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[B-171683]

Contracts—Specifications—Conformability of Equipment, Etc., Offered—Part Numbers

Where an invitation provides for the acceptance of bids on ball bearings that are identified by different part numbers than those cited in the solicitation if such parts are prequalified, although an inquiry by the contracting officer to the manufacturer of the part offered by the low bidder would have disclosed it met the requirements of the controlled drawing contained in the procurement package, since the procuring agency's representative at the manufacturing plant reported that the information and data available did not support acceptance of the part offered by the low bidder, the contracting officer acted reasonably in rejecting the low bid. However, in future procurements, whenever the part number offered by a qualified vendor differs from the specification requirements, advice as to its acceptability should be obtained from the prime contractor.

To Kaler, Worsley, Daniel & Hollman, September 3, 1971:

We refer to your letters of January 22, 1971, and March 17, 1971, relating to your protest against award of a contract to SKF Industries after rejection of the low bid of your client, Marlin-Rockwell Company, a Division of TRW, Inc. (MRC/TRW), under invitation for bids No. DAAJ01-71-B-0082 (P1J) issued by the U.S. Army Aviation Systems Command, St. Louis, Missouri.

The invitation called for bids for 1,876 stacked ball bearings, FSN 3110-847-2722, Bell Helicopter Company P/N 204-040-346-3, or qualified vendor's part numbers in accordance with USAAVSCOM Procurement Package Number 204-040-346 with Revision B dated June 3, 1968. The invitation and the referenced procurement package both listed the approved sources and vendors as SKF Industries for P/N 458804 and MRC/TRW for P/N 1PR-MRC-7216D-SP-T Matched DB 1/2 PR-MRC-7216D-SP.

The invitation set forth on page 13 the following provisions:

C. 32 SUPPLIES ELIGIBLE FOR CONTRACT-AWARD CONSIDERATION

1. This solicitation is not on an "or equal" basis, i.e., not for a brand name "or equal" supplies. However, prospective contractors may submit Bids on supplies bearing different part numbers from those cited in the solicitation provided that in order for such Bids to be responsive, all of the following prerequisites must be met:

a. That on or before the time of Bid Opening the offered supplies have been successfully tested with a detailed test report prepared thereon.

b. That on or before the time of Bid Opening the supplies and their testing and approval thereof have been accepted by the prime manufacturer as acceptable supplies and are fully interchangeable with the part number cited in the solicitation and suitable for the intended applicable use.

c. Evidence of such prequalification and acceptance is furnished by the prospective contractor as a part of his Bid. It should be noted that approval of this item by the prime manufacturer is a lengthy and time consuming process.

2. The delivery schedule in this solicitation is critical and the Government does not have adequate specification and testing data or facilities to evaluate alleged "or equal" items. The supplies eligible for contract award consideration must be:

a. The specific part number (or their superseding part numbers) cited in the solicitation.

b. Those supplies bearing different part numbers which comply with the product prequalification provisions set forth in Paragraph 1 of this clause.

3. Superseding part numbers not cited in the invitation offered by vendors of the prime contractor must also be qualified in accordance with paragraph 1 above, and evidence of prequalification, and acceptance must be furnished with vendor's bid.

On page 16 of the invitation immediately below the space provided for listing the manufacturer and part number bid upon is the following provision:

(Bidder certifies that vendor part number or prime part number offered is qualified in accordance with the controlled drawing contained in USAAVSCOM Procurement Package Number 204–040–346. See Section C, paragraph 32, subparagraph 3.)

SKF Industries bid on its P/N 458804 as listed in the invitation at a unit price of $80 and a total amount of $150,080. MRC/TRW inserted its P/N 7216–D–5–T & 7216–D–5–S in the space provided in the bid form with a unit price of $77.22 and a total amount of $144,864.72.

MRC/TRW also placed a notation near the procurement package number that it was "quoting to Revision F." There is no Revision F in the procurement package, however, Revision B which is referenced in the invitation, contains Revision F, dated October 11, 1967, of Bell Helicopter drawing No. 204–040–346, originally dated June 22, 1959. The latest revision of the drawing, Revision F, lists the approved part number which was used in the invitation but does not list the part number bid upon by MRC/TRW.

After bid opening, the contracting officer noted that the part number offered by MRC/TRW was not the one listed in the invitation and he requested comments from the procuring agency's representative at Bell concerning the acceptability of the part number offered. The representative responded that "Information/Data does not support the Marlin-Rockwell Number (7216–D–5–T & 7216–D–5–S) as acceptable to the item of supply, Bell P/N 204–040–346–3." The contracting officer then rejected the bid of MRC/TRW because it did not conform to the essential requirements of the invitation, and made award to SKF Industries as the lowest responsive, responsible bidder.

Your letters to our Office in support of the protest filed by MRC/TRW explain the discrepancy between the part number called for in the invitation and the part number offered by MRC/TRW in its bid by stating that the part number used in the Bell drawing and the invitation was a preproduction number and the part number bid upon is a production number for the bearing in question and has been used by MRC/TRW since 1960. You submitted documentation of MRC/TRW's efforts from 1960 to 1963 to get Bell to change the drawing to list its qualified part by the production number instead of the pre-

production number. Such efforts were apparently discontinued after October 16, 1963, when your client received information from a Bell Transmission Group Engineer through the Benson Engineering Company, its representative in Dallas, to the effect that Bell would not make a special revision of its drawing for such a minor change because of the costs involved, but would incorporate all such minor changes when a major change of the drawing was required.

The drawing itself shows that subsequent to such advice, Revision D was made on January 16, 1965, Revision E on March 2, 1966, and Revision F on November 11, 1967, without any change in the approved part number for MRC/TRW, which continued to be listed as the number you have identified as the preproduction number. The record is silent as to the reason for Bell's failure to make the requested change of part numbers when these subsequent revisions of the drawing were made.

You submitted a list of 14 purchase orders from Bell Helicopter for the bearing sets in question under the current MRC/TRW production numbers and a list of three Government contracts under which you furnished bearing sets under the production numbers. In support of the latter assertion, you attached a copy of RFP DAAJ01–69–R–0052 (1L), issued on August 30, 1968, by the U.S. Army Aviation Materiel Command, which called for proposals on 403 bearing sets and listed the approved part number for MRC/TRW as the original part number shown in Procurement Package Number 204–040–346, Revision B, dated June 3, 1968.

You contend that the invitation in the instant procurement permits use of superseding part numbers not cited in the invitation, and that the certification printed below the space provided for insertion of the part numbers bid upon is all the evidence needed to support a finding that the parts listed by superseding part numbers have been prequalified and accepted by the prime manufacturer. The certification, however, is that the "part number offered is qualified in accordance with the controlled drawing contained in USAAVSCOM Procurement Package Number 204–040–346." Since the part number offered by MRC/TRW is not the one listed in the procurement package, we think it is obvious that such certification does not apply, and that we must look further for the bid requirement in the case of a superseding part number. The certification specifically refers to section C, paragraph 32, subparagraph 3, which sets forth the bid requirements if a superseding part number is offered and provides that superseding part numbers "must *also* be qualified" and that "evidence of prequalification, and acceptance must be furnished with vendor's bid." No such evidence was submitted with the bid of MRC/TRW to show that its superseding part number was "also" qualified. [Italic supplied.]

Although you state that the only evidence of qualification and acceptance by Bell that MRC/TRW could provide was its own certification, since Bell's approval was manifested only by production orders to MRC/TRW, you submitted a copy of current production order from Bell to our Office in support of your position. It is our view that such copy, together with an appropriate explanation, if it had been submitted with the bid, may have satisfied the bid requirement and been adequate to show acceptability of the superseding part number. Your argument, that unless the certifications as to superseding part numbers are acceptable as evidence the invitation is defective, is not persuasive in the circumstances.

The copy of the Army Aviation Materiel Command solicitation of August 30, 1968, which you submitted as evidence that MRC/TRW had supplied bearings to other Government agencies under its current production number, does not establish that fact since it is not a copy of the contract which resulted from the solicitation. While it does establish that the solicitation used the same procurement package as the present solicitation and listed the same preproduction number for the bearing in question, it appears that it was a matter peculiarly within the knowledge of MRC/TRW that various Government agencies were basing their solicitations on information supplied by Bell which did not set forth MRC/TRW's current production number for the bearing. Good judgment, in these circumstances and even in the absence of the bid requirements discussed above, would seem to dictate that MRC/TRW should have advised the procuring agency that the bearing offered was the same as that called for, and that it was acceptable to Bell in lieu of its P/N 204–040–346–003.

In view of the foregoing, it would appear that the situation in which MRC/TRW found itself as a result of its bid, and which led to rejection of its bid as nonresponsive, was a situation of its own making and was not a result of any improper action on the part of the Army Aviation Systems Command. Thus, the procuring agency acted on the latest drawing available from Bell both in drafting the invitation and in evaluating the bids, while the bid of MRC/TRW did not respond to the invitation by offering the qualified part number listed therein, but instead offered another part number without any information that could be verified as to its acceptability to Bell. Clearly the bid did not conform to the bid requirements and could be construed as responsive only if it was proper to seek information from sources other than the bid.

You assert that the procuring agency had an obligation to seek further information from MRC/TRW before rejection of its bid, and you cite as authority our decision at 41 Comp. Gen. 620 (1962). We

find no analogy between that case and the present one. In the 1962 case, the bid was responsive on its face and some confusion arose when the contracting officer made calculations on projection of a performance curve in a chart obtained from the motor manufacturer but not from the bidder. We held that the bidder was entitled to be heard in such a case. In the present case, however, the bid of MRC/TRW was not responsive on its face nor was any conflicting information obtained from any other source.

Although it may well be that an inquiry prior to award, directed to proper personnel at Bell, would have disclosed the acceptability of the part number offered, an inquiry to the procuring agency's representative at Bell elicited only that information and data available did not support the offered part number as an acceptable item for the Bell part number. In these circumstances, we believe the contracting officer acted reasonably on the basis of information available to him when he rejected the bid of MRC/TRW as nonresponsive.

However, we have recommended in our letter of today to the Secretary of the Army that consideration be given to establishing procedures for use in future procurements which will ensure that advice is obtained from the prime contractor whenever a part number is offered by a qualified vendor which differs from the part number listed by the prime contractor and set out in the invitation.

For the reasons stated, we find no basis for legal objection to the action of the procuring agency. Accordingly, your protest is denied.

[B-171959]

Bids—Transfers—Propriety

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

Claims—Assignments—Contracts—Validity of Assignment—Sale, Etc., of Business

The transfer of Government contracts pursuant to a novation agreement to the successor in interest of a contractor who ceased operations because of the lack of funds and the liens attached against it is valid and may be recognized since the transfer of rights and obligations incident to a sale or merger of a contracting corporation or other entity does not constitute an assignment in violation of the Anti-Assignment Act, 41 U.S.C. 15, which rule is implemented by paragraph

26-402 of the Armed Services Procurement Regulation recognizing a third party interest to a Government contract where the interest is incidental to the transfer of all the assets of the contractor, or all of that part of the contractor's assets involved in performance of the contract.

To the I. D. Precision Components Corporation, September 3, 1971:

We refer to your telegram of February 19, 1971, and your letter of March 5, 1971, protesting against the award to Defense Ordnance Corporation (DOC), of contracts under invitation for bids No. DAAA09-71-B-0067 (IFB-0067) and invitation for bids No. DAAA09-71-B-0101 (IFB-0101) issued by the United States Army Ammunition Procurement and Supply Agency, Joliet, Illinois.

IFB-0067 was issued on August 26, 1970, for 263,550 fuzes. Bids were opened on October 7, 1970, and award was made to DOC as successor in interest to the low bidder, Brad's Machine Products (Brad's) on February 19, 1971, for a total price of $677,323.50.

IFB-0101 was issued on October 21, 1970, for 3,045,030 boosters (labor surplus set-aside portion of a total quantity of 10,150,100). Bids were opened on December 10, 1970, and award made under the set-aside portion to DOC, successor in interest to Brad's on February 19, 1971, at a total price of $3,237,561.16.

The rather complex series of events leading to this protest may be summarized as follows:

On December 17, 1970, Brad's ceased operations due to a lack of operating funds and due to liens placed against the firm by the Internal Revenue Service. At this time the Government had an unliquidated balance of progress payments due on three contracts totaling $996,547.60.

Prior to the owner's departure, which precipitated the shutdown he had executed a power of attorney to his lawyer authorizing him to make any and all decisions on behalf of Brad's and to transfer all of its property.

On January 19, 1971, a novation agreement was signed among the attorney for Brad's DOC and the Government to the effect that all the assets of Brad's were to be transferred to DOC including eight Government contracts (six of which were under performance), four bids (including the two bids which are the subject of this protest) and one proposal.

The contracting officer determined that DOC was financially responsible and a true successor in interest to Brad's, and DOC was awarded contracts under the subject IFBs. Performance has begun and is continuing.

Your firm filed a protest with the contracting officer by a teletype dated January 26, 1971. The contracting officer denied your protest

by letter dated February 19, 1971. You protested the contracting officer's determination to this Office by a telegram of the same date.

Your protest is based on the following contentions: (1) The attempted novation of the subject bids after opening but before award violates procurement policy because DOC was not the original bidder and did not have to accept the bids if it did not want the awards; (2) since the Armed Services Procurement Regulation (ASPR) provides no authority for a novation of bids, the novation was beyond the contracting officer's authority and not binding on the Government and (3) our decision, B–154351, June 16, 1964, is applicable to this situation since the original bidder was not in existence at the time award was made.

Concerning the assignment of Brad's contract to DOC, it must be noted that although the transfer of a Government contract, or any interest therein, is prohibited by the Anti-Assignment Act, 41 U.S.C. 15, it has been recognized that the transfer of rights and obligations incident to a sale or merger of a contracting corporation or other entity does not constitute an assignment in violation of the Anti-Assignment Act. See *Seaboard Air Line Railway* v. *United States*, 256 U.S. 655 (1921), and 48 Comp. Gen. 196 (1968). This rule is implemented by ASPR 26–402 which establishes a procedure for the Government to recognize a third party in interest to a Government *contract* where such interest is incidental to the transfer of all the assets of the contractor, or all of that part of the contractor's assets involved in the performance of the contract. Therefore, we conclude that the assignment of the contracts was valid.

With regard to the transfer of the bids you cite B–154351, *supra*, where we held that a bid could not be transferred to a third party for purpose of award after the death of the bidder. The third party (a corporation) had alleged that the deceased bidder (an individual) in fact was its agent bidding on behalf of the corporation. Our decision stated that the corporation could not be regarded as the true bidder in place of the deceased, "for the Government does not contract with undisclosed principals. 15 Comp. Gen. 566."

You contend there is an analogy to the cited case here because when Brad's "went out of business" its bids lapsed and, therefore, were not transferable to Brad's successor in interest. However, it is well settled that a corporation does not cease to exist as an entity merely because it becomes insolvent, loses its property or ceases to carry on business. Unless it is dissolved or surrenders its charter, a corporation within the contemplation of law is considered to be an existing real entity with a capacity to enter into contracts whether or not it possesses assets. See *Lucas* v. *Swan*, 67 F. 2d 106, 109 (1933), and 19 Am. Jur. 2d Corpora-

tions section 1585. Thus, it appears that Brad's was in existence at the time of the transfer of bids and at the time of the awards, and presumably it has never ceased to exist. Accordingly, we do not find the rule in B–154351, *supra*, to be applicable here.

It is clear that neither the Anti-Assignment Act nor the ASPR provision germane to assignments covers the question of the transfer of bids or offers. In addition, we have not been able to discover any decisions of this Office or court cases directly in point. We are not, however, totally without guidance in seeking a solution to this problem. It is well settled that a bidder acquires no enforceable contract rights merely by submitting a bid. Such rights arise only upon valid acceptance by authorized Government personnel. The only right which accrues to the bidder is to have the bid fairly and honestly considered for award. See *Heyer Products Company* v. *United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956), 177 F. Supp. 251, 147 Ct. Cl. 256 (1959), and *Keco Industries, Incorporated* v. *United States*, 192 Ct. Cl. 733 (1970).

In 43 Comp. Gen. 353, 372 (1963), we stated that the transfer or assignment of rights and obligations arising out of proposals submitted in negotiated procurements is to be avoided, both as a matter of public policy and a matter of sound procurement policy, unless such a transfer is effected by operation of law (e.g., bankruptcy) to a legal entity which is the complete successor in interest to the original offeror. If this rule is to be applied in negotiated procurements, it should certainly control in formally advertised procurements since in the former a proposal may normally be withdrawn at any time prior to award while under the latter procedure bids are fixed as of the time of opening and may not thereafter be withdrawn or amended until they are rejected or expire by their own terms. To permit a party to enter into the competition after bids have been opened by virtue of taking over the bid of one whose situation makes its responsibility questionable would seem to provide an unwarrented option to the prejudice of other bidders. In this connection it should be noted that the assignment of the bids was not by operation of law.

In light of the foregoing, we conclude that it is not proper to permit a party to take over another's bid after bid opening and thereby become eligible for awards. Therefore, we conclude that no award should have been made to DOC under IFB–0067. We are not unmindful of the fact that the award under IFB-0101 was for a portion of the set-aside quantity and that the eligible bidder has the option of accepting award on a partial set-aside. However, in light of our language in 43 Comp. Gen. 353 and the fact that eligibility to participate in the set-aside is based on the rules of formal advertising, we reach the same result as to the award to DOC under IFB–0101.

We have already noted that this appears to be a case of first impression. The contracting officer had no firm guidance available to him either in prior precedent or applicable regulation. Nor is there any indication that the parties acted in other than good faith. In the circumstances, we conclude that it would not be appropriate to disturb the awards already made. With respect to future cases, however, the rule set out in the preceding paragraph will be applied.

[B-173137]

Contracts—Negotiation — Request for Proposals — Submission Date — Extension

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

Contracts—Negotiation—Late Proposals and Quotations—Acceptance in Government's Interest

Although paragraph 3-506 of the Armed Services Procurement Regulation (ASPR) requires requests for proposals to notify offerors that late proposals or modification to proposals received after the date for submission will not be considered, in view of ASPR 3-506(c)(ii), which provides for consideration of a late proposal when the Secretary of the Department determines it is of "extreme importance to the Government, as for example where it offers some important technical or scientific breakthrough," late proposals are authorized to be opened in order to determine the applicability of the exception. However, where a prompt award was necessary, the failure to open a late proposal to determine if the proposal warranted an exception to the requirement that late proposals may not be considered does not justify disturbing the award.

To Waco Engineers and Associates and Poong Chun Products Co., Ltd., Septembr 8, 1971:

We refer to your letter dated May 26, 1971, with enclosures, protesting against the contracting officer's rejection of your proposal submitted in response to request for proposals (RFP) No. DAJB03-71-R-6128, issued by the United States Army Korea Procurement Agency.

The subject RFP was issued on April 9, 1971, for the management, operation, maintenance, and repair of real property facilities in the Northern sector of Korea. The closing date on the RFP was set for 1500 hours on April 23, 1971. Pursuant to amendment No. 1 issued April 9, the closing date was extended to April 26 and the time changed to 1300 hours. Amendment No. 2 dated April 16, 1971,

further etxended the opening date to May 3, 1971; a final amendment was issued on April 26, which included no changes in regard to opening date or time. Your proposal was hand-delivered to the procurement activity at 1320 hours, on May 3, 1971. On May 4, you were notified that pursuant to Armed Services Procurement Regulation (ASPR) 3-506 your proposal was determined to be late and would not be considered for award.

You contend that the contracting officer's determination was erroneous because the time set for closing was either 1500 hours as specified in the initial RFP or any time up to 2400 hours on May 3, 1971. The activity, on the other hand, contends that the proper opening time was 1300 hours.

Resolution of the issue requires a careful examination of the RFP (DD Form 1665, June 1, 1966), and the amendments (all on GSA Standard Form 30). The RFP in its original form provides in block #8 that offers will be accepted until 1500 hours on April 23, 1971. Amendment No. 1 provides in block #12, entitled "Description of Amendment," at item c: "DD Form 1665, Block 8 change the time and date to read 1300 hours, 26 April 1971." Later, amendment No. 2 was issued which provides, also in block #12, at item a: "DD form 1665, Block 8 change the date to read 3 May 1971." On both amendment forms at block #9 the following provision appears, checked as follows:

*** * * The hour and date specified for receipt of offers ☒ is extended, ☐ is not extended.**

Each amendment form also contains the following provision in block #12:

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

Block #8 references the original RFP. The issue to be decided here is whether the second amendment changed the opening time established by the first amendment.

It appears from an examination of the RFP and the two pertinent amendments thereto that the time for submission of proposals was to be May 3, 1971, at 1300 hours. The cited provision in block #12 of both amendments clearly provides that unless that particular amendment makes a change in the RFP or in an earlier amendment, all the terms of the RFP as modified by prior amendments remain in effect. Thus, it is clear that all earlier amendments remain effective unless specifically changed by a later amendment. Accordingly, since block #12 of amendment No. 1 changed both the date and time for opening and block #12 of amendment No. 2 changed only the opening date, the time established by amendment No. 1, 1300 hours, was the effective closing time.

Although it is true that on both amendments the box in item No. 9 is checked to specify that the hour and date for receipt of offers is extended, we do not feel this factor creates any ambiguity as to the intended opening time required by amendment No. 2. Since the provision contains only two boxes, one of which is to be checked if the hour and date is extended, the other if the opening of offers is not to be extended, we feel the intent of amendment No. 2 not to alter the opening time is clear in view of the fact that the time was specifically mentioned as a changed item in block #12 of amendment No. 1, while only the date was listed as a changed item in block #12 of amendment No. 2. It should have been evident from the series of documents received that box #9 is merely a notice provision to call attention to the fact that opening of proposals is to be extended. It has no practical meaning without a description in block #12 of the new date and/or time and is therefore of no effect unless that new time and/or date is set forth in block #12. In any case, we believe that a change from 1300 hours, April 26 to 1300 hours, May 1, may well be considered an extension of hour and date.

Accordingly, we conclude that the deadline set by the RFP as amended for the submission of proposals was 1300 hours on May 3, 1971, and, therefore, that your proposal was late.

ASPR 3-506 requires RFPs to contain a clause notifying prospective offerors that late proposals or modifications to proposals received after the date for submission has passed will not be considered. Here your proposal was received at 1320 hours, 20 minutes subsequent to the closing time specified. ASPR 3-506(b) requires contracting officers to treat such late proposals in the same manner that late bids would be treated under an advertised procurement.

Provision is made in ASPR 3-506(c) for consideration of a late proposal in certain circumstances. Under ASPR 3-506(c)(ii), the only exception to the general rule which could conceivably be applicable here, a late proposal may be considered when the Secretary of the Department determines that it is of "extreme importance to the Government, as for example where it offers some important technical or scientific breakthrough." ASPR 3-506(c) further provides that all late proposals shall be opened in order that a determination may be made as to whether the exception contained in ASPR 3-506(c)(ii) is applicable. It appears from the record that your proposal was not opened in accordance with the above-cited regulation. However, in view of the fact that award has already been made based on a determination by the activity that prompt award was necessary for the continuity of essential services, we do not believe the contracting officer's omission would justify disturbing the award.

Accordingly, your protest must be denied.

[B-173933]

Voluntary Services—Prohibition Against Accepting—State Employees

The Emergency Employment Act of 1971, designed to deal with high unemployment and the drastic curtailment of vital public services at State and local levels because of the lack of local revenues does not constitute statutory authority to enable Federal agencies to consent to have work done for them by the local non-Federal employees hired under the act in view of the prohibitory language in section 3679 of the Revised Statutes, 31 U.S.C. 665(b), against accepting voluntary services or employing personal services in excess of that authorized by law, and because the sums made available under the act are intended to staff open local Government jobs and not Federal offices. Also to permit the staffing of Federal offices would involve the application of various laws relating to Federal employees.

To the Secretary of Labor, September 10, 1971:

On August 20, 1971, the Chairman of the Civil Service Commission requested our decision as to whether the Emergency Employment Act of 1971, approved July 12, 1971, Public Law 92-54, 85 Stat. 146, constitutes a statutory basis which will enable Federal agencies to consent to have Federal work done for them by non-Federal employees.

The Emergency Employment Act of 1971 is designed to deal with the twin national emergencies of high unemployment and drastic curtailment of vital public services at the State and local levels which cannot be financed because of the lack of local revenues. Specifically, under this act eligible applicants which include units of Federal, State, and general local governments will—during periods of high unemployment—have sums made available to them to hire the unemployed and underemployed in jobs which provide needed but curtailed public services.

Your Department is charged with the responsibility for administering this act and on August 14, 1971, your implementing regulations were published in the Federal Register.

Subsection 55.5(d) of those regulations appear at 36 Fed. Reg., August 14, 1971, 15435(DI) and reads as follows:

> Federal agencies acting as employing agencies may employ participants only in accordance with laws governing Federal employment. In the case of positions subject to the jurisdiction of the Civil Service Commission, employment of participants must be in accordance with the applicable Commission regulations. *However, employees of other employing agencies who are not Federal employees may perform work for a Federal agency if the agency gives its consent.* [Italic supplied.]

While there is ample authority in Public Law 92-54 for both Federal agencies and local governments to hire eligible persons, we can find nothing in the law which would authorize local governments to hire such persons with the expectation of placing them for work in Federal agencies, nor authorize Federal agencies to consent to accepting the services of persons hired by local governments.

Section 3679 of the Revised Statutes of the United States, 31 U.S.C. 665(b), reads as follows:

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in case of emergency involving the safety of human life or the protection of property.

In view of the prohibition of this language and the absence of specific authority in Public Law 92–54 allowing the practice contemplated, we are not aware of any authority for a Federal agency to give its consent to have local government employees hired under this act perform work for them.

In addition, it seems to us that this practice would to a degree be at cross-purposes with the desire of the Congress to make funds available under Public Law 92–54 to local governments to enable them to fund jobs for needed services which have gone unfilled at the local level because of inadequate resources. See S. Rept. 92–48,4. Specifically, the allocation of any sums made available by this act to local governments for the purpose of using them to staff Federal offices would not meet the avowed purpose of staffing open local government jobs that have gone unfilled because of lack of funds. Moreover, to allow the practice contemplated would raise serious questions involving the possible application of various laws relating to Federal employees such as the Federal Tort Claims Act and the Federal employment ceiling limitations and reductions.

We have directed our response to you in order to expedite the handling of this matter since we have been informally advised by a representative of your Department that our decision is needed as soon as possible but no later than September 10, 1971. The representative also suggested that we not follow the usual practice of obtaining a written report from you on the matter.

Accordingly, absent any additional information from your Department that would overcome what is here stated, there is not authority for the Federal agencies to consent to allowing employees hired by local governments under this act to perform work for them and therefore the consent contemplated by the last sentence of subsection 55.5(d) of your regulations cannot be granted by Federal agencies. The regulation should be modified accordingly.

A copy of this decision is being furnished to the Civil Service Commission.

[B–172261]

Contracts—Negotiation—Evaluation Factors—Point Rating—Price Consideration

Under the point rating criteria—technical efficacy 40 percent; qualifications 20 percent; real cost to Government 40 percent—established to evaluate oil analysis

services for the Navy, where the criteria contrary to paragraph 3-501(b) of the Armed Services Procurement Regulation (ASPR) was not disclosed, the award to the incumbent contractor, whose price was not the lowest, on the basis of a narrow margin higher score on the subfactors of "Extended Voyages" and "MSC Experience," was not the most advantageous to the Government—a requirement of ASPR 3-101. Since, under ASPR 3-805.1, price may not be disregarded, the two minor subfactors should have been evaluated on a sliding scale to allow for the respective capabilities of offerors in a competitive range, and the acceptance of the higher priced and higher scored offer rather than a lower priced, lower scored offer that would meet the Government's needs should have been supported by a specific determination of technical superiority.

Contracts—Awards—"Good Faith" Effect

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

To Spectron, Inc., September 13, 1971:

We refer to your protest, by letter of December 23, 1970, addressed to Mr. John T. Dunn, Office of Secretary of Defense, Installations and Logistics, against the award by the Military Sealift Command (MSC), Department of the Navy, of contract N00033 71 D 0004 to Analysts, Inc. (Analysts), for the performance of oil analysis services for the period December 1, 1970, through December 31, 1972. The procurement solicitation was request for quotations (RFQ) N00033 71 R 0001, dated August 10, 1970.

The substance of your protest is that you consider yourself technically superior to Analysts, whose award price was higher than your price, and to Faber Service Corporation (Faber), who quoted the lowest price and was rated second by the MSC evaluation committee. In this connection, you question whether Analysts and Faber were ever certified by the Department of Defense Equipment Oil Analysis Program Activity (DOD EOAPA) for performance of the services involved (as contemplated by Department of Defense Directive 4151.14, dated May 15, 1969, as amended by Change No. 1, dated September 14, 1970). In addition, you assert that geographic location of laboratory facilities was made an evaluation factor although the RFQ did not so advise offerors.

The RFQ stated in paragraph 1.2, section 1, of the Schedule, that the purpose of the used oil analysis is to provide MSC with a means of predicting incipient failures of engines (diesel, steam and gas turbines) with closed lube oil systems. In addition, prospective offerors were informed that the contractor's test reports should include specific recommendations for overhaul, operation and maintenance of each individual unit based on data obtained from the required analysis; that with each test report there should be provided a determination of the internal wear condition of each unit; that when abnormal or critical internal

wear is detected, the components wearing excessively should be identified in the report; and that the contractor is to keep individual record cards on the various units in order that the trends of each unit may be watched for any pertinent changes in data from spectrometric and physical tests.

Schedule A of the RFQ specified the method and frequency of sample testing and included a list of the ships to be serviced under the contract; 45 in the Atlantic Area, on which reports are to be made to MSC, Atlantic, Brooklyn, New York, and 85 in the Pacific Area, on which reports are to be made to MSC, Pacific, Oakland, California. The minimum quantity of samples on which the services are to be ordered by the Government under the entire contract is 10 percent of the maximum estimated quantity set forth in paragraph 1.5, section 1, of the RFQ, and it is our understanding that this quota has already been fulfilled.

Paragraph 1.3, section 1, requires that when unusual wear patterns develop the contractor shall provide telephonic notice to the pertinent MSC Area Command of the test results and shall recommend an equipment trouble check. In addition, tests of samples are required to be made and the results recorded within 24 hours after receipt of samples by the contractor, and the contractor is to retain a running record of the test results and have a system of quick retrieval of data in the event a detailed analysis of an engine becomes necessary. Reports and analysis data become the property of the Government.

Paragraph 1.7, section 1, relating to award and evaluation of offers, reads as follows:

> 1.7 Award will be made to a responsible firm offering to perform the services prescribed in Schedule A in the manner and under the terms found by the Contracting Officer to be in the best interest of the Government, price and other factors considered. Evaluation criteria will consist of three principal factors:
> a. Technical efficacy of the proposed analysis system.
> b. Qualifications of the Offeror's laboratory and organization, and capacity to monitor the system in the MSC type operation, including demonstrated capability to make sound engineering recommendations for maintenance and repair.
> c. Cost to the Government.

Paragraph 1.9, section 1, informed offerors that offers should include, among other information, a statement as to the method by which samples will be handled for both East Coast and West Coast and speed of response by laboratory based on United States Postal Service as well as a statement of the offeror's experience in performing similar services, including the names of firms to which services were provided and a description of the services.

On September 16, 1970, the contracting officer appointed an *ad hoc* committee to evaluate the offers received in response to the RFQ on the basis of evaluation criteria to be established prior to examination of offers.

On September 17, the committee issued a statement setting forth the evaluation criteria and the applicable numerical weights as follows:

Factor	Weight	Total
I. TECHNICAL EFFICACY		
a. System for Analysis	20	
b. Service Personnel	5	
c. Paperwork	10	
d. Extended Voyages (Far East ships, etc.)	5	40
II. QUALIFICATIONS		
a. Management Personnel	4	
b. Laboratory (Equipment Qualification and Personnel)	8	
c. Organization	2	
d. MSC experience	6	20
III. REAL COST TO GOVERNMENT		40
Total Score		100

This information was not given to offerors.

Five firms responded to the RFQ by October 9, the final date for submission of offers. Of the six offers received, one each from Analysts, Faber, and your firm was considered to be within a competitive range, and negotiations were accordingly conducted with these firms until October 22, 1970, the date set for submission of best and final offers.

In a discussion of October 20, 1970, between your Mr. Kincaid and a member of the *ad hoc* evaluation panel, Mr. Kincaid disclosed that your spectrometer did not include capability to test for phosphorus and barium, as required by the RFQ test specification (page 2, Schedule A), but declined to have the equipment modified for such purpose unless you were assured that you would receive the MSC contract. Mr. Kincaid is also reported as having declined to make any further revision in your prices.

In discussions of October 20 and 22, 1970, between Faber and another member of the *ad hoc* evaluation panel, Faber stated that in addition to its laboratory in Los Angeles, which is equipped to make both physical tests and spectrometric analysis of lube oil samples, Faber has a laboratory in New York City at which physical tests may be made. Faber stated, however, that the use of the two laboratories could be disadvantageous since supervision of test results and records should be "left under one head," and Faber did not regard distance as a factor on the basis that delivery of oil samples from Baltimore to Los Angeles is faster than delivery from Baltimore to New Jersey. (In its proposal

Faber had included information to the effect that parcel post between New York City and Long Island or New Jersey required at least 3 days but more often 4 days whereas air mail between Los Angeles and Norfolk (Virginia), Baltimore or Boston took only 2 days.)

In addition, the record includes a memorandum of a telephone conversation between a member of the evaluation committee and the United States Coast Guard pertaining to Faber's performance of similar services for the Coast Guard, which indicates that Faber was regarded as capable and that no problems were encountered in the performance of the services for the East Coast of the United States.

On October 26, the evaluation committee issued a memorandum recommending award to Analysts as the offeror whose offer was determined by the committee to be most advantageous to the Government. The memorandum included the following pertinent statements:

> The recommendation of contract award to Analysts, Inc. is, in part, based on a maximum rating for Technical Efficacy in that Analysts, Inc. has laboratory facilities on both the East and West Coasts which will provide a more rapid response covering test results as called for by paragraph 1.3 of the solicitation. The other bidders have one testing laboratory each which would prohibit their being as responsive to vessels operating from the opposite coast from which the laboratory is located. Also, Analysts, Inc. shows a higher score for MSC experience under the category of Qualifications since they are currently providing similar services under MSC area command contracts and they now have a data bank on MSC vessels which other firms do not have.

The evaluation analysis supporting the committee's memorandum showed that in all but three areas, Real Cost to the Government, Extended Voyages, and MSC Experience, all three competitive range offerors had received equal scores.

Under Real Cost to the Government, a major evaluation factor listed in the RFQ, the evaluation worksheet shows that to the prices quoted by you and by Faber there were added amounts sufficient to cover the cost of the estimated number of long distance telephone calls concerning unusual wear patterns between your respective laboratories and the two MSC area commands. For each command the number of calls was estimated at 425, or 850 calls for both commands, for the contract period. No such item was added to Analysts' price in view of the fact that only local telephone calls would be involved between Analysts' laboratories in New York City and Oakland and the MSC area commands in Brooklyn and Oakland. Even with consideration of the telephone cost factor, however, Faber was lowest, you were second, and Analysts was third. Accordingly, using the formula 40 [maximum number of points for real cost to Government] × Lowest Price (Faber's evaluated price) over Offeror's Evaluated Price, Faber was credited with 40 points, your firm with 39.18 points, and Analysts with 32.69 points.

On the subfactor of Extended Voyages, which carried a maximum score of 5 points, the committee stressed the need for prompt and fast mail service to convey samples to the contractor and to return analysis results to the ships involved. The committee concluded that Analysts, with laboratories on each coast of the United States, was in a more favorable position than either Faber or you to receive the samples, make analyses, and return the results to the appropriate MSC command. Accordingly, on this subfactor Analysts received 5 points, Faber 2.5 points in view of the location of its laboratory in Los Angeles, and your firm only 1.5 points for your laboratory in Puerto Rico. The parenthetical notation, "with inherent mail delay," appears in the committee comments on the location of your laboratory.

On the subfactor MSC Experience, which carried a maximum score of 6 points, the committee noted that Analysts had acquired a background of experience in lube oil maintenance technique under its past MSC contracts, which neither Faber nor you possessed. Accordingly, Analysts was awarded 6 points for this factor, and no points were awarded to Faber or to you.

The total scores were Analysts 92.69 points; Faber 91.50 points; and your firm 89.68 points. Award was therefore made to Analysts on November 5, 1970, and notifications were issued to Faber and to you on November 10 by letter, which furnished the following information as to the award:

> * * * Thirteen firms were solicited and six proposals were received. The contract was awarded to Analysts, Inc., 820 East Elizabeth Avenue, Linden, New Jersey at an estimated price of $172,085 for a twenty-five month period. The award was evaluated as most advantageous to the Government after consideration of (1) technical efficacy of the proposed analysis system, (2) qualifications of the offeror's laboratory and organization and capacity to monitor the system in the MSC type operation, and (3) real cost to the Government.

In justification of the method of evaluation, MSC states that the contracting officer was of the opinion that a proper evaluation of offers had to take into account the ability of offerors to perform in a timely manner and the ability, or lack of ability, to recognize a trend of wear for at least the first several months of the contract period. He was also of the opinion that appropriate weights could be assigned to such factors without precluding qualified offerors from effectively competing for the contract. Accordingly, while MSC concedes that such criteria favored the current contractor (Analysts), MSC views the 5- and 6-point values assigned to Extended Voyages and MSC Experience, respectively, as relatively low. Further, MSC's Counsel relates the MSC Experience factor to the ability of offerors to collate new analysis data with data gathered from earlier analyses and states that since only Analysts has a data bank, Analysts received

the full 6 points for this subfactor while Faber and your firm received no points.

On the matter of certification of Analysts and Faber under the Department of Defense Equipment Oil Analysis Program, the contracting officer states that it was not until after the award had been made to Analysts that MSC became aware that under Change No. 1, dated September 14, 1970, to Department of Defense Directive 4151.14, dated May 15, 1969, such certification of contractors conducting oil analysis for Department of Defense activities was required. On the basis, however, of a presolicitation statement by a DOD EOAPA representative that Analysts, as well as your firm and a third firm (which did not compete for this contract), was well qualified to provide the services in question, and in light of a determination by MSC, based on previous MSC experience of Analysts and other information, that Analysts was well qualified technically and administratively to perform the contract, the contracting officer states that certification [post award] was not deemed necessary.

Armed Services Procurement Regulation (ASPR) 3-501(b) requires that solicitations contain the information necessary to enable a prospective offeror to prepare a proposal or quotation properly, and that such information be set forth in full in the solicitations, except for certain standard procurement forms which may be incorporated in the solicitations by reference.

In applying ASPR 3-501(b) to procurements in which point evaluation formulas are used in the evaluation process, we have stated that sound procurement policy dictates that offerors be informed as to the evaluation factors and the relative importance to be attached to each factor. 47 Comp. Gen. 336, 342 (1967); 44 *id.* 439 (1965). While we have never held that any mathematical formula need be used in the evaluation process, we believe that when numerical ratings are used offerors should be informed, at the least, of the major factors to be considered and the broad scheme of scoring to be employed. Further, whether or not numerical ratings are used, it is our view that offerors should be given notice of any minimum standards to be required as to any particular element of evaluation together with reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. 49 Comp. Gen. 229 (1969).

In the instant case, the RFQ, as indicated above, set forth three major evaluation factors in general terms and also delineated certain areas in which offerors were required to furnish detailed information. Subsequently, specific criteria, or subfactors, were established by MSC for each of the major evaluation factors together with a numerical scoring system. However, no information was given to offerors as to

such criteria or the relative importance to be attached thereto. Further, since two of the subfactors involved, Extended Voyages and MSC Experience, account for the narrow margin by which Analysts outpointed both Faber and your firm, it is apparent that knowledge of such subfactors was important to offerors and that offerors should have been specifically advised of their consideration in evaluating proposals.

Since the RFQ gave the locations by area for each of the ships to be serviced under the contract, stressed the need for prompt testing of samples and quick communication of results to the Government, and specifically solicited information from offerors as to method of handling samples for both the East and West Coasts and speed of response by laboratory based on United States Postal Service, we believe that offerors should have expected that location of laboratory facilities and speed of mail service would be considered in the evaluation process. Further, since the two coastal laboratories possessed by Analysts obviously enable Analysts to provide more expeditious service than either Faber or your firm can provide from their single laboratories, and since your laboratory is farther removed from the respective MSC Area Commands than either Analysts' or Faber's laboratories, we do not view the scoring on this subfactor as unreasonable.

On the evaluation of the MSC Experience subfactor, however, we have several serious objections. First, the RFQ, by requesting the names of firms for whom offerors had rendered similar services, implied that commercial experience would be considered by MSC in selecting the most advantageous offers. No indication was given to offerors that only MSC experience would be considered in the evaluation process. Second, if (as MSC's Counsel has explained in his letter of April 16) this subfactor relates merely to the ability of offerors to collate new analysis data with previously recorded MSC analysis data, then the term "MSC Experience" is a misnomer, the true subfactor being "ability to collate analysis data." Third, since it is our understanding that the previous similar MSC contracts with Analysts included language such as appears in paragraph 1.3, section 1, of this RFQ, making all reports and analysis data the property of the Government, it appears that MSC could have required Analysts to make such data available to the Government in the event of award of the current contract to another offeror.

In line with the foregoing, while it is conceivable that Analysts, by reason of its familiarity with the previously amassed data, might be capable of more quickly collating new data and recognizing trends in machinery wear than a new contractor, we question the absence of any point credit to other responsible offerors for ability to collate the new data with the existing data. We suggest, therefore, that as in

the evaluation of the subfactor of Extended Voyages, a sliding scale could have been used to allow for the respective abilities of all offerors in this regard. This is particularly significant in view of the fact that Analysts' total score was but 1.19 points higher than the total score of Faber and 3.01 points than the score of your firm, both of whom quoted substantially lower prices than Analysts.

More important than such deficiencies in the RFQ, however, for the reasons discussed below we are unable to concur with the position of the procuring activity that the award to Analysts resulted in the contract which was most advantageous to the Government.

Armed Services Procurement Regulation (ASPR) 3-101, relating to negotiation as distinguished from formal advertising, contemplates that in a competitively negotiated procurement the award shall be made to the best advantage of the Government, price and other factors considered. ASPR 3-805.1, consistent with 10 U.S.C. 2304(g), requires the conduct, after receipt of initial proposals, of discussions with all responsible offerors who submit proposals within a competitive range, price and other factors considered, with certain exceptions not here pertinent.

Under such provisions, it is apparent that price is a factor which may not be disregarded in the making of the award. This is particularly true where, as here, more than one acceptable offer from a technically qualified source remains for consideration after conduct of the negotiations contemplated by ASPR 3-805.1(a). Nor do we believe that, where a fixed-price contract is contemplated, the use for evaluation purposes of a numerical rating in which cost to the Government is assigned points along with other factors in itself justifies acceptance of the offer with the highest number of points without regard to price. See 44 Comp. Gen. 439 (1965). Rather, it is our view that if a lower priced, lower scored offer meets the Government's needs, acceptance of a higher priced, higher scored offer should be supported by a specific determination that the technical superiority of the higher priced offer warrants the additional cost involved in the award of a contract to that offeror.

The record indicates that the award to Analysts was based on its high score. There is no indication that any determination was made that neither Faber nor your firm could have satisfactorily met the Government's requirements. Conversely, advice included in a letter dated January 14, 1971, from the contracting officer to your firm to the effect that your offer met the criteria required by the RFQ and stating the desire of MSC that you compete for future MSC procurements may be construed as evidence that your offer was acceptable. In the circumstances, absent evidence of any basis for disqualification of

either Faber or your firm, it is our opinion that the record does not support the conclusion of MSC that award to Analysts was most advantageous to the Government, price and other factors considered, as contemplated by the procurement regulations.

There is no evidence in the record, however, of any bad faith on the part of the contracting activity in the conduct of the procurement. In the circumstances, we are unable to conclude that the award is illegal. In view thereof, and since there is no termination for convenience of the Government clause in the contract, we do not believe that it would be in the interests of the Government to now terminate the contract. Your protest is therefore denied.

For your information, we are calling the attention of the Department of the Navy to the deficiencies in the procurement with the request that action be initiated to preclude recurrence of such deficiencies in future procurements.

[B-146285]

States—Federal Aid, Grants, Etc.—Federal Statutory Restrictions—State Fund Contributions

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

States—Federal Aid, Grants, Etc.—Recovery by Federal Government—Waiver

The recovery of erroneous payments of Federal grants may not be waived on the basis of the *quantum meruit* doctrine which has been applied where goods or services are received by the Government in the absence of an express contractual provision in view of the fact it would be unfair for the Government to have tangible benefits without recompense, since the Government accrues no tangible benefits, as traditionally understood in the context of the *quantum meruit* and *quantum valebat* cases, from a grant of funds, nor does the activity carried out by the grantee constitute efforts or labor performed for the direct benefit of the United States.

Funds—Federal Grants, Etc., to Other Than States—Educational Grants—More Than One—Prohibition

The recipient of a Social and Rehabilitation Service (SRS) research fellowship grant upon receiving an award of a Special Nurse Fellowship grant became ineligible for the SRS fellowship under SRS regulations, which prohibit the receipt of any other Federal educational benefits during the period of the SRS fellowship, and the regulation issued under the authority in 29 U.S.C. 37(b) is a statutory regulation that has the force and effect of law, and the regulation having

been published in the Federal Register, as well as the Code of Federal Regulations (45 CFR 405.31), the recipient is charged with knowledge of the prohibition against receiving two Federal educational benefits and there is no basis for waiving recovery of the SRS grant.

To the Secretary of Health, Education, and Welfare, September 15, 1971:

Reference is made to letter dated July 14, 1971, from the General Counsel requesting our decision as to whether your Department is in every case legally required to seek the repayment of funds paid under grants which have, subsequent to award, been determined to have been inadvertently made without authority under the statute and/or the regulations governing the grant program; and whether your Department may pay for expenditures incurred and noncancellable commitments made by the grant recipients prior to notification that the grant has been retracted.

The General Counsel refers to the following as examples of the kinds of situations prompting the request for our decision:

(1) The Office of Education, in fiscal year 1968, made a grant under the Adult Education Act of 1966 (20 U.S.C. §§ 1201–1213) to the State of South Carolina. The State was not eligible since it did not meet the requirement (20 U.S.C. § 1206(b) and 45 CFR § 166.28) that its financial contribution to the program be not less than that of the previous year.

(2) A similar problem has arisen in the Emergency School Assistance Program administered by the Commissioner of Education under delegation from the Secretary of Health, Education, and Welfare. Provision for this program is made in the Emergency School Assistance appropriation contained in the Office of Education Appropriation Act, 1971, Pub. L. 91–380, 84 Stat. 800, which appropriates $75 million for assistance to "desegregating local educational agencies."

In a few cases in which ESAP grants were made to local educational agencies, it has been determined, after the award of the grant, that the grantee was in fact ineligible for ESAP assistance under the regulation because the district was not operating under a court order or plan requiring the commencement of the terminal phase of desegregation within the period specified. In several of such cases reexamination of the plans which had been submitted as the basis for eligibility revealed that the terminal phase was not to commence until after the opening of the 1970–71 academic year. The facts revelant to those cases should have been known to the Office of Education officials and taken into account in the grant award process but were apparently overlooked.

(3) The Social and Rehabilitation Service (SRS) of this Department awarded a research fellowship effective September 1, 1970. Effective September 28, 1970, the recipient was awarded a Special Nurse Fellowship by the National Institutes of Health. The Institute had been advised of the SRS fellowship but told the recipient that she could hold both fellowships. In fact, her receipt of the NIH fellowship made her ineligible for the SRS fellowship under SRS regulations.

The General Counsel states that in the first of these cases the Office of Education, on the advice of the Office of the General Counsel declined to seek recovery of the grant funds on the ground that despite the grantee's "technical ineligibility" the Government could be deemed to have received the value of the grant funds, since they were properly expended for a program purpose. He points out that this Office has ruled that a Government contractor, under the doctrine of *quantum meruit*, may recover the reasonable value of services where a contract

has been canceled as defective (40 Comp. Gen. 447 (1961); 37 Comp. Gen. 330 (1957)), and that contract principles may apply to grants (41 Comp. Gen. 134 (1961)). In rendering our decision on the question presented, we are asked to consider the applicability of such principles to the above-described grant situations.

The General Counsel further states:

> * * * it would serve the interest of this Department not to require repayment of grant funds where the grantee relies in good faith on program officer's determinations of eligibility and where except for some technical element of eligibility, the expenditure by the grantee is fully congruent with Congressional and Program purposes.

Concerning the examples given in the General Counsel's submission, comment here would be inappropriate with respect to example No. (2), since that situation is the subject of a congressional inquiry received by this Office and one on which we have requested, by letter dated August 12, 1971, a full report from your Department.

As to the General Counsel's first example, 20 U.S.C. 1206(b) provides that:

> (b) *No payment shall be made to any State* from its allotment for any fiscal year *unless the Commissioner finds* that *the amount available for expenditure by such State* for adult education from non-Federal sources for such year *will be not less than the amount expended for such purposes from such sources during the preceding fiscal year.* [Italic supplied.]

The implementing statutory regulations (45 CFR 166.28) provides as follows:

> *Before a State may receive a payment* from its allotment under section 304(b) of the Act, *the Commissioner must find,* pursuant to section 307(b) of the Act, *that there will be available for expenditure by the State* including its political subdivisions, for basic education for adults, from non-Federal sources during the fiscal year for which the allotment is made, *an amount equal to not less than the total amount expended for such purposes from such sources during the preceding fiscal year.* The information received under § 166.47 (a) and (b) shall serve as the basis of the Commissioner's finding. [Italic supplied.]

The statute involved in clear and unequivocal terms prohibits the making of a grant payment to any State for any fiscal year unless the Commissioner of Education finds that the amount available for expenditure by such State for project purposes from non-Federal sources will not be less than the amount expended for such purposes from such sources during the preceding fiscal year. It is clear that the Congress intended that each State's financial contribution to the program be not less than that of the previous year. In other words, the Congress did not intend grant funds to be available to a State for grant (program) purposes, unless the State agreed to meet all the requirements for entitlement to such grant as set forth in the statute and implementing statutory regulations.

Since the State involved must be considered to have constructive, if not actual, notice of both the statute and regulation involved, we do

not think there is a valid basis, as a general proposition, for waiving the recovery of the grant funds where that State fails to meet the financial contribution requirement of not less than the prior year State expenditures on the program. It is recognized however that there might be some exceptional cases where the total amount of the grant would not have to be recovered such as where the State due solely to circumstances beyond its control was unable to expend all of its anticipated contribution. These exceptional cases will have to be considered on an individual basis.

We recognize that the requirement that improperly used grant funds be in all cases repaid may in some instances impose hardships on grantees who have in good faith relied on, and acted upon, a Federal agency's prior determination of eligibility. However, the erroneous initial determination made by HEW, while unfortunate for the grantees, may not be used by your Department as the justification for not requiring repayment of the monies in question. It is well established that the Government is bound only by acts of its agents which are within the scope of their delegated authority. See: *Lloyd's Acceptances*, 7 Wall. 666; *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. 380, 384 (1947). Moreover, the rule is equally well established that officers and agents of the Government have no authority to give away the money or property of the United States, either directly or by the release of vested rights. *Bausch & Lomb Optical Co.* v. *United States*, 78 Ct. Cl. 584 (1934); 20 Comp. Gen. 448 (1941); 40 Comp. Gen. 309, 311 (1960). In our view, not to require repayment of funds in the hands of an ineligible grantee could have the effect of binding the United States to the improper and erroneous initial award determination and would, in effect, constitute the giving away of United States funds without authority of law.

With respect to the applicability of the *quantum meruit* doctrine, this doctrine would not appear to be for application in the kinds of circumstances presently in question. The *quantum meruit* doctrine has been applied in numerous cases involving goods or services received by the Government in the absence of an express contractual provision therefor. The right to payment on such a basis is predicated on the theory that it would be unfair for one party to have the tangible benefits of the labor of another without recompense, and that payments so justified are authorized on the basis of the value received by the Government agency. 40 Comp. Gen. 447, 451 (1961). The instant situation differs in a material sense, in our view. It cannot be said that any measurable tangible benefit, as traditionally understood in the context of the *quantum meruit* and *quantum valebat* contract cases, has accrued to the Government or that the activities carried out by the grantee con-

stitute efforts or labor performed solely for the direct benefit of the United States.

As to the applicability of contract principles to the subject matter of Federal grants, this Office has never indicated, nor has any court, as far as we can ascertain, that all contract principles, both equitable and legal, apply to the subject matter of grants. In 41 Comp. Gen. 134, 137 (1961), and in other cases, we have stated the generally accepted principle that once a grant has been offered and accepted, a contractional relationship exists between the Government and the grantee. However, for the reasons stated above, we do not believe the *quantum meruit* doctrine would be applicable in cases involving grants, at least in the kinds of circumstances presently in question.

Concerning example No. (3), we have been informally advised by a representative of your Department that 45 CFR 405.31 is applicable to research fellowships awarded by the Social and Rehabilitation Service. This regulation provides, in pertinent part, as follows:

> Research fellowships are available to any person who has demonstrated ability and special aptitude for advanced training or productive scholarship in the professional fields which contribute to the vocational rehabilitation of handicapped persons. Predoctoral, postdoctoral, and special research awards are made. A candidate for a fellowship shall meet the qualifications established by the Administrator for carrying out the purpose of research fellowships, including:
>
> * * * * * * *
>
> (c) He shall not be receiving other Federal educational benefits during the period of the Social and Rehabilitation Service fellowship.

The quoted regulation was apparently issued pursuant to the authority contained in 29 U.S.C. 37(b) and thus is a statutory regulation. It is well established that valid statutory regulations have the force and effect of law. See *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542 (1958); 31 Comp. Gen. 193 (1951); 38 *id.* 248 (1958); 40 *id.* 473 (1961); *id.* 691 (1961); and 43 *id.* 516 (1964).

The cited regulation was published in the Federal Register (as well as the Code of Federal Regulations) and, hence, everyone is charged with knowledge of the regulation. See *Federal Crop Ins. Corp.* v. *Merrell*, *supra*. Thus, we are not aware of any basis for waiving recovery of the grant in connection with example No. (3).

Considering the foregoing, you are advised that while there may be some instances where your Department would not be required to seek repayment of grant funds from a "technically ineligible grantee," each case must be decided on its merits. Thus, this Office cannot lay down any general guidelines pertaining to the recovery or nonrecovery of grant funds from grantees subsequently determined to be ineligible for a grant under the law involved and/or applicable regulations.

[B-173282]

Public Utilities—Relocation—Government Liability

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

To the Architect of the Capitol, September 15, 1971:

Reference is made to your letter of June 16, 1971, concerning the request of the Potomac Electric Power Company (PEPCO) for reimbursement of facilities relocation costs incurred incident to the construction of the Library of Congress James Madison Memorial Building.

You state in your letter that you denied PEPCO's request based on our decision 10 Comp. Gen. 331 (1931). In that case we held that the appropriation made for the construction of underground duct lines from the Capitol power plant to new public buildings was not available for the payment of the costs of relocating public utilities. The case then went on to state:

> Rights of way or franchises granted * * * to public utility corporations, in public streets, etc., to operate their business are usually coupled with reservations that the public utility company will, upon demand of the granting authority, vacate the streets, etc., or relocate or divert its conduits, lines, etc., to meet the needs of the granting authority as they arise. It is understood that the franchises of public utility companies in the District of Columbia are granted on such a basis and that when the need of the Federal Government or the District of Columbia government so require in connection with the construction of public buildings, etc., such public utility companies are under obligation to remove, divert, or relocate their lines, conduits, etc., without cost to the Federal Government or the District of Columbia.

In another line of cases we have consistently held that in the absence of specific statutory authority, appropriations for the construction of roads and trails could not be used for the purpose of paying the cost of removing and relocating public utility lines on public property when they interfered with the paramount right of the United States to use the lands. See 44 Comp. Gen. 59 (1964) and cases cited therein.

PEPCO alleges that our rulings have not been consistently applied and cites the federally assisted Metro program in which they are being reimbursed for relocations of their facilities and the policy of the Bureau of Public Roads. In the Metro program, however, there is specific statutory authority for such reimbursement. (Section 68 of the act of November 6, 1966, Public Law 89-774, 80 Stat. 1347.) Insofar as utility relocation payments by the Bureau of Public Roads are concerned see 23 U.S.C. 123. The appropriation measures for the

Library of Congress building contain no similar authority, nor are we aware of any other law authorizing payment by the Architect of the Capitol of the type of costs involved here.

Under these circumstances we find that you were correct in denying PEPCO's request for reimbursement and requiring that it perform the necessary relocation work without cost to the Government.

[B-173489]

Bidders—Qualifications—Security Clearance

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

To Kirkland, Ellis, Hodson, Chaffetz, Masters & Rowe, September 15, 1971:

Reference is made to your legal memorandum received on August 31, 1971, and prior correspondence, on behalf of Ocean Electric Corporation, protesting against the award of a contract to any other bidder, under invitation for bids (IFB) No. N62470-71-B-0859, issued by the Department of the Navy, Naval Facilities Engineering Command, Atlantic Division, Norfolk, Virginia.

For the reasons hereinafter stated, the protest of Ocean Electric is denied.

The IFB, issued on May 20, 1971, as a small business set-aside, solicited bids for a construction contract to modify and improve the existing air-conditioning and heating systems, improve the electrical lighting and power systems, replace certain plumbing fixtures and toilet partitions, and incidental related work at the Naval Air Rework Facility, Naval Air Station, Norfolk, Virginia. Bids were opened as scheduled on June 22, 1971, and were abstracted as follows:

Bidder	Price
Joseph S. Floyd Corporation	$675,346
Parker Sparks, Inc.	785,000
Ocean Electric Corporation	809,074
Leon H. Perlin Co.	815,900
Vanguard Construction Corp.	870,281
J. E. Weddle & Associates	879,325

Both the cover sheet and bid form of the IFB contain the following statement:

ONLY BIDS RECEIVED FROM CONTRACTORS HAVING ACTIVE FACILITIES SECURITY CLEARANCE OF CONFIDENTIAL OR HIGHER WILL BE CONSIDERED.

In this regard, paragraph 1A.14 of the IFB specifications provides as follows:

1A.14 Security Requirements. No employee or representative of the contractor will be admitted to the site of the work unless he furnishes satisfactory proof that he is a citizen of the United States or if an alien, his residence within the United States is legal. No employee or representative of the contractor will be admitted to the classified areas of the work until he has received a security clearance for CONFIDENTIAL. Workmen will be permitted access to only those areas within the existing building where work is to be performed hereunder. Personnel security clearance for his employees to have access to the site shall be initiated and obtained through the Officer in Charge, who will furnish necessary instructions. Initiation of clearance will require submittal of detailed information regarding each person to be cleared. Clearance is expected to require six weeks to two months. During the bidding period, contractors having the proper security clearance will be allowed to inspect areas of the existing building in which work is to be performed hereunder. Contractors must be escorted during inspection in security areas. The Contractor shall be required to arrange with the Security Officer, Naval Air Rework Facility, U.S. Naval Air Station to obtain required identification badges for each of his employees and shall be held responsible for strict accountability of all badges issued to his employees. Any person violating security regulations shall be denied further entrance to the building. These requirements are in addition to the basic "Security requirements" paragraph in the Section entitled "Additional General Paragraphs."

In view of these statements in the IFB, the Navy requested information from the two regional offices of the Defense Contract Administration Services (DCAS) as to which bidders held active facilities security clearances at the time of bid opening. The responses of the DCAS regional offices, received by the Navy on June 25 and 26, 1971, are quoted, in pertinent part, below:

As of 2:00 P.M. 22 June 1971 Ocean Electric Corp. * * * held a secret clearance. Parker-Sparks Inc. * * * was eligible for an interim secret clearance; however, administrative processing had not been completed by this Headquarters. Joseph S. Floyd Corp. * * *, Leon H. Pearling Company, Inc. * * * and J. E. Weddle Associates, Inc. * * * were not cleared facilities.

* * * Vanguard Construction Corporation * * * cleared secret 20 March 1969 * * *

With this information in hand, the Navy refused to consider the low bid of Joseph S. Floyd Corporation for award, since that firm did not possess the required security clearance, and, in fact, had not applied for the clearance until only 2 working days before bid opening. By letter dated June 29, 1971, the cognizant DCAS regional office advised the Navy that the second low bidder, Parker-Sparks, "is cleared: INTERIM SECRET." The president of Ocean Electric, by letter of June 29, 1971, filed a protest before award with our Office on the ground that any contemplated award by the Navy to Parker-

Sparks would be improper because that firm did not possess an active facilities security clearance of confidential or higher on the date of bid opening as required by the IFB.

Initially, you contend that the "issuance of even an interim security clearance to Parker-Sparks, Inc., some seven days after bid opening was in itself contrary to the regulations of the Department of Defense governing the issuance of security clearances and thus illegal and of no effect." Expanding on this contention, you state that the interim secret facilities clearance granted Parker-Sparks is not fully as valid as the final secret security clearance necessitated by the IFB. The Navy rebuts this contention by asserting that "it is our position that the Industrial Security Regulation which governs the Department of Defense in security matters, are internal regulations, minor violations of which would not render actions illegal." Furthermore, the Navy advised that "An interim clearance is fully as valid as the final clearance as far as access to classified materials and areas is concerned, and is issued as an expedient where circumstances dictate."

The grant or denial of security clearances to bidders or contractors is a matter within the discretion of the Department of Defense (DOD). In the absence of clear and convincing evidence that a security clearance was improperly issued, we have held that the grant of such clearance to a bidder or contractor will not be questioned. *Cf.* B–159469, B–160265, March 22, 1967. While the Navy may not have strictly followed the provisions of the DOD Industrial Security Regulation (DOD ISR), (DOD Directive No. 5220.22–R), in initiating a security clearance request for Parker-Sparks, there is no evidence that the interim secret clearance was improperly granted by DCAS, the agency within DOD responsible for issuing such clearances. Moreover, our review of the appropriate security regulations uncovers no distinction between the level of classified information to which a contractor holding a final facility security or an interim facility security clearance would have access.

You urge that the two lower bidders are not eligible for award since neither bidder possessed a security clearance of confidential or above at the date of bid opening. DCAS informed the Navy 3 working days after bid opening that, as of the date of bid opening, Parker-Sparks was "eligible" for an interim secret clearance. By letter dated 5 working days after bid opening, DCAS advised the Navy that Parker-Sparks possessed an interim secret clearance. Also, we note that Parker-Sparks initiated its request for a security clearance on an expedited basis by letter dated May 20, 1971, the same day the IFB was issued. By speedletter of May 25, 1971, the Navy requested that the cognizant DCAS regional office process a facility security clearance of secret for Parker-Sparks. Moreover, Parker-Sparks forwarded the necessary security agreement forms by June 11, 1971, to the

cognizant DCAS regional office to fulfill the processing requirements of its security clearance request.

In its initial report on the protest to our Office, the Navy stated that, on the basis of the DCAS information of June 25, "this Command considered that the firm of Parker-Sparks, Inc., was cleared for an active facilities clearance of Interim Secret as of the day of bid opening, and was accordingly, eligible to receive award of this contract." In a supplemental report to our Office, the Navy changed its position and advised:

> * * * the firm of Parker-Sparks had been investigated by DCASR before the bid opening date, and this investigation had satisfied DCASR that the firm was eligible for an interim clearance. Under these circumstances, it was considered that the firm had met our mandatory requirement, that the successful firm be able to begin performance immediately upon receiving notice of award. Delay of award pending final clearance would have created crucial delays, and therefore the interim clearance was accepted. * * *
>
> * * * * * * *
>
> As noted earlier, this Command's basic requirement in the procurement was for a contractor who could begin work immediately upon receipt of a Notice of Award. This requirement was mandatory, and was not waived as contended by the protestant. What was waived was any necessity for the bidder to have the clearance in hand on 22 June, the day of bid opening. This was waived as a minor item, so long as the aforementioned mandatory requirement was met. Award was not withheld "pending their clearance," as contended by the protestant, nor was that firm afforded any special treatment.

We note that section 2–102b of the DOD ISR recognizes the possibility of the issuance of an interim security clearance where an award must proceed due to urgency. In this regard, you believe that the Navy's attempt to waive the requirement for a bidder to have a security clearance by bid opening compromises the integrity of the competitive bidding system. Also, you vigorously object to that which is implicit in the Navy's present position that the low bidder might no longer be precluded from consideration for award since the firm's application for a security clearance is, as the Navy reports, "presently being processed, and a clearance is expected shortly."

We must observe that, in accordance with the provisions of paragraph 1–703(b)(5) of the Armed Services Procurement Regulation, the earliest date that the Navy could have awarded the contract would have been June 29, 1971, the date that Parker-Sparks was officially cleared "interim secret." That paragraph provides, as follows:

> (5) *Award of Set-Aside Procurements.* Except as provided in 3–508.1 or when the contracting officer determines in writing that award must be made without delay to protect the public interest, *award will not be made prior to* (i) *five working days after the bid opening date for procurements placed through small business restricted advertising,* or (ii) the deadline date for submitting a protest set forth in the notification to the apparently unsuccessful offeror(s) for small business set-aside procurements placed through conventional negotiation. [Italic supplied.]

The specific requirement of the IFB with which you contend that both lower bidders failed to comply before bid opening reads, as follows:

ONLY BIDS RECEIVED FROM CONTRACTORS HAVING ACTIVE FACILITIES SECURITY CLEARANCE OF CONFIDENTIAL OR HIGHER WILL BE CONSIDERED.

Nothing in the quoted statement specifically requires that a bidder have the necessary clearance on the date of bid opening in order to permit consideration of his bid. Moreover, keeping this conclusion in mind, in view of the fact that an award could not have been made prior to June 29, 1971, we doubt if the Navy could have refused to award a contract to any bidder whose clearance became effective between bid opening and June 29. This alone, in our opinion, would have compelled the Navy to consider the bid of Parker-Sparks for award. Therefore, we need not consider the question whether Parker-Sparks possessed an active facilities security clearance of interim secret on the date of bid opening.

In any event, we feel constrained to comment further on the security clearance requirements of the IFB. The express purpose of prescribing that contractors possess the designated security clearances was to permit access by the contractor's employees to the classified areas where the work was to be performed. Therefore, in view of the fact that the IFB did not necessarily preclude consideration of a prospective contractor, prior to performing work in classified areas, who did not hold a requisite clearance at bid opening, we find that such a requirement constituted an aspect of the bidder's responsibility. See B–161211, July 11, 1967, and cases cited therein; and B–167536, October 17, 1969. In this regard, we quote from B–161211, *supra*, which discusses the legal ramifications where, as here, a security clearance requirement constitutes a matter of responsibility:

> It is our view that the quoted provision required that the *contractor*, not the bidder, possess a facility clearance *prior to performing work in specified areas* and constituted a requirement regarding the bidder's responsibility as a prospective contractor. Such a requirement was not a condition precedent to submission of a bid, and proof or evidence of such qualification could be furnished at any time prior to performance of work under the contract. We have held with respect to responsibility that the critical time is the time for performance, plus any lead time which may be necessary in the particular case. Since the invitation requirement could be met at any time prior to performance, the provision readily can be interpreted to have required that the evidence of clearance be provided at some time after the bids were opened. The availability of evidence of security clearance, therefore, did not affect the responsiveness of the bid which had to be decided on the basis of information submitted prior to or at bid opening. Compare B–142350, March 30, 1960, 39 Comp. Gen. 655 and 38 Comp. Gen. 423. Under this view, the fact that the successful bidder did not have pertinent security clearances at the time of opening of bids or even at the time of award does not furnish a valid legal basis for disturbing the award of the contract. See 43 Comp. Gen. 77; B–160085 dated October 18, 1966, 46 Comp. Gen. 326.

Continuing in this view, even if we had construed the IFB to require an adequate security clearance as of the date of bid opening, such a construction would not alter our conclusion. The mere method of stating a particular requirement by attempting to compel compliance by bid opening does not change the essence of the purpose for which the information is required, and if it is required to determine responsibil-

ity, it cannot be made a matter of responsiveness or, as you argue, eligibility. See 45 Comp. Gen. 4, 7 (1965); and B–165799, March 25, 1969; and see B–160538, November 15, 1967. Further, invitation requirements which fix the time of compliance as the date of bid opening normally relate to the timely procurement of the requested services and are matters of procurement responsibility and convenience. Had the contracting officer determined that performance could not be delayed pending DCAS consideration and resolution of the Parker-Sparks clearance request, we would be in no position to object. On the other hand, the Navy's time requirements obviously did not require such action, rendering consideration, at that time, of the Parker-Sparks bid permissible. See 47 Comp. Gen. 539, 543 (1968), wherein we ruled on the necessity of holding a valid license to perform the required work at bid opening.

You state that the Navy's possible consideration of the bid of Joseph S. Floyd Corporation would make a mockery of the competitive bidding system, since that firm did not possess any security clearance at either the time of bid opening, or at the time performance was contemplated to have begun, but for your protest. As stated above, the time for submission of evidence of a bidder's responsibility is governed by the time when performance is required. In this case, in view of the preaward posture of your protest, contract performance, of course, is not required as of this date. Therefore, we would have no objection to the Navy's consideration of that bid if that firm will have the necessary clearance prior to the time for contract performance. See B–160538, B–160540, March 24, 1967.

In conclusion, you allege that any waiver or relaxation of the requirements for clearance by bid opening operates to the detriment of any bidders misled thereby into not submitting bids unless they possessed the requisite clearance. However, since at least three of the six bidders did not possess security clearances at bid opening, it does not appear that prospective contractors were discouraged from bidding or interpreted the security clearance provision as required clearance at bid opening. But even if some bidders were discouraged from bidding, such a situation would not operate to dilute the responsibility characteristics of the security clearance requirements of the IFB. Further, adequate competition was obtained, as evidenced by the submission of six bids in response to the IFB. See B–161211, *supra*.

[B–173392]

Bids—Late—Hand-Carried Delay

A hand-carried sealed bid delivered after the bid opening officer began to open the first bid may not be considered on the basis the corridor clock upon which the messenger relied was 2 minutes earlier than the special clock in the bid opening room, which is regulated by Western Union to accurately reflect Naval Observatory time, since there is no reason to assume the corridor clock reflected the local time specified in the invitation for bids and the special clock did not

and, therefore, the bid opening officer properly relied on the special clock in designating the bid opening time had arrived. Furthermore, notwithstanding it would be in the best interest of the Government to consider the rejected bid, paragraphs 2-303.1 and 2-303.5 of the Armed Services Procurement Regulation prohibiting consideration of late bids are regulations that must be strictly construed and enforced in order to maintain the integrity of the competitvie bidding system.

To James P. Smith, September 17, 1971:

Reference is made to your letter of July 21, 1971, and subsequent correspondence culminating with your letter of September 10, relative to your protest in behalf of Wilkinson and Jenkins Construction Company under invitation for bids (IFB) No. DACW 41-71-B-0116 covering channel stabilization work in the Missouri River. In effect, you protest against the adverse finding by the contracting officer that the hand-carried bid of Wilkinson and Jenkins was received after the official closing time for receipt of bids.

Amendment 1 to the IFB, issued June 1, 1971, provided under the heading "Bidding Time" the following:

> Sealed bids in one copy for the work described herein will be received until 1:00 p.m. local time at the place of bid opening, 17 June 1971, in Room No. 148A, Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, and at that time publicly opened. Hand carried bids delivered immediately prior to bid opening shall be delivered to the above designated room.

A memorandum prepared by the bid opening officer, and dated June 17, 1971, relates the contracting agency's understanding of the circumstances, under which the bid of Wilkinson and Jenkins was received, as follows:

> 1. This bid was scheduled to open 1:00 p.m. local time in room 148A of the Federal Building, 601 East 12th Street, Kansas City, Missouri. Room 148A is the customary opening room inasmuch as Western Union maintains a special clock for the Corps of Engineers in this room.
>
> 2. The clock is controlled by a master clock at Western Union headquarters in Kansas City, which clock is regulated by universal time of the Naval Observatory time. This service was obtained by the Corps to eliminate any possibility that the bid opening officer would proceed in opening the bids on erroneous times. This clock has a red bulls-eye on its face that lights up when the hour is reached, and openings are begun upon its illumination.
>
> 3. Several contractors had submitted their bids and were awaiting the scheduled opening time. Approximately two minutes before 1:00 p.m., the bid opening officer announced that such bids would be opened at the scheduled time of 1:00 p.m.
>
> The red light flashed on at 1:00 p.m., the bid opening officer announced that it was 1:00 p.m., the appointed time for opening the bids, and proceeded to open the first bid. Thereupon a man appeared in the door of the room who attracted the bid opening officer's attention, and approached the table and asked if this was where the bids were being opened. The bid opening officer examined the envelope and, noting that it carried the identification for the current bid opening, accepted the bid, placed it on the table away from the other bids and asked the man to have a seat.
>
> 4. Bids were opened and read and, as agreed by Mr. Schauf of Counsel, who sat at the table during the aforementioned events, announcement was made that we were in possession of an unopened bid which may or may not be considered.
>
> 5. As the group disbanded, the bidders approached the bid opening table and all offered the opinion that the bid was late and should not be considered.
>
> 6. Later, Mr. W. C. Wilkinson called saying that his man who had delivered the bid stated that he was waiting in the hall outside the door and waited until the clock in the hall neared 1:00 p.m. before entering the room. He said the

clocks are approximately 1 minute apart—the Western Union clock faster—there is a 55 second difference in the time, as he claimed.

7. The bids were read to Mr. Wilkinson who stated that his bid was between the Government estimate and the apparent low bidder; therefore, he wants his bid considered.

From the documents submitted in support of your protest, which included a transcript of a "hearing" before the contracting officer on June 21, it appears that the events leading up to submission of the Wilkinson and Jenkins bid were substantially as follows:

Mr. John Hannon was entrusted by William C. Wilkinson, the president of Wilkinson and Jenkins, with the responsibility of presenting the company's previously prepared sealed bid at the time stated for bid opening. Mr. Hannon arrived at the district office about 10:00 a.m., since he had heard the bids "could have been opened at 11:00. He was informed that 1:00 p.m. was the correct time and states that he did not consider turning the bid in at the earlier time as he "didn't want to turn it in until right before 1:00." Mr. Hannon turned the bid over to his son, Ronnie Hannon, who retained it until he finally delivered it to the bid opening room. Both Hannons aver that they set their watches with a clock in the corridor, and rechecked them with other clocks on the ground floor of the building. Neither entered the first floor bid room prior to their entrance near bid opening time. Both Hannons allege that Ronnie Hannon entered the bid opening room two minutes before bid opening time by the corridor clock. Additionally, Ronnie alleges that he went directly to the bid opening desk, gave the bid envelope to Mr. Schauf, who handed it to the bid opening officer, whereupon that official either told him he was "right on the nose" or that he "made it by the nose."

Thereafter according to Ronnie Hannon's testimony at the "hearing," the bid opening officer asked him to sit down, them said it was time for the bids to be opened, and proceeded to open the first bid.

You contend that since the IFB set the bid opening at 1:00 p.m. "local time," and the Hannons were not aware of the special clock in the bid opening room they were justified in relying on the corridor clocks as correctly reflecting "local time," and the bid should therefore be considered as received in time.

Alternatively, you contend that the bid opening officer's statement to Ronnie Hannon that he was "right on the nose" indicates that the bid was timely delivered even if bid opening time is determined by the clock in the bid opening room.

Finally, you contend that even if the bid was delivered after the bid opening time, it must have been delivered less than 1 minute after bid opening time. In view thereof, and since it is undisputed that no bid had been opened and read at the time, you contend that no competitive advantage could accrue to Wilkinson and Jenkins; that it would not be prejudicial to the other bidders if the bid is now opened

and considered for award; and it would therefore be in the best interest of the Government to do so since the bid is low by more than $40,000.

With respect to your contention that "local time," as that term is used in the IFB, should be considered to mean the time shown by the corridor clocks rather than the bid opening room clock, it should be noted that the inclusion of this term in invitations for bids is attributable to a decision of this Office which directed its use to preclude confusion resulting from use of "Eastern Standard Time," "Central Standard Time," "Daylight Savings Time" and other similar terms. 49 Comp. Gen. 164 (1969). While no consideration was given in the decision as to how the correct "local time" was to be determined for bid opening purposes, it is our opinion that the term must, on military procurements, be read in conjunction with ASPR 2–402.1, which provides as follows:

> The official designated as the bid opening officer shall decide when the bid opening time has arrived, and shall so declare to those present. He shall then personally and publicly open all bids received prior to that time, and when practicable read them aloud to the persons present, and have the bids recorded.

The record indicates that the clock in the bid opening room was a special clock regulated by Western Union to accurately reflect Naval Observatory time. The record does not indicate that the corridor clocks were so regulated, and there is no valid basis for assuming that the corridor clocks reflected the correct local time while the clock in the bid opening room was incorrect. Under the circumstances, we must conclude that the bid opening officer acted properly in relying on the clock in the bid opening room as establishing the time for bid opening, and that the Hannons were not justified in relying upon the corridor clocks even though they were in ignorance of the existence of the bid opening clock.

Concerning your contention that the bid was delivered to the bid opening officer on time, we note that Ronnie Hannon's testimony at the "hearing" indicated he did not notice the clock in the bid opening room when he entered, and he was therefore unable to testify as to the time reflected by that clock. The only basis for concluding that the bid was timely by that clock is the testimony of Ronnie Hannon that the bid opening officer either said he was "right on the nose" (page 16 of the transcript) or that he "made it by the nose" (page 34 of the transcript).

Conversely, the bid opening officer's memo of June 17, which apparently was written immediately after the bid opening and must therefore be given full credence, indicates that the red light on the clock flashed, the bid opening officer announced that it was time for opening of bids, and began to open the first bid before Mr. Hannon appeared. That this was in fact the case would appear to be borne out by the advice in paragraph 5 of the statement that all other bidders indicated, as they left the room, that the Wilkinson and Jenkins bid should be considered a late bid. On the record, we therefore conclude that the bid

was not delivered until after 1:00 p.m., as shown by the clock in the bid opening room.

With respect to your final contention, that it would be in the best interest of the Government to consider the bid, the Armed Services Procurement Regulation (ASPR), which furnish direction and rules applicable to bid openings, are quite detailed and specific as to the handling of late bids. First, ASPR 2-303.1 provides that:

> Bids which are received in the office designated in the invitation for bids *after the exact time set for opening* are "late bids," even though received only one or two minutes late (but see 2-402.3). Late bids *shall not* be considered for award except as authorized in this paragraph 2-303. [Italic supplied.]

Additional, ASPR 2-303.5 which deals with hand-carried bids and hence is for applicable here reads:

> A late hand-carried bid, or any other late bid not submitted by mail or telegram, *shall not* be considered for award. [Italic supplied.]

This Office has consistently taken the position that these, and other similar, regulations must be strictly construed and enforced. Thus, in our decision reported at 47 Comp. Gen. 784 (1968), where a bid was hand delivered late, but prior to opening of the first bid, we said:

> In keeping with the clear mandate of these regulations, this Office has consistently refused to permit consideration of hand delivered bids after the time set for the final receipt of bids even where no bids have been opened. B-137550, December 18, 1958 and B-164073, April 24, 1968.
>
> Your client's lack of knowledge of other bid prices and good faith are, under the circumstances, not relevant. Further, it is the opinion of this Office that competition is strengthened by insuring that only those bids received before the time stated are for consideration. While this may operate harshly in certain instances, any relaxation of the rule would inevitably create confusion and disagreements as to its applicability under varying circumstances and would increase the opportunity for frauds. B-130889, March 26, 1957.

While the bid in that case was delivered 15 minutes after the time set for bid opening, we are aware of no reason why a distinction should be made, or a different conclusion should be reached where, as in the instant case, it appears that the bid was hand delivered about 55 seconds after bid opening time. See, in this connection, B-137550, December 18, 1958, in which we reached the same conclusion where a bid was 5 minutes late; B-130889, March 26, 1957, where the bid was 2 minutes late; and B-164073, April 24, 1968, where the bid was 4 minutes late by the bid opening room clock, but only 1 minute late by the time subsequently determined to be the correct time. As stated repeatedly in the decisions of this Office, we believe that maintenance of confidence in the integrity of the competitive bidding system is of much greater importance than a monetary saving in an individual procurement.

In view of the foregoing, it is our opinion that the bid of Wilkinson and Jenkins must be considered a late bid and cannot properly be considered for award.

Accordingly, your protest must be denied.

[B-173849]

Pay—Retired—Disability—Recomputation of Retired Pay—"Highest Percentage of Disability"

A member of the uniformed services who when retired for length of service was found to be physically fit for military duty despite residual muscle damage from war wounds and who suffered a myocardial infarction when he voluntarily returned to active duty is entitled to combine the percentages of both disabilities in the recomputation of his retired pay under 10 U.S.C. 1402(b), even though the section only provides for the member's return to his earlier retired status. for pursuant to section 1402(d), his disability retired pay must be based upon the highest percentage of disability attained while on active duty after retirement and, therefore, the member's disability from war wounds continuing to exist upon his return to retired status is for inclusion in the "highest percentage" determination, notwithstanding the wounds did not render him unfit for active military service.

To the Secretary of the Army, September 17, 1971:

Further reference is made to letter dated August 11, 1971, from the Assistant Secretary of the Army (FM), requesting a decision whether, in the recomputation of the retired pay of a member of the uniformed services pursuant to 10 U.S.C. 1402(b), the percentage of disability incurred on active duty after retirement may be combined with the percentage of disability found to exist at the time of retirement. The request has been assigned Submission SS-A-1131 by the Department of Defense Military Pay and Allowance Committee.

The member to whom the submission refers was retired for length of service on January 1, 1965. At that time he was found to be physically fit for military service despite residual muscle damage resulting from wounds incurred in Korea. Although those wounds were ratable in accordance with the Veterans Administration Schedule for Rating Disabilities, they were not rated as causing him to be disabled for active service. Accordingly, he was retired not by reason of physical disability.

On January 1, 1968, the member voluntarily returned to active duty. On July 11, 1970, he suffered a myocardial infarction from which he is still recuperating and his case is before the United States Army Disability System for release from active service and return to the retired list.

The myocardial infarction is ratable at 60 percent and the ratings attributable to the residuals of his war wounds, if combined with ratings for his present unfitting condition, would result in a combined rating of 70 percent. Hence, doubt has been raised as to the proper application of 10 U.S.C. 1402(d) in the recomputation of the member's retired pay when he reverts to an inactive status on the retired list.

Subsection (b) of section 1402, Title 10, U.S. Code, provides as follows:

(b) A member of an armed force who has been retired other than for physical disability, and who while on active duty incurs a physical disability of at least 30 percent for which he would otherwise be eligible for retired pay under chapter

61 of this title, is entitled, upon his release from active duty, to retired pay under subsection (d).

Having incurred a disability of more than 30 percent while on active duty after retirement, the member, under the provisions of subsection (d) of section 1402, may, upon his return to the retired list, elect to receive either (1) the retired pay to which he became entitled when he retired plus applicable adjustments under 10 U.S.C. 1401a, or (2) retired pay computed by taking the highest monthly basic pay that he received while on active duty after retirement and multiplying, as he elects, by 2½ percent of years of service credited under 10 U.S.C. 1208, or by "the highest percentage of disability attained while on active duty after retirement."

Subsection 1402(b) does not provide for physical disability retirement, but only for return to an earlier retired status with receipt of disability retirement pay if the conditions of that section are met. This is true because the member retains his retired status while on active duty and because clause (1) of 10 U.S.C. 1402(d) permits the member to elect to receive the retired pay to which he became entitled when he first retired. Furthermore, the member, having already been retired, may not be placed upon the temporary disability retired list. Thus, the recomputation in his case under the disability retired pay formula must be based upon the highest percentage of permanent disability he attained while on active duty after retirement.

Although the member's disability from his war wounds did not render him unfit to be retained in the military service and he was retired for length of service, it seems clear that the residual muscle damage which was incurred while on active duty was permanent in nature. While his reversion to an inactive status on the retired list may not be construed as a "retirement," he is entitled to elect disability retirement pay computed on the highest percentage of disability attained while on active duty after retirement. That is to say, he is entitled to the ratable percentage of disability determined to exist at the time of his reversion to the retired list in the same manner as if he were retiring for disability under chapter 61, Title 10, U.S. Code, which would include all permanent disability then present which was incurred while on active duty.

Accordingly, since the disability resulting from the member's war wounds continued to exist upon his return to retired status, that disability should be included in the computation of the highest percentage of disability which he attained while on active duty after retirement even though, when considered alone, the disability resulting from his war wounds was not determined to be such as to render him unfit for active military service.

[B-135984]

Torts—Claims Under Federal Tort Claims Act—Settlement—Claimant's Indebtedness to Government

Where an agreement with the person whose leg was negligently fractured when struck by a food cart while visiting a Veterans Administration (VA) hospital provided for settlement of the tort claim in the amount of $25,000, plus $5,857, the cost of furnishing emergency and followup care at the hospital pursuant to 38 U.S.C. 611(b)—a total award of $30,857—the voucher issued in settlement of the award should set off the claimant's indebtedness for the hospitalization against the total award, specifying credit of the setoff to the VA, Medical Care appropriation. However, where a tort suit filed in a Federal District Court is compromised by the Attorney General under 28 U.S.C. 2677, such an agreement is a net settlement, as is a judgment that provides for the deduction of an indebtedness, and in each case the debt for the emergency hospitalization is extinguished notwithstanding the appropriation involved will not be reimbursed.

To the Administrator, Veterans Administration, September 22, 1971:

Reference is made to your letter of May 17, 1971, which raises several questions regarding the procedure to be followed in settling tort claims where the claimant also has an outstanding debt due the Government.

An example of a situation giving rise to your questions concerned an incident that occurred in a VA hospital in which a nonveteran female visitor was negligently struck by a food cart fracturing her leg. Pursuant to the authority contained in 38 U.S.C. 611(b), the visitor was furnished emergency and followup care which, under the rate schedule established pursuant to this statutory provision, amounted to $5,857. This individual subsequently filed a tort claim against the Government and an agreement was reached to settle the claim for $25,000, in addition to the care received by her for which she had been billed but had not paid.

You state that this agreement gives rise to the question whether the voucher in settlement of the claim which would be submitted to the General Accounting Office for processing and subsequently to the Treasury Department for payment, should be made out in the amount of $30,857 or in the amount of $25,000. It is explained that under the first alternative, the claimant would have been required to submit her personal check in the amount of $5,857 to satisfy the indebtedness incurred due to the hospitalization furnished her. The proceeds from the check then would be used to reimburse the Medical Care appropriation pursuant to the administrative provision set forth in the last sentence of the Veterans Administration section of the Independent Offices and Department of Housing and Urban Development Appropriation Act, 1971, approved December 17, 1970, 84 Stat. 1454, which reads as follows:

No part of the foregoing appropriations shall be available for hospitalization or examination of any persons except beneficiaries entitled under the laws bestowing such benefits to veterans, unless reimbursement of cost is made to the appropriation at such rates as may be fixed by the Administrator of Veterans Affairs.

By following the procedure outlined above, compliance would be had with the above-quoted provision of law in that the appropriation would have been reimbursed. However, you state the practical effect of such a procedure would be that the amount of the reimbursement would actually be obtained from the Treasury Department funds (the indefinite appropriation established pursuant to 31 U.S.C. 724(a)) and could conceivably be construed as supplementation of one appropriation from another.

The second alternative is described in your letter as follows:

> The alternative to the above procedure would be to prepare the voucher to be transmitted to GAO and ultimately the Treasury Department, to cover only the $25,000 cash benefit, and then terminate, by appropriate administrative action, any further attempts to collect the $5,857 relating to medical services rendered. While this alternative procedure would seem to be within the broad perimeter of authority granted agency heads to take "reasonably necessary" action to properly consider, compromise and settle federal tort claims (see 29 C.G. 111), it also raises questions as to the fiscal procedure which must be followed to accomplish it. For example, while the Federal Claims Collection Act of 1966 (PL 89-508) authorizes the head of federal agencies, or their designee, to compromise or terminate collection action on claims due the United States not exceeding $20,000, the regulations implementing this Act, as promulgated by the Comptroller General (title 4, CFR, chapter II) and followed by the Veterans Administration (title 38, CFR, section 1.900 et seq.), may not permit the termination of collection action where the debtor is obtaining a settlement from the Government under the Federal Tort Claims Act. Furthermore, unless actual reimbursement is made to the Veterans Administration Medical Care appropriation, the restrictive language of the VA Appropriations Act, cited above, against the expenditure of funds to provide hospitalization of non-Veterans Administration beneficiaries unless reimbursement is made, might be violated.

While the above example involves settlement authority of the Veterans Administration, it is stated that similar difficulties have been encountered in terminating collection action on a debt established as a result of emergency hospitalization of a nonbeneficiary where a suit filed in a Federal District Court has been settled by the Attorney General pursuant to the compromise authority contained in 28 U.S.C. 2677. In that case the United States Attorney compromised the action against the United States for $4,000 and notified your agency to terminate collection action on a bill for emergency hospitalization which amounted to $2,948.

A third example is cited in your letter but it appears, except for the particular appropriation involved, to be so little different from the first example cited above as not to require repeating it here.

You ask to be advised—

> * * * whether the authority granted by the Federal Tort Claims Act is broad enough to authorize the agency to terminate or waive collection of a debt due the Government by the claimant as part of the overall settlement of a tort claim (a procedure which is administratively desirable), or whether we must treat the collection of debts due the Government as entirely separate actions, even though the money which may ultimately be collected on such debt is derived from the tort claim settlement, and is thus indirectly paid by the Treasury Department.

For all practical purposes the net effect of either procedure proposed with respect to the first example described above is that the indebted-

ness is set off against the amount of the tort claim award. If the amount of the tort claim award is greater than the debt, the debt is extinguished by setoff against the award and the claimant is paid the balance. If the amount of the award is less than the indebtedness the indebtedness should be reduced by the amount of the award.

In other words, it is our view that the setoff action is entirely separate and apart from any compromise of the indebtedness and such action would be proper without regard to the fact that the amount of the indebtedness might exceed $20,000 and with or without the enactment of the Federal Claims Collection Act of 1966. This latter act neither enlarged nor restricted the authority of a department head to compromise and settle tort claims against his department or to set off against any tort claim award the amount of the claimant's indebtedness to the Government.

Consequently, with respect to the first example, the amount of the tort claim award is $30,857 against which there should be set off the amount of the claimant's indebtedness to the Government. Also, since the amount set off properly is for credit to an appropriation account the voucher issued in settlement of the claim should specify that the amount of the setoff be deposited to the credit of the designated account and that the balance of the award be paid to the claimant.

With respect to the second example it may be noted that the courts in entering judgments usually deduct from the amounts otherwise determined to be due successful litigants any amounts properly for setoff or for allowance under a counterclaim, and judgments then are entered in net amounts. Under such a net judgment the amount of the indebtedness is satisfied upon entry of that judgment.

The compromise entered into by the United States Attorney in this case appears to be in the nature of a net settlement, it being assumed that the indebtedness was properly before the Attorney General, and thus the compromise agreement also extinguishes the debt for the emergency hospitalization. While we think a judgment or compromise under the Tort Claims Act should be in the gross amount with instructions therein to set off any indebtedness involved, it appears that your agency has no alternative in this matter but to comply with the terms of a judgment or compromise agreement by terminating the indebtedness, notwithstanding the fact that the appropriation involved will not be reimbursed.

[B–173630]

Timber Sales—Bids—Bid Bond—Sealed Bid-Auction Timber Sale

Under a combined sealed bid-auction timber sale, the failure of the high bidder to furnish a bid bond with its sealed bid submitted to qualify for the oral bidding—a failure corrected before the oral bidding began—was a minor informality, and the defect having been remedied, the high bid was properly included in the oral bidding. Even if sections 1–2.404–2(5)(f) and 1–10.103–4 of the Federal

Procurement Regulations requiring the rejection of bids to furnish goods or services when a bid bond is not furnished applied to timber sales, 38 Comp. Gen. 532, incorporated in procurement regulations, should not be made applicable to the timber sale since the sealed bids only qualified bidders to participate in the oral bidding and no competitive advantage accrued prior to the oral bidding as no bidder knew whether any other bidder would submit an oral bid in excess of his, or any other bidder's sealed bid price.

To Bodie, Minturn & Glantz, September 23, 1971:

Reference is made to your letter of July 15, 1971, with enclosure, protesting on behalf of the San Juan Lumber Company (San Juan) against the action of the Forest Service Supervisor of the Malheur National Forest, John Day, Oregon, which permitted the Crown Zellerbach Corporation to participate in the oral bidding portion of a combined sealed bid-auction timber sale.

On May 13, 1971, the Forest Service Supervisor, pursuant to 36 CFR 221.8(a), advertised the sale in a John Day, Oregon, newspaper. This advertisement advised prospective bidders that sealed bids would be accepted until 10:00 A.M., June 14, 1971, and that immediately following the opening of sealed bids there would be oral bidding for an estimated 14,500,000 board feet of designated timber in an area of Murphy Creek in Malheur National Forest. The advertisement also gave a minimum acceptable bid and stated that the required bid guarantee was $5,000.

Three sealed bids were received and opened on schedule. Bids received from two of the bidders, San Juan Lumber, Inc. (San Juan), and Edward Hines Lumber Co. (Hines), were found to be in order, qualifying both firms for participation in the oral bidding. However, the third bid, which was received from Crown Zellerbach Corporation, did not contain the bid guarantee. When this was brought to the attention of Crown Zellerbach's representative he immediately produced a check which he gave to the Forest Service officer in charge of the oral bidding. A recess was called to determine the acceptability of Crown Zellerbach's bid. It was determined that Crown Zellerbach's failure to include its bid guarantee with its bid was a minor informality which could be waived. There is some dispute as to exactly when San Juan first objected to accepting Crown Zellerbach's bid guarantee. In any event the objection was timely and duly noted by the Forest Service before the oral bidding was continued.The last oral bid made by Hines was $238,774, which was followed by Crown Zellerbach's bid of $240,614. From this point on until the final bid of $352,834, made by San Juan, only San Juan and Crown Zellerbach participated in the bidding.

By its letter of July 14, 1971, and your supplementary letter dated July 15, 1971, with enclosures, San Juan protested the action of the Forest Service permitting Crown Zellerbach to participate in the oral bidding, because at the time Crown Zellerbach was allegedly an unqualified bidder. Additionally, San Juan requested that the amount of

the contract to be awarded be reduced to $240,634, which was the amount of San Juan's first bid after Hines, who is alleged to be the only other qualified bidder, submitted its last bid.

The INSTRUCTIONS TO BIDDERS, which were set forth in the bid form, read, in pertinent part, as follows:

4. SUBMISSION OF SEALED BIDS. Sealed bids must be submitted to the Forest Officer, designated by the advertisement as the receiving officer, at or prior to the time established by the advertisement. Such bids should be enclosed with the required bid guarantee in a sealed envelope addressed to the designated receiving officer. * * *.

* * * * * * *

6. ORAL AUCTION BIDDING. If the advertisement provides for ORAL AND SEALED bids, each bidder to participate in the oral auction must submit a sealed bid in accordance to the preceding instructions. All parties who submit a satisfactory sealed bid will be permitted to continued bidding orally immediately following opening and posting of the sealed bids. The high bidder must confirm his bid in writing immediately upon being declared the high bidder.

* * * * * * *

8. BID GUARANTEE. A bid guarantee in the form of cash, a bid bond on Form 2400-24, or an irrevocable letter of credit, a certified check, bank draft, cashier's check or money order payable to the Forest Service, USDA, in the amount specified by the advertisement as the bid guarantee must accompany each bid. * * * Failure to submit an acceptable bid guarantee will require rejection of the bid as unresponsive unless there is no other acceptable bid. * * *.

In the brief accompanying your letter of July 15 you cite by reference section 1-2.404-2(5)(f) of the Federal Procurement Regulations (FPR) which states:

Where a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bids shall be rejected except as otherwise provided in section 1-10.103-4.

FPR 1-10.103-4 relates to the failure to submit a proper bid guarantee and states that where an IFB requires a bid guarantee and it is not furnished, the bid shall be rejected, except in certain situations not applicable in the present case.

Since these regulations are applicable to Federal agencies in the procurement of property and services, we question whether they are applicable to the sale of timber by the Department of Agriculture. However, even if it is assumed that the regulations are applicable in the present case, we must point out that the above mentioned regulations (FPR 1-2.404-2(5)(f) and 1-10.103-4) were promulgated subsequent to and in conformance with our decision reported at 38 Comp. Gen. 532 (1959). See 46 Comp. Gen. 11 (1966). In our 1959 decision, which you also cite in the brief accompanying your letter of July 15, we held that a bid guarantee requirement in an IFB is material and the procuring activity cannot waive a failure to comply with the requirement but must reject the bid as nonresponsive, even though the failure is inadvertent and not due to the bidders inability to obtain a bond. In that decision the rationale for the above rule was stated, in pertinent part, as follows:

* * * adherence to the rule permitting waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, * * *.

We do not believe that the rule set out in our 1959 decision and incorporated into the various procurement regulations should be applicable in the present case, since the sealed bids in the instant case were intended only as a means of ascertaining who should be considered a qualified bidder to participate in the oral bidding. Under such circumstances we fail to see how the opportunity to supply a missing bid bond, following bid opening and prior to commencement of the oral bidding, could result in a competitive advantage to that bidder, or in a competitive disadvantage to the other bidders. In this connection, it is apparent that, prior to commencement of the oral bidding, no bidder is in a position to know whether any other bidder will, or will not, submit an oral bid which will be in excess of his, or any other bidder's, sealed bid price.

Under the circumstances, it is our opinion that Crown Zellerbach's failure to submit a bid bond with its bid should be considered a minor informality, and since the defect was remedied prior to commencement of the oral bidding, Crown Zellerbach's bids were properly included in the oral bidding.

Accordingly, your protest is denied, and we are today advising the Forest Service to award the sale contract at your high oral bid price.

[B–157936]

States--Employees--Training by Federal Government

State and local government employees who are admitted to Federal training programs established by Federal agencies to train Government professional, administrative, and technical personnel pursuant to section 302 of the Intergovernmental Personnel Act of 1970 (Public Law 91–648, approved January 5, 1971) may not be reimbursed the travel and subsistence expenses incurred incident to such training since the undefined term "cost of training" in section 302, given its usual and ordinary meaning does not authorize a Federal agency to pay the travel and subsistence expenses of State and local government employees admitted to Federal training programs.

To the Chairman, United States Civil Service Commission, September 24, 1971:

Reference is made to your letter of August 20, 1971, requesting our decision as to whether Federal agencies may pay travel and subsistence expenses of State and local government employees who are admitted to Federal training programs established by the Federal agency to train Government professional, administrative, and technical personnel. Specifically, you ask whether payment of such expenses is authorized under section 302 of the Intergovernmental Personnel Act of 1970, Public Law 91–648, approved January 5, 1971, 42 U.S.C. 4742.

Public Law 91–648, in order to strengthen the training and development of State and local government employees and officials, particularly in the above-mentioned fields, authorizes Federal assistance in the training of State and local employees. Section 302, dealing with the admission of these employees to Federal employees' training programs, provides as follows:

> Sec. 302. (a) In accordance with such conditions as may be prescribed by the head of the Federal agency concerned, a Federal agency may admit State and local government employees and officials to agency training programs established for Federal professional, administrative, or technical personnel.
>
> (b) Federal agencies may waive, in whole or in part, payments from, or behalf of, State and local governments for the costs of training provided under this section. Payments received by the Federal agency concerned for training under this section shall be credited to the appropriation or fund used for paying the training costs.
>
> (c) The Commission may use appropriations authorized by this Act to pay the initial additional developmental or overhead costs that are incurred by reason of admittance of State and local government employees to Federal training courses and to reimburse other Federal agencies for such costs.

Subsection 302 (b), 42 U.S.C. 4742(b), provides that Federal agencies may waive, in whole or in part, State and local government payments only for the *cost of the Federal training* provided. Subsection (c), 42 U.S.C. 4742(c), does provide for Commission payment of "additional developmental or overhead costs" incurred by reason of the admittance of State and local government employees to the Federal training courses. However, on the basis of the express language used, neither of these provisions would appear to be for application with respect to the travel and subsistence costs presently in question. Since the term "cost of training" is not defined in the act, it has to be given its usual and ordinary meaning in the context in which it is used. It seems rather clear from reading the entire section that such term refers to the cost incurred by the Federal agency in conducting the training program and it is not common practice for the agency conducting training programs to finance travel and subsistence expenses of other agency employees attending the training program.

The House and Senate Reports which accompanied S. 11, the bill which later became Public Law 91–648, generally only paraphrase the provisions of section 302 (see H. Rept. No. 91–733, and S. Rept. No. 91–489), and consequently do not disclose what is meant by the term "cost of training." However, recourse to prior legislative history on similar bills containing provisions substantially identical to that of section 302 is more fruitful. In Senate Report 90–701, which accompanied S. 699, entitled the Intergovernmental Personnel Act of 1967 (which passed the Senate but was not considered by the House prior to adjournment of the first session of the 90th Congress), the following is stated with respect to section 302:

> This section also authorizes Federal agencies admitting State and local government employees and officials to their training programs to receive payments for the training from, or on behalf of, State and local governments, to waive all or part of such payments, and to enter into agreements concerning

the payments with the State or local government concerned. It is contemplated that such agreements may deal with such matters as method of payment, training fees, contributions for costs not covered by the fee, and amounts to be waived. State and local government payments may include contributions to meet any *costs of conducting the training* not covered by payments on a "fee-per-student" or similar basis. *These unreimbursed costs would ordinarily be developmental or overhead costs, perhaps involved in the modification of a training program or course to better meet the needs of participating State and local government employees, as well as of Federal employees.*

This section authorizes the Commission to use appropriations authorized by this bill to meet such costs to the extent they are unreimbursed, and to reimburse other Federal agencies for these costs. (p. 19) [Italic supplied.]

The above-quoted legislative history refers only to the Federal costs of conducting the training and does not evidence a congressional intent that the Federal agencies concerned pay the travel and subsistence costs in question.

In light of the foregoing, you are advised that in our opinion section 302 of the Intergovernmental Personnel Act of 1970, does not authorize Federal agencies to pay the travel and subsistence expenses of State and local government employees admitted to the agencies' training programs.

[B–173961]

Officers and Employees—Transfers—Relocation Expenses—Distance Between Old and New Stations

Before payment of relocation expenses may be made to an employee who incident to a change of duty station located 30 miles from his old duty station, moved his residence which was located 26 miles from the new duty station to within 14 miles of the new station in order to reduce his travel time from 1 hour to 20 minutes, an agency determination must be made, pursuant to section 1.3a of Office of Management and Budget Circular No. A–56, revised June 26, 1969, that the relocation of the employee's residence for the relatively short distance within the same general local area was incident to the transfer of his official station.

To Luella S. Howard, September 27, 1971:

Reference is made to your letter dated August 24, 1971, and enclosures, inquiring as to whether the claim for reimbursement of relocation expenses of Mr. Jack C. Lipscomb may be certified for payment in view of National Safety Transportation Board (NTSB) Order 1500.1A, section V, paragraph 2f.

The matter concerns the transfer of Mr. Lipscomb from his duty station at 800 Independence Avenue, S.W., Washington, D. C., to Dulles International Airport. A distance of 30 miles exists between the old and new duty stations. The distance between Mr. Lipscomb's old residence in Arlington and the new duty station at Dulles is reported to be 26 miles and to take approximately 1 hour to travel in rush hour traffic as opposed to a commuting time of about 20 minutes from the Manassas residence to Dulles over a distance of 14 miles.

Pursuant to this change of duty stations, Mr. Lipscomb asserts he is eligible for expenses incident to relocation of his residence from Arlington, Virginia, to Manassas, Virginia. He submitted a request to the ad-

ministrative office for approval of a travel authorization to provide for such expenses.

By memoranda under dates of July 9 and July 28, 1971, approval of the travel authorization was denied by Mr. Richard Spears, General Manager of NTSB. In the cited memoranda, Mr. Spears stated that the request was denied on the following grounds:

1. NTSB is "not practicing a policy of reimbursement for household moves in the Washington area nor do we intend to initiate such a policy."
2. The "intent of NTSB Order 1500.1A, Section V, paragraph 2f is not to provide for a gross compensation of an employee's relocation expenses in the kind of situation presented by Mr. Lipscomb."
3. A lack of prior approval of the travel authorization pursuant to paragraph 3 of section 1 of the referenced NTSB order is fatal to the claim.

Section V, paragraph 2f of NTSB Order 1500.1A states:

Distance Limitation. Travel and transportation expenses and applicable allowances as provided in this section are payable provided that the transfer to a new official station is at least 10 miles distant from the old official station, and, in case of a relatively short distance relocation, the Safety Board has determined that the relocation was incident to the change of official station.

The above agency regulation is based upon section 1.3a of Office of Management and Budget Circular No. A–56, revised June 26, 1969, which provides in pertinent part as follows:

(1) When change of official station or other action described below is authorized or approved by such official or officials as the head of the department may designate, travel and transportation expenses and applicable allowances as provided herein are payable in the case of (a) transfer of an employee from one official station to another for permanent duty, *provided that:* the transfer is in the interest of the Government and is not primarily for the convenience or benefit of the employee or at his request; the transfer is to a new official station which is at least ten miles distant from the old station; and, in case of a relatively short distance relocation, a determination of eligibility is made under the provisions of 1.3a (2) * * *

(2) When the change of official station involves a short distance within the same general local or metropolitan area, the travel and transportation expenses and applicable allowances in connection with the employee's relocation of his residence may be authorized only when the agency determines that the relocation was incident to the change of official station. Such determination should take into consideration such factors as commuting time and distance between the employee's residence at the time of notification of transfer and his old and new posts of duty as well as the commuting time and distance between a proposed new residence and the new post of duty. Ordinarily, a relocation of residence should not be considered as incident to a change of official station unless the one-way commuting distance from the old residence to the new official station is at least ten miles greater than from the old residence to the old official station. Even then, circumstances surrounding a particular case, e.g., relative commuting time, may suggest that the move of residence was not incident to the change of official station.

As indicated by section 1.3, it is a matter for agency determination whether the change of residence in cases involving a relatively short distance relocation is incident to the transfer of official station. See B–163955, March 14, 1969; B–172756, June 29, 1971; and B–167171, August 8, 1969. Unless and until such a determination has been made as required by said section 1.3, there is no basis for payment of the claim.

The enclosures are returned as requested.

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ADVERTISING

Advertising *v.* negotiation

"Turnkey" housing projects

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

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Government

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Surrender of vested rights

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

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

ALIENS
Employment
Transfers
Between nonappropriated and appropriated fund positions

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

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

ATOMIC ENERGY COMMISSION Page

Contracts

Competition *v.* defense requirements

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

AUTOMATIC DATA PROCESSING SYSTEMS

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

BIDDERS

Debarment

Contract award eligibility

Business affiliates

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

Product status

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

Types of debarment

Debarment of firms or individuals from securing Govt. contracts are of two types—by statute or regulation—neither of which define term "debarred." However, grounds for listing firm or individual on Joint Consolidated List and consequences thereof are set forth in detail in Part 6 of Armed Services Procurement Reg. (ASPR). Administrative debarment of firm or individual under ASPR 1-604 may be authorized at discretion of Secretary of each department or by his authorized representative in

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public interest. Regulation is not based on specific statute dealing with debarment, but is in implementation of general authority to contract contained in Armed Services Procurement Act of 1947, as amended (41 U.S.C. 151)---- 65

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

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

Contracts, generally. (*See* **Contracts**)
Government equipment, etc.
Special tooling
Status of tooling
Low bid on Fin Assemblies that indicated Govt-owned special tooling would be used and included pursuant to "Research and Production Property and Special Tooling" provision of invitation for bids (IFB) list of tooling identified as to part number, acquisition cost, and age, but did not include written permission to use tooling, or information as to anticipated amount of tooling to be used and rental fee, was erroneously evaluated as nonresponsive bid as special tooling is not defined as "facility" in par. 13-101.8 of Armed Services Procurement Reg. and IFB did not require permission to use tooling, and since omitted informa-

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Government equipment, etc.—Continued

Special tooling—Continued

Status of tooling—Continued

tion could be calculated from bid, deviation is minor one that may be waived. Therefore, it is recommended that contract awarded be terminated for convenience of Govt. and low bid considered for award..... 62

Late

Hand-carried delay

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

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

Mistakes

Allegation withdrawal

Award of contract

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

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Intended bid price uncertainty

Correction

Inconsistent with competitive bidding system

Determination by contracting agency that although low bidder on military housing construction project had made bona fide mistake, but in absence of clear and convincing evidence of bid actually intended bid may not be modified but only withdrawn as degree of proof required to permit correction is much higher than that required to justify withdrawal of bid, is question of fact made pursuant to authority delegated by U.S. GAO to administrative agencies, subject to GAO review, and review of data furnished in support of alleged error evidences determination was reasonable, for there is nothing inconsistent in fact data submitted proves existence of mistake but does not meet standard of proof required to establish bid intended 1

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

Specifications. (*See* **Contracts, specifications**)

Transfers

Propriety

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

Two-step procurement

Preproposal conferences and site surveys

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

Specifications

Revision

Formal amendment requirement

Although prior to issuance of second step of two-step procurement for design, fabrication, and installation of defense test chamber, formal amendment to letter request for technical proposals should have been

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Two-step procurement—Continued
Specifications—Continued
Revision—Continued
Formal amendment requirement—Continued
issued to cover revisions in specifications as required by par. 3–805.1(e) of Armed Services Procurement Reg. in order to give acceptable offerors opportunity to modify their proposals, contract awarded will not be disturbed for omission was not prejudicial as technical proposals of offerors who during negotiations under first-step of procurement had made their proposals acceptable indicate offerors prior to bidding on second-step had ample opportunity to intelligently consider specifications revisions and thus in effect had incorporated them in their second-step bid. However, recurrence of circumstances of this procurement should be prevented---------- 85

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

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

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

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

CERTIFYING OFFICERS

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Timeliness

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

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

Validity of assignment

Sale, etc., of business

Transfer of Govt. contracts pursuant to novation agreement to successor in interest of contractor who ceased operations because of lack of funds and liens attached against it is valid and may be recognized since transfer of rights and obligations incident to sale or merger of contracting corporation or other entity does not constitute assignment

CLAIMS—Continued Page
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in violation of Anti-Assignment Act, 41 U.S.C. 15, which rule is implemented by par. 26-402, ASPR, recognizing third party interest to Govt. contract where interest is incidental to transfer of all assets of contractor, or all of that part of contractor's assets involved in performance of contract 145

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

Reversion rate
The special rate selected for demoted employee as rate he will receive at end of 2-year saved pay period prescribed by 5 U.S.C. 5337, salary retention act, is not affected pursuant to 5 CFR 530.306(b)(3) by fact special rate is decreased or discontinued during retention period, and special rate is rate to which employee will revert on expiration of retention period and continues to be entitled to as long as he remains in same position or until he becomes entitled to higher rate. Therefore,

COMPENSATION—Continued Page
Downgrading—Continued
Saved compensation—Continued
Reversion rate—Continued
GS–13 employee demoted to GS–11 with retained special rate of $18,945, for whom GS–11, step 10, at special rate of $18,088 was selected, rate subsequently decreased to $16,604, is entitled at end of retention period to $18,088 for as long as he remains in same position or until he is entitled to higher rate ---- 53
Special salary rates
Adjustments on basis of statutory increases
Since adjustments in special salary rates under 5 U.S.C. 5303(d) resulting from general increase in statutory pay schedules are not increases provided by statute within meaning of 5 U.S.C. 5337(a), adjustments may not be reflected in retained rates derived from special salary rates established for demoted employees, and it follows general conversion rule in sec. 531.205(a)(3) of Civil Service Regs. (36 F.R. 1029) with respect to salary rates above maximum rate of employee's grade is for application in prescribing increase for employees receiving retained salary rate under 5 U.S.C. 5337(a) ---- 53
Revision or termination
Salary rates in excess of maximum regular rates under Civil Service Regs. (5 CFR 530.306) and E.O. 11073, dated Jan. 2, 1963, received by employees as result of downward revision or termination of special rate ranges are not covered by 5 U.S.C. 5337—salary retention act—but are saved rates to which general conversion rules for statutory pay increases apply ---- 53
Military pay. (*See* Pay)
Overtime
Traveltime
Between residence and headquarters
Traveltime of one-half hour each way from home to duty station and return in Govt-owned boat by Federal Aviation Administration wage board employees assigned to Alaska and performing regularly scheduled duty period of 8 hours per day is not compensable as overtime under 5 U.S.C. 5542(b)(2)(B) since employees did not perform work while traveling, travel was not incident to performance of work, nor did it result from event which could not be scheduled or controlled administratively, and fact that boat trip could be dangerous because of tidal action or dock in need of repairs does not constitute travel under arduous conditions as travel under arduous conditions is travel performed under severe weather conditions ---- 7
Rates
Highest previous rate
Administrative discretion
Retroactive adjustment in pay rate of employee who upon reemployment in GS–3 position following resignation from GS–6, step 4, position is placed in step 10 under highest-previous rate rule to step 1 in accordance with administrative regulation restricting use of highest-previous rate rule may not be reversed as appointment to GS–3, step 10, was not administrative waiver of administrative restriction on use of highest-

COMPENSATION—Continued Page
Rates—Continued
Highest previous rate—Continued
Administrative discretion—Continued
previous rate rule, nor may original pay-setting action be affirmed by regulating or higher level, since distinctions recognized in 30 Comp. Gen. 492 between statutory and so-called purely administrative regulations no longer apply in view of contrary court cases and fact that B–158880 changed rule in 30 Comp. Gen. 492. However, overpayments received in good faith by employee may be waived under 5 U.S.C. 5584 ---------- 30
Applicability
Foreign service salary rates
Employees of Dept. of Agriculture who completed service in overseas positions under 22 U.S.C. 2385(d)(1) and are entitled to same benefits as provided by 22 U.S.C. 928 for persons appointed to Foreign Services Reserve, upon reinstatement to their former positions, may have their salaries set under highest previous rate rule in accordance with 5 U.S.C. 5334(a) and sec. 531.203(c) of Civil Service Regs. rather than on basis they are only eligible to receive step increases they would have earned had they remained in positions in which regularly employed, as highest previous rate rule has never been construed as excluding salary rates attained in Foreign Service ---------- 50
Saved
Downgrading actions. (*See* **Compensation, downgrading**)
CONTRACTORS
Employees
Overseas
Death or injury
Compensation
Award to eligible survivors of Govt. contractor employee killed in Vietnam by military aircraft which was made pursuant to Defense Base Act (DBA) that incorporated provisions of Longshoremen's and Harbor Workers' Compensation Act to overseas employment of decedent does not preclude third party liability on part of Govt. under Military Claims Act since concept of exclusive liability under first two acts is limited to contractor, and right to compensation benefits stemmed from DBA and not War Hazard Compensation Act (WHCA), which supplemented war-risk hazard benefits of DBA. Although for purposes of WHCA, injured persons are considered civilian employees of Govt. and, therefore, are precluded by Federal Employees' Compensation Act from asserting damage claim against U.S., this act does not change status of contractor employees for purposes of Defense Base Act ---------- 125

CONTRACTS

Page

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

Awards

Cancellation

Erroneous awards

Cancellation not required

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

Erroneous awards

"Good faith" award

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

"Good faith" effect

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

Withdrawal of bid mistake allegation

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

CONTRACTS—Continued Page

Bid procedure. (*See* **Bids**)

Construction

Against writer

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

Cost-plus

Evaluation factors

"Best buy analysis"

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

Labor stipulations

Davis-Bacon Act

Classification of workmen

Local area practice

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

CONTRACTS—Continued Page

Labor stipulations—Continued

Service Contract Act of 1965

Minimum wage, etc., determinations

Failure to issue

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

Negotiation

Awards

Initial proposal basis

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

Competition

Discussion with all offerors requirement

Actions not requiring

Fact that during negotiations of new contract for reproduction of research papers for sale to Govt. and general public upon cancellation of existing contract because of deficiencies in request for proposals (RFP), discussions relative to start-up time were held with offerors within competitive range but not with incumbent contractor who had submitted offer under amended RFP was not prejudicial as matter of start-up time was not germane to incumbent contractor whereas discussions were required with other offerors because complications involved in procurement necessitated revision in contract award date, thereby lessening time new contractor would have to prepare for contract performance 37

Generally

Although all pertinent portions of work study report used in preparation of request for proposals (RFP) for data base management system should have been physically included in RFP for sake of clarity since RFP incorporated report by reference as well as apprising offerors of procurement requirements, time to question adequacy of evaluation

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Generally—Continued
criteria and their importance was prior to proposal submission. Furthermore, on basis of cost effectiveness formula in report, use of operation and maintenance costs computed on 5-year cycle to determine most advantageous proposal in competitive range, procedure that is *per se* acceptable if such costs are reasonable, was proper, even though operation and maintenance costs were incapable of precise assessment and were only projected costs---------- 102
Evaluation factors
"Best buy analysis"
Failure to disclose 3 to 1 ratio of technical merit to cost evaluation formula of "best buy analysis" included in Evaluation/Selection Plan approved as basis for award of cost-plus-fixed-fee contract under request for quotations for procurement of automatic test equipment for internal combustion engine powered materiel—where no questions as to best buy analysis were raised at prequotation conference—was not prejudicial in award competition, even though solicitation did not accurately reflect importance to be accorded to cost, which was ranked as least important of 11 evaluation factors, since two offerors selected for negotiations were essentially equal as to technical ability and, therefore, only consideration remaining for evaluation was price, advantage not to be ignored pursuant to par. 4-106.4 of Armed Services Procurement Reg---------- 33
Although negotiation of turnkey construction contracts for military family housing under 10 U.S.C. 2304(a)(10) and par. 3-210.2(xiii) of Armed Services Procurement Reg. which authorize negotiation when it is impracticable to obtain competition or impossible to draft specifications was necessary because impossibility of drafting adquate specifications is inherent in "turnkey" concept that permits housing developer to use his own architect, future procurements by same method should, in addition to identifying technical criteria for each turnkey project, indicate relative importance of each evaluation factor, and when using "best value formula" evaluation, Govt. should determine that its actual requirements were met, and if those requirements become definitized during course of negotiations, all offerors in competitive range must be given opportunity to submit revised proposals---------- 129
Point rating
Price consideration
Under point rating criteria—technical efficacy 40 percent; qualifications 20 percent; real cost to Govt. 40 percent—established to evaluate oil analysis services for Navy, where criteria contrary to par. 3-501(b), ASPR, was not disclosed, award to incumbent contractor, whose price was not lowest, on basis of narrow margin higher score on subfactors of "Extended Voyages" and "MSC Experience," was not most advantageous to Govt.—requirement of ASPR 3-101. Since, under ASPR 3-805.1, price may not be disregarded, two minor subfactors should have been evaluated on sliding scale to allow for respective capabilities of offerors in competitive range, and acceptance of higher priced and higher scored offer rather than lower priced, lower scored offer that would meet Govt.'s needs should have been supported by specific determination of technical superiority---------- 153

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

"Successor employer" doctrine

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

Late proposals and quotations

Acceptance in Government's interest

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

Propriety

Incumbent contractor

Fact that during negotiations of new contract for reproduction of research papers for sale to Govt. and general public upon cancellation of existing contract because of deficiencies in request for proposals (RFP), discussions relative to start-up time were held with offerors within competitive range but not with incumbent contractor who had submitted offer under amended RFP was not prejudicial as matter of start-up time was not germane to incumbent contractor whereas discussions were required with other offerors because complications involved in procurement necessitated revision in contract award date, thereby lessening time new contractor would have to prepare for contract performance 37

Request for proposals

Submission date

Extension

Rejection pursuant to par. 3–506 of ASPR of hand-carried late proposal received at 1320 hours, or 20 minutes subsequent to closing hour specified in request for proposals to maintain real property in Korea, which had been extended twice, first amendment advancing initial closing hour from 1500 to 1300 hours and second one indicating change in opening date only, was in accordance with provision in each amendment that

CONTRACTS—Continued Page

Negotiation—Continued

Request for proposals—Continued

Submission date—Continued

Extension—Continued

unchanged terms and conditions remained in full force and effect. Furthermore, checking in both amendments block "the hour and date specified for receipt of offers is extended" rather than "is not extended" block, where only one of blocks could be checked, created no ambiguity, considering time was specifically mentioned in amendment No. 1, while only date was changed in amendment No. 2 149

Specifications

Basis for exception to formal advertising

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

Novation agreements

Rule

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

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

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Options

More than one award

Equal option quantities

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

Requests for quotations

Evaluation factors

Disclosure

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

Research and development

Duality of approach

Award of similar research and development contracts to two laboratories by Atomic Energy Commission for simultaneous development of nuclear weapons is not considered duplication of effort but duality of approach to double opportunity for making new discoveries and to explore diversity of branches of existing science and engineering fields .. 57

Service Contract Act of 1965. (*See* **Contracts, labor stipulations, Service Contract Act of 1965**)

Specifications

Amendments

Furnishing requirement

Although prior to issuance of second step of two-step procurement for design, fabrication, and installation of defense test chamber, formal amendment to letter request for technical proposals should have been issued to cover revisions in specifications as required by par. 3–805.1(e) of Armed Services Procurement Reg. in order to give acceptable offerors opportunity to modify their proposals, contract awarded will not be disturbed for omission was not prejudicial as technical proposals of offerors who during negotiations under first-step of procurement had

CONTRACTS—Continued Page
Specifications—Continued
Amendments—Continued
Furnishing requirements—Continued
made their proposals acceptable indicate offerors prior to bidding on second-step had ample opportunity to intelligently consider specifications revisions and thus in effect had incorporated them in their second-step bid. However, recurrence of circumstances of this procurement should be prevented ---------- 85
Conformability of equipment, etc., offered
Part numbers
Where invitation provides for acceptance of bids on ball bearings that are identified by different part numbers than those cited in solicitation if such parts are prequalified, although inquiry by contracting officer to manufacturer of part offered by low bidder would have disclosed it met requirements of controlled drawing contained in procurement package, since procuring agency's representative at manufacturing plant reported that information and data available did not support acceptance of part offered by low bidder, contracting officer acted reasonably in rejecting low bid. However, in future procurements, whenever part number offered by qualified vendor differs from specification requirements, advice as to its acceptability should be obtained from prime contractor ---------- 141
Failure to furnish something required
Bid bond
Sales
Under combined sealed bid-auction timber sale, failure of high bidder to furnish bid bond with its sealed bid submitted to qualify for oral bidding—failure corrected before oral bidding began—was minor informality, and defect having been remedied, high bid was properly included in oral bidding. Even if secs. 1–2.404–2(5)(f) and 1–10.103–4 of Federal Procurement Regs. requiring rejection of bids to furnish goods or services when bid bond is not furnished applied to timber sales, 38 Comp. Gen. 532, incorporated in procurement regulations, should not be made applicable to timber sale since sealed bids only qualified bidders to participate in oral bidding and no competitive advantage accrued prior to oral bidding as no bidder knew whether any other bidder would submit oral bid in excess of his, or any other bidder's sealed bid price -- 182
Qualified products
Time for qualification
Award of contract to low bidder whose product did not receive qualification approval for listing on Military Products List prior to bid opening, although product—electron tubes—had been tested and found qualified for listing on specified date prior to bid opening but ministerial act of approval had not been accomplished, does not violate par. 1–1107.1 of Armed Services Procurement Reg. which prescribes that only bids "offering products which are qualified for listing on applicable Qualified Products List at time set for opening of bids" shall be considered in making awards, as regulation does not impose requirement for formal "approval" prior to bid opening, and, moreover, regulation

CONTRACTS—Continued Page
Specifications—Continued
Qualified products—Continued
Time for qualification—Continued
should be interpreted to insure procurement of products meeting Govt. needs in manner that will not place unnecessary restrictions on competition 47

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

COURTS
Judgments, decrees, etc.
Judgment of dismissal
Adjudication on the merits
Dismissal by court of complaint requesting both preliminary injunction pending resolution of protest filed with U.S. GAO to award of contract to reproduce research papers for sale to Govt. and public subsequent to cancellation by mutual agreement of contract initially awarded petitioner due to deficiencies in request for proposals (RFP), and permanent injunctive relief that would compel cancellation of contested award and reinstate initial contract was according to Federal Rule of Civil Procedure 41(b) final adjudication on merits that GAO must honor since two issues involved in protest—that resolicitation on basis of price only should have been advertised and not negotiated and that procurement procedures had been violated by calling for best and final offers three times—were adjudicated by court 37

DAVIS-BACON ACT
(See **Contracts, labor stipulations, Davis-Bacon Act**)

DEBT COLLECTIONS
Waiver
Civilian employees
Compensation overpayments
Employee unaware of overpayment
Retroactive adjustment in pay rate of employee who upon reemployment in GS–3 position following resignation from GS–6, step 4, position is placed in step 10 under highest-previous rate rule to step 1 in accordance with administrative regulation restricting use of highest-previous rate rule may not be reversed as appointment to GS–3, step 10, was not administrative waiver of administrative restriction on use of highest-

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Civilian employees—Continued
Compensation overpayments—Continued
Employee unaware of overpayment—Continued
previous rate rule, nor may original pay-setting action be affirmed by regulating or higher level, since distinctions recognized in 30 Comp. Gen. 492 between statutory and so-called purely administrative regulations no longer apply in view of contrary court cases and fact that B–158880 changed rule in 30 Comp. Gen. 492. However, overpayments received in good faith by employee may be waived under 5 U.S.C. 5584. 30

DEPARTMENTS AND ESTABLISHMENTS
Agents. (*See* Agents, Government)
Regulations. (*See* Regulations)
Services to States, etc.
Training employees
State and local government employees who are admitted to Federal training programs established by Federal agencies to train Govt. professional, administrative, and technical personnel pursuant to sec. 302 of Intergovernmental Personnel Act of 1970 (Pub. L. 91–648, approved Jan. 5, 1971) may not be reimbursed travel and subsistence expenses incurred incident to such training since undefined term "cost of training" in sec. 302, given its usual and ordinary meaning does not authorize Federal agency to pay travel and subsistence expenses of State and local government employees admitted to Federal training programs---- 185

DISCHARGES AND DISMISSALS
Military personnel
Probationary period
Severance pay entitlement
Regular Army officer with less than 3 years of service who was recommended for elimination under sec. IX, Ch. 5, AR 635–100, because of substandard performance of duty properly was discharged without severance pay since officer was not discharged under 10 U.S.C. Ch. 359—secs. 3781–3787—and, therefore, sec. 3781 prescribing that board of officers may be convened to review record of officer to determine if he should be eliminated or required to show cause for his retention on active list is not for application and officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while officer is in probationary status with less than 3 years' service, and par. 10–3b, AR 635–120, indicating to contrary should be clarified---- 8

EDUCATION
Marine Corps Associate Degree Completion Program
Requirements
Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not

EDUCATION—Continued Page
Marine Corps Associate Degree Completion Program—Continued
Requirements—Continued
use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program.... 3

EQUIPMENT
Automatic Data Processing Systems
Selection and purchase
Negotiation procedures

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

FAMILY ALLOWANCES
Separation
Type 2
Common residence
Management and control by member

Restriction on payment of Type II family separation allowance (FSA–II) of $30 per month authorized by 37 U.S.C. 427(b) to cases where primary dependents of member of uniformed services are living in residence subject to member's management and control and which he will share with them as common residence during such time as duty assignments permit having been removed by Pub. L. 91–529, amending sec. 427(b), FSA–II is payable regardless of residence of primary dependents if separation is result of member's military orders. To extent par. 30311a of Dept. of Defense Military Pay and Allowances Entitlements Manual prescribing member is not member with dependents for FSA–II entitlement when "the sole dependent resides in a hospital, school, or institution" provides otherwise it is more restrictive than law. 47 Comp. Gen. 431, overruled..... 97

Wife also member of uniformed services

Member of uniformed services with no dependents, as his wife, his only dependent, is also member of service on active duty is not entitled to family separation allowance (FSA–II) provided by 37 U.S.C. 427(b) because, notwithstanding elimination from section pursuant to Pub. L. 91–533 of qualifying language for entitlement to FSA–II of phrase "who is entitled to a basic allowance for quarters," prohibition in 37 U.S.C. 420 against increasing member's allowance on account of dependent entitled to basic pay under 37 U.S.C. 204 precludes payment of FSA–II,

FAMILY ALLOWANCES—Continued Page
Separation—Continued
Type 2—Continued
Wife also member of uniformed services—Continued
since in view of similarity of family separation allowance to basic allowance for quarters, rules denying increased quarters allowance to member whose spouse, his sole dependent, is also entitled to active pay is for application in determining entitlement to family separation allowance 116

FEDERAL TORT CLAIMS ACT MATTERS
(*See* Torts, claims under Federal Tort Claims Act)

FEES
Parking
Space on a monthly basis
Official and personal use

When employee ocasionally uses his privately owned automobile on official business, pro rata reimbursable cost to Govt. for weekly or monthly parking fees paid by employee may be computed on basis of number of days space is available to him during period for which rental is paid. Use of 31-day base in 47 Comp. Gen. 219 in computing Govt.'s pro rata share for monthly cost of parking fees did not consider that under monthly parking rate agreement, parking is not available on weekends or holidays 79

FOREIGN GOVERNMENTS
Nationals
Employment by United States
Under governmental agreement

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

FUNDS
Appropriated. (*See* Appropriations)
Federal grants, etc., to other than States
Educational grants
More than one
Prohibition

Recipient of Social and Rehabilitation Service (SRS) research fellowship grant upon receiving award of Special Nurse Fellowship grant became ineligible for SRS fellowship under SRS regulations, which prohibit receipt of any other Federal educational benefits during period

FUNDS—Continued Page
Federal grants, etc., to other than States—Continued
Educational grants—Continued
More than one—Continued
Prohibition—Continued
of SRS fellowship, and regulation issued under authority in 29 U.S.C. 37(b) is statutory regulation that has force and effect of law, and regulation having been published in Federal Register, as well as CFR (45 CFR 405.31), recipient is charged with knowledge of prohibition against receiving two Federal educational benefits and there is no basis for waiving recovery of SRS grant---------- 162

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

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

Labor stipulations
Davis-Bacon Act
In dispute concerning wages paid for placing and puddling concrete in which fiber duct pipe was encased, where wage rate determination incorporated in contract only listed "concrete puddler," and invitation had not indicated any other rate was to be paid for fiber duct encased concrete, request by contracting agency for information that would indicate substantial area practice of using concrete puddlers for encasing fiber duct in concrete at rates specified in wage determination was in accord with decisions of Comptroller General and, although Secretary of

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Labor stipulations—Continued
Davis-Bacon Act—Continued
Labor's function under Davis-Bacon Act, 40 U.S.C. 276a, generally is exhausted when wage determination is furnished, contract provided for referral to Secretary of classification disagreements and, therefore, new evidence of local area practices may not be considered by GAO. 50 Comp. Gen. 103, holding contractor liable for Davis-Bacon Act violations, is affirmed---------- 42
Settlements
Time limitation
Claim submitted by Western Union Telegraph Company within 10-year limitation period for filing claims with U.S. GAO for services denied administratively on basis claim was barred by 1-year limitation of action provision in Communications Act, 47 U.S.C. 415(a), is cognizable under 31 U.S.C. 71 and 236, as time limitations for commencement of "actions at law" prescribed by Communications Act and Interstate Commerce Act do not affect jurisdiction of GAO unless specifically provided by statute, and 3-year limitation for filing transportation claims with GAO prescribed by sec. 322 of Transportation Act, as amended, 49 U.S.C. 66, does not affect right of firms providing service under Communications Act to have their claims considered by GAO if presented within 10 full years after dates on which claims first accrued---------- 20
GRATUITIES
Reenlistment bonus
Critical military skills
Reenlistment for purpose of college training
Under Marine Corps Associate Degree Completion Program (MAD COP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program--- 3
HOUSING
"Turnkey" developers
Contracts
Negotiation procedures
Although negotiation of turnkey construction contracts for military family housing under 10 U.S.C. 2304(a)(10) and par. 3-210.2(xiii) of Armed Services Procurement Reg. which authorize negotiation when it is impracticable to obtain competition or impossible to draft specifications was necessary because impossibility of drafting adequate specifications is inherent in "turnkey" concept that permits housing developer

HOUSING—Continued Page
"Turnkey" developers—Continued
Contracts—Continued
Negotiation procedures—Continued
to use his own architect, future procurements by same method should, in addition to identifying technical criteria for each turnkey project, indicate relative importance of each evaluation factor, and when using "best value formula" evaluation, Govt. should determine that its actual requirements were met, and if those requirements become definitized during course of negotiations, all offerors in competitive range must be given opportunity to submit revised proposals---------- 129

LEAVES OF ABSENCE
Civilians on military duty
Active duty, etc., training
Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and too are for recovery---------- 23

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

MILEAGE
Housetrailer. (*See* Trailer Allowance)

MILITARY PERSONNEL Page

Discharges and dismissals. (*See* Discharges and Dismissals)

Education. (*See* Education)

Elimination

Probationary period

Severance pay entitlement

Regular Army officer with less than 3 years of service who was recommended for elimination under sec. IX, Ch. 5, AR 635–100, because of substandard performance of duty properly was discharged without severance pay since officer was not discharged under 10 U.S.C. Ch. 359—secs. 3781–3787—and, therefore, sec. 3781 prescribing that board of officers may be convened to review record of officer to determine if he should be eliminated or required to show cause for his retention on active list is not for application and officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while officer is in probationary status with less than 3 years' service, and par. 10–3b, AR 635–120, indicating to contrary should be clarified 81

Family allowances. (*See* Family Allowances)

Outside United States

Tours of duty extended

Drayage and storage of household effects

Involuntary extension of overseas tour of duty being marked departure from usual practice of rotating members of uniformed services from overseas to U.S., extension may be viewed as unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes movement of dependents and household effects without regard to issuance of orders directing change of station. Therefore, Joint Travel Regs. may be amended to authorize reimbursement to member who unable to renew lease for local economy housing for extended tour of duty incurs expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters 17

Pay. (*See* Pay)

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

Reservists

Retirement

Eligibility determination erroneous

Notice to reservist of armed services under 10 U.S.C. 1331(d) of eligibility to retire pursuant to chapter 67 of Title 10, U.S.C., upon discovery that although member meets 20 years' service requirement of 1331(a)(2), he does not satisfy sec. 1331(a)(3) to effect last 8 years of qualifying service must have been as member of Reserve component or war service requirement of sec. 1331(c), and that he is excluded from chapter by sec. 1331(a)(4) because he is entitled to retired pay under "another provision of law," serves to validate only service eligibility requirements of clauses (2) and (3) of 10 U.S.C. 1331(a) since for purpose of 10 U.S.C. 1406, limiting revocation of retired pay because of error in determining years of service under sec. 1331(a)(2), both clauses must be read together, whereas sec. 1406 does not affect prohibitions in secs. 1331(a)(4) and 1331(c) 92

MILITARY PERSONNEL—Continued Page

Reservists—Continued

Retirement—Continued

Eligibility determination erroneous—Continued

Notification pursuant to 10 U.S.C. 1331(d) to reservist of armed services of eligibility to retired pay under chapter 67 of Title 10 U.S.C., where member has been granted retired pay prior to discovery of ineligibility is conclusive only as it pertains to service eligibility requirement of sec. 1331(a)(2)—20 years of service computed under sec. 1332—and sec. 1331(a)(3) to effect that at least 8 years of qualifying service must be within category named in sec. 1332(a)(1), provided payment of retired pay began after Oct. 14, 1966, effective date of Pub. L. 89-652 (10 U.S.C. 1331(d)) 92

Training

Civilian schools

Studies related to military specialty

Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program 3

OFFICERS AND EMPLOYEES

Aliens. (*See* Aliens, employment)

Compensation. (*See* Compensation)

Debt collections

Waiver. (*See* Debt Collections, waiver, civilian employees)

Dual benefits

Under separate statutes

Prohibition

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A-56, were unauthorized and too are for recovery 23

OFFICERS AND EMPLOYEES—Continued Page

Fees for parking vehicles. (*See* Fees, parking)
Overtime. (*See* Compensation, overtime)
Per diem. (*See* Subsistence, per diem)
Reduction-in-force
Reemployment after break in service
Travel and transportation expenses

Entitlement to travel and transportation expenses of employee of Army in Canal Zone who separated in reduction-in-force action is returned to actual residence in U.S. and after 7-day break in service accepts position with another Dept. of Defense component located 419 miles from residence is because of break in service within purview of 5 U.S.C. 5724a(c) and not 5 U.S.C. 5724(e). Under sec. 5724(a)(c), governing reimbursement of employees who involved ln reduction-in-force or transfer of function are employed within 1 year of separation, acquiring agency bears expenses of employee's travel between old and new stations, less costs incurred by losing agency, which if in excess of cost of direct travel between stations, need not be recouped by losing agency---- 14

Service agreements
Failure to fulfill contract
Service interrupted by military duty

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

Transfers
Break in service
Expense entitlement

Employee who resigned from Federal Bureau of Investigation before expiration of 12-month service period following transfer of official duty station and accepted employment with another bureau in Dept. of Justice after 15-day break in service is liable for refund of transfer costs disbursed to him under 5 U.S.C. 5724(i), and monies collected from him may not be reimbursed on basis of *Finn* v. *U.S.*, 192 Ct. Cl. 814, which holds "Government service" as used in sec. 5724(i) is not synonymous with agency service since that ruling does not apply when there is break in service for then Govt.'s obligation for "transfer" expenses could not be definitely established as obligation would be dependent upon whether or not separated employee eventually returned to Govt. service---- 52

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Effective date

Per diem and travel purposes

Employee who while on temporary duty in Boston is confirmed for permanent appointment at temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after employee had departed on July 23, and to which point he did not return to assume new duties until Aug. 9, during which period he performed duty at old headquarters, Chicago, returned to Boston to seek housing, attended conference, and was on leave, is considered to have been transferred for travel and per diem purposes on Aug. 9, date he returned to Boston, and as employee was expected to return to Chicago after completing temporary duty, rule that employee may not be allowed per diem after receiving notice temporary duty station is to be his permanent station has no application 10

Relocation expenses

Break in service

Entitlement to expenses effect

Employee of National Park Service in California who refusing to relocate with transferred functions was separated and granted severance pay, and who after placing his residence on market, which was sold within 2 months, and storing his household effects, departed for Washington, D.C., in privately owned automobile, towing housetrailer, upon reinstatement in Park Service in Washington within 4 months, is entitled pursuant to 5 U.S.C. 5724(a) to same benefits he would have been entitled to had he transferred without break in service, and under Pub. L. 89–516, employee may be reimbursed for sale of house, storage of household effects, expenses incurred to travel to Washington with wife prior to reinstatement, and other proper relocation expenses. However, reimbursement for storage and shipment of employee's effects, precludes allowance of mileage for housetrailer 27

Distance between old and new stations

Before payment of relocation expenses may be made to employee who incident to change of duty station located 30 miles from his old duty station, moved his residence which was located 26 miles from new duty station to within 14 miles of new station in order to reduce his travel time from 1 hour to 20 minutes, agency determination must be made, pursuant to sec. 1.3a of Office of Management and Budget Cir. No. A–56, revised June 26, 1969, that relocation of employee's residence for relatively short distance within same general local area was incident to transfer of his official station 187

Transfers between agencies

Applying rational of *Finn* v. *U.S.*, 428 F. 2d 828, to transfers of employees between agencies, term "employee" may not be defined to mean individual employed by particular agency as opposed to one employed by any Govt. agency, therefore, notwithstanding employees breached 12-month employment agreements they signed to remain in service after interagency transfer, they are entitled, no break in service having occurred, to reimbursement under 5 U.S.C. 5724a on basis of

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Transfers between agencies—Continued
interagency transfer for expenses of house purchase at new station made within 1-year time limit prescribed, whether purchase and/or settlement occurred before or after transfer to another agency, and it is immaterial if employees negotiated for transfer to other agency, after signing employment agreement, for agreement only obligates them to serve in Govt., not in particular agency ---------- 112
What constitutes a transfer
Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and too are for recovery ---------- 23
Transportation. (*See* **Transportation**)
Travel expenses. (*See* **Travel Expenses**)
Vessel crew members. (*See* **Vessels, crews**)

PAY
Additional
Proficiency pay
College training period
Under Marine Corps Associate Degree Completion Program (MADCOP), which requires enlisted man to reenlist or extend enlistment so as to have 6 years of active duty remaining at time of assignment to 2-year junior college program for purpose of obtaining associate degree, and which authorizes payment of all tuition costs and fees and continuation of member's pay and allowances, including previously approved proficiency pay, member selected for MADCOP who will not use his specialty while attending junior college may only be paid variable reenlistment bonus and proficiency pay if major course of study pursued is reasonably related to his critical skill, such as disbursing man studying data processing and who upon completion of studies that enhanced his skills will resume duties he had performed prior to entering program --- 3
Aviation duty
Minimum flight requirements
Waiver
Regulations implementing statutory authorized waiver of minimum flight requirements for members of uniformed services while attending course of instruction of 90 days or more or while serving under certain overseas assignments may be amended to include periods of travel, leave, and temporary duty not in excess of 90 days in cases of consecu-

PAY—Continued Page

Aviation duty—Continued

Minimum flight requirements—Continued

Waiver—Continued

tive duty assignments between schools and remote places, or vice versa, where statutory waiver is applicable, and extention of waiver of flight performance requirements would be in accord with congressional intent expressed in legislative history of Defense Dept. Appropriation Act of 1971 to avoid high cost of providing aircraft that otherwise would be incurred. However, rule of 34 Comp. Gen. 243 should continue to be applied to travel to first of such assignments and from last of such assignments 95

Civilian employees. (*See* **Compensation**)

Retired

Advancement on the retired list

Reduction in pay effect

Retired pay of enlisted members of uniformed services who serve on active duty after retirement under 10 U.S.C. 3914, which brings their retired pay recomputation within purview of 10 U.S.C. 1402(a), and who then are advanced on retired list pursuant to 10 U.S.C. 3964, is not required to be recomputed under 10 U.S.C. 3992 if reduction of retired pay would result, unless member consents to advancement. Therefore, since sergeant first-class E–7 who is advanced on retired list to grade of warrant officer WO–1 would benefit by having his retired pay recomputed under sec. 1402(a) and not sec. 3992, his advancement may be rescinded on basis advancement was contrary to his wishes. However, where it would be to advantage of member, also re-retired as sergeant first-class E–7, but advanced to grade of major, to accept advancement, recomputation of his retired pay should be in accordance with sec. 3992 137

Disability

Recomputation of retired pay

"Highest percentage of disability"

A member of uniformed services who when retired for length of service was found to be physically fit for military duty despite residual muscle damage from war wounds and who suffered myocardial infarction when he voluntarily returned to active duty is entitled to combine percentages of both disabilities in recomputation of his retired pay under 10 U.S.C. 1402(b), even though section only provides for member's return to his earlier retired status, for pursuant to sec. 1402(d), his disability retired pay must be based upon highest percentage of disability attained while on active duty after retirement and, therefore, member's disability from war wounds continuing to exist upon his return to retired status is for inclusion in "highest percentage" determination, notwithstanding wounds did not render him unfit for active military service 178

Revocation limitations

Notice to reservist of armed services under 10 U.S.C. 1331(d) of eligibility to retire pursuant to chapter 67 of Title 10, U.S.C., upon discovery that although member meets 20 years' service requirement of 1331(a)(2), he does not satisfy sec. 1331(a)(3) to effect last 8 years of qualifying service must have been as member of Reserve component or war service requirement of sec. 1331(c), and that he is excluded from chapter by sec. 1331(a)(4) because he is entitled to retired pay under

PAY—Continued Page

Retired—Continued

Revocation—Continued

"another provision of law," serves to validate only service eligibility requirements of clauses (2) and (3) of 10 U.S.C. 1331(a) since for purpose of 10 U.S.C. 1406, limiting revocation of retired pay because of error in determining years of service under sec. 1331(a)(2), both clauses must be read together, whereas sec. 1406 does not affect prohibitions in secs. 1331(a)(4) and 1331(c)---- 92

Notification pursuant to 10 U.S.C. 1331(d) to reservist of armed services of eligibility to retired pay under chapter 67 of Title 10 U.S.C., where member has been granted retired pay prior to discovery of ineligibility is conclusive only as it pertains to service eligibility requirement of sec. 1331(a)(2)—20 years of service computed under sec. 1332—and sec. 1331(a)(3) to effect that at least 8 years of qualifying service must be within category named in sec. 1332(a)(1), provided payment of retired pay began after Oct. 14, 1966, effective date of Pub. L. 89–652 (10 U.S.C. 1331(d))---- 92

Severance

Early discharge

During probationary period

Regular Army officer with less than 3 years of service who was recommended for elimination under sec. IX, Ch. 5, AR 635–100, because of substandard performance of duty properly was discharged without severance pay since officer was not discharged under 10 U.S.C. Ch. 359—secs. 3781–3787—and, therefore, sec. 3781 prescribing that board of officers may be convened to review record of officer to determine if he should be eliminated or required to show cause for his retention on active list is not for application and officer is considered to have been discharged under 10 U.S.C. 3814, which provides for discharge without severance pay while officer is in probationary status with less than 3 years' service, and par. 10–3b, AR 635–120, indicating to contrary should be clarified---- 81

PAYMENTS

Absence or unenforceability of contract

Acceptance of goods or services by Government

Grants-in-aid status

Recovery of erroneous payments of Federal grants may not be waived on basis of *quantum meruit* doctrine which has been applied where goods or services are received by Govt. in absence of express contractual provision in view of fact it would be unfair for Govt. to have tangible benefits without recompense, since Govt. accrues no tangible benefits, as traditionally understood in context of *quantum meruit* and *quantum valebat* cases, from grant of funds, nor does activity carried out by grantee constitute efforts or labor performed for direct benefit of U.S.--- 162

Quantum meruit

Payment in lieu of taxes

Costs of performing governmental functions of installing traffic light over public highway or paving public dirt road in vicinity of Veterans Administration (VA) hospitals may not be shared by VA, since such governmental functions are generally financed from revenues raised by State and local taxation and Federal contributions in lieu of State and

PAYMENTS—Continued Page

Absence or unenforceability of contract—Continued

Quantum merit—Continued

Payment in lieu of taxes—Continued

local taxes are not permitted in absence of specific statutory provision, and broad authority in 38 U.S.C. 5001 *et seq.* to operate hospitals does not contain necessary specific authorization for VA to participate in proposed governmental functions. Moreover, principle of payments measured by *quantum* of services rendered is only applicable to direct utility type services, such as sewer, water, trash, etc., that are furnished to Govt 135

Dual

Under separate statutes

Prohibition

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A–56, were unauthorized and too are for recovery 23

In lieu of taxes. (*See* **States, Federal payments in lieu of taxes**)

PUBLIC UTILITIES

Relocation

Government liability

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

QUARTERS

Failure to furnish

Vessel crew members

Quarters and subsistence authorized by 5 U.S.C. 5947 to be furnished aboard vessels without charge to employees of Corps of Engineers, Dept. of Army, engaged in floating plant operations may not be obtained by contract in lieu of individual allowance to each employee that is prescribed by section for employees prevented from boarding vessel because of hazardous weather conditions or because vessel is in ship-

QUARTERS—Continued Page
Failure to furnish—Continued
Vessel crew members—Continued
yard undergoing repairs since purpose of sec. 5947 is to substitute allowance when quarters and subsistence cannot be provided on board vessel, and authority to furnish quarters or subsistence, or both, "on vessels, without charge" does not authorize furnishing of quarters and subsistence off vessel without charge in lieu of allowance payment. However, furnishing of quarters in accordance with 5 U.S.C. 5911 is not precluded ---------- 100

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

STATES
Employees
Training by Federal Government
State and local government employees who are admitted to Federal training programs established by Federal agencies to train Govt. professional, administrative, and technical personnel pursuant to sec. 302 of Intergovernmental Personnel Act of 1970 (Pub. L. 91–648, approved Jan. 5, 1971) may not be reimbursed travel and subsistence expenses incurred incident to such training since undefined term "cost of training" in sec. 302, given its usual and ordinary meaning does not authorize Federal agency to pay travel and subsistence expenses of State and local government employees admitted to Federal training programs ---- 185

Federal aid, grants, etc.
Federal statutory restrictions
State fund contributions
Requirement in Adult Education Act of 1966 (20 U.S.C. 1201–1213), and implementing statutory regulation, that State's contribution from non-Federal sources for any fiscal year "will be not less than amount expended for such purpose from such sources during preceding fiscal year" may not be waived since statute and regulation are constructive, if not actual, notice of requirement, and grant funds are to be recovered if State fails to meet its financial contribution. If failure is due to circumstances beyond State's control, possible waiver is for consideration on individual basis. Fact that initially grant was erroneously made

STATES—Continued Page

Federal aid, grants, etc.—Continued

Federal statutory restrictions—Continued

State fund contributions—Continued

does not justify waiver as Govt. is only bound by acts of its agents within scope of delegated authority, which does not permit giving away money or property of U.S., either directly or by release of vested rights.. 162

Recovery by Federal Government

Waiver

Recovery of erroneous payments of Federal grants may not be waived on basis of *quantum meruit* doctrine which has been applied where goods or services are received by Govt. in absence of express contractual provision in view of fact it would be unfair for Govt. to have tangible benefits without recompense, since Govt. accrues no tangible benefits, as traditionally understood in context of *quantum meruit* and *quantum valebat* cases, from grant of funds, nor does activity carried out by grantee constitute efforts or labor performed for direct benefit of U.S..... 162

Unemployment relief

Work for Federal Government restriction

Emergency Employment Act of 1971, designed to deal with high unemployment and drastic curtailment of vital public services at State and local levels because of lack of local revenues does not constitute statutory authority to enable Federal agencies to consent to have work done for them by local non-Federal employees hired under act in view of prohibitory language in sec. 3679 of R.S., 31 U.S.C. 665(b), against accepting voluntary services or employing personal services in excess of that authorized by law, and because sums made available under act are intended to staff open local Govt. jobs and not Federal offices. Also to permit staffing of Federal offices would involve application of various laws relating to Federal employees..... 152

Federal payments in lieu of taxes

Governmental functions

Specific authorization requirement

Costs of performing governmental functions of installing traffic light over public highway or paving public dirt road in vicinity of Veterans Administration (VA) hospitals may not be shared by VA, since such governmental functions are generally financed from revenues raised by State and local taxation and Federal contributions in lieu of State and local taxes are not permitted in absence of specific statutory provision, and broad authority in 38 U.S.C. 5001 *et seq.* to operate hospitals does not contain necessary specific authorization for VA to participate in proposed governmental functions. Moreover, principle of payments measured by *quantum* of services rendered is only applicable to direct utility type services, such as sewer, water, trash, etc., that are furnished to Govt..... 135

STATUTES OF LIMITATION Page

Claims

General Accounting Office

Settlement jurisdiction

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

STORAGE

Household effects

Military personnel

Nontemporary storage

Outside United States

Involuntary extension of overseas tour of duty being marked departure from usual practice of rotating members of uniformed services from overseas to U.S., extension may be viewed as unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes movement of dependents and household effects without regard to issuance or orders directing change of station. Therefore, Joint Travel Regs. may be amended to authorize reimbursement to member who unable to renew lease for local economy housing for extended tour of duty incurs expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters..... 17

SUBSISTENCE

Meals furnished civilian employee

Allowance when unavailable

Quarters and subsistence authorized by 5 U.S.C. 5947 to be furnished aboard vessels without charge to employees of Corps of Engineers, Dept. of Army, engaged in floating plant operations may not be obtained by contract in lieu of individual allowance to each employee that is prescribed by section for employees prevented from boarding vessel because of hazardous weather conditions or because vessel is in shipyard undergoing repairs since purpose of sec. 5947 is to substitute allowance when quarters and subsistence cannot be provided on board vessel, and authority to furnish quarters or subsistence, or both, "on vessels, without charge" does not authorize furnishing of quarters and subsistence off vessel without charge in lieu of allowance payment. However, furnishing of quarters in accordance with 5 U.S.C. 5911 is not precluded..... 100

SUBSISTENCE—Continued

Per diem Page

Military personnel

Temporary duty

Recall to permanent duty station

Navy officer who was unable to fulfill temporary duty assignment because he was recalled to permanent station for emergency duties a few hours after arrival at temporary duty station and advance payment for rental of hotel room may be reimbursed in addition to taxi fare and tips for handling baggage at air terminal for advance payment, even though payment of per diem is precluded by par. M4253-3a of Joint Travel Regs. because officer's absence from permanent duty station was less than 10 hours since officer under proper orders rented hotel room due to unavailability of Govt. quarters, and reimbursable hotel charge is considered administrative expense that is chargeable to appropriation for Operation and Maintenance, Navy 12

Temporary duty

Station later designated as permanent

Employee who while on temporary duty in Boston is confirmed for permanent appointment at temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after employee had departed on July 23, and to which point he did not return to assume new duties until Aug. 9, during which period he performed duty at old headquarters, Chicago, returned to Boston to seek housing, attended conference, and was on leave, is considered to have been transferred for travel and per diem purposes on Aug. 9, date he returned to Boston, and as employee was expected to return to Chicago after completing temporary duty, rule that employee may not be allowed per diem after receiving notice temporary duty station is to be his permanent station has no application 10

TIMBER SALES

Bids

Bid bond

Sealed bid

Auction timber sale

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

TORTS Page

Claims under Federal Tort Claims Act

Settlement

Claimant's indebtedness to Government

Where agreement with person whose leg was negligently fractured when struck by food cart while visiting Veterans Administration hospital provided for settlement of tort claim in amount of $25,000, plus $5,857, cost of furnishing emergency and followup care at hospital pursuant to 38 U.S.C. 311(b)—total award of $30,857—voucher issued in settlement of award should set off claimant's indebtedness for hospitalization against total award, specifying credit of setoff to VA, Medical Care appropriation. However, where tort suit filed in Federal Dist. Court is compromised by Attorney General under 28 U.S.C. 2377, such agreement is net settlement, as is judgment that provides for deduction of settlement, as is judgment that provides for deduction of indebtedness, and in each case debt for emergency hospitalization is extinguished notwithstanding appropriation involved will not be reimbursed 180

TRAILER ALLOWANCE

Storage and shipment of household effects

Additional allowance precluded

Employee of National Park Service in California who refusing to relocate with transferred functions was separated and granted severance pay, and who after placing his residence on market, which was sold within 2 months, and storing his household effects, departed for Washington, D.C., in privately owned automobile, towing housetrailer, upon reinstatement in Park Service in Washington within 4 months, is entitled pursuant to 5 U.S.C. 5724(a) to same benefits he would have been entitled to had he transferred without break in service, and under Pub. L. 89-516, employee may be reimbursed for sale of house, storage of household effects, expenses incurred to travel to Washington with wife prior to reinstatement, and other proper relocation expenses. However, reimbursement for storage and shipment of employee's effects, precludes allowance of mileage for housetrailer 27

TRANSPORTATION

Civilians on military duty

Dual payments

Civilian employee who incident to interruption of service in Hawaii under transportation agreement for period of active duty training in U.S. as Army reservist receives monetary allowance for return travel to Hawaii, upon reemployment under new transportation agreement is precluded by par. C4007 of Joint Travel Regs., prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as civilian and, therefore, employee is indebted for any amounts received for transportation incident to reemployment. Furthermore, since employee's reemployment is regarded as new appointment and not transfer, payments made on assumption transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Cir. No. A-56, were unauthorized and too are for recovery 23

TRANSPORTATION—Continued Page

Dependents

Civilians on military duty

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

Household effects

Military personnel

Packing, crating, drayage, etc.

Involuntary extension of overseas tour of duty being marked departure from usual practice of rotating members of uniformed services from overseas to U.S., extension may be viewed as unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes movement of dependents and household effects without regard to issuance or orders directing change of station. Therefore, Joint Travel Regs. may be amended to authorize reimbursement to member who unable to renew lease for local economy housing for extended tour of duty incurs expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters 17

TRAVEL EXPENSES

Reemployment after separation

Liability for expenses

Entitlement to travel and transportation expenses of employee of Army in Canal Zone who separated in reduction-in-force action is returned to actual residence in U.S. and after 7-day break in service accepts position with another Dept. of Defense component located 419 miles from residence is because of break in service within purview of 5 U.S.C. 5724a(c) and not 5 U.S.C. 5724(e). Under sec. 5724(a)(c), governing reimbursement of employees who involved in reduction-in-force or transfer of function are employed within 1 year of separation, acquiring agency bears expenses of employee's travel between old and new stations, less costs incurred by losing agency, which if in excess of cost of direct travel between stations, need not be recouped by losing agency 14

Temporary duty

Station later designated as permanent

Employee who while on temporary duty in Boston is confirmed for permanent appointment at temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after

TRAVEL EXPENSES—Continued Page
Temporary duty—Continued
Station later designate as permanent—Continued
employee had departed on July 23, and to which point he did not return to assume new duties until Aug. 9, during which period he performed duty at old headquarters, Chicago, returned to Boston to seek housing, attended conference, and was on leave, is considered to have been transferred for travel and per diem purposes on Aug. 9, date he returned to Boston, and as employee was expected to return to Chicago after completing temporary duty, rule that employee may not be allowed per diem after receiving notice temporary duty station is to be his permanent station has no application---------- 10

VESSELS
Crews
Quarters and subsistence on board vessels
Unavailable
Quarters and subsistence authorized by 5 U.S.C. 5947 to be furnished aboard vessels without charge to employees of Corps of Engineers, Dept. of Army, engaged in floating plant operations may not be obtained by contract in lieu of individual allowance to each employee that is prescribed by section for employees prevented from boarding vessel because of hazardous weather conditions or because vessel is in shipyard undergoing repairs since purpose of sec. 5947 is to substitute allowance when quarters and subsistence cannot be provided on board vessel, and authority to furnish quarters or subsistence, or both, "on vessels, without charge" does not authorize furnishing of quarters and subsistence off vessel without charge in lieu of allowance payment. However, furnishing of quarters in accordance with 5 U.S.C. 5911 is not precluded--------- 100

VETERANS ADMINISTRATION
Hospital services
Emergency to visitor injured at hospital
Reimbursement
Where agreement with person whose leg was negligently fractured when struck by food cart while visiting Veterans Administration hospital provided for settlement of tort claim in amount of $25,000, plus $5,857, cost of furnishing emergency and followup care at hospital pursuant to 38 U.S.C. 611(b)—total award of $30,857—voucher issued in settlement of award should set off claimant's indebtedness for hospitalization against total award, specifying credit of setoff to VA, Medical Care appropriation. However, where tort suit filed in Federal Dist. Court is compromised by Attorney General under 28 U.S.C. 2677, such agreement is net settlement, as is judgment that provides for deduction of settlement, as is judgment that provides for deduction of indebtedness, and in each case debt for emergency hospitalization is extinguished notwithstanding appropriation involved will not be reimbursed---------- 180

VOLUNTARY SERVICES
Prohibition against accepting
State employees
Emergency Employment Act of 1971, designed to deal with high unemployment and drastic curtailment of vital public services at State and local levels because of lack of local revenues does not constitute

VOLUNTARY SERVICES—Continued Page

Prohibition against accepting—Continued

State employees—Continued

statutory authority to enable Federal agencies to consent to have work done for them by local non-Federal employees hired under act in view of prohibitory language in sec. 3679 of R.S., 31 U.S.C. 665(b), against accepting voluntary services or employing personal services in excess of that authorized by law, and because sums made available under act are intended to staff open local Govt. jobs and not Federal offices. Also to permit staffing of Federal offices would involve application of various laws relating to Federal employees 152

WORDS AND PHRASES

"Debarred"

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

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