Decisions of The Comptroller General of the United States

VOLUME 52 Pages 57 to 110

AUGUST 1972

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300103700

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 45 cents (single copy) ; subscription price: $4 a year; $1 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Edwin W. Cimokowski

John W. Moore

TABLE OF DECISION NUMBERS

Cite Decisions as 52 Comp. Gen.—.

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

[B–174829]

Contracts—Negotiation—Sole Source Basis—Broadening Competition

The sole source award for the procurement of band III variable heads for radio relay sets from the Canadian Commercial Corporation, who together with its subcontractor—the Canadian Marconi Corporation (CCC/CMC)—developed the bands I and II in contemplation of the United States/Canada memorandum of understanding for defense production, which was made on the basis of the absence of engineering drawings suitable for competitive procurement due to the delinquency of CCC/CMC in furnishing the data package, and the urgency of the need for the heads, will not be questioned, as the urgency of the procurement is supported by a Determination and Findings of public exigency that is final pursuant to 10 U.S.C. 2310(b). However, the decisions of the procurement agency contributing largely to the undesirable choice of a sole-source award, future procurement actions should reflect the competition required by the statutory procurement system.

To the Secretary of the Army, August 1, 1972:

We refer to the protest of The Magnavox Company against the proposed sole-source award to the Canadian Commercial Corporation, and subcontract with the Canadian Marconi Corporation (CCC/CMC), for the production of band III variable heads of the AN/GRC–103(v) radio relay set under request for proposals (RFP) DAABO5–72–R–0034, issued by the Army Electronics Command (ECOM).

While we find no legal bases to question the proposed sole-source award, we feel that the circumstances involved require our comments as to the efficacy of the band III variable head program. In any event, subject to the time restraints administratively imposed on this program, we believe that the record, as we view it, would require the procurement activity to fully re-review its sole-source decision in the light of our conclusions reached here.

To reach our conclusions we have drawn on facts reported to us by both the procurement activity and Magnavox. Although not fully documented, we feel that the following is a fair statement of the background leading up to the present controversy.

The radio itself and bands I and II were developed by CCC/CMC in the early 1960's, presumably in contemplation of the United States/Canada memorandum of understanding for defense production. Initially, no technological data was developed for use of the United States—apparently because the agreement at that time did not provide for the procurement data contract coverage. ASPR 6–507 contains the MOU (Memorandum of Understanding), paragraph 13 of which is pertinent to our inquiry:

13. *Other Research and Development Efforts Not in Defense Development Sharing Program:*

a. Consistent with normal DOD source selection procedures, Canadian firms may bid for DOD research and development contracts which are to be funded solely by the United States. DOD will evaluate proposals from qualified Canadian

firms on a parity with proposals received from United States firms. CDDP undertakes to ensure that Canadian firms comply with DOD procurement procedures.

All the work on the radio and bands I and II was accomplished on a sole-source basis by CCC/CMC until May 15, 1969, when ECOM issued invitation for bids (IFB) DAAB05-69-B-0422—a two-step procedure for the development and production of a band I head through reverse engineering of a Government-furnished model (CCC/CMC model) and a performance specification. Various "transferable technologies" were also available in the form of a 1966 test report on the CCC/CMC development efforts. Production quantities over a 2-year period were 71 band I heads for the first year and 840 band I heads for the second year, with a 112-percent option applicable to both years. The IFB also contained a requirement for the independent research and development and production, based on a performance specification only, of 15 band II heads and 15 band III heads, plus delivery of a procurement data package sufficient for competitive reprocurement of the radio and bands I, II and III heads.

On June 25, 1969, Magnavox was awarded contract DAAB05-69-C-1332 under this IFB at the following prices: $9,977 each for band I production for both years; $8,945 each for the option quantities; $25,102 each for research, development and production of the band II head; $25,042 each for research, development and production of the band III head; $376,000 for the entire competitive reprocurement data package. We note that CCC/CMC's prices for both years and option quantities of band I heads were $13,995; the cost for the reprocurement package for bands I, II and III was $55,210. We understand that Magnavox performed in accordance with the contract provisions, but the second year production of the band I heads was canceled in August 1971 due to a lack of requirements. It is our further understanding that this competitive procurement was made necessary because of the lack of coverage in the early CCC/CMC contracts for the furnishing of a reprocurement data package, and because separate efforts to purchase a data package from CCC/CMC were unproductive.

On April 8, 1969, sole-source award of contract DAAB07-69-C-0141 was made to CCC/CMC for the production of bands II and III heads, 100 each at a unit price of $34,950.15. Item 0011 required the delivery of engineering data and drawings applicable to bands II and III at a cost of $642,362. The complete data package has not been delivered to date.

In December 1970, ECOM issued an RFP to CCC/CMC and Magnavox for the production of 131 radios with band II heads, 83 radios with band III heads and 145 band III heads. Contract DAAB05-71-

C–3716 was awarded to CCC/CMC on February 18, 1971, at the prices of $11,016, $11,016 and $4,991 each, respectively. The comparable Magnavox prices were $11,591, $11,591 and $5,206, respectively.

On March 29, 1972, RFP DAABO5–72–R–0034, the subject of this protest, was issued to CCC/CMC for production of 216 band III heads. The supporting determination and finding (D&F) cited 10 U.S. Code 2304(a)(2), as implemented by ASPR 3–202.2(vi), as negotiation authority because "the public exigency will not permit the delay incident to advertising." The procurement request dated February 15, 1972, invoked Uniform Materiel Movement and Issue Priority System (UMMIPS) "05." ASPR 3–202.2(vi) provides in this regard:

> In order for the authority of this paragraph 3–202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiating under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. The following are illustrative of circumstances with respect to which this authority may be used:
>
> * * * * * * *
>
> (vi) Purchase request citing an issue priority designator 1 through 6, inclusive, under the Uniform Materiel Movement and Issue Priority System (UMMIPS).

The D&F states, in part:

> 2. Procurement by negotiation of the above described equipment is necessary because:
>
> *a.* The purchase request cites UMMIPS Priority Designator "05" with deliveries required to begin 31 March 1973 and complete 31 January 1974 to support deployment of units in overseas theaters.
>
> *b.* A complete procurement data package to permit formal advertising will not be available until November 1972, when production drawings will be available. Allowing 4 months administrative lead time to award a contract and 24 months production lead time for a new contractor, the first delivery under formal advertising procedures would be March 1975. The requirement for initial production tests by TECOM would delay fielding equipment made by a new contractor another 6 months until September 1975.
>
> *c.* Canadian Marconi Company, a current producer of Band III RF Variable Heads and AN/GRC–103 Radio Sets, is the only known source who can furnish the equipment to be interchangeable with Band III RF Variable Heads already fielded. Based on a May 1972 award, Canadian Marconi can begin deliveries in March 1973.
>
> 3. Use of formal advertising for procurement of the above described equipment is unpracticable because solicitation by formal advertising procedures and award thereunder cannot be effected in time to assure delivery at the earliest possible date.

Magnavox protests the proposed sole-source award to CCC/CMC under RFP DAAB05–72–R–0034 for the following reasons: (1) CCC/CMC is not the only qualified source available; (2) the Army possesses sufficient technical data to permit competition; (3) Magnavox can produce an interchangeable, compatible unit from its own band III design; (4) Magnavox can meet the required delivery schedule; and (5) the proposed sole-source award would reward CCC/CMC for its

delinquent furnishing of the required procurement data package and provide it with an incentive to forestall future competitive procurements.

The Army has justified the proposed sole-source award on these bases: (1) the nonavailability of a technical data package precludes competition; (2) the supplies are urgently needed and CCC/CMC is the only source which can meet its required delivery schedule; (3) the Magnavox version of the band III head cannot be introduced into the Army's supply system because of the logistical problems in supporting two different designs; and (4) the administrative decision to negotiate under 10 U.S.C. 2304(a)(2) is final.

Magnavox offers two methods whereby it could satisfy the urgent time requirements. First, Magnavox proposes to utilize its band III design developed under contract DAAB05-69-C-1332. The Army, however, points out that the Magnavox configuration differs from the CCC/CMC configuration, now part of the Army's supply system. We understand that, except for a difference in size of the pin and hole arrangement which insures proper mechanical alignment when the variable band head is inserted in the radio, both designs are functionally interchangeable and compatible. Moreover, we are informed that the size discrepancy is minor and that no fault for the discrepancies has been assessed. It is not disputed that the Magnavox design performs as contractually required. Rather, the Army maintains that the difference in internal circuitry and components precludes dual logistic support.

The Magnavox units were required under its contract to be interchangeable and compatible with the existing radio configuration. From the record, it is obvious that an effort of the nature expected of Magnavox would not provide for total commonality of components with the CCC/CMC model. Moreover, the Army has expended $375,630 for the Magnavox effort for the development and production of the 15 band III heads plus a portion of $376,000 applicable to the engineering data package for band III. But we have been informed that the Magnavox band III effort was not intended to yield a unit for deployment. Rather, it was ECOM's intention to procure a test model and data for an alternative design as insurance in the event that CCC/CMC either failed to produce a working band III head or deliver an engineering data package suitable for competitive reprocurement. In fact, the Magnavox band III heads were never subjected to testing by the Army's Test and Evaluation Command.

We do not understand the rationale of the Magnavox contract insofar as that contract relates to the CCC/CMC sole-source situation. While ECOM may have intended to utilize the Magnavox contract data to avoid future sole-source awards, no steps were taken to imple-

ment that intention through appropriate procurement management techniques, and we note that ECOM is now confronted with the very situation that the Magnavox contract was designed to alleviate. If, as ECOM asserts, it doubted the ability of CCC/CMC to deliver the data package in accordance with contract No. DAAB07-69-C-0141—a requirement to forestall its previous disinclination to furnish a procurement data package—appropriate remedies are available under the contract to enforce timely delivery of the procurement data package.

The absence of engineering production drawings suitable for competitive procurement and the urgency of the requirement constitute the major bases for the proposed noncompetitive award. Engineering data and drawings for the bands II and III heads are line requirements of CCC/CMC contract DAAB07-69-C-0141 at a cost of $642,362. Under the contract, delivery of the running set of drawings was required to be concurrent with delivery of the first production model in December 1970. However, to reflect slippages on both the Army's and CCC/CMC's part, the drawing schedule was revised to reflect a March 31, 1971, delivery date. The first of two increments of the running set of drawings was delivered April 6, 1971, and the second increment was delivered May 18, 1971.

The final set of drawings was required to be delivered concurrent with submission of the final production lot on June 30, 1971. Even though the delivery schedule had already slipped 3 months, we have been advised that the contract was not modified because CCC/CMC advised that it could rectify the delays and still deliver the production units and final drawings on schedule. On June 30, 1971, after it became apparent that the drawing schedule would not be met, the Army advised CCC/CMC that it would accept a 1-month further delay without formal modification of the contract.

It is further reported that CCC/CMC offered to supply the final set of drawings by July 12, 1971. However, the final set of drawings had to reflect changes and revisions occasioned by ECOM's review of the running set of drawings. Inasmuch as the drawing package consists of approximately 3,500 drawings, it was determined that the final set of drawings could not be delivered until ECOM reviewed and corrected the running set and thereafter submitted revisions to CCC/CMC. At the time of submission of the drawings, the ECOM review time was estimated at 6 months. The running set of drawings was reviewed and finally approved on April 6, 1972, or approximately 11 months after delivery by CCC/CMC. We have been informally advised that the 5-month delay in reviewing the drawings is attributable to the fact that the drawings were reviewed by one individual.

However, partial delivery of the final set of drawings was accomplished on June 22, 1972, and we are advised that the remainder will be delivered by August 1, 1972.

The Army asserts that regardless of all other considerations, procurement type data in the hands of the Government are insufficient for purposes of competitive procurement, and that CCC/CMC is the only firm which can meet its urgent time requirements. In rebuttal, Magnavox points to its past performance with the radio and bands I, II and III as evidence of its technical qualifications. However, it is agreed that Magnavox's technical capability to perform is not here in question. Rather, the critical inquiry here is Magnavox's ability to perform within the stringent timeframe.

In this regard, the D&F cited 10 U.S.C. 2304(a)(2) as authority to negotiate the contemplated contract. The provisions of 10 U.S.C. 2310(b) make the findings of the D&F final; therefore, we are precluded from questioning the legal sufficiency of the findings. In our decision 51 Comp. Gen. 658 (1972), our Office concluded that we are not precluded from questioning whether the determination, based upon the findings, is proper. We recognize that while reliance upon the "public exigency" exception to formal advertising does not *per se* authorize a sole-source award, it does clothe the contracting officer with considerable latitude to determine the method best suited to satisfy the urgent needs of the Government. 46 Comp. Gen. 606 (1967).

In the circumstances, we are compelled to conclude that no legal basis exists to question an award, albeit noncompetitively, to CCC/CMC. However, we also feel compelled to observe that the procurement decisions made in connection with the band III head program contributed largely to the undesirable choice of a sole-source award. We feel that had the Government reaped the benefits of the prior Magnavox award the likelihood of a noncompetitive award might have been avoided. Further, we believe that the preservation of a domestic procurement base for the end items is an important goal that should not be minimized because of the exigencies now apparent. We trust that future procurement actions will reflect the competition which is the keystone of the statutory procurement system.

Finally, Magnavox contends that it could satisfy the urgent requirements if afforded the use of engineering data the Army now possesses and is furnished a model for reverse engineering. The time estimates necessary to accomplish this effort (the securing of necessary production material; the reverse engineering of the item; preproduction testing and production) work to the disadvantage of Magnavox, and we find no basis to question the position of the procurement activity. But

we iterate our recommendation that the sole-source decision be reexamined.

Accordingly, we have no alternative but to deny the Magnavox protest.

[B-158458]

Contracts—Disputes—Contract Appeals Board Decision—Review by the General Accounting Office—S&E Contractors, Inc., Case Effect

In view of the holding by the United States Supreme Court in *S&E Contractors, Inc.* v. *United States*, No. 70–88, April 24, 1972, that decisions rendered pursuant to the disputes clause of a contract in favor of a contractor are final and conclusive and not subject to review by the United States General Accounting Office (GAO) absent fraud or bad faith, GAO no longer will object to the payment of a claim for refund of the amount withheld from a contractor on the basis a Maryland State sales tax determined to be inapplicable had been included in the contract price and paid, a refund approved by the Board of Contract Appeals but not returned to the contractor because the GAO in 49 Comp. Gen. 782 held the Board was wrong as a matter of law.

To John H. Bransby, Department of the Army, August 2, 1972:

This is in reference to your letter of July 5, 1972, requesting an advance decision as to whether the claim of John C. Grimberg Company, Incorporated (Grimberg), against the United States Army Corps of Engineers under construction contract DA–18–020–ENG–3098 may be paid.

The claim arose out of a dispute as to whether the contract price included an amount for a Maryland State sales tax that was subsequently determined to be inapplicable to the contract. The contracting officer, believing that $13,926.30 of the contract price was included for payment of the sales tax, set off that amount against other funds owed to the company. On appeal under the disputes clause, the Board of Contract Appeals decided that the sales tax in question was not included in the contract price. ASBCA No. 12783, January 22, 1970. However, we subsequently held that the Board was wrong as a matter of law and advised you that the claim should not be paid. 49 Comp. Gen. 782 (1970).

Your request is prompted by the assertion of counsel for Grimberg that a recent decision of the United States Supreme Court, *S&E Contractors, Inc.* v. *United States*, No. 70–88, April 24, 1972, requires that the claim be paid. In that case, the Supreme Court held that decisions rendered pursuant to the disputes clause of a contract in favor of a contractor are final and conclusive and not subject to review by this Office absent fraud or bad faith. Accordingly, since there is no indication of fraud or bad faith in this case, we will no longer interpose an objection to payment of Grimberg's claim.

[B-174478]

Quarters—Government Furnished—Assignment More Costly Than Payment of an Allowance

Commanding officers who in the assignment or nonassignment of public quarters to members of the uniformed services have the duty to accomplish the maximum practicable occupancy of Government quarters and to issue a written statement or certificate to members upon the assignment or nonassignment of quarters—and a member's personal desire provides no basis for the nonassignment of available quarters--may be granted some latitude in circumstances requiring that judgment be used as to whether the assignment of quarters would be more costly to the government than the payment of the allowance prescribed by 37 U.S.C. 403, since there is no requirement that all available quarters must be occupied. However, determinations should be made on an individual basis and an approved allowance supported by a written certificate or statement.

Military Personnel—Dislocation Allowance—Members Without Dependents—Quarters Not Assigned

A member of the uniformed services without dependents who is transferred to a permanent station and furnished a certificate of nonavailability of Government quarters on the basis that it would be economically advantageous to the United States not to require the member to occupy available quarters is entitled to a dislocation allowance pursuant to paragraph M9003-1 of the Joint Travel Regulations, implementing 37 U.S.C. 407(a), which authorizes the payment of a dislocation allowance to a member that is not assigned to Government quarters and is furnished a certificate of nonavailability of quarters.

To the Secretary of the Navy, August 4, 1972:

By letter dated November 3, 1971, the Assistant Secretary of the Navy (Financial Management) requests a decision whether the commanding officer at a permanent duty station may certify, for the purpose of entitlement to basic allowance for quarters, that adequate Government quarters are not available for assignment to a member transferred to his activity when for personal reasons the member requests that he be permitted to reside in private quarters and when in the judgment of the commanding officer such nonassignment would be economically advantageous to the Government. A further question pertains to the entitlement of a member without dependents, not assigned quarters under such conditions, to a dislocation allowance under the provisions of 37 U.S. Code 407(a). The request has been assigned Control No. SS-N-1135 by the Military Pay and Allowance Committee, Department of Defense.

The Assistant Secretary suggests that there is an apparent conflict between two decisions of our Office, 39 Comp. Gen. 561 (1960) and 48 Comp. Gen. 216 (1968), with respect to the availability and/or assignment of Government quarters as they pertain to the entitlement of

members of the uniformed service to basic allowance for quarters, if otherwise entitled. He says that in 39 Comp. Gen. 561 we held that a certificate of nonavailability of quarters was not conclusive when the facts in the case are contrary to such certification.

Apparently in conflict, he says, is 48 Comp. Gen. 216 in which we stated (citing several Court of Claims rulings) that the mere availability of quarters which could have been assigned to a member with or without dependents at a permanent station does not defeat the right of such member to basic allowance for quarters when not assigned to such quarters and that quarters are not "furnished" to a member merely because there are quarters available for assignment—they must be assigned to him.

In view of the apparent conflict between these decisions, the Assistant Secretary questions whether the availability of Government quarters should be the sole criterion governing the assignment or nonassignment of such quarters and therefore determinative of whether entitlement exists to basic allowance for quarters. He suggests that it is desirable for reasons of economy that a commanding officer have a certain amount of flexibility when it would be more advantageous to the Government not to assign adequate Government quarters. For example, he says it may cost more to store a member's household effects and maintain him in Government quarters than to pay a basic allowance for quarters.

Also, he states that it would be prudent for the commanding officer to keep some adequate quarters available for assignment to temporary duty personnel when it is known that such personnel will normally be there, which would result in a savings in per diem costs exceeding amounts expended for basic allowance for quarters. Finally, he indicates that when the Government is leasing quarters on a "when occupied" basis, it may cost more to assign a member to such quarters if the lease cost is greater than the basic allowance for quarters.

With respect to whether a member without dependents not assigned adequate quarters at his permanent station under conditions described above would be entitled to a dislocation allowance, the Assistant Secretary cites in support thereof the provisions of 37 U.S.C. 407(a), which authorizes the payment of a dislocation allowance to a member without dependents who is transferred to a permanent station where he is not assigned to quarters of the United States.

Section 403(a) of Title 37, U.S. Code, provides in pertinent part that, except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters. Subsection (b) thereof provides that a member who is assigned to quarters of the United States or a housing facility under the

jurisdiction of a uniformed service, appropriate to his grade, rank or rating and adequate for himself and his dependents, if with dependents, is not entitled to a basic allowance for quarters. Subsection (g) authorizes the President to prescribe regulations for the administration of that section.

Section 407(a) of Title 37, U.S. Code, provides that a member without dependents who is transferred to a permanent station where he is not assigned to quarters of the United States is entitled to a dislocation allowance. A member whose dependents may not make an authorized move in connection with a permanent change of station is considered a member without dependents.

Section 403 of Executive Order 11157, June 22, 1964, as amended, implementing 37 U.S.C. 403, provides generally that any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a member and his dependents, or (b) by a member without dependents "* * * shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances * * *." Section 407 thereof provides that the Secretaries concerned are authorized to prescribe such supplemental regulations not inconsistent with the Executive order as they may deem necessary or desirable to carry out the provisions of that order, with respect to members within their respective departments. All such regulations are required to be uniform for all services to the fullest extent practicable.

We believe that the alleged inconsistency between our decisions in 39 Comp. Gen. 561 and 48 Comp. Gen. 216 is more apparent than real. In both cases, we recognized the principle that it is the assignment or nonassignment of Government quarters (or the offer of such quarters) by a commanding officer which was the governing factor in the entitlement to basic allowance for quarters. We stated, however, that claims for payment of such allowances are for determination on the basis of the facts in each case.

In these cases, we adhered to the principle stated in *McVane* v. *United States*, 118 Ct. Cl. 500 (1951), concerning a case where plaintiff had been advised that Government quarters were available but received permission to live in private quarters. In that case, plaintiff contended that while quarters were available, they were never assigned, citing *Lake* v. *United States*, 97 Ct. Cl. 477 (1942) and *Lundblad* v. *United States*, 98 Ct. Cl. 397 (1943). The court said that the facts in those cases were not analogous to those considered in the *Mc-*

Vane case. In those cases, plaintiffs had no way of knowing whether quarters were available or whether the omission of assignment to quarters was intentional. However, in the case it was considering, plaintiff had been personally advised that Government quarters were available but his request to reside in private quarters was approved. Under the circumstances, it was not necessary for his commanding officer to have delivered written orders assigning him to specific quarters.

In 39 Comp. Gen. 561 the record shows that the officer had been occupying adequate Government quarters at his duty station and that other adequate bachelor quarters were also available to him if he desired a change. However, he requested to reside off-base. No justification for the issuance of a certificate of nonavailability of quarters was furnished and it appeared from the facts in the case that it was issued presumably in compliance with the member's request and "with the assumption that it would be at officer's expense." It was on the basis of the facts in the record indicating that the offering of public quarters to the member in the circumstances of that case was regarded by the local finance and commanding officer as tantamount to an assignment of quarters even though he was not formally assigned such quarters or required to occupy them that we concluded that the certificate was not conclusive in the matter.

In 48 Comp. Gen. 216 we considered the case of a member who had been assigned family type housing for himself upon arrival at his new duty station. These quarters were in excess of the needs of the command and though at that time he was ineligible for such quarters by virtue of his grade and his dependents were not with him, such assignment was presumably made on the basis of a projected promotion and his statements that his dependents would join him at that station. When he was promoted to an eligible grade, however, his dependents did not join him. The member requested termination of the assignment and permissive transfer closer to his home because continued assignment at that station would result in hardship to him.

On that basis and under authority of applicable Army regulations providing for termination of assignment of family quarters when dependents do not permanently reside with the member occupant, his commanding officer terminated the member's assignment to family type housing. In reviewing the applicable regulations we concluded that in the circumstances disclosed, even though the housing officer refused to furnish a certificate of nonassignment of quarters, the commanding officer's action was proper and therefore the member was not assigned to family type quarters and was entitled to basic allowance for quarters.

The assignment or nonassignment of public quarters for members of the armed services, of course, is primarily an administrative matter and it is the duty of the responsible officers to accomplish the maximum practicable occupancy of Government quarters. Supplemental administrative regulations governing assignment of available public quarters provide that it is the responsibility of the installation commander to maintain maximum occupancy of all Government quarters for members reporting at his installation. These regulations provide further that written statements or certificates be furnished the member upon the assignment or nonassignment of quarters. The personal desires of the member provide no basis for the nonassignment of available Government quarters.

We agree, however, with the views expressed by the Assistant Secretary that some latitude should be given these commanders in circumstances requiring that judgment be used as to whether assignment of Government quarters to specific classes of members and families may be more costly to the Government than the payment of basic allowance for quarters. *Cf.* 51 Comp. Gen. 513 (1972).

Therefore, in view of the circumstances disclosed, and since pertinent statutory provisions and implementing Executive orders do not specifically require that all available quarters must be occupied, the first question is answered in the affirmative. However, it would seem that under the provisions of section 407 of the cited Executive order, any action taken in the matter should be based upon appropriate regulations which would permit installation commanders to assign or to not assign available quarters on the basis of a determination in each individual case that the action taken would be more economically advantageous to the Government. To support the payment of quarters allowance in such cases we believe that such regulations should require that a certificate or statement be furnished by the commanding officer that action was taken in accordance with such regulations.

With respect to the entitlement to dislocation allowance by a member without dependents transferred to a permanent station and furnished a certificate of nonavailability in circumstances described above, paragraph M9003-1, Joint Travel Regulations, implementing 37 U.S.C. 407(a), authorizes payment of the allowance to such member when not assigned to quarters of the United States. Therefore, upon receipt of a certificate of nonassignment of quarters under the circumstances stated in the question the member would be entitled to a dislocation allowance, if otherwise entitled. However, the entitlement to such allowance should also be considered in determining the economic advantage to the United States in not requiring the occupancy of available quarters.

[B-175439]

Transportation—Household Effects—Military Personnel—Trailer Shipment—Change of Duty Station Requirement

The costs incurred by a staff sergeant incident to the movement of his housetrailer without a permanent change of station from a trailer court declared "off-limits" by the Ellsworth Air Force Base commander in order to protect the health and welfare of Armed Forces personnel living in the trailer court may be reimbursed to the member, even though there was no change in the member's assignment to create entitlement to the trailer allowance prescribed by 37 U.S.C. 409, as the costs resulted from the base commander's exercise of his authority, pursuant to regulation, in connection with the proper administration of Ellsworth Air Force Base, and the reimbursement to the member treated as an operational expense chargeable to the appropriation for Operation and Maintenance, Air Force.

To First Lieutenant Timothy K. Smith, Department of the Air Force, August 4, 1972:

We refer further to your letter dated January 25, 1972, with attachments, file reference ACFFT/7220, forwarded here by indorsement of March 10, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72-8), requesting an advance decision regarding the entitlement of Staff Sergeant Donald L. Gregory, USAF, to reimbursement for costs incident to the movement of his housetrailer.

You say that on September 28, 1970, Sergeant Gregory moved his mobile home into the Villa Trailer Court which was on the base housing referral list of Ellsworth Air Force Base, South Dakota. An undated letter from the base commander addressed to all military personnel residing at the trailer court was received by the member on November 30, 1970. It stated that in order to protect the health and welfare of personnel living there, which was endangered by unsanitary conditions and the hazards of fire and explosion, in acccordance with paragraph 9, Air Force Regulation 125-11, in coordination with the local Armed Forces Disciplinary Control Board (AFDCB) the Villa Trailer Court was declared "off-limits" to all Armed Forces personnel, effective immediately. Residents of the trailer court were to vacate the premises by March 1, 1971.

Sergeant Gregory requested an extension of time for removal from the trailer court; however, his request was denied by the base commander on February 25, 1971, and on March 6, 1971, he moved his mobile home to another location. He has submitted a claim for $125.50 for expenses said to have been incurred incident to the relocation, including $55 for transportation, $8 for telephone installation, $7.84 for materials required for new water and electric hook-ups, and $54.66 for trailer repairs (conversion from LP to natural gas).

It appears to be the member's opinion that since until ordered to leave there he resided at an approved trailer court satisfactory to him, the claimed expenses result from his obedience to orders and, therefore, he should be reimbursed for them.

You ask whether there is authority for payment of the claim. In forwarding your request for decision, the Chief, Pay and Travel Division, Directorate of Accounting and Finance, Headquarters Strategic Air Command, indicates that while he is aware of no provision for movement of a housetrailer from one trailer court to another court in such circumstances, reimbursement may be in order since relocation was not by the member's choice but resulted from orders of his commanding officer.

Section 406, Title 37, U.S. Code, provides that a member of a unifomed service who is ordered to make a change of permanent station is entitled to transportation of baggage and household effects, or reimbursement therefor. Section 409, of the same title, indicates that under regulations prescribed by the Secretaries concerned and in place of the transportation of baggage and household effects or payment of a dislocation allowance, a member otherwise entitled to such transportation, under section 406 may transport a housetrailer or mobile dwelling within the continental United States, Alaska, or between the continental United States and Alaska. Accordingly, paragraph M10002–1 of the Joint Travel Regulations limits trailer allowances to members otherwise entitled to transportation of household goods, providing certain other conditions exist.

Consequently, in the absence of a change of permanent station, no trailer allowances are payable. Sergeant Gregory served at Ellsworth Air Force Base both prior and subsequent to the relocation of his housetrailer; as there has been no change in his assignment there is no entitlement to trailer allowances.

Air Force Regulation 125–11, March 12, 1965 (Army Regulation 15–3, Defense Supply Agency Regulation 5725.1, Bureau of Personnel Instruction 1620.4, Marine Corps Order 1620.1, Commandant Instruction 1620.1), in effect at the time of the occurrences described, prescribes uniform policies and procedures and provides guidelines for the establishment, operation, and coordination of AFDCB activities for the elimination of conditions inimical to the health, morals, and welfare of Armed Forces personnel. The regulation states that "off-limits" establishments or areas are designated by commanders to assist in maintaining discipline and safeguarding the health, morals, and welfare of military personnel (par. 9a). Armed Forces personnel are prohibited from entering "off-limits" establishments or areas (par. 9b).

The commander of Ellsworth Air Force Base by issuing the "off-limits" order to residents of the Villa Trailer Court in effect required Sergeant Gregory to remove his housetrailer from the previously approved trailer park. Necessarily, in making the trailer ready for transportation, moving it to another location, and installing it at the new site so it could be occupied as a dwelling, he incurred expenses for goods and services which would not have been required in the absence of the removal order.

As such costs were incurred as a result of the base commander's exercise of his authority in connection with the proper administration of Ellsworth Air Force Base, they may be paid as incident to the operation of that facility and charged to the appropriation for Operation and Maintenance, Air Force. Since in the circumstances Sergeant Gregory had no choice but to pay the required costs from personal funds, he may be reimbursed for the necessary expenditures. *See* 51 Comp. Gen. 12 (1971), copy enclosed.

Accordingly, the voucher submitted is returned herewith and if otherwise proper, payment may be made on the basis indicated.

[B-163375]

Appropriations—Continuing—Restrictions—In Permanent Appropriations

Although in considering the bill for the "Department of Labor, and Health, Education and Welfare Appropriation Act, 1973," the House was more restrictive than the Senate as to the number of Federal employees authorized to determine compliance with the Occupational Safety and Health Act of 1970, the inspection activities of the Labor Department under the 1970 act remain unchanged during the effective period of the Joint Resolution (Public Law 92-334), which provides continuing appropriations for fiscal year 1972 projects until fiscal year 1973 funds become available, for notwithstanding that pursuant to section 101(a)(3) of the Joint Resolution, the more restrictive language governs, section 101(a)(4) controls to make the restriction on inspection services inapplicable under the Joint Resolution in view of the fact a similar restriction was not contained in the 1972 appropriation act.

To the Secretary of Labor, August 9, 1972:

Reference is made to your letter of July 27, 1972, asking whether the Joint Resolution, H.J. Res. 1234, Public Law 92-334, approved July 1, 1972, 86 Stat. 402, making continuing appropriations for fiscal year 1973, prohibits the use of funds during the effective period of the Joint Resolution to conduct Federal compliance inspections under the Occupational Safety and Health Act of 1970, approved December 29, 1970, 84 Stat. 1590, 29 U.S. Code 651 note.

Question in the matter arises because H.R. 15417, 92d Congress, the "Department of Labor, and Health, Education, and Welfare Appropriation Act, 1973," when passed by the House of Representatives on

June 15, 1972, contained a provision following the appropriation for necessary expenses for the Occupational Safety and Health Administration, reading as follows:

None of the funds appropriated by this Act shall be expended to pay the salaries of any employees of the Federal Government who inspect firms employing 25 persons or less for compliance with the Occupational Safety and Health Act of 1970.

And when H.R. 15417 subsequently was passed by the Senate on June 28, 1972, this provision was identical with the House provision except that the prohibition on the payment of salaries was changed to prohibit such payment to persons inspecting firms employing "fifteen persons" rather than "25 persons."

Pertinent to the question presented for decision are the following provisions of section 101(a) of the Joint Resolution which provides for the appropriation of—

(1) Such amounts as may be necessary for continuing projects or activities (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1972 and for which appropriations, funds, or other authority would be available in the following Appropriation Acts for the fiscal year 1973:

* * * * * * *

Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriation Act;

* * * * * * *

(3) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House is different from that which would be available or granted under such Act as passed by the Senate, the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority: *Provided*, That no provision in any Appropriation Act for the fiscal year 1973, which makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation, shall be effective before the date set forth in section 102(c) of this joint resolution.

(4) Whenever an Act listed in this subsection has been passed by only one House or where an item is included in only one version of an Act as passed by both Houses, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower: *Provided*, That no provision which is included in an Appropriation Act enumerated in this subsection but which was not included in the applicable appropriation Act for 1972, and which by its terms is applicable to more than one appropriation, fund, or authority shall be applicable to any appropriation, fund, or authority provided in this joint resolution unless such provision shall have been included in identical form in such bill as enacted by both the House and the Senate.

You point out that the primary purpose of the Occupational Safety and Health Act of 1970 is to assure every working man and woman in the Nation safe and healthful working conditions. The act empowers the Secretary of Labor to conduct inspections of every employer and places no restriction on that authority based on the number of employees the employer has. You further point out that the Secretary is required by section 8(f) of that act, 29 U.S.C. 657, to conduct inspec-

tions in response to valid employee complaints. You state that your Department, for practical reasons, strongly wishes to continue its present program activities, without any change, unless mandated to do so by the law.

Inasmuch as the salary payment limitation contained in H.R. 15417 as passed by the House of Representatives is more restrictive than that passed by the Senate, it could be argued that under section 101 (a)(3) of the Joint Resolution the Secretary's authority to conduct compliance inspections is restricted to firms employing 26 or more employees.

We believe however that this argument must fail in that a similar restriction was not contained in the applicable 1972 fiscal year appropriation act; by its terms—"None of the funds appropriated by this Act * * *"—it is applicable to more than one appropriation and its provisions as passed by the House of Representatives are not identical with those as passed by the Senate. Accordingly, it is our view that the restrictive language is governed by the proviso to section 101(a)(4) of the Joint Resolution and thus is inapplicable to any appropriation, fund, or authority provided in the Joint Resolution. *Cf.* B–142011, August 6, 1969. Your question, therefore, is answered in the negative.

[B–176486]

Fees—Airport Departures—Reimbursement

The airport fees military and civilian personnel are required to pay when departing from airports incident to the official travel of themselves and their immediate families and dependents are reimbursable, if the charges are reasonable, as transportation expenses on the basis the Supreme Court in 92 S. Ct. 1349 (1972) held that a user fee imposed on departing passengers does not involve an unconstitutional burden on interstate commerce, and that if the funds received by local authorities do not exceed airport costs, it is immaterial whether they are expressly earmarked for airport use. However, as fees imposed on arriving passengers are held to be an unreasonable interference with interstate commerce, they may not be reimbursed, but if found valid upon appeal, reimbursement is authorized on the same basis as departure fees.

To the Secretary of Defense, August 9, 1972:

We refer to letter of July 11, 1972, from the Assistant Secretary of Defense (Comptroller), requesting our decision whether airport fees which military and civilian personnel are required to pay when departing from and arriving at certain airports (especially Philadelphia, Pa.) on official travel may properly be reimbursed by the Department of Defense.

The Assistant Secretary refers to the Supreme Court decision in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*,

Inc., 92 S. Ct. 1349 (1972) in which it was held that the $1 user fee imposed on passengers departing from the airport operated by the Evansville Authority and the similar fee imposed on passengers departing from airports in the State of New Hampshire did not involve an unconstitutional burden on interstate commerce. Further, he indicates that several jurisdictions in addition to the two involved in the *Evansville* decision have imposed airport fees on departing passengers and that Philadelphia has imposed a $2 airport fee on arriving as well as departing passengers.

The questions presented are whether the Department of Defense may reimburse civilian employees and members of the uniformed services for airport fees they are required to pay incident to official travel of themselves and their immediate families and dependents and whether the Joint Travel Regulations, Volume 1, may be amended effective July 1, 1972, to authorize reimbursement to the categories of personnel enumerated in 37 U.S. Code 410(a).

In arriving at its decision in the cited case the Supreme Court held that the $1 airport fee imposed by the Authority and State involved reflected a fair approximation of the cost of the services furnished. Such charges were not considered a burden or tax on interstate commerce and thus were not in violation of the commerce clause, Article 1, section 8, of the United States Constitution. Although the court did not fully analyze the relationship of the charges to the costs of operating the airports it indicated that the parties contesting the charge had not sustained the burden of showing the charges to be unreasonable. The court also held with regard to the New Hampshire payment of one-half of the fees collected to the general revenues of the jurisdictions owning the airport land that "so long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use."

Another matter for consideration is the general rule of Federal immunity from State and local taxes. Since that immunity does not extend to reasonable user charges imposed by State or local authorities for services rendered to or facilities used by the Federal Government (50 Comp. Gen. 343 (1970) and cases cited therein) the determination made under the commerce clause may be viewed as disposing of the question of tax immunity. Thus, while reasonable charges may be paid by the United States, an unreasonable charge would be considered a tax from which the Federal Government is immune.

With respect to the fees charged by the City of Philadelphia we have been advised that the Court of Common Pleas of Philadelphia County has enjoined the charge of the $2 fee on arriving passengers

for the reason that this charge constituted an unreasonable interference with interstate commerce. The $2 fee on departing passengers, however, was allowed to stand. We understand further that the Philadelphia city council is considering an amendment to the ordinance involved under which the arrival fee would be rescinded, the departure fee would be increased to $3 and United States military personnel on active duty would be exempted.

In view of the foregoing our view is that a civilian employee of the United States or member of the uniformed services traveling by air on official business who is required to pay a departure fee imposed for the purpose of recovering airport operating and maintenance costs would have no proper basis for refusing to pay such fee. Similarly, such employees and members could not refuse to pay those fees on behalf of the members of their immediate families or dependents traveling at Government expense. Accordingly, departure fees properly paid in connection with official travel may be reimbursed to such personnel. However, as the landing fee in Philadelphia has been held by the courts to be invalid and assuming this decision will be sustained by superior courts, reimbursement of the landing fee to those who may have paid it is not authorized. We assume that procedures will be adopted by the City of Philadelphia or the airlines involved for refund of those fees to the individuals who have paid the same. In the event that the arrival fee is held to be valid upon appeal reimbursement to employees of that fee would be authorized on the same basis as reimbursement of departure fees is authorized herein.

We believe the fees are to be regarded as a transportation expense. In connection with civilian travel see sections 2.1 and 9.1d of the Standardized Government Travel Regulations.

While we do not consider an amendment is necessary to the Joint Travel Regulations, Volume 1, to permit reimbursement of the departure fees in cases where a specific exemption is not applicable, appropriate amendments could be made to the regulations to specifically authorize such payment if deemed administratively desirable. Reimbursement of fees paid by the categories of persons covered by 37 U.S.C. 410(a) is authorized on the same basis.

[B–174685]

Subsistence—Per Diem—Military Personnel—Quarters and Messing Facilities Furnished—Determination of Availability

A member of the uniformed services at a temporary duty or delay point where a Government mess, as defined in paragraph M1150–4 of the Joint Travel Regulations, is determined not to be available because of the distance between lodgings and the mess location, or because of the incompatibility of mess hours with duty

hours, may be paid per diem at a rate authorized when a Government mess is not available on the basis that a member in a travel status is not required to use inadequate quarters, unless a military necessity, and distance is a factor in determining the impracticability of utilizing a Government facility. However, regardless of distance, if it is practicable to utilize a mess for some but not all meals because of the incompatibility of duty hours, breakfast, lunch and dinner should be considered separately in determining the impracticability of utilizing an available mess.

To the Secretary of the Navy, August 11, 1972:

Reference is made to letter of November 22, 1971, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) in which a decision is requested whether a member of the uniformed services may be paid a per diem for the period at a temporary duty or delay point at a rate authorized when Government mess is not available when the impracticability determination of utilizing an available mess is based on not only the distance from the place of lodging to the location of the Government mess, but also incompatibility of mess hours with required hours of duty. The request has been assigned PDTATAC Control No. 71–52 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary refers to paragraph M4451–1, Joint Travel Regulations, which provides generally that except when directed because of military necessity, a member in a travel status will not be required to use Government quarters designated as inadequate by the appropriate authority of the Service concerned. It further provides that available Government quarters designated as adequate and mess will be used by members in a travel status to the maximum extent practicable, except (item 2) when furnished a statement by competent authority at the temporary duty or delay point to the effect that utilization of existing Government facilities was impracticable. Paragraph M4451–2 of the regulations provides that such a statement shall have the effect of a statement of nonavailability.

The Assistant Secretary refers also to item 2, paragraph 4050–2b (2) (b), Navy Travel Instruction, which provides that impracticability determinations as to the use of an available Government mess may not be based on the distance or cost incident to travel from the location of the member's quarters to the site where the Government mess is located in those instances where the member elects not to occupy available inadequate Government quarters.

The Assistant Secretary questions whether this restriction is mandatory in per diem cases, in view of the fact that in 42 Comp. Gen. 558 (1963) such limitation was applied with respect to the use of a Government mess at an enlisted member's permanent duty station for purposes of basic allowance for subsistence. He says that it is doubtful

whether the limitation applies in instances when a temporary duty station and per diem are involved.

Section 404(b)(2), Title 37, U.S. Code, provides that the Secretaries concerned may prescribe the allowances for the kinds of travel, but not more than the amounts authorized in that section. Subsection (d)(2) provides in pertinent part that the travel and transportation allowances authorized for each kind of travel may not be more than one of the following:

(2) transportation in kind, reimbursement therefor, or a monetary allowance as provided in clause (1) of this subsection, plus a per diem in place of subsistence of not more than $25 a day: * * *.

As stated in the Assistant Secretary's letter, paragraph M4451–1(2), Joint Travel Regulations, implementing section 404 of Title 37, provides that, except when directed because of military necessity, a member in a travel status will not be required to use Government quarters designated as inadequate by the appropriate authority of the Service concerned. And, as noted above, it also states that available Government quarters designated as adequate and mess will be used by members in a travel status to the maximum extent practicable, except when the commanding officer (or his designated representative) at the temporary duty or delay point furnishes a statement to the effect that utilization of existing Government facilities was impracticable.

Paragraph M1150–4, Joint Travel Regulations, defines the term "Government mess" as any of the messes there specified, provided it is made available to, or utilized by, the member concerned, even though officers are assessed a charge therefor.

As indicated, paragraph 4050–2b(2)(b)(2), Navy Travel Instructions, provides in pertinent part that the commanding officer or his designated representative at the point of temporary duty or delay will endorse the member's orders to specify, as appropriate.

That the use of available Government mess or officers' or enlisted open mess is impracticable and the reason for such determination (such impracticability determinations may not be based on distance or cost incident to travel from the location of the member's quarters to the site where the Government mess or officers' or enlisted open mess is located in those instances where the member elects not to occupy available, inadequate Government quarters and occupies private quarters).

Since the Joint Travel Regulations provide that, except when directed because of military necessity, a member in a travel status will not be required to use inadequate Government quarters, we are of the opinion that, in making determinations as to the impracticability of utilization of an available Government mess, the distance between the mess and place of lodging is a factor properly for consideration.

Also for consideration is the distance (and availability of transportation when necessary) between the place of duty and the mess as well as the compatibility of the messing hours with the hours of duty. Thus, regardless of the distance between place of lodging and mess, it may be practical for the member to utilize the mess for one or two meals (breakfast and lunch) each day, but impracticable to utilize the mess for the third meal (dinner) because of the incompatibility of his duty hours with the time he normally would eat such meal and because of the distance between his place of lodging and the mess. Hence, breakfast, lunch and dinner should be considered separately in making determinations as to the impracticability of utilizing an available mess.

Your question is answered accordingly. And, it is our view that the cited provision in paragraph 4050, Navy Travel Instructions, is more restrictive than is required.

[B-175787]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Owned by a Relative, Etc.

Employees who occupy temporary quarters and are furnished subsistence in the homes of relatives in connection with permanent transfers of station may be reimbursed reasonable rental and subsistence charges under section 8.4, Office of Management and Budget Circular No. A-56, effective September 1, 1971. Charges are not reasonable when relatives are paid the same amounts employees would pay in motels or restaurants, or are based upon maximum amounts reimbursable under the regulation. Reasonableness depends on the circumstances of each case, such as the number of individuals involved, the extra work performed by relatives, and the need to hire extra help, and, therefore, employees should be required to furnish sufficient information to permit a reasonableness determination to be made, and expenses based on estimates of average rates per day are not acceptable.

To R. J. Schullery, Department of Transportation, August 11, 1972:

This refers further to your letter of April 21, 1972, in which you requested our decision as to the propriety of certifying for payment two claims for reimbursement of expenses incurred by employees incident to occupancy of temporary quarters in connection with permanent transfers of station.

The claims submitted by Mr. Lyle S. Miller and Mr. Watkins L. George involve the occupancy of temporary quarters under somewhat similar circumstances. In both cases the temporary quarters occupied were in the homes of close relatives and the manner in which the employees have undertaken to substantiate their claims for reimbursement raise doubts as to whether they may be certified for payment. As your letter states, it might be said that:

It appears that the amounts claimed by both Messrs. Miller and George for subsistence expenses while occupying temporary quarters with relatives is based

upon the maximum amount that can be reimbursed for each ten-day period rather than with (on) actual subsistence costs incurred.

The provisions of section 2.5, Office of Management and Budget Circular No. A–56, revised June 26, 1969, subsequently revised as section 8.4, effective September 1, 1971, are applicable to both cases. Inasmuch as no change in substance was made the discussion of each case which follows will, for reasons of convenience, be based on the current regulation, which provides, in pertinent part, as follows:

8.4 *Allowable amount*

a. *Actual expenses allowed.* Reimbursement will be only for actual subsistence expenses incurred provided these are incident to occupancy of temporary quarters *and are reasonable as to amount.* Allowable subsistence expenses include only charges for meals (including groceries consumed while occupying temporary quarters), lodging, fees and tips incident to meals and lodging, laundry, cleaning and pressing of clothing.

b. *Itemization and receipts.* The actual expenses will be itemized in a manner prescribed by the head of the agency which will permit at least a review of the amounts spent *daily* for (1) lodging, (2) meals, and (3) all other items of subsistence expenses. Receipts will be required at least for lodging and laundry and cleaning expenses (except when coin-operated facilities are used) * * *

c. *Computation of maximum.* The amount which may be reimbursed for temporary quarters subsistence expenses will be the lesser of either (a) the actual amount of allowable expense incurred for each ten-day period or (b) the amount computed * * * in accordance with a formula provided. [Italic supplied.]

Mr. Miller transferred from Greensboro, North Carolina, to Gainesville, Florida, effective June 14, 1971. Occupancy of temporary quarters began June 7, 1971, to allow preparation of the employee's house-trailer (used as a residence) for transportation to the new duty station. From that date through June 19 Mr. Miller lived, with the exception of 3 days, at motels at the old and new duty stations or appears to have to have been in a travel status between the old and new stations. His wife and three children, one aged 12, one aged 2, and one an infant of 1 month, lived throughout the period at the home of Mrs. Bertie M. Sims of Savannah, Georgia, who apparently is the mother of Mrs. Miller.

Your primary question as to Mr. Miller's claim concerns the reasonableness of the expenses for his dependents. The itemization of expenses provided on your agency form for this purpose shows, for each day of the first 10 days: Lodging, $25; Meals, $18; Tips, $2; and Laundry, $5, the total amount being $500, or the same amount as that allowable as the maximum under subsection 8.4c of Circular No. A–56. For the following 3 days of occupancy, the amount for lodging is reduced to $15 per day and the amount for tips to $1. For the 11th and 12th days the laundry charges were reduced to $2.50. The amount for meals is shown as $19 for the 11th day and $18 for each of the last 2 days of occupancy. Receipts signed by Mrs. Sims have been supplied for lodging and laundry.

With respect to the charge for rent for the employee's dependents during the entire period we believe he should be required to supply a further explanation of the basis upon which the lodging rates were established since the reduction from $25 to $15 on the 11th day of occupancy suggests that the rates were fixed at the maximum amounts allowable to the employee for his dependents rather than the actual rental value of the quarters. Although the regulations do not preclude payment of rent to relatives whose premises are occupied as temporary quarters, the amount allowed must be reasonable. See B–174986, May 11, 1972, copy enclosed. In the absence of an explanation of the method used to establish the rental rates we agree the lodging costs appear to be unreasonable.

As to the claim for costs of meals, tips and laundry throughout the period, these appear to be estimates based on average rates per day and not an actual itemization of expenditures. Our decisions have allowed reimbursement on the basis of detailed estimates where these (1) are based on actual expenditures and (2) are reasonable in amount. In this case we do not regard the estimates submitted as meeting this standard. B–164057, June 5, 1968, copy enclosed. *Cf.* B–161166, April 26, 1967; B–166238, March 27, 1969; B–165553, November 28, 1968.

The record shows that on June 12, 18, and 19, Mr. Miller also lodged at the residence of Mrs. Sims and has submitted receipts signed by her for rent ($12.50 per day) and laundry ($9). In this connection we note the voucher claims $18.75 for this expense on June 18. With respect to the lodging expense on June 12 it may be that this was incurred as a travel expense reimbursable in accordance with subsection 2.1 of Circular No. A–56 since Mr. Miller apparently vacated the motel at his old duty station on June 10. Moreover, he claimed no temporary quarters allowance for himself for that day or June 11, and the motel receipts submitted by him indicate occupancy of motel quarters at the new duty station beginning June 13, 1971. Accordingly, the claim for $12.50 for lodging expense on that day should be further clarified before any reimbursement is allowed.

The claim for Mr. Miller's lodging at Savannah on June 18 (Friday night) and 19 (Saturday) is also subject to further clarification since his absence from his old and new duty stations on those dates suggests that he traveled to Savannah to visit the members of his family and then accompany them to his new duty station. Also, it may be that his mobile home was ready for occupancy on June 18. Under such circumstances he is not to be regarded as entitled to temporary quarters for himself for those 2 days.

As noted above the file includes a receipt for $9 for laundry for Mr. Miller signed by Mrs. Sims; however, the itemized claim fails to in-

clude a reference to this charge. Accordingly, and since no explanation appears for a laundry bill of this magnitude, no reimbursement for the item is allowable.

In summary, the only expenses itemized by Mr. Miller which may now be certified for payment are those incurred on the days in which he occupied temporary quarters at motels at his old and new official stations.

Mr. Watkin L. George transferred from Balboa, Canal Zone, to Atlanta, Georgia, in accordance with a travel order dated August 10, 1971. That document authorized occupancy of temporary quarters by Mr. George and two dependents for a maximum period of 60 days.

Mr. George executed a formal agreement with his brother, John H. George, under which the employee and his dependents occupied part of his brother's residence, described in the agreement as a "Two (2) bedroom furnished Apartment." The agreement provided in pertinent part that—

2. Lessor shall furnish all Utilities (Water, Lights and Gas) and Lessee shall have Laundry privileges.
3. Lessee shall pay to Lessor—John H. George, at the end of each Ten (10) days the following amounts:
$25.00 per day for the first 10 days
$10.00 per day for the second 10 days
$5.00 per day for the balance of rental
This Lease not to exceed Sixty (60) Days however Lessee may terminate said lease at such time said Lessee acquires a permanent residence.
4. It is further agreed that the Lessor shall furnish three (3) meals per day and the Lessee agrees to pay $5.00 per day per person for said meals.

In support of his claim for reimbursement in the amount of $1,195.04 (including two dry cleaning bills from a commercial establishment for which receipts are supplied), Mr. George itemized his expenses for lodging and meals exactly as these charges were agreed upon with his brother. He has also presented receipts from his brother for each of the six 10-day periods during which he occupied the temporary quarters.

As a result of questions as to the circumstances under which Mr. George occupied temporary quarters and claimed reimbursement, an investigation was undertaken by your agency. In the course of the investigation Mr. George executed a sworn statement including the following in explanation of the manner in which he made his living arrangements during the 60-day period:

When my brother and I set up our lease agreement, we set the payment scale according to what the travel regulations allowed. We did this to get the full benefits of the temporary quarters allowance, and to assure that my brother would be adequately reimbursed over the full period of time. We set up the payment scale in the lease according to the manner shown in the travel regulations.

Regarding the $5.00 per day per person for meals, I considered the cost to be well below what it would have cost if we had been eating all of our meals in a restaurant. I based the meal cost relative to what the restaurant cost would

be and not actually what it would cost to cook the meal at home. I consider the $15.00 meal cost per day to have been a savings to the government.

* * * * * * *

My reasoning in paying my brother for lodging and meals at the rate that I did was based on what it would have cost the government if I had had the same services in a motel or other public lodging. I did not base the charges on what it was actually costing me and my brother for me and my family to reside in his home. The charges were on a relative basis, not actual.

Subsection 8.2d of Circular No. A–56 provides, in pertinent part, that: "Temporary quarters should be regarded as an expedient to be used only if, or for as long as, necessary until the employee concerned can move into residence quarters of a permanent type."

The record indicates that Mr. George occupied temporary quarters for 58 days and it is not entirely clear that it was necessary for him to occupy temporary quarters for this length of time. Also, his statement that he and his brother drew up their rental agreement in such a manner as "to get the full benefits of the temporary quarters allowances" suggests that unavailability of suitable permanent housing was not altogether the motivating reason for the length of time the employee occupied temporary quarters. In view of this and since Mr. George admits the payments to his brother were unrelated to actual costs to his brother during the period in question, there is no proper basis on the present record on which temporary quarters may be allowed except for the commercial dry cleaning charges for which he has provided receipts.

We point out that in the past we have allowed reimbursement for charges for temporary quarters and subsistence supplied by relatives where the charges have appeared reasonable; that is, where they have been considerably less than motel or restaurant charges. It does not seem reasonable or necessary to us for employees to agree to pay relatives the same amounts they would have to pay for lodging in motels or meals in restaurants or to base such payments to relatives upon maximum amounts which are reimbursable under the regulations. Of course, what is reasonable depends on the circumstances of each case. The number of individuals involved, whether the relative had to hire extra help to provide lodging and meals, the extra work performed by the relative and possibly other factors would be for consideration. In the claims here involved as well as similar claims we believe the employees should be required to support their claims by furnishing such information in order to permit determinations of reasonableness.

The vouchers are returned herewith for handling in accordance with the foregoing.

[B–174213]

General Accounting Office—Decisions—Advance—Voucher Accompaniment

Although, normally, the Comptroller General of the United States General Accounting Office (GAO) would not render a decision to a question of law submitted by a certifying officer unaccompanied by a voucher as required by 31 U.S.C. 82d, the statutory authority under which the GAO renders decisions to certifying officers, since the question submitted is general in nature and will be a recurring one, the reply to the question raised is addressed to the head of the agency under the broad authority contained in 31 U.S.C. 74, pursuant to which the GAO may provide decisions to the heads of departments on any question involved in payments which may be made by that department.

Fees—Parking—Occupancy Tax—Legal Incidence of Tax on Vendee

In view of the administrative burdens to implement the United States General Accounting Office (GAO) decision of December 10, 1971, 51 Comp. Gen. 367, holding that the San Francisco City and County tax on the occupancy of parking spaces is not chargeable to the Federal Government when a Government-owned vehicle is involved, and that a voucher for the tax in favor of a Government employee may not be certified for payment, the decision is modified to permit certifying officers to certify vouchers for payment of the parking tax in the amount of 1 dollar or less in spite of the Government's immunity to the tax, since the correct procedure prescribed in 7 GAO 26.2 for the use of a tax exemption certificate when the legal incidence of the tax is on the vendee is not available as its use is restricted to purchases on which the taxes exceed 1 dollar. 51 Comp. Gen. 367, modified.

To the Acting Administrator, General Services Administration, August 14, 1972:

We have received a letter dated April 6, 1972, from Mr. Charles A. Lewis, Authorized Certifying Officer, Chief, Accounts Payable Branch, Finance Division, Region 9, General Services Administration, concerning the tax on rents charged for occupancy of parking space in parking stations in the City and County of San Francisco insofar as concerns Government-owned vehicles.

At the outset we wish to refer you to 31 U.S. Code 82d, the statutory authority under which this Office renders decisions to certifying officers, which provides as follows:

> The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.

Under the above-quoted authority, a certifying officer is entitled to a decision by the Comptroller General on a question of law involved in payment on a specific voucher which has been presented to him for certification prior to payment of the voucher, which should accompany the submission to this Office. 21 Comp. Gen. 1128 (1942).

In the instant case, no voucher accompanied the request for decision and the question presented is general in nature. Normally, we would not render a decision under such circumstances. However, in view of the fact that the problem involved in the instant situation will be of a recurring nature, we are rendering our decision to you under the broad authority contained in 31 U.S.C. 74, pursuant to which we may provide decisions to the heads of departments on any question involved in payments which may be made by that department.

In our decision of December 10, 1971, 51 Comp. Gen. 367, we held that the San Francisco City and County tax of 25 percent on occupancy of parking spaces is not chargeable to the Federal Government when a Government-owned vehicle is involved, and that a voucher for same in favor of a Government employee may not be certified for payment.

Mr. Lewis states that consideration has been given to the alternatives of either requiring Government employees to bear the burden of the tax or of setting up an administrative procedure whereby the tax would not be charged or that reimbursement would be sought from the city taxing authorities after payment of the tax.

As to the latter, Mr. Lewis states that reimbursement after payment would create an unreasonable burden on the city, and the administrative costs to the Federal Government would exceed the amount of the taxes involved. We note that this disparity was further increased as of July 1, 1972, when the tax was reduced to 10 percent.

Mr. Lewis further states that consideration has been given to the use of the Standard Form 1094 U.S. Tax Exemption Certificate, but that this procedure would likewise entail a substantial administrative burden and is also limited by certain restrictions on the use of such certificates.

In view of the administrative burdens of implementing our decision of December 10, 1971, 51 Comp. Gen. 367, Mr. Lewis requests that certifying officers be allowed to certify travel vouchers (in favor of Government employees) where the amount of the parking tax in question is one dollar or less.

Because of the nature of the tax involved, the proper procedure would be the use of the tax exemption certificate. The GAO Manual, Title 7, section 26.1, reads in pertinent part as follows:

> Agencies, as well as Government corporations, generally are not authorized to pay State or local taxes, because the United States is not liable for the payment of such taxes when the legal incidence of the tax is on the vendee. If a vendor requires evidence that a sale or transaction is tax exempt, he should be provided with a tax exemption certificate.

Since the tax is usually computed on the gross income of each parking lot, such a certificate would be necessary as evidence that the transaction was tax exempt.

Several restrictions on the use of the tax exemption certificates are found in 7 GAO 26.2, one of which is that they may not be used for purchases on which the taxes are one dollar or less. This provision is a recognition that the administration costs of the use of the certificate are prohibitive when dealing with such small amounts and, therefore, State and local taxes of one dollar or less may be paid in spite of the Government's immunity to such taxation.

On this basis, we will approve the request that certifying officers be permitted to certify vouchers for payment of the San Francisco parking tax in the amount of one dollar or less. Our decision, 51 Comp. Gen. 367, is modified accordingly.

[B-176226]

District of Columbia—Redevelopment Land Agency—Travel Expense Reimbursement to Prospective and New Employees

The District of Columbia Redevelopment Land Agency (RLA), although a Federal corporation, is deemed to be a local public agency within the framework of the District of Columbia Government (D.C.) for the purposes of title I of the Housing Act of 1949, as amended (5 D.C. Code 717a(g)), which provides for financial assistance to local communities, and as the agency is not an independent office of the executive branch of the Federal Government, it is not subject to the Department of Housing and Urban Development regulations authorizing payment of travel expenses for employment interviews and moving expenses for new employees but to the regulations that govern D.C. employees, which are the same as those for Federal employees and, therefore, in the absence of specific authority, RLA may not pay travel expenses for preemployment interviews or relocation expenses to new employees.

To Executive Director, District of Columbia Redevelopment Land Agency, August 14, 1972:

Reference is made to your letter dated June 7, 1972, requesting our decision to the following questions:

(1) Can the District of Columbia Redevelopment Land Agency reimburse applicants for permanent professional and supervisory positions actual travel expenses incurred for the purpose of employment interviews with the Agency, so long as such reimbursements are made in accordance with regulations of the Department of Housing and Urban Development?

(2) Can the District of Columbia Redevelopment Land Agency reimburse new employees for their expenses, including their immediate families, household goods, and personal effects, incurred in moving to the Washington area to begin employment with the Agency, so long as reimbursements are made in accordance with regulations of the Department of Housing and Urban Development?

You recognize that the types of expenditures involved may not be made by Federal agencies in the absence of special circumstances or authorization. However, you state that while the District of Columbia Redevelopment Land Agency (RLA) is a Federal corporation (the act of August 2, 1946, ch. 736, 60 Stat. 790), it is a local public agency for all the purposes of Title I of the Housing Act of 1949, as amended (5 D.C. Code 717a(g) derived from title VI, section 609, of the act

of July 15, 1949, ch. 338, 63 Stat. 441). Title I of the Housing Act of 1949 pertains to the extension of financial assistance to local communities for community development and redevelopment in the form of loans and grants. You also state that:

> HUD is charged with promulgating regulations for the implementation of the Housing Act of 1949, and has done so in part in the form of the HUD Urban Renewal Handbook. Such regulations specify those expenditures of local public agencies which are proper administrative expenses incidental to carrying out an urban renewal project and thus payable from funds made available by the applicable Loan and Grant Contract. Such regulations (RHA 7217.1, Chapter 1, Section 4, Page 14) state the following in regard to the two questions stated above:
>
> "Project costs may include (1) travel expense for employment interviews incurred by applicants for permanent professional and supervisory positions of the LPA, and (2) moving expenses incurred by new LPA employees, including their immediate families and household goods and personal effects, for such positions.
>
> "The incurring of these expenses shall be authorized in each case in advance by official action (as described in the second paragraph of this Section). Specific action is required with respect to each individual applicant or employee concerned. The resolution or other official action shall include a determnaton that the expense is reasonable and necessary in the particular case."
>
> * * * * * * *
>
> The above regulations permit local public agencies to reimburse prospective employees travel expenses and new employees moving expenses subject to certain conditions. Inasmuch as the Agency is considered by law (5 D.C. Code 717(a)) to be a local public agency for all the purposes of Title I of the Housing Act of 1949, it is our position that we, regardless of our status otherwise as a Federal Agency, are lawfully able to make the same expenditures * * *.

In support of the position stated above you also note our determination that once Federal funds are transferred to State or local agencies pursuant to loan and grant contracts, the conditions of the loan and grant control the expediture of such funds, and not the Federal statutory restrictions generally applicable to the expenditures of appropriated moneys.

In B–121019, December 17, 1954, copy enclosed, it was held that RLA appeared to be a local public agency within the framework of the District of Columbia Government and not an "Independent Office of the Executive Branch of the Federal Government." *See also* B–121019, June 7, 1955, copy enclosed. We recognize that for certain purposes, such as the Federal Tort Claims Act, RLA has been considered to be a Federal agency. *Goddard, et al.* v. *United States*, 287 F. 2d 343 (1961). However, for the purposes of this case we shall consider RLA to be a local public agency in accordance with the decisions cited above.

We have carefully considered the regulations quoted in your letter. It is our view that such regulations are to be used as guidelines for the development of rules by a local public agency should no local policies exist. In this connection your attention is invited to Urban Renewal

Handbook, RHM 7217.1, chapter 1, section 4, paragraph 2, which states in pertinent part as follows:

2 LOCAL PUBLIC PRACTICE

a. *Adoption of Local Government Policies.* Local government means the government of the city, county, or other political subdivision which established the local agency or for which it was established. In the case of a regional authority or agency, local government means the municipality, county, or other political subdivision in which the local agency central office is located.

(1) *When the local agency is a unit of the local government* and its administrative practices are governed by State or local regulations similarly applicable to all other employees of that governing unit, the local agency must follow the local regulations with respect to administrative practices, subject to the specific limitations in this Chapter. A copy of the applicable policies must be retained in the local agency's office and must remain available for HUD review.

In view of the above regulations and inasmuch as RLA is deemed to be a local public agency within the framework of the Government of the District of Columbia for the purpose of this case, it follows that RLA should apply the travel and relocation regulation applicable to employees of the District of Columbia. The regulations for such employees are the same as those for employees of Federal agencies. *See* 5 U.S.C. 5701; 5 U.S.C. 5721; Office of Management and Budget (OMB) Circular No. A–7, revised effective October 10, 1971, section 1.1; and OMB Circular No. A–56, revised effective September 1, 1971, sections 1.2b and c.

As you have noted in your letter, there are established rules that an agency or instrumentality within the purview of the statutes and regulations cited above may not properly pay either travel expenses to prospective employees for preemployment interviews (40 Comp. Gen. 221 (1960)) or relocation expenses to new employees (7 Comp. Gen. 203 (1927)) unless there is specific authority therefor. We are not aware of any authority which would exempt RLA from the above rules so as to permit it to make expenditures of the type here involved.

In view of the above your questions are answered in the negative.

[B–175254]

Bidders—Responsibility *v.* Bid Responsiveness—Experience

The experience requirement provision in an invitation for bids to furnish gas turbine power generators which stated that the low bidder may be required to establish supplier experience in the furnishing of gas turbine power plants, and, if not a manufacturer, written certificates would have to be obtained from the manufacturer of the engines—one before award assuring compliance with the criteria to which the engines were designed and manufactured, and one after Government acceptance of delivery warranting that the engines are proper and adequate for the use to which they have been put—involves a matter of bidder responsibility for determination by the contracting officer, except where a Certif-

icate of Competency had been or would be issued. However, since a literal compliance with the certifications required was not intended or sought in the procurement, future solicitations should state the requirements more precisely.

Bids—Competitive System—Equal Bidding Basis for All Bidders—Ambiguous Specifications

Where a specification provision for the procurement of turbine power generators which stated a gear box component of the generator "shall be of a proven design recommended and in use by the manufacturer of the gas turbine engine" was literally interpreted to require furnishing the more expensive gear box currently in use by the manufacturer as opposed to furnishing the less expensive gear box that has been used by the manufacturer, bidders did not compete on equal terms to the prejudice of the bidder who would have submitted a lower bid if the gear requirement had been clearly stated and, therefore, the invitation for bids should be canceled since an award under the solicitation would be invalid because one bidder had been prejuiced in the preparation of its bid, and any resolicitation should make prospective bidders aware of actual needs as required by paragraph 1,1201 of the Armed Services Procurement Regulation.

To the Secretary of the Navy, August 16, 1972:

Reference is made to the letters of April 25, 1972, and June 8, 1972, from the Counsel for the Naval Facilities Engineering Command (NAVFAC) regarding the protests filed by Abbott Power Corporation (Abbott), Stewart & Stevenson Services, Incorporated (S&S), and Emerson G. M. Diesel, Incorporated (Emerson), against award of a contract under invitation for bids (IFB) N62578–72–B–0018, issued December 15, 1971, by the Naval Facilities Engineering Command, Davisville, Rhode Island.

The solicitation was for twelve 2000 KW gas turbine power generators and related data packages, with an option in the Government to purchase up to an additional twelve units. Of the twelve bids received by the opening date of February 14, 1972, the three lowest were as follows: Abbott, $3,330,000; S&S, $3,493,584; and Emerson, $3,638,300.

S&S protested any award to the low bidder, alleging that Abbott was not a responsible bidder and that its bid was nonresponsive. When NAVFAC agreed with those contentions, Abbott filed its protest, asserting that it is entitled to the award as the low responsive, responsible bidder. Emerson contends, in its protest, that award cannot be made to either Abbott or S&S because both intend to furnish equipment which does not conform to the specifications. During our consideration of these protests, Custom Applied Power Corporation (CAPCO), the ninth low bidder, filed a protest alleging that no lower bidder could meet the experience requirement set forth in the IFB. We also received a submission from the Solar Division of International Harvester Company, which urged cancellation of the IFB and readvertisement on the grounds that the invitation was "poorly conceived" and any contract based on it would result in continuing disputes. Award has not yet been made.

The protests of S&S and CAPCO are based on the requirements of paragraph C–12 of the invitation, which states:

Experience Requirements

Prior to award, the apparent low conforming bidder shall, on request of the Officer in Charge, furnish data establishing that he is an experienced supplier normally engaged in the design, fabrication, test and support of gas turbine power plants of similar type, complexity and capacity (at least 500 Kw) as the plants to be furnished hereunder. The bidder must have made timely delivery of all equipment. If the apparent low conforming bidder is not the manufacturer of gas turbine engines to be furnished, the following will be required from the bidder prior to award: a written certification from the engine manufacturer that the latter has agreed to provide the bidder (if awarded the contract) with engineering services necessary to monitor preliminary and final design, fabrication, and testing of the power plants to insure that all details of engine applications are in complete conformance with the criteria to which the engines were designed and manufactured. In addition, the engine manufacturer shall provide in the certification a commitment that upon acceptance of the power plants by the Government, he will warrant to the Government that the engines are proper and adequate for the use to which they have been put.

It is undisputed that Abbott has not previously furnished gas turbine power plants and therefore cannot meet the literal terms of the stated experience requirements. This is the basis for NAVFAC's determination that Abbott is not a responsible bidder. However, Abbott, a small business firm, has been issued a Certificate of Competency (COC) by the Small Business Administration for this procurement. The certification is conclusive with respect to Abbott's capacity and credit to perform the contract and under our decisions clearly encompasses experience requirements. 38 Comp. Gen. 864 (1959); 40 *id.* 106 (1960). However, S&S asserts that the COC is not conclusive on the experience requirement of this solicitation because the issue is bid responsiveness rather than bidder responsibility in that the IFB requires proof of reliability of the bid item and not just a general experience level of a prospective contractor.

We have recognized in our decisions that experience requirements directed primarily to the performance history of the item being procured concern bid responsiveness, while the experience of a bidder is properly a matter of responsibility. 48 Comp. Gen. 291 (1968); 49 *id.* 9 (1969). Thus, in the former case, involving procurement of diesel engine generator units, we treated a requirement that a proposed engine shall have performed satisfactorily for 8000 hours during the previous 2 years as a matter of responsiveness. Although the instant IFB requires only that the contractor be "an experienced supplier" and does not contain any specific performance history requirement, S&S argues that the inherent complexity of a 2000 KW generator transforms the experience requirement into one of established reliability of the bid item, and cites B–175493, April 20, 1972, as a case in which we viewed as nonresponsive a bid that failed to establish the reliability of the item to be procured. That case, however, carefully recognized and pre-

served the dichotomy between product experience and bidder experience, and the IFB therein specifically included a 1-year-in-use requirement for the bid item as well as a 5-year experience requirement for the manufacturer. The experience requirement of this IFB clearly goes to the matter of responsibility, and insofar as Abbott is concerned, the issue is foreclosed by the issuance of the Certificate of Competency.

S&S also contends that Abbott does not have and cannot obtain the manufacturer's certification required by the second half of paragraph C–12. This certification must contain both an agreement that the engine manufacturer will provide certain engineering services to the contractor with respect to the power plant and a commitment that the engine manufacturer, upon acceptance of the power plants by the Government, will warrant to the Government that the engines are proper and adequate for the use to which they have been put.

Our record contains copies of certifications furnished by Detroit Diesel Allison Division (DDA) to both Abbott and S&S. While the first portion of the certifications are similar, they differ in that Abbott's certification refers to engineering services with respect to the "gas turbine engines" while the S&S certification refers to the "power plant." The other part of the certification furnished Abbott states that:

> * * * We certify the engines are proper and adequate for the intended use in accordance with Detroit Diesel Allison Division interpretation of specification CDC–BD–6115–330–4.

The S&S certification is again similar, but contains the word "warranted" instead of "certify." The entire certification provided to Abbott also contains the following statement:

> All certifications supplied in this TWX and our offer to sell assume compliance with paragraph C12 * * *.

S&S claims that these differences indicate that while its certification is in conformity with paragraph C–12, the certification provided to Abbott is more limited and does not meet the requirements of paragraph C–12. However, DDA, in a subsequent TWX to Abbott, stated that "the same degree of assistance has been offered to all bidders for the purpose of their proposals." We have also been informally advised by DDA that it has furnished the same certifications to those bidders requesting them.

Notwithstanding this dispute, it appears that neither bidder's certification literally complies with paragraph C–12. That paragraph requires a preaward commitment from the engine manufacturer to later warrant to the Government that its engines are adequate for the use to which they have been put. DDA, however, has certified only that its engine is adequate for the use intended by the IFB. DDA has informally advised that while it is not willing to certify now that it will sub-

sequently provide a warranty to the Government, it would be willing to furnish the stated certification after the generators are built if they have been assembled properly and in accordance with DDA's recommendations. We think DDA's position in this respect is reasonable. We can understand the reluctance of the engine manufacturer, a subcontractor under this IFB, to commit itself in advance to warrant that the prime contractor has assembled the generator units in such a way that the engine is adequate and proper for the use *to which it has been put.* This requirement of paragraph C–12 probably cannot be achieved by any bidder who does not also manufacture the turbine. However, since NAVFAC has indicated a willingness to make award to S&S, we assume that literal compliance was neither intended nor sought at this time, and that a more general certification, such as that furnished by DDA, will satisfy the Navy's requirements.

It does not appear that the Navy has specifically evaluated the certifications presented by the two low bidders in light of the total record that has been amassed during the tendency of these protests; nor would the bidders be precluded from offering other certification data or even other engines. Accordingly, consideration of the issue by our Office at this time would be premature. However, we believe that requirements of this type in future procurements should be thought out with great care and precisely stated.

The claim of CAPCO that all lower bidders do not meet the experience requirement of paragraph C–12 is not supported by the record. As indicated above, this involves a matter of responsibility, and with respect to Abbott, the issue is foreclosed by the Certificate of Competency. With respect to other bidders it is well established that, except where a Certificate of Competency has been or would be issued, the question of bidder responsibility is primarily for determination by the contracting officer, and we will regard that determination as conclusive unless there is convincing evidence that it was the result of bad faith or arbitrary action. 43 Comp. Gen. 228 (1963). CAPCO has submitted no evidence to support its allegation.

Emerson's protest is based on a literal reading of paragraph 3.10 of the specifications, which states that the gear box component of the generator "* * * shall be of a proven design recommended and in use by the manufacturer of the gas turbine engine." During preaward surveys both Abbott and S&S indicated an intention to furnish a turbine manufactured by Detroit Diesel Allison (DDA) and a gear unit produced by Western Gear Corporation, although Abbott also stated that it had not made a final decision as to which gear it would use and objected to having to provide this information prior to award. While DDA is willing to recommend the use of the Western gear with its

engine, Emerson claims that the specification requires that the gear must also have been used by DDA, and that DDA has in fact never used the Western gear in its own production of generators of this type. Emerson asserts that only a Falk gear can satisfy this requirement, and it further asserts that it will be prejudiced if use of another gear is allowed because its bid was based on providing a DDA engine coupled with the much more costly Falk unit. In support of its assertion, Emerson has submitted figures to us indicating that its bid price could have been more than $360,000 lower had it anticipated the use of other than a Falk gear.

At the outset, we must reject any implication in the Emerson protest that the two low bids were nonresponsive with respect to this gear requirement. The invitation did not require bidders to identify either the turbine or the gear that would be used in the generator, and nothing was submitted with the bids to indicate which components would be furnished or that the specifications would not be met. We think it is clear that the invitation allowed a successful bidder, upon award of a contract, to furnish a generator with any turbine and gear combination that would meet the detailed specifications of the IFB.

We understand that certain engine manufacturers now produce or have, in the past, produced entire generator units for their own use or for use by their customers. We also understand that while DDA formerly supplied complete generator units, which utilized Falk gears, it no longer builds complete systems and now provides only the engine. The record indicates that S&S, one of DDA's franchised distributors, has supplied a generator unit using a DDA engine coupled with a Western gear. DDA has also pointed out that it currently has in use for this application at its plant only two gears, one manufactured by General Electric and one developed by DDA. However, it would not recommend either gear for commercial use with its engine.

Emerson claims that the words "and in use by the manufacturer," contained in paragraph 3.10, clearly require the contractor to furnish a gear that has been used by the engine manufacturer, and asserts as a fact that only a Falk gear has been used by DDA. Since DDA has stated that it uses gears other than Falk, but has supplied generators using only the Falk gear, it appears that Emerson is claiming that the specifications require the use of a gear that has been furnished by a turbine manufacturer as part of its generator unit. NAVFAC personnel read the specification more broadly, claiming that the use of a gear by a manufacturer's distributor in furnishing a complete generator unit to a customer satisfies the specification. NAVFAC's counsel also points out in his June 8, 1972, letter that "there could be no substantial difference with respect to assuring a satisfactory combination

whether the use experience had been by the manufacturer or its distributor."

We think a strictly literal interpretation of the words in paragraph 3.10 would require the contractor to furnish a gear box that *is currently in use by the engine manufacturer*, as opposed to Emerson's assertion that the gear need only be one that has been used by the manufacturer. The expert opinion of a university English professor, submitted by Emerson as part of its protest file, supports this strict interpretation. Therefore, such a reading of paragraph 3.10 would require the use of either a DDA gear or a General Electric gear with a DDA engine, assuming DDA's recommendation could also be obtained, a result not advocated by the Navy, Emerson, nor any other protesting party. Furthermore, since generally the customer, not the manufacturer, has the units in use, such as interpretation, contrary to the NAVFAC's purpose, could eliminate the gear/turbine combinations which have had the greatest amount of proven experience.

We are thus faced with a situation where the clear and unambiguous, if overliteral, meaning of a material provision would result in a frustration of the procurement since the only two gears which would meet the in-use requirement so far as it pertains to the DDA turbine would not receive the recommendation of the turbine manufacturer as required by the paragraph. If this interpretation is abandoned in favor of a practical one more in accordance with the Navy's obvious purpose, we cannot say that Emerson's interpretation is unreasonable. The record establishes that the DDA turbine has always been mated commercially with a Falk gear, except in the one instance when S&S furnished a DDA engine coupled with a Western gear. Under such circumstances, Emerson's view that the specifications required the use of a Falk gear with a DDA engine is not unreasonable. Since Emerson, a DDA distributor, reasonably believed it was required to furnish Falk gears, while Abbott and S&S, with equal reason, believed the less expensive Western gear was acceptable, it is apparent that the bidders were not competing on equal terms. An award made pursuant to a solicitation which permits the preparation of bids on an unequal basis is not invalid unless a bidder has been prejudiced thereby, 39 Comp. Gen. 834 (1960); 40 *id.* 561 (1961). In this case, Emerson has made a *prima facie* showing that it could have submitted a materially lower bid affecting the bidding order if paragraph 3.10 had been reasonably clear.

Since Emerson appears to have been prejudiced in the preparation of its bid, because paragraph 3.10 cannot mean what it says and what it was intended to mean cannot readily be ascertained, the invitation should be canceled.

NAVFAC has stated that the Western gear used with the DDA engine will satisfy its needs. Such a determination is within the requiring agency's reasonable discretion. However, any resolicitation should make the determination clear, so that all prospective bidders are made aware of the Navy's actual requirements, as required by ASPR 1.1201.

With respect to compliance with the post-opening certification requirement of paragraph C–12, the matter is returned for consideration by the procuring activity in accordance with the foregoing.

[B–175838]

Agriculture Department—Indemnity Payments—Contamination of Cheese—Removal From Commercial Market

Cheese that contained dieldrin which was removed from the commercial market at the direction of the State of Wisconsin Department of Agriculture under 14-day hold orders beginning April 11, 1969, but the final determination that the cheese was adulterated pursuant to both State and Federal law and should not move in interstate or foreign commerce was not made until May 14, 1971, is considered to have been removed from the commercial market after November 30, 1970, thus permitting indemnity payments under section 204(b) of the Agricultural Act of 1970, approved November 30, 1970, in view of the fact the legal effectiveness of the hold orders to remove the cheese from the commercial market prior to May 14, 1971, is doubtful. However, before making the indemnity payment action should be taken to insure the claimant will not also collect or benefit under its judgment against the farmer responsible for the contamination.

To the Secretary of Agriculture, August 16, 1972:

By letter of May 1, 1972, with enclosures, the Honorable Clarence D. Palmby, Assistant Secretary of Agriculture, forwarded for our consideration the claim of the Liberty Pole Cheese Company, Inc., of Viroqua, Wisconsin, for an indemnity payment on 163,364 pounds of Romano cheese which Liberty Pole manufactured and which had been removed from the commercial market by direction of the State of Wisconsin Department of Agriculture because such cheese contained residues of the economic poison dieldrin. The letter states that indemnity payments in such instances are authorized by section 204(b) of the Agricultural Act of 1970, approved November 30, 1970, 84 Stat. 1362 (codified as 7 U.S.C.A. 450j–450*l*), for dairy products which manufacturers were directed to remove from the commercial market after the date of enactment of the act. The letter further states that your Department has determined that Liberty Pole meets the eligibility requirements of the statute and the program regulations (7 CFR 760), except that there is a question as to whether Liberty Pole was directed to remove the cheese from commercial market before or after November 30, 1970, and requests our advice as to whether, assuming all other requirements of the statute and regulations have been met,

an indemnity payment may be made to Liberty Pole on the basis that is was directed to remove its cheese from the commercial market after November 30, 1970.

The record transmitted to our Office indicates that the cheese was the subject of a "hold order" issued by the Wisconsin Department of Agriculture on April 11, 1969, prohibiting the sale or movement of the cheese for any purpose until an analysis or examination thereof had been completed, inasmuch as it was believed that the cheese was adulterated with a pesticide residue. Under Wisconsin law (Wisconsin Statutes, chapter 97, section 97.12), such order was effective only for a 14-day period, and was required to be confirmed or released within that period. This order was released on April 16, 1969, and a new 14-day holding order issued on that date. This latter order was not formally confirmed until May 12, 1969, more than 14 days after issuance of the hold order. On September 11, 1969, all prior holding orders were consolidated into one final hold order. However, the Wisconsin Department of Agriculture did not make any final decision as to the salability or ultimate disposition of the cheese pending further study and review of the matter and investigation of possible market outlets for the cheese outside the State of Wisconsin. On May 14, 1971, the Wisconsin Department of Agriculture advised Hale, Skemp, Hanson, Schnurrer & Skemp, attorneys for Liberty Pole, that it had been determined that the cheese was adulterated under both State and Federal law and hence could not be moved in interstate or foreign commerce as food for human consumption; and that since all possibilities for sale of the cheese as a food in other States or countries not having restrictions on pesticide residues in foods had proved fruitless, it had no further recourse but to order final disposition of the cheese and its diversion from human food channels.

The record also shows that Liberty Pole obtained a default judgment on March 9, 1970, against the dairy farmer whose dieldrin-contaminated milk caused the contamination of the cheese here involved. Liberty Pole's civil action was based upon alleged breach of warranty by the dairy farmer with respect to the milk which he sold to Liberty Pole. It is indicated that, insofar as your Department is aware, Liberty Pole has never recovered anything on this judgment. Nevertheless, there is an implication that this judgment may be construed as an admission by Liberty Pole that the cheese had been removed from the commercial market prior to November 30, 1970.

Liberty Pole contends that, since it and the Wisconsin Department of Agriculture had been attempting to dispose of the cheese outside of the State of Wisconsin, it was not directed to remove the cheese from the commercial market until May 14, 1971, the date of the letter

from the Wisconsin Department of Agriculture advising that such efforts had proved fruitless and ordering final disposition of the cheese. The statute (7 U.S.C.A. 450j–450*l*) authorizes indemnity for manufacturers of dairy products who have been directed since November 30, 1970, to remove their dairy products from the commercial markets. "Commercial market" is defined by 7 CFR 760.2(o)(2) as:

> The market to which the affected manufacturer normally delivers his dairy products and from which they were removed because of detection therein of pesticide residue.

Likewise, 7 CFR 760.2(p) defines "Removed from the commercial market" as meaning:

> (1) Produced and destroyed or fed to livestock, (2) produced and delivered to a handler who destroyed it or disposed of it as salvage (such as separating whole milk, destroying the fat, and drying the skim milk), or (3) produced and otherwise diverted to other than the commercial market.

The record before our Office clearly shows that Liberty Pole normally sold and delivered its cheese to the Wisconsin locations of major cheese distributors, such distributors taking title at the time Liberty Pole sold the cheese to them. Hence, the State of Wisconsin would appear to constitute the "commercial market" for Liberty Pole under the quoted regulations. Since the hold orders issued to Liberty Pole by the Wisconsin Department of Agriculture, from their inception in 1969, purported to prohibit the sale or movement of the cheese within the State of Wisconsin, Liberty Pole's "commercial market," such orders, if legal and proper, would constitute a direction to Liberty Pole to remove the cheese from the commercial market in 1969, long prior to the enactment of the act.

However, there appear to be grave doubts as to the propriety and legality of the hold orders issued by the Wisconsin Department of Agriculture. That Department itself, in its letter of December 9, 1971, to the Assistant Deputy Administrator of ASCS, questions the legality of its actions and the legal sufficiency and effectiveness of its hold orders in this case to remove the cheese from the commercial market. The letter of March 3, 1972, from Hale, Skemp, Hanson, Schnurrer & Skemp to the Assistant Deputy Administrator is to the same effect. Section 97.12 of the Wisconsin Statutes specifically provides that "Such holding order shall not be effective for a period longer than 14 days from the time of delivery thereof," and that an analysis or examination of the product in question must be completed and the order be confirmed or released within that time. Apparently this was not done in the present case. Moreover, in the case of the *Central Cheese Company, Inc.* v. *Department of Agriculture, State of Wisconsin*, Case #119–480 in the Circuit Court of Dane County,

State of Wisconsin, wherein the Wisconsin Department of Agriculture, after issuing a hold order on certain cheese, failed to make a final finding of adulteration within the 14-day period as required by the Wisconsin law—as is the situation in the present case—the court ordered that the cheese be released from the hold order and possession of the same be turned over to the owner.

In view of the above, there is sufficient doubt as to the legal effectiveness of the hold orders in this case to constitute a direction to remove the cheese from the commercial market prior to the letter of May 14, 1971 (although the cheese obviously was, in fact, withheld from such market prior to such date), that, assuming all other requirements of the statute and regulations have been met, our Office will not be required to object to the making of an indemnity payment to Liberty Pole on the basis that it was directed to remove the cheese from the commercial market after November 30, 1970. However, before making the indemnity payment your Department should take appropriate action to insure that Liberty Pole will not also collect or benefit under its judgment against Mr. Traastad.

[B-140144]

Travel Expenses—Military Personnel—Escort Duty—Performed by Non-Governmental Personnel

An individual not in the employ of the United States Government who travels as an attendant to a military member on the temporary disability list incapable of traveling alone to report for the mandatory physical examination required by 10 U.S.C. 1210(a) in order to avoid the termination of his disability retired pay may be reimbursed actual transportation costs notwithstanding section 1210(g), authorizing travel and transportation allowances for the member, does not provide for the attendant since the use of governmental personnel involves two round trips, thus making the single round trip travel of non-governmental personnel more economical and practicable and, therefore, beneficial to the interests of the United States. B-140144, August 24, 1959, overruled.

To the Secretary of the Navy, August 18, 1972:

We again refer to letter of December 8, 1971, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision whether, under existing legislation, an individual not in U.S. Government employ, may be authorized to perform travel as an attendant to a military member on the temporary disability retired list when such member is traveling for the purpose of submitting to a mandatory physical examination and is incapable of traveling alone. The request was assigned PDTATAC Control No. 71-58 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says he is aware of our decision of August 24, 1959, B-140144, in which we advised the Secretary of the Army that

we found no authority under 37 U.S. Code 253 (now section 404) or 5 U.S. Code 73(b)2 (now section 5703) for payment of travel expenses of attendants (other than Government personnel) for members on the temporary disability retired list traveling to or from place of examination.

The Assistant Secretary says that subsequent to our decision the Department of the Army sponsored DOD Legislative Proposal 87–10 to provide allowances in cases of this nature, that the proposal thereafter became DOD Legislative Proposal 88–45 but was not included in the 1963 Department of Defense Legislative Proposal for the 88th Congress, and that there has been no subsequent legislative proposal on this subject matter.

However, the Assistant Secretary refers to decision of August 26, 1968, 48 Comp. Gen. 110, dealing with an entirely different matter. He says that the synopsis and concluding four paragraphs of that decision indicate a liberalized view of the term "persons serving without compensation," as used in 5 U.S.C. 5703, which may be broad enough to include persons serving in other than an advisory capacity. Also, he refers to B–169917 of July 13, 1970, as indicating a more liberal view in the case of an individual not in U.S. Government employ when traveling as an attendant for a civilian employee.

Section 1210(a) of Title 10, U.S. Code, provides in pertinent part that a physical examination shall be given at least once every 18 months to each member of the Armed Forces whose name is on the temporary disability retired list and that if a member fails to report for an examination, after a receipt of proper notification, his disability retired pay may be terminated. Travel and transportation allowances for the member are authorized by subsection (g) of that section for members on the temporary disability retired list ordered to submit to such physical examination.

The purpose of the legislative proposal was to amend section 1210(g) to authorize persons to travel at Government expense as attendants to members of the Armed Forces who, at the time they are required to submit to periodic physical examinations, are incapable of traveling alone. It was stated that where Government personnel are detailed to act as attendants, the resultant travel costs usually involve two round trips between the hospital and the member's home, whereas the costs for only one round trip would result if non-Government personnel were authorized to perform this function.

Further, it was mentioned that should it be necessary to dispatch an ambulance for this purpose, travel costs would be further increased if an attendant as well as a driver were required. Also, mention was made of the fact that these members, at the time they are placed on the temporary disability retired list, are authorized to select a home within or

without the United States, and in an instance where a member's home or residence is outside the United States it may be not only uneconomical but impractical to provide an attendant who is in the employ of the United States.

This Office did not object to the proposed legislation. However, it was not enacted and, apparently, the Department of Defense effort to obtain it has been abandoned.

In the 1970 decision we held that reimbursement of the transportation expenses was authorized for an individual not in the U.S. Government employ incident to travel as an attendant for a civilian employee (the attendant's husband) whose travel was authorized by 5 U.S.C. 5702(b). A similar situation is involved here since transportation of members on the temporary disability retired list is authorized by 10 U.S.C. 1210. Also, it is shown that in many instances it would be to the Government's interest to authorize non-Government personnel to travel as attendants to such members when they are ordered to travel for the purpose of submitting to a mandatory physical examination and are incapable of traveling alone.

Upon further consideration we now believe that reimbursement of the actual transportation costs of a non-Government attendant may be authorized in such cases when the member is incapable of traveling alone. Accordingly, the question is answered in the affirmative.

[B–148324, B–175376]

Military Personnel—Reservists—Disability Determinations—Benefits Entitlements

Upon reconsidering the entitlements of National Guard members and other reservists under the act of June 20, 1949, which prescribes the same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although the holding that the ability to resume normal civilian employment is not the standard for determining entitlement to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or a final disposition of the matter, decisions that hold physical presence at a regular drill or a conditional temporary assignment to limited duty terminates entitlemen to pay and allowances or medical care and hospitalization will no longer be followed, but a member must promptly report injury, disease, and his current disability status to permit action to retire, separate, or refer him to the Veterans Administration.

Military Personnel—Reservists—Disability Determinations—Administration of Disability Benefits Program

In the implementation of the changes in the administration of the disability benefits program provided by the act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report the incurrence of disability to enable the military services to provide proper medical and hospital care, as well as pay and allowances, to the disabled member. Where a member is not provided medical or hospital care so that a current determination of entitlement to pay and allowances cannot be made, any payment to a member

should be supported each month by a report from his civilian physician and by a statement from the member showing the days of military duty or civilian employment, together with the name and address of his employer.

Statutory Construction—Prospective Effect of Acts

Since a decision changing a prior construction of a statute generally is prospective only, the reconsideration of the entitlements of National Guard members and other reservists under the act of June 20, 1949, providing similar benefits for reservists injured or disabled in line of active duty or training as Regular members receive, may be considered tantamount to a changed construction of the law and, therefore, the changes may not be given retroactive application. However, where no final action with respect to the physical disability proceedings, or other final action has been taken, such cases may be considered to be within the purview of the changed entitlements.

To the Secretary of Defense, August 18, 1972:

There is before us for consideration the question whether certain standards set forth in our decisions of March 4, 1958, 37 Comp. Gen. 558, and May 19, 1964, 43 Comp. Gen. 733, are creating inequities by terminating pay and allowances to certain members of the National Guard and other reservists pending recovery from an injury or disease incurred in line of duty under the circumstances discussed below.

The act of June 20, 1949, ch. 225, 63 Stat. 201, 10 U.S. Code 6148, provided that members of the armed services other than members of the Regular services should be in all respects entitled to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay and allowances as may be provided by law or regulation for members of the Regular services if called to active duty for more than 30 days and suffer disability in line of duty from disease while so employed, or if ordered to active duty or inactive duty training for any period of time and suffer disability in line of duty from injury while so employed.

The provisions of law concerning entitlement to pay and allowances during periods of disability under that law are now codified in 37 U.S.C. 204 (g), (h), and (i), and the provisions of law governing disability retirement or separation are now contained in 10 U.S.C. 1201–1221.

Under those provisions of law a member (other than a Regular member) of the armed services is entitled to continue in receipt of pay and allowances for the period of hospitalization and while awaiting action on his disability retirement proceedings if such proceedings are instituted.

In the absence of determinations by service medical officers concerning the member's disability status or of the duration of his inability to perform his military duties, we have utilized information concerning the member's ability or inability to resume his normal civilian employment in establishing a presumptive disability for military duty.

As a general rule, however, such secondary evidence is not controlling. Rather, the standard to be applied in detemining the duration of the member's entitlement to pay and allowances is his inability to perform his military duties and not the duties of his civilian employment. 43 Comp. Gen. 733 (1964); 47 *id.* 531 (1968).

The legislative history of the 1949 law establishes that it was the intent of Congress that members disabled in line of duty under the conditions prescribed therein should be "kept in a pay status until their hospitalization is completed and their case finally settled," that is, "while hospitalized or awaiting final decision of his case." *See* 29 Comp. Gen. 509 (1950); 36 *id.* 692 (1957); 43 *id.* 733 (1964).

In decision of March 4, 1958, 37 Comp. Gen. 558, we said the "conditional" release from the hospital for a service medical board with a recommendation that the member be returned to a duty status with temporarily restricted duty or to a duty status with limited activities and the further requirement of periodically reporting for reevaluation of a physical condition is regarded as a final decision in the member's case. We there said:

> * * * Since there are varying degrees of "temporarily restricted duty" and "limited activities" which may be applicable in different cases of the type here involved, where a member is returned to a National Guard duty status, we believe that the matter of his right to active-duty pay and allowances should be decided on the basis of whether or not he is returned to a duty status and without regard to the amount or degree of restricted or limited duty it is recommended that he perform after his return.

We also pointed out that where the injury is such as not to warrant or suggest the institution of disability retirement proceedings at the date of termination of hospitalization, payment of pay and allowances after that date would not appear to be justified in the absence of a showing of physical disability to perform military duty.

In 48 Comp. Gen. 1 (1968) we said with respect to an aviation pilot injured while on training duty that entitlement to pay and allowances continues until the member is physically qualified to perform his full and specialized duty of flying, but that if the Reserve member is capable of performing restricted or limited duty, under our decision 37 Comp. Gen. 558 "the actual return of such a Reserve member to a Reserve duty status" is "the determinative factor in establishing the cutoff date" of pay and allowances and the member ceases to be entitled to pay and allowances when he is "officially returned to a Reserve duty status."

There have recently been brought to our attention two cases of members of the Florida National Guard who were injured while on annual training duty. It is reported that Specialist 5 Shelby C. Owens, 266–62–2200, incurred an injury to his right knee on July 25, 1969, and upon release from active duty on July 27, 1969, his commanding officer advised him to consult his private physician, who determined that

he had a reasonably serious injury and advised him not to attend drills or go to work.

He reported for the next unit assemblies on August 9 and 10, 1969, however, and reported that his knee had not gotten any better, that he was not in great pain, but that he was unable to work in his civilian occupation (electrician). His attendance at drills consisted merely of sitting at a desk, which was completely unrelated to his military duty (heavy equipment operator). Apparently he continued to attend some drills on a limited duty basis not requiring him to walk or stand for a long time, and there is some indication that he was totally disabled to perform his regular military duties during the period October 1, 1969, through September 13, 1970.

He was discharged from his unit in February 1971 "with a L–2 profile." However, no details have been furnished as to any change in status during this period, such as hospitalization or other treatment. Also there is no evidence before this Office indicating that a military medical officer ever determined that Mr. Owens was at any time physically unfit to perform his regular military duties.

Sergeant First Class Robert L. Zontini, 281–32–3041, incurred an injury to his back on June 15, 1971, in a parachute jump during annual training of his Florida National Guard unit and has been hospitalized in various Army hospitals since that time. We understand that recently a Physical Evaluation Board was convened to consider his case. It appears that service medical officers consider that he has received maximum medical treatment for his back injury, that they are unable to improve his medical condition, and that even though he is not fully recovered he is able to perform limited military service. He says that he is unable to pursue his civilian occupation as an air traffic controller.

In a letter to a Member of Congress concerning the problem of injured members of the National Guard, The Adjutant General, Florida National Guard, indicates that our decisions which restrict the continuation of pay and allowances to injured members of the Reserve components who are returned to duty in a limited Reserve duty status create undue hardship on the members and their families. It is suggested that injured members should receive pay and allowances until they are able to resume their regular civilian occupations.

It seems clear that there was no legislative intention that members of the armed services other than Regulars should continue to receive pay and allowances indefinitely until they are fully recovered and able to resume their normal civilian occupations. *See* 43 Comp. Gen. 733, 736 (1964). As there indicated, in some cases we authorized payment of pay and allowances until the injured member resumed his civilian employment where there was no direct or service-established medical

evidence of the member's disability status or the duration of his inability to perform his military duties. We there said:

> The utilization of secondary evidence of the disability status of an injured reservist in the past because of the unavailability of direct service medical evidence or determination of that status was not intended as establishing a general rule for guidance of the services in future cases. The statute contemplates that the services will provide the necessary hospital and medical care to injured reservists and to extend to them the same treatment, rights, and benefits extended to Regulars by statute or regulation, including if appropriate the institution of disability retirement proceedings and, of course, making the requisite determinations. As we pointed out in 33 Comp. Gen. 339, 346, the necessary administrative or other determinations should be made with reasonable promptness following the injury.

See also 47 Comp. Gen. 531, 534–535 (1968).

As pointed out in those decisions and other decisions cited above, the legislative history of the 1949 act clearly shows that the event which would terminate disability pay is recovery of ability to perform military duty or a final decision is made in the case. Consequently we must adhere to our decision of May 19, 1964, 43 Comp. Gen. 733, that ability to resume normal civilian employment is not the standard to be used in determining entitlement to disability pay where contemporaneous service medical data are available.

Entitlement to disability pay and allowances therefore terminates when the member recovers sufficiently to perform his military duties or when a final decision is made in his case, such as completion of separation proceedings if such proceedings are timely initiated and he is separated for disability with or without monetary disability benefits, such as disability compensation from the Veterans Administration.

We now agree, however, that neither the mere physical presence of an injured reservist at a regular drill of his military unit nor a conditional temporary assignment to limited duty in itself constitutes an event which should terminate entitlement of pay and allowances on account of an injury incurred in line of duty while performing military duty or to medical care and hospitalization therefor. In view thereof and of the inequities resulting from our decision of March 4, 1958, 37 Comp. Gen. 558, requiring the termination of pay and allowances when a reservist is temporarily authorized or directed to perform limited military duties pending recovery from an injury or disease incurred in line of duty, that decision and other similar decisions will no longer be followed.

It is noted that paragraph 8, National Guard Regulation 40–3(1), makes it the individual responsibility of each member of the National Guard to report to his unit commander without delay whenever he incurs a disease or injury while engaged in training under 32 U.S.C. 502–505, (2) requires each member to be informed that failure to promptly report the disease or injury will result in loss of medical benefits, and (3) makes it the responsibility of the unit commander to

take action to insure that the member receives medical care under the conditions there prescribed. Paragraphs 9 and 10 thereof cover hospitalization and separation of disabled members, restoration to duty upon recovery, as well as retirement and separation for disability where authorized by law.

In disability cases, especially where the member is disabled but is not hospitalized, it seems to us that such member has a responsibility not only to promptly report his injury or disease, but also his current disability status from time to time to the proper military authorities in order that proper action may be taken currently in his case to retire him, separate him from the service, etc., or refer him to the Veterans Administration. *See* 47 Comp. Gen. 716 (1968). His failure to do so should be at the risk of loss of benefits.

In short, where the member cooperates with the services so that appropriate administrative determinations may be made currently by the proper military authorities with respect to his disability resulting from injury or disease, this Office will not question otherwise proper payments of pay and allowances under 37 U.S.C. 204 (g), (h), and (i) even though the member may perform some military duty in a limited duty status if the record establishes that proper action was taken in the member's case promptly to comply with the regulations. On the other hand, in cases where the record fails to establish that the member promptly notified the proper military authorities and kept them advised currently concerning his condition, we believe a basis for denial of pay and allowances may exist.

In the case of Sergeant Zontini, the information furnished this Office indicates that he has received medical and hospital care in service hospitals, that he has received the maximum medical treatment for his injury, and that his case has been referred to a Physical Evaluation Board. Thus in his case it appears that the appropriate service authorities have provided the appropriate medical and hospital care and presumably are able to make an appropriate disposition of his case. Since he apparently has received the maximum medical treatment appropriate in his case, it is our opinion that, if it be determined that he is entitled to payment of pay and allowances under this decision, payment should terminate upon completion of the disability proceedings.

In any event, payment of pay and allowances may not be continued on the basis that he is not recovered sufficiently to resume his normal civilian occupation. Presumably consideration has been or will be given to entitlement to the normal disability benefits that would be paid in the case of a Regular similarly situated: disability retirement or severance pay, or disability compensation by the Veterans Administration.

The information furnished us concerning Specialist Owens is too meager to enable us to determine whether he had been given the service or other medical care available at Government expense. However, as stated above, the record indicates that he was discharged in February 1971 and, if that be a fact, further consideration of his case apparently would be precluded under the last paragraph of this decision.

In summary, it is our recommendation that, to implement the changes in the administration of the disability benefit program that may be occasioned by this decision, the responsibility of the individual member of the military services to promptly report the incurrence of a disability to the military authorities designated for that purpose be brought to the attention of such members to facilitate not only a prompt disability in line of duty determination, but also to enable the services to provide the proper medical and hospital care as well as pay and allowances to the disabled member. Where the member is provided service medical care currently, current determinations of entitlement to pay and allowances are, or can be, readily made.

Where the member is not provided medical or hospital care by the military services we suggest that the payment of pay and allowances may be dependent not only upon the prompt reporting of the incurrence of a disability, but also upon the periodic reporting currently of his disability condition (*see* generally 47 Comp. Gen. 716 (1968) and B–168076, November 24, 1969); that is, that such payments be supported for each individual month by the report of his civilian physician based upon his physical examination made during that month showing the member's physical condition, as well as the member's statement showing the days (1) he performed any military training duty or (2) he was employed during that month in civilian employment together with the name and address of his employer.

A decision changing a prior construction of a statute generally is prospective only. 27 Comp. Gen. 686, 688 (1948); 36 Comp. Gen. 84 (1956). Since this decision may be considered tantamount to a changed construction of law, it will not be given retroactive application. However, in cases of the type here considered and currently pending where no final action with respect to the physical disability proceedings or other final action has been taken, such cases may be considered as coming within the purview of this decision.

[B–175809]

Gratuities—Enlistment Bonus—Military Specialty Requirement

Since payment of the enlistment bonus authorized by section 203(a) of Public Law 92–129 (37 U.S.C. 308a) to aid in filling military combat positions by encouraging new enlistments and the extension of initial enlistment terms is contingent on a member qualifying and serving in his designated military specialty, promulgated regulations should require a member to be qualified and serving

in his specialty before gaining entitlement to the $3,000 bonus prescribed for a period of at least 3 years service—the bonus to be paid in a lump sum or periodic installments—and should provide that a member to be eligible for continued bonus installments must maintain qualification in his specialty. Furthermore, the right of a qualified member who extends his service vests at the time the extension is executed, and if a member is not qualified, his right vests after the extension is executed and he completes retraining.

To the Secretary of Defense, August 30, 1972:

Further reference is made to letter dated April 20, 1972, with enclosures, from the Assistant Secretary of Defense (Comptroller) requesting a decision on questions concerning the administration of the enlistment bonus authorized by section 308a of Title 37, U.S. Code, as added by section 203(a) of the act of September 28, 1971, Public Law 92–129, 85 Stat. 358.

The questions presented are contained in Department of Defense Military Pay and Allowance Committee Action Nos. 462 and 463. Committee Action No. 463 consists of two questions as follows:

(1) May a member who enlists for service in a combat element of an armed force for participation in the Enlistment Bonus program be required to become qualified in the combat element skill prior to gaining bonus entitlement?
(2) If the answer to question (1) is yes, may the member be required to maintain skill qualification in order to be eligible for continued bonus installments?

Since another question is presented in Committee Action No. 462, that question will be numbered 3 and considered in that order. The question is:

(3) May a member who extends his initial period of active duty in a combat element of an armed force be paid the enlistment bonus as prescribed by the Secretary of Defense before he enters into service under the extension period?

The pertinent parts of 37 U.S.C. 308a, subsections (a) and (b) read as follows:

(a) Notwithstanding section 514(a) of title 10 or any other provision of law, a person who enlists in any combat element of an armed force for a period of at least three years, or who extends his initial period of active duty in a combat element of an armed force to a total of at least three years, may, under regulations to be prescribed by the Secretary of Defense, be paid a bonus in an amount prescribed by the Secretary, but not more than $3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the Secretary.
(d) Under regulations approved by the Secretary of Defense, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

Concerning questions (1) and (2), it is stated in the discussion in Committee Action No. 463 that under the above law the Secretary of Defense proposes to promulgate regulations providing that the enlistment bonus be paid "* * * to persons who enlist for the purpose of *qualifying and serving* in designated military specialties * * *." Further, it is proposed that the regulations will prescribe the method of payment as "* * * payable in three equal periodic installments of $1,000. The first installment will accrue and be payable upon *completion of training and award of the designated military speciality.*"

Subsequent installments would be payable on the anniversary dates of the first installment "providing the member maintains qualification in the specialty."

The view is expressed in the Committee Action discussion that the phrase in 37 U.S.C. 308a(a), "under regulations to be prescribed by the Secretary of Defense," provides authority for the issuance of regulations requiring the member to become qualified and awarded the designated military specialty prior to his being entitled to the bonus.

It is stated, however, that our decision 45 Comp. Gen. 379 (1966), involving the payment of the variable reenlistment bonus authorized by 37 U.S.C. 308(g), a provision of law somewhat similar to 37 U.S.C. 308a, raises some doubt as to the validity of the proposed regulations. In that decision it was stated that the reenlistment of a member pursuant to regulations prescribed as provided in the statute constitutes an acceptance of the Government's offer and at that point the Government becomes obligated to pay the variable reenlistment bonus. Hence, it was our view that the right to receive the variable reenlistment bonus vests in the member upon completion of the reenlistment procedure, and regulations promulgated by the Secretaries concerned may not diminish the amount of such variable reenlistment bonus which became fixed at the point of reenlistment nor in any other manner curtail subsequent payments of any portion of the bonus. It is apparent that if this reasoning also applies to 37 U.S.C. 308a, the proposed regulations would be invalid.

The Committee Action discussion indicates that the legislative history of 37 U.S.C. 308a supports the view that the reasoning applied in our decision 45 Comp. Gen. 379, *supra*, is not applicable to 37 U.S.C. 308a. In this regard the testimony is cited by the Honorable Roger T. Kelley, Assistant Secretary of Defense (Manpower and Reserve Affairs) before the Senate and House Armed Services Committees on February 2 and 23, 1971, respectively, in regard to legislation proposed by the Department of Defense to authorize the enlistment bonus. In that testimony Mr. Kelley presented the proposal of the Department of Defense that the enlistment bonus be paid "to those who enlist for at least 3 years in the Army combat skills as follows: $1,000 when qualified through combat skills training. $1,000 each after the first and second year, if still qualified." (*See* Hearings before the Senate Committee on Armed Services on S. 495, 92d Cong., 1st sess., p. 63, and Hearings before the House Committee on Armed Services on H.R. 3498, 92d Cong., 1st sess., p. 48.) It is also pointed out that on May 25, 1971, in debate on the Senate floor on H.R. 6531 which became the act of September 28, 1971, Senator Strom Thurmond in effect reiterated Mr. Kelley's statement as to the manner in which the Department of Defense proposed to pay the enlistment bonus. (117 Cong. Rec., May 25, 1971, S7754.)

There is also for noting that in letters dated January 29, 1971, to the President of the Senate and the Speaker of the House of Representatives transmitting proposed legislation to authorize the enlistment bonus, the Honorable David Packard, then Deputy Secretary of Defense, stated in part that the bonus would be "offered to the prospective enlistee and paid after he has completed qualifications for the military occupation in question." He further proposed that the bonus of $3,000 would be offered payable in three equal installments, the first installment of which "would be payable upon completion of training and upon being qualified for and awarded the appropriate military occupational specialty (MOS)." (S. Rept. No. 93, 92d Cong., 1st sess., p. 51, and H. Rept. No. 82, 92d Cong., 1st sess., p. 54.)

It is apparent from the language of 37 U.S.C. 308a and its legislative history that the purpose of the statute is to provide a substantial financial inducement in the form of a bonus to aid in obtaining personnel to fill combat positions in the Armed Forces by encouraging new enlistments and by encouraging those serving their initial terms of service to extend their terms for such service.

The individuals at whom the enlistment bonus is aimed are first-term enlistees or draftees with whom the services have had little or no prior experience and, as was pointed out in the Committee Action discussion, the services generally do not know whether such individuals will be able to qualify for the combat elements. In this respect the purpose of the enlistment bonus differs from the reenlistment and variable reenlistment bonuses which are designed to encourage reenlistments by men who have been trained and have served in the armed services and with whose skills and qualifications the services are thoroughly familiar.

Although the statute does not specifically state that a member must qualify in the appropriate military specialty before becoming eligible, it does provide that the bonus is payable for an enlistment or extension of initial period of active duty for the required period in a "combat element of an armed force." It appears that Congress did not intend that bonuses of up to $3,000 be paid without some assurance that the members to whom they are paid will be qualified and capable of serving in such combat elements. Therefore, it is our view that a regulation such as that proposed in Committee Action No. 463 to the effect that payment of the enlistment bonus is contingent on the member's qualifying and serving in the designated military specialty is within the overall intent of and in harmony with the law, Accordingly, question (1) is answered in the affirmative.

Concerning question (2), while there is no specific requirement in section 308(a) of Title 37, U.S. Code, that in order for a member to be eligible for continued bonus installments (second and third installments) he must maintain qualification in his designated military

specialty, the legislative history of section 308a(a) supports the view expressed in Committee Action No. 463 that the second and third installment payments of the bonus may be contingent, under appropriate administrative regulations, upon the member maintaining qualification in his specialty.

In this connection, the Assistant Secretary of Defense (Manpower and Reserve Affairs) in testifying on the bill, which added section 308a, clearly pointed out that under the method of payment as proposed by the Department of Defense the initial payment ($1,000) of the bonus would be payable when qualified through combat skills training and "$1,000 each [would be payable] after the first and second year, if still qualified." Also, during the floor debate on the bill, Senator Stennis had incorporated in the Congressional Record the above-mentioned part of the Assistant Secretary's testimony pertaining to the method of payment. *See* 117 Cong. Rec. May 25, 1971, S7751.

Since Congress was fully aware of the manner in which the Department of Defense planned to implement the enlistment bonus program, it is our view that, in the absence of any evidence of legislative intent to the contrary, the qualification requirement in the proposed regulations respecting the second and third installment payments of the bonus does not appear to be inconsistent with the law nor with the holding in our decision in 45 Comp. Gen. 379. Question 2 is also answered in the affirmative.

It is indicated in the discussion with respect to question (3) in Committee Action No. 462 that certain enlistees and inductees who are otherwise qualified and who extend their initial active duty commitment as there indicated would be entitled to a bonus of $1,000 which would be payable under the proposed regulations as follows:

Extensions of Initial Active Duty Commitments. For extendees qualified and serving in designated military specialities, the bonus will be payable on the date the member executes his extension of initial active duty commitment. For extendees serving in military specialities not designated for the bonus, the bonus will be payable on the date the member completes retraining and is awarded the designated military speciality.

It is indicated that question has arisen as to the time of payment of the enlistment bonus in light of our decision 35 Comp. Gen. 663 (1956) which concerned the reenlistment bonus authorized by section 208(a) of the Career Compensation Act of 1949 as added by section 2 of the act of July 16, 1954, 68 Stat. 488, now codified in essentially the same form in 37 U.S.C. 308(a)-(f).

In that decision we stated that "For the purposes of section 208, a voluntary extension of an enlistment for two or more years is to be considered a 'reenlistment' and regardless of the date on which the extension agreement may be signed by the member, it seems plain that service under such agreement would not begin and that, therefore, the 'reenlistment' would not become effective, until after the normal

date of expiration of the enlistment current when the agreement was signed." We held, therefore, that the reenlistment bonus authorized for a voluntary extension of an enlistment could be paid only after expiration of the term for which the member was otherwise obligated to serve and after the extension had become fully effective and service thereunder had actually begun.

The Committee Action discussion points out, and we agree, that the purposes of the reenlistment bonus and the enlistment bonus, now authorized in 37 U.S.C. 308a, are different in that one is to encourage reenlistments while the other is to encourage initial enlistees or draftees to enter a combat element of an armed force. Entitlement to the reenlistment bonus authorized by section 208 of the Career Compensation Act of 1949 arose upon reenlistment within 90 days after the date of the member's release from active duty, and a voluntary extension of an enlistment for 2 or more years was to be considered a reenlistment. Such bonus was computed based on the monthly basic pay to which the member was entitled at the date of discharge.

In authorizing the enlistment bonus, however, 37 U.S.C. 308a provides that such bonus may be paid in an amount prescribed by the Secretary of Defense, but not more than $3,000, and among others, may be paid to a person who extends his initial period of active duty in a combat element "to a total of at least three years." Therefore, eligibility for the enlistment bonus in the case of an extendee is not based solely upon the extension period as is the case with reenlistment bonus. In the case of the enlistment bonus the extendee's eligibility is based upon the initial period of service in a combat element as extended "to a total of at least three years."

Accordingly, it is our view that the right to such bonus (or the first installment if payable in installments) vests at the time the enlistment extension is executed provided the member is otherwise qualified. If he is not otherwise qualified the right to the bonus (or first installment) vests after the extension agreement is executed and other qualifications are attained (see answer to question (1)). Question (3) is therefore answered in the affirmative on the basis indicated.

We note that subsequent to the above-mentioned Assistant Secretary's letter of April 20, 1972, there has been issued DOD Directive No. 1304.16 dated June 1, 1972, establishing the policy governing the award of an enlistment bonus under 37 U.S.C. 308a. This directive is implemented in DOD Instruction No. 1304.17 dated June 1, 1972. Under the DOD Instruction, an enlistment bonus in the amount of $1,500 would be paid to a person who initially enlists for a period of 4 years for the purpose of qualifying and serving in a designated military specialty in the Army or Marine Corps combat element as there specified. The Instruction states that this procedure is on a test basis and is applicable only for the period June 1 to August 31, 1972.