Decisions of The Comptroller General of the United States

VOLUME 52 Pages 1 to 56

JULY 1972

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300103600

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 COUNSEL

F. Henry Barclay, Jr.

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-161261]

Quarters Allowance—Dependents—Husband's Dependency—Status for Entitlement to Quarters

In view of section 703 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–2), which prohibits job discrimination based on sex, 32 Comp. Gen. 364 and other similar decisions holding that a female member of the uniformed services, in order to receive an increased allowance for quarters on account of a dependent husband under 37 U.S.C. 403, must not only meet the test prescribed by 37 U.S.C. 401 that her husband is dependent upon her for over one-half his support but that he also must be incapable of self-support due to a physical or mental incapacity, will no longer be for application prospectively as to incapacity. However, the 1964 act does not overcome the different dependency standards prescribed by statute for male and female members and, therefore, until remedial legislation is enacted, 37 U.S.C. 401 controls, and a female member must continue to establish that her spouse is dependent upon her for half of his support to entitle her to an increased quarters allowance.

To the Secretary of Defense, July 3, 1972:

There have come to our attention certain inequities which appear to have resulted from our holding in 32 Comp. Gen. 364 (1953) concerning the dependency requirement applicable to female members of the uniformed services claiming a basic allowance for quarters on account of a dependent husband.

In 32 Comp. Gen. 364, it was held that a female officer of the uniformed services who voluntarily assumes the support of her husband in order to permit him to attend college, although he is physically and mentally capable of self-support, does not have a husband who is "in fact dependent" upon her for over half of his support within the meaning and intent of the applicable statutory provisions.

Section 403 of Title 37, U.S. Code, provides for payment of basic allowance for quarters to members of the uniformed services, the rate being greater for a member with dependents. For the purpose of qualification for this allowance, the term "dependent" is defined in 37 U.S.C. 401 as including the spouse of such member subject to the further condition that "a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support."

In order for a husband to be regarded as "in fact dependent * * * for over one-half of his support" on his wife who is a member of a uniformed service, this Office has consistently held that the husband must be incapable of self-support due to a physical or mental incapacity or for other reason, and that the evidence submitted must support both dependency and incapacity. *See* 45 Comp. Gen. 163 (1965); 32 Comp. Gen. 364 (1953). Basically, our decision in 32 Comp. Gen. 364 (1953) was predicated on what has been the traditional concept that a wife is dependent on her husband except in those few

cases where he is unable to work when it is recognized that in such special circumstances he may, in fact, be dependent on her.

Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. 2000e–2, prohibits job discrimination based on sex in all aspects of employment, except that employment on the basis of sex is not prohibited if it is a *bona fide* occupational qualification reasonably necessary to the normal operation of a particular business or enterprise. In enacting the ban on discrimination based on sex the Congress intended to bring to an end prescribed discriminatory practices against female employees based on stereotyped characterizations of the sexes. Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. *See* the concurring opinion of Mr. Justice Marshall in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1971). *See also* the final proviso in section 701(b) of the 1964 act, 42 U.S.C. 2000e(b).

We have reexamined our decision in 32 Comp Gen. 364 and other similar decisions in the light of present day developments in the law. We have concluded that the dependency concepts applicable to the traditional family and fundamental to our prior decisions are no longer for application under present standards. We now believe that under the law as presently constituted a female member of the Armed Forces should be credited, if otherwise proper, with increased allowances on account of a dependent husband upon a showing that he is in fact dependent on her for over one-half of his support, notwithstanding he is physically and mentally capable of self-support.

Effect must be given, however, to the different dependency standards prescribed by statute that are applicable in determining the quarters allowances to which members of the uniformed services are entitled. Under those provisions the wife of a male member is regarded as his dependent without meeting any test of dependency while a female member is entitled to increased quarters allowance on account of a husband only if she establishes that her husband is in fact dependent on her for over one-half of his support. The Civil Rights Act of 1964 does not alter this statutory distinction pertaining to military personnel.

And, it is well settled that where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. *Rosencrans* v. *United States*, 165 U.S. 257 (1897).

Moreover, it has been recognized that remedial legislation will be required to grant female members the same rights as male members.

H.R. 4954, H.R. 2580 and H.R. 2335, 92d Congress, 1st Session, would, among other things, amend section 401 of Title 37, U.S. Code, to authorize quarters allowance on account of a husband of a female member on the same basis as it is authorized on account of the wife of a male member. *See also* H.R. 8758 and H.R. 8759, introduced on May 26, 1971. No action has been taken on these bills. Unless and until legislation similar to the bills cited above is enacted into law we are of the opinion that there is no authority in the law to authorize to a female member increased quarters allowance on account of a dependent husband unless it is established that he is dependent upon her for over one-half of his support.

The question of the right of a female member of the uniformed services to a basic allowance for quarters on account of a dependent husband was considered by the United States District Court for the Middle District of Alabama in the case of *Sharron A. Frontiero and Joseph Frontiero* v. *Melvin R. Laird* as Secretary of Defense, *et al.*, Civil Action No. 3232–N, which was decided on April 5, 1972. The court found from the facts of record that the husband was not dependent on the female officer for more than one-half of his support. The husband's living expenses total approximately $354 a month and he receives $205 a month in veterans' benefits. The court went on to uphold the constitutionality of 37 U.S.C. 401. We understand the plaintiffs have appealed the decision to the United States Supreme Court.

A decision changing a prior construction of a statute generally is prospective only. 27 Comp. Gen. 686, 688 (1948); 36 Comp. Gen. 84 (1956). Therefore, effective this date, we hold that a female member of the uniformed services may be considered as having a dependent husband within the meaning of 37 U.S.C. 401 where there is sufficient evidence to establish his dependence on her for more than one-half of his support without regard to the husband's mental or physical capability to support himself.

Accordingly, the decision in 32 Comp. Gen. 364 (1953) and other similar decisions will no longer be for application except as to periods prior to the date of this decision.

[B–175116]

Military Personnel—Retired—Contracting With Government—Prohibition Period—Active Duty After Retirement Effect

A navy officer transferred pursuant to 10 U.S.C. 6380 to the retired list effective July 1, 1967, but retained on active duty and released July 1, 1969, at which time he was employed by a subsidiary of a boat building company and involved in all aspects of Government procurement, is subject to the prohibition in 37 U.S.C. 801(c) against the payment of retired pay to an officer whose activities

for 3 years subsequent to the placement of his name on the retired list constitute "selling" to the Government. However, since the commencement of the 3-year limitation began to run from the date the officer's name was placed on the retired list and not from the date he was released from active duty, the retired pay forfeiture period terminated June 30, 1970, and as the officer was not involved in any serious procurement discussion prior to July 1, 1970, he is entitled to retired pay for the 3-year period subsequent to July 1, 1967.

To C. R. Davies, Department of the Navy, July 3, 1972:

Further reference is made to your letter of January 11, 1972 (file reference XO:MTP:mlj 7220/274 864), with enclosures, requesting an advance decision whether the described activities of Lieutenant Commander Fred M. Cloonan, U.S. Navy, retired, as an employee of the Northern Line Machine and Engineering Company, constitute "selling" within the meaning of 37 U.S. Code 801(c), so as to prohibit payment of retired pay and, if so, the commencement date of the 3-year restriction period. Your request has been assigned Submission No. DO–N–1143 by the Department of Defense Military Pay and Allowance Committee.

You say that Commander Cloonan was transferred to the retired list effective July 1, 1967, pursuant to the provisions of 10 U.S.C. 6380. Coincident with his retirement, you say that the officer was retained on active duty for 2 years and subsequently released therefrom on July 1, 1969, when payments of retired pay were instituted.

You refer to an opinion of The Acting Judge Advocate General of the Navy dated November 18, 1971, holding, in substance, that Commander Cloonan's activities constitute "selling," etc., within the meaning of 37 U.S.C. 801(c), and that as a result of that opinion you say that the officer's retired pay was suspended beginning December 1, 1971. In the event we agree with the Navy opinion, you ask for a ruling as to whether the 3-year retired pay forfeiture period begins to run from July 1, 1967, the date of transfer to the retired list, or July 2, 1969, the date following his release from active duty. You also ask whether the forfeiture period is limited to the period he was actually engaged in "selling" activities or whether it includes the entire period covered by the contract resulting from such activities, subject, of course, to the 3-year limitation.

Subsequent to the receipt of your submission, a legal brief was filed here on March 21, 1972, by the firm of Hill, Christopher and Phillips, Washington, D.C., on behalf of Commander Cloonan. The brief takes issue with the above-mentioned opinion of The Navy Judge Advocate General and there were enclosed several documents pertaining to the officer's retired status and a description of his activities during his employment following his release from active duty.

By letter dated January 26, 1967, the Chief of Naval Personnel advised Commander Cloonan that he was scheduled for "transfer to the Retired List of the Navy effective 1 July 1967," pursuant to 10 U.S.C.

6380, and that orders would be issued effecting his retirement on that date. The letter further advised him, however, that in view of service needs at that time he had been recommended and approved for retention on active duty in a "retired status" for a period of 2 years. He was to notify the Chief of Naval Personnel whether or not he desired and voluntarily agreed to retention on active duty in a retired status until June 30, 1969. The record contains a copy of a Certificate of Retirement from the Armed Forces of the United States of America certifying that the officer was "retired" from the United States Navy on July 1, 1967.

It is reported in the legal brief that Commander Cloonan began his employment as General Manager with Northern Line Machine and Engineering Company, a subsidiary of Tacoma Boat Building Company, Inc., on July 3, 1969. It is also reported that in August of 1969, at the request of Mr. Arthur McClinton, Head Systems Engineering Staff, Naval Research Laboratory, Washington, D.C., representatives of the Naval Research Laboratory toured the Northern Line facilities. While Commander Cloonan accompanied other representatives of the Northern Line on the tour of the facilities, it is stated that the officer was not present during discussion concerning the possibility of Northern Line submitting an unsolicited technical proposal for winch machinery on the USNS *Hayes* (T-AGOR-16). We find nothing in the record to indicate that the August 1969 visit at the contractor's facility resulted in any serious procurement discussion between the contractor's representatives and the retired officer.

The record contains a statement of Mr. Arthur T. McClinton, Naval Research Laboratory, dated March 18, 1971, concerning his visit to the contractor's facilities on December 30, 1970. At that time, he and another representative of the Naval Research Laboratory were shown around the plant by Mr. Cloonan. After recalling his prior visit to the old Northern Line plant, Mr. McClinton states that "Mr. Cloonan, through his representations, was definitely attempting to persuade us to purchase Northern Line's products." He further states that "all subsequent contacts with the company were through Mr. Cloonan who did his best to sell us on Northern Line's gear."

The file also contains a statement dated March 18, 1971, from Lieutenant Donald W. Konz, the contract negotiator on the procurement in question, which reads as follows:

> I, Donald W. Konz, LT SC USN, acting as the NRL Contract Negotiator for Solicitation N00173-71-B-0007, affirm that I held telephone conversations with Fred M. Cloonan, representing Northern Lines Machine & Engineering Company, concerning the procurement during the time between September 1970 and February 1971. These conversations, initiated both by myself and Mr. Cloonan, numbered at least five, and we have discussed all aspects of the procurement. At all times during these discussions, it was my understanding that Mr. Cloonan was the designated company representative for all matters of the procurement.

A statement of facts furnished by Lieutenant J. R. Stafford as contracting officer on this procurement, states on pages 3 and 4, in pertinent part as follows:

> While considering Western Gear's protest to the Contracting Officer made in its letter of February 19, 1971, the Contracting Officer found that Mr. Cloonan had also signed a letter transmitting the technical proposal of Tacoma Boatbuilding in response to Step I (enclosure (5)). He had also signed other correspondence and negotiated with the Government's buyer and technical personnel on contractual matters (enclosures (6), (7), (8), (9), (10), and (11)).

Section 801(c) of Title 37, U.S. Code (formerly 5 U.S.C. 59c) provides as follows:

> Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

For the purpose of the above-cited provisions of law, the term "selling" is defined in paragraph I.C.2 of Inclosure 3–C, Department of Defense Directive 5500.7, dated August 8, 1967, to mean:

> a. Signing a bid, proposal, or contract;
> b. Negotiating a contract;
> c. Contacting an officer or employee or any of the foregoing departments or agencies for the purpose of:
> (1) Obtaining or negotiating contracts,
> (2) Negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or
> (3) Settling disputes concerning performance of a contract, or
> d. Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person.

We have held that the employment of retired officers in nonsales, executive or administrative positions, including contacts by a retired officer in his capacity as a noncontracting technical consultant with a noncontracting technical specialist which involves no sales activities, is outside the purview of the statute and the DOD Directive. *See* 41 Comp. Gen. 784 (1962); 41 Comp. Gen. 799 (1962); 42 Comp. Gen. 87 (1962); and 42 Comp. Gen. 236 (1962). However, where a retired officer actually participates in some phase of the procurement process, as substantiated by the record, it has been held that such activities bring him within the purview of the definition of selling as defined in the DOD Directive. *See*, for example, 42 Comp. Gen. 32 (1962); 42 Comp. Gen. 236, 241 (1962); and 43 Comp. Gen. 408 (1963).

It would seem from the above-quoted statements of Navy personnel who had direct contact with Commander Cloonan that the officer's contacts were not solely limited to technical matters but rather included "all aspects of the procurement." On the record before us, we reason-

ably may not conclude that his activities did not come within the purview of the statute and the DOD Directive. The question arises, however, whether the 3-year retired pay forfeiture period actually had run before the retired officer's activities involving any procurement began.

In determining the commencement date of the restriction period in section 801(c) of Title 37, The Navy Judge Advocate General in opinion of November 18, 1971, involving Commander Cloonan's case, takes the view that the period begins to run from the date of release from active duty following the placement of his name on the retired list and not from the date his name was placed on the retired list. In arriving at that conclusion, the opinion states, in pertinent part, as follows:

> * * * Subsection 801(c), read literally, would appear to be inapplicable to any selling activity undertaken by him after 1 July 1970—three years after subject officer's name was placed on the retired list, but only one year after he terminated his active-duty service. Such a result is clearly contrary to the spirit of subsection 801(c) and may be legally erroneous in light of the intent of Congress in first enacting section 801(c) in 1962. At that time, it was the intent of Congress not to substantively change existing law (see Public Law 87-649, sec. 12(a)(76 Stat. 497)(1962)). Existing law—the source of section 801(c)—provided that the period during which a Regular officer on the retired list would be subject to pay forfeiture for selling activities would begin running from the date of "retirement," not from the date on which his name was placed on the retired list. It is possible that "retirement," as used in the source law, was intended to mean "actual retirement," *i.e.*, actual termination of active service.

Section 801(c) of Title 37 was derived from section 1309 of the Department of Defense Appropriation Act, 1954, 67 Stat. 437, which was reflected in section 59(c) of Title 5, U.S. Code. Section 59(c) as amended by the act of October 9, 1962, Public Law 87-777, 76 Stat. 777, which increased from 2 to 3 years the period prescribed therein, provided that "No payment shall be made * * * to any officer on the retired list of the * * * Regular Navy * * * for a period of 3 years after retirement * * *."

In response to a question "Does the phrase 'for a period of two years after retirement' in the Act of August 7, 1953 [5 U.S.C. 59c] limit the period of prohibition to the two years commencing on the effective date of retirement," we said that question was answered in the affirmative. *See* question 3 in 38 Comp. Gen. 470, 474 (1959). In this connection, while the term "retirement" is not defined in either 5 U.S.C. 59c or 37 U.S.C. 323 (1958 ed.), it is our view that it relates to the formal act of initial retirement under statutes providing for the placement of a member's "name" on the retired list and does not relate to release from active duty after service on active duty after retirement. *Cf. Gordon* v. *United States*, 134 Ct. Cl. 840 (1956).

Title 37 of the U.S. Code was revised and codified by the act of September 7, 1962, Public Law 87-649, 76 Stat. 451. In explaining

the change in language of section 801(c) the codifiers said—"The words 'his name is placed on that list' are substituted for the word 'retirement' to conform to the words 'on any retired list,' since an officer may be on a retired list under chapter 67 of Title 10 without being formally retired." *See* page A26 of House of Representatives Report No. 1399, dated March 6, 1962, to accompany H.R. 10431 which became Public Law 87-649.

In the light of the above, it is our view that the 3-year prohibition against payment of retired pay in section 801(c) of Title 37 begins to run from the date the officer's name "is placed on that [retired] list." Had Congress intended that the commencement date begin to run from a date other than the date the officer's name is placed on the retired list, we believe other language would have been used.

Commander Cloonan's name was placed on the retired list effective July 1, 1967, pursuant to law (10 U.S.C. 6380), and under the provisions of 37 U.S.C. 801(c) the 3-year retired pay forfeiture provision in his case terminated on June 30, 1970. Since it does not appear from the record that prior to July 1, 1970, the retired officer and the procuring agency had any serious discussions relating to procurement, it is our view that the retired officer's activities during the 3-year period subsequent to the date his name was placed on the retired list may not be considered to be within the purview of the law and the DOD Directive so as to preclude entitlement to retired pay for the period in question.

Accordingly, payment of retired pay to the officer which was suspended beginning December 1, 1971, may now be resumed. Since payment is authorized, no answer is required to your other questions.

[B-175791]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Agency Activity Relocation Pending

An employee of the Geological Survey who on the basis of an announcement to all employees in the Washington Metropolitan area, dated July 1, 1971, of the award of a building construction contract on June 28, 1971, incident to the impending move early in 1974 of the agency to Reston, Virginia, relocated her residence from Hyattsville, Maryland, to Herndon, Virginia, pursuant to which she and her husband had entered into an agreement on December 28, 1971, for the purchase of the residence and made settlement February 18, 1972, is not entitled to relocation expense reimbursement, although the July 1, 1971, announcement established notice of the agency's move, as there is no authority for the payment of real estate expenses until a transfer from one official station to another is consummated or canceled in view of the fact an employee may separate from the service prior to transfer.

To F. G. Usher, United States Department of the Interior, July 3, 1972:

This refers to your letter of April 20, 1972, with enclosures, requesting an advance decision whether a voucher in the amount of $2,790.90 in favor of Mrs. Mary L. Ratliff, an employee of the Geological Survey, representing reimbursement of real estate expenses, may be certified for payment.

You say that the Geological Survey has a headquarters building under construction in Reston, Virginia, which is expected to be ready for occupancy early in 1974. The announcement of the impending move was made by memorandum dated July 1, 1971, from the Acting Director, to all employees in the metropolitan area. It was this official notice that prompted Mrs. Ratliff to relocate her residence from Hyattsville, Maryland, to Herndon, Virginia. The record shows that Mrs. Ratliff and her husband entered into an agreement on December 28, 1971, for the purchase of a residence in Herndon, Virginia, and settlement was made February 18, 1972. Mrs. Ratliff has signed the appropriate service agreement.

All employees in the Washington area have been notified of the intended move to Reston, although travel authorizations for the transfer of duty station have not and will not be issued until shortly before the actual move. With regard to Mrs. Ratliff's voucher, you ask the following questions:

Question 1: Does the Acting Director's memorandum constitute "official notice" on the basis of which Survey may reimburse employees for appropriate expenses connected with the move of headquarters to Reston?

* * * * * * *

Question 2: May I certify the voucher for payment at this time? If not, what would be the earliest date that I could certify it for payment?

Reimbursement of expenses incurred in anticipation of a transfer has been authorized when it was shown that the travel order subsequently issued to the employee included authorization for the expenses on the basis of a previously existing administrative intention, clearly evident at the time the expenses were incurred by the employee to transfer the employee's headquarters. *See* 48 Comp. Gen. 397 (1968), and decisions cited therein.

In regard to Question 1 the memorandum of July 1, 1971, advising the employees that a building contract had been entered into on June 28, 1971, and indicating that the Geological Survey installations would move to Reston upon completion thereof early in 1974 is acceptable as establishing notice within the decision cited above.

Concerning Question 2 there is no authority under the law or regulations for payment of real estate expenses such as here claimed unless and until transfer from one official station to another is consummated

or canceled. This is so because an employee may be separated from the service prior thereto.

The voucher is returned herewith.

[B-168921]

Leaves of Absence—Court—Witness—Private Litigation

Employees summoned to appear as private individuals and not in their official capacities in a suit by a fellow employee for overtime compensation are not entitled to the court leave authorized by 5 U.S.C. 6322(b), as amended by Public Law 91–563, approved December 19, 1970, for the period of absence in which they appeared as witnesses on behalf of the private party and without official assignment to such duty. The matter of granting court leave to a Government employee to testify on behalf of a private party was rejected in the consideration of Public Law 91–563, and both the Federal Personnel Manual (FPM), chapter 630, subchapter 10–3–d, and FPM Letter 630–21, dated March 30, 1971, provide that a witness appearing for a private party in a nonofficial capacity is not entitled to court leave.

To the Commander, Philadelphia Naval Shipyard, Department of the Navy, July 5, 1972:

Reference is made to your letter dated January 13, 1972, with enclosures, reference CODE 630 (TAM), requesting an advance decision as to whether the requests of Messrs. B. Ciseck and B. Turci, employees of the Philadelphia Naval Shipyard, to charge their absences on November 9, 1971, to court leave in lieu of annual leave would be proper under the circumstances hereinafter related.

The record indicates that on November 9, 1971, the employees here involved were summoned to appear before the Commissioner, United States Court of Claims, upon the application of the plaintiff in the case of *Gerace* v. *United States*, Ct. Cl. No. 18–70, decided April 24, 1972.

The record further indicates that the testimony rendered by Messrs. Ciseck and Turci was in the behalf of plaintiff Gerace. We also note that it is the position of the Director of Civilian Manpower Management, Department of the Navy, that such testimony was not given by the employees in their official capacity; rather, the testimony related to the employees' observations with respect to the availability of overtime work during the period of plaintiff's claim.

Section 6322(b) of Title 5, United States Code, as amended by Public Law 91–563, approved December 19, 1970, 84 Stat. 1476, provides as follows:

(b) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia is performing official duty during the period with respect to which he is summoned, or assigned by his agency, to—

(1) to testify or produce official records on behalf of the United States or the District of Columbia; or

(2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia.
(c) The Civil Service Commission may prescribe regulations for the administration of this section.

Under the cited statute an employee is entitled to court leave when he is subpoenaed or summoned in connection with a judicial proceeding as a witness on behalf of a State or local government, but not on behalf of a private party. An employee is also considered to be performing official duty when he is summoned or assigned by his agency to produce official records on behalf of a party other than the United States or the District of Columbia. Apparently, the matter of granting court leave to a Government employee to testify on behalf of a private party was considered and rejected in the consideration of Public Law 91–563. See the hearing on a similar bill, H.R. 10247, before a subcommittee of the House Committee on Post Office and Civil Service dated June 11, 1969.

We note that the Federal Personnel Manual (FPM), chapter 630, subchapter 10–3d, issued by the Civil Service Commission, states in pertinent part that—

* * * If the witness service in a nonofficial capacity is on behalf of a private party, the employee's absence must be charged to annual leave or leave without pay, and he may accept fees and expenses incidental thereto.

See also FPM Letter 630–21, dated March 30, 1971, wherein it is stated—

* * * Also, *court leave for witness service* (as distinguished from official duty while testifying in official capacity or producing official records) *is not available when the service is strictly on behalf of a private party;* it must be on behalf of a government.

Since the record indicates that the testimony in behalf of plaintiff Gerace was not rendered by Messrs. Ciseck and Turci in their official capacity, it is our view that the charge to annual leave of their absences on November 9, 1971, was proper.

[B–174527]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Expenses Claimed Included in Selling Price

The claim of an employee for the closing costs paid by the seller and included in the sales price of the residence he purchased in connection with a transfer of official station which had been denied on the grounds the requirements of subsections 4.1f and 4.3a of Office of Management and Budget Circular No. A–56, that provide the expenses claimed must have been paid by the employee and supported by documentation to this effect, had not been met, now may be allowed on the basis that the closing costs added to the purchase price are clearly discernible and separable from the price allocable to the realty; that the seller who initially paid the costs regards that the purchaser did, although the down and closing payments from the purchaser's own funds exceeded the closing costs; and that documentation of the costs and the purchaser's liability for them have been furnished. Contrary holdings are overruled.

To James L. Humphrey, United States General Accounting Office, July 5, 1972:

This will refer to the claim of Mr. Herbert R. Martinson for reimbursement of closing costs in the amount of $1,205.50 paid incident to his purchase of a residence in connection with a transfer of official station.

The claim was previously denied on grounds it did not meet the requirements of subsections 4.1f and 4.3a of Office of Management and Budget (OMB) Circular No. A-56 which provide as follows:

> 4.1 Conditions and requirements under which allowances are payable. * * *
>
> * * * * * * *
>
> f. The expenses for which reimbursement is claimed were paid by the employee. * * *
>
> * * * * * * *
>
> 4.3 Procedural and control requirements.
>
> a. Application for reimbursement and documentation of expenses. * * * Each amount claimed must be supported by documentation showing that the expense was in fact incurred and paid by the employee. * * *

The rationale for denial in this and other similar cases was that the closing costs incident to purchase of a residence could not be regarded as having been paid by the purchaser even though included in the sales price; also, that we would not look behind the price of the realty. As to similar cases *see* B-165841, January 22, 1969; B-165841, December 7, 1970; B-171440, March 3, 1971; B-172339, July 20, 1971; B-173870, August 30, 1971; B-169752, June 2, 1970; and B-172369, May 27, 1971.

In support of his claim Mr. Martinson provided the following information concerning the circumstances under which his residence was financed:

> I reported for duty in Washington on July 26, 1971. On January 9, 1971, I entered into a contract for the purchase of a new home from Levitt and Sons, Incorporated. The sale was closed on July 2, 1971. The sales price of the residence was $41,255.
>
> On January 9, 1971, I paid Levitt and Sons, Incorporated $2,000 (a deposit) and on July 2, 1971, I paid Levitt and Sons, Incorporated $39,255 including $6,255 from personal resources and $33,000 I borrowed from Interstate Builders Association, a company not affiliated with Levitt and Sons, Incorporated.

In explanation of the manner in which the closing costs on the purchase were disbursed, Mr. Martinson supplied a letter from the Vice President of Universal Funding Corporation, a subsidiary of Levitt and Sons, the seller of the property, listing " * * * the fees and charges INCLUDED in the Sales Price of the home you recently purchased from Levitt & Sons, Inc. * * * ." The letter closed with the statement that:

> Each of the fees and/or charges was paid by Levitt & Sons, Inc. on your behalf and are not items that were mortgaged or paid for over a long period of time. Full credit in the amount of $1,205.50 is given to the purchaser.

The closing costs which were added to the purchase price are clearly discernible and separable from the price allocable to the realty. Although the seller may have actually performed the act of initially paying the costs, the down payment and the amount paid at closing by the purchaser from his own funds exceeded the amount of those costs and the seller regards them as having been, in effect, paid by the purchaser. Also, the purchaser has supplied documentation of the amount of the costs and of his liability for them. In the light of the facts in this case, we believe the conditions of subsections 4.1f and 4.3a of OMB Circular No. A–56, *supra*, may be considered as having been met.

Accordingly, our decisions cited above and others in which the fact situations are similar are hereby overruled and this decision will govern in future analogous cases.

The claim is returned herewith for allowance, if otherwise correct.

[B–175526]

Buy American Act—Applicability—Contractors' Purchases From Foreign Sources—End Product *v.* Components

Under an invitation for bids to supply softballs that contained a "U.S. Products Certificate" clause that required bidders to certify only U.S. End Products and Services would be furnished thus implementing the Balance of Payments program, sending the American produced softball core, together with covers, needles and thread to Haiti to have the covers sewn on the softball core would constitute manufacturing outside the U.S. and precludes consideration of the bid since the phrase "U.S. End Product" stems from the Buy American Act and requires the end product to be supplied to be manufactured in the U.S. Furthermore, the fact that the services to be performed in Haiti would constitute less than 3 percent of cost does not make applicable the provision in the U.S. Products and Service clause that 25 percent or less of the services performed outside the U.S. will be considered U.S. services since the contract contemplated is for a product, not services.

To the Jamar Corporation, July 5, 1972:

Further reference is made to your letter of March 21, 1972, protesting against the rejection of your bid under invitation for bids (IFB) 2PN–IR–E–DO582, issued by the General Services Administration.

The above-referenced invitation was issued on December 13, 1971, for the supply of 1667-dozen softballs. Paragraph 14 of the IFB advised bidders:

To alleviate the impact of government expenditures on the U.S. Balance of International Payments, only United States End Products and Services may be delivered under this contract. Accordingly, the representation on Page 2 of this solicitation entitled "BUY AMERICAN CERTIFICATE" and the clause in the General Provisions entitled "BUY AMERICAN ACT" are inapplicable to this contract, and the following certificate and clause are substituted therefor:

U.S. PRODUCTS CERTIFICATE

To the extent that the government specifies that the items being purchased are in implementation of the Balance of Payments Program, the bidder or offeror hereby certifies that each such item is a U.S. END PRODUCT or comprises U.S.

SERVICES (as defined in the contract clause entitled "U.S. PRODUCTS AND SERVICES (BALANCE OF PAYMENTS PROGRAM)"), and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

U.S. PRODUCTS AND SERVICES
(BALANCE OF PAYMENTS PROGRAM)

(a) To the extent that the government specifies that the items being purchased are in implementation of the Balance of Payments Program, the contractor agrees that there will be delivered or performed under this contract only U.S. END PRODUCTS or U.S. SERVICES.

(b) FOR THE PURPOSE OF THIS CLAUSE:

(1) "COMPONENTS" means those articles, materials and supplies which are directly incorporated in the End Products;

(2) "END PRODUCTS" means those articles, materials and supplies which are acquired under this contract for public use;

(3) "U.S. END PRODUCT" means:

* * * * * * *

(ii) *An end product manufactured in the United States,* if the cost of the components thereof which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components.

(4) "U.S. SERVICES" means those that are performed within the United States. In some instances, services provided under a single contract are performed partially in the United States and partially abroad. Such services shall be considered U.S. Services if 25 percent or less of the total cost of the services is attributable to services (including incidental supplies used in connection therewith) performed outside the United States. [Italic supplied.]

Your firm submitted the lowest of the 11 bids received. However, in response to an inquiry by the contracting officer subsequent to bid opening, you advised that your production plan included stitching the balls in Haiti. It appears that all raw materials used in your softballs are domestic, and are cut, assembled, wound and vulcanized in your Illinois plant. The cores and covers of the balls are shipped to Haiti, where the covers are sewn on the cores by Haitians using American-made needles and thread. In the judgment of the procuring activity, this production plan would not result in a "U.S. End Product" as defined in paragraph (b)(3)(ii) of the above-quoted U.S. Products and Services (Balance of Payments Program) clause, and your bid was rejected as nonresponsive. The second low bidder failed to furnish the guaranteed maximum cubic footage of its offered material, as required by the invitation, and its bid was also rejected as nonresponsive. Award was made to the Lannom Manufacturing Company as the low responsive responsible bidder.

Since the definition of a "U.S. End Product" as set out in the above clause requires the end product (softballs) to be manufactured in the United States, the question presented by the instant case is whether hand-sewing the covers around the cores in Haiti constitutes a "manufacture" of the softballs outside the United States, thereby precluding them from qualifying as U.S. End Products.

The definitions used in the U.S. Products and Services (Balance of Payments Program) clause stem from the Buy American Act (41 U.S.

Code 10a–d) as implemented by Executive orders and Government procurement regulations. The legislative history of the act's use of the word "manufacture" was reviewed in 46 Comp. Gen. 813, 818–19 (1967). We concluded in that decision that "manufactured in the United States," as used in the act and the contract provision implementing that act, included the assembly in the United States of articles from foreign-manufactured components. Thus, the mounting and alignment, in the United States, of foreign-made electric motors onto domestically manufactured circulating pump units constituted a "manufacture" of the complete pump units (end product), in the United States, within the contemplation of the Buy American Act and the implementing contract provision.

Similarly, in the instant case, we believe the sewing of the cover component around the core component of the softballs in Haiti constituted a "manufacture" of the softballs (end product) in that country and outside the United States.

In your letter of March 21 you call attention to paragraph (b)(4), U.S. Services, of the U.S. Products and Services clause, which permits a cost of foreign services of up to 25 percent in contracts for U.S. Services, and you state that the services which you proposed to have performed in Haiti would constitute less than 3 percent of the cost of the softballs. We do not consider this paragraph defining "U.S. Services" to be applicable here since the contract is for delivery of a product rather than for the performance of services. See paragraph (a) of the clause which provides that the contractor agrees that there will be delivered or performed under the contract only U.S. End Products *or* U.S. Services.

In view of the foregoing, we see no legal basis for objection to the rejection of your bid since, in our view, your softballs (end products) would have been manufactured in Haiti and therefore you did not propose to furnish U.S. End Products as defined in, and required by, the U.S. Products and Services clause of the IFB. Accordingly, your protest is denied.

[B–176083]

Economic Stabilization Act of 1970—Cost-of-Living Stabilization—Military Pay Increases, Etc.

The claim of an Air Force sergeant for a retroactive increase in basic pay and quarters allowance from the effective date of the act of September 28, 1971, Public Law 92–129, through November 13, 1971, the end of the 90-day wage-price freeze—August 15 to November 13, 1971—imposed by Executive Order 11615, dated August 15, 1971, issued pursuant to the Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at the rates in effect on August 14, 1971, is within the broad scope of

authority vested in the President by the Economic Stabilization Act and, furthermore, the increase for the wage-price freeze period not having been provided by law prior to August 15, 1971, and by appropriations to cover, the increase does not meet the requirements of section 203(c) of the Economic Stabilization Act Amendments which authorize retroactive payment of increases.

To the Secretary of Defense, July 7, 1972:

We have before us for consideration the question of entitlement of Sergeant Michael H. Stiles, 484–60–5858, United States Air Force, to a retroactive increase in basic pay for the period October 1, 1971, through November 13, 1971, including an increase in basic allowance for quarters for the period July 1, 1971, through November 13, 1971, under the provisions of title II of the act of September 28, 1971, Public Law 92–129, 85 Stat. 355 (37 U.S. Code 203(a)).

Title II of the above-mentioned act of September 28, 1971, authorized increases in quarters allowance for all military personnel and increases in basic pay for those members in the lower grades with short periods of service, effective October 1, 1971. The same law also amended the Dependents Assistance Act of 1950 to authorize increases in quarters allowances for the lower enlisted grades effective July 1, 1971—the date those allowances authorized by the 1950 act as amended terminated by operation of law (50 U.S.C. App. 2216).

The period in question falls within the 90-day wage-price freeze (August 15 to November 13, 1971) imposed by the President by Executive Order 11615 dated August 15, 1971, under authority contained in the Economic Stabilization Act of 1970, Public Law 91–379, 84 Stat. 799, as amended (12 U.S.C. 1904 note). Sergeant Stiles questions the authority of the President to freeze military pay increases authorized in the act of September 28, 1971, Public Law 92–129. There is also for consideration the Economic Stabilization Act Amendments of 1971, Public Law 92–210, approved December 22, 1971, and its application to the military pay law of September 28, 1971.

By Executive Order 11615 dated August 15, 1971, issued under the Economic Stabilization Act of 1970, the President stabilized prices, rents, wages and salaries, for a period of 90 days from that date. The order established a Cost of Living Council and delegated to it broad authority to act for the President in carrying out its provisions. The Cost of Living Council delegated to the Director, Office of Emergency Preparedness, responsibility and authority to implement, administer, monitor and enforce the stabilization of prices, rents, wages and salaries as directed by the Executive order.

After the effective date of the wage-price freeze (August 15, 1971), the only action taken on the military pay bill, H.R. 6531 (which became the act of September 28, 1971), on the floor of either house of Congress was Senate consideration of, and vote on, the conference report on that bill. During that consideration, Senator Cannon on

September 15, 1971, said, in part, "So I urge Senators to vote for the conference report and to give the military a pay raise, when it can be granted. That, of course, will be after the freeze has been lifted." (117 Cong. Rec. S. 14354.)

And on September 21, 1971, Senator Dole said that "A decision on applying the wage-price freeze to the military pay increase will be deferred until passage of the bill in its present form." (117 Cong. Rec. S. 14683.)

On September 23, 1971, while the enrolled bill, H.R. 6531, which became the act of September 28, 1971, was being considered by the President, the Attorney General, in an opinion to the Chairman, Cost of Living Council, concluded that Executive Order 11615 "will suspend [the] effectiveness of the military raises until November 14, 1971, without further action by the President." Thereafter, on September 28, 1971, the President, in signing into law H.R. 6531, stated in part that "By law pay increases provided in this Act [Public Law 92–129] are subject to the 90-day wage-price freeze." Moreover, the Cost of Living Council specifically determined that "Military pay and benefit increases authorized by Public Law 92–129 may not be implemented during the freeze." *See* paragraph 502(26) of Economic Stabilization Circular No. 102, 36 FR 20490, October 22, 1971.

In the light of the above and the broad authority vested in the President by the Economic Stabilization Act of 1970, it is our view that the President's action to freeze military pay (during the period August 15 to November 13, 1971) at the rates in effect on August 14, 1971, was, and is, authorized by law, notwithstanding the increased rates prescribed in Public Law 92–129, approved September 28, 1971.

The question further arises whether military personnel come within the scope of the Economic Stabilization Act Amendments of 1971, Public Law 92–210, approved December 22, 1971, for purposes of a retroactive increase in basic pay during the period of the wage-price freeze. Section 2 of title II of the act of December 22, 1971, amended section 203 of the Economic Stabilization Act of 1970 to provide as follows:

(c)(1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to August 15, 1971. unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President

determines that the increase provided in such contract is undreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

Section 3 of the same act, Public Law 92–210, 5 U.S.C. 5305 note, under the heading "Federal Employee Compensation," provided for an adjustment in rates of pay on the basis there indicated of each Federal statutory pay system, which includes General Schedule employees, and that such period increase was to take effect on the first day of the first pay period that began on or after January 1, 1972. In connection with section 3, military personnel were also entitled to an adjustment in basic pay under section 8 of the act of December 16, 1967, Public Law 90–207, 81 Stat. 654, which provides that whenever the General Schedule rates of compensation for Federal classified employees are adjusted upward, there shall immediately be placed into effect a comparable adjustment in the basic pay of members of the uniformed services. This provision of law was implemented by Executive Order 11638 dated December 22, 1971, effective January 1, 1972.

The provisions of section 203(c) of the Economic Stabilization Act Amendments of 1971 were considered by us in decision of February 23, 1972, 51 Comp. Gen. 525, as they pertain to within-grade increases for General Schedule and wage-board employees and to wage-grade schedules, during the wage-price freeze covered by Executive Order 11615. In that decision we said, among other things, that "the provisions of section 203(c) could not be applicable to general salary increases in the General Schedule and other statutory systems since such increases were specifically covered by section 3 of [the same law] Public Law 92–210, and such increases do not meet the conditions specified in section 203(c)." After quoting part of the legislative history of section 203(c) we said that it is apparent that the use of the terms "contract" or "employment contract" did not necessarily exclude Federal employees from the provisions of section 203(c) in certain circumstances.

We concluded in the decision of February 23, 1972, that those wage-board employees for whom wage surveys were begun prior to August 15, 1971, are subject to section 203(c)(2) and may be granted retroactive increases in wages to the date such increases would have

otherwise been effective during the period August 15, 1971, to November 14, 1971. We also took the view that both the conditions of (A) and (B) of paragraph (3) of section 203(c) were satisfied so as to authorize within-grade increases for General Schedule and wage board employees which arose during the wage-price freeze and were not paid. This conclusion was based in part on the fact that such increases were provided by law prior to August 15, 1971, and appropriations had been made to cover such increases.

We have before us a copy of a memorandum dated May 3, 1972, from J. Fred Buzhardt, General Counsel, Department of Defense, addressed to Mr. Moot, Assistant Secretary of Defense (Comptroller) concerning Sergeant Stiles' entitlement. The view is expressed in that memorandum that any increases in military pay and allowances authorized by the act of September 28, 1971, are not properly payable for any period prior to November 14, 1971. The memorandum refers to our decision of February 23, 1972, 51 Comp. Gen. 525, and discusses at some length the holding in that decision and the application of section 203(c) of the Amendments of 1971.

It is stated in the memorandum that even assuming arguendo that the pay and allowances of military personnel could be considered fixed pursuant to a "contract" or "employment contract," or that military personnel are not necessarily excluded from the provisions of the Amendments of 1971, it cannot be said that the increases authorized for military personnel by the act of September 28, 1971, were agreed to in a contract executed prior to August 15, 1971.

In relating the military pay increase authorized by the act of September 28, 1971, to the wage and salary increases and conditions specified in (A) and (B) of paragraph (3) of section 203(c) of the Amendments of 1971, the General Counsel's memorandum states, in part:

> * * * The increases authorized by the Act of September 28, 1971, do not meet either condition (A) or (B). In this connection, it is significant to note that the law was not enacted until September 28, 1971 and that a supplemental appropriation request is now being considered by the appropriations committees to cover the additional costs of the military pay increases *only for the period after November 13, 1971.* Furthermore, in appearances before the appropriations committees in April, 1972, Defense witnesses made it abundantly clear that supplemental appropriations were being requested to pay only for increases which accrued after November 13, 1971.

The memorandum points out, however, that retroactive longevity increases—which presumably accrued during the wage-price freeze—were authorized and paid to military personnel on the basis of our decision of February 23, 1972. In this connection, it is pointed out that longevity increases for military personnel met the requirements of section 203(c)(3) of the Amendments of 1971 in that such increases

were provided by law prior to August 15, 1971, and appropriations had been made to cover such increases in the fiscal year 1972.

We find nothing in the Economic Stabilization Act Amendments of 1971 or in its legislative history which would authorize retroactively for the period of the wage-price freeze, the rates of basic pay and allowances for military personnel authorized in the act of September 28, 1971. In support of the view that military personnel were not considered as being included in the Amendments of 1971, there is for noting that during floor discussion in the House of Representatives on the conference report as it relates to section 3 (adjusting the rates of pay of General Schedule employees and other pay systems) Mr. Udall said, in part:

> As I read the debate and reports, it was clearly the intention of the Senate amendment, and it is the intention of the provisions included in the conference report, that the comparability adjustment is applicable to military personnel, and to all other employees whose pay is adjusted when adjustments are made in the basic pay of the General Schedule. (Cong. Rec., Dec. 14, 1971, H. 12530)

These remarks indicate generally that Congress was concerned with getting pay raises for both civilian and military personnel in January 1972.

Had Congress intended to include military personnel in the Amendments of 1971, by extending the provisions of that act to cover basic pay increases authorized in the act of September 28, 1971, other than longevity increases, we believe appropriate language would have been used. In this connection, Congress specifically took note of a situation concerning employees whose compensation is adjusted on the basis of wage surveys (5 U.S.C. 5341) and authorized a retroactive increase in pay during the wage-price freeze provided certain conditions were met. *See* the act of May 17, 1972, Public Law 92-298, 86 Stat. 146.

In the light of the above and in the absence of some specific statutory authority or legislative intent to nullify the action taken by the President under the 1970 act, it is our view that increases in military pay and allowances authorized by the act of September 28, 1971, are not payable for any period prior to November 14, 1971.

[B-175779]

Contracts—Protests—Timeliness

The time limitations imposed by 4 CFR 20.2(a) of the Interim Bid Protest Procedures and Standards provisions for filing a protest, first with the contracting agency and then with the United States General Accounting Office (GAO), are intended to provide effective remedial action and, therefore, must be observed. Although a protest that the successful bidder was not responsible—a protest that does not involve an impropriety—was timely filed with the contracting agency, it may not be considered by GAO since the protest was not filed within 5 days of notification of initial adverse agency action. Furthermore, the protest may not be considered for "good cause"—a compelling reason for delayed

filing beyond a protestor's control—or on the basis a significant issue of procurement practices or procedures was raised, because a protest challenging the responsibility of a bidder involves neither exception to the timely filing of a protest.

To the Panoramic Studios, July 13, 1972:

Reference is made to your letter of May 12, 1972, which responded to our letter B–175779, May 10, 1972, wherein we advised you that under our "Interim Bid Protest Procedures and Standards" we would regard as untimely your protest under RFP DAAK01–71–R–6301, issued by the Army Mobility Equipment Command.

You state that section 20.2(a) of the "Interim Bid Protest Procedures and Standards" is contradictory and misleading in that it urges protestors to initially seek resolution of their complaints with the contracting agency and yet imposes relatively short time limits for filing protests with our Office. You suggest that this permits contracting agencies to "spin out" discussions of protests "secure in the knowledge that the General Accounting Office will then say that no 'timely' protest was ever submitted." You allege that this has occurred in your protest, which has not received the "objective, independent and impartial" handling our bid protest procedures are intended to provide.

Section 20.2(a) of the "Interim Bid Protest Procedures and Standards" states:

> Protestors are urged to seek resolution of their complaints initially with the contracting agency. Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely. The term "filed" as used in this section means receipt in the contracting agency or in the General Accounting Office as the case may be and protestors are, therefore, cautioned that protests should be transmitted or delivered in that manner which will assure earliest receipt.

The limited factual information contained in your letter of April 14, 1972, indicates that the basis of your protest to the procuring agency was that the successful offeror was not a responsible contractor. Since your protest did not involve an impropriety apparent prior to the closing date for receipt of proposals, the second sentence of section 20.2(a) is inapplicable to your protest.

The next sentence of section 20.2(a) provides that in other cases (such as yours), bid protests shall be filed not later than 5 days after the basis for the protest is known or should have been known, whichever is earlier. A protest which alleges that the successful offeror is not responsible could not have been made until you were aware of the identity of that offeror. In the instant case, award was made on June 16, 1971, and we have been informally advised by the Depart-

ment of the Army that your protest letter of June 21, 1971, was received by the contracting officer on June 23, 1971. Since your protest was received by the contracting agency 5 working days after the award, which was when the basis of your protest would first have been known to you, your protest to the contracting agency was timely.

The next sentence of section 20.2(a) states that when a timely protest has been filed initially with the contracting agency, subsequent protests to our Office must be filed "within 5 days of notification of adverse agency action" in order to be considered. We are advised by the Army that it denied your protest by letter of June 25, 1971, which you subsequently told the Army was too brief. In response to your complaint, a fuller explanation was made by the Army on July 7, 1971. Thus, the "notification of adverse agency action" occurred upon your receipt of the Army's letter of June 25, 1971. As we observed in our letter of May 10, 1972, you did not file a protest under this procurement with our Office until April 25, 1972, 10 months after you had been notified of adverse agency action concerning your protest. Therefore, your protest is untimely under the provisions of the fourth sentence of section 20.2(a). Furthermore, it does not appear that any remedial action of benefit to your firm is now available from this Office, even if we should conclude that the contract was illegally awarded, since the supplies thereunder have been delivered and payment has been made.

We do not regard the provisions of section 20.2(a) to be conflicting and misleading. We urge protestors to initially seek resolution of their complaints with the contracting agency, within certain time limits, in order that protests may be expeditiously resolved at a stage in the procurement when some effective remedial action may be taken on meritorious protests. We think it inappropriate, for example, for a bidder to first allege that there is an impropriety in an invitation for bids after bids have been opened and his competitors' prices exposed. In the instant case, you met the requirement that a protest must be timely filed with the contracting agency.

Our bid protest regulations then provide that following "adverse agency action" upon a protest, the protestor seeking a decision of our Office must file his protest in a timely manner. The intent of this provision also is to secure the resolution of the matter when some meaningful relief may be afforded, not—as in this case— after the contract is completely performed.

"Adverse agency action" may consist of a procurement action (such as the award of a contract despite the pendency of a protest) or, as in the instant case, a decision on the merits of the protest. We realize that a protestor may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protestor to engage

in further correspondence with the agency. As you observe in your letter of May 12, it then becomes difficult to identify the "final" adverse agency action. For this reason, we regard it as obligatory upon a protestor to file his protest with our Office within 5 days of notification of *initial* adverse agency action, if it is to be considered timely. It appears that the "adverse agency action" in this case occurred no later than June 25, 1971. Additionally, there is no evidence of record that the Army acted to "spin out the discussion * * * for weeks or months * * *" as you allege may be possible under our regulations.

You further state in your letter of May 12, 1972:

> We note also in Section 20.2(b) that a protest not timely can be considered if it raises a "significant" issue. Does "significant" mean a large sum of money, or a glaringly obvious flaw, or is there a question of principle? What is "good cause?"

The subsection to which you refer provides:

> The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

"Good cause" varies with the circumstances of each protest, although it generally refers to some compelling reason, beyond the protestor's control, which has prevented him from filing a timely protest. There is no indication of record that any supervening circumstance delayed the filing of your protest before this Office. "Issues significant to procurement practices or procedures" refers not to the sum of money involved, but to the presence of a principle of widespread interest. We are not inclined to view a protest challenging the responsibility of a particular bidder as coming within this provision.

For the foregoing reasons, we remain of the opinion that your protest is inappropriate for consideration by our Office.

[B–175190]

Military Personnel—Missing, Interned, Etc., Persons—Quarters and Subsistence—Entitlement

Enlisted members of the uniformed services, whether with or without dependents, who prior to being carried in a missing status (37 U.S.C. 551–558) were quartered and subsisted by the United States Government under the concept of "changed conditions" may be credited with quarters and subsistence allowances from the beginning of a missing status. The statutory provisions involved in 23 Comp. Gen. 207 and 895, which were the basis for denying allowances to members entering a "missing status," have been superseded by sections 301 and 302 of the Career Compensation Act of 1949 (37 U.S.C. 403) to provide that a member on active duty is entitled at all times to subsistence and quarters in kind or allowances in lieu thereof and, therefore, members determined to be in a missing status are entitled to a monetary allowance in lieu of subsistence and quarters in kind from the beginning of the missing status, subject to 31 U.S.C. 71a.

To the Secretary of Defense, July 17, 1972:

Further reference is made to letter dated February 10, 1972, from the Assistant Secretary of Defense (Comptroller), in which decision is requested on questions relating to the payment of quarters and subsistence allowances to members without dependents who are carried in a missing status pursuant to 37 U.S. Code 551–558.

It is indicated in the letter that entitlement to these allowances has been denied over the years to members entering a "missing status" on the basis of our decision of September 20, 1943, 23 Comp. Gen. 207, wherein it was held that an enlisted member of the Navy who was absent from his ship in a missing status (under the Missing Persons Act of March 7, 1942, 56 Stat. 143) was not entitled to quarters and subsistence allowances authorized by section 10 of the Pay Readjustment Act of 1942, 56 Stat. 363.

The Assistant Secretary points out that the law currently in effect relating to the payment of pay and allowances to missing members is similar to that in effect in 1943 (section 2 of the Missing Persons Act of March 7, 1942, 56 Stat. 144).

It is also noted that under the provisions of 37 U.S.C. 403 a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters, with the exception of a member who is assigned to "quarters of the United States" and a member who is on "field duty" unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty.

The Assistant Secretary states that the decision in 23 Comp. Gen. 207 is based on the premise that the purpose of the statute is to provide for the payment of quarters and subsistence allowances when the duty assignment of the member makes impractical the furnishing of quarters and subsistence normally furnished. In contrast, it is pointed out that 37 U.S.C. 403 expressly provides that "except as otherwise provided by * * * law, a member * * * who is entitled to basic pay is entitled to a basic allowance for quarters," and, he says, the question of duty assignment is not mentioned in the statute.

It is also stated that under 37 U.S.C. 402 a member who is entitled to basic pay is entitled to a basic allowance for subsistence "when rations in kind are not available." It is indicated in the letter that an enlisted member has been consistently considered to be entitled to be subsisted in kind by the U.S. Government or to be paid an appropriate monetary allowance in lieu thereof when not so subsisted. The Assistant Secretary notes that "Regular Military Compensation" has been defined to include quarters and subsistence in kind or an allowance substitute (H.R. Report No. 92–82, March 25, 1971, p. 24).

In the discussion in the Assistant Secretary's letter relating to the

Missing Persons Act it is indicated that under the provisions of 37 U.S.C. 552 a member who is in a missing status is entitled to the same pay and allowances to which he was entitled at the time of entering a missing status or to which he may thereafter become entitled. It is pointed out that the fact that a member was not actually entitled to a monetary allowance for quarters and subsistence at the beginning of the missing status (because he was furnished such by the U.S. Government) would not appear to be determinative of his entitlement to such monetary allowances after he entered a missing status in view of the intent of Public Law 90–207 approved December 16, 1967, and the "changed conditions" under which entitlement to these allowances should "thereafter become" effective, as stated in 23 Comp. Gen. 895 (1943) at page 897:

> * * * it is not to be presumed that the statute contemplates that the pay status of a missing person is to be computed differently from that of any other officer on active duty, not in a missing status, whose pay and allowances obviously are affected upon the happening of changed conditions. *Cf.* 23 Comp. Gen. 21. An officer not in a missing status would not be entitled to a continuation of rental allowance for a wife following her death or upon cessation of the marital relationship; and the same rule is to be applied in the case of a missing officer. Similarly, the same rule would be for application, insofar as rental allowance for dependents is concerned, when the dependents occupy public quarters, whether (1) such occupation of quarters be an incident to their relationship to the officer, that is, the assignment to him of quarters for his dependents, or (2) because of the dependent's status as a member of the armed forces by reason of which she is furnished quarters in kind or paid a cash allowance in lieu thereof.

The Assistant Secretary continues by stating that, while the member was being quartered and subsisted by the U.S. Government immediately prior to entering a missing status, due to "changed conditions" the U.S. Government can no longer quarter or subsist the member and under normal circumstances he would then become entitled to receive a monetary allowance for quarters and subsistence. It is emphasized that in 23 Comp. Gen. 207 it was held that, had the member at the time he entered the missing status been serving under conditions which entitled him to these allowances, he would have continued to receive the allowances while in a missing status. It is indicated that it appears somewhat inconsistent to have entitlement to these allowances based solely upon the happenstance of the conditions under which a member is serving at the time of entering a missing or prisoner of war status in view of the provisions of Public Law 90–207.

In light of the foregoing, decision is requested on the following questions:

1. Is a member, without dependents, who was not entitled to basic allowance for quarters at the beginning of a period of "missing status," entitled to credit for such allowance when he enters a missing status?
2. Is a member who was not entitled to a basic allowance for subsistence at the beginning of a period of "missing status," entitled to credit for such allowance when he enters a missing status? If so, at what rate?

It is also requested that, if the above questions are answered in the negative, statutory amendments be suggested which would permit the crediting of these allowances.

The questions presented by the Assistant Secretary have not been considered by this Office in light of the laws currently in effect.

Section 403 of Title 37, U.S. Code, provides in pertinent part that a member of the uniformed services who is entitled to basic pay is entitled to basic allowance for quarters except when on "field duty" or "sea duty" or when assigned to "quarters of the United States." It appears that a basic allowance for quarters is authorized under the above-cited section at all times to members who are entitled to basic pay with the exception of when they are assigned to quarters of the United States or are considered to be in a status where they are furnished by the United States whatever quarters are utilized such as when on field duty or sea duty.

Section 402 of Title 37, U.S. Code, provides in pertinent part that:

(a) Except as otherwise provided by this section or by another law, each member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for subsistence. * * *

(b) An enlisted member is entitled to the basic allowance for subsistence, on a daily basis, of one of the following types—

(1) when rations in kind are not available;

(2) when permission to mess separately is granted; and

(3) when assigned to duty under emergency conditions where no messing facilities of the United States are available.

* * * * * * *

(c) An officer of a uniformed service who is entitled to basic pay is, at all times, entitled to the basic allowances for subsistence on a monthly basis.* * *

It would appear in view of the above-quoted language that a member of the uniformed services is entitled to be either subsisted in kind or paid a monetary allowance in lieu thereof at all times.

This view is substantiated by the legislative history of Public Law 90–207, approved December 16, 1967, 81 Stat. 649, which authorized an increase in the basic pay of members of the uniformed services and in section 8 also provided for increases in such pay whenever an increase in the compensation of Federal civilian employees is authorized. The history of the act clearly indicates that in establishing the rates of compensation of members of the uniformed services, the rates of the quarters and subsistence allowances are considered.

For example, Senate Report No. 808 on H.R. 13510 at page 5 in discussing the increase in basic pay for members of uniformed services, it was stated that " * * * The 5.6 percent proposed basic pay increase is considered the equivalent of 4.5 percent civilian increase when the following factors of military compensation are taken into account—basic pay, subsistence allowance, quarters allowance, and tax advan-

tages." In House Report 787 on the same bill at page 3 it is stated that: " 'Regular military compensation' is defined as basic pay, quarters, and subsistence allowances, either in cash or in kind, and the tax advantage thereon."

In view of the above there can be little doubt that quarters and subsistence either in kind or a monetary allowance therefor is an integral part of the total compensation of a member of the uniformed services to which he is entitled at all times.

Section 552, Title 37, U.S. Code, is a codification of section 2 of the Missing Persons Act of March 7, 1942, which provided that a member absent from duty in a missing status would be entitled while so absent to receive or have credit to his account "the same pay and allowances to which such person was entitled at the time of the beginning of the absence or may become entitled thereafter." The act of August 29, 1957, Public Law 85-217, 71 Stat. 491, amended section 2 to provide that a member of the Armed Forces in a missing status would be entitled to receive or have credited to his account "the same basic pay, special pay, incentive pay, basic allowance for quarters, basic allowance for subsistence, and station per diem allowances for not to exceed ninety days, to which he was entitled at the beginning of such period of absence * * *."

In our decision of September 10, 1964, 44 Comp. Gen. 127, we pointed out that the legislative history of the 1957 amendment to the Missing Persons Act indicated that it was the legislative intent that members in a missing status should have credited to their accounts the same pay and allowances they would have received while performing active duty, with the exception of temporary allowances such as a per diem for travel expenses.

There is no doubt that basic allowances for quarters and subsistence are allowances to which a member is entitled while in a missing status if he was entitled to these allowances at the time of entering a missing status. 23 Comp. Gen. 360 (1943). It appears reasonably clear that, inasmuch as quarters and subsistence allowances are payable except when a member is furnished these items in kind, entitlement to the allowances in lieu thereof exists when the United States no longer furnishes these allowances.

As noted above the Assistant Secretary points out that in 23 Comp. Gen. 895 (1944) reference was made to "changed conditions" which would be determinative of an officer's entitlement to rental allowance under section 6 of the Pay Readjustment Act of 1942. In that decision the "changed conditions" referred to entitlement to a rental allowance based on a dependent wife who while the member was in a missing status became entitled to be quartered and subsisted by the United

States in her own right by virtue of her active duty status in a uniformed service.

We agree with the view of the Assistant Secretary that the concept of "changed conditions" should also be applied in the case of a member receiving quarters and subsistence in kind furnished by the United States while on field duty who enters a missing status under the Missing Persons Act and as a result of such status can no longer be furnished quarters and subsistence in kind and that therefore such a member is entitled to the monetary allowances in lieu thereof.

Questions 1 and 2 are answered in the affirmative and hence no new legislation is required. The rate of basic allowance for subsistence payable to enlisted members is that payable when rations in kind are not available.

The statutory provisions concerning monetary allowances in lieu of quarters furnished in kind by the United States which were involved in our decisions 23 Comp. Gen. 207 and 895 have been superseded by the provisions of sections 301 and 302 of the Career Compensation Act of 1949, 63 Stat. 812, which in turn are now codified in 37 U.S.C. 402 and 403. Since under such statutory provisions a member of the uniformed services on active duty is entitled at all times to be furnished subsistence and quarters in kind or allowances in lieu thereof, members of the uniformed services determined to be in a missing status under the provisions of 37 U.S.C. 552 are entitled to a monetary allowance in lieu thereof, subject, of course, to the provisions of 31 U.S.C. 71a. Such allowances may be credited from the beginning of the missing status.

[B-175444]

Pay—Drill—Training Assemblies—Status for Benefits Entitlement

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to the inactive duty training authorized by 32 U.S.C. 502(a)(1), answering the roll call, and participating for 65 minutes in the first assembly, were ordered home to pick up equipment, and who while traveling in a privately owned car were in a collision in which two members were killed and one injured, passed out of military control when they ceased to perform inactive duty training. Since their 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and the members were not in training for the purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), the situation of the deceased does not meet the requirements of 10 U.S.C. 1481(a)(3), authorizing the disposition of remains, nor entitle the injured member to medical care and pay and allowances. However, for the purposes of the death gratuity provided by 32 U.S.C. 321, the members are considered to have been traveling directly from an inactive duty training period.

To the Secretary of the Army, July 17, 1972:

Further reference is made to letter dated March 10, 1972, from the Assistant Secretary of the Army (Financial Management) requesting a decision regarding several questions arising as a result of an auto-

mobile accident which occurred on August 21, 1971, involving SP4 James L. Ehlers, 506–56–3024, SP4 Robert E. Krueger, 507–64–6266, and SP4 Dick L. Dittmer, 508–54–3332, incident to their performance of inactive duty training pursuant to 32 U.S. Code 502(a)(1), as members of Company C, 67th Support Battalion, Nebraska Army National Guard. The request has been assigned submission number SS–A–1144 by the Department of Defense Military Pay and Allowance Committee.

It is stated that the unit training schedule for Company C, 67th Support Battalion, covering the period of July 1 through September 30, 1971, was published and posted on the unit bulletin board. That schedule showed that on August 21, 1971, assembly 5 would be held from 1:00 p.m., to 5:00 p.m., the evening meal would be eaten from 5:00 p.m., to 6:00 p.m., and assembly 6 would be held from 6:00 p.m., to 9:00 p.m., followed by "CO Time (Showdown Insp)" from 9:00 p.m., to 10:00 p.m.

Both assemblies and the showdown inspection were scheduled to be held in the unit armory at York, Nebraska. Members were required to provide their own transportation.

It is also stated that it is a unit standard operating procedure that any member not reporting with the equipment required to stand inspection is dispatched to pick up the necessary equipment prior to the time of the inspection.

It appears that Specialists Ehlers, Krueger and Dittmer reported on time and in the proper class C uniform, for the initial formation at 1:00 p.m., August 21, 1971, where they answered to roll call. However, they did not have any of the individual clothing and field equipment necessary for the 9:00 p.m. showdown inspection.

Specialists Ehlers, Krueger and Dittmer remained at the armory until 2:05 p.m. (about 65 minutes), when they left in the proper military uniform, apparently pursuant to authority from their commanding officer, to return to their homes and pick up their missing equipment. The record contains a statement from their commanding officer that he considered the three members "present for duty" during period 1 (assembly 5).

The record indicates that the three members left the armory in Krueger's automobile apparently intending to stop at their respective homes in Utica, Nebraska (Ehlers), Columbus, Nebraska (Krueger), and Genoa, Nebraska (Dittmer), and return to York, a round trip of approximately 125 miles.

While the apparent route the three members chose to follow was not the shortest route to Dittmer's home, it was the shortest to Ehlers' and Krueger's homes and apparently the shortest route by which they could have stopped at all three homes and returned to the armory in York.

At 2:30 p.m., Krueger's atuomobile collided with another automobile about four miles from York, directly on the way from York to Utica. As a result of injuries received in that collision, Specialists Krueger and Dittmer died and Specialist Ehlers was hospitalized.

Upon submission of the cases to The Judge Advocate General of the Army, the opinion was expressed that the cases fall within the rationale of *Meister* v. *United States*, 162 Ct. Cl. 667 (1963), and in accordance with the instructions in our decision of October 25, 1963, 43 Comp. Gen. 412, 415, they should be submitted here for decision. In order that proper payment of pay and allowances, death gratuity, and certain other benefits may be made, the following questions were presented for consideration:

a. Are these members entitled to compensation under section 206, Title 37 United States Code for the inactive duty training assembly scheduled for 1300 to 1700 hours on 21 August 1971?
b. Were Krueger and Dittmer on authorized inactive duty training for the purposes of section 1481(a)(3) of Title 10 United States Code?
c. Can Ehlers be considered as performing training under section 502 of Title 32 United States Code and disabled in line of duty from injury while so employed for the purposes of section 318(2), Title 32 United States Code and section 204(b)(2), Title 37 United States Code, which would entitle him to medical care and pay and allowances?
d. If the answer to b is negative, were Krueger and Dittmer traveling directly to or from inactive duty training when they sustained their fatal injuries?
e. If the answer to c is negative can Ehlers be considered as traveling directly to or from inactive duty training within the meaning of section 106(d), Title 38 United States Code for the purpose of Veterans Administration benefits?
f. If it is determined that none of the members were engaged in inactive duty training at the time of the accident, can they be considered as traveling from the inactive duty training or traveling to the inactive duty training period scheduled to begin at 1800 hours?
g. What would be the members status if only one four hour training period was scheduled, 1300 to 1700 hours, and a portion of that period was set aside for the showdown assembly? It is doubtful that the members could have stopped at all three homes and returned to the armory between 1430, when the accident occurred, and 1700 hours when the training period was scheduled to end.

We note that in question c reference is made to section 204(b)(2), Title 37, U.S. Code, which has no application to this case and appears to have been a typographical error. The appropriate statutory provision intended appears to be 37 U.S.C. 204(h)(2), upon which we are basing our answer to that question.

The inactive duty training involved here appears to have been a multiple unit training assembly two (MUTA-2) authorized by 32 U.S.C. 502(a)(1) which provides in pertinent part as follows:

(a) Under regulations to be prescribed by the Secretary of the Army * * * each company * * * of the National Guard * * * shall—
(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year * * *.

Pay for members attending such assemblies is authorized by 37 U.S.C. 206(a) which provides in pertinent part as follows:

(a) Under regulations prescribed by the Secretary concerned, * * * a member of the National Guard * * * who is not entitled to basic pay under section 204

of this title, is entitled to compensation, at the rate of 1/30 of the basic pay authorized for a member of a uniformed service of a corresponding grade entitled to basic pay, for each regular period of instruction, or period of appropriate duty, at which he is engaged for at least *two hours* * * * [Italic supplied.]

National Guard Regulation 37–104–2 (effective June 1, 1971) provides in part in paragraph 2–4*a*(3) that one of the requirements for qualifying for unit training assembly pay is that the member "must engage in a period inactive duty training for the time prescribed by NGR 350–1," and, "when a member participates for one period of a multiple assembly, he is entitled to pay for such participation on the basis of one assembly." Paragraph 3*a* of National Guard Regulation 350–1 defines a multiple unit training assembly two (MUTA–2) as two unit training assemblies conducted during one calendar day, and a unit training assembly is defined as an authorized and scheduled training assembly of not less than 4 hours' duration.

Section 1481, Title 10, U.S. Code, provides in pertinent part as follows:

(a) The Secretary concerned may provide for the recovery, care, and disposition of the remains of—

* * * * * * *

(3) any member of the Army National Guard * * * who dies *while entitled to pay from the United States and while* (A) on active duty, (B) performing authorized travel to or from that duty, (*C*) *on authorized inactive-duty training,* * * *. [Italic supplied.]

Section 318, Title 32, U.S. Code, provides in pertinent part as follows:

A member of the National Guard is entitled to the hospital benefits, pensions, and other compensation provided by law or regulation for a member of the Regular Army * * * of corresponding grade and length of service, whenever he is called or ordered to perform training under section 502 * * * of this title—

* * * * * * *

(2) for any period of time, and is disabled in line of duty from injury *while so employed.* [Italic supplied.]

Section 204, Title 37, U.S. Code, provides in pertinent part as follows:

(h) A member of the National Guard is entitled to the pay and allowances provided by law and regulation for a member of the Regular Army * * * of corresponding grade and length of service, whenever he is called or ordered to perform training under section 502 * * * of title 32—

* * * * * * *

(2) for any period of time, and is disabled in line of duty from injury *while so employed.* [Italic supplied.]

In our decision of October 25, 1963, 43 Comp. Gen. 412, we said that when a reservist is ordered to inactive duty training involving multiple drills, the period of training extends from the time the member is first mustered in until the end of his scheduled inactive duty training on that day. Thus, we held that reservists injured at the place of train-

ing during a scheduled lunch break, or at a time when no actual duty is being performed during a drill, are entitled to the benefits of 10 U.S.C. 6148(a) (provision of law similar to 32 U.S.C. 318(2), *supra*) since in neither of the cases had the men been released from military control at the time the injuries occurred.

However, we also stated in that decision that tours of inactive duty training are for scheduled periods of time and, where such duty is to be performed at the headquarters of the member's Reserve unit, do not include travel to and from his home and headquarters, such travel not being a part of the inactive duty training. This is true whether the travel is by Government vehicle or private automobile and the granting of permission to travel during a part of the period assigned for the performance of the drill would not increase the member's rights in any way. *See* answers to questions (e), (f), and (g), 43 Comp. Gen. 412, *supra*.

In decision B–156628, June 1, 1965, involving a National Guard member who was ordered to training consisting of four inactive duty training assemblies on consecutive days, and who was injured after completion of the drills scheduled for the first day while playing softball in the bivouac area, it was held that he may be deemed to have received the injuries while in an inactive duty training status within the purview of 32 U.S.C. 318(2) since, at the time of the injury, he was still under military control in the training area where he was required to remain.

Our decision B–164204 of July 12, 1968, involved a National Guard member ordered to 2 consecutive days of annual range firing under 32 U.S.C. 502, who after performance of the first day's training, was given permission by his unit commander to leave the training area in order to visit Hattiesburg, Mississippi, for his own convenience, and was injured in an automobile accident during that absence. In that decision we said that in such circumstances, we could not conclude that during the period of his absence from the training area and from military supervision he continued to be in an inactive duty training status and "was so employed" within the meaning of 32 U.S.C. 318, when he was injured.

In the instant case the three members were mustered in with their unit at 1:00 p.m., and apparently participated in the scheduled training with their unit at the armory for about 1 hour before leaving for their homes in a private automobile while their unit apparently continued to perform the scheduled training exercise. It is our view that upon leaving the training area where the scheduled training exercise was being held to return to their homes to pick up required equipment and clothing they had apparently forgotten to bring with them

and passing out of military control, the three members ceased to perform inactive duty training.

Since the three members were engaged in inactive duty training for only about 65 minutes, for the purposes of 37 U.S.C. 206(a) and the regulations issued pursuant thereto, they were not engaged in inactive duty training for a sufficient length of time to be entitled to pay under that statute. Also, they were not employed in inactive duty training at the time of the accident for the purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2). Since the two deceased members were not entitled to pay from the United States and were not on authorized inactive duty training at the time of their deaths, their situation did not meet the requirements of 10 U.S.C. 1481(a)(3). Hence, questions a, b, and c are answered in the negative.

We assume that questions d and f were asked in regard to possible payment of a death gratuity as provided by 32 U.S.C. 321 in the cases of Krueger and Dittmer. Subsection 321(a)(3) authorizes the payment of such gratuity to or for the survivor of a member of the National Guard who, when authorized or required by proper authority, assumed an obligation to perform training or duty under certain statutes including 32 U.S.C. 502 and who dies while traveling directly to or from that duty.

While their intentions may have been to return to the armory to participate in the inactive duty training assembly beginning at 6:00 p.m., it seems clear that at the time of the accident, the three members were traveling from the inactive duty training assembly which had begun at 1:00 p.m. The record indicates that the accident occurred on the most direct route from the armory to both Ehlers' and Krueger's homes and, while it was not the most direct route to Dittmer's home, considering the fact that the three members were traveling together in one automobile, the route being followed appears overall to have been a direct route by which they could have stopped at all three homes. *Cf.* 48 Comp. Gen. 762 (1969).

Accordingly, for the purpose of 32 U.S.C. 321(a)(3), questions d and f are answered by saying that at the time of the accident all three members were traveling directly from the inactive duty training period which had begun at 1:00 p.m.

Question e should be submitted to the Veterans Administration for determination since 38 U.S.C. 106(d) is a statutory provision within that agency's purview and not within our jurisdiction. See 38 U.S.C. 211(a). Questions d and f should also be submitted to the Veterans Administration for determination in relation to statutes administered by that agency.

In answer to question g, if only one 4-hour training period had been scheduled (1:00 p.m. to 5:00 p.m.) with a portion of that period set

aside for the showdown inspection, the members' status in relation to the statutory provisions within our jurisdiction discussed above would have been the same, that is, they would not have been engaged in inactive duty training for a sufficient length of time to be entitled to pay under 37 U.S.C. 206(a), they would not have been engaged in inactive duty training at the time of the accident for the purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), they would not have met the requirements of 10 U.S.C. 1481(a)(3), and they would have been traveling directly from that inactive duty training period for the purpose of 32 U.S.C. 321(a)(3).

[B-175975]

Subsistence—Per Diem—Dependents—Transfer of Employee

Since the Office of Management and Budget Circular No. A-56 provides the per diem payable to a civilian employee for his dependents traveling with him incident to a change of official station should be computed on the basis of a percentage of the per diem rate the employee would receive if traveling alone, an employee who paid varying per diem rates while traveling with his spouse on a househunting trip to seek a residence at his new station and in connection with travel performed with his dependents from his old to his new station is entitled to a per diem allowance for his dependents computed by using the average single rate applicable to the rooms occupied as the base upon which the dependents' per diem is calculated.

To A. A. Fusco, Office of Economic Opportunity, July 17, 1972:

Further reference is made to your letter of May 8, 1972, requesting our decision as to the proper rate of per diem payable to Mr. Augustin T. Gurule, an employee of your agency, while traveling to seek residence quarters at his new station and while traveling from his old to his new station, incident to a transfer of station from San Francisco, California, to Dallas, Texas.

All travel involved was performed in January 1972. During the travel to seek residence quarters Mr. Gurule was accompanied by his spouse. The lodging receipt from the employee's motel in Dallas shows a daily charge plus tax of $16.76. During the actual transportation of the employee, his spouse, and dependent daughter, to the new duty station, lodging was secured at various locations at varying rates. Paragraph 6.3c, Office of Management and Budget Circular No. A-7, revised effective October 10, 1971, specifies that the per diem rate of an employee is computed by adding the average cost of lodging to a suitable allowance for meals and miscellaneous expenses. You request our decision as to which of the following methods of computing per diem is correct.

Mr. Gurule obtains and certifies as to the single rate applicable to the room(s) which he occupied with his dependent(s). The average rate (single) will be used in computation of his per diem thus forming the base upon which the dependent(s) per diem is calculated or;

Divide the actual amount paid for the room(s) by the number of persons occupying the room(s). The average cost of lodging per person thus obtained will be used in determining the daily per diem for the employee and provide the base for the computation of per diem for his dependent(s).

Circular No. A–56 issued by the Office of Management and Budget provides for the payment of a per diem allowance for the spouse who accompanies the employee on a househunting trip incident to a change of official station which amounts to 75 per centum of the per diem allowance authorized for the employee; also, in connection with travel between the old and new stations the dependents when they accompany the employee are authorized a per diem allowance based on a percentage of the per diem rate authorized for the employee. We believe such regulations contemplate that the per diem for the spouse or other dependents as the case might be should be computed on the basis of the per diem rate an employee would receive if he were traveling alone. Therefore, the first suggested method for computing the per diem entitlements is approved.

The voucher is returned herewith for handling in accordance with the above.

[B–176491]

National Guard—Pay, Etc., Entitlement—Disaster Relief Duty Ordered by State

The duty performed by National Guard units ordered by the State of Pennsylvania to aid in the disaster relief necessitated by the extensive flooding in the State may be considered as the annual summer training of the units within the purview of 32 U.S.C. 502, and Federal funds used for pay and allowance purposes, even though ordinarily section 502 training is conducted in accordance with established training policies, standards, and programs approved by the Department of the Army and Department of the Air Force in coordination with State National Guard organizations, in view of the broad discretion vested in the Secretaries concerned to regulate the training of National Guard units.

To the Secretary of the Army, July 17, 1972:

This refers to your letter dated July 12, 1972, requesting advice as to whether we would be required to object to the use of Federal funds under the circumstances outlined in your letter.

It is pointed out in your letter that due to extensive floods during the month of June 1972 the Commonwealth of Pennsylvania ordered a number of National Guard units to duty. These units, you say, have performed and are performing outstanding service in the relief of personal hardships and material losses suffered by the people of Pennsylvania.

Although action to call the National Guard units to duty on June 22, 1972, was initiated by the Commonwealth, you state that request has now been made that the Department of the Army designate that duty as annual summer training of the units, to be financed by Federal

funds. You say that you consider such action to be appropriate since this disaster relief situation has afforded the units an unparalleled opportunity to test their organization, procedures and equipment under actual emergency conditions rather than simulated situations.

This duty, it is said, provides an excellent measure of the discipline and leadership of the units. Radio communication and troop movement procedures have undergone the severest possible tests. Logistical units have been put to the test of moving thousands of tons of relief supplies. In the case of medical units, invaluable training under field conditions has been provided.

You stated that the situation fully warrants a determination that the duty constituted proper and adequate annual field training for these units and that you now propose to make a determination that the duty performed shall be considered as annual active duty Federal training, effective June 22, 1972, under the provisions of 32 U.S. Code 502. Funds to cover pay and allowances of National Guard members for annual active duty training have been appropriated and are available under the heading "National Guard Personnel, Army" for both fiscal years 1972 and 1973. You therefore request a decision as to whether such appropriations are available for disaster relief duty in the event you determine that the duty performed shall be considered as annual active duty Federal training.

Section 502, Title 32, U.S. Code, provides in pertinent part as follows:

> (a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—
>
> * * * * * * *
>
> (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.
>
> * * * * * * *
>
> (f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may
> (1) without his consent, but with the pay and allowances provided by law; or
> (2) with his consent, either with or without pay and allowances;
>
> be ordered to perform training or other duty in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

The regular 15-day annual training and any additional training is performed in State Guard status but the training programs conducted are such as are approved by the Department of the Army and the Department of the Air Force in coordination with the State National Guard organizations. While ordinarily such training is conducted in accordance with established training policies, standards and programs (*See* National Guard Regulation 350–1), in view of the

broad discretion vested in the Secretaries concerned to regulate such training we would not be required to object to the use of Federal funds for pay and allowance purposes in the event you determine that such disaster relief duty shall be considered as annual active duty Federal training.

[B-158368]

Foreign Governments—Military Assistance—Grants by Other Than Defense Department

In the implementation of section 402 of the Foreign Assistance Act of 1971 (22 U.S.C. 2321b), the Department of Defense required to consider the value of an excess Defense article ordered by any department, agency, or establishment, except AID, as an expenditure made from funds appropriated under the Foreign Assistance Act of 1961 for military assistance, unless the ordering agency certifies to the Comptroller General that the excess Defense article is not to be transferred by grant to a foreign country or international organization, may charge during fiscal year 1972 the amounts not covered by a certification to the appropriate funds, and may adopt interim procedure beginning with fiscal year 1973, for the use of a "blanket" certification to be renewed each year, since these procedures will ensure congressional control of the distribution of surplus arms.

To the Secretary of Defense, July 18, 1972:

By letter dated May 30, 1972, with enclosures (reference SP), the Assistant Secretary of Defense (Installations and Logistics) requested our views on a letter dated May 30, 1972, sent by him to the General Services Administration (GSA) relating to an interim procedure for implementing the requirements of section 402 of the Foreign Assistance Act of 1971, Public Law 92-226, dated February 7, 1972.

Section 402, in pertinent part, amends section 8 of the act of January 12, 1971, 22 U.S. Code 2321b, to provide in part:

* * * "Subject to the provisions of subsection (b), the value of any excess defense article granted to a foreign country or international organization by any department, agency, or independent establishment of the United States Government (other than the Agency for International Development) shall be considered to be an expenditure made from funds appropriated under the Foreign Assistance Act of 1961 for military assistance. Unless such department, agency, or establishment certifies to the Comptroller General of the United States that the excess defense article it is ordering is not to be transferred by any means to a foreign country or international organization, when an order is placed for a defense article whose stock status is excess at the time ordered, a sum equal to the value thereof shall (1) be reserved and transferred to a suspense account, (2) remain in the suspense account until the defense article is either delivered to a foreign country or international organization or the order therefor is canceled, and (3) be transferred from the suspense account to (A) the general fund of the Treasury upon delivery of such article, or (B) to the military assistance appropriation for the current fiscal year upon cancellation of the order."

This provision was placed in the bill by the Senate Committee on Foreign Relations which, on page 54 of Senate Report 92-404, dated October 21, 1971, explains the provision as follows:

Section 402—Restrictions on Excess Defense Articles

This section amends section 8(a) of the Foreign Military Sales Act Amendments of 1971 to (1) increase the ceiling on the value of excess articles that may be given to foreign countries without a charge against appropriations for military grant assistance, and (2) require that all excess defense articles provided to a country (except Vietnam, see below) or international organization on a grant basis by any U.S. Government agency or department (except the Agency for International Development, see below) be treated in a like manner to excess defense articles provided by the Department of Defense to foreign countries under the authority of Part II of the Foreign Assistance Act of 1961, as amended.

There have been reports to the effect that the CIA has provided and is providing surplus arms to foreign forces in Southeast Asia. If this is true, Congress' efforts to bring the distribution of surplus arms under control is being circumvented.

Hence, the objective of the provisions in subsections (1) and (3) is to ensure that any grants of excess defense articles by the Central Intelligence Agency, for example, be applied to the annual ceiling on surplus military equipment or, once the ceiling is reached, charged against the appropriation for military assistance. Only by making these limitations applicable to other Government agencies and departments, like the CIA, can Congress keep account of the distribution of these arms and hold the program within meaningful limits.

AID's use of excess military equipment is excluded from the provisions of this section because of its use of many of these items, such as vehicles or engineering equipment, for economic assistance programs. Moreover, the provisions of this section are not to apply to the distribution of surplus arms in Vietnam until July 1, 1972, when funding for military aid to that country will be resumed under the regular military assistance program authorized by the Foreign Assistance Act.

In other words this law, in essence, requires the Department of Defense to consider the value of any excess Defense article ordered by another Federal agency (except the Agency for International Development (AID)) as an expenditure made from funds appropriated under the Foreign Assistance Act of 1961, 22 U.S.C. 2151 note, for military assistance, unless the ordering agency certifies to the Comptroller General that the excess Defense article is not to be transferred by grant to a foreign country or international organization. The legislative history states that the provision is meant to ensure that congressional efforts to control the distribution of surplus arms are not being circumvented.

The procedure proposed for fiscal year 1972, as set forth in the Assistant Secretary's letter to GSA is as follows:

We have previously requested the Defense Supply Agency to solicit your assistance, in view of your overall responsibilities for administering the excess and surplus personal property program, to obtain this information from the Federal Civil Agencies involved. Specifically, we require (a) the total dollar value at acquisition cost of excess Defense articles transferred to each Federal Agency during Fiscal Year 1972 (1) which was subsequently transferred or will be transferred to foreign recipients, and (2) which was not subsequently transferred to foreign recipients; (b) that all Federal Agencies be notified of the certification requirement to the Comptroller General pursuant to the aforementioned law. The information requested above will assure compliance with the law on a retroactive basis for Fiscal Year 1972 and will serve to notify the Federal Agencies of the certification requirements of the law. * * *

Under the procedure proposed for fiscal year 1972, as we understand it, the agencies which acquired excess Defense articles in such year will advise GSA—which in turn will advise your Department—as to the total dollar acquisition cost of such articles, including a

breakdown of the dollar acquisition cost of the articles that were or will be transferred to foreign recipients. Where appropriate, such agencies will certify to the Comptroller General as to the articles—including the dollar acquisition cost—which have not been and will not be transferred to foreign recipients. We understand that your Department will charge the appropriate funds for those amounts not covered by a certification. We have no objection to this procedure for fiscal year 1972.

As to the proposed interim procedure, which is to be effective at the latest with the start of fiscal year 1973 (i.e., July 1, 1972), the Assistant Secretary's letter to GSA reads as follows:

> In addition, and as an interim measure, pending development of final procedures and formal revisions to the Federal Property Management Regulations (FPMRs), we intend, subject to the approval of the Comptroller General, to make the following procedures applicable to the transfer of excess Defense articles to all other Federal Agencies, effective as soon as possible but not later than July 1, 1972:
>
> a. Identification and listing of those Federal Agencies which certify to the Comptroller General that they will not order excess Defense articles for subsequent transfer by any means to a foreign country or international organization. These Agencies will not be required to submit a notification of certification to the DoD on each article requested for transfer.
>
> b. Federal Agencies not identified in accordance with subparagraph a above will, when applicable, submit a certification to the Comptroller General and a notification thereof to DoD for each article requested for transfer, prior to release by the DoD. A sample notification of certification to the DoD is provided as an enclosure.
>
> c. Requests from agencies which do not provide a certification under the procedures prescribed in subparagraph a and b above will be forwarded to the Defense Security Assistance Agency (DSAA) for review and approval/disapproval of the transfer.

The interim procedure, as we understand it, would permit the use of a "blanket" certification from those agencies which will state that they will not order excess Defense articles for subsequent transfer by any means to a foreign country or international organization; these agencies will not be required to submit a certification to the Comptroller General or a notification of certification to the Department of Defense on each article requested for transfer. Agencies not executing a "blanket" certification will be required to submit a certification to the Comptroller General and a notification thereof to the Defense Department for each article requested for transfer prior to release of the articles by your department, except that requests from agencies for articles which are not covered by a certification will be transmitted to the Defense Security Assistance Agency for review and either approval or disapproval and, when approved, the articles so transferred shall be considered to be an expenditure made from funds appropriated under the Foreign Assistance Act of 1961 for military assistance.

The Assistant Secretary asks in particular whether we have any legal objection to the use of a "blanket" certification. He states:

> * * * We believe such a certification would meet the requirements of the law in that it would be continuing in nature until revoked by the agency. Thus, as required by law, a certification would, in effect, be made each time a Defense article was ordered. The economies of such blanket certification procedure appear obvious when compared to a procedure which would require each Government Agency to provide a new certification on a separate piece of paper each and every time a Defense article is ordered.

We have reviewed the proposed interim procedures and have no objection to them from either a legal or audit standpoint. Insofar as the "blanket" certification is concerned, we agree with the position expressed by the Assistant Secretary that a "blanket" certification could be viewed as continuing in nature (until revoked) so that the certification would, in effect, be made each time a Defense article was ordered. Moreover, it does not appear to us that congressional control over excess Defense articles necessarily would be more certain if a certification is required upon the ordering of each article than if a "blanket" certification is executed at the beginning of each fiscal year. Accordingly, we feel the use of a blanket certification would comply with the requirements of section 402 of Public Law 92–226. However, we feel such certification should be made at least once each fiscal year to cover articles ordered during that year.

Considering the foregoing, and subject to the last mentioned qualification, we perceive no objection to the proposed interim procedures (including the "blanket" certification) insofar as they are described in the Assistant Secretary's letter with enclosures. Of course, the exact details of the interim and permanent procedures will have to be worked out among the interested agencies. We might further state that at this time we see no reason to object to the incorporation of the "blanket" certification procedure, if such is determined to be useful, into the more permanent procedures which will be developed for implementing section 402 of Public Law 92–226.

[B–176218]

Contracts—Subcontracts—Bid Shopping—Listing of Subcontractors—Compliance Requirement

The low bid for the performance of a boiler replacement and fuel conversion project that failed to list the names of manufacturers or fabricators that would perform two categories of the work of the project to be subcontracted properly was rejected as nonresponsive since the principles enunciated in 49 Comp. Gen. 120 that the subcontractor listing requirement does not apply to firms assembling off-the-shelf items do not encompass manufacturers or fabricators, who, although using off-the-shelf items, must conform to specifications, as the purpose of the listing requirement is to discourage bid shopping and encourage competition among construction subcontractors. Therefore, as other bids received were unreasonably priced, the discarding of all bids and the use of negotiation procedures to accomplish the project were in accordance with 41 U.S.C. 252(c)(14).

Bids—Prices—Reduction Propriety—Reduction After Cancellation of Invitation

A price reduction from the second low bidder after the discarding of bids, because the low bid was nonresponsive and the remaining bids received were unreasonable as to price, was properly rejected since a bid determined to be unreasonably high cannot be said to be that of the "otherwise successful" bidder who pursuant to section 1–2.305 of the Federal Procurement Regulations is entitled voluntarily to reduce its bid after bid opening. Therefore, the decision to cancel the invitation for bids and resolicit the procurement under 41 U.S.C. 252(c)(14), which permits the use of negotiation procedures where bid prices after advertising are unreasonable, was a proper determination.

To the Acting Administrator, General Services Administration, July 21, 1972:

We refer to a supplemental report dated July 7, 1972, and an initial report of June 27, 1972, from your General Counsel, on the protest of W. G. Cornell Co. of Washington, Inc., and John C. Grimberg Company, Inc., a joint venture (Cornell-Grimberg), against the award of a contract to the Limbach Company (Limbach) under an invitation for bids (IFB) covering project No. 08001/08002, for boiler replacement and fuel conversion at the Central and West Heating Plants, Washington, D.C. Also, your General Counsel discussed the protest of Limbach against an award to Cornell-Grimberg and the failure to make an award to Limbach under the IFB.

Cornell-Grimberg, the second low bidder, with a base bid of $14,700,000, protested against an award to Limbach, the low bidder, with a base bid of $13,890,000, alleging that its bid is nonresponsive to the listing of subcontractors requirements of the IFB. Your General Counsel reports that, subsequent to a review of, and agreement with, the allegations of Cornell-Grimberg, the contracting officer rejected the Limbach bid as nonresponsive. In addition, the contracting officer rejected the Limbach bids of Cornell-Grimberg and Norair Engineering Corp. as unreasonable as to price. All bidders were notified of the contracting officer's determination and of the intention to negotiate a contract pursuant to the authority in 41 U.S. Code 252(c)(14), permitting the use of negotiation procedures where bid prices after advertising are not reasonable.

In the initial report on the Cornell-Grimberg protest, your General Counsel advised that, upon further consideration, the contracting officer believed that the Limbach bid was responsive. However, the supplemental report, based on additional review and analysis, takes the position that the initial report was in error and that the Limbach bid is, in fact, nonresponsive. Moreover, the contracting officer refuses to accept a unilateral bid price reduction of $500,000 tendered by Cornell-Grimberg approximately 1 week after bid opening. Therefore, the contracting officer lifted the suspension of the receipt of offers under the negotiated resolicitation and set a closing date of July 11, 1972.

The IFB contained the standard GSA listing of subcontractors

clause which provides for the listing of subcontractors by bidders for various specified categories of work, two of which were "Flue-gas Dust Collection [System]" and "Control Systems." The IFB specifications disclose that the major portion of the flue-gas dust collection system involves the furnishing of an electrostatic precipitator by a precipitator manufacturer. Similarly, the control systems portion of the specifications provides that all control equipment shall be provided as a system by a single experienced manufacturer. To fulfill the work requirements of the flue-gas dust collection system, Limbach listed itself on the subcontractors listing form and also an electrical firm. Further, Limbach listed itself for the control systems portion. Limbach did not list as subcontractors the manufacturers or fabricators of either the precipitator or control systems. Both Cornell-Grimberg and Norair listed manufacturers or fabricators for the two categories.

Your General Counsel's present position, as subscribed to by counsel for Cornell-Grimberg, points to this failure to list the respective manufacturers or fabricators for the two categories to justify the nonresponsiveness of the Limbach bid. He invites our attention to those portions of the subcontractors listing clause which warn bidders that the failure to list subcontractors for every category, or portion thereof, as applicable, will result in the rejection of the bid as nonresponsive. In addition, he relies, in support of his position, on the following excerpt from the clause:

> The term "subcontractor" for the purpose of this requirement shall mean the individual or firm with whom the bidder proposes to enter into a subcontract for manufacturing, fabricating, installing, or otherwise *performing work* under this contract *pursuant to the project specifications* applicable to any category included on the list. [Italic supplied.]

The decision in 49 Comp. Gen. 120, at page 123 (1969), construed the effect of language identical to that quoted above, as follows:

> * * * We are of the view that such language was intended to encompass only those manufacturers and fabricators whose products are specially made to conform with particular IFB specifications, and not to firms such as those under consideration here who merely assemble off-the-shelf items. * * *

With that decision in mind, your General Counsel rationalizes the basis for his conclusion, as follows:

> There is, to our knowledge, no dispute as to the fact that the successful bidder will have to subcontract out the manufacturing or fabricating of the control system and the precipitator, and that the holder of these subcontracts must perform work under this contract (at lease supervision) at the site. It is apparent therefore, that under the literal wording of [the above-quoted paragraph] * * * such manufacturers would be a "subcontractor" required to be listed. The sole question is whether the principles enunciated in 49 Comp. Gen. 120 are sufficiently broad to exclude from the definition of subcontractor the manufacturers of the control system and the precipitator.
>
> The basis for the determination that the manufacturers and/or fabricators are subcontractors and consequently must be included in the listings in question is that (1) although the components included are substantially "off-the-shelf" items, the systems must be specially manufactured or fabricated pursuant to the project specifications, and some major components of the precipitator must be specially fabricated for the purpose of this contract, and (2) the manufacturers of both

the control and precipitator systems are required to perform work at the site, such as supervision of installaton, testing of operation, and instruction in use.

* * * Even assuming that ninety per cent of the cost of the components of the precipitator category are off-the-shelf items, it is our position that the degree of design and engineering required, the critical importance of the ten per cent specifically fabricated components, and the on-site duties of the manufacturers require the manufacturers to be treated as subcontractors rather than mere suppliers.

We conclude, after review of the entire record as supplemented by conferences with the interested parties, that the failure of Limbach to list the respective manufacturers involved in the performance of the two categories in question rendered its bid nonresponsive. In so concluding, we subscribe to the above-quoted position of your General Counsel that bidders were required to list subcontractors who would specially fabricate significant portions of the precipitator and who would perform substantial on-the-site work relating to the precipitator and the control system.

We believe your General Counsel's position is a reasonable interpretation of the contract documents, but we also understand the underlying considerations which prompted Limbach to complete the subcontractor listing form in the manner evidenced by its bid. However, in our opinion, the listing form, while lacking a degree of specificity, afforded adequate information, when read in the light of the IFB specifications, to permit a bidder to properly complete the form.

With respect to the propriety of the PBS refusal to accept the Cornell-Grimberg price reduction, the record reveals that the contracting officer had rejected all bids, including the Cornell-Grimberg bid, as unreasonable as to price before receipt of the price reduction. Therefore, we have no basis upon which to object to such refusal since a bid determined to be unreasonably high cannot be said to be that of the "otherwise successful" bidder who is entitled voluntarily to reduce its bid after opening. This is the context of section 1–2.305 of the Federal Procurement Regulations. Moreover, the record shows that Cornell-Grimberg, although it had received no official communication of the rejection before offer of the reduction, was aware of the contemplated action to reject on the basis of price unreasonableness. *See* B–167299, August 11, 1969; and B–157055, February 17, 1967.

Therefore, we concur with the decision to cancel the IFB and to resolicit the procurement under negotiation procedures.

[B–175781]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions—Extension

Notwithstanding the contract for the sale of a residence incident to a permanent change of station that had been entered into within the 1-year time limit prescribed by section 4.1e of Office of Management and Budget Circular No. A–56 had been canceled, and that a subsequent contract of sale with another purchaser was not executed until shortly after the expiration of the 1-year period, the cost of selling the residence may be reimbursed to the employee under section

4.1e, since the head of an agency, or his designee, may extend the time limitation in situations other than litigation, and a reasonable relationship between the sale or purchase of a residence and a station transfer may be assumed when a contract had been entered into in the initial year, regardless of whether it had been canceled and was not in existence at the expiration of the initial year. Contrary holdings overruled.

To Gilbert H. Dawson, National Security Agency, July 24, 1972:

This refers to your letter dated April 20, 1972, with enclosures, reference Serial: N41/0537F, requesting an advance decision on the claim of Mr. Robert C. Tarr, a civilian employee of the National Security Agency, for costs of selling a residence pursuant to a permanent change of station from Fort George G. Meade, Maryland, to Friendship Annex III, Friendship, Maryland.

Your letter enclosures indicate that the employee commenced his duty at the new station on July 13, 1970, and executed a contract of sale on his Vienna, Virginia, residence on March 27, 1971. The purchaser's loan application was never perfected since the financing source reported that alleged bank deposits were not verified and that domestic difficulties complicated the possibility of loan approval. Under these circumstances the prospective purchaser sought a release from the contract of sale which the employee accepted in consideration of the purchaser's forfeiture of his deposit. The release agreement was executed July 3, 1971; however, a subsequent contract of sale was not executed with another purchaser until July 23, 1971.

Your letter states that the chairman of the "DIRNSA PCS Committee" approved an extension of the settlement period for the sales contract executed on July 23, 1971, to September 17, 1971. You raise a question whether such extension was valid inasmuch as the first contract of sale was effectively canceled on July 3, 1971, and a second contract was not in existence until July 23, 1971, or "nine days after the initial one-year period had expired."

Section 4.1e of Office of Management and Budget (OMB) Circular No. A–56, revised June 26, 1969, provides that the head of an agency or his designee may extend the 1-year time limit for purchasing a residence only in those cases, other than situations involving litigation, when he determines that circumstances justifying the exception exist which preclude settlement within the initial 1-year period of the sale/purchase contract entered into in good faith by the employee within the initial 1-year period.

Our Office has held that section 4.1e authorizes an extension of the 1-year limitation for settlement (other than litigation) only for an existing purchase or sale contract which was entered into during the initial 1 year following a transfer of official station. *See* B–171882, April 2, 1971; B–168392, December 16, 1969, and June 12, 1970.

Apparently the basis for the requirement that a contract of sale or purchase be entered into during the initial 1-year period before an extension of time could be granted was to ensure timely sale or pur-

chase of a residence and to show a reasonable connection between such a transaction and the transfer of official station. Upon further consideration of this subject matter our view is that a reasonable relationship between the sale or purchase of a residence and a transfer of station may be assumed when a contract has been entered into the initial year regardless of whether it has been canceled and thus not in existence at the expiration of the initial year. We note that the regulation is silent as to any requirement that a contract be in existence at the end of the 1-year period. Accordingly, we now hold that under the circumstances related the head of an agency is not precluded from granting an extension of time in any case where a contract has been entered into during the initial year but canceled before the expiration thereof. The decisions cited in the preceding paragraph and others similar thereto no longer will be followed.

In the instant case an extension was actually granted based on a contract entered into during the first year. Accordingly, the voucher with supporting papers is returned herewith and may be processed for payment if otherwise correct.

[B-173735]

Contracts—Default—Procurement From Another Source—Excess Cost Liability—Disposition of Collection

The excess costs that are due the Government incident to a replacement contract awarded upon default by the original contractor may be deducted from the amount earned but withheld from the defaulting contractor and the excess costs transferred from the appropriation account in which held to the miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with the general rule that excess costs recovered from defaulting contractors or their sureties are required by section 3617, Revised Statutes, 31 U.S.C. 484, to be deposited in the Treasury as miscellaneous receipts. Furthermore, there is no distinction between amounts earned by but withheld from defaulting contractors and those recovered from voluntary payments, litigation, or otherwise.

To Paul J. Grainger, United States Department of Agriculture, July 25, 1972:

Reference is made to your letter dated July 6, 1971, received here on July 30, concerning a voucher that has been presented to you for certification which proposes to transfer the sum of $2,464.65 from the appropriation account "12-20X8102(11), Federal Aid Highways Trust Fund" to the miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs."

It is explained in your letter that—

* * * This amount represents excess costs due to a replacement contract awarded to complete work started and defaulted by the original contractor, R. D. Bottorff. When the default occurred, there was $4,136.00 earned by Bottorff, but unpaid. Of this amount $1,085.86 is due the Department of Labor for violation of the Service Contract Act, 41 U.S.C. 351, et seq. After payment to the Department of Labor there remains in the appropriation $3,050.14 earned, but unpaid to the defaulting contractor, Bottorff. As previously mentioned $2,464.65 is scheduled for deposit to Miscellaneous Receipts. Prior to effecting this transfer we request your ruling as to the proper disposition of excess costs.

You refer to our decisions 8 Comp. Gen. 284 (1928); 10 *id.* 510 (1931); 14 *id.* 106 (1934); 40 *id.* 590 (1961); 44 *id.* 623 (1965); and 46 *id.* 554 (1966), all of which articulate the general rule that excess costs recovered from defaulting contractors or their sureties are required by section 3617, Revised Statutes, 31 U.S. Code 484, to be deposited into the Treasury as miscellaneous receipts. However, you state that in none of the decisions that you have reviewed have you found specific discussion clarifying whether amounts earned and not paid must be deposited as a collection. The decision appearing in 8 Comp. Gen. 284 is stated to be the closest but you feel that it is ambiguous and you are not sure that there properly was considered therein the difference between unexpended funds and collections or recoveries.

While the decision in 8 Comp. Gen. 284 required that an amount earned by and withheld from the defaulting contractor be deposited into the Treasury as miscellaneous receipts, the question primarily involved therein was whether or not the amount should instead be deposited into the reclamation fund pursuant to a statutory provision providing generally that all moneys received in connection with operations of the reclamation law be deposited into the reclamation fund.

The decisions 10 Comp. Gen. 510 and 14 Comp. Gen. 106 likewise concerned amounts earned by and withheld from defaulting contractors and which were required to be deposited as miscellaneous receipts; however there was not discussed therein any distinction between amounts earned but unpaid and amounts otherwise recovered from defaulting contractors.

The case in 44 Comp. Gen. 623 concerned, in part, an earned but withheld amount to be taken into consideration for the purpose of computing the amount of excess costs to be recovered from the defaulting contractor. While it was not specifically stated in that decision that the amount withheld properly might remain in the appropriation or whether it must be deposited as miscellaneous receipts, the general rule with respect to disposition of excess costs was set out therein and reference was made to 8 Comp. Gen. 284 and 14 *id.* 106 which, as stated above, required such amounts earned but withheld to be deposited as miscellaneous receipts.

The most recent decision which you referred to, 46 Comp. Gen. 554 (1966), concerned the withholding of an amount owing to the defaulting contractor under a contract other than the contract under default. While that amount as well as any that might otherwise be collected as excess costs were directed to be deposited as miscellaneous receipts, no distinction was drawn between amounts withheld and those otherwise recovered.

The remaining decision referred to in your letter, 40 Comp. Gen. 590, as partially quoted in the letter permitted the balance remaining under the defaulted contract to be used for reprocurement, but no portion of such balance had been earned by the defaulting contractor.

The decision also repeated the general rule that amounts recovered from defaulting contractors are required to be deposited into the Treasury as miscellaneous receipts. It found no authority whereby any excess costs recovered from the defaulting contractor or his surety could be used to reimburse the appropriation involved but held that such excess costs need not be considered in computing statutory maximum cost limitations. There were not for consideration any amounts earned by the defaulting contractor but not paid to him. Such case, therefore, is not relevant to the matter here involved.

We agree with your observation that in the decisions involving recovery of excess costs there has been little or no discussion regarding the distinction to be made between amounts earned by but withheld from defaulting contractors and those recovered through voluntary payments, litigation, or otherwise, nor, in general, do we believe any distinction properly can be made.

Accordingly, and if otherwise correct, the voucher which is returned herewith properly may be certified.

[B-174012]

Contracts—Negotiation—Competition—Aggregate Award Basis Effect

The cancellation of a request for proposals (RFP) for the inspection, maintenance, and repair of three types of electron microscopes because the specifications were considered inadequate for competitive procurement, and the reissuance of the RFP on the basis an award "would be made in the aggregate, price, and other factors considered," did not result in the price competition contemplated by section 1-3.807-1(b)(1) of the Federal Procurement Regulations since separate awards under the initial RFP would have obtained the services for less. Therefore, since justification for an aggregate award is sound only if the Government realizes a substantial savings from the consolidation, the aggregate award requirement was both unnecessary and improper, and rejection of the low offeror (on two items) who had not complied with the aggregate requirement was not justified.

Bidders—Qualifications—Capacity, Etc.—Technical Criteria Utilization

Where offerors were not required to submit technical proposals to service electron microscopes but only to offer to conform to the best practices of the industry, and the factors making up the technical criteria were evaluation of capacity factors, the determination an offeror was technically unacceptable amounted, in essence, to a determination of nonresponsibility for reasons of capacity that required a referral to the Small Business Administration (SBA) under paragraph 1-1.708.3 of the Federal Procurement Regulations. Furthermore, the award of the nonpersonal service, fixed price, contract to the offeror determined capable of providing the highest quality services was without authority and, therefore, if the SBA will issue a Certificate of Competency to the rejected offeror, the award made should be terminated for the convenience of the Government.

To the Secretary of Health, Education, and Welfare, July 25, 1972:

Reference is made to letters dated December 16, 1971, and March 9, 1972, from the Director of Procurement and Materiel Management, OASAM, furnishing us a report and a supplemental report in connection with a protest by Siems International Electron Microscope Serv-

ice (Siems) against the cancellation of request for proposal (RFP) NIH-71-P(T)-335CC (hereafter RFP-335CC), the resolicitation of the requirement, and the award to another firm under RFP No. NIH-72-P(T)-120CC (hereafter RFP-120CC) by the National Institutes of Health (NIH).

RFP-335CC, issued on March 29, 1971, was for the inspection, maintenance and repair of seventeen Siemens electron microscopes, Models 1, 1A and 101, under Item Nos. 1, 2 and 3, for the period April 1, 1971, through March 31, 1972. According to the record, RFP-335CC was issued only to the Siemens Corporation, the manufacturer of the microscopes, since a noncompetitive procurement was contemplated, and the RFP was synopsized in the Commerce Business Daily for informational purposes only. However, Siems requested a copy of the solicitation prior to closing date for the purpose of submitting an offer. Siems submitted an offer of $1,300 per instrument for Models 1 and 1A, while Siemens made an offer of $1,600 per instrument for Models 1 and 1A, and $2,000 for Model 101.

After an evaluation of the Siems proposal, NIH did not consider Siems' service adequate to meet requirements. NIH based this conclusion on the fact that (1) Siems would not have access to spare parts or the latest training techniques essential to servicing updated instruments; (2) Mr. Siemer Siems' prior service, as an employee of Siemens, had not been completely satisfactory; and (3) on occasions Mr. Siems, who was also the founder of the Siems firm, while an employee of Siemens, found it necessary to contact the company for assistance, which he would be unable to do as an independent operator. NIH pointed out that its scientists required "high resolution" microscopy which exceeded ordinary service and necessitated the service of outstanding technicians. NIH further stated that award in the aggregate was necessary to provide an economical inducement for the contractor to provide proper servicing for all types of equipment, although the solicitation permitted awards on an item basis (par. 10, Standard Form 33A).

The contracting officer subsequently determined that Siems was not responsible and this determination was referred to the Small Business Administration (SBA), pursuant to Federal Procurement Regulations (FPR) 1-1.708. SBA issued Siems a Certificate of Competency (COC) on June 15, 1971, subject to reconsideration if the award was not made within 60 days. The contracting officer, pursuant to FPR 1-1.708.3, requested that SBA reconsider its decision to issue a COC. A meeting was held in connection with the COC which was attended by representatives from SBA, NIH, and the Department of Health, Education, and Welfare (DHEW). While SBA refused to withdraw the COC, it apparently agreed with the NIH and DHEW representatives that if the specifications were inadequate, as NIH maintained,

the specifications should be revised and the requirement resolicited. It would also appear that those present at the meeting were in agreement that an aggregate award might be appropriate and, if so, should be included in the new specifications.

After further analysis it was decided that the specifications were inadequate for competitive procurement and on September 17, 1971, both Siems and Siemens were advised that no award would be made on RFP–335CC and that the requirement would be resolicited at a later date. RFP–120CC was subsequently issued for the inspection, maintenance and repair of Siemens, Model 1, 1A and 101, electron microscopes for the period January 1, 1972, through December 31, 1972. The solicitation specifically stated that award would be in the aggregate, price and other factors considered. The covering letter accompanying RFP–120CC issued November 29, 1971, stated that an aggregate award was contemplated and any offer not quoting on all three microscopes would be declared nonresponsive. The covering letter also provided:

> Each offer must be accompanied with appropriate documentation in sufficient detail to permit evaluation by the Government in the following areas of significant interest:
>
> TECHNICAL EVALUATION CRITERIA
>
> 1. Pool of skilled service technicians and engineers in terms of numbers and qualifications. Submit names of individuals actually to be assigned to service the instruments, and a list of potential substitutes (reasonable number) together with a resume of their experience and educational backgrounds. NIH requires best possible assistance in solving difficult technical problems. 30 points.
>
> 2. Sufficiency of stock of spare parts and ability to quickly obtain the quantity and variety of spare parts which could conceivably be reasonably required in service of the instruments. 20 points.
>
> 3. Cognizance of new design changes and improvements in servicing techniques developed by the manufacturer of the instruments. Experience and ability to service the needs of high resolution microscopists. Submit names, organization and phone numbers of "high resolution" microscopists who have been service customers, 25 points.
>
> 4. Response to emergency situations and potential for remedying the problem with minimum down time. See specifications for response time to calls for service. 25 points.
>
> You are requested to submit any new material which will aid in the technical evaluation together with copies of data previously submitted. Mere reference to data previously submitted will not suffice.
>
> Award may be made without discussion of proposals received, hence, proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

The specifications for RFP–120CC included provisions requiring that the successful contractor (1) provide service under "high resolution" conditions, (2) maintain an adequate supply of spare parts, and (3) have a reasonable number of qualified personnel to respond to emergency situations within 24 hours. The "High Resolution" provision defined that term as bringing the electron microscope to the guaranteed resolution of Siemens electron microscopes, point to point, and required that offers be accompanied by a certification and/or recommendation as to the offeror's ability to service and test instruments of that caliber without resorting to trial and error methods.

In a letter dated December 15, 1971, Siems protested the proposed aggregate award for the servicing and maintenance of all three models. It was the contention of Siems that it was not necessary to quote on all three models on the original solicitation and that NIH, knowing that Siems was not familiar with Model 101, had asserted, in RFP–120CC, the requirement that offerors quote on all three models. It was contended by Siems that this was done in order to eliminate that firm from competition. Siems mentioned several institutions where contracts were awarded covering Models 1 and 1A, while separate contracts were awarded covering Model 101.

The proposals were opened as scheduled on December 20, 1971. Siems submitted a quote of $1,000 per instrument for Models 1 and 1A, while Siemens submitted a quote of $1,600 per instrument for Models 1 and 1A, and $2,000 per instrument for Model 101. Both offers were submitted to an evaluation committee made up of prominent NIH scientific personnel who evaluated the offers in accordance with the criteria set forth in the contracting officer's covering letter. The Siems offer received substantially fewer points from each of the committee members than did Siemens' offer. According to the contracting officer, it was determined that in view of the decision reached by the evaluation committee and the fact Siems had not quoted on all three models, that Siems' offer was not only technically unacceptable, but nonresponsive to the solicitation.

The latest 3-month extension of Siemens' contract (NIH–71–7) expired on December 31, 1971, and on January 3, 1972, NIH made a determination to award the contract to Siemens, prior to resolution of the protest. The basis for this determination was stated to be an urgent need for services as stated in the evaluation committee's recommendation for immediate award to Siemens as the sole responsive offeror. No explanation was given as to why NIH did not seek another extension of Siemens' prior contract, although it appears that Siemens had accepted three 3-month extensions of its contract under which (according to informal advice received from your agency) the services had been satisfactorily performed at prices of $1,312.65, for Models 1 and 1A, and $1,575 for Model 101.

It is Siems' contention that with the exception of the requirement that the award be made in the aggregate, there is no substantive difference between the two solicitations, and even the requirement in RFP–120CC that the successful contractor provide services under "high resolution" conditions adds nothing to the solicitation, but merely describes the skill level required in servicing the microscopes. We note, in this connection, that the specifications of both solicitations required all necessary adjustments: the maintenance to be comparable with the best practices of the industry, and the workmanship performed by the contractor to be of a quality acceptable to the Government. In re-

gard to the "spare parts" requirement, Siems states that the ability to obtain spare parts is an implicit requirement where the successful bidder will be required to inspect, maintain and repair equipment, and RFP–335CC required the contractor to furnish manufacturer's approved repair parts. Concerning the "technical personnel" addition, the protestant states that this adds nothing to the procurement, but merely adds criteria for determining whether it was qualified in this particular area, a determination which SBA already made, under RFP–335CC, in Siems' favor. The protestant further states that none of the remaining provisions which were added to RFP–120CC have an effect on the present procurement.

It is protestant's view that since the only substantive difference between the two solicitations is the requirement that award be made in the aggregate, the only point at issue is whether it is necessary and proper that the award be made in the aggregate. Protestant does not feel that award in the aggragate is either necessary or justified under the circumstances of the present case. Additionally, Siems alleges that it was the intent of NIH under both solicitations to make an unauthorized sole source solicitation award to Siemens.

We agree with Siems that the initial question with which we must deal is whether award in the aggregate was necessary or proper. In this regard, both the contracting officer and the Director of Procurement and Materiel Management stated that award in the aggregate was necessary "to provide an economic inducement for the contractor to provide emergency service within 24 hours for all types of equipment." However, there is nothing in the record to justify a conclusion that either Siemens or Siems could not reasonably have been expected to offer 24-hour emergency service in the event the solicitation had provided for awarding contracts for servicing less than all of the microscopes. Moreover, the record fails to establish that the bidders could reasonably have been expected to offer, or that they did offer, these services at a lesser price when award in the aggregate was required. Conversely, Siemens' offer under RFP–120CC, requiring award in the aggregate, was identical to its offer under RFP–335CC, which did not require that award be in the aggregate. Moreover, the record indicates that other Government installations using the same three types of microscopes have awarded separate contracts to Seims and Siemens, one for servicing Models 1 and 1A, and the other for servicing Model 101. There is no indication that emergency service was not promptly performed under these contracts or that contract prices were adversely affected thereby.

In addition, FPR 1–1.301–1 requires that procurements be made on a competitive basis to the maximum practicable extent. Here, the record does not establish that separate awards were not practicable and, contrary to the established policy of obtaining competition in procurements, use of the aggregate award provision precludes re-

ceipt of a responsive offer from the only apparent source of competition for Siemens on Models 1 and 1A. Without affording Siems the opportunity to compete for the servicing of Models 1 and 1A, it is apparent that the only possibility of obtaining price competition for those models, as contemplated by FPR 1-3.807-1(b)(1), was eliminated. Also, see subsection (ii)(a) of that regulation which makes an exception to a presumption of adequate price competition when the solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete.

The desirability of consolidating requirements to the maximum extent possible is also given as a justification for an aggregate award. While consolidation of requirements is considered to be a sound procurement practice in those instances where the Government can expect to realize a substantial savings as a result of such consolidation, the record does not indicate that NIH had any such expectation at the time it was decided to issue a resolicitation requiring award in the aggregate. This is evidenced by the fact that by making two separate awards under RFP-335CC, i.e., an award to Siems for Models 1 and 1A, and an award to Siemens for Model 101, the Government could have obtained the required services for approximately $4,200 less than could be realistically expected from an aggregate award to Siemens, who offered, under RFP-335CC, to service the fourteen 1 and 1A models for $1,600 per microscope while Siems offered to service the same microscopes for $1,300 per microscope. We are unable to conclude that NIH could, in good faith, have expected Siemens to lower its offer on a resolicitation, since undoubtedly Siemens realized that it would be the only firm making an aggregate offer under the resolicitation.

In view of the above, we can only conclude that the aggregate award requirement in the present case was both unnecessary and improper. Since failure of an offer to comply with an improper requirement in the solicitation will not justify its rejection on the grounds of nonresponsiveness, we must also conclude that Siems' offer under RFP-120CC was improperly rejected, since the only reason given for the determination that Siems' offer was nonresponsive was that it failed to offer to service all three types of microscopes.

With respect to the evaluation committee's conclusion that Siems' offer was "technically unacceptable," the record does not indicate that either Siems or Siemens actually submitted a technical proposal, as such proposals are generally constituted, although both firms did list (1) qualified personnel who would or could work on the contract; (2) response time to emergency calls; and (3) their spare parts capacity. Conversely, it appears that both concerns merely offered to service and maintain the microscopes in the manner required by the solicitation for a fixed amount of money per microscope. The record does not

indicate that when NIH sent out the RFPs it either solicited or expected to receive differing technical approaches on how to service and maintain the microscopes, but only that the servicing and maintenance offered should conform to the best practices of the industry, and be of a quality acceptable to the Government, which could include bringing the microscopes to the manufacturer's guaranteed resolution.

In regard to the technical evaluation criteria listed in the covering letter accompanying RFP–120CC, we believe there is merit in the protestant's position that the factors making up the criteria are factors which are properly for consideration in the evaluation of Siems' capability or capacity to perform the services offered. Matters of capacity reflecting on an offeror's responsibility do not change in character merely by having been expressed in terms of responsiveness in the solicitation. 39 Comp. Gen. 173, 178 (1959); 45 Comp. Gen. 4, 7 (1965).

Concerning the changes in the second solicitation (RFP–120CC) which constitute the principal bases advanced as to the necessity for cancellation of RFP–335CC, the first change that we note is a requirement that the contractor provide service under "high resolution" conditions. While this provision requires the contractor to bring the microscopes to the resolution guaranteed for the microscopes, we are not persuaded that this action could not also be reasonably required of the contractor under the specifications of both solicitations which provide that the contractor shall make all necessary adjustments; furnish maintenance comparable with the best practices of the industry; perform workmanship of a quality acceptable to the Government; and promptly rectify any instances of nonacceptable service at no extra cost to the Government. In any event, whether Siems is capable of meeting this requirement is clearly a question of capacity to be finally decided by SBA.

Regarding the change which requires the contractor to have an adequate supply of spare parts, we note that one of the reasons given in support of the procuring activity's determination, under RFP–335CC, that Siems' service was inadequate to meet their requirements was that Siems did not have access to spare parts. SBA was not convinced that such was the case, as indicated by the issuance of a COC. Similarly, in connection with the change requiring a reasonable number of qualified technicians and engineers, it would appear that SBA was of the opinion that Siems had a sufficient number of qualified personnel to perform the services or it would not have issued a COC to Siems.

Thus, the determination by the proposal evaluation committee that Siems' offer was technically unacceptable amounted, in essence, to a determination that Siems was not responsible for reasons of capacity which, when adopted by the contracting officer, was a matter subject to referral to SBA under FPR 1–1.708.3.

We believe the record before us requires a conclusion that the motivating factor for not making an award to Siems under RFP-335CC, and for the cancellation of that RFP, was the procuring activity's belief that the services furnished by Siemens would be of a higher quality than the services furnished by Siems. While there is evidence that this could be true, the record does not establish that Siems could not have satsifactorily met the essential minimum needs of NIH as to Models 1 and 1A, especially since that firm was issued a COC which was not withdrawn even after reconsideration by SBA at the request of NIH. It is well established that there is no authority to base the award of a nonpersonal service, fixed price, contract on a determination that a certain bidder is believed to be capable of providing the highest quality of services. *See* 43 Comp. Gen. 353; 41 Comp. Gen. 484.

In view of our conclusion that rejection of Siems' offer as nonresponsive was improper, and our conclusion that the technical defects found by the evaluation committee reflected upon Siems' capacity, it is our opinion that the question of Siems' capacity to service the Model 1 and 1A microscopes must now be submitted to SBA for a determination as to whether Siems is entitled to a COC covering that portion of the services on which it bid. If SBA issues a COC as to those services, that portion of Siemens' contract should be terminated for the convenience of the Government and an award for such terminated portion should be made to Siems.

We would appreciate advice of whatever action is taken on our recommendation.

The files transmitted with the letters dated December 16, 1971, and March 9, 1972, from the Director of Procurement and Materiel Management are returned.

[B-176281]

Funds—Foreign—United States Owned Currencies—Interest Earned

The interest on loans of excess foreign currencies made under section 234(c) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of the United States held in the accounts of the Treasury—and the interest accrued on foreign currency acquired in the administration of insurance or guaranty portfolios and held in interest bearing depositories designated by the Treasurer of the United States pending their sale for dollars need not be deposited into the general fund of the Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by the Overseas Private Investment Corporation to carry out its purposes since the interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within the meaning of section 236 of the act, which authorizes their retention by the corporation.

To the President, Overseas Private Investment Corporation, July 26, 1972:

Reference is made to your letter of June 16, 1972, in which you request a ruling on two questions as follows:

1. Does the Overseas Private Investment Corporation retain interest on loans of excess foreign currencies made under Section 234(c) of the Foreign Assistance Act of 1961, as amended, ("FAA");
2. Does the Overseas Private Investment Corporation retain the interest accrued on foreign currency acquired in the administration of its insurance or guaranty portfolios and held in interest bearing depositories.

In the absence of legislation authorizing otherwise, the amounts involved would be for depositing into the general fund of the Treasury as miscellaneous receipts in accordance with section 3617 of the Revised Statutes, codified in 31 U.S. Code 484. The questions arise because of doubt as to whether those amounts constitute "revenues and income transferred to or earned by the Corporation from whatever source derived" within the meaning of section 236 of the Foreign Assistance Act of 1961, as amended, 22 U.S. Code 2196, which authorizes the Overseas Private Investment Corporation to retain them.

With reference to the first question, subsection 234(c) was added to the Foreign Assistance Act of 1961, by that part of the Foreign Assistance Act of 1969, approved December 30, 1969, Public Law 91-175, 83 Stat. 805, 22 U.S.C. 2162, which created the Overseas Private Investment Corporation. That subsection specifically authorizes the Corporation—

To make loans in United States dollars repayable in dollars or loans in foreign currencies (including without regard to section 1415 of the Supplemental Appropriation Act, 1953, such foreign currencies which the Secretary of the Treasury may determine to be excess to the normal requirements of the United States and the Director of the Bureau of the Budget may allocate) to firms privately owned or of mixed private and public ownership upon such terms and conditions as the Corporation may determine. * * *

The excess currencies made available to the Corporation under subsection 234(c) are general assets of the United States held in accounts in the Treasury. As explained in one of the Memoranda of Law attached to your letter, these currencies are derived from a variety of sources including repayment of loans made under the Mutual Security Act of 1954, as amended, the Foreign Assistance Act of 1961, as amended, and the Agricultural Trade Development and Assistance Act of 1954, as amended (Public Law 480). In addition to other restrictions loans made with these currencies may be restricted by provisions in the acts under which they were first accrued. It is not suggested that retention of repayments of principal of excess currency loans is authorized as the retention authority of section 236 refers only to "revenues and income."

The second question, involving interest on foreign currencies received by the Corporation in the administration of its insurance or guarantee portfolios, relates to currencies which have been deposited into depositories designated by the Treasurer of the United States pending their sale for dollars.

Section 236 of the Foreign Assistance Act of 1961 was also included in that part of the Foreign Assistance Act of 1969 approved Decem-

ber 30, 1969, Public Law 91–175, 83 Stat. 805, which created the Overseas Private Investment Corporation. It provides:

> SEC. 236. INCOME AND REVENUES. In order to carry out the purposes of the Corporation, *all revenues and income transferred to or earned by the Corporation, from whatever source derived,* shall be held by the Corporation and shall be available to carry out its purposes, including without limitation—
> (a) payment of all expenses of the Corporation, including investment promotion expenses:
> (b) transfers and additions to the insurance or guaranty reserves, the Direct Investment Fund established pursuant to section 235, and such other funds or reserves as the Corporation may establish at such time and in such amounts as the Board may determine; and
> (c) payment of dividends, on capital stock, which shall consist of and be paid from net earnings of the Corporation after payments, transfers, and additions under subsections (a) and (b) hereof. [Italic supplied.]

During its legislative history, section 236 was designated as section 326 of H.R. 14580. As to that section, the report of the House Committee on Foreign Affairs in House Report No. 91–611, dated November 6, 1969, at page 30 stated:

> This section provides for the use of revenues and income earned by the Corporation, including fees from insurance and guaranty programs, interest from loans, dividends, and other receipts characterized as income. Such funds shall be available to carry out the Corporation's purposes, including the payment of all operating and administrative expenses incurred in conjunction with the Corporation's activities. In addition, the Board of Directors may make allocations from this account to the Insurance or Guaranty Reserves, the Direct Investment Fund, or other funds or reserves which the Corporation may establish. The Corporation will then pay to the U.S. Treasury dividends consisting of its net earnings after payment of expenses and allocation to reserves and other funds.

See to the same effect page 16 of the Committee Print of the "Section-by-Section Analysis of the Proposed Foreign Assistance Act of 1969" dated June 12, 1969, prepared by the Agency for International Development for the use of the members of the Committee on Foreign Affairs and of the House of Representatives in connection with H.R. 11792, an earlier bill which included a similar section.

Neither section 236 nor its legislative history as set out above or elsewhere nor any other provision that we could find expresses a legislative intent directed toward exempting the specific amounts in question from the requirement of being deposited into the general fund of the Treasury as miscellaneous receipts. Nevertheless there is no doubt that these amounts are acquired as the result of the activities of the Corporation. The language of section 236 is broad and we believe that use of the words "all revenues and income * * * earned by the Corporation, from whatever source derived" appearing in that section justifies the conclusion that these amounts be held by the Overseas Private Investment Corporation to be included in amounts available for carrying out its purposes. In view thereof, the questions presented are answered in the affirmative.