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TABLE OF DECISION NUMBERS

Cite Decisions as 51 Comp. Gen.—.

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-173292]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Consultants—Reduction in Retired Pay

A retired Air Force major employed by two Government agencies as a civilian consultant under excepted appointments—Intermittent—a 1-year appointment in fiscal year 1969, which was extended for a year, and another appointment in fiscal year 1970 with no time limitation, would, if only one appointment were involved, be entitled pursuant to the Dual Compensation Act of 1964, 5 U.S.C. 5532, to exemption from reduction of retired pay for no more than the first 30-day period for which he received compensation as an expert regardless of the fiscal year in which the appointment was made or the services performed. However, where two or more appointments are involved, the exemption applies to the first 30 days of work in each fiscal year during which the retired officer received civilian pay, but the officer having worked less than 30 days under both appointments in each fiscal year is not subject to a reduction of retired pay.

To Lieutenant Colonel N. C. Alcock, Department of the Air Force, October 1, 1971:

Further reference is made to your letter dated May 19, 1971, requesting an advance decision concerning the application of 5 U.S.C. 5532 (dual compensation statute) in the case of Major General Archie A. Hoffman, retired. Your submission has been assigned Air Force Request No. DO-AF-1128 by the Department of Defense Military Pay and Allowance Committee.

In your letter you state that on May 1, 1969, General Hoffman accepted employment as a consultant with the National Aeronautics and Space Administration under an excepted appointment—Intermittent—not to exceed April 30, 1970. It is further indicated that on December 9, 1969, General Hoffman accepted an excepted appointment—Intermittent—with the Federal Aviation Agency with no limitation except the number of days that could be worked in the succeeding 12-month period. On May 1, 1970, his initial appointment with the National Aeronautics and Space Administration was converted to an excepted appointment not to exceed April 30, 1971.

It is stated that during the period May 1, 1969, through February 1971, he worked a total of 36 days under these appointments. However, he has not worked 30 days under any appointment or more than 30 days in any one fiscal year.

You specifically request a decision concerning the application of 5 U.S.C. 5532 in General Hoffman's case and whether the answer would be the same if in fact the appointment dated December 9, 1969, was specifically terminated and a new appointment made on December 9, 1970.

Section 5532 of Title 5, U.S. Code, provides in pertinent part as follows:

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an

annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retirement pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

(c) The reduction in retired or retirement pay required by subsection (b) of this section does not apply to a retired officer of a regular component of a uniformed service—

* * * * * * *

(2) employed on a temporary (full-time or part-time) basis, any other part-time basis, or an intermittent basis, for the first 30-day period for which he receives pay.

The exemption from reduction in retired or retirement pay under paragraph (2) of this subsection does not apply longer than—

(i) the first 30-day period for which he receives pay under one appointment from the position in which he is employed, if he is serving under not more than one appointment; and

(ii) the first period for which he receives pay under more than one appointment, in a fiscal year, which consists in the aggregate of 30 days, from all positions in which he is employed, if he is serving under more than one appointment in that fiscal year.

You say that it is not clear whether Congress intended that subsection 5532(c)(2)(ii) applies when the multiple appointments are made in the same fiscal year, or whether the exemption applies to the first period for which pay is received which is in the aggregate of 30 days in a fiscal year (whether or not the appointments were made in the same fiscal year). You suggest that a third possible interpretation is that Congress intended that the exemption is exhausted when the days for which pay is received reaches an aggregate of 30 days in a multiple employment situation even though that 30-day aggregate is not reached in any one fiscal year and even though the appointments were made in different fiscal years and days for which pay was received did not exceed 30 under either appointment. You point out that General Hoffman's appointment to NASA was in Fiscal Year 1969 and to FAA in Fiscal Year 1970; that he was employed only 16 days by NASA and 17 days by FAA (through December 1970); and that he did not have an aggregate 30 days in Fiscal Year 1970 or before May 19, 1971, in Fiscal Year 1971.

H.R. 7381, 88th Congress, 1st session, which became the Dual Compensation Act of 1964, as originally introduced provided in pertinent part—

(c) The reduction in retired, retirement, or retainer pay required by subsection (a) of this section shall not apply to employment of a retired member of a uniformed service on a temporary, part-time, or intermittent basis for the first thirty days of such employment for which he receives salary; however, this subsection shall not apply to more than thirty such days in any fiscal year.

As you point out, if only one civilian appointment were involved the retired officer would be entitled, under 5 U.S.C. 5532(c)(2)(i), to exemption from reduction for no more than the first 30-day period for which he receives pay under that appointment without regard to the

fiscal year when the appointment was made or the fiscal year or years when the services were performed.

If, however, more than one civilian appointment is involved, as in General Hoffman's case, it becomes necessary to apply the provision in 5 U.S.C. 5532(c) (2) (ii). As you indicate, it is not entirely clear what that provision was intended to mean and which of the three possible interpretations indicated in your letter should be adopted and followed.

It is our view that the references to "fiscal year" in such provision relate to the period or periods for which the retired officer receives civilian pay rather than the fiscal year or years in which the instruments of civilian appointment are dated. In other words, we think that the actual intent and purpose of such provision is that the exemption is to be applied to the first 30 days of work in each fiscal year during which the retired officer receives civilian pay under two or more appointments.

This view seems consistent with the language of subsection (c) as originally introduced, and can be reconciled with the language as enacted, including the punctuation thereof. It also recognizes that the whole thrust of the statute is against periods of dual compensation or days when services are performed involving dual compensation considerations and not days on which instruments of appointment are made or issued.

Based on our interpretation of the statute and the summary you have furnished (showing that General Hoffman worked 4 days in Fiscal Year 1969, 7 days in Fiscal Year 1970 and 5 days in Fiscal Year 1971 for NASA, and 8 days in Fiscal Year 1970 and 12 days in 1971 for FAA) his retired pay has not become subject to any reduction under 5 U.S.C. 5532. The answer would be the same if the appointment dated December 9, 1969, had been specifically terminated and a new appointment had been issued effective December 9, 1970.

[B–173958]

Pay—Active Duty—Reservists—Injured in Line of Duty—Disability Determination

As a correction of military records pursuant to 10 U.S.C. 1552 is final and conclusive on all officers of the United States, except when procured by fraud, the conclusion of the Board for Correction of Military Records for the Coast Guard that a former Reserve member was not fit for duty on November 19, 1969; that the Notice of Eligibility for Disability Benefits issued on that date when he was released from hospitalization occasioned by an injury suffered while participating in an official volley ball game should not have been cancelled, even though he subsequently attended drills, and that he was disabled until discharged on April 5, 1971, when he was found unfit for duty, entitles the former reservist to payment of pay and allowances, less drill pay, from November 20, 1969, through April 5, 1971, the date of discharge, computed from April 15,

1970, at the increased rates established by Executive Order 11525, and from January 1, 1971, to the date of discharge, at the rates established by Executive Order 11577.

To the Secretary of Transportation, October 1, 1971:

This refers to letter dated August 6, 1971, from Mr. R. H. Mills, Chief, Settlements and Records Branch, Pay and Allowances Division, United States Coast Guard, in effect requesting an advance decision on the propriety of payment of pay and allowances to Mr. John Sotak, a former Coast Guard member, for the period from November 20, 1969, through April 5, 1971, date of his discharge from the U.S. Coast Guard Reserve.

On May 6, 1969, while participating in an official volleyball game, Mr. Sotak suffered an injury which required hospitalization and medical treatment. He was hospitalized until May 13, 1969, and a Notice of Eligibility for Disability Benefits was issued on May 14, 1969. This notice was terminated on November 19, 1969, and he returned to a drill status. He performed his first drill on November 25, 1969, and continued to perform drills on a weekly basis through January 27, 1970. He was transferred to the active status pool on February 1, 1970.

On December 4, 1970, Mr. Sotak filed an application with the Board for Correction of Military Records for the Coast Guard requesting, in substance, that the Board correct his military record to show that he was unfit for duty on November 19, 1969, and to reinstate his Notice of Eligibility for Disability Benefits. The Board determined that he was not fit for duty on November 19, 1969, that his Notice of Eligibility for Disability Benefits should not have been cancelled; that it should be restored as of November 19, 1969, and that he be found unfit for duty to the time of his discharge from the Coast Guard Reserve. The decision was approved by the Acting General Counsel as designee of the Secretary, Department of Transportation, on July 2, 1971.

In view of our decisions holding that where a member, despite his injury, is actually returned to a Reserve duty status, continued payment of active duty pay and allowances is too doubtful to warrant our approval of payment, even though the duty involved be of limited or restricted nature, Mr. Mills expressed doubt as to whether the fact of actual attendance at drills can be changed to create entitlement to pay and allowances and presented for consideration the following questions:

1. In light of the referenced decisions, may the Commander Eighth Coast Guard District's letter 5890 serial 4676/rmb of 24 November 1969 be considered as having been retrospectively voided by the approved findings of the Correction Board's action (enclosure 1 Tab 8)?

2. If the answer to question (1) is in the affirmative, can payment be made to Mr. Sotak for pay and allowances (less payments for drills) through 5 April 1971 the date of his discharge?

3. In view of the decision in 50 Comp. Gen. 99 should the answer to question (2) be in the affirmative may Mr. Sotak's pay for the period 1 January through 5 April 1971 be based on the increased rates of basic pay established by Executive Order 11577 of 8 January 1971?

The provisions of law relating to the entitlement to active duty pay and allowances after an ordered period of active duty, or inactive duty training, for a member of the Coast Guard Reserve during a period of disability resulting from an injury incurred in line of duty are contained in 37 U.S.C. 204. Subsection 204(i) provides, in pertinent part, that:

A member of the * * * Coast Guard Reserve is entitled to the pay and allowances provided by law or regulation for the member of the * * * Regular Coast Guard * * * of corresponding grade and length of service, under the same conditions as those described in clauses (1) and (2) of subsection (g) of this section.

Subsection (g) provides for such entitlement whenever the member "is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed."

In our decision of May 19, 1964, reported in 43 Comp. Gen. 733 (1964), we said, on page 737, that:

It seems reasonably clear that a right to active duty pay and allowances under the above-cited provisions of law while the member concerned is temporarily disabled by injury incurred in line of duty, is based upon physical disability to perform military duty, not his normal civilian pursuit, and that the determination as to how long the disability continues is left to the exercise of a sound administrative judgment. If, despite his injury, the service concerned should actually return him to a limited or restricted Reserve duty status where he would be subject to being called upon to perform such duty as his physical condition would permit, we would regard the continued payment of active duty pay and allowances in such circumstances as being too doubtful to warrant our approval of such payment. 37 Comp. Gen. 588. In each case, the service concerned should determine when the injured reservist recovers sufficiently to be fit to perform his normal military duties. In making that determination, the service should apply the same standards it would apply in the case of a member of the Regular service. * * *

The above-quoted language was referred to in several subsequent decisions, namely, 45 Comp. Gen. 54 (1965); 47 Comp. Gen. 531 (1968); 48 Comp. Gen. 1 (1968); and B–168276, of December 16, 1969. Thus, for a number of years the decisions of this Office have viewed the actual return of a Reserve member to a Reserve duty status as the determining factor in establishing the termination date for pay and allowances authorized by subsections (g), (h) and (i) of section 204, Title 37, U.S. Code. In the absence of correction of his record there would, therefore, be no legal basis for continuing to pay Mr. Sotak active duty pay and allowances for any period subsequent to November 19, 1969.

464-001 O - 72 - 2

Under the provisions of 10 U.S.C. 1552, the Secretary of the military department concerned is authorized to correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Such a correction authorized by the statute is final and conclusive on all officers of the United States, except when procured by fraud. Thus the conclusion of the Correction Board that Mr. Sotak was not fit for duty on November 19, 1969, even though he was fit for limited Reserve duty and actually attended drills; that his Notice of Eligibility for Disability Benefits should not have been canceled and should be restored as of November 19, 1969; that he was disabled until his discharge from the Coast Guard Reserve, and that at the time of his discharge he was found unfit for duty, approved on behalf of the Secretary of Transportation, is final and conclusive.

Upon the correction of his record, a member is entitled under 10 U.S.C. 1552(c) to all pay which would have become due under applicable provisions of law on the basis of the facts reflected by the record as corrected. We held in 34 Comp. Gen. 7 (1954) that the rights of a member whose record has been changed by correction board action are for determination solely on the basis of the proper application of the statutes to the facts as shown by the corrected record. See 40 Comp. Gen. 502, 504 (1961).

The action of the Correction Board, as approved on behalf of the Secretary of Transportation, established a fact which was not reflected by the official records before the correction was made, that is, that Mr. Sotak was not fit for military duty on November 19, 1969, and remained so unfit until his discharge. The records as corrected now show that he was not returned to his normal military duty and his eligibility for disability benefits continued until the date of his discharge from the Coast Guard Reserve. Accordingly, questions 1 and 2 are answered in the affirmative.

In our decision of August 18, 1970, 50 Comp. Gen. 99, we held that under the retroactive provisions of the Federal Employees Salary Act of 1970, approved April 15, 1970, Public Law 91-231, 84 Stat. 195, 5 U.S.C. 5332 note, and regulations issued thereunder, a Naval Reserve officer injured while on active duty for training who continued on the basis of disability to receive the benefits provided by 10 U.S.C. 6149(a) and 37 U.S.C. 204(i) was not entitled to a retroactive increase because he was not on active duty on the effective date of the act. Thus, he was entitled to increased pay and allowances only from April 15, 1970. Mr. Sotak's case is squarely within the rule of that decision and he is entitled to the increased rate of pay established under Executive Order 11525, dated April 15, 1970, only from

April 15, 1970. The 1970 decision has no bearing on the increased rates of monthly basic pay for members of the uniformed services established by Executive Order 11577, dated January 8, 1971, effective January 1, 1971, issued pursuant to the Federal Pay Comparability Act of 1970, approved January 8, 1971, Public Law 91–656, 84 Stat. 1946, 5 U.S.C. 5301 note. Hence, question 3 is answered in the affirmative.

Upon the proper adjustment of the pay of Mr. Sotak for the period from January 1 to April 15, 1970, the voucher, which is returned herewith, may be certified for payment, if otherwise correct.

[B–173667]

Buy American Act—Waiver—Public Interest

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

To the Campbell Chain, Division of Unitec Industries, Inc., October 7, 1971:

We refer to your protest, by letter of July 20, 1971, and subsequent correspondence, against any award by the Department of the Army of a contract to Nosted Kjetting (Nosted), a Norwegian concern, under bid evaluation procedures set forth in invitation for bids (IFB) DAAE07–71–B–1747 issued by the United States Army Tank Automotive Command (TACOM), Warren, Michigan. The procurement items are tire chain assemblies, on which Nosted's bid is lowest and your bid is second low.

You object to provisions in the IFB which provide for evaluation of bids offering items of Norwegian source without regard to the restrictions of the Buy American Act (41 U.S.C. 10a–d) upon waiver thereof by the Secretary of Defense. You maintain that the effect of such waiver is to reduce the act to a nullity. Further, you state that you are unaware of any inherent power in the Secretary of Defense to completely vitiate the provisions of the act.

You contend, therefore, that Nosted's bid should be evaluated under the provisions of Armed Services Procurement Regulation (ASPR)

6-104.4, issued in implementation of the Buy American Act, as a bid offering a foreign end product, to which a price differential and customs duties apply. As thus evaluated, Nosted's bid would not be the lowest bid, and you therefore assert that award should be made to you as the lowest responsive bidder.

In addition, you specifically state that with application to Nosted's bid price of the 10 percent "levy" imposed on all imported items pursuant to Presidential Proclamation 4074 of August 15, 1971, Nosted's bid is some $5,000 higher than your bid. Accordingly, you further assert that when the Proclamation is complied with, there can be no legitimate reason for not making award to you.

The IFB, which was issued on May 27, 1971, included the following pertinent language with respect to bids of Norwegian firms:

C-37 NOTICE OF POTENTIAL NORWEGIAN SOURCE COMPETITION:

a. *GENERAL:* Bids for this procurement are being solicited from sources in Norway pursuant to the *UNITED STATES-NORWAY MEMORANDUM OF UNDERSTANDING RELATING TO THE PROCUREMENT OF DEFENSE ARTICLES AND SERVICES OF 27, FEBRUARY 1968.*

b. *PRIME CONTRACT BASIS:* Bids of Norwegian firms will be evaluated exclusive of import duty and if found otherwise acceptable for award except for the clause entitled, "Buy American Act," they will be forwarded to the Secretary of Defense for a determination as to whether it would be in the public interest to waive the restrictions of the Buy American Act and accept such bids for Norwegian source supplies, provided the following three conditions exist:

(i) The Norwegian firms' bid is acceptable in every way including price and other factors; and

(ii) The end products offered are manufactured in Norway or the United States; and

(iii) The cost of the components in those end products which are mined, produced, or manufactured in Norway, the United States, or Canada, or any combination of these three countries, exceeds fifty percent (50%) of the total cost of all components in the end products.

c. *SUBCONTRACT BASIS:* U.S. firms which propose to use Norwegian subcontractors will have their bids evaluated free of import duty for the Norwegian end products, provided those portions of the bid prices are identified accordingly. If award is made to a U.S. firm making such a bid, import duty will be waived upon application to the Contracting Officer."

D-3 EVALUATION OF BIDS.

* * * * * * *

c. For evaluation purposes only, an evaluation factor equal to the applicable U.S. Manufacturer's Excise Tax shall be added by the Government to all Canadian Bids and Norwegian bids received in response to this Invitation.

In addition, a duty-free entry clause for Norwegian end products was set forth in paragraph D-11.

The Memorandum of Understanding (MOU) referenced in the IFB is an executive agreement based on authority contained in section 402 of the Mutual Defense Assistance Act of 1949, 63 Stat. 714. It was signed for the Government of Norway by the Minister of Defense of Norway and for the United States by the Secretary of Defense. The MOU provides in pertinent part that in consideration of substantial

procurement by the Ministry of Defense of Norway of certain items from sources in the United States, the Department of Defense (DOD) will search out potential DOD requirements suitable for procurement from Norwegian sources with the objective of procuring selected equipment and supplies in Norway through calendar year 1973 with a target value of $30,000,000. Provision is also made for additional procurement of defense items with a target value of $10,000,000 for use by the United States in Norway. In this connection, the MOU includes the following pertinent language:

> Such procurements will include selected defense items which: (i) satisfy DOD requirements for performance, quality, and delivery and (ii) cost DOD no more than would comparable U.S.-source defense articles or foreign-source defense items eligible for procurement contract award. In inviting competitive bids from Norwegian sources for such selected defense items, the DOD will evaluate such bids without imposing any differential under the Buy American Act or the Balance of Payments Program and without taking applicable U.S. customs and duties into consideration so that Norwegian firms may better compete for the sale of such defense items to the DOD with U.S. firms or foreign firms which are eligible for procurement contract awards.

Instructions issued by the Department of Defense and by the Department of the Army in implementation of the MOU are to the effect that exemptions thereunder will be determined in advance of a procurement; that exempted items will be placed on a Selected Item List; that each procurement solicitation will include a notice of potential Norwegian source competition; and that each contract for an item on a List shall include a clause providing for duty-free entry of Norwegian end products unless it is clear that no Norwegian end product will be imported into the United States in connection with the performance of the contract.

The record pertaining to this procurement shows that on May 12, 1971, 2 weeks before the IFB was issued, the procuring activity was advised that the tire chain assemblies were included on the TACOM list of candidate items covered by the MOU. Pursuant to the instructions issued in implementation of the MOU the procuring activity included in the IFB the required notice of potential Norwegian source competition and the duty-free Norwegian end products clauses.

The contracting officer states that Nosted's low bid will be submitted to the Secretary of Defense for determination whether it would be in the public interest to waive the restrictions of the Buy American Act only if such bid is first found by the contracting officer to be completely acceptable. To this end a preaward survey of Nosted is being conducted by the United States Procurement Center, Frankfurt, Germany. If the survey report is unfavorable, the contracting officer further states, no referral will be made to the Secretary of Defense respecting Nosted's bid, and award will be made to that low bidder who is determined to be both responsive and responsible.

The intent of the Congress with respect to application of the provisions of the Buy American Act, authorizing determinations by the agency head concerned that application of the act would be inconsistent with the public interest, is clarified in 41 U.S.C. 10d as follows:

> In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10b (a) of this title preceding the words "Provided, however," shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

Under such provisions, the decisions as to whether it is in the public interest to apply the Buy American Act to Federal procurements are matters of discretion which is vested in the heads of the Government departments. In the exercise of such administrative discretion, and pursuant to the MOU in question, appropriate officials in DOD have determined that it would be inconsistent with the public interest to apply the Buy American Act restrictions to certain supplies of Norwegian source. Further, it is to be noted that the procedures which are applied in connection with procurement of such products under the MOU are consistent with the procedures applied under ASPR 6-504 to bids offering Canadian end products, the legality of which we have upheld as a proper exercise by DOD of its discretion under the "public interest" exception in the Buy American Act. B-151898, August 22, 1963. In the circumstances, we do not believe that the waiver of the restrictions of the Buy American Act as to the end products offered by Nosted in this procurement may be regarded as in violation of that statute. See B-170026, December 14, 1970.

As to the impact of any such waiver upon the Balance of Payments policy, it is apparent from the language quoted above from the MOU with Norway that such factor was considered in the execution of the agreement. For your information, however, the MOU reflects a target for procurement by the Government of Norway from sources in the United States which is several times greater in money value than the target set by the United States for purchases from Norway.

Concerning the effect of Presidential Proclamation 4074 on this procurement, you are advised that the 10 percent levy imposed by the Proclamation is an additional customs duty applicable only to dutiable articles imported into the customs territory of the United States. In this connection, the Department of Defense has issued guidelines for the military procurement activities in Defense Procurement Circular No. 91, Supplement No. 2, dated August 30, 1971, to the effect that all provisions of section VI of ASPR will continue to apply to purchases of foreign-made items; i.e., where duty is a bid evaluation factor, the

additional duty will be considered, but where foreign products are exempt from the restrictions of the Buy American Act and therefore also exempt from import duty, the additional duty will not be an evaluation factor.

Inasmuch as Norwegian end products, as defined in the IFB, are exempted from import duty under the provisions of paragraph D–11, incident to their exemption from Buy American Act restrictions, no import duty, including the additional duty imposed by Proclamation 4074, applies. It follows that no import duty is required to be considered in the evaluation of Nosted's bid.

For the reasons stated, we see no legal basis for objection to the evaluation of Nosted's bid in accordance with the provisions of the IFB, as proposed by the Department of the Army, as the lowest bid or for objection to an award based on such bid in the event Nosted is determined to be a responsible prospective contractor and the Secretary of Defense issues a waiver of the Buy American Act restrictions as to the bid. Your protest is therefore denied.

[B–138790]

Officers and Employees—Training—Subversive Activities Prohibition—Determination Overseas

In making a determination whether the prohibition in 5 U.S.C. 4107(a) against the training of employees by, in, or through a non-Government facility which teaches or advocates the overthrow of the Government of the United States by force or violence; or by or through an individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, the Department of Defense may delegate the authority granted agency heads by Executive Order 11348, dated April 20, 1967, to determine the eligibility of a foreign government or an international organization to provide training to a major theatre or local commander, subject to consultation with the Department of State and other appropriate Federal agencies in the area, and may also provide that the eligibility of noncitizens may be determined from security files in the local or theatre level since applying the procedures in 5 CFR 410.504 to determine security eligibility in the United States would be ineffective.

To the Chairman, United States Civil Service Commission, October 8, 1971:

This is in further reference to your letter of July 14, 1971, and enclosure, in which you state that you have been asked by the Department of Defense whether the security-requirement provisions in section 5–2c(2) and (4) of Federal Personnel Manual Chapter 410 pertain to non-United States Government facilities located in overseas areas. It is the Department's view that the requirements appear to be directed to non-Government facilities in the United States.

The above-cited provisions of the FPM also appear as section 410.504 of the training regulations, part 410, Title 5 of the Code of Federal

Regulations, implementing chapter 41 of Title 5, United States Code. 5 U.S.C. 4107(a) provides:

> Appropriations or other funds available to an agency are not available for payment for training an employee—
> (1) by, in, or through a non-Government facility which teaches or advocates the overthrow of the Government of the United States by force or violence; or
> (2) by or through an individual concerning whom determination has been made by a proper Government administrative or investigatory authority that, on the basis of information or evidence developed in investigations and procedures authorized by law or Executive order, there exists a reasonable doubt of his loyalty to the United States.

The applicable regulations 5 CFR 410.504 now provide:

> § 410.504 Prohibition of training through non-Government facilities advocating overthrowing of the Government by force or violence.
>
> (a) With respect to training by, in, or through an organization, the requirements of section 4107(a) of Title 5, United States Code, are met if it is ascertained that the organization is not included in the list of organizations designated by the Attorney General pursuant to section 12 of Executive Order 10450.
> (b) With respect to training conducted by an individual with whom contractual or other arrangements are made directly, the requirements of section 4107(a) of Title 5, United States Code, are met if both of the following conditions are met:
> (1) It is ascertained that the investigative files of the Commission contain no record that a determination has been made that a reasonable doubt exists concerning the individual's loyalty to the Government of the United States. Search of the investigative files of the Commission shall be made before contracting with or otherwise arranging for the services of individuals for training, except that in emergency situations, the search shall be made as soon as possible.
> (2) Subject to the exceptions stated in this subparagraph, the individual executes an affidavit, certificate, or express contractual warranty that he does not teach or advocate the overthrow of the Government of the United States by force or violence. This condition does not apply (i) to an individual who performs training under oral or other informal arrangements for periods of 16 hours or less within a single program; or (ii) to an individual who performs training without pay by the Government (whether or not the Government provides payment or reimbursement for travel and subsistence incident to the training).

It is stated in your letter that the Department of Defense points out that to determine that an organization is not on the Attorney General's list under Executive Order 10450 does not appear appropriate for organizations located in host countries where United States Forces are located, as the Attorney General's list does not include organizations located in host countries. Further, the search of investigative files of the Commission to ascertain that no determination of a reasonable doubt of loyalty has been made of a non-Government individual performing training appears unlikely to be productive with respect to non-United States citizens in foreign areas.

The Department says (1) that it would like authority to permit the determination of the eligibility of a foreign non-Government institution to provide training services to be made by the major theater or local commander, such determination to be made in consultation with the Department of State and other appropriate Federal agencies in the area; and (2) that instead of a search of the Commission's investiga-

tive files with respect to non-United States citizens in foreign areas it would seem more reasonable to require a review of security files in the local or theater level. You point out that the present regulations set forth the procedures specified in our decision of June 22, 1959, 38 Comp. Gen. 857.

The basic question raised by you is whether the alternative procedure suggested by the Department of Defense for foreign organizations and individuals in foreign areas will be accepted by our Office as sufficient to protect certifying officers who certify payments for training through such facilities.

In respect to "(1)" above, the request of the Department for authority to determine eligibility, section 4101(6) of Title 5, United States Code, includes in the definition of "non-Government facility" the following:

> (B) a foreign government or international organization, or instrumentality of either, which is designated by the President as eligible to provide training under this chapter;

The President, by Executive Order 11348, dated April 20, 1967, delegated the authority to determine eligibility under "(B)" above to the head of each agency after advice has been obtained from the Department of State. Thus the proposal of the Department of Defense to determine eligibility in the manner indicated is consistent therewith and acceptable.

Concerning "(2)" above, the request for permission to substitute a review of security files at the local or theater level in place of a search of the Commission's investigative files, the basis for the request is the probability that the security files at the local level would be more productive than a search of investigative files of the Commission. This seems reasonable and we would offer no objection thereto.

[B-173122]

Statutes of Limitation—Claims—Transportation—Administrative Delays—Claims Barred

Claims for transporting shipments under Government bills of lading that were not presented for payment to the United States General Accounting Office (GAO) within 3 years of the dates on which the claims accrued pursuant to section 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66), by reason of delayed handling in the departments involved are barred and may not be considered for payment. A cause of action for transportation charges against the United States accrues under section 322 upon the completion of the transportation service and the statute of limitation begins to run from the date of delivery to the consignee, and the filing of a claim with some other agency of the Government does not satisfy the requirements of the act. Where the running of the 3-year period is imminent, claims may be filed directly with the Transportation Division of GAO.

464-001 O - 72 - 3

To the Southern Railway System, October 8, 1971:

We refer to your letter of May 25, 1971, with enclosures, concerning your bills No. F-66001 3/68 (our TK-927151) in the amount of $4,001.15 and No. F-71501 4/68 (our TK-927152) in the amount of $3,962.83, for transportation services performed in connection with shipments which moved under Government bills of lading Nos. A-5677785 dated February 23, 1968, and A-5677786 dated March 6, 1968, respectively.

You ask us to review the action taken by our Transportation Division as regards these claims in view of the circumstances which resulted in the delay of claims reaching the General Accounting Office. After a thorough study of the record, we must conclude that the action taken in advising you that such claims were barred and could not be allowed was the only proper disposition of such claims that could have been made under the applicable law and regulations.

You state that your bill in the amount of $4,001.15 (our TK-927151, GBL No. A-5677785) was included in a March 1968 bill to the Department of Highways & Traffic, Procurement (Government of the District of Columbia), Washington, D.C., along with four other items totaling $38,421.74; that the bill for $4,001.15 was deleted from the payment received in November 1968 with advice that such amount should be billed to the Department of Interior, National Capital Region; that you so billed the Department of Interior in December 1968; and that you have traced with the Department of Interior that bill as well as your bill in the amount of $3,962.83 (our TK-927152, GBL No. A-5677786) for payment many times without success. You say that the Department of Interior should not be excused from accepting their just responsibility for payment of these bills by failing to act until after the statutory period had expired.

The record shows that the Consignee's Certificate of Delivery on Government bill of lading No. A-5677785 was executed on February 27, 1968, and the Consignee's Certificate of Delivery on Government bill of lading No. A-5677786 was executed on March 8, 1968. The bills for the transportation services under both bills of lading were forwarded to our Transportation Division by letter of March 16, 1971, from the National Park Service, Department of the Interior, and were first received in the General Accounting Office on March 17, 1971. The record indicates that no payment for services under either of the bills of lading in question was made and your bills were returned to you on April 28, 1971, with advice that the claims on such bills were barred and could not be considered for payment since they were not received

in the General Accounting Office within 3 years of the dates on which the claims accrued.

Section 322 of the Transportation Act of 1940, as amended in 1958 by Public Law 85-762, 72 Stat. 860, 49 U.S.C. 66, specifically provides for payment of transportation bills upon presentation subject to the proviso:

> * * * That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim *shall be received in the General Accounting Office* within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later. [Italic supplied.]

A cause of action for transportation charges against the United States accrues upon the completion of the transportation service, that is, the date of delivery to the consignee, and the statute of limitations begins to run from that date. *United States* v. *Wilder*, 13 Wall. 254 (U.S. 1871); *Arkansas Oak Flooring Co.* v. *Louisiana & Arkansas Ry. Co.*, 166 F. 2d 98 (1948), cert. denied 334 U.S. 828; *Southern Pacific Co.* v. *United States*, 67 Ct. Cl. 414 (1929), cert. denied 280 U.S. 567; *Atlantic Coast Line R. Co.* v. *United States*, 66 Ct. Cl. 576 (1929); and *Hughes Transportation, Inc.* v. *United States*, 109 F. Supp. 373 (1953).

In the present instance shipment under bill of lading No. A-5677785 was delivered to the consignee on February 27, 1968, and the shipment under bill of lading No. A-5677786 was delivered on March 8, 1968, and so far as the record here discloses no charges were paid on either shipment. The causes of action therefore accrued on those dates of delivery. Likewise, the statute of limitations barred the claims on February 27 and March 8, 1971, respectively, but the claims were not received in our Office until March 17, 1971.

Regulations of our Office, 4 CFR 54.6a, specifically provide that the filing of a claim with some other agency of the Government will not meet the requirements of the statute, that the claim must be received in the General Accounting Office within 3 years after the date such claim first accrued, and 4 CFR 54.6, while generally stating that action will be expedited if claimants file their claims with the department or agency out of the activity of which it arose, points out that a claimant may file a claim direct with the Transportation Division, General Accounting Office, particularly if the applicable statutory period of limitation is about to expire. Compare *United States* v. *Utz*, 80 Fed. 848 (1897); *Kennedy* v. *United States*, 79 Fed. 893 (1897), affirmed 95 Fed. 127.

Prior to the 1958 amendment, carrier claims, like other claims cognizable by the General Accounting Office, would be considered if presented within 10 years after the claims first accrued. See 31 U.S.C. 71a.

The 1958 amendment was enacted due, in large part, to carrier support for a reduced limitation to apply in transportation accounts. The purpose of the statute is to terminate controversy after a reasonable period of time and to assure the Government as well as the carriers protection from old claims on which records have become destroyed, lost, or impracticable to obtain. Delivery of the shipments here involved was admittedly made more than 3 years before your claims based thereon were received in our Office, and there is no discretion or authority in officers or agents of the United States to waive the provisions of law establishing the 3-year statute of limitations. Compare *United States* v. *Garbutt Oil Co.*, 302 U.S. 528 (1937); *John Finn* v. *United States*, 123 U.S. 227 (1887); *Munro* v. *United States*, 303 U.S. 36 (1938). We would be violating the law if we undertook to consider your claims on their merits.

We appreciate your view that the claims should have been acted on more promptly by the Department of Interior. However, since your claims were not received in the General Accounting Office within 3 years as required by law, the action of our Transportation Division in returning your bills and their supporting papers with advice that the claims were barred was the only disposition that could legally be made of them. Also, as indicated in the regulations referred to above, your System could have protected itself as to the instant bills, and can protect itself as to future bills by filing claims with the Transportation Division, U.S. General Accounting Office, where the running of the period of limitations is imminent. As you may see, the barring provision, 49 U.S.C. 66, not only bars carriers' claims not filed in the General Accounting Office within the 3-year limitation period, but also precludes our Office from deducting, after expiration of such period, overcharges in carriers' bills. Accordingly, the action of our Transportation Division must be and is sustained.

[B-173576, B-173579]

Contracts—Negotiation—Evaluation Factors—Manning Requirements

Where the manning charts submitted with the 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, the offeror is within the competitive range for negotiation, and the fact that the contract to be awarded may prove unprofitable, although there is no evidence it might, does not justify rejection of the otherwise acceptable offer. The evaluation criteria now employed in mess attendant solicitations are intended to advise offerors of the exact role manning charts play in the evaluation process, and to minimize offers that quote prices that bear no reasonable relation to the manning hours offered, and to preclude the acceptance of the lowest rate per man-hour, rather than the lowest overall proposal.

To Sellers, Conner & Cuneo, October 12, 1971:

Further reference is made to your protests on behalf of ABC Management Services, Inc. (ABC), under Solicitation Nos. N00204–71–R–0037 (0037) and N00204–71–R–0040 (0040), issued by the Naval Air Station, Pensacola, Florida.

The solicitations requested offers for mess attendant services at New Orleans, Louisiana, and Gulfport, Mississippi, respectively, for the period July 1, 1971, through June 30, 1972. Both procurements resulted in awards being made to Space Services of Georgia, Inc. (Space Services) on June 28, 1971, as the firm offering the most advantageous proposal, under each solicitation, price and other factors considered.

ABC contends that the contract awards violated the terms of the solicitations because, in its offer under solicitation No. 0037, Space Services did not offer the total minimum hours (if management hours are included) estimated by the Government to assure satisfactory performance, and in both procurements Space Systems failed to include enough money in its offered prices to pay for the minimum labor costs and payroll taxes which it promised in its manning charts.

You also contend that the contract awards violated the clear language of our decisions in 50 Comp. Gen. 686 and B–170706, both dated March 29, 1971, wherein, among other things, our Office was critical of two similar procurements issued by the same purchasing activity because the offerors were not informed of all evaluation factors, and the Government's estimate of the required number of manning hours did not appear to be realistic.

ABC maintains that, as a result of the referenced decisions of our Office and the concomitant amended terms of the solicitations, it was reasonable for ABC and other offerors to expect that the hours offered in the manning charts should be very close to the Government's estimate and that the price offered must include sufficient monies to provide the services described in the manning charts. Consequently, ABC states that had offerors known that deviations from these requirements would be tolerated, they could have offered lower prices. You therefore submit that the current contracts were awarded on bases not known to all offerors and each contract should be terminated, or in the alternative our Office should instruct the Department of the Navy not to exercise the options.

Following the referenced decisions of our Office, the Naval Supply Systems Command, which is responsible for providing guidance to field purchasing activities, issued instructions that mess attendant service solicitations should be modified so as to advise offerors more definitively of the factors to be used in evaluating offerors' manning

charts for the purpose of establishing a competitive range by including:

(a) The Government's estimate that total manning hours between specified ranges are necessary to perform the services on representative weekdays and representative weekend days.
(b) A statement that the cost of the number of manhours shown by the offeror will be compared with the offeror's price to verify that manhours and price are consistent.
(c) A statement that acceptability of distribution of manhours in space job categories will be evaluated to determine proper staffing.

At the request of the Department of the Navy, the above modifications were reviewed informally by representatives of our Office who concurred that the revisions were responsive to the recommendations made in the cited cases.

Consequently, under both contested procurements section 5.1 of the request for proposals (RFP), insofar as pertinent here, provided:

5.1—Evaluation of Offerors' manning charts

All offerors shall submit manning charts with their proposals, in the format of Attachment A, showing the estimated number of personnel proposed in each space each half hour of a representative weekday and of representative weekend day. The Government estimates that under present conditions satisfactory performance will require total manning hours of * * *.

Manning charts whose hours do not approximate these ranges may result in rejection of the offer without discussion. For the purpose of establishing a competitive range, evaluation of the offerors manning charts will be based on the following factors:

1. The cost of the number of manhours per year shown on the manning chart including wage rates; if applicable, fringe benefits (health and welfare, vacation, and holidays); and other employee-related expenses (for example, FICA), will be compared with the offeror's price to verify that offeror's manhours are consistent with offered price. * * *
2. Acceptability of distribution of manhours to perform the required services satisfactorily, and to assure proper staffing in space/job categories prior to, during, after meal hours and at peak periods.

Nothing in this section, or elsewhere in this contract, shall be construed as limiting the contractor's responsibility for fulfilling all of the requirements set forth in this contract.

Under solicitation 0037 the Navy's estimated number of manhours were:

Item 0001

Between 52 and 55 plus 8 management hours on a representative weekday.
Between 39 and 42 plus 6 management hours on a representative weekend day.

Item 0002

Between 94.5 and 102.5 plus 8 management hours on a representative weekday/holiday.
Between 110 and 118 plus 8 management hours on a representative weekend day.

Space Services' offer for these items was:
Item 0001

56 hours for a representative weekday.
44 hours for a representative weekend day.
Item 0002

98.5 hours for a representative weekday.
114 hours for a representative weekend day.

Inasmuch as Space Services' offer exceeds the maximum number of hours under Item 0001 and exceeds the minimum number of hours under item 0002 (excluding management hours), we think that the offered hours do approximate the Government's estimate and Space Services was properly found to be within the competitive range for negotiation. To conclude otherwise would require ignoring of the fact that manning charts are used as an aid to the contracting officer in determining responsibility, not responsiveness, for which the contracting officer has quite broad discretion.

Concerning your contention that Space Services' offer under each procurement was less than that required to pay minimum wages specified by the Department of Labor, plus required payroll taxes and health and welfare benefits, the procuring activity estimates that after the payment of the minimum wage, plus health and welfare, there will be approximately $5,000 to cover the cost of other fringe benefits and employee-related expenses under each procurement. While you disagree with the Department's computation and estimate, and it would appear from the record that Space Services' low offer under each solicitation may be below that required to enable Space Services to pay the cost of performance (if all of the offered hours are utilized) and still be able to enjoy a profit, we are unable to conclude that its offered prices are insufficient to permit it to satisfactorily perform the contract. In this connection, we have held that the fact that the low bidder or offeror might incur a loss in performing the contract at the price shown in its bid or offer does not justify rejecting an otherwise acceptable bid. 49 Comp. Gen. 311 (1969); B-173088, July 27, 1971. We therefore agree with the rationale of the administrative report to our Office from the Department of the Navy, which stated:

> The RFP did not specifically require each offeror to quote a certain minimum price per manhour, nor did it require that under any resulting contract the contractor furnish the exact number of manhours shown on the manning chart, except to the extent that all of the contract requirements were fulfilled. Therefore, it can reasonably be concluded that if a contractor managed the job efficiently, the number of manhours required to do the job would decrease, reducing the contractor's costs proportionately.

We think that once it has been determined that an offeror's manning chart indicates his understanding of, and his ability to fulfill, the contract requirements, including wage rates, number of workers and total estimated labor hours, he should be considered to be in the competitive

range for negotiation purposes. The evaluation criteria now being employed in mess attendant solicitations are intended to more fully advise offerors of the exact role the manning charts are to play in evaluating the offers, to help minimize the receipt of offers which quote prices that bear no reasonable relation to the number of manning hours offered, and to preclude the acceptance of the lowest rate per manhour, rather than the lowest overall proposal.

In view of the foregoing, we are unable to conclude that the contracts here involved were awarded in a manner which was contrary to the language and intent of the solicitation, or contrary to the decisions of our Office. Accordingly, your protests are denied.

[B-173019]

Transportation—Rates—Exclusive Use of Vehicle—Applicability—Basis for Determination

On shipments of electronic and other equipment, the exceptions taken to line-haul charges derived from a section 22 tender (49 U.S.C. 22 and 317(b)), computed on the basis of constructive weight, determined by multiplying 7 pounds per cubic foot by the cubic capacity of an exclusively used 40-foot van— even though the van was the only size available to the carrier and was not filled to capacity, or that exclusive use had not been requested—and to unrequested specialized handling charges will be reconsidered. The exceptions that were based on applying the sliding scale of volume minimum weights and table of rates contained in the tender, will be removed if it can be shown seals had been attached to the vehicle by the shipper, or exclusive use of the vehicle had been ordered and furnished, and the exceptions to the accessorial charges will be allowed upon proof of authenticity.

To the Trans-World Movers, Inc., October 14, 1971:

We refer to your attorney's letter of July 28, 1971, concerning the indebtedness of Trans-World Movers, Inc. (Trans-World), formerly Cowboy Van Lines, Inc. (Cowboy).

Trans-World was paid for transportation and related services prior to audit, as required by section 322 of the Transportation Act of 1940, 49 U.S.C. 66, in connection with various shipments of electronic and other equipment. Line-haul transportation charges were derived from section 22 tenders (49 U.S.C. 22 and 317(b)) which were published by Trans-World, Cowboy and other electronic equipment carriers. The technical correctness of tariff charges for extra services (referred to on vouchers as accessorial services) is not in issue, but the performance of services listed on DD Forms 619, such as loading and unloading, is disputed.

Transportation charges were computed by the carrier on the basis of constructive weight, generally, 22,400 pounds, determined by multiplying 7 pounds per cubic foot by 3,200 cubic feet—the reported cubic capacity of a 40-foot van, which was apparently furnished in each instance. The note and minimum charge provisions of the tenders

contain the language upon which the charges are based. The following, extracted from Appendix No. 1 of Cowboy's I.C.C. Rate Tender 69–4, is representative of the provisions involved:

NOTE: When special service is requested, charges will be based on actual weight or seven pounds per cubic foot of the van used, whichever is greater.
Special service is requested for shipment [sic] which consist of or include simulators, electronic instruments and all equipment requiring specialized handling movable under the household goods commodity descriptions.
When seals are applied to the van by the shipper or shippers agent, charges will be based on actual weight subject to a minimum weight based on seven pounds per foot of total vehicle space.
If the shipper or shippers [sic] agents fails to annotate the government bill of lading as to size of vehicle requested, cubic footage capacity, charges will be based on seven pounds per cubic foot of van furnished for each shipment.
MINIMUM CHARGE: Subject to AVAILABILITY of equipment [sic] for exclusive use of a vehicle when requested will be on actual weight subject to a minimum charge of 12,000 pounds if the capacity of the vehicle ordered is less than 1700 cubic feet.

Appendix III of this tender consists of five columns of rates (expressed in cents per 100 pounds) which are tied to varying mileage blocks. These columns (A, B, C, D, and E) constitute a sliding scale of volume minimum weights of 8,000, 10,000, 12,000, 15,000 and 20,000 pounds and over, respectively. See Item 12 of the tender, showing the applicability of the sliding scale of volume minimum weights. Our Transportation Division issued Notices of Overcharge (Form 1003), requesting refunds, generally, of amounts in excess of charges based on the sliding scale of minimum weights, on the premise that charges for special service or exclusive use could not be assessed in the absence of some request by the shipper for such service.

While your attorney's letter of July 28, 1971, limits discussion of our audit action to the circumstances surrounding a single shipment, consideration of the entire account reveals a current indebtedness to the United States of approximately $114,000, comprising overcharges made in the payment of over 200 bills for transportation services.

The disagreement in this case concerns at least two questions: (1) a question as to the meaning and interpretation of Cowboy Van Lines Tenders No. 69–4 through 69–7, and (2) a question as to the correctness of the DD Forms No. 619 issued by the carrier and used in support of charges for loading or unloading services or in support of a claim for other special services.

Appendix No. 1 of Tender 69–4 (Tenders 69–5 through 69–7 contain the same provisions) states that it applies on shipments consisting of articles which because of their unusual nature require specialized handling and equipment usually employed in moving household goods. In other words, the service to be furnished is similar to that accorded shipments of unpacked or uncrated household goods in equipment designed especially for such service. While the tender indicates the articles to be covered require "specialized handling," no-

464-001 O - 72 - 4

where in this tender is there a definition or explanation as to what service is to be included in "specialized handling." Since the service generally furnished by the so-called "electronics carriers," such as Cowboy Van Lines, Inc., is apparently household goods service for certain electronic equipment or office furniture and other items named in the first paragraph, it seems the term "specialized service" has no other meaning than that relative to the ordinary movement of the named commodities in household goods vans.

As indicated above, the provision, beginning with the term "NOTE," states that when special service is requested, charges will be based on "actual weight of seven pounds per cubic foot of the van used, whichever is greater." The clause "actual weight of seven pounds" was subsequently amended to read: "actual weight or seven pounds;" however, again there is no explanation as to the kind of service embraced by the term "special service."

The next paragraph in Appendix No. 1 provides that special service *is* requested for shipments which consist of or include the equipment named in that paragraph. We find nothing in the tender to explain what is meant by "special service is requested." This provision was carried in Cowboy Van Lines Tender 69–4 and reissues thereof until Trans-World Movers Tender ICC–71–11, was issued effective February 16, 1971. Perhaps the phrase was meant to signify that special services (undefined) *may* be requested for transportation of the commodities named, but, as the provision applicable at the time of the disputed shipments reads, it is patently ambiguous, and must be construed most strongly against its framer.

We note that if a transportation officer desires certain *specific vehicle service* named in paragraph (e) of Movers & Warehousemen's Association of America Government Rate Tenders I.C.C. No. 1–U and No. 1–V (referred to in Tender 69–4 and superseding tenders), the Government bill of lading must be annotated to show that such service is requested. All requests, such as for exclusive use or other services named in paragraph (e) of Tenders No. 1–U and 1–V, must be entered on the bills of lading by the issuing transportation officer. See paragraph No. 214046, page 214–17 of Defense Supply Regulations No. 4500.3, effective March 15, 1969. These regulations have the force of law. *Public Utilities of California* v. *United States*, 355 U.S. 534, 542 (1958).

We agree that with respect to the sentence in the provision introduced by the term "NOTE," referring to the application of seals by the shipper to the vehicle, it is clear that in such instances the carrier is entitled to compensation at the actual weight or 7 pounds per cubic foot of *total* vehicle space, whichever is greater.

The next sentence of the provision is not susceptible of a conclusive interpretation; it states that if the shipper or shipper's agent fails to annotate the Government bill of lading "as to size of vehicle requested, cubic footage capacity," charges will be made on the basis of 7 pounds per cubic foot.

Generally, when a shipper desires to engage the services of a carrier, he must necessarily contact the carrier and request the placing of a vehicle for loading. We have noted in the audit of the present accounts that in almost every instance Cowboy Van Lines seems to have treated such an order for a van as coming within the scope of the item for exclusive use of vehicle service. Furthermore, agents of Cowboy reportedly filled in the spaces on the top of the bill of lading as to the cubic-foot capacity of the vehicles ordered and furnished. A carrier may not independently make binding, unauthorized additions or deletions on a Government bill of lading, particularly where accessorial or special services are ordered by Government representatives. See paragraph 2 of the Administrative Direction on the reverse side of the bill of lading.

In a letter to our Transportation Division dated January 27, 1971, Mr. Walter R. Plankinton, President of Trans-World Movers, Inc., stated that the company utilizes only 40-foot trailers of 3,200 cubic feet for these electronics movements. Thus Trans-World would assume that any shipper's order to place a vehicle for loading means an order for a 40-foot vehicle and that a bill of lading as issued by a Government officer may be altered to include notations resulting in a situation which entails consideration of ambiguous provisions of an applicable tender. We note that the ambiguous provision is not contained in the current Trans-World Tender ICC 71–1.

As stated above, Tender 69–4 and superseding issues contain five scales of *volume* minimum weights and tables of rates. Obviously, these scales of rates and minimum weights are included for the purpose of computing the charges to be assessed on shipments of electronic equipment tendered to it for transportation. However, the effect of the construction of the ambiguous provision in question that Trans-World seeks to sustain would nullify the application of the five rate scales in the tender. For example, in almost every case, a vehicle fully loaded has been treated as one subject to exclusive use requirements and the 7 cubic foot basis has been applied, although there is nothing on the bill of lading placed there by or with the acquiescence of Government representatives to show that exclusive use was either desired or requested.

The carrier or its agent seems to have frequently added information to the bill of lading, which upon investigation proved not to

have been authorized by any responsible Government personnel. The bill of lading (E–9,584,878) and accompanying record enclosed with the letter of July 28, 1971, clearly illustrates the nature of these additions. The original bill of lading shows that the transportation officer inserted information in the appropriate spaces to indicate that a 40-foot vehicle was ordered and furnished. When the bill of lading was prepared for billing, it appears that the carrier inserted information as to the 3,200 cubic feet. The space reserved for a showing of whether the shipment fully loads the vehicle is checked "YES," with an unidentifiable initial or initials placed just above it.

The copy of the letter from the administrative office attached to your attorney's letter of July 28, 1971, agrees that a 40-foot vehicle was ordered and furnished, which is the only size vehicle that could have been requested, since only 40-foot vehicles are used by the carrier. It is shown further that the shipment measured 1,596 cubic feet, so, obviously, it could not occupy all the useable space of the vehicle; whoever caused the checkmark to be placed on the bill of lading to show the vehicle was fully loaded was not in possession of the true facts. In the case of this example the administrative office reports that exclusive use of the vehicle was not requested.

The same example clearly demonstrates the strained and illogical interpretation by the carrier of the ambiguous terms of Cowboy Van Lines Tenders 69–4 through 69–7 in that freight charges on the shipment remain at $497.28 under various conditions. If the vehicle were fully loaded with freight weighing less than 22,400 pounds (7 pounds times 3,200 cubic feet) the charge would be $497.28. If the shipper requested exclusive use, the charge would be $497.28, and if, as in the example, a vehicle of the only size available (40 feet) was ordered for the accommodation of a less truckload lot, 1,596 cubic feet, the charges would also be $497.28, notwithstanding that there was an applicable charge of $293, available at the 10,000-pound scale of rates named in the tender.

Since the administrative report shows that exclusive use was not ordered, we consider the ordering of the 40-foot vehicle as being merely an order to make a vehicle available for loading, without creating a basis for exclusive use charges. We therefore sustain the Notice of Overcharge (Form 1003) issued by our Transportation Division, dated November 18, 1970, with reference to the shipment discussed above.

With regard to the first of the two questions (interpretation of the tenders which we say are involved in this case, we believe that the 7 cubic foot basis should be upheld in any instance where the bill of lading record, or subsequent administrative advice indicates that the

full use of a trailer was desired by the shipper. We will consider full use of a trailer to be established where seals were applied by the shipper or where exclusive use was actually requested and furnished. It is our view, however, that the mere request for a 40-foot vehicle for loading is not a request for exclusive use, whether or not the shipment fully loads the vehicle. In such instances, our audit will observe the applicable scale of rates in the tender based on the weight loaded.

Concerning the authenticity of the various DD Forms 619 used to support charges for accessorial services, authorization for the use of this document is set forth in paragraph 6010 on page 6–34 of Army Regulation No. 55–356, dated December 1968. This in substance provides that the carriers will use the form (DD 619) in billing for materials and services not included in the line-haul transportation rates. Each form is required to be prepared in full and signed by the carrier's representative. The form is then presented to an authorized representative of the transportation officer ordering the service, who will sign the statement attesting to the fact that materials or services were provided as indicated by the carrier. In other words, before a DD Form 619 is valid for use in support of a bill for materials and services, it must be confirmed by a transportation officer or representative that (1) the service was requested and (2) that such service was performed.

Ordinarily, in our audit of carriers' accounts covering the movement of household goods these DD Forms 619 are accepted without further investigation, where such forms are properly signed by the shipper or a Government transportation officer, and where there is nothing to suggest the need for further development. We had no problem in connection with DD Forms 619 in the earlier stages of our audit of Cowboy Van Lines' bills computed on the basis of the carrier's tenders; however, investigation of a number of items revealed discrepancies which made it necessary to develop the record on most of the bills received. The major differences in the DD Forms 619 and the reports from administrative offices relate to the loading and unloading charges reported, and to the annotation that exclusive use was ordered by the shipper. In most instances the administrative reports contradict the information stated on the DD Forms 619.

We refer again to Government bill of lading E–9,584,878, dated May 2, 1969, covering a shipment of 38 desks, weighing 9,880 pounds, moving from Cannon Air Force Base, New Mexico, to Aurora, Colorado. The related DD Form 619, which, under the regulations is issued by the carrier, states that (1) exclusive use of 3,200 cubic foot van ordered by shipper and (2) it took three men 7 hours each to load

at $5.75 per hour, or $120.75, and three men 6 hours each to unload at $5.75 per hour, or $103.50, for a total cost of $224.25, as billed by Cowboy Van Lines, in addition to charges based on 22,400 pounds (3,200 cubic feet at 7 pounds per cubic foot). The copy of the administrative report which you furnished with your letter shows that exclusive use of vehicle service was not requested; that the shipment did not fully load the vehicle (the original bill of lading is checked "YES" to indicate that the shipment fully loaded the vehicle); that the driver alone loaded the shipment; and that the consignee's employees unloaded the shipment.

Mr. Plankinton's letter of January 27, 1971, refers to Cowboy Van Lines Bill No. 030301, submitted March 3, 1970 (our reference TK No. 931755) and supported by bill of lading F-3,208,876, dated February 18, 1970; it covers a movement of four skids of aircraft trainers weighing 8,800 pounds, moving from Army Depot, Georgia, to Southern Airways, Fort Wolters, Texas.

Inasmuch as the vehicle moved under seals, we agree that freight charges computed at 22,400 pounds (7 pounds per cubic foot at 3,200 cubic feet) are correct, and your claim will be allowed to that extent.

The bill, however, also included a DD Form 619, stating a charge of $138 for loading, plus $69 for unloading. Inasmuch as the bill of lading is annotated "SHIPPER TO LOAD; CONSIGNEE TO UNLOAD" the matter was investigated and a copy of the route order was supplied showing that the loading by carrier was not authorized and that the vehicle was unloaded by employees of the consignee. In the circumstances, the *prima facie* showing on the DD Form 619 as to loading and unloading costs is rebutted, and the burden of proving the correctness of its claims rests with the carrier. *United States* v. *New York, New Haven & Hartford RR Co.*, 355 U.S. 253, 262 (1957).

Finally, we are enclosing copies of our record in connection with a shipment made under bill of lading F-2,112,710, dated February 23, 1970, covering office furniture transported from Minot Air Force Base, North Dakota, to Hill Air Force Base, Utah. In view of the representations made in the DD Form 619, and the conflicting comment received from the administrative office we must conclude that the basis set forth on our Form No. 1003, dated December 28, 1970, is correct, and that the Government has been overcharged $829.34 on this item.

We are of the view that with respect to the application of the Cowboy Van Lines Tenders which were in effect prior to February 16, 1971, the carrier is entitled to the 7 pound per cubic foot basis when seals were attached to the vehicle by the shipper and in instances where exclusive use of the vehicle was ordered and furnished. We do not agree that the mere ordering of a vehicle, without more, for the accommoda-

tion of a particular consignment, is a request for complete and sole occupancy of the vehicle and, therefore, in such cases the rate scales in Appendix III of the effective tenders are for application. With respect to the accessorial services loading and unloading charges, in view of the dubious authenticity of various DD Forms 619 as executed, we will recognize the validity of the information in such forms only when supported by supplementary evidence confirming the correctness of the information.

Our Transportation Division will review the record and revise the debt, currently $114,330.75, consistent with the views herein stated, and your company will be advised accordingly.

As you know, action has been taken to recover this substantial debt by monthly installment payments. Such a procedure will be continued for the time being, pending consideration of alternative proposals for the liquidation of the debt.

[B–173955]

Subsistence—Per Diem—Military Personnel—Temporary Duty—En Route to New Duty Station—Permanent Unit at Temporary Duty Station

A chief petty officer who incident to a permanent duty station change from Memphis, Tennessee, to Patrol Squadron Eight at Brunswick, Maine, is ordered to report on April 29, 1971 for 19 weeks of instruction on temporary duty with Squadron Thirty at Patuxent River, Maryland, is entitled to per diem for the entire period of the temporary duty, notwithstanding the unit to which assigned at his new permanent duty station was located at Patuxent River until June 30, 1971, since paragraph M4201–4 of the Joint Travel Regulations prohibiting the payment of per diem within the limits of a permanent duty station has no application as the officer was not a 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 the time the old permanent station of the Squadron.

To N. Delozier, Department of the Navy, October 15, 1971:

We again refer to your letter of June 24, 1971, CT33/ND:kld, requesting a decision whether payment of per diem may be made on an enclosed voucher in favor of ADJC, Jerome C. Matthews, 457 91 09, USN, in the described circumstances. The request was assigned Control No. 71–37 by the Per Diem, Travel and Transportation Allowance Committee.

By orders No. 098–71, dated March 14, 1971, Chief Petty Officer Matthews was transferred from Naval Air Technical Training Center, Memphis, Millington, Tennessee, to Patrol Squadron Thirty (VP30) at Naval Air Station, Patuxent River, Maryland, for 19 weeks under instruction, upon completion of which he was to report to Patrol Squadron Eight (VP8) at Brunswick, Maine, for duty. These orders

directed a change of permanent station from Millington to Brunswick with temporary duty en route at Patuxent River. He reported for temporary duty with Patrol Squadron Thirty at Patuxent River on April 29, 1971. The class he was to attend was scheduled to convene on May 3, 1971, and Mr. Matthews was to remain with Patrol Squadron Thirty at Patuxent River for temporary duty under instruction until September 1971.

Your doubt as to the member's entitlement to per diem for temporary duty at Patuxent River arises from the fact that by message 161837Z, dated February 1971, the Chief of Naval Operations officially announced the change of permanent duty station of Patrol Squadron Eight from Patuxent River, Maryland, to Brunswick, Maine, effective June 30, 1971. Thus, when the member reported to Patrol Squadron Thirty at Patuxent, Maryland, to perform temporary duty, the unit to which he was assigned upon reporting to his permanent station was physically located at the same place and did not move to Brunswick, Maine, until a later date.

Since Mr. Matthews' orders designate Brunswick, Maine, as the permanent station of Patrol Squadron Eight, you question whether paragraph M4201-4 of the Joint Travel Regulations should be applied to the temporary duty here involved. That paragraph provides generally that per diem allowances are not payable for any travel or temporary duty performed within the limits of the permanent duty station. Also, you question whether per diem may be paid beginning July 1, 1971, following the official change of station of Patrol Squadron Eight.

Under the provisions of 37 U.S. Code 404, per diem and travel allowances accrue to members of the uniformed services only during periods while away from their designated posts of duty. A member's designated post of duty, permanent station, is the place at which his basic duty assignment is for performance. It is changed by change of permanent station orders and when a member performing temporary duty at a location receives change of permanent station orders assigning him to duty at that location it becomes his permanent station. In the case of a Navy shore-based mobile unit change-of-station move, the change is effective when the unit members commence travel to the new station for the purpose of performing their regular duty assignment with no intention of returning to the old duty station. Hence, when Mr. Matthews reported at Patuxent River for the performance of temporary duty that location was the permanent station of Patrol Squadron Eight (VP8). 43 Comp. Gen. 73 (1963). In this case, however, the member concerned was not a member of Patrol Squadron

Eight until he reported for duty at Brunswick and its unit movement orders from Patuxent River to Brunswick could not include him.

Upon his arrival at Patuxent River, Maryland, the member reported to Patrol Squadron Thirty for temporary duty. Presumably, he performed that duty and upon completion thereof reported to Patrol Squadron Eight at Brunswick, Maine, for permanent duty. In those circumstances the fact that the permanent station of the squadron to which he was being assigned for permanent duty at Brunswick continued to be Patuxent River for a portion of the time the member was assigned there for temporary duty does not in our opinion affect his travel status or his entitlement to per diem for any portion of the temporary duty assignment.

The voucher is returned herewith for payment in the amount due for the temporary duty at Patuxent River.

[B–173691]

Bids—Buy American Act—Restrictions Not for Application—Foreign Subcontractor—Product Not End Component

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

To the Centro Corporation, October 20, 1971:

We refer to a letter of August 24, 1971, from your attorneys protesting the procurement by a Government prime contractor of a 1/6 scale model of an amphibious assault landing craft from British Hovercraft Corporation, Ltd. The contractor is Bell Aerospace Company (Bell), and the cost-reimbursement research and development contract involved is N00024–71–C–0276 with the Naval Ship Systems Command (NSSC).

The substance of your original protest, which was considered by NSSC, is that since there are domestic firms, one of whom is Centro Corporation of Dayton, Ohio, who are capable of producing the scale model, the Buy American Act, 41 U.S.C. 10a–d, should be invoked to preclude procurement of the item from any nondomestic source. NSSC has advised you of its opinion that the scale model is not the end product being procured by the Goverment under its contract with

Bell, since it is not to be delivered to the Government for public use but to Bell for its own use, and that it therefore does not fall within the coverage of the Buy American Act. However, you contend that the scale model is Government property acquired for "public use," and that it does not qualify as a domestic source end product under the Government procurement regulations; i.e., and end product manufactured in the United States if the cost of its components which are manufactured in the United States exceeds 50 percent of the cost of all of its components.

Bell's contract calls for the detailed design and construction of two experimental Amphibious Assault Landing Craft (AALC); for provision of a test and trials instrumentation system; for testing of the AALC; for support of Navy trials of the AALC; and for related data. Craft models required by the contract to be delivered to the Government include a display model (scale ¼ inch=1 foot) and a model suitable for tow tank tests to be conducted at Government facilities in a controlled environment, neither of which models is the 1/6 scale model covered by Bell's subcontract with British Hovercraft.

The contract includes, among other provisions, a subcontract clause requiring advance written approval of the contracting officer of awards of any fixed price subcontracts in excess of $25,000 or 5 percent of the value of the contract; a Government property clause providing for passage to the Government of title to all property purchased by the contractor for which he is entitled to reimbursement; and the Buy American Act clause prescribed by Armed Services Procurement Regulation (ASPR) 6–104.5 and 7–204.3 reading as follows:

BUY AMERICAN ACT (1964 MAY)

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

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

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

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

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

(i) which are for use outside the United States;

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

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

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

The record shows that Bell's prime contract is part of Phase II of the Navy's three-phase Amphibious Assault Landing Craft Program, which has been undertaken to define, develop, test, evaluate and document the performance of a new type of AALC. In Phase I of the Program, Bell and another firm, Aerojet General Corporation (Aerojet), were awarded independent cost reimbursement contracts to develop a *preliminary* AALC design using the air cushion principle and to provide data, model test results and a full scale mock-up of the craft. A major objective of the initial contracts, NSSC states, was to define the characteristics of a prototype test craft to be constructed and tested under Phase II of the program in order to assess the craft's performance levels in various sea states as well as its feasibility for use in amphibious assault operations. In Phase II of the Program, Aerojet received a contract with the same general provisions as Bell's Phase II contract. Each contract constitutes an extension of the separate development efforts of the respective contractor under Phase I.

In Bell's report to the Navy on its Phase I contract efforts, Bell proposed to use a 1/6 scale radio controlled model in various tests to gather information dealing with the craft design and performance. Aerojet pursued a different method to achieve the same objectives. In soliciting a proposal from each contractor for a Phase II contract, NSSC states that it intended to allow each contractor, with as little constraint as possible, to furnish a detailed design of an experimental AALC and to construct and test such craft. In addition, the stating of specific requirements not related to performances were avoided to the maximum extent possible in the Government's Statement of Work and Specification even though they were included in the Phase I reports submitted by the contractors. The proposal submitted by Bell under Phase II of the Program included a provision for procurement of a 1/6 scale model.

In a letter dated July 9, 1971, Bell submitted to the contracting officer a request for permission to purchase from British Hovercraft the 1/6 radio controlled scale model with drawings and test data. In the letter, which was accompanied by supporting documentation, Bell stated that it had determined that British Hovercraft was tech-

nically most competent to perform the subcontract and that British Hovercraft had submitted the lowest priced proposal in competition with Centro Corporation and two other domestic concerns. The proposals received by Bell were as follows:

Offeror	5 months Delivery	6 months Delivery
British Hovercraft	*$119, 688	*$111, 288
Centro Corporation	257, 129	214, 274
H & H Industries, Inc.	229, 040	
Atkins and Merrill, Inc.	370, 601	

*Price includes $1,296 for cost of transportation by ship to New Orleans.

In evaluating the above proposals, Bell added to the British Hovercraft price of $119,688, for delivery within 5 months, a 50 percent differential, pursuant to the provisions of ASPR 6-104.4, thereby increasing that firm's evaluated price to $179,532. Further, Bell's evaluation team gave consideration to the factor of additional expense of liaison trips to British Hovercraft as opposed to United States sources ($3,000 vs. $750) and other factors, including those which might affect performance by British Hovercraft. Upon completion of its considerations of the various factors, Bell's evaluation team concluded that the wide variance between the actual cost of the foreign model and the cost of a domestic product, and the technical superiority of the proposal for the British Hovercraft model, were sufficient to outweigh any negative considerations with respect to an award to British Hovercraft.

By letter of July 16, 1971, the contracting officer advised Bell of his consent to award of the subcontract to British Hovercraft. On August 10, Bell issued a purchase order for delivery of the model within 6 months, F.O.B. British Hovercraft's plant, at a total price of $109,992.

In a report to our Office, NSSC adheres to its position that the scale model is not an end product procured for public use as contemplated by the Buy American Act but is only an item of primary usefulness to the contractor for the purpose of conducting the tests discussed above. After the model is turned over to the Government, NSSC states, it will be available for tests in order to verify the contractor's test results based on the same model; however, the Government's use will, if anything, be incidental to the contractor's use and therefore not encompassed by the term "public use" in the Buy American Act.

NSSC further states that even if the 1/6 scale model is considered to be an end product within the purview of the Buy American Act,

there has been compliance with the requirements of the act as implemented by Executive Order 10582 and ASPR. In this regard, it is stressed that although Bell added to British Hovercraft's price a 50 percent differential for evaluation purposes, British Hovercraft's evaluated price was substantially lower than all other offers.

NSSC further urges that if the 1/6 scale model is considered to be a component of the AALC's, its cost is less than 50 percent of the total cost of all components of the end products, and its procurement from a foreign source is therefore permitted by section 2 of the Buy American Act. Accordingly, and for the other reasons stated above, NSSC contends that there has been no violation of the Buy American Act in the purchase of the 1/6 scale radio controlled model of the AALC from British Hovercraft.

The Buy American Act does not state an absolute prohibition against the procurement for the Government of other than domestic supplies and materials for public use. Rather, it expressly provides that the restrictions against the purchase of foreign products do not apply where it is determined that the cost of domestic products is unreasonable or their procurement is inconsistent with the public interest. 42 Comp. Gen. 467 (1963). In implementation of the act, ASPR 6–104.4, relating to evaluation of bids and proposals, includes the following pertinent provisions:

6–104.4 Evaluation of Bids and Proposals.

(a) In accordance with the Buy American Act, the Secretary of Defense has determined that where the following procedures result in the acquisition of foreign end products, the acquisition of domestic source end products would be (i) unreasonable in cost or (ii) inconsistent with the public interest (see 6–103.3 and 6–103.5).

(b) Except as provided in (d) below, bids and proposals shall be evaluated so as to give preference to domestic bids. Each foreign bid (other than a low bid offering a Canadian end product) shall be adjusted for purposes of evaluation either by excluding any duty from the foreign bid and adding 50 percent of the bid (exclusive of duty) to the remainder, or by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid, whichever results in the greater evaluated price, except that a 12 percent factor shall be used instead of the 6 percent factor if (i) the firm submitting the low acceptable domestic bid is a small business concern, or a labor surplus area concern, or both, (ii) small purchase procedures (see Section III, Part 6) are not used, and (iii) any contract award to a domestic concern which would result from applying the 12 percent factor, but which would not result from applying the 6 percent or 50 percent factor, would not exceed $100,000. (If an award for more than $100,000 would be made to a domestic concern if the 12 percent factor is applied, but would not be made if the 6 percent or 50 percent factor is applied, the matter shall be submitted to the Secretary of the Department concerned for a decision as to whether the award to the small business or labor surplus area concern would involve unreasonable cost or inconsistency with the public interest (see 6–103.3).)

Since the 1/6 scale model is not to be directly incorporated in any other item to be furnished to the Government under Bell's contract, the model does not constitute a component of an end product as defined in the Buy American Act clause, and the component cost rule set forth

in that clause is not for application to the procurement of the scale model.

As to whether the model constitutes an end product for public use within the purview of the Buy American Act and ASPR, we do not believe that a resolution of such question is required. As shown above, procurement of the British Hovercraft model would have been proper, even if the 1/6 scale model could be regarded as an end product, since the evaluated price of that model is still lower than the prices of the domestic models after applying the 50 percent foreign differential factor prescribed by ASPR 6-104.4. This ASPR provision states that the Secretary of Defense has determined that where the evaluation procedures set out therein results in the acquisition of foreign end products, the acquisition of domestic source end products would be unreasonable in cost or inconsistent with the public interest. Such determinations by the heads of the departments, which serve to exempt the procurements concerned from the restrictions of the Buy American Act, are specifically authorized by that act. 41 U.S.C. 10a.

Accordingly, we are unable to conclude that there has been any violation of the Buy American Act or the implementing regulations, and we therefore do not find any legal basis for questioning the award of the subcontract for the 1/6 scale model to British Hovercraft.

In view of the foregoing, your protest is denied.

[B-164118]

Housing—Loans—Maturity Date of Loan—Extension—Refinancing of Note *v.* Date Violation

The loss sustained by an Employees Credit Union on a note insured under Title I of the National Housing Act (12 U.S.C. 1701, *et seq.*), a note which when payments were reduced extended the maturity of the loan beyond the 5 years and 32 days prescribed by the act, is reimbursable if the time extension of the original note is not considered a violation of the maturity date limitation but as a refinancing of the loan within the purview of section 2(b) of the act. Therefore, upon reconsideration if it is determined a refinancing rather than a violation of the maturity limitation was involved, payment of the loss may be certified upon waiver pursuant to section 2(e) of the act of any noncompliance with the regulations applicable to refinancing.

To the Acting Director, Insurance Division, Federal Housing Administration, October 21, 1971:

Your letter of May 26, 1971, requested our opinion whether you may certify for payment a voucher for $2,102.94, in favor of the Stancal Employees Credit Union, Post Office Box 220, Seattle, Washington 98111. The payment involves reimbursement of a loss sustained by the Credit Union on a note of Charles L. and June D. Barnard, dated April 18, 1967, which had been insured under title I of the

National Housing Act (Public Law 479, 73d Congress, 48 Stat. 1246, 12 U.S.C. 1701 *et seq.*).

The question of the Credit Union's entitlement to payment of its loss on the note arises by reason of an agreement approved December 30, 1969, entitled "Extension Agreement," which recites and provides as follows:

"WHEREAS the undersigned, Charles L. Barnard, has executed a note in favor of STANCAL EMPLOYEE'S CREDIT UNION in the original amount of $3500.00 and payable $72.00 each month starting May 21, 1967, and which has an unpaid principal of $2492.62; and WHEREAS the above borrower finds that he is unable to complete the payment of this loan on the present terms; NOW THEREFORE, he requests that relief be given in the form of an extension of time. If this extension is approved, I hereby agree to pay the balance remaining due on this note at the rate of $46.08 each month starting January 15, 1970, with interest at the rate as provided in the original note, all other provisions of the original note except those changed by this agreement to remain in full force and effect."

Section 2(b) of the National Housing Act, 12 U.S.C. 1703(b), at the time of the execution of the original note provided that an obligation of the class here involved may not be insured if it has a maturity in excess of 5 years and 32 days. Viewing the agreement of December 1969 as an extension of the maturity of the original loan—the final payment being due on June 15, 1974, or 7 years and 58 days from the date of the original note—the claim of the Credit Union would be for disallowance. See B–131963, July 17, 1957; B–149800, September 28, 1962; and B–164118, November 19, 1969. The Credit Union however contends that the agreement of December 1969 was conditioned upon approval by the Federal Housing Administration, and without that approval it is of no effect.

On the day of approving the extension agreement, December 30, 1969, the Credit Union wrote the Federal Housing Administration of the borrowers' dire financial situation resulting in default and of their promise "to resume payments starting on January 15, 1970 at rate of $46.08 per month, clearing balance in 5 years." As the Credit Union used and completed the standard administrative form for a request of an extension of time in filing the insurance claim, the Federal Housing Administration returned the request with the advice that under the applicable regulations the Credit Union had "an automatic claim-filing period on this loan until October 21, 1972 (6 months after maturity)." Although, as contended by the Credit Union, the Federal Housing Administration did not approve the agreement of December 1969, the record does not substantiate the contention that the Credit Union's approval of the agreement with the debtors was subject to Federal Housing Administration approval. See B–164118, August 14, 1968. Rather, viewing the agreement of December 1969 in light of the overall situation and correspondence, we consider the

agreement as essentially a refinancing of the loan within the purview of the proviso of section 2(b) of the National Housing Act:

* * * *Provided further*, That any obligation with respect to which insurance is granted under this section on or after July 1, 1939, may be refinanced and extended in accordance with such terms and conditions as the Secretary may prescribe, but in no event for an additional amount or term in excess of the maximum provided for in this subsection.

In a prior opinion (B-131963, July 17, 1957) concerning the provisions of section 2(b) dealing with the maturity and the refinancing of insured obligations we expressed the view that a financial institution may extend the time for paying a note beyond the statutory maximum period "only if it refinances the loan, that is, if a new note is executed." We are of the opinion that the agreement of December 1969, while having as its principal sum the outstanding balance of the original note differs so substantially from the note of April 1967 in its period of payment and amount of monthly installment as to be tantamount to a new note and reasonably could be considered a refinancing of the outstanding obligation of the original note. The relief requested by the borrowers and granted by the Credit Union was not a mere extension of time. Moreover, the previously discussed request of the Credit Union to the Federal Housing Administration incident to the former's approval of the agreement of 1969 may reasonably be viewed as notification of intent to refinance the loan.

The voucher and file are returned for further consideration of this case as involving a refinancing within the contemplation of the proviso of section 2(b) and not necessarily a violation of the maximum maturity provision of that section. If upon reconsideration it is found that noncompliance with administrative regulations applicable to refinancing warrants waiver under authority of section 2(e) of the National Housing Act, 12 U.S.C. 1703(e), granting the Secretary of Housing and Urban Development power to waive regulations prescribed by him, the voucher would then be for certification.

[B-163375]

Boards, Committees, and Commissions—Compensation—Aggregate Limitation

The members of the National Advisory Committee established by section 7(a) of the 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 the rates prescribed for grade GS-15 since section 3109 limits payment to experts and consultants to the per diem equivalent of the highest rate payable under the General Schedule salary rates established for Federal employees. The experts and consultants of the advisory committees, appointed under section 7(b) to assist in standard setting functions, for whom section 7(c)(2) prescribes grade GS-18, may not be paid in excess of grade GS-15,

unless they can qualify under the rule in 43 Comp. Gen. 509, to the effect that an exception to the grade GS–15 limitation may be made only when the limitation on the number of positions authorized for grade GS–18 is removed.

To the Secretary of Labor, October 22, 1971:

This refers to letter of September 1, 1971, from the Assistant Secretary of Labor, requesting a decision from our Office as to the level of compensation for members of the National Advisory Committee on Occupational Safety and Health.

The Occupational Safety and Health Act of 1970, Public Law 91–596, 84 Stat. 1590, enacted December 29, 1970, 29 U.S.C. 656, provides in pertinent part as follows:

SEC.7.(a)(1) There is hereby established a National Advisory Committee on Occupational Safety and Health consisting of twelve members appointed by the Secretary, four of whom are to be designated by the Secretary of Health, Education, and Welfare, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and composed of representatives of management, labor, occupational safety and occupational health professions, and of the public. The Secretary shall designate one of the public members as Chairman. The members shall be selected upon the basis of their experience and competence in the field of occupational safety and health.

* * * * * * *

(3) The members of the Committee shall be compensated in accordance with the provisions of section 3109 of title 5, United States Code.

* * * * * * *

(b) An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions * * * Persons appointed to advisory committees from private life shall be compensated in the same manner as consultants or experts under section 3109 of title 5, United States Code. * * *

(c) In carrying out his responsiblities under this Act, the Secretary is authorized to—

* * * * * * *

(2) employ experts and consultants or organizations thereof as authorized by section 3109 of title 5, United States Code, except that contracts for such employment may be renewed annually; compensate individuals so employed at rates not in excess of the rate specified at the time of service for grade GS–18 under section 5332 of title 5, United States Code, including traveltime, and allow them while away from their homes or regular places of business, travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently, while so employed.

The Assistant Secretary of Labor states in part that—

Inasmuch as Congress expressly provided that compensation be paid at the GS–18 level for experts and consultants, we believe that Congress intended to provide the same GS–18 level of compensation for advisory committee members; and we wish to pay members at the GS–18 rate. To conclude otherwise would mean, unfortunately, that members of the National Advisory Committee who serve as experts and consultants would be compensated at a lower rate than those individuals hired as experts and consultants under section 7(c) of the Act.

A determination is requested as to whether members of the National Advisory Committee may be paid at the GS–18 rate.

Subsections 7(a)(3) and 7(b) cited above refer to 5 U.S.C. 3109 for fixing the compensation of the members of advisory committees. Under 5 U.S.C. 3109 Federal agencies may, when specifically au-

thorized in an appropriation or other statute, employ experts or consultants or organizations thereof temporarily (1 year or less) or intermittently without regard to civil service classification laws. Experts or consultants hired pursuant to this statute as officers or employees of the United States may not, however, be paid in excess of the per diem equivalent of the highest rate payable under the General Schedule salary rates established for Federal employees unless other rates are specifically provided in the appropriation or other law.

This Office has ruled that under 5 U.S.C. 3109 an expert or consultant ordinarily may not be paid a rate in excess of the highest rate payable for GS–15 of the General Schedule, which at present would be $31,523 per annum. 29 Comp. Gen. 267 (1949); 43 *id.* 509 (1964). An exception to this rule was made in the case of individuals to be placed in "professional engineering positions primarily concerned with research and development and professional positions in the physical and natural sciences and medicine * * *." Under our decision in 43 Comp. Gen. 509 such individuals appointed as experts and consultants may be at rates not in excess of grade GS–18 of the General Schedule. The basis for this was the removal of the limitation on the number of positions that could be placed in the named categories.

It may be that some members of advisory committees appointed by the Secretary of Labor could qualify for the salary rate applicable to grade GS–18 of the General Schedule in accordance with the decision in 43 Comp. Gen. 509 (1964). However, for those members of such advisory committees who cannot so qualify as well as members of the National Advisory Committee, we see no basis for payment of salaries in excess of the rate for grade GS–15 of the General Schedule. This is so because the language of the statute is clear and the legislative history contains no firm indication that such language does not express the true intent of the legislators.

The questions presented are answered accordingly.

[B–173233]

Pay—Withholding—Debt Liquidation—Property Losses—Member on Detail

Although the involuntary collection from the current pay of officers and enlisted men of a military department who while assigned to a Department of Defense agency are held pecuniarily liable for the loss, damage, or destruction of Government property, even though not accountable for the property, is not authorized absent specific statutory authority for setoff since the property was not under the control of the service having jurisdiction of the member charged, pursuant to 37 U.S.C. 1007(c) and 1007(e), only pertaining to enlisted members of the Army and Air Force, the Secretary concerned may promulgate regulations to provide for the determination of a member's liability, relying on the reporting of the instrumentality whose property is involved, and for the involuntary collection of the indebtedness from the current pay of the member, or may cancel an indebtedness pursuant to 10 U.S.C. 4837(d) and 9837(d).

To the Secretary of Defense, October 22, 1971:

Further reference is made to a letter dated June 9, 1971, from the Assistant Secretary of Defense (Comptroller) requesting a decision on several questions relating to involuntary collection from the current pay of service members (officers or enlisted) of a military department who are assigned for duty to a Department of Defense agency and are not accountable for property, but who have been held to be pecuniarily liable for loss, damage or destruction of Government property pursuant to a report of survey approved by the head of a Department of Defense agency. A copy of the Department of Defense Military Pay and Allowance Committee Action No. 453, presenting and discussing the several questions was attached.

The questions are as follows:

1. When a member of the Air Force, who is assigned to duty with the Defense Intelligence Agency and who is not accountable for property, has been held pecuniarily liable for loss, damage or destruction of Government property, pursuant to a report of survey initiated, processed and approved by the Director, Defense Intelligence Agency, may the Secretary of the Air Force, when requested, administratively effect involuntary collection of the indebtedness from the current pay of the individual so held pecuniarily liable:
   a. If he is an officer?
   b. If he is an enlisted member?
2. If question 1a is answered in the affirmative, would the appropriate Secretary of the Military Department retaining payment jurisdiction over the member have the same authority, if the individual held pecuniarily liable by the Defense Intelligence Agency report of survey and who is not accountable for property, is:
   a. An officer of the Army?
   b. An officer of the Navy or Marine Corps?
3. If question 1b is answered in the affirmative, would the appropriate Secretary of the Military Department retaining payment jurisdiction over the member have the same authority, if the individual held pecuniarily liable by the Defense Intelligence Agency report of survey and who is not accountable for property, is:
   a. An enlisted member of the Army?
   b. An enlisted member of the Navy or Marine Corps?

It is stated in the Committee Action that Table 7–7–3 of the Department of Defense Military Pay and Allowances Entitlements Manual, captioned "Indebtedness Due to Loss or Damage to Public Property or Supplies," appears to provide, in Rule 7, authority for the involuntary collection from current pay of a nonaccountable Air Force enlisted member by the Secretary of the Air Force where such member is determined to be pecuniarily liable by an Army report of survey and vice versa.

The Committee Action indicates that such conclusion appears to be supported by the Army and Air Force reciprocal agreement (AR 735–11, para 12–8 and AFM 177–111, para 10420e), in which each service has agreed to recognize the liability for the pecuniary charges against one of its own members established by a report of survey of the other service and when requested will take action to effect collection, even though neither regulation specifically provides for

cross service involuntary collection action. However, the Committee Action refers to an opinion rendered by the Judge Advocate General, Department of the Army, dated March 13, 1957 (JAGA 1956/8800), wherein it was concluded that no authority exists for either service to involuntarily stop the "current pay" of one of its members to satisfy an indebtedness raised by a finding of pecuniary liability by the other service.

While the discussion states that such proposition is not free from doubt, it is stated further that the only restriction which appears in Table 7-7-3 of the DODPM against involuntary stoppage of current pay for a debt establishd by administrative determination, including a report of survey by another service or agency, appears as a note to Rule 3. That note states:

> Involuntary stoppage of pay is not authorized for a debt established by an administrative determination, including report of survey, of another service or agency. No authority exists for one service to involuntarily stop current pay of one of its own members to satisfy a debt raised by a finding of pecuniary liability by the other service or agency.

In *Smith* v. *Jackson*, 241 F. 747 (1917), affirmed by the Supreme Court, 246 U.S. 388 (1918), it was held that the current compensation of an officer or employee of the United States may not be withheld under the Government's general right of setoff of debts due the United States from the debtor. We have therefore held that, in the absence of specific statutory authority, no authority exists to set off general debts due the United States by its employees out of their current salaries without their consent. See 29 Comp. Gen. 99 (1949); 37 Comp. Gen. 353 (1957); and 42 Comp. Gen. 83 (1962).

Table 7-7-3 of the DODPM sets forth rules under which collection may be made against military personnel for indebtedness due to loss or damage to public property or supplies. Rules 1 and 2 apply to accountable officers; Rules 3 through 7 apply to all officers and enlisted personnel in circumstances when they are not accountable officers. Of the latter group, only Rules 3 and 7, which involve Army and Air Force personnel, permit the involuntary collection from a member's current pay under the circumstances therein set forth. Rules 4 through 6, on the other hand, permit collection from a member's current pay only with the member's consent.

Each of these rules must be read in connection with the statutory authority from which it was derived as well as the general limitation imposed by *Smith* v. *Jackson*, *supra*. Rule 3, based upon 37 U.S.C. 1007(e), permits involuntary checkage from the current pay of both officers and enlisted personnel of the Army and Air Force for damage or cost of repairs to arms or equipment under the circumstances therein set forth and, as such, constitutes an exception to the general rule.

The Note to Rule 3 appears to have been added as a result of the above mentioned opinion (JAGA 1956/8800) and, as such, appears to represent but a clarification of the permitted bounds of that checkage under Rule 3. In view of the long standing interpretation given to *Smith* v. *Jackson*, by the courts and this Office, we agree with that opinion under current regulations. Where Congress has intended that current pay be subject to involuntary withholding by the Government, it has provided specific statutory authority for that purpose.

In this regard it is noted that provision is made in 10 U.S.C. 4835 and 10 U.S.C. 9835, and Army and Air Force regulations issued pursuant thereto (AR 735–11 and AFM 177–111), for holding a person liable for loss, damage, or destruction of Government property pursuant to reports of survey made thereunder. Authority to hold a person so liable, however, is limited by those provisions of law to property of law to property of the United States "under the control" of the Department of the Army and Air Force respectively. Accordingly, neither provisions of law nor the regulations issued pursuant thereto provide any authority for the involuntary collection from members of the Army or Air Force on the basis of a report of survey of lost, damaged, or destroyed property that is not under the control of the service of which the individual is a member. As pointed out above, 37 U.S.C. 1007(e) has been given a similar application.

Rule 7 of Table 7–7–3 of the DODPM, which provides for involuntary collection from the current pay of Army and Air Force enlisted personnel for loss or damage to Government property that is not within the scope of Rule 3, is derived from the act of May 22, 1928, ch. 676, 45 Stat. 698, and its antecedent laws, section 1303, Revised Statutes, and Article of War 83, act of June 4, 1920, 41 Stat. 804. The pertinent provisions of that act as presently codified in 37 U.S.C. 1007(c) read as follows:

> (c) Under regulations prescribed by the Secretary concerned, an amount that an enlisted member of the Army or the Air Force is administratively determined to owe the United States or any of its instrumentalities may be deducted from his pay in monthly installments. * * *

The legislative history of the 1928 act shows that, while the right of the Government to proceed against the pay of an Army enlisted member on an involuntary basis was established by statute, there appears to be nothing in that history or in subsequent legislation indicating that the Secretary of the Army or the Secretary of the Air Force is permitted to involuntarily stop the current pay of one of their respective enlisted members based solely upon a report of survey issued by another service.

It is our view therefore that under existing regulations the same conclusion must be reached in cases where the only action is the report

of survey and it emanates from any other agency of the Federal Government. Accordingly, questions 1a and 1b are answered in the negative and the other questions require no answer.

It is to be observed, however, that subsections 1007(c) and 1007(e) of Title 37 provide generally that deductions may be made from the current pay of members of the Army or of the Air Force under certain circumstances. Subsection 1007(c) relates to debts owed to the United States or any of its instrumentalities by enlisted members, based upon administrative determinations made pursuant to regulations prescribed by the Secretary concerned. Subsection 1007(e) relates to the damage or cost of repairs to arms or equipment due to abuse or negligence of all members who had the care or use of the property.

The term "instrumentalities" as used in subsection 1007(c) has been interpreted as meaning only those instrumentalities of the United States which are dependent upon appropriated funds under the control of the Secretaries of the Army and the Air Force (Dig. Op. JAG, 1912–40, section 1521(4)), and, as indicated above, neither that subsection nor subsection 1007(e) has been viewed as authorizing collection action where another service was involved. The unification, subsequent to that opinion and early decisions of this Office, of the military departments under the direction, authority and control of the Secretary of Defense pursuant to the National Security Act of 1947, Public Law 253, ch. 343, 61 Stat. 495, as amended, 50 U.S.C. 401, however, appears to support the conclusion that the instrumentalities referred to in 37 U.S.C. 1007(c) properly may be viewed as including all agencies under the direction and control of the Secretary of Defense which are supported by appropriated funds. The broad language of subsection 1007(e) supports a similar conclusion in the case of that subsection.

While regulations have not been promulgated by the Secretary of the Army or the Secretary of the Air Force to apply 37 U.S.C. 1007(c) and 37 U.S.C. 1007(e) in such manner, there would appear to be no legal prohibition against their doing so to provide for an independent administrative determination by them of whether an enlisted member of their respective services performing a tour of duty with another agency of the Department of Defense will be held liable for such loss, damage or destruction of Government property of that agency or under his care or use, thus permitting involuntary collection of any such administratively determined indebtedness from the member's current pay. As to this conclusion, while the statutes do not prescribe any particular procedure for the administrative determination of indebtedness, they do require, in our opinion, that such determination be made by the Secretary of the service of which the individual concerned is a member, or his designee.

We see nothing, however, that would preclude, as a practical matter of administrative procedure in making such determination of indebtedness, the reliance by the respective Secretaries or their designee(s) on the report of the instrumentality (Defense Intelligence Agency report of a board of survey, for example), that investigates the facts and circumstances and makes findings and recommendations, even though such findings and recommendations may be advisory only. See *Morgan* v. *United States*, 298 U.S. 468, 481 (1936); *Eagles* v. *Samuels*, 329 U.S. 304, 315, 316 (1946); *NLRB* v. *Duval Jewelry Co.*, 357 U.S. 1 (1957).

Of course the provisions of 37 U.S.C. 1007(c) and 37 U.S.C. 1007(e) apply only to members of the Army and Air Force, and not to members of the other armed services, and this expression of our views pertains only to Army and Air Force members.

It follows that if regulations of the Army and Air Force are amended to authorize an administrative determination of indebtedness under 37 U.S.C. 1007(c) or 37 U.S.C. 1007(e) in the manner discussed above, the Secretary concerned would also be authorized to remit or cancel such an indebtedness of an enlisted man, under the provisions of 10 U.S.C. 4837(d) and 9837(d).

[B-61937]

Military Personnel—Dependents—Certificates of Dependency—Filing Requirements

The requirements for the annual submission of dependency certificates by members of the Armed Forces in pay grade E-4 and above and the annual recertification of dependency certificates by active duty members in those pay grades should be continued as the certifications are important to the proper audit of a disbursing officer's account to support the credit claimed for dependency payments and to evidence the continued existence of a dependent and the dependency status. However, as methods and procedures for recertification differ substantially among the services, more uniform methods, incorporating the best features of the procedure of each service is desirable to accomplish savings in paperwork, time, and manpower.

To the Secretary of Defense, October 26, 1971:

Further reference is made to letter dated June 9, 1971, from the Deputy Assistant Secretary of Defense (Comptroller) requesting decision as to whether the requirement for annual submissions of dependency certificates by members in pay grades E-4 (over 4 years' service) and above and the annual recertification of dependency certificates by active duty members of the Armed Forces in those pay grades may be discontinued. The request was assigned Department of Defense Military Pay and Allowance Committee Action No. 452, a copy of which was enclosed.

We have found that the methods of annually recertifying dependency by members in pay grade E-4 (over 4 years' service) and above

vary among the services. For example, it appears that in the Air Force annual recertification of primary dependents (wives and children) is generally accomplished at the local level at the time of the annual personnel records review by the member recertifying on the reverse of a copy of DD Form 137–1 which is retained in his financial data file. See AFM 177–105, par. 6.11. Annual redetermination of parental dependency is accomplished by the local Consolidated Base Personnel Office or General Support Unit completing DD Form 137 which is signed by the member and forwarded to the Air Force Accounting and Finance Center, Denver, Colorado, where the redetermination of parental dependency takes place. See AFM 177–105, par. 6–10.

In the Army annual recertification of primary dependency by members in these pay grades is generally accomplished by the member certifying on DA Form 3298 which is retained in his financial records folder. See AR 37–104–2, par. 2–50.1b. Annual recertification of parental dependency is accomplished by completing an original and three copies of DD Form 137. The original of this form is attached to copy 1 of the member's military pay voucher which is submitted to the Finance Center, U.S. Army, Indianapolis, Indiana. One copy is filed in the member's financial data records folder, one copy is filed with the Finance and Accounting Office's retained copy of the related payroll, and one copy is given to the member. See Army Regulations 37–104–2, par. 2–50.1c.

The annual recertification of primary dependents for Navy members in pay grades E–4 (over 4 years' service) and above and the recertification of primary dependents and parental dependents of Marine Corps members in these pay grades is accomplished by submitting a NAVCOMP Form 2040 to the member's disbursing officer who retains it. See Navy and Marine Corps Military Pay Procedures Manual, pars. 30226, 30242 and 30245. Navy members with dependent parents annually recertify by submitting NAVCOMP Form 2040 in duplicate to their disbursing officers who retain one copy and forward the other copy to the Navy Family Allowance Activity, Cleveland, Ohio, where parental dependency is determined.

As was pointed out in the discussion contained in Committee Action No. 452, the importance of these certifications lies in the support they provide for the credit claimed by the disbursing officers for dependency payments made during the periods involved. Consequently, they are important to the proper audit of the disbursing officer's accounts. See 32 Comp. Gen. 232 (1952) and 38 Comp. Gen. 369 (1958). This support covers the continued existence of the dependent and the dependency status.

We recognize that members generally are required to promptly report any change that may occur in their dependency status; however,

the annual redetermination of secondary dependency and the annual recertification of primary dependency gives some assurance that changes which have been overlooked, or are unreported for other reasons, will not go undetected indefinitely. The importance of the annual submission of parental dependency certificates is demonstrated by the fact that of the 2,598 cases in which such certificates were submitted to the Air Force Accounting and Finance Center in fiscal year 1971, 551 or 21 percent were disapproved.

Accordingly, it is our view that the annual recertification of dependency serves an important purpose and should be continued. However, it appears that the methods and procedures for recertification may differ substantially among the services and that more uniform methods, incorporating the best features of the procedure of each service, might accomplish some of the desired savings in paperwork, time and manpower mentioned in Committee Action No. 452.

[B–173157]

Contracts—Negotiation—Pilot Projects—Method of Conducting Negotiations

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

Bidders—Qualifications—Business Affiliates—Evidence

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

To Reavis, Pogue, Neal & Rose, October 26, 1971:

Reference is made to a letter dated June 1, 1971, with enclosure, from The Metal Bank of America, and your letter dated July 21, 1971, protesting the award of a contract to Thermal Reduction Corporation, under request for quotations No. N00140–71–Q–1330, issued by the Naval Regional Procurement Office, Philadelphia, Pennsylvania.

The subject solicitation, issued March 10, 1971, called for the disposal of 500 gross tons of unserviceable explosive fuses by incineration

at the Naval Ammunition Depot—Earle, Colts Neck, New Jersey (NAD Earle). Under the terms of the solicitation, the contractor would be responsible for providing the incineration device, preparation of the site, incineration of the fuses, removal of scrap residue, removal of incineration device upon completion of the services, and restoration of the site. The solicitation requested a firm fixed-price quotation and a detailed technical proposal indicating the method and manner in which the services would be performed.

You allege that preferential treatment and technical assistance were given to Thermal Reduction Corporation prior to the submission of quotations. The contracting officer's statement, included in the administrative file, reports in this regard that your allegation relates to a demonstration involving detonation of some fuses held at NAD Earle on September 18, 1970, attended by representatives of Thermal Reduction Corporation. It is stated that observing the detonation of a few fuses would be of no significance to the particular requirement covered by the subject solicitation since it provides for disposal by incineration (not detonation) and that detonation of fuses has little or no relationship to an incineration operation. It is further reported that your company was offered the opportunity to attend an identical demonstration, but did not choose to do so.

You contend that the true nature of the demonstration was a test by incineration (not detonation) whereby the fuses were burned by the use of thermite grenades. The contracting officer states in the supplemental administrative report that there was no incineration but rather the fuses were exploded by heat from the thermite grenades.

While we cannot conclude that Thermal Reduction Corporation was afforded preferential treatment by the Government, we do believe the circumstances surrounding the demonstration certainly might create the appearance of favoritism. The report of the Explosive Ordnance Disposal Officer included in the supplemental administrative report indicates that representatives of Thermal Reduction Corporation requested the demonstration, and additionally, requested that a high heat source be used as the destructive element. In his opinion, the demonstration provided no information of value relative to the subject procurement. Whether "incineration" or "detonation" was used in the demonstration, the fact remains that a prospective offeror was afforded an opportunity at its request to view destruction of these explosive fuses by a high heat source. While it is reported that Metal Bank was offered the opportunity to witness a demonstration involving detonation of fuses, you indicate they were not made aware of the fact that the fuses were to be destroyed by a high heat source and not merely detonated. The Navy's supplemental report recognizes the problems

generated by such communications with prospective offerors and indicates that such practices will not be repeated in future procurements.

It is alleged that Thermal Reduction Corporation is not a responsible contractor and that it is a non-existent company. The contracting officer states in this regard as follows:

> * * * Thermal Reduction was established in July 1970. It is a wholly-owned affiliate of Lapadula & Villani Inc., sharing common ownership and under the direction of the parent company's executive board. Lapadula & Villani, Inc. is a diversified firm consisting of a group of companies, each having specialized abilities. Technical personnel from the requiring activity have visited Thermal Reduction and are aware of the resources available to this firm for the performance of the contract. They have advised the Contracting Officer that they consider Thermal Reduction capable of satisfactorily performing the contract. Lapadula & Villani, Inc. have successfully performed several Government contracts awarded by the United States Naval Shipyard, Philadelphia, Pa. The Contracting Officer has determined that Thermal Reduction is a responsible quoter.

It has long been the rule of our Office to accept the contracting officer's determination of responsibility, unless it is shown by convincing evidence that the finding was arbitrary, capricious, or not based on substantial evidence. 45 Comp. Gen. 4 (1965) and cases cited therein. We find no such evidence in the record, and have no reason to question the qualifications of Thermal Reduction Corporation.

You also contend that the negotiation procedures under the solicitation were unfair. Metal Bank's letter of June 1, 1971, states as follows:

> 4. The procedure used in arriving at a final bid price was most unfair. On 8 April by telephone and confirmed by letter on 9 April, we were asked for an amplification of our technical proposal and a review of our price. It was pointed out that our proposal contained various qualitative options. We were told that further negotiations would be conducted at which time the options would be reduced. This lulled us into replying on 13 April . . . "We would be amenable to further negotiations on costs when the full requirements of the project and equipment are agreed upon. Depending on this, a cost reduction may be in order."
>
> Therefore, we were shocked when advised on 6 May that no further negotiations would be carried on and would be amenable to reducing our price. Since we were unable to ascertain which qualitative extremes of our proposal were desired by the Navy, we were unable to fairly consider a reduction in price. Had this been handled in accordance with the format transmitted to us on 8 April, we have no doubt that a final bid price would have been arrived at that was as low or lower than the one finally accepted.

The contracting officer states that only ultimate objectives were specified in the solicitation and that development of operating procedures and the selection and design of equipment which would accomplish the ultimate objective were entirely the responsibility of the contractor. The contracting officer states that Metal Bank was never told that negotiations would be conducted to define operating procedures or equipment design. The contracting officer states further that Metal Bank's original proposal (letter of April 13, 1971) contains only four references to any variables in procedures or equipment as follows:

On page 3 it states:

(4) We do not consider it necessary to wall in the incinerators with sand bags, but subject to further negotiations with you, this could be done if considered necessary.

On page 5 it states:

We have not at this time established a procedure dealing with non-inert fuses in the burned residue. In view of the comments set forth in Question No. 3, we do not feel this situation will exist. We are amenable to visually inspecting the burned residue at the time it is removed on a batch basis, but other efforts in this vein would be subject to future negotiations.

On page 6 it states:

It is possible to include in the design an entry door that is similar in design to a bank night depository door. This would be a multi-sided revolving affair that would mean that as the boxes rolled through, one side of the door would always be in the closed position. We do not consider this a desirable item, but could provide if required.

On page 8 it states:

We feel that the desired function will be accomplished by ¾" plate. We are able to plate this with naval armor plate of any size up to 4" thick if further negotiation should indicate the desirability of this. We also recognize that it might be necessary to replace the plating during the project, and, if so, this will be done promptly at our expense.

Notwithstanding the above-quoted paragraphs, the contracting officer states that the Metal Bank proposal was interpreted as a promise to effectively meet all contingencies and accomplish the objective at a firm fixed-price because of the following statement made on page 8 of its April 13, 1971, letter:

In consideration of the variables involved in this proposal (size of armor plate, amount of sand bagging, etc.), we could not at this time make any changes in our bid price. However, even if all the variable options we have mentioned in this letter are requested by you at the maximum degree, we can absorb them at no increase in the offered prices. Further than this, we would be amenable to further negotiations on costs when the full requirements of the project and equipment are agreed upon. Depending on this, a cost reduction may be in order.

It is reported that since Metal Bank had submitted an acceptable technical proposal, it, along with other firms submitting acceptable proposals, was requested to state its best and final price by letter dated May 6, 1971, from the contracting officer. The letter stated that award of the proposed contract would be based on the quoted prices on record or as revised in reply to the subject letter; it stated further that no revision of prices would be accepted unless received on or before May 17, 1971. By letter dated May 14, 1971, to the contracting officer, Metal Bank reconfirmed its price contained in the original quotation.

In our opinion the procedures followed in the conduct of negotiations were proper. Metal Bank was advised by the letter of May 6, 1971, that its final price was requested. Its response on May 14, 1971, was unequivocal and reconfirmed its quoted price. The obvious intent of this correspondence was to conclude negotiations. Such a procedure is consistent with the provisions of Armed Services Procurement Regulation (ASPR) and our decisions. See ASPR 3-805.1 and 48 Comp. Gen. 536 (1969).

You allege that offerors should have been given an opportunity to submit revised prices on the same level of performance. You state that if the Navy had specified a minimum level of performance deemed to be satisfactory, the quoters, including Metal Bank, would have been in a position to re-evaluate their earlier offers, and revise their quoted prices downward. We find no reason to object to the Navy's position in this matter. It simply wanted the contractor to incinerate five hundred tons of explosives fuses in a safe and pollution-free manner, and it could not tell offerors the specific equipment, the design features and the operating procedures which would assure successful accomplishment of this task.

We note in this regard that the supplemental administrative report contains a letter dated August 24, 1971, from the Officer in Charge, Naval Regional Procurement Office, which states that Metal Bank will be furnished at its request data delivered under the contract in accordance with applicable laws and regulations governing release of information to the public which may be especially applicable to future procurements. In view of the fact that this procurement for detonation of explosive fuses is the first of its kind, since fuses were previously dumped at sea, the requirements for such a pilot project could not be specifically detailed. However, we agree with your contention that any follow-on procurements should be conducted as competitively as possible. Therefore, we are recommending to the Secretary of the Navy by separate letter dated today that any reasonable steps be taken to insure adequate competition in future procurements of this type including as appropriate more definitive specifications, demonstrations and pre-bid conferences.

For the reasons stated, we find no basis to conclude that the negotiation procedure followed under subject solicitation would not result in a valid award. Accordingly, your protest is denied.

[B–173345]

Contracts—Specifications—Restrictive—Particular Make—"Or Equal" Product Acceptability

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

To the Secretary of the Navy, October 26, 1971:

We refer to letters SUP 0222 dated July 21 and August 12, 1971, with enclosures, from the Deputy Commander, Procurement Management, Naval Supply Systems Command, reporting on the protest of Sweinhart Electric Co., Inc. against the award of a contract to Cal-West Electric, Inc., for an electric generating set, under invitation for bids (IFB) No. N66314-71-B-2516, issued by the Naval Regional Procurement Office (NRPO), Naval Supply Center, Oakland, California.

NRPO has advised that the electric generating set was scheduled for delivery to the using activity by Cal-West on August 20, 1971. Therefore, our action is confined to making recommendations to preclude recurrence of the procurement deficiencies noted herein.

The IFB solicited bids for one "Electric Generating Set, Diesel Driven, radiator cooled, ONAN Model 300 DFT-4R or equal," in accordance with "DESCRIPTION/SPECIFICATIONS," which in section F1 required that the set generate 300 kilowatts (kw.). Also, section F2, entitled "DIESEL ENGINES," specified:

Type: 4-cycle; V-12 cylinder; 5.5-in bore; 6-in stroke; 1710-cu in piston displacement; 15.1 to 1 compression ratio; piston speed 1800-fpm; 463-bhp maximum at 1800-rpm. Cummins Engine, V1710P500 or equal.

Section C9 of the IFB contained the brand name or equal clause required by the provisions of paragraph 1-1206.3(b) of the Armed Services Procurement Regulation (ASPR). The clause advised bidders that the items called for by the IFB have been identified by a brand name or equal description which was intended to be descriptive rather than restrictive and indicative of the quality and characteristics of products that would be satisfactory. The clause further provided that bids offering equal products were to be considered for award if such products were equal "in all material respects" to the referenced brand name.

The June 8, 1971, bid opening established Sweinhart as the low bidder. However, by letter dated June 9, 1971, the second low bidder, Cal-West, advised NRPO that the Sweinhart bid stated exceptions to the specifications in the IFB. Among others, Cal-West pointed out that the Caterpillar engine offered by Sweinhart was 6-cylinder rather than 12-cylinder as provided in the specifications. Also, Cal-West stated that the electric generating set with the Caterpillar engine model proposed by Sweinhart was only rated to produce a maximum of 250-kw. standby power according to published literature, as opposed to the 300-kw. requirement in the IFB. It is reported that:

* * * After further review, the bid of Sweinhart Electric Company was rejected as nonresponsive due to failure to meet engine type requirements and on 15 June 1971 award was made to Cal-West Electric, Incorporated. * * *

Initially, we note the circumstances under which Sweinhart's bid was originally rejected. Apparently, the procurement activity accepted the allegations of the second low bidder concerning the alleged nonresponsiveness of the low bidder without investigation and without affording the low bidder an opportunity to answer the allegation. We believe that this occurrence adversely affected the integrity of the competitive bidding system and we suggest that steps be taken to avoid future situations.

The substance of the Sweinhart protest deals with the contention that the 6-cylinder Caterpillar engine is equal in all material respects to the 12-cylinder brand name engine prescribed by the IFB. In that connection, the July 21 administrative report stated that the two primary technical bases upon which the Sweinhart bid was rejected as nonresponsive were insufficient kilowatt output and number of cylinders in the proposed engine. In addition, the report advised that, of the remaining eight bidders (excluding Sweinhart and Cal-West), five offered 12-cylinder engines, *each* manufactured by a firm other than the brand name company—a fact clearly indicating that the specifications were not restrictive.

The supplemental report of August 12, prepared in response to various inquiries by our Office, *inter alia*, conceded, contrary to the initial report, "that the engine offered by Sweinhart will produce 300 kw of power." Thus, one of the two bases that NRPO relied upon for rejecting the Sweinhart bid admittedly was erroneous. Also, the report stated that the cubic inch piston displacement and piston speed criteria, in addition to the 12-cylinder requirement to which Sweinhart did not conform, were considered to be salient characteristics. Further, it was stated that the initial report was "erroneous in stating that five bidders offered twelve cylinder engines other than Cummins [the brand name]." In fact, the report states that only one other bidder who offered other than the brand name was responsive. However, other information furnished in the report indicates that the bidder was nonresponsive at least to the cubic inch piston displacement requirement.

The description/specification in the IFB is almost a verbatim copy of the design and performance criteria in the technical literature on the brand name article. The effect of this is to make each and every feature listed in the description a salient feature of the brand name. Where, as here, the contracting agency, in a "brand name or equal" purchase description, goes beyond the make and model of the brand name and specifies particular features, we have held that such features must be presumed to have been regarded as material and essential to the needs of the Government. 49 Comp. Gen. 195, 199 (1969). In this

case, NRPO's purchase description represented an unqualified administrative determination that certain particular features were material and essential to the needs of the Government. Since the equipment offered in the Sweinhart bid did not conform to these features specified to be material and essential, it was not equal in all material respects and the acceptance of that bid could not have been accomplished without a waiver of the advertised specifications. Therefore, since this action would have been improper, we are of the opinion that the contracting officer's decision that the Sweinhart bid was nonresponsive to the solicitation was correct. See 49 Comp. Gen., *supra;* 48 *id.* 441, 446 (1968); 44 *id.* 302, 305 (1964); and 43 *id.* 761, 766 (1964).

However, we note that the Sweinhart bid was nonresponsive to several other requirements, in that, for example, it offered an 11.5-gallon oil capacity whereas the specifications provided an oil capacity of 18 gallons plus 3 gallons for filters. NRPO appeared to disregard these deviations from the specifications, relying on the following rationale:

> * * * As is customary in all brand name or equal solicitations, the values expressed are nominal and reasonable variances from them would have been acceptable. * * *

This rationale clearly indicates that some of the specification requirements were not material and essential to the needs of the Government. Further, we note the marked shift of emphasis in the supplemental report concerning the technical bases for the rejection of Sweinhart's bid. That report introduces a technical factor nominated as engine *reliability* based on minimum levels of cubic inch piston displacement and piston speed into the evaluation process. The report stated that the using activity validated its reliability requirement and that a recognized mechanical engineer is of the opinion that the using activity would be fortunate to obtain 1,000 hours of intermittent operation from the engine offered by Sweinhart at 300 kw.

These statements constitute nothing more than an after-the-fact attempt to rationalize a previously stated opinion which NRPO has never seemed to regard as a reasonably reliable technical basis for utilization in the detailed specifications in the IFB. It appears to us that NRPO never made a reasoned presolicitation determination of what salient characteristics constituted the actual essential needs of the Government. The reports contain no empirical evidence in support of the proposition that the Caterpillar engine cannot perform as reliably as the brand name. This fact, alone, would appear to raise a question as to the appropriateness of specifying a 12-cylinder engine as a requirement. See 49 Comp. Gen., *supra.* In the absence of such evidence and in view of the admitted capability of that engine to produce the required kilowatt output to perform as an acceptable power source,

we requested an engineer in our Office to review the Sweinhart and NRPO technical arguments in support of their respective positions. The engineer concluded:

I concur with Sweinhart's contention that the Caterpillar diesel engine—Model D343 TA—which they offered is in conformance on an "or equal" basis with the specifications of the IFB.

In my opinion, the Contracting Officer (CO) was incorrect in his conclusion that the six cylinder Caterpillar engine is not responsive because it is less reliable than the 12 cylinder Cummins engine. The CO uses Brake Mean Effective Pressure (BMEP), and piston travel to illustrate and compare engine reliability. I disagree with the Contracting Officer's conclusion because:

1. BMEP by itself cannot be used to judge engine reliability. If a comparison is to be made, all engine design factors must be considered (engine strength, design history, type of aspiration, etc.)

2. The amount of piston travel does not indicate how much wear on engine experiences Piston travel cannot be used by itself to compare the reliability of engines because design considerations like the number of piston rings must also be considered.

3. There are more moving parts in a 12 cylinder engine than there are in a six cylinder engine. Therefore, the probability of failure for the 12 cylinder engine is greater.

4. The Mean Time Between Overhaul (MTBO) is one indicator of how long an engine will satisfactorily operate before it needs an overhaul. I contacted technical representatives from Cummins and Caterpillar concerning the two engines in question. I was advised that for the same load (300KW) and under the same conditions of intermittent usage the MTBO's for the engines were nearly equal.

Cummins MTBO—at least ten thousand hours. Caterpillar MTBO—eight to ten thousand hours.

In 45 Comp. Gen. 462, 466 (1966), we discussed the basic principles under the regulations governing "brand name or equal" procurements in ASPR 1–1206.1, *et seq.*, as follows:

Essentially, the "or equal" provision in an advertised purchase description is for the purpose of maximizing and equalizing competition where ordinarily none would exist due to the Government's needs for the particular essential characteristics of a product of one manufacturer. Through the device of "brand name or equal," responsive bids may be submitted by those firms which offer their commercial products which, in their opinions, are equal in all material respects to the brand name product referenced. The regulations, quoted above, when dealing with the various aspects of "brand name or equal" procurements, speak generally of the acceptability of "equal" products if they meet the needs of the Government in "essentially the same manner as those referenced"; if determined "to be equal in all material respects to the brand name"; and that "equal" bids shall not be rejected because of "minor differences in design, construction, or features which do not affect the suitability of the products for their intended use." The foregoing strongly suggests that *the overriding consideration in determining equality or similarity of another commercial product to a name brand commercial product is whether its performance capabilities can be reasonably equated to the brand name referenced. In other words, whether the equal product can do the same job in a like manner and with the desired results should be the determinative criteria rather than whether certain features of design of the brand name are also present in the "equal" product.* We recognize of course, that the Government is not required to purchase an "equal" product if it be determined that such product will not meet the Government's advertised requirements. However, we feel that a specification—such as is exemplified by the technical exhibit—which requires the use of certain brand name design characteristics is so restrictive as to prevent the competition required under advertised procedures. * * * [Italic supplied.]

Accordingly, we conclude that the IFB was defective as restrictive of competition for listing characteristics which were not essential

and material to the needs of the Government. See B–157857, January 26, 1966; 45 Comp. Gen., *supra;* and 49 *id.* 347, 350 (1969). It is our opinion that had the IFB purchase description contained only those salient characteristics affecting performance which were essential to the needs of the Government, the Sweinhart bid might very well have been responsive. Therefore, the IFB neither permitted nor was conducive to the full, free and unrestricted submission of competitive bids offering comparable equipment which, in all material respects affecting performance, met the needs of the Government as required by 10 U.S.C. 2305(b). See 45 Comp. Gen., *supra.* In this regard, we note again that the only bidder offering other than the brand name engine who was considered to be responsive by NRPO was in fact nonresponsive.

Also, due to the fact that reasonable tolerances with respect to various physical and functional characteristics of the desired generating set were generally acceptable to NRPO, the salient characteristics in the purchase description should have so stated. See 48 Comp. Gen., *supra.* In the alternative, we believe that, since NRPO set forth its needs with such precise specificity, future procurements of this item should be effected under purchase descriptions and not under the "brand name or equal" technique. See 49 Comp. Gen. 347, 352 (1969).

We expect that appropriate steps will be taken to preclude recurrence of the circumstances which gave rise to the protest.

[B–173855]

Bidders—Qualifications—Geographical Location Requirement

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

To Stassen and Kostos, October 26, 1971:

Reference is made to your letter dated August 23, 1971, with enclosures, protesting on behalf of Art Cap Company, Incorporated, the award of a contract to a higher bidder under invitation for bids No. DSA100–71–B–1410, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania.

The solicitation requested bids for a quantity of frame service caps, and was expressly restricted to small business firms on the Qualified Manufacturers List (QML) for the item prior to bid opening. The invitation required bidders to state the exact place of performance

in their bids, and provided that an offer, otherwise acceptable, would be considered nonresponsive if the offer failed to list the place of performance (Clauses B10.70 and B16.80). Your low bid was rejected for failure to list the place of performance.

In your letter to us you recognized the existence of similarities between the present circumstances and those which faced our Office in B–167974, November 14, 1969. In that case a solicitation issued by DPSC requested bids for a quantity of aluminized asbestos firefighter coats and was expressly restricted to small business firms on the QML for the items prior to bid opening. The invitation required bidders to state the exact place of performance in their bids and provided that an offer, otherwise acceptable, would be considered nonresponsive if the offer fails to list the place of performance. The protestor's low bid was rejected for failure to list the place of performance. The protestor had contended that since it had been a supplier to DPSC on approximately 150 prior contracts, all of which were bid for at its facility at Milwaukee, which was on the QML for the item, the failure to list the plant location should have been considered an inadvertent error which should have been waived or corrected. We responded to this argument, in part, as follows:

> * * * The requirement that bidders list the specific facility which will be utilized in the performance of the contract is to obtain a binding contractual commitment for compliance with the essential provision that the item will be manufactured in an approved facility. In the absence of such a listing a bidder could not be required upon award to manufacture the items in a facility which has been approved prior to bid opening. This is the case notwithstanding the number of prior contracts you have had with the procurement activity utilizing your facility at Milwaukee. The requirement for listing of the manufacturing facility must therefore be considered a material requirement of the invitation for bids.
>
> Under formal advertising procedures for Government contracts, it is an established rule that a bid, to be acceptable, must conform to all material requirements of the advertised terms and specifications. If, due to a mistake, a bid results in a material deviation from the advertised requirements, such a bid is nonresponsive and cannot under any circumstances be corrected so as to make it responsive to the invitation and thus eligible for award. 40 Comp. Gen. 432 (1961).

Since the discrepancy in the protestor's bid had, therefore, resulted in a material deviation from the advertised requirements, the deviation could not be corrected or waived and accordingly the protest was denied.

You have attempted to distinguish B–167974 from the instant case by emphasizing the following: that Art Cap is an approved QML facility which is located at 599 Broadway, New York, New York; that this is the only facility used by Art Cap; that this address is indicated on page 7 of the solicitation in the block on the top of the page entitled "Name of Offeror or Contractor," and further that two preaward surveys have been conducted at the Art Cap address at 599 Broadway on this procurement, which should be accepted as conclusive proof that the contracting officer had interpreted Art Cap's bid as clearly mani-

festing an intention that its place of performance was 599 Broadway.

The fact that Art Cap indicated its address in the block calling for the name of the offeror or contractor does not require an interpretation that this represents its place of performance for the subject contract. Art Cap used the same address stamp in the same block on every other page of the solicitation where the block appears. It is significant to note that there is no stamp whatsoever on page 6 of the solicitation which sets forth the Place of Performance clause and is the proper place where the plant location should have been shown. The fact that the address is indicated in an area of the solicitation which happens to be contiguous to the QML provisions does not serve as an acceptable substitute for showing the place of performance where explicitly called for on page 6 of the solicitation. The proper interpretation as to what the address stamped on page 7 pertains is that it must apply to the block in which it was placed and not to a distinctly separate provision which coincidentally is located contiguous to the block in which it has been placed. The contracting officer has correctly drawn this conclusion. It is well known that the address of the bidder is not necessarily the place of performance. Therefore, as we have indicated in the above-quoted portion of B-167974, the fact that Art Cap stamped an address in the block calling merely for the name of the offeror or contractor is not sufficient to show that this is a binding commitment to perform at this address.

You further contend that the provisions of the IFB are confusing. Specifically, you allege that Clause B10.70 indicates that if the bidder does not include the place of performance that the place of permance will then be considered that facility which the bidder has leased or owns at the time of opening. Paragraph 1 of Clause B10.70 is reproduced below:

CLAUSE B10.70 PLACE OF PERFORMANCE (DPSC 1969 May)

1. Offerors must stipulate below the plant(s) where the work is to be performed, indicating the exact address(es) (Street, City, County, State) thereof, name(s) and address(es) of the owner(s) and operator(s), the operation to be performed at such plant(s) and the quantity of items to be manufactured at each plant. FAILURE TO SHOW THE ABOVE IN THE OFFER, OR THE INDICATING OF ALTERNATE PLACE(S) OF PERFORMANCE WILL RENDER THE OFFER NONRESPONSIVE, IF AT THE TIME OF OPENING/CLOSING THE OFFEROR DOES NOT OWN OR LEASE THE PLANT(S) WHERE THE WORK IS TO BE PERFORMED. If the procurement is for an item restricting a procurement to the Qualified Manufacturers' List or Labor Surplus Area sources, the preceding sentence is not applicable, since on these procurements, offers are non-responsive unless places of performance are furnished.

It can be clearly seen that the sentence which apparently serves as the basis for your allegation is conclusively negated by the immediately succeeding sentence in the paragraph. This sentence makes clear that when, as here, the solicitation is for an item restricting the procurement to the QML, the construction which might otherwise be applied when the offeror owns or leases the plant where the work is to be per-

formed but fails to affirmatively indicate the place of performance, cannot be applied.

Furthermore, in order to effectively alleviate any doubt that might, however unlikely, remain as to whether a mandatory requirement exists for providing the place of performance, a Caution Notice was provided. This notice, which was part of the first sheet attached to the IFB, contained the following caveat in bold face type:

NOTICE

THIS PROCUREMENT IS RESTRICTED TO THE QML PROGRAM. SEE SECTION B OF PAGE 6 FAILURE TO NAME A PLACE OF PERFORMANCE WILL MAKE YOUR OFFER NONRESPONSIVE.

You have further questioned the policy rationale behind the distinction made between a QML bid and a non-QML bid as to place of performance. Firstly, the discovery of several flagrant practices in connection with military clothing procurement led to investigations of procurement practices and procedures in that field by various committees of the Congress during the 1950s. These investigations culminated in recommendations directed in large part to the adoption of procedures in military clothing procurements which would give the greatest assurance that bidders would submit adequate information to permit the contracting agency to ascertain beyond any reasonable doubt that the bidder was an established and reputable manufacturer with sufficient capacity and credit to perform the contract, to permit such determination to be made promptly and without undue delay in contract awards, and to assure that contracts would be awarded only to responsible bidders as required by law. These recommendations provided the impetus for the QML program. The procedures of the QML program require that bids received from firms on the QML who fail to list any facility at all as a place of performance will not be considered for award. If this were not so, the offeror would have the option of deciding after bid opening whether to make his offer responsive by naming a facility which had been qualified by the QML prior to bid opening, or nonresponsive by naming a facility which had not been qualified by the QML prior to bid opening.

Since the discrepancy in Art Cap's bid resulted in a material deviation from the advertised requirements, Art Cap's bid could not be corrected and the deviation could not be waived. We must therefore conclude that Art Cap's bid was properly rejected. Accordingly, Art Cap's protest is denied.

[B–167790]

Disaster Relief—Agency Participation—Reimbursement

The practice of the Office of Emergency Preparedness (OEP) in calling upon Federal agencies to provide relief assistance pursuant to the Disaster Relief Act of 1970 (42 U.S.C. 4401 *et seq.*) from their own funds pending reimbursement

from funds appropriated to the President's disaster fund or directly to the performing agency is within the scope of the act. Not only is Congress well aware of the practice, but section 203(f) of the act provides for the President to direct any Federal agency, with or without reimbursement, to provide disaster assistance—authority similar to that in the repealed 1950 act, prescribing "such reimbursement to be in such amounts as the President may deem appropriate"—and the President having delegated his authority to the Director of OEP by Executive Order 11575, Federal agencies may be assigned to provide assistance without a prior advance of funds from OEP.

To the Director, Office of Emergency Preparedness, October 27, 1971:

Reference is made to your letter of September 23, 1971, concerning a question that has arisen with regard to the funding of disaster assistance furnished pursuant to the Disaster Relief Act of 1970, Public Law 91-606, approved December 31, 1970, 84 Stat. 1744, 42 U.S.C. 4401 *et seq.*

You state that it is your position that Federal agencies can utilize any available appropriation to accomplish disaster assistance work performed at the direction of the Office of Emergency Preparedness (OEP). Also, you state that it is the practice of OEP to reimburse other Federal agencies in accordance with OEP regulations for work performed as a result of a presidentially declared major disaster.

The Department of Housing and Urban Development, however, has questioned this practice and has raised the question as to whether that Department can provide such assistance upon a direct assignment made by the Director, OEP, without a prior advance of funds.

Concerning such matter, section 203(f) of Public Law 91-606, 42 U.S.C. 4413(f), provides as follows:

> In the interest of providing maximum mobilization of Federal assistance under this chapter, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance. The President may direct any Federal agency, *with or without reimbursement*, to utilize its available personnel, equipment, supplies, facilities, and other resources in accordance with the authority, herein contained. The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter, and he may exercise any power or authority conferred on him by any section of this chapter either directly or through such Federal agency as he may designate. [Italic supplied.]

The above provisions are similar to section 5 of the act of September 30, 1950, 64 Stat. 1110, which act was repealed by Public Law 91-606. However, one of the differences between section 203(f) and the former section 5 is that the underscored words "with or without reimbursement" were added to section 203(f).

As indicated in your letter the Congress is well aware of the practice of OEP in calling upon Federal agencies to provide relief assistance with their own funds pending reimbursement from funds appropriated to the President's disaster fund or directly to the performing agency. See, for example, pages 417-429 of the Senate hearings on the Second Supplemental Appropriation Bill for 1966, wherein officials of OEP explained that Federal agencies at the request of OEP had expended

a total of $76,292,000 for disaster assistance and that the $75 million appropriation requested would be used to reimburse those agencies. The Congress appropriated only $65 million. Furthermore, it appeared that the Congress contemplated that Federal agencies need not be reimbursed in full in that section 7 of the earlier repealed act provided in part that—

> The President may, also out of such funds, [funds appropriated to carry out the purposes of the act] reimburse any Federal agency for any of its expenditures under section 3 in connection with a major disaster, such reimbursement to be *in such amounts as the President may deem appropriate.* [Italic supplied.]

The above provisions are similar to those contained in section 203(c) of Public Law 91–606, 42 U.S.C. 4413(c), except that section 203(c) does not provide that reimbursement may be made in such amounts as the President may deem appropriate. It is believed, however, that the underscored language in section 203(f) quoted above provides such similar authority.

Furthermore, in explaining the provisions of section 203(f) the Committee of Conference made the following statement:

> The President would further be authorized to coordinate the activities of Federal agencies providing disaster assistance, *direct any Federal agency to utilize its funds,* personnel, equipment, supplies, facilities, and other resources, prescribe such rules and regulations as may be necessary, and exercise any power or authority conferred on him by any section of this Act either directly or through whatever Federal agency he designates. [Italic supplied.]

See page 20 of House Report No. 91–1752.

In view of the foregoing, and since the President's authority in this regard has been delegated to the Director of OEP by Executive Order 11575, we concur in your view that Federal agencies can provide assistance under Public Law 91–606 upon a direct assignment made by the Director of OEP without a prior advance of funds from OEP.

[B–173695]

Contracts—Specifications—Restrictive—Particular Make—Administrative Determination

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

To the Memorex Corporation, October 27, 1971:

We refer to your letter of October 4, 1971, and prior correspondence, protesting against the alleged unduly restrictive nature of request for

proposals (RFP) No. DAHC 15-71-R0085, issued by the Defense Supply Service (DSS), Washington.

For the reasons stated below, the protest of Memorex is denied.

The RFP solicited offers for the lease and maintenance of 12 each California Computer Products, Inc. "CD-22 Dual Disk Drive OR EQUAL" to be compatible with a designated International Business Machines Corporation (IBM) computer for use by the United States Army Management Systems Support Agency (USAMSSA). Essential characteristics of the brand name were listed in the RFP, including a requirement that the "Disk arrangement" be "Dual drive (2-high)." Prior to the date set for receipt of proposals, Memorex questioned the USAMSSA need to specify 2-high disk drives, since the use of that essential characteristic operated to eliminate several firms, including Memorex, which manufactured or distributed 1-high disk drives, from competing under the RFP. In addition, on July 26, 1971, Memorex submitted its proposal and in the cover letter thereto urged DSS to modify the alleged unduly restrictive 2-high requirement for the following reasons:

1. Three different USAMSSA officials, including the Agency Director, have told us on three separate occasions that their *sole* reason for specifying "two-high" disk drives was to make sure that the replacement equipment would not require any more space than the existing IBM disk drives.
2. We have clearly established that our disk drives do not require any more floor space.
3. The "two-high" specification is therefore based on erroneous assumptions and should be deleted from the "Essential Characteristics" in the RFP.

You have been furnished pertinent portions of the DSS reports to our Office on the protest. The reports disclose that DSS and the using activity, USAMSSA, obtained the appropriate delegation of authority to replace existing IBM disk drives (2-high) from the General Services Administration (GSA), the Federal agency exclusively responsible for Government-wide coordination of the procurement and management of automatic data processing equipment. Paragraph 4 of the GSA limitations for delegation of the procurement authority stated, in pertinent part, as follows:

4. Some of the suppliers of this type of two-high disk drive would be IBM, leasing companies, Calcomp, Century Data Systems, and Randolph Computer Corporation. These sources should be solicited. In addition, you will obtain and use the current GSA Bidders Mailing List appropriate to the item(s) to be procured. This list, updated weekly, is available from the Automated Data Management Services Division, Region #3, General Services Administration, 7th & D Streets, SW, Washington, DC 20407. In the instance of the procurement in question, you should request Bidders Mailing List Codes 3, 5, and 6, Class 7440. This delegation of ADPE procurement authority should be quoted as your authority for the request.

In view of the allegations of Memorex, DSS inquired of GSA as to the possibility that the 2-high requirement unduly restricted competition. GSA, by letter dated July 9, 1971, replied, as follows:

With regard to your July 7, 1971 telephone request for information relative to those companies making a two high disk drives, the companies listed in paragraph 4 of the limitations to the delegation do indeed make or sell such a device. To our knowledge IBM, however, has not announced a product as fast as the requirement of USAMSSA for a 35 millisecond access time. Thus it is possible to obtain competition from several sources for a two high product and in this sense the RFP is not restrictive nor is it a sole source procurement.

As you are aware a large number of other companies make a Model 2314 replacement in a single spindle version. Use of such a device involves certain tradeoffs with regard to maintenance access space, swinging panels, operator access and distance, etc. USAMSSA has indicated to GSA that they have studied their requirement and that only the two-high device will meet that requirement. We granted a delegation based on that assumption.

The file reflects disagreement between USAMSSA, the using activity, and Memorex as to the feasibility of utilizing the 1-high disk drive within the critical space limitations of the room in which the drives will be installed. USAMSSA readily admits that one of the principal purposes of the procurement is that "no additional physical space will be required." The using agency supports its position by stating that the Memorex cabinets occupy more floor space on a square footage basis than the existing IBM units or the brand name. Memorex concedes this point. Further, DSS points out that:

* * * While it is true the number of square feet involved in the present IBM and the Memorex equipment is approximately the same, the floor plans submitted by Memorex of necessity require a different layout or configuration which would drastically and adversely affect USAMSSA's immediate and imminent plans for the computer room wherein space and arrangement of equipment are the most critical factors.

On the other hand, Memorex argues that USAMSSA has excluded and ignored the necessary clearance space required in front of, beside, and in back of the cabinets for access by operations and maintenance personnel. Therefore, Memorex argues, "it is obvious * * * that the Memorex units will in fact require less floor space than the IBM units they will replace." Also, Memorex requests the opportunity to submit to DSS and USAMSSA floor plans other than those set forth in its proposal and in its protest letter to our Office.

The drafting of proper "brand name or equal" purchase descriptions which set forth essential characteristics to meet the requirements of the Government is a matter primarily within the jurisdiction of the procuring activity. Where, as here, the contracting agency in a "brand name or equal" purchase description goes beyond the make and model of the brand name and specifies particular features, we have held that such features must be presumed to have been regarded as material and essential to the needs of the Government. With particular reference to this case, the DSS and USAMSSA insistence on the 2-high essential characteristic constitutes an unqualified administrative determination that the characteristic was and is material and essential to the needs of the Government. See 49 Comp. Gen. 195, 199 (1969).

Keeping these principles in mind, we conclude that the DSS and USAMSSA requirement for a 2-high disk drive represents a valid

and reasonable restriction on competition. Our conclusion is based not only upon a review of the written record, but also upon a physical examination of the site of installation. In our opinion, utilization of the larger 1-high disk drives, taking into account the specific physical outlay of the installation site, would require a rearrangement of the current equipment and elimination of space for projected future automatic data processing equipment in the USAMSSA computer room. Moreover, the service and operating space clearances cited by Memorex, while possibly resulting in a mathematical computation establishing feasibility of the 1-high equipment fitting into the computer room, do not reflect the actual physical features of the room, e.g., concrete posts and equipment installed subsequent to Memorex's inspection of the computer room. In fact, the current equipment, as presently situated, does not afford USAMSSA personnel the recommended clearances prescribed by the IBM descriptive literature. Also, the Memorex floor plans indicate that the disk drives would, of necessity, require a two-bank arrangement which would not be as readily accessible to operators as are the current and desired units which are arranged in one bank facing the center of the room. The use of 1-high devices would require USAMSSA to employ additional operators around the clock to operate any 1-high set of disk drives. In conclusion, we note that the use of 1-high equipment would effectively eliminate or greatly reduce critical thoroughfares now existing in the computer room.

Had this been a formally advertised procurement the Memorex 1-high offer would have been nonresponsive to a feature considered to be material and essential to the needs of the Government. Since this is a negotiated procurement, "nonresponsiveness" is ordinarily considered to be a subject of negotiation. Therefore, Memorex's request to continue to pursue the matter with DSS and USAMSSA would appear to constitute permissible negotiation if it intended to make its offer "responsive." See B-171482, March 17, 1971. However, Memorex has indicated that it does not intend to make its offer "responsive" to the Government's requirements. Therefore, further discussion between Memorex and the Government would involve only the possibility of acceptance of 1-high equipment if the RFP were amended to permit such an offer. Of prime significance is the fact that Memorex has been afforded the opportunity on numerous occasions to discuss the subject with DSS and USAMSSA and has persisted in its view that 1-high equipment would be satisfactory. The contracting officials have reviewed the various Memorex floor plans submitted and, in fact, both before and after the RFP issued, considered the possibility of effecting this procurement to permit the acceptance of 1-high equipment. Nevertheless, both DSS and USAMSSA have refused to eliminate the 2-high requirement.

Thus, further discussions or negotiations with Memorex would appear to be futile. Accordingly, the protest of Memorex is denied.

[B–174001]

Interest—Payment Delay—Contracts

The rule of long standing that interest may not be paid by the Government in the absence of an express statutory provision or a lawful contract will no longer be followed since there is no statute prohibiting the payment of interest under contractual provisions, and such provisions will not violate the so-called Antideficiency Act (31 U.S.C. 665), provided sufficient funds are reserved under the appropriation financing the contract to cover the interest cost. Therefore, appropriate regulations may be promulgated to authorize inclusion in future contracts of provisions for the payment of interest for a period of delay in payment occasioned by the fact a disputed claim under the contract required the contractor to pursue his administrative remedies, or litigate, before the amount owing could be determined. 22 Comp. Gen. 772, overruled.

To the Deputy Secretary of Defense, October 27, 1971:

By letter dated August 31, 1971, you wrote to our Office concerning the fact that under current practice, a contractor presenting a claim to the Department under a contract is not paid interest for periods of delay on that part of a claim ultimately determined to be owed by the Government. You point out that delay in payment may be for a considerable period of time if the claim is in dispute and the contractor is required to pursue his administrative remedies or even litigate before an amount is finally determined owing.

To remedy the situation you propose to promulgate appropriate regulations allowing for the inclusion of a clause in future contracts providing for the payment of interest on the delayed payment of a contractor's claim arising in connection with his contract. In view of our holding in 22 Comp. Gen. 772 (1943), you request our views on the matter.

It is a rule of long standing that interest may not be paid by the Government in the absence of express provisions in statutes or a lawful contract. See 24 ALR 2d 985, sec. 19 (1952). This historical rule is restated for application by the Court of Claims at 28 U.S.C. 2516. In 22 Comp. Gen. 772 (1943) there was for consideration a claim presented by the contractor for interest pursuant to the terms of a contract. Specifically, the contractor had noted on his bid that it was submitted subject to certain rules and regulations of the Department of the Interior which provided in part for the payment of interest to the seller on the invoice price of coal in case of delays of more than 10 days. We denied the claim holding that no statute provided for the payment of such interest and, "To the extent that the said notation on the bid would purport to result in making this [Department of the Interior] rule applicable to the purchase, its inclusion in the contract

may not be treated as authorized by law. There is no statute authorizing purchasing officers to obligate the Government to pay interest for delay in paying for supplies or materials." Thus, in applying the historic rule concerning the payment of interest we construed the contract exception as being for application only where there was specific statutory authority authorizing the inclusion of provisions in contracts for the payment of interest.

In *United States* v. *Thayer-West Point Hotel Company*, 329 U.S. 585, 590 (1947), there was for consideration whether it was proper for the Court of Claims to award interest where the Government had breached a lease which, pursuant to a statute requiring "just compensation" to the lessee, contained a provision for just compensation in case of breach. While the court in denying the claim for interest held that the Court of Claims had erroneously applied the just compensation rule of eminent domain in allowing for interest, it recognized that the Government could have contracted in the lease for the payment of interest. Specifically, the court held that: "Here neither the Act of March 30, 1920, nor the lease under which respondent operated contains an express provision for the payment of interest, either in addition to or as a part of the 'just compensation' to be paid to respondent. If the United States had desired to provide by statute *or to contract in the lease for payment of interest*, it would have been easy to have said so in express terms." [Italic supplied.]

There is no statute prohibiting the payment of interest under contractual provisions. Such contractual provisions would not violate the so-called Antideficiency Act (31 U.S.C. 665), provided that sufficient funds are reserves under the appropriation financing the contract to cover the interest cost. After a careful review of our prior decision and the relevant court cases we are of the view that statutory authority is not required for a Federal department or agency to include in its contracts provisions for the payment of interest where, on claims under its contracts, there are delays in payment occasioned by the Government.

We therefore have no objection to the promulgation of appropriate regulations authorizing the inclusion in future Department of Defense contracts of provisions providing for such interest payments. The decision in 22 Comp. Gen. 772 (1943) is overruled.

We would like to have an opportunity to comment on any proposed regulations on this subject.

[B–174105]

Canal Zone Government—Medical and Educational Services Furnished—Dependents—Children

The term "dependent" as used in section 105 of the Civil Functions Appropriation Act, 1954, as amended (2 C.Z. Code 232), which authorizes payment to the

Canal Zone Government of unrecoverable costs from employees of the United States and their dependents for education and hospital and medical care furnished, in the absence of a statutory or valid regulatory definition of the phrase "dependent child," may be construed in accordance with the definition in Black's Law Dictionary and, therefore, a "dependent child" need not mean a child under the age of 21. However, as the statement on an invoice for medical services furnished the daughter of a Federal employee that she is a "full-time student under 23 years of age" does not automatically establish dependency, and the amount billed is not represented as unrecovered costs from the employee or dependent, as required by the statute, the invoice may not be certified for payment.

To Winston S. Daniel, United States Department of Transportation, October 27, 1971:

This is in reply to your letter of September 9, 1971, with which you enclosed an invoice from the Canal Zone Government for medical services provided to a 21-year-old dependent daughter of a Federal Highway Administration employee. In connection with that invoice, you requested that we clarify certain points regarding agency responsibility to the Canal Zone Government for the cost of educational, medical and hospital services furnished to dependents of Government employees by the Canal Zone Government. In effect, you asked whether such dependents in the Canal Zone must be unmarried and under age 21 to qualify for college tuition expenses and hospital and medical attention at agency expense.

Agency reimbursement to the Canal Zone Government for certain amounts expended by the Canal Zone Government for furnishing education and hospital and medical care to employees of agencies of the United States and their dependents is required by section 105 of the Civil Functions Appropriation Act, 1954, 67 Stat. 202, as revised by section 107 of the Civil Functions Appropriation Act, 1955, 68 Stat. 335, which provides, in pertinent part, that:

> * * * Amounts expended by the Canal Zone Government for furnishing education, and hospital and medical care to employees of agencies of the United States and their dependents * * * less amount payable by such employees and their dependents hereafter shall, notwithstanding any other provision of law, be fully reimbursable to the Canal Zone Government by such agencies. The appropriation or fund of any such other agency bearing the cost of the compensation of the employee concerned is hereby made available for such reimbursements.

The statute has been codified as section 232 of Title 2 of the Canal Zone Code.

In 34 Comp. Gen. 510, 512 (1955), with reference to the statute, we said that:

> * * * Congress clearly intended that employees of the various departments and agencies employed in the Canal Zone shall be required to pay only the charges established for education and medical services by the Canal Zone Government, and that all of the costs of such services not so recovered must be borne by the employing agency involved.

In construing the term "dependents" as used in the statute, we held in a decision to the Governor of the Canal Zone that while the legislative history indicates that "the furnishing of educational services

* * * was considered * * * primarily from the standpoint of the needs of minor dependents * * * the plain language of the statute makes no distinction on that basis." B–124786, December 31, 1956.

Following that decision, Congress specifically provided that Defense Department appropriations were available "for primary and secondary schooling of minor dependents," by inserting the word "minor" in section 607 of the Department of Defense Appropriation Act of 1958, 71 Stat. 323, which made the language of that section differ to that extent from similar language which had appeared in prior annual Department of Defense appropriation acts. As so changed, similar language has been included in subsequent Defense Department appropriation acts. We held that as a result of that language Defense Department appropriations were no longer available to reimburse the Canal Zone Government for educational services furnished to wives of DOD personnel. 38 Comp. Gen. 408 (1958). This annual restriction that the dependent be a minor by its terms is applicable only to appropriations for the Department of Defense.

In the absence of any applicable restrictive definition, we think the term dependent should be accorded its normal common meaning. Dependent is defined by Black's Law Dictionary (4th Ed.) as one "who derives support from another" and "who relies on another for support or favor." Such a definition does not include any age limitation, but rather is based on specific situations of factual dependency.

It is our opinion, therefore, that in the absence of a statutory or valid regulatory definition of dependent child which provides otherwise, a child need not be under the age of 21 to come within the term "dependents" as used in the Civil Functions Appropriation Act, 1954, as amended, if actual dependency is established. Your question is answered accordingly.

With respect to the invoice for medical services furnished to your employee's 21-year-old daughter, we note the statement thereon that she is a "full-time college student under 23 years of age." Such a statement does not automatically establish dependency under the Civil Functions Appropriation Act, 1954, as amended. Furthermore, there is no indication that the invoiced amount represents unrecovered costs over and above the amount payable by the employee or his dependent receiving the services, as required by the statute. Your agency is required to reimburse the Canal Zone Government only for the actual costs of the services provided less the standard charge to the employee or his dependent as established by the Canal Zone Government for such services. 34 Comp. Gen. 510, *supra*, and 37 *id.* 107 (1957).

The invoice which may not properly be certified for payment upon the present record, is returned herewith. See 37 Comp. Gen. 107, *supra*.

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