Decisions of The Comptroller General of the United States

VOLUME 52 Pages 405 to 468

JANUARY 1973

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300104200

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

Paul Shnitzer

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-176613]

Transportation—Dependents—Military Personnel—Dislocation Allowance—Members Without Dependents

The payment of a dislocation allowance to an officer of the Army Nurse Corps as a member without dependents who is receiving a basic allowance for quarters as a member with dependents for her mother who will not join her at her new duty station where she was not assigned Government quarters depends on whether or not the mother resided with the officer at the old station. If she did not, the officer is entitled to a dislocation allowance pursuant to paragraph M9002 of the Joint Travel Regulations in an amount equal to the applicable monthly rate of the quarters allowance prescribed for a member of the officer's pay grade without dependents, but if the mother did reside with her at the time of transfer, her entitlement to transportation for the mother precludes payment of the allowance even though the mother may not have changed her residence.

To Major John T. Donohue, Department of the Army, January 2, 1973:

This refers to your letter dated April 19, 1972, which was forwarded here by 1st endorsement, dated July 21, 1972, of the Per Diem, Travel and Transportation Allowance Committee, requesting an advance decision as to the legality of payment of a dislocation allowance to Lieutenant Colonel Jeanne E. Rivera, Army Nurse Corps, as a member without dependents. Your request has been assigned PDTATAC Control No. 72-29.

By orders issued January 14, 1972, Colonel Rivera was ordered to travel on a change of permanent station from Fort Bragg, North Carolina, to Brooke Army Medical Center, Fort Sam Houston, Texas, with a reporting date of March 20, 1972. Pursuant to these orders, the member submitted the enclosed voucher claiming a dislocation allowance as a member without dependents. You say that such allowance has been paid to the officer twice before, under similar conditions. However, you say doubt exists as to the legality of the payment since Colonel Rivera is presently receiving basic allowance for quarters as a member with dependents in behalf of her dependent mother. As the mother has not and does not intend to join her daughter at her new station you say that there is no entitlement to dependents travel or dislocation allowance as a member with dependents. The officer has not been assigned Government quarters at her new station.

Section 406, Title 37, U.S. Code, provides in part that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation of his dependents, to reimbursement thereof, or to a monetary allowance in place of transportation, subject to such conditions and limitations as are prescribed by the Secretaries concerned.

Section 401 of Title 37, U.S. Code, reads, in part, as follows:

§ 401. Definitions.

In this chapter, "dependent," with respect to a member of a uniformed service, means—

* * * * * * *

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support * * *.

The regulations regarding dislocation allowances promulgated pursuant to 37 U.S.C. 407, are contained in Chapter 9 of the Joint Travel Regulations (JTR). Paragraph M9001 reads, in part, as follows:

1. MEMBER WITH DEPENDENTS. The term "member with dependents," as used in this Part, means a member * * * who has dependents entitled to transportation in connection with a change of permanent station.
2. MEMBER WITHOUT DEPENDENTS. The term "member without dependents" as used in this Part, means a member * * * who has no dependents or who is not entitled to transportation of dependents under the provisions of par. M7000 in connection with a change of permanent station.

Paragraph M9003 states, in part:

* * * The dislocation allowance is payable to a member with dependents whenever dependents relocate their household in connection with a permanent change of station or whenever a member without dependents is transferred to a permanent duty station where he is not assigned to Government quarters.

Paragraph M7000, JTR, states that members are entitled to transportation of dependents at Government expense upon a permanent change of station except as otherwise provided. Subparagraph 11 of paragraph M7000, an exception to the rule, reads as follows:

For any travel performed by a dependent parent or parents who do not actually reside in the household of said member unless otherwise authorized or approved by the Secretary of the service concerned or his designated representative.

It is noted that on the enclosed voucher, the section entitled "Dependents Actual Travel" is completed in such a manner to indicate that the mother traveled from North Carolina to Texas. However, based on the record before this Office, this appears to be erroneous and for purposes of this decision, it will be considered that no movement of the dependent occurred.

A member may receive quarters allowance (BAQ) with dependents for a dependent parent who does not reside with the member, as the residence requirement contained in 37 U.S.C. 401(3), is suspended by 50 U.S.C. App. 2201. However, for a dependent parent to be entitled to transportation in connection with a permanent change of station, he or she must actually reside in the member's household, unless the travel is authorized or approved as provided in paragraph M7000–11

of the regulations. For the purpose of entitlement to a dislocation allowance a "member without dependents" includes a member who has a dependent not entitled to transportation in connection with the member's change of permanent station (par. M9001–2, JTR). Therefore, a member receiving BAQ with dependents may receive a dislocation allowance as a member without dependents where the parent, because he or she does not reside with the member, is not entitled to transportation in connection with an assignment to a new permanent station.

The record is not clear as to whether the officer's mother resided with her at Fort Bragg. If her mother did not reside with her, in accord with paragraph M9002 of the regulations, Colonel Rivera is entitled to a dislocation allowance in an amount equal to the applicable monthly rate of BAQ prescribed for a member of her pay grade, without dependents. However, if the officer's mother resided with her at Fort Bragg, she was entitled to transportation in connection with the change of permanent station to Brooke Army Medical Center, and such entitlement precludes payment of a dislocation allowance even though the mother may not have changed her residence.

The voucher and supporting documents are returned herewith for appropriate action in accord with this decision.

[B–177455]

Travel Expenses—Overseas Employees—Return for Other Than Leave—Retirement, Etc.—Time Limitation

A Forest Service employee who elected to remain in Alaska upon retirement and then approximately 1 year and 5 months after retirement requested travel and transportation expenses to return to his residence in the United States is not entitled to such expenses incident to his Alaskan tour of duty in the absence of an explanation that his delayed return was due to circumstances beyond his control. The cognizant agency regulation prescribes that the travel and transportation of an employee must be incident to the termination of his assignment and that the date of return travel must be set at the time of termination and be within a reasonable time, normally within 6 months, provisions that are in accord with the long-standing position of the Comptroller General of the United States.

To Paul J. Grainger, United States Department of Agriculture, January 2, 1973:

Reference is made to your letter dated November 9, 1972, with enclosures, requesting an advance decision on the claim of Mr. W. Howard Johnson, a former employee of the United States Department of Agriculture, Forest Service, for travel and transportation benefits under the circumstances hereinafter described.

The letter of November 9, 1972, asserts that Mr. Johnson, prior to his retirement, was employed with the Forest Service and was assigned to an official duty station at Juneau, Alaska. Incident to such assignment Mr. Johnson had entered into a service agreement. This agreement indicated that at the completion of a 2-year tour of duty at Juneau, Mr. Johnson would be entitled to the appropriate travel and transportation benefits for both him and his family as well as his household goods back to his place of actual residence in the United States at the time of assignment. The locality designated as his place of actual residence was Missoula, Montana.

You further stated that:

> Mr. Johnson retired from the Forest Service in Juneau, Alaska, on February 5, 1971, without authorization of benefits available under Section 1.11d of Office of Management and Budget Circular No. A–56. Mr. Johnson was encouraged by both our Fiscal Agent and Personnel Officer at that time to set the date for his return travel to the Continental United States. Instead, Mr. Johnson indicated that he did not intend to return to the Continental United States. In accordance with the expressed desire of Mr. Johnson, no travel authorization was made or issued by the Forest Service for his return travel.
>
> Approximately one year and five months after Mr. Johnson retired, he inquired at our Juneau, Alaska office about being authorized to return travel and transportation benefits. He was notified at that time by our Fiscal Office that while we could not authorize the requested benefits, should he decide to make a claim, it should be directed to our Regional Office in Juneau, Alaska.
>
> Mr. Johnson had, for personal reasons, elected to remain in Juneau, Alaska, at the time of his retirement from duty. The policy as expressed in the Forest Service Manual for the Alaska Region was that travel and transportation be authorized at the time of termination and a reasonable time of six months would be allowed for commencement of employee travel, in accordance with the intent of 28 CG 289. This policy was approved by Mr. Johnson, as Regional Forester, and was in effect at the time of his retirement. There was no known information shortly following Mr. Johnson's retirement that indicated he would be returning to the Continental United States.

In view of the considerable time (approximately 17 months) which elapsed between the time of Mr. Johnson's retirement and the date he requested return travel and transportation benefits to the continental United States, you ask whether he is entitled to such benefits.

Section 1.5 of the controlling regulations, Office of Management and Budget (OMB) Circular No. A–56, revised August 17, 1971, states:

> b. *Time limits for beginning travel and transportation.* All travel, including that for the immediate family, and transportation, including that for household goods allowed under these regulations, should be accomplished as soon as possible. The maximum time for beginning allowable travel and transportation will not exceed two years from the effective date of the employee's transfer or appointment.

Moreover, cognizant agency regulations (Forest Service Manual, section 6543.52c) provided that:

> 4. *Time Limits for Travel and Transportation.* Return allowance from Alaska to continental United States.
>
> * * * * * * *

b. *Termination of Employment.* When an employee terminates, his travel and transportation must be incident to termination of his assignment. *The date of return travel must be set at the time of termination and be within a reasonable time, normally within six* (6) *months.* The travel of immediate family and transportation of household effects must begin within two (2) years from the date the employees begins his return. [Italic supplied.]

With regard to an employee's entitlement to travel and transportation benefits back to the United States for separation, this Office has long adhered to the position that the travel of such employee be *clearly incidental* to the termination of his assignment and that the travel should commence within a reasonable time after the assignment has been terminated in order for return expenses to be reimbursable. 28 Comp. Gen. 285, 289 (1948). Under the above regulations your agency has specified a reasonable time as being normally within six months.

In view of the above and in the absence of an explanation from Mr. Johnson that his delay in returning to the continental United States was due to circumstances beyond his control (such as incapacitating sickness), the voucher, with accompanying papers, which is returned herewith, may not be certified for payment.

[B–176913]

Contracts—Offer and Acceptance—Ambiguity Effect—Patent Ambiguity

An offer to furnish an indefinite quantity of automatic data processing services under a second request for proposals, following the termination of a contract for the convenience of the Government because the first solicitation was misstated, that was evaluated by adding the sum shown for rental and maintenance and ignoring the "no charge" phrase, was erroneously evaluated since the ambiguity was patent on its face and the discrepancy, pursuant to paragraph 3–804 of the Armed Services Procurement Regulation, should have been resolved with the offeror. Therefore, negotiations should be reopened for the term remaining under the contract and if the protestant makes the best offer, the existing contract should be terminated for the convenience of the Government and a contract awarded to the protestant. This corrective recommendation requires the action prescribed by section 236 of the Legislative Reorganization Act of 1970.

To the Secretary of the Navy, January 5, 1973:

Reference is made to letter SUP 02E of September 15, 1972, from the Deputy Commander, Procurement Management, Naval Supply Systems Command, reporting on the protest of Satellite Computer Service against the award of an indefinite quantity contract for automatic data processing services to Sci-Tek Incorporated under request for proposals (RFP) No. N00140–73–R–0288, issued by the Naval Regional Procurement Office, Philadelphia, Pennsylvania.

This solicitation represents the second attempt to procure these services. The first attempt had resulted in a contract award to Satellite on June 2, 1972. However, that contract was terminated for the convenience of the Government by the contracting activity on June 30 in view of the fact that the solicitation had not correctly stated the Government's actual requirements and because clarifying discussions had been held only with Satellite to the exclusion of the other offerors. RFP No. N00140–73–R–0288 was subsequently issued. Proposals were received from Satellite and Sci-Tek. Subsequent to opening and review of the proposals, Satellite was given the opportunity to review and change its proposal. No specific clarifications of the Satellite proposal were requested. Satellite made no changes. Sci-Tek was requested to clarify two items in its proposal. After this clarification, Sci-Tek was determined to have submitted the lower-priced proposal. Award was made to that firm on August 28, 1972, for the total estimated cost of $40,815.90 for the contract period ending June 30, 1973. On August 31, Satellite telephoned the buyer to inquire as to the status of the procurement and was informed that award had been made to Sci-Tek. The award was thereafter protested to our Office.

Satellite contends that award should have been made to it inasmuch as it was in fact the low offeror. This is so, it is maintained, because in determining Satellite's total offered price the procurement activity added a sum of $11,890 for item 1 to the Satellite price for item 2 to arrive at a total estimated cost greater than Sci-Tek was determined to have offered after clarifications. The Satellite proposal, it is contended, offered item 1 at "no charge," and consequently Satellite's total estimated cost was lower than that of Sci-Tek. The Satellite offer for item 1 was stated in its proposal as follows:

Item		Qty	Unit	U.P.	Total
0001	RENTAL WITH MAINTENANCE OF ONE (1) DATA COMMUNICATIONS TERMINAL FOR THE PERIOD *Beginning with date of Contract* THRU *30 June 1973*	10 MOS		$	$
		$11,890			No Charge
	A. RENTAL—$689/MO.	6,890			No Charge
	B. MAINTENANCE—$500/MO.	5,000			No Charge

Satellite allegedly entered these prices, while indicating there would be nonetheless no charge, because under the previous solicitation it had submitted only a total price for item 1 and had as a result been allegedly requested to itemize its maintenance and rental costs thereunder for Navy internal cost purposes. These itemized costs were then written into Satellite's terminated contract.

The contracting officer advises that he and the buyer interpreted the Satellite proposal as offering a price of $11,890 for item 1. They regarded it as inconceivable that Satellite or any other prospective contractor would offer item 1 at no charge. The $11,890 sum was identical to the cost figures in Satellite's terminated contract. Consequently, it was felt that the words "No Charge" could only mean that there were no other charges for item 1 beyond the monthly rental and maintenance charges. It was further believed that to conclude that an offeror would insert monthly prices for rental and maintenance and then extend these to 10-month totals when the item was, in fact, to be offered at no charge would be completely illogical. The contracting officer believes that his interpretation of Satellite's item 1 pricing was reasonable and that the protest should be denied, citing 47 Comp. Gen. 390 (1968).

We do not believe, under the circumstances of this case, that the reasoning of our decision at 47 Comp. Gen. 390 should be applied. There the solicitation had requested offers for new items. Several offerors offered both new and overhauled units. The protestant offered "OVERHAULED CERTIFIED" items at prices substantially below the offers for new items from the other offerors and roughly comparable to the prices offered for overhauled items. We held to be reasonable the contracting officer's interpretation of "overhauled certified" as meaning items other than new items, especially as there was nothing in the proposal to bring the protestant's special meaning of these words to the attention of the contracting officer. The protestant had used "overhauled certified" to mean new items in storage inspected before delivery. Other than that the solicitation had requested offers on new items and the protestant's offer was not specifically for such, there was nothing in the protestant's proposal to indicate that new items were being offered. At best, the ambiguity in meaning for the words "overhauled certified" was latent rather than inherent. The protestant had been requested to verify its proposal, but no specific area to be clarified had been indicated.

Under the facts of this case, the ambiguity created by Satellite was patent upon the face of the proposal. Whereas in our decision at 47 Comp. Gen. 390, nothing in the offeror's proposal provided any indication that the description "overhauled certified" meant something more than an overhauled item, we believe that the Satellite proposal was sufficient to indicate an ambiguity as to whether the offeror intended "no charge" or a price of $11,890 for item 1. When Satellite was provided an opportunity to review the proposal after it was received, the discrepancy in the proposal should have been brought to its attention for resolution rather than assuming that the prices for item

1 were intended and that "no charge" was not. That is what is required by Armed Services Procurement Regulation 3-804 which provides:

> * * * Complete agreement of the parties on all basic issues shall be the objective of the contract negotiations. Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid. * * *.

In our view, the failure to conform to the negotiation requirements in this case was so material a deviation as to call for reopening of negotiations with both Sci-Tek and Satellite for any agency requirements estimated to be remaining in the contract period. If, as a result of such negotiations, the Satellite proposal is found to be the best offer, then the Sci-Tek contract should be terminated for the convenience of the Government and a contract for the remaining term should be awarded to Satellite. *See* B-175968, October 17, 1972.

As this decision contains a recommendation for corrective action to be taken, your attention is directed to section 236 of the Legislative Reorganization Act of 1970, 84 Stat. 1140, 1171, 31 U.S. Code 1176, which requires that you submit written statements to certain committees of the Congress as to the action taken. The statements are to be sent to the Committees on Government Operations of both Houses not later than 60 days after the date of this decision and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this decision.

[B-177401]

Agriculture Department—Indemnity Programs—Milk—Contamination of Milk—Contaminant Registration and Approval Requirement

The fact that the only statute requiring the registration of chemicals is the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135-135k) does not imply waiver of the registration and approval requirement in 7 U.S.C. 450j to permit indemnity payments to dairy farmers who were directed to remove their milk from the commercial market because it contained residues of a chemical which was not registered and approved for use by the Federal Government at the time of use since, under the express language of the statutes pertaining to the Milk Indemnity Program, the use of a contaminant must have been registered with and affirmatively endorsed or recommended by the Government. Therefore, indemnity claims for milk contaminated from the consumption by dairy cattle of ensilage stored in a silo coated with paint containing "Aroclor 1254," a compound not required to be registered and approved, may not be allowed.

To the Secretary of Agriculture, January 10, 1973:

Reference is made to letter of November 3, 1972, from the Assistant Secretary of Agriculture concerning two claims submitted to your Department for an indemnity payment for milk which was removed

from the commercial market pursuant to the direction of the Department of Agriculture of the State of Ohio. According to the Assistant Secretary the evidence submitted by the claimants established that the contamination of the milk resulted from the consumption by their dairy cattle of ensilage contaminated with "Aroclor 1254." The ensilage had been stored in a silo, the inside of which had been coated with a silo paint which contained as one of its ingredients "Aroclor 1254," a compound of a class known as polychlorinated biphenyls (PCB).

As indicated in the Assistant Secretary's letter, the Milk Indemnity Payment Program was originally authorized by section 331 of the Economic Opportunity Act of 1964, and extended from time to time, and the Program is currently authorized by Public Law 90–484. In pertinent part, Public Law 90–484 is identical with its predecessors and reads as follows (7 U.S. Code 450j):

> . . . That the Secretary of Agriculture is authorized to make indemnity payments, at a fair market value, to dairy farmers who have been directed since January 1, 1964, to remove their milk . . . from commercial markets *because it contained residues of chemicals registered and approved for use by the Federal Government at the time of such use.* [Italic supplied.]

The Assistant Secretary states that your Department, by published regulations, limits Dairy Indemnity Program Payments to farmers whose milk is removed from the market because of contamination by an economic poison (1) registered pursuant to the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 135–135k), and (2) recommended for use by Agriculture Handbook 313 or 331 or any other agency of the Federal Government. 7 CFR 760 *et seq.* A "pesticide" is defined in the regulations as an economic poison registered under the last cited act. 7 CFR 760.2(f).

The Assistant Secretary advises that the regulations were drafted in this manner for two reasons. First, the legislative history of the act authorizing the Program indicates that losses to dairy farmers resulting from pesticides were the primary losses discussed in the Senate when the legislation was under consideration. 110 Cong. Rec. 16749–16752 (July 23, 1964). Second, the Federal Insecticide, Fungicide, and Rodenticide Act is the only authorization your Department has located for registering chemicals with the Federal Government.

The claimants contend that the regulations cited above reflect an unsupportable, narrow interpretation of the act by your Department. They argue that if the Congress intended milk indemnity payments to be limited to those losses caused by pesticides registered under the Federal Insecticide, Fungicide, and Rodenticide Act, it would have expressly so stated in the authorizing statute the reference to such act.

They state that instead Congress used the much broader language "residue of chemicals." Therefore, it is the position of these dairy farmers that Congress intended to provide indemnity payments to all dairy producers who were directed to remove their milk from commercial markets because it contained residues of chemicals registered and approved for use by the Federal Government and not just those whose milk contained pesticides.

The Assistant Secretary's letter continues:

> Applicants [claimants] contend that the registration and approval requirements of the statute should be waived in their case. First, they point out that the Federal Government does not have a system for registering and approving the uses of all chemicals. Second, they argue that "Aroclor 1254" is one of a class of chemicals designated as polychlorinated biphenyls (PCB's). Since 1929, these chemicals have been produced and have been employed in a wide range of industrial uses. Over the years numerous studies have documented the environmental hazards of PCB's. Federal administrative agencies have had the power and mandatory duty as expressed by Congress to control the use of PCB's. With respect to environmental contamination by PCB's, either directly or indirectly, of the nation's food, the Food and Drug Administration has had the authority for a considerable period of time to control the use of PCB under the provisions of the Federal Food, Drugs and Cosmetic Act [Section 402(a), 406, 409, 701, 52 Stat. 1046 as amended, 1049, 1055–56 as amended by 70 Stat. 919 and 72 Stat. 948, 72 Stat. 1785–88 as amended; 21 U.S.C. 342(a), 348, and 371].
>
> The Food and Drug Administration has recently exercised its mandate by issuing a Notice of Proposed Rule Making concerning PCB's which would preclude the accidental PCB contamination of food (37 F.R. 5105, March 18, 1972; Notice of Availability of Draft Environmental Impact Statement, 37 F.R. 9503, May 11, 1972). Included in the proposed rules was the following special provision which was necessary to preclude accidental PCB contamination of animal feed:
>
> > "Coatings or paint for use on the contact surfaces of feed storage areas may not contain PCB's or any other harmful or deleterious substances likely to contaminate feed."

The claimants point out that this regulation is too late to protect them. They argue that the fact that the Federal Government allowed silo paint to contain PCB during such a period of time, when an administrative agency thereof was under a statutory obligation to regulate its use, shows that it acquiesced and impliedly consented to such a use.

The Assistant Secretary requests a decision as to whether 7 U.S.C. 450j authorizes the making of an indemnity payment to the claimants under the circumstances of this case.

In order to be entitled to an indemnity payment under 7 U.S.C. 450j a dairy farmer must have been required to remove his milk from the market because it contained residues of a chemical registered and approved for use by the Federal Government. It appears that the only statute requiring the registration of a chemical is the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 135–135k, and that Aroclor 1254 is not an economic poison required to be registered under such act.

The claimants evidently recognize that Aroclor 1254 is not a chemical registered and approved for use by the Federal Government. However, it apparently is their position that since the Government does not have a system for registering and approving all chemicals and—according to the claimants—impliedly consented to the use of Aroclor 1254 for painting silos, the registration and approval requirement of 7 U.S.C. 450j should be waived in their case.

This Office is without authority to waive the requirements set forth in 7 U.S.C. 450j. Thus, if the claimants are to be indemnified, it must be because they fall within the terms of that statute, taking into account the legislative intent in enacting it.

While we are cognizant that 7 U.S.C. 450j is remedial legislation and is therefore to be given a liberal interpretation, any such interpretation must be consistent both with the language used therein and with the intent of Congress as disclosed by the legislative history of the provision. 45 Comp. Gen. 96 (1965). As already noted, the express language of the statute, read literally, precludes indemnification for contamination by substances such as Aroclor 1254 which are not registered with, and/or approved by, the Government.

Moreover, an examination of the legislative history of 7 U.S.C. 450j indicates that the statute was not intended to compensate dairy farmers for every contamination of their milk by chemicals. Rather, the debate on the bill which became 7 U.S.C. 450j shows that the object of Congress in enacting it was to compensate farmers whose milk was ordered removed from the market because of contamination by certain chemicals the use of which had been affirmatively recommended by the Government at the time of that use. *See* 110 Cong. Rec. 16661–16665 (July 22, 1964), and *id.* 16749–16752 (July 23, 1964). Specifically, the Congress was considering cases in which residues of pesticides recommended for use by the Department of Agriculture had been found in milk. It was considered inequitable that dairy farmers should bear the resulting loss when it was the Government that had recommended the use of pesticides which, when used as recommended, contaminated milk. Claimants' view, that they should be compensated for milk contaminated by a chemical concerning the use of which the Government had then taken no position, is thus not consistent with the intent of Congress in enacting 7 U.S.C. 450j.

As to the claimants' position that the Food and Drug Administration (FDA) has had both the power and the duty to regulate the use of PCB's and that the failure by FDA to perform that alleged duty earlier, constituted implied consent to the continued use of PCB's, we

do not believe that inaction by FDA with respect to a particular substance can be construed as consent or approval by the Government to its use. Moreover, even if there might be said to have been implied consent by the Government to the use of PCB's, this would in any event not satisfy the intent of 7 U.S.C. 450j that, for farmers to be indemnified, the use of the contaminant must have been registered with and affirmatively endorsed or recommended by the Government.

In light of the foregoing it is our view that 7 U.S.C. 450j does not authorize the making of indemnity payments under circumstances such as exist in the instant two cases.

[B-177173]

Gratuities—Reenlistment Bonus—Critical Military Skills—Reenlistment for Retraining Purposes

A reenlistment that was not for the purpose of continuing the use of the critical skill a member of the uniformed services held at the time of his reenlistment but was for the purpose of retraining the member does not create entitlement to the variable reenlistment bonus provided by 37 U.S.C. 308(g) as the military service will not receive the exact benefit intended from the bonus since it will neither have the continued use of the critical skill possessed by the member nor avoid the necessity of training a replacement in the skill. Therefore, when it is known at the time of reenlistment that a member will not continue to utilize the critical skill upon which payment of the variable reenlistment bonus is based, payment may not be authorized, and this is so even if the skill is not a critical one.

To Major F. D. Brady, United States Marine Corps, January 11, 1973:

Further reference is made to your letter dated September 14, 1972, CD-wsd 7220/4, forwarded to this Office by Headquarters United States Marine Corps letter dated October 3, 1972, CD-wmm 7220, requesting an advance decision as to whether Corporal Robert W. Chastain, 224 66 3007, USMC, is eligible for a variable reenlistment bonus incident to his reenlistment in the Marine Corps on June 6, 1972. The request has been assigned control number DO-MC-1172 by the Department of Defense Military Pay and Allowance Committee.

You indicate the facts in this case to be essentially as follows. Prior to his reenlistment Corporal Chastain was qualified and serving in military occupational specialty (MOS) 0351 (Antitank Assaultman), a skill designated as critical under Marine Corps regulations issued pursuant to 37 U.S. Code 308(g) and for which a variable reenlistment bonus, multiple 2, is authorized. On April 27, 1972, Corporal Chastain agreed to reenlist for 6 years and requested that he be reassigned to duty in occupational field 21 (Armament Repair) upon his reenlistment.

On June 2, 1972, Marine Corps Headquarters authorized his permanent change of station immediately after reenlistment and directed that his MOS be changed and that he be assigned on-the-job training in occupational field 21 leading to MOS 2111 (Infantry Weapon Repairman), a noncritical skill, upon reporting to his new command. On August 28, 1972, these instructions were modified to the extent of directing that Corporal Chastain be assigned on-the-job training leading to MOS 2131 (Artillery Weapon Repairman), a critical skill for which a variable reenlistment bonus, multiple 2, is authorized. As you indicate, it was known before Corporal Chastain's reenlistment that he was not being reenlisted for the purpose of continued use of his service in MOS 0351, the critical skill which he held at the time of his reenlistment.

You state that other than the question regarding his MOS, Corporal Chastain met the eligibility requirements for a variable reenlistment bonus at the time of his reenlistment, June 6, 1972.

You indicate that even though Corporal Chastain had a critical MOS (0351) at the time of his reenlistment and, after retraining, will perform service in an MOS (2131) also designated as critical at the same skill level, you are uncertain as to his entitlement to a variable reenlistment bonus since it appears that the Marine Corps will not receive the exact benefit intended from such bonus. It is your view that the Marine Corps will neither have the continued use of Corporal Chastain's service in the critical skill which he already possesses nor will it avoid the necessity of training a replacement in that skill.

In this regard you indicate that while this Office has held in 46 Comp. Gen. 322 (1966) and 48 *id.* 624 (1969) that entitlement to a variable reenlistment bonus vests in the member at the time of reenlistment, we have also held that there is no entitlement to such a bonus where it seems obvious at the time of enlistment that the Government will not receive the benefit for which the bonus was intended. 47 Comp. Gen. 414 (1968), and 49 *id.* 206 (1969).

The letter from Marine Corps Headquarters transmitting your letter here indicates that the Marine Corps variable reenlistment bonus program is designed to retain qualified personnel in critical skill areas with a resulting decrease in replacement training costs and time. After discussing certain policy guidelines and the need for flexibility in implementing the program, the letter states, in part, as follows:

> Within these basic guidelines, there is a need for flexibility based on our manpower needs. This flexibility is needed because of the time lag which occurs between the identification of a change in criticality of a skill and approval of a recommended change to our VRB program by the Department of Defense, and thus allows us to be more responsive in meeting changing critical skill requirements. We consider our policy in this regard to be within the spirit of the VRB

program; that is, we consider it a valid effort to retain careerists in critical skills while reducing training costs and time.

We permit payment of a VRB to an eligible Marine who reenlists into another VRB-eligible skill area that is more critical than the skill for which he was originally trained in cases where he possesses the aptitude for the more critical skill, and where the shortage of personnel with the necessary aptitude is more acute. At no time, however, will a VRB be authorized that is of a higher multiple than that specified for the member's previous MOS. For example, a Marine for whose MOS a VRB multiple of 2 is authorized and who reenlists for an MOS authorized a multiple of 4, would receive only the multiple 2 for his "old" MOS.

Additionally, in a few specific cases, a Marine who reenlists for an MOS with a VRB multiple equal to that authorized for his previous MOS is paid a VRB if he is otherwise qualified and if the new MOS is more critical at the time of reenlistment than his previous MOS. This situation has occurred due to the time lag mentioned above. In most cases the retraining involved is accomplished by on-the-job training which entails no additional cost.

The variable reenlistment bonus is authorized by 37 U.S.C. 308(g), which was added by section 3 of the act of August 21, 1965, Public Law 89–132, 79 Stat. 547, and currently provides in pertinent part as follows:

(g) Under regulations to be prescribed by the Secretary of Defense * * * a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. * * *.

In our decision 47 Comp. Gen. 414 (1968), to which you refer, we noted that Department of Defense administrative regulations then in effect, and issued pursuant to 37 U.S.C. 308(g), contemplated payment of the variable reenlistment bonus only to a member who possesses a military skill in critically short supply, as an inducement to reenlist for the purpose of retaining the use of his service in such specialty which, as we indicated, was precisely the intent of Congress in authorizing the variable reenlistment bonus. That remains our view. (Similar Department of Defense regulations are now found in DOD Directives 1304.14 and 1304.15 dated September 3, 1970.)

In that decision we also stated that we recognize that 37 U.S.C. 308(g) does not specifically provide that entitlement to the variable reenlistment bonus shall exist only if the member is reenlisted for the purpose of utilizing the critically designated military skill which he possesses. And, we have recognized that regulations may not curtail the bonus after entitlement has vested by requiring that the member continue to satisfactorily perform his duties in the specialty for which it was authorized. 45 Comp. Gen. 379 (1966).

In 47 Comp. Gen. 414 we also noted that the legislative history shows that the only purpose in authorizing the bonus was as an inducement to first-term enlisted members possessing a critically needed military skill to reenlist so that such skill would not be lost to the service and the training of a replacement required. In effect, we said that the bonus

is a form of additional compensation for individuals serving in the critical military skills and, while payment of the bonus is not affected by subsequent duty changes, the reenlistment must be for that purpose. Thus, in that decision we held that enlisted members who had been selected for college training leading to commissioning as officers who reenlisted for the purpose of meeting the obligated service requirements for such training were not entitled to the variable reenlistment bonus. *See also* 48 Comp. Gen. 624 (1969).

As you indicate, entitlement to the variable reenlistment bonus vests in the member at the time he is reenlisted, provided that the requirements for such bonus are met. 45 Comp. Gen. 379, 46 *id.* 322, 47 *id.* 414, and 48 *id.* 624. However, as indicated above, one of the primary requirements which must be met is that the member be reenlisted for the purpose of serving in the critical military skill which he possesses at the time of reenlistment and upon which the bonus is based.

Thus, in 49 Comp. Gen. 206 (1969), to which you refer, we held that an enlisted member who was discharged, reenlisted and within a few days appointed a Reserve officer on active duty was not entitled to a reenlistment bonus since the reenlistment was not entered into with a bona fide intention of serving thereunder and the Government received no benefit from the reenlistment.

In 51 Comp. Gen. 3 (1971), we recognized that in some instances further training of members possessing critical skills may be desirable in those skills after reenlistment. In that decision we authorized payment of the variable reenlistment bonus to a member who was reenlisted to acquire the necessary obligated active duty remaining to enable him to participate in a program whereby he would attend a junior college to obtain an associate degree majoring in a course of study reasonably related to his skill and which would enhance his skill. However, it was contemplated there that upon completion of such schooling he would resume his regular duty in the same skill in which he performed prior to his assignment to the program.

In the instant case, however, it was clearly known at the time Corporal Chastain reenlisted that upon reenlisting and reporting to his new command his military occupational specialty was to be changed and he was to be trained in a new skill and not utilized in the critical skill which he possessed at the time of reenlistment and upon which his variable reenlistment bonus was to be based.

Hence, the Marine Corps will no longer have the benefit of Corporal Chastain's services in the critical skill upon which the bonus is to be based and it will be necessary to train a replacement for him in that skill at additional expense to the Government. Thus, the very thing the variable reenlistment bonus was instituted to avoid would result.

Therefore, it is our view that in cases such as this where it is known at the time of reenlistment that the member is not to be utilized in the critical skill which he possesses and upon which the variable reenlistment bonus is based, the purpose of the bonus is defeated and no entitlement to it accrues. That is our view whether or not the new skill in which the member is to be trained and serve is a critical skill.

Accordingly, payment to Corporal Chastain of a variable reenlistment bonus in the described circumstances is not authorized.

Concerning the comments in Headquarters U.S. Marine Corps letter of October 3, 1972, while we recognize that some degree of flexibility may be necessary in administering the variable reenlistment bonus program, it would appear that such flexibility should be limited to the authority to determine which skills are critical and fixing the appropriate multiplier for each skill, and to adjust those determinations according to the needs of the service. If, as indicated in the letter, there is a time lag between the identification of a change in criticality of a skill and approval of a recommended change to the bonus program by the Department of Defense, we believe this is a matter which should be resolved administratively. As we have indicated above, it is our view that such flexibility does not provide a legal basis for authorizing a bonus for a member who reenlisted for the purpose of training and serving in some new skill other than the critical skill which he held at the time of reenlistment and upon which the bonus is based. This is our view whether or not the new skill for which he is to be trained and subsequently serve in is critical.

[B–176203]

Military Personnel—Record Correction—Retirement Status—Disability in Lieu of Years of Service—Income Tax Refund

A correction of military records under 10 U.S.C. 1552 to show that a deceased officer had been retired for disability and not years of service pursuant to 10 U.S.C. 8911, created entitlement to a refund of the income taxes withheld since section 104(a)(4) of the Internal Revenue Code of 1954, as amended, provides that disability retired pay is not subject to Federal income tax. The claim of the officer's widow for refund of taxes for the years denied by the Internal Revenue Service as barred by the applicable statute of limitations may be allowed as being a claim within the meaning of 10 U.S.C. 1552(c) in view of *Clyde A. Ray* v. *United States*, decided January 21, 1972 (197 Ct. Cl. 1), in which the court held the plaintiff's claim was not for the refund of taxes but to effectuate the administrative remedy allowed under 10 U.S.C. 1552, and that shelter of income from taxation is a "pecuniary benefit" flowing from the record correction.

Taxes—Federal—Refunds—Military Records Correction—Disability in Lieu of Years of Service

In the settlement of claims for income tax refunds occasioned by the correction of military records to show disability retirement in lieu of retirement for years

of service, there is no objection to following the rule in *Clyde A. Ray* v. *United States*, decided January 21, 1972 (197 Ct. Cl. 1) to the effect that claims for amounts withheld for income tax purposes will be treated as "pecuniary benefits" due within the meaning of 10 U.S.C. 1552(c) rather than a claim for tax refunds. However, claims should be limited to amounts withheld for income taxes in years for which the Internal Revenue Service (IRS) is barred from making refunds by the applicable statute of limitations, and the settlement of claims, without interest, may be paid from current appropriations available for claims under 10 U.S.C. 1552(c). Claimants' information and the advice of IRS should be solicited as aids in computing amounts due, and whether refunds should be withheld from a disbursement to IRS is for that agency to determine.

To N. R. Breningstall, United States Air Force, January 16, 1973:

Further reference is made to your letter dated May 18, 1972, ACF, with attachments, forwarded to this Office by Headquarters United States Air Force letter dated June 9, 1972, requesting an advance decision concerning the claim of Mrs. Mildred C. Smith for refund of amounts of Federal income tax withheld for the years 1961 through 1966 from the retired pay of her deceased husband, Colonel James W. Smith, USAF, Retired. The request has been assigned number DO–AF–1161 by the Department of Defense Military Pay and Allowance Committee.

You indicate that Lieutenant Colonel James W. Smith was retired for years of service effective April 30, 1961, pursuant to 10 U.S. Code 8911 and advanced on the retired list to the grade of colonel pursuant to 10 U.S.C. 8963 with retired pay in the amount of 75 percent of basic pay computed under 10 U.S.C. 8991. On this basis his entire retired pay was taxable income and appropriate amounts were withheld by the Air Force and remitted to the Internal Revenue Service.

You also indicate that effective October 1, 1967, Colonel Smith waived part of his retired pay in favor of tax exempt Veterans Administration compensation. The amount of retired pay thus waived was $70 per month effective October 1, 1967, increased to $72 per month effective January 1, 1969, and to $75 per month effective July 1, 1970. Veterans Administration compensation was terminated effective August 30, 1970, by reason of the member's death on September 11, 1970.

The record shows that pursuant to the recommendations of the Air Force Board for the Correction of Military records and under the authority of 10 U.S.C. 1552, on April 2, 1970, Colonel Smith's military records were directed to be corrected to show that on April 30, 1961, he was unfit to perform the duties of his office by reason of physical disability; that he had a total combined compensable rating of 100 percent; that he was not retired by reason of years of service on April 30, 1961, but that on that date his name was placed on the Temporary Disability Retired List, with entitlement to disability retired

pay effective May 1, 1961. It was also directed that Colonel Smith's records be further corrected to show that he was removed from the Temporary Disability Retired List on January 31, 1965, and placed on the Permanent Disability Retired List on January 31, 1965, with 20 percent disability.

You indicate that no change in the gross amount of retired pay to which Colonel Smith was entitled resulted from this change in his records. However, since pursuant to section 104(a)(4) of the Internal Revenue Code of 1954, 68A Stat. 30, as amended, 26 U.S.C. 104(a)(4), disability retired pay is not subject to Federal income tax, the taxable portion of Colonel Smith's retired pay was changed retroactively to May 1, 1961, by the correction action.

It appears that incident to the correction of Colonel Smith's records the Air Force furnished him a statement showing his taxable income as reported by the Air Force on Internal Revenue Service Form W-2 for each year from May 1, 1961, through December 31, 1969; the amount which should have been reported under the corrected records; and the amount of tax actually withheld from his retired pay for each year. The adjustment of taxable income and withholding for the year 1970 was made on the Form W-2 current for that year.

It is reported that claims for refund of taxes filed with the Internal Revenue Service by or on behalf of Colonel Smith in 1970 were paid for the years 1967, 1968 and 1969. Claims for the years 1961 through 1966 were denied by the Internal Revenue Service as barred by the applicable statute of limitations. *See* section 6511(a) of the Internal Revenue Code of 1954, 68A Stat. 808, as amended, 26 U.S.C. 6511(a).

Colonel Smith's widow, by her attorney, has now filed a claim with the Air Force for the amounts withheld for taxes by the Air Force during the years 1961 through 1966 stating in effect that such amounts should now be paid by the Air Force under authority of 10 U.S.C. 1552(c) inasmuch as the correction of Colonel Smith's records gave rise to the right to recover the taxes wrongfully withheld from his pay.

You indicate that in the past the Air Force and the other services have taken the position that such amounts originally correctly withheld as required by statute (sections 3402–3404, Internal Revenue Code of 1954, 68A Stat. 457, as amended, 26 U.S.C. 3402–3404) cannot be considered as amounts "found to be due the claimant" within the meaning of 10 U.S.C. 1552(c). You note, however, that in the case of *Clyde A. Ray* v. *United States*, 453 F. 2d 754, 197 Ct. Cl. 1 (1972), involving facts essentially the same as those in Colonel Smith's case, the Court of Claims reached a contrary conclusion, finding the plaintiff entitled

to judgment "based on the withholdings made from and applicable to what has been determined to be plaintiff's disability retired pay" for the years for which the Internal Revenue Service was without authority to allow refund.

You request our decision as to whether the *Ray* case may be followed in the settlement, under 10 U.S.C. 1552, of Colonel Smith's case and other similar cases. If the answer to that question is in the affirmative, you ask advice as to the procedure to be followed to insure that the amount paid by the Air Force does not duplicate any amount received by way of refund from the Internal Revenue Service for any tax year. And, you ask whether the Air Force may withhold the amount so payable from the next current disbursement to the Internal Revenue Service of amounts withheld for taxes. If such withholding from the Internal Revenue Service may not be made, you request advice as to how any such added expenditure to the member over and above his statutory entitlement should be accounted for.

Subsection 1552(a) of Title 10, U.S. Code, provides generally that the Secretary of a military department acting through boards of civilians of the executive part of that military department may correct any military record of that department when he considers it necessary to correct an error or remove an injustice and, except when procured by fraud, such a correction is final and conclusive on all officers of the United States. Subsection 1552(c) provides in pertinent part as follows:

> (c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. * * *.

This office has long held that a correction of records under 10 U.S.C. 1552 entitles the member whose records are corrected to all the benefits due him on the basis of the facts as shown by the corrected records, and his rights are determined in the same manner as if his original records had shown the information contained in the corrected records. *See* 32 Comp. Gen. 242 (1952), 34 *id.* 7 (1954) *and* 50 *id.* 718 (1971). The Court of Claims has also taken that view. *See* for example, *Prince* v. *United States*, 127 Ct. Cl. 612 (1954).

In *Clyde A. Ray* v. *United States*, *supra*, the court in effect held that the plaintiff's suit was not one for refund of taxes paid, but a suit to effectuate in full the administrative remedy allowed under 10 U.S.C. 1552, and that shelter of income from taxation is a "pecuniary benefit" flowing from the Correction Board's decision on the nature of his retirement. The court indicated that the plaintiff's claim arose

as a result of the error of the Air Force in withholding amounts approximately equal to his supposed tax liability and thus it was not a claim for refund of taxes. All that had to be done was to determine the difference between the retirement pay the member received and the pay he would have received if the record had been correct from the beginning.

As you indicated, the amount awarded by the court in the *Ray* case was to be based on the withholdings made from and applicable to what was determined to be the plaintiff's disability retired pay for the years for which the Internal Revenue Service had refused tax refunds. The court said that "reliquidation of plaintiff's income tax liability for those years" would not be necessary unless the parties submitted stipulated figures on that basis, but the judgment is without prejudice to the defendant's rights, if any, to recover any tax windfall that may inure to the plaintiff.

The Government took the position in the *Ray* case, as indicated from our records, that allowances of tax refunds for prior years is within the sole province of the Internal Revenue Service. The Government's position appears to have been fully presented to the court. No further action was taken by the Department of Justice concerning the court's decision.

Accordingly, in the settlement of claims of the type here involved, we would have no objection to following the rule in the *Ray* case to the effect that claims for amounts withheld for income tax purposes will be treated as "pecuniary benefits" due the individual within the meaning of 10 U.S.C. 1552(c) rather than a claim for tax refund. However, claims for such amounts should be limited to amounts withheld for income taxes in years for which the Internal Revenue Service is barred from making refunds by the applicable statute of limitations. Settlement of such claims may be paid from current appropriations available for payment of claims pursuant to 10 U.S.C. 1552(c) and accounted for as such. No interest may be allowed in any such settlements since 10 U.S.C. 1552 makes no provision for payment of interest.

To aid in the computation of amounts due, the claimant should be advised to furnish the necessary information and it would appear proper to request the advice of the Internal Revenue Service in preparing such computations.

Your question as to whether you may withhold amounts paid on such claims from your next current disbursement to the Internal Revenue Service is primarily a matter for determination by that agency and not within our jurisdiction. *See* 26 U.S.C. 3402(a), 3403, 3404, 6301 and 6302 of the Internal Revenue Code of 1954, as amended.

However, it would appear that to deduct such amounts from current disbursements to the Internal Revenue Service would be indirectly effecting a refund of taxes barred by the applicable statute of limitations and, therefore, illegal.

Your questions are answered accordingly and, if otherwise correct, payment may be made on such basis to Colonel Smith's widow on the voucher which is returned herewith.

[B-176334]

Contracts—Negotiation—Awards—Initial Proposal Basis—Award Authority Discretionary

The practice of the United States Procurement Agency in Japan of conducting negotiations in all procurements with a high dollar value or operational significance is a proper exercise of a discretionary right, even though paragraph 3-805.1 of the Armed Services Procurement Regulation permits awards on the basis of initial proposals if offerors are so informed and circumstances so warrant. Therefore, the fact that the low offeror under a solicitation for utility plant services was displaced because its best and final offer was its initial proposal that compared reasonably with the Government's estimate is not subject to question, although the Government should have refined its estimate before proposal submission. Furthermore, the use of the estimate as a negotiating tool was in the nature of advice that proposals were too high, rather than the use of an auction technique, and there is no evidence in the record that prices were leaked during negotiation.

To PAE International, January 16, 1973:

Your letters of June 23 and September 1, 1972, protest the award of a contract to Taihei Dengyo Kaisha, Ltd., by the United States Army Procurement Agency, Japan, under request for proposals (RFP) DAJB17-72-R-0139, on the ground that procedural errors prejudicial to PAE took place during negotiations leading to the award of a contract to your competitor.

The subject RFP requested offers for a services contract for the operation, maintenance and repair of utility plants, systems and facilities at certain United States Forces installations in Japan and was negotiated pursuant to 10 U.S. Code 2304(a)(6), which permits negotiation where the property or services involved are to be procured and used outside of the United States. The RFP was issued on February 1, 1972, and set February 22 as the proposal submission date. The initial offers of the three offerors determined to be responsible and within the competitive range, expressed in Japanese yen as required by the RFP, are set out below:

PAE International (Corrected)	¥350,148,888
Kawabata Kensetsu	387,801,588
Taihei Dengyo	390,384,000

(The RFP stipulated a yen to dollar ratio of 308 to 1.)

Following negotiations, final offers were submitted, with PAE electing to resubmit its initial offer because no changes in specifications or scope of work resulted from negotiations. In this context, PAE believed that its original offer was realistic and reasonable. All three final offers were within 1½ percent of the Government's estimate of ¥347,824,275. The final offers are set out below:

Taihei Dengyo	¥346,860,000
PAE International	350,148,888
Kawabata Kensetsu (Corrected)	352,106,892

Award was made to Taihei Dengyo, the incumbent contractor, on May 22, 1972.

You contend, in view of the reasonableness of PAE's initial offer as compared with the Government's estimate and the fact that no changes in scope of work were made during negotiations, that award should have been made on the basis of initial proposals in this instance as contemplated by the right reserved in the RFP to dispense with negotiations and by the caution therein that offerors should submit their best offers initially. You further question the fact that the Government's estimate was not formulated until March 15, 1972, some 6 weeks after proposals were submitted. In this regard, you speculate that the PAE offer influenced the Government estimate, since the two figures were close.

Also, you contend that the revelation of the Government's estimate to offerors during negotiation constituted an "auction technique" prohibited by paragraph 3–805.1(b) of the Armed Services Procurement Regulation (ASPR) because you suspect that the other offerors had been made aware of the fact that the PAE price offer and the Government estimate were extremely close. In this regard, you state that it was rumored during negotiations that PAE's price was 15 percent less than that submitted by Taihei Dengyo and that PAE's price and the Government estimate were "approximately the same." You also state that you were contacted by a labor union representative who had information that PAE had submitted the lowest initial offer. You conclude that the above-summarized facts, coupled with the reduction of the incumbent contractor's proposal price by some ¥43,000,000 (roughly $140,000) to just slightly less than the Government estimate and the PAE offer, provide clear evidence of collusion between Government personnel and the incumbent contractor. You request, in the light of these circumtances, that the contract awarded to Taihei Dengyo be canceled, or, in the alternative, that the option to renew the contract for an additional year not be exercised so that the procurement for the next fiscal year may be opened to competition.

The Army's administrative report, a copy of which was furnished to you, advises that written or oral discussions are customarily conducted by the procuring activity in all procurements which have either "a high dollar value or an operational significance" in accordance with ASPR 3–805.1(a). The report concedes that the Government estimate utilized during negotiations was not formulated until March 15, 1972, significantly after receipt of initial proposals. However, the reports take the position that this estimate was merely a refinement of an estimate formulated well before proposal submission on the basis of the actual procurement requests submitted by the Army and Navy installations at which the services covered by the RFP were to be performed. This earlier estimate was in the amount of ¥350,214,912, exclusive of certain reimbursable costs, and was reportedly only $214 more than the PAE offer. It is further stated that the refined estimate was formulated by the Contract Pricing Branch of the procuring agency on the basis of the RFP manning tables and known manning levels, fiscal year 1972 pricing information, and the fiscal year 1973 using activity cost estimates; and that pricing branch personnel were "permitted no access to the four offers received on 22 Feb 72 during preparation of the Government estimate."

On the question of divulgence of PAE's initial offer by Government personnel, the report states that "At no time prior to award was the price offered by PAE, or any other offeror, disclosed to any person outside the concerned US Government procurement personnel" and states further that the conduct of this procurement was personally reviewed by the Commanding Officer, United States Army Procurement Agency, Japan. Also, the report points out that the difference between the PAE and Taihei Dengyo offers was closer to 11 percent than in was to 15 percent, indicating that PAE's before-award information with respect to the range of offered prices was erroneous and probably based on speculation rather than on any concrete information.

Finally, with respect to PAE's claim that the divulgence of the Government estimate during negotiations constituted an auction technique, the report takes the position that so long as PAE's price was not revealed to other offerors, and so long as no offerors were advised that the Government estimate was a price which had to be met, no auction occurred. The report also points out that there is no statutory or regulatory prohibition against the divulgence of the Government's estimate during negotiations leading to a supply contract.

For reasons set out below, your protest must be denied.

Although ASPR 3–805.1, which implements 10 U.S.C. 2304(g), permits the award of a contract on the basis of initial proposals where proper notification thereof is provided offerors and where the cir-

cumstances otherwise warrant, the exercise of such right is discretionary. In fact, the section expresses a preference for discussions. In this regard, the regulation states that discussions "shall be conducted" with all responsible offerors within a competitive range but that the discussion requirement "need not be applied to" certain situations including procurements where adequate competition clearly demonstrates that a reasonable price will be achieved. Further, subparagraph (a) (v) of section 3–805.1 states that:

> * * * In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. * * *.

See, also, 47 Comp. Gen. 279 (1967); 50 *id.* 246, 251 (1970).

We therefore must conclude that the practice of the Japan Procurement Agency of conducting negotiations in all procurements with "high dollar value or operational significance" is not subject to objection on the record before us.

On the question of the timing of the formulation of the Government's estimate, the file reflects that a Military Interdepartmental Purchase Request dated January 12, 1972, from the United States Navy Public Works Center, Yokosuka, Japan, for that portion of the fiscal year 1973 services to be performed at naval facilities in the amount of $76,464, or ¥23,550,912 at the stated currency exchange rate of ¥308 to $1, was in the hands of the procuring agency before proposal submission. Likewise, a Purchase Request and Commitment dated December 7, 1971, from the Army's Director of Facilities Engineering for Japan for the Army's portion of the fiscal year 1973 services in the amount of $1,053,755 converted to ¥326,664,000 for the fixed-price portion of the proposed contract was also in the hands of the procuring agency before proposal submission.

Although the Army's fixed-price estimate as expressed in yen was incorrectly converted at an exchange rate of approximately 310 to 1 rather than the stipulated 308 to 1 rate, it was added to the previously mentioned Navy figure to reach a preproposal rough Government estimate of ¥350,214,912. While we think that the better approach would have been to have finished the refinement of the Government's detailed estimate before proposal submission, we cannot conclude that the competitive position of PAE was prejudiced.

Similarly, we must conclude that the record does not substantiate the allegation that PAE's price was compromised during negotiations. In this regard, as indicated above, the administrative report has denied, following a review by the head of the procuring agency, that PAE's price was revealed. You have advanced no evidence that the PAE price was in fact revealed other than an inference drawn from the fact that the Government estimate divulged to offerors was close

to the amount of the PAE offer and unsubstantiated allegations with respect to rumors reported to you during negotiations that PAE was low.

While we are not unmindful of your position that the circumstances warrant an independent investigation of your suspicions that the PAE price was leaked, we cannot conclude on the record that sufficient grounds exist for our Office to recommend that an investigation of your allegations be conducted.

Concerning the alleged prohibited auction technique, ASPR 3-805.1 (b) provides, in pertinent part, as follows:

> Whenever negotiations are conducted with more than one offeror, auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to that of another offeror. On the other hand, it is permissible to inform an offeror that his price is considered by the Government to be too high. * * *.

In our opinion, the use of the Government estimate as a negotiating tool was not proscribed by this regulation since PAE's price was not divulged. As indicated above, the administrative report has denied that any information with respect to the PAE offer was provided other offerors. Therefore, the record does not establish that offerors were advised that their prices were not low as compared to other offerors. Further, in our opinion, the advice to offerors of the amount of the Government estimate did not constitute an indication of a "price which must be met," within the scope of the cited regulation. The term "auction" connotes direct price bidding between two competing offerors, not the negotiation of a price between an offeror and the Government provided an offeror's standing with respect to his competitors is not divulged. Therefore, the use of the Government estimate as a negotiating tool was more in the nature of advice to those offerors to whom it was divulged that they should consider whether their initial offers might be "too high," a technique specifically sanctioned by ASPR 3-805.1(b).

Accordingly, we must conclude, on the basis of the present record, that the award of the contract to Taihei Dengyo will not be questioned by our Office.

[B-170098]

Pay—Retired—Waiver for Civilian Retirement Benefits—Revocation

A retired member of the uniformed services who at age 57 after 10 years of Federal employment is immediately granted a civil service annuity based on 30 years of military and civilian service, the military service having been used to establish eligibility for the civil service annuity, may not upon reaching age 62 and becoming eligible for a deferred annuity revoke the waiver of his military

retired pay, with a concurrent reduction of civil service annuity by excluding credit for military service since restoration and payment of retired military pay would amount to a double benefit based on the same service contrary to 5 U.S.C. 8332(j). Any recomputation of civil service annuity is within the jurisdiction of the Civil Service Commission, and a member who failed to apply for an immediate civil service annuity based on his military and civilian service, upon becoming eligible at 62 to a deferred civil service annuity would not receive civil service benefits for the period prior to reaching age 62.

To the Secretary of Defense, January 17, 1973:

This refers to letter dated September 11, 1972, from the Assistant Secretary of Defense (Comptroller) transmitting for decision Department of Defense Military Pay and Allowance Committee Action No. 467 involving the following question:

1. May a Civil Service retiree with 5 or more years civilian service who used his military service to establish eligibility for an annuity, revoke his waiver of military retired pay upon reaching age 62, have his military retired pay reinstated, and have his Civil Service annuity recomputed on the basis of civilian service only?

In reaching our decision, the Assistant Secretary asks us to consider a statement (copy of which was enclosed) made by the Deputy Assistant Secretary of Defense (Manpower and Reserve Affairs) on H.R. 10670 before the Special Subcommittee on Survivor Benefits, Senate Committee on Armed Services. H.R. 10670 has become Public Law 92-425, 10 U.S. Code 1447, approved September 21, 1972. This law establishes a survivor benefit plan for military personnel.

In 50 Comp. Gen. 80 (1970) it was held, quoting from the syllabus, that:

A retired member of the uniformed services whose military service upon retirement from civilian employment is not used to establish his civil service annuity eligibility but is only used in the computation of the annuity to increase the amount payable, may withdraw his waiver of retired pay and have the pay reinstated as no double benefit would result from the same service by terminating the use of the military service to compute the civil service annuity and reinstating the retired pay, and 5 U.S.C. 8332(e) provides that a civil service retirement does not affect the right of an employee to retired pay, pension, or compensation in addition to an annuity payable upon retirement from the Federal civilian service.

In the circumstances giving rise to the question the military service was required to be used to establish eligibility for an immediate annuity under 5 U.S.C. 8336(a). The committee action sets forth the following example concerning the type of situation involved:

A military member retires with 20 years service at age 47; he thereafter is employed by the Federal Government for 10 years; at age 57 he applies for and is granted a Civil Service annuity based on 30 years service, having waived the military retired pay. At age 62 he requests his military retired pay be reinstated, with concurrent reduction of Civil Service annuity by excluding credit for military service.

The Committee is of the view that with the passage of time the annuitant having attained the age at which he would have been eligible

for an annuity based on civilian service only, the question should be answered in the affirmative there being no double benefit even though the military service was initially used for eligibility. The committee action states that to conclude otherwise and deny the request for reinstatement of military retired pay would appear to be contrary to the intent of 5 U.S.C. 8332(j). Hence, in effect the annuitant is deemed to have become eligible for a deferred annuity.

Subsection 8338(a), Title 5, U. S. Code, provides as follows:

> (a) An employee who is separated from the service or transferred to a position in which he does not continue subject to this subchapter after completing 5 years of civilian service is entitled to an annuity beginning at the age of 62 years.

The "civil service retiree" in the question presented is not "an employee who is separated from the service" but is a civil service annuitant who was granted immediate retirement at age 57. Having acquired the status of an annuitant which status would continue even if he were to be reemployed in the civil service which he was not, no entitlement to eligibility arises under 5 U.S.C. 8338(a) upon his having become 62 years of age. *See* 49 Comp. Gen. 581 (1970).

Section 8332(j) of Title 5, U.S. Code, requires the exclusion of military service performed by an individual after December 1956 in determining creditable service in the computation of a civil service annuity if the annuitant or his widow or child receives or is eligible to receive monthly old-age or survivor social security benefits based on his wages. The law further provides that where an individual or widow becomes 62 years of age and otherwise eligible for social security benefits, the Civil Service Commission is required to redetermine the aggregate period of service on which the annuity is based, so as to exclude such military service when he or she becomes 62 years of age.

We find nothing in section 8332(j) or its legislative history which would warrant the conclusion that Congress intended that the military service which is to be excluded in computing the civil service annuity may now be used to reinstate his military retired pay.

Since it appears from the quoted example that the member's military service was initially used to establish his eligibility for a civil service annuity—as distinguished from using his military service in the computation of the annuity to increase the amount thereof—it is our view that to permit revocation of his waiver of military retired pay and reinstate such payments would amount to a double benefit based on the same service which the law does not contemplate. *See* 41 Comp. Gen. 460 (1962) and 49 *id.* 581 (1970). If it is considered that the law should be changed in this respect the matter should be presented by the Department of Defense to the Congress for its consideration.

Accordingly, the question, as it relates to military retired pay, is answered in the negative. Concerning the recomputation of the annuity on the basis of civilian service only, this is a matter primarily within the jurisdiction of the Civil Service Commission and should be resolved by that office.

We recognize that if the member, upon reaching age 62, will not be permitted to reinstate his military retired pay after waiver thereof and use his military service to establish a civil service annuity, the effect may be to reduce the total annuity benefits that he would otherwise receive upon reaching that age. There is also for noting, however, that a retired member who, at age 57, as in the example cited, does not apply for and receive an immediate civil service annuity based on his civilian and military service but waits until he becomes 62 years of age when he is otherwise eligible for a deferred annuity based on his civilian service only, would not receive the civil service annuity benefits for the period prior to reaching age 62.

[B-176923]

Medical Treatment—Military Personnel—Hospitalization—Duty Within Hospital Vicinity—Status of Duty

When a member of the uniformed services stationed in the United States is ordered to a hospital, the treatment generally is temporary and does not justify the transportation of dependents. However, if the period of hospitalization is prolonged or the member is returned from overseas, the station change is regarded as permanent and the member is entitled to the transportation of dependents and a dislocation allowance, and all members, irrespective of having dependents, are eligible to have their household effects transported. Although members who have basic eligibility for permanent change of station allowances incident to hospitalization may not be authorized per diem and other temporary duty allowances when assigned duty within the corporate limits of the city or town wherein the hospital is located, such allowances are payable to members whose home port or duty station is in the United States and whose treatment will not be prolonged.

To the Secretary of the Air Force, January 17, 1973:

We refer further to letter dated August 21, 1972, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs), forwarded here by letter of August 24, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72-37), requesting a decision regarding the entitlement of members of the uniformed services to per diem and other travel allowances.

In his letter, the Assistant Secretary of the Air Force states that question has arisen regarding the entitlement to per diem and other travel allowances in the case of a member who has been transferred from a duty station to a hospital for treatment, after which he has been transferred in a temporary duty status to a location which is within

the corporate limits of the city wherein the hospital is located. It is explained that this temporary duty assignment may be for the purpose of being near the hospital for further treatment in an outpatient status or to await a further permanent duty assignment.

Additionally, the Assistant Secretary indicates that entitlement to transportation of dependents and the payment of a dislocation allowance are clear where the member is within the United States, and a statement of expected prolonged hospitalization is obtained, or for those members transferred to a hospital in the United States from outside the United States, in which event no statement of expected prolonged hospitalization is required.

However, as the result of extending entitlements, normally authorized only in connection with permanent changes of station, to personnel said to be in a temporary duty status at a hospital, the Assistant Secretary expresses doubt concerning these members' entitlement to per diem and other travel allowances during subsequent temporary duty assignments at a place within the corporate limits of the city where the hospital is located.

Therefore, our opinion is requested as to proper entitlements in the following circumstances:

a. When a member is attached to a ship whose home port is outside the United States, or on permanent duty at a station outside the United States and dependents travel from the home port or duty station outside the continental United States to the location of the hospital. Subsequent to hospitalization, the member is transferred to temporary duty at a place within the corporate limits of the city wherein the hospital is located.

b. Same circumstances as stated in a, except the member has no dependents.

c. Same circumstances as stated in a, but the dependents were located in the continental United States and traveled to the location of the hospital.

d. Same circumstances as stated in a, but the home port or the permanent duty station is within the continental United States, and the period of hospitalization is contemplated to be prolonged.

e. Same circumstances as stated in a, but the home port or permanent duty station is within the continental United States and the member has no dependents or the dependents do not perform travel to the location of the hospital.

Paragraph M7004–1 of the Joint Travel Regulations states that except as provided in subparagraph 3, entitlement to transportation of dependents incident to a member's hospitalization shall be contin-

gent upon a statement by the commanding officer of the receiving hospital that he has evaluated the case and believes that the period of treatment of the member in that hospital can be expected to be prolonged.

Subparagraph 2 provides in pertinent part that a member on active duty who is transferred within the United States from either a permanent or temporary duty station to a hospital for observation and treatment is entitled to transportation of dependents, as for a permanent change of station, from his last permanent duty station or the place the dependents were retained under paragraph M7055, to the hospital.

Subparagraph 3 provides that a member on active duty outside the United States who is transferred to a hospital in the United States for observation and treatment is entitled to transportation of dependents from the overseas station or a designated place, as applicable, to the first hospital to which he is transferred for observation and treatment. In such case the statement of prolonged hospitalization referred to in subparagraph 1 is not required.

Provisions regarding entitlement to the transportation of household goods of a member incident to hospitalization in circumstances similar to those specified in subparagraphs 2 and 3, M7004, are contained in paragraph M8254 of the regulations.

Paragraph M9003–3a provides that a dislocation allowance is payable to a member with dependents who is transferred from outside the United States to a hospital within the United States for observation and treatment and who relocates his household incident to such transfer. Subparagraph 3b provides that the dislocation allowance is payable, as for a permanent change of station, to a member with dependents who is transferred from inside the United States to a hospital in the United States for observation and treatment and who relocates his household incident to such transfer provided a statement of prolonged hospitalization has been issued by the commanding officer of the receiving hospital.

Paragraph M1150–10a, in pertinent part, defines "permanent station" as the post of duty or official station to which a member is assigned or attached for duty other than "temporary duty" or "temporary additional duty," the limits of which will be the corporate limits of the city or town in which the member is stationed. Paragraph M3003–2a defines the term "temporary duty" as duty at one or more locations, other than the permanent station. Subparagraph 2b states that temporary additional duty is a form of temporary duty. Paragraph M3050–1 indicates that members are entitled to travel and transportation allowances only while actually in a "travel

status," and that they shall be deemed to be in this status while performing travel away from their permanent duty station.

In 4 Comp. Gen. 653 (1925) we said that while an order to proceed to a hospital for treatment is not a permanent change of station (since a patient does not perform duty), where a member at a foreign station is detached with directions to proceed to the United States for treatment, his family or dependents are entitled to be brought back to the United States, and the detachment is regarded as a permanent change of station for this purpose. However, where the member's station is in the United States and he is ordered to a hospital for treatment, the basic general rule was stated to be that there is not such a change of station as to justify transportation of dependents, as illness necessitating treatment in a hospital is, in nearly all cases, relatively temporary.

Accordingly, where a member is on duty outside the United States and he is hospitalized in the United States, in addition to entitlement to transportation of dependents (par. M7004–3), Volume 1 of the Joint Travel Regulations authorizes the payment of a dislocation allowance to a member with dependents who relocates his household incident to such transfer (par. M9003–3a), and also authorizes the transportation of household goods for members with or without dependents (par. M8254–3). Additionally, when a member stationed in the United States is hospitalized similar entitlements are extended to him "as for a permanent change of station" where a statement of prolonged hospitalization is issued by the commanding officer of the receiving hospital. (Subpars. 1 and 2, M7004; par. M9003–3b; and subpars. 1 and 2, M8254).

Members who obtain eligibility for any of the foregoing entitlements do so because their assignments to hospitals in the United States are regarded as permanent changes of station for these purposes, or entitlements are extended "as for" a permanent change of station. In either event, such members receive entitlements similar to those received by other members who in fact receive a change of permanent station. In such circumstances, the hospitals to which the members are assigned must be regarded as if they were permanent stations for the purpose of determining those members' entitlement to travel allowances incident to subsequent assignment to the same station. Members within the United States, who, because their hospitalizations are expected to be of short duration, are not able to obtain a statement of prolonged hospitalization, and therefore they are not eligible for permanent change of station allowances. Consequently, the places of hospitalization for such members may not be

regarded as permanent stations. *See* 43 Comp. Gen. 596 (1964), Question 5.

In view of the foregoing, in circumstances a, b, c, and d, the members having basic eligibility for permanent change of station allowances, per diem and other temporary duty allowances may not be authorized where the member subsequently is transferred to duty at a place within the corporate limits of the city or town wherein the hospital is located. Circumstance e does not appear to be entirely clear. If a member whose home port or duty station is in the United States will undergo a period of prolonged hospitalization, then he should be considered as not entitled to temporary duty allowances, as in circumstances a–d. However, if there will be no prolonged hospitalization, then the member is eligible for travel allowances resulting from subsequent temporary duty within the corporate limits of the city or town in which the hospital to which he was assigned is located.

[B–163536]

Commodity Credit Corporation—Barter Program and Agreements—Expansion of Program

The barter program which was originally conceived as a means of making productive use of surplus agricultural commodities owned by the Commodity Credit Corporation (CCC) to acquire strategic and critical materials; expanded to generate supplies to meet offshore and overseas needs; and further broadened to increase exports of agricultural commodities; to realize balance of payments advantages; and to assist in achieving international policy goals, may be modified to assure exporters of barter eligibility at time of sale rather than at time of export thereby enabling them to take immediate advantage of favorable markets, and to permit CCC to promptly revise eligibility criteria in response to shifting world market forces, thus increasing overall exports and expanding foreign markets in accordance with congressional intent. The modification should provide for access to the books and records of barter contractors until the expiration of 3 years after final payment.

To the Secretary of Agriculture, January 18, 1973:

By letter dated August 29, 1972, the Assistant Secretary of Agriculture for International Affairs and Commodity Programs has requested our concurrence as to the legality of certain proposed modifications in the Commodity Credit Corporation's barter program.

The Assistant Secretary's letter describes the barter program, as presently set forth at 7 CFR 1495.1–1495.8, as follows:

The Commodity Credit Corporation (CCC), since 1950, has conducted a barter program. This program was designed originally to exchange high-storage-cost, deteriorative agricultural commodities in CCC inventories for less-expensive-to-store, nondeteriorative strategic materials for stockpiling. However, over the past ten to twelve years, the program has gone through a number of revisions. Barter for strategic materials is no longer a part of the program, and almost all of the agricultural commodities exported are from private stocks.

Since its inception the barter program has been carried out through CCC-contracts with U.S. firms. Today, these contracts require the contractor to furnish foreign goods or services, or funds to buy them, to other government agencies, and to export U.S. agricultural commodities to eligible countries. The other government agencies reimburse CCC for the value of what they receive from the contractors. CCC is obligated to pay contractors for the f.o.b. value of the private stock commodities exported.

Contracts are signed with those firms submitting the lowest offers (expressed as a percentage of the value of the goods, services, or funds to be supplied). The value of the commodities to be exported represents the dollar value of what is to be supplied by the contractor plus the dollar value of the contractor's percentage offer (barter differential). Contractors use the barter differential to marginally reduce the selling price of the commodities to be exported and to cover various costs incident to performance of their contracts. Between 30 and 35 different firms hold barter contracts at any one time. In addition, during a year, about 250 export traders in grains, cotton, vegetable oils, tallow and grease, and tobacco participate in the barter program as commodity export agents of barter contractors.

It is our belief that the CCC barter program generates export sales through regular commercial channels. To the extent that such sales are additional to those which would otherwise be made commercially, the program achieves its purpose. As pointed out in your report of [February 12, 1971], to the Congress, entitled "Balance-of-Payments Benefits Achieved by the Department of Agriculture Through an Increased Agricultural Barter Program" [B–163536], it is not possible to establish a system which will guarantee that barter exports will not displace any commercial exports. In order to minimize such displacements, however, foreign markets for U.S. commodities are analyzed by USDA specialists. If it is determined that barter program assistance can help to develop, maintain, or increase a U.S. market, the market is designated an eligible destination for barter shipments of the particular commodity. Generally, when a country has not been a substantial cash market for the commodity and cannot be expected to become one in the near future, it is designated "B", and barter exports are allowed to that country without restriction. When a country has a history of substantial U.S. cash sales but it appears that U.S. exports can be increased or maintained through barter, the country is designated "A", and barter exports are permitted after review and approval on a case-by-case basis. Major U.S. markets for U.S. commodities, where there is little or no likelihood that barter exports would increase total sales, are designated "X", and barter exports are not allowed. It is planned to continue this system.

At the present time, a listing of eligible export destinations for each eligible commodity is attached to and incorporated by reference in each barter contract. The listing is fixed for all exports under that contract for the 14 to 18 months allowed the contractor for meeting his export obligations.

The Assistant Secretary then describes the proposed program modifications, which are published as a proposed rule making at 37 F.R. 6205–6207 (March 25, 1972):

* * * In view of the depletion of CCC stocks, all exports will be from private stocks. The export of an agricultural commodity to a foreign country will, in general, be eligible for application to a barter contract if, at the time of the export sale, the commodity is an eligible barter commodity and the foreign country is an eligible barter destination. As changes are made in the eligibility of commodities and countries, updated lists will be distributed to barter contractors and the export trade. Thus, we will be able to react more promptly to shifting world market forces.

We also plan to provide that, at the time of export, the exporter must be either a barter contractor or a firm which has arranged to make the export under a barter contract. We will not require that the exporter, at the time of the export sale, have been a barter contractor or a firm which has made such an arrangement with a barter contractor.

After these program modifications, export sellers, upon whom the success of the program depends, will be placed in a position of knowing when they sell an eligible commodity to an eligible destination that the later export can qualify

as a barter export. This will permit them to take immediate advantage of a favorable market situation without risking the loss of sales by waiting until they become barter contractors or arrange to make their exports under barter contracts. Equally important, U.S. exporters competing with foreign sellers in the less favorable barter markets will not first have to obligate themselves to export under barter contracts without having made sales to cover all or a significant part of their export obligations. This will encourage a wider and more active participation in the program, especially by firms with comparatively limited resources.

* * * * * * *

Barter contracts to be signed under the revised program will not require a casual relationship between a particular barter contract and the export sale of a commodity in the sense that, after the barter contract is signed, the barter contractor must sell the commodity himself or arrange with another firm to sell the commodity after the arrangement is made. Moreover, in the case of some export sales, it may not be clear that the export would not have taken place without the barter program. We believe it is clear, however, that the great bulk of the exports which will be applied under the barter program will be exports which would not have taken place in the absence of the barter program. It is our belief that the modification of the barter program will bring about the export of additional commodities.

CCC will publish in the Federal Register the essential provisions of the new program, pointing out that if exporters sell eligible commodities to eligible destinations, the subsequent exports may generally be applied to barter contracts. In addition, the new program will be made known to present contractors and other barter exporters through USDA information channels. Thus, any exporter will know that after having made such an export sale, he may obtain a barter contract himself or arrange with a barter contractor to make the export under the barter contract. He will know that if he enters into a barter contract after having made such a sale, he will receive the full benefit of the barter differential for the ensuing exports. He will also know that if, after having made such a sale, he enters into such an arrangement with a barter contractor he will receive a part of the differential due the barter contractor for exports applied to the barter contract. In this manner, the modified barter program will provide additional stimulation for exports into those markets where U.S. commodities require barter program assistance.

Accordingly, it seems clear that CCC will, under the modified barter program, cause agricultural commodities to be exported and that the barter program aids in the development of foreign markets for agricultural commodities, within the meaning of Section 5(f) (of the Commodity Credit Corporation Charter Act, discussed *infra*).

Finally, our views are requested as follows:

The proposed changes in the barter program which are outlined herein are needed to make the program more responsive to changing market situations. However, before instituting these changes and publishing them as regulations, we would appreciate your early concurrence in our position that there would be no legal objection to the program even though there may not be a causal relationship between a particular barter contract and the export sale of a commodity applied to the contract, and even though in the case of some sales it may not be clear that the export would not have taken place without the program.

The present barter program is based upon the substantive authority set forth in section 4(h) and section 5(d) and (f) of the Commodity Credit Corporation Charter Act (Charter Act), approved June 29, 1948, ch. 704, 62 Stat. 1070, 1071, 1072, as amended, 15 U.S. Code 714b (h) and 714c(d) and (f), and in sections 302 and 303 of the Agricultural Trade Development and Assistance Act of 1954, popularly known as "Public Law 480," approved July 10, 1954, ch. 469, 68 Stat. 454,

458–459, as amended, 7 U.S.C. 1431 and 1692. Section 4(h) of the Charter Act, as amended, provides, *inter alia:*

> * * * Notwithstanding any other provision of law, the Commodity Credit Corporation is authorized, upon terms and conditions prescribed or approved by by the Secretary of Agriculture, to accept strategic and critical materials produced abroad in exchange for agricultural commodities acquired by the Corporation. * * *.

Subsections 5 (d) and (f), as amended, authorize the Corporation, respectively, to "remove and dispose of or aid in the removal or disposition of surplus agricultural commodities" and to "export or cause to be exported, or aid in development of foreign markets for, agricultural commodities."

Section 302 of Public Law 480, as amended, provides in part:

> In order to prevent the waste of commodities whether in private stocks or acquired through price-support operations by the Commodity Credit Corporation before they can be disposed of in normal domestic channels without impairment of the price-support program or sold abroad at competitive world prices, the Commodity Credit Corporation is authorized, on such terms and under such regulations as the Secretary of Agriculture may deem in the public interest: (1) upon application, to make such commodities available to any Federal agency for use in making payment for commodities not produced in the United States; [and] (2) to barter or exchange such commodities for strategic or other materials as authorized by law * * *.

Section 303 of Public Law 480, as amended, provides in part:

> The Secretary [of Agriculture] shall, whenever he determines that such action is in the best interest of the United States, and to the maximum extent practicable, barter or exchange agricultural commodities owned by the Commodity Credit Corporation for (a) such strategic or other materials of which the United States does not domestically produce its requirements and which entail less risk of loss through deterioration or substantially less storage charges as the President may designate, or (b) materials, goods, or equipment required in connection with foreign economic and military aid and assistance programs, or (c) materials or equipment required in substantial quantities for offshore construction programs. He is directed to use every practicable means, in cooperation with other Government agencies, to arrange and make, through private channels, such barters or exchanges or to utilize the authority conferred on him by section 4(h) of the Commodity Credit Corporation Charter Act, as amended, to make such barters or exchanges. In carrying out barters or exchanges authorized by this section, no restrictions shall be placed on the countries of the free world into which surplus agricultural commodities may be sold, except to the extent that the Secretary shall find necessary in order to take reasonable precautions to safeguard usual marketings of the United States and to assure that barters or exchanges under this Act will not unduly disrupt world prices of agricultural commodities or replace cash sales for dollars. * * *.

The evolution of the statutory provisions discussed above reflects a consistent interest on the part of the Congress in expansion of the barter program. As originally established by section 416 of the Agricultural Act of 1949, approved October 31, 1949, ch. 792, 63 Stat. 1051, 1058, barter was apparently designed simply as one method of usefully disposing of perishable food commodities acquired by CCC through price support operations, in return for less perishable items required for Government strategic stockpiles. However, barter authority was

greatly expanded by enactment of sections 302 and 303 of Public Law 480. Among other things, these sections authorized barter as a means of acquiring materials needed in connection with foreign economic and military assistance programs and offshore construction, as well as strategic materials for stockpiling. In addition, the Secretary of Agriculture was directed to employ barter as a priority method for disposing of agricultural commodities owned by the CCC. In making these changes, the Congress recognized and emphasized the value of the barter program in developing international markets for American agricultural commodities. *See, e.g.*, H. Rept. No. 1776, 83d Cong. 2d sess., pp. 5–6, 9–11; 100 Cong. Rec. 8280 (June 15, 1954) (Remarks of Representative Hill).

Authority to barter was further broadened by section 6 of the act approved September 6, 1958, Public Law 85–931, 72 Stat. 1790, 1791, 7 U.S.C. 1692, which amended generally section 303 of Public Law 480. Enactment of this provision was designed to overcome a practice undertaken by the Secretary of Agriculture whereby prospective barter contractors were required to demonstrate that each particular barter transaction contemplated would increase, rather than supplant, existing foreign markets for agricultural commodities exported by conventional means. *See* generally, remarks of Senators Ellender and Humphrey, at 104 Cong. Rec. 4641–4650 (March 18, 1958). Senator Ellender specifically criticized the administrative practice of placing upon exporters the burden of establishing "additionality," as follows:

> * * * While the flexibility of barter arrangements permits the price reductions necessary to make the commodity move, generates the dollar exchange necessary to such movement, and therefore does increase overall exports, it is almost impossible to show that any particular barter contract will result in the so-called additionality required by the revised program. * * *. *Id.* at 4644.

This practice was addressed in the Conference Report on the 1958 act, H. Rept. No. 2694, 85th Cong., 2d sess., pp. 7–8:

> One of the important changes made in existing law by the amendment reported herewith is that it relieves the Secretary of the responsibility of making a finding that barter transactions would protect the funds and assets of the Commodity Credit Corporation. Instead, the Congress has made the policy decision that barter is in the best interests of the country as a whole and intends and directs that the barter program be carried out substantially as it was prior to May 1957 [when the Secretary of Agriculture imposed proof of additionality upon exporters].
>
> * * * * * * *
>
> The deletion of the language pertaining to the protection of assets was specifically designed to remove the legal base which permitted the Secretary to require so-called certificates of additionality to be furnished by contractors to establish that any sale through barter would be in addition to normal cash sales. Nor is anything in this bill to be construed to permit the requiring of such certificates of additionality.

The Conference Report also discussed other aspects of the barter program as follows:

The House amendment contained a limitation of $500 million on the amount of barter the Secretary could engage in any one year. This has been removed from the bill agreed to by the conferees. This is a clear indication on the part of the conference committee that it did not want any such dollar limitation on the authority of the Secretary to exchange essentially valueless surpluses for materials of lasting value.

* * * * * * *

In the past the burden of proof as to additionality has been on the contractors in relation to each contract proposed by them. Under the language of the bill, that burden of proof has been shifted to the Secretary and, in exercising that authority, he is required to follow substantially the same procedures as are followed in title I of Public Law 480. However, it should be noted that the safeguarding of usual marketings is limited to the safeguarding of usual marketings of the United States. It is not intended that the usual marketings of other nations shall be a basis of consideration in the approval of a barter transaction.

Furthermore, in the exceptions granted to the Secretary, he is required to assure that a particular barter transaction will not unduly disturb world prices of agricultural commodities. The conferees were aware that prior to May 28, 1957, barter contractors were offering nominal discounts in order to dispose of the commodities abroad. These discounts normally were around 1 to 2 percent. * * * This bill contemplates that a discount of a few percent will not unduly disturb the world prices and not be the basis for establishing restrictions. If a discount is reported above this reasonable rate, the Secretary should take appropriate precautions and action to guard against the disturbing effect of such a large discount.

The Secretary was also directed to assure that a barter sale does not replace a cash sale for American dollars. The burden of proof is on the Secretary to establish that the barter deal does in fact replace a cash sale for American dollars. If such a finding is made, it is the intention of the conferees that the particular barter transaction should be rejected. *Id.* at 8–9.

Finally, the Conference Report added the following direction with respect to the barter program generally:

The details of the barter provisions included in this conference report are relatively unimportant. Congress is not so much concerned with the administrative details of the Secretary's operations as that he should carry on an aggressive and effective barter program. Had he been doing so, there would have been no need for any barter legislation in this bill. *Id.* at 7.

Section 205(c) of the Mutual Security Act of 1959, approved July 24, 1959, Public Law 86–108, 73 Stat. 246, 250, 22 U. S. C. 1925, amended section 416 of the Agricultural Act of 1949, as amended, to authorize barter from private stocks, in addition to stocks acquired by CCC in its price support operations.

As indicated by the foregoing, the barter program was originally conceived primarily as a means of making productive use of surplus agricultural commodities owned by CCC—initially by acquiring stockpile items, and later by generating supplies to meet offshore construction and other overseas needs. However, as noted in our report of February 12, 1971, *supra*, p. 4, the program has now evolved into a means of pursuing the following major objectives:

—increasing exports of domestically produced agricultural commodities,
—realizing balance-of-payments advantages, and
—assisting in achieving international policy goals.

Under the modifications now proposed, the barter program would be based entirely upon subsections 5(d) and (f) of the CCC Charter Act, which authorize the Corporation to dispose or aid in the disposition of surplus agricultural commodities, and to export, cause to be exported, or aid in the development of foreign markets for, agricultural commodities [see proposed rulemaking, *supra*, statement of authority]. Several major program changes would be effected. It is stated that in view of the depletion of CCC stocks, all future barter exports would be made from private stocks. Since the overall thrust of the proposed program changes is to increase flexibility, we have some reservations concerning the need and desirability of firmly excluding from barter any CCC stocks which may be available. On the other hand, we recognize that the proposed modifications represent perhaps the final transition of the program from the original context of simply disposing of surplus Government stocks to the more general objectives of promoting agricultural exports and effecting balance-of-payments advantages. Moreover, we believe that the statutory authority in support of this transition is clear. Accordingly, we cannot conclude that this change goes beyond the scope of administrative discretion.

Our attention is directed primarily to a series of changes which would constitute a new fundamental approach to the mechanics of the program. First, barter participation would be made possible in the case of export sales arranged prior to formal application for barter. This would be accomplished by applying to such transactions commodity and destination eligibility criteria in effect at the time of sale, rather than those in effect at the time of the subsequent export [proposed rulemaking, *supra*, § 1495.13(a)]. Secondly, exporters would be required to become barter contractors only by the time of export, thereby affording barter participation with respect to sales by exporters who were not under barter contracts at the time of sale [*id.*]. Thirdly, formal application for barter with respect to particular sales would not irrevocably bind the seller or CCC to apply the ensuing export to a barter contract [*id.*, § 1495.18]. Under the existing program, participation is limited to exports undertaken by exporters who are barter contractors at the time of sale, under eligibility criteria fixed by their particular contracts; and the contract imposes specific export obligations which must be met within the contract period. The proposed changes in the mechanics of the program are designed to afford exporters some assurance of barter eligibility at the time of sale, and thereby enable them to take immediate advantage of favorable market situations. These changes will also enable CCC to make prompt and frequent revisions in eligibility criteria in response to shifting world

market forces. It is anticipated that the general effect of these modifications will be to increase flexibility and to achieve wider and more active participation in the barter program, thereby increasing overall exports and expanding foreign markets. On the other hand, it is suggested that under the new approach it will be difficult to establish a causal relationship between a particular export sale and the barter program, and to demonstrate that particular sales would not have taken place without the program.

The general purposes reflected in this new approach are clearly consistent with the congressional mandate for an aggressive barter program, and with the thrust of the recommendations in our 1971 report that the program should be more flexible and responsive to world market conditions. Moreover, as noted previously, the Congress has recognized the difficulty of relating particular transactions to the overall objectives of increasing exports; and has, in effect, indicated that such difficulties should not unduly inhibit the program's operation. Accordingly, we believe that the administrative determination stated in your submission—that the new approach will generally result in increased exports and foreign markets—is sufficient to overcome the possibility of diminished control on a case-by-case basis. This is not, however, to minimize the importance of taking reasonable precautions to prevent interference with conventional exports and existing foreign markets. It is clear that the barter premium is, in effect, a subsidy, provided for the purpose of advancing the objectives discussed previously. To the extent that the premium is applied to transactions which would have taken place without it, no benefit is received. In other words, there is no doubt that the barter program is designed to promote additional exports and new and expanded markets, and not to underwrite conventional export transactions. It appears that the viability of the program changes will depend, in the long run, upon careful and frequent evaluation on the part of CCC of commodity and destination criteria, as well as review of individual barter transactions.

For the reasons stated above, we have no legal objection to implementation of the proposed changes in the barter program. However, it is apparent to us that the critical significance of evaluation under the revised program will, in addition to expanding agency evaluation responsibilities, enlarge the scope of information required by this Office in carrying out our audit activities. For this reason, and in view of difficulties which we have experienced in obtaining complete information in connection with our audits of other agricultural export programs, it is requested that the barter program be further revised to provide specifically in the regulations that "the Secretary of Agriculture and the Comptroller General or any of their duly authorized rep-

resentatives shall have access to and the right to examine all books, documents, papers, and records of barter contractors related to or bearing upon such contracts and transactions thereunder. All such books, documents, papers, and records shall be retained by barter contractors, and the rights of access and examination provided herein shall be effective, until the expiration of three years after final payment under any barter contract."

[B-177528]

Airports—Government Use of Municipal Airports—"Reasonable Share" of Costs Determination

Since it is impossible that a reasonable share of the extraordinary maintenance costs, proportionate to the Federal Government's disproportionate use of the taxiway and runway at the airport transferred to the Joint Board of the Texarkana Municipal Airport Authority can be determined under the indenture agreement executed between the General Services Administration and the Board or from the authorizing statute, 50 U.S.C. App. 1622, as no objective standard is provided to give concrete meaning to what is considered a "reasonable share," proportional to use, of the cost of operating and maintaining the facilities, the use and maintenance charges that are abnormally burdensome as a result of the Government's damaging use of the runway may be negotiated with the Board.

To the Secretary of the Army, January 18, 1973:

Reference is made to your letter dated November 24, 1972, with enclosures, requesting our opinion as to the proper construction and interpretation to be given to an indenture dated September 4, 1969, executed between the General Services Administration, acting on behalf of the United States, and the Joint Board of Texarkana Airport Authority (Joint Board), by which certain leased property at the Texarkana Municipal Airport, together with certain Government-owned improvements thereon, were transferred to the Joint Board.

Paragraph 6F of the indenture provides:

F. That the grantee will make available all facilities of the airport at which the property described herein is located or developed with Federal aid and all those usable for the landing and taking off of aircraft to the United States at all times, without charge, for use by aircraft of any Agency of the United States in common with other aircraft, except that if the use by aircraft of any Agency of the United States in common with other aircraft, is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged; and unless otherwise determined by the FAA, or otherwise agreed to by the grantee and the using Federal Agency, substantial use of an airport by United States aircraft will be considered to exist when operations of such aircraft are excess of those which, in the opinion of the FAA, would unduly interfere with use of the landing area by other authorized aircraft or during any calendar month that (1) either five [5] or more aircraft of any Agency of the United States are regularly based at the airport or on land adjacent thereto, or (2) the total number

of movements (counting each landing as a movement and each take-off as a movement) of aircraft of any Agency of the United States is 300 or more, or (3) the gross accumulative weight of aircraft of any Agency of the United States using the airport (the total movements of such Federal aircraft multiplied by gross certified weights thereof) is in excess of five million pounds.

It is reported that from 1970 until June of 1972, United States Air Force C–141 cargo planes, carrying Army material destined for or shipped from the Red River Army Depot, landed and took off from the Texarkana Municipal Airport. As a consequence of the great weight of these airplanes (257,500 pounds, as compared to an average weight of 58,300 pounds for commercial flights) portions of the taxiway and of the runway of the airport were seriously damaged. Also, since the gross accumulative weight of such landings had increased from approximately 7 million pounds in April 1971 to 13 million pounds in April 1972, the FAA determined on May 15, 1972, that "substantial use," as defined in paragraph 6F quoted above, was being made of the airport facilities by United States aircraft and that the parties should proceed to negotiate a reasonable use and maintenance charge.

Pursuant to paragraph 6B(1) of the indenture, which authorizes the Joint Board to prohibit any type or class of aeronautical use of the airport if such action is necessary for the safe operation of the facilities, the Joint Board has suspended further military flights into the airport until such time as the runway is again in a safe operative condition.

You indicate that in the interest of national defense your Department desires to again have full access to the airport for the carriage of cargo to the Red River Depot, and to accomplish this purpose you wish to negotiate a reasonable use and maintenance charge with the Joint Board. You advise of your intention to pay for a proportionate amount for the ordinary annual operating expenses of $295,786 (i.e., $55,608 or 18.8 percent computed on the ratio of the total gross landing weight of Army planes to the total gross landing weight of all planes). However, you seek our advice as to whether you may pay approximately $244,392 (74 percent) of the extraordinary maintenance costs of approximately $330,000, since it is your belief that substantially all of such abnormal maintenance burden has been engendered as a result of the Government's use of, and resulting damage to, the runway. Your request for our opinion is made for the stated reason that there is no objective standard provided, in either the indenture or the statute (50 U.S. Code App. 1622) under which the indenture was executed, for giving a concrete meaning to the phrase "reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used" in the indenture, or

to the phrase "reasonable share of the cost of maintaining and operating the landing area, commensurate with the use made by it," which appears in the statute.

We believe your question may properly be answered in the light of the intent of the parties in executing the indenture, and by giving the ordinary meaning to the language quoted above.

These considerations are significant, we think, in showing that the parties in the use of the word "maintaining" did not intend it in a narrow sense, but rather that it should be liberally construed so as to include any extraordinary maintenance caused by a disproportionate use of the facilities, such as was caused in this instance by the great weight of the Government's airplanes. In this connection, we note that "maintain" is defined as the upkeep or preserving of the condition of property to be operated. Black's Law Dictionary, 4th Ed.

In *Concordia—Arrow Flying Service Corporation* v. *City of Concordia*, 289 P. 955 (S. Ct. Kans. 1930), it was stated at page 957:

> To maintain an airport is to keep it in a state of efficiency for the furnishing of those facilities and the rendition of those services which air transportation and communication demand.

We believe it is apparent that considerable more wear and tear results to a runway from one landing of a C–141 cargo plane than results from five landings of planes weighing only one-fifth as much as a C–141. We are therefore in agreement with your position that a reasonable share of the extraordinary maintenance costs, proportionate to the Government's use of the airport, cannot properly be computed in the same manner as its share of the operating expenses. Accordingly, since it is your belief that substantially all of the damage to the runways is attributable to Government planes, and since we understand that it is impossible to establish the extent of such damage with any degree of exactitude, we will interprose no objection to the negotiation of use and maintenance charges with the Joint Board as outlined in your letter.

[B–175608]

Compensation—Overtime—Traveltime—Administratively Controllable

Where an employee's regularly scheduled duties involve assignments to which he commutes daily from his headquarters or residence, the travel to and from home to perform those regularly scheduled duties is not considered an imposition upon his private life significantly different from the travel required of the employee to report to a permanent duty station, and such travel is not regarded as overtime hours within the meaning of 5 U.S.C. 5542(b)(2).

Therefore, the travel to perform requests to the Department of Agriculture for grading and inspection services which is subject to control—scheduling—even though the event giving rise to the travel resulted from an event which was not controllable, is not payable as overtime compensation.

Compensation—Overtime—Traveltime—Between Headquarters and Work Assignment

When employees of the Department of Agriculture are required to report first to headquarters and from there to travel to their grading or inspection assignments, if the requirement is for purposes other than merely facilitating their use of Government transportation and is regarded as within their regularly scheduled tours of duty, including regularly scheduled overtime, or where the requirement is incident to the work of the employees, the time in travel from headquarters may be regarded as hours of work. Furthermore, if an employee actually performs work while traveling, regardless of whether he reports first to headquarters, the time involved may properly be considered hours of work.

Compensation—Overtime—Traveltime—"Official Duty Station" Concept

The term "official duty station" in Civil Service Commission Federal Manual Supplement 990–2, book 550, subchapter S1–3, which is stated to mean an "employee's designated post of duty, the limits of which will be the corporate limits of the city or town in which the employee is stationed," may only be redefined by the Commission and, therefore, the Department of Agriculture may not consider an "official duty station" in terms of a mileage radius in order to better effectuate the purpose of the overtime provision contained in 5 U.S.C. 5542(b)(2). However, the matter of authorizing mileage to an employee for the use of his automobile incident to official travel is discretionary with the employing agency.

Subsistence—Per Diem—Area of Entitlement—Mileage From Permanent Duty Station

Under the Standardized Government Travel Regulations which authorize the payment of per diem for travel of 24 hours or less (Section 6.6d), and provide for agency responsibility to prescribe individual rates (Section 6.3), the Department of Agriculture has the authority and responsibility to establish a radius of 25 miles from the permanent duty station of employees within which per diem is not payable to graders and inspectors of the Department who travel outside the metropolitan area of their duty stations to provide requested service, if the restriction on the payment of per diem is predicated upon a reasonable basis.

To Steve F. Heller, United States Department of Agriculture, January 22, 1973:

We refer to your letter of September 20, 1972, requesting our further consideration of Mr. Dick Gamble's claim for overtime compensation for time spent in a travel status which was the subject of our decision B–175608, June 19, 1972, addressed to you.

You state that in reliance upon our holding in 50 Comp. Gen. 519 (1971) (fourth case, page 525), the Consumer and Marketing Service (C&MS) has authorized payments of overtime compensation for

travel by graders and inspectors outside the metropolitan area of their duty stations to provide services as requested by applicants since such traveltime was not viewed as subject to agency control. In view of our decision in B–175608 which held that travel under what you consider to be similar circumstances was subject to agency control, you now ask whether payments made in reliance upon 50 Comp. Gen. 519 were in error.

You indicate that the circumstances of Mr. Albert W. Chumley's travel, 50 Comp. Gen. 519, and Mr. Gamble's travel, B–175608, are considered by C&MS to be identical in terms of the event that necessitated the travel. In this regard you state:

> * * * In both cases, the Agency was responding to requests of applicants for grading service. The fact that, where possible, Agency policy is to assign graders to service certain plants on a rotational basis does not seem to us to give the Agency control of the hours the graders' services will be required. We merely determine which grader will be sent to provide services at the times requested by the plants. If, in the course of assigning a grader designated to service a plant during a specified calendar period, we must order travel time that is both outside regular work hours and away from the official duty station, we have considered such travel as resulting from an event we could not schedule or control. We have been authorizing overtime payment for such travel since receipt of 50 Comptroller General 519. In fact, we have processed retroactive payments for such travel time performed by graders back to the effective date of the statute on overtime pay for travel which results from events which cannot be administratively scheduled or controlled (Public Law 90–206).

The Department of Agriculture's request for a decision in 50 Comp. Gen. 519 indicated that on two particular occasions Mr. Chumley was required to travel on Sunday to perform meat grading duties early Monday morning. We understood from that submission that Sunday was not included within Mr. Chumley's regular workweek and that the two inspectional assignments were not in the vicinity of his official station nor ones he was scheduled to perform on a regular basis. We stated in that decision as follows:

> * * * In order for inspection and grading to serve the purpose intended by the statute, the services must be provided when requested, and to the extent that on this account an employee's travel cannot be scheduled during his regular duty hours, his travel is compensable at overtime rates. We view the needs of applicants for inspections and grading services as events over which the agency has no administrative control * * *.

Your request for a decision in B–175608 explained that Mr. Gamble is assigned on a rotational basis for 90-day periods to provide grading services at various plant locations in and around Omaha and that the length of his and other graders' assignments, as well as their hours of work, are established by C&MS for reasons of sound management. We understand further that such plant assignments constitute Mr. Gamble's and other graders' regular duties and that they perform only occasional administrative functions at headquarters.

Although we do not regard the needs of the applicants in Mr. Gamble's case as any more subject to agency control than we do in Mr. Chumley's case, we do not consider, for the reason hereinafter stated, the circumstances of Mr. Gamble's travel to be within the scope of authority provided by 5 U.S. Code 5542(b)(2).

Public Law 90-206, approved December 16, 1967, in part, expanded the authority for payment of overtime by adding subsection (b)(2)(B)(iv). The Senate report on the legislation indicates that by that addition Congress intended, in part, to induce agency compliance with the provision of 5 U.S.C. 6101(b)(2) requiring the proper scheduling of travel and, in part, to provide overtime compensation for travel occasioned by emergencies or events beyond agency control in consideration for the imposition such travel makes upon employees' private lives. *See* page 31 of Senate Report No. 801 on H.R. 7797 wherein it is stated as follows:

> The committee has revised the provisions of the House bill in regard to traveltime and overtime pay. The Senate amendment revises present law so that an employee in the classified service, under wage board pay systems, or in the postal field service shall be paid for travel time outside of his regular work schedule if the travel involves the performance of work while traveling (such as an ambulance attendant taking a patient to a hospital); is incident to travel that involves the performance of work while traveling (such as a postal employee riding in a truck to a destination to pick up another truck and drive it back to his original duty station); is carried out under arduous conditions; or results from an event which could not be scheduled or controlled administratively.
>
> The committee believes that regulations to implement these provisions should take into account the provisions of section 16 of Public Law 89-301, which requires agencies to the maximum extent practicable to schedule travel within the regular work schedule. The committee is convinced that the heads of executive departments and agencies can do much more to prevent the abuse of an employee's own time.
>
> We are not satisfied with the progress agencies have made to comply with the 1965 act. An employee should not be required to travel on his offday in order to be at work at a temporary duty station early Monday morning to attend a meeting. It is an imposition upon his private life that should not be made. Nevertheless, pay for travel status should not be made so attractive that employees would seek to travel on their offdays in order to receive overtime pay. Proper scheduling and administration planning is the answer to the problems of travel pay in many cases. When emergencies occur or when events cannot be controlled realistically by those in authority, traveltime must be paid for.

Where an employee's regularly scheduled duties involve assignments to which he commutes daily from his headquarters or residence, we do not regard his travel from home and back to perform those regularly scheduled duties as an imposition upon his private life significantly different than the travel required of an employee in reporting to his permanent duty station. For this reason we do not regard Mr. Gamble's travel as overtime hours of work within the meaning of 5 U.S.C. 5542(b)(2). Moreover as indicated in our decision of June 19, 1972, such travel was subject to control (scheduling) even though the event giving rise thereto resulted from an event which was not controllable. 50 Comp. Gen. 674 (1971).

We understand that many graders such as Mr. Gamble are required to report first to headquarters and from there to travel to their grading assignments. Where that requirement is for purposes other than merely facilitating their use of Government transportation and is regarded as within their regularly scheduled tours of duty, including regularly scheduled overtime, or where it is incident to their work, the time in travel from his headquarters may be regarded as hours of work. 43 Comp. Gen. 293 (1963). Similarly, if the employee actually performs work while traveling, regardless of whether he reports first to headquarters, the time involved may properly be considered hours of work.

Your letter also requests reconsideration of the position expressed in our letter B–175608 in regard to travel beyond the corporate limits but within the metropolitan area of an employee's duty station as being within the purview of the overtime provisions here in question.

The regulation of the Civil Service Commission Federal Personnel Manual Supplement 990–2, book 550, subchapter S1–3, adopts the following definition of "official duty station" also prescribed in the Standardized Government Travel Regulations:

> By official duty station we mean the employee's designated post of duty, the limits of which will be the corporate limits of the city or town in which the employee is stationed, but if not stationed in an incorporated city or town, the official duty station is the reservation, station, or established area, or, for large reservations, the established subdivision thereof, having definite boundaries within which the designated post of duty is located. This use is the same use of this term as in the Standardized Government Travel Regulations.

You point out inconsistencies in the application of this definition to situations of graders assigned to permanent duty in small corporate areas whose temporary duty assignments outside the corporate limits involve shorter distances than they ordinarily travel from their homes to headquarters. These graders may be entitled to overtime compensation for their traveltime, while graders permanently assigned to posts of duty within large corporate areas may be required to travel 30 or more miles within those corporate limits and yet be ineligible for payment of overtime compensation for that greater distance of travel involved. This result, you contend, does not effectuate the purpose of section 5542(b)(2) of Title 5, U.S. Code, of compensating employees for the imposition that travel for the benefit of the Government makes upon their private lives. It is your opinion that a definition of "official duty station," perhaps in terms of a mileage radius, would permit the more realistic implementation of the law involved.

Under the presently prescribed regulation, it is not within an agency's discretion to redefine corporate limits as you have suggested, or otherwise to limit entitlement to overtime compensation to travel performed beyond a particular radial distance. Inasmuch as a definition such as you proposed is a matter for consideration by the Civil

Service Commission, we suggest that your recommendation be directed to that agency.

With regard to travel such as Mr. Gamble performs between his residence and the plant to which he is assigned, you ask whether your agency may properly deny payment of mileage when he reports for work outside the corporate limits but near his permanent duty station. As indicated in our decision of June 19, 1972, the matter of authorizing mileage to an employee for the use of his automobile in connection with official travel is discretionary with the agency in which he is employed. In view thereof, we see no reason why mileage may not be denied in Mr. Gamble's case or others similar thereto, provided such action is not in conflict with regulations of your agency.

Your final question concerns the payment of per diem to employees who are on temporary duty for periods in excess of 10 hours beyond the corporate limits, but within the general area, of their permanent duty stations. You state that the Department of Agriculture has prescribed a per diem rate of "lodging cost plus $10, not to exceed $25" which cannot be denied, reduced or adjusted by agencies within the Department. That regulation, 7 AR 550(c)(4), provides as follows:

Per diem for travel of less than 24 hours. Per diem for travel of less than 24 hours, when authorized under agency regulations, shall be computed in accordance with Section 6.6d of the Standardized Government Travel Regulations. However, when such travel does not require a night's lodging the per diem rate shall be $10.00.

Paragraph 6.6d of the Standardized Government Travel Regulations, referenced in the above regulation, provides as follows:

d. *Computation of basic entitlement.* (1) *Travel of 24 hours or less.* For continuous travel of 24 hours or less, the travel period will be regarded as commencing with the beginning of the travel and ending with its completion, and for each 6-hour portion of the period, or fraction of such portion, one-fourth of the per diem rate for a calendar day will be allowed: *Provided,* That no per diem will be allowed when the travel period is 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6:00 a.m. or terminates after 8:00 p.m. (The proviso does not apply in the case of travel incident to a change of official station).

Paragraph 6.6d, *supra*, is, in effect, a presumption that when an employee travels more than 10 hours he incurs at least some of those expenses for which per diem is authorized and that one quarter of the daily per diem rate for each 6 hours involved is a fair rate of reimbursement for those expenses.

Also, paragraph 6.3 of the Standardized Government Travel Regulations provides as follows:

6.3 *Agency responsibility for prescribing individual rates.* a. *General.* It is the responsibility of each department and agency to authorize only such per diem allowances as are justified by the circumstances affecting the travel. Care should be exercised to prevent fixing per diem rates in excess of those required to meet the necessary authorized subsistance expenses. To this end, consideration should be given to factors which will reduce the expenses of the employees such as:

known arrangements at temporary duty locations where lodging and meals may be obtained without cost or at prices advantageous to the traveler; established cost experience in the localities where lodging and meals will be required; situations where special rates for accommodations have been made available for a particular meeting or conference; the extent to which the traveler is familiar with establishments providing lodging and meals at a lower cost in certain localities, particularly where repeated travel is involved; and, the use of methods of travel where sleeping accommodations will be provided as part of the transportation expenses. The specific rules contained in b–e below will be applied in the situations covered.

Regarding your specific inquiry as to whether it is within the administrative discretion of your agency to establish a radius of 25 miles from the permanent duty station within which per diem is not payable, we have recognized that agencies generally have the authority and the responsibility to restrict payment of per diem upon a reasonable basis. We have no information, however, as to whether the regulations of the Department of Agriculture preclude agencies within the Department from imposing limitations such as you propose.

Your questions are answered accordingly.

[B–177015]

Subsistence—Per Diem—Military Personnel—Departure From Permanent Station—Delayed

An officer of the uniformed services who used his privately owned automobile to reach his airport departure point under orders authorizing travel to attend a conference, but who is prevented from departing due to adverse weather conditions and he returned home after an absence of 4 hours, may not be paid per diem since paragraph M4205–4a of the Joint Travel Regulations prohibits the payment of a per diem allowance for a round trip performed entirely within a 10-hour period of the same calendar day. However, based on the rationale in B–166490, April 23, 1969, relating to a civilian employee, the officer for the use of his automobile is entitled to the travel allowance prescribed by paragraph M4401–2, item 2, of the regulations, which authorizes mileage for one round trip from home to airport, plus parking fees, not to exceed the cost of two taxicab fares between those points.

To R. T. Babbin, Department of the Navy, January 22, 1973:

Further reference is made to your letter dated March 30, 1972, received in this Office September 11, 1972, in which you request an advance decision as to the propriety of payment of the travel claim of Commander Lane A. Kispert, USN, 470 32 3827. Your request has been assigned PDTATAC Control No. 72–43 by the Per Diem, Travel and Transportation Allowance Committee.

It appears that Commander Kispert was directed to attend a conference in Washington, D.C. Incident to this travel, he was authorized to use a privately owned vehicle for transportation from Brunswick to Portland, Maine, and from there continue his travel from Portland

to Washington, D.C., via commercial air carrier and return in the same manner.

It appears that Commander Kispert departed NAS Brunswick at 1000 hours and arrived at Portland at 1130 hours on March 5, 1972. On arriving at Portland he learned that the flight to Washington on which he was to travel had been canceled because of adverse weather conditions. He then departed Portland at 1230 for Brunswick arriving there at 1400 hours.

Commander Kispert performed the ordered travel on the next day and he was paid per diem and round trip mileage from Brunswick to Portland.

In view of the fact that on March 5, 1972, the officer did not complete the travel directed in his orders you question the propriety of the payment of per diem in view of paragraph M4204–3b(1) of the Joint Travel Regulations (change 223, August 1, 1971), and payment of mileage for the travel performed on that day.

Section 404 of Title 37, U.S. Code, provides that under regulations prescribed by the Secretaries concerned, members of the uniformed services shall be entitled to receive travel and transportation allowances for travel performed under competent orders upon a change of permanent station, or otherwise, or when away from their designated post of duty.

Paragraph M4205–4a of the Joint Travel Regulations (change 228, February 1, 1972) promulgated pursuant to the above-cited section provides that a per diem allowance is not authorized for a round trip performed entirely within a 10-hour period of the same calendar day.

Thus, although Commander Kispert was unable to fulfill his temporary duty assignment due to weather conditions causing the cancellation of his flight, the fact remains that the period of time away from his permanent duty station was only 4 hours. Hence, payment of per diem in such circumstances is specifically prohibited under the provision of paragraph M4205–4a of the Joint Travel Regulations. In view of the above, the provision of paragraph M4204–3b(1) need not be considered. *See* 51 Comp. Gen. 12 (1971).

Under the provisions of paragraph M4401–2, item 2 of the Joint Travel Regulations, a member who actually drives his own automobile to an airport, parks it and actually drives it from the airport to his home incident to temporary duty travel is entitled to mileage for one round trip from home to airport plus the parking fee, not to exceed the cost of two taxicab fares between those points.

While on March 5, 1972, Commander Kispert did not accomplish all the travel incident to his temporary duty, it is our view that he is entitled to travel allowance under the provisions of paragraph

M4401–2, item 2, since use of his privately owned vehicle was authorized and the temporary duty was not accomplished at that time through no fault of his own, but due rather to the weather. The rationale of decision B–166490, April 23, 1969, which permitted mileage payment to a Government employee in similar circumstances, is for equal application to a military member.

Accordingly, the travel claim of Commander Kispert and the supporting papers are returned herewith, payment being authorized in accordance with the above.

[B–177035]

Quarters Allowance—Dependents—Children—Payments That Do Not Constitute Support

An officer of the uniformed services who gave his wife at the time of their divorce a promissory note for $1,500 that is being reduced by his mother in the amount of $30 per month paid to the father of his former spouse is not entitled, in the absence of a definitive court decree requiring child support payments for the son born of the marriage, to a basic allowance for quarters for the child who is in the custody of his mother since the payments are not support payments and there is no showing any part of the monthly payments are used to support the child. If the requirements for payment of a quarters allowance cannot be shown for the periods the officer received the allowance, the payments are subject to collection unless there is for application Public Law 92–453, authorizing waiver of certain claims of the United States against members in prescribed circumstances.

To Lieutenant Colonel J. M. Magaldi, Jr., United States Marine Corps, January 23, 1973:

Further reference is made to your letter dated August 4, 1972, which was forwarded here by Headquarters United States Marine Corps letter dated September 14, 1972, and supplemented by letter of October 17, 1972, requesting a decision regarding the propriety of payment of a basic allowance for quarters (BAQ) to Captain Robert Carl Delones, 417 58 6682, USMC, on account of his legitimate child residing with his former wife, in the circumstances described. Your request has been assigned Control No. DO–MC–1164 by the Department of Defense Military Pay and Allowance Committee.

It appears from the record (as disclosed in Captain Delones' statement enclosed with your letter) that in January 1966 the member was divorced from Edwina Smith Delones, the mother of his son, Robert Shawn Delones. The divorce decree of the Circuit Court, Lauderdale County, State of Alabama, dated January 17, 1966, gave custody of their minor child to the mother, and stipulated as follows:

> The second party [Robert Carl Delones] agrees to pay all medical expenses in connection with the care of the mother in the birth of the child and in addition thereto to pay to the mother a sum of Fifteen Hundred Dollars ($1500.00) in cash, which shall be secured by borrowing the same from a local bank.
>
> It is expressly understood by the parties hereto that both of the parties to this agreement are students enrolled in Florence State College, and the payment of the aforesaid lump sum constitutes a full and complete satisfaction of all financial responsibiity of the second party to the first party and their minor child, and the first party hereby releases the second party from all claims of support, dower, and alimony for herself and her minor child.

Captain Delones states that it was agreed between himself and his former spouse that the $1,500 would be paid in the form of a promissory note dated January 14, 1966, payable on demand.

Thereafter, in October 1968, the member remarried Edwina Smith Delones. This marriage terminated in divorce on July 1, 1969. The divorce decree (issued by the same court and the same judge as the prior divorce), dated July 1, 1969, gave custody of the minor child to the mother, and stipulated as follows:

> It is further adjudged and decreed that the matter of child support is specifically reserved by the Court for future decree, but alimony is denied.

With the foregoing as background, the member avers that at the time of the second divorce (July 1969), it was agreed, presumably verbally, that the divorce settlement would consist of payment of the former 1966 promissory note, payable on desired terms of spouse, and that the former spouse could request and receive any further child support that she deemed necessary. The member states that his former spouse requested that he begin payments of $30 per month, starting August 1969, towards payment of the 1966 promissory note.

While the record is not clear on this point, the member further states that these payments have been made in the form of personal checks from his mother, Vivian I. Delones, to Clarence E. Smith, the grandfather of Robert S. Delones, and that Clarence E. Smith places said payments into a savings account for Robert to be utilized for child support, when required. Clarence E. Smith and the former spouse have the option to withdraw funds as desired for support. The member states that he reimburses his mother by monthly allotment checks in the amount of $325, in order to make the $30 monthly payments and whatever other support his former spouse may request.

Captain Delones contends that he is entitled to payment of BAQ by virtue of his legitimate child and states that it is his intention to continue the $30 per month payments for an indefinite period of time beyond the termination date of the promissory note.

You request our decision on whether or not the $30 payments being provided by Captain Delones since the first divorce in 1966, and continued with the second divorce in 1969, are considered support payments so as to entitle the member to receive payment of BAQ on behalf of his legitimate child since August 4, 1967, the date of his original entry into the Marine Corps. In this connection, you have terminated the member's BAQ, effective May 31, 1971, but have not taken any action to recover previous credits of BAQ pending decision by our Office.

In transmitting the matter here, the Head, Disbursing Branch, Fiscal Division, U.S. Marine Corps, asks whether payment of pay and allowances may continue without deduction of BAQ previously paid on the child's behalf for the periods August 4, 1967, through October 25, 1968, and July 11, 1969, through May 31, 1971. Basic allowance for quarters was paid on behalf of a wife from October 26 through November 21, 1968, but no BAQ was paid for the period November 22, 1968, through July 10, 1968, as Government quarters were assigned.

Under the pertinent provisions of 37 U.S. Code 403, a member of the uniformed services who is entitled to basic pay is entitled to an increased basic allowance for quarters for his dependents when not assigned to appropriate Government quarters. Substantially similar provisions have been contained in the military pay and allowance laws since 1922, their basic purpose being to at least partially reimburse the members concerned for the expense of providing private quarters for their dependents, where Government quarters are not available, and not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. 42 Comp. Gen. 642, 644 (1963).

While, under the normal relationship of husband and father, proof of dependency is not generally required to establish a right to the higher basic quarters allowance on account of a member's wife or child, that general rule, however, is not free from exceptions and has not been viewed as applicable in certain cases. With respect to the foregoing, paragraph 30236, Department of Defense Military Pay and Allowances Entitlements Manual provides, in pertinent part, as follows:

a. Member Absolved From Support Responsibility by Divorce Decree or Court Order. BAQ is not payable when a member has been absolved by divorce decree or court order from the responsibility of supporting his child or children, and he does not contribute to their support.

* * * * * * *

c. Divorce Decree or Court Order Silent on Support. A divorce decree or court order giving custody of a member's minor children to the mother, without stating that the member is required to support them, does not of itself deprive the member of BAQ for the children. This is true regardless of the jurisdiction in which the decree was issued or in which the children are domiciled, if it is shown that the member contributes to their support.

The divorce decree of July 1, 1969, did not specifically absolve Captain Delones from support responsibility of his child within the contemplation of paragraph 30236a, above. However, in stating that "the matter of child support is specifically reserved by the Court for future decree," the divorce decree falls within the purview of paragraph 30236c, in being silent on the matter of support. This, of itself, would not operate to deprive Captain Delones of BAQ on account of his child. However, from the facts as submitted, and from the statements of Captain Delones, it appears that the $30 monthly payments being made through his mother to the grandfather of his child, are directed towards payment of a $1,500 promissory note to his former spouse. Moreover, nothing in the record submitted here shows that any part of the $30 monthly payments is actually being utilized for the support of his child. In fact, the member's dependency certificate indicates that his former spouse (having custody of his son) has remarried, and her address is unknown to him.

In the circumstances, while Captain Delones may be setting aside payment of $30 per month in a fund for his child, it does not appear from the present record that any part of this sum is being utilized for the support of his child. In view of Captain Delones' own statement that the payments are being made toward payment of the 1966 promissory note, such payments cannot be viewed as support payments for his child. *See*, generally, 23 Comp. Gen. 71 (1943); 38 *id* 89 (1958); 42 *id.* 642 (1963); and *Robey* v. *United States*, 71 Ct. Cl. 561 (1931).

In the absence of a definitive court decree requiring child support payments, and in the absence of a definite showing of the disposition of the $30 monthly payments and whether they are being utilized for the support of his child, the matter admits of too much doubt to authorize crediting the member with increased quarters allowance on account of a dependent child. Also, if the foregoing elements cannot be shown to apply to prior periods, action should be taken to collect payments of increased BAQ paid the member for the periods August 4, 1967, through October 25, 1968, and July 11, 1969, through May 31, 1971.

In this connection, however, there may be for consideration the provisions of the act of October 2, 1972, Public Law 92-453, 10 U.S.C.

2774, authorizing the waiver of certain claims of the United States against members in prescribed circumstances.

Your question is answered accordingly.

[B-176483]

Contracts—Specifications—Restrictive—Particular Make—"Or Equal" Product Not Solicited

The award of a contract for the procurement of a named brand electric siren that was negotiated under 10 U.S.C. 2304(a)(10), which authorizes an exception to formal advertising when it is impossible to draft adequate specifications, to the manufacturer of the brand siren rather than to the low offeror who had not been requested to submit a sample for testing was improper where the record does not indicate an immediate award was essential or that there was insufficient time to qualify an alternate product, and where the use of the 10 U.S.C. 2304(a)(10) authority was based on the fact it was difficult and not impossible to draft adequate specifications, and the request for proposals did not advise offerors of the characteristics on which the sirens would be tested and evaluated in qualifying alternate products. Future solicitations should contain all the information necessary to permit the offer of an equal item.

To the Director, Defense Supply Agency, January 26, 1973:

We refer to reports dated August 18 and November 14, 1972, concerning the protest of Smith & Wesson Electronics Company under request for proposals (RFP) DSA 400-72-R-6927, issued by the Defense General Supply Center on April 6, 1972, for a requirement of electronic sirens, Federal Sign and Signal Corporation part number, P15A W/SA-24. Although the RFP did not solicit sirens on an "or equal" basis, it did not specifically exclude alternate products from consideration or indicate that award could not be delayed for testing and approval of other manufacturers' sirens.

The subject procurement was negotiated under the authority of 10 U.S. Code 2304(a)(10). Armed Services Procurement Regulation (ASPR) 3-210.2 (xiii), which implements that statutory authority, provides that purchases and contracts may be negotiated "when it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the required supplies or services." In this regard, the record shows that on March 17, 1972, the contracting officer determined that it was impracticable to obtain competition for the sirens by formal advertising, as follows:

Findings

The Defense General Supply Center proposes to procure by negotiation 250 each, FSN 6350-907-8629 Siren, Electronic, Federal Sign and Signal Corp P/N P15A W/SA-24 as authorized by PR S-43283-2067-OH. The estimated cost of the proposed procurement is $32,250.00.

The Air Force has stated that the only acceptable item is Federal Sign and Signal Corp's P/N P15A W/SA–24.

Use of formal advertising for procurement of the above described equipment is impracticable because it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the equipment.

Determination

The proposed contract is for property or services for which it is impracticable to obtain competition by formal advertising.

Four proposals for the requirement were received by the Center on April 26, 1972, the closing date for the procurement. Smith & Wesson submitted the lowest unit price for the requirement at $98.25 and offered to supply its Stephenson-Magnum Part No. 1–004–0061–01, for which descriptive literature was included with the offer. The second-lowest offeror, Federal Sign and Signal Corporation, offered to supply the part shown in the solicitation at $108.00 each.

On May 2, 1972, the contracting officer requested the Center's Directorate of Technical Operations to evaluate Smith & Wesson's proposal. On May 8, 1972, the Director of Technical Operations returned the contracting officer's request without an evaluation. The Director told the contracting officer that the procurement item description was an "F" coded, sole source procurement; that the military using activity, the San Antonio Air Materiel Area (SAAMA), Department of the Air Force, had previously advised DSA that samples of any item offered for the specified part would not be evaluated without testing by SAAMA; that SAAMA had previously advised Smith & Wesson (formerly Stephenson Company) of this testing requirement and, notwithstanding such advice, the company had never furnished SAAMA with a sample for testing. In view thereof, and inasmuch as Smith & Wesson did not submit a test sample with its proposal, the contracting officer states that he made an award for the requirement to Federal Sign on June 23, 1972. We are further advised that the contractor completed shipment of the items on September 8, 1972.

The record does not indicate that immediate award was essential or that there was insufficient time to secure and test a Smith and Wesson sample before awarding the contract to the higher offeror. The testing procedures at SAAMA for the sirens seem uncomplicated and are reported as follows:

Mr. Ruiz stated there were no specific tests that had to be passed; that when a siren was received it would be completely disassembled and the various components inspected for burrs, sharp edges, workmanship, wiring, ability to withstand weathering, hard knocks, vibration and corrosion, etc. The unit was then reassembled and powered to observe its functioning. If things appeared satisfactory, Mr. Ruiz would obtain permission from a security police chief to install the siren on one of his vehicles for a period of two to three weeks. Mr. Ruiz would be kept

informed as to the performance of the item and if satisfactory, he would then notify the manufacturer that its item was qualified.

Smith & Wesson maintains that neither SAAMA nor DSA requested it to submit a sample of its product for testing; that a specification should have been prepared for the requirement; and that the award to Federal Sign should therefore be canceled.

The contracting officer states that the Center repeatedly attempted to have SAAMA develop a purchase description to permit competitive procurement of the siren, as follows:

On 15 July 1970 this Center's Director of Technical Operations (Director) requested SAAMA to develop a purchase description adequate for competitive procurement of the siren * * *. By reply dated 25 August 1971 SAAMA advised that the requested purchase description would be forwarded in December 1971 * * *. In connection with the instant RFP, the Director on 4 May 1972 made telephonic inquiry to SAAMA relative to the status of the purchase description or specification that SAAMA was to have prepared. In the discussion which followed SAAMA advised that none had been prepared * * *. According to SAAMA no specification was contemplated for the siren since SAAMA had been instructed in a letter from the Department of Defense not to prepare specifications for "off the shelf" items * * *. It is understood that SAAMA proposes future procurements on the basis of manufacturers' part numbers with additional part numbers being added when SAAMA's testing is favorably completed.

In this regard, we are also advised that SAAMA has furnished the following reply, dated September 29, 1972, concerning its current position on the desirability of developing a purchase description for the subject item:

"Purchase description" will not be developed because of the difficulty of covering each and every requirement (tolerances) of each and every source (e.g., db output, current output, tone-sound generation circuits, installation bracket, and compatibility with 2-way communication set).

While it is stated that the subject requirement was an "F" coded (sole source) item, it is noted that at the time of issuance of the RFP another siren, manufactured by R. E. Dietz Company, appears to have been qualified by SAAMA. Also, it is apparent that the using activity would consider other products for award if samples of such other products had passed the qualification testing at the activity. The RFP did not, however, advise offerors of the characteristics on which the sirens would be tested and evaluated in qualifying alternate products.

Although it is stated that Smith & Wesson was informally advised of the testing procedures prior to the closing date for the RFP, we do not believe such informal advice constituted an adequate substitute for including in the RFP the requirement for samples on alternate products and listing the characteristics of the sirens on which the testing and evaluation would be conducted. In this regard, ASPR

3-501(a) provides that solicitations of proposals shall contain the information necessary to enable a prospective offeror to prepare a proposal properly, and we fail to see how other prospective offerors, including Smith & Wesson, could have intelligently prepared a proposal without precise, written information as to the standards which have to be met for qualifying their products. In furtherance of this general requirement, ASPR 3-501(b), paragraph C(x) provides for including in a solicitation any requirements for samples or descriptive literature, and ASPR 3-501(b), paragraph F(i) contemplates that the solicitation will contain a description of the needed item in sufficient detail to permit full and free competition.

Concerning Smith & Wesson's allegation that a specification should have been prepared for the procurement, we do not believe that the record adequately refutes such contention. SAAMA's position, as stated above, is not that SAAMA cannot develop a purchase description for the item, but that it would be difficult to do so. As noted previously, ASPR 3-210.2(xiii), which was cited by the contracting officer as authority for negotiating the requirement, contemplates *impossibility* of drafting adequate specifications or any other adequately detailed description of the item as a basis for negotiation, not mere difficulty or inconvenience. We do not believe it can be seriously contended that purchase descriptions and/or specifications have not been developed for more complex items than the siren, and entailing much more difficulty than that which can be reasonably contemplated by SAAMA in preparing a purchase description or specification for the siren. We are not persuaded by the material of record that it would have been impracticable to develop a purchase description, as set out under ASPR 1-1206, for the subject procurement or for additional procurements of the item.

In this connection, it would appear that where the acceptability of an item can be decided under test procedures of the type applied by SAAMA to the instant item, such test procedures, and/or the acceptable test results, could be converted without undue effort into the salient characteristics contemplated for an "or equal" purchase description by ASPR 1-1206.2(b). Also, since it is noted that there were seven previous procurements of the sirens in 1970 and 1971, it appears that consideration should be given to whether there will be continuing procurements of the item so as to require the preparation of Federal and Military specifications for the siren.

In view of the above conclusions, it is our opinion that the subject award to Federal Sign was improperly made. While the completion

of the subject contract precludes, for practical considerations, its cancellation as sought by Smith & Wesson, we recommend that action be taken to insure that future solicitations for this item contain all information necessary to permit any bidder to offer an equal item.

In this connection, we believe it appropriate to call to your attention the announced intention of the Center to issue a solicitation for 170 additional sirens under the authority of ASPR 3-210.2(xiii). Under the present circumstances, we are not persuaded that the development of a purchase description which would permit competition for the items would be either impossible or impracticable. Additionally, we question whether the qualification procedure followed by SAAMA on these items is not inconsistent with, and prohibited by, the provisions of Part 11, paragraph 1, of the ASPR.

In view thereof, we recommend that the question of developing a purchase description for these units be reexamined, and that we be advised of the results thereof.

The files forwarded with the reports of August 18 and November 14 are returned.

[B-176848]

Claims—Assignment—"Financing Institutions" Requirement—Tax Exempt Bonds Method of Financing

The rents to be received by the lessor constructing a Social Security Building to be leased to the General Services Administration, with an option to purchase and assign to the builder the land owned by the Housing Authority of Birmingham, the issuer of bonds to finance the building, may be assigned under the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15, to the Birmingham National Bank as agent or trustee of all parties, including bondholders, participating in the financing. The bank qualifies as a "financial institution" both as a bondholder and in its capacity as trustee for the individual bondholders that may not qualify as assignees since the group as a lender of money to make the construction of the building possible may be considered a financing institution. Also, the conveyance of the land by the lessor to the Housing Authority is not an assignment that is prohibited by the act because the conveyance will be subject to the lease.

To Purcell & Nelson, January 26, 1973:

This is in reply to your letter dated December 6, 1972, relative to the proposed financing of the construction of a Social Security Administration Building in Birmingham, Alabama, to be leased to the General Services Administration (GSA) under Lease No. GS-04B-14592 (Neg.), dated September 11, 1972.

Your letter is written on behalf of the Public Building Authority of Birmingham, the purchasers and holders of the bonds it proposes to issue, and the Birmingham Trust National Bank, as trustee for such holders. You request an opinion by this Office as to whether a proposed assignment of rents complies with, and a conveyance of the land is prohibited by the Assignment of Claims Act of 1940, as amended, 31 U.S. Code 203, 41 U.S.C. 15. We understand that you urgently require a decision by this Office in order to facilitate the issuance of certain bonds proposed to finance the project.

The pertinent facts recited in your letter of December 6, 1972, are as follows:

* * * On September 11, 1972 the General Services Administration ("GSA") entered into a Lease Agreement with Franklin L. Haney of Chattanooga, Tennessee ("the Lessor"), whereby the Lessor agreed to construct the building in the Civic Center of Birmingham on land owned by the Housing Authority of Birmingham which gave GSA its option to purchase the land, assignable to the successful bidder, for the price of $1,300,000. The GSA Lease specifies that the building is to contain a total of 450,000 net usable square feet of office and related space in accordance with plans and specifications to be approved by GSA and that GSA has the option at any time within the first ten years of the initial term of the Lease to acquire up to a total of 150,000 additional net usable square feet of contiguous space. The Lease requires the Lessor to provide all maintenance services to the building other than such services prescribed in the Lease to be performed by GSA. The Lease provides for an initial 20-year term beginning on August 1, 1974 and may be renewed at the option of GSA for two additional terms of ten years each, subject to certain termination rights reserved to GSA. The building is to be occupied by the U.S. Social Security Administration as its "Birmingham Payment Center."

The Authority proposes to finance the construction of the building by issuing for sale to the public its 20-year tax-exempt Social Security Administration Building Revenue Bonds, Series A (1973), in the aggregate principal amount of $17,900,000 under a Trust Indenture with the Birmingham Trust National Bank, a national banking association, as Trustee for all parties (including bondholders) participating in the financing of the cost of the land, the building and the facilities referred to in the Lease. The Authority will also issue and sell to the City of Birmingham for $1,300,000 its junior and subordinate Series B Bonds (1973), also subject to the Trust Indenture, in the aggregate principal amount of $9,500,000.

Solicitations for Offers AT-2-180 were issued by GSA on March 15, 1972 under Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, for the leasing of the above described land and building. In order to induce bidders to submit bids to GSA pursuant to this solicitation and on the basis of a building to be constructed on a site within the corporate limits of the City of Birmingham, Alabama, the Authority on June 1, 1972 offered to enter into an agreement with any *bona fide* bidder for the issuance of tax-exempt bonds and for the construction of the required building out of the proceeds of such bonds. A number of bidders, including the Lessor, submitted bids based on tax-exempt bond financing. The Lessor's bid, simply a square-foot annual rental, could not have been made without tax-exempt bond financing because the rentals stated in his bid will not provide sufficient revenues for debt service on a conventional loan in the required amount.

* * * * * * *

When the bonds are issued, sold and delivered by the Authority, the following will have taken place or then will be consummated: (1) GSA will reassign its option to purchase the land to the Lessor who shall exercise the option and the Housing Authority shall convey the land to the Lessor; (2) the deed of conveyance and the Lease will be duly recorded in Jefferson County, Alabama; (3) at the Authority's request and with the consent of the authorized contracting officer, the Lessor will assign the rents due and to become due to the Lessor under the Lease to the Birmingham Trust National Bank as Trustee for all parties participating in financing; (4) the Lessor will convey the land subject to the Lease to the Authority; and (5) the Authority will pledge the land and the building with the Trustee to secure the bonds.

A separate Trust Indenture will require that the Trustee apply the rents received by it for the benefit of the following: with respect to the initial 20-year term of the Lease (1) payment of principal and interest to the Series A bondholders, including the Trustee who will be a bond purchaser, (2) payment of the annual maintenance charges to the Lessor, the Lessor having deposited $250,000 with the Trustee as security for his performance of such maintenance, (3) payment of $15,000 interest annually to the Series B bondholder or bondholders, and (4) payment of the remainder of such rents to the Lessor; after the intial term of the Lease, and during one or both optional renewal lease periods, (1) payment of maintenance charges, (2) payment of principal and interest to the Series B bondholder or bondholders, the bonds to be fully paid by December 1, 2000, and (3) payment of the remainder of such rents to the City.

A Government contractor is precluded from unilaterally transferring its Government contract to another party wishing to obtain such contract (41 U.S.C. 15), and an assignment of accounts receivable from the United States can be lawfully accomplished only through compliance with the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15. The latter statute provides, in pertinent part, as follows:

§ 15. Transfers of contracts; assignments of claims; set-off against assignee.

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided, * * *. 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; * * *.

The GSA Lease provides, in its General Provisions, as follows:

8. Assignment of Claims.

Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this lease provides for payments aggregating $1,000 or more, claims for monies due or to become due the Lessor from the Government under this contract may be assigned to a bank, trust company,

or other financing institution, including any Federal lending agency, and may thereafter be further assigned or reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.

You have requested advice as to whether the Birmingham Trust National Bank may be regarded as a "financing institution" within the meaning of the act or, in the alternative, as trustee for two or more parties participating in the financing. You point out that the Bank will be a bondholder and in addition will act as trustee for the other bondholders.

So far as concerns the Bank as a bondholder, it clearly qualifies as an assignee under the act. In terms of its capacity as trustee for the other bondholders we must look to the parties the trustee represents because an assignment to a party or parties not eligible under the act cannot be validated by the simple expedient of having ineligible assignees designate a bank as a trustee for collection. We do not know who the individual bondholders will be. However, it is probably fair to say that many, as individuals, would not qualify as financing institutions under the act. Nevertheless, we have held that a trust corpus, together with the trustees, individual, corporate or otherwise, having as a function the investing of the assets of the trust, may be regarded as a financing institution under the act. 50 Comp. Gen. 613 (1971). Similarly, we believe that the totality of the bondholders, albeit unincorporated, have as a group the function of lending money, specifically in this case in order to make it possible for the contractor to perform a Government contract, and therefore may be considered a financing institution under the act. The assignment may of course be made to the Bank as agent or trustee of all of the parties participating in the financing. Accordingly, it is our opinion that a valid assignment of contract payments may be made to the Bank, acting in such a capacity.

You also request our opinion as to whether the conveyance of the land by the Lessor to the Authority, subject to the lease, should be regarded as the transfer of a contract, which is prohibited by the act.

It has been recognized that the purposes of the law relative to the assignment of contracts with the United States are (1) to secure to the Government the personal attention and services of the contractor, (2)

to render the party performing the contract liable to punishment for fraud or neglect of duty, (3) to prevent parties from acquiring a mere speculative interest in a Government contract, and (4) to prevent speculators from selling such contracts at a profit to *bona fide* bidders and contractors. See *Thompson* v. *Commissioner of Internal Revenue*, 205 F. 2d 73 (1953); Shnitzer, *Assignment of Claims Arising Out of Government Contracts*, 16 Fed. B. J. 376.

Transfers which do not contravene any of the purposes for the prohibition have been regarded as valid, and the Supreme Court has held that the prohibition does not embrace a simple lease of real estate, under which the Lessor has nothing to do except collect the rent. See *Freedman's Savings and Trust Co.* v. *Shepherd*, 127 U.S. 494 (1888).

In the present case, it does not appear that Mr. Haney, as Lessor, will transfer his right to receive rent to the Authority. Further, we have noted the document which you submitted here by letter dated January 10, 1973, wherein counsel for the Lessor proposes to include express language, in the deed from the Lessor to the Authority, to the effect that the conveyance is subject to the existing lease to GSA, and that Mr. Haney is not thereby released from his obligations under the lease to GSA. Under the circumstances, it is our opinion that the conveyance to the Authority cannot be regarded as the transfer of a contract such as would violate the provisions of 41 U.S.C. 15.

We trust the foregoing will serve the purpose of your inquiry.

The documents furnished in connection with our review of this matter are returned as requested.

[B-177008]

Contracts—Negotiation—Competition—Discussion With All Offerors—Failure to Discuss

The failure to call in offerors in the competitive range for detailed discussions of specific deficiencies in their proposals, and the requirement that engineers have a Bachelor of Science Degree resulted in the award of a contract to other than the low offeror at a substantial increase in price to the Government, which indicates that the manner and extent of the discussions of proposals with offerors in the competitive range were not conducive to obtaining maximum competition. One of the primary purposes of conducting negotiations with offerors is to raise to an acceptable status those proposals which are capable of being made acceptable, and thereby increase competition, and it is incumbent upon Government negotiators to be as specific as practical considerations will permit in advising offerors of the corrections required in their proposals. Furthermore, the Bachelor of Science Degree requirement should be reconsidered before it is included in future procurements.

To the Secretary of the Navy, January 31, 1973:

Reference is made to a letter dated October 27, 1972, reference SUP 02E, from Captain G. G. Dunn, Deputy Commander, Procurement Management, Naval Supply Systems Command, furnishing us a report in connection with a protest by Global Marine Engineering Company (Global) against the award of a contract under request for proposal N00123-72-R-2869, issued by the U.S. Naval Regional Procurement Office, Los Angeles, California.

Enclosed is a copy of our decision of today to Global. Although we have denied the protest we do not believe the record demonstrates that the manner and extent of the discussions of proposals with those offerors in the competitive range were conducive to obtaining maximum competition in the final offers.

In its comments on the contracting officer's statement of October 13, 1972, Global states:

> Further, in the referenced paragraph [paragraph 3] the phrase "... as discussed during negotiations . . ." is used. It is respectfully pointed out that the negotiations conducted with GMEC during the proposal evaluation phase consisted of long distance telephone calls from Miss E. Levenson (Code 0S5), NRPOLA, in which the undersigned was given advanced briefings on the context and requirements of forthcoming correspondence requesting additional information. GMEC was not given the opportunity to negotiate in conference on any of the points considered by the proposal evaluators to be questionable or unresponsive. In previous government contract pre-award phases with NRPOLA, NRPO, Oakland, and others, Global Marine was invited to participate in conventional negotiations. We believe that had negotiations been available under this RFP, the proposal evaluation might have produced other results.

The administrative report furnished this Office does not contain memoranda of the telephone conversations between Global and the procuring activity; however, there is no indication that the protester and other offerors were advised of the specific deficiencies in their proposals, such as the inadequacy of a National Certificate for the engineers.

We note that three of the five final proposals were evaluated as unacceptable for lack of personnel qualifications. In this connection, the contracting officer reports:

> In the final evaluation of revised proposals, other proposers were determined to have proposed personnel who lacked the required background for Electronics Engineer, Electronics Engineer Technician, Senior Electrical and Electronics Draftsmen and Electrical and Electronics Draftsmen, the Mechanical, Electrical and Electronics Engineer, the Senior Electronics Engineer, the Senior Mechanical Technician and Draftsman, the Senior Electrical Draftsman, the Electronics Draftsman and were disqualified for failure to meet the experience requirements.

Since one of the primary purposes of conducting negotiations with offerors is to raise to an acceptable status those proposals which are capable of being made acceptable, and thereby increase competition for the procurement, we believe it is incumbent upon Government negotiators to be as specific as practical considerations will permit in advising offerors of the corrections required in their proposals. In view of the substantial difference between the evaluated amounts of Global's offer and the award price ($388,073 v. $635,600), we do not find the record persuasive that savings could not have been effected in the procurement had those offerors in the competitive range been called in for detailed discussions of the defects in their proposals.

Regarding the administrative position that a British National Certificate is not adequate for engineers to be employed in the work, the protester states:

> Contrary to the statements of Paragraph 4, GMEC's protest letter does not state that the National Certificate is the equivalent of a Bachelors Degree in Engineering. It does state (and we do maintain) that the National Certificate is the "technical equivalent" of the Bachelors Degree. It must be pointed out that marine engineers educated in Great Britain and possessing degrees no higher than the National Certificate hold fully responsible engineering positions throughout the U.S. shipbuilding industry. For example, in the Machinery Group performing engineering design at National Steel and Shipbuilding Company in San Diego there were eight active supervisory and assistant supervisory positions during the new construction design phase of the U.S. Navy LST1182 class vessels. Of these, three were filled by engineers, including Mr. Brodie, who held degrees no higher than the British National Certificate. The LST1182 class ship designs were under the technical cognizance of SUPSHIP11ND and subject to the same military design specifications and standards as are the conversion and repair designs under the contract discussed here.
>
> We submit Attachment 1 to demonstrate that Mr. Brodie's engineering education is technically equivalent, for all practical purposes, to that required for the BSME degree awarded by the California State University (CSU) at San Diego. CSU at San Diego is widely recognized for its training in practical, or applied, engineering, whereas the University of California at San Diego (UCSD) emphasizes the sciences rather than applied engineering. UCSD's undergraduate curriculum leads to the Bachelor of Arts degree in Engineering Sciences; the BSME degree is not available at UCSD. We do not understand why (or how) acceptance for admittance into a graduate school, particularly one that does not offer the Bachelor of Science degree in Mechanical Engineering, can be construed to be a meaningful criterion for the capability to prepare engineering designs for repairs and alterations to U.S. Navy ships.

In view of such statement it appears that a review of the requirement for a Bachelor of Science Degree may be warranted before that requirement is included as a minimum educational factor for engineers in any future procurements of this nature.

The file transmitted with Captain Dunn's letter of October 27 is returned.