discussed suspension action (enclosure (3), TAB D).

(e) RFP N62678-72-R-0277. This RFP concerned work on the USS SAN DIEGO (AFS-6) during a restricted availability from 4 April 1972 until 1 May

1972 (enclosure (4), TAB A). Job Order No. 360/72 dated 30 March 1972 was awarded to Moon Engineering Company, Inc., Norfolk, Virginia (enclosure (4), TAB C), and as of 10 May 1972, the work thereunder was 90% complete (enclosure (10)). Protestant's unsolicited proposal was rejected by letter dated 30 March 1972 based on the ground of the above-discussed suspension action (enclosure (4), TAB D).

(f) RFP N62678-72-R-0301. This RFP concerned work on the USS NEWPORT (LST-1179) during a restricted availability from 23 March 1972 until 9 May 1972 (enclosure (5), TAB A). Job Order No. 348/72 dated 23 March 1972 was awarded to Norfolk Shipbuilding and Drydock Corporation, Norfolk, Virginia (enclosure (5), TAB C), and the work thereunder was 88% complete as of 10 May 1972 (enclosure 10)). Protestant's unsolicited proposal was rejected by letter dated 24 March 1972 on the ground of the above-discussed suspension action (enclosure (5), TAB D).

(g) IFB N62678-72-B-0069. This IFB concerned work on the USS INDEPENDENCE (CVA-62) during a restricted availability from 23 March 1972 until 10 April 1972 (enclosure (6), TAB A). Job Order No. 346/72 dated 22 March 1972 was awarded to Associated Naval Architects (enclosure (6, TAB C), and the work thereunder was 100% complete on 10 April 1972 (enclosure (10)). Protestant's unsolicited bid was rejected by letter dated 22 March 1972 on the ground of the above-discussed suspension action (enclosure (6), TAB D).

(h) IFB N62678-72-B-0070. This IFB concerned work on the USS CORONADO (LPD-11) during a restricted availability from 3 April 1972 until 4 May 1972 (enclosure (7), TAB A). Job Order No. 358/72 dated 30 March 1972 was awarded to Norfolk Shipbuilding (enclosure (7), TAB C), and the work thereunder was 90% complete as of 10 May 1972 (enclosure (10)). Protestant's unsolicited bid was rejected by letter dated 28 March 1972 on the ground of the above-discussed suspension action (enclosure (7), TAB D).

(i) IFB N62678-72-B-0071. This IFB concerned work on the USS RICH (DD-820) during a split availability from 31 March 1972 until 9 April 1972 and from 3 May 1972 until 14 May 1972 (enclosure (8), TAB A). Job Order No. 349/72 dated 23 March 1972 was awarded to Associated Naval Architects (enclosure (8), TAB C), and the work thereunder was 84% complete as of 10 May 1972 (enclosure (10)). Protestant's unsolicited bid was rejected by letter dated 24 March 1972 on the ground of the above-discussed suspension action (enclosure (8), TAB D).

(j) RFP N62678-72-R-0241. This RFP concerned work on the USS DE SOTO COUNTY (LST-1171) during a restricted availability from 24 January 1972 until 25 March 1972 (enclosure (9), TAB A). Job Order No. 279/72 dated 24 January 1972 was awarded to Moon Engineering Company, Norfolk, Virginia, (enclosure (9), TAB C), and the work thereunder was 100% complete on 7 April 1972 (enclosure (10)). It is interesting to note that on the abstract of bids under this RFP, Protestant's proposal was some $37,381.84 higher than the proposal of Moon Engineering (enclosure (9), TAB B), and thus, even if this proposal had not been rejected by letter dated 24 January 1972 based on the above-discussed suspension action (enclosure (9), TAB D), it would not have been the low proposal and could not have formed the basis for an award.

Your protest on behalf of Horne is based primarily upon two contentions. First, you contend that rejection of Horne's bids and proposals without a written determination of nonresponsibility pursuant to paragraph 1-904.1(iv) of the Armed Services Procurement Regulation, including referral to the Small Business Administration for review of a negative determination pursuant to ASPR 1-705.4(c)(vi), was invalid. Second, you contend that the determination that Horne lacks the necessary integrity to be a Government contractor was based upon a regulation which is invalid under applicable statute and the United States Constitution. You argue that ASPR 1-605, which provides for suspension of contractors under stated circumstances, is invalid in that it fails to provide for notice or hearing on the charges upon which the suspension is based in violation of the due process requirements of the Fifth Amendment to the Constitution.

It is the Navy's position that the situation with respect to the subject solicitations is analogous to that involving Horne Brothers reported in 51 Comp. Gen. 703 (1972), and the rationale expressed therein is dispositive of the instant protests. In addition, the Navy points out that as of the date of the protest one of the subject solicitations was canceled, the work under four was completed, and as of May 10, 1972, the work under the remaining four solicitations was substantially (84 to 90 percent) complete.

The earlier decision referred to in the preceding paragraph involved rejection of Horne's low bid for overhaul of the U.S.S. *Francis Marion* because on December 14, 1971, it had been placed on the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors, in a suspended status, and it was not determined to be in the Government's best interest to consider its bid. In denying Horne's protest based upon essentially the same contentions as involved here, we stated the following:

> Paragraph 1–605.1 of ASPR provides that an agency may, in the interest of the Government, suspend a firm or individual suspected, upon adequate evidence, of commission of specified crimes, including bribery, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor. With regard to the period of suspension, ASPR 1–605.2(a) provides that all suspensions are for a temporary period pending completion of investigation and such legal proceedings as may ensue. It also provides for a limit on the period of suspension in the event prosecutive action is not commenced within a maximum of 18 months.
>
> While it is true, as you contend, that the procedures lack certain elements which may be considered necessary by a court in order to afford due process in the more severe debarment action, which was involved in the *Gonzalez* case, *supra*, as a general rule, temporary or limited suspension for a reasonable time by way of such summary action as provided for in this regulation does not of itself result in a denial of due process. See *Gonzalez* v. *Freeman*, 334 F. 2d 570, 579, (1964); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152–153 (1941), and *R. A. Holiman & Co.* v. *Securities and Exchange Commission*, 299 F. 2d 127, 131–133, cert. denied, 370 U.S. 911 (1962). We note that certain safeguards are included in the regulation. For example, suspension must be based upon adequate evidence, not mere accusation; in assessing the adequacy of the evidence, consideration must be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof, and inferences which may be drawn from the existence or absence of affirmative facts; and the assessment of the evidence includes an examination of basic documents, such as contracts, inspection reports, and correspondence. Moreover, the regulation provides that the suspension may be modified and contracts may be awarded if it is determined to be in the best interest of the Government. In view of the foregoing, and since the matter is presently before the courts, we do not believe it proper for our Office to question the validity of the regulation.
>
> Although the notice of suspension did not allege commission of one of the specific criminal acts named in the regulation, it stated that the suspected gratuities and favors were considered inducements or irregularities indicating a "lack of business integrity." In this regard, the regulation provides for suspension not only where commission of a specific crime is suspected, but of "any other offense indicating a lack of business integrity or business honesty." We do not believe it is necessary to decide at this time whether the word "offense" should be read to mean "criminal offense." Suffice it to say that the evidence upon which the suspension was based was also the basis for convening the

Special Grand Jury to continue the investigation resulting on April 24, 1972, in a 21-count criminal indictment. Included in the indictment are charges that Navy inspectors were bribed with "tanks of gasoline, liquor and other things of value." The indictment appears sufficient to establish that there was adequate evidence of criminal offenses to satisfy the standards of the regulation.

Furthermore, it is our view that rejection of Horne's bid without making a determination of nonresponsibility pursuant to ASPR Paragraph I, Part 9, was a proper action. ASPR 1-605 provides that placing an individual or firm on the consolidated list is for the purpose of protecting the interest of the Government and not for the purpose of punishment. To protect the interest of the Government, ASPR 1-603(a) provides:

> "*Type D* includes concerns which have been suspended under the conditions set forth in 1-605. Concerns under Type D listings shall not be awarded contracts or solicited for bids or proposals, except where the Secretary concerned or his authorized representative determines it to be in the best interest of the Government to make an exception for a particular procurement or where the listing indicates that the Suspension does not apply to sales contracts or to procurement contracts."

> Also, Section 1-605.3(iii) provides for the notice of suspension to contain language to the same effect. By clear terms the regulation prohibits the award of a contract to a suspended individual or firm except in the one situation where the Secretary concerned or his designee determines it to be in the best interest of the Government to make an exception for a particular procurement. In these circumstances, to require a written determination of nonresponsibility pursuant to applicable regulations would serve no useful purpose.

At the time of our earlier decision, litigation was pending in the United States District Court for the District of Columbia (Civil Action No. 289-72). On April 13, 1972, the District Court granted Horne's motion for a preliminary injunction, ordering cessation of performance of the work by another contractor pending a decision by our Office. On May 17, 1972, upon the Government's Motion for Stay Pending Appeal before the United States Court of Appeals for the District of Columbia (Civil Action No. 72-1392), the court found that Horne was not likely to prevail on the merits and reversed the District Court's order.

However, the Court of Appeals noted that there are "serious and fundamental questions regarding the fairness of procedures utilized by the Government in suspending contractors." In this connection, the court stated that while a temporary suspension not to exceed 1 month without an opportunity for a hearing may be acceptable, the protracted summary suspension permissible under ASPR 1-605 could not be sustained. The court noted, however, that there are circumstances where the Government need not afford the contractor a hearing within 1 month of the suspension, citing as an example, the situation where such a proceeding may prejudice an action by prematurely "tipping" the Government's entire case. Nevertheless, the court indicated that it may not condone the failure to afford a hearing even in that situation since the "adequate evidence" showing needed to sustain a suspension would not necessarily have the latter result since it requires something less than the evidence needed in a successful criminal prosecution.

However, the court made the following observation:

> There may be circumstances where substantial Government interests would be prejudiced even by a disclosure of enough facts to show "adequate evidence" for the suspension. In that event, however, the Government may not simply ignore the interests of the contractor. Rather, an appropriate official of the Government, one vested with sufficient discretionary power, must make a formal determination that significant injury would result if a hearing were to be held. The contractor's protection would lie in a deliberated determination by an official with discretion, and he would not be consigned to the juggernaut of rules as they now stand, which do not even make room for the possibility of a legitimate interest in an opportunity for the contractor to be heard. Moreover, there remains the possibility of a court action challenging as arbitrary the determination to deny the proceeding. A court concerned with a real possibility of abuse of discretion—i.e., of a suspension made without "adequate evidence" against the contractor—would have latitude to consider the problem without courting injury to the Government's legitimate interests, by inspection *in camera* of at least some of the evidence held by the Government.

The Court of Appeals has now spoken on the question of the validity of a suspension pursuant to ASPR 1-605. However, the court's ruling came after rejection of Horne's bids and proposals because of its suspended status, the awards under the subject solicitations, and completion of most, if not all, of the work under the contracts. In the circumstances, we find no basis for remedial action with respect to the protested procurements. However, it is our view that the validity of Horne's continued suspension and rejection of its bids or proposals will depend upon conformance with the guidelines established in the court's decision and we are so advising the Secretary of the Navy. In this connection, it should be noted that the court specifically stated in footnote 8 that it was not discussing the rights of suspended contractors in the usual post indictment situation, which is now Horne's position.

Accordingly, Horne's protest is denied.

[B-175395]

Bids—Buy American Act—Construction Contracts—Statement of Foreign Materials

A bidder responding to an invitation for bids to construct the superstructure of a Federal office building that contained Buy American Act provisions (10 U.S.C. 10a-10d) in accordance with sections 1-18.604 and 1-18.605 of the Federal Procurement Regulations—provisions amplified in a prebid conference—who failed to submit information concerning the amount of non-domestic structural steel proposed to be used and to provide data to demonstrate that the cost of domestic structural steel would exceed by more than 6 percent the cost of comparable foreign steel, omitted information that goes to the responsiveness of the bid, and it would be prejudicial to other bidders and detrimental to the competitive bidding system to permit correction of the nonresponsive bid after bid opening.

Contracts—Subcontracts—Bid Shopping—Subcontractor Substitution Prior to Award

The listing of a joint venture—two responsible electrical subcontractors—that did not meet the experience and percentage manufacture requirements of the subcontractor qualification clause pertaining to the building control and monitor-

ing category of work that was contained in an invitation for bids (IFB) to construct the superstructure of a Federal office building does not require rejection of the bid as substitution of a qualified first-tier subcontractor is permissible under the terms of the IFB and applicable regulations, the listing defect does not materially affect the responsiveness of the bid as it relates to the primary purpose of the listing requirement—antibid shopping—and the qualification clause which is regarded as similar to a competency of bidder clause is considered as relating solely to the responsibility of the listed subcontractors.

To the Acting Administrator, General Services Administration, June 16, 1972:

Reference is made to a letter dated May 3, 1972, from your General Counsel, and prior correspondence, reporting on the protests of Perini Corporation-Baugh Construction Company (Perini-Baugh) and The Massart Company (Massart), a listed subcontractor of Perini-Baugh, against any award to Huber, Hunt & Nichols, Inc. (Huber), or Hoffman Construction Company (Hoffman) under an invitation for bids (IFB) covering project No. 45902, issued by the Public Buildings Service, Region 10, for the construction of the superstructure of the Federal Office Building, Seattle, Washington. In addition, your General Counsel reported on the protest of Hoffman against any proposed award of the contract to Huber.

As required by the IFB, the five bidders responding thereto submitted prices for a base bid, 11 additive and deductive alternates and one option. The contracting office reports that, since no final decision has been made as to which alternates will be selected, the low bidder cannot be determined at this time. But, it is reported that either Huber or Hoffman will be the low evaluated bidder depending on the alternates selected. In the event that the Huber and Hoffman bids are disqualified, either Perini-Baugh or Peter Kiewitt Sons & Co. would be the low evaluated bidder depending again upon which alternates are selected.

In accordance with the provisions of sections 1–18.604 and 1–18.605 of the Federal Procurement Regulations (FPR), the IFB contained the following clauses:

INFORMATION REGARDING BUY AMERICAN ACT

(a) The Buy American Act (41 U.S.C. 10a–10d) generally requires that only domestic construction material be used in the performance of this contract. (See the clause entitled "Buy American" in Standard Form 23A, General Provisions, Construction Contracts.) This requirement does not apply to the construction material or components listed in the clause entitled "Buy American Act" of GSA Form 1139, General Conditions, section 1 of the contract.

(b) (1) Furthermore, bids or proposals offering use of additional nondomestic construction material may be acceptable for award if the Government determines that use of comparable domestic construction material is impracticable or would unreasonably increase the cost or that domestic construction material (in sufficient and reasonable available commercial quantities and of a satisfactory quality) is unavailable. Reliable evidence shall be furnished justifying such use of additional nondomestic construction material.

(2) Where it is alleged that use of domestic construction material would unreasonably increase the cost:

(i) Data shall be included, based on a reasonable canvass of suppliers, demonstrating that the cost of each such domestic construction material would exceed by more than 6 percent the cost of comparable nondomestic construction material. (All costs of delivery to the construction site shall be included, as well as any applicable duty.)

(ii) For evaluation purposes, 6 percent of the cost of all additional nondomestic construction material, which qualifies under paragraph (i) above, will be added to the bid or proposal.

(3) When offering additional nondomestic construction material, bids or proposals may also offer, at stated prices, any available comparable domestic construction material, so as to avoid the possibility that failure of a nondomestic construction material to be acceptable, under (1) above, will cause rejection of the entire bid.

* * * * * * *

19. BUY AMERICAN

(a) AGREEMENT. In accordance with the Buy American Act (41 USC 10a–10d), and Executive Order 10582, December 17, 1954 (3 CFR, 1954–58 Comp., p. 230), as amended by Executive Order 11051, September 27, 1962 (3 CFR, 1959–63 Comp., p. 635), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

All prospective contractors, including the five bidders, were forwarded a summary of the prebid conference which was attended by representatives of the bidders. Among others, the following questions and answers concerning the Buy American Act were included in the summary:

1. May nondomestic structural steel be used on the project?

Yes, provided the bid states that it is based on the use of specified nondomestic construction materials and provided also that such use meets the criteria of FPR Subpart 1–18.6 (copy attached).

* * * * * * *

6. May a bid be based on use of a specified portion of nondomestic structural steel?

Yes, provided the portion is identified specifically so that the criteria set out in Section 1–18.603 may be applied. An identification by percentage would not be a satisfactory identification.

Huber inserted the following entry under the structural steel category of the subcontractor listing portion of its bid:

SAN JOSE STEEL
S.J., CAL.
PARTLY NON-DOMESTIC IN ACCORD-
ANCE WITH B.A. ACT.

The Huber bid did not include information pertaining to the portion of foreign structural steel proposed to be used. In addition, its bid failed to provide any data to demonstrate that the cost of domestic structural steel would exceed by more than 6 percent the cost of comparable foreign structural steel. Post-bid-opening information supplied by the subcontractor listed by Huber discloses that the cost of foreign material or nondomestic structural steel included in the base bid alone amounted to $2,145,515.

Your General Counsel, Perini-Baugh, and Hoffman argue that the Huber bid should be rejected as nonresponsive on account of its failure to identify the amount of nondomestic structural steel proposed to be used or data for use in comparing the relative costs of comparable domestic and nondomestic steel. It is contended that such failure leaves the Government incapable of determining whether the cost of domestic steel would unreasonably increase the cost of the project. Moreover, it is argued, to permit such information and data to be supplied subsequent to the opening of bids and the exposure of bid prices would be prejudicial to other bidders and seriously detrimental to the competitive bidding process.

Huber claims that the above-quoted notation in its bid complies with the requirements of the Buy American Act, 41 U.S.C. 10a, the related Executive orders, and decisions of our Office, which, in its opinion, require only notice of the intended use of nondomestic materials, and permit the submission of appropriate data for evaluation after bid opening. Moreover, Huber states that no change can be made in the quantities or percentages of foreign and domestic materials in its bid since it was contractually bound to the listed subcontractor-supplier at bid opening.

Upon consideration of the record before us, as supplemented by counsel for the respective parties and your General Counsel, we conclude that the Huber bid should be rejected as nonresponsive.

Initially, we believe that the above-quoted portion of the IFB entitled "Information Regarding Buy American Act," as amplified by the answers to questions 1 and 6 in the prebid conference, required bidders to explicitly identify the specific portion of nondomestic structural steel to be used and to furnish cost data justifying the use of nondomestic structural steel. Notwithstanding these requirements, counsel for Huber argues that the provisions of the Buy American Act, the related Executive orders and our decisions excuse technical noncompliance with these terms of the IFB. Counsel cites our decision at 39 Comp. Gen. 695 (1960) wherein we found that a bidder's failure, as required by the terms of an IFB, to compute the percentage of foreign product cost, need not cause rejection of the bid. However, we enunciated the following principles respecting bidders' obligations under the Buy American Act (pages 698–699):

> It is, of course, essential that a bidder claiming the preference accorded a domestic bidder establish that the cost of foreign products in his bid is less than the cost of domestic products. Sufficient information on this point should be submitted with the bid to preclude any change, after bid opening, in the claimed percentages of foreign and domestic products which would affect either the relative standing of his bid or its status as a domestic bid. However, we do not believe that the detailed cost information required to establish the foreign or domestic status of a bid need be made public as a part of the bid. *It is sufficient, in our opinion, for the procuring agency to require the bidder to submit with*

his bid a statement listing any foreign materials, products, or components entering into the supplies to be furnished, with a statement of the percentage of the cost of all materials, products, or components represented by such foreign items, subject to verification by the agency before award. In the case of award to a domestic bidder proposing to use a substantial percentage of foreign products, the use of foreign products other than those disclosed in its bid might properly be prohibited under penalty of price reduction, liquidated damages, or other sanctions. [Italic supplied.]

In this regard, the information and data called for by the instant IFB in no way would result in an evaluation inconsistent with the terms of the Buy American Act and the related Executive orders. Therefore, we believe that the contracting agency properly required that the information and data be submitted with the bid as a matter of bid responsiveness.

Beyond this, there remains the question of the propriety of allowing Huber to submit Buy American Act information and data subsequent to bid opening. The Huber bid clearly indicated an intention to use an undisclosed quantity of nondomestic structural steel. Under FPR section 1–18.602–1, nondomestic construction material can be used only if the requirement for the use of domestic material is determined to unreasonably increase the cost. That determination can be made where (1) a bid offers nondomestic construction material, the cost of which, plus 6 percent thereof, is less than the cost of comparable domestic construction material, and (2) the bid is the low bid after adding for evaluation purposes 6 percent of the cost of all qualifying nondomestic material. See FPR section 1–18.603.

Unlike the evaluation of a bid under an IFB for a supply contract, the evaluation of a bid for a construction contract under the Buy American Act takes into consideration each particular item of construction material to be brought to the construction site for incorporation in the building or work. See FPR sections 1–6.104–4 and 1–18.603–1. The abstract of bids reveals that the Huber bid and that of Hoffman, the two low bidders, are quite close on the base bid, the alternates and the option. Taking, for purposes of example, the post-bid-opening figure of $2,145,515, proposed as the cost of nondomestic structural steel by the Huber supplier, would result, after application of the 6-percent differential, in the addition of a factor in excess of $128,000 to the Huber bid.

Moreover, we are not convinced by Huber's argument that it had a prebid binding agreement with its structural steel subcontractor which was adequate to identify costs and proportions of nondomestic and domestic steel. However, this post-bid-opening information may not be relied upon to cure the deficiencies in Huber's bid so far as Buy American Act evaluation is concerned. Under the principles of formal advertising, it would be manifestly unfair to permit a bidder to supple-

ment his opened bid to provide information which would govern the evaluation of his bid for purposes of determining the lowest evaluated bidder.

We believe that counsel for Huber misplaces reliance on 48 Comp. Gen. 142 (1968), where, after bid opening, we allowed a bidder to change its offer of a domestic to a foreign supply product. There, unlike here, the bidder was clearly responsive to the terms of the invitation and its bid could be evaluated under the Buy American Act without reference to any question relating to bid responsiveness. See B–169279, June 1, 1970.

The Perini-Baugh and its listed subcontractor, Massart, protests relate to a claimed nonresponsiveness of the Huber and Hoffman bids relating to their listing of subcontractors. The IFB included the subcontractor listing clause prescribed by General Services Administration Procurement Regulations (GSPR) 5B–2.202–70(e). That clause provides for the listing of subcontractors by bidders for various specified categories of work set forth on a separate listing form, one of which was "BUILDING CONTROL AND MONITORING (ALL WORK IN DIVISION 17)." The clause further requires bidders, as to each category on the listing form, to submit the name and address of the individual or firm with whom subcontracting is proposed for the performance of such category. Also, under the clause, the bidder agrees that none of the listed categories will be performed by an individual or firm other than those named. A subcontractor is defined thereunder as the individual or firm with whom the bidder proposes to enter into a subcontract for manufacture, fabricating, installing, or otherwise performing work under the contract pursuant to the specifications applicable to any category on the list. In addition, the clause warns bidders that the failure to list subcontractors for every category would result in rejection of the bid as nonresponsive.

For the work to be performed in division 17, Huber and Hoffman listed a joint venture, consisting of two responsible electrical subcontractors. In addition, for the subcontractor listing category of "Precast Concrete Skin," required if two of the alternates are selected, Huber listed the name of a company for installation which the contracting office is unable to identify. In view of our opinion that the Huber bid is nonresponsive to the Buy American Act requirements, we do not feel it is necessary to consider the responsiveness of the Huber bid in this latter regard.

The regional office reports that the building control and monitoring work (division 17) involves the furnishing of a prototype system to include usual building controls integrated with a central monitoring and control system designed to provide additional safety in case of fire

or other emergency. To assure coordination among the components of the system, which are not novel, the specification set forth the following clause:

CONTRACTOR QUALIFICATIONS

a. The control and monitoring systems Contractor shall have been in business at least five years, shall manufacture at least 40 percent of the components of the entire system, including the central control console, and shall accept single responsibility for the complete control and monitoring systems assembly and installation described herein. This Contractor shall employ factory-trained engineers fully capable of rendering training, instruction, and routine and emergency maintenance service and shall have a local service organization capable of maintaining all the equipment provided in this Division 17.

The listing of an electrical subcontractor for the category in question appears to be understandable in view of the history of such work. The regional office reports, in this regard, as follows:

The control category was included in the listings to avoid other problems inherent in subcontractor listing. Control work is normally a part of the electrical or mechanical subcontract, and is further subcontracted at the second tier. It would be very rare, in the usual case, for a general contractor to subcontract directly with the controls contractor. Here, however, because of the sophisticated nature of the system it was considered likely that the controls subcontract would be at the first tier. Therefore, a controls category was included to avoid a defective listing of more than one subcontractor for the electrical or mechanical category.

Perini-Baugh and Massart (its listed subcontractor) assert that the listed joint venture for division 17 work does not meet the experience and percentage manufacture requirements of the above-quoted contractor qualification clause. The regional office agrees with this assertion. Therefore, it is argued that the listing is defective and requires rejection of the Hoffman bid. Hoffman counters with the claim that it is customary in the industry and permissible under the IFB to subcontract the work, which it intends to do with an admittedly responsible controls contractor, which two other bidders listed as a subcontractor. Hoffman further contends that the listed joint venture qualifies as a manufacturer.

The regional office, as concurred in by your General Counsel, urges that the subcontractor listing by Huber and Hoffman was responsive to the terms of the IFB, but proposes to reject the use of the listed joint venture, and permit the substitution of a qualified first-tier subcontractor. Also, it is argued that the contractor qualification clause is nothing more than a competency of bidder clause dealing with matters of responsibility. The regional office, in support thereof, points to the following paragraph from the subcontractor listing clause (subparagraph "j"):

Subcontractor Rejection: Notwithstanding any of the provisions of this clause, the Contracting Officer *shall have authority to disapprove or reject* the employment of any subcontractor he has determined nonresponsible or who does not meet the requirements of an applicable Specialist or Competency of Bidder clause. [Italic supplied.]

Similarly, the listing form contains the following statement:

NOTE: The listing of an individual or firm (whether a subcontractor 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.* [Italic supplied.]

Further, the regional office invites our attention to GSPR 5B–2.404–70, which states, in pertinent part, as follows:

When an invitation for bids contains the Listing of Subcontractors clause prescribed in § 5B–2.202–70(e), bids shall be rejected if:

(c) A named subcontractor does not meet the standards of responsibility prescribed in § 1–1.310–5, unless the contracting officer finds that substitution is justifiable under the conditions prescribed in § 5B–53.7010–3(a) (8), or

(d) An individual or firm named on the list does not meet the specified requirements of an applicable Specialist or Competency of Bidder clause, unless the contracting officer finds that substitution is justifiable under the conditions prescribed in § 5B–53.7010–3(a) (9) or that the deficiency in qualifications is so minor as not to be considered substantive (e.g., a lack of one month of a required 3 years' experience).

These portions of the GSPR 5B–53.7010–3 clause referred to in the preceding quote are quoted below:

(a) The contracting officer may permit substitution of a subcontractor for one named in a bid pursuant to the Listing of Subcontractors provision prescribed in § 5B–2.202–70(e), in unusual situations, upon submission by the contractor or bidder of a complete justification therefor. The term "unusual situations" includes (but is not limited to) a subcontractor's:

* * * * * * *

(8) Failure to meet any criteria of responsibility set out in § 1–1.310–5, but only when the contracting officer, in the exercise of sound discretion, finds that substitution for this cause would be in the best interests of the Government (i.e., that it would not be prejudicial to the rights of other bidders and that the contractor or bidder has not attempted to circumvent the restraint on bid shopping by listing a nonresponsible subcontractor in order to gain an opportunity to bid shop prior to making the requested substitution); or

(9) Failure to meet the qualifications requirements of an applicable Specialist or Competency of Bidder clause, but only when the contracting officer, in the exercise of sound discretion, after discussion with the contractor or bidder and, if appropriate, the named subcontractor, finds that substitution for this cause would be in the best interests of the Government as specified in § 5B–53.7010–3(a) (8).

(b) Where the contracting officer ascertains that a proposed substitution is justified, the substitution shall be authorized at no increase in the bid or contract price or, if the proposed substitute offers the contractor or bidder a lower price than the named subcontractor, at a reduction in the bid or contract price.

Our review of the record, as supplemented by the briefs of counsel, leads us to the conclusion that the proposed substitution of a qualified first-tier subcontractor is permissible under the terms of the invitation and applicable regulations.

The practice of rejecting a bid for failure to comply with subcontractor listing requirements stems from our agreement (43 Comp. Gen. 206 (1963)) with your Administration that such listing requirements be considered material invitation requirements in order to control the undesirable practice of bid shopping by prime contractors. See 50 Comp. Gen. 839, 842 (1971). However, we believe that the defect in the

listing of the joint venture by Hoffman does not materially affect the responsiveness of its bid insofar as it relates to the primary purpose of the listing requirement—antibid shopping.

The inability of Hoffman's proposed subcontractor under division 17 to meet experience and manufacture requirements relates to the joint venture's responsibility. We have held that experience qualification clauses facilitate the contracting officer's determination of responsibility involving the consideration of organization, technical experience, knowledge, skills, "know-how," technical equipment and facilities. See 45 Comp. Gen. 4, 7 (1965).

Such being the case, we agree that the instant contractor qualification clause should be regarded as similar to a competency of bidders clause and as relating solely to the responsibility of listed subcontractors. Thus, the failure of the joint venture listed by Hoffman to satisfy criteria need not be regarded administratively as fatal to consideration of the bid.

No evidence has been presented to question the good faith listing by Hoffman. As we stated above, the listing was understandable, and it is significant to note that two bidders chose to list the same joint-venture subcontractor. In this regard, we have no basis to dispute Hoffman's statement that its bid was based upon information and proposals obtained from second-tier subcontractors including the controls subcontractor listed by two other bidders and considered to be responsible by the regional office. Moreover, none of the protesting parties have established that substitution of a qualified subcontractor for the joint venture proposed for division 17 work would be prejudicial to other bidders. The regional office on this point states that:

> A number of independent sources have furnished us reports as to the various subcontractor bids involving the mechanical, electrical and controls subcontracts, and combinations thereof. From these we have determined that any differing interpretations of the subcontractor listing provisions, as to controls, could not have affected the relative standing of the bidders. Therefore, permitting the substitution would not be prejudicial to other bidders.

We therefore conclude that the Hoffman bid is responsive to the subcontractor listing requirements of the IFB. As requested, the enclosures forwarded with the General Counsel's letter of April 4, 1972, are returned.

[B–175641]

Bonds—Bid—Supply *v.* Construction Contracts—Combination

The use of the annual bid bond that is applicable to supplies and services which the low bidder has on file with the contracting agency in the procurement of a hydrogenerator to be installed and tested in lieu of the payment and performance bonds specified in the invitation for bids—bonds generally required only on contracts involving construction as opposed to contracts for supplies and services—is approved as being legally sufficient to obligate the surety as the contract contemplated consisting of only 25 percent construction falls within the meaning of

a supply and service contract contained in section 1-12.402—1(a) of the Federal Procurement Regulations (FPR), and section 1-12.402-2 prescribes that labor standards need not apply to contracts predominantly for nonconstruction work. Furthermore, the failure of the bidder to use the proper standard form 34, where the difference in the forms is not one of substance, may be waived as a minor informality pursuant to FPR 1-2.405.

To the Westinghouse Electric Corporation, June 16, 1972:

We refer to your letter dated April 6, 1972, and subsequent correspondence, protesting the award of a contract to Colt Industries Operating Corporation, Fairbanks Morse Power Systems Division (Colt), under invitation for bids (IFB) DS-6938 issued by the Bureau of Reclamation, Denver, Colorado. Award has been withheld pending our decision.

Your protest is addressed solely to the question of the propriety of the use of an annual bid bond, limited by the Federal Procurement Regulations (FPR) to use with respect to bids on supply and services contracts only, in connection with an invitation involving part construction and part supply work.

The bidding schedule solicited bids for:

> Furnishing, installing, and testing one new armature winding rated 125,000-kva, unity power factor, 13,800-volt, for existing 120-rmp, 3-phase 60-hz, vertical-shaft, hydrogenerator, complete in accordance with this solicitation at Grand Coulee Powerplant, including shipment of the materials and equipment to the site of installation, near Coulee Dam, Washington * * *

It is clear from the IFB that some construction work was contemplated as a necessary incident to the installation of the equipment. To this end, section C-10 of the IFB requires the successful bidder to furnish at the time of award a payment bond equal to 12 percent of the contract price at the time of award for the protection of all persons supplying labor and materials for the prosecution of the work. Also, section C-11(a) requires the contractor to furnish at the time of award a performance bond equal to 25 percent of the contract price at time of award to cover the field installation work. Except for circumstances specifically enumerated in FPR, and not here involved, payment and performance bonds are generally required only on contracts involving construction, as opposed to contracts for supplies or services. The fact that construction work was contemplated under the IFB was confirmed at bid opening with the announcement of the engineers' estimate that 25 percent of the total contract amount would be for installation and testing of the equipment.

Four bids were submitted and opened on March 30, 1972, as follows:

Colt	$314,440
Westinghouse Electric Corp. (Westinghouse)	317,059
National Electric Coil	324,952
General Electric Company	344,675

Section A–1(a) of the IFB cautions bidders that the failure to furnish a bid bond in an amount not less than 20 percent of the amount of the bid to guarantee the execution of all necessary contractual documents and the furnishing of all required bonds within the stated timeframes may be cause for rejection of the bid. Colt referenced in its bid its annual bid bond No. 27–60–14, standard form 34, revised November 1950, applicable to services and supplies, which is on file with the Bureau of Reclamation. Westinghouse's bid bond was submitted on standard form 24, June 1964 edition, applicable to construction, supplies and services.

You contend that the subject IFB contemplates a construction contract for purposes of the bid bond requirement and that Colt's submission of an annual bid bond with its bid covering only "supplies and services" is, therefore, in violation of FPR 1–10.103–1(b). This provision states that "Annual bid bonds are not acceptable in connection with bids for construction contracts." You accordingly maintain that the Colt bid should be rejected as nonresponsive. In substantiation of your contention, you point out that in addition to the requirement for performance and payment bonds mentioned above, the invitation contained numerous other clauses which specifically relate to the construction portion of the proposed work. You further maintain that the construction work in this instance is clearly segregable from the supply work, concluding therefrom that a bid bond specifically covering the construction work is clearly required. Alternatively, you argue that Colt's bid bond was submitted on a superseded form which would not bind the surety in the event Colt failed to submit a payment bond for the construction portion of the work, as required.

FPR subpart 1–10.1, Bonds, at section 1–10.102–7 defines a construction contract to mean "any contract for construction, alteration, or repair as provided in §§ 1–12.402–1 and 1–18.101–1." Subpart 1–12.4 deals with Labor Standards in Construction Contracts and provides at section 1–12.402–1(a):

> A contract is for construction if it is solely or predominantly for construction, alteration, or repair * * * of a public building or public work. * * * (Other types of contracts involving construction within the contemplation of this § 1–12.402 are described in § 1–12.402–2.)

Section 1–12.402–2 provides that labor standards need not be applied to contracts predominantly for nonconstruction work which also involve construction unless the construction work is "substantial" and "is physically or functionally separate from, and, as a practical matter, is capable of being performed on a segregated basis from the other work required by the contract."

Subpart 1–18 is concerned with "Procurement of Construction" and provides at section 1–18.000:

> This part sets forth contracting procedures peculiar to construction contracts. * * * Where a contract covers the procurement of both construction and supplies or services, the contract shall include provisions applicable to the predominant part of the work, or shall be divided into parts, and include the provisions appropriate for each part, but see § 1–12.402–2.* * *

It is the position of the Department of the Interior that the contract to be awarded as a result of the subject invitation will be a supply contract, not a construction contract, inasmuch as the predominant portion of the work will be the furnishing of supplies (75 percent) and the construction work merely incidental thereto (25 percent). Interior concludes, and we agree, that the Colt bid bond, applicable only to "supplies and services," would be enforceable should Colt fail to execute contractual documents or to furnish such bonds as are required by the invitation terms.

For the purpose of characterizing a given contract as either construction or supplies or services, the FPR subpart dealing with bonds, section 1–10.1, refers to the FPR subpart in "Labor Standards for Construction Contracts," section 1–12.4, for definition of a construction contract. However, that reference is limited to the definitional purpose and carries no further application of the Labor Standards subpart to bid bonds. You correctly advance the theory that segregability of work carries with it the concommitant duty to apply labor standards under given guidelines, even when the predominant portion of the work is for supplies or services. However, that inquiry is not relevant to the question whether the contemplated contract is for construction or supplies or services. Rather it evidences the policy that even when a contract is for supplies or services, consideration should be given to the inclusion of labor standard provisions. However, that determination must be made separate and apart from that relating to the general nature of the contract.

In the circumstances, the contract advertised is not predominantly for construction within the contemplation of FPR section 1–12.402–1(a) since the construction portion of the work amounts to only 25 percent. We therefore conclude that the contract to be awarded will be a supply contract and that the Colt bid bond applicable by its terms to contracts for supplies and services is legally sufficient to obligate the surety.

Concerning the use by Colt of the superseded 1950 edition of standard form 34 in lieu of the 1964 edition of standard form 34 currently being used, you contend that such use requires the rejection of Colt's bid as nonresponsive because, in your opinion, the superseded form would not bind the surety in the event a proper payment bond is not

submitted by the contractor, as required. In this regard, we have held that failure to utilize the designated bond form is not in itself a sufficient reason to reject an otherwise acceptable bid so long as the bond as submitted affords the Government appropriate recourse in the event the bidder does not fulfill the conditions of the bid. 39 Comp. Gen. 83, 84 (1959). A comparison of the provisions of the two forms shows them to be substantially the same. Both forms obligate the surety to make payments in accordance with the bid guarantee provisions of the IFB if the bidder fails to execute the necessary contractual documents and furnish the requisite bonds. While it is true that the form utilized by Colt does not specify that the execution of a payment bond is covered by its terms, it is our opinion that the obligation stated therein to "give bond * * *, as may be required, for the faithful performance and proper fulfillment of the resulting contract" includes both performance and payment bonds since fulfillment of the contract, by its terms, will require furnishing of both payment and performance bonds. The difference between the two forms, therefore, constitutes one of form rather than substance and may properly be waived by the contracting officer as a minor informality pursuant to FPR section 1-2.405. B-161904, July 17, 1967.

Accordingly, your protest is denied.

[B-175840]

Timber Sales—Access Roads—Amortization—"Earned Purchaser Credit" Transfers

The proposal to change the road amortization provisions in standard Forest Service timber sale contracts so as to permit transfer of "earned purchaser credit" between contracts—credits earned when the rate of timber removal is insufficient to amortize the cost of constructing access roads built to the area from which the timber is to be removed—may not be approved in the absence of statutory authority. To apply purchaser credits to other than the contract of timber under which earned would exchange timber for road construction and 16 U.S.C. 476, authorizing the sale of timber in national forests, provides that the Secretary of Agriculture may sell the timber for not less than the appraised value.

To the Secretary of Agriculture, June 16, 1972:

Reference is made to a letter dated April 28, 1972, from the Assistant Secretary requesting our decision on a proposal by industry to change the road amortization provisions in standard Forest Service timber sale contracts so as to permit transfer of earned purchaser credit between contracts.

It is reported that "earned purchaser credit" is part of a system employed to amortize road construction costs incurred in constructing specified roads to remove timber from a particular sale area. Under the

system, timber is appraised and offered for sale as if the necessary roads had already been constructed. As road construction proceeds, the timber purchaser is credited for the estimated cost of such work up to the maximum amount stated in the contract and the earned credits applied against the charges, in excess of base rates, for the timber. Since road construction must precede timber removal, and the rate of removal may not be sufficient to amortize the costs, there may be a balance of earned but unused purchaser credit equivalent to about one year's road construction cost at any given time. Industry proposes that it be allowed to apply this balance toward stumpage charges on other sales and thereby reduce cash outlays. It is argued that this would be in the public interest as it would result in a more effective use of capital and better and more orderly road construction and timber harvesting on National Forest lands.

It is the Department's position that any such benefits as may accrue would not be sufficient to offset the disadvantages, which include a temporary reduction in stumpage receipts. It is pointed out that while it might be argued that any reduction in cash payments on one sale would be offset by higher payments on other sales, there are situations where this would not be true. So-called deficit sales are cited in illustration. These are sales in which the difference between value at base rates, which must be paid in cash, and bid rates is less than the estimated road cost. Transfer of earned purchaser credit from such sales would result in reduced total stumpage charges. Another example cited involves sales from which the timber is not removed as a result of damage after construction of the road.

Furthermore, it is the Department's view that industry's proposal would be contrary to the long-established principle that a tract of timber may not be charged with costs for work which is not necessary to the harvesting of that timber. Cited in this connection are two decisions of our Office, B–65972, May 19, 1947, and B–130831, February 7, 1958. Also cited as an example of this principle is the following quotation from a portion of the legislative history of the Easement Act, Public Law 88–657, 16 U.S.C. 532:

> The amendment to section 4 adopted by the Senate and included in the reported bill makes it clear that purchasers of national forest timber and other forest products will not be required to pay out of their own funds more than the cost of the standard of road needed in the harvesting and removal of the timber and other products covered by the particular sale.

The question involved in the cited cases was whether your Department had authority to provide for the construction of permanent type roads beyond those reasonably required by timber purchasers to remove timber through a reduction in the appraised value of the given tract of timber. We pointed out that the only statutory authority, 16 U.S.C. 476, to sell National Forest timber provides that the Secretary

of Agriculture "* * * may sell the same for not less than the appraised value * * *." In construing the provisions of this statute we concluded that while there was nothing contained therein which expressly permits the use of proceeds from such sales for road construction, the Secretary properly recognized that timber purchasers must have access roads and may properly allow the cost of constructing roads against the appraised value of the timber purchased. However, we concluded that to provide for construction of roads of a higher standard than necessary for timber removal through a reduction of the appraised value would reduce the price of the timber sold accordingly and would result in the exchange of timber for road construction without statutory authority therefor. It is our view that application of purchaser credit to other than the tract of timber under which it was earned would likewise be the exchange of timber for road construction and without statutory authority.

Accordingly, we are constrained to object to the transfer of earned purchaser credit between contracts.

[B-175378]

Travel Expenses—Overseas Employees—"Discount 50 Plan" Reduced Fares—Entitlement

The "Discount 50 Plan," a published tariff that offers reduced air fares to Federal civilian employees and their dependents stationed outside the Western Hemisphere and traveling on authorized leave at their own expense is not available to an employee who is to be reimbursed by the United States, nor may a transportation request, the use of which is limited to travel chargeable to the U.S., be issued under the Plan. However, employees who have used the Plan incident to the renewal agreement travel authorized by 5 U.S.C. 5728(a) may be reimbursed, and it is immaterial if an employee did not travel to or spend a substantial period at his place of residence or authorized destination, but his entitlement is limited to the cost of travel to his place of residence, and, furthermore, the fact that an employee's dependents did not travel with him does not deprive him of entitlement to the cost of their travel to a different destination within the U.S., limited to the cost of traveling to the actual place of residence.

To the Assistant Secretary of the Army, June 19, 1972:

Further reference is made to your letter of February 22, 1972, which was forwarded to this Office March 2, 1972, by the Per Diem, Travel and Transportation Allowance Committee and assigned FDTATAC Control No. 72-4. You request an advance decision as to the propriety of reimbursement for renewal agreement travel performed by civilian employees and their dependents at personal expense and for such travel to places other than the actual place of residence or authorized alternate destinations.

In your letter you state as follows:

Incident to overseas tour renewal agreement travel, an increasing number of civilian employees are performing such travel at personal expense, using what is referred to as the Discount 50 Plan. See Local and Joint Passenger Rules Tariff No. PR-6, CAB No. 142 (Rule 246). The Plan provides for reduced air fares for

travel originating and terminating outside the Western Hemisphere and involves required stopovers. Government employees and their dependents are eligible to travel under the Plan if the employee is stationed outside the Western Hemisphere and traveling on authorized leave at his own expense. Upon completion of travel under the Plan, employees are claiming reimbursement for their travel and the travel of their dependents performed at personal expense incident to renewal agreement travel.

You further state that other questions have arisen in connection with the foregoing involving travel to a place other than the actual place of residence or alternate destinations and the amount of time spent in the United States. You report that the following travel situation is typical of the cases which are generating doubts as to the propriety of reimbursement:

Incident to renewal agreement travel, an employee is authorized travel to an alternate destination, Albuquerque, N. M. His home of actual residence is Alamogordo, N. M. The employee traveled to Albuquerque, N. M., but remained there for only 5½ hours. He states that the purpose of his travel thereto was to meet with his former employer. The employee's dependents accompanied him on home leave travel but performed travel to East Flat Rock, North Carolina, not Albuquerque, N. M., the point specified in the employee's travel orders as the authorized alternate destination. Of the 26 days the employee spent in a leave status, all except 2 days were spent at East Flat Rock, N. C. The employee and his dependents utilized the aforementioned Discount 50 Plan at personal expense. In this case the cost of the Plan was less than it would have cost had the employee and dependents used transportation requests. The Plan requires that the travelers make at least three stopovers between the point of origin and final destination.

Your doubt concerns whether under the foregoing facts and circumstances employees are entitled to travel and per diem expenses under the provisions of 5 U.S.C. 5728(a) which provide as follows:

(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty.

Section 1.12b(3) of Office of Management and Budget Circular No. A-56, revised August 17, 1971, states:

An employee and his family may travel to a location in the United States, its territories or possessions, Puerto Rico, the Canal Zone or another country in which the place of actual residence is located other than the location of the place of actual residence, however, an employee whose actual residence is in the United States must spend a substantial amount of time in the United States, its territories or possessions, Puerto Rico, or the Canal Zone incident to travel under 1.12 to be entitled to the allowance authorized. The amount allowed for travel and transportation expenses when travel is to an alternate location shall not exceed the amount which would have been allowed for travel over a usually traveled route from the post of duty to the place of actual residence and for return to the same or a different post of duty outside the continental United States as the case may be.

In connection with the foregoing facts, law and regulations, you ask the following questions:

(a) Is reimbursement by the Government proper for renewal agreement travel performed at personal expense under the Discount 50 Plan?

The Discount 50 fare is applicable to round trip or circle transportation wholly within the continental U.S.A. and Alaska and to open jaw transportation which originates at designated gateway points. Paragraph (A)(4) of the Discount 50 Plan, published in Local and Joint Passenger Rules Tariff No. PR–6, C.A.B. No. 142, Rule 246, provides that such fare will apply to United States Government personnel, and their dependents, stationed outside the Western Hemisphere traveling on authorized leave *at their own expense* who display proof that travel originated and will terminate outside the Western Hemisphere. Since the employees, although traveling on authorized leave at their own expense, are by law and regulations entitled to travel at Government expense for renewal agreement travel, it is believed that the fare was not intended to apply in such cases. The fact that such employees pay the expenses of travel out of their own funds initially for which they are later reimbursed by the United States may not be regarded as travel performed "at their own expense." Employees contemplating travel to the United States should therefore be advised that the Discount 50 Plan is applicable only when the expenses of the travel within the continental United States and Alaska are not reimbursable. If, as indicated in your letter, some employees have already used the Discount 50 Plan and are now seeking reimbursement, no objection thereto will be raised by our Office to reimbursement of such expenses if otherwise proper.

(b) Is it proper to issue a Transportation Request for travel under the Discount 50 Plan?

The answer here is in the negative. The purpose of a transportation request is to procure from a common carrier, transportation, accommodations, or other services chargeable to the Government. As the Discount 50 Plan is stated to be applicable to Government personnel traveling at their own expense, the issuance of a transportation request for such travel would be improper.

(c) Considering the requirement for stopovers under the Discount 50 Plan, is an employee's travel under such Plan a violation of the provisions of JTR, C 4152–2c?

Since, for the reason stated above, the Discount 50 Plan was not intended for use for travel such as here involved, no reply is necessary as to question (c).

(d) In the travel situation described herein, has the employee complied with the intent and purpose of home leave by remaining at Albuquerque for such a short period of time?

(e) If the answer to (d) is in the negative, does the fact that the employee spent 26 days of a 28 day leave period in the United States, albeit not at the authorized alternate destination or actual place of residence, satisfy the requirement of Section 1.12b(3), Office of Management and Budget Circular No. A–56 (now under the administration of General Services Administration) that the employee must spend a substantial amount of time in the United States, its territories or possessions, Puerto Rico or the Canal Zone?

(f) In regard to the travel situation described herein, would it be proper to recognize East Flat Rock, North Carolina, as an alternate destination in lieu of the actual place of residence?

In the hypothetical case you present in your letter, the employee elected Albuquerque, New Mexico, as his alternate destination. Travel to an alternate location is authorized by the regulations, and the only requirement attached thereto is that when the actual residence is in the United States, a substantial amount of time must be spent in this country. Moreover, the regulation does not specify that the employee must travel to his actual place of residence or to a designated alternate location. Thus, the failure to travel to or spend a substantial period of time at his actual place of residence or an authorized alternate destination such as Albuquerque, New Mexico, in this case, is immaterial. Reimbursement in such circumstances is allowable in an amount not in excess of that which would have been allowed for travel from the post of duty to the place of actual residence and for return to the same or a different post of duty outside the continental United States. See B–173226, August 2, 1971, copy enclosed. Question (d) is answered in the affirmative; no answers are required to questions (e) and (f).

(g) Since the employee's dependents, in the situation described herein, did not perform travel to the place of actual residence or the authorized alternate destination, is their travel to East Flat Rock, N.C., properly reimbursable?

An employee performing renewal agreement travel may travel alone or be accompanied by dependents. See paragraph C4521b of the Joint Travel Regulations. Since dependents traveled to East Flat Rock, the travel expenses would be limited to that point not to exceed costs of travel had it been to actual place of residence.

[B–175682]

Bids—Late—Telegraphic Modifications—Propriety of Consideration

A telegram that reduced both base and additive alternate bids and completed information omitted from the initial bid respecting subcontractor listing which was telephoned to the contracting agency 6 minutes before bid opening, was promptly transcribed and hand carried to the contracting officer, and later confirmed by Western Union, is an acceptable modification pursuant to Federal Procurement Regulations 1–2.304. Furthermore, the failure to indicate whether prices were to be reduced "by" or "to" the dollar amounts listed created no ambiguity, for an ambiguity exists only when the terms of a bid are subject to two or more reasonable interpretations, whereas reducing prices "by" the amounts specified brought the prices in line with other bids and the Government's estimate. Also a telegraphic abbreviation combining two categories of subcontracting work was properly interpreted to cover both categories and to satisfy the requirement that the bid identify the subcontractor to be used in each category.

To Paul & Gordon, June 28, 1972:

Reference is made to your letter dated April 21, 1972, with enclosures, in support of the protest of the Cardan Company, Incorporated (Cardan), against the award of a contract to the Alder Con-

struction Company (Alder) under invitation for bids (IFB) BIA-0150-72-17, issued by the Bureau of Indian Affairs, United States Department of the Interior, on February 14, 1972.

The IFB called for prices on the base item and seven additive alternates. Bids were to be submitted by 2:00 p.m., April 11, 1972. Opposite each of 24 categories of work the bidder was to insert the name and address of a subcontractor or subcontractors proposed to perform that category of work or his own name and address where he proposed to do that work with his own forces. Five bids were received by bid opening. Alder's original bid submission failed to include names and addresses for all 24 categories. However, Alder sent a telegram to amend its prices for the base and alternate items and to complete the subcontractor listing. The telegram was telephoned by Western Union to the contracting officer's secretary at 1:54 p.m., April 11, 1972, just minutes before bid opening. The secretary reduced it to writing and carried it to the bid opening room. A confirmation copy was received after bid opening from Western Union. The telegram read:

REVISE OUR BID PROJECT LH53-137 STEWART GYMNASIUM AS FOLLOWS REDUCE BASE BID $365,000.00 REDUCE ALTERNATE A $130,000 REDUCE ALTERNATE B $75,000 REDUCE ALTERNATE C $50,000 REDUCE ALTERNATE D $2,000 REDUCE ALTERNATE E $8,000 REDUCE ALTERNATE F $5,000 ALTERNATE G $13,000 SUBCONTRACTORS AS FOLLOWS: REINFORCING, STEEL ENGINEERS, LAS VEGAS; PILLING TURZILLO, OMAHA, NEBRASKA; STRUCTURAL STEEL DECKING, ALDER CONSTRUCTION; WALLBOARD, PLASTER, PAINTING, TED MILLER, SALT LAKE CITY; CERAMIC TILE, KINGSBERRY TILE, CARSON CITY; GLAZING, DESERT GLASS RENO; SYNTHETIC FLOOR SURFACING, WESTERN ATHLETIC SURFACING; OAKLAND; SHEET METAL, NEVADA; SHEET METAL, RENO; ROOFING, YANCEY, RENO; PLUMBING, HEATING, SEWER LINE, AND WATER LINE, ASCO ENGINEERING, VENTURA, CALIFORNIA; ELECTRICAL, ACME COLLINS, RENO, RESILIENT FLOORING, ALDER CONSTRUCTION.

Based on the telegram Alder's bid prices were reduced by the amounts listed and the subcontractor listing was considered complete. Including Alder's bid modification, the procuring agency computed the three low base bids as follows:

Alder Construction Company	$935,000
The Cardan Company, Inc.	962,000
J. R. Youngdale Constr. Co., Inc.	962,800

The original Alder base bid had been $1,300,000. Consequently, the agency's acceptance of the Alder bid modification has the effect of displacing Cardan as the low bidder. The same result occurs for each combination of base bid and alternates listed in the IFB.

You contend that the Alder telegram amending its original bid should not be accepted by the agency because it was delivered to the bid room after the time designated for bid opening. Telegraphic modifications of bids were authorized by paragraph 5(d) of Standard Form 22, "Instructions to Bidders" which was incorporated into the

IFB. Concerning the modification of bids, Federal Procurement Regulations 1–2.304 states in part:

(a) Bids may be modified or withdrawn by written or telegraphic notice received in the office designated in the invitation for bids not later than the exact time set for opening of bids. A telegraphic modificaion or withdrawal of a bid received in such office by telephone from the receiving telegraph office not later than the time set for opening of bids shall be considered if such message is confirmed by the telegraph company by sending a copy of the written telegram which formed the basis for the telephone call.

The procuring agency reports that the local Western Union office telephoned the Alder telegram to the Division of Plant Design and Construction, the office designated in the IFB for receipt of bids. As noted, the message was taken by the secretary to the contracting officer, whose office is just a short distance from the bid opening room; the message was promptly transcribed and hand carried to the contracting officer and was later confirmed by the telegraph company. We do not construe the regulation to require that the call from the telegraph company must be taken on a telephone in the bid opening room. Since, presumably, only the individual with the receiver to his ear would hear the message, we do not believe it is significant that the call was received in a nearby office. We have previously indicated that a telegraphic bid modification telephoned to the addressee contracting officer prior to opening and later confirmed in writing may be considered. B–142110, March 10, 1960. See also B–168210(2), July 10, 1970. Accordingly, we conclude that the Alder bid modification was received on time under the regulation.

The telegram states in part that the base bid and alternates A through F should be reduced in price; however, there is no express directive as to whether the bids should be reduced "by" or "to" the dollar amount listed. The procuring agency interpreted the bid modification as directing a reduction in bids "by" the dollar amounts listed because this interpretation is consistent with the other bids (base bid range: $962,000 to $985,000) and the Government estimate (base bid: $923,000). Since the original Alder base bid was $1,300,000, reduction of the original bid "by" $365,000 would be in line with the other bids and the Government estimate; reduction "to" $365,000 would result in an unreasonably low bid.

You contend that the bid prices are ambiguous due to the lack of direction in the bid modification concerning how the bid prices are to be reduced and that our decision, 50 Comp. Gen. 302 (1970) requires a rejection of the Alder bid for ambiguity.

An ambiguity exists where the terms of a bid are subject to two or more reasonable interpretations. However, an item in the bid may be confusing without being ambiguous if an application of reason would serve to remove the doubt. 48 Comp. Gen. 757, 760 (1969); B–173907 (1), December 22, 1971. We believe the only reasonable construction of the Alder telegram is that the items were to be reduced "by" rather

than "to" the dollar amounts listed since the insertion of "to" would constitute reductions significantly beyond what could reasonably have been intended. Therefore, we find that the contracting officer properly construed Alder's base bid and bids for alternates A through F.

In the case you cite, 50 Comp. Gen. 302 (1970), we held that the telegraphic bid modification of a bid for Government surplus property could reasonably be interpreted as modifying the original bid of $6,161.61 either "by" or "to" $8,900. A wide divergence in prices under Government surplus sales can reasonably be expected, whereas similar differences in bids on Government procurement are much less likely: for example, we have recognized that such a divergence may not put the contracting officer on notice of possible error in a surplus sale while it would in a Government purchase. B-175630, May 11, 1972. Therefore, we think the present case is distinguishable from 50 Comp. Gen. 302 (1970).

Concerning alternate G, the procuring agency reports that due to inadequate funds alternate G will not be included in any award made. Consequently, it is not necessary to determine whether or not Alder's bid modification for alternate G is ambiguous.

As indicated, Alder's bid as initially submitted did not include a proposed subcontractor or its own name for each of the 24 designated work categories. Alder sought to remedy the omissions in its telegram. However, the telegram telescoped or abridged the categories as indicated in the following tabulation:

Category Per IFB	Alder Abbreviation	Alder Subcontractor Identification
Structural Steel (Installation)	STRUCTURAL STEEL	ALDER CONSTRUCTION
Steel Decking	DECKING	
Lightgage Framing and Wallboard	WALLBOARD	TED MILLER, SALT LAKE CITY
Plaster and Stucco	PLASTER	
Painting	PAINTING	
Plumbing (Within Buildings)	PLUMBING	ASCO ENGINEERING, VENTURA, CALIFORNIA
Heating, Ventilating and Air Conditioning	HEATING	
Sewer Lines (Outside Utilities)	SEWER LINE	
Water Lines (Outside Utilities)	WATER LINE	

The procuring activity considered the work descriptions used by Alder as abbreviations for the entire work category because the same subcontractor usually performs all the work in each category. There

was no category listed as "Structural Steel Decking." The procuring activity reports that "structural steel" normally does not refer to "steel decking" and the latter term does not normally denote "structural steel" and that due to the similarity in the wording of the terms "Structural Steel" and "Steel Decking" and since Alder had not previously furnished a subcontractor listing for these categories, the procuring agency interpreted the bid modification as covering both categories. Consequently, it was considered that Alder had identified itself to perform these two categories with its own forces. Failure to fully set out the addresses as called for by the IFB was also not considered material. However, you contend that the telegraphed information contained ambiguities and omissions which rendered the Alder bid nonresponsive.

The purpose of requiring a subcontractor listing is to prevent "bid shopping" after award of contract and in 43 Comp. Gen. 206 (1963) we held that the failure to furnish a list of subcontractors required by the IFB rendered a bid nonresponsive. See also 44 Comp. Gen. 526 (1965). In these cases the bidder omitted the entire name and address of the subcontractor for some or all of the work categories. However, where there was only a partial omission in the subcontractor name or address or where the procuring agency could determine the subcontractor name from a reasonable interpretation of the job description without obtaining clarification data from the bidder, we have considered such irregularities minor. 50 Comp. Gen. 295 (1970); B–170862, November 10, 1970.

In B–173991(1), March 20, 1972, it was alleged that a bid was nonresponsive because the subcontractor listing did not include a name for the work category "ventilating." However, the bidder had submitted the name of its general building subcontractor and a description of the work he was to perform. We found the bid responsive since the information on the form, reasonably construed, indicated that the general subcontractor would perform all the categories of work, including ventilating, not otherwise provided for. We noted that the procuring activity was able to identify the categories of work to be performed by the subcontractor. We find that the present situation is analogous to the earlier case and that the agency reasonably interpreted the description, "Structural Steel Decking" and other work categories listed in the Alder telegram to relate to the total of each of the categories for which the required information had not previously been provided.

The cases cited by you in support of your position with respect to the subcontractor listing in general simply stand for the proposition that the requirement is material and failure to comply in substance is fatal to the bid. One case cited by you, B–171771, April 23, 1971, is distinguishable because there the bidder sought to reserve an

option to select one of two listed subcontractors. In the present case the only issue is whether the bid identified the subcontractor Alder proposed to use in each of the listed categories. We find that it has.

Based on the above, your protest must be denied.

[B-175774]

Bids—Bidder Designation—Discrepancy Between Bid and Bid Bond

Where the principal named in a bid bond was a joint venture which included the Corporation that was the only entity named in the low bid, the statements and affidavits submitted after bid opening, to evidence that a mistake had been made and the bidder intended to be named in the bid was the joint venture, may not be accepted to make the nonresponsive bid responsive by changing the name of the bidder. An alleged mistake is proper for consideration only when the bid is responsive at the time of submission, and the bid submitted not having met the terms of the invitation for bids which required the bid guarantee to be submited in the proper form and amount by the time set for the opening of bids, it would not be proper to consider the reasons for the nonresponsiveness of the bid, whether due to mistake or otherwise.

To the Secretary of the Army, June 29, 1972:

Reference is made to the request for an advance decision pursuant to the Armed Services Procurement Regulation (ASPR) 2-406.3(f) forwarded to our Office on April 20, 1972, by Mr. E. Manning Seltzer, General Counsel, Office of the Chief of Engineers. The request concerned the alleged mistake in bid of Canyon Construction Company and Associates, Joint Venture, which contends through its joint venture manager, Mr. Wayne H. Lott, president of Canyon Construction Company (Canyon), that Mr. Lott inadvertently designated Canyon rather than the joint venture as the bidder under solicitation DACA63-72-B-0093, issued by the U.S. Army Engineer District, Fort Worth, Texas.

The record evidences that the low bidder under the subject solicitation represented itself as "Canyon Construction Company," a corporation incorporated in Texas, and the Bid Form (Standard Form 21) was signed by Mr. Lott as the president of this corporation. However, the required bid bond accompanying the bid designated as principal "Canyon Construction Company and Associates, a Joint Venture" and the bond was signed by Mr. Lott in the capacity of joint venture manager.

In support of his position that he made a mistake in bidding, Mr. Lott alleges that "commitments were made by us for the joint venture contracting of this job and this was our original intent as shown in the bid bond." Mr. Lott also submitted three affidavits, one executed by himself, one by Mr. Joe Sharp, the purported participant in the joint venture, and one by Mr. C. A. Schutze, Jr., the Attorney-in-Fact for Fidelity and Deposit Company of Maryland, who executed the bid bond. These affidavits attest to the fact that Canyon and Joe Sharp intended to submit as a joint venture a bid under the subject solicitation.

We are of the view that even if the failure to name the joint venture as the bidder was the result of inadvertence, as contended by Mr. Lott, an alleged mistake is proper for consideration only in cases where the bid is responsive to the requirements of the invitation.

It is a well-established principle of procurement law that whether a bid is responsive to the invitation is for determination upon the basis of the bid as submitted and that it is not proper to consider the reasons for the unresponsiveness, whether due to mistake or otherwise. See 38 Comp. Gen. 819 (1959).

This principle is implemented by our decisions B–169369, April 7, 1970, and 44 Comp. Gen. 495 (1965), and we are of the opinion that any apparent conflict between these decisions, as contemplated by Mr. Seltzer's letter of April 20, can be reconciled.

In 44 Comp. Gen. 495, *supra*, where the bidder and the principal named in the accompanying bid bond were determined to be distinct legal entities, although they were affiliated, an issue was whether the surety's obligation ran to a legal entity different from that expressly identified on the bid bond. We held that it did not. We were therefore of the opinion that the bond as submitted with the bid did not establish that the surety had an obligation to pay a debt of the bidder under the invitation, and that the establishment of such a relationship after bid opening would tend to compromise the integrity of the competitive bid system by making it possible for a bidder to decide after opening whether or not to make his bid responsive.

In our decision B–169369, *supra*, where the principal named on the bid bond was a joint venture which included a corporation as a member, and the nominal bidder was the corporation, we held that it appeared from the information submitted with the bid that the bid was intended to be that of the joint venture. In particular, we noted that in addition to a copy of the bid bond, a copy of the "Certificate of Joint Venture With Parent Co." submitted with the bid, clearly expressed the intention and agreement of the two affiliated companies to submit a joint bid. Thus, we concluded that since the intended bidder and the principal on the bid bond were the same legal entity, the surety was bound by the bond submitted with the bid in the event of a failure by the intended bidder to execute the contract and other documents upon acceptance of the bid. In light of this conclusion, we held that the bid bond was sufficient and the bid was responsive and not subject to rejection.

In each of the referenced cases the decision of this Office addressed the issue of whether the bid as submitted was responsive, insofar as the solicitation in each case required the bidder to submit a binding bid bond and there was an apparent conflict between the principal named on the bid bond and the nominal bidder. In 44 Comp. Gen. 495, *supra*, we noted that evidence of the surety's obligation to the nominal

bidder would have to be established by evidence outside the bid, whereas in B–169369, *supra*, we were able to conclude from the bid itself that the intended bidder was the same legal entity as the principal named on the bid bond, and we held that the bid was responsive to the bonding requirement of the invitation.

In the instant case the solicitation also requires each bidder to submit a bid bond with its bid. In this regard paragraph 4 of the Instructions to Bidders (Standard Form 22) states as follows:

Where a bid guarantee is required by the invitation for bids, failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

In light of the foregoing, since the principal material evidencing the joint venture of Canyon and Joe Sharp as the intended bidder are the statements and affidavits submitted after the bid opening, we are of the view that the bid submitted by Mr. Wayne H. Lott is nonresponsive, and that the bid may not be made responsive by changing the name of the nominal bidder.

Accordingly, the subject bid should be rejected.

The file forwarded with Mr. Seltzer's April 20 request is returned.

[B–174007]

Transportation—Automobiles—Military Personnel—Commercial Vessels—Reimbursement Basis

An enlisted Army member in grade E–5 and therefore eligible to have his automobile shipped at Government expense pursuant to 10 U.S.C. 2634 incident to his transfer overseas, who when erroneously denied such transportation arranged and paid for shipping the vehicle by commercial means, is entitled to partial reimbursement in the amount the Army would have been charged by the Military Sealift Command (MSC), Department of the Navy, under its applicable schedule of rates if the Government had arranged for the shipment. Regulations denying an eligible member reimbursement for the cost of shipping his privately owned vehicle overseas by commercial means when he personally arranges for the service because the Government erroneously refused to do so may be amended to provide for partial reimbursement based on MSC costs. 45 Comp. Gen. 39 and other similar decisions modified.

To the Secretary of the Army, June 30, 1972:

Reference is made to letter dated August 17, 1971, from Colonel Fletcher R. Veach, Jr., USA, Commanding Officer, Headquarters, NATO/SHAPE Support Group (US), APO New York, New York 09088, requesting an advance decision concerning the claim of Ronald D. Rembaum, SP5, Headquarters Company, NATO/SHAPE Group (US), for reimbursement for the cost of the personally procured shipment of his vehicle.

By Special Orders Number 87, Headquarters, United States Army Personnel Center, Fort Dix, New Jersey 08640, dated March 28, 1970, SP5 Rembaum's permanent station was changed to 5th Replacement Battalion, APO New York, New York 09058. By Special Orders

Number 84, Headquarters, 5th Replacement Battalion, dated April 1, 1970, Specialist Rembaum was assigned to NATO/SHAPE Support Group (US), in Belgium.

The record before us shows that shortly after arriving at his new duty station, Specialist Rembaum visited the passenger and privately owned vehicle section of the NATO/SHAPE Support Group's transportation office where he was informed that he was not eligible to ship his car from the United States to Europe at Government expense because he was not command sponsored. Afterwards the member personally arranged for commercial transportation of his car from Boston, Massachusetts, to Antwerp, Belgium, for which he paid $275.19 from his own funds, after the car's arrival on or about August 3, 1970.

Upon learning that Army Regulation 55–71 provides authority for the Government shipment of his automobile, Specialist Rembaum made claim for reimbursement for the cost of the personally arranged shipment. The claim was forwarded through military channels to the Finance Center, United States Army, which denied payment of the claim because of the lack of authority for reimbursement of a member who ships his vehicle at his own expense.

In his letter, Colonel Veach recommends that an exception be made to the provisions of paragraph 16–26 of Army Regulation 55–71, so that the member may be reimbursed for the cost of shipping his car, which he says resulted from erroneous information received from Government personnel. Additionally, Colonel Veach recommends that the regulation be considered for revision to provide a basis for reimbursement to other members in similar circumstances.

The pertinent statutory authority for transoceanic shipment at Government expense of privately owned vehicles of members of the Armed Forces is contained in 10 U.S.C. 2634 and provides in material part as follows:

2634 Motor vehicles; for members on change of permanent station

(a) When a member of an armed force is ordered to make a change of permanent station, one motor vehicle owned by him and for his personal use * * * may * * * be transported, at the expense of the United States to his new station * * *
(1) on a vessel owned, leased, or chartered by the United States;
(2) by privately owned American shipping services; or
(3) by foreign-flag shipping services if shipping services described in clauses (1) and (2) are not reasonably available.

The statute and implementing regulations contemplate that arrangements for such shipment will be made by the appropriate shipping officer. In this respect, Army Regulation 55–71, which in chapter 16 prescribes the policies and procedures for transportation of privately owned vehicles, specifically provides in paragraph 16–26 that an army member is not authorized reimbursement for the cost of shipment of privately owned vehicles by commercial means when he personally

arranges for such service. A similar provision is contained in paragraph M11002–1 of the Joint Travel Regulations.

Paragraph 16–5, Army Regulation 55–71, provides entitlement for transoceanic shipment at Government expense of one privately owned vehicle for the personal use of a member pursuant to permanent change-of-station orders involving movement to, from, or between oversea commands. Entitlement is based on the rank or grade held by the member on the effective date of permanent change-of-station orders. Authorized personnel includes enlisted men in grade E–5.

Although Specialist Rembaum was in grade E–5 on March 28, 1970, the effective date of his permanent change-of-station orders to an oversea area, and therefore was in a grade eligible for transoceanic transportation of his automobile, the record shows that he was erroneously denied such transportation.

We have been informally advised by the Military Sealift Command, Department of the Navy, the agency responsible for transoceanic shipment of automobiles of service personnel, that the charge to the service concerned (Department of the Army) by that agency for transporting the member's vehicle from Boston to Antwerp would have been $136.80 (228 cubic feet), regardless of whether a commercial, chartered, or Government ship was utilized.

In decision of July 20, 1965, 45 Comp. Gen. 39, we expressed the view that the Joint Travel Regulations could not be amended to provide reimbursement for personally arranged commercial shipment of a motor vehicle as we were of the opinion that the statutory authority providing for Government arranged shipment did not confer that entitlement. We have now concluded, however, that consistent with the purpose of relieving a member of the expense of shipping his car, the statute would not preclude partial reimbursement in the amount that the Army would have been charged by the Military Sealift Command under its applicable schedule of rates if the Government had arranged for the shipment.

Accordingly, the claim of Specialist Rembaum is being referred to our Transportation and Claims Division with instructions to verify the amount that the Army would have been charged if the shipment had been arranged by the Military Sealift Command and to issue a settlement in his favor for that amount.

We would not object to an amendment of the applicable regulations to provide for partial reimbursement on the basis indicated above in other similar cases where a member is entitled to overseas transportation of his automobile by the Government but is erroneously denied such transportation and ships the vehicle at his own expense. Our decision of July 20, 1965, 45 Comp. Gen. 39, and other similar decisions are modified to that extent.

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ABSENCES

Leaves of absence. (*See* Leaves of Absence)

ADVERTISING

Advertising *v.* negotiation

Advertising when feasible and practicable

Fact negotiation is authorized under 10 U.S.C. 2304(a)(10) when impracticable to obtain competition, does not exclude advertising procurement when feasible and practicable to do so; therefore, before issuing RFP where available specifications were "primarily performance and design parameters," and available design data was "incomplete, not sufficiently detailed and largely uncoordinated," consideration should have been given to advertising performance-type specifications and to par. 1-1206.2 of ASPR, which authorizes use of brand-name-or-equal purchase descriptions when more precise and detailed specifications are not available, since performance-type specifications and formal advertising are not mutually inconsistent---------- 637

"Turnkey" housing projects

Although negotiation of turnkey construction contracts for military family housing under 10 U.S.C. 2304(a)(10) and par. 3-210.2(xiii) of Armed Services Procurement Reg. which authorize negotiation when it is impracticable to obtain competition or impossible to draft specifications was necessary because impossibility of drafting adequate specifications is inherent in "turnkey" concept that permits housing developer to use his own architect, future procurements by same method should, in addition to identifying technical criteria for each turnkey project, indicate relative importance of each evaluation factor, and when using "best value formula" evaluation, Govt. should determine that its actual requirements were met, and if those requirements become definitized during course of negotiations, all offerors in competitive range must be given opportunity to submit revised proposals---- 129

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AGENTS

Government

Authority

Surrender of vested rights

Requirement in Adult Education Act of 1966 (20 U.S.C. 1201–1213), and implementing statutory regulation, that State's contribution from non-Federal sources for any fiscal year "will be not less than amount expended for such purpose from such sources during preceding fiscal year" may not be waived since statute and regulation are constructive, if not actual, notice of requirement, and grant funds are to be recovered if State fails to meet its financial contribution. If failure is due to circumstances beyond State's control, possible waiver is for consideration on individual basis. Fact that initially grant was erroneously made does not justify waiver as Govt. is only bound by acts of its agents within scope of delegated authority, which does not permit giving away money or property of U.S., either directly or by release of vested rights 162

Contractors

Status

Under make-or-buy proposal by prime contractor pursuant to request for proposals to furnish launch vehicles, participation of NASA in negotiation of second step engine with subcontractors does not make prime contractor agent of NASA so as to subject subcontracting to Govt.'s procurement statutes and regulations, for in make-or-buy program as defined in NASA PR 3.901–1, Govt. buys management, including placing and administering subcontracts, from prime contractor along with goods and services to assure performance at lowest overall cost, with right of review reserved in Govt. Therefore, essential point is not selection of subcontractor but make-or-buy decision, and record shows NASA thoroughly analyzed various technical aspects involved in prime contractor's proposal, including relative merits of two different subcontractor design configurations 743

Unless prime contractor is acting as purchasing agent, bid protest procedures of U.S. GAO do not provide for adjudication of protests against subcontract awards made by prime contractors. Furthermore, where award of subcontract has been made and neither fraud nor bad faith on part of contracting officer in approving award is alleged, possibility of finding adequate justification to support cancellation of subcontract is so remote that consideration of such protests under GAO's bid protest procedures would be unwarranted. However, in audit of prime contract, attention will be given to any evidence indicating cost to Govt. was unduly increased because of improper procurement actions by prime contractor. Furthermore, when prime contractor is not acting as Govt. agent, bid preparation expenses of subcontractor are not reimbursable 803

AGENTS—Continued Page

Of private parties

Authority

Contracts

Bid bond

Bid bond submitted in required amount of $52,351.58, which constituted 20% of bid total ($261,757.90), but attachment to bond limited surety's obligation to amount not to exceed $50,000, is valid bond that binds surety in amount of $50,000, and low bid may be considered, notwithstanding bond did not equal required penal amount, since pursuant to sec. 1-10.103-4(b), FPR, when amount of bid guarantee equals or is greater than difference between bid price and price in next higher acceptable bid ($272,956), failure to submit sufficient bid guarantee may be waived. Although general rule is that agent who exceeds his authority may not bind principal, where difference between contract as authorized and contract as made is difference in amount, exception is recognized and principal is liable upon contract as it was authorized. B-148309, Mar. 19, 1962, overruled 802

AIRCRAFT

Charter

Military Airlift Command

Meals furnished Government travelers

The practice of collecting from officers and civilians reimbursement for meals provided them on Military Airlift Command military flights may not be discontinued on bases charges for transportation provided to Govt. travelers on contract charter flights appear to be subject to tariff rates fixed by Civil Aeronautics Board on substantially same basis as tariff rates established for commercial flights and, therefore, cost of in-flight meals could not be identified as part of cost of either contract charter flights or private commercial flights, and that in-flight meals are not extra compensation within meaning of 5 U.S.C. 5536, since meals supplied by Base Mess are chargeable to funds appropriated for operation of messes and, therefore, collection for cost of meals furnished is required by sec. 810 of Dept. of Defense Appropriation Act, 1971 455

AIRPORTS

Federal Aid

Development projects

Land title

Grant under Airport and Airway Development Act of 1970 (49 U.S.C. 1701 *et seq.*) to fund air station in Guam for both civil and military use pursuant to joint-use agreement between Dept. of Navy and Territory of Guam where landing area is owned by U.S. Govt., excluded by act from sponsoring airport development, which pursuant to sec. 16(c)(1) of act may only be approved if "public agency" holds good title to landing area, may be approved by Secretary of Transportation, provided he determines grant will effectuate purpose of act, on basis joint-use agreement will give Guam "good title" and, moreover, legislation has been introduced to clarify grant assistance where landing area is owned by U.S. 627

ALASKA Page

Employees

Compensation

Overtime

Travel between residence and headquarters

Traveltime of one-half hour each way from home to duty station and return in Govt-owned boat by Federal Aviation Administration wage board employees assigned to Alaska and performing regularly scheduled duty period of 8 hours per day is not compensable as overtime under 5 U.S.C. 5542(b)(2)(B) since employees did not perform work while traveling, travel was not incident to performance of work, nor did it result from event which could not be scheduled or controlled administratively, and fact that boat trip could be dangerous because of tidal action or dock in need of repairs does not constitute travel under arduous conditions as travel under arduous conditions is travel performed under severe weather conditions 7

ALIENS

Employment

Transfers

Between nonappropriated and appropriated fund positions

To give effect to agreement between Govt. of U.S. and Republic of Philippines relating to Employment of Philippine Nationals in U.S. Military Bases in Philippines, Filipino employees transferred among nonappropriated and appropriated fund positions may retain their seniority, which will encompass leave accumulations, length of service for end of year bonuses, severance pay, and lump-sum payment in lieu of retirement annuity, since agreement provides that uniform personnel policies and administration apply equally to all employees "regardless of nationality and sources of funds used," and 22 U.S.C. 889 does not require compensation plans for aliens to be limited by laws and regulations applicable to civil service employees. Therefore, to implement agreement, U.S. may be considered as one employer with no distinction between service under nonappropriated or appropriated fund activities .. 123

ALLOWANCES

Excess living costs outside United States, etc. (See **Station Allowances**)

Family. (*See* **Family Allowances**)

Quarters. (*See* **Quarters Allowance**)

Relocation

Persons displaced by Federal programs

Although Dept. of Housing and Urban Development must amend project grants, contracts, and agreements with State agencies entered into prior to Jan. 2, 1971, effective date of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, in order to comply with title II of act which provides for relocation allowances and assistance to persons displaced by Federal and federally assisted programs on or after Jan. 2, 1971, including persons whose displacement was delayed until July 1, 1972, pursuant to sec. 221(b), cost-sharing requirements of sec. 211(a) do not apply since sec. 211(c) pro-

ALLOWANCES—Continued Page

Relocation—Continued

Persons displaced by Federal programs—Continued

viding for amendment of programs to implement relocation assistance does not include sec. 211(a), and pursuant to sec. 220(a), repeal of Housing Act of 1949, as amended, does not affect 100 percent existing Federal liability for relocation costs---------- 267

Station allowances. (*See* **Station Allowances**)

Trailer allowances. (*See* **Trailer Allowances**)

ANNUAL LEAVE

(*See* **Leaves of Absence, annual**)

APPROPRIATIONS

Availability

Membership fees

Bar associations

Membership dues assessed by unified bar for District of Columbia (D.C.) on Govt. attorneys who are members of D.C. bar are personal expenses that are not payable from appropriated funds. Therefore, since only those attorneys of U.S. Patent Office who are members of D.C. bar are subject to dues of unified bar to be permitted to appear in U.S. District Court for D.C., Court of Appeals for that circuit, and U.S. Court of Customs and Patent Appeals, those attorneys who are not members of D.C. bar, may without payment of dues to unified bar appear before U.S. District Court for D.C. in those cases in which U.S. is party, and if admitted to practice before highest court of any State, may be admitted to practice before U.S. Court of Appeals, U.S. Court of Claims, and U.S. Court of Customs and Patent Appeals------ 701

Music

Expenditures for incentive-type music scientifically programmed, such as MUZAK system, may be considered "necessary expenses" since music tends to raise level of employee morale and increase employee productivity by creating pleasantly stimulating and efficient work atmosphere that results in savings to Govt. and, therefore, funds appropriated to Bureau of Public Debt, Treasury Dept., may be used to make monthly rental payments to MUZAK Company for incentive-type music played in space occupied by Bureau in privately owned building, which space was equipped with MUZAK system prior to occupation by Bureau. B–86148, dated Nov. 8, 1950, overruled---------- 797

Objects other than as specified

Public utility relocation

Request of Potomac Electric Power Co. (PEPCO) for reimbursement of facilities relocation costs incurred incident to construction of Library of Congress James Madison Memorial Building was properly denied in absence of statutory authority similar to that under which PEPCO is being reimbursed for relocations of their facilities in connection with Metro program, and neither appropriation measures for Library of Congress building nor any other authority provides for payment of utility location costs by Architect of Capitol---------- 167

APPROPRIATIONS—Continued Page

Availability—Continued

Safety glasses

Holding in 42 Comp. Gen. 626 that in absence of showing that employee was unable to furnish prescription from which safety glasses could be made, or that prescription could not be made from glasses employee normally wears, cost of eye refraction examinations was not for payment by Govt. does not preclude such examinations where employee has not previously worn glasses or where it is administratively determined existing prescription is inadequate, and general practice of Air Force of providing refraction examinations under its occupational vision program established pursuant to 5 U.S.C. 7903 and 29 U.S.C. 668(a) should be discontinued and AFR 160–112 amended to clarify that refraction examinations may be authorized at Govt. expense only where employee had previously not worn glasses or his present prescription or glasses are inadequate. 42 Comp. Gen. 626, clarified 775

Disaster relief

Agency participation prior to advance of funds

Practice of Office of Emergency Preparedness (OEP) in calling upon Federal agencies to provide relief assistance pursuant to Disaster Relief Act of 1970 (42 U.S.C. 4401 *et seq.*) from their own funds pending reimbursement from funds appropriated to President's disaster fund or directly to performing agency is within scope of act. Not only is Congress well aware of practice, but sec. 203(f) of act provides for President to direct any Federal agency, with or without reimbursement, to provide disaster assistance—authority similar to that in repealed 1950 act, prescribing "such reimbursement to be in such amounts as President may deem appropriate"—and President having delegated his authority to Director of OEP by E.O. 11575, Federal agencies may be assigned to provide assistance without prior advance of funds from OEP 245

Federal grants, etc., to other than States. (*See* **Funds, Federal grants, etc., to other than States**)

Obligation

Investment repayment

Hire costs for tankers to be constructed for charter to Military Sealift Command (MSC) for 5-year term with options to cover 15 years, and costs of breach, termination, failure to exercise renewal option, or value of lost tanker are operating expenses chargeable to Navy Industrial Fund since charter arrangement is not purchase of an asset requiring authorization and appropriation of funds. Fact that MSC assumes certain termination costs does not transform 5-year charter with its 15-year renewal options into 20-year charter, and except for authority in sec. 739 of the Dept. of Defense Appropriations Act, 1972, DOD would be required to set aside cash for option termination costs; also question of the general, full faith and credit obligations of United States is for determination by Attorney General; and only way to insure investors of unconditional obligation of the Fund is to so provide in charter for each vessel 598

APPROPRIATIONS—Continued Page

Obligation—Continued

Section 1311, Supplemental Appropriation Act, 1955

Departmental transfers

Agreement of June 4, 1971, by which funds were transferred by HEW to FAA to provide training from June 7, 1971, to June 7, 1972, for air traffic control trainees pursuant to sec. 303(a) of Manpower Development and Training Act of 1962, as amended, 42 U.S.C. 2613(a), which authority terminates June 30, 1972, is agreement that was authorized independently of sec. 601 of Economy Act since sec. 306(a) of Manpower Act provides for making of contracts and agreements, and training agreement having been entered into prior to June 30, 1971, meets obligation requirement of sec. 1311 of Supplemental Appropriation Act, 31 U.S.C. 200, and, therefore, transferred funds remain available for further obligation by FAA in accordance with agreement within time limits of Manpower Development and Training Act 766

Loans

Reporting

Since requirement of sec. 1311 of Supplemental Appropriation Act of 1955, as amended, (31 U.S.C. 200), that recording of obligation must be supported by documents applies more readily to 1-year or multi-year appropriations, SBA whose financial transactions involve loans from Business Loan and Investment Fund and Disaster Loan Fund—both revolving funds, appropriations to which remain available until expended—may adopt reporting system that departs from exact obligation basis if specific nature of such reporting is disclosed to all appropriate budgetary authorities. Recognizing distinctions between loans, reports on guaranty loans may be made on commitment basis, on computed basis for obligation estimates, and on direct participation loans, and reports should include obligation statements 631

ARCHITECT OF THE CAPITOL

Authority

Public utilities relocation

Request of Potomac Electric Power Co. (PEPCO) for reimbursement of facilities relocation costs incurred incident to construction of Library of Congress James Madison Memorial Building was properly denied in absence of statutory authority similar to that under which PEPCO is being reimbursed for relocations of their facilities in connection with Metro program, and neither appropriation measures for Library of Congress building nor any other authority provides for payment of utility location costs by Architect of Capitol 167

ASSIGNMENT OF CLAIMS

(*See* **Claims, assignments**)

ATOMIC ENERGY COMMISSION Page

Contracts

Competition *v.* defense requirements

Although Atomic Energy Commission's extension of contract containing "Avoidance of Organizational Conflicts of Interest" clause for manning underground weapons testing activity for 5-year period with contractor initially selected in 1947 contributes to common defense and security by avoiding serious disruption of weapons program that change of contractors would entail, and procedure was consistent with Commission's procurement regulations, it is suggested that maximum practicable competition should be obtained in future whenever contracts utilizing appropriated funds are to be awarded and it appears likely Govt.'s position can be improved in terms of cost or performance. In fact, adoption of policy favorable to competition instead of being disruptive to weapons program might well have salutory effect on incumbent contractor's performance 57

Subcontractors

Bid procedures

While prime contractor under Atomic Energy Commission (AEC) operating type contract is not bound by statutory and regulatory requirements that govern direct procurement by Govt., AEC Procurement Reg. 9–59.002 provides for AEC review of cost-type contractors' procurement systems and methods, as well as review of individual procurement actions and, therefore, there is no basis to question procurement determinations made under rules applicable to such AEC contracts or under rules governing direct Federal procurements in connection with evaluation of bids submitted under invitation for bids issued by AEC prime contractor for installation of mechanical, electrical, and HVAC systems 329

ATTORNEYS

Fees

Bar membership dues

Government attorneys

Membership dues assessed by unified bar for District of Columbia (D.C.) on Govt. attorneys who are members of D.C. bar are personal expenses that are not payable from appropriated funds. Therefore, since only those attorneys of U.S. Patent Office who are members of D.C. bar are subject to dues of unified bar to be permitted to appear in U.S. District Court for D.C., Court of Appeals for that circuit, and U.S. Court of Customs and Patent Appeals, those attorneys who are not members of D.C. bar, may without payment of dues to unified bar appear before U.S. District Court for D.C. in those cases in which U.S. is party, and if admitted to practice before highest court of any State, may be admitted to practice before U.S. Court of Appeals, U.S. Court of Claims, and U.S. Court of Customs and Patent Appeals 701

AUTOMATIC DATA PROCESSING SYSTEMS

(*See* **Equipment, Automatic Data Processing Systems**)

AWARDS

Contract awards. (*See* **Contracts, awards**)

BANKRUPTCY

Page

Referees

Compensation

Limitation on salary changes

Acceptance by full-time referees in bankruptcy of comparability adjustment in rates of pay authorized for Govt. employees would in view of 2-year limitation on salary changes in sec. 40(b) of Bankruptcy Act, 11 U.S.C. 68(b), preclude any further adjustments in referee salaries by Judicial Conference until expiration of 2-year limitation since salaries of referees are administratively fixed and, therefore, are not within purview of sec. 3 of Economic Stabilization Act Amendments of 1971 requiring adjustments in pay of employees subject to statutory pay system, which as defined in Federal Pay Comparability Act of 1970 excludes administratively fixed salaries. Therefore, since administrative action is prerequisite to salary adjustments similar to those granted by sec. 3 of 1971 act, approval by Judicial Conference of salary adjustments are subject to sec. 40(b) limitation 709

BIDDERS

Debarment

Contract award eligibility

Business affiliates

Fact that bidder under invitation for bids (IFB) for Globe valves is affiliate of debarred firm does not preclude award of contract to affiliate, where administrative determination not to extend debarment of principal to affiliate—discretionary determination under par. 1-604 of Armed Services Procurement Reg.—was made with full knowledge of relationship and only after extensive preaward survey that found production facilities, technical and quality capabilities of affiliate to be adequate, as purpose of debarment is not to punish but to protect interest of U.S. Furthermore, reason for debarred corporation establishing affiliate was to effect settlement with its creditors by assigning lease, sale, and licensing agreements with affiliate to creditors 65

Rejection of bidder in best interest of Government

Rejection, both as prime contractor or subcontractor, of low bidder under invitation for bids to overhaul topside of Navy vessel as being in best interest of Govt. without issuing written determination of responsibility required by par. 1-904.1 of Armed Services Procurement Reg., and referral to Small Business Administration under ASPR 1-705.4(vi), because bidder had been placed in suspended status on Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors, pursuant to ASPR 1-605, for lack of business integrity, was proper action that was not in violation of due process since written determination is not required if it is not in best interest of Govt. to award contract to suspended bidder whose placement on consolidated list was not for purpose of punishment but in the best interest of Govt 703

BIDDERS—Continued Page

Debarment—Continued

Procedure

Due process status

Since procedures under par. 1–605 of Armed Services Procurement Reg., which prescribes temporary or limited suspension for reasonable time in interest of Govt. of contractor suspected of commission of specific crimes, including bribery, or any other offense indicating lack of business integrity or business honesty, although lacking certain elements which may be considered by court in order to afford due process in more severe debarment action, do not result in denial of due process, as regulation includes safeguards and provides for modification of suspension and contract award when in best interest of Govt., and because bidder's status is before courts, U.S. GAO will not question validity of regulation.. 703

Guidelines established in court decision

Contractor on Joint Consolidated List of Debarred, Ineligible, or Suspended Contractors in suspended status whose bids and proposals were rejected under numerous ship repair solicitations pursuant to holding in 51 Comp. Gen. 703, to effect rejection of bid of suspended contractor without issuance of written determination of responsibility (ASPR 1-904.1(iv)) and referral to SBA (ASPR 1-705.4(c)(vi)) was in best interest of Govt., is not entitled to reconsideration of status on basis of retroactive guidelines established by U.S. Court of Appeals for Dist. of Columbia in Civil Action No. 72-1392, to prevent unfairness in utilizing ASPR 1-605 suspension procedures, and validity of contractor's continued suspension depends upon conformance with guidelines established in court decision---------- 810

Product status

Sale to Govt. of products of debarred firm through affiliated company, licensee, or distributor, is legally permissible for, while firm or individual may be debarred, there is no provision in Armed Services Procurement Reg. (ASPR) for debarring products of debarred firm or individual, and although under ASPR 1-604.2(b) all known affiliates of debarred concern or individual may also be debarred, decision to include affiliates in debarment is not automatic but is individual determination to be made on case by case basis---------- 65

Types of debarment

Debarment of firms or individuals from securing Govt. contracts are of two types—by statute or regulation—neither of which defines term "debarred." However, grounds for listing firm or inidvidual on Joint Consolidated List and consequences thereof are set forth in detail in Part 6 of Armed Services Procurement Reg. (ASPR). Administrative debarment of firm or individual under ASPR 1-604 may be authorized at discretion of Secretary of each department or by his authorized representative in public interest. Regulation is not based on specific statute dealing with debarment, but is in implementation of general authority to contract contained in Armed Services Procurement Act of 1947, as amended (41 U.S.C. 151)---------- 65

BIDDERS—Continued Page

Identity

Erroneous

Where principal named in bid bond was joint venture which included corporation that was only entity named in low bid, statements and affidavits submitted after bid opening, to evidence that mistake had been made and bidder intended to be named in bid was joint venture, may not be accepted to make nonresponsive bid responsive by changing name of bidder. Alleged mistake is proper for consideration only when bid is responsive at time of submission, and bid submitted not having met terms of invitation for bids which required bid guarantee to be submitted in proper form and amount by time set for opening of bids, it would not be proper to consider reasons for nonresponsiveness of bid, whether due to mistake or otherwise 836

Qualifications

Administrative determinations

Notice of bid rejection

Signing of contract by contracting officer on basis of favorable preaward survey constitutes affirmative determination of bidder responsibility that is required by par. 1-904.1 of Armed Services Procurement Reg., and, therefore, fact that written determination respecting responsibility was not issued to low rejected bidder does not invalidate contract. Moreover, since responsibility is question of fact to be determined by contracting officer and necessarily involves exercise of considerable range of discretion, U.S. GAO will not substitute its judgment for that of contracting officer where there is no convincing evidence that responsibility determination was arbitrary, capricious, or not based upon substantial evidence 703

As bid evaluation factor

Rejection of bid

Determination small business concern was nonresponsible on basis of negative preaward survey evidencing past unsatisfactory performance under both Govt. and private contracts attributable to tenacity and perseverance which, pursuant to sec. 1-1.708-2(a)(5) of Federal Procurement Regs. that concerns deficiencies other than capacity and credit, was forwarded to Small Business Administration (SBA) for issuance of Certificate of Competency (COC) if warranted is upheld where SBA agreed bidder lacked tenacity and perseverance and, in addition, concluded concern was deficient in capacity and issuance of COC was not justified. While factor of tenacity and perseverance is not covered by COC procedure, denial of COC operated as concurrence by SBA in contracting officer's determination award to low bidder was precluded 288

Business affiliates

Debarment of one

Fact that bidder under invitation for bids (IFB) for Globe valves is affiliate of debarred firm does not preclude award of contract to affiliate, where administrative determination not to extend debarment of principal to affiliate—discretionary determination under par. 1-604 of Armed Services Procurement Reg.—was made with full knowledge of relationship and only after extensive preaward survey that found production

BIDDERS—Continued Page

Qualifications—Continued

Business affiliates—Continued

Debarment of one—Continued

facilities, technical and quality capabilities of affiliate to be adequate, as purpose of debarment is not to punish but to protect interest of U.S. Furthermore, reason for debarred corporation establishing affiliate was to effect settlement with its creditors by assigning lease, sale, and licensing agreements with affiliate to creditors---------- 65

Evidence

Contracting officer's determination that wholly owned affiliate under direction of parent company consisting of companies having specialized abilities that had successfully performed Govt. contracts was responsible offeror capable of satisfactorily performing contract for disposal of unserviceable explosive fuses by incineration is acceptable determination unless it can be shown by convincing evidence that finding was arbitrary, capricious, or not based on substantive evidence---------- 233

Delivery capabilities

Administrative determination

Question of bidder responsibility is primarily for administrative determination by contracting officer, and determination is conclusive unless there is convincing evidence that determination was result of arbitrary action or bad faith, and conclusiveness of determination includes bidder's ability to make delivery within critical time period, and, therefore, there is no basis to challenge contracting officer's determination that delivery could be made on time of vehicular lighting kits and kit components that is based on p eaward survey that considered tooling and assembling plans and capabilities of successful bidder, and examined arrangements to obtain necessary components---------- 439

Experience

Administrative determination

Under request for proposals that required that "bidding organization must have demonstrated competence and experience in developing and implementing complex computer aided simulation systems together with working knowledge of commercial marine operations and understanding of potential technological advances available in current products as they may be related to advanced ship operations," and also provided for the evaluation of offers on basis prescribed weighted criteria that included "experience in ship operational simulation systems" factor, determination that successful offeror met experience factor requiring broad exercise of administrative judgment in a technical area, validity of determination will not be questioned by U.S. GAO---------- 397

Financial responsibility

Evaluation

Allegation that low bidder submitted bid on which he will incur loss is for referral to Secretary of department involved with advice that it should be considered by procuring activity in determining whether bidder is responsible bidder for procurement---------- 255

BIDDERS—Continued Page
Qualifications—Continued
Geographical location requirement

Failure of low bidder to state exact place of contract performance, information required under invitation for bids to furnish service caps that was restricted to small business firms on Qualified Manufacturers List (QML) for item prior to bid opening, may not be corrected or waived as minor deviation as information is material to maintaining QML procedures established for procurement of military clothing in order to permit prompt determination that bidder is established and reputable manufacturer with sufficient capacity and credit to perform contract and to prevent firm from having option of deciding after bid opening whether or not to make its offer responsive by naming facility that had been qualified by QML prior to bid opening---------- 242

Integrity, etc.
Rejection notice to bidder

Rejection, both as prime contractor or subcontractor, of low bidder under invitation for bids to overhaul topside of Navy vessel as being in best interest of Govt. without issuing written determination of responsibility required by par. 1-904.1 of Armed Services Procurement Reg., and referral to Small Business Administration under ASPR 1-705.4(vi), because bidder had been placed in suspended status on Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors, pursuant to ASPR 1-605, for lack of business integrity, was proper action that was not in violation of due process since written determination is not required if it is not in best interest of Govt. to award contract to suspended bidder whose placement on consolidated list was not for purpose of punishment but in best interest of Govt---- 703

License requirement
Time for compliance

Failure of low bidder under solicitation for security guard services to meet State and local licensing and registration requirements of invitation for bids prior to award does not affect legality of contract as matter is one between bidder and State and local authorities and is not factor controlling bidder eligibility to obtain Govt. contracts. Upon determination that license or permit is prerequisite to being legally capable of performing for Federal Govt. within its boundaries, State or local authority may enforce requirements if not in conflict with Federal policies or laws, or execution of Federal powers. However, in event of enforcement of State or local licensing requirements, should contractor not perform, he may be found in default and contract terminated with prejudice---------- 377

Preaward surveys
Performance record unsatisfactory

Determination small business concern was nonresponsible on basis of negative preaward survey evidencing past unsatisfactory performance under both Govt. and private contracts attributable to tenacity and perseverance which, pursuant to sec. 1-1.708-2(a)(5) of Federal Procurement Regs. that concerns deficiencies other than capacity and

BIDDERS—Continued Page

Qualifications—Continued

Preaward surveys—Continued

Performance record unsatisfactory—Continued

credit, was forwarded to Small Business Administration (SBA) for issuance of Certificate of Competency (COC) if warranted is upheld where SBA agreed bidder lacked tenacity and perseverance and, in addition, concluded concern was deficient in capacity and issuance of COC was not justified. While factor of tenacity and perseverance is not covered by COC procedure, denial of COC operated as concurrence by SBA in contracting officer's determination award to low bidder was precluded 288

Satisfactory as basis for award

Signing of contract by contracting officer on basis of favorable preaward survey constitutes affirmative determination of bidder responsibility that is required by par. 1-904.1 of Armed Services Procurement Reg., and, therefore, fact that written determination respecting responsibility was not issued to low rejected bidder does not invalidate contract. Moreover, since responsibility is question of fact to be determined by contracting officer and necessarily involves exercise of considerable range of discretion, U.S. GAO will not substitute its judgment for that of contracting officer where there is no convincing evidence that responsibility determination was arbitrary, capricious, or not based upon substantial evidence 703

Survey team impartiality

Residence of preaward survey team members at facilities of competitor of offeror they disqualified for award created appearance of conflict, if not actual conflict, which should not have been allowed to exist, and it could very well have precluded an impartial survey. Although there is no evidence of impropriety, it is suggested that when appointments to survey teams are made extraordinary care should be exercised to preclude any possible basis for using appointment action as ground for subsequent complaint in event of adverse survey action, and consideration should be given to practicality of assigning survey team members that have no connection with competitors of contractor being surveyed .. 588

Timeliness of use

Rejection of low offer to overhaul aircraft engines at price sufficiently significant to be of prime importance in any overall evaluation of proposals on basis of old preaward survey recommending "no award" to offeror was not justified for had contracting officer complied with par. 1-905.1 of Armed Services Procurement Reg. requiring that determination of contractor responsibility be based on most current information he would have learned deficiencies reflected in survey report had been corrected. Contractor's responsibility should be measured from information of record at time of award, a concept particularly significant in view of involved price differential, and, therefore, current preaward survey should be obtained and rejected offeror's responsibility reconsidered 588

BIDDERS—Continued Page

Qualifications—Continued

Security clearance

Provisions in invitation for bids to improve Navy facility that stated "only bids received from contractors having active facilities security clearance of confidential or higher will be considered" does not require that bidder have necessary clearance on date of bid opening to be considered as requirement is not condition precedent to submission of bid but rather constitutes aspect of bidder responsibility, evidence of which is for submission by time performance is required. Therefore, bids of low bidder who did not possess clearance and second low bidder who only held interim clearance at bid opening time may be considered. Furthermore, interim clearance is as valid as final one, and grant or denial of security clearance to bidders or contractors is discretionary act that will not be questioned unless clearance was improperly issued-- 168

Small business concerns

Certification referral procedure

Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solicited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA---- 448

Status determination

Low bidder under total small business set-aside for tool sets who on date of bid opening did not qualify as small business concern under the IFB or SBA regulations may not be considered for contract award on basis of its erroneous self-certification allegedly made in good faith, for although bidder met appropriate size standard at time bid was prepared, SBA requirement that number of employees be based on the average for four quarters preceding bid preparation had been overlooked. Since standard of "good faith" is not necessarily limited to an incident of intentional misrepresentation, bidder apprised of applicable small business size having failed to exercise prudence and care to ascertain its size under prescribed guidelines has not certified itself to be small business concern in good faith---------- 595

State, etc., licensing requirements

Failure of low bidder under solicitation for security guard services to meet State and local licensing and registration requirements of invitation for bids prior to award does not affect legality of contract as matter is one between bidder and State and local authorities and is not factor controlling bidder eligibility to obtain Govt. contracts. Upon determination that license or permit is prerequisite to being legally capable

BIDDERS—Continued Page

Qualifications—Continued

State, etc., licensing requirements—Continued

of performing for Federal Govt. within its boundaries, State or local authority may enforce requirements if not in conflict with Federal policies or laws, or execution of Federal powers. However, in event of enforcement of State or local licensing requirements, should contractor not perform, he may be found in default and contract terminated with prejudice---- 377

Tenacity and perseverance

Certificate of Competency effect

Determination small business concern was nonresponsible on basis of negative preaward survey evidencing past unsatisfactory performance under both Govt. and private contracts attributable to tenacity and perseverance which, pursuant to sec. 1-1.708-2(a)(5) of Federal Procurement Regs. that concerns deficiencies other than capacity and credit, was forwarded to Small Business Administration (SBA) for issuance of Certificate of Competency (COC) if warranted is upheld where SBA agreed bidder lacked tenacity and perseverance and, in addition, concluded concern was deficient in capacity and issuance of COC was not justified. While factor of tenacity and perseverance is not covered by COC procedure, denial of COC operated as concurrence by SBA in contracting officer's determination award to low bidder was precluded-- 288

Responsibility *v.* bid responsiveness

Bidder ability to perform

Low bid submitted on "brand name" basis under small business set-aside requiring component parts of tent frames and doors to be furnished on "Brand Name or Equal" basis is not nonresponsive bid because bidder secured price quotations on parts after bid opening and after contracting agency had contacted manufacturer—which according to record was not improper interference—as bid on its face complied in all material respects to invitation for bids, and fact that bidder could not anticipate furnishing brand name item at bid opening time is matter of responsibility and not bid responsiveness for significant time to determine ability to perform is not at bid opening time but at time of scheduled performance, and contractor if unable to perform would be subject to default termination and liability for excess costs---- 787

BIDS

Aggregate *v.* separable items, prices, etc.

Evaluation. (*See* **Bids, evaluation, aggregate *v.* separable items, prices, etc.**)

Subitem pricing

Low bid on indefinite type contract that failed to quote separate prices on supply and service sub-line items—indentified as 0001AA through 0001AE—to accompany electric counters—0001—solicited under invitation that scheduled sub-line items pursuant to par. 20-304.2(b) of Armed Services Procurement Reg. as alphabetical suffixes of basic contract item, and requested bidders to quote prices on "Total Item" and not on sub-line item quantities may be considered for contract award as

BIDS—Continued Page

Aggregate *v.* separable items, prices, etc.—Continued

Subitem pricing—Continued

bidder would be obligated to furnish all listed requirements of schedule at price quoted for basic item, notwithstanding confusing "shorthand references" to subitems—references that should be avoided in future procurements. Furthermore, fact that other bidders construed invitation as requiring separate prices for subitems is extraneous evidence that may not be considered 255

Alternative

Evaluation criteria

Legality of solicitation

Invitation for building construction which although it did not spell out specific criteria for selection of either bid No. 1, providing for completion in 1,095 calendar days, or bid No. 2, completion in 870 days, in legal invitation, even though it is suggested future construction solicitations identify those factors that will be considered in selecting shorter or longer completion date, and award of contract to low bidder on basis of price on earlier completion date was proper since invitation provided for award on basis of price and other factors, and "other factors"—rental space savings, gain in operating efficiency, and earlier availability of space to accommodate program and staff expansions—are costs that are too intangible to evaluate, as is provision for assessment of liquidated damages 645

Failure to bid on alternate

Bid rejection unjustified

Requirements award under IFB soliciting base and alternate bids for motor vehicle parts pursuant to concept of contractor-operated on-base parts store, which asked for separate discounts in base bid on common and captive parts and single discount in alternate bid on parts, should be terminated for convenience of Govt. and award offered to low bidder on base bid since bidder's failure to bid on alternate items did not justify rejection of its low base bid as bid covered all work contemplated, nor is bid invalid because 90% discount was offered on captive parts, as unusually high discount does not evidence submission of unbalanced bid, mistake, or future intent to transfer parts during contract performance to lower common parts category. Moreover, in absence of IFB provision, it was inappropriate in evaluation of alternate bid to consider unliquidated cost reduction to administer one discount .. 792

Ambiguous

Two possible interpretations

Absent

Telegram that reduced both base and additive alternate bids and completed information omitted from initial bid respecting subcontractor listing which was telephoned to contracting agency 6 minutes before bid opening, was promptly transcribed and hand carried to contracting officer, and later confirmed by Western Union, is acceptable modification pursuant to FPR 1-2.304. Furthermore, failure to indicate whether prices were to be reduced "by" or "to" dollar amounts listed created no ambiguity, for ambiguity exists only when terms of bid are subject

BIDS—Continued Page

Ambiguous—Continued

Two possible interpretations—Continued

Absent—Continued

to two or more reasonable interpretations, whereas reducing prices "by" amounts specified brought prices in line with other bids and Govt.'s estimate. Also telegraphic abbreviation combining two categories of subcontracting work was properly interpreted to cover both categories and to satisfy requirement that bid identify subcontractor to be used in each category---

Awards (*See* **Contracts, awards**) 831

Bid forms

Copies

Noncompliance effect

Failure of successful bidder under invitation for bids issued by Govt. prime contractor to comply with requirement that proposals be submitted in triplicate was minor deviation which properly was waived pursuant to sec. 1–2.405(a) of Federal Procurement Regs. Furthermore, single copy submitted by bidder was made available by prime contractor for examination by any interested party at time of bid opening--- 329

Failure to use designated form

Use of annual bid bond that is applicable to supplies and services which low bidder has on file with contracting agency in procurement of hydrogenerator to be installed and tested in lieu of payment and performance bonds specified in invitation for bids—bonds generally required only on contracts involving construction as opposed to contracts for supplies and services—is approved as being legally sufficient to obligate surety as contract contemplated consisting of only 25 percent construction falls within meaning of supply and service contract contained in sec. 1–12.402–1(a), FPR, and sec. 1–12.402–2 prescribes that labor standards need not apply to contracts predominantly for nonconstruction work. Furthermore, failure of bidder to use proper standard form 34, where difference in forms is not one of substance, may be waived as minor informality pursuant to FPR 1–2.405--- 822

Bid shopping. (*See* **Contracts, subcontracts, bid shopping**)

Bidder designation

Discrepancy between bid and bid bond

Where principal named in bid bond was joint venture which included corporation that was only entity named in low bid, statements and affidavits submitted after bid opening, to evidence that mistake had been made and bidder intended to be named in bid was joint venture, may not be accepted to make nonresponsive bid responsive by changing name of bidder. Alleged mistake is proper for consideration only when bid is responsive at time of submission, and bid submitted not having met terms of invitation for bids which required bid grarantee to be submitted in proper form and amount by time set for opening of bids, it would not be proper to consider reasons for nonresponsiveness of bid, whether due to mistake or otherwise--- 836

BIDS—Continued Page

Bidders. (*See* Bidders)

Bonds. (*See* Bonds, bid)

Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)

Buy American Act

Buy American certificate

Issuance, use, etc.

Acceptance of volunteer alternate offer on nozzle fin assemblies that contemplated incorporating component parts fabricated from import foreign steel in domestic end item, for evaluation on basis of issuing duty-free certificate, would be unfair to other bidders, even though purchase qualifies as emergency war material within contemplation of par. 6–603.1 of ASPR, and Defense Dept. under ASPR 6–602 may issue duty-free certificates if there is appropriation savings. Therefore, RFP should be canceled and reissued to require offerors furnishing domestic end items incorporating foreign origin materials to submit alternate offers that evidence the duty for evaluation on ex-duty basis if duty-free certificate is issued, and negotiations should be reopened to permit all offerors to submit alternate offers on duty-free basis..... 650

Construction contracts

Statement of foreign materials

Bidder responding to invitation for bids to construct superstructure of Federal office building that contained Buy American Act provisions (10 U.S.C. 10a–10d) in accordance with secs. 1–18.604 and 1–18.605 of FPR—provisions amplified in prebid conference—who failed to submit information concerning amount of nondomestic structural steel proposed to be used and to provide data to demonstrate that cost of domestic structural steel would exceed by more than 6 percent cost of comparable foreign steel, omitted information that goes to responsiveness of bid, and it would be prejudicial to other bidders and detrimental to competitive bidding system to permit correction of nonresponsive bid after bid opening..... 814

Foreign product determination

Purchases for contractor's use

Since award by a Govt. joint venture prime contractor of subcontract to Canadian firm for mobile office units manufactured in Canada for its own use while constructing an anti-ballistic missile site in Montana was not subject to Buy American Act, 41 U.S.C. 10a–d, award did not violate the act nor the ASPR, notwithstanding any adverse effect on domestic trailer industry. Not only does act not apply to contractor's purchases for his own use, as they are not to become permanent part of structure being constructed for Govt., mobile units are not considered components of construction material as defined in Buy American clause of contract, which conforms to act, and procurement regulations, nor do they constitute end products acquired for public use as contemplated by the act.. 538

BIDS—Continued Page

Buy American Act—Continued

Generally. (*See* **Buy American Act**)

Restrictions not for application

Foreign subcontractor

Product not end component

Procurement by Govt. prime contractor, with approval of contracting officer, of foreign produced scale model of amphibious assault landing craft as aid to perform cost-reimbursement research and development contract—model technically superior to domestically offered models and offered at lowest cost, even with 50 percent differential, transportation, and travel expenses added—is not subject to Buy American Act, 41 U.S.C. 10a–d. Even if model were to be considered end product and for public use, restrictions of act would not apply since there is no absolute prohibition against procurement of other than domestic supplies and materials for public use, and as cost of model after applying 50 percent differential prescribed by par. 6–104.4 of Armed Services Procurement Reg. is lowest, award to subcontractor was in public interest 217

Cancellation. (*See* **Bids, discarding all bids**)

Competitive system

Bid rejection on basis of allegations

Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to U.S. GAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular features listed in invitation overstated Govt.'s needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique 237

Foreign contractors

Notice to domestic contractors

Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norweigian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor 195

BIDS—Continued Page

Competitive system—Continued

Late bids

A hand-carried bid which was placed in wrong box near bid opening room more than hour before sheduled bid opening time, which if opened on schedule would have been low bid, was properly considered not to be late bid within meaning of par. 2–303.5 of Armed Services Procurement Reg.—determination consistent with 34 Comp. Gen. 150—as Govt. due to vagueness of employee's directions and unidentified change in location of bid box was primarily responsible for misdelivery, notwithstanding lack of good judgment in depositing bid. Therefore, bid, responsive both as to method and timeliness of submission, may be considered for award without violating spirit and interest of maintaining integrity of formal bid advertising system---------- 69

A hand-carried sealed bid delivered after bid opening officer began to open first bid may not be considered on basis corridor clock upon which messenger relied was 2 minutes earlier than special clock in bid opening room, which is regulated by Western Union to accurately reflect Naval Observatory time, since there is no reason to assume corridor clock reflected local time specified in invitation for bids and special clock did not and, therefore, bid opening officer properly relied on special clock in designating bid opening time had arrived. Furthermore, notwithstanding it would be in best interest of Govt. to consider rejected bid, pars. 2–303.1 and 2–303.5, ASPR, prohibiting consideration of late bids are regulations that must be strictly construed and enforced in order to maintain integrity of competitive bidding system---------- 173

Maximum practicable competition

Although Atomic Energy Commission's extension of contract containing "Avoidance of Organizational Conflicts of Interest" clause for manning underground weapons testing activity for 5-year period with contractor initially selected in 1947 contributes to common defense and security by avoiding serious disruption of weapons program that change of contractors would entail, and procedure was consistent with Commission's procurement regulations, it is suggested that maximum practicable competition should be obtained in future whenever contracts utilizing appropriated funds are to be awarded and it appears likely Govt.'s position can be improved in terms of cost or performance. In fact, adoption of policy favorable to competition instead of being disruptive to weapons program might well have salutory effect on incumbent contractor's performance---------- 57

Multiple bids

Fact that both low and high bids to construct administrative building at Govt. installation were signed by same individual does not require rejection of low bid where evidence shows multiple bids were submitted for legitimate business reasons and submission of both bids were not attempt to circumvent statutory or regulatory requirements or to prejudice either U.S. or other bidders. Furthermore, it is immaterial whether prices quoted were discussed by concerns before submitting separate bids, for any discussion would not constitute reasonable basis for concluding that conspiracy had been entered into to eliminate competition from other bidders---------- 403

BIDS—Continued Page

Competitive system—Continued

Preservation of system's integrity

Where contracting officer overlooked discount offered by bidder which if evaluated would have displaced successful bidder awarded 1-year janitorial requirements contract under invitation for bids, when first two low bidders were found nonresponsive because low bidder, unable to show its intended bid, withdrew and second low bidder, although erroneously interpreting the specifications, would not allege mistake, award made contrary to 10 U.S.C. 2305(c) to other than lowest responsive bidder should be terminated for convenience of Govt., notwithstanding claim for 6 months' performance under contract, as administratively recommended on basis no difficulties are anticipated in changing contractors and that termination would be in best interest of U.S---------- 423

Even though obvious error of quoting two-color printing job at one-third price of same job printing in one color in response to invitation for printing weekly newspaper for Naval Weapons Center, China Lake, California, was verified as correct by low bidder, bid should not have been accepted for acceptance gave ostensible low bidder option to withdraw its bid, request bid correction, or insist upon correctness of its bid despite ridiculously low price quoted on two-color job, and preservation of fairness in competitive system precludes giving bidder right to make such election after results of bidding are known. Although correction of erroneous item displaced low bid, since only other bidder was nonresponsive, directed cancellation was withdrawn in B-174592, Apr. 27, 1972, as being in best interests of Govt---------- 498

Low bid that omitted price of "Environmental Protection" item contained in IFB to repair portion of Mississippi River banks, a price bidder alleges was included in basic bid price, is nonresponsive bid that may not be considered for award, for although environmental work could have been treated as inherent part of job, it was regarded as material and listed as separate item calling for separate price and, therefore, omission should not be waived as minor informality. To do so would ignore rule that where there is any substantial question as to whether bidder upon award could be required to perform all of work called for if he chose not to, integrity of competitive bid system requires that bid be rejected as, at least, ambiguous unless bid otherwise affirmatively indicates that bidder contemplate performance---------- 543

Qualified products use

Award of contract to low bidder whose product did not receive qualification approval for listing on Military Products List prior to bid opening, although product—electron tubes—had been tested and found qualified for listing on specified date prior to bid opening but ministerial act of approval had not been accomplished, does not violate par. 1-1107.1 of Armed Services Procurement Reg. which prescribes that only bids "offering products which are qualified for listing on applicable Qualified Products List at time set for opening of bids" shall be considered in making awards, as regulation does not impose requirement for formal "approval" prior to bid opening, and, moreover, regulation should be interpreted to insure procurement of products meeting Govt. needs in manner that will not place unnecessary restrictions on competition---- 47

BIDS—Continued Page
Competitive system—Continued
"Same manufacturer" requirement for all items
Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications. Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency---- 315
Specifications
Ambiguity effect on competition
IFB to procure legal information retrieval data base which, because it did not clearly indicate whether photocomposition, Linotron 1010 system, or master typography program was to be furnished, was ambiguous IFB inadequate to secure necessary pricing for competitive bid evaluation purposes, and lack of clarity having generated number of oral requests for explanation, amendment pursuant to sec. 1-2.207(d) of FPR should have been issued. Therefore, contract awarded should be terminated for convenience of Govt. as award was not in accord with reasonable interpretation of IFB and procurement resolicited. Pursuant to Pub. L. 91-510, action taken on this recommendation should be sent to Senate and House Committees on Govt. Operations within 60 days---- 635
Standards inadequacy
Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B-173244, August 16, 1972---- 518
Subcontractors
Application of system to subcontractors
While prime contractor under Atomic Energy Commission (AEC) operating type contract is not bound by statutory and regulatory requirements that govern direct procurement by Govt., AEC Procurement Reg. 9-59.002 provides for AEC review of cost-type contractors' procurement systems and methods, as well as review of individual procure-

BIDS—Continued Page

Competitive system—Continued

Subcontractors—Continued

Application of system to subcontractors—Continued

ment actions and, therefore, there is no basis to question procurement determinations made under rules applicable to such AEC contracts or under rules governing direct Federal procurements in connection with evaluation of bids submitted under invitation for bids issued by AEC prime contractor for installation of mechanical, electrical, and HVAC systems---- 329

Under make-or-buy proposal by prime contractor pursuant to request for proposals to furnish launch vehicles, participation of NASA in negotiation of second step engine with subcontractors does not make prime contractor agent of NASA so as to subject subcontracting to Govt.'s procurement statutes and regulations, for in make-or-buy program as defined in NASA PR 3.901–1, Govt. buys management, including placing and administering subcontracts, from prime contractor along with goods and services to assure performance at lowest overall cost, with right of review reserved in Govt. Therefore, essential point is not selection of subcontractor but make-or-buy decision, and record shows NASA thoroughly analyzed various technical aspects involved in prime contractor's proposal, including relative merits of two different subcontractor design configurations---- 743

Two-step procurement

Competition sufficiency

Since only offeror in addition to incumbent contractor responding to request for technical proposals under two-step procurement for installation of telecommunications system overseas, who in answering questions posed after evaluation of offers indicated risk incident to site could not be assumed without surveying site, was erroneously determined to be nonresponsive and was improperly denied opportunity to participate in second-step inviting prices notwithstanding by then site had been surveyed, contracting officer's subsequent determination to make procurement competitive and permit rejected offeror to submit technically acceptable proposal was in line with first step's intended purpose of fostering competition, and offeror should be allowed to compete in second step as sole source award to incumbent contractor would not be justified---- 372

Contracts generally. (*See* **Contracts**)

Delivery provisions

Ability to meet

Administrative determination

Question of bidder responsibility is primarily for administrative determination by contracting officer, and determination is conclusive unless there is convincing evidence that determination was result of arbitrary action or bad faith, and conclusiveness of determination includes bidder's ability to make delivery within critical time period, and, therefore, there is no basis to challenge contracting officer's determination that delivery could be made on time of vehicular lighting kits and kit components that is based on preaward survey that considered tooling and assembling plans and capabilities of successful bidder, and examined arrangements to obtain necessary components---- 439

BIDS—Continued Page

Deviations from advertised specifications. (*See* Contracts, specifications, deviations)

Discarding all bids

Invitation defects

Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR) promulgated by GSA to coordinate and provide for economic and efficient purchase of ADPE systems or units and, therefore, procurement of ADP equipment by Army Corps of Engineers delegated authority subject to provisions of FPMR, particularly late proposals and modifications provision—authority redelegated to District Engineer—is not governed by Armed Services Procurement Reg., and District Engineer vested with all authority and responsibility usual to position of contracting officer, with exception of choosing successful offeror, having issued request for proposals that failed to incorporate late proposal and modification requirement of FPMR, properly canceled request ---- 457

Specifications defective

Information omission

Invitation for bids soliciting Attitude Indicators for 2-year period that included items for definite and estimated quantities, and First Article Test Report which was not to be separately priced, but omitted the technical data specification for determining cost of spare parts, maintenance, etc., of indicators was an inadequate invitation and was properly canceled pursuant to 10 U.S.C. 2305(c) and par. 2-404.1(b)(i) of ASPR, since omission precluded consideration of all cost factors as required by ASPR 2-404.1(b)(iv), and therefore the minimum needs of Govt. not having been met, reason for cancellation of the inadequate invitation was cogent. Moreover, reinstatement of original invitation to permit data package to be offered would be prejudicial without insuring the standing of bidders would remain unchanged ---- 426

Evaluation

Aggregate *v.* separable items, prices, etc.

Component *v.* unit price differences

A bid that offered an aggregate of component prices that exceeded unit prices for vehicular lighting kits solicited under invitation that included options to purchase additional kits and kit components "up to 100 percent" and provided for award at kit unit prices is nonresponsive bid, and defect may not be corrected on basis other bidders will not be displaced since award will not be made at component prices, for acceptance of bid may not result in the lowest cost should Govt. exercise option for component parts. Fact that deviation is considered material does not mean solicitation was ambiguous because component option was for indefinite quantity, "up to 100 percent," as bidders had responsibility of submitting competitive bids that would allow for recovery of costs and reasonable profit regardless of extent to which the option was exercised ---- 439

BIDS—Continued Page

Evaluation—Continued

Aggregate *v.* separable items, prices, etc.—Continued

Subitems

Low bid on indefinite type contract that failed to quote separate prices on supply and service sub-line items—identified as 0001AA through 0001AE—to accompany electric counters—0001—solicited under invitation that scheduled sub-line items pursuant to par. 20–304.2(b) of Armed Services Procurement Reg. as alphabetical suffixes of basic contract item, and requested bidders to quote prices on "Total Item" and not on sub-line item quantities may be considered for contract award as bidder would be obligated to furnish all listed requirements of schedule at price quoted for basic item, notwithstanding confusing "shorthand references" to subitems—references that should be avoided in future procurements. Furthermore, fact that other bidders construed invitation as requiring separate prices for subitems is extraneous evidence that may not be considered 255

Delivery provisions

Accelerated delivery

Effect on option and Government equipment rental

Under invitation for bids to furnish bomb bodies that included option for additional quantities; that permitted accelerated delivery if scheduled requirements were met; and that provided for first article approval waiver, and consideration of transportation costs and value of use of rent-free Govt-owned equipment and tooling, award on basis of accelerated delivery to low bidder on initial quantity properly did not consider fact that option price was higher, since exercise of option simultaneously with award was not contemplated and market would be tested before option was exercised and, moreover, bid is not considered to have been nonresponsive because option delivery rate was based on accelerated rate, and rental factor had been computed at accelerated delivery rate without regard to extended use of Govt. property under prior contract. 467

Discount provisions

Basic and alternate bids on different basis

Requirements award under IFB soliciting base and alternate bids for motor vehicle parts pursuant to concept of contractor-operated on-base parts store, which asked for separate discounts in base bid on common and captive parts and single discount in alternate bid on parts, should be terminated for convenience of Govt. and award offered to low bidder on base bid since bidder's failure to bid on alternate items did not justify rejection of its low base bid as bid covered all work contemplated, nor is bid invalid because 90% discount was offered on captive parts, as unusually high discount does not evidence submission of unbalanced bid, mistake, or future intent to transfer parts during contract performance to lower common parts category. Moreover, in absence of IFB provision, it was inappropriate in evaluation of alternate bid to consider unliquidated cost reduction to administer one discount 792

Discount not evaluated

Where contracting officer overlooked discount offered by bidder which if evaluated would have displaced successful bidder awarded 1-year janitorial requirements contract under invitation for bids, when first two

BIDS—Continued Page
Evaluation—Continued
Discount provisions—Continued
Discount not evaluated—Continued
low bidders were found nonresponsive because low bidder, unable to show its intended bid, withdrew and second low bidder, although erroneously interpreting the specifications, would not allege mistake, award made contrary to 10 U.S.C. 2305(c) to other than lowest responsive bidder should be terminated for convenience of Govt., notwithstanding claim for 6 months' performance under contract, as administratively recommended on basis no difficulties are anticipated in changing contractors and that termination would be in best interest of U.S---- 423

Erroneous
Specification misinterpretation
Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B-173244, August 16, 1972---- 518

Factors other than price
Administrative costs
Since cost of Govt. testing under invitation for bids to furnish fueling at sea probes and receivers is insignificant and cannot be realistically estimated as evaluation factor, par. 1-1903(a)(iii) of Armed Services Procurement Reg., which provides that if Govt. is to be responsible for first article testing, cost of such testing shall be evaluation factor "to the extent that such cost can be realistically estimated," is not applicable-- 352

Equal employment opportunity
"Affirmative action programs"
Rejection of low bid on non-set-aside portion of requirements type contract for fiberboard because of noncompliance with E.O. 11246 due to bidder's failure to develop equal employment opportunity affirmative action plans (AAP) at facilities other than the one bidding, was proper implementation of agency regulations requiring each establishment of a bidder to have an AAP, and in addition providing for hearing upon more than one nonresponsibility determination; for 30-day "show cause" notice regarding enforcement proceedings, with aid to bidder in resolving deficiencies; for contract cancellation or termination; and for debarment, and there was no denial of due process as the determination of nonresponsibility was limited or temporary suspension and not *de facto* debarment. However, in future in issuing "show cause" order, bidder should be advised he can be found nonresponsible until resolution of matter—resolution that should be determined without delay---- 551

BIDS—Continued Page

Evaluation—Continued

Factors other than price—Continued

Intangible economic factors

Invitation for building construction which although it did not spell out specific criteria for selection of either bid No. 1, providing for completion in 1,095 calendar days, or bid No. 2, completion in 870 days, in legal invitation, even though it is suggested future construction solicitations identify those factors that will be considered in selecting shorter or longer completion date, and award of contract to low bidder on basis of price on earlier completion date was proper since invitation provided for award on basis of price and other factors, and "other factors"—rental space savings, gain in operating efficiency, and earlier availability of space to accommodate program and staff expansions—are costs that are too intangible to evaluate, as is provision for assessment of liquidated damages 645

Government equipment, etc.

Layaway and maintenance costs

In evaluation of offers to supply metal parts for projectiles submitted under RFP issued pursuant to 10 U.S.C. 2304(a)(16), permitting negotiation of contracts in interests of national defense and industrial mobilization, by producers who operate Govt-owned facilities or privately owned plants utilizing Govt. equipment, exclusion of layaway, maintenance, and space rental costs for idle plants or equipment was proper since scope of layaway and maintenance works for all offerors had not been established. Furthermore, there is no legal basis to disturb contracts awarded prior to resolution of protest, as provided by paragraph 2-407.8(b)(3), since objectionable provision for evaluating abnormal maintenance costs was removed from RFP, and record evidences negotiations conducted were within authority of 10 U.S.C. 2304(a)(16), and that delivery schedules were designed to be equitable 694

Rental evaluation determination

Accelerated delivery basis

Under invitation for bids to furnish bomb bodies that included option for additional quantities; that permitted accelerated delivery if scheduled requirements were met; and that provided for first article approval waiver, and consideration of transportation costs and value of use of rent-free Govt-owned equipment and tooling, award on basis of accelerated delivery to low bidder on initial quantity properly did not consider fact that option price was higher, since exercise of option simultaneously with award was not contemplated and market would be tested before option was exercised and, moreover, bid is not considered to have been nonresponsive because option delivery rate was based on accelerated rate, and rental factor had been computed at accelerated delivery rate without regard to extended use of Govt. property under prior contract 467

Separate facilities contract

Submission of signature page of facilities contract, accompanied by covering letter and exhibits evidencing contract provided for use of Govt-owned facilities free of charge, with bid under small business and labor surplus set-aside portions of invitation for bomb bodies that con-

BIDS—Continued Page
Evaluation—Continued
Government equipment, etc.—Continued
Rental evaluation determination—Continued
Separate facilities contract—Continued
tained Govt-owned property clause stating bidder proposing to use Govt. property "*SHALL NOT* include in its offer any 'Rental Fee' or 'Use Charge' for use of such property" complied with terms of clause, notwithstanding written permission to use facilities was granted after bid opening, since facilities contract did not require use approval prior to bidding and, therefore, facilities contract constituted adequate approval for use of Govt. facilities in possession of bidder on rent-free basis.. 335

Special tooling
Low bid on Fin Assemblies that indicated Govt-owned special tooling would be used and included pursuant to "Research and Production Property and Special Tooling" provision of invitation for bids (IFB) list of tooling identified as to part number, acquisition cost, and age, but did not include written permission to use tooling, or information as to anticipated amount of tooling to be used and rental fee, was erroneously evaluated as nonresponsive bid as special tooling is not defined as "facility" in par. 13–101.8 of Armed Services Procurement Reg. and IFB did not require permission to use tooling, and since omitted information could be calculated from bid, deviation is minor one that may be waived. Therefore, it is recommended that contract awarded be terminated for convenience of Govt. and low bid considered for award. 62

Invitation defective
Invitation for bids soliciting Attitude Indicators for 2-year period that included items for definite and estimated quantities, and First Article Test Report which was not to be separately priced, but omitted the technical data specification for determining cost of spare parts, maintenance, etc., of indicators was an inadequate invitation and was properly canceled pursuant to 10 U.S.C. 2305(c) and par. 2–404.1(b)(i) of ASPR, since omission precluded consideration of all cost factors as required by ASPR 2–404.1(b)(iv), and therefore the minimum needs of Govt. not having been met, reason for cancellation of the inadequate invitation was cogent. Moreover, reinstatement of original invitation to permit data package to be offered would be prejudicial without insuring the standing of bidders would remain unchanged..... 426

Negotiation. (*See* Contracts, negotiation, evaluation factors)
Options
Price omission
Low bid that failed to quote unit price on option items under invitation for radar transponders that stated offers would be evaluated "exclusive of the option quantity" is not nonresponsive bid. If IFB had specified that option prices may not exceed basic bid prices or established some other standard for option prices, Govt. would be deprived of valuable benefit if option could not be exercised, or if Govt. intended to exercise option, or portion of it, at time of award, bid omitting option prices would be nonresponsive. However, IFB did not establish ceiling for option prices or provide for including them in bid evaluation; therefore, failure to quote option prices is not material deviation since there is substantially no difference between bid with an unreasonably high option price and bid without any option price..... 528

BIDS—Continued Page

Evaluation—Continued

Two-step procurement. (*See* **Bids, two-step procurement, evaluation**)

Failure to furnish something required. (*See* **Contracts, specifications, failure to furnish something required**)

Forms. (*See* **Bids, bid forms**)

Government equipment, etc.

Evaluation, (*See* **Bids, evaluation, Government equipment, etc.**)

Information status

Submitted after bid opening

Low bid submitted on "brand name" basis under small business set-aside requiring component parts of tent frames and doors to be furnished on "Brand Name or Equal" basis is not nonresponsive bid because bidder secured price quotations on parts after bid opening and after contracting agency had contacted manufacturer—which according to record was not improper interference—as bid on its face complied in all material respects to invitation for bids, and fact that bidder could not anticipate furnishing brand name item at bid opening time is matter of responsibility and not bid responsiveness for significant time to determine ability to perform is not at bid opening time but at time of scheduled performance, and contractor if unable to perform would be subject to default termination and liability for excess costs---------- 787

Joint ventures. (*See* **Joint Ventures**)

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

Labor surplus area performance. (*See* **Contracts, awards, labor surplus areas**)

Late

Hand-carried delay

A hand-carried bid which was placed in wrong box near bid opening room more than hour before scheduled bid opening time, which if opened on schedule would have been low bid, was properly considered not to be late bid within meaning of par. 2-303.5 of Armed Services Procurement Reg.—determination consistent with 34 Comp. Gen. 150—as Govt. due to vagueness of employee's directions and unidentified change in location of bid box was primarily responsible for misdelivery, notwithstanding lack of good judgment in depositing bid. Therefore, bid, responsive both as to method and timeliness of submission, may be considered for award without violating spirit and interest of maintaining integrity of formal bid advertising system---------- 69

A hand-carried sealed bid delivered after bid opening officer began to open first bid may not be considered on basis corridor clock upon which messenger relied was 2 minutes earlier than special clock in bid opening room, which is regulated by Western Union to accurately reflect Naval Observatory time, since there is no reason to assume corridor clock reflected local time specified in invitation for bids and special clock did not and, therefore, bid opening officer properly relied on special clock in designating bid opening time had arrived. Furthermore, notwithstanding it would be in best interest of Govt. to consider rejected bid, pars. 2-303.1 and 2-303.5, ASPR, prohibiting consideration of late bids are regulations that must be strictly construed and enforced in order to maintain integrity of competitive bidding system---------- 173

BIDS—Continued Page
Late—Continued
Mail delay evidence
Certified mail

Low bid to re-roof several plant buildings sent by certified air mail which was not timely received, but telegram reducing bid price was, properly was considered for award as requirements of sec. 1–2.303 of the FPR were satisfied since late receipt of bid was due solely to delay in the mails, and initialed, certified mail receipt issued indicated bid should have been timely received, and notwithstanding omission of symbol "AIR MAIL" from bid envelope. Envelope was received as part of "airmail bundle" and should have been dispatched as airmail and delivered on time, for omission of legend where sufficient airmail postage was attached does not mean envelope was handled as ordinary mail, for fact postal regulations require use of the symbol does not preclude designating mail as "airmail" by other acts of sender 522

Negotiated procurement. (*See* Contracts, negotiation, late proposals and quotations)
Telegraphic modifications
Propriety of consideration

Telegram that reduced both base and additive alternate bids and completed information omitted from initial bid respecting subcontractor listing which was telephoned to contracting agency 6 minutes before bid opening, was promptly transcribed and hand carried to contracting officer, and later confirmed by Western Union, is acceptable modification pursuant to FPR 1–2.304. Furthermore, failure to indicate whether prices were to be reduced "by" or "to" dollar amounts listed created no ambiguity, for ambiguity exists only when terms of bid are subject to two or more reasonable interpretations, whereas reducing prices "by" amounts specified brought prices in line with other bids and Govt.'s estimate. Also telegraphic abbreviation combining two categories of subcontracting work was properly interpreted to cover both categories and to satisfy requirement that bid identify subcontractor to be used in each category 831

Mistakes
Actual or constructive knowledge effect

Contract awarded low bidder under invitation for bids soliciting services to clean exhaust ducts for 1 year that was inconsistent as specifications required two cleanings and bid schedule four is not binding contract, notwithstanding "Order of Precedence" clause prescribed schedule would prevail in case of inconsistency since before notice of award was mailed inconsistency was discovered and bidder alleged its bid was based on two services per year. Had discrepancy been discovered after valid award had been consummated or had contracting officer had actual or constructive notice of error, four cleanings would be required, but as bidder was not afforded opportunity to prove its alleged error, no valid contract came into being with mailing of notice and purported contract should be rescinded 360

BIDS—Continued Page

Mistakes—Continued

Allegation after award. (*See* **Contracts, mistakes**)

Allegation withdrawal

Award of contract

Award of construction contract to low bidder who withdrew allegation of error, confirmed original bid price, and requested award on basis of its low submitted bid is proper where submitted worksheets do not support error alleged or established intended bid price was something other than amount bid and, therefore, error alleged is considered judgmental error that may not be corrected or serve as basis for withdrawal of bid. Furthermore, low bidder in confirming its bid price, waived underaddition error found by contracting officer, and no other error having been alleged by bidder, U.S. GAO will not conduct complete review of workpapers, for any discrepancies that may be found would not establish errors if bidder contended otherwise..... 18

Correction

Nonresponsive bid

Where principal named in bid bond was joint venture which included corporation that was only entity named in low bid, statements and affidavits submitted after bid opening, to evidence that mistake had been made and bidder intended to be named in bid was joint venture, may not be accepted to make nonresponsive bid responsive by changing name of bidder. Alleged mistake is proper for consideration only when bid is responsive at time of submission, and bid submitted not having met terms of invitation for bids which required bid guarantee to be submitted in proper form and amount by time set for opening of bids, it would not be proper to consider reasons for nonresponsiveness of bid, whether due to mistake of otherwise..... 836

Still lowest bid

An error in addition of subcontract column on final summary and estimate sheet of bid submitted under invitation issued for construction of VA hospital addition may be corrected and bid still low bid considered for award, notwithstanding that although preliminary estimate sheets were initialed and dated to indicate when and by whom prepared and checked, final summary and estimate sheet does not contain such information since documentary evidence submitted to prove error indicates figures inserted in final summary and estimate sheet, particularly the erased and reentered figures, represent actual subbids or estimates and substantiates entries were made before bid submission, and evidence establishing both mistake and actual bid intended meets requirements for correction of an error in bid price prior to award..... 503

Intended bid price uncertainty

Correction

Inconsistent with competitive bidding system

Determination by contracting agency that although low bidder on military housing construction project had made bona fide mistake, but in absence of clear and convincing evidence of bid actually intended bid may not be modified but only withdrawn as degree of proof required to permit correction is much higher than that required to justify with-

BIDS—Continued Page
Mistakes—Continued
Intended bid price uncertainty—Continued
Correction—Continued
Inconsistent with competitive bidding system—Continued
drawal of bid, is question of fact made pursuant to authority delegated by U.S. GAO to administrative agencies, subject to GAO review, and review of data furnished in support of alleged error evidences determination was reasonable, for there is nothing inconsistent in fact data submitted proves existence of mistake but does not meet standard of proof required to establish bid intended---------- 1

Nonresponsive bid
Mistake procedure use to correct

Although under par. 2–406.1 of Armed Services Procurement Reg. apparent mistake in bid must be verified, confirmation of bid cannot make nonresponsive bid responsive. However, notwithstanding erroneous statement of contracting officer that verification of low bid made it responsive bid since bid was responsive on its face, rejection of bid is not required, but remedial action is recommended to insure bid mistake procedure is not used for determining whether bid is responsive 255

Unit price *v.* extension differences
Decimal point misplaced

Correction of bid in accordance with invitation for janitorial services that provided "in case of error in extension of price, unit price will govern," which displaced bid from low to second place was proper, for bidder's contention its bid price was firm and price intended, and that errors in placement of decimal points in unit prices were clerical errors to be waived as minor informalities under par. 2–405 of Armed Services Procurement Reg. (ASPR) is not acceptable where contracting officer found it impossible to tell whether misplaced decimal points occurred in unit price figures or multiplication performed to compute price extension and, therefore, errors are not apparent within meaning and intent of ASPR 2–406.2 to permit correction of unit prices and award contract on basis of low total price---------- 283

Verification
Acceptance of bid unwarranted

Even though obvious error of quoting two-color printing job at one-third price of same job printing in one color in response to invitation for printing weekly newspaper for Naval Weapons Center, China Lake, California, was verified as correct by low bidder, bid should not have been accepted for acceptance gave ostensible low bidder option to withdraw its bid, request bid correction, or insist upon correctness of its bid despite ridiculously low price quoted on two-color job, and preservation of fairness in competitive system precludes giving bidder right to make such election after results of bidding are known. Although correction of erroneous item displaced low bid, since only other bidder was nonresponsive, directed cancellation was withdrawn in B–174592, Apr. 27, 1972, as being in best interests of Govt---------- 498

BIDS—Continued Page

Modification

Telegraphic modifications

Late. (*See* **Bids, late, telegraphic modification**)

Negotiated procurement. (*See* **Contracts, negotiation**)

Novation agreements

Effect on bid status

When low bidder under two invitations for bids on fuzes, one labor surplus set-aside, ceased operations due to lack of funds and liens placed against it, awards should not have been made to successor in interest under novation agreement entered into after bid opening since bidder acquires no enforceable rights by submitting bid, and, therefore, awards made were prejudicial to other bidders. This ruling is in accord with 43 Comp. Gen. 353, at page 372, concerning transfer of rights in negotiated procurement, and since it is case of first impression, as neither Anti-Assignment Act, 41 U.S.C. 15, nor par. 26-402, ASPR, re third party interests, apply, contracting officer lacked precedent guidance and good faith awards will not be disturbed, but rule will be applied in future procurements 145

Omissions

Failure to bid on all items

Low bid that omitted price of "Environmental Protection" item contained in IFB to repair portion of Mississippi River banks, a price bidder alleges was included in basic bid price, is nonresponsive bid that may not be considered for award, for although environmental work could have been treated as inherent part of job, it was regarded as material and listed as separate item calling for separate price and, therefore, omission should not be waived as minor informality. To do so would ignore rule that where there is any substantial question as to whether bidder upon award could be required to perform all of work called for if he chose not to, integrity of competitive bid system requires that bid be rejected as, at least, ambiguous unless bid otherwise affirmatively indicates that bidder contemplated performance 543

Information

Qualified products information

Under invitation for bids providing for award of guaranteed minimum requirements type contract for power tools that contained Qualified Products clause and provided space for manufacturer's name, QPL test or qualification reference number, but not for product designation, failure to furnish product designation does not require rejection of bid since, although omitted information is useful in identifying whether an item is on applicable QPL, it is not essential as manufacturer's name and QPL test numbers furnished by bidder suffice for locating appropriate item on QPL, and task of tracing an item imposes no undue burden on contracting agency. Therefore, there is nothing in omission of product designation to equate with failure to identify 415

BIDS—Continued Page

Options

Aggregate *v.* separable items, prices, etc.

Component *v.* unit price differences

A bid that offered an aggregate of component prices that exceeded unit prices for vehicular lighting kits solicited under invitation that included options to purchase additional kits and kit components "up to 100 percent" and provided for award at kit unit prices is nonresponsive bid, and defect may not be corrected on basis other bidders will not be displaced since award will not be made at component prices, for acceptance of bid may not result in the lowest cost should Govt. exercise option for component parts. Fact that deviation is considered material does not mean solicitation was ambiguous because component option was for indefinite quantity, "up to 100 percent," as bidders had responsibility of submitting competitive bids that would allow for recovery of costs and reasonable profit regardless of extent to which the option was exercised ---------- 439

Delivery requirements

Under invitation for bids to furnish bomb bodies that included option for additional quantities; that permitted accelerated delivery if scheduled requirements were met; and that provided for first article approval waiver, and consideration of transportation costs and value of use of rent-free Govt-owned equipment and tooling, award on basis of accelerated delivery to low bidder on initial quantity properly did not consider fact that option price was higher, since exercise of option simultaneously with award was not contemplated and market would be tested before option was exercised and, moreover, bid is not considered to have been nonresponsive because option delivery rate was based on accelerated rate, and rental factor had been computed at accelerated delivery rate without regard to extended use of Govt. property under prior contract ---------- 467

Exercise of option. (*See* **Contracts, options**)

Peddling. (*See* **Contracts, subcontracts, bid shopping**)

Personal services. (*See* **Personal Services**)

Prebid conference effect

Provisions of pars. 3–504 and 3–504.2 of Armed Services Procurement Reg. which set forth procedure for preproposal conferences do not preclude conducting more than one preproposal conference or site survey so long as offerors are treated equally and supplied substantially similar information. Therefore, where no additional information to that disclosed at original site survey was presented at later site survey under two-step procurement conducted for benefit of successful offeror unable to be represented at preproposal conference and site survey, there is no basis for holding there was noncompliance with provisions ---------- 85

BIDS—Continued Page

Preparation

Costs

Subcontractors

Unless prime contractor is acting as purchasing agent, bid protest procedures of U.S. GAO do not provide for adjudication of protests against subcontract awards made by prime contractors. Furthermore, where award of subcontract has been made and neither fraud nor bad faith on part of contracting officer in approving award is alleged, possibility of finding adequate justification to support cancellation of subcontract is so remote that consideration of such protests under GAO's bid protest procedures would be unwarranted. However, in audit of prime contract, attention will be given to any evidence indicating cost to Govt. was unduly increased because of improper procurement actions by prime contractor. Furthermore, when prime contractor is not acting as Govt. agent, bid preparation expenses of subcontractor are not reimbursable---------- 80$_3$

Prices

Misplaced

Low bidder who does not qualify for waiver of first article requirements offered to previous suppliers of fueling at sea probes and receivers but inadvertently entered bid prices in waiver space and inserted dashes in area reserved to bidders that were not eligible for first article waiver has not submitted nonresponsive bid *per se* as dashes have no firm meaning apart from entire context in which used and examination of entire bid demonstrates entries were erroneous and intent was to bid on basis of first article contractor testing and, although, not for correction as bid mistake, error is supported by fact low bidder did not identify prior contracts under which first articles on production samples had been furnished or indicate delivery time advancement in event of waiver, and inserted subitems not applicable to first article waiver---------- 352

Supplier's prices

Quoted after bid opening

Low bid submitted on "brand name" basis under small business set-aside requiring component parts of tent frames and doors to be furnished on "Brand Name or Equal" basis is not nonresponsive bid because bidder secured price quotations on parts after bid opening and after contracting agency had contacted manufacturer—which according to record was not improper interference—as bid on its face complied in all material respects to invitation for bids, and fact that bidder could not anticipate furnishing brand name item at bid opening time is matter of responsibility and not bid responsiveness for significant time to determine ability to perform is not at bid opening time but at time of scheduled performance, and contractor if unable to perform would be subject to default termination and liability for excess costs---------- 787

Unprofitable

Allegation that low bidder submitted bid on which he will incur loss is for referral to Secretary of department involved with advice that it should be considered by procuring activity in determining whether bidder is responsible bidder for procurement---------- 255

BIDS—Continued Page

Qualified

"Entry into plant" requirement

"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information---------- 476

Qualified products. (*See* Contracts, specifications, qualified products)

Request for proposals. (*See* Contracts, negotiation, request for proposals)

Sales. (*See* Sales)

Samples. (*See* Contracts, specifications, samples)

Signatures

Multiple bids

Fact that both low and high bids to construct administrative building at Govt. installation were signed by same individual does not require rejection of low bid where evidence shows multiple bids were submitted for legitimate business reasons and submission of both bids were not attempt to circumvent statutory or regulatory requirements or to prejudice either U.S. or other bidders. Furthermore, it is immaterial whether prices quoted were discussed by concerns before submitting separate bids, for any discussion would not constitute reasonable basis for concluding that conspiracy had been entered into to eliminate competition from other bidders---------- 403

Site surveys

Provisions of pars. 3–504 and 3–504.2 of Armed Services Procurement Reg. which set forth procedure for preproposal conferences do not preclude conducting more than one preproposal conference or sit survey so long as offerors are treated equally and supplied substantially similar information. Therefore, where no additional information to that disclosed at original site survey was presented at later site survey under two-step procurement conducted for benefit of successful offeror unable to be represented at preproposal conference and site survey, there is no basis for holding there was noncompliance with provisions---------- 85

Small business concerns

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

Specifications. (*See* Contracts, specifications)

BIDS—Continued Page

Subcontracts

Applicability of Federal procurement rules

While prime contractor under Atomic Energy Commission (AEC) operating type contract is not bound by statutory and regulatory requirements that govern direct procurement by Govt., AEC Procurement Reg. 9–59.002 provides for AEC review of cost-type contractors' procurement systems and methods, as well as review of individual procurement actions and, therefore, there is no basis to question procurement determinations made under rules applicable to such AEC contracts or under rules governing direct Federal procurements in connection with evaluation of bids submitted under invitation for bids issued by AEC prime contractor for installation of mechanical, electrical, and HVAC systems ---- 329

Bid forms

Copy requirements

Failure of successful bidder under invitation for bids issued by Govt. prime contractor to comply with requirement that proposals be submitted in triplicate was minor deviation which properly was waived pursuant to sec. 1–2.405(a) of Federal Procurement Regs. Furthermore, single copy submitted by bidder was made available by prime contractor for examination by any interested party at time of bid opening ---- 329

Bid shopping. (*See* **Contracts, subcontracts, bid shopping**)

Evaluation

Affirmative action programs

Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since certification will bind successful bidder to comply with affirmative action plan conditions imposed in invitation, and affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford low bidder opportunity to correct bid deficiency -- 329

Surplus property. (*See* **Sales**)

Transfers

Propriety

When low bidder under two invitations for bids on fuzes, one labor surplus set-aside, ceased operations due to lack of funds and liens placed against it, awards should not have been made to successor in interest under novation agreement entered into after bid opening since bidder acquires no enforceable rights by submitting bid, and, therefore, awards made were prejudicial to other bidders. This ruling is in accord with 43 Comp. Gen. 353, at page 372, concerning transfer of rights in negotiated procurement, and since it is case of first impression, as neither Anti-Assignment Act, 41 U.S.C. 15, nor par. 26–402, ASPR, re third party interests, apply, contracting officer lacked precedent guidance and good faith awards will not be disturbed, but rule will be applied in future procurements ---- 145

BIDS—Continued Page

Two-step procurement

Evaluation

Overliteral interpretation of first-step

Rejection of first-step proposal of two-step advertisement to supply and assemble all components of firefighting truck to be furnished by Govt. for failure to respond to problem of tailgate interference even though evaluation report did not require a response, identified problem, and provided solutions, and otherwise technical offer was acceptable, was based on overliteral interpretation of first-step procedure designed to be flexible, similar to negotiated procurement and to evaluate potential bidder's ability to meet specifications; in fact letter request for technical proposals advised first-step offerors that it realized all design factors could not be detailed in advance. Therefore, since first-step proposal should not have been summarily rejected, second-step invitation should be canceled with all qualified offerors, including rejected one, allowed to bid upon readvertisement 592

First-step

Purpose

Since only offeror in addition to incumbent contractor responding to request for technical proposals under two-step procurement for installation of telecommunications system overseas, who in answering questions posed after evaluation of offers indicated risk incident to site could not be assumed without surveying site, was erroneously determined to be nonresponsive and was improperly denied opportunity to participate in second-step inviting prices notwithstanding by then site had been surveyed, contracting officer's subsequent determination to make procurement competitive and permit rejected offeror to submit technically acceptable proposal was in line with first step's intended purpose of fostering competition, and offeror should be allowed to compete in second step as sole source award to incumbent contractor would not be justified 372

Preproposal conferences and site surveys

Provisions of pars. 3–504 and 3–504.2 of Armed Services Procurement Reg. which set forth procedure for preproposal conferences do not preclude conducting more than one preproposal conference or site survey so long as offerors are treated equally and supplied substantially similar information. Therefore, where no additional information to that disclosed at original site survey was presented at later site survey under two-step procurement conducted for benefit of successful offeror unable to be represented at preproposal conference and site survey, there is no basis for holding there was noncompliance with provisions 85

Specifications

Revision

Formal amendment requirement

Although prior to issuance of second step of two-step procurement for design, fabrication, and installation of defense test chamber, formal amendment to letter request for technical proposals should have been issued to cover revisions in specifications as required by par. 3–805.1(e) of Armed Services Procurement Reg. in order to give acceptable offerors

BIDS—Continued Page

Two-step procurement—Continued

Specifications—Continued

Revision—Continued

Formal amendment requirement—Continued

opportunity to modify their proposals, contract awarded will not be disturbed for omission was not prejudicial as technical proposals of offerors who during negotiations under first-step of procurement had made their proposals acceptable indicate offerors prior to bidding on second-step had ample opportunity to intelligently consider specifications revisions and thus in effect had incorporated them in their second-step bid. However, recurrence of circumstances of this procurement should be prevented 85

Technical proposals

Multiple

Specification compliance

In two-step procurement, where pursuant to par. 2-503.1(a)(x) of Armed Services Procurement Reg., letter request for proposals authorized and encouraged offerors to submit multiple technical proposals presenting basic approaches, offerors because of flexibility of procurement need only submit proposals which comply with basic requirements of specifications rather than proposals based on strict compliance with all details or specifications, and it is responsibility of procuring agency to determine acceptability of technical proposal 85

Use basis

Specifications deficient

Determination of how best to satisfy Govt.'s requirements is within ambit of sound administrative discretion, subject to compliance with law and implementing regulations, and as Govt.'s authority to purchase is broad and comprehensive, extending not only to subject matter of purchase but also to mode of purchase, two-step formal method of procurement prescribed by par. 2-502(a)(i) may be used when specifications are not sufficiently definite and complete 85

Unbalanced

Discounts

Requirements award under IFB soliciting base and alternate bids for motor vehicle parts pursuant to concept of contractor-operated on-base parts store, which asked for separate discounts in base bid on common and captive parts and single discount in alternate bid on parts, should be terminated for convenience of Govt. and award offered to low bidder on base bid since bidder's failure to bid on alternate items did not justify rejection of its low base bid as bid covered all work contemplated, nor is bid invalid because 90% discount was offered on captive parts, as unusually high discount does not evidence submission of unbalanced bid, mistake, or future intent to transfer parts during contract performance to lower common parts category. Moreover, in absence of IFB provision, it was inappropriate in evaluation of alternate bid to consider unliquidated cost reduction to administer one discount 792

BOARDS, COMMITTEES, AND COMMISSIONS Page

Compensation

Aggregate limitation

Members of National Advisory Committee established by sec. 7(a) of Occupational Safety and Health Act of 1970, which provides for members to be compensated in accordance with 5 U.S.C. 3109, may not be paid salaries in excess of rates prescribed for grade GS-15 since sec. 3109 limits payment to experts and consultants to per diem equivalent of highest rate payable under General Schedule salary rates established for Federal employees. Experts and consultants of advisory committees, appointed under sec. 7(b) to assist in standard setting functions, for whom sec. 7(c)(2) prescribes grade GS-18, may not be paid in excess of grade GS-15, unless they qualify under rule in 43 Comp. Gen. 509, to effect that exception to grade GS-15 limitation may be made only when limitation on number of positions authorized for grade GS-18 is removed 224

BONDS

Bid

Failure to furnish

Oral bidding

Under combined sealed bid-auction timber sale, failure of high bidder to furnish bid bond with its seal bid submitted to qualify for oral bidding—failure corrected before oral bidding began—was minor informality, and defect having been remedied, high bid was properly included in oral bidding. Even if secs. 1-2.404-2(5)(f) and 1-10.103-4 of Federal Procurement Regs. requiring rejection of bids to furnish goods or services when bid bond is not furnished applied to timber sales, 38 Comp. Gen. 532, incorporated in procurement regulations, should not be made applicable to timber sale since sealed bids only qualified bidders to participate in oral bidding and no competitive advantage accrued prior to oral bidding as no bidder knew whether any other bidder would submit oral bid in excess of his, or any other bidder's sealed bid price 182

Penal sum omitted

Criteria for determination that bid bond submitted with bid is sufficient is whether surety intends to be obligated for sum certain and objectively manifests such an intent. Therefore, where bid bond accompanying low bid omitted penal sum required by invitation but surety signed and sealed bond, which was referenced to specific invitation that bid was submitted on, rejection of low bid was erroneous and bid should be reinstated since surety knew extent of obligation undertaken and in issuing bond manifested intent to be bound in required penal sum 508

Principal not bidder

Where principal names in bid bond was joint venture which included corporation that was only entity named in low bid, statements and affidavits submitted after bid opening, to evidence that mistake had been made and bidder intended to be named in bid was joint venture, may not be accepted to make nonresponsive bid responsive by changing name of bidder. Alleged mistake is proper for consideration only when bid is responsive at time of submission, and bid submitted not having met

BONDS—Continued Page

Bid—Continued

Principal not bidder—Continued

terms of invitation for bids which required bid guarantee to be submitted in proper form and amount by time set for opening of bids, it would not be proper to consider reasons for nonresponsiveness of bid, whether due to mistake or otherwise---------- 836

Sufficiency

Bid bond submitted in required amount of $52,351.58, which constituted 20% of bid total ($261,757.90), but attachment to bond limited surety's obligation to amount not to exceed $50,000, is valid bond that binds surety in amount of $50,000, and low bid may be considered, notwithstanding bond did not equal required penal amount, since pursuant to sec. 1-10.103-4(b), FPR, when amount of bid guarantee equals or is greater than difference between bid price and price in next higher acceptable bid ($272,956), failure to submit sufficient bid guarantee may be waived. Although general rule is that agent who exceeds his authority may not bind principal, where difference between contract as authorized and contract as made is difference in amount, exception is recognized and principal is liable upon contract as it was authorized. B–148309, Mar. 19, 1962, overruled---------- 802

Supply *v.* construction contracts

Combination

Use of annual bid bond that is applicable to supplies and services which low bidder has on file with contracting agency in procurement of hydrogenerator to be installed and tested in lieu of payment and performance bonds specified in invitation for bids—bonds generally required only on contracts involving construction as opposed to contracts for supplies and services—is approved as being legally sufficient to obligate surety as contract contemplated consisting of only 25 percent construction falls within meaning of supply and service contract contained in sec. 1–12.402–1(a), FPR, and sec. 1–12.402–2 prescribes that labor standards need not apply to contracts predominantly for nonconstruction work. Furthermore, failure of bidder to use proper standard form 34, where difference in forms is not one of substance, may be waived as minor informality pursuant to FPR 1–2.405---------- 822

Performance

Reduction

Consideration

Failure of low offeror to submit performance bond equal to 100 percent of contract price by time of contract award under request for proposals to construct mail facility that made furnishing of bond condition of contract and not condition precedent to award does not affect validity of contract since acceptance of late performance bond reflects long-standing practice that permits furnishing of Miller Act bonds up to time of contract performance, and general bond condition was met albeit in lesser percentage amount with valuable consideration of price reduction moving to Govt. However, procurement should have been resolicited to reflect lesser penal amount, and future procurements should consider all statutory and regulatory bonding requirements, as well as proposed guarantee provisions in pars. 18-801 and 10-102.4, ASPR---------- 733

BUY AMERICAN ACT Page

Applicability

Contractors purchases from foreign sources

Items not for inclusion in contract performance

Since award by a Govt. joint venture prime contractor of subcontract to Canadian firm for mobile office units manufactured in Canada for its own use while constructing an anti-ballistic missile site in Montana was not subject to Buy American Act, 41 U.S.C. 10a–d, award did not violate the act nor the ASPR, notwithstanding any adverse effect on domestic trailer industry. Not only does act not apply to contractor's purchases for his own use, as they are not to become permanent part of structure being constructed for Govt., mobile units are not considered components of construction material as defined in Buy American clause of contract, which conforms to act, and procurement regulations, nor do they constitute end products acquired for public use as contemplated by the act.. 538

Bids. (*See* **Bids, Buy American Act**)

Waiver

Public interest

Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor..... 195

CANAL ZONE GOVERNMENT

Medical and educational services furnished

Dependents

Children

Term "dependent" as used in sec. 105 of Civil Functions Appropriation Act, 1954, as amended (2 C.Z. Code 232), which authorizes payment to Canal Zone Govt. of unrecoverable costs from employees of U.S. and their dependents for education and hospital and medical care furnished, in absence of statutory or valid regulatory definition of phrase "dependent child," may be construed in accordance with definition in Black's Law Dictionary and, therefore, "dependent child" need not mean child under age of 21. However, as statement on invoice for medical services furnished daughter of Federal employee that she is "full-time student under 23 years of age" does not automatically establish dependency, and amount billed is not represented as unrecovered costs from employee or dependent, as required by statute, invoice may not be certified for payment..... 252

CARRIERS Page

Communications

Statutes of limitation

Claim submitted by Western Union Telegraph Company within 10-year limitation period for filing claims with U.S. GAO for services denied administratively on basis claim was barred by 1-year limitation of action provision in Communications Act, 47 U.S.C. 415(a), is cognizable under 31 U.S.C. 71 and 236, as time limitations for commencement of "actions at law" prescribed by Communications Act and Interstate Commerce Act do not affect jurisdiction of GAO unless specifically provided by statute, and 3-year limitation for filing transportation claims with GAO prescribed by sec. 322 of Transportation Act, as amended, 49 U.S.C. 66, does not affect right of firms providing service under Communications Act to have their claims considered by GAO if presented within 10 full years after dates on which claims first accrued---------- 20

CERTIFYING OFFICERS

Submissions to Comptroller General

Timeliness

Where request for decision on propriety of payment made is submitted by official whose status as certifying officer authorized to submit to Comptroller General question of law involved in payment on specific voucher presented to him for certification prior to payment, which voucher must accompany submission, is doubtful and, normally, payment having been made, such request would not be considered, since problem presented is of recurring nature, decision requested was addressed to head of department concerned under broad authority in 31 U.S.C. 74, pursuant to which decisions are rendered to heads of departments on any question involved in payments which may be made by department----- 79

CHECKS

Payees

Joint

Divorce of payees

Negotiation of joint income tax refund checks issued in names of divorced couple on basis of joint income tax return by claimant's former wife, without his knowledge or permission, did not extinguish liability of U.S. or pass title to endorsing bank, who therefore is subject to reclamation proceedings, as, absent statute or court decision to contrary, joint payees may not be considered as one person or entity so that endorsements of both were required for negotation of checks. Moreover, Uniform Commercial Code requires all joint payees must endorse and discharge negotiable instrument; and while code is not necessarily determinative with respect to Govt. checks, it should be followed to maximum extent practicable in interest of uniformity where it is not inconsistent with Federal interest, law, or court decisions. 50 Comp. Gen. 441 modified---------- 668

CHECKS—Continued Page

Travelers

Reimbursement

Military personnel

Reimbursement to members of uniformed services for cost of purchasing traveler's checks, whether related travel is performed within or without U.S., may be authorized without regard to value of checks purchased in view of broad authority for reimbursement in connection with travel of members and their dependents, and Joint Travel Regs. amended accordingly, thus bringing reimbursement for cost of traveler's checks for travel within U.S. in line with long recognition that cost of traveler's checks incident to travel outside U.S. is valid expense. However, amendment of Standardized Government Travel Regs. to accomplish same uniformity in reimbursing civilian employees for cost of traveler's checks is matter for consideration by Administrator of GSA---------- 606

CLAIMS

Assignments

Contracts

Novation agreements

When low bidder under two invitations for bids on fuzes, one labor surplus set-aside, ceased operations due to lack of funds and liens placed against it, awards should not have been made to successor in interest under novation agreement entered into after bid opening since bidder acquires no enforceable rights by submitting bid, and, therefore, awards made were prejudicial to other bidders. This ruling is in accord with 43 Comp. Gen. 353, at page 372, concerning transfer of rights in negotiated procurement, and since it is case of first impression, as neither Anti-Assignment Act, 41 U.S.C. 15, nor par. 26–402, ASPR, re third party interests, apply, contracting officer lacked precedent guidance and good faith awards will not be disturbed, but rule will be applied in future procurements---------- 145

Validity of assignment

Sale, etc., of business

Transfer of Govt. contracts pursuant to novation agreement to successor in interest of contractor who ceased operations because of lack of funds and liens attached against it is valid and may be recognized since transfer of rights and obligations incident to sale or merger of contracting corporation or other entity does not constitute assignment in violation of Anti-Assignment Act, 41 U.S.C. 15, which rule is implemented by par. 26–402, ASPR, recognizing third party interest to Govt. contract where interest is incidental to transfer of all assets of contractor, or all of that part of contractor's assets involved in performance of contract---------- 145

Evidence to support

Administrative records contrary to allegations

Acceptance of administrative statements

Rate tenders which offer reduced freight rates pursuant to sec. 22 of Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Govt. traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in offeree to make series of

CLAIMS—Continued Page

Evidence to support—Continued

Administrative records contrary to allegations—Continued

Acceptance of administrative statements—Continued

separate contracts by series of independent acceptances until at least 30 days written notice by either party to tender of cancellation or modification of tender is received. Therefore, where Military Traffic Management and Terminal Service maintains supplements canceling or modifying four rate tenders were not received and carrier insists they were mailed, question of fact is raised and administrative statements must be accepted, and overcharges resulting from controversy are for recovery from carrier either directly or by deduction from any amounts subsequently due carrier as provided by 49 U.S.C. 66 541

Federal Tort Claims Act. (*See* Torts, claims under Federal Tort Claims Act)

Statutes of limitation. (*See* Statutes of Limitation)

CLOTHING AND PERSONAL FURNISHINGS

Special clothing and equipment

Hazardous occupations

Safety glasses

Holding in 42 Comp. Gen. 626 that in absence of showing that employee was unable to furnish prescription from which safety glasses could be made, or that prescription could not be made from glasses employee normally wears, cost of eye refraction examinations was not for payment by Govt. does not preclude such examinations where employee has not previously worn glasses or where it is administratively determined existing prescription is inadequate, and general practice of Air Force of providing refraction examinations under its occupational vision program established pursuant to 5 U.S.C. 7903 and 29 U.S.C. 668(a) should be discontinued and AFR 160–112 amended to clarify that refraction examinations may be authorized at Govt. expense only where employee had previously not worn glasses or his present prescription or glasses are inadequate. 42 Comp. Gen. 626, clarified 775

Safety necessity for expenditures by Government

Purchase of protective clothing and equipment for personnel performing hazardous duty is not only authorized under 5 U.S.C. 7903, it is prescribed by sec. 19(a) of the Occupational Safety and Health Act of 1970, which establishes Federal safety program and provides that head of each Federal agency has the primary responsibility for determining protective clothing and equipment to be acquired at Govt. expense for the use of employees. Therefore, protective clothing and equipment for personnel operating snowmobiles under varying physical conditions over rough and remote forest terrain may be furnished by Govt. if purchase is determined to be necessary because of priority safety need established by operation of safety management program, regardless of whether or not procurement satisfies requirements of 5 U.S.C. 7903 446

COAST GUARD Page

Reservists

Disability determination

As correction of military records pursuant to 10 U.S.C. 1552 is final and conclusive on all officers of U.S., except when procured by fraud, conclusion of Board for Correction of Military Records for Coast Guard that former Reserve member was not fit for duty on Nov. 19, 1969; that Notice of Eligibility for Disability Benefits issued on that date when he was released from hospitalization occasioned by injury suffered while participating in official volley ball game should not have been canceled, even though he subsequently attended drills, and that he was disabled until discharged on Apr. 5, 1971, when he was found unfit for duty, entitles former Reservist to payment of pay and allowances, less drill pay, from Nov. 20, 1969, through Apr. 5, 1971, date of discharge, computed from Apr. 15, 1970, at increased rates established by E.O. 11525, and from Jan. 1, 1971, to date of discharge, at rates established by E.O. 11577 191

COLLECTIONS

Debt collections (*See* Debt Collections)

COMMISSIONS

(*See* Boards, Committees, and Commissions)

COMPENSATION

Double

Civilians on military duty

Reimbursement

Civilian employee serving in Hawaii under transportation agreement who as Army reservist is ordered, effective July 29, 1968, to active duty for training in U.S. and is granted military leave from July 18 to Aug. 1, 1968 under 5 U.S.C. 5534, which is applicable to reservists and National Guardsmen, may be carried on civilian rolls beyond military reporting date; may be reimbursed pursuant to 5 U.S.C. 5724 on basis of administrative approval for travel of dependents and shipment of privately owned automobile to U.S.; and may be also under 5 U.S.C. 5534 reemployed June 9, 1969, although released from active duty June 23, but employee entitled under 5 U.S.C. 6323 to 15 days military leave for single period of training, extending from 1 calendar year into next, having been granted military leave from July 18, to Aug. 1, 1968, may not be granted military leave from June 9 to 23, 1969, but may be granted annual leave 23

Concurrent military retired and civilian service pay

Consultants

Reduction in retired pay

Retired Air Force major employed by two Govt. agencies as civilian consultant under excepted appointments—Intermittent—1-year appointment in fiscal year 1969, which was extended for year, and another appointment in fiscal year 1970 with no time limitation, would if only one appointment were involved be entitled pursuant to Dual Compensation Act of 1964, 5 U.S.C. 5532, to exemption from reduction of retired pay for no more than first 30-day period for which he received compensation as expert regardless of fiscal year in which appointment was made

COMPENSATION—Continued Page

Double—Continued

Concurrent military retired and civilian service pay—Continued

Consultants—Continued

Reduction in retired pay—Continued

or services performed. However, where two or more appointments are involved, exemption applies to first 30 days of work in each fiscal year during which retired officer received civilian pay, but officer having worked less than 30 days under both appointments in each fiscal year is not subject to reduction of retired pay---------- 189

Downgrading

Saved compensation

More than one downgrading action

When employee is receiving retained rate of compensation based on special rate that is limited by formula in 5 U.S.C. 5337(b), increase under 5 U.S.C. 5303(d) in special rate of grade and step from which he was demoted is not regarded as increase provided by statute within meaning of 5 U.S.C. 5337(b), but retained rate prescribed for employee may be increased under general conversion rule in sec. 531.205(a)(3) of Civil Service Commission Regs. Thus applying general conversion rule, employee reduced more than three grades whose special rate in GS–12, step 3, was $15,611, and whose retained rate in GS–7, step 1, under formula in 5 U.S.C. 5337(b) is $13,828, is entitled to new retained rate of $14,456 ($13,828, plus $628, increase in step 10 of GS–7)---------- 53

Reversion rate

The special rate selected for demoted employee as rate he will receive at end of 2-year saved pay period prescribed by 5 U.S.C. 5337, salary retention act, is not affected pursuant to 5 CFR 530.306(b)(3) by fact special rate is decreased or discontinued during retention period, and special rate is rate to which employee will revert on expiration of retention period and continues to be entitled to as long as he remains in same position or until he becomes entitled to higher rate. Therefore, GS–13 employee demoted to GS–11 with retained special rate of $18,945, for whom GS–11, step 10, at special rate of $18,088 was selected, rate subsequently decreased to $16,604, is entitled at end of retention period to $18,088 for as long as he remains in same position or until he is entitled to higher rate---------- 53

Special salary rates

Adjustments on basis of statutory increases

Since adjustments in special salary rates under 5 U.S.C. 5303(d) resulting from general increase in statutory pay schedules are not increases provided by statute within meaning of 5 U.S.C. 5337(a), adjustments may not be reflected in retained rates derived from special salary rates established for demoted employees, and it follows general conversion rule in sec. 531.205(a)(3) of Civil Service Regs. (36 F.R. 1029) with respect to salary rates above maximum rate of employee's grade is for application in prescribing increase for employees receiving retained salary rate under 5 U.S.C. 5337(a)---------- 53

COMPENSATION—Continued Page

Downgrading—Continued

Special salary rates—Continued

Revision or termination

Salary rates in excess of maximum regular rates under Civil Service Regs. (5 CFR 530.306) and E.O. 11073, dated Jan. 2, 1963, received by employees as result of downward revision or termination of special rate ranges are not covered by 5 U.S.C. 5337—salary retention act—but are saved rates to which general conversion rules for statutory pay increases apply 53

Highest previous rate. (*See* **Compensation, rates, highest previous rate**)

Holidays

Days in lieu of

Inauguration Day

Fact that Inauguration Day, January 20 of each fourth year after 1965 is prescribed in 5 U.S.C. 6103(c) as legal public holiday for Federal employees in the District of Columbia and specified adjacent areas does not require regarding Friday, Jan. 19, 1973, as legal holiday for purposes of 5 U.S.C. 6103(b), which substitutes other days as legal holidays for purpose of statutes relating to pay and leave of Federal employees for those holidays enumerated in 5 U.S.C. 6103(a) that fall on nonworkdays, such as the Friday immediately before a Saturday holiday. Not only does the listing of public holidays in sec. 6103(a) not include Inauguration Day, legislative history of subsec. (c) indicates no additional legal holiday was intended and that only the working situation of employees around metropolitan area of District of Columbia would be affected 586

Increases

Administrative action

Wage and price stabilization effect

Acceptance by full-time referees in bankruptcy of comparability adjustment in rates of pay authorized for Govt. employees would in view of 2-year limitation on salary changes in sec. 40(b) of Bankruptcy Act, 11 U.S.C. 68(b), preclude any further adjustments in referee salaries by Judicial Conference until expiration of 2-year limitation since salaries of referees are administratively fixed and, therefore, are not within purview of sec. 3 of Economic Stabilization Act Amendments of 1971 requiring adjustments in pay of employees subject to statutory pay system, which as defined in Federal Pay Comparability Act of 1970 excludes administratively fixed salaries. Therefore, since administrative action is prerequisite to salary adjustments similar to those granted by sec. 3 of 1971 act, approval by Judicial Conference of salary adjustments are subject to sec. 40(b) limitation 709

Periodic step-increases. (*See* **Compensation, periodic step-increases**)

Retroactive

Increases withheld during wage freeze

Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract

COMPENSATION—Continued Page
Increases—Continued
Retroactive—Continued
Increases withheld during wage freeze—Continued
executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3) (A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases---------- 525

Military personnel. (*See* Pay)
Night work
Basic compensation determinations
Since, in accordance with sec. 539.203 of Civil Service Regs., wage board employee upon conversion of his position to GS position is entitled to inclusion of night differential in setting GS rate only if he was in receipt of night differential as part of basic pay at time of position conversion, if employee's regular night shift tour is worked on rotational basis or at regularly scheduled anticipated intervals, night differential may not be prorated and included in fixing his GS rate. However, employee who works night shift on irregular, unanticipated basis and is in receipt of night differential at time of position conversion may have night differential treated as part of basic pay in setting GS rate upon conversion of his wage board position---------- 641

As only employees actually working and being paid for night shift work at time their wage board positions are converted to GS positions are entitled to inclusion of night differential as basic pay, employees who work rotating shifts may not in conversion of wage board rates to GS rates have their compensation converted to three different rates of basic pay—day shift, and second and third shifts at different rates of night differential and, furthermore, highest previous rate rule is not prescribed in sec. 539.203 of Civil Service Regs. for use in circumstances involved---------- 641

Holdings in Civil Service Regs. sec. 539 and 34 Comp. Gen. 708 that when employee and his position are brought under GS in conversion action and basic pay for wage board position, including night differential, exceeds maximum rate for GS position plus 10 percent night differential, employee will be paid "saved" basic pay of wage board position, but not 10 percent night differential authorized, for GS position remains unaffected by 50 Comp. Gen. 332, which concurs with view of Civil Service Commission that when basic pay for GS position does not exceed maximum rate plus 10 percent, conversion rate will be fixed to guarantee employee no loss of pay, and if he works night shift he will be paid night differential---------- 641

COMPENSATION—Continued Page

Overpayments

Debt collection. (*See* Debt Collections, waiver, civilian employees, compensation overpayments)

Overtime

Traveltime

Administratively controllable

In applying 5 U.S.C. 5542(b)(2)(B)(iv), which authorizes payment of overtime when travel after end of normal tour of duty "results from an event which could not be scheduled or controlled administratively," term "event" although including anything which necessitates employee's travel, requires existence of immediate official necessity in connection with event requiring travel, and if necessity is not so immediate as to preclude proper scheduling of travel, time in travel does not qualify as hours of employment, and phrase "could not be scheduled" contemplates more than fact that administrative pressures make scheduling in accordance with 5 U.S.C. 6101(b)(2) difficult or impractical, or emergency situations. Events considered beyond administrative control are discussed in Federal Personnel Manual Supplement 990–2 727

In view of policy expressed in 5 U.S.C. 6101(b)(2) that to maximum extent practicable travel should be scheduled within regularly scheduled workweek of employee, per diem costs which might be necessary to comply with policy are not considered unreasonable. However, should uncontrollable event necessitate employee's travel, notwithstanding there is sufficient notice to permit scheduling of travel during his regularly scheduled duty hours, where such scheduling would result in payment of at least 2 days additional per diem, travel may be required during off duty hours and compensated for at overtime rates 727

Although pursuant to 5 U.S.C. 6101(b)(2) travel should not be scheduled at times outside of employee's regularly scheduled workweek as section does not require or permit payment of compensation for such travel, at same time employing agency has discretionary authority to determine when it is impracticable to schedule official travel within employee's workweek and to order travel that is noncompensable as overtime. However, official requiring noncompensable travel is required to comply with 5 CFR 610.123 and record reasons for ordering travel and furnish copy of statement to employee, who in turn would not be justified in refusing to perform properly ordered travel 727

Assignment not primary function of employee

Attorney whose travel away from permanent duty station to obtain affidavit of witness involved returning to headquarters after end of normal tour of duty may not be paid overtime compensation or allowed compensatory time under 5 U.S.C. 5542(b)(2)(B) for return trip home, even though initial travel qualified as hours of employment, since duties as attorney are primarily to perform legal functions and not to transport documents, and fact that transportation of affidavit was necessary to performance of duties did not convert return trip to hours of employment within meaning of 5 U.S.C. 5542(b)(2)(B)(i), which authorizes payment of overtime compensation for time spent in travel status only when travel involves performance of work while traveling 727

COMPENSATION—Continued Page

Overtime—Continued

Traveltime—Continued

Between residence and headquarters

Traveltime of one-half hour each way from home to duty station and return in Govt-owned boat by Federal Aviation Administration wage board employees assigned to Alaska and performing regularly scheduled duty period of 8 hours per day is not compensable as overtime under 5 U.S.C. 5542(b)(2)(B) since employees did not perform work while traveling, travel was not incident to performance of work, nor did it result from event which could not be scheduled or controlled administratively, and fact that boat trip could be dangerous because of tidal action or dock in need of repairs does not constitute travel under arduous conditions as travel under arduous conditions is travel performed under severe weather conditions 7

Periodic step-increases

Wage and price freeze

Retroactive adjustment

Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3) (A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases 525

Rates

Highest previous rate

Administrative discretion

Retroactive adjustment in pay rate of employee who upon reemployment is GS–3 position following resignation from GS–6, step 4, position is placed in step 10 under highest-previous rate rule to step 1 in accordance with administrative regulation restricting use of highest-previous rate rule may not be reversed as appointment to GS–3, step 10, was not administrative waiver of administrative restriction on use of highest-previous rate rule, nor may original pay-setting action be affirmed by a regulating or higher level, since distinctions recognized in 30 Comp. Gen. 492 between statutory and so-called purely administrative regulations no longer apply in view of contrary court cases and fact that B–158880 changed rule in 30 Comp. Gen. 492. However, overpayments received in good faith by employee may be waived under 5 U.S.C. 5584 .. 30

COMPENSATION—Continued Page
Rates—Continued
Highest previous rate—Continued
Applicability
Foreign service salary rates

Employees of Dept. of Agriculture who completed service in overseas positions under 22 U.S.C. 2385(d)(1) and are entitled to same benefits as provided by 22 U.S.C. 928 for persons appointed to Foreign Services Reserve, upon reinstatement to their former positions, may have their salaries set under highest previous rate rule in accordance with 5 U.S.C. 5334(a) and sec. 531.203(c) of Civil Service Regs. rather than on basis they are only eligible to receive step increases they would have earned had they remained in positions in which regularly employed, as highest previous rate rule has never been construed as excluding salary rates attained in Foreign Service---------- 50

Limitations
Experts and consultants, etc.

Members of National Advisory Committee established by sec. 7(a) of Occupational Safety and Health Act of 1970, which provides for members to be compensated in accordance with 5 U.S.C. 3109, may not be paid salaries in excess of rates prescribed for grade GS–15 since sec. 3109 limits payment to experts and consultants to per diem equivalent of highest rate payable under General Schedule salary rates established for Federal employees. Experts and consultants of advisory committees, appointed under sec. 7(b) to assist in standard setting functions, for whom sec. 7(c)(2) prescribes grade GS–18, may not be paid in excess of grade GS–15, unless they qualify under rule in 43 Comp. Gen. 509, to effect that exception to grade GS–15 limitation may be made only when limitation on number of positions authorized for grade GS–18 is removed---------- 224

Saved
Downgrading actions. (*See* Compensation, downgrading, saved compensation)

Wage board employees
Conversion to classified positions
Rate establishment

Since, in accordance with sec. 539.203 of Civil Service Regs., wage board employee upon conversion of his position to GS position is entitled to inclusion of night differential in setting GS rate only if he was in receipt of night differential as part of basic pay at time of position conversion, if employee's regular night shift tour is worked on rotational basis or at regularly scheduled anticipated intervals, night differential may not be prorated and included in fixing his GS rate. However, employee who works night shift on irregular, unanticipated basis and is in receipt of night differential at time of position conversion may have night differential treated as part of basic pay in setting GS rate upon conversion of his wage board position---------- 641

COMPENSATION—Continued Page

Wage board employees—Continued

Conversion to classified positions—Continued

Rate establishment—Continued

In setting rates of pay for employees whose positions are converted without change of duties from Coordinated Federal Wage System to GS system in wage area where 15 percent cost-of-living allowance is authorized (5 U.S.C. 5941), allowance is not for consideration in comparing GS rate range with wage rate since sec. 539 of Civil Service Regs. and not "highest previous rate" rule in sec. 531 of the Regs. is for application, as agency has no discretionary authority in setting such conversion rates. Therefore, wage board annual rate of $11,377.60 under sec. 539.203(c) should have been set at GS–9, step 4, $11,517 per annum, and not at GS–9, step 1, $10,470 per annum, plus 15 percent cost-of-living allowance ($12,040.50), and corrective action, including retroactive payment of additional compensation, where appropriate, is required 656

"Saved" compensation

Night differential

Holdings in Civil Service Regs. sec. 539 and 34 Comp. Gen. 708 that when employee and his position are brought under GS in conversion action and basic pay for wage board position, including night differential, exceeds maximum rate for GS position plus 10 percent night differential, employee will be paid "saved" basic pay of wage board position, but not 10 percent night differential authorized, for GS position remains unaffected by 50 Comp. Gen. 332, which concurs with view of Civil Service Commission that when basic pay for GS position does not exceed maximum rate plus 10 percent, conversion rate will be fixed to guarantee employee no loss of pay, and if he works night shift he will be paid night differential 641

Increases

Retroactive

Wage adjustments

Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3)(A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases 525

COMPENSATION—Continued Page
Wage board employees—Continued
Night differential
Basic compensation determination

As only employees actually working and being paid for night shift work at time their wage board positions are converted to GS positions are entitled to inclusion of night differential as basic pay, employees who work rotating shifts may not in conversion of wage board rates to GS rates have their compensation converted to three different rates of basic pay—day shift, and second and third shifts at different rates of night differential and, furthermore, highest previous rate rule is not prescribed in sec. 539.203 of Civil Service Regs. for use in circumstances involved 641

CONFERENCES
(*See* Meetings)

CONTRACTORS
Agents of Government. (*See* Agents, Government, contractors)
Employees
Overseas
Death or injury
Compensation

Award to eligible survivors of Govt. contractor employee killed in Vietnam by military aircraft which was made pursuant to Defense Base Act (DBA) that incorporated provisions of Longshoremen's and Harbor Workers' Compensation Act to overseas employment of decedent does not preclude third party liability on part of Govt. under Military Claims Act since concept of exclusive liability under first two acts is limited to contractor, and right to compensation benefits stemmed from DBA and not War Hazard Compensation Act (WHCA), which supplemented war-risk hazard benefits of DBA. Although for purposes of WHCA, injured persons are considered civilian employees of Govt. and, therefore, are precluded by Federal Employees' Compensation Act from asserting damage claim against U.S., this act does not change status of contractor employees for purposes of Defense Base Act 125

Foreign
Executive agreement authority
Notice of competition to domestic contractors

Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor 195

CONTRACTS Page

"Affirmative action programs." (*See* **Contracts, labor stipulations, nondiscrimination, "affirmative action programs"**)

Assignments. (*See* **Claims, assignments**)

Awards

Cancellation

Damages

Service charges imposed by Airlie House "75% of total or $750.00 per night, whichever is less" upon cancellation of confirmed reservation, terms which were furnished contracting agency before issuance of purchase order reserving facilities, may be paid since valid contractual relationship was created upon issuance of purchase order and provisions of Airlie's operating policy furnished the Govt. prior to issuance of purchase order became part of contract. While cancellation of hotel reservations within reasonable time prior to dates reserved generally will not involve liability to pay for unused rooms, and provision regarding payment of unreasonably large amount would be unenforceable penalty clause, there is no basis for determination that cancellation charges are unreasonable since Airlie is exclusively a conference center which deals only in group reservations 453

Erroneous awards

Bid evaluation error

Notwithstanding failure to acknowledge amendment presumably included in bid set to correct drawing number omissions in technical data package list (TDPL) and erroneous listing of some numbers in Military Specification (Milspec) to which telescopes being solicited were to conform, low bid was responsive as issuance of amendment was unnecessary where original invitation, accompanied by aperture cards of drawings, served to bind prospective contractors. Omitted numbers in TDPL were referenced in Milspec, which correctly listed erroneous numbers in specification requirements provision and, therefore, Milspec and cards, standing alone, required bidder compliance. Erroneous award to other than low bidder should be terminated for convenience of Govt. and contract offered to low bidder 293

Where contracting officer overlooked discount offered by bidder which if evaluated would have displaced successful bidder awarded 1-year janitorial requirements contract under invitation for bids, when first two low bidders were found nonresponsive because low bidder, unable to show its intended bid, withdrew and second low bidder, although erroneously interpreting the specifications, would not allege mistake, award made contrary to 10 U.S.C. 2305(c) to other than lowest responsive bidder should be terminated for convenience of Govt., notwithstanding claim for 6 months' performance under contract, as administratively recommended on basis no difficulties are anticipated in changing contractors and that termination would be in best interest of U.S. 423

Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made.

CONTRACTS—Continued Page
Awards—Continued
Cancellation—Continued
Erroneous awards—Continued
Bid evaluation error—Continued
The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B–173244, August 16, 1972 518

Cancellation not required
Although prior to issuance of second step of two-step procurement for design, fabrication, and installation of defense test chamber, formal amendment to letter request for technical proposals should have been issued to cover revisions in specifications as required by par. 3–805.1(e) of Armed Services Procurement Reg. in order to give acceptable offerors opportunity to modify their proposals, contract awarded will not be disturbed for omission was not prejudicial as technical proposals of offerors who during negotiations under first-step of procurement had made their proposals acceptable indicate offerors prior to bidding on second-step had ample opportunity to intelligently consider specifications revisions and thus in effect had incorporated them in their second-step bid. However, recurrence of circumstances of this procurement should be prevented 85

Termination for convenience in lieu
Determination by contracting officer upon reviewing procurement for set of water distillation units and associated manuals, drawings, and provisioning list in connection with protest, that award to offeror who reduced price of list to become low offeror was improper because other offerors within competitive range were not given opportunity to review their offers and perhaps modify their prices was in accord with 10 U.S.C. 2304(g). Opportunity to revise or modify proposal, regardless of whether opportunity results from action initiated by Govt. or offeror, constitutes discussion and, therefore, award based on price reduction without discussion with other offerors was improper, but impropriety does not require severe remedy of contract cancellation, and cancellation may be modified to termination for convenience of Govt 479

Cancellation of contract award because of contracting officer's failure to hold discussions with all offerors within competitive range after holding discussions with one offeror should be converted to termination for convenience since contracting officer did not lack authority to make award and there is no indication in record that either offeror or procurement activity contracted other than in good faith or with any intent to deprive other offerors of equal opportunity to compete and, consequently, contract awarded was not void *ab initio*. Cancellation of contract is desirable, but for urgency of procurement, costs that would be chargeable against Govt., or similar circumstances relating to best interests of Govt. when termination for convenience would either be too expensive or not in Govt.'s best interest 481

CONTRACTS—Continued Page
Awards—Continued
Erroneous awards
"Good faith" award

When low bidder under two invitations for bids on fuzes, one labor surplus set-aside, ceased operations due to lack of funds and liens placed against it, awards should not have been made to successor in interest under novation agreement entered into after bid opening since bidder acquires no enforceable rights by submitting bid, and, therefore, awards made were prejudicial to other bidders. This ruling is in accord with 43 Comp. Gen. 353, at page 372, concerning transfer of rights in negotiated procurement, and since it is case of first impression, as neither Anti-Assignment Act, 41 U.S.C. 15, nor par. 26–402, ASPR, re third party interests, apply, contracting officer lacked precedent guidance and good faith awards will not be disturbed, but rule will be applied in future procurements 145

"Good faith" effect

Where there is no evidence in procurement record of bad faith in award of contract that does not contain termination for convenience of Govt. clause, it would not be in interest of Govt. to terminate contract. However, attention of contracting agency is called to deficiencies in procurement with request that action be initiated to preclude recurrence of such deficiencies in future procurements 153

Labor surplus areas
Certificate of eligibility
Submission with bid requirement

Where under small business and labor surplus set-aside portions of invitation, certificate of eligibility for first preference on basis of location of contemplated subcontractor, submitted under labor surplus area set-aside procedure prescribed by par. 1–804.2(b) of Armed Services Procurement Reg., was recalled after bid opening—a conclusive Dept. of Labor determination—upon subsequent approval of area as one of substantial unemployment, prospective prime contractor properly was not allowed to utilize its post-bid opening first preference certificate, notwithstanding its small business status, for recall of subcontractor's certificate was denial of certification and, therefore, no valid certificate existed at bid opening time, and since affirmative action of small business concern after bid opening to improve its priority may not be accepted, its labor-surplus bid was nonresponsive 335

Small business concern that failed to submit current certification of first preference eligibility status with its bid under labor surplus area set-aside portion of procurement for air conditioners to evidence commitment to employing disadvantaged individuals as required by IFB in accordance with par. 1–804.2(d) of ASPR, properly was evaluated as Group 7 priority bidder—small business concern that is not located in labor surplus area—and, therefore, not entitled to priority in negotiations since submission with bid of certificate of eligibility for first preference is matter of responsiveness and is required for determination of bidder eligibility for award of labor surplus area set-aside. Therefore, award to only other Group 7 bidder on basis of being low bidder on same item in unrestricted portion of IFB is appropriate 719

CONTRACTS—Continued Page
Awards—Continued
Labor surplus areas—Continued
Certificate of eligibility—Continued
Validity determination

Untimely submission of certificate of eligibility—subsequently recalled—under labor surplus area set-aside by small business concern, who in contrast to Govt-owned facilities operated under contract, owns its facilities and utilizes Govt-owned production equipment, properly was considered on basis of Comp. Gen. decisions and agency regulations. Determination to exclude certificate was not erroneous because contracting officer failed to exercise independent judgment, or discretion since solicitation and regulations requiring certificate to be submitted with offer were mandatory, and reliance of Comptroller's decisions was appropriate in view of 31 U.S.C. 1, *et seq.*, authorizing disallowance of credit in accounts of fiscal officers for payments under illegal contract---- 344

Where contracting officer knew first preference eligibility certificate submitted under labor surplus area set-aside was invalid, precedent established in 50 Comp. Gen. 559 is not for application, for although in that decision award was made on basis of invalid labor surplus area certificate, certificate was accepted in good faith by contracting officer and, therefore, contract awarded was not void *ab initio* but only voidable at option of Govt. and cancellation of award was not necessary------- 719

Price differentials
Computation

In evaluating small business and labor surplus set-aside portions of invitation for bids prescribing that "set-aside portion shall be awarded at highest unit price awarded on non-set-aside portion, adjusted to reflect transportation and other cost factors which are considered in evaluating bids on non-set-aside portion," and that "unit price shall include evaluation factors added for rent-free use of Govt. property," adjustment of award price to reflect facilities rental represents cost to Govt. and not hypothetical cost to each bidder to eliminate any competitive advantage, and award price for labor surplus area set-aside should be computed to accurately reflect actual transportation costs to Govt. provided no prohibitory price differential results---------- 335

Set-aside
One concern only qualified

In view of par. 1-804.1(a)(1)(ii), ASPR, which provides that partial labor surplus area set-aside shall not be made if there is reasonable expectation that bids or proposals will be received from no more than two concerns with technical competency and productive capacity and only one of concerns will qualify as labor surplus area concern, labor surplus area set-aside was properly not provided for procurement of fuze grenades under authority of 10 U.S.C. 2304(a)(16) since only one of two qualified concerns was labor surplus area concern. Furthermore, whether criteria to set aside portion of a procurement for labor surplus area concerns has been satisfied in given case is largely within discretion of contracting authority---------- 749

CONTRACTS—Continued Page

Awards—Continued

Multiple

Single award in lieu

Notwithstanding request for proposals for fuze grenades provided for two contract awards in order to retain two sources of supply in event of unforeseeable contingencies, single award, pursuant to amendment to RFP, in view of changed circumstances to offeror who submitted both proposal solicited and unsolicited proposal on basis of savings to Govt. is not prohibited, even though 10 U.S.C. 2304(a)(16), under which procurement was negotiated, indicates price need not control when national defense is involved, since neither determination and findings nor RFP state maintenance of production capacity requires current production by more than one contractor where Govt. is assured of support for immediate and long range logistics associated with required item. Furthermore, in determining low offer, use of Govt. facilities was evaluated---- 749

Notice

To unsuccessful bidders

Although in not giving unsuccessful bidder notice of determination to make award of contract while bid protest was pending with U.S. GAO contracting agency failed to comply with sec. 20.4 of GAO bid protest procedures (4 CFR 20.4), GAO has no authority either to impose time limits on contracting agencies for reports on protests or to regulate withholding of award. However, it is hoped agencies will incorporate protest procedures and standards into their regulations. Furthermore, agency's determination that early award was necessary to take advantage of low bid before it expired in order to avoid accepting next low bid at substantial increase, and mailing of "no award" notice after award was not contrary to ASPR, which in par. 2-407.8(b)(3) does not require notice to be given prior to award---- 787

Procedural defects

Where there is no evidence in procurement record of bad faith in award of contract that does not contain termination for convenience of Govt. clause, it would not be in interest of Govt. to terminate contract. However, attention of contracting agency is called to deficiencies in procurement with request that action be initiated to preclude recurrence of such deficiencies in future procurements---- 153

Propriety

Upheld

Unsuccessful offeror under request for proposals (RFP) to provide management and technical services to develop marine computer aided operational research center was not prejudiced by failure of chairman of evaluation committee to visit its facility, or by facility selected for visit in absence of any legal or regulatory requirements to this effect; nor by selection of the site for contract performance since selection was made after award; nor by fact award of the research and development contract was made on fixed price basis as the two categories are not mutually exclusive—one term referring to type of work, the other to type of contract used; and, furthermore, subsequent authorization of funds for procurement of hardware and software under Phase II of contract was not in conflict with terms of RFP---- 397

CONTRACTS—Continued Page
Awards—Continued
Small business concerns
Certifications
Denial
Reconsideration

Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solicited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA ---------- 448

Eligibility
Unacceptable

Determination small business concern was nonresponsible on basis of negative preaward survey evidencing past unsatisfactory performance under both Govt. and private contracts attributable to tenacity and perseverance which, pursuant to sec. 1-1.708-2(a)(5) of Federal Procurement Regs. that concerns deficiencies other than capacity and credit, was forwarded to Small Business Administration (SBA) for issuance of Certificate of Competency (COC) if warranted is upheld where SBA agreed bidder lacked tenacity and perseverance and, in addition, concluded concern was deficient in capacity and issuance of COC was not justified. While factor of tenacity and perseverance is not covered by COC procedure, denial of COC operated as concurrence by SBA in contracting officer's determination award to low bidder was precluded-- 288

Self-certification
"Good Faith" certification

Low bidder under total small business set-aside for tool sets who on date of bid opening did not qualify as small business concern under the IFB or SBA regulations may not be considered for contract award on basis of its erroneous self-certification allegedly made in good faith, for although bidder met appropriate size standard at time bid was prepared, SBA requirement that number of employees be based on the average for four quarters preceding bid preparation had been overlooked. Since standard of "good faith" is not necessarily limited to an incident of intentional misrepresentation, bidder apprised of applicable small business size having failed to exercise prudence and care to ascertain its size under prescribed guidelines has not certified itself to be small business concern in good faith ---------- 595

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Awards—Continued
Small business concerns—Continued
Set-asides
Price differential computation

In evaluating small business and labor surplus set-aside portions of invitation for bids prescribing that "set-aside portion shall be awarded at highest unit price awarded on non-set-aside portion, adjusted to reflect transportation and other cost factors which are considered in evaluating bids on non-set-aside portion," and that "unit price shall include evaluation factors added for rent-free use of Govt. property," adjustment of award price to reflect facilities rental represents cost to Govt. and not hypothetical cost to each bidder to eliminate any competitive advantage, and award price for labor surplus area set-aside should be computed to accurately reflect actual transportation costs to Govt. provided no prohibitory price differential results---------- 335

Withdrawal
Bid prices excessive

Withdrawal of small business set-aside pursuant to par. 1-706.3, ASPR, cancellation of RFQ, and resolicitation of procurement to overhaul and modify aircraft propeller components from both large and small firms were not arbitrary actions where on basis of quote—not "courtesy offer"—from small business concern prior to correction of standard industrial classification which changed its status to large business, contracting officer determined limiting quotations to small business would be detrimental to public interest, reasonable determination notwithstanding withdrawal notice did not literally comply with ASPR 1-706.3(a), or that before withdrawal, discussions were not held with all small business firms within competitive range (ASPR 3-805.1(a)), or that late price reduction by small firm was not considered---------- 739

Size
Conclusiveness of determination

Determination by Size Appeals Board of the Small Business Administration that low offeror under RFQ was qualified as small business concern on both date for receipt of quotations and date of award is conclusive pursuant to 15 U.S.C. 637(b)(6), which states that "Offices of the Government having procurement or lending powers * * * shall accept as conclusive the Administration's determination as to which enterprises are to be designated 'small-business concerns' "---------- 531

Validity

Contract awarded low bidder under invitation for bids soliciting services to clean exhaust ducts for 1 year that was inconsistent as specifications required two cleanings and bid schedule four is not binding contract, notwithstanding "Order of Precedence" clause prescribed schedule would prevail in case of inconsistency since before notice of award was mailed inconsistency was discovered and bidder alleged its bid was based on two services per year. Had discrepancy been discovered after valid award had been consummated or had contracting officer had actual or constructive notice of error, four cleanings would be required, but as bidder was not afforded opportunity to prove its alleged error, no valid contract came into being with mailing of notice and purported contract should be rescinded---------- 360

CONTRACTS—Continued Page
Awards—Continued
Withdrawal of bid mistake allegation

Award of construction contract to low bidder who withdrew allegation of error, confirmed original bid price, and requested award on basis of its low submitted bid is proper where submitted worksheets do not support error alleged or establish intended bid price was something other than amount bid and, therefore, error alleged is considered judgmental error that may not be corrected or serve as basis for withdrawal of bid. Furthermore, low bidder in confirming its bid price, waived underaddition error found by contracting officer, and no other error having been alleged by bidder, U.S. GAO will not conduct complete review of workpapers, for any discrepancies that may be found would not establish errors if bidder contended otherwise---------- 18

Bid shopping. (*See* Contracts, subcontracts, bid shopping)
Bids, generally. (*See* Bids)
Bonds. (*See* Bonds)
Breach of contract
By Government
Authority to determine

Forest Service has authority to enter into agreement with contractor to settle termination costs incident to Agriculture Board of Contract Appeals ruling that Govt. improperly defaulted contract, but since Board's holding that Forest Service breached its obligation to furnish agreed supplies is not supported by evidence, damages awarded by Board for supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and Dept. of Agriculture should make independent analysis of merits of claim and full examination of available defenses, and then determine if breach occurred under decisions of courts and/or U.S. GAO, and should provide that in future proceedings, Board shall not express opinion or make finding of contract breach---------- 491

Conflicts of interest prohibitions
Applicability to Federal Procurement Regulations

In award of contract for management and technical services to develop marine computer aided operational research center, Dept. of Commerce properly did not consider rules of organizational conflicts of interest as provisions of ASPR App. G "Rules for the Avoidance of Organizational Conflicts of Interest" do not apply to the procurement, and there are no comparable organizational conflicts of interest provisions in the Federal Procurement Regs. Moreover, even if applicable, App. G would only prohibit the successful contractor—a producer of marine equipment who will gain an unavoidable competitive advantage from the research and development effort—from participating in competition for a production contract and would not preclude award of the research and development contract---------- 397

CONTRACTS—Continued Page

Conflicts of interest prohibitions—Continued

Exclusionary clause

Although interpretation of conflicts of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1-3.805-1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals. 397

Construction

Against writer

Although terms contained in request for proposals and contracts negotiated for equal quantities under set-aside and non-set-aside portions of procurement for dispensers indicated intent to exercise option equally between awardees, and contract was subject to conflicting, albeit reasonable interpretation to be resolved against drafter, since exercise of option by Govt. in manner variant from terms specified did not meet requirements of par. 1-1502, ASPR, that election—which is sole right of optionee—must be positive, unambiguous, and in exact compliance with terms of option, exercise of option was counteroffer that having been accepted is binding. However, in similar future situations, quantitative equality of both contractors should be preserved 119

Cost-plus

Evaluation factors

"Best buy analysis"

Failure to disclose 3 to 1 ratio of technical merit to cost evaluation formula of "best buy analysis" included in Evaluation/Selection Plan approved as basis for award of cost-plus-fixed-fee contract under request for quotations for procurement of automatic test equipment for internal combustion engine powered materiel—where no questions as to best buy analysis were raised at prequotation conference—was not prejudicial in award competition, even though solicitation did not accurately reflect importance to be accorded to cost, which was ranked as least important of 11 evaluation factors, since two offerors selected for negotiations were essentially equal as to technical ability and, therefore, only consideration remaining for evaluation was price, advantage not to be ignored pursuant to par. 4-106.4 of Armed Services Procurement Reg 33

Research and development contracts. (*See* Contracts, research and development)

Damages

Consequential

Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary

CONTRACTS—Continued Page
Damages—Continued
Consequential—Continued
procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract---- 609

Although refusal of GSA to accept proposals of offeror to furnish automatic data processing equipment for Defense user agencies that included disclaimer against implied warranties and liability for consequential damages is matter of procurement policy within discretion of agency, interests of Govt. and its contractors would be better served if Govt.'s position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that policy be further examined, with consideration given to varying extent of contractor liability for consequential damages, and to effect of such variances on cost to Govt. and disposition of firms toward doing business with Govt---- 613

Government liability
Breach of contract

Forest Service has authority to enter into agreement with contractor to settle termination costs incident to Agriculture Board of Contract Appeals ruling that Govt. improperly defaulted contract, but since Board's holding that Forest Service breached its obligation to furnish agreed supplies is not supported by evidence, damages awarded by Board for supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and Dept. of Agriculture should make independent analysis of merits of claim and full examination of available defenses, and then determine if breach occurred under decisions of courts and/or U.S. GAO, and should provide that in future proceedings, Board shall not express opinion or make finding of contract breach---- 491

Method of computation

"Total cost" method used by Court of Claims in computing damages when Govt.'s responsibility for damages was clearly established, no other method of computing damages was available, and contractor's bid was considered reasonable is not for application where prior to award bid of improperly defaulted contractor was so low contracting agency believed contractor would be unable to perform---- 491

CONTRACTS—Continued Page

Data, rights, etc.

Disclosure

Trade secrets

"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information ---------- 476

Subcontractors

Government's status

Proprietary data, drawings of laser system, furnished by subcontractor as part of Phase I of "Pave Nail Program" for modification of OV-10 aircraft, which became basis for procurement of Phase II, was not wrongfully used by Govt. where drawings were not identified as trade secret or bore no proprietary legend, had previously been furnished without limitation, and were difficult to categorize as proprietary, as Govt. is entitled to disclose and use technical data purchased for value from prime contractor without restriction or knowledge of third party's proprietary rights. Furthermore, Comptroller General will not adjudicate disputes regarding violations of proprietary rights which arise under arrangements to which Govt. is not direct party, and until such rights are established in courts, there is no justification to disturb any program or grant any relief to protesting party ---------- 803

Deliveries

Defective supplies, etc.

Rejection

Acceptance of self-certification by manufacturers on Qualified Products List that their products comply with noise level requirements standard set for power tools solicited pending completion of test facilities by Naval Ship Engineering Center is administrative matter, since facilities will be ready in ample time to test deliveries under contract awarded and failure of a product to meet noise level requirements would be basis for rejection of delivery ---------- 415

Forms. (*See* Forms)

Government property

Disposal

Policy to minimize ownership

Award of non-set-aside portion of labor surplus area procurement for projectiles to contractor operating Govt-owned facility (GOCO) rather than to contractor owning his facility and utilizing Govt-owned produc-

CONTRACTS—Continued Page
Government property—Continued
Disposal—Continued
Policy to minimize ownership—Continued
tion equipment is not violative of policy to minimize Govt. ownership of industrial facilities stated in Dept. of Defense Directive 4275.5, Nov. 14, 1966, under heading "Industrial Facility Expansion Policy," for although award will keep Govt. facility in existence, no acquisition, expansion, construction, or use of property to increase production is entailed. Furthermore, solicitation provided for participation of GOCO contractors, and approval of accounting procedures, removes possibility of portion of GOCO contractor's cost being allocated to its cost-reimbursable contract with Govt---- 344

Joint ventures. (*See* Joint Ventures)
Labor stipulations
Davis-Bacon Act
Classification of workmen
Local area practice
In dispute concerning wages paid for placing and puddling concrete in which fiber duct pipe was encased, where wage rate determination incorporated in contract only listed "concrete puddler," and invitation had not indicated any other rate was to be paid for fiber duct encased concrete, request by contracting agency for information that would indicate substantial area practice of using concrete puddlers for encasing fiber duct in concrete at rates specified in wage determination was in accord with decisions of Comptroller General and, although Secretary of Labor's function under Davis-Bacon Act, 40 U.S.C. 276a, generally is exhausted when wage determination is furnished, contract provided for referral to Secretary of classification disagreements and, therefore, new evidence of local area practices may not be considered by GAO. 50 Comp. Gen. 103, holding contractor liable for Davis-Bacon Act violations, is affirmed---- 42

Nondiscrimination
"Affirmative action programs"
Minority manpower goals
Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since certification will bind successful bidder to comply with affirmative action plan conditions imposed in invitation, and affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford low bidder opportunity to correct bid deficiency-- 329

CONTRACTS—Continued Page

Labor stipulations—Continued

Nondiscrimination—Continued

"Affirmative action program"—Continued

Noncompliance

Rejection of low bid on non-set-aside portion of requirements type contract for fiberboard because of noncompliance with E.O. 11246 due to bidder's failure to develop equal employment opportunity affirmative action plans (AAP) at facilities other than the one bidding, was proper implementation of agency regulations requiring each establishment of a bidder to have an AAP, and in addition providing for hearing upon more than one nonresponsibility determination; for 30-day "show cause" notice regarding enforcement proceedings, with aid to bidder in resolving deficiencies; for contract cancellation or termination; and for debarment, and there was no denial of due process as the determination of nonresponsibility was limited or temporary suspension and not *de facto* debarment. However, in future in issuing "show cause" order, bidder should be advised he can be found nonresponsible until resolution of matter—resolution that should be determined without delay---------- 551

Service Contract Act of 1965

Minimum wage, etc., determinations

Failure to issue

Award of cost-plus-award-fee contract for operational support and maintenance of Pacific Missile Range Instrumentation Facility to other than incumbent contractor on basis of lowest potential cost exposure to Govt. was not illegal under Service Contract Act of 1965, 41 U.S.C. 351, notwithstanding Dept. of Labor within its discretionary authority refused to issue wage determination, and as refusal is not attributable to any misfeasance or nonfeasance on part of contracting agency, failure to include wage determination in request for proposals will not affect validity of contract. Furthermore, lack of wage determination was not prejudicial to incumbent contractor, possibility of labor strife is conjectural, and labor cost overruns will be borne by new contractor to whom "successor employer" doctrine is inapplicable as former contractor had no bargaining agreement---------- 72

Wage and price stabilization effect

The general rule that failure of bidder to acknowledge receipt of amendment which could affect price, quality, or quantity of procurement being solicited, renders bid nonresponsive because bidder would have option to decide after bid opening to become eligible for award by furnishing extraneous evidence that addendum had been considered or to avoid award by remaining silent, is for application to low bid for construction of prefabricated metal building as unacknowledged amendment incorporated wage determination that affected contract price, notwithstanding that E.O. 11615, dated Aug. 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since Executive order does not obviate implementation of rates in wage determination and, therefore, failure to acknowledge amendment may not be waived---------- 500

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Labor surplus area awards. (*See* **Contracts, awards, labor surplus areas**)

Leases. (*See* **Leases**)

Make-or-buy basis

Government participation

Under make-or-buy proposal by prime contractor pursuant to request for proposals to furnish launch vehicles, participation of NASA in negotiation of second step engine with subcontractors does not make prime contractor agent of NASA so as to subject subcontracting to Govt.'s procurement statutes and regulations, for in make-or-buy program as defined in NASA PR 3.901–1, Govt. buys management, including placing and administering subcontracts, from prime contractor along with goods and services to assure performance at lowest overall cost, with right of review reserved in Govt. Therefore, essential point is not selection of subcontractor but make-or-buy decision, and record shows NASA thoroughly analyzed various technical aspects involved in prime contractor's proposal, including relative merits of two different subcontractor design configurations 743

Mistakes

Allegation before award. (*See* **Bids, mistakes**)

Mutual

Future events

Crop insurance contracts to cover freezing losses which were made effective by Federal Crop Insurance Corp. pursuant to 7 CFR 409.25 as of November 1, under the mistaken belief freezing weather would not occur earlier, may be modified to permit payment for crop damage resulting from freeze on October 30 and 31, on the basis of mutual mistake—a rule applicable to future as well as past events—since contracts did not reflect intention of parties to accomplish objective of providing crop insurance coverage for period of possible freeze. Furthermore, administrative delay in accepting timely filed applications for insurance until after several freezes had injured crops should not deprive applicants of insurance coverage, and Corporation failing to act within reasonable time has authority under 7 U.S.C. 1506(i) to take corrective action 617

"Model"

Propriety

Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract 609

CONTRACTS—Continued Page

Negotiation

Awards

Initial proposal basis

Fact that initial proposals may be rated as acceptable does not invalidate necessity for discussions of weaknesses, excesses, or deficiencies in proposals so that contracting officer may obtain most advantageous contract for Govt., therefore, where record of award made on basis of most favorable initial proposal pursuant to sec. 1-3.805-1(a)(5) of Federal Procurement Regs. evidences discussions were conducted with all offerors within competitive range, price and other factors considered, and that all offerors were treated similarly, in order to eliminate uncertainties, discussions were "meaningful," regardless of whether term employed during procurement procedures was "discussion" or "negotiation" since both terms are considered synonymous 102

Award of contract on basis of initial proposal because specifications in request for proposals are considered to adequately describe Govt.'s requirements was not justified since, pursuant to par. 3-805.1 of the ASPR, adequate specifications are not an exception from requirement to conduct discussions with all offerors within competitive range and, therefore, prospective contractors submitting proposals that are not materially deficient and can be made acceptable through minor revisions or modifications should be afforded opportunity to satisfy Govt.'s requirements rather than closing door to possible fruitful negotiations, and discussions must be meaningful and furnish information to all offerors in competitive range as to areas in which their proposals are deficient to enable them to satisfy requirements 431

Most advantageous to Government requirement

Under point rating criteria—technical efficacy 40 percent; qualifications 20 percent; real cost to Govt. 40 percent—established to evaluate oil analysis services for Navy, where criteria contrary to par. 3-501(b), ASPR, was not disclosed, award to incumbent contractor, whose price was not lowest, on basis of narrow margin higher score on subfactors of "Extended Voyages" and "MSC Experience," was not most advantageous to Govt.—requirement of ASPR 3-101. Since, under ASPR 3-805.1, price may not be disregarded, two minor subfactors should have been evaluated on sliding scale to allow for respective capabilities of offerors in competitive range, and acceptance of higher priced and higher scored offer rather than lower priced, lower scored offer that would meet Govt.'s needs should have been supported by specific determination of technical superiority 153

Propriety

Evaluation of proposals

In negotiation pursuant to 41 U.S.C. 252(c)(10) of 20-year lease with four 5-year renewal options for space in building to be constructed, application of principles inherent in competitive system, even if negotiations were not subject to the Federal Procurement Regs., would have secured a more favorable lease, for then possibility of transferring option cost benefits to 20-year price would have been discussed; zoning requirements would not have been stated in terms of nonresponsiveness, terms inappropriate in negotiated contract; past performance and not financial

CONTRACTS—Continued Page
Negotiation—Continued
Awards—Continued
Propriety—Continued
Evaluation of proposals—Continued
capacity alone would have determined capacity to provide lease space by date specified; price evaluation basis would have been stated with information that option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of lease would not be in the best interests of Govt., the progress of building construction should be closely monitored ---------- 565

Upheld

Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program ---------- 621

Basic ordering agreements
Propriety

Because request for quotations to procure aircraft engine idler pulleys issued pursuant to 10 U.S.C. 2304(a)(10) allowing negotiations when formal competitive procedures are impracticable on basis of determination and findings that fully adequate data and quality assurance procedures were not available contained requirement that proposal should incorporate current basic ordering agreement does not make contract awarded illegal because terms and conditions of agreements may vary with each firm since par. 3-410.2, ASPR, provides general terms of each agreement, and specific terms of contract are defined by contract requirements. However, of importance is fact that offeror whose final price was 60% lower than successful contractor was not given equal opportunity to compete as required by 10 U.S.C. 2304(g), a situation to be avoided in future procurements ---------- 755

Bonds
Performance

Failure of low offeror to submit performance bond equal to 100 percent of contract price by time of contract award under request for proposals to construct mail facility that made furnishing of bond condition of contract and not condition precedent to award does not affect validity of contract since acceptance of late performance bond reflects long-standing practice that permits furnishing of Miller Act bonds up to time of contract performance, and general bond condition was met

CONTRACTS—Continued Page

Negotiation—Continued

Bonds—Continued

Performance—Continued

albeit in lesser percentage amount with valuable consideration of price reduction moving to Govt. However, procurement should have been resolicited to reflect lesser penal amount, and future procurements should consider all statutory and regulatory bonding requirements, as well as proposed guarantee provisions in pars. 18–801 and 10–102.4, ASPR 733

Changes, etc.

Reopening negotiations

Administrative determination

Although late acknowledgment of amendment which provided in event of discrepancy between solicitation requirements and sample display kit, solicitation would govern, and added a clause to request for proposals for survival kits regarding royalties, by low offeror who prior to issuance of amendment had confirmed its offer did not include royalties was erroneously waived on basis amendment did not go to substance of offer and was not prejudicial to other offerors, issuance of amendment was proper exercise of administrative authority in absence of statutory or regulatory provision establishing criteria for determination of what constitutes substantial change to justify reopening negotiations after they have been terminated by call for best and final offers 411

Specifications

Brand name or equal provision

When brand name or equal clause contained in par. 1–1206.3(b) of ASPR and written for advertised procurements is adopted for use in negotiated procurements pursuant to ASPR 1–1206.5 and 3–501(b)C (xxv), clause should be suitably modified. Mere substitution of the words "offeror" for "bidder" and "offer" for "bid" leaves restrictions in a request for proposals (RFP) which are contrary to intent and purposes of negotiated procurement. Furthermore, the inclusion in RFP of provision similar to par. (c)(3) of clause, which precludes modification after bid opening to make product conform to brand name is inconsistent with principle of allowing modifications in proposals pursuant to ASPR 3–805.1(b) 431

Competition of changes

Although interpretation of conflicts of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1–3.805–1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals 397

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Negotiation—Continued

Competition

Competitive range formula

Manning information

Where manning charts submitted with low offer to furnish mess attendant services indicate understanding of, and ability to fulfill contract requirements, including wage rates, number of workers, and total estimated labor hours, offeror is within competitive range for negotiation, and fact that contract to be awarded may prove unprofitable, although there is no evidence it might, does not justify rejection of otherwise acceptable offer. Evaluation criteria now employed in mess attendant solicitations are intended to advise offerors of exact role manning charts play in evaluation process, and to minimize offers that quote prices that bear no reasonable relation to manning hours offered, and to preclude acceptance of lowest rate per man-hour, rather than lowest overall proposal 204

Manning requirements

Fact that solicitation provided that manning charts whose hours do not approximate Govt.'s estimates may result in rejection of offer without discussion does not alter conclusion in 51 Comp. Gen. 204 that manning charts do not affect responsiveness of bids or offers as such language is but initial probative evidence of offeror's responsibility, and since manning charts serve as aids in determining responsibility charts cannot be made matter of responsiveness by any language in request for proposals. Furthermore, considering manhours and price separately does not imply there need be no reasonable relation between hours and dollars, and requirement that manhours be consistent with prices connotes test of reasonableness rather than exact requirement for minimum price per manhour, and since manning charts are not exact formula, acceptance of determination offeror is within competitive range is justified 309

Technical acceptability

Under RFP, issued pursuant to 10 U.S.C. 2304(a)(10), which authorizes negotiations when it is impracticable to draft specifications, that contained descriptive clause—insufficient for formal advertising—relating to design and performance characteristics of air compressor being solicited, determination descriptive literature furnished by low offeror did not conform, where information lacking was contained in RFP, was determination proposal was not technically within competitive range. However, while failure to comply with descriptive literature clause in advertised procurement requires bid rejection, this rule does not automatically apply in negotiated procurement and discussions should have been held with offeror to determine whether its proposal was technically acceptable. 637

Discussion with all offerors requirement

Actions not requiring

Fact that during negotiations of new contract for reproduction of research papers for sale to Govt. and general public upon cancellation of existing contract because of deficiencies in request for proposals (RFP), discussions relative to start-up time were held with offerors

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Actions not requiring—Continued
within competitive range but not with incumbent contractor who had submitted offer under amended RFP was not prejudicial as matter of start-up time was not germane to incumbent contractor whereas discussions were required with other offerors because complications involved in procurement necessitated revision in contract award date, thereby lessening time new contractor would have to prepare for contract performance ---------- 37

Equal opportunity to compete

Although late acknowledgment of amendment which provided in event of discrepancy between solicitation requirements and sample display kit, solicitation would govern, and added a clause to request for proposals for survival kits regarding royalties, by low offeror who prior to issuance of amendment had confirmed its offer did not include royalties was erroneously waived on basis amendment did not go to substance of offer and was not prejudicial to other offerors, issuance of amendment was proper exercise of administrative authority in absence of statutory or regulatory provision establishing criteria for determination of what constitutes substantial change to justify reopening negotiations after they have been terminated by call for best and final offers ---------- 411

Cancellation of contract award because of contracting officer's failure to hold discussions with all offerors within competitive range after holding discussions with one offeror should be converted to termination for convenience since contracting officer did not lack authority to make award and there is no indication in record that either offeror or procurement activity contracted other than in good faith or with any intent to deprive other offerors of equal opportunity to compete and, consequently, contract awarded was not void *ab initio*. Cancellation of contract is desirable, but for urgency of procurement, costs that would be chargeable against Govt., or similar circumstances relating to best interests of Govt. when termination for convenience would either be too expensive or not in Govt.'s best interest ---------- 481

Relaxation of manning requirements during negotiations with low offeror under RFQ to perform maintenance and operation services for technical laboratory for 1-year period with two 1-year options, after assuring offerors at prequotation conference that minimum manning requirements of RFQ would be enforced and penalty levied for noncompliance, even if performance was satisfactory, without providing all offerors in competitive range an opportunity to reconsider their offers was contrary to par. 3-805.1(e) of the ASPR, and options should not be exercised, notwithstanding award was made with understanding that satisfactory performance with less than specified minimum personnel would be acceptable and no price reduction required ---------- 531

Because request for quotations to procure aircraft engine idler pulleys issued pursuant to 10 U.S.C. 2304(a)(10) allowing negotiations when formal competitive procedures are impracticable on basis of determination and findings that fully adequate data and quality assurance procedures were not available contained requirement that proposal should incorporate current basic ordering agreement does not make contract

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Equal opportunity to compete—Continued
awarded illegal because terms and conditions of agreements may vary with each firm since par. 3-410.2, ASPR, provides general terms of each agreement, and specific terms of contract are defined by contract requirements. However, of importance is fact that offeror whose final price was 60% lower than successful contractor was not given equal opportunity to compete as required by 10 U.S.C. 2304(g), a situation to be avoided in future procurements 755

Generally

Although all pertinent portions of work study report used in preparation of request for proposals (RFP) for data base management system should have been physically included in RFP for sake of clarity since RFP incorporated report by reference as well as apprising offerors of procurement requirements, time to question adequacy of evaluation criteria and their importance was prior to proposal submission. Furthermore, on basis of cost effectiveness formula in report, use of operation and maintenance costs computed on 5-year cycle to determine most advantageous proposal in competitive range, procedure that is *per se* acceptable if such costs are reasonable, was proper, even though operation and maintenance costs were incapable of precise assessment and were only projected costs 102

"Meaningful" discussions

Fact that initial proposals may be rated as acceptable does not invalidate necessity for discussions of weaknesses, excesses, or deficiencies in proposals so that contracting officer may obtain most advantageous contract for Govt., therefore, where record of award made on basis of most favorable initial proposal pursuant to sec. 1-3.805-1(a)(5) of Federal Procurement Regs. evidences discussions were conducted with all offerors within competitive range, price and other factors considered, and that all offerors were treated similarly, in order to eliminate uncertainties, discussions were "meaningful," regardless of whether term employed during procurement procedures was "discussion" or "negotiation" since both terms are considered synonymous 102

Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program 621

CONTRACTS—Continued Page

Negotiation—Continued

Competition—Continued

Discussion with all offerors requirement—Continued

Proposal revisions

Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority-owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed---------- 272

Determination by contracting officer upon reviewing procurement for set of water distillation units and associated manuals, drawings, and provisioning list in connection with protest, that award to offeror who reduced price of list to become low offeror was improper because other offerors within competitive range were not given opportunity to review their offers and perhaps modify their prices was in accord with 10 U.S.C. 2304(g). Opportunity to revise or modify proposal, regardless of whether opportunity results from action initiated by Govt. or offeror, constitutes discussion and, therefore, award based on price reduction without discussion with other offerors was improper, but impropriety does not require severe remedy of contract cancellation, and cancellation may be modified to termination for convenience of Govt---------- 479

Specification adequacy effect

Award of contract on basis of initial proposal because specifications in request for proposals are considered to adequately describe Govt.'s requirements was not justified since, pursuant to par. 3-805.1 of the ASPR, adequate specifications are not an exception from requirement to conduct discussions with all offerors within competitive range and, therefore, prospective contractors submitting proposals that are not materially deficient and can be made acceptable through minor revisions or modifications should be afforded opportunity to satisfy Govt.'s requirements rather than closing door to possible fruitful negotiations, and discussions must be meaningful and furnish information to all offerors in competitive range as to areas in which their proposals are deficient to enable them to satisfy requirements---------- 431

Written or oral negotiations

Written negotiations conducted with offeror whose proposal in response to request for quotations to procure Fatigue Analysis Program for B–57 aircraft was deficient with respect to component test plan specification and, therefore, its proposal was nonresponsive, satified the requirements of par. 3–805.1 of ASPR implementing 10 U.S.C. 2304(g) to provide that "written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range,"

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Written or oral negotiations—Continued
and discharged contracting officer's duty to negotiate, and further negotiations were not required because offeror advised in writing of deficiencies in its proposal failed in his final offer to comply with specifications for component test plan---------- 433

Maximum possible extent
In negotiation of pilot procurement for disposal of unserviceable explosive fuses by incineration under request for quotations that placed on contractor responsibility for providing and removing incinerator device, preparation and restoration of site, and incineration of fuses and removal of scrap residue, conclusion of negotiations upon receipt of best and final offers was consistent with par. 3–805.1 of Armed Services Procurement Reg. in absence of requirement to continue negotiations to define operating procedures or equipment design. However, as detonation demonstration for prospective offeror, although not prejudicial, created appearance of favoritism, and pilot project was not specifically detailed, future procurements should insure adequate competition by including as appropriate more definite specifications, demonstrations, and prebid conferences---------- 233

Before rejection of unsolicited offers for repair kits for generator on qualified products list (QPL) under solicitation containing qualified components clause, and acceptance on sole source basis of QPL supplier's offer to furnish kits, if time permits, and in view of par. 3–102(c) of Armed Services Procurement Reg. prescribing competition to maximum extent, determination should be made if kit was altered by QPL offeror, or if kits of unsolicited offerors procured from same source used by QPL offeror automatically qualified kits under applicable military specifications. If it cannot be determined that parts in kits have been altered or enhanced, or if examination is not practical, award may be made to QPL offeror and unsolicited offerors advised of kit parts requiring qualification testing for future procurements of kits---------- 323

Conflicts of interest prohibitions
Exclusionary clause based on sales
Although interpretation of conflicts of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1–3.805–1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals---------- 397

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Negotiation—Continued
Determination and findings
Finality

Although written finding, pursuant to 10 U.S.C. 2310(b), by contracting officer of his determination to negotiate procurement pursuant to "public exigency" exception to use of formal advertising set forth at 10 U.S.C. 2304(a)(2), as implemented by par. 3-202.2(vi) of ASPR, is final under terms of statute, U.S. GAO is not precluded from questioning whether determination based on findings is proper. To extent prior decisions citing 10 U.S.C. 2310(b) are contrary to this holding, they should not be followed---------- 658

Evaluation factors
All offerors informed requirement

Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority-owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed---------- 272

"Best buy analysis"

Failure to disclose 3 to 1 ratio of technical merit to cost evaluation formula of "best buy analysis" included in Evaluation/Selection Plan approved as basis for award of cost-plus-fixed-fee contract under request for quotations for procurement of automatic test equipment for internal combustion engine powered materiel—where no questions as to best buy analysis were raised at prequotation conference—was not prejudicial in award competition, even though solicitation did not accurately reflect importance to be accorded to cost, which was ranked as least important of 11 evaluation factors, since two offerors selected for negotiations were essentially equal as to technical ability and, therefore, only consideration remaining for evaluation was price, advantage not to be ignored pursuant to par. 4-106.4 of Armed Services Procurement Reg---------- 33

Although negotiation of turnkey construction contracts for military family housing under 10 U.S.C. 2304(a)(10) and par. 3-210.2(xiii) of Armed Services Procurement Reg. which authorize negotiation when it is impracticable to obtain competition or impossible to draft specifications was necessary because impossibility of drafting adequate specifications is inherent in "turnkey" concept that permits housing developer to use his own architect, future procurements by same method should, in addition to identifying technical criteria for each turnkey project, indicate relative importance of each evaluation factor, and when using "best value formula" evaluation, Govt. should determine that its actual requirements were met, and if those requirements become definitized during course of negotations, all offerors in competitive range must be given opportunity to submit revised proposals---------- 129

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Competitive advantage precluded

In negotation pursuant to 41 U.S.C. 252(c)(10) of 20-year lease with four 5-year renewal options for space in building to be constructed, application of principles inherent in competitive system, even if negotiations were not subject to the Federal Procurement Regs., would have secured a more favorable lease, for then possibility of transferring option cost benefits to 20-year price would have been discussed; zoning requirements would not have been stated in terms of nonresponsiveness, terms inappropriate in negotiated contract; past performance and not financial capacity alone would have determined capacity to provide lease space by date specified; price evaluation basis would have been stated with information that option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of lease would not be in the best interests of Govt., the progress of building construction should be closely monitored---------- 565

Criteria

Consideration of evaluation factors not contained in request for proposals (RFP) for management and technical services to develop marine computer aided operational research center but were developed in discussions with offerors was proper, even though factors are not easily categorized under RFP criteria, in view of fact additional factors are sufficiently correlated to generalized criteria shown in RFP to satisfy requirement that prospective offerors should be advised of evaluation factors which will be applied to their proposals. Furthermore, the two competing offerors received same evaluation information and each proposal was evaluated according to same criteria---------- 397

Descriptive literature

Under RFP, issued pursuant to 10 U.S.C. 2304(a)(10), which authorizes negotiations when it is impracticable to draft specifications, that contained descriptive clause—insufficient for formal advertising—relating to design and performance characteristics of air compressor being solicited, determination descriptive literature furnished by low offeror did not conform, where information lacking was contained in RFP, was determination proposal was not technically within competitive range. However, while failure to comply with descriptive literature clause in advertised procurement requires bid rejection, this rule does not automatically apply in negotiated procurement and discussions should have been held with offeror to determine whether its proposal was technically acceptable---------- 637

Factors other than price

Import duty

Acceptance of volunteer alternate offer on nozzle fin assemblies that contemplated incorporating component parts fabricated from import foreign steel in domestic end item, for evaluation on basis of issuing duty-free certificate, would be unfair to other bidders, even though purchase qualifies as emergency war material within contemplation of par. 6-603.1 of ASPR, and Defense Dept. under ASPR 6-602 may issue

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Factors other than price—Continued

Import duty—Continued

duty-free certificates if there is appropriation savings. Therefore, RFP should be canceled and reissued to require offerors furnishing domestic end items incorporating foreign origin materials to submit alternate offers that evidence the duty for evaluation on ex-duty basis if duty-free certificate is issued, and negotiations should be reopened to permit all offerors to submit alternate offers on duty-free basis---------- 650

Minority subcontracting

Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority-owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed---------- 272

Make-or-buy proposals

Under make-or-buy proposal by prime contractor pursuant to request for proposals to furnish launch vehicles, participation of NASA in negotiation of second step engine with subcontractors does not make prime contractor agent of NASA so as to subject subcontracting to Govt.'s procurement statutes and regulations, for in make-or-buy program as defined in NASA PR 3.901–1, Govt. buys management, including placing and administering subcontracts, from prime contractor along with goods and services to assure performance at lowest overall cost, with right of review reserved in Govt. Therefore, essential point is not selection of subcontractor but make-or-buy decision, and reco d shows NASA thoroughly analyzed various technical aspects involved in prime contractor's proposal, including relative merits of two different subcontractor design configurations---------- 743

Manning requirements

Where manning charts submitted with low offer to furnish mess attendant services indicate understanding of, and ability to fulfill contract requirements, including wage rates, number of workers, and total estimated labor hours, offeror is within competitive range for negotiation, and fact that contract to be awarded may prove unprofitable, although there is no evidence it might, does not justify rejection of otherwise acceptable offer. Evaluation criteria now employed in mess attendant solicitations are intended to advise offerors of exact role manning charts play in evaluation process, and to minimize offers that quote prices that bear no reasonable relation to manning hours offered, and to preclude acceptance of lowest rate per man-hour, rather than lowest overall proposal---------- 204

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Manning requirements—Continued

Fact that solicitation provided that manning charts whose hours do not approximate Govt.'s estimates may result in rejection of offer without discussion does not alter conclusion in 51 Comp. Gen. 204 that manning charts do not affect responsiveness of bids or offers as such language is but initial probative evidence of offeror's responsibility, and since manning charts serve as aids in determining responsibility charts cannot be made matter of responsiveness by any language in request for proposals. Futhermore, considering manhours and price separately does net imply there need be no reasonable relation between hours and dollars, and requirement that manhours be consistent with prices connotes test of reasonableness rather than exact requirement for minimum price per manhour, and since manning charts are not exact formula, acceptance of determination offeror is within competitive range is justified---------- 309

Relaxation of manning requirements during negotiations with low offeror under RFQ to perform maintenance and operation services for technical laboratory for 1-year period with two 1-year options, after assuring offerors at prequotation conference that minimum manning requirements of RFQ would be enforced and penalty levied for noncompliance, even if performance was satisfactory, without providing all offerors in competitive range an opportunity to reconsider their offers was contrary to par. 3-805.1(e) of the ASPR, and options should not be exercised, notwithstanding award was made with understanding that satisfactory performance with less than specified minimum personnel would be acceptable and no price reduction required---------- 531

Point rating

Price consideration

Under point rating criteria—technical efficacy 40 percent; qualifications 20 percent; real cost to Govt. 40 percent—established to evaluate oil analysis services for Navy, where criteria contrary to par. 3-501(b), ASPR, was not disclosed, award to incumbent contractor, whose price was not lowest, on basis of narrow margin higher score on subfactors of "Extended Voyages" and "MSC Experience," was not most advantageous to Govt.—requirement of ASPR 3-101. Since, under ASPR 3-805.1, price may not be disregarded, two minor subfactors should have been evaluated on sliding scale to allow for respective capabilities of offerors in competitive range, and acceptance of higher priced and higher scored offer rather than lower priced, lower scored offer that would meet Govt.'s needs should have been supported by specific determination of technical superiority---------- 153

Subcontracting with minority firms

Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority-owned enterprises, and assignment of

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Point rating—Continued

Subcontracting with minority firms—Continued

numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed 272

Propriety of evaluation

Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program 621

"Successor employer" doctrine

Award of cost-plus-award-fee contract for operational support and maintenance of Pacific Missile Range Instrumentation Facility to other than incumbent contractor on basis of lowest potential cost exposure to Govt. was not illegal under Service Contract Act of 1965, 41 U.S.C. 351, notwithstanding Dept. of Labor within its discretionary authority refused to issue wage determination, and as refusal is not attributable to any misfeasance or nonfeasance on part of contracting agency, failure to include wage determination in request for proposals will not affect validity of contract. Furthermore, lack of wage determination was not prejudicial to incumbent contractor, possibility of labor strife is conjectural, and labor cost overruns will be borne by new contractor to whom "successor employer" doctrine is inapplicable as former contractor had no bargaining agreement 72

Impracticable to obtain

Advertising in lieu of negotiation

Fact negotiation is authorized under 10 U.S.C. 2304(a)(10) when impracticable to obtain competition, does not exclude advertising procurement when feasible and practicable to do so; therefore, before issuing RFP where available specifications were "primarily performance and design parameters," and available design data was "incomplete, not sufficiently detailed and largely uncoordinated," consideration should

CONTRACTS—Continued Page
Negotiation—Continued
Impracticable to obtain—Continued
Advertising in lieu of negotiation—Continued
have been given to advertising performance-type specifications and to par. 1-1206.2 of ASPR, which authorizes use of brand-name-or-equal purchase descriptions when more precise and detailed specifications are not available, since performance-type specifications and formal advertising are not mutually inconsistent---------- 637

Late proposals and quotations
Acceptance in Government's interest
Although par. 3-506, of ASPR, requires requests for proposals to notify offerors that late proposals or modification to proposals received after date for submission will not be considered, in view of ASPR 3-506(c)(ii), which provides for consideration of late proposal when Secretary of Dept. determines it is of "extreme inportance to the Govt., as for example where it offers some important technical or scientific breakthrough," late proposals are authorized to be opened in order to determine applicability of exception. However, where prompt award was necessary, failure to open late proposal to determine if proposal warranted exception to requirement that late proposals may not be considered does not justify disturbing award---------- 149

Rejection propriety
Rejection pursuant to par. 3-506 of ASPR of hand-carried late proposal received at 1320 hours, or 20 minutes subsequent to closing hour specified in request for proposals to maintain real property in Korea, which had been extended twice, first amendment advancing initial closing hour from 1500 to 1300 hours and second one indicating change in opening date only, was in accordance with provision in each amendment that unchanged terms and conditions remained in full force and effect. Furthermore, checking in both amendments block "the hour and date specified for receipt of offers is extended" rather than "is not extended" block, where only one of blocks could be checked, created no ambiguity, considering time was specifically mentioned in amendment No. 1, while only date was changed in amendment No. 2---------- 149

Limitation on negotiation
Nonresponsiveness of offer
Request for proposals soliciting offers on "brand name or equal" basis for lease and maintenance of computers that would fit space occupied by IBM computers to be replaced is not restrictive because offer did not meet essential "disk arrangement" specified, and therefore, could not satisfy principal purpose of procurement that "no additional physical space will be required." Drafting of proper "brand name or equal" purchase description is matter primarily within jurisdiction of procurement activity and any particular features required must be presumed to be material and essential to needs of Govt. Although nonresponsiveness of offer may be subject for negotiation since offeror does not intend to make its offer "responsive" and contracting officials adhere to initial requirements, further discussions would be futile---------- 247

CONTRACTS—Continued Page

Negotiation—Continued

National emergency authority

"One or more" awards

Maintenance of supply sources

Notwithstanding request for proposals for fuze grenades provided for two contract awards in order to retain two sources of supply in event of unforeseeable contingencies, single award, pursuant to amendment to RFP, in view of changed circumstances to offeror who submitted both proposal solicited and unsolicited proposal on basis of savings to Govt. is not prohibited, even though 10 U.S.C. 2304(a)(16), under which procurement was negotiated, indicates price need not control when national defense is involved, since neither determination and findings nor RFP state maintenance of production capacity requires current production by more than one contractor where Govt. is assured of support for immediate and long range logistics associated with required item. Furthermore, in determining low offer, use of Govt. facilities was evaluated 749

Use propriety

In evaluation of offers to supply metal parts for projectiles submitted under RFP issued pursuant to 10 U.S.C. 2304(a)(16), permitting negotiation of contracts in interests of national defense and industrial mobilization, by producers who operate Govt.-owned facilities or privately owned plants utilizing Govt. equipment, exclusion of layaway, maintenance, and space rental costs for idle plants or equipment was proper since scope of layaway and maintenance works for all offerors had not been established. Furthermore, there is no legal basis to disturb contracts awarded prior to resolution of protest, as provided by paragraph 2-407.8(b)(3), since objectionable provision for evaluating abnormal maintenance costs was removed from RFP, and record evidences negotiations conducted were within authority of 10 U.S.C. 2304(a)(16), and that delivery schedules were designed to be equitable 694

Options

Not to be exercised

Procedural deficiencies in procurement

Relaxation of manning requirements during negotiations with low offeror under RFQ to perform maintenance and operation services for technical laboratory for 1-year period with two 1-year options, after assuring offerors at prequotation conference that minimum manning requirements of RFQ would be enforced and penalty levied for noncompliance, even if performance was satisfactory, without providing all offerors in competitive range an opportunity to reconsider their offerors was contrary to par. 3-805.1(e) of the ASPR, and options should not be exercised, notwithstanding award was made with understanding that satisfactory performance with less than specified minimum personnel would be acceptable and no price reduction required 531

CONTRACTS—Continued Page

Negotiation—Continued

Pilot projects

Method of conducting negotiations

In negotiation of pilot procurement for disposal of unserviceable explosive fuses by incineration under request for quotations that placed on contractor responsibility for providing and removing incinerator device, preparation and restoration of site, and incineration of fuses and removal of scrap residue, conclusion of negotiations upon receipt of best and final offers was consistent with par. 3-805.1 of Armed Services Procurement Reg. in absence of requirement to continue negotiations to define operating procedures or equipment design. However, as detonation demonstration for prospective offeror, although not prejudicial, created appearance of favoritism, and pilot project was not specifically detailed, future procurements should insure adequate competition by including as appropriate more definite specifications, demonstrations, and prebid conferences 233

Prices

"Best buy analysis"

Failure to disclose 3 to 1 ratio of technical merit to cost evaluation formula of "best buy analysis" included in Evaluation/Selection Plan approved as basis for award of cost-plus-fixed-fee contract under request for quotations for procurement of automatic test equipment for internal combustion engine powered materiel—where no questions as to best buy analysis were raised at prequotation conference—was not prejudicial in award competition, even though solicitation did not accurately reflect importance to be accorded to cost, which was ranked as least important of 11 evaluation factors, since two offerors selected for negotiations were essentially equal as to technical ability and, therefore, only consideration remaining for evaluation was price, advantage not to be ignored pursuant to par. 4-106.4 of Armed Services Procurement Reg 33

Propriety

Incumbent contractor

Fact that during negotiations of new contract for reproduction of research papers for sale to Govt. and general public upon cancellation of existing contract because of deficiencies in request for proposals (RFP), discussions relative to start-up time were held with offerors within competitive range but not with incumbent contractor who had submitted offer under amended RFP was not prejudicial as matter of start-up time was not germane to incumbent contractor whereas discussions were required with other offerors because complications involved in procurement necessitated revision in contract award date, thereby lessening time new contractor would have to prepare for contract performance 37

CONTRACTS—Continued Page
Negotiation—Continued
Public exigency
Finality of determination

Although written finding, pursuant to 10 U.S.C. 2310(b), by contracting officer of his determination to negotiate procurement pursuant to "public exigency" exception to use of formal advertising set forth at 10 U.S.C. 2304(a)(2), as implemented by par. 3-202.2(vi) of ASPR, is final under terms of statute, U.S. GAO is not precluded from questioning whether determination based on findings is proper. To extent prior decisions citing 10 U.S.C. 2310(b) are contrary to this holding, they should not be followed---------- 658

Request for proposals
Brand name or equal procedure

When brand name or equal clause contained in par. 1-1206.3(b) of ASPR and written for advertised procurements is adopted for use in negotiated procurements pursuant to ASPR 1-1206.5 and 3-501(b) C (xxv), clause should be suitably modified. Mere substitution of the words "offeror" for "bidder" and "offer" for "bid" leaves restrictions in a request for proposals (RFP) which are contrary to intent and purposes of negotiated procurement. Furthermore, the inclusion in RFP of provision similar to par. (c)(3) of clause, which precludes modification after bid opening to make product conform to brand name is inconsistent with principle of allowing modifications in proposals pursuant to ASPR 3-805.1(b)---------- 431

Omissions
Price escalation clause

Omission of price escalation clause to reflect impact of E.O. 11615, Aug. 15, 1971, which provides for stabilization of prices, rents, wages, and salaries, from request for proposals to furnish projectiles that was issued to both Govt-owned, contractor operated facilities and privately owned facilities utilizing Govt-owned production equipment does not make solicitation defective. Opportunity during negotiations to propose contract with escalation provision having been declined by protestant because maximum amount of escalation would have to be added to price, it is not appropriate after submission of proposal to contend award cannot properly be made on basis of proposals which, as was case with protestant's proposal, did not include escalation clause------ 344

Submission date
Extension

Rejection pursuant to par. 3-506 of ASPR of hand-carried late proposal received at 1320 hours, or 20 minutes subsequent to closing hour specified in request for proposals to maintain real property in Korea, which had been extended twice, first amendment advancing initial closing hour from 1500 to 1300 hours and second one indicating change in opening date only, was in accordance with provision in each amendment that unchanged terms and conditions remained in full force and effect. Furthermore, checking in both amendments block "the hour and date specified for receipt of offers is extended" rather than "is not extended" block, where only one of blocks could be checked, created no ambiguity, considering time was specifically mentioned in amendment No. 1, while only date was changed in amendment No. 2---------- 149

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Negotiation—Continued

Request for quotations

Basic ordering agreements

Variances

Because request for quotations to procure aircraft engine idler pulleys issued pursuant to 10 U.S.C. 2304(a)(10) allowing negotiations when formal competitive procedures are impracticable on basis of determination and findings that fully adequate data and quality assurance procedures were not available contained requirement that proposal should incorporate current basic ordering agreement does not make contract awarded illegal because terms and conditions of agreements may vary with each firm since par. 3-410.2, ASPR, provides general terms of each agreement, and specific terms of contract are defined by contract requirements. However, of importance is fact that offeror whose final price was 60% lower than successful contractor was not given equal opportunity to compete as required by 10 U.S.C. 2304(g), a situation to be avoided in future procurements---------- 755

Firm offer confirmation

In issuing request for quotations, since use of Standard Form 18, which contained inconsistent and misleading provisions, instead of Form 33 was cause for rejection of low proposal on basis of failure to confirm that low quotation was firm offer and failure to submit revised proposal, use of form in absence of substantive reasons, even though authorized by par. 16-102.1(b)(1) of Armed Services Procurement Reg., is not required. To avoid placing prospective contractors in position to "second guess" whether solicitation was requesting quotation or firm offer, Standard Form 33 should be used in future procurements thereby eliminating that prospective contractors go through additional step of confirming that their initial proposals are firm offers---------- 30_5

Offer defective

Written negotiations conducted with offeror whose proposal in response to request for quotations to procure Fatigue Analysis Program for B-57 aircraft was deficient with respect to component test plan specification and, therefore, its proposal was nonresponsive, satisfied the requirements of par. 3-805.1 of ASPR implementing 10 U.S.C. 2304(g) to provide that "written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range," and discharged contracting officer's duty to negotiate, and further negotiations were not required because offeror advised in writing of deficiencies in its proposal failed in his final offer to comply with specifications for component test plan---------- 433

Sole source basis

Parts, etc.

Initial equipment sole source

Before rejection of unsolicited offers for repair kits for generator on qualified products list (QPL) under solicitation containing qualified components clause, and acceptance on sole source basis of QPL supplier's offer to furnish kits, if time permits, and in view of par. 3-102(c) of Armed Services Procurement Reg. prescribing competition to maximum extent,

CONTRACTS—Continued Page

Negotiation—Continued

Sole source basis—Continued

Parts, etc.—Continued

Initial equipment sole source—Continued

determination should be made if kit was altered by QPL offeror, or if kits of unsolicited offerors procured from same source used by QPL offeror, automatically qualified kits under applicable military specifications. If it cannot be determined that parts in kits have been altered or enhanced, or if examination is not practical, award may be made to QPL offeror and unsolicited offerors advised of kit parts requiring qualification testing for future procurements of kits---------- 323

Specifications unavailable

Basis for exception to formal advertising

Although negotiation of turnkey construction contracts for military family housing under 10 U.S.C. 2304(a)(10) and par. 3-210.2(xiii) of Armed Services Procurement Reg. which authorize negotiation when it is impracticable to obtain competition or impossible to draft specifications was necessary because impossibility of drafting adequate specifications is inherent in "turnkey" concept that permits housing developer to use his own architect, future procurements by same method should, in addition to identifying technical criteria for each turnkey project, indicate relative importance of each evaluation factor, and when using "best value formula" evaluation, Govt. should determine that its actual requirements were met, and if those requirements become definitized during course of negotiations, all offerors in competitive range must be given opportunity to submit revised proposals---------- 129

Descriptive literature requirement

Under RFP, issued pursuant to 10 U.S.C. 2304(a)(10), which authorizes negotiations when it is impracticable to draft specifications, that contained descriptive clause—insufficient for formal advertising—relating to design and performance characteristics of air compressor being solicited, determination descriptive literature furnished by low offeror did not conform, where information lacking was contained in RFP, was determination proposal was not technically within competitive range. However, while failure to comply with descriptive literature clause in advertised procurement requires bid rejection, this rule does not automatically apply in negotiated procurement and discussions should have been held with offeror to determine whether its proposal was technically acceptable---------- 637

Performance-type specifications warrants advertising

Fact negotiation is authorized under 10 U.S.C. 2304(a)(10) when impracticable to obtain competition, does not exclude advertising procurement when feasible and practicable to do so; therefore, before issuing RFP where available specifications were "primarily performance and design parameters," and available design data was "incomplete, not sufficiently detailed and largely uncoordinated," consideration should have been given to advertising performance-type specifications and to par. 1-1206.2 of ASPR, which authorizes use of brand-name-or-equal purchase descriptions when more precise and detailed specifications are not available, since performance-type specifications and formal advertising are not mutually inconsistent---------- 637

CONTRACTS—Continued Page

Novation agreements

Rule

When low bidder under two invitations for bids on fuzes, one labor surplus set-aside, ceased operations due to lack of funds and liens placed against it, awards should not have been made to successor in interest under novation agreement entered into after bid opening since bidder acquires no enforceable rights by submitting bid, and, therefore, awards made were prejudicial to other bidders. This ruling is in accord with 43 Comp. Gen. 353, at page 372, concerning transfer of rights in negotiated procurement, and since it is case of first impression, as neither Anti-Assignment Act, 41 U.S.C. 15, nor par. 26–402, ASPR, re third party interests, apply, contracting officer lacked precedent guidance and good faith awards will not be disturbed, but rule will be applied in future procurements 145

Transfer of Govt. contracts pursuant to novation agreement to successor in interest of contractor who ceased operations because of lack of funds and liens attached against it is valid and may be recognized since transfer of rights and obligations incident to sale or merger of contracting corporation or other entity does not constitute assignment in violation of Anti-Assignment Act, 41 U.S.C. 15, which rule is implemented by par. 26–402, ASPR, recognizing third party interest to Govt. contract where interest is incidental to transfer of all assets of contractor, or all of that part of contractor's assets involved in performance of contract 145

Options

More than one award

Equal option quantities

Although terms contained in request for proposals and contracts negotiated for equal quantities under set-aside and non-set-aside portions of procurement for dispensers indicated intent to exercise option equally between awardees, and contract was subject to conflicting, albeit reasonable interpretation to be resolved against drafter, since exercise of option by Govt. in manner variant from terms specified did not meet requirements of par. 1–1502, ASPR, that election—which is sole right of optionee—must be positive, unambiguous, and in exact compliance with terms of option, exercise of option was counteroffer that having been accepted is binding. However, in similar future situations, quantitative equality of both contractors should be preserved 119

Payments

Assignments. (*See* Claims, assignments)

Past due accounts

Interest

The rule of long standing that interest may not be paid by Govt. in absence of express statutory provision or lawful contract will no longer be followed since there is no statute prohibiting payment of interest under contractual provisions, and such provisions will not violate so-called Antideficiency Act (31 U.S.C. 665), provided sufficient funds are reserved under appropriation financing contract to cover interest cost.

CONTRACTS—Continued Page

Payments—Continued

Past due accounts—Continued

Interest—Continued

Therefore, appropriate regulations may be promulgated to authorize inclusion in future contracts of provisions for payment of interest for period of delay in payment occasioned by fact disputed claim under contract required contractor to pursue his administrative remedies, or litigate, before amount owing could be determined. 22 Comp. Gen. 772, overruled ---- 251

Performance

Ability to perform

Time for determination

Low bid submitted on "brand name" basis under small business set-aside requiring component parts of tent frames and doors to be furnished on "Brand Name or Equal" basis is not nonresponsive bid because bidder secured price quotations on parts after bid opening and after contracting agency had contacted manufacturer—which according to record was not improper interference—as bid on its face complied in all material respects to invitation for bids, and fact that bidder could not anticipate furnishing brand name item at bid opening time is matter of responsibility and not bid responsiveness for significant time to determine ability to perform is not at bid opening time but at time of scheduled performance, and contractor if unable to perform would be subject to default termination and liability for excess costs ---- 787

Inspection

"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information ---- 476

Personal services. (*See* **Personal Services**)

Proprietary, etc., items. (*See* **Contracts, data, rights, etc.**)

Protests

Certificate of Competency denial

Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solic-

CONTRACTS—Continued Page

Protests—Continued

Certificate of Competency denial—Continued

ited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA---- 448

Procedures

Compliance

Although in not giving unsuccessful bidder notice of determination to make award of contract while bid protest was pending with U.S. GAO contracting agency failed to comply with sec. 20.4 of GAO bid protest procedures (4 CFR 20.4), GAO has no authority either to impose time limits on contracting agencies for reports on protests or to regulate withholding of award. However, it is hoped agencies will incorporate protest procedures and standards into their regulations. Furthermore, agency's determination that early award was necessary to take advantage of low bid before it expired in order to avoid accepting next low bid at substantial increase, and mailing of "no award" notice after award was not contrary to ASPR, which in par. 2-407.8(b)(3) does not require notice to be given prior to award---------- 787

Resolution

Award notwithstanding protest

Where contracting officer is aware prior to award that bidder considered its total bid and not unit prices to be correct, and he determined that errors in unit prices were not for correction, protest was "resolved" prior to award within contemplation of par. 2-407.8 of Armed Services Procurement Reg. since it does not appear that any different result would have, or should have, obtained if award had been delayed------ 283

In evaluation of offers to supply metal parts for projectiles submitted under RFP issued pursuant to 10 U.S.C. 2304(a)(16), permitting negotiation of contracts in interests of national defense and industrial mobilization, by producers who operate Govt-owned facilities or privately owned plants utilizing Govt. equipment, exclusion of layaway, maintenance, and space rental costs for idle plants or equipment was proper since scope of layaway and maintenance works for all offerors had not been established. Furthermore, there is no legal basis to disturb contracts awarded prior to resolution of protest, as provided by paragraph 2-407.8(b)(3), since objectionable provision for evaluating abnormal maintenance costs was removed from RFP, and record evidences negotiations conducted were within authority of 10 U.S.C. 2304(a)(16), and that delivery schedules were designed to be equitable---------- 694

CONTRACTS—Continued Page
Protests—Continued
Subcontractor protests

Unless prime contractor is acting as purchasing agent, bid protest procedures of U.S. GAO do not provide for adjudication of protests against subcontract awards made by prime contractors. Furthermore, where award of subcontract has been made and neither fraud nor bad faith on part of contracting officer in approving award is alleged, possibility of finding adequate justification to support cancellation of subcontract is so remote that consideration of such protests under GAO's bid protest procedures would be unwarranted. However, in audit of prime contract, attention will be given to any evidence indicating cost to Govt. was unduly increased because of improper procurement actions by prime contractor. Furthermore, when prime contractor is not acting as Govt. agent, bid preparation expenses of subcontractor are not reimbursable---------- 803

Timeliness

Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications. Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency_ 315

Purchase orders. (*See* Purchases, purchase orders)
Qualified products. (*See* Contracts, specifications, qualified products)
Requests for quotations
Negotiation of procurement. (*See* Contracts, negotiation, requests for quotations)
Research and development
Conflicts of interest prohibitions
Applicability to Federal Procurement Regulations

In award of contract for management and technical services to develop marine computer aided operational research center, Dept. of Commerce properly did not consider rules of organizational conflicts of interest as provisions of ASPR App. G "Rules for the Avoidance of Organizational Conflicts of Interest" do not apply to the procurement, and there are no comparable organizational conflicts of interest provisions in the Federal Procurement Regs. Moreover, even if applicable, App. G would only prohibit the successful contractor—a producer of marine equipment who will gain an unavoidable competitive advantage from the research and development effort—from participating in competition for a production contract and would not preclude award of the research and development contract---------- 397

CONTRACTS—Continued Page
Research and development—Continued
Conflicts of interest prohibitions—Continued
Exclusionary clause based on sales

Although interpretation of conflicts of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1–3.805–1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals_ 397

Cost-plus contracts
Subcontracting

Reevaluation of subcontract offers by prime contractor under cost-plus-a-fixed-fee research and development contract for oceanographic sensors required by National Oceanic and Atmospheric Administration's (NOAA) National Data Buoy Center (NDBC), located at National Aeronautics and Space Administration (NASA) facility, and award to other than subcontractor first selected on basis of technical superiority was proper, even though the reevaluation at recommendation of Govt. deviated from initial cost weight criteria, since relative importance of criteria was not destroyed, and direct and substantial involvement of NASA, NOAA, and NDBC in the subcontract award process was warranted in order to protect Govt.'s interest, which was more than *pro forma* as it will bear ultimate cost of subcontract_____ 678

Duality of approach

Award of similar research and development contracts to two laboratories by Atomic Energy Commission for simultaneous development of nuclear weapons is not considered duplication of effort but duality of approach to double opportunity for making new discoveries and to explore diversity of branches of existing science and engineering fields__ 57

Fixed price basis contract

Unsuccessful offeror under request for proposals (RFP) to provide management and technical services to develop marine computer aided operational research center was not prejudiced by failure of chairman of evaluation committee to visit its facility, or by facility selected for visit in absence of any legal or regulatory requirements to this effect; nor by selection of the site for contract performance since selection was made after award; nor by fact award of the research and development contract was made on fixed price basis as the two categories are not mutually exclusive—one term referring to type of work, the other to type of contract used; and, furthermore, subsequent authorization of funds for procurement of hardware and software under Phase II of contract was not in conflict with terms of RFP_____ 397

Sales, generally. (*See* **Sales**)
Samples (*See* **Contracts, specifications, samples**)
Service Contract Act. (*See* **Contracts, labor, stipulations, Service Contract Act of 1965**)
Small business concern awards. (*See* **Contracts, awards, small business concerns**)

CONTRACTS—Continued Page

Specifications

Adequacy

Minimum needs standard

Invitation for bids soliciting Attitude Indicators for 2-year period that included items for definite and estimated quantities, and First Article Test Report which was not to be separately priced, but omitted the technical data specification for determining cost of spare parts, maintenance, etc., of indicators was an inadequate invitation and was properly canceled pursuant to 10 U.S.C. 2305(c) and par. 2-404.1(b)(i) of ASPR, since omission precluded consideration of all cost factors as required by ASPR 2-404.1(b)(iv), and therefore the minimum needs of Govt. not having been met, reason for cancellation of the inadequate invitation was cogent. Moreover, reinstatement of original invitation to permit data package to be offered would be prejudicial without insuring the standing of bidders would remain unchanged---------- 426

Ambiguous

Changes, revisions, etc.

Explanation, etc., requirement

IFB to procure legal information retrieval data base which, because it did not clearly indicate whether photocomposition, Linotron 1010 system, or master typography program was to be furnished, was ambiguous IFB inadequate to secure necessary pricing for competitive bid evaluation purposes, and lack of clarity having generated number of oral requests for explanation, amendment pursuant to sec. 1-2.207(d) of FPR should have been issued. Therefore, contract awarded should be terminated for convenience of Govt. as award was not in accord with reasonable interpretation of IFB and procurement resolicited. Pursuant to Pub. L. 91-510, action taken on this recommendation should be sent to Senate and House Committees on Govt. Operations within 60 days---------- 635

Clarification

Before bidding

Drawings forwarded to bidders with amendments that were acknowledged were incorporated by reference into invitation for bids (IFB) and, therefore, submission of bid without inquiry as to drawings is inconsistent with allegation of nonreceipt at later date since time for airing issue of this nature is prior to bid submission. In any event, nonreceipt of drawings does not present cogent reason for cancellation of IFB as nonreceipt has no bearing on bidder's obligation to perform in accordance with specifications---------- 352

Construction of ambiguity

Contract awarded low bidder under invitation for bids soliciting services to clean exhaust ducts for 1 year that was inconsistent as specifications required two cleanings and bid schedule four is not binding contract, notwithstanding "Order of Precedence" clause prescribed schedule would prevail in case of inconsistency since before notice of award was mailed inconsistency was discovered and bidder alleged its bid was based on two services per year. Had discrepancy been discovered after valid award had been consummated or had contracting officer had actual or constructive notice of error, four cleanings would be

CONTRACTS—Continued Page
Specifications—Continued
Ambiguous—Continued
Construction of ambiguity—Continued
required, but as bidder was not afforded opportunity to prove its alleged error, no valid contract came into being with mailing of notice and purported contract should be rescinded---------- 360

Pricing provisions

A bid that offered an aggregate of component prices that exceeded unit prices for vehicular lighting kits solicited under invitation that included options to purchase additional kits and kit components "up to 100 percent" and provided for award at kit unit prices is nonresponsive bid, and defect may not be corrected on basis other bidders will not be displaced since award will not be made at component prices, for acceptance of bid may not result in the lowest cost should Govt. exercise option for component parts. Fact that deviation is considered material does not mean solicitation was ambiguous because component option was for indefinite quantity, "up to 100 percent," as bidders had responsibility of submitting competitive bids that would allow for recovery of costs and reasonable profit regardless of extent to which the option was exercised---------- 439

Rule

Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications. Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency---------- 315

Amendments
Furnishing requirement

Although prior to issuance of second step of two-step procurement for design, fabrication, and installation of defense test chamber, formal amendment to letter request for technical proposals should have been issued to cover revisions in specifications as required by par. 3-805.1(e) of Armed Services Procurement Reg. in order to give acceptable offerors opportunity to modify their proposals, contract awarded will not be disturbed for omission was not prejudicial as technical proposals of offerors who during negotiations under first-step of procurement had made their proposals acceptable indicate offerors prior to bidding on second-step had ample opportunity to intelligently consider specifications revisions and thus in effect had incorporated them in their second-step bid. However, recurrence of circumstances of this procurement should be prevented---------- 85

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Specifications—Continued
Basic ordering agreements
Propriety

Because request for quotations to procure aircraft engine idler pulleys issued pursuant to 10 U.S.C. 2304(a)(10) allowing negotiations when formal competitive procedures are impracticable on basis of determination and findings that fully adequate data and quality assurance procedures were not available contained requirement that proposal should incorporate current basic ordering agreement does not make contract awarded illegal because terms and conditions of agreements may vary with each firm since par. 3-410.2, ASPR, provides general terms of each agreement, and specific terms of contract are defined by contract requirements. However, of importance is fact that offeror whose final price was 60% lower than successful contractor was not given equal opportunity to compete as required by 10 U.S.C. 2304(g), a situation to be avoided in future procurements 755

Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
Conformability of equipment, etc., offered
Part numbers

Where invitation provides for acceptance of bids on ball bearings that are identified by different part numbers than those cited in solicitation if such parts are prequalified, although inquiry by contracting officer to manufacturer of part offered by low bidder would have disclosed it met requirements of controlled drawing contained in procurement package, since procuring agency's representative at manufacturing plant reported that information and data available did not support acceptance of part offered by low bidder, contracting officer acted reasonably in rejecting low bid. However, in future procurements, whenever part number offered by qualified vendor differs from specification requirements, advice as to its acceptability should be obtained from prime contractor. 141

Self-certification by bidder

Acceptance of self-certification by manufacturers on Qualified Products List that their products comply with noise level requirements standard set for power tools solicited pending completion of test facilities by Naval Ship Engineering Center is administrative matter, since facilities will be ready in ample time to test deliveries under contract awarded and failure of a product to meet noise level requirements would be basis for rejection of delivery 415

Technical deficiencies
Administrative determination conclusiveness

Requests for proposals soliciting offers on "brand name or equal" basis for lease and maintenance of computers that would fit space occupied by IBM computers to be replaced is not restrictive because offer did not meet essential "disk arrangement" specified and, therefore, could not satisfy principal purpose of procurement that "no additional physical space will be required." Drafting of proper "brand name or equal" purchase description is matter primarily within jurisdiction of procurement activity and any particular features required must be presumed to be material and essential to needs of Govt. Although nonrespon-

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Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Administrative determination conclusiveness—Continued
siveness of offer may be subject for negotiation since offeror does not intend to make its offer "responsive" and contracting officials adhere to initial requirements, further discussions would be futile---------- 247

Negotiated procurement

Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program---------- 621

Defective
Brand name or equal product requirement

Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to U.S. GAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular features listed in invitation overstated Govt.'s needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique---------- 237

Delivery provisions
Open-ended provision

Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B-173244, August 16, 1972---------- 518

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Specifications—Continued

Demonstrations as aid to bidders, etc.

Propriety

In negotiation of pilot procurement for disposal of unserviceable explosive fuses by incineration under request for quotations that placed on contractor responsibility for providing and removing incinerator device, preparation and restoration of site, and incineration of fuses and removal of scrap residue, conclusion of negotiations upon receipt of best and final offers was consistent with par. 3-805.1 of Armed Services Procurement Reg. in absence of requirement to continue negotiations to define operating procedures or equipment design. However, as detonation demonstration for prospective offeror, although not prejudicial, created appearance of favoritism, and pilot project was not specifically detailed, future procurements should insure adequate competition by including as appropriate more definite specifications, demonstrations, and prebid conferences 233

Descriptive data

Advertised *v.* negotiated procurement

Under RFP, issued pursuant to 10 U.S.C. 2304(a)(10), which authorizes negotiations when it is impracticable to draft specifications, that contained descriptive clause—insufficient for formal advertising—relating to design and performance characteristics of air compressor being solicited, determination descriptive literature furnished by low offeror did not conform, where information lacking was contained in RFP, was determination proposal was not technically within competitive range. However, while failure to comply with descriptive literature clause in advertised procurement requires bid rejection, this rule does not automatically apply in negotiated procurement and discussions should have been held with offeror to determine whether its proposal was technically acceptable 637

Deviations

Informal *v.* substantive

Bid bond principal and bidder variance

Where principal named in bid bond was joint venture which included corporation that was only entity named in low bid, statements and affidavits submitted after bid opening, to evidence that mistake had been made and bidder intended to be named in bid was joint venture, may not be accepted to make nonresponsive bid responsive by changing name of bidder. Alleged mistake is proper for consideration only when bid is responsive at time of submission, and bid submitted not having met terms of invitation for bids which required bid guarantee to be submitted in proper form and amount by time set for opening of bids, it would not be proper to consider reasons for nonresponsiveness of bid, whether due to mistake or otherwise 836

Component *v.* unit price differences

A bid that offered an aggregate of component prices that exceeded unit prices for vehicular lighting kits solicited under invitation that included options to purchase additional kits and kit components "up to 100 percent" and provided for award at kit unit prices is nonresponsive

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued
Component *v.* unit price differences—Continued
bid, and defect may not be corrected on basis other bidders will not be displaced since award will not be made at component prices, for acceptance of bid may not result in the lowest cost should Govt. exercise option for component parts. Fact that deviation is considered material does not mean solicitation was ambiguous because component option was for indefinite quantity, "up to 100 percent," as bidders had responsibility of submitting competitive bids that would allow for recovery of costs and reasonable profit regardless of extent to which the option was exercised_ 439

Delivery provisions

Failure of bidder to acknowledge receipt of amendment issued on Standard Form 30 to correct delivery date stated in invitation for bids to procure library shelves, and which contained Standard Form 33A, to include installation of the shelves may not be waived as minor informality, notwithstanding waiver of provision in the amendment for extension of bid opening date would be proper, since correction of delivery provision had more than trivial or negligible effect on price, delivery, and performance as bidder under initial invitation would only be obligated to make delivery and not to install the shelves in period stated. Furthermore, Standard Forms used, although not requiring amendment to be signed and returned, provide for compliance by other means with mandatory acknowledgment requirement_____ 408

"Entry into plant" requirement

"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information_____ 476

Failure to bid on each item

Low bid that omitted price of "Environmental Protection" item contained in IFB to repair portion of Mississippi River banks, a price bidder alleges was included in basic bid price, is nonresponsive bid that may not be considered for award, for although environmental work could have been treated as inherent part of job, it was regarded as material and listed as separate item calling for separate price and, therefore, omission should not be waived as minor informality. To do so would ignore rule that where there is any substantial question as to whether bidder upon award could be required to perform all of work called for if he chose not to, integrity of competitive bid system requires that bid be rejected as, at least, ambiguous unless bid otherwise affirmatively indicates that bidder contemplated performance_____ 543

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Deviations—Continued
Informal *v.* substantive—Continued
First article waiver eligibility misstated

Low bidder who does not qualify for waiver of first article requirements offered to previous suppliers of fueling at sea probes and receivers but inadvertently entered bid prices in waiver space and inserted dashes in area reserved to bidders that were not eligible for first article waiver has not submitted nonresponsive bid *per se* as dashes have no firm meaning apart from entire context in which used and examination of entire bid demonstrates entries were erroneous and intent was to bid on basis of first article contractor testing and, although, not for correction as bid mistake, error is supported by fact low bidder did not identify prior contracts under which first articles on production samples had been furnished or indicate delivery time advancement in event of waiver, and inserted subitems not applicable to first article waiver---------- 352

Information

Low bid on Fin Assemblies that indicated Govt-owned special tooling would be used and included pursuant to "Research and Production Property and Special Tooling" provision of invitation for bids (IFB) list of tooling identified as to part number, acquisition cost, and age, but did not include written permission to use tooling, or information as to anticipated amount of tooling to be used and rental fee, was erroneously evaluated as nonresponsive bid as special tooling is not defined as "facility" in par. 13-101.8 of Armed Services Procurement Reg. and IFB did not require permission to use tooling, and since omitted information could be calculated from bid, deviation is minor one that may be waived. Therefore, it is recommended that contract awarded be terminated for convenience of Govt. and low bid considered for award---------- 62

Minority manpower utilization

Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since certification will bind successful bidder to comply with affirmative action plan conditions imposed in invitation, and affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford low bidder opportunity to correct bid deficiency---------- 329

Option prices

Low bid that failed to quote unit price on option items under invitation for radar transponders that stated offers would be evaluated "exclusive of the option quantity" is not nonresponsive bid. If IFB had specified that option prices may not exceed basic bid prices or

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued
Option prices—Continued

established some other standard for option prices, Govt. would be deprived of valuable benefit if option could not be exercised, or if Govt. intended to exercise option, or portion of it, at time of award, bid omitting option prices would be nonresponsive. However, IFB did not establish ceiling for option prices or provide for including them in bid evaluation; therefore, failure to quote option prices is not material deviation since there is substantially no difference between bid with an unreasonably high option price and bid without any option price---- 528

Drawings
Amendment identification

Drawings forwarded to bidders with amendments that were acknowledged were incorporated by reference into invitation for bids (IFB) and, therefore, submission of bid without inquiry as to drawings is inconsistent with allegation of nonreceipt at later date since time for airing issue of this nature is prior to bid submission. In any event, nonreceipt of drawings does not present cogent reason for cancellation of IFB as nonreceipt has no bearing on bidder's obligation to perform in accordance with specifications---------- 352

Part number identification

Where invitation provides for acceptance of bids on ball bearings that are identified by different part numbers than those cited in solicitation if such parts are prequalified, although inquiry by contracting officer to manufacturer of part offered by low bidder would have disclosed it met requirements of controlled drawing contained in procurement package, since procuring agency's representative at manufacturing plant reported that information and data available did not support acceptance of part offered by low bidder, contracting officer acted reasonably in rejecting low bid. However, in future procurements, whenever part number offered by qualified vendor differs from specification requirements, advice as to its acceptability should be obtained from prime contractor------- 141

Failure to furnish something required
Addenda acknowledgment
Addenda in bid package

Notwithstanding failure to acknowledge amendment presumably included in bid set to correct drawing number omissions in technical data package list (TDPL) and erroneous listing of some numbers in Military Specification (Milspec) to which telescopes being solicited were to conform, low bid was responsive as issuance of amendment was unnecessary where original invitation, accompanied by aperture cards of drawings, served to bind prospective contractors. Omitted numbers in TDPL were referenced in Milspec, which correctly listed erroneous numbers in specification requirements provision and, therefore, Milspec and cards, standing alone, required bidder compliance. Erroneous award to other than low bidder should be terminated for convenience of Govt. and contract offered to low bidder---------- 293

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required—Continued
Addenda acknowledgment—Continued
Price stabilization certification

Failure of low bidder to sign and submit with its bids price certification attached to three solicitations issued for printing and binding services may not be waived as minor informality. Certification addendum bound bidder to reduce, at time of billing, any prices offered in bid which did not conform to requirements of E.O. 11615, dated Aug. 15, 1971, issued under authority of Economic Stabilization Act of 1970 for purpose of stabilizing prices, rents, wages and salaries in order to stabilize economy, reduce inflation, and minimize unemployment, and, therefore, bids submitted were nonresponsive under rule that if addendum to invitation affects price, quantity or quality, it concerns material matters that may not be waived even to effect savings for Govt---------- 370

Wage determinations

The general rule that failure of bidder to acknowledge receipt of amendment which could affect price, quality, or quantity of procurement being solicited, renders bid nonresponsive because bidder would have option to decide after bid opening to become eligible for award by furnishing extraneous evidence that addendum had been considered or to avoid award by remaining silent, is for application to low bid for construction of prefabricated metal building as unacknowledged amendment incorporated wage determination that affected contract price, notwithstanding that E.O. 11615, dated Aug. 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since Executive order does not obviate implementation of rates in wage determination and, therefore, failure to acknowledge amendment may not be waived------ 500

Waiver
Basis

Failure of bidder to acknowledge receipt of amendment issued on Standard Form 30 to correct delivery date stated in invitation for bids to procure library shelves, and which contained Standard Form 33A, to include installation of the shelves may not be waived as minor informality, notwithstanding waiver of provision in the amendment for extension of bid opening date would be proper, since correction of delivery provision had more than trivial or negligible effect on price, delivery, and performance as bidder under initial invitation would only be obligated to make delivery and not to install the shelves in period stated. Furthermore, Standard Forms used, although not requiring amendment to be signed and returned, provide for compliance by other means with mandatory acknowledgment requirement---------- 408

Erroneous

Although late acknowledgment of amendment which provided in event of discrepancy between solicitation requirements and sample display kit, solicitation would govern, and added a clause to request for proposals for survival kits regarding royalties, by low offeror who prior to issuance of amendment had confirmed its offer did not include royalties was erroneously waived on basis amendment did not go to substance of offer and

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

Addenda acknowledgment—Continued

Waiver—Continued

Erroneous—Continued

was not prejudicial to other offerors, issuance of amendment was proper exercise of administrative authority in absence of statutory or regulatory provision establishing criteria for determination of what constitutes substantial change to justify reopening negotiations after they have been terminated by call for best and final offers---------- 411

Alternate bids

Requirements award under IFB soliciting base and alternate bids for motor vehicle parts pursuant to concept of contractor-operated on-base parts store, which asked for separate discounts in base bid on common and captive parts and single discount in alternate bid on parts, should be terminated for convenience of Govt. and award offered to low bidder on base bid since bidder's failure to bid on alternate items did not justify rejection of its low base bid as bid covered all work contemplated, nor is bid invalid because 90% discount was offered on captive parts, as unusually high discount does not evidence submission of unbalanced bid, mistake, or future intent to transfer parts during contract performance to lower common parts category. Moreover, in absence of IFB provision, it was inappropriate in evaluation of alternate bid to consider unliquidated cost reduction to administer one discount---------- 792

Bid bond

Sales

Under combined sealed bid-auction timber sale, failure of high bidder to furnish bid bond with its seal bid submitted to qualify for oral bidding—failure corrected before oral bidding began—was minor informality, and defect having been remedied, high bid was properly included in oral bidding. Even if secs. 1-2.404-2(5)(f) and 1-10.103-4 of Federal Procurement Regs. requiring rejection of bids to furnish goods or services when bid bond is not furnished applied to timber sales, 38 Comp. Gen. 532, incorporated in procurement regulations, should not be made applicable to timber sale since sealed bids only qualified bidders to participate in oral bidding and no competitive advantage accrued prior to oral bidding as no bidder knew whether any other bidder would submit oral bid in excess of his, or any other bidder's sealed bid price------ 182

Information

Minority manpower utilization

Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required—Continued
Information—Continued
Minority manpower utilization—Continued
certification will bind successful bidder to comply with affirmative action plan conditions imposed in invitation, and affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford low bidder opportunity to correct bid deficiency---------- 329

Place of contract performance

Failure of low bidder to state exact place of contract performance, information required under invitation for bids to furnish service caps that was restricted to small business firms on Qualified Manufacturers List (QML) for item prior to bid opening, may not be corrected or waived as minor deviation as information is material to maintaining QML procedures established for procurement of military clothing in order to permit prompt determination that bidder is established and reputable manufacturer with sufficient capacity and credit to perform contract and to prevent firm from having option of deciding after bid opening whether or not to make its offer responsive by naming facility that had been qualified by QML prior to bid opening---------- 242

License approval

Failure of low bidder under solicitation for security guard services to meet State and local licensing and registration requirements of invitation for bids prior to award does not affect legality of contract as matter is one between bidder and State and local authorities and is not factor controlling bidder eligibility to obtain Govt. contracts. Upon determination that license or permit is prerequisite to being legally capable of performing for Federal Govt. within its boundries, State or local authority may enforce requirements if not in conflict with Federal policies or laws, or execution of Federal powers. However, in event of enforcement of State or local licensing requirements, should contractor not perform, he may be found in default and contract terminated with prejudice---------- 377

Minimum needs requirement
Erroneously stated

Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt's. actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B–173244, August 16, 1972---------- 518

CONTRACTS—Continued Page

Specifications—Continued

Minimum needs requirement—Continued

Specification adequacy

Invitation for bids soliciting Attitude Indicators for 2-year period that included items for definite and estimated quantities, and First Article Test Report which was not to be separately priced, but omitted the technical data specification for determining cost of spare parts, maintenance, etc., of indicators was an inadequate invitation and was properly canceled pursuant to 10 U.S.C. 2305(c) and par. 2-404.1(b)(i) of ASPR, since omission precluded consideration of all cost factors as required by ASPR 2-404.1(b)(iv), and therefore the minimum needs of Govt. not having been met, reason for cancellation of the inadequate invitation was cogent. Moreover, reinstatement of original invitation to permit data package to be offered would be prejudicial without insuring the standing of bidders would remain unchanged 426

Misinterpretation

Evidenciary value

Low bid on indefinite type contract that failed to quote separate prices on supply and service sub-line items—identified as 0001AA through 0001AE—to accompany electric counters—0001—solicited invitation that scheduled sub-line items pursuant to par. 20-304.2(b) of Armed Services Procurement Reg. as alphabetical suffixes of basic contract item, and requested bidders to quote prices on "Total Item" and not on sub-line item quantities may be considered for contract award as bidder would be obligated to furnish all listed requirements of schedule at price quoted for basic item, notwithstanding confusing "shorthand references" to subitems—references that should be avoided in future procurements. Furthermore, fact that other bidders construed invitation as requiring separate prices for subitems is extraneous evidence that may not be considered 255

Propriety

Alternative bidding

Invitation for building construction which although it did not spell out specific criteria for selection of either bid No. 1, providing for completion in 1,095 calendar days, or bid No. 2, completion in 870 days, in legal invitation, even though it is suggested future construction solicitations identify those factors that will be considered in selecting shorter or longer completion date, and award of contract to low bidder on basis of price on earlier completion date was proper since invitation provided for award on basis of price and other factors, and "other factors"—rental space savings, gain in operating efficiency, and earlier availability of space to accommodate program and staff expansions—are costs that are too intangible to evaluate, as is provision for assessment of liquidated damages 645

Qualified products

Parts for qualified product

Before rejection of unsolicited offers for repair kits for generator on qualified products list (QPL) under solicitation containing qualified components clause, and acceptance on sole source basis of QPL supplier's offer to furnish kits, if time permits, and in view of par. 3-102(c) of

CONTRACTS—Continued Page
Specifications—Continued
Qualified products—Continued
Parts for qualified product—Continued
Armed Services Procurement Reg. prescribing competition to maximum extent, determination should be made if kit was altered by QPL offeror, or if kits of unsolicited offerors procured from same source used by QPL offeror, automatically qualified kits under applicable military specifications. If it cannot be determined that parts in kits have been altered or enhanced, or if examination is not practical, award may be made to QPL offeror and unsolicited offerors advised of kit parts requiring qualification testing for future procurements of kits 323

Product designation
Under invitation for bids providing for award of guaranteed minimum requirements type contract for power tools that contained Qualified Products clause and provided space for manufacturer's name, QPL test or qualification reference number, but not for product designation, failure to furnish product designation does not require rejection of bid since, although omitted information is useful in identifying whether an item is on applicable QPL, it is not essential as manufacturer's name and QPL test numbers furnished by bidder suffice for locating appropriate item on QPL, and task of tracing an item imposes no undue burden on contracting agency. Therefore, there is nothing in omission of product designation to equate with failure to identify 415

Time for qualification
Award of contract to low bidder whose product did not receive qualification approval for listing on Military Products List prior to bid opening, although product—electron tubes—had been tested and found qualified for listing on specified date prior to bid opening but ministerial act of approval had not been accomplished, does not violate par. 1–1107.1 of Armed Services Procurement Reg. which prescribes that only bids "offering products which are qualified for listing on applicable Qualified Products List at time set for opening of bids" shall be considered in making awards, as regulation does not impose requirement for formal "approval" prior to bid opening, and, moreover, regulation should be interpreted to insure procurement of products meeting Govt. needs in manner that will not place unnecessary restrictions on competition 47

Restrictive
Particular make
Administrative determination
Request for proposals soliciting offers on "brand name or equal" basis for lease and maintenance of computers that would fit space occupied by IBM computers to be replaced is not restrictive because offer did not meet essential "disk arrangement" specified and, therefore, could not satisfy principal purpose of procurement that "no additional physical space will be required." Drafting of proper "brand name or equal" purchase description is matter primarily within jurisdiction of procurement activity and any particular features required must be presumed to be material and essential to needs of Govt. Although nonresponsiveness of offer may be subject for negotiation since offeror does not intend to make its offer "responsive" and contracting officials adhere to initial requirements, further discussions would be futile 247

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Information timeliness

Low bid submitted on "brand name" basis under small business set-aside requiring component parts of tent frames and doors to be furnished on "Brand Name or Equal" basis is not nonresponsive bid because bidder secured price quotations on parts after bid opening and after contracting agency had contacted manufacturer—which according to record was not improper interference—as bid on its face complied in all material respects to invitation for bids, and fact that bidder could not anticipate furnishing brand name item at bid opening time is matter of responsibility and not bid responsiveness for significant time to determine ability to perform is not at bid opening time but at time of sheduled performance, and contractor if unable to perform would be subject to default termination and liability for excess costs---------- 787

Negotiated procurement

When brand name or equal clause contained in par. 1-1206.3(b) of ASPR and written for advertised procurements is adopted for use in negotiated procurements pursuant to ASPR 1-1206.5 and 3-501(v)C (xxv), clause should be suitably modified. Mere substitution of the words "offeror" for "bidder" and "offer" for "bid" leaves restrictions in a request for proposals (RFP) which are contrary to intent and purposes of negotiated procurement. Furthermore, the inclusion in RFP of provision similar to par. (c)(3) of clause, which precludes modification after bid opening to make product conform to brand name is inconsistent with principle of allowing modifications in proposals pursuant to ASPR 3-805.1(b)---------- 431

"Or equal" product acceptability

Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to U.S. GAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular, features listed in invitation overstated Govt.'s needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique---------- 237

"Same manufacturer" requirement for all items

Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications.

CONTRACTS—Continued Page

Specifications—Continued

Restrictive—Continued

"Same manufacturer" requirement for all items—Continued

Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency 315

Samples

Brand name or equal procurement

"Facility of use"

Requirement for samples to be submitted with bids on brand name or equal procurement for quantities of noise generator and noise figure meter was in accord with policy in par. 2-202.4 of Armed Services Procurement Reg. for "products that must be suitable from standpoint of balance, facility of use, general feel, color, or pattern," and testing of samples notwithstanding descriptive data indicated compliance with specifications was proper under invitation that provided for inspection and testing of samples to evaluate characteristics of "facility of use" to determine compliance with brand name items with respect to workmanship, performance, verification, and compatibility. Furthermore, conflict regarding test results must be resolved in favor of administrative position since there is no showing test was defective, improperly conducted, or erroneously reported 583

Standard forms. (*See* Forms, standard forms)

Tests

First article

Waiver eligibility misstated

Low bidder who does not qualify for waiver of first article requirements offered to previous suppliers of fueling at sea probes and receivers but inadvertently entered bid prices in waiver space and inserted dashes in area reserved to bidders that were not eligible for first article waiver has not submitted nonresponsive bid *per se* as dashes have no firm meaning apart from entire context in which used and examination of entire bid demonstrates entries were erroneous and intent was to bid on basis of first article contractor testing and, although, not for correction as bid mistake, error is supported by fact low bidder did not identify prior contracts under which first articles on production samples had been furnished or indicate delivery time advancement in event of waiver, and inserted subitems not applicable to first article waiver 352

Government responsible

Cost as an evaluation factor

Since cost of Govt. testing under invitation for bids to furnish fueling at sea probes and receivers is insignificant and cannot be realistically estimated as evaluation factor, par. 1-1903(a)(iii) of Armed Services Procurement Reg., which provides that if Govt. is to be responsible for first article testing, cost of such testing shall be evaluation factor "to the extent that such cost can be realistically estimated," is not applicable 352

CONTRACTS—Continued Page

Subcontracts

Administrative approval

Reevaluation of subcontract offers by prime contractor under cost-plus-a-fixed-fee research and development contract for oceanographic sensors required by National Oceanic and Atmospheric Administration's (NOAA), National Data Buoy Center (NDBC), located at National Aeronautics and Space Administration (NASA) facility, and award to other than subcontractor first selected on basis of technical superiority was proper, even though the reevaluation at recommendation of Govt. deviated from initial cost weight criteria, since relative importance of criteria was not destroyed, and direct and substantial involvement of NASA, NOAA, and NDBC in the subcontract award process was warranted in order to protect Govt.'s interest, which was more than *pro forma* as it will bear ultimate cost of subcontract---------- 678

Bid shopping

Listing of subcontractors

Although failure to complete subcontractor listing form submitted with low bid for conversion of Federal buildings for categories of curtain wall construction—fabricator and erection, terms not shown in specifications—may be waived under 41 CFR 5B–2.202–70(a) for "erection" category as it constitutes less than 3½ percent of project cost computed on basis of reasonable estimate of costs, failure may not be waived for "fabricator" category that exceeds allowable percentage because specifications referred to category as "insulated metal siding," as bidder was obligated before bidding to clarify any doubt concerning required subcontractor listing and, therfore, bid must be rejected. However, since problem of subcontractor listing categories not conforming to specifications is recurring one, future subcontractor listing categories should utilize specification identifications---------- 264

Where invitation for bids did not require bidder to name his subcontractors and there was no statutory or regulatory requirement for listing of subcontractors, there is no basis to reject low bid for construction of Govt. building for failing to identify subcontractors used in compilation of bid or to be used in performance of contract. Since "bid shopping" was not prohibited under procurement, fixed price stated in bid could be premised on nothing more than wisdom of bidder, however, use of subcontractors' bids as guide in determining the prime bid would not give bidder an unfair advantage, and it follows award to low bidder constitutes an unconditional obligation for Govt. to pay the fixed price and contractor to perform at that price---------- 403

Telegram that reduced both base and additive alternate bids and completed information omitted from initial bid respecting subcontractor listing which was telephoned to contracting agency 6 minutes before bid opening, was promptly transcribed and hand carried to contracting officer, and later confirmed by Western Union, is acceptable modification pursuant to FPR 1–2.304. Furthermore, failure to indicate whether prices were to be reduced "by" or "to" dollar amounts listed created no ambiguity, for ambiguity exists only when terms of bid are subject to two or more reasonable interpretations, whereas reducing prices "by" amounts specified brought prices in line with other bids and Govt.'s estimate.

CONTRACTS—Continued Page

Subcontracts—Continued

Bid shopping—Continued

Listing of subcontractors—Continued

Also telegraphic abbreviation combining two categories of subcontracting work was properly interpreted to cover both categories and to satisfy requirement that bid identify subcontractor to be used in each category-- 831

Subcontractor substitution prior to award

Listing of joint venture—two responsible electrical subcontractors—that did not meet experience and percentage manufacture requirements of subcontractor qualification clause pertaining to building control and monitoring category of work that was contained in IFB to construct superstructure of Federal office building does not require rejection of bid as substitution of qualified first-tier subcontractor is permissible under terms of IFB and applicable regulations, listing defect does not materially affect responsiveness of bid as it relates to primary purpose of listing requirement—antibid shopping—and qualification clause which is regarded as similar to competency of bidder clause is considered as relating solely to responsibility of listed subcontractors---------- 814

Make-or-buy proposals of prime contractors

Government participation in subcontracting

Under make-or-buy proposal by prime contractor pursuant to request for proposals to furnish launch vehicles, participation of NASA in negotiation of second step engine with subcontractors does not make prime contractor agent of NASA so as to subject subcontracting to Govt.'s procurement statutes and regulations, for in make-or-buy program as defined in NASA PR 3.901-1, Govt. buys management, including placing and administering subcontracts, from prime contractor along with goods and services to assure performance at lowest overall cost, with right of review reserved in Govt. Therefore, essential point is not selection of subcontractor but make-or-buy decision, and record shows NASA thoroughly analyzed various technical aspects involved in prime contractor's proposal, including relative merits of two different subcontractor design configurations---------- 743

Minority subcontracting

Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority-owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed---------- 272

CONTRACTS—Continued Page
Subcontracts—Continued
Specifications
Failure to furnish something required
Information

Requirements in invitation for bids issued by Atomic Energy Commission prime contractor for installation of mechanical, electrical, and HVAC systems to submit price breakdown for numerous aspects of work and plan or schedule for accomplishing work to include start and completion dates for all major construction, material procurement, need date for Govt. equipment, manning table, and list of lower tier subcontractors—information intended to assure availablity of adequate subcontractor support and not to prevent bid shopping—are not requirements that define or limit bidder's obligation under contract since they are requirements that are related to bidder's ability to perform rather than bidder's obligation to perform---------- 329

Termination
Compensation
Authority to settle

Forest Service has authority to enter into agreement with contractor to settle termination costs incident to Agriculture Board of Contract Appeals ruling that Govt. improperly defaulted contract, but since Board's holding that Forest Service breached its obligation to furnish agreed supplies is not supported by evidence, damages awarded by Board for supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and Dept. of Agriculture should make independent analysis of merits of claim and full examination of available defenses, and then determine if breach occurred under decisions of courts and/or U.S. GAO, and should provide that in future proceedings, Board shall not express opinion or make finding of contract breach---------- 491

Convenience of Government
Cancellation converted to termination

Cancellation of contract award because of contracting officer's failure to hold discussions with all offerors within competitive range after holding discussions with one offeror should be converted to termination for convenience since contracting officer did not lack authority to make award and there is no indication in record that either offeror or procurement activity contracted other than in good faith or with any intent to deprive other offerors of equal opportunity to compete and, consequently, contract awarded was not void *ab initio*. Cancellation of contract is desirable, but for urgency of procurement, costs, that would be chargeable against Govt., or similar circumstances relating to best interests of Govt. when termination for convenience would either be too expensive or not in Govt.'s best interest---------- 481

Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Cancellation converted to termination—Continued
should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B–173244, August 16, 1972 518

Erroneous awards
Low bid on Fin Assemblies that indicated Govt-owned special tooling would be used and included pursuant to "Research and Production Property and Special Tooling" provision of invitation for bids (IFB) list of tooling identified as to part number, acquisition cost, and age, but did not include written permission to use tooling, or information as to anticipated amount of tooling to be used and rental fee, was erroneously evaluated as nonresponsive bid as special tooling is not defined as "facility" in par. 13–101.8 of Armed Services Procurement Reg. and IFB did not require permission to use tooling, and since omitted information could be calculated from bid, deviation is minor one that may be waived. Therefore, it is recommended that contract awarded be terminated for convenience of Govt. and low bid considered for award 62

Where contracting officer overlooked discount offered by bidder which if evaluated would have displaced successful bidder awarded 1-year janitorial requirements contract under invitation for bids, when first two low bidders were found nonresponsive because low bidder, unable to show its intended bid, withdrew and second low bidder, although erroneously interpreting the specifications, would not allege mistake, award made contrary to 10 U.S.C. 2305(c) to other than lowest responsive bidder should be terminated for convenience of Govt., notwithstanding claim for 6 months' performance under contract, as administratively recommended on basis no difficulties are anticipated in changing contractors and that termination would be in best interest of U.S 423

IFB to procure legal information retrieval data base which, because it did not clearly indicate whether photocomposition, Linotron 1010 system, or master typography program was to be furnished, was ambiguous IFB inadequate to secure necessary pricing for competitive bid evaluation purposes, and lack of clarity having generated number of oral requests for explanation, amendment pursuant to sec. 1–2.207(d) of FPR should have been issued. Therefore, contract awarded should be terminated for convenience of Govt. as award was not in accord with reasonable interpretation of IFB and procurement resolicited. Pursuant to Pub. L. 91–510, action taken on this recommendation should be sent to Senate and House Committees on Govt. Operations within 60 days 635

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Erroneous awards—Continued

Requirements award under IFB soliciting base and alternate bids for motor vehicle parts pursuant to concept of contractor-operated on-base parts store, which asked for separate discounts in base bid on common and captive parts and single discount in alternate bid on parts, should be terminated for convenience of Govt. and award offered to low bidder on base bid since bidder's failure to bid on alternate items did not justify rejection of its low base bid as bid covered all work contemplated, nor is bid invalid because 90% discount was offered on captive parts, as unusually high discount does not evidence submission of unbalanced bid, mistake, or future intent to transfer parts during contract performance to lower common parts category. Moreover, in absence of IFB provision, it was inappropriate in evaluation of alternate bid to consider unliquidated cost reduction to administer on discount---- 792

Recommendation for corrective action—termination of contract for convenience of Govt. and award to low, responsive bidder—required contracting agency under sec. 232 of Legislative Reorganization Act of 1970, Pub. L. 91-510, to submit written statements of action taken with respect to recommendation to House and Senate Committees on Govt. Operations not later than 60 days after date of recommendation, and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation--- 792

Unprofitable
Rule

Where manning charts submitted with low offer to furnish mess attendant services indicate understanding of, and ability to fulfill contract requirements, including wage rates, number of workers, and total estimated labor hours, offeror is within competitive range for negotiation, and fact that contract to be awarded may prove unprofitable, although there is no evidence it might, does not justify rejection of otherwise acceptable offer. Evaluation criteria now employed in mess attendant solicitations are intended to advise offerors of exact role manning charts play in evaluation process, and to minimize offers that quote prices that bear no reasonable relation to manning hours offered, and to preclude acceptance of lowest rate per man-hour, rather than lowest overall proposal---------- 204

Warranties
Implied
Disclaimer by contractor

Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact

CONTRACTS—Continued Page
Warranties—Continued
Implied—Continued
Disclaimer by contractor—Continued
offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract 609

Although refusal of GSA to accept proposals of offeror to furnish automatic data processing equipment for Defense user agencies that included disclaimer against implied warranties and liability for consequential damages is matter of procurement policy within discretion of agency, interests of Govt. and its contractors would be better served if Govt.'s position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that policy be further examined, with consideration given to varying extent of contractor liability for consequential damages, and to effect of such variances on cost to Govt. and disposition of firms toward doing business with Govt 613

CORPORATIONS
Corporate entity
Bid under trade name acceptability

The fact that bid of corporation to furnish guard services was submitted under its trade name does not require rejection of bid on basis corporation lacks legal entity since recognized principle is that corporation may conduct business under assumed name, or under name differing from its true corporate name, and in District of Columbia where corporation is located, contract executed in assumed name is valid if unaffected by fraud and, therefore, bid may be considered as being submitted in true name of organization which had corporate entity at time of bid opening 494

Determination

Bidder who was authorized to operate as detective agency at time its bid was submitted and was under consideration for award, and during part of period of its performance of interim guard service pending determination of its "legal entity," but who is not now subject to prohibition against employment by Govt. of detective agencies—prohibition that applies regardless of actual services performed—since its detective agency license has expired, should not be eliminated from consideration for award of proposed service contract, in view of fact that bid describing corporate business of bidder "as guard service to commercial and residential establishments," with no mention of its detective service was made in good faith 494

COURTS
Administrative matters
Expense reimbursement by District of Columbia to United States

The phrase "all other miscellaneous expenses" in sec. 173(b) of District of Columbia Court Reform and Criminal Procedure Act of 1970, which amends act of June 30, 1906, that provided for reimbursing U.S. percentage of expenditures made for expenses of U.S. Dist. Court for

COURTS—Continued Page
Administrative matters—Continued
Expense reimbursement by District of Columbia to United States—Con.
D.C. (47 U.S.C. 204), to prescribe 30-month phaseout period of reimbursement procedure at reduced percentage rates, is construed to include reimbursement for salaries of U.S. District Court Judges, court clerk and other nonjudiciary or support personnel, and magistrates, as well as fees and expenses of court-appointed counsel, and expenses for which funds in judiciary appropriation acts are available, on basis that from 1906 to 1971, D.C. reimbursed U.S. pursuant to 47 D.C. Code 204 and annual judiciary appropriation act provisions, and 1970 act only phased out program 784

Criminal Justice Act of 1964
Proceedings in the District of Columbia courts
Administration and budgeting for programs

Notwithstanding reorganization of local courts in District of Columbia pursuant to D.C. Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91–358), Administrative Office of U.S. Courts should continue to handle administration of, and budgeting for Criminal Justice Act (CJA) program in D.C. courts in same manner as in past and to extent possible as it administers and budgets for programs of Federal district courts, except for D.C. Public Defender Service which is covered by secs. 306 and 307 of Reform Act, and responsibilities of Judicial Conference of U.S. or Administrative Office of U.S. Courts under 28 U.S.C. 604, 605, and 610 remain unchanged with respect to D.C. Superior Court and D.C. Court of Appeals 769

District of Columbia
Superior Court
Criminal Justice Act application

In prosecution of cases brought in District of Columbia Superior Court established by D.C. Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91–358) by merging Court of General Sessions, Juvenile Court, and D.C. Tax Court, which new court was given exclusive jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia," funds appropriated to Federal Judiciary for implementation of Criminal Justice Act (CJA), 18 U.S.C. 3006A, are available to pay attorneys and experts appointed by Superior Court since Pub. L. 91–447 amended CJA by adding subsec. (1) to make CJA applicable to District and, therefore, CJA applies when prosecution is brought in name of U.S. in Superior Court and D.C. Court of Appeals and when counsel is appointed in juvenile proceedings pursuant to 18 U.S.C. 3006A(a) 769

Judgments, decrees, etc.
Judgment of dismissal
Adjudication on the merits

Dismissal by court of complaint requesting both preliminary injuction pending resolution of protest filed with U.S. GAO to award of contract to reproduce research papers for sale to Govt. and public subsequent to cancellation by mutual agreement of contract initially awarded petitioner due to deficiencies in request for proposals (RFP), and permanent injunctive relief that would compel cancellation of contested award and

COURTS—Continued Page
Judgments, decrees, etc.—Continued
Judgement of dismissal—Continued
Adjudication on the merits—Continued
reinstate initial contract was according to Federal Rule of Civil Procedure 41(b) final adjudication on merits that GAO must honor since two issues involved in protest—that resolicitation on basis of price only should have been advertised and not negotiated and that procurement procedures had been violated by calling for best and final offers three times—were adjudicated by court 37

CUSTOMS
Duties
Exemption
Foreign contractor
Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor 195

DEBT COLLECTIONS
Pay withholding
Military personnel. (*See* **Pay, withholding**)
Waiver
Civilian employees
Compensation overpayments
Employee unaware of overpayment
Retroactive adjustment in pay rate of employee who upon reemployment in GS–3 position following resignation from GS–6, step 4, position is placed in step 10 under highest-previous rate rule to step 1 in accordance with administrative regulation restricting use of highest-previous rate rule may not be reversed as appointment to GS–3, step 10, was not administrative waiver of administrative restriction on use of highest-previous rate rule, nor may original pay-setting action be affirmed by a regulating or higher level, since distinctions recognized in 30 Comp. Gen. 492 between statutory and so-called purely administrative regulations no longer apply in view of contrary court cases and fact that B–158880 changed rule in 30 Comp. Gen. 492. However, overpayments received in good faith by employee may be waived under 5 U.S.C. 5584 30

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Military personnel
Property losses

Although involuntary collection from current pay of officers and enlisted men of military department who while assigned to Dept. of Defense agency are held pecuniarily liable for loss, damage, or destruction of Govt. property, even though not accountable for property, is not authorized absent specific statutory authority for setoff since property was not under control of service having jurisdiction of member charged, pursuant to 37 U.S.C. 1007(c) and 1007(e), only pertaining to enlisted members of Army and Air Force, Secretary concerned may promulgate regulations to provide for determination of member's liability, relying on reporting of instrumentality whose property is involved, and for involuntary collection of indebtedness from current pay of member, or may cancel indebtedness pursuant to 10 U.S.C. 4837(d) and 9837(d)

DECEDENTS' ESTATES
Person causing death of decedent
Federal *v.* State law

Husband who entered plea of guilty to first degree manslaughter in connection with death of wife—former Federal employee in State of Ohio—is not entitled to unpaid compensation due decedent. Statute and case law of State which permit payment to husband would prevail only in absence of Federal statute or policy. However, policy governing payment pursuant to 5 U.S.C. 5582, prescribing order of precedence for payment of money due deceased employee, is that payment will not be made to person otherwise entitled if such person participated in death of individual in whose estate he seeks to benefit in absence of evidence establishing that there was no felonious intent on his part. Furthermore, payment may not be made to estate of decedent as there is surviving minor child who is higher in order of precedence 483

DEFENSE DEPARTMENT
Industrial facilities
Disposal

Award of non-set-aside portion of labor surplus area procurement for projectiles to contractor operating Govt-owned facility (GOCO) rather than to contractor owning his facility and utilizing Govt-owned production equipment is not violative of policy to minimize Govt. ownership of industrial facilities stated in Dept. of Defense Directive 4275.5, Nov. 14, 1966, under heading "Industrial Facility Expansion Policy," for although award will keep Govt. facility in existence, no acquisition, expansion, construction, or use of property to increase production is entailed. Furthermore, solicitation provided for participation of GOCO contractors, and approval of accounting procedures, removes possibility of portion of GOCO contractor's cost being allocated to its cost-reimbursable contract with Govt 344

DELEGATION OF AUTHORITY Page

Between agencies

Automatic data processing equipment

Regulations controlling purchase

Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR) promulgated by GSA to coordinate and provide for economic and efficient purchase of ADPE systems or units and, therefore, procurement of ADP equipment by Army Corps of Engineers delegated authority subject to provisions of FPMR, particularly late proposals and modifications provision—authority redelegated to District Engineer—is not governed by Armed Services Procurement Reg., and District Engineer vested with all authority and responsibility usual to position of contracting officer, with exception of choosing successful offeror, having issued request for proposals that failed to incorporate late proposal and modification requirement of FPMR, properly canceled request ---------- 457

Heads of agencies to subordinates

Expenditure approval

Training programs

Authority to approve for payment on individual basis expenditures that are incurred in administration of training program established by Selective Service System pursuant to Govt. Employees Training Act (5 U.S.C. 4101–4118), and to establish criteria for payment, may be delegated by Director of Selective Service, and directive to this effect issued, notwithstanding neither language of Training Act nor implementing regulations do not expressly provide for delegation since secs. 4103, 4109(a), and 4105(c) of Title 5, U.S. Code, in assigning to agency heads responsibility for establishment of training programs and for oversight of such programs sanction delegation of authority by agency heads in connection with development and conduct of agency training programs ---------- 777

DEPARTMENTS AND ESTABLISHMENTS

Management

General Accounting Office recommendation compliance

Recommendation for corrective procurement action in decision of Comptroller General, copy of which was furnished congressional committees named in sec. 232 of Legislative Reorganization Act of 1970, requires, pursuant to sec. 236, contracting agency involved to submit written statements of action taken on recommendation to House and Senate Committees on Govt. Operations not later than 60 days after date of recommendation, and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation ---------- 293

DEPARTMENTS AND ESTABLISHMENTS—Continued Page

Regulations. (*See* **Regulations**)

Services between

Appropriation obligation

Funds transferred for training personnel

Agreement of June 4, 1971, by which funds were transferred by HEW to FAA to provide training from June 7, 1971, to June 7, 1972, for air traffic control trainees pursuant to sec. 303(a) of Manpower Development and Training Act of 1962, as amended, 42 U.S.C. 2613(a), which authority terminates June 30, 1972, is agreement that was authorized independently of sec. 601 of Economy Act since sec. 306(a) of Manpower Act provides for making of contracts and agreements, and training agreement having been entered into prior to June 30, 1971, meets obligation requirement of sec. 1311 of Supplemental Appropriation Act, 31 U.S.C. 200, and, therefore, transferred funds remain available for further obligation by FAA in accordance with agreement within time limits of Manpower Development and Training Act---------- 766

Services to States, etc.

Training employees

State and local government employees who are admitted to Federal training programs established by Federal agencies to train Govt. professional, administrative, and technical personnel pursuant to sec. 302 of Intergovernmental Personnel Act of 1970 (Pub. L. 91–648, approved Jan. 5, 1971) may not be reimbursed travel and subsistence expenses incurred incident to such training since undefined term "cost of training" in sec. 302, given its usual and ordinary meaning does not authorize Federal agency to pay travel and subsistence expenses of State and local government employees admitted to Federal training programs---------- 185

DETAILS

Military personnel

Civilian duty

Travel funds advanced recovery

Unaccounted travel funds advanced by Federal Aviation Administration to members of Armed Forces detailed to Dept. of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from retired pay of members indebted for outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding debt arose in other than military department, as detailed member remains member of Armed Forces subject to recall to duty, and since his paramount obligation is to military, his pay and allowances are subject to military laws and regulations, and indebtedness of each individual should be referred to appropriate military department for collection---------- 303

DETECTIVE SERVICES

Employment prohibition. (*See* **Personal Services, detective employment prohibition**)

DISASTER RELIEF Page

Agency participation

Reimbursement

Practice of Office of Emergency Preparedness (OEP) in calling upon Federal agencies to provide relief assistance pursuant to Disaster Relief Act of 1970 (42 U.S.C. 4401 *et seq.*) from their own funds pending reimbursement from funds appropriated to President's disaster fund or directly to performing agency is within scope of act. Not only is Congress well aware of practice, but sec. 203(f) of act provides for President to direct any Federal agency, with or without reimbursement, to provide disaster assistance—authority similar to that in repealed 1950 act, prescribing "such reimbursement to be in such amounts as President may deem appropriate"—and President having delegated his authority to Director of OEP by E.O. 11575, Federal agencies may be assigned to provide assistance without prior advance of funds from OEP---------- 245

DISCHARGES AND DISMISSALS

Military personnel

Probationary period

Severance pay entitlement

Regular Army officer with less than 3 years of service who was recommended for elimination under sec. IX, Ch. 5, AR 635–100, because of substandard performance of duty properly was discharged without severance pay since officer was not discharged under 10 U.S.C. Ch. 359—secs. 3781–3787—and, therefore, sec. 3781 prescribing that board of officers may be convened to review record of officer to determine if he should be eliminated or required to show cause for his retention on active list is not for application and officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while officer is in probationary status with less than 3 years' service, and par. 10–3b, AR 635–120, indicating to contrary should be clarified---------- 81

DISTRICT OF COLUMBIA

Bar associations

Unified bar

Membership dues

Membership dues assessed by unified bar for District of Columbia (D.C.) on Govt. attorneys who are members of D.C. bar are personal expenses that are not payable from appropriated funds. Therefore, since only those attorneys of U.S. Patent Office who are members of D.C. bar are subject to dues of unified bar to be permitted to appear in U.S. District Court for D.C., Court of Appeals for that circuit, and U.S. Court of Customs and Patent Appeals, those attorneys who are not members of D.C. bar, may without payment of dues to unified bar appear before U.S. District Court for D.C. in those cases in which U.S. is party, and if admitted to practice before highest court of any State, may be admitted to practice before U.S. Court of Appeals, U.S. Court of Claims, and U.S. Court of Customs and Patent Appeals---------- 701

DISTRICT OF COLUMBIA—Continued Page
Bar associations—Continued
Unified bar—Continued
Membership dues—Continued

Since authority of U.S. GAO to issue advance decisions to certifying officers is limited to questions involved in specific vouchers presented to them for certification, question of whether appropriated funds may be used to pay membership dues to unified bar of District of Columbia presented by certifying officer must be treated as request for decision from head of agency under 31 U.S.C. 74, and reply directed to him..... 701

Courts
Expense reimbursement to United States

The phrase "all other miscellaneous expenses" in sec. 173(b) of District of Columbia Court Reform and Criminal Procedure Act of 1970, which amends act of June 30, 1906, that provided for reimbursing U.S. percentage of expenditures made for expenses of U.S. Dist. Court for D.C. (47 U.S.C. 204), to prescribe 30-month phaseout period of reimbursement procedure at reduced percentage rates, is construed to include reimbursement for salaries of U.S. District Court Judges, court clerk and other nonjudiciary or support personnel, and magistrates, as well as fees and expenses of court-appointed counsel, and expenses for which funds in judiciary appropriation acts are available, on basis that from 1906 to 1971, D.C. reimbursed U.S. pursuant to 47 D.C. Code 204 and annual judiciary appropriation act provisions, and 1970 act only phased out program..... 784

Reorganization
District of Columbia Court Reform and Criminal Procedure Act of 1970
Effect on application of the Criminal Justice Act

In prosecution of cases brought in District of Columbia Superior Court established by D.C. Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91-358) by merging Court of General Sessions, Juvenile Court, and D.C. Tax Court, which new court was given exclusive jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia," funds appropriated to Federal Judiciary for implementation of Criminal Justice Act (CJA), 18 U.S.C. 3006A, are available to pay attorneys and experts appointed by Superior Court since Pub. L. 91-447 amended CJA by adding subsec. (1) to make CJA applicable to District and, therefore, CJA applies when prosecution is brought in name of U.S. in Superior Court and D.C. Court of Appeals and when counsel is appointed in juvenile proceedings pursuant to 18 U.S.C. 3006A(a)... 769

DOCUMENTS
Incorporation by reference
Requests for proposals

Although all pertinent portions of work study report used in preparation of request for proposals (RFP) for data base management system should have been physically included in RFP for sake of clarity since RFP incorporated report by reference as well as apprising offerors of procurement requirements, time to question adequacy of evaluation criteria and their importance was prior to proposal submission. Further-

DOCUMENTS—Continued Page
Incorporation by reference—Continued
Requests for proposals—Continued
more, on basis of cost effectiveness formula in report, use of operation and maintenance costs computed on 5-year cycle to determine most advantageous proposal in competitive range, procedure that is *per se* acceptable if such costs are reasonable, was proper, even though operation and maintenance costs were incapable of precise assessment and were only projected costs 102

ECONOMIC STABILIZATION ACT OF 1970
Cost-of-living stabilization
Military pay increases

When in adjustment of retired or retainer pay under 10 U.S.C. 1401a to reflect Consumer Price Index cost-of-living increase effective June 1, 1971, higher retired rate results for members retired on or prior to Sept. 30, 1971, computed at rates in E.O. 11577, dated Jan. 1, 1971, than for members retiring on or after Oct. 1, 1971, whose retired pay is for computation at rates in Pub. L. 92–129, effective Oct. 1, 1971, because of new rates prescribed by public law and exemption of military personnel placed in retired status during wage/price freeze period imposed by E.O. 11615, dated Aug. 15, 1971, issued under Economic Stabilization Act of 1970, pursuant to 10 U.S.C. 1401a(e), pay of member retired after Sept. 30, 1971, may not be less than if he had retired on that date.. 384

Federal employees
Wage freeze
Adjustment

Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3) (A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases 525

EDUCATION
Marine Corps Associate Degree Completion Program
Requirements

Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously

EDUCATION—Continued Page
Marine Corps Associate Degree Completion Program—Continued
Requirements—Continued
approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program 3

ENTERTAINMENT
Music
Propriety of contract to furnish
Expenditures for incentive-type music scientifically programmed, such as MUZAK system, may be considered "necessary expenses" since music tends to raise level of employee morale and increase employee productivity by creating pleasantly stimulating and efficient work atmosphere that results in savings to Govt. and, therefore, funds appropriated to Bureau of Public Debt, Treasury Dept., may be used to make monthly rental payments to MUZAK Company for incentive-type music played in space occupied by Bureau in privately owned building, which space was equipped with MUZAK system prior to occupation by Bureau. B–86148, dated Nov. 8, 1950, overruled 797

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

EQUIPMENT
Automatic Data Processing Systems
Selection and purchases
By other than General Services Administration
Applicability of General Services Administration regulations
Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR) promulgated by GSA to coordinate and provide for economic and efficient purchase of ADPE systems or units and, therefore, procurement of ADP equipment by Army Corps of Engineers delegated authority subject to provisions of FPMR, particularly late proposals and modifications provision—authority redelegated to District Engineer—is not governed by Armed Services Procurement Reg., and District Engineer vested with all authority and responsibility usual to position of contracting officer, with exception of choosing successful offeror, having issued request for proposals that failed to incorporate late proposal and modification requirement of FPMR, properly canceled request 457

EQUIPMENT—Continued Page

Automatic Data Processing Systems—Continued

Selection and purchases—Continued

Negotiation procedures

Although all pertinent portions of work study report used in preparation of request for proposals (RFP) for data base management system should have been physically included in RFP for sake of clarity since RFP incorporated report by reference as well as apprising offerors of procurement requirements, time to question adequacy of evaluation criteria and their importance was prior to proposal submission. Furthermore, on basis of cost effectiveness formula in report, use of operation and maintenance costs computed on 5-year cycle to determine most advantageous proposal in competitive range, procedure that is *per se* acceptable if such costs are reasonable, was proper, even though operation and maintenance costs were incapable of precise assessment and were only projected costs---------- 102

Warranties and damages

Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract---------- 609

Although refusal of GSA to accept proposals of offeror to furnish automatic data processing equipment for Defense user agencies that included disclaimer against implied warranties and liability for consequential damages is matter of procurement policy within discretion of agency, interests of Govt. and its contractors would be better served if Govt.'s position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that policy be further examined, with consideration given to varying extent of contractor liability for consequential damages, and to effect of such variances on cost to Govt. and disposition of firms toward doing business with Govt---------- 615

EXPERTS AND CONSULTANTS

Compensation

Aggregate limitation

Members of National Advisory Committee established by sec. 7(a) of Occupational Safety and Health Act of 1970, which provides for members to be compensated in accordance with 5 U.S.C. 3109, may not be paid salaries in excess of rates prescribed for grade GS–15 since sec. 3109 limits payment to experts and consultants to per diem equivalent of highest rate payable under General Schedule salary rates established

EXPERTS AND CONSULTANTS—Continued Page
Compensation—Continued
Aggregate limitation—Continued
for Federal employees. Experts and consultants of advisory committees, appointed under sec. 7(b) to assist in standard setting functions, for whom sec. 7(c)(2) prescribes grade GS–18, may not be paid in excess of grade GS–15, unless they qualify under rule in 43 Comp. Gen. 509, to effect that exception to grade GS–15 limitation may be made only when limitation on number of positions authorized for grade GS–18 is removed ---------- 224

Retired member of the uniformed services

Retired Air Force major employed by two Govt. agencies as civilian consultant under excepted appointments—Intermittent—1-year appointment in fiscal year 1969, which was extended for year, and another appointment in fiscal year 1970 with no time limitation, would if only one appointment were involved be entitled pursuant to Dual Compensation Act of 1964, 5 U.S.C. 5532, to exemption from reduction of retired pay for no more than first 30-day period for which he received compensation as expert regardless of fiscal year in which appointment was made or services performed. However, where two or more appointments are involved, exemption applies to first 30 days of work in each fiscal year during which retired officer received civilian pay, but officer having worked less than 30 days under both appointments in each fiscal year is not subject to reduction of retired pay ---------- 189

FAMILY ALLOWANCES
Separation
Type 2
Common residence
Management and control by member

Restriction on payment of Type II family separation allowance (FSA–II) of $30 per month authorized by 37 U.S.C. 427(b) to cases where primary dependents of member of uniformed services are living in residence subject to member's management and control and which he will share with them as common residence during such time as duty assignments permit having been removed by Pub. L. 91–529, amending sec. 427(b), FSA–II is payable regardless of residence of primary dependents if separation is result of member's military orders. To extent par. 30311a of Dept. of Defense Military Pay and Allowances Entitlements Manual prescribing member is not member with dependents for FSA–II entitlement when "the sole dependent resides in a hospital, school, or institution" provides otherwise it is more restrictive than law. 47 Comp. Gen. 431 overruled ---------- 97

Wife also member of uniformed services

Member of uniformed services with no dependents, as his wife, his only dependent, is also member of service on active duty is not entitled to family separation allowance (FSA–II) provided by 37 U.S.C. 427(b) because, notwithstanding elimination from section pursuant to Pub. L. 91–533 of qualifying language for entitlement to FSA–II of phrase "who is entitled to a basic allowance for quarters," prohibition in 37 U.S.C. 420 against increasing member's allowance on account of dependent

FAMILY ALLOWANCES—Continued Page
Separation—Continued
Type 2—Continued
Wife also member of uniformed services—Continued
entitled to basic pay under 37 U.S.C. 204 precludes payment of FSA–II, since in view of similarity of family separation allowance to basic allowance for quarters, rules denying increased quarters allowance to member whose spouse, his sole dependent, is also entitled to active pay is for application in determining entitlement to family separation allowance.. 116

FEDERAL AVIATION ADMINISTRATION
Sky marshals
Military personnel detailed
Travel funds advanced recovery
Unaccounted travel funds advanced by Federal Aviation Administration to members of Armed Forces detailed to Dept. of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from retired pay of members indebted for outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding debt arose in other than military department, as detailed member remains member of Armed Forces subject to recall to duty and since his paramount obligation is to military, his pay and allowances are subject to military laws and regulations, and indebtedness of each individual should be referred to appropriate military department for collection.. 303

FEDERAL GRANTS, ETC., TO OTHER THAN STATES (*See* **Funds**)
FEDERAL TORT CLAIMS ACT MATTERS
(*See* **Torts, claims under Federal Tort Claims Act**)

FEES
Attorneys
Bar membership
Government attorneys
Membership dues assessed by unified bar for District of Columbia (D.C.) on Govt. attorneys who are members of D.C. bar are personal expenses that are not payable from appropriated funds. Therefore, since only those attorneys of U.S. Patent Office who are members of D.C. bar are subject to dues of unified bar to be permitted to appear in U.S. District Court for D.C., Court of Appeals for that circuit, and U.S. Court of Customs and Patent Appeals, those attorneys who are not members of D.C. bar, may without payment of dues to unified bar appear before U.S. District Court for D.C. in those cases in which U.S. is party, and if admitted to practice before highest court of any State, may be admitted to practice before U.S. Court of Appeals, U.S. Court of Claims, and U.S. Court of Customs and Patent Appeals..... 701

Parking
Government-owned vehicles
Parking tax
The 25 percent tax imposed on rents charged for occupancy of parking space in parking stations which was paid by employee for parking Govt. vehicle while on official business may not be reimbursed to employee as incidence of tax falls directly on Govt. as lessee and under its consti-

FEES—Continued Page
Parking—Continued
Government-owned vehicles—Continued
Parking tax—Continued
tutional prerogative, Govt. is entitled to rent or lease parking space free from payment of tax and employee was not required to pay tax. Municipal Code imposing tax exempts U.S. if payment is made by Govt. check, but it is not feasible for employee operating Govt. vehicle on official business to pay for parking by Govt. check. However, since Govt.'s immunity does not extend to employee when he operates his own vehicle on official business, he may be reimbursed tax under 5 U.S.C. 5704 as part of parking cost. Modified by 52 C.G. __ (B–174213, Aug. 14, 1972)---- 367

Space on a monthly basis
Official and personal use
When employee occasionally uses his privately owned automobile on official business, pro rata reimbursable cost to Govt. for weekly or monthly parking fees paid by employee may be computed on basis of number of days space is available to him during period for which rental is paid. Use of 31-day base in 47 Comp. Gen. 219 in computing Govt.'s pro rata share for monthly cost of parking fees did not consider that under monthly parking rate agreement, parking is not available on weekends or holidays---- 79

FOREIGN GOVERNMENTS
Employment of United States Government retirees
Public Health Service commissioned officers
Retired member of Regular component of Commissioned Corps of Public Health Service who notified Service of intent to accept employment with Canadian Dept. of Agriculture and inquired whether his retired pay would be affected if he became Canadian citizen is not eligible to receive retired pay unless his employment is approved by Congress, by virtue of Art. I, Sec. 9, Cl. 8 of U.S. Constitution and E.O. 5221, although in view of B–51184, Aug. 2, 1945, he may retain payments made. Status of officers of Commissioned Corps of PHS is like that held by Regular commissioned officers of armed services who are subject to constitutional provision and, therefore, pursuant to 44 Comp. Gen. 130, PHS officer may not receive retired pay while employed by Canadian Govt. without congressional consent. B–51184, Aug. 2, 1945, overruled---- 780

Executive agreements
Procurement
Norway
Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d,

FOREIGN GOVERNMENTS—Continued Page
Executive agreements—Continued
Procurement—Continued
Norway—Continued

and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor 195

Nationals
Employment by United States
Under governmental agreement

To give effect to agreement between Govt. of U.S. and Republic of Philippines relating to Employment of Philippine Nationals in U.S. Military Bases in Philippines, Filipino employees transferred among nonappropriated and appropriated fund positions may retain their seniority, which will encompass leave accumulations, length of service for end of year bonuses, severance pay, and lump-sum payment in lieu of retirement annuity, since agreement provides that uniform personnel policies and administration apply equally to all employees "regardless of nationality and sources of funds used," and 22 U.S.C. 889 does not require compensation plans for aliens to be limited by laws and regulations applicable to civil service employees. Therefore, to implement agreement, U.S. may be considered as one employer with no distinction between service under nonappropriated or appropriated fund activities 123

FOREIGN MATTERS GENERALLY
Training Government employees overseas
Subversive activities determination

In making determination whether prohibition in 5 U.S.C. 4107(a) against training of employees by, in, or through non-Govt. facility which teaches or advocates overthrow of Govt. of U.S. by force or violence; or by or through individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, DOD may delegate authority granted agency heads by E.O. 11348, dated Apr. 20, 1967, to determine eligibility of foreign government or international organization to provide training to major theatre or local commander, subject to consultation with Dept. of State and other appropriate Federal agencies in area, and may also provide that eligibility of noncitizens may be determined from security files in local or theatre level since applying procedures in 5 CFR 410.504 to determine security eligibility in the U.S. would be ineffective 199

FORMS
Bid. (*See* **Bids, bid forms**)
Deviations
Waiver

Use of annual bid bond that is applicable to supplies and services which low bidder has on file with contracting agency in procurement of hydrogenerator to be installed and tested in lieu of payment and performance bonds specified in invitation for bids—bonds generally required only on contracts involving construction as opposed to contracts for

FORMS—Continued Page
Deviations—Continued
Waiver—Continued

supplies and services—is approved as being legally sufficient to obligate surety as contract contemplated consisting of only 25 percent construction falls within meaning of supply and service contract contained in sec. 1–12.402–1(a), FPR, and sec. 1–12.402–2 prescribes that labor standards need not apply to contracts predominantly for nonconstruction work. Furthermore, failure of bidder to use proper Standard Form 34, where difference in forms is not one of substance, may be waived as minor informality pursuant to FPR 1–2.405 ---------- 822

Standard forms
Erroneous use
"Second guess" effect

In issuing request for quotations, since use of Standard Form 18, which contained inconsistent and misleading provisions, instead of Form 33, was cause for rejection of low proposal on basis of failure to confirm that low quotation was firm offer and failure to submit revised proposal, use of form in absence of substantive reasons, even though authorized by par. 16–102.1(b)(1) of Armed Services Procurement Reg., is not required. To avoid placing prospective contractors in position to "second guess" whether solicitation was requesting quotation or firm offer, Standard Form 33 should be used in future procurements thereby eliminating that prospective contractors go through additional step of confirming that their initial proposals are firm offers ---------- 305

FUNDS
Advance
Agency program participation without advance of funds

Practice of Office of Emergency Preparedness (OEP) in calling upon Federal agencies to provide relief assistance pursuant to Disaster Relief Act of 1970 (42 U.S.C. 4401 *et seq.*) from their own funds pending reimbursement from funds appropriated to President's disaster fund or directly to performing agency is within scope of act. Not only is Congress well aware of practice, but sec. 203(f) of act provides for President to direct any Federal agency, with or without reimbursement, to provide disaster assistance—authority similar to that in repealed 1950 act, prescribing "such reimbursement to be in such amounts as President may deem appropriate"—and President having delegated his authority to Director of OEP by E.O. 11575, Federal agencies may be assigned to provide assistance without prior advance of funds from OEP ---------- 245

Appropriated. (*See* Appropriations)
Federal grants, etc., to other than States
Educational grants
More than one
Prohibition

Recipient of Social and Rehabilitation Service (SRS) research fellowship grant upon receiving award of Special Nurse Fellowship grant became ineligible for SRS fellowship under SRS regulations, which prohibit receipt of any other Federal educational benefits during period

FUNDS—Continued Page

Federal grants, etc., to other than States—Continued

Educational grants—Continued

More than one—Continued

Prohibition—Continued

of SRS fellowship, and regulation issued under authority in 29 U.S.C. 37(b) is statutory regulation that has force and effect of law, and regulation having been published in Federal Register, as well as CFR (45 CFR 405.31), recipient is charged with knowledge of prohibition against receiving two Federal educational benefits and there is no basis for waiving recovery of SRS grant 162

Miscellaneous receipts. (*See* **Miscellaneous Receipts**)

Revolving

Appropriation obligation reporting

Since requirement of sec. 1311 of Supplemental Appropriation Act of 1955, as amended, (31 U.S.C. 200), that recording of obligation must be supported by documents applies more readily to 1-year or multi-year appropriations, SBA whose financial transactions involve loans from Business Loan and Investment Fund and Disaster Loan Fund—both revolving funds, appropriations which remain available until expended—may adopt reporting system that departs from exact obligation basis if specific nature of such reporting is disclosed to all appropriate budgetary authorities. Recognizing distinctions between loans, reports on guaranty loans may be made on commitment basis, on computed basis for obligation estimates, and on direct participation loans, and reports should include obligation statements 631

Trust

Creation of trust

Prohibition

Annuity payments

Creation of trust to receive annuity payments made under Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. 1431–1446, is not legally permissible since sec. 1435 describes eligible beneficiaries as spouse or children, and sec. 1440 provides that annuity elected by member of armed services is not assignable or subject to execution, levy, attachment, garnishment, or other legal process. Therefore, widow receiving RSFPP annuity payments may not retain both legal and equitable ownership by executing Living Trust Agreement appointing herself as trustee or a bank in the event of her incompetency; annuities for a child or children in accord with DOD Dir. 1332.17 may only be paid to guardian or person who has care, custody, and control of child or children; and only payments to a duly appointed legal representative will discharge the Govt.'s liability 437

GENERAL ACCOUNTING OFFICE

Decisions

Advance

Disbursing and certifying officers

Questions not on voucher

Since authority of U.S. GAO to issue advance decisions to certifying officers is limited to questions involved in specific vouchers presented to

GENERAL ACCOUNTING OFFICE—Continued Page
Decisions—Continued
Advance—Continued
Disbursing and certifying officers—Continued
Questions not on voucher—Continued
them for certification, question of whether appropriated funds may be used to pay membership dues to unified bar of District of Columbia presented by certifying officer must be treated as request for decision from head of agency under 31 U.S.C. 74, and reply directed to him---- 701

Requests
Paid voucher
Where request for decision on propriety of payment made is submitted by official whose status as certifying officer authorized to submit to Comptroller General question of law involved in payment on specific voucher presented to him for certification prior to payment, which voucher must accompany submission, is doubtful and, normally, payment having been made, such request would not be considered, since problem presented is of recurring nature, decision requested was addressed to head of department concerned under broad authority in 31 U.S.C. 74, pursuant to which decisions are rendered to heads of departments on any question involved in payments which may be made by department---- 79

Informal opinion
Not a legal precedent
An informal opinion to Navy member who was not entitled to decision that erroneously informed him as to his entitlement to transportation at Govt. expense of dependent acquired during his return travel from restricted overseas area to U.S. incident to his transfer to Fleet Reserve has no legal effect as precedent and should not be used as authority in similar cases---- 485

Jurisdiction
Bids
Error allegation review
Award of construction contract to low bidder who withdrew allegation of error, confirmed original bid price, and requested award on basis of its low submitted bid is proper where submitted worksheets do not support error alleged or establish intended bid price was something other than amount bid and, therefore, error alleged is considered judgmental error that may not be corrected or serve as basis for withdrawal of bid. Furthermore, low bidder in confirming its bid price, waived under-addition error found by contracting officer, and no other error having been alleged by bidder, U.S. GAO will not conduct complete review of workpapers, for any discrepancies that may be found would not establish errors if bidder contended otherwise---- 18

GENERAL ACCOUNTING OFFICE—Continued Page

Jurisdiction—Continued

Civil service matters

Postal service

In establishing permanent pay schedule for Postal Rate Commission employees exempted from General Schedule Pay Rates of Title 5 by 5 U.S.C. 2104(b) and 2105(e), Commission is, pursuant to 39 U.S.C. 3604(b), required to follow appropriate compensation rates established by Postal Service under ch. 10 of Title 39, notwithstanding sec. 3604(d) appears to give Commission independent authority as sec. 3604(d) does not supersede sec. 3604(b). However, sec. 3604(d) makes 39 U.S.C. 410(a) applicable to Commission to effect "No Federal law dealing with public or Federal contracts, property, work, officers, employees, budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service" and, therefore, the Commission and not U.S. GAO is vested with authority to make final determination as to applicability of ch. 10 of Title 39 to Commission 395

Contracts

Labor stipulations

Davis-Bacon Act

In dispute concerning wages paid for placing and puddling concrete in which fiber duct pipe was encased, where wage rate determination incorporated in contract only listed "concrete puddler," and invitation had not indicated any other rate was to be paid for fiber duct encased concrete, request by contracting agency for information that would indicate substantial area practice of using concrete puddlers for encasing fiber duct in concrete at rates specified in wage determination was in accord with decisions of Comptroller General and, although Secretary of Labor's function under Davis-Bacon Act, 40 U.S.C. 276a, generally is exhausted when wage determination is furnished, contract provided for referral to Secretary of classification disagreements and, therefore, new evidence of local area practices may not be considered by GAO. 50 Comp. Gen. 103, holding contractor liable for Davis-Bacon Act violations, is affirmed 42

Small business matters

Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solicited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA 448

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Contracts—Continued
Specification evaluation

Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to U.S. GAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular features listed in invitation overstated Govt's needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique---------- 237

Subcontractors' claims

Unless prime contractor is acting as purchasing agent, bid protest procedures of U.S. GAO do not provide for adjudication of protests against subcontract awards made by prime contractors. Furthermore, where award of subcontract has been made and neither fraud nor bad faith on part of contracting officer in approving award is alleged, possibility of finding adequate justification to support cancellation of subcontract is so remote that consideration of such protests under GAO's bid protest procedures would be unwarranted. However, in audit of prime contract, attention will be given to any evidence indicating cost to Govt. was unduly increased because of improper procurement actions by prime contractor. Furthermore, when prime contractor is not acting as Govt. agent, bid preparation expenses of subcontractor are not reimbursable---------- 803

Protests
Contracts. (*See* Contracts, protests)
Recommendations
Implementation

Recommendation for corrective procurement action in decision of Comptroller General, copy of which was furnished congressional committees named in sec. 232 of Legislative Reorganization Act of 1970, requires, pursuant to sec. 236, contracting agency involved to submit written statements of action taken on recommendation to House and Senate Committees on Govt. Operations not later than 60 days after date of recommendation, and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation---------- 293

IFB to procure legal information retrieval data base which, because it did not clearly indicate whether photocomposition, Linotron 1010 system, or master typography program was to be furnished, was ambiguous IFB inadequate to secure necessary pricing for competitive bid evaluation purposes, and lack of clarity having generated number of oral requests for explanation, amendment pursuant to sec. 1-2.207(d)

GENERAL ACCOUNTING OFFICE—Continued Page
Recommendations—Continued
Implementation—Continued
of FPR should have been issued. Therefore, contract awarded should be terminated for convenience of Govt. as award was not in accord with reasonable interpretation of IFB and procurement resolicited. Pursuant to Pub. L. 91–510, action taken on this recommendation should be sent to Senate and House Committees on Govt. Operations within 60 days 635
Recommendation for corrective action—termination of contract for convenience of Govt. and award to low, responsive bidder—required contracting agency under sec. 232 of Legislative Reorganization Act of 1970, Pub. L. 91–510, to submit written statements of action taken with respect to recommendation to House and Senate Committees on Govt. Operations not later than 60 days after date of recommendation, and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation 792
Settlements
Time limitation
Claim submitted by Western Union Telegraph Company within 10-year limitation period for filing claims with U.S. GAO for services denied administratively on basis claim was barred by 1-year limitation of action provision in Communications Act, 47 U.S.C. 415(a), is cognizable under 31 U.S.C. 71 and 236, as time limitations for commencement of "actions at law" prescribed by Communications Act and Interstate Commerce Act do not affect jurisdiction of GAO unless specifically provided by statute, and 3-year limitation for filing transportation claims with GAO prescribed by sec. 322 of Transportation Act, as amended, 49 U.S.C. 66, does not affect right of firms providing service under Communications Act to have their claims considered by GAO if presented within 10 full years after dates on which claims first accrued 20
GRANTS
To other than States. (*See* Funds, Federal grants, etc., to other than States)
To States. (*See* States, Federal aid, grants, etc.)
GRATUITIES
Reenlistment bonus
Critical military skills
Conditions to qualify for initial entitlement
Sergeant first class who had 1 year, 1 month, and 28 days of enlisted active duty prior to 17 years of commissioned service, upon termination of which he immediately reenlisted for 3 years in grade E–7 and was paid first reenlistment bonus pursuant to 37 U.S.C. 308(d), does not qualify for payment of variable reenlistment bonus prescribed by 37 U.S.C. 308(g), for not only does he not meet requirement that he must have served at least 21 months of enlisted active service, he does not as former officer reenlisting in service satisfy requirement that he possess critical skill that service does not want to lose, which is sole purpose of inducing first-term enlisted members to reenlist by offering them variable reenlistment bonus 261

GRATUITIES—Continued Page
Reenlistment bonus—Continued
Critical military skills—Continued
Reenlistment for purpose of college training

Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program--- 3

GUAM
Airport development project
Land title

Grant under Airport and Airway Development Act of 1970 (49 U.S.C. 1701 *et seq.*) to fund air station in Guam for both civil and military use pursuant to joint-use agreement between Dept. of Navy and Territory of Guam where landing area is owned by U.S. Govt., excluded by act from sponsoring airport development, which pursuant to sec. 16(c)(1) of act may only be approved if "public agency" holds good title to landing area, may be approved by Secretary of Transportation, provided he determines grant will effectuate purpose of act, on basis joint-use agreement will give Guam "good title" and, moreover, legislation has been introduced to clarify grant assistance where landing area is owned by U.S.---------- 627

HOLIDAYS
Days in lieu of
Inauguration Day

Fact that Inauguration Day, January 20 of each fourth year after 1965 is prescribed in 5 U.S.C. 6103(c) as legal public holiday for Federal employees in the District of Columbia and specified adjacent areas does not require regarding Friday, Jan. 19, 1973, as legal holiday for purposes of 5 U.S.C. 6103(b), which substitutes other days as legal holidays for purpose of statutes relating to pay and leave of Federal employees for those holidays enumerated in 5 U.S.C. 6103(a) that fall on nonworkdays, such as the Friday immediately before a Saturday holiday. Not only does the listing of public holidays in sec. 6103(a) not include Inauguration Day, legislative history of subsec. (c) indicates no additional legal holiday was intended and that only the working situation of employees around metropolitan area of District of Columbia would be affected---------- 586

HOUSING Page

Displacement

Relocation costs

Trailer park tenants notified to vacate only after Govt. signed agreement to lease building to be constructed on vacated land, are "displaced persons" as result of Federal and federally assisted programs within contemplation of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and tenants are entitled to relocation expenses and assistance under act since lease transaction amounts, in effect, to Federal lease-construction project, even though five-point criteria established to determine building is "in existence"—title; design; construction financing; building permit; and fixed completion date—to assure compliance with appropriation prohibition concerning payment of rental on lease agreements for space in buildings erected for Govt., had not been met, financing arrangement not having been completed as of date of issuance of space solicitation---------- 660

Loans

Maturity date of loan

Extension

Refinancing of note *v.* date violation

Loss sustained by Employees Credit Union on note insured under title I of National Housing Act (12 U.S.C. 1701, *et seq.*), note which when payments were reduced extended maturity of loan beyond 5 years and 32 days prescribed by act, is reimbursable if time extension of original note is not considered a violation of maturity date limitation but as a refinancing of loan within purview of sec. 2(b) of act. Therefore, upon reconsideration if it is determined a refinancing rather than a violation of maturity limitation was involved, payment of loss may be certified upon waiver pursuant to sec. 2(e) of act of any noncompliance with regulations applicable to refinancing---------- 222

"Turnkey" developers

Contracts

Negotiation procedures

Although negotiation of turnkey construction contracts for military family housing under 10 U.S.C. 2304(a)(10) and par. 3-210.2(xiii) of Armed Services Procurement Reg. which authorize negotiation when it is impracticable to obtain competition or impossible to draft specifications was necessary because impossibility of drafting adequate specifications is inherent in "turnkey" concept that permits housing developer to use his own architect, future procurements by same method should, in addition to identifying technical criteria for each turnkey project, indicate relative importance of each evaluation factor, and when using "best value formula" evaluation, Govt. should determine that its actual requirements were met, and if those requirements become definitized during course of negotiations, all offerors in competitive range must be given opportunity to submit revised proposals---------- 129

HOUSING AND URBAN DEVELOPMENT DEPARTMENT Page

Urban redevelopment projects

Relocation allowances and assistance

Although Dept. of Housing and Urban Development must amend project grants, contracts, and agreements with State agencies entered into prior to Jan. 2, 1971, effective date of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, in order to comply with title II of act which provides for relocation allowances and assistance to persons displaced by Federal and federally assisted programs on or after Jan. 2, 1971, including persons whose displacement was delayed until July 1, 1972, pursuant to sec. 221(b), cost-sharing requirements of sec. 211(a) do not apply since sec. 211(c) providing for amendment of programs to implement relocation assistance does not include sec. 211(a), and pursuant to sec. 220(a), repeal of Housing Act of 1949, as amended, does not affect 100 percent existing Federal liability for relocation costs. 267

HUSBAND AND WIFE

Divorce

Check issuance to co-payees

Negotiation of joint income tax refund checks issued in names of divorced couple on basis of joint income tax return by claimant's former wife, without his knowledge or permission, did not extinguish liability of U.S. or pass title to endorsing bank, who therefore is subject to reclamation proceedings, as, absent statute or court decision to contrary, joint payees may not be considered as one person or entity so that endorsements of both were required for negotiation of checks. Moreover, Uniform Commercial Code requires all joint payees must endorse and discharge negotiable instrument; and while code is not necessarily determinative with respect to Govt. checks, it should be followed to maximum extent practicable in interest of uniformity where it is not inconsistent with Federal interest, law, or court decisions. 50 Comp. Gen. 441 modified 668

INSURANCE

Damage and loss claims

Effective date of insurance

Crop insurance contracts to cover freezing losses which were made effective by Federal Crop Insurance Corp. pursuant to 7 CFR 409.25 as of November 1, under the mistaken belief freezing weather would not occur earlier, may be modified to permit payment for crop damage resulting from freeze on October 30 and 31, on the basis of mutual mistake—a rule applicable to future as well as past events—since contracts did not reflect intention of parties to accomplish objective of providing crop insurance coverage for period of possible freeze. Furthermore, administrative delay in accepting timely filed applications for insurance until after several freezes had injured crops should not deprive applicants of insurance coverage, and Corporation failing to act within reasonable time has authority under 7 U.S.C. 1506(i) to take corrective action 617

INTEREST Page

Payment delay

Contracts

The rule of long standing that interest may not be paid by Govt. in absence of express statutory provision or lawful contract will no longer be followed since there is no statute prohibiting payment of interest under contractual provisions, and such provisions will not violate so-called Antideficiency Act (31 U.S.C. 665), provided sufficient funds are reserved under appropriation financing contract to cover interest cost. Therefore, appropriate regulations may be promulgated to authorize inclusion in future contracts of provisions for payment of interest for period of delay in payment occasioned by fact disputed claim under contract required contractor to pursue his administrative remedies, or litigate, before amount owing could be determined. 22 Comp. Gen. 772, overruled 251

JOINT VENTURES

Bids

Bid bond principal but not bidder

Bid responsiveness

Where principal named in bid bond was joint venture which included corporation that was only entity named in low bid, statements and affidavits submitted after bid opening, to evidence that mistake had been made and bidder intended to be named in bid was joint venture, may not be accepted to make nonresponsive bid responsive by changing name of bidder. Alleged mistake is proper for consideration only when bid is responsive at time of submission, and bid submitted not having met terms of invitation for bids which required bid guarantee to be submitted in proper form and amount by time set for opening of bids, it would not be proper to consider reasons for nonresponsiveness of bid, whether due to mistake or otherwise 836

LEASES

Agreement to execute lease

Federal project status

Relocation expenses to "displaced persons"

Trailer park tenants notified to vacate only after Govt. signed agreement to lease building to be constructed on vacated land, are "displaced persons" as result of Federal and federally assisted programs within contemplation of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and tenants are entitled to relocation expenses and assistance under act since lease transaction amounts, in effect, to Federal lease-construction project, even though five-point criteria established to determine building is "in existence"—title; design; construction financing; building permit; and fixed completion date—to assure compliance with appropriation prohibition concerning payment of rental on lease agreements for space in buildings erected for Govt., had not been met, financing arrangement not having been completed as of date of issuance of space solicitation 660

LEASES—Continued Page

Building construction for lease to Government

Construction commitment prior to leasing

Since implementation of statutory limitation on use of appropriations for lease construction programs included in Independent Offices Appropriation Acts since 1963 must assure that only construction already committed as private venture is offered to Govt. for rental, and fact offered building is not actually in existence is not decisive, GSA should not have accepted lease offer that failed to satisfy five criteria designed to meet the restriction because lessor as of date of soliciation did not have title or any other possessory interest to site to permit start of construction—the first criterion—or have firm construction contract with fixed completion date—the fifth criterion—and, furthermore, doubt as to compliance with remaining criteria-design, financing, and building permit—were not resolved---------- 573

Lease negotiation

Propriety

In negotiation pursuant to 41 U.S.C. 252(c)(10) of 20-year lease with four 5-year renewal options for space in building to be constructed, application of principles inherent in competitive system, even if negotiations were not subject to the Federal Procurement Regs., would have secured a more favorable lease, for then possibility of transferring option cost benefits to 20-year price would have been discussed, zoning requirements would not have been stated in terms of nonresponsiveness, terms inappropriate in negotiated contract; past performance and not financial capacity alone would have determined capacity to provide lease space by date specified; price evaluation basis would have been stated with information that option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of lease would not be in the best interests of Govt., the progress of building construction should be closely monitored---------- 565

Negotiation

Competition

Maximum

Fact that lease offer was accepted although offeror had not complied with five criteria established to implement statutory limitation on use of appropriations for lease construction programs included in the Independent Offices Appropriation Act of 1970 does not exclude lessor from participating in any resolicitation of the requirement, or preclude participation in future lease procurements as Govt. has duty to secure maximum competition in its procurements. However, since issues of noncompliance are broader than single transaction involved, Congress will be informed of matter for possible corrective legislative action, and, although payments under existing leases will be accepted, payments on leases hereafter executed without regard for restriction against leasing buildings to be erected for Govt. will be questioned---------- 573

LEAVES OF ABSENCE Page

Annual

Accrual

Crediting basis

Service creditable under the Civil Service Retirement Act

Federal Personnel Manual Letter No. 831-26, dated Jan. 21, 1971, prescribing that service creditable for annual leave accrual may be considered as including all service which may be credited under Civil Service Retirement Act is not in conflict with decision of U.S. GAO. Furthermore, all service creditable under 5 U.S.C. 8332 for annuity purposes under act even though not regarded as military or Govt. service may be used in determining years of service for leave accrual purposes unless excluded under other provisions of law. Therefore, service specified in 5 U.S.C. 8332(b)(1)-(8) is creditable, but employment not otherwise creditable for leave accrual purposes is not creditable solely because it may by specific provision—other than 5 U.S.C. 8332—be creditable for retirement purposes 301

Civilians on military duty

Active duty, etc., training

Civilian employee serving in Hawaii under transportation agreement who as Army reservist is ordered, effective July 29, 1968, to active duty for training in U.S. and is granted military leave from July 18 to Aug. 1, 1968 under 5 U.S.C. 5534, which is applicable to reservists and National Guardsmen, may be carried on civilian rolls beyond military reporting date; may be reimbursed pursuant to 5 U.S.C. 5724 on basis of administrative approval for travel of dependents and shipment of privately owned automobile to U.S.; and may be also under 5 U.S.C. 5534 reemployed June 9, 1969, although released from active duty June 23, but employee entitled under 5 U.S.C. 6323 to 15 days military leave for single period of training, extending from 1 calendar year into next, having been granted military leave from July 18, to Aug. 1, 1968, may not be granted military leave from June 9 to 23, 1969, but may be granted annual leave 23

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A-56, were unauthorized and, too, are for recovery 23

LEAVES OF ABSENCE—Continued Page

Military personnel

Missing, interned, etc.

Accrual and payment of leave

Since Missing Persons Act, 37 U.S.C. 551–558, neither enlarges not decreases entitlement of member of armed services to leave benefits, entitlement to leave and to payment for unused accrued leave are governed by Armed Forces Leave Act of 1946 (10 U.S.C. 701–707 and 37 U.S.C. 501–504) and, therefore, person in missing status continues to accrue leave at rate of 2½ calendar days for each month in missing status until date of death, and payment for any leave to the credit of a missing person on date determined by competent evidence to be date of death, subject to 60-day maximum prescribed in 37 U.S.C. 501(d), should be computed on the basic pay and allowances to which member was entitled on date of death 391

Payments for unused leave on discharge, etc.

Allowances for inclusion

Lump sum payment for accrued leave, not to exceed 60 days, provided in 37 U.S.C. 501(b) for all members of uniformed services upon separation—whether enlisted members or warrant or commissioned officers—is authorized to be computed at regular military compensation consisting of basic pay and subsistence and quarters allowances and, therefore, Army officer upon retirement entitled to payment pursuant to par. 40401 and Table 4–4–5 of Dept. of Defense Military Pay and Allowances Entitlements Manual may not have his payment increased by including station housing and cost-of-living allowances in computation of 60 days' accrued leave to his credit as these allowances are not payable by virtue of membership in uniformed services but accrue incident to particular duty assignments 312

Missing persons

Although member of uniformed services continues to be credited pursuant to 37 U.S.C. 552(a) with pay and allowances until his death is determined and such credits are not disturbed if death is determined to have occurred prior to date of determination, for purposes of leave accrual actual date of death remains date of discharge under 37 U.S.C. 501(a), so that no leave accrues after that date. Therefore, member of Marine Corps who was determined on Sept. 10, 1971, to have died on Apr. 30, 1967, did not continue to accrue leave after Apr. 30, 1967. However, pursuant to Pub. L. 92–169, his widow is entitled to payment for leave that had accrued to member before his death, as well as arrears of pay and 6 months' death gratuity due, on basis of member's posthumous promotions from grade E–2 to E–5, at rates in effect on Sept. 10, 1971, date member was determined to have died on Apr. 30, 1967 759

Status during

Civil arrest and military confinement

Army sergeant while confined by U.S. Military authorities in Naval Correctional Center in Japan for Japanese Govt. during period of his trial and appellate review on charge of murder who performed normal prison-type duties, none of which were his military speciality or equal

LEAVES OF ABSENCE—Continued Page

Military personnel—Continued

Status during—Continued

Civil arrest and military confinement—Continued

to normal duties of his grade, is not entitled to pay and allowances for period of confinement as Army Regs., although authorizing employment of prisoners in variety of capacities, prohibits payment while so employed, and Rule 8, Table 1–3–2, Dept. of Defense Military Pay and Allowances Entitlements Manual, provides that when confined for foreign civil offense for which member has been charged or indicted by foreign court, he is not entitled to pay and allowances except for period of leave and BAQ under par. 10312 of Manual, unless absence is excused as unavoidable---------- 380

LICENSES

State and municipalities

Government contractors

Failure of low bidder under solicitation for security guard services to meet State and local licensing and registration requirements of invitation for bids prior to award does not affect legality of contract as matter is one between bidder and State and local authorities and is not factor controlling bidder eligibility to obtain Govt. contracts. Upon determination that license or permit is prerequisite to being legally capable of performing for Federal Govt. within its boundaries, State or local authority may enforce requirements if not in conflict with Federal policies or laws, or execution of Federal powers. However, in event of enforcement of State or local licensing requirements, should contractor not perform, he may be found in default and contract terminated with prejudice---------- 377

LOANS

Government insured

Default

Bank's negligence, fraud, or misrepresentation effect on guarantee

Although under loan guarantee program conducted pursuant to sec. 7(a) of Small Business Act, SBA has discretionary power to arrange for bank and make demand payment (immediate purchase) for percentage of loan guaranteed, either upon default of loan or when borrower breaches material covenant of loan agreement, payment by SBA to bank under loan guaranteed program "where SBA officials have knowledge, prior to payment, of possibility of bank negligence, fraud, or misrepresentation," in order to protect certifying officers would not be in best interest of U.S. and may not be approved. However, SBA may pay innocent holder of guaranteed loan note upon default of borrower since payment will not waive any right of SBA against bank involved-- 474

Limitations

Maturity date of loan

Violation *v.* refinancing of note

Loss sustained by Employees Credit Union on note insured under title I of National Housing Act (12 U.S.C. 1701, *et seq.*), note which when payments were reduced extended maturity of loan beyond 5 years and 32 days prescribed by act, is reimbursable if time extension of original

LOANS—Continued Page
Government insured—Continued
Limitations—Continued
Maturity date of loan—Continued
Violation *v.* refinancing of note—Continued
note is not considered a violation of maturity date limitation but as a refinancing of loan within purview of sec. 2(b) of act. Therefore, upon reconsideration if it is determined a refinancing rather than a violation of maturity limitation was involved, payment of loss may be certified upon waiver pursuant to sec. 2(e) of act of any noncompliance with regulations applicable to refinancing---------- 222

MEALS
Furnishing
Military Airlift Command flights
Liability of Government travelers
The practice of collecting from officers and civilians reimbursement for meals provided them on Military Airlift Command military flights may not be discontinued on bases charges for transportation provided to Govt. travelers on contract charter flights appear to be subject to tariff rates fixed by Civil Aeronautics Board on substantially same basis as tariff rates established for commercial flights and, therefore, cost of in-flight meals could not be identified as part of cost of either contract charter flights or private commercial flights, and that in-flight meals are not extra compensation within meaning of 5 U.S.C. 5536, since meals supplied by Base Mess are chargeable to funds appropriated for operation of messes and, therefore, collection for cost of meals furnished is required by sec. 810 of Dept. of Defense Appropriation Act, 1971---------- 455

MEETINGS
Reservation canceled
Liability
Service charges imposed by Airlie House "75% of total or $750 per night, whichever is less" upon cancellation of confirmed reservation, terms which were furnished contracting agency before issuance of purchase order reserving facilities, may be paid since valid contractual relationship was created upon issuance of purchase order and provisions of Airlie's operating policy furnished the Govt. prior to issuance of purchase order became part of contract. While cancellation of hotel reservations within reasonable time prior to dates reserved generally will not involve liability to pay for unused rooms, and provision regarding payment of unreasonably large amount would be unenforceable penalty clause, there is no basis for determination that cancellation charges are unreasonable since Airlie is exclusively a conference center which deals only in group reservations---------- 453

MILEAGE Page

Housetrailer. (*See* **Trailer Allowances**)

Military personnel

Travel by privately owned automobile

Error in orders

Retroactive amendment of orders authorizing travel by privately owned vehicle and directing group travel pursuant to pars. M4100 and M4104 of Joint Travel Regs. after performance of temporary duty at ROTC summer camp to delete group travel requirement entitles members traveling by privately owned vehicles to allowance prescribed by par. M4104 of regulations since general rule that travel orders may not be revoked or modified retroactively to increase or decrease accrued or fixed rights after performance of travel does not apply when orders are modified within reasonable time to correct administrative error or complete orders to show original intent, and deletion of group travel requirement reflects intent that members who were permitted to travel by privately owned conveyances were exempt from group travel------- 736

MILITARY PERSONNEL

Acceptance of foreign presents, emoluments, etc.

Foreign government employment

Application of prohibition to other than military personnel

Retired member of Regular component of Commissioned Corps of Public Health Service who notified Service of intent to accept employment with Canadian Dept. of Agriculture and inquired whether his retired pay would be affected if he became Canadian citizen is not eligible to receive retired pay unless his employment is approved by Congress, by virtue of Art. I, Sec. 9, Cl. 8 of U.S. Constitution and E.O. 5221, although in view of B–51184, Aug. 2, 1945, he may retain payments made. Status of officers of Commissioned Corps of PHS is like that held by Regular commissioned officers of armed services who are subject to constitutional provision and, therefore, pursuant to 44 Comp. Gen. 130, PHS officer may not receive retired pay while employed by Canadian Govt. without congressional consent. B–51184, Aug. 2, 1945, overruled-- 780

Annuity elections for dependents. (*See* **Pay, retired, annuity elections for dependents**)

Benefits generally

Election

Irrevocable

Election by Army Reserve 2nd Lt. incident to graduation from Officer Candidate School at Ft. Benning and assignment to 2 years' active duty there, to move his household goods rather than his housetrailer from home of record to Columbus, Ga., where he had rented an apartment, because he anticipated duty in Vietnam, may not be revoked when overseas orders were canceled, and member paid trailer allowance authorized in 37 U.S.C. 409 in lieu of dislocation allowance and shipment of baggage and household goods. Unless erroneously informed of benefits and election is irrevocable, for an additional election or reelection may not be authorized, and finality in the settlement of claims is essential. Since member was aware of amounts payable whatever his election and he chose to move his household goods as most beneficial arrangement for him, he is not entitled to adjustment of cost---------- 509

MILITARY PERSONNEL—Continued Page

Civil arrest

Status

Army sergeant while confined by U.S. Military authorities in Naval Correctional Center in Japan for Japanese Govt. during period of his trial and appellate review on charge of murder who performed normal prison-type duties, none of which were his military speciality or equal to normal duties of his grade, is not entitled to pay and allowances for period of confinement as Army Regs., although authorizing employment of prisoners in variety of capacities, prohibits payment while so employed, and Rule 8, Table 1–3–2, Dept. of Defense Military Pay and Allowance Entitlements Manual, provides that when confined for foreign civil offense for which member has been charged or indicted by foreign court, he is not entitled to pay and allowances except for period of leave and BAQ under par. 10312 of Manual, unless absence is excused as unavoidable 380

Civilian service

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

Dependents

Certificates of dependency

Filing requirements

Requirements for annual submission of dependency certificates by members of Armed Forces in pay grade E–4 and above and annual recertification of dependency certificates by active duty members in those pay grades should be continued as certifications are important to proper audit of disbursing officer's account to support credit claimed for dependency payments and to evidence continued existence of dependent and dependency status. However, as methods and procedures for recertification differ substantially among services, more uniform methods, incorporating best features of procedure of each service, are desirable to accomplish savings in paperwork, time, and manpower 231

Transportation. (*See* Transportation, dependents, military personnel)

Discharges and dismissals. (*See* Discharges and Dismissals)

Dislocation allowance

Members without dependents

Quarters not assigned

Divorced Naval officer whose former wife was given legal custody, care, and control of their children under court order permitting them to visit with him during their summer vacation is considered to be member without dependents within meaning of par. M9001–2 of Joint Travel Regs. and, therefore, fact that children accompanied officer when his permanent duty station was changed during their visit does not entitle him to reimbursement for their transportation or to dislocation allowance for children under M9004–2–1, since travel of children was not to establish residence and neither their visiting status nor their residence was changed. However, since officer was not assigned public quarters he is entitled pursuant to 37 U.S.C. 407 to dislocation allowance as member without dependents equal to quarters allowance for 1 month 716

MILITARY PERSONNEL—Continued Page

Dual benefits

Retired pay from uniformed and Public Health services

Reserve officer with more than 20 years of active service in National Guard and Army Reserve discharged to accept commission with Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from PHS, upon mandatory retirement from PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for Reserve duty in computation of PHS retired pay in absence of statute authorizing dual benefits for same service. Since officer is entitled to greater benefit if Reserve duty is used to increase PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for Army retired pay received concurrently with PHS retired pay, notwithstanding payments were made in error and received in good faith ---------- 298

Education. (*See* **Education**)

Elimination

Probationary period

Severance pay entitlement

Regular Army officer with less than 3 years of service who was recommended for elimination under sec. IX, Ch. 5, AR 635–100, because of substandard performance of duty properly was discharged without severance pay since officer was not discharged under 10 U.S.C. Ch. 359—secs. 3781–3787—and, therefore, sec. 3781 prescribing that board of officers may be convened to review record of officer to determine if he should be eliminated or required to show cause for his retention on active list is not for application and officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while officer is in probationary status with less than 3 years' service, and par. 10–3b, AR 635–120, indicating to contrary should be clarified ---------- 81

Family allowances. (*See* **Family Allowances**)

Gratuities. (*See* **Gratuities**)

Household effects

Storage. (*See* **Storage, household effects**)

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

Indebtedness

Pay withholding. (*See* **Pay, withholding**)

Leaves of absence. (*See* **Leaves of Absence, military personnel**)

Mileage. (*See* **Mileage, military personnel**)

Missing, interned, etc., persons

Housetrailer transportation

Wife of Army warrant officer missing in action who moved household effects in her mobile home and was denied reimbursement for expenses incurred in movement of trailer, as 37 U.S.C. 554 in providing for travel and transportation of dependents and household and personal effects of members of uniformed services in missing status does not specifically include housetrailer, nevertheless may be reimbursed expense of trailer movement since amount involved is less than it would cost Govt. to comply with par. M8353 of Joint Travel Regs. authorizing shipment of household goods when member is in missing status for more than 29 days, either to his official home of record or residence of his next of kin. 763

MILITARY PERSONNEL—Continued Page
Missing, interned, etc., persons—Continued
Leaves of absence
Accrual and payment

Since Missing Persons Act, 37 U.S.C. 551–558, neither enlarges nor decreases entitlement of member of armed services to leave benefits, entitlement to leave and to payment for unused accrued leave are governed by Armed Forces Leave Act of 1946 (10 U.S.C. 701–707 and 37 U.S.C. 501–504) and, therefore, person in missing status continues to accrue leave at rate of 2½ calendar days for each month in missing status until date of death, and payment for any leave to the credit of a missing person on date determined by competent evidence to be date of death, subject to 60-day maximum prescribed in 37 U.S.C. 501(d), should be computed on the basic pay and allowances to which member was entitled on date of death 391

Although member of uniformed services continues to be credited pursuant to 37 U.S.C. 552(a) with pay and allowances until his death is determined and such credits are not disturbed if death is determined to have occurred prior to date of determination, for purposes of leave accrual actual date of death remains date of discharge under 37 U.S.C. 501(a), so that no leave accrues after that date. Therefore, member of Marine Corps who was determined on Sept. 10, 1971, to have died on Apr. 30, 1967, did not continue to accrue leave after Apr. 30, 1967. However, pursuant to Pub. L. 92–169, his widow is entitled to payment for leave that had accrued to member before his death, as well as arrears of pay and 6 months' death gratuity due, on basis of member's posthumous promotions from grade E–2 to E–5, at rates in effect on Sept. 10, 1971, date member was determined to have died on Apr. 30, 1967 759

Promotions while in missing-in-action status

Any amounts due member of Marine Corps who when he entered missing status, as defined by 37 U.S.C. 551(2), on Apr. 30, 1967, was private first class E–2, and who by Sept. 10, 1971, date his death was established as Apr. 30, 1967, had been promoted successively to sergeant E–5, are payable at rates in effect on Sept.10, 1971, for pursuant to Pub. L. 92–169, promotion of member while in missing status is "fully effective for all purposes," notwithstanding 10 U.S.C. 1523 or any other provision of law and even though Secretary concerned or his designee under 37 U.S.C. 556(b) determines member died before promotion was made, and member's spouse who was his widow on day of his death is entitled to payment of arrears of pay and 6 months' death gratuity due notwithstanding she had remarried before he was officially determined to be dead 759

Storage of household effects
Extension of nontemporary storage

The requirement in Joint Travel Regs. that Secretary concerned or his designee at termination of each year member of uniformed services is in missing status—that is absent for period of more than 29 days—must determine need for and authorize an extension of nontemporary storage of household and personal effects of member provided under par. M8101–6 of the regs. is in accord with language of Public Law

MILITARY PERSONNEL—Continued Page
Missing, interned, etc., persons—Continued
Storage of household effects—Continued
Extension of nontemporary storage—Continued
90-236 (37 U.S.C. 554(b)) and its legislative history and, therefore, regs. may not be amended to delete yearly approval requirement to provide for continuation of nontemporary storage so long as member is in missing status. 392

Orders. (*See* Orders)
Outside United States
Tours of duty extended
Drayage and storage of household effects
Involuntary extension of overseas tour of duty being marked departure from usual practice of rotating members of uniformed services from overseas to U.S., extension may be viewed as unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes movement of dependents and household effects without regard to issuance of orders directing change of station. Therefore, Joint Travel Regs. may be amended to authorize reimbursement to member who unable to renew lease for local economy housing for extended tour of duty incurs expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters 17

Pay. (*See* Pay)
Per diem. (*See* Subsistence, per diem, military personnel)
Quarters allowance. (*See* Quarters Allowance)
Record correction
Overpayment liability
Debt remission
Correction of military records under 10 U.S.C. 1552 directing remission of indebtedness of officer who refunded an overpayment of retired pay resulting from erroneous use of pay rates effective July 1, 1968, rather than rates in effect June 1, 1968, officer's mandatory retirement date, does not support repayment of amount collected since officer's mandatory retirement date computed on base retirement date of April 30, 1938, remained unaffected by correction as failure to accomplish officer's retirement on date required by law does not add to his right in any way in computing retired pay entitlement and, furthermore, authority to correct military records is limited to factual changes and Secretary concerned has no authority to waive indebtedness of officer, 10 U.S.C. 9837(d) applying only to enlisted personnel 563

Pay rights
Basis of corrected facts
As correction of military records pursuant to 10 U.S.C. 1552 is final and conclusive on all officers of U.S., except when procured by fraud, conclusion of Board for Correction of Military Records for Coast Guard that former Reserve member was not fit for duty on Nov. 19, 1969; that Notice of Eligibility for Disability Benefits issued on that date when he was released from hospitalization occasioned by injury suffered while participating in official volley ball game should not have been cancelled,

MILITARY PERSONNEL—Continued Page
Record correction—Continued
Pay rights—Continued
Basis of corrected facts—Continued
even though he subsequently attended drills, and that he was disabled until discharged on Apr. 5, 1971, when he was found unfit for duty, entitles former reservist to payment of pay and allowances, less drill pay, from Nov. 20, 1969, through Apr. 5, 1971, date of discharge, computed from Apr. 15, 1970, at increased rates established by E.O. 11525, and from Jan. 1, 1971, to date of discharge, at rates established by E.O. 11577 ---- 191

Reenlistment bonus. (*See* Gratuities, reenlistment bonus)
Reservists
Release from active duty
Readjustment payment on involuntary release. (*See* Pay, readjustment payment to reservists on involuntary release)
Retirement
Eligibility determination erroneous
Notice to reservist of armed services under 10 U.S.C. 1331(d) of eligibility to retire pursuant to chapter 67 of Title 10, U.S.C., upon discovery that although member meets 20 years' service requirement of 1331(a)(2), he does not satisfy sec. 1331(a)(3) to effect last 8 years of qualifying service must have been as member of Reserve component or war service requirement of sec. 1331(c), and that he is excluded from chapter by sec. 1331(a)(4) because he is entitled to retired pay under "another provision of law," serves to validate only service eligibility requirements of clauses (2) and (3) of 10 U.S.C. 1331(a) since for purpose of 10 U.S.C. 1406, limiting revocation of retired pay because of error in determining years of service under sec. 1331(a)(2), both clauses must be read together, whereas sec. 1406 does not affect prohibitions in secs. 1331(a)(4) and 1331(c) ---- 91

Notification pursuant to 10 U.S.C. 1331(d) to reservist of armed services of eligibility to retired pay under chapter 67 of Title 10, U.S.C., where member has been granted retired pay prior to discovery of ineligibility is conclusive only as it pertains to service eligibility requirement of sec. 1331(a)(2)—20 years of service computed under sec. 1332—and sec. 1331(a)(3) to effect that at least 8 years of qualifying service must be within category named in sec. 1332(a)(1), provided payment of retired pay began after Oct. 14, 1966, effective date of Pub. L. 89-652 (10 U.S.C. 1331(d)) ---- 91

Retired pay. (*See* Pay, retired)
Retirement
Effective date
Mandatory retirement
Correction of military records under 10 U.S.C. 1552 directing remission of indebtedness of officer who refunded an overpayment of retired pay resulting from erroneous use of pay rates effective July 1, 1968, rather than rates in effect June 1, 1968, officer's mandatory retirement date, does not support repayment of amount collected since officer's mandatory retirement date computed on base retirement date of April 30, 1938, remained unaffected by correction as failure to accomplish

MILITARY PERSONNEL—Continued Page
Retirement—Continued
Effective date—Continued
Mandatory retirement—Continued
officer's retirement on date required by law does not add to his right in any way in computing retired pay entitlement and, furthermore, authority to correct military records is limited to factual changes and Secretary concerned has no authority to waive indebtedness of officer, 10 U.S.C. 9837(d) applying only to enlisted personnel ---------- 563
Service credits. (*See* Pay, service credits)
Station allowances. (*See* Station Allowances)
Subsistence
Per diem. (*See* Subsistence, per diem)
Temporary duty
Between station changes
Allowances
Air Force officer whose orders transferring him from Hawaii to Virginia and providing for concurrent travel of dependents are amended to place officer on terminal temporary duty "Operation Bootstrap" at University of Southern Calif. at no expense to Govt., may be paid station housing allowance and cost-of-living allowance for dependents who continued to reside in Hawaii incident to his temporary assignment for period of permissive temporary duty pursuant to par. 3-19c, Air Force Manual 36-11, since officer remained assigned to overseas station and was expected to return to that station for change-of-station processing after completing assignment ---------- 691
Training
Civilian schools
Studies related to military specialty
Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program ---------- 3
Transportation
Automobiles. (*See* Transportation, automobiles, military personnel)
Dependents. (*See* Transportation, dependents, military personnel)
Household effects. (*See* Transportation, household effects, military personnel)
While in a leave status
To eliminate difficulty being experienced in distinguishing between "cost-charge" Govt. procured transportation furnished members traveling in leave status without prior orders who are without funds to return to their duty station and mixed travel that is adjusted under par.

MILITARY PERSONNEL—Continued Page
Transportation—Continued
While in a leave status—Continued
M4154 of the Joint Travel Regs. on travel vouchers of members traveling under change-of-station orders with leave en route who are without funds at their leave point and are also furnished Govt. procured transportation, regulations should be changed to produce uniformity in treatment of member travel claims. It is suggested that issuance of transportation request (TR) in all leave cases be treated as "cost-charge" transaction and amount of TR deducted from pay and allowances due member, or in lieu of issuing TR, a casual payment be authorized..... 556
Travel expenses. (*See* Travel Expenses, military personnel)
Variable reenlistment bonus. (*See* Gratuities, reenlistment bonus, critical military skills)
MISCELLANEOUS RECEIPTS
Special account *v.* miscellaneous receipts
Federally and State supported projects
Revenues received by Smithsonian Institution from several activities at National Zoo may be deposited into the Treasury to credit of the Institution under sec. 5589, Revised Statutes, 20 U.S.C. 53, since requirement for deposit of gross receipts from activities supported by appropriated funds into general fund of the Treasury as miscellaneous receipts, pursuant to sec. 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under authority of original trust charter and 1846 Organic Act and not on basis of real property rights. However, as bulk of administration of Zoo activities will continue to be supported by appropriated funds, books should reflect gross amount of receipts realized from Zoo activities supported by appropriated funds and a full disclosure made to Congress. 42 Comp. Gen. 650, modified..... 506
NONDISCRIMINATION
Affirmative action programs. (*See* Contracts, labor stipulations, nondiscrimination, "affirmative action programs")
Contracts
Preference to contractor with minority subcontracting arrangement
Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority-owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed..... 272

OFFICERS AND EMPLOYEES Page

Acceptance of foreign presents, emoluments, etc.

Public Health Service commissioned officers

Retired member of Regular component of Commissioned Corps of Public Health Service who notified Service of intent to accept employment with Canadian Dept. of Agriculture and inquired whether his retired pay would be affected if he became Canadian citizen is not eligible to receive retired pay unless his employment is approved by Congress, by virtue of Art. I, Sec. 9, Cl. 8 of U.S. Constitution and E.O. 5221, although in view of B–51184, Aug. 2, 1945, he may retain payments made. Status of officers of Commissioned Corps of PHS is like that held by Regular commissioned officers of armed services who are subject to constitutional provision and, therefore, pursuant to 44 Comp. Gen. 130, PHS officer may not receive retired pay while employed by Canadian Govt. without congressional consent. B–51184, Aug. 2, 1945, overruled 780

Aliens. (*See* Aliens, employment)

Attorneys. (*See* Attorneys)

Canal Zone locations

Medical and educational services

Agency reimbursement

Term "dependent" as used in sec. 105 of Civil Functions Appropriation Act, 1954, as amended (2 C.Z. Code 232), which authorizes payment to Canal Zone Govt. of unrecoverable costs from employees of U.S. and their dependents for education and hospital and medical care furnished, in absence of statutory or valid regulatory definition of phrase "dependent child," may be construed in accordance with definition in Black's Law Dictionary and, therefore, "dependent child" need not mean child under age of 21. However, as statement on invoice for medical services furnished daughter of Federal employee that she is "full-time student under 23 years of age" does not automatically establish dependency, and amount billed is not represented as unrecovered costs from employee or dependent, as required by statute, invoice may not be certified for payment 252

Clothing and personal furnishings. (*See* Clothing and Personal Furnishings)

Compensation. (*See* Compensation)

Death or injury

Compensation claims. (*See* Decedents' Estates, compensation)

Debt collections

Waiver. (*See* Debt Collections, waiver)

Delegation of authority. (*See* Delegation of Authority)

Dual benefits

Under separate statutes

Prohibition

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as

OFFICERS AND EMPLOYEES—Continued Page

Dual benefits—Continued

Under separate statutes—Continued

Prohibition—Continued

civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and, too, are for recovery ---------- 23

Dual compensation

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

Downgrading

Saved compensation. (*See* Compensation, downgrading, saved compensation)

Experts and consultants. (*See* Experts and Consultants)

Leaves of absence (*See* Leaves of Absence)

Moving expenses. (*See* Officers and Employees, transfers, relocation expenses)

Overseas

Home leave

"Discount 50 Plan" reduced fares

"Discount 50 Plan," published tariff that offers reduced air fares to Federal civilian employees and their dependents stationed outside Western Hemisphere and traveling on authorized leave at own expense is not available to employee who is to be reimbursed by U.S., nor may transportation request, use of which is limited to travel chargeable to U.S., be issued under Plan. However, employees who have used Plan incident to renewal agreement travel authorized by 5 U.S.C. 5728(a) may be reimbursed, and it is immaterial if employee did not travel to or spend substantial period at place of residence or authorized destination, but entitlement is limited to cost of travel to place of residence, and, furthermore, fact that employee's dependents did not travel with him does not deprive him of entitlement to cost of their travel to different destination within U.S., limited to cost of traveling to actual place of residence ---------- 828

Overtime. (*See* Compensation, overtime)

Parking fees. (*See* Fees, parking)

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

Postal service. (*See* Postal Service, United States, employees)

Qualifications

Licenses

Doctors

Use by VA's Dept. of Medicine and Surgery of physicians who have been granted temporary or limited license to practice medicine, surgery, or osteopathy, from State where appropriate State Board has made determination that applicant is professionally qualified to practice in that State, but does not qualify for regular license, because he has not

OFFICERS AND EMPLOYEES—Continued Page

Qualifications—Continued

Licenses—Continued

Doctors—Continued

complied with various technical requirements—either statutory or administrative—such as residency or citizenship requirements, may be continued for period not to exceed 18 months in view of inability of Dept. to hire medical personnel with permanent or unrestricted licenses, provided VA also determines in accordance with 38 U.S.C. 4106(a) that individual involved is professionally qualified to practice medicine, surgery or osteopathy 536

Reemployment or reinstatement

Travel and transportation expenses

Entitlement to travel and transportation expenses of employee of Army in Canal Zone who separated in reduction-in-force action is returned to actual residence in U.S. and after 7-day break in service accepts position with another Dept. of Defense component located 419 miles from residence is because of break in service within purview of 5 U.S.C. 5724a(c) and not 5 U.S.C. 5724(e). Under sec. 5724(a)(c), governing reimbursement of employees who involved in reduction-in-force or transfer of function are employed within 1 year of separation, acquiring agency bears expenses of employee's travel between old and new stations, less costs incurred by losing agency, which if in excess of cost of direct travel between stations, need not be recouped by losing agency 14

Relocation expenses. (*See* **Officers and Employees, transfers, relocation expenses**)

Service agreements

Failure to fulfill contract

Service interrupted by military duty

Civilian employee serving in Hawaii under transportation agreement who as Army reservist is ordered, effective July 29, 1968, to active duty for training in U.S. and is granted military leave from July 18 to Aug. 1, 1968 under 5 U.S.C. 5534, which is applicable to reservists and National Guardsmen, may be carried on civilian rolls beyond military reporting date; may be reimbursed pursuant to 5 U.S.C. 5724 on basis of administrative approval for travel of dependents and shipment of privately owned automobile to U.S.; and may be also under 5 U.S.C. 5534 reemployed June 9, 1969, although released from active duty June 23, but employee entitled under 5 U.S.C. 6323 to 15 days' military leave for single period of training, extending from 1 calendar year into next, having been granted military leave from July 18, to Aug. 1, 1968, may not be granted military leave from June 9 to 23, 1969, but may be granted annual leave 23

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received

OFFICERS AND EMPLOYEES—Continued Page
Service agreements—Continued
Failure to fulfill contract—Continued
Service interrupted by military duty—Continued
for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and, too, are for recovery---------- 23

Violation
Reemployment after break in service

Employee who resigned from Federal Bureau of Investigation before expiration of 12-month service period following transfer of official duty station and accepted employment with another bureau in Dept. of Justice after 15-day break in service is liable for refund of transfer costs disbursed to him under 5 U.S.C. 5724(i), and monies collected from him may not be reimbursed on basis of *Finn* v. *U.S.*, 192 Ct. Cl. 814, which holds "Government service" as used in sec. 5724(i) is not synonymous with agency service since that ruling does not apply when there is break in service for then Govt.'s obligation for "transfer" expenses could not be definitely established as obligation would be dependent upon whether or not separated employee eventually returned to Govt. service-------- 52

Subsistence. (*See* Subsistence)
Subversive activities prohibition
Training in foreign area

In making determination whether prohibition in 5 U.S.C. 4107(a) against training of employees by, in, or through non-Govt. facility which teaches or advocates overthrow of Govt. of U.S. by force or violence; or by or through individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, DOD may delegate authority granted agency heads by E.O. 11348, dated Apr. 20, 1967, to determine eligibility of foreign government or international organization to provide training to major theatre or local commander, subject to consultation with Dept. of State and other appropriate Federal agencies in area, may also provide that eligibility of noncitizens may be determined from security files in local or theatre level since applying procedures in 5 CFR 410.504 to determine security eligibility in the U.S. would be ineffective---------- 199

Training
Expenses
Delegation of authority to approve

Authority to approve for payment on individual basis expenditures that are incurred in administration of training program established by Selective Service System pursuant to Govt. Employees Training Act (5 U.S.C. 4101–4118), and to establish criteria for payment, may be delegated by Director of Selective Service, and directive to this effect issued, nontwithstanding neither language of Training Act nor implementing regulations do not expressly provide for delegation since secs.

OFFICERS AND EMPLOYEES—Continued Page

Training—Continued

Expenses—Continued

Delegation of authority to approve—Continued

4103, 4109(a), and 4105(c) of Title 5, U.S. Code, in assigning to agency heads responsibility for establishment of training programs and for oversight of such programs sanction delegation of authority by agency heads in connection with development and conduct of agency training programs---- 777

Failure to fulfill obligated service

Indebtedness of employee

Training costs provided under 5 U.S.C. 4108, which were collected from employees who transferred to other Govt. agencies or organizations, without discharging their service commitment, prior to issuance of Fed. Personnel Manual Ltr. No. 410–8, authorizing waiver of repayment of training costs if recovery would be against equity and good conscience or against public interest, may not be reimbursed to employees, notwithstanding completion of period of time by employee with gaining agency at least equal to service commitment to losing agency, as waiver authority extends only to waiver of right to recover and, therefore, since debt for training costs has been extinguished, no right of recovery remains---- 419

Service requirement

Transfer to another Government agency

Assumption of training costs by acquiring agency

Irrespective of whether determination is made that recovery is required of training costs provided employee under 5 U.S.C. 4108 at time of his transfer to another Govt. agency or organization, or whether employee's obligations under a service agreement are satisfied by service with another agency or organization, there is no authority for assessment of training costs against agency to which employee transfers notwithstanding the benefit of employee's training paid for by losing agency inures to gaining agency---- 419

Waiver of training costs

With amendment of Fed. Personnel Manual by Ltr. No. 410–8, head of agency or his delegated representative is authorized to waive recovery of training costs extended under 5 U.S.C. 4108 when an employee transfers to another agency or organization in any branch of Govt. prior to completion of agreed period of services and gives notice of at least 10 workdays of his intent to transfer, and losing agency determines collection of training costs would be against equity and good conscience or against public interest, and instructions may be applied retroactively where gaining agency benefits by employee's training and waiver is conditioned on completion of employee's obligated service by continued employment with his new agency, since waiver is in public interest and, therefore, retroactive application of instructions is immaterial---- 419

OFFICERS AND EMPLOYEES—Continued Page
Training—Continued
Subversive activities prohibition
Determination overseas

In making determination whether prohibition in 5 U.S.C. 4107(a) against training of employees by, in, or through non-Govt. facility which teaches or advocates overthrow of Govt. of U.S. by force or violence; or by or through individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, DOD may delegate authority granted agency heads by E.O. 11348, dated Apr. 20, 1967, to determine eligibility of foreign government or international organization to provide training to major theatre or local commander, subject to consultation with Dept. of State and other appropriate Federal agencies in area, and may also provide that eligibility of noncitizens may be determined from security files in local or theatre level since applying procedures in 5 CFR 410.504 to determine security eligibility in the U.S. would be ineffective 199

Transfers
Break in service
Expense entitlement

Employee who resigned from Federal Bureau of Investigation before expiration of 12-month service period following transfer of official duty station and accepted employment with another bureau in Dept. of Justice after 15-day break in service is liable for refund of transfer costs disbursed to him under 5 U.S.C. 5724(i), and monies collected from him may not be reimbursed on basis of *Finn* v. *U.S.*, 192 Ct. Cl. 814, which holds "Government service" as used in sec. 5724(i) is not synonymous with agency service since that ruling does not apply when there is break in service for then Govt.'s obligation for "transfer" expenses could not be definitely established as obligation would be dependent upon whether or not separated employee eventually returned to Govt. service 52

Effective date
Per diem and travel purposes

Employee who while on temporary duty in Boston is confirmed for permanent appointment at temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after employee had departed on July 23, and to which point he did not return to assume new duties until Aug. 9, during which period he performed duty at old headquarters, Chicago, returned to Boston to seek housing, attended conference, and was on leave, is considered to have been transferred for travel and per diem purposes on Aug. 9, date he returned to Boston, and as employee was expected to return to Chicago after completing temporary duty, rule that employee may not be allowed per diem after receiving notice temporary duty station is to be his permanent station has no application 10

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses
Break in service
Entitlement to expenses effect

Employee of National Park Service in California who refusing to relocate with transferred functions was separated and granted severance pay, and who, after placing his residence on market, which was sold within 2 months, and storing his household effects, departed for Washington, D.C., in privately owned automobile, towing housetrailer, upon reinstatement in Park Service in Washington within 4 months, is entitled pursuant to 5 U.S.C. 5724(a) to same benefits he would have been entitled to had he transferred without break in service, and under Pub. L. 89–516, employee may be reimbursed for sale of house, storage of household effects, expenses incurred to travel to Washington with wife prior to reinstatement, and other proper relocation expenses. However, reimbursement for storage and shipment of employee's effects, precludes allowance of mileage for housetrailer 27

Distance between old and new stations

Before payment of relocation expenses may be made to employee who incident to change of duty station located 30 miles from his old duty station, moved his residence which was located 26 miles from new duty station to within 14 miles of new station in order to reduce his travel time from 1 hour to 20 minutes, agency determination must be made, pursuant to sec. 1.3a of Office of Management and Budget Cir. No. A–56, revised June 26, 1969, that relocation of employee's residence for relatively short distance within same genaral local area was incident to transfer of his official station 187

Transfers between agencies

Applying rationale of *Finn* v. *U.S.*, 428 F. 2d 828, to transfers of employees between agencies, term "employee" may not be defined to mean individual employed by particular agency as opposed to one employed by any Govt. agency, therefore, notwithstanding employees breached 12-month employment agreements they signed to remain in service after intra-agency transfer, they are entitled, no break in service having occurred, to reimbursement under 5 U.S.C. 5724a on basis of intra-agency transfer for expenses of house purchase at new station made within 1-year time limit prescribed, whether purchase and/or settlement occurred before or after transfer to another agency, and it is immaterial if employees negotiated for transfer to other agency, after signing employment agreement, for agreement only obligates them to serve in Govt., not in particular agency 112

What constitutes a transfer

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
What constitutes a transfer—Continued
for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and, too, are for recovery---------- 23
Travel expenses. (*See* Travel Expenses)
Traveltime
Administrative determination
Employee compliance requirement
Although pursuant to 5 U.S.C. 6101(b)(2) travel should not be scheduled at times outside of employee's regularly scheduled workweek as section does not require or permit payment of compensation for such travel, at same time employing agency has discretionary authority to determine when it is impracticable to schedule official travel within employee's workweek and to order travel that is noncompensable as overtime. However, official requiring noncompensable travel is required to comply with 5 CFR 610.123 and record reasons for ordering travel and furnish copy of statement to employee, who in turn would not be justified in refusing to perform properly ordered travel---------- 727
Vessel crew members. (*See* Vessels, crews)
Wage board
Compensation. (*See* Compensation, wage board employees)
ORDERS
Amendment
Retroactive
Travel completed
Retroactive amendment of orders authorizing travel by privately owned vehicle and directing group travel pursuant to pars. M4100 and M4104 of Joint Travel Regs. after performance of temporary duty at ROTC summer camp to delete group travel requirement entitles members traveling by privately owned vehicles to allowance prescribed by par. M4104 of regulations since general rule that travel orders may not be revoked or modified retroactively to increase or decrease accrued or fixed rights after performance of travel does not apply when orders are modified within reasonable time to correct administrative error or complete orders to show original intent, and deletion of group travel requirement reflects intent that members who were permitted to travel by privately owned conveyances were exempt from group travel---------- 736
Canceled, revoked, or modified
Leave status
Navy enlisted member stationed in California who while on leave in Baltimore, which was authorized under orders providing for subsequent temporary duty to attend school in Rhode Island, is directed to return to permanent duty station upon completion of leave is entitled to travel allowances equivalent to round-trip distance between permanent duty

ORDERS—Continued Page

Cancelled, revoked, or modified—Continued

Leave status—Continued

station and leave point, not to exceed round-trip distance between permanent and temporary duty stations, even though ordinarily such allowances are not payable for leave travel performed for personal reasons and not public business, since member performed circuitous travel to his leave point under competent orders, travel he would not have undertaken had he not been ordered to perform the temporary duty. B–166236, May 21, 1969, modified 548

Permissive *v.* mandatory

Travel orders

Air Force officer whose orders transferring him from Hawaii to Virginia and providing for concurrent travel of dependents are amended to place officer on terminal temporary duty "Operation Bootstrap" at University of Southern Calif. at no expense to Govt., may be paid station housing allowance and cost-of-living allowance for dependents who continued to reside in Hawaii incident to his temporary assignment for period of permissive temporary duty pursuant to par. 3–19c, Air Force Manual 36–11, since officer remained assigned to overseas station and was expected to return to that station for change-of-station processing after completing assignment 691

Purchase orders. (*See* **Purchases, purchase orders**)

PAY

Absence without leave

Civil arrest

Confinement

Trial and appellate review

Army sergeant while confined by U.S. Military authorities in Naval Correctional Center in Japan for Japanese Govt. during period of his trial and appellate review on charge of murder who performed normal prison-type duties, none of which were his military speciality or equal to normal duties of his grade, is not entitled to pay and allowances for period of confinement as Army Regs., although authorizing employment of prisoners in variety of capacities, prohibits payment while so employed, and Rule 8, Table 1–3–2, Dept. of Defense Military Pay and Allowances Entitlements Manual, provides that when confined for foreign civil offense for which member has been charged or indicted by foreign court, he is not entitled to pay and allowances except for period of leave and BAQ under par. 10312 of Manual, unless absence is excused as unavoidable 380

Active duty

Reservists

Injured in line of duty

Disability determination

As correction of military records pursuant to 10 U.S.C. 1552 is final and conclusive on all officers of U.S., except when procured by fraud, conclusion of Board for Correction of Military Records for Coast Guard that former Reserve member was not fit for duty on Nov. 19, 1969; that

PAY—Continued Page

Active duty—Continued

Reservists—Continued

Injured in line of duty—Continued

Disability determination—Continued

Notice of Eligibility for Disability Benefits issued on that date when he was released from hospitalization occasioned by injury suffered while participating in official volley ball game should not have been canceled, even though he subsequently attended drills, and that he was disabled until discharged on Apr. 5, 1971, when he was found unfit for duty, entitles former reservist to payment of pay and allowances, less drill pay, from Nov. 20, 1969, through Apr. 5, 1971, date of discharge, computed from Apr. 15, 1970, at increased rates established by E.O. 11525, and from Jan. 1, 1971, to date of discharge, at rates established by E.O. 11577 191

Additional

Proficiency pay

College training period

Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program 3

Aviation duty

Minimum flight requirements

Waiver

Regulations implementing statutory authorized waiver of minimum flight requirements for members of uniformed services while attending course of instruction of 90 days or more or while serving under certain overseas assignments may be amended to include periods of travel, leave, and temporary duty not in excess of 90 days in cases of consecutive duty assignments between schools and remote places, or vice versa, where statutory waiver is applicable, and extention of waiver of flight performance requirements would be in accord with congressional intent expressed in legislative history of Defense Dept. Appropriation Act of 1971 to avoid high cost of providing aircraft that otherwise would be incurred. However, rule of 34 Comp. Gen. 243 should continue to be applied to travel to first of such assignments and from last of such assignments 95

PAY—Continued Page

Civilian employees. (*See* **Compensation**)

Disability retired pay. (*See* **Pay, retired, disability**)

Increases

Wage-price freeze

Retired pay

When in adjustment of retired or retainer pay under 10 U.S.C. 1401a to reflect Consumer Price Index cost-of-living increase effective June 1, 1971, higher retired rate results for members retired on or prior to Sept. 30, 1971, computed at rates in E.O. 11577, dated Jan. 1, 1971, than for members retiring on or after Oct. 1, 1971, whose retired pay is for computation at rates in Pub. L. 92–129, effective Oct. 1, 1971, because of new rates prescribed by public law and exemption of military personnel placed in retired status during wage/price freeze period imposed by E.O. 11615, dated Aug. 15, 1971, issued under Economic Stabilization Act of 1970, pursuant to 10 U.S.C. 1401a(e), pay of member retired after Sept. 30, 1971, may not be less than if he had retired on that date---------- 384

Missing, interned, etc., persons

Promotions

"Effective for all purposes"

Any amounts due member of Marine Corps who when he entered missing status, as defined by 37 U.S.C. 551(2), on Apr. 30, 1967, was private first class E–2, and who by Sept. 10, 1971, date his death was established as Apr. 30, 1967, had been promoted successively to sergeant E–5, are payable at rates in effect on Sept. 10, 1971, for pursuant to Pub. L. 92–169, promotion of member while in missing status is "fully effective for all purposes," notwithstanding 10 U.S.C. 1523 or any other provision of law and even though Secretary concerned or his designee under 37 U.S.C. 556(b) determines member died before promotion was made, and member's spouse who was his widow on day of his death is entitled to payment of arrears of pay and 6 months' death gratuity due notwithstanding she had remarried before he was officially determined to be dead---------- 759

Although member of uniformed services continues to be credited pursuant to 37 U.S.C. 552(a) with pay and allowances until his death is determined and such credits are not disturbed if death is determined to have occurred prior to date of determination, for purposes of leave accrual actual date of death remains date of discharge under 37 U.S.C. 501(a), so that no leave accrues after that date. Therefore, member of Marine Corps who was determined on Sept. 10, 1971, to have died on Apr. 30, 1967, did not continue to accrue leave after Apr. 30, 1967. However, pursuant to Pub. L. 92–169, his widow is entitled to payment for leave that had accrued to member before his death, as well as arrears of pay and 6 months' death gratuity due, on basis of member's posthumous promotions from grade E–2 to E–5, at rates in effect on Sept. 10, 1971, date member was determined to have died on Apr. 30, 1967------ 759

PAY—Continued Page

Proficiency. (*See* **Pay, additional, proficiency pay**)

Readjustment payment to reservists on involuntary release

Involuntary release factor requirement

Although retired Commander, USNR, had 28 years, 6 months, and 28 days of service for basic pay purposes and 11 years, 8 months, and 29 days of active service when he was released from active duty under 10 U.S.C. 6389 because he twice failed of selection for promotion, and who because he had not reached age 60 was placed on retired list without retired or readjustment pay, meets continuous active duty requirement of 10 U.S.C. 687 on basis his service from Dec. 11, 1962 to July 1, 1971, was not interrupted by break in service of more than 30 days is, nevertheless, not entitled to readjustment pay because neither transfer to Retired Reserve in lieu of discharge or expiration of active duty orders on day he was transferred to Retired Reserve pursuant to 10 U.S.C. 6389 is considered to be involuntary release from active duty within purview of 10 U.S.C. 687 799

Record correction. (*See* **Military Personnel, record correction**)

Reservists

Injured in line of duty. (*See* **Pay, active duty, reservists, injured in line of duty**)

Retired

Active duty

After retirement

Public Health Service commissioned service

Reserve officer with more than 20 years of active service in National Guard and Army Reserve discharged to accept commission with Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from PHS, upon mandatory retirement from PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for Reserve duty in computation of PHS retired pay in absence of statute authorizing dual benefits for same service. Since officer is entitled to greater benefit if Reserve duty is used to increase PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for Army retired pay received concurrently with PHS retired pay, notwithstanding payments were made in error and received in good faith 298

Advancement on the retired list

Reduction in pay effect

Retired pay of enlisted members of uniformed services who serve on active duty after retirement under 10 U.S.C. 3914, which brings their retired pay recomputation within purview of 10 U.S.C. 1402(a), and who then are advanced on retired list pursuant to 10 U.S.C. 3964, is not required to be recomputed under 10 U.S.C. 3992, if reduction of retired pay would result, unless member consents to advancement. Therefore, since sergeant first-class E–7 who is advanced on retired list to grade of warrant officer WO–1 would benefit by having his retired pay recomputed under sec. 1402(a) and not sec. 3992, his advancement may be rescinded on basis advancement was contrary to his wishes. However, where it would be to advantage of member, also re-retired as sergeant first-class E–7, but advanced to grade of major, to accept advancement, recomputation of his retired pay should be in accordance with sec. 3992 .. 137

PAY—Continued Page

Retired—Continued

Annuity elections for dependents

Failure to elect effect

Election by Army Reserve officer retired for age under 10 U.S.C. 1331 not to participate in Retired Serviceman's Family Protection Plan, 10 U.S.C. 1441–1446, does not affect validity of his election to come under plan in connection with his retirement from Public Health Service (PHS), where he served as commissioned officer on active duty following discharge from Army Reserve. Since officer had in effect valid election to participate in plan at time of retirement from PHS, and there was implied surrender by him of his military retired pay at that time, deductions made from his PHS retired pay based solely on that retired pay were proper ---------- 298

Trust establishment to receive payments

Creation of trust to receive annuity payments made under Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. 1431–1446, is not legally permissible since sec. 1435 describes eligible beneficiaries as spouse or children, and sec. 1440 provides that annuity elected by member of armed services is not assignable or subject to execution, levy, attachment, garnishment, or other legal process. Therefore, widow receiving RSFPP annuity payments may not retain both legal and equitable ownership by executing Living Trust Agreement appointing herself as trustee or a bank in the event of her incompetency; annuities for a child or children in accord with DOD Dir. 1332.17 may only be paid to guardian or person who has care, custody, and control of child or children; and only payments to a duly appointed legal representative will discharge the Govt.'s liability ---------- 437

Concurrent military retired and civilian service pay

Reduction in retired pay

Retired Air Force major employed by two Govt. agencies as civilian consultant under excepted appointments—Intermittent—1-year appointment in fiscal year 1969, which was extended for year, and another appointment in fiscal year 1970 with no time limitation, would if only one appointment were involved be entitled pursuant to Dual Compensation Act of 1964, 5 U.S.C. 5532, to exemption from reduction of retired pay for no more than first 30-day period for which he received compensation as expert regardless of fiscal year in which appointment was made or services performed. However, where two or more appointments are involved, exemption applies to first 30 days of work in each fiscal year during which retired officer received civilian pay, but officer having worked less than 30 days under both appointments in each fiscal year is not subject to reduction of retired pay ---------- 189

Disability

Recomputation of retired pay

"Highest percentage of disability"

A member of uniformed services who when retired for length of service was found to be physically fit for military duty despite residual muscle damage from war wounds and who suffered myocardial infarction when he voluntarily returned to active duty is entitled to combine percentages

PAY—Continued Page
Retired—Continued
Disability—Continued
Recomputation of retired pay—Continued
"Highest percentage of disability"—Continued
of both disabilities in recomputation of his retired pay under 10 U.S.C. 1402(b), even though section only provides for member's return to his earlier retired status, for pursuant to sec. 1402(d), his disability retired pay must be based upon highest percentage of disability attained while on active duty after retirement and, therefore, member's disability from war wounds continuing to exist upon his return to retired status is for inclusion in "highest percentage" determination, notwithstanding wounds did not render him unfit for active military service ---------- 178

Increases
Cost-of-living increases
Active duty recall
Since rates of basic pay prescribed in Pub. L. 92–129 are applicable rates for purpose of adjusting retired pay under 10 U.S.C. 1401a for members who retired on or after Oct. 1, 1971, members of armed services who served on active duty after retirement and are entitled to recomputation of their pay pursuant to 10 U.S.C. 1402(a) and to partial cost-of-living increase adjustment under 10 U.S.C. 1401a(c) and (d), are subject for purposes of footnote 1 of sec. 1402(a) to starting date of Oct. 1, 1971, in determining their basic pay after continuous period of at least 2 years service, or to basic pay rates prescribed by Pub. L. 92–129 if released on or after Oct. 1, 1971, as these rates replace rates prescribed by E.O. 11577, effective Jan. 1, 1971 ---------- 384

Basic pay increases and wage freeze effect
When in adjustment of retired or retainer pay under 10 U.S.C. 1401a to reflect Consumer Price Index cost-of-living increase effective June 1, 1971, higher retired rate results for members retired on or prior to Sept. 30, 1971, computed at rates in E.O. 11577, dated Jan. 1, 1971, than for members retiring on or after Oct. 1, 1971, whose retired pay is for computation at rates in Pub. L. 92–129, effective Oct. 1, 1971, because of new rates prescribed by public law and exemption of military personnel placed in retired status during wage/price freeze period imposed by E.O. 11615, dated Aug. 15, 1971, issued under Economic Stabilization Act of 1970, pursuant to 10 U.S.C. 1401a(e), pay of member retired after Sept. 30, 1971, may not be less than if he had retired on that date ---------- 384

Revocation limitations
Notice to reservist of armed services under 10 U.S.C. 1331(d) of eligibility to retire pursuant to chapter 67 of Title 10, U.S.C., upon discovery that although member meets 20 years' service requirement of 1331(a)(2), he does not satisfy sec. 1331 (a)(3) to effect last 8 years of qualifying service must have been as member of Reserve component or war service requirement of sec. 1331(c), and that he is excluded from chapter by sec. 1331(a)(4) because he is entitled to retired pay under "another provision of law," serves to validate only service eligibility

PAY—Continued Page

Retired—Continued

Revocation limitations—Continued

requirements of clauses (2) and (3) of 10 U.S.C. 1331(a) since for purpose of 10 U.S.C. 1406, limiting revocation of retired pay because of error in determining years of service under sec. 1331(a)(2), both clauses must be read together, whereas sec. 1406 does not affect prohibitions in secs. 1331(a)(4) and 1331(c)---------- 91

Notification pursuant to 10 U.S.C. 1331(d) to reservist of armed services of eligibility to retired pay under chapter 67 of Title 10, U.S.C., where member has been granted retired pay prior to discovery of ineligibility is conclusive only as it pertains to service eligibility requirement of sec. 1331(a)(2)—20 years of service computed under sec. 1332—and sec. 1331(a)(3) to effect that at least 8 years of qualifying service must be within category named in sec. 1332(a)(1), provided payment of retired pay began after Oct. 14, 1966, effective date of Pub. L. 89–652 (10 U.S.C. 1331(d))---------- 91

Service credits

Dual credit

Concurrent payments of retired pay

Reserve officer with more than 20 years of active service in National Guard and Army Reserve discharged to accept commission with Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from PHS, upon mandatory retirement from PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for Reserve duty in computation of PHS retired pay in absence of statute authorizing dual benefits for same service. Since officer is entitled to greater benefit if Reserve duty is used to increase PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for Army retired pay received concurrently with PHS retired pay, notwithstanding payments were made in error and received in good faith---------- 298

Severance

Early discharge

During probationary period

Regular Army officer with less than 3 years of service who was recommended for elimination under sec. IX, Ch. 5, AR 635–100, because of substandard performance of duty properly was discharged without severance pay since officer was not discharged under 10 U.S.C. Ch. 359—secs. 3781–3787—and, therefore, sec. 3781 prescribing that board of officers may be convened to review record of officer to determine if he should be eliminated or required to show cause for his retention on active list is not for application and officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while officer is in probationary status with less than 3 years' service, and par. 10–3b, AR 635–120, indicating to contrary should be clarified---------- 81

PAY—Continued Page

Withholding

Debt liquidation

Property losses

Member on detail

Although involuntary collection from current pay of officers and enlisted men of military department who while assigned to Dept. of Defense agency are held pecuniarily liable for loss, damage, or destruction of Govt. property, even though not accountable for property, is not authorized absent specific statutory authority for setoff since property was not under control of service having jurisdiction of member charged, pursuant to 37 U.S.C. 1007(c) and 1007(e), only pertaining to enlisted members of Army and Air Force, Secretary concerned may promulgate regulations to provide for determination of member's liability, relying on reporting of instrumentality whose property is involved, and for involuntary collection of indebtedness from current pay of member, or may cancel indebtedness pursuant to 10 U.S.C. 4837(d) and 9837(d)---------- 226

Retired pay

Unaccounted travel funds advanced by Federal Aviation Administration to members of Armed Forces detailed to Dept. of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from retired pay of members indebted for outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding debt arose in other than military department, as detailed member remains member of Armed Forces subject to recall to duty, and since his paramount obligation is to military, his pay and allowances are subject to military laws and regulations, and indebtedness of each individual should be referred to appropriate military department for collection---------- 303

PAYMENTS

Absence or unenforceability of contract

Acceptance of goods or services by Government

Grants-in-aid status

Recovery of erroneous payments of Federal grants may not be waived on basis of *quantum meruit* doctrine which has been applied where goods or services are received by Govt. in absence of express contractual provision in view of fact it would be unfair for Govt. to have tangible benefits without recompense, since Govt. accrues no tangible benefits, as traditionally understood in context of *quantum meruit* and *quantum valebat* cases, from grant of funds, nor does activity carried out by grantee constitute efforts or labor performed for direct benefit of U.S.-- 162

Quantum meruit

Payment in lieu of taxes

Costs of performing governmental functions of installing traffic light over public highway or paving public dirt road in vicinity of Veterans Administration (VA) hospitals may not be shared by VA, since such governmental functions are generally financed from revenues raised by

PAYMENTS—Continued Page

Absence or unenforceability of contract—Continued

***Quantum meruit*—Continued**

Payment in lieu of taxes—Continued

State and local taxation and Federal contributions in lieu of State and local taxes are not permitted in absence of specific statutory provision, and broad authority in 38 U.S.C. 5001 *et seq.* to operate hospitals does not contain necessary specific authorization for VA to participate in proposed governmental functions. Moreover, principle of payments measured by *quantum* of services rendered is only applicable to direct utility type services, such as sewer, water, trash, etc., that are furnished to Govt---------- 135

Checks. (*See* **Checks**)

Contracts. (*See* **Contracts, payments**)

Dual

Under separate statutes

Prohibition

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and, too, are for recovery---------- 23

In lieu of taxes. (*See* **States, Federal payments in lieu of taxes**)

PERSONAL SERVICES

Contracts

Basis for contracting personal services

Since rule that purely personal services for Govt. are to be performed by Federal personnel under Govt. supervision is rule of policy and not positive law it need not be applied when contracting out is substantially more economical, feasible, or made necessary by unusual circumstances and services do not require Govt. supervision, and, therefore, services of Spanish translator obtained under purchase order may be continued and payment made in accordance with the terms of order. However, such services in future should be made subject to formal contract, for authority to use purchase order for services is primarily intended to relate to one-time operation. Overrules 6 Comp. Gen. 364---------- 561

Detective employment prohibition

Applicability

Bidder who was authorized to operate as detective agency at time its bid was submitted and was under consideration for award, and during part of period of its performance of interim guard service pending

PERSONAL SERVICES—Continued Page
Detective employment prohibition—Continued
Applicability—Continued
determination of its "legal entity," but who is not now subject to prohibition against employment by Govt. of detective agencies—prohibition that applies regardless of actual services performed—since its detective agency license has expired, should not be eliminated from consideration for award of proposed service contract, in view of fact that bid describing corporate business of bidder "as guard service to commercial and residential establishments," with no mention of its detective service was made in good faith ---------- 494

POSTAL SERVICE, UNITED STATES
Employees
Compensation
Postal Rate Commission employees
In establishing permanent pay schedule for Postal Rate Commission employees exempted from General Schedule Pay Rates of Title 5 by 5 U.S.C. 2104(b) and 2105(e), Commission is, pursuant to 39 U.S.C. 3604(b), required to follow appropriate compensation rates established by Postal Service under ch. 10 of Title 39, notwithstanding sec. 3604(d) appears to give Commission independent authority as sec. 3604(d) does not supersede sec. 3604(b). However, sec. 3604(d) makes 39 U.S.C. 410(a) applicable to Commission to effect "No Federal law dealing with public or Federal contracts, property, work, officers, employees, budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service" and, therefore, the Commission and not U.S. GAO is vested with authority to make final determination as to applicability of ch. 10 of Title 39 to Commission ---------- 395

PROPERTY
Private
Acquisition
Relocation expenses to "displaced persons"
Trailer park tenants notified to vacate only after Govt. signed agreement to lease building to be constructed on vacated land, are "displaced persons" as result of Federal and federally assisted programs within contemplation of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and tenants are entitled to relocation expenses and assistance under act since lease transaction amounts, in effect, to Federal lease-construction project, even though five-point criteria established to determine building is "in existence"—title; design; construction financing; building permit; and fixed completion date—to assure compliance with appropriation prohibition concerning payment of rental on lease agreements for space in buildings erected for Govt., had not been met, financing arrangement not having been completed as of date of issuance of space solicitation ---------- 660

PROPERTY—Continued Page

Public

Damage, loss, etc.

Accountability of civilian and military personnel

Liability determination

Although involuntary collection from current pay of officers and enlisted men of military department who while assigned to Dept. of Defense agency are held pecuniarily liable for loss, damage, or destruction of Govt. property, even though not accountable for property, is not authorized absent specific statutory authority for setoff since property was not under control of service having jurisdiction of member charged, pursuant to 37 U.S.C. 1007(c) and 1007(e), only pertaining to enlisted members of Army and Air Force, Secretary concerned may promulgate regulations to provide for determination of member's liability, relying on reporting of instrumentality whose property is involved, and for involuntary collection of indebtedness from current pay of member, or may cancel indebtedness pursuant to 10 U.S.C. 4837(d) and 9837(d)..... 226

Private use

Receipts disposition

Revenues received by Smithsonian Institution from several activities at National Zoo may be deposited into the Treasury to credit of the Institution under sec. 5589, Revised Statutes, 20 U.S.C. 53, since requirement for deposit of gross receipts from activities supported by appropriated funds into general fund of the Treasury as miscellaneous receipts, pursuant to sec. 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under authority of original trust charter and 1846 Organic Act and not on basis of real property rights. However, as bulk of administration of Zoo activities will continue to be supported by appropriated funds, books should reflect gross amount of receipts realized from Zoo activities supported by appropriated funds and a full disclosure made to Congress. 42 Comp. Gen. 650, modified..... 506

Surplus

Disposition. (*See* **Sales**)

Real. (*See* **Real Property**)

PUBLIC BUILDINGS

Construction

Bid evaluation

Time factor

Invitation for building construction which although it did not spell out specific criteria for selection of either bid No. 1, providing for completion in 1,095 calendar days, or bid No. 2, completion in 870 days, in legal invitation, even though it is suggested future construction solicitations identify those factors that will be considered in selecting shorter or longer completion date, and award of contract to low bidder on basis of price on earlier completion date was proper since invitation provided for award on basis of price and other factors, and "other factors"—rental space savings, gain in operating efficiency, and earlier availability of space to accommodate program and staff expansions—are costs that are too intangible to evaluate, as is provision for assessment of liquidated damages..... 645

PUBLIC HEALTH SERVICE Page
Commissioned personnel
Retired pay
Annuity election for dependents
Validity

Election by Army Reserve officer retired for age under 10 U.S.C. 1331 not to participate in Retired Servicemen's Family Protection Plan, 10 U.S.C. 1441–1446, does not affect validity of his election to come under plan in connection with his retirement from Public Health Service (PHS), where he served as commissioned officer on active duty following discharge from Army Reserve. Since officer had in effect valid election to participate in plan at time of retirement from PHS, and there was implied surrender by him of his military retired pay at that time, deductions made from his PHS retired pay based solely on that retired pay were proper ---------- 298

Computation

Reserve officer with more than 20 years of active service in National Guard and Army Reserve discharged to accept commission with Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from PHS, upon mandatory retirement from PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for Reserve duty in computation of PHS retired pay in absence of statute authorizing dual benefits for same service. Since officer is entitled to greater benefit if Reserve duty is used to increase PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for Army retired pay received concurrently with PHS retired pay, notwithstanding payments were made in error and received in good faith---------- 298

Foreign government employment

Retired member of Regular component of Commissioned Corps of Public Health Service who notified Service of intent to accept employment with Canadian Dept. of Agriculture and inquired whether his retired pay would be affected if he became Canadian citizen is not eligible to receive retired pay unless his employment is approved by Congress, by virtue of Art. I, Sec. 9, Cl. 8 of U.S. Constitution and E.O. 5221, although in view of B–51184, Aug. 2, 1945, he may retain payments made. Status of officers of Commissioned Corps of PHS is like that held by Regular commissioned officers of armed services who are subject to constitutional provision and, therefore, pursuant to 44 Comp. Gen. 130, PHS officer may not receive retired pay while employed by Canadian Govt. without congressional consent. B–51184, Aug. 2, 1945, overruled---------- 780

PUBLIC UTILITIES
Relocation
Government liability

Request of Potomac Electric Power Co. (PEPCO) for reimbursement of facilities relocation costs incurred incident to construction of Library of Congress James Madison Memorial Building was properly denied in absence of statutory authority similar to that under which PEPCO is being reimbursed for relocations of their facilities in connection with Metro program, and neither appropriation measures for Library of Congress building nor any other authority provides for payment of utility location costs by Architect of Capitol---------- 167

PURCHASES Page

Purchase orders

Use limitation

Since rule that purely personal services for Govt. are to be performed by Federal personnel under Govt. supervision is rule of policy and not positive law it need not be applied when contracting out is substantially more economical, feasible, or made necessary by unusual circumstances and services do not require Govt. supervision, and, therefore, services of Spanish translator obtained under purchase order may be continued and payment made in accordance with the terms of order. However, such services in future should be made subject to formal contract, for authority to use purchase order for services is primarily intended to relate to one-time operation. Overrules 6 Comp. Gen. 364 ---------- 561

QUARTERS

Failure to furnish

Vessel crew members

Quarters and subsistence authorized by 5 U.S.C. 5947 to be furnished aboard vessels without charge to employees of Corps of Engineers, Dept. of Army, engaged in floating plant operations may not be obtained by contract in lieu of individual allowance to each employee that is prescribed by section for employees prevented from boarding vessel because of hazardous weather conditions or because vessel is in shipyard undergoing repairs since purpose of sec. 5947 is to substitute allowance when quarters and subsistence cannot be provided on board vessel, and authority to furnish quarters or subsistence, or both, "on vessels, without charge" does not authorize furnishing of quarters and subsistence off vessel without charge in lieu of allowance payment. However, furnishing of quarters in accordance with 5 U.S.C. 5911 is not precluded ---------- 100

QUARTERS ALLOWANCE

Availability of quarters

Assignment delayed

Navy ensign, without dependents, who while on temporary duty in connection with fitting out a vessel was not assigned Govt. bachelor quarters for more than 2 months after reporting for duty, although aware of their availability within few days after arrival, and who for period prior to quarters assignment was credited with BAQ under 37 U.S.C. 403(f), and resided, without authority, in civilian community and was paid per diem, is not considered to have been involuntarily assigned to quarters occupancy since he was aware of availability of of quarters and assignment policy in effect at the Command and, therefore, his residency in civilian community was for his own convenience. Although payment of BAQ prior to assignment of quarters will not be questioned, there is no authority for further payment of BAQ ---------- 513

QUARTERS ALLOWANCE—Continued Page

College attendance

Government quarters not occupied

Members of uniformed services without dependents who, between permanent duty stations, attend civilian school to obtain baccalaureate degree under permissive travel orders at no expense to Govt., are entitled, pursuant to 37 U.S.C. 403(f), to BAQ if not assigned Govt. quarters while on such temporary duty, since "no expense" provision in travel orders pertains to travel and per diem allowances incident to temporary duty which does not involve public business, and prohibition in 37 U.S.C. 320, which was basis for denying allowance in 39 Comp. Gen. 718, has been removed. Whether school assignment is regarded as period of temporary duty or leave of absence is immaterial, except if member is not entitled to pay and allowances 673

Dependents

Husband and wife both members of armed services

Female officer who married another officer receiving basic allowance for quarters (BAQ) on account of children from previous marriage until his separation from service on June 7, 1971, is not entitled to allowance from date of birth of a son to the marriage on March 14, 1971, until her husband left service, for although under rule 12, table 3-2-4, Dept. of Defense Military Pay and Allowances Entitlements Manual when both members are assigned to same or adjacent bases or shore stations and male member has dependents other than a wife and female member has dependents "in her own right"—parents and children under 21 from another marriage—and family type quarters are not assigned for joint occupancy, both are entitled to receive BAQ, the child born of the marriage of the two officers must be regarded as father's dependent to prevent dual BAQ payments 413

REAL PROPERTY

Acquisition

Relocation costs

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

Although Dept. of Housing and Urban Development must amend project grants, contracts, and agreements with State agencies entered into prior to Jan. 2, 1971, effective date of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, in order to comply with title II of act which provides for relocation allowances and assistance to persons displaced by Federal and federally assisted programs on or after Jan. 2, 1971, including persons whose displacement was delayed until July 1, 1972, pursuant to sec. 221(b), cost-sharing requirements of sec. 211(a) do not apply since sec. 211(c) providing for amendment of programs to implement relocation assistance does not include sec. 211(a), and pursuant to sec. 220(a), repeal of Housing Act of 1949, as amended, does not affect 100 percent existing Federal liability for relocation costs 267

REGULATIONS Page

Administrative *v.* statutory

Distinctions

Elimination

Retroactive adjustment in pay rate of employee who upon reemployment in GS–3 position following resignation from GS–6, step 4, position is placed in step 10 under highest-previous rate rule to step 1 in accordance with administrative regulation restricting use of highest-previous rate rule may not be reversed as appointment to GS–3, step 10, was not administrative waiver of administrative restriction on use of highest-previous rate rule, nor may original pay-setting action be affirmed by a regulating or higher level, since distinctions recognized in 30 Comp. Gen. 492 between statutory and so-called purely administrative regulations no longer apply in view of contrary court cases and fact that B–158880 changed rule in 30 Comp. Gen. 492. However, overpayments received in good faith by employee may be waived under 5 U.S.C. 5584 30

Noncompliance effect

Delegated authority

Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR) promulgated by GSA to coordinate and provide for economic and efficient purchase of ADPE systems or units and, therefore, procurement of ADP equipment by Army Corps of Engineers delegated authority subject to provisions of FPMR, particularly late proposals and modifications provision—authority redelegated to District Engineer—is not governed by Armed Services Procurement Reg., and District Engineer vested with all authority and responsibility usual to position of contracting officer, with exception of choosing successful offeror, having issued request for proposals that failed to incorporate late proposal and modification requirement of FPMR, properly canceled request 457

SAFETY GLASSES

(*See* **Clothing and Personal Furnishings, special clothing and equipment, hazardous occupations, safety glasses**)

SALES

Bids

Mistakes

Lot *v.* unit price basis

Not withstanding clause in invitation offering steel bolts for sale on lot basis provided that in event total bid price and unit bid price were not in agreement, "the unit bid price will not be considered," contracting officer should have requested verification of bid price prior to award where bid on item appraised at $100 was $477.25, and other bids ranged from $7 to $82, since unit price multiplied by any of quantities in lot item did not result in total price bid, but was correct for item below item bid on, and as Defense Disposal Manual DOD 4160.21–M requires sales contracting officer to examine all bids for mistakes and to request verification from bidder in cases of apparent mistake, even though sales terms indicate otherwise, contract awarded should be canceled and bid deposit refunded. B–173163, dated Oct. 1, 1971, modified 488

SALES—Continued Page

Timber. (*See* Timber Sales)

SELECTIVE SERVICE SYSTEM

Delegation of authority by Director

Training programs

Authority to approve for payment on individual basis expenditures that are incurred in administration of training program established by Selective Service System pursuant to Govt. Employees Training Act (5 U.S.C. 4101–4118), and to establish criteria for payment, may be delegated by Director of Selective Service, and directive to this effect issued, notwithstanding neither language of Training Act nor implementing regulations do not expressly provide for delegation since secs. 4103,4 109(a), and 4105(c) of Title 5, U.S. Code, in assigning to agency heads responsibility for establishment of training programs and for oversight of such programs sanction delegation of authority by agency heads in connection with development and conduct of agency training programs 777

SMALL BUSINESS ADMINISTRATION

Contracts

Awards to small business concerns. (*See* Contracts, awards, small business concerns)

Loans

Appropriation obligation reporting

Since requirement of sec. 1311 of Supplemental Appropriation Act of 1955, as amended, (31 U.S.C. 200), that recording of obligation must be supported by documents applies more readily to 1-year or multi-year appropriations, SBA whose financial transactions involve loans from Business Loan and Investment Fund and Disaster Loan Fund—both revolving funds, appropriations to which remain available until expended—may adopt reporting system that departs from exact obligation basis if specific nature of such reporting is disclosed to all appropriate budgetary authorities. Recognizing distinctions between loans, reports on guaranty loans may be made on commitment basis, on computed basis for obligation estimates, and on direct participation loans, and reports should include obligation statements 631

Guaranteed loan programs

Default, etc., by borrower

Bank's demand payment status

Although under loan guarantee program conducted pursuant to sec. 7(a) of Small Business Act, SBA has discretionary power to arrange for bank to make demand payment (immediate purchase) for percentage of loan guaranteed, either upon default of loan or when borrower breaches material covenant of loan agreement, payment by SBA to bank under loan guaranteed program "where SBA officials have knowledge, prior to payment, of possibility of bank negligence, fraud, or misrepresentation," in order to protect certifying officers would not be in best interest of U.S. and may not be approved. However, SBA may pay innocent holder of guaranteed loan note upon default of borrower since payment will not waive any right of SBA against bank involved 474

SMITHSONIAN INSTITUTION Page

National Zoo

Revenue disposition

Revenues received by Smithsonian Institution from several activities at National Zoo may be deposited into the Treasury to credit of the Institution under sec. 5589, Revised Statutes, 20 U.S.C. 53, since requirement for deposit of gross receipts from activities supported by appropriated funds into general fund of the Treasury as miscellaneous receipts, pursuant to sec. 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under authority of original trust charter and 1846 Organic Act and not on basis of real property rights. However, as bulk of administration of Zoo activities will continue to be supported by appropriated funds, books should reflect gross amount of receipts realized from Zoo activities supported by appropriated funds and a full disclosure made to Congress. 42 Comp. Gen. 650, modified 506

STATES

Employees

Training by Federal Government

State and local government employees who are admitted to Federal training programs established by Federal agencies to train Govt. professional, administrative, and technical personnel pursuant to sec. 302 of Intergovernnmental Personnel Act of 1970 (Pub. L. 91–648, approved Jan. 5, 1971) may not be reimbursed travel and subsistence expenses incurred incident to such training since undefined term "cost of training" in sec. 302, given its usual and ordinary meaning does not authorize Federal agency to pay travel and subsistence expenses of State and local government employees admitted to Federal training programs 185

Federal aid, grants, etc.

Disaster relief

Appropriation availability

Practice of Office of Emergency Preparedness (OEP) in calling upon Federal agencies to provide relief assistance pursuant to Disaster Relief Act of 1970 (42 U.S.C. 4401 *et seq.*) from their own funds pending reimbursement from funds appropriated to President's disaster fund or directly to performing agency is within scope of act. Not only is Congress well aware of practice, but sec. 203(f) of act provides for President to direct any Federal agency, with or without reimbursement, to provide disaster assistance—authority similar to that in repealed 1950 act, prescribing "such reimbursement to be in such amounts as President may deem appropriate"—and President having delegated his authority to Director of OEP by E.O. 11575, Federal agencies may be assigned to provide assistance without prior advance of funds from OEP 245

Federal statutory restrictions

Federal Government use of State employees

Emergency Employment Act of 1971, designed to deal with high unemployment and drastic curtailment of vital public services at State and local levels because of lack of local revenues does not constitute statutory authority to enable Federal agencies to consent to have

STATES—Continued Page
Federal aid, grants, etc.—Continued
Federal statutory restrictions—Continued
Federal Government use of State employees—Continued
work done for them by local non-Federal employees hired under act in view of prohibitory language in sec. 3679 of R.S., 31 U.S.C. 665(b), against accepting voluntary services or employing personal services in excess of that authorized by law, and because sums made available under act are intended to staff open local Govt. jobs and not Federal offices. Also to permit staffing of Federal offices would involve application of various laws relating to Federal employees---------- 15

State fund contributions

Requirement in Adult Education Act of 1966 (20 U.S.C. 1201–1213), and implementing statutory regulation, that State's contribution from non-Federal sources for any fiscal year "will be not less than amount expended for such purpose from such sources during preceding fiscal year" may not be waived since statute and regulation are constructive, if not actual, notice of requirement, and grant funds are to be recovered if State fails to meet its financial contribution. If failure is due to circumstances beyond State's control, possible waiver is for consideration on individual basis. Fact that initially grant was erroneously made does not justify waiver as Govt. is only bound by acts of its agents within scope of delegated authority, which does not permit giving away money or property of U.S., either directly or by release of vested rights---------- 162

Recovery by Federal Government
Waiver

Recovery of erroneous payments of Federal grants may not be waived on basis of *quantum meruit* doctrine which has been applied where goods or services are received by Govt. in absence of express contractual provision in view of fact it would be unfair for Govt. to have tangible benefits without recompense, since Govt. accrues no tangible benefits, as traditionally understood in context of *quantum meruit* and *quantum valebat* cases, from grant of funds, nor does activity carried out by grantee constitute efforts or labor performed for direct benefit of U.S---------- 162

Relocation allowances and assistance
Persons displaced by federally assisted programs

Although Dept. of Housing and Urban Development must amend project grants, contracts, and agreements with State agencies entered into prior to Jan. 2, 1971, effective date of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, in order to comply with title II of act which provides for relocation allowances and assistance to persons displaced by Federal and federally assisted programs on or after Jan. 2, 1971, including persons whose displacement was delayed until July 1, 1972, pursuant to sec. 221(b), cost-sharing requirements of sec. 211(a) do not apply since sec. 211(c) providing for amendment of programs to implement relocation assistance does not include sec. 211(a), and pursuant to sec. 220(a), repeal of Housing Act of 1949, as amended, does not affect 100 percent existing Federal liability for relocation costs-- 267

STATES—Continued Page

Federal payments in lieu of taxes

Governmental functions

Specific authorization requirement

Costs of performing governmental functions of installing traffic light over public highway or paving public dirt road in vicinity of Veterans Administration (VA) hospitals may not be shared by VA, since such governmental functions are generally financed from revenues raised by State and local taxation and Federal contributions in lieu of State and local taxes are not permitted in absence of specific statutory provision, and broad authority in 38 U.S.C. 5001 *et seq.* to operate hospitals does not contain necessary specific authorization for VA to participate in proposed governmental functions. Moreover, principle of payments measured by *quantum* of services rendered is only applicable to direct utility type services, such as sewer, water, trash, etc., that are furnished to Govt---------- 135

Municipalities

Services to Federal Government

Service charge *v.* tax

Even though governmental or private entity furnishing ambulance services is supported in whole or in part by State or local taxes, VA may enter into contract for transporting veterans to and from a VA facility, provided political subdivision involved is not required to furnish such service without direct charge, and contract should not only provide for payments not to exceed fair and reasonable value of services received, but should comply with Fed. procurement law and regs. Under Mississippi statutes local governments are not required to furnish ambulance services and, therefore, VA may enter into contract with city of Biloxi or private concern to furnish transportation to and from VA center at Biloxi, but contract may not provide for subsidy since 46 Comp. Gen. 616 is not precedent for authorizing subsidy payments generally. Modifies B–172945, June 22, 1971---------- 444

Vehicle parking tax

The 25 percent tax imposed on rents charged for occupancy of parking space in parking stations which was paid by employee for parking Govt. vehicle while on official business may not be reimbursed to employee as incidence of tax falls directly on Govt. as lessee and under its constitutional prerogative, Govt. is entitled to rent or lease parking space free from payment of tax and employee was not required to pay tax. Municipal Code imposing tax exempts U.S. if payment is made by Govt. check, but it is not feasible for employee operating Govt. vehicle on official business to pay for parking by Govt. check. However, since Govt.' immunity does not extend to employee when he operates his own vehicle on official business, he may be reimbursed tax under 5 U.S.C. 5704 as part of parking cost. Modified by 52 C.G. 83 (1972)---------- 367

Taxes (*See* **Taxes, State**)

STATION ALLOWANCES Page
Military personnel
Excess living costs outside United States, etc.
Member on temporary duty between station changes

Air Force officer whose orders transferring him from Hawaii to Virginia and providing for concurrent travel of dependents are amended to place officer on terminal temporary duty "Operation Bootstrap" at Univeristy of Southern Calif. at no expense to Govt., may be paid station housing allowance and cost-of-living allowance for dependents who continued to reside in Hawaii incident to his temporary assignment for period of permissive temporary duty pursuant to par. 3–19c, Air Force Manual 36–11, since officer remained assigned to overseas station and was expected to return to that station for change-of-station processing after completing assignment---------- 691

STATUTES OF LIMITATION
Claims
General Accounting Office
"Actions at law" limitations

Claim submitted by Western Union Telegraph Company within 10-year limitation period for filing claims with U.S. GAO for services denied administratively on basis claim was barred by 1-year limitation of action provision in Communications Act, 47 U.S.C. 415(a), is cognizable under 31 U.S.C. 71 and 236, as time limitations for commencement of "actions at law" prescribed by Communications Act and Interstate Commerce Act do not affect jurisdiction of GAO unless specifically provided by statute, and 3-year limitation for filing transportation claims with GAO prescribed by sec. 322 of Transportation Act, as amended, 49 U.S.C. 66, does not affect right of firms providing service under Communications Act to have their claims considered by GAO if presented within 10 full years after dates on which claims first accrued---------- 20

Transportation
Administrative delays
Claims barred

Claims for transporting shipments under Govt. Bs/L that were not presented for payment to U.S. GAO within 3 years of dates on which claims accrued pursuant to sec. 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66), by reason of delayed handling in departments involved are barred and may not be considered for payment. A cause of action for transportation charges against U.S. accrues under sec. 322 upon completion of transportation service and statute of limitation begins to run from date of delivery to consignee, and filing of a claim with some other agencyof Govt. does not satisfy requirements of act. Where running of 3-year period is imminent, claims may be filed directly with Transportation Division of GAO---------- 201

STORAGE Page

Household effects

Military personnel

Nontemporary storage

Missing persons

The requirement in Joint Travel Regs. that Secretary concerned or his designee at termination of each year member of uniformed services is in missing status—that is absent for period of more than 29 days—must determine need for and authorize an extension of nontemporary storage of household and personal effects of member provided under par. M8101-6 of the regs. is in accord with language of Public Law 90-236 (37 U.S.C. 554(b)) and its legislative history and, therefore, regs. may not be amended to delete yearly approval requirement to provide for continuation of nontemporary storage so long as member is in missing status 392

Outside United States

Involuntary extension of overseas tour of duty being marked departure from usual practice of rotating members of uniformed services from overseas to U.S., extension may be viewed as unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes movement of dependents and household effects without regard to issuance of orders directing change of station. Therefore, Joint Travel Regs. may be amended to authorize reimbursement to member who unable to renew lease for local economy housing for extended tour of duty incurs expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters 17

SUBSIDIES

Service contracts

Even though governmental or private entity furnishing ambulance services is supported in whole or in part by State or local taxes, VA may enter into contract for transporting veterans to and from a VA facility, provided political subdivision involved is not required to furnish such service without direct charge, and contract should not only provide for payments not to exceed fair and reasonable value of services received, but should comply with Fed. procurement law and regs. Under Mississippi statutes local governments are not required to furnish ambulance services and, therefore, VA may enter into contract with city of Biloxi or private concern to furnish transportation to and from VA center at Biloxi, but contract may not provide for subsidy since 46 Comp. Gen. 616 is not precedent for authorizing subsidy payments generally. Modifies B-172945, June 22, 1971 444

SUBSISTENCE

Meals furnished civilian employee

Allowance when unavailable

Quarters and subsistence authorized by 5 U.S.C. 5947 to be furnished aboard vessels without charge to employees of Corps of Engineers, Dept. of Army, engaged in floating plant operations may not be obtained by contract in lieu of individual allowance to each employee that is prescribed by section for employees prevented from boarding vessel because of hazardous weather conditions or because vessel is in shipyard undergoing repairs since purpose of sec. 5947 is to substitute allowance when

SUBSISTENCE—Continued Page

Meals furnished civilian employee—Continued

Allowance when unavailable—Continued

quarters and subsistence cannot be provided on board vessel, and authority to furnish quarters or subsistence, or both, "on vessels, without charge" does not authorize furnishing of quarters and subsistence off vessel without charge in lieu of allowance payment. However, furnishing of quarters in accordance with 5 U.S.C. 5911 is not precluded---------- 100

Per diem

Delays

Rest stopover

Employee who at close of conference at 1600 on Friday remained in Chicago, departing for permanent duty station in Los Angeles by air 10:05 Saturday, arriving after 4 hours air travel, is entitled to per diem for three-fourths of day for Saturday since in view of length of Friday workday and fact return travel by air and travel to and from airports would involve 6 hours, employee prudently determined to remain overnight in Chicago. Par. C1051–1 of Joint Travel Regs. provides that traveler on official business will exercise same care in incurring expenses that prudent person would exercise if traveling on personal business, and pars. C1051–2 and C10101–7 of regulations containing many provisions to meet numerous travel situations are only guidelines for use in determining whether in particular situation traveler acted in reasonable manner---------- 364

Military personnel

Temporary duty

En route to new duty station

Permanent unit at temporary duty station

Chief petty officer who incident to permanent duty station change from Memphis, Tennessee, to Patrol Squadron Eight at Brunswick, Me., is ordered to report on Apr. 29, 1971 for 19 weeks of instruction on temporary duty with Squadron Thirty at Patuxent River, Md., is entitled to per diem for entire period of temporary duty, notwithstanding unit to which assigned at his new permament duty station was located at Patuxent River until June 30, 1971, since par. M4201–4 of Jt. Trav. Regs. prohibiting payment of per diem within limits of permanent duty station has no application as officer was not member of Squadron Eight until he reported to Brunswick and, therefore, his travel status and per diem entitlement were not affected because his temporary duty station was for part of time old permanent station of Squadron---------- 215

Recall to permanent duty station

Navy officer who was unable to fulfill temporary duty assignment because he was recalled to permanent station for emergency duties a few hours after arrival at temporary duty station and advance payment for rental of hotel room may be reimbursed in addition to taxi fare and tips for handling baggage at air terminal for advance payment, even though payment of per diem is precluded by par. M4253–3a of Joint Travel Regs. because officer's absence from permanent duty station was less than 10 hours since officer under proper orders rented hotel room due to unavailability of Govt. quarters, and reimbursable hotel charge is considered administrative expense that is chargeable to appropriation for Operation and Maintenance, Navy---------- 12

SUBSISTENCE—Continued Page

Per diem—Continued

Temporary duty

Station later designated as permanent

Employee who while on temporary duty in Boston is confirmed for permanent appointment at temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after employee had departed on July 23, and to which point he did not return to assume new duties until Aug. 9, during which period he performed duty at old headquarters, Chicago, returned to Boston to seek housing, attended conference, and was on leave, is considered to have been transferred for travel and per diem purposes on Aug. 9, date he returned to Boston, and as employee was expected to return to Chicago after completing temporary duty, rule that employee may not be allowed per diem after receiving notice temporary duty station is to be his permanent station has no application 10

SUBVERSIVE ACTIVITIES PROHIBITION

Training Government employees overseas

In making determination whether prohibition in 5 U.S.C. 4107(a) against training of employees by, in, or through non-Govt. facility which teaches or advocates overthrow of Govt. of U.S. by force or violence; or by or through individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, DOD may delegate authority granted agency heads by E.O. 11348, dated Apr. 20, 1967, to determine eligibility of foreign government or international organization to provide training to major theatre or local commander, subject to consultation with Dept. of State and other appropriate Federal agencies in area, and may also provide that eligibility of noncitizens may be determined from security files in local or theatre level since applying procedures in 5 CFR 410.504 to determine security eligibility in the U.S. would be ineffective 199

TAXES

Federal

Joint returns

Refunds

Negotiation of joint income tax refund checks issued in names of divorced couple on basis of joint income tax return by claimant's former wife, without his knowledge or permission, did not extinguish liability of U.S. or pass title to endorsing bank, who therefore is subject to reclamation proceedings, as, absent statute or court decision to contrary, joint payees may not be considered as one person or entity so that endorsements of both were required for negotiation of checks. Moreover, Uniform Commercial Code requires all joint payees must endorse and discharge negotiable instrument; and while code is not necessarily determinative with respect to Govt. checks, it should be followed to maximum extent practicable in interest of uniformity where it is not inconsistent with Federal interest, law, or court decisions. 50 Comp. Gen. 441 modified 668

TAXES—Continued Page

State

Government immunity

Vehicle parking tax

The 25 percent tax imposed on rents charged for occupancy of parking space in parking stations which was paid by employee for parking Govt. vehicle while on official business may not be reimbursed to employee as incidence of tax falls directly on Govt. as lessee and under its constitutional prerogative, Govt. is entitled to rent or lease parking space free from payment of tax and employee was not required to pay tax. Municipal Code imposing tax exempts U.S. if payment is made by Govt. check, but it is not feasible for employee operating Govt. vehicle on official business to pay for parking by Govt. check. However, since Govt.'s immunity does not extend to employee when he operates his own vehicle on official business, he may be reimbursed tax under 5 U.S.C. 5704 as part of parking cost. Modified by 52 C.G. 83 (1972) ---------- 367

TERRITORIES AND POSSESSIONS

Guam. (*See* Guam)

TIMBER SALES

Access Roads

Amortization

"Earned purchase credit"

Transfers

Proposal to change road amortization provisions in standard Forest Service timber sale contracts so as to permit transfer of "earned purchaser credit" between contracts—credits earned when rate of timber removal is insufficient to amortize cost of constructing access roads built to area from which timber is to be removed—may not be approved in absence of statutory authority. To apply purchaser credits to other than contract of timber under which earned would exchange timber for road construction and 16 U.S.C. 476, authorizing sale of timber in national forests, provides that Secretary of Agriculture may sell timber for not less than appraised value ---------- 826

Bids

Bid bond

Sealed bid

Auction timber sale

Under combined sealed bid-auction timber sale, failure of high bidder to furnish bid bond with its seal bid submitted to qualify for oral bidding—failure corrected before oral bidding began—was minor informality, and defect having been remedied, high bid was properly included in oral bidding. Even if secs. 1-2.404-2(5)(f) and 1-10.103-4 of Federal Procurement Regs. requiring rejection of bids to furnish goods or services when bid bond is not furnished applied to timber sales, 38 Comp. Gen. 532, incorporated in procurement regulations, should not be made applicable to timber sale since sealed bids only qualified bidders to participate in oral bidding and no competitive advantage accrued prior to oral bidding as no bidder knew whether any other bidder would submit oral bid in excess of his, or any other bidder's sealed bid price ---------- 182

TORTS Page

Claims under Federal Tort Claims Act

Settlement

Claimant's indebtedness to Government

Where agreement with person whose leg was negligently fractured when struck by food cart while visiting Veterans Administration hospital provided for settlement of tort claim in amount of $25,000, plus $5,857, cost of furnishing emergency and followup care at hospital pursuant to 38 U.S.C. 611(b)—total award of $30,857—voucher issued in settlement of award should set off claimant's indebtedness for hospitalization against total award, specifying credit of setoff to VA, Medical Care appropriation. However, where tort suit filed in Federal Dist. Court is compromised by Attorney General under 28 U.S.C. 2677, such agreement is net settlement, as is judgment that provides for deduction of settlement, as is judgment that provides for deduction of indebtedness, and in each case debt for emergency hospitalization is extinguished notwithstanding appropriation involved will not be reimbursed..... 180

TRAILER ALLOWANCES

Pullman rail car

Status as mobile dwelling

Pullman rail car converted and used as residence by member of uniformed services qualifies as mobile dwelling under par. M10001–1, Joint Travel Regs., which defines "house trailer" as mobile dwelling constructed or coverted for use as residence and designed to be moved overland, either self-propelled or by towing, that contains household goods and personal effects of member and his dependents, and member is entitled to trailer allowance prescribed by 37 U.S.C. 409, which contemplates payment on mileage basis for overland travel, since there is no indication in sec. 409 that allowance is not applicable to privately owned Pullman car transported overland by rail, and subject to tariff charges, as well as to highway movements..... 806

Storage and shipment of household effects

Additional allowance precluded

Employee of National Park Service in California who refusing to relocate with transferred functions was separated and granted severance pay, and who after placing his residence on market, which was sold within 2 months, and storing his household effects, departed for Washington, D.C., in privately owned automobile, towing housetrailer, upon reinstatement in Park Service in Washington within 4 months, is entitled pursuant to 5 U.S.C. 5724(a) to same benefits he would have been entitled to had he transferred without break in service, and under Pub. L. 89–516, employee may be reimbursed for sale of house, storage of household effects, expenses incurred to travel to Washington with wife prior to reinstatement, and other proper relocation expenses. However, reimbursement for storage and shipment of employee's effects precludes allowance of mileage for housetrailer..... 27

TRANSPORTATION Page

Accessorial charges

Evidence to support

On shipments of electronic and other equipment, exceptions taken to line-haul charges derived from a sec. 22 tender (49 U.S.C. 22 and 317 (b)), computed on basis of constructive weight, determined by multiplying 7 pounds per cubic foot by cubic capacity of an exlusively used 40-foot van—even though van was only size available to carrier and was not filled to capacity, or that exclusive use had not been requested—and to unrequested specialized handling charges will be reconsidered. Exceptions that were based on applying sliding scale of volume minimum weights and table of rates contained in tender, will be removed if it can be shown seals had been attached to vehicle by shipper, or exclusive use of vehicle had been ordered and furnished, and exceptions to accessorial charges will be allowed upon proof of authenticity---------- 208

Tariff interpretation

Computing packing and unpacking services on shipment of household goods that moved under Govt. bill of lading on actual weight of shipment, 7,490 pounds, at rate provided for 4,000 to 7,999 pound range of carrier's applicable tender for accessorial services rather than at lower rate prescribed for 8,000 pounds or more, produced overcharge which was properly recovered by setoff as carrier's tender is subject to tariff of Movers & Warehousemen's Association of America, Inc., to effect total transportation charge of any shipment shall not exceed charge computed by use of lowest weight and applicable rate in next higher weight bracket for same distance, if carrier's tender does not provide an exception or none need be implied to give effect to tender, for it is what tender is, not what it should have been, that controls---------- 676

Automobiles

Civilians on military duty

Civilian employee serving in Hawaii under transportation agreement who as Army reservist is ordered, effective July 29, 1968, to active duty for training in U.S. and is granted military leave from July 18 to Aug. 1, 1968 under 5 U.S.C. 5534, which is applicable to reservists and National Guardsmen, may be carried on civilian rolls beyond military reporting date; may be reimbursed pursuant to 5 U.S.C. 5724 on basis of administrative approval for travel of dependents and shipment of privately owned automobile to U.S.; and may be also under 5 U.S.C. 5534 reemployed June 9, 1969, although released from active duty June 23, but employee entitled under 5 U.S.C. 6323 to 15 days military leave for single period of training, extending from 1 calendar year into next, having been granted military leave from July 18, to Aug. 1, 1968, may not be granted military leave from June 9 to 23, 1969, but may be granted annual leave---------- 23

TRANSPORTATION—Continued Page

Automobiles—Continued

Military personnel

Commercial vessels

Reimbursement basis

Enlisted Army member in grade E–5 and therefore eligible to have automobile shipped at Govt. expense pursuant to 10 U.S.C. 2634 incident to transfer overseas, who when erroneously denied such transportation arranged and paid for shipping vehicle by commercial means, is entitled to partial reimbursement in amount Army would have been charged by Military Sealift Command, Dept. of Navy, under its applicable schedule of rates if the Government had arranged for shipment. Regulations denying eligible member reimbursement for cost of shipping privately owned vehicle overseas by commercial means when he personally arranges for service because Govt. erroneously refused to do so may be amended to provide for partial reimbursement based on MSC costs. 45 Comp. Gen. 39 and other similar decisions modified..... 838

Bills

Time-barred claims

Claims for transporting shipments under Govt. Bs/L that were not presented for payment to U.S. GAO within 3 years of dates on which claims accrued pursuant to sec. 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66), by reason of delayed handling in departments involved are barred and may not be considered for payment. A cause of action for transportation charges against U.S. accrues under sec. 322 upon completion of transportation service and statute of limitation begins to run from date of delivery to consignee, and filing of a claim with some other agency of Govt. does not satisfy requirements of act. Where running of 3-year period is imminent, claims may be filed directly with Transportation Division of GAO..... 201

Civilians on military duty

Dual payments

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and, too, are for recovery..... 23

TRANSPORTATION—Continued Page

Dependents

Civilians on military duty

Civilian employee serving in Hawaii under transportation agreement who as Army reservist is ordered, effective July 29, 1968, to active duty for training in U.S. and is granted military leave from July 18 to Aug. 1, 1968 under 5 U.S.C. 5534, which is applicable to reservists and National Guardsmen, may be carried on civilian rolls beyond military reporting date; may be reimbursed pursuant to 5 U.S.C. 5724 on basis of administrative approval for travel of dependents and shipment of privately owned automobile to U.S.; and may be also under 5 U.S.C. 5534 reemployed June 9, 1969, although released from active duty June 23, but employee entitled under 5 U.S.C. 6323 to 15 days military leave for single period of training, extending from 1 calendar year into next, having been granted military leave from July 18, to Aug. 1, 1968, may not be granted military leave from June 9 to 23, 1969, but may be granted annual leave 23

Military personnel

Changes in grade or rank

Ineffective for entitlement purposes

Enlisted man married in Honolulu, his home, prior to enlisting in Army in 1968, where wife continued to reside when he was assigned to Vietnam in ineligible grade for dependent travel, who in 1970 prior to effective date of permanent station change to Texas was promoted to SP–5, eligible pay grade for dependent transportation, nevertheless is not entitled to reimbursement for wife's transoceanic travel, even though his status is similar to that of member who acquired dependent overseas since he did not acquire dependent at overseas station and did not have at least 12 months remaining on his overseas tour, nor had dependent been authorized to be present in vicinity of his overseas station and he, therefore, is regarded as member "without dependents" within meaning of AR 55–46, and subject to restrictions of par. M7000–14 of Joint Travel Regs 362

Children

Member's duty station change during children's visit

Divorced Naval officer whose former wife was given legal custody, care, and control of their children under court order permitting them to visit with him during their summer vacation is considered to be member without dependents within meaning of par. M9001–2 of Joint Travel Regs. and, therefore, fact that children accompanied officer when his permanent duty station was changed during their visit does not entitle him to reimbursement for their transportation or to dislocation allowance for children under M9004–2–1, since travel of children was not to establish residence and neither their visiting status nor their residence was changed. However, since officer was not assigned public quarters he is entitled pursuant to 37 U.S.C. 407 to dislocation allowance as member without dependents equal to quarters allowance for 1 month 716

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel—Continued

Dependents acquired after issuance of orders

Navy member who interrupted his travel from Saigon to Philadelphia incident to his transfer to Fleet Reserve to be married in England is not entitled to dependent's transoceanic transportation at Govt. expense under authority of par. M7060 of Joint Travel Regs. since pursuant to par. 4300–2, member is considered to have been without dependent at restricted station and he, therefore, is subject to par. M7000–14, prohibiting payment by Govt. of transoceanic or overseas land transportation of dependent, and to par. M7000–17, prohibiting transportation of dependents at Govt. expense upon member's permanent change of station when presence of dependents at member's overseas station was not authorized or approved by appropriate military overseas commander. 485

Household effects

Military personnel

Election of benefits

Irrevocable

Election by Army Reserve 2nd Lt. incident to graduation from Officer Candidate School at Ft. Benning and assignment to 2 years' active duty there, to move his household goods rather than his housetrailer from home of record to Columbus, Ga., where he had rented an apartment, because he anticipated duty in Vietnam, may not be revoked when overseas orders were canceled, and member paid trailer allowance authorized in 37 U.S.C. 409 in lieu of dislocation allowance and shipment of baggage and household goods. Unless erroneously informed of benefits and election is irrevocable, for an additional election or reelection may not be authorized, and finality in the settlement of claims is essential. Since member was aware of amounts payable whatever his election and he chose to move his household goods as most beneficial arrangement for him, he is not entitled to adjustment of cost---------- 509

Packing, crating, drayage, etc.

Involuntary extension of overseas tour of duty being marked departure from usual practice of rotating members of uniformed services from overseas to U.S., extension may be viewed as unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes movement of dependents and household effects without regard to issuance of orders directing change of station. Therefore, Joint Travel Regs. may be amended to authorize reimbursement to member who unable to renew lease for local economy housing for extended tour of duty incurs expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters---------- 17

Trailer shipment

Missing, interned, etc., persons

Wife of Army warrant officer missing in action who moved household effects in her mobile home and was denied reimbursement for expenses incurred in movement of trailer, as 37 U.S.C. 554 in providing for travel and transportation of dependents and household and personal effects

TRANSPORTATION—Continued Page
Household effects—Continued
Military personnel—Continued
Trailer shipment—Continued
Missing, interned, etc., persons—Continued
of members of uniformed services in missing status does not specifically include housetrailer, nevertheless may be reimbursed expense of trailer movement since amount involved is less than it would cost Govt. to comply with par. M8353 of Joint Travel Regs. authorizing shipment of household goods when member is in missing status for more than 29 days, either to his official home of record or residence of his next of kin------ 763

Packing, crating, etc., charges
Reimbursement

Computing packing and unpacking services on shipment of household goods that moved under Govt. bill of lading on actual weight of shipment, 7,490 pounds, at rate provided for 4,000 to 7,999 pound range of carrier's applicable tender for accessorial services rather than at lower rate prescribed for 8,000 pounds or more, produced overcharge which was properly recovered by setoff as carrier's tender is subject to tariff of Movers & Warehousemen's Association of America, Inc., to effect total transportation charge of any shipment shall not exceed charge computed by use of lowest weight and applicable rate in next higher weight bracket for same distance, if carrier's tender does not provide an exception or none need be implied to give effect to tender, for it is what tender is, not what it should have been, that controls---------- 676

Military personnel
In leave status without funds

To eliminate difficulty being experienced in distinguishing between "cost-charge" Govt. procured transportation furnished members traveling in leave status without prior orders who are without funds to return to their duty station and mixed travel that is adjusted under par. M4154 of the Joint Travel Regs. on travel vouchers of members traveling under change-of-station orders with leave en route who are without funds at their leave point and are also furnished Govt. procured transportation, regulations should be changed to produce uniformity in treatment of member travel claims. It is suggested that issuance of transportation request (TR) in all leave cases be treated as "cost-charge" transaction and amount of TR deducted from pay and allowances due member, or in lieu of issuing TR, a casual payment be authorized------ 556

Overcharges
Tender cancellation disputed

Rate tenders which offer reduced freight rates pursuant to sec. 22 of Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Govt. traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in offeree to make series of separate contracts by series of independent acceptances until at least 30 days' written notice by either party to tender of cancellation or modification of tender is received. Therefore, where Military Traffic Management and Terminal Service maintains supplements canceling or modifying four rate tenders were not received and carrier insists they were mailed,

TRANSPORTATION—Continued Page

Overcharges—Continued

Tender cancellation disputed—Continued

question of fact is raised and administrative statements must be accepted, and overcharges resulting from controversy are for recovery from carrier either directly or by deduction from any amounts subsequently due carrier as provided by 49 U.S.C. 66 541

Pullman rail car

Mobile dwelling for trailer allowance purposes

Pullman rail car converted and used as residence by member of uniformed services qualifies as mobile dwelling under par. M10001–1, Joint Travel Regs., which defines "house trailer" as mobile dwelling constructed or converted for use as residence and designed to be moved overland, either self-propelled or by towing, that contains household goods and personal effects of member and his dependents, and member is entitled to trailer allowance prescribed by 37 U.S.C. 409, which contemplates payment on mileage basis for overland travel, since there is no indication in sec. 409 that allowance is not applicable to privately owned Pullman car transported overland by rail, and subject to tariff charges, as well as to highway movements 806

Rates

Exclusive use of vehicle

Applicability

Basis for determination

On shipments of electronic and other equipment, exceptions taken to line-haul charges derived from a sec. 22 tender (49 U.S.C. 22 and 317 (b)), computed on basis of constructive weight, determined by multiplying 7 pounds per cubic foot by cubic capacity of an exclusively used 40-foot van—even though van was only size available to carrier and was not filled to capacity, or that exclusive use had not been requested—and to unrequested specialized handling charges will be reconsidered. Exceptions that were based on applying sliding scale of volume minimum weights and table of rates contained in tender, will be removed if it can be shown seals had been attached to vehicle by shipper, or exclusive use of vehicle had been ordered and furnished, and exceptions to accessorial charges will be allowed upon proof of authenticity 208

Increases

Ex-parte

Effective date

Intrastate shipments of several carloads of aviation fuel that had been originally shipped in interstate commerce under Govt. bills of lading to storage areas other than points involved in reshipments and commingled with other fuel shipments are independent shipments and are not continuity of original interstate transportation, which ended when fuel was stored and, in addition, since intrastate reshipments moved within 30-day notice period of Ex-Parte rate increases, reshipments are not subject to rate increase and claim for additional freight charges based on Ex-Parte rate increase is not applicable and may not be allowed 714

TRANSPORTATION—Continued Page

Rates—Continued

Section 22 quotations

Shipping point not tender listing

Claim for freight overcharges deducted pursuant to 49 U.S.C. 66 in payment of shipment of pallets of empty projectiles from Twin Cities Army Ammunition Plant, Minn., under Govt. bill of lading that made reference to sec. 22 I.C.C. (49 U.S.C. 22) special tariff rate—I.C.C. 185—for shipments originating from New Brighton, Minn., located 2½ miles from plant, was properly disallowed. Interpreting tender—continuous unilateral offer—as any other contract document to determine intent of parties, evidences plant and New Brighton are not different locations since it is common knowledge ammunition plants are not located within municipalities, Govt. agent believed special tariff rate applied or other carriers would have been tendered shipment, and carrier's agent did not object to B/L reference to I.C.C. 185 tender, issued to secure ammunition traffic 724

Tariffs

Construction

Accessorial charges

Computing packing and unpacking services on shipment of household goods that moved under Govt. bill of lading on actual weight of shipment, 7,490 pounds, at rate provided for 4,000 to 7,999 pound range of carrier's applicable tender for accessorial services rather than at lower rate prescribed for 8,000 pounds or more, produced overcharge which was properly recovered by setoff as carrier's tender is subject to tariff of Movers & Warehousemen's Association of America, Inc., to effect total transportation charge of any shipment shall not exceed charge computed by use of lowest weight and applicable rate in next higher weight bracket for same distance, if carrier's tender does not provide an exception or none need be implied to give effect to tender, for it is what tender is, not what it should have been, that controls 676

Supplements

Receipt requirement to be effective

Rate tenders which offer reduced freight rates pursuant to sec. 22 of Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Govt. traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in offeree to make series of separate contracts by series of independent acceptances until at least 30 days' written notice by either party to tender of cancellation or modification of tender is received. Therefore, where Military Traffic Management and Terminal Service maintains supplements canceling or modifying four rate tenders were not received and carrier insists they were mailed, question of fact is raised and administrative statements must be accepted, and overcharges resulting from controversy are for recovery from carrier either directly or by deduction from any amounts subsequently due carrier as provided by 49 U.S.C. 66 541

TRANSPORTATION—Continued Page

Requests

Issuance, use, etc.

"Cost-charge" basis

To eliminate difficulty being experienced in distinguishing between "cost-charge" Govt. procured transportation furnished members traveling in leave status without prior orders who are without funds to return to their duty station and mixed travel that is adjusted under par. M4154 of the Joint Travel Regs. on travel vouchers of members traveling under change-of-station orders with leave en route who are without funds at their leave point and are also furnished Govt. procured transportation, regulations should be changed to produce uniformity in treatment of member travel claims. It is suggested that issuance of transportation request (TR) in all leave cases be treated as "cost-charge" transaction and amount to TR deducted from pay and allowances due member, or in lieu of issuing TR, a casual payment be authorized 556

TRAVEL EXPENSES

Advances

Unexpended amounts refund

Military personnel detailed to civilian agency

Unaccounted travel funds advanced by Federal Aviation Administration to members of Armed Forces detailed to Dept. of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from retired pay of members indebted for outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding debt arose in other than military department, as detailed member remains member of Armed Forces subject to recall to duty, and since his paramount obligation is to military, his pay and allowances are subject to military laws and regulations, and indebtness of each individual should be referred to appropriate military department for collection 303

Military personnel

Leaves of absence

Temporary duty termination

Navy enlisted member stationed in California who while on leave in Baltimore, which was authorized under orders providing for subsequent temporary duty to attend school in Rhode Island, is directed to return to permanent duty station upon completion of leave is entitled to travel allowances equivalent to round-trip distance between permanent duty station and leave point, not to exceed round-trip distance between permanent and temporary duty stations, even though ordinarily such allowances are not payable for leave travel performed for personal reasons and not public business, since member performed circuitous travel to his leave point under competent orders, travel he would not have undertaken had he not been ordered to perform the temporary duty. B-166236, May 21, 1969, modified 548

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Miscellaneous expenses

Reservists on temporary duty

Members of Reserve components away from home on active duty for less than 20 weeks, and entitled to per diem at their permanent station, may be reimbursed such miscellaneous expenses as are authorized for Regular members of uniformed services under part I, ch. 4, vol. 1 of the Joint Travel Regs. in connection with travel or temporary duty and regulations amended accordingly in view of parity intended to be accomplished by the addition of clause (4) to 37 U.S.C. 404(a) by act of Dec. 1, 1967, the amended regulations, of course, subject to limitations in part A, ch. 6. However, entitlement to travel between place of lodging or messing and duty as prescribed in par. M4413 may not be authorized since under clause (4) members at their permanent station performing annual training duty are not entitled to per diem when Govt. quarters and mess are available 559

Taxicabs

Temporary duty

Navy officer who was unable to fulfill temporary duty assignment because he was recalled to permanent station for emergency duties a few hours after arrival at temporary duty station and advance payment for rental of hotel room may be reimbursed in addition to taxi fare and tips for handling baggage at air terminal for advance payment, even though payment of per diem is precluded by par. M4253-3a of Joint Travel Regs. because officer's absence from permanent duty station was less than 10 hours since officer under proper orders rented hotel room due to unavailability of Govt. quarters, and reimbursable hotel charge is considered administrative expense that is chargeable to appropriation for Operation and Maintenance, Navy 12

Traveler's checks

Reimbursement

Reimbursement to members of uniformed services for cost of purchasing traveler's checks, whether related travel is performed within or without U.S., may be authorized without regard to value of checks purchased in view of broad authority for reimbursement in connection with travel of members and their dependents, and Joint Travel Regs. amended accordingly, thus bringing reimbursement for cost of traveler's checks for travel within U.S. in line with long recognition that cost of traveler's checks incident to travel outside U.S. is valid expense. However, amendment of Standardized Government Travel Regs. to accomplish same uniformity in reimbursing civilian employees for cost of traveler's checks is matter for consideration by Administrator of GSA 606

TRAVEL EXPENSES—Continued Page

Overseas employees

"Discount 50 Plan" reduced fares

Entitlement

"Discount 50 Plan," published tariff that offers reduced air fares to Federal civilian employees and their dependents stationed outside Western Hemisphere and traveling on authorized leave at own expense is not available to employee who is to be reimbursed by U.S., nor may transportation request, use of which is limited to travel chargeable to U.S., be issued under Plan. However, employees who have used Plan incident to renewal agreement travel authorized by 5 U.S.C. 5728(a) may be reimbursed, and it is immaterial if employee did not travel to or spend substantial period at place of residence or authorized destination, but entitlement is limited to cost of travel to place of residence, and, furthermore, fact that employee's dependents did not travel with him does not deprive him of entitlement to cost of their travel to different destination within U.S., limited to cost of traveling to actual place of residence---- 828

Prudent person rule

Employee who at close of conference at 1600 on Friday remained in Chicago, departing for permanent duty station in Los Angeles by air 10:05 Saturday, arriving after 4 hours air travel, is entitled to per diem for three-fourths of day for Saturday since in view of length of Friday workday and fact return travel by air and travel to and from airports would involve 6 hours, employee prudently determined to remain overnight in Chicago. Par. C1051–1 of Joint Travel Regs. provides that traveler on official business will exercise same care in incurring expenses that prudent person would exercise if traveling on personal business, and pars. C1051–2 and C10101–7 of regulations containing many provisions to meet numerous travel situations are only guidelines for use in determining whether in particular situation traveler acted in reasonable manner---- 364

Reemployment after separation

Liability for expenses

Entitlement to travel and transportation expenses of employee of Army in Canal Zone who separated in reduction-in-force action is returned to actual residence in U.S. and after 7-day break in service accepts position with another Dept. of Defense component located 419 miles from residence is because of break in service within purview of 5 U.S.C. 5724a(c) and not 5 U.S.C. 5724(e). Under sec. 5724(a)(c), governing reimbursement of employees who involved in reduction-in-force or transfer of function are employed within 1 year of separation, acquiring agency bears expenses of employee's travel between old and new stations, less costs incurred by losing agency, which if in excess of cost of direct travel between stations, need not be recouped by losing agency---- 14

TRAVEL EXPENSES—Continued Page

Temporary duty

Station later designated as permanent

Employee who while on temporary duty in Boston is confirmed for permanent appointment at temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after employee had departed on July 23, and to which point he did not return to assume new duties until Aug. 9, during which period he performed duty at old headquarters, Chicago, returned to Boston to seek housing, attended conference, and was on leave, is considered to have been transferred for travel and per diem purposes on Aug. 9, date he returned to Boston, and as employee was expected to return to Chicago after completing temporary duty, rule that employee may not be allowed per diem after receiving notice temporary duty station is to be his permanent station has no application 10

Tips

Baggage handling, etc.

Temporary duty interrupted

Navy officer who was unable to fulfill temporary duty assignment because he was recalled to permanent station for emergency duties a few hours after arrival at temporary duty station and advance payment for rental of hotel room may be reimbursed in addition to taxi fare and tips for handling baggage at air terminal for advance payment, even though payment of per diem is precluded by par. M4253–3a of Joint Travel Regs. because officer's absence from permanent duty station was less than 10 hours since officer under proper orders rented hotel room due to unavailability of Govt. quarters, and reimbursable hotel charge is considered administrative expense that is chargeable to appropriation for Operation and Maintenance, Navy 12

TRUST FUNDS

(*See* Funds, trust)

UNEMPLOYMENT

Relief

Emergency Employment Act of 1971

Emergency Employment Act of 1971, designed to deal with high unemployment and drastic curtailment of vital public services at State and local levels because of lack of local revenues does not constitute statutory authority to enable Federal agencies to consent to have work done for them by local non-Federal employees hired under act in view of prohibitory language in sec. 3679 of R.S., 31 U.S.C. 665(b), against accepting voluntary services or employing personal services in excess of that authorized by law, and because sums made available under act are intended to staff open local Govt. jobs and not Federal offices. Also to permit staffing of Federal offices would involve application of various laws relating to Federal employees 152

VEHICLES Page
Parking fee. (*See* Fees, parking)
VESSELS
Charters
Long-term

Hire costs for tankers to be constructed for charter to Military Sealift Command (MSC) for 5-year term with options to cover 15 years, and costs of breach, termination, failure to exercise renewal option, or value of lost tanker are operating expenses chargeable to Navy Industrial Fund since charter arrangement is not purchase of an asset requiring authorization and appropriation of funds. Fact that MSC assumes certain termination costs does not transform 5-year charter with its 15-year renewal options into 20-year charter, and except for authority in sec. 739 of the Dept. of Defense Appropriations Act, 1972, DOD would be required to set aside cash for option termination costs; also question of the general, full faith and credit obligations of United States is for determination by Attorney General; and only way to insure investors of unconditional obligation of the Fund is to so provide in charter for each vessel..... 598

Crews
Quarters and subsistence on board vessels
Unavailable

Quarters and subsistence authorized by 5 U.S.C. 5947 to be furnished aboard vessels without charge to employees of Corps of Engineers, Dept. of Army, engaged in floating plant operations may not be obtained by contract in lieu of individual allowance to each employee that is prescribed by section for employees prevented from boarding vessel because of hazardous weather conditions or because vessel is in shipyard undergoing repairs since purpose of sec. 5947 is to substitute allowance when quarters and subsistence cannot be provided on board vessel, and authority to furnish quarters or subsistence, or both, "on vessels, without charge" does not authorized furnishing of quarters and subsistence off vessel without charge in lieu of allowance payment. However, furnishing of quarters in accordance with 5 U.S.C. 5911 is not precluded..... 100

VETERANS ADMINISTRATION
Contracts
Ambulance services
Authority to contract

Even though governmental or private entity furnishing ambulance services is supported in whole or in part by State or local taxes, VA may enter into contract for transporting veterans to and from a VA facility, provided political subdivision involved is not required to furnish such service without direct charge, and contract should not only provide for payments not to exceed fair and reasonable value of services received, but should comply with Fed. procurement law and regs. Under Mississippi statutes local governments are not required to furnish ambulance services and, therefore, VA may enter into contract with city of Biloxi or private concern to furnish transportation to and from VA center at Biloxi, but contract may not provide for subsidy since 46 Comp. Gen. 616 is not precedent for authorizing subsidy payments generally. Modifies B–172945, June 22, 1971..... 444

VETERANS ADMINISTRATION—Continued Page

Employees
Medical and surgery
Qualifications
Licensing

Use by VA's Dept. of Medicine and Surgery of physicians who have been granted temporary or limited license to practice medicine, surgery, or osteopathy, from State where appropriate State Board has made determination that applicant is professionally qualified to practice in that State, but does not qualify for regular license, because he has not complied with various technical requirements—either statutory or administrative—such as residency or citizenship requirements, may be continued for period not to exceed 18 months in view of inability of Dept. to hire medical personnel with permanent or unrestricted licenses, provided VA also determines in accordance with 38 U.S.C. 4106(a) that individual involved is professionally qualified to practice medicine, surgery or osteopathy---------- 536

Hospital services
Emergency to visitor injured at hospital
Reimbursement

Where agreement with person whose leg was negligently fractured when struck by food cart while visiting Veterans Administration hospital provided for settlement of tort claim in amount of $25,000, plus $5,857, cost of furnishing emergency and followup care at hospital pursuant to 38 U.S.C. 611(b)—total award of $30,857—voucher issued in settlement of award should set off claimant's indebtedness for hospitalization against total award, specifying credit of setoff to VA, Medical Care appropriation. However, where tort suit filed in Federal Dist. Court is compromised by Attorney General under 28 U.S.C. 2677, such agreement is net settlement, as is judgment that provides for deduction of settlement, as is judgment that provides for deduction of indebtedness, and in each case, debt for emergency hospitalization is extinguished notwithstanding appropriation involved will not be reimbursed---------- 180

VOLUNTARY SERVICES
Prohibition against accepting
State employees

Emergency Employment Act of 1971, designed to deal with high unemployment and drastic curtailment of vital public services at State and local levels because of lack of local revenues does not constitute statutory authority to enable Federal agencies to consent to have work done for them by local non-Federal employees hired under act in view of prohibitory language in sec. 3679 of R.S., 31 U.S.C. 665(b), against accepting voluntary services or employing personal services in excess of that authorized by law, and because sums made available under act are intended to staff open local Govt. jobs and not Federal offices. Also to permit staffing of Federal offices would involve application of various laws relating to Federal employees---------- 152

WAGE AND PRICE STABILIZATION Page

Contract matters

Prices

Certification

Failure of low bidder to sign and submit with its bids price certification attached to three solicitations issued for printing and binding services may not be waived as minor informality. Certification addendum bound bidder to reduce, at time of billing, any prices offered in bid which did not conform to requirements of E.O. 11615, dated Aug. 15, 1971, issued under authority of Economic Stabilization Act of 1970 for purpose of stabilizing prices, rents, wages and salaries in order to stabilize economy, reduce inflation, and minimize unemployment, and, therefore, bids submitted were nonresponsive under rule that if addendum to invitation affects price, quantity or quality, it concerns material matters that may not be waived even to effect savings for Govt. 370

Escalation clause coverage

Omission of price escalation clause to reflect impact of E.O. 11615, Aug. 15, 1971, which provides for stabilization of prices, rents, wages, salaries, from request for proposals to furnish projectiles that was issued to both Govt-owned, contractor operated facilities and privately owned facilities utilizing Govt-owned production equipment does not make solicitation defective. Opportunity during negotiations to propose contract with escalation provision having been declined by protestant because maximum amount of escalation would have to be added to price, it is not appropriate after submission of proposal to contend award cannot properly be made on basis of proposals which, as was case with protestant's proposal, did not include escalation clause..... 344

Wage determination provisions

The general rule that failure of bidder to acknowledge receipt of amendment which could affect price, quality, or quantity of procurement being solicited, renders bid nonresponsive because bidder would have option to decide after bid opening to become eligible for award by furnishing extraneous evidence that addendum had been considered or to avoid award by remaining silent, is for application to low bid for construction of prefabricated metal building as unacknowledged amendment incorporated wage determination that affected contract price, notwithstanding that E.O. 11615, dated Aug. 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since Executive order does not obviate implementation of rates in wage determination and, therefore, failure to acknowledge amendment may not be waived..... 500

Customs duty

Product exempt from Buy American Act

Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d,

WAGE AND PRICE STABILIZATION—Continued Page

Customs duty—Continued

Product exempt from Buy American Act—Continued

and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor 195

Military personnel

Pay increases

When in adjustment of retired or retainer pay under 10 U.S.C. 1401a to reflect Consumer Price Index cost-of-living increase effective June 1, 1971, higher retired rate results for members retired on or prior to Sept. 30, 1971, computed at rates in E.O. 11577, dated Jan. 1, 1971, than for members retiring on or after Oct. 1, 1971, whose retired pay is for computation at rates in Pub. L. 92–129, effective Oct. 1, 1971, because of new rates prescribed by public law and exemption of military personnel placed in retired status during wage/price freeze period imposed by E.O. 11615, dated Aug. 15, 1971, issued under Economic Stabilization Act of 1970, pursuant to 10 U.S.C. 1401a(e), pay of member retired after Sept. 30, 1971, may not be less than if he had retired on that date 384

Wage changes

Federal employees

Adjustment of wage increases withheld

Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3)(A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases 525

Administratively fixed compensation

Acceptance by full-time referees in bankruptcy of comparability adjustment in rates of pay authorized for Govt. employees would in view of 2-year limitation on salary changes in sec. 40(b) of Bankruptcy Act, 11 U.S.C. 68(b), preclude any further adjustments in referee salaries by Judicial Conference until expiration of 2-year limitation since salaries of referees are administratively fixed and, therefore, are not within purview of sec. 3 of Economic Stabilization Act Amendments of 1971 requiring adjustments in pay of employees subject to statutory pay system, which as definied in Federal Pay Comparability Act of 1970 excludes administratively fixed salaries. Therefore, since administrative action is prerequisite to salary adjustments similar to those granted by sec. 3 of 1971 act, approval by Judicial Conference of salary adjustments are subject to sec. 40(b) limitation 709

WORDS AND PHRASES Page

"Could not be scheduled"

In applying 5 U.S.C. 5542(b)(2)(B)(iv), which authorizes payment of overtime when travel after end of normal tour of duty "results from an event which could not be scheduled or controlled administratively," term "event" although including anything which necessitates employee's travel, requires existence of immediate official necessity in connection with event requiring travel, and if necessity is not so immediate as to preclude proper scheduling of travel, time in travel does not qualify as hours of employment, and phrase "could not be scheduled" contemplates more than fact that administrative pressures make scheduling in accordance with 5 U.S.C. 6101(b)(2) difficult or impractical, or emergency situations. Events considered beyond administrative control are discussed in Federal Personnel Manual Supplement 990-2..... 727

"Courtesy offer"

Withdrawal of small business set-aside pursuant to par. 1-706.3, ASPR, cancellation of RFQ, and resolicitation of procurement to overhaul and modify aircraft propeller components from both large and small firms were not arbitrary actions where on basis of quote—not "courtesy offer"—from small business concern prior to correction of standard industrial classification which changed its status to large business, contracting officer determined limiting quotations to small business would be detrimental to public interest, reasonable determination notwithstanding withdrawal notice did not literally comply with ASPR 1-706.3(a), or that before withdrawal, discussions were not held with all small business firms within competitive range (ASPR 3-805.1(a)), or that late price reduction by small firm was not considered..... 739

"Debarred"

Debarment of firms or individuals from securing Govt. contracts are of two types—by statute or regulation—neither of which defines term "debarred." However, grounds for listing firm or individual on Joint Consolidated List and consequences thereof are set forth in detail in Part 6 of Armed Services Procurement Reg. (ASPR). Administrative debarment of firm or individual under ASPR 1-604 may be authorized at discretion of Secretary of each department or by his authorized representative in public interest. Regulation is not based on specific statute dealing with debarment, but is in implementation of general authority to contract contained in Armed Services Procurement Act of 1947, as amended (41 U.S.C. 151)..... 65

WORDS AND PHRASES—Continued Page

"Dependent child"

Term "dependent" as used in sec. 105 of Civil Functions Appropriation Act, 1954, as amended (2 C.Z. Code 232), which authorizes payment to Canal Zone Govt. of unrecoverable costs from employees of U.S. and their dependents for education and hospital and medical care furnished, in absence of statutory or valid regulatory definition of phrase "dependent child," may be construed in accordance with definition in Black's Law Dictionary and, therefore, "dependent child" need not mean child under age of 21. However, as statement on invoice for medical services furnished daughter of Federal employee that she is "full-time student under 23 years of age" does not automatically establish dependency, and amount billed is not represented as unrecovered costs from employee or dependent, as required by statute, invoice may not be certified for payment 252

"Event"

In applying 5 U.S.C. 5542(b)(2)(B)(iv), which authorizes payment of overtime when travel after end of normal tour of duty "results from an event which could not be scheduled or controlled administratively," term "event" although including anything which necessitates employee's travel, requires existence of immediate official necessity in connection with event requiring travel, and if necessity is not so immediate as to preclude proper scheduling of travel, time in travel does not qualify as hours of employment, and phrase "could not be scheduled" contemplates more than fact that administrative pressures make scheduling in accordance with 5 U.S.C. 6101(b)(2) difficult or impractical, or emergency situations. Events considered beyond administrative control are discussed in Federal Personnel Manual Supplement 990-2 727

"Second guess"

In issuing request for quotations, since use of Standard Form 18, which contained inconsistent and misleading provisions, instead of Form 33, was cause for rejection of low proposal on basis of failure to confirm that low quotation was firm offer and failure to submit revised proposal, use of form in absence of substantive reasons, even though authorized by par. 16-102.1(b)(1) of Armed Services Procurement Reg., is not required. To avoid placing prospective contractors in position to "second guess" whether solicitation was requesting quotation or firm offer, Standard Form 33 should be used in future procurements thereby eliminating that prospective contractors go through additional step of confirming that their initial proposals are firm offers 305

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