Decisions of The Comptroller General of the United States

VOLUME 52 Pages 909 to 1250

JUNE 1973

WITH

CUMULATIVE TABLES AND INDEX DIGEST

JULY 1, 1972–JUNE 30, 1973

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300104700

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 95 cents (single copy) except for June issue which varies in price. This issue $2.45; subscription price; $10.80 a year; $2.70 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Edwin W. Cimokowski

John W. Moore

Paul Shnitzer

Table Of Decision Numbers

		Page
B-131836	June 5	912
B-159950	June 6	923
B-172061	June 27	977
B-175028	June 26	967
B-175723	June 28	981
B-176395	June 15	941
B-176404	June 26	969
B-176881	June 7	930
B-177152	June 6	924
B-177400	June 15	945
B-177515	June 13	936
B-177610	June 21	957
B-177691	June 28	987
B-177887	June 29	997
B-178010	June 4	909
B-178020	June 5	917
B-178038	June 22	962
B-178132	June 12	932
B-178137	June 20	952
B-178156	June 5	920
B-178237	June 6	927
B-178270	June 26	973
B-178362	June 18	950
B-178414	June 20	955
B-178428	June 28	993
B-178574	June 22	964

Cite Decisions as 52 Comp. Gen.—.

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

[B–178010]

Pay—Courts-Martial Sentences—Forfeitures—Execution—Effective Date for Forfeiture Purposes

A Marine Corps officer whose sentence for violating the Uniform Code of Military Justice on November 22, 1972, was approved as to the forfeiture of pay and allowances, but not as to dismissal, and finally executed on December 18, 1972, following which the officer was detached from duty and ordered to travel to his home of record without entitlement to active duty pay and allowances, where he was released on December 31, 1972, and transferred to the Reserves with 45 days' unused leave is entitled to pay and allowances through December 17, 1972, pursuant to the interpretation of 10 U.S.C. 857 and 871 that the day of the execution of a sentence controls; to mileage for authorized travel by privately owned automobile as provided by paragraph M4157 of the Joint Travel Regulations, but not to payment for the unused leave as the forfeiture imposed was "all pay and allowances."

To C. B. Palmer, June 4, 1973:

Further reference is made to your letter dated December 22. 1972, which was forwarded here by letter dated February 8, 1973, Headquarters, United States Marine Corps, requesting an advance decision concerning the legality of crediting the pay account of First Lieutenant John J. Kazalonis, 189 38 1916, U.S. Marine Corps Reserve, with accrued leave pay and travel allowance on separation in the circumstances described. Your request has been assigned Control No. DO–MC–1181 by the Department of Defense Military Pay and Allowance Committee.

The record indicates that by General Court-Martial Order No. 49–72 Headquarters, First Marine Division, dated November 22, 1972, Lieutenant John J. Kazalonis was found guilty of violations of the Uniform Code of Military Justice. He was sentenced to dismissal from the service and forfeiture of all pay and allowances. On the same day, November 22, 1972, the Convening Authority, Headquarters, 1st Marine Division, approved only so much of the sentence as provided for total forfeitures of all pay and allowances.

On December 18, 1972, the Convening Authority issued the following:

In the General Court-Martial Case of First Lieutenant John J. KAZALONIS, 189 38 1916, U.S. Marine Corps Reserve, on active duty, the approved sentence to forfeiture of all pay and allowances as promulgated in General Court-Martial Order Number 49–72, this headquarters, dated 22 November 1972, is ordered executed effective 22 November 1972.

By orders dated December 21, 1972, Lieutenant Kazalonis was detached from his then duty station and ordered to proceed to the place from which ordered to active duty and was released from active duty on December 31, 1972. Upon release from active duty Lieutenant Kazalonis was transferred to the U.S. Marine Corps Reserve, Ready Reserve Forces. The orders further stated that they were not to be

considered as involuntary release from active duty and that he had 45 days' unused leave due.

Paragraph 2 of the same orders was amended the same day, December 21, 1972, to read:

> You are not entitled to or authorized active duty pay and allowances for travel to your home of record. You are authorized to travel to your home of record via privately owned conveyance.

You ask whether the total forfeiture of pay and allowances applies to accrued leave pay for leave earned prior to and after the date of execution of the General Court-Martial sentence when the member's separation is honorable. You also ask whether the travel allowance on separation is subject to forfeiture under the same conditions.

In transmitting your requests here, the Head, Disbursing Branch, Fiscal Division, Headquarters United States Marine Corps, asks an additional question—whether the officer is entitled to pay and allowances for the period November 22 through December 17, 1972. It is stated that the officer was not paid pay and allowances for any period after November 21, 1972.

Section 857, Title 10, U.S. Code, governing the effective date of sentences, provides in pertinent part:

> (a) Whenever a sentence of a court martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended or deferred, the forfeiture may apply to pay or allowances becoming due on or after the sentence is approved by the convening authority.
>
> * * * * * * *
>
> (c) All other sentences of courts-martial are effective on the date ordered executed.

Under section 871(d) of Title 10, the convening authority may suspend the execution of any sentence, except a death sentence.

In *United States* v. *Watkins*, 8 CMR 87 (1953), the Court of Military Appeals in discussing when a forfeiture becomes effective considered the above statutory provisions. It held that section 857 of Title 10 (Article 57 of the Uniform Code of Military Justice) must be construed along with section 871 (Article 71 of the Code). When that is done, the court said in part that the various portions of a sentence become effective (b) if in addition to confinement, unsuspended, sentence includes forfeitures, it may become effective on the date the convening authority approves; (c) if confinement is not included, forfeitures may become effective on the date the convening authority orders them into execution. The court drew a clear distinction between approval of a sentence and when it is ordered executed. In *United States* v. *McDaniel*, 21 CMR 182 (1956), the Court of Military Appeals held that approval of a sentence and its execution are two distinct

legal events. However, in one instrument the convening authority can act in regard to the two matters, approval and execution.

Section 88, Manual for Courts-Martial, United States, 1969 (Revised edition) "Powers of the Convening Authority with respect to the Sentence," provides in part:

> Execution of sentence (1) *Authority to order*, Except in the case of a new trial (110b), the convening authority may, at the time of approval of any sentence, order its execution if, as approved by him, it does not involve a general or flag officer, a sentence of death or dismissal, or an unsuspended sentence of dishonorable discharge, bad-conduct discharge, or confinement for one year or more. * * *.
> (3) *To forfeitures of pay and allowances.* If a sentence as approved by the convening authority does not include confinement or if the sentence to confinement is to be suspended, any approved forfeitures may not be *applied* until the sentence is ordered into execution. * * *.

Since Lieutenant Kazalonis' sentence did not include confinement and since the convening authority only approved that portion of the sentence that provided for total forfeiture of pay and allowances, the further action of this convening authority on December 18, 1972, ordering the execution of the sentence effective November 22, 1972, appears to be inconsistent with the law and the above-cited authorities. It is our view that since the sentence was not ordered into execution by the convening authority until December 18, 1972, collection of forfeitures prior to that date would not be proper. Thus, Lieutenant Kazalonis is entitled to pay and allowances through December 17, 1972.

Concerning the question whether a sentence of total forfeiture of all pay and allowances would prohibit the payment for 45 days' accrued leave at the date of Lieutenant Kazalonis' release from active duty under honorable conditions, section 501(e) of Title 37, U.S. Code, provides:

> A member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or Environmental Science Services Administration who is discharged under other than honorable conditions forfeits all accrued leave to his credit at the time of his discharge.

In the instant case, while the officer's release from active duty was under honorable conditions, the court-martial sentence by its express terms imposed the forfeiture of "all pay and allowances." Since the right to a leave payment accrues at the date of discharge, it is our view that a sentence to forfeit all pay and allowances includes a payment for unused accrued leave which is part of the member's compensation for active military service. In 34 Comp. Gen. 95 (1954) we held that a dishonorable discharge of an enlisted man whose military record had been corrected to show honorable discharge, but not corrected to delete the pay forfeiture provision of a court-martial sentence, may not be paid for any unused leave, which is part of the member's compensation for active military service and was forfeited by the court-

martial sentence. *See, also*, B–122440, June 8, 1955, and B–160170, October 11, 1966.

In the light of the above, and in view of the sentence to forfeit all pay and allowances, the officer is not entitled to be compensated for unused accrued leave standing to his credit at the time of his release from active duty.

The orders of December 21, 1972, as amended, releasing Lieutenant Kazalonis from active duty, provided in pertinent part:

> You are not entitled to or authorized active duty pay and allowances for travel to your home of record. You are authorized to travel to your home of record via privately owned conveyance.

Section 404(a)(3) of Title 37 of the U.S. Code provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under orders upon release from active duty from his last duty station to his home or the place from which he was called or ordered to active duty.

Joint Travel Regulations paragraph M4157 implementing that law provides that a member who is separated from the service or relieved from active duty under conditions prescribed in subparagraph 2 or under conditions other than those outlined in subparagraphs 3 through 5 or under paragraph M4158 (none of which are applicable to Lieutenant Kazalonis) will be entitled to mileage from his last duty station to his home of record or the place from which he was ordered to active duty, as the member may elect. Since Lieutenant Kazalonis was released from active duty under honorable conditions, he is entitled under the law and regulations to travel and transportation allowance consistent with his orders of December 21, 1972.

Accordingly, payment for mileage to Lieutenant Kazalonis for the travel via privately owned vehicle in accordance with the orders of December 21, 1972, as amended, is authorized.

[B–131836]

Family Allowances—Separation—Type 2—Ship Duty—Residence Location

Navy members assigned in excess of 30 days to ship overhaul at the Norfolk Naval Shipyard, located 3 miles from home port, Norfolk, Virginia, who had the option to move their families at Government expense to the Norfolk area but chose not to do so are not entitled to payment of the family separation allowance provided by 37 U.S.C. 427(b)(2) as they have no greater right than those members who had moved their families to the vicinity of Norfolk and because they continued to reside with their dependents are not entitled to a separation allowance. The fact that a member did not move his family to the vicinity of Norfolk in anticipation of extended sea duty gives him no vested right to the allowance since frequent changes, often at short notice, is an incident of military service. Any payments made on the basis of misinterpreting 43 Comp. Gen. 527 would be proper for waiver under 10 U.S.C. 2774.

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

We refer to letter dated March 30, 1973, from the Under Secretary of the Navy, in response to our letter of February 9, 1973, in which we requested an expression of your views concerning the propriety of payment under 37 U.S. Code 427(b)(2) of family separation allowance (FSA) to about 230 members on three ships which have been or are being overhauled at the Norfolk Naval Shipyard in Portsmouth, Virginia, located about 3 miles from Norfolk, Virginia, the home port of the ships.

In our letter we stated that none of these members' families reside in the Norfolk area and that when they were assigned to the ships the members had the option of moving their families at Government expense to the Norfolk area, but chose not to do so. While the ships were at Norfolk such members had no entitlement to FSA, but were paid the allowance for the period when the ships to which they were assigned were being overhauled in Portsmouth. We pointed out that those members who had moved their families to Norfolk, the home port of the ships, did not receive the allowance and it was further pointed out that had the other members moved their families to the Norfolk area they too would not have been entitled to the allowance while their ships were at Portsmouth for overhaul since they still would have been within easy commuting distance of their families.

In our letter we referred to two of our decisions, 43 Comp. Gen. 444 (1963) and 43 *id.* 527 (1964) in which we held, contrary to an earlier decision, 43 Comp. Gen. 332 (1963), that a member whose dependents do not reside at or in the vicinity of the home port would be entitled to FSA, if otherwise qualified, when the member's vessel is away from its home port and there results a separation of the member from his dependents by reason of his military assignment.

It was noted, however, that the decisions did not consider the situation of a short move of the vessel in the vicinity of the home port such as the movement from Norfolk to Portsmouth. Since no entitlement to the allowance resulted in the case of dependents residing in the vicinity of Norfolk, the view was expressed that members whose dependents did not reside in that vicinity had no greater right.

In his letter of March 30, 1973, the Under Secretary has expressed the view that under the governing law and regulations the payments of the allowance to the involved members are believed to be correct provided they are otherwise entitled thereto. He says that there is no question that a member of eligible pay grade and "with dependents" who is on duty on board ship away from the home port of the ship for a continuous period of more than 30 days is entitled to the allowance, if otherwise entitled, even though the ship is "away from the home

port" only as far as a nearby port. In this connection, he adds that 37 U.S.C. 427(b)(2) uses the words "the home port" and does not address or open consideration of a term such as vicinity or proximity.

The Under Secretary also explains that the entitlement of a member must additionally be examined under the provisions of paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements Manual which states in pertinent part that "FSA does not accrue to a member if all of his dependents reside at or near his duty station" and also establishes guidelines of either a distance (one way) of 50 miles as a reasonable commuting distance or a time of 1½ hours required to commute one way as the basis for determining whether the dependents reside near the duty station.

The Under Secretary further says that the governing law would appear to have contemplated that the fact of a member being on duty on board ship away from its home port for a continuous period of more than 30 days did create and constitute a Government-enforced family separation. And, he points out that clause (2) of 37 U.S.C. 427(b) is the only one of the three clauses under that subsection which does not contain the phrase "and his dependents do not reside at or near * * *." In view thereof he expresses the belief that Congress contemplated the absence of the ship from the home port as creating the Government-enforced separation and did not intend that the member's decision regarding where he located his family would enter the entitlement determination. This view, he states, is supported by our decision, 43 Comp. Gen. 444 (1963), in which it was determined that a Navy member who maintains a residence for his family in San Francisco while assigned to a ship with its home port at San Diego is entitled to the allowance when the vessel is away from that home port for more than 30 days.

In commenting on the effect of the above-mentioned paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements Manual the Under Secretary also expresses the view that if some eligible members on board ship in Portsmouth had moved their dependents to the area, but to a point outside that described by a 50-mile radius or 1½ hours one-way traveltime from the ship, when away from the home port, they would be eligible to receive the allowance. On this basis, he asserts that if the ship on which a member was on board at Portsmouth had gone to a port in Maine for 30 days or more, his entitlement to the allowance would have to be examined under the same time and distance rules with regard to his dependent's residence.

Additionally, the Under Secretary contends that a hardship would be inflicted on Navy members under the views expressed in our letter of February 9, 1973. He refers to an eligible member who receives

orders to a ship which at that time is scheduled to be deployed from its home port a majority of the time during the member's prospective tour. On this information, the member utilizes his dependent transportation entitlement to move his family to an area which is judged better for his family during prolonged absences and which is away from the home port. Upon reporting to the ship, the member finds that the schedule has changed and the ship will be undergoing overhaul in a yard outside of, but close by, the home port. The Under Secretary says that a decision made by the member because of prospective Government-enforced separation has now created a situation in which any change to the current entitlement would presumably not allow payment of the allowance. This, he asserts, would work a hardship on the member and would be an inequitable interpretation of the law.

We now understand that the propriety of payment of FSA to members assigned to a vessel homeported at Norfolk but at the Portsmouth Naval Shipyard for a period in excess of 30 days was considered by the Comptroller of the Navy in 1967. It is our understanding that he concluded that if the member's dependents resided at a place other than the home port and the distance exceeded a reasonable commuting distance (50 miles one-way), payment was authorized unless the member actually commuted to the residence of his dependents.

In decision of January 30, 1964, 43 Comp. Gen. 527, we rejected a Navy proposal to deny FSA under 37 U.S.C. 427(b)(2) when the ship to which a member is attached moves from the home port to another location within a 50 mile radius. We said that—

> * * * Unlike the restrictive dependent residence provision in clauses (1) and (3) of section 427(b), clause (2) contains no express language which would restrict or qualify the payment of the allowance on the basis of where dependents reside. Hence, we are dubious that there is adequate basis for a rule which, for purposes of payment of the allowance under clause (2), which would make a distinction between cases where the member's ship is less than 50 miles from its home port and cases where it is more than 50 miles from the home port. It is our view, however, as indicated in our decision of October 9, 1963 [43 Comp. Gen. 332] and for the reasons stated therein, that the allowances authorized by all three clauses under subsection (b) are "predicated on a separation of the member from his dependents by reason of his military assignment and is designed to reimburse him for the additional expenses that arise [at the place] where his dependents reside by reason of his separation from them."

Thus, the basic question in determining entitlement to FSA is whether there has resulted an enforced separation of the member from his dependents by reason of his military assignment. Contrary to the opinion of the Under Secretary no entitlement exists if the member's vessel moves to a nearby port and the member can continue to reside with his dependents.

Paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements Manual, referred to by the Under Secre-

tary, reflects our affirmative answer to question 26 in 43 Comp. Gen. 332, 353 (1963) as follows:

> If the dependents of a member do not reside within a reasonable daily commuting distance of his duty station, a distance of 50 miles being considered as the maximum one-way distance for this purpose except where a member actually commutes a greater distance daily, may it be considered that his dependents do not reside at or near his station for the purpose of clause (1) of 37 U.S.C. 427(a) or clause (1) and (3) of 37 U.S.C. 427(b)?

Paragraph 30313 also reflects the decisions in the cases of *Casida* v. *United States*, 193 Ct. Cl. 262 (1970) and *Tasker* v. *United States*, 178 Ct. Cl. (1967) holding that the members were entitled to family separation allowance under section 427(b)(1) where the dependents resided about 25 miles from the members' duty stations but the circumstances were such that commuting was not feasible because of poor roads and the lack of transportation.

It will be noted that clause (1) of subsection 427(a) and clauses (1) and (3) of subsection 427(b) authorize FSA in circumstances where transportation of dependents to the member's duty station is not authorized at Government expense and his dependents do not reside at or near such station.

Since payment of family separation allowance incident to duty aboard a vessel is governed by clause (2) and since Norfolk is not a restricted station, transportation of dependents to that station being authorized at Government expense in otherwise proper cases, paragraph 30313 of the manual appears to have no application in the case of members assigned to vessels homeported there. Consequently, that paragraph of the regulations provides no basis to pay FSA to a member who, for personal reasons, has elected to locate his dependents away from such home port.

As indicated above, we have held that a member is not precluded from receiving FSA by reason of the fact that he does not move his dependents to the vicinity of the home port, as he is authorized to do at Government expense. Those decisions were intended to authorize the allowance on substantially the same basis as is authorized for members whose dependents reside at the home port. However, it was not intended that a member who elected not to bring his dependents to reside at the home port would be in a more favorable position than the member who moved his dependents to the home port.

As we have indicated, the allowances authorized in all three clauses under subsection 427(b) are predicated on a separation of the member from his dependents by reason of his military assignment. When the vessels involved were moved from Norfolk to Portsmouth there was not such a separation of the members and their dependents residing at Norfolk as would entitle them to the allowance. Likewise, no such

separation resulted in the case of dependents who reside away from the home port.

While the Under Secretary maintains that to deny FSA in the circumstances involved "would work a hardship on the Navy member and would be an unwarranted and inequitable extension of the FSA law," it is pointed out that, on the other hand, the unjustified payments of the allowance to the members whose dependents do not reside in the Norfolk area are tantamount to a "windfall" since the other members on the same ships whose dependents resided in that area are legally precluded from receiving the allowance.

Furthermore, the fact that the member may have expected extended sea duty when he located his dependents away from the home port provides no basis for payment of the allowance. Frequent changes in duty assignments, often on short notice, is an incident of duty in the armed services. A member has no vested right to allowances which might have accrued if his anticipated assignment had not been changed.

In view of the foregoing, we find no legal basis for the payments of FSA incident to the movement of the vessels from Norfolk to Portsmouth. Therefore, such payments should be discontinued immediately. Inasmuch as there is evidence of record, as indicated above, to show that the Comptroller of the Navy misinterpreted our decision, 43 Comp. Gen. 527, no action need be taken to collect the improper payments already made if they were correct in other respects. These payments presumably were accepted in good faith by the members and, in any event, they apparently would be proper for waiver under the provisions of 10 U.S.C. 2774.

[B–178020]

Quarters—Government Furnished—Service Charges—Period of Absence

An officer involuntarily assigned to bachelor officers quarters (BOQ) at his temporary duty station, Clark Air Force Base (AB) in the Philippines, which he is directed to maintain while deployed to Taiwan because of adverse weather conditions, and where he is paid for the period August 8 through October 1, 1972, the maximum locality per diem rate of $13 is entitled to reimbursement of the $2 per day service charge he paid during his absence from the AB notwithstanding paragraphs M4205–5 and M4254–1b of the Joint Travel Regulations against increasing a maximum locality rate. The service charge is not a rental fee but is intended to defray operating expenses, and as the service was not agreed to by the officer, or required to be furnished during his absence, the reimbursement will not constitute additional per diem.

To R. C. Kearney II, Department of the Air Force, June 5, 1973:

Further reference is made to your letter dated December 6, 1972, file reference ACFFT, with attachments, forwarded here by endorsement dated February 13, 1973, from the Department of Defense Per Diem, Travel and Transportation Allowance Committee, which re-

quests an advance decision as to the entitlement of Major Warren T. Kwiecinski, SSAN 392-28-1408, to reimbursement for BOQ (bachelor officer quarters) service charges for the period from August 8 through October 1, 1972. This request was assigned PDTATAC Control No. 73-4.

The record indicates that Major Kwiecinski's permanent duty station was Barksdale Air Force Base (AFB), Louisiana. He performed temporary duty at Clark Air Base (AB), Philippines, from May 7, 1972, to August 8, 1972. He was then assigned temporary duty at Ching Chuan Kang, AB, Taiwan, during the period of August 3 through October 19, 1972. According to Major Kwiecinski's letter of November 13, 1972, the 4102d Air Refueling Squadron was directed to move to Ching Chuan Kang AB after 2 months of torrential rains had reduced Clark AB's capability to support aerial tanker operations.

The member states that the commander of the squadron directed his staff to maintain assigned BOQ at Clark AB. He further states that personnel were informed to expect redeployment to Clark AB in approximately 10 days, after the fuel line from Cubi Point Naval Air Station to Clark AB was repaired. However, the squadron apparently remained at Ching Chuan Kang AB until October 19, 1972. Major Kwiecinski was paid the maximum locality per diem rate of $13 per day while at this air base as no Government quarters or meals were furnished to him. Major Kwiecinski states that on October 2, 1972, he and approximately 40 other members were flown to Clark AB to recover their personal belongings and to check out of their assigned quarters.

During the period that Major Kwiecinski maintained his assigned quarters at Clark AB pursuant to his commander's direction (August 8, 1972, to October 1, 1972), he was assessed a BOQ service charge of $2 per day for a total charge of $110. He paid this charge and now seeks reimbursement thereof. Major Kwiecinski believes that he is entitled to such reimbursement since his commander directed him to maintain quarters at Clark AB.

You express doubt regarding the claim for reimbursement of BOQ fees paid by the member, as it appears that such payment would be in excess of the maximum locality rate set forth in Appendix A of the Joint Travel Regulations (JTR).

Paragraph M4205-5, JTR, provides in pertinent part:

b. *Additional Quarters Required During Period of Temporary Duty.* * * * When an officer or an enlisted member is required to procure additional Government quarters not under the jurisdiction of the Department of Defense, or they

are required to procure additional lodgings built and operated with nonappropriated funds, the per diem allowance will be increased by the daily cost incurred for the use of such quarters, rounded to the next higher dollar. The increase in the per diem rate is authorized only when the procurement of additional Government and nonappropriated quarters is required through no fault of the member. *In no case will these additions result in a total per diem of more than $25, or locality rate in Appendix A when member is paid under the provisions of par. M4205-3f(2), item 2, for travel outside the United States.* [Italic supplied.]

A similar limitation on the amount of per diem payable is also found in paragraph M4254–1b of the regulations.

Since Major Kwiecinski was paid the maximum locality per diem rate of $13 per day, as set forth in Appendix A of the Joint Travel Regulations, during his temporary duty at Ching Chuan Kang, AB, per diem payment in excess of this amount is precluded.

Paragraph 3–11 of Air Force Manual (AFM) 30–7, dated January 1, 1970, provides in pertinent part:

b. Personnel who voluntarily occupy bachelor quarters after receiving a notification that service charges are established are considered to have accepted any established service charges. *Personnel who are involuntarily assigned to bachelors quarters, and do not agree to accept the maid/housekeeping service, will not be required to pay the service charge; however, they are responsible for cleaning their personal living area.* [Italic supplied.]

Under the above provision, a member is not required to pay a BOQ service charge if he is involuntarily assigned to a BOQ and does not agree to accept the maid/housekeeping service. In the present case, the fact that Major Kwiecinski was involuntarily assigned to the BOQ at Clark AB is clearly established in view of his commander's direction that the assigned BOQ's were to be maintained. Further, there is no indication in the present record that he agreed to accept the maid/household service. In this regard, it would appear that a BOQ service charge should not be assessed where, in the performance of a member's official duties, he is required to maintain quarters but does not in fact occupy such quarters.

The BOQ service charge is intended to defray the cost of housekeeping, other services, and supplies and equipment not available from appropriated funds (see paragraph 4–8 AFM 30–7). These services include the daily changing of linens, the providing of an adequate supply of soap and towels, maid service, etc. It is clear that these services are not required to be rendered during the period of time that a member does not occupy the quarters. Further, the service charge obviously is not a rental fee (which may not be charged a member for his use of Government quarters), and therefore the mere assignment to BOQ should not be a basis for the imposition of a service charge, where the assignment is involuntary.

It would seem from the above that Major Kwiecinski should not have been assessed the $110 BOQ service charge for the involuntary "use" of BOQ at Clark AB from August 8, 1972, to October 1, 1972.

Therefore, it appears that the member may request an adjustment of BOQ charges by the Clark Air Base Billeting Fund, a nonappropriated fund activity. Any reimbursement would not constitute the payment of additional per diem. *Cf.* 45 Comp. Gen. 551 (1966). The voucher and supporting papers will be retained here.

[B-178156]

Details—Compensation—Higher Grade Duties Assignment

A GS-12 employee detailed on July 26, 1971, on a temporary basis to the GS-13 position of Chief, Employee Relations Branch in the Pacific Northwest Region of the Forest Service, pending receipt from headquarters of the certificate of candidates to fill the position, who was not selected when the position was filled on August 20, 1972, may not be retroactively temporarily promoted to GS-13 for the period involved. Exceptions to the rule that a personnel action may not be effected retroactively to increase the right of an employee to compensation are permitted where the personnel action intended is not effected through administrative error; where an error deprives an employee of a right granted by statute or regulation; and where nondiscriminatory administrative regulations or policies have not been carried out, and the higher level assignment not falling within any of the exceptions, the employee is only entitled to the salary of the position to which appointed.

To the Secretary of Agriculture, June 5, 1973:

Reference is made to letter dated March 2, 1973, from Mr. J. W. Deinema, Acting Chief, Forest Service, requesting our decision as to whether the Forest Service has the authority to effect a retroactive temporary promotion for an employee, Mr. William D. Green, for the period July 26, 1971, through August 19, 1972.

The circumstances surrounding this request are set forth in the above-cited letter as follows:

On July 2, 1971, a position of Chief, Employee Relations Branch (Supervisory Labor Management Relations Specialist GS-230-13), was established in the Division of Personnel Management, Pacific Northwest Region, Forest Service, U.S. Department of Agriculture.

On July 26, 1971 that office requested the Washington Office, Forest Service, Washington, D.C., for a certificate of candidates to fill this position. That request also asked that Mr. William D. Green be included on the requested certificate. Mr. Green met the criteria for filling the position.

Mr. Green was at this time assigned as a Personnel Management Specialist, GS-201-12, Employment and Employee Relations Branch, Division of Personnel Management, Pacific Northwest Region.

Pending receipt of the certificate of candidates to fill the GS-13 position, Mr. Green was assigned to that position on a temporary Acting basis.

Concurrent with this activity the Regional Personnel Officer was reassigned (July 11, 1971) and his successor did not report for duty until after November 1, 1971. In addition, the President's freeze on hiring and promotions was effected on August 5, 1971, and the Department of Agriculture and the Forest Service froze all promotions shortly thereafter. As a result of these events no action was taken to formally fill the GS-13 position, nor was Mr. Green's detail to that position formally recognized through a detail documented by a personnel action or a temporary promotion.

On March 16, 1972, the Region again requested a certificate of candidates in order to fill the Employee Relations Branch Chief position previously established on July 2, 1971. The Washington Office replied on March 22, 1972, that the position should be filled by lateral reassignment and this was done, effective August 20, 1972. Mr. Green was not selected to fill the position but continued to perform the duties of Employee Relations Branch Chief from July 1971 through August 1972.

It is further stated in the letter that as a result of his non-selection for the grade GS–13 position Mr. Green filed a formal grievance. One of his allegations was that he was unfairly treated by being detailed to a higher grade position without appropriate compensation or recognition. The Washington Office of the Forest Service concluded that "Mr. Green did function as Chief, Employee Relations Branch, for a period of time without being officially detailed or compensated." It was also found that "the Region was in violation of the spirit if not the intent of the Federal Personnel Manual, Chapter 300, Section 8–3."

Consequently, it is reported that the Grievance Examiner concluded that there was a serious breach by the Forest Service of the Civil Service Commission and the Department of Agriculture's policies and regulations concerning details, which resulted in unfair treatment to Mr. Green. Based on the above facts, the Examiner found that the Forest Service "was obligated to give Mr. Green a temporary promotion and/or have the position filled, through appropriate means, as soon as circumstances permitted." The Examiner accordingly recommended that Mr. Green's records be documented, so as to be given recognition for the entire period that he was detailed to the higher grade position. While recognizing that the regulations do not make any provisions for a retroactive temporary promotion and that such promotions may not be made, the Examiner further recommended that the Forest Service present the circumstances of Mr. Green's grievance to the Civil Service Commission and/or the Comptroller General for a ruling as to whether or not Mr. Green may receive a retroactive temporary promotion for the period of time he performed higher grade duties.

It is urged in the letter that the finding that Mr. Green was, in fact, acting as an incumbent of the new grade GS–13 position supports a conclusion that the failure to process a temporary promotion was an administrative error. Also, it is contended that the provisions of 5 CFR 550.801(b), providing for the payment of backpay when the employee is found to have undergone an unjustified or unwarranted personnel action, and the rationale applied in our decision 48 Comp. Gen. 258 (1968) lead to the conclusion that a retroactive temporary promotion is in order.

As a general rule a personnel action may not be effected retroactively so as to increase the right of an employee to compensation. *See* 40

Comp. Gen. 207 (1960). However, exceptions to this rule have been made where through administrative or clerical error a personnel action was not effected as originally intended, where an administrative error has deprived the employee of a right granted by statute or regulation, or where *nondiscretionary* administrative regulations or policies have not been carried out. *See* B–172077, April 7, 1971; B–165125, October 28, 1968, copies enclosed.

It is clear from the record before us that the circumstances surrounding Mr. Green's working assignment from the period July 26, 1971, through August 19, 1972, do not fall within any of the above exceptions so as to justify a temporary promotion retroactively. Even though he may have been eligible for promotion to grade GS–13 during this period, Mr. Green had no vested right to such a promotion at any time, by statute, regulation, or otherwise. In this regard, while we recognize that the actions of the Forest Service in the present case may not have been within the intent of Subchapter 4–4, Chapter 335 of the Federal Personnel Manual (i.e., that except when the service is for a brief period, a temporary promotion should be effected where the temporary service of an employee in higher-grade position is required), there are no mandatory provisions contained therein directing that an agency promote the employee under such circumstances.

Our decision in 48 Comp. Gen. 258, *supra*, is clearly distinguishable from the present case. In that case when an employee's position was reclassified from grade GS–9 to grade GS–11, the agency delayed in promoting the employee to Grade GS–11 for approximately 9 months after the Civil Service Commission waived the position's qualification requirements. We held that since the applicable regulation *directed* that personnel action be taken within specified time limits when a classification action had been effected, and the agency failed to take such action within the time specified, corrective action was in order. Thus, the decision clearly fell within the above-cited exception that a nondiscretionary administrative regulation had not been carried out.

In addition to the above, it is stated in the letter of March 2, 1973, that the final decision as to whether Mr. Green would be promoted to grade GS–13 rested within the discretionary authority of the Washington Office of the Forest Service. The letter indicates in this connection that it is doubtful that the Washington Office would have approved his selection, in place, to grade GS–13, in view of the management philosophy that interunit experience is important for the betterment of the organization and the development of employees, and that this view seems to be substantiated by the fact that a grade GS–13 employee from another Forest Service unit was selected for the new unit. Since it appears that Mr. Green would not have been tempo-

rarily promoted in any event, it is difficult to find a basis on which to justify a retroactive temporary promotion for the period involved, other than the fact that he had performed higher grade duties for which he received no additional compensation. With respect to this latter fact, you are advised that Federal employees are entitled only to the salaries of the positions to which they are appointed regardless of the duties they actually perform. See *Dianish* v. *United States*, 183 Ct. Cl. 702 (1968); *Coleman* v. *United States*, 100 Ct. Cl. 41 (1943); B–175372, April 13, 1972, copy enclosed.

Accordingly, we find no basis on which the Forest Service may effect a retroactive temporary promotion for Mr. Green for the period involved.

[B–159950]

Funds—Nonappropriated—Civilian Employee Activities—Premium Pay for Sunday Work

Prevailing rate employees of nonappropriated fund instrumentalities of the military departments and the Coast Guard who work regularly scheduled tours of duty of less than 40 hours a week may not be allowed Sunday premium pay under 5 U.S.C. 5550, as added by section 10 of Public Law 92–392, August 19, 1972. The legislative history of the act shows it was the intent of Congress to provide Sunday premium pay for nonappropriated fund employees in the same amounts and under the same conditions as such pay is authorized for other Federal prevailing rate employees. Accordingly, the Civil Service Commission regulations issued pursuant to 5 U.S.C. 5548(b) under which Sunday premium pay is allowed prevailing rate employees of nonappropriated fund activities should require that such employees have basic full-time workweeks of 40 hours, exclusive of regularly scheduled overtime, for entitlement to Sunday premium pay.

To the Chairman, United States Civil Service Commission, June 6, 1973:

We refer to your letter of April 5, 1973, concerning the payment of Sunday premium pay to prevailing rate employees of nonappropriated fund instrumentalities of the military departments and the Coast Guard under the provisions of 5 U.S. Code 5550, as added by section 10 of Public Law 92–392, August 19, 1972.

You request our decision with respect to the payment of Sunday premium pay to employees at such instrumentalities who work regulary scheduled tours of duty of less than 40 hours a week in view of the decision 46 Comp. Gen. 337 (1966) in which it was held that the provisions of 5 U.S.C. 5544(a) which authorize Sunday premium pay for prevailing rate employees other than those employed by nonappropriated fund instrumentalities apply only to full-time employees. In that connection you indicate that many nonappropriated fund employees who are considered "full-time" employees have basic workweeks of a few hours less than 40. As an example you say that such employees may work 5 - 7-hour days for a total of 35 hours per week.

The language of 5 U.S.C. 5550 with respect to Sunday premium pay is similar to that contained in 5 U.S.C. 5544(a) in that premium pay is prescribed for employees whose "regular work schedule includes an 8-hour period of service, part of which is on Sunday."

We note that 5 U.S.C. 5550 in addition to providing for Sunday premium pay provides for payment of overtime compensation to prevailing rate nonappropriated fund employees for work in excess of 8 hours a day or 40 hours a week. That section also authorizes payment of premium pay for standby or on-call duty based upon a workweek in excess of 40 hours. It seems clear, therefore, that the Congress in enacting premium pay provisions for nonappropriated fund prevailing rate employees predicated such allowances on the assumption that the basic workweek of full-time employees in that category was 40 hours. Moreover, the legislative history of Public Law 92–392 shows that it was the intent of Congress to provide Sunday premium pay for prevailing rate nonappropriated fund employees in the same amounts and under the same conditions as such pay is authorized for other Federal prevailing rate employees. *See* H. Rept. 92–339 at page 23.

Accordingly, it is our opinion that the Commission's regulations issued pursuant to 5 U.S.C. 5548(b) under which Sunday premium pay is allowed prevailing rate employees of nonappropriated fund instrumentalities should require that such premium pay will be allowed only to employees who have basic full-time workweeks of 40 hours exclusive of regularly scheduled overtime.

[B–177152]

Transportation—Rates—Classification—Bomb Fins and Bodies

A mixed-truckload shipment of bomb fins and bodies (explosives and projectile parts) described in the Government bill of lading as "ammunition items" and tendered subject to C. I. Whitten Transfer Co. Tender I.C.C. No. 300 was erroneously classified and therefore the I.C.C. No. 300 tender is inapplicable. Bomb fins are not blasting supplies as the term "supplies" refers to items furnished for operational or maintenance purposes whereas the fins form part of a completed product, nor are the fins ammunition or explosives as they were not transported as an accessory to a larger unit also being transported at the same time. However, the services having been performed and received, under the principle of *quantum meruit*, the carrier is entitled to a reasonable compensation, which will be obtained by computing the charges due under Whitten's tariff rates on Component Parts of Explosives contained in MF–I.C.C. No. 64.

To the C. I. Whitten Transfer Company, June 6, 1973:

Reference is made to your letter of September 28, 1972, with enclosures, requesting review of our settlement certificate of June 23, 1972, which disallowed your claim (our No. TK–945534) for $16.64 on bill No. 6429–A for additional freight charges. The claim relates to

a shipment of Government property transported from Fort Estill, Kentucky, to Dover Air Force Base, Delaware, under Government bill of lading (GBL) F-3350172, dated June 3, 1970.

Review is sought on the basis of a letter from the Bureau of Operations, Interstate Commerce Commission, dated February 18, 1972, which indicates the belief that bomb fins and bodies cannot be considered to be blasting supplies. The letter further indicates the possibility that the term "explosives" would include such bomb parts, depending upon the particular circumstances surrounding each individual shipment. You therefore contend that the bomb fins were properly rated as explosives.

The shipment in question consisted of 11,911 pounds of articles (including dunnage and pallet weight) described in the bill of lading as "AMMUNITION ITEMS." Such articles consisted of inert bomb fin assemblies, fuze bomb tails, fuze bomb noses, and detonating fuzes. The face of the bill of lading, in the space provided for a showing of tariff or special rate authorities, indicates that the shipment was tendered subject to the provisions of C. I. Whitten Transfer Co. Tender I.C.C. No. 300. However, that tender applies only on shipments of "Ammunition and/or Explosives and/or Fireworks" and thus would be inapplicable to a mixed shipment of explosives and projectile parts (bomb fins).

The informal comments which you have received from the Bureau of Operations are of a general nature and are not controlling on the disposition of related problems treated in formal proceedings. But we will consider the implications of those comments as related to this case. We agree with the premise that bomb fins are not blasting supplies. As stated in our decision B-170792, November 15, 1971—

> The term "supplies" has a very broad meaning and is distinguished from "materials" or "ingredients." It embraces those things furnished for the purpose of operation, as distinguished from "materials," which are furnished for original construction. *Mutrie Motor Transportation, Inc.* v. *Blue Line Express*, 53 M.C.C. 530 (1951); *Carroll Trucking Co., Interpretation of Certificate*, 52 M.C.C. 178 (1950). The term "supplies" means those things consumed in, or necessary to, the maintenance and operation of a plant, factory, or business other than the raw materials or ingredients which go into the finished product. *Bell Motor Freight, Inc., Extension-Aluminum Foil*, 67 M.C.C. 544 (1956); *St. Mary's Trucking Co., Inc., Extension-Michigan*, 82 M.C.C. 502 (1960). They do not form part of the completed product and are articles furnished for the purpose of operation, such as wrapping paper or returnable skids, or forms, hoists and gasoline used by a contractor. *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329, 333 (1952) reversed on other grounds in *Salvino* v. *United States*, 119 F. Supp. 277 (1954); *Builders Express, Inc.. Interpretation of Certificate*, 51 M.C.C. 103, 107 (1949). Supplies are such things as are intended to be used and consumed in the progress of the work. *Grifall Common Carrier Application*, 62 M.C.C. 763, 765 (1954); *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429, 437 (1952) affirmed *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (1953), affirmed 345 U.S. 980 (1953).

It seems to us that a bomb fin would be better described as "material" than as an item of "supply." Such fins apparently do not meet many of the tests for classifying an item as a "supply," since fins form a part of the completed product and are not items furnished for the purpose of operation or maintenance as used by a contractor.

However, if bomb fins are not blasting supplies, it does not necessarily follow that they can be termed explosives or ammunition, so as to be ratable under Whitten Tender I.C.C. No. 300. The Bureau of Operations letter of February 18 states in part—

> It is possible, however, that the term explosives would include these bomb parts and instruments. Bombs and other ammunition, * * *, have been considered within "explosives" authority when they contain explosives. The general rule is that where a carrier has authority to transport a commodity, this includes parts of that commodity which are moving in connection with it and at the same time. However, independent shipments of parts for stock, or shipments consisting entirely of pieces or ingredients to be assembled at destination into bombs or other ammunition are not within "explosives" authority.

This rationale was discussed in *East Texas Motor Freight Lines—Interpretation of Certificate*, 62 M.C.C. 727 (1954), wherein it was stated at page 728 that,

> * * * the general rule has been that authority to transport a specified commodity is not authority to transport unassembled parts or ingredients thereof. This rule is particularly valid where, as here, the authorized commodity "ammunition" has a large variety of forms and sizes and where the parts when transported are not in the nature of accessories intended for installation on a specific larger unit which is also being transported at the same time, but, rather, are themselves a subdivision of the larger unit in an unassembled state. A grant of authority to transport "ammunition" cannot be construed as authority to transport also ingredients, or component parts of ammunition, or incomplete unassembled units intended for incorporation or assembly at a proper time and place into a unit of ammunition.

Under this rationale bomb fins would not be classifiable as "ammunition," since they were not being transported as an accessory to a larger unit, also being transported at the same time. Thus, the transportation of an ingredient or component part (the bomb fins), not being shipped with articles describable as "ammunition," does not come within Whitten's authority to transport "ammunition" so as to make applicable the terms of Tender I.C.C. No. 300.

Further, the bomb fins could only be termed explosives if they met one of two conditions: (1) they, in and of themselves, had an explosive capacity or (2) they were transported with other components which when assembled would comprise a complete bomb. The record does not indicate whether the bomb fin assemblies had any explosive capacity of their own, and the bill of lading shows that only some components of a bomb were being transported, not an entire, unassembled bomb. Therefore, it is our view that the bomb fin assemblies would not fall within the classification of "explosives."

Since the bomb fins were neither blasting supplies nor ammunition

or explosives, the items shipped would not be embraced within the commodity description of Tender I.C.C. No. 300 and the rates provided therein would not be applicable to the shipment. However, the service has been performed and the benefit of the service has been received. Consequently, under the principles of *quantum meruit*, the carrier is entitled to a reasonable compensation. See *National Carloading Corp.* v. *United States*, 64 F. Supp. 150, 105 Ct. Cl. 479 (1946); *Berger* v. *Dynamic Imports, Inc.*, 274 N.Y.S. 2d 537 (1966); *Cities Service Oil Co.* v. *Erie R. Co.*, 237 I.C.C. 387, 389 (1940); *Brownlee* v. *Southern Ry.*, 192 I.C.C. 119, 121 (1933); and *Stein Potato Co.* v. *Northern Pacific Ry. Co.*, 144 I.C.C. 123, 124 (1928). Since Whitten's tariff rates, as contained in MF–I.C.C. No. 64, apply to COMPONENT PARTS OF EXPLOSIVES, there would seem to be no valid reason why such rates should not be used in computing the measure of the *quantum meruit* charges due for this mixed-truckload shipment.

The settlement disallowing your claim was consistent with that view, and, accordingly, it is sustained.

[B–178237]

Transportation—Rates—Section 22—Agencies Not Party to Quotations—Applicability of Special Rates to All Agencies Nonetheless

Payment for a shipment of Electrical Instruments, NOI, by the Coast Guard, which was transported in a 40-foot trailer given exclusive use, with a released valuation of 60 cents per pound, properly was computed under Trans Country Van Lines Tender I.C.C. No. 50—a section 22 Tender—that had been referenced in the Government bill of lading, and the carrier is not entitled to the additional charges claimed. The carrier's claim is based on Government Rate Tender I.C.C. No. 1–U, which names the Coast Guard because Tender I.C.C. No. 50 does not, and on the fact its commercial bill of lading makes reference to I.C.C. No. 1–U. However, the I.C.C. No. 50, section 22 Tender is offered to the "United States Government" and until canceled is available to any Government agency, without giving special notice, that is willing to do business with the offering carrier, unless the agency is specifically excluded from the Tender.

To the Trans Country Van Lines, Inc., June 6, 1973:

Your letter of July 28, 1972, and earlier letters, in effect, request review of our settlement certificate (claim TK–912888) dated January 28, 1971. That certificate disallowed your claim for $671.94 on supplemental bill No. 6773. You maintain that a certain section 22 tender must be used to determine the applicable charges and the settlement certificate is predicated on the use of another section 22 tender providing a lower charge basis.

The transportation services involved were covered by Government bill of lading (GBL) B–9138081, issued March 22, 1967. Under that GBL a shipment of Electrical Instruments, NOI, weighing 23,660 pounds, was accepted by Trans Country for transportation from the United States Coast Guard Supply Center, Brooklyn, New York, to

Avondale, Louisiana. The GBL shows that a 40-foot trailer having a capacity of 3,000 cubic feet was ordered and furnished, that exclusive use of trailer was requested, that the articles were released at a value of 60 cents per pound, and that "ICC No. 50" was considered by the Coast Guard to be the applicable tender for the computation of the charges. Reference to Tender I.C.C. No. 50 appears in the block on the GBL reserved for reference to Tariff or Special Rate Authorities.

For the subject services you originally claimed $1,941.79 on your bill 6773 and were paid in that amount by a Government disbursing officer in May 1967. The amount of $1,941.79 was produced by a rate of $8.15 per 100 pounds applied to 23,660 pounds ($1,928.29) and a $13.50 per shipment charge.

In our audit it was determined that the allowable charges were $1,269.85 (23,660 pounds at $5.31 per 100 pounds), plus a per shipment charge of $13.50. Upon your failure to refund, the difference of $671.94 between the allowable amount and the paid charges of $1,941.79 was recovered by setoff in the payment of another bill. Our notice of overcharge (Form 1003), issued to you on March 1, 1968, shows that the charge basis was derived from Trans Country Van Lines Tender I.C.C. No. 50, supplement 4, effective March 1, 1967.

You disputed the setoff and subsequently submitted your supplemental bill 6773 for additional charges of $695.60, somewhat higher than the original claim for $671.94 due to the fact that you raised the line haul rate from $8.15 to $8.25 per 100 pounds.

The $8.25 rate is derived from Government Rate Tender I.C.C. No. 1–U; it is your position that Tender I.C.C. No. 50 is not applicable to the transportation in question because the Coast Guard is not named in the tender as an offeree. Therefore, you believe that the Coast Guard was not entitled to take advantage of the rates set forth therein. Since Tender I.C.C. No. 1–U specifically names the Coast Guard as one of the Government agencies authorized to ship goods under the terms of the tender, you believe that I.C.C. No. 1–U is the only tender for use in determining the charges. You also are of the opinion that since your commercial bill of lading contains a reference to "GRT1U No. 6" (Government Rate Tender I.C.C. No. 1–U, Section VI), the transportation contract requires the use of that tender to determine the charges due the carrier for these services.

Condition 2 on the back of GBL B–9138081 sets forth that—

> Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

As noted, your usual form, the standard household goods bill of lading and freight bill, included a reference to Government Rate Ten-

der I.C.C. No. 1–U. But there was "otherwise specifically provided or otherwise" stated on the related GBL (to which the commercial bill of lading specifically refers) that Trans Country Tender I.C.C. No. 50 was applicable to the transportation covered thereby. There thus was a reasonable basis for concluding that the Coast Guard and Trans Country (whose agent, when accepting the shipment, concurred in the GBL terms for the account of the principal) intended that I.C.C. No. 50 be the applicable tender.

It is obvious that the Coast Guard office issuing the GBL believed that there was no valid restriction to its use of I.C.C. No. 50, and it also seems probable that the reason Trans Country was offered the goods was because its I.C.C. No. 50 rates were comparable to other competing carriers who would have been eligible and available to handle the freight. As a matter of fact both Tender I.C.C. No. 1–U and Tender I.C.C. No. 50 were available for consideration by the shipping agency, but since the latter tender afforded the most favorable basis, the carrier is obliged to apply the price in that tender.

That the Coast Guard had a reasonable basis for concluding that I.C.C. No. 50 and Trans Country were appropriate for consideration in determining how the freight should be transported is initially found in I.C.C. No. 50 itself. Item 10 of I.C.C. No. 50, which is in the Uniform Tender of Rates And/Or Charges For Transportation Services Government form, stipulates that the carrier offers "on a continuing basis to the United States Government, hereinafter called the Government, pursuant to section 22 of the Interstate Commerce Act * * * the transportation services herein described." If it were intended that the tender be limited to a particular Government agency, that intention could have been effectuated simply; but the tender as issued authorized its use by any Government agency that wished to ship the various kinds of articles described therein, including electronic equipment and scientific instruments, subject to, among other types of special services, Exclusive Use of Vehicle handling.

If Trans Country intended to limit use of I.C.C. No. 50 to the Military Traffic Management and Terminal Service, it has not done so under the language of the tender, and it is immaterial that the Military Traffic Management and Terminal Service might have been the principal user or one of the Government agencies which acknowledged that it intended to use the service at the rates specified in the tender. A section 22 tender a carrier offers generally to the "United States Government" is available to any Government agency not excluded, willing to do business with the offering carrier.

The tender does not require that an agency give the carrier any special advance notice that it intends to take advantage of the car-

rier's offer. It is sufficient that the transportation contract as reflected in the GBL signify that intention any time during the period the tender is in effect and has not been canceled in accordance with its terms—which in this case was when the carrier undertook to notify the United States Government that the tender was canceled. And item 21 of I.C.C. No. 50 states that the tender may be canceled by the carrier on written notice of not less than 30 days or otherwise by mutual agreement.

We believe that the transportation contract made between the parties in this case incorporated the terms of I.C.C. No. 50 and any charge basis contrary to those terms extending less favorable charges to the United States was superseded. Accordingly, the action of our Transportation and Claims Division in disallowing your claim based on the applicability of Tender I.C.C. No. 1–U was correct and it is sustained.

[B–176881]

Set-Off—Transportation—Property Damage, Etc.—Freight Charges and Damage Claim Arising in Same Shipment

In the absence of any evidence rebutting the Government's *prima facie* case of carrier liability for damages to a shipment of switches which moved under a Government bill of lading, the Comptroller General upon review sustained the action taken by the Transportation and Claims Division in offsetting the freight charges due the carrier against the Government's damage claim on the same shipment. The carrier's *prima facie* liability having been established, it had the burden of proving otherwise but failed to show lack of negligence and improper packing- in fact its agent participated in loading the shipment (209 F. 2d, 442, 445). The legal justification for the offset was recently restated in *Burlington Northern, Inc. v. United States*, 462 F. 2d 526. The amount of the damage claim in excess of the freight charges is for prompt refund or collection by other means.

To the Murphy Motor Freight Lines, Inc., June 7, 1973:

Please refer to your letter of March 21, 1973, to our Transportation and Claims Division, which we will consider as a request for review of the action taken by that Division on its Certificate of Settlement (our claim No. TK–945043) dated March 1, 1973.

The settlement allowed in full the $1,144.65 claimed on your bill No. 303 for freight charges on a shipment of four sets of switches (consisting of 33 pieces) transported for the Bureau of Reclamation, Department of the Interior, under Government bill of lading No. D–5067224 by Garrett Freightlines and Murphy from Coulee Dam, Washington, to Granite Falls, Minnesota, in November 1969.

The amount allowed was set off against a damage claim of $6,902.23 discovered when Murphy delivered the shipment at Granite Falls; the damage claim was sent here for collection by the Bureau of Reclamation.

Also involved here is the Division's letter of February 20, 1973, file

TC-SR-014814-EPD, to you, informing you of the carrier's *prima facie* liability for the damage claim and that the amount found allowable on your bill No. 303 would be set off against the amount of the damage claim. You were requested to refund the balance of that claim.

In your letter you renew your request for payment of freight charges of $1,144.65 and you state that your company's position on the damage claim is that carrier liability has not been established; that the damage was caused by acts of the shipper (improper loading); that the switches were shipped set up with the insulators in place whereas ordinarily you state that the insulators would have been packed separately in small wooden crates to minimize movement during normal transportation handling; and that in your view the major part of the damages to the insulators was caused by normal road vibration.

You enclosed with your letter a copy of memorandum from Garrett Freightlines which we will accept as clarifying the fact that the shipment moved from origin to destination on one 40-foot flat rack trailer and was not transferred to another trailer while en route as is indicated on the copies of the delivery receipts in our records.

The legal justification for the Division's setoff of your claim for freight charges against the Government's damage claim was recently restated in *Burlington Northern, Inc.* v. *United States*, 462 F. 2d 526 (1972). There, at page 529, the Court of Claims said:

> The general rule of the Government's right of offset is clearly stated in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 67 S.Ct. 1599, 91 L.Ed. 2022 (1947), wherein the Supreme Court stated at page 239, 67 S.Ct. at page 1602, "The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him.'" This procedure has been followed in many areas, including transportation cases, *C & H Transportation Co.* v. *United States*, 193 Ct. Cl. 72, 436 F.2d 480 (1971); *Johnson Motor Transport* v. *United States*, 137 Ct. Cl. 892, 149 F. Supp. 175 (1957).

See also, *Yale Express System, Inc.* v. *Nogg*, 362 F. 2d 111, 114, n. 2 (1966).

The Division's letter of February 20, 1973, to you, correctly outlines the law applicable to this damage claim. Crucial to your defense of this claim is the rule that once a *prima facie* case of carrier liability is established (and the record establishes one), you have the burden of proving *both* that the carriers were not negligent and that the alleged excepted cause of the damage (here, improper loading) was the *sole* cause of the damages.

Assuming that the shipment was improperly loaded and prepared for transportation by the shipper and that this was the proximate and sole cause of the damage to the shipment, you must further show that the defect was latent and concealed and not discernible to the ordinary observation of agents of the carrier. But the record shows that the carrier's agent not only had the opportunity to observe and

inspect the packing and loading of the shipment, but, as stated by you in your letter of November 9, 1971, to the Bureau of Reclamation:

> The shipment in question was loaded jointly by the Government and by the driver for Garrett Freightlines, Incorporated. The switches were shipped set up and they were wired together at the top, in order to keep the units from toppling over in transit.

As was stated in *United States* v. *Savage Truck Line*, 209 F. 2d 442, 445 (1953), cert. den. 347 U.S. 952:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. This rule is not only followed in cases arising under the federal statutes by decisions of the federal courts but also for the most part by the decisions of the state courts.

In these circumstances and in the absence of any evidence rebutting the Government's *prima facie* case of carrier liability for damages of $6,902.23 incident to the shipment of switches moved under Government bill of lading No. D-5067224, we sustain the action taken by our Transportation and Claims Division in allowing and crediting $1,144.65 in freight charges against the Government's damage claim of $6,902.23 on the same shipment. The balance of that claim, $5,757.58, should be promptly refunded or it will be collected by other means.

[B-178132]

Bids—All or None—Separate Groupings

Under a total small business set-aside solicitation for pastry requirements that listed estimated quantities for each of the 33 items solicited and required both unit and total estimated prices for each of the items, and indicated any of the items might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Government, multiple awards to the low bidder on two of three groupings submitted and to the protestant for the remainder of the items would result in the lowest aggregate price to the Government as provided by the solicitation, and as the statement of the group bidder that each group of items "are bid as a Total All or None Bid" does not qualify its bid, since in listing the items in groups, the bidder indicated that an award of individual items would not be acceptable, the group bidder, administratively determined to be a responsible bidder, is eligible to receive an award.

To Fried, Frank, Harris, Shriver & Kampelman, June 12, 1973:

By letter dated May 3, 1973, and prior correspondence, you protested on behalf of Martin Bakery, Incorporated (Martin), the proposed award of a contract under invitation for bids (IFB) F41615-73-B-0427 to Sterling Bakery, Incorporated (Sterling). The procurement was issued as a total small business set-aside on January 11, 1973, with bid opening date on February 13, 1973.

The solicitation contemplated award of a requirements type contract for 33 pastry items for troop, hospital, and organizational con-

sumption at Lackland Air Force Base, Texas, for a 12-month period ending March 31, 1974. The schedule listed estimated quantities for each of the 33 items and required both unit and total estimated prices for each of the items.

The solicitation cautioned bidders that the "quantities of supplies or services specified herein are estimates only, and are not purchased hereby." Further, the solicitation did not guarantee bidders that any quantities described as estimated would be purchased, but rather, only the Government's actual requirements would be procured.

Sterling and Martin, the only bidders, bid on each of the 33 items set forth in the schedule. Martin submitted low unit prices for items 1, 2, 5, 6, 8, 11, 12, 13, 14, and 15; and also submitted the low aggregate evaluated price for all 33 items in the amount of $523,740. Sterling was low bidder on items 3, 4, 7, 9, 10, and 16–33. Sterling's aggregated evaluated price for all 33 items was $530,280, or $6,540 higher than Martin's. However, the solicitation did not limit award to the low aggregated price on an all or none basis, but provided for multiple awards "for the items and combination of items which result in the lowest aggregate price to the Government * * *."

Martin bid each item separately while Sterling's bid included the following:

Item Numbers: 1, 2, 5, 6, 11 are bid as a Total All or None Bid.

Item Numbers: 3, 4, 7, 8, 9, 10 are bid as a Total All or None Bid.

Item Numbers: 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, are bid as a Total All or None Bid.

It has been determined that on a multiple award basis the aggregate price to the Government would be $511,070. On this basis Martin would receive award for items 1, 2, 5, 6 and 11, for a total price of $56,740; and Sterling would receive award for items 3, 4, 7, 8, 9, 10 and 12–33, for a total price of $454,330.

You contend that by adding the "all or none" language Sterling qualified its bid in such a way as to render it nonresponsive. In this connection, you cite our decisions B–174038, December 28, 1971, and B–160173, October 20, 1966, for the proposition that our Office "has held numerous times that 'all or none' bids such as Sterling's are nonresponsive."

In B–174038 the solicitation contemplated award of an indefinite quantity contract for a single item, with a guaranteed minimum quantity of 624 units and with the Government reserving the right to order up to a total of 2,000 units. The low bid included the following language at the end of the schedule:

MINIMUM QUANTITY	624	$6.90
MAXIMUM QUANTITY	2,000	6.90
ALL OR NONE		

Because of the "all or none" language the contracting officer considered the low bid to be conditioned on award of the maximum quantity of 2,000 units; and since only the minimum quantity of 624 was to be awarded initially, he rejected the low bid as nonresponsive. The low bidder asserted that it intended to supply whatever quantity the Government might order; and that the "all or none" language was intended to overcome the eventuality that the contract might be awarded to more than one bidder. Our Office, however, denied the protest stating that the contracting officer's interpretation was not unreasonable.

In B-160173, *supra*, we held that an "all or none condition" in a bid precluded award of any quantity other than the quantity set forth in the solicitation. In that case the IFB called for deliveries on an indefinite quantities basis of an aggregate maximum quantity of 2,474,700 tent pole sections to four different destinations. The IFB provided that bidders could bid on "maximum" and "minimum" quantities for each of the four destinations.

The protesting bidder placed the word "all" in both the maximum quantity and minimum quantity columns for each of the four destinations. The bidder maintained that its bid should be interpreted as applying to any quantity that the Government might actually order under the IFB, rather than to the maximum quantity advertised. Our Office, however, agreed with the contracting officer and rejected this position. We stated:

> * * * By inserting the word "All" in the maximum quantity column, opposite each of the four destinations shown on Forms 369-1 and 369-2, you stated, in effect, that you were bidding upon that definite number of units specified in the preceding "Quantity (Number of Units)" column for each of the installations * * *.

You contend that the reasoning of the above-cited cases applies equally to the instant case. You maintain that Sterling's use of the "all or none" language, particularly the use of the phrase "are bid as a total," indicates that Sterling was bidding on the exact quantity set forth in the "Quantity-Estimated" column for each of the 33 items rather than on a "requirements" basis. Thus, you conclude that Sterling's bid was nonresponsive to the Government's need for a "requirements" contract.

Additionally, you maintain that at the very least the "all or none" language rendered Sterling's bid ambiguous as its intent is not clear from a reading of its bid. You then point out that the ambiguity cannot be explained after bid opening, citing for example 45 Comp. Gen. 800, 804-5 (1966). You therefore request that Sterling's bid be rejected as nonresponsive and that all 33 items under the solicitation be awarded to Martin.

The Comptroller General decisions you cite for the proposition

that Sterling's "all or none" language indicates that it was bidding on the exact quantities set forth in the schedule as the estimated quantity for each of the 33 items, rather than on a requirements basis, are distinguishable from the present case. In the procurements involved in those decisions only one item was being procured and maximum and minimum quantities were specified in the solicitation. Thus, when the bidders stated "all or none" it was reasonable to conclude that they intended to bid on only the maximum quantity specified.

In the instant solicitation, however, no "maximum" and/or "minimum" limitations are stated. Furthermore, section D of the solicitation reads in relevant part:

> * * * bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). * * * *individual awards will be for items and combinations of items which result in the lowest aggregate price* * * *. [Italic supplied.]

Thus, the solicitation clearly indicated that any of the 33 items in the schedule might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Government.

It is our opinion that when Sterling's bid is viewed in light of the foregoing section, it must reasonably be interpreted to stipulate that award would be accepted only on items 1, 2, 5, 6, and 11 as a group; on items 3, 4, 7, 8, 9 and 10 as a group; and on items 12 through 33 as a group; and that award of individual items or any other combination of items would not be acceptable. We do not believe that the bid is reasonably susceptible of any other interpretation and to construe the qualifications as relating to item quantities rather than to groups of items is in our view unreasonable. By listing the items in the schedule in groups the bidder's intent is clear.

You also contend that Sterling may not be a responsible bidder within the meaning of Section 1, Part 9, of the Armed Services Procurement Regulation. You maintain it is likely that Sterling will not be able to obtain many of the ingredients necessary for satisfactory performance, and that the Government will be forced to alter its planned menus in order to accommodate Sterling's inability to perform.

In this connection, a preaward survey of Sterling was conducted by the cognizant Defense Contract Administration Service office and an affirmative recommendation made in a report dated March 7, 1973. On the basis of that report, which our Office has examined, the contracting officer determined that Sterling was a responsible prospective contractor. Our Office has consistently held that questions concerning the qualifications of a prospective contractor are primarily for resolution by the administrative officers concerned. In the absence

of a showing of bad faith or arbitrary or capricious action, or lack of any reasonable basis for the determination, we are not justified in objecting to, or substituting our judgment for a determination made on this question by an administrative agency. *See* 49 Comp. Gen. 553 (1970); B-175922, October 17, 1972. Since no such showing has been made, we find no legal basis for overturning the agency's determination that Sterling is a responsible prospective contractor.

On the basis of the foregoing, your protest is denied.

[B-177515]

Transportation—Household Effects—Military Personnel—"Do It Yourself" Movement—Benefits Entitlement

A member of the uniformed services who incident to permanent change of station orders participates in a "Do It Yourself" program and moves his household effects within the continental United States using a rental truck and packing materials furnished through a contractual arrangement by the Government with a national truck rental company and hired assistance to load and unload the goods is not considered to have been afforded "transportation in kind" and consequently he is entitled to a mileage allowance for his personal travel under paragraph M4150-1, item 1 of the Joint Travel Regulations (JTR), but not to per diem which is predicated on the denial of the mileage allowance. A movement under temporary duty orders entitles the member to a monetary allowance pursuant to JTR M4203-3a; a travel allowance is payable for dependents riding in the rental truck; and a reasonable reimbursement may be made for hired help if supported by required evidence.

To the Secretary of the Navy, June 13, 1973:

We refer further to letter dated November 2, 1972, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), forwarded here by letter of November 16, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72-50), concerning the entitlement to travel and transportation allowances of members of the uniformed services who participate in a "Do It Yourself" program for the movement of household goods within the continental United States.

The Assistant Secretary indicates that since the use of a rental truck to move household goods is generally less costly to the Government than a Government-arranged shipment by a commercial household goods carrier, the Navy has developed a program under which rental trucks and packing material are provided to Navy personnel who desire to move their own household goods within the continental United States. It is stated that the rental trucks and packing material are provided through contractual arrangements with national truck rental companies.

Under the current provisions of the Joint Travel Regulations (paragraph M8500) a member who personally arranges for transportation of his household goods by means of a rental truck must procure the

truck and packing aids himself and subsequently submit a claim for reimbursement.

Since the member is required to drive the rental truck to the appropriate destination, the following questions are asked concerning the member's entitlement to travel and transportation allowances:

1. Is a member who moves his household goods under this program incident to permanent change of station orders entitled to mileage allowance under the Joint Travel Regulations, paragraph M4150–1, item 1, or to per diem allowances for receiving "transportation in kind" (the truck in which he drives to destination) under Joint Travel Regulations, paragraph M4150–1, item 2? If the member is entitled to per diem, is such per diem based on the actual required travel time or on a constructive basis over a usually traveled route by air or surface common carrier?

2. The question of entitlement on permanent change of station is further complicated if the permanent change of station involves the member's separation from the service and he has travel entitlement to his home of record or place from which ordered to active duty, whichever he elects, under the provisions of paragraph M4157–1a of the Joint Travel Regulations. This paragraph provides, in part, that the member is entitled to mileage allowance at the time of separation without regard to the actual performance of travel. If it is held in answer to paragraph 1 that a member is not entitled to a mileage allowance, is such decision applicable to a permanent change of station involving separation from the service? If it is, further questions arise regarding the member's entitlement when the distance household goods are moved differs from that between permanent duty station and the place elected for travel entitlement:

a. When a lesser distance is involved, is either of the following applicable:
(1) Reimbursement under the provisions of paragraph M4154 of the Joint Travel Regulations, or
(2) mileage allowance for the distance between the location to which household goods are moved and the place elected for travel entitlement, providing such payment does not exceed mileage allowance to place of election?

b. When a greater distance is involved, will the member be required to pay, in addition to excess cost for the rental truck, the amount by which transportation cost plus per diem involved in the actual transportation of his household goods exceeds a mileage allowance to the place elected for travel entitlement? If so, what cost elements, in addition to the charge for the rental truck must be included in the computation of transportation cost?

3. Is a member who moves his household goods under the Navy's program incident to temporary duty orders entitled to per diem allowances or to monetary allowances under the provisions of Joint Travel Regulations, paragraph M4203?

Additionally, the Assistant Secretary refers to circumstances in which a member's household goods are too heavy or cumbersome to be handled safely by him or his dependents. Since there are no provisions for assistance to the member under the Navy's contractual arrangements for obtaining rental trucks and packing material, it is stated that members are being instructed that they may hire personnel other than themselves or their dependents—to assist in loading and unloading—and they may submit claims for reimbursement of labor costs within reasonable amounts. The Assistant Secretary takes the view that the member should be reimbursed for the costs of such labor since such costs of labor for handling household goods are either directly or indirectly incurred by the Government when a shipment is made by a commercial carrier through a Government transportation officer.

524–843 O—74——3

It is understood by the Assistant Secretary that several claims for reimbursement of labor costs have been filed with the Navy but have been forwarded to this Office for settlement and that they have been approved in whole or part. It is stated, however, that a decision in this regard is desired so that more definitive guidelines may be furnished to Navy personnel who desire to move themselves.

Section 404(a), Title 37, U.S. Code, provides in pertinent part that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed upon a change of permanent station, or otherwise, or when away from his designated post of duty, or upon separation from the service or release from active duty. Section 404(b) of Title 37 states that "The Secretaries concerned may prescribe—(1) the conditions under which travel and transportation allowances are authorized, including advance payments thereof; and (2) the allowances for the kinds of travel, but not more than the amounts authorized in this section." Subsection (d) of section 404 provides that the travel and transportation allowances authorized for each kind of travel may not be more than one of the following—

(1) transportation in kind, reimbursement therefor, or a monetary allowance in place of the cost of transportation at a rate that is not more than 7 cents a mile based on distances established, over the shortest usually traveled route * * *

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

(3) a mileage allowance of not more than 10 cents a mile based on distances established under clause (1) of this subsection.

Subsection (f) of section 404 provides that the travel and transportation allowances authorized under this section may be paid on the member's separation from the service or release from active duty, whether or not he performs the travel involved.

Section 406(a), Title 37, U.S. Code, provides that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation in kind for his dependents, to reimbursement therefor, or to a monetary allowance in place of that transportation in kind at a rate to be prescribed, but not more than the rate authorized under section 404(d) of this title. In connection with a change of temporary or permanent station, section 406(b) provides that a member is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned, without regard to the comparative costs of the various modes of transportation. Subsection (c) further provides that the allowances and transportation au-

thorized by subsections (a) and (b) of this section are in addition to those authorized by sections 404 and 405 of this title and are—

(1) subject to such conditions and limitations;
(2) for such grades, ranks and ratings; and
(3) to and from such places;

prescribed by the Secretaries concerned.

Paragraph M4150–1 of the Joint Travel Regulations provides in pertinent part that allowances for permanent change-of-station travel will be as follows, subject to the selection of the traveler: "1. mileage at the rate of $0.06 per mile; 2. transportation in kind or transportation request(s), plus a per diem allowance."

Paragraph M4151 of the regulations states that mileage is an allowance to cover the average cost of first class transportation including sleeping accommodations, cost of subsistence, lodging, and other incidental expenses directly related to the travel. Mileage is payable for the official distance between permanent duty stations, including travel directed via temporary duty points en route, when the member is authorized to and does perform such travel at his personal expense. The mileage allowance is payable regardless of the mode of transportation utilized and will accrue under conditions prescribed in this part. Paragraph M4151 further provides that mileage and per diem will not be allowed for the same day except in the case of payment of mileage under paragraph M4157 incident to separation from the service or relief from active duty.

Relative to temporary duty allowances in the United States, paragraph M4203–1 states that transportation in kind (including berths, parlor car seats, or staterooms, when required) may be furnished as contemplated by the orders, as authorized in Chapter 2, Part A (Accommodations on Common Carriers). Except as provided in subparagraphs 2 and 3b (reimbursement for cost of transportation and travel by privately owned conveyance) when authorized travel is performed at personal expense, the member will be reimbursed a monetary allowance in lieu of transportation at the rate of $0.05 for the official distance (par. M4203–3a, JTR).

The term "Government conveyance," unless otherwise qualified, is defined to mean any transportation facility owned, leased or chartered by the Government; except that a Government-owned vessel totally leased for commercial operation will not be considered a Government conveyance (par. M1150–6, JTR).

A member who elects to participate in the "Do It Yourself" program is required to drive a rental truck containing his household goods, supplied at Government expense, which otherwise would be transported by a commercial household goods mover. It appears that

under paragraph M1150–6 of the Joint Travel Regulations a leased vehicle would be considered to be a Government conveyance, as a transportation facility leased by the Government. However, a truck is supplied to the member to move household goods, and any personal travel via such conveyance is merely incidental to the transportation of these effects. Where a member drove his personally owned truck to transport his household goods, and received reimbursement for expenses of the operation of the vehicle, we held that he was entitled to the payment of a mileage allowance for his personal transportation as it is separate and distinct from allowance for the transportation of household goods. Decision B–176516, December 13, 1972, copy enclosed.

Additionally, "transportation in kind" which may be furnished as contemplated by orders (par. M4203–1, JTR) refers to accommodations on common carriers, such as berths, parlor car seats or staterooms. We do not consider that a member driving a loaded truck, or a dependent sitting beside him in the cab of the vehicle, is afforded the equivalent of such modes of transportation.

Therefore, in answer to question 1, a member who moves his household goods under the "Do It Yourself" program, incident to permanent change-of-station orders, is not considered to be afforded "transportation in kind," and consequently is entitled to a mileage allowance for his personal travel under item 1, paragraph M4150–1 of the regulations.

In view of our answer to question 1, no answer is required to question 2 which is predicated on the denial of entitlement to a mileage allowance.

In answer to question 3, if a member moves his household goods under the program incident to temporary duty orders, as in the case of a permanent change of station, he is entitled to a monetary allowance in lieu of transportation in accordance with paragraph M4203–3a of the regulations, with reimbursement at the rate of $0.05 per mile for travel performed at personal expense.

Naval Supply Systems Command Instruction (NAVSUPINST) 4050.62, August 3, 1972, a copy of which was enclosed with the Assistant Secretary's letter, provides procedures for utilizing the "Do It Yourself" method of moving personal property. Paragraph I.g.2 of the instruction indicates that travel allowances will not be paid to dependents who ride to the new destination in the rental truck. Consistent with the view expressed in answer to question 1, a member may be paid a travel allowance for dependents as well as a mileage allowance for himself, although they ride in a rental truck.

Paragraph II.b.2 of the instruction states as follows:

(d) *Assistance in loading and unloading.* The Comptroller General of the United States has determined that claims for reimbursement for labor submit-

ted under this program are payable at Government expense. While no general guidelines were outlined for future use, nor any specific rate of reimbursement set, the Comptroller General, in approving payment ruled that claims for reimbursement of labor in "reasonable" amounts would be honored, provided such claims, together with the other costs of the "Do It Yourself" moves, do not exceed the costs of transportation that would have been incurred had the goods been shipped by the government on a GBL or local contract procurement documents. Members should be counseled that reimbursement claims should be made for reasonable amounts, that each claim will be judged on its own merits, and that claims for reimbursement of labor of members or dependents will not be honored. All claims for reimbursement should be submitted to NRFC, Washington, D.C. and supported by documented proof of payment of the amount claimed, including identification of each person to whom payment was made, amount of time for which payment was made, and all other documents applicable to the "Do It Yourself" move.

In accord with 37 U.S.C. 406(b), and under the principle of paragraph M8500 of the Joint Travel Regulations which provides for reimbursement for shipments of household goods which are made at personal expense, we held in decision B-147846, January 30 and April 16, 1962 (copies enclosed) that reimbursement is authorized to a member who individually arranged for the hire of a moving van and secured assistance in packing and crating his household goods, upon presentation of a receipt for payment of a reasonable amount for such assistance. In decision B-159003, May 31, 1966 (copy enclosed), reimbursement was denied to a Navy member who, incident to his personally arranged household goods shipment by rental truck, presented bills for packing and unpacking services from persons who appeared to be members of his immediate family.

Accordingly, the Transportation and Claims Division of this Office has authorized payment of claims for reimbursement for the cost of assistance in loading and unloading of household goods shipped pursuant to the "Do It Yourself" program. We would have no objection to the payment of similar type claims provided such claims are within reasonable amounts and properly supported as indicated in paragraph II.b.2 of the above-quoted instruction.

[B-176395]

Contracts—Federal Supply Schedule—To Other Than Low Bidder or Offeror—Justification

Although selection from multiple sources available under a Federal Supply Schedule (FSS) is within the jurisdiction of a procuring agency because it best knows its needs, nonetheless the agency is required to comply with paragraph 5-106 of the Armed Services Procurement Regulation. Therefore, an agency that issued a request for quotations (RFQ) to FSS suppliers for the rental of copier machines which did not clearly state the variations from the copiers available from FSS sources and placed a delivery order for foreign-made copiers with the low offeror under the RFQ whose FSS price list is not the lowest should have included a justification for the order in the contract file to the effect the lower-priced copiers would not do and procuring the higher priced copiers was necessary: should have timely submitted required Buy American information; and should if it continues to use the RFQ procedure to up-date information,

clarify its requirements so suppliers unable to conform will be spared the time and expense of responding to an RFQ.

To the Secretary of the Air Force, June 15, 1973:

Reference is made to letter of April 16, 1973, reference LGPM, and prior correspondence, from the Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, concerning the protest of Apeco Corporation against the issuance of a delivery order by procurement officials at Richards-Gebaur Air Force Base, Missouri (hereinafter R–G), for rental of copier machines during fiscal year 1973. The order was issued on July 1, 1972, for the rental of six low-speed and eight high-speed copiers from the A. B. Dick Company under its Federal Supply Schedule (FSS) contract GS–00S–06921.

R–G issued request for quotations (RFQ) (DD Form 1155) No. F23608–72–Q–0438 on April 24, 1972, for information on electrostatic copier machines (Federal Supply Catalog Group 36, part IV, class 3610 equipment) available for rental under existing General Services Administration contracts. Rental of this equipment from FSS sources is not mandatory. *See* paragraph 5–102.3 of the Armed Services Procurement Regulation (ASPR). However, the decision was made to utilize the FSS and R–G issued the RFQ to 13 FSS suppliers, 10 of whom responded with quotations. R–G determined that eight of these, including Apeco, did not meet the performance requirements set forth in the RFQ. A. B. Dick and Savin Business Machines Company offered foreign-made copiers which were found to meet the requirements and the order was placed with A. B. Dick, whose price was lower. The total price of the order was $10,118.40.

The protest is directed at the list of requirements, and at three requirements in particular: Both the low- and high-speed copiers were, first, required to have "paper length selection from 5½ in. to 14½ in." (the selection requirement) and, second, to be able to produce "700 to 800 copies per roll-18#-20# light weight paper" (the number of copies requirement). The rolls of paper referred to are 8 inches wide. Thus the copiers were basically required to be able to produce sizes of copies ranging from 5½ by 8 inches to 14½ by 8 inches. However, it is not clear what size or sizes of copies are required to be produced at the rate of 700–800 per roll. The third controverted requirement is that the high-speed copier be able to produce 26–30 copies per minute (the speed requirement). The size or sizes of copies required to be produced at this rate are not specified.

The protestant has presented numerous objections concerning the meaning and application given by the R–G officials to these requirements. We believe its protest is essentially grounded upon three con-

tentions: that the requirements were unclear, that they were unduly restrictive or did not represent the minimum needs of the agency, and that, in any event, Apeco's copiers were in conformity with them. There is merit to the allegation that the requirements were unclear. As to the selection requirement, there is no indication how the operator is to select the sizes of copies—whether by dialing, by manually inserting a different size roll of paper, or otherwise. As to the number of copies and speed requirements, as already noted, there is no indication what size or sizes of copies are involved. Furthermore, it is reasonable that Apeco did not request any clarification of the requirements, since the record shows that the protestant had been issued the delivery order for the previous year, fiscal year 1972, under the same list of requirements. R–G has stated, without offering further explanation, that the 1972 order was issued erroneously and, therefore, there is no inconsistency in the fact that Apeco's copiers were found not to be in conformity with the same requirements for fiscal year 1973.

The only justification in the record for these requirements is a memorandum dated June 13, 1972, which antedates the delivery order. This was the day before A. B. Dick was notified that it was to receive the order. This memorandum lists various offices which called for the selection requirements. However, we note that the requesting organization did not call for the capability to produce copies from 5½ to 14½ inches in length, but only that the machines be capable of producing copies 5½ inches long and copies 14½ inches long. Also, the number of copies requirement is stated as being "over 700 copies of 8 x 10½ size per roll of paper," the justification being that this feature would eliminate a major waste of time involved in changing the paper rolls. No mention is made of the speed requirement. The contracting officer has stated that the contents of the memorandum constituted a response to a query to the requesting organization to review and confirm its requirements. Although no explanation has been given why the information in the June 13, 1972, memorandum could not have been assembled and included in the contract file before the RFQ was issued, there is no reason to question the veracity of its contents and we are satisfied that it establishes a need for copiers which would produce 5½, 10½ and 14½ by 8-inch copies and over 700 copies per roll of the 10½ by 8-inch size. However, no need has been established for the speed requirement.

In view of the needs of the requesting organization as indicated above, R–G's determination not to rent the Apeco copiers was proper. The requesting organization needed copiers which could produce over 700 8 by 10½ inch size copies per roll. R–G's position on this point, confirmed by examination of the Authorized Federal Supply Schedule

and Price List, is that Apeco's copiers will produce only 600 "letter-size" copies per roll. As to the length selection requirement, the protestant contended in its November 9, 1972, letter to our Office that it could meet this requirement by a "gear adjustment." It does not appear from the record that Apeco made this claim at the time it was informed that it would not receive the purchase order. R–G states that the only offers made by Apeco in this regard were that the selection requirement could be met by changing the paper rolls or by utilizing two machines in each location instead of one. We see no basis on the record to challenge R–G's determination that Apeco's offers were unacceptable because changing the paper rolls would be unduly burdensome to the operators and that R–G's offices lack sufficient space to house two machines. Further, we cannot regard Apeco's unsubstantiated allegation concerning "gear adjustment," made more than 4 months after the purchase order was issued, as overriding R–G's determination of nonconformity with the length selection requirement. Also, it is noted that the Authorized Federal Supply Schedule and Price List shows that the maximum copy size which Apeco's copiers will produce is 8½ by 14 inches, which falls short of the 14½ inch requirement.

In a decision involving selection from multiple sources under a Federal Supply Schedule, our Office reiterated its view that determinations as to the needs of an agency and which products meet those needs are matters primarily within the jurisdiction of the procuring agency and with which we will not interfere unless they clearly appear to involve bad faith or are not based upon substantial evidence. B–168499, January 20, 1970. In the present case, we cannot say that the contracting officials failed to meet this standard in deciding to rent copiers from A. B. Dick rather than from Apeco. Accordingly, Apeco's protest is denied. However, the matters discussed above demonstrate a failure to comply with the proper procedures and a need for improvements in R–G's method of procuring such services. Procedures for selection among multiple sources on a Federal Supply Schedule are prescribed by Armed Services Procurement Regulation (ASPR) 5–106. ASPR 5–106 provides:

(a) *General.* Certain of the Federal Supply Schedules, listed in 5–102.3, provides several sources for certain requirements. Additionally, some such Schedules indicate that multiple sources are provided to make available a selection of supplies or services to meet a specific or an unusual requirement. When orders in excess of $250 are placed at other than the lowest Schedule price, the purchasing office shall include in the contract file a memorandum containing the facts justifying the order. The justification may be based on considerations such as delivery time and administrative expense. When the order is to fulfill a specific or an unusual need, it shall, in addition to any other basis for justification, state the unusual or specific requirements such as differences in performance characteristics, and compatibility with existing equipment or systems.

(b) *Procurement of Articles of Foreign Origin for Use in the United States.* When purchase of an item of foreign origin is specifically required, the using activity shall furnish the procuring activity sufficient information to permit the determinations required by Section VI to be made.

Examination of Apeco's Authorized Federal Supply Schedule and Price List for 1972 reveals that Apeco's rental price for each copier was lower than A. B. Dick's. Therefore, the purchase order was placed at other than the lowest Schedule price and a factual justification of the order was required to be included in the contract file. While the June 13, 1972, memorandum serves to justify some of the requirements it does not satisfy the inquiry whether A. B. Dick copiers did, in fact, meet the requirements; whether Apeco copiers did not meet actual needs; and why rental from A. B. Dick was justified although Apeco's rental price was lower. We believe that the failure to compile a timely factual justification was a procedural departure from the regulation. *See*, in this regard, 46 Comp. Gen. 713 (1967). In addition, the record shows that the "Buy American" determination required by ASPR section VI was not made until after the delivery order was issued.

The April 16, 1973, supplementary report states that R–G uses the RFQ procedure to assure that up-to-date information is obtained on the availability of equipment from FSS suppliers, since there may be some delay before procuring activities are informed of amendments to the Schedules, and also to obtain more detailed price information than is provided in the Schedules and Price Lists. In the event that R–G wishes to continue to use this procedure, its list of requirements should be clarified to indicate how paper length selection is to be accomplished, and what size or sizes of copies are required to be produced at the rate of 700–800 copies per roll, and what sizes are to be produced at the rate of 26–30 copies per minute on the high-speed copier. This is necessary so that prospective suppliers can be adequately informed as to whether their equipment meets R–G's needs. Suppliers whose equipment is nonconforming, as was the case with eight of 10 suppliers here, may thus be spared the time and expense involved in preparing a response to the RFQ.

[B–177400]

Transportation—Accessorial Charges—Additional Charge for Unusual Services—Driver Assignment, Shipment Charge, Etc.

A motor carrier who transported electrical instruments from New York to New Mexico under a Government bill of lading noted "Two Drivers Authorized," for which he was paid on a line-haul basis that included the regular driver's service is not entitled to reimbursement for the driver's overtime service in the absence of a provision in either the Government tender I.C.C. 50 or in the Military Rate Tender IV authorizing such payment; is only entitled to the regular charges prescribed for the extra driver if the services were not performed in New York, computed on the basis of the actual hours worked as evidenced by the driver's logs, which is the best support of the claim (4 CFR 54.5); and is not entitled to a shipment charge based on the minimum weight applicable in the computation of the line-haul charges but rather on the basis of the net weight shipped. Furthermore, round the clock charges for both drivers, as provided by contract or labor laws, is not the responsibility of the United States.

To the Trans Country Van Lines, Inc., June 15, 1973:

By your letter of October 27, 1972, you request review of the disallowance of certain amounts included in your supplemental bill No. 35060, dated March 21, 1972, for $684.15 for the transportation of electrical instruments from College Point, New York, to White Sands, New Mexico, under Government bill of lading D–5546937, dated August 7, 1969. By certificate of settlement dated October 16, 1972, TK–948455, you were allowed $97 of the $684.15 claimed on your March 21, 1972, supplemental bill, the balance of the amount $587.15 being disallowed. Despite the fact that only $587.15 of your supplemental bill was disallowed, you claim a balance of $671.15 is due you. A supplemental bill for $671.15 was enclosed with your letter of October 27, 1972.

For the transportation service rendered you originally claimed and were paid $2,221.36, representing the line-haul charges of $1,487.36, computed on the basis of 8,810 pounds as 22,400 pounds at $6.64 per hundred pounds, which charge is not in controversy, plus a per shipment charge of $30 and extra driver charges of $704. On audit of the payment voucher in our Office lower charges were considered applicable and a "Notice of Overcharge" (GAO Form 1003) dated October 12, 1970, was issued for $425. However, in response to your protest dated October 26, 1970, an amended Form 1003 was issued reducing the overcharge to $400.15, which amount was recovered by deduction on or about November 23, 1971. At that time you had thus received a net payment of $1,821.21 ($2,221.36 less $400.15 deducted).

Thereafter, in response to your claims for additional charges, you were allowed on your supplemental bill of March 24, 1971, an additional transportation charge of $112 by settlement of January 21, 1972, TK–928713, which amount was credited against an overcharge on bill number 36197. Also, as indicated, you were allowed $97 by the settlement of October 16, 1972, mentioned above. The computations made on the settlement allowing the $97 overlooked and failed to consider that $112 was allowed as a credit by the settlement of January 21, 1972.

In your request for review you agree that the line-haul rate includes a factor to cover one regular driver's services, but you contend that only the normal hours of the one regular driver, as defined in Rule 10 of your commercial tariff, are included and covered by the line-haul rate and that overtime service in excess of the usual 8 a.m. to 5 p.m. on weekdays and all hours worked on Saturdays, Sundays, and holidays must be paid for at the applicable overtime rates.

By section 217(a) of the Interstate Commerce Act, 49 U.S. Code 317(a), every common carrier by motor vehicle is required to publish and file with the Interstate Commerce Commission tariffs setting forth

its charges for all service in interstate or foreign commerce. By section 217(b), 49 U.S.C. 317(b), such a common carrier is prohibited from charging, demanding, collecting or receiving a greater or less or different compensation than the rates, fares or charges published in the tariffs filed with the Interstate Commerce Commission, with a proviso incorporating the provisions of section 22 of the Interstate Commerce Act, 49 U.S.C. 22, which permits free or reduced rate transportation for the United States.

There is no provision in Trans Country Van Lines Government tender I.C.C. 50 that provides for the assessment of additional service charges or for the application of the provisions of your regular commercial tariff. However, the provisions of Military Rate Tender (MRT) I-series are incorporated by reference in Item 16. Item 170 of MRT 1-V provides for labor charges. The first paragraph of item 170 as to labor charges provides:

> Covers all services for which no charges are otherwise provided in tender when such services are requested by shipper (except in areas described below).

and names a rate of $5.75 per manhour for regular time and $7.75 per manhour for overtime.

Subsequent paragraphs contain exceptions for certain areas. Pertinent here among such exceptions is the provision that a rate of $8 per manhour regular time and $12 per manhour overtime will be payable "*WHEN SERVICE IS PERFORMED IN:* * * * NEW YORK: New York City and Counties of Nassau, Suffolk and Westchester." [Italic supplied.] Note 1 to Item 170 provides:

> REGULAR time labor charge applies when service is performed in accordance with Rule 10 of carriers' tariff. OVERTIME labor charge applies when service is performed:
>
> Between 5:00 P.M. and 8:00 A.M., except Saturdays, Sundays and holidays. During any hour on all official, National holidays * * *.

Rule 10 of your commercial tariff, to which you refer, applies only as provided in Item 170, which, by the terms of the first paragraph, applies only for services "for which no charges are otherwise provided." You agree that the driver's services during the hours 8 a.m. to 5 p.m. on weekdays are included in the line-haul rate. We find no provision in either Government tender I.C.C. 50 or in MRT 1-V which expressly excludes the regular driver's overtime service from being included in the line-haul rate, or which expressly provides charges for the regular driver's overtime in addition to the line-haul charges, and we have been cited to no such provision. In the absence of such provision, there is no basis for the payment of overtime for the regular driver in addition to the line-haul charges. Also, since the line-haul charges provided and paid were based on a minimum weight of 22,400 pounds, while only 8,810 pounds moved, we assume such higher charges

are intended to cover any extra expenses involved incident to exclusive use of the vehicle for which no specific extra charge is provided. In addition, there is no indication on the covering bill of lading and there is no evidence in our file that either continuous service or delivery by a given date was requested as alleged by you.

Accordingly, we find no basis for the payment of charges in addition to the line-haul charges for overtime of the regular driver.

It appears to be your contention, also, that the shipper is obligated to pay extra driver charges of $8 per manhour for regular time and of $12 per manhour for overtime because the services "were engaged in New York City." However, a shipper is obligated to and may be required to pay only such charges as are published in duly filed tariffs or in special reduced rate tenders under sections 22 and 217(b) of the Interstate Commerce Act, 49 U.S.C. 22 and 317(b). In the audit and settlement of your supplemental bills for the subject movement, charges for the extra driver of $5.75 per manhour regular time and $7.75 per manhour overtime were allowed as set forth in paragraph 1 of section 170, MRT I.C.C. 1–V. The only exceptions are as set forth in the succeeding paragraphs of item 170. The charges of $8 per manhour regular time and of $12 per manhour overtime, claimed by you, apply only "WHEN SERVICE IS PERFORMED IN: * * * New York City and Counties * * * " specified. No provision is made for the higher $8 and $10 rates because the service originates in New York City or the specified counties of New York State. While the services were engaged in New York City (College Point), the services were to be performed between New York to New Mexico, and (except for the loading time) not in New York City or the specified counties. Therefore, the labor rates for services performed in New York City and counties specified (except as indicated in the prior sentence) are not applicable.

You also state, on page 2 of your request for review, that you are unable to locate any provision in which it is written that a copy of the driver's logs, suggested by our Transportation and Claims Division in disallowance of your claim for additional labor charges, must accompany billing.

Section 54.5 of Title 4 of the Code of Federal Regulations, 4 CFR 54.5, provides:

> EVIDENTIARY DATA REQUIRED. Each claim should set forth all of the pertinent facts and details and *be supported by such evidentiary data* as will clearly establish the liability of the United States. Bare assertions or conclusions as to amounts due from the United States usually are not accorded formal consideration. [Italic supplied.]

The tariff provides a basis for charges for each manhour of regular and overtime additional labor performed, and the notation on the

Government bill of lading, as follows: "Two Drivers Authorized" establishes that extra driver service was requested, but the amount of the service rendered is not shown. The driver's logs are the best evidence of the extent of the extra driver's service, and is the best support of a claim for such charges.

You also claim a shipment charge of $30 based on the minimum weight applicable in the computation of the line-haul charges. The shipment charge is provided by Item 15 of MRT I.C.C. 1–V, which provides graduated shipment charges for different weight groups. Of importance here are the last two groups providing a charge of $24.85 when shipment weighs 8,000 pounds to 11,999 pounds inclusive, and $30 when shipment weighs 12,000 pounds and over. Note 1 to Item 15 provides:

The shipment charge will be applied to net weight of the shipment, as defined in Paragraph (i) of Application of Tender.

Net weight is defined in paragraph (i) as the actual weight, including the weight of the goods plus cartons, barrels, fiber drums, wardrobes, crates (mirror, marble, etc.), wooden boxes (when approved by the shipping officer) used to pack linens, books, bedding mattresses, lamp shades, draperies, glassware, chinaware, bric-a-brac, table lamp bases, kitchenware and other fragile articles, and the necessary packing and filler material incident thereto, and nothing else will be included in the net weight. The net weight of the subject shipment was 8,810 pounds. Since the shipment falls within the weight group 8,000 pounds to 11,999 pounds, the applicable shipment charge is $24.85. There is nothing in Item 15 which makes the shipment charge subject to the minimum weight applicable in the computation of the line-haul charge. See our decision to you of March 27, 1973, 52 Comp. Gen. 612.

The total applicable charges, therefore, are:

Line Haul 8,810 as 22,400 lbs. at $6.64 cwt	$1,487.36
Shipment Charge	24.85
Additional Transportation Charge	112.00
Labor 2 hours at $8 per hour loading in NYC	16.00
Extra Driver:	
August 7, 1969:	
1 man— 8 hours at $5.75	46.00
1 man— 2 hours at 7.75	15.50
August 8, 1969:	
1 man— 8 hours at 5.75	46.00
1 man— 2 hours at 7.75	15.50
August 9, 1969:	
1 man—10 hours at 7.75	77.50
August 10, 1969:	
1 man—10 hours at 7.75	77.50
	278.00
	$1,918.21

Also, insofar as your current computation claims round the clock (24 hours per day) labor charges for both the regular and extra driver, we find no provision in the tenders which requires such charges except as indicated in the above computation to be paid by the consignor or consignee. Your company's obligations to its drivers under contracts with them or labor laws affecting them are not matters in which the United States as shipper or person responsible for freight on the shipment is involved.

The net charges paid or credited:	
Paid originally	$2,221.36
Setoff	(400.15)
Allowed January 21, 1972	112.00
Allowed October 16, 1972	97.00
	$2,030.21

You have, therefore, received an overcharge of $112. Accordingly, the disallowance of your claim for additional charges is sustained, and the overcharge of $112 should be refunded promptly in order to avoid the necessity for collection by other available means.

[B-178362]

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

The wife of a Navy member on active duty who incident to travel from Lisbon, Portugal, to the United States Air Force Base Torrejon, Spain, via Madrid, Spain, and return, as an attendant to her husband who was unable to travel unaccompanied, is furnished Government procured commercial air between Lisbon and Madrid and is provided Government quarters, may be reimbursed the cost of travel via commercial auto from the Air Base to Madrid Airport upon a showing of the actual expenses incurred. Payment to the wife is approved on the basis the rationale stated for paying the expenses of individuals not employed by the United States incident to traveling as an attendant to a military member on a temporary disability retired list, and as an attendant to a civilian employee is equally applicable to a member of the uniformed services on active duty.

To R. V. Byars, Department of the Navy, June 18, 1973:

Further reference is made to your letter of March 7, 1973, file reference FFC (RVB:cc) FP (HNR) 4650 (L), with enclosures, forwarded to this Office by endorsement of April 2, 1973, from the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 73-15) in which you request an advance decision regarding the claim of Jeanne Janise Larsen, wife of RM1 Michael K. Larsen, USN, 538-40-4279, for travel performed as an escort or attendant to her husband when it had been medically determined that the service member should not travel unaccompanied.

The record indicates that Mrs. Larsen traveled from Lisbon, Portugal, to U.S. Air Force Base Torrejon, Spain, via Madrid, Spain, and return, as an attendant to her husband who was unable to travel unac-

companied, in accordance with Special Orders Number 28–71 Tango 210272 dated December 9, 1971, U.S. National Support Unit, Headquarters of Commander Iberian Atlantic Area, Oeiras, Portugal. Mrs. Larsen thereafter submitted a claim for her travel in accord with the orders which directed travel by commercial air and provided that use of Government quarters was mandatory. She was furnished Government procured commercial air between Lisbon and Madrid at the cost of $66.10.

You say that in the absence of specific provisions in the Joint Travel Regulations, Volume 1 or 2, to authorize travel expenses of a non-employee acting as escort and since you are unaware of any statutory authority which would specifically authorize travel and transportation allowances for a person traveling as an attendant, other than a member or employee, the question arises concerning the legality of authorizing such travel and whether entitlement exists under the circumstances described.

In decision of August 18, 1972, 52 Comp. Gen. 97 (copy enclosed) this Office had for consideration the question whether payment might be made to an individual not in U.S. Government employ who performed travel as an attendant to a military member on the temporary disability retired list when the member traveled for the purpose of submitting to a mandatory physical examination and was incapable of traveling alone. Noting that in some situations where Government personnel are detailed to act as attendants, the resultant travel costs usually involve two round trips between the hospital and the member's home, whereas the cost of only one round trip would result if non-Government personnel were authorized to perform this function, we held that reimbursement of the actual transportation costs of a non-Government attendant would be authorized when the member was incapable of traveling alone.

In the above cited decision, we referred to decision B–169917, July 13, 1970 (copy enclosed), in which we held that reimbursement of transportation expenses was authorized for an individual not in the U.S. Government employ incident to travel as an attendant for a civilian employee (the attendant's husband) whose travel in such circumstances was authorized.

Although the cited decisions did not involve a member of the uniformed forces on active duty, we are of the opinion that the rational set forth is equally applicable to a member of the uniformed forces on active duty so as to authorize reimbursement for actual expenses to a non-Government employee who has performed authorized travel as an attendant or escort for a member of the uniformed forces, as incident to the member's travel, when it has been determined that the member is incapable of traveling alone.

Mrs. Larsen's claim does not show that she personally paid for any of her travel expenses, and payment of per diem allowances is not authorized in such circumstances. However, her voucher indicates that she traveled via commercial auto from Torrejon Air Force Base to Madrid Airport. In accord with the foregoing, she may be reimbursed for such transportation upon a showing of the actual expense incurred. The voucher and supporting papers are returned herewith.

[B-178137]

Military Personnel—Record Correction—Actions That May Not Be Delegated—Changes of Material Facts or Creation of New Records

Although the Secretaries of the military departments concerned may delegate the performance of certain ministerial duties to correct administrative errors in members' records, changes that involve a material fact or create a new record require a Board for Correction of Military Records action pursuant to 10 U.S.C. 1552. Therefore, in the absence of such a proceeding, the Adjutant General of the Army may not correct the record of a member retired as an Army Sergeant who received a bad conduct discharge in 1949 from the Navy and shortly thereafter used the papers and name of a Marine to enlist in the Regular Army, from which he was retired in 1960, under 10 U.S.C. 3914, recalled in 1965, and retired again in 1972, also under section 3914, to evidence continued service under his own name until the effective date of the second retirement, as such an action would be ineffective to authorize pay and allowances, including retired pay, for the retirement periods.

To H. C. McDaniel, Department of the Army, June 20, 1973:

Further reference is made to your letter dated February 12, 1973 (file reference FINCS–AF Peppers, Marvin F. 493 20 8620), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $14,508.31, in favor of Master Sergeant Marvin F. Peppers, USA, Retired, SSAN 493–20–8620, representing active duty pay and allowances for the periods December 1, 1960, to June 30, 1965, and from April 1, 1972, to November 30, 1972, and for retired pay for the period December 1, 1972, to January 31, 1973, in the circumstances described. Your letter was forwarded to this Office by letter from the Office of the Comptroller of the Army, dated February 28, 1973 (file reference DACA–FIJ–M), and has been assigned Control Number DO–A–1183 by the Department of Defense Military Pay and Allowance Committee.

You say that Mr. Peppers served in the United States Naval Reserve (inactive) from April 25, 1945, to May 31, 1945, and then on active duty in the United States Navy from June 1, 1945, to March 11, 1949, when he was released from the Navy with a bad conduct discharge. On October 25, 1949, Mr. Peppers, using the papers and the name of Harold Merowitz, a former Marine, enlisted in the Regular Army. He served in a continuous active duty status under the name of Merowitz from that date through November 30, 1960, when he, as Merowitz, was

retired for years of service, effective December 1, 1960, under the provisions of 10 U.S. Code 3914. On July 1, 1965, he was recalled to active duty as Merowitz and served on that duty until March 31, 1972, when he was again placed on the retired list effective April 1, 1972.

You say that The Adjutant General of the Army, with approval of the Secretary of the Army, has taken administrative action to void Mr. Peppers' retirement in 1960, under the name of Merowitz, and to place him in the status of a Regular Army enlisted man on active duty beyond expiration of his term of service under his own name. You also say that it was further determined that he reenlisted in the Regular Army on December 11, 1959, and has had continuous service from then through November 30, 1972, at which time he was placed on the United States Army Retired List effective December 1, 1972, under the provisions of 10 U.S.C. 3914.

You express doubt as to the propriety of stating, through administrative action only, that Mr. Peppers was on continuous active duty from November 11, 1959, through November 30, 1972, when in actuality he did not serve on active duty in his own name or that of Merowitz during the periods December 1, 1960, through June 30, 1965, and April 1, 1972, through November 30, 1972. In this regard, you say that although the subject of the memorandum of November 6 1972, from The Adjutant General to the Secretary of the Army shows "Correction of Military Records" in Mr. Peppers' case, it has been reported to you that the matter was never submitted to the Army Board for Correction of Military Records for action under the provisions of 10 U.S.C. 1552.

On the basis of the above, you ask the following questions:

a. Is member entitled to active duty pay and allowances, less prior overpayments, retired pay payments and compensation received from civilian occupation, if any, for the period 1 December 1960 through 30 June 1965 and from 1 April 1972 through 30 November 1972?

b. Is member entitled to retired pay effective 1 December 1972? If so, may payment be made as a Master Sergeant (E–8) with over 26 years service, as certified on the attached DA Form 3713, dated 21 November 1972?

The provisions of law relating to the correction of the military or naval records of members of the uniformed services are derived from section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended by the act of October 25, 1951, Public Law 220, 65 Stat. 655, and is presently codified as 10 U.S.C. 1552. Subsection 1552 (a) of that section provides that:

The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. * * * a correction under this section is final and conclusive on all officers of the United States.

In our decision dated December 23, 1952, 32 Comp. Gen. 294, we took the position that the statute authorizing correction of military or naval records does not authorize the Secretary to confirm or to validate illegal actions but does authorize him, acting through "boards of civilian officers or employees," to correct military records, authorizing payment only on that basis.

In the case of *Francis J. Proper* v. *United States*, 139 Ct. Cl. 511 (1957), it was argued that under the provisions of section 207 of the 1946 Legislative Reorganization Act and its amendments, the Secretary of the Army did not need to act through a civilian board; that the recommendations of the Correction Board were merely advisory and that the Secretary was free to accept and act favorably on those findings and recommendations or to ignore them, as he saw fit. The court, citing 32 Comp. Gen. 294 (1952), concluded in the *Proper* case that,

> Such an interpretation of section 207 makes the words "acting through boards of civilian officers or employees" superfluous. Neither the act itself nor its legislative history warrants such an interpretation. Since the errors or injustice which might require correction were originally made by the military, Congress made it manifest that the correction of those errors and injustices was to be in the hands of civilians.

In the case of *Jack M. Hertzog* v. *United States*, 167 Ct. Cl. 377 (1964), which upheld the position taken in the *Proper* case, the court expressed the view that the legislation authorizing the correction of military or naval records requires that the Secretaries of the services concerned act, if at all, through "boards of civilians" in the matter of deciding whether or not a service member's military record should be corrected.

The memorandum to the Secretary of the Army from The Adjutant General dated November 6, 1972, referred to in your submission, concerns Sergeant Peppers' request for correction of his military records and provides in pertinent part as follows:

> 2. It has been determined that Sergeant Peppers fraudulently obtained retirement on 1 December 1960 by using the service of Harold Merowitz; therefore, his retirement is void. Subsequently, he was recalled to active duty for a period of 6 years and 9 months. His status is now that of a Regular Army enlisted member on active duty beyond expiration of his term of service, with 21 years, 7 months and 1 day of service which he actually performed himself.
>
> 3. It is noted that Sergeant Peppers' bad conduct discharge from the Navy was based on an unauthorized absence of only 6 days and 2 hours which occurred when he was only 22 years of age. Subsequently, he has served 17 years, 10 months and 6 days of honorable service in the Army; attained the rank of Master Sergeant, and has been the recipient of various awards and commendations.
>
> 4. In view of the above, it is proposed to effect Sergeant Peppers' retirement at the earliest practicable date. Immediately on retirement, his case will be referred to the Comptroller of the Army for any necessary adjustments of his pay status.

We recognize that the Secretaries of the military departments concerned may perform or delegate the performance of certain ministerial duties with regard to a service member's military or naval records under authority inherent in their positions, in order to correct certain

administrative errors which from time to time arise regardless of the care taken to insure the accuracy of such records. However, we are unaware of any authority in law or regulation, nor has any been cited in either your submission or in the enclosures, whereby the Secretary of the Army acting through the Office of The Adjutant General may make any changes in an individual's Army record that would result in a change of material fact or the creation of a new record, in the absence of a proceeding before the Army Board for Correction of Military Records.

As the record indicates, Mr. Peppers' enlistment in the Army and his retirement therefrom in 1960 were both fraudulently obtained. In this light and since it appears that the purported changes would have the effect of placing him in an active duty pay status for a period of over 5 years when in fact he performed no active duty because of being on the retired list, it is our view that the purported record changes constitute a change of material fact which we believe is for consideration by the Army Board for Correction of Military Records under 10 U.S.C. 1552.

Accordingly, in the absence of Correction Board action in Mr. Peppers' case, the correction action taken by The Adjutant General is ineffective to authorize pay and allowances, including retired pay for the periods in question.

Your questions are answered in the negative. Should the Army Board for Correction of Military Records act favorably on any request for correction that may be presented by Mr. Peppers, and should you have any further questions concerning this matter, it may be submitted here for resolution.

[B–178414]

Contracts—Specifications—Site Visits

The failure of the low bidder to attend the prebid site inspection required by an invitation for the manufacture and installation of a Thermal Shock Chamber that provided "in no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract," does not require rejection of the low bid on the basis acceptance of the bid would be prejudicial to other bidders as the purpose of the site visit provisions of the invitation was to warn bidders that site conditions would affect the cost of performance and that a bidder assumed the risk of any cost of performance due to observable site conditions. as well as to provide for the Government's acceptance notwithstanding the bidder's failure to inspect—an acceptance which would effectively bind the bidder to perform in accordance with the advertised terms and specifications—and to protect the Government against bid withdrawal or claim after contract award.

To the Environmental Tectonics Corporation, June 20, 1973:

This is in reply to your telefax message dated April 10, 1973, and letter dated May 24, 1973, protesting the award of a contract to the

low bidder, Tenney Engineering, Inc. (Tenney), under invitation for bids DAAA21-73-B-0280, issued at Picatinny Arsenal, Dover, New Jersey, for the manufacture and installation of a Thermal Shock Chamber in accordance with specifications.

Essentially, it is your position that Tenney's failure to attend the "required" prebid site inspection rendered its bid nonresponsive. You state that to hold otherwise prejudices other bidders and would not permit all bidders to compete on a common basis.

The provisions in the invitation concerning site inspection are included in Section C, Instructions, Conditions, and Notices to Offerors at page 11 and in Section F, Description/Specifications at page 32, paragraph 11.6, as follows:

SITE VISIT (1967 APR)

Bidders are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. In no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract.

* * * * * * *

11.6 Prospective contractors are required to inspect the site prior to bidding as special rigging hookup and carpentry is required to install the chamber.

You have taken the position that Tenney's bid is nonresponsive since prospective contractors were "required," "urged" and "expected" to attend site inspection, and since site conditions apparent at time of inspection could well affect price and quality.

Under formal advertising procedures for Government contracts, it is an established rule that a bid, to be acceptable, must be responsive as submitted, that is, it must conform to all material requirements of the advertised terms and specifications. 10 U.S. Code 2305(c). The Government's acceptance of such a bid effectively binds the bidder to perform in accordance with the advertised terms and specifications. 42 Comp. Gen. 502 (1963).

In our opinion the purpose and the effect to be given to the above-quoted provisions regarding the site visit are obvious. By including these provisions the Government sought to warn bidders that site conditions could affect the cost of performance of the contract and in the event a bidder failed to inspect the site, the Government sought to protect itself against the necessity of permitting withdrawal of such bid after opening or against a claim after award of the contract. We therefore believe it is clear that bidders were to assume the risk of any costs of performance due to observable site conditions and that the Government intended to consider a bid for acceptance notwithstanding a bidder's failure to inspect the site. In view thereof, we must conclude that by submitting its bid under such conditions, Tenney

knowingly committed itself to manufacture and install the chamber at its bid price and to assume the risk of any unanticipated increased costs due to observable site conditions, a basis common to all participating bidders irrespective of nonattendance at site inspection. *See* 1 Comp. Gen. 321 (1921).

We have also noted your contention that "other bidders were prejudiced and very likely dissuaded from bidding because site visit was clearly stipulated, as not to do so would be cause for rejection of their bid." In this connection, there is no provision in the solicitation to the effect that failure to attend the site inspection would be cause for bid rejection, and for the reasons stated above we believe the contrary is in fact the case. Moreover, your argument that other bidders may have been dissuaded from bidding because of the site inspection provisions is entirely speculative and in any event unpersuasive since we have concluded that all bidders were bidding on the common basis of meeting the specification requirements irrespective of attendance.

Accordingly, your protest must be denied.

[B-177610]

Property—Public—Space Assignment—Charge Assessment

Where the General Services Administration (GSA) cannot establish Standard Level User Charges (SLUC) for space and services furnished pursuant to the Public Buildings Amendments of 1972 on the basis of commercial rates, the GSA Administrator has broad discretion under the act to assess charges and may assign concessions for blind stands and Federal Credit Unions, with the concurrence of occupying agencies, and this space together with joint use space and parking facilities may be considered to establish user charges, and the cost of concessions for cafeterias, beauty parlors, etc., may be charged the occupying agencies on a pro rata reasonable basis. Under its authority to assign and reassign space in Government owned and leased buildings, GSA may assess SLUC rates in buildings occupied by permit from another agency, reimbursing the controlling agency; may charge for congressional district offices; and may outlease sites until needed for construction at fair rental value.

To the Acting Administrator, General Services Administration, June 21, 1973:

Reference is made to your letter of December 6, 1972, concerning proposed user charges to be assessed for use of space and services controlled by the General Services Administration pursuant to the Public Buildings Amendments of 1972.

The Public Buildings Amendments of 1972 (Act), approved June 6, 1972, Public Law 92–313, 86 Stat. 219, amended both the Public Buildings Act of 1959, as amended, 40 U.S. Code 601, *et seq.*, and the Federal Property and Administrative Services Act of 1949, 63 Stat. 277, as amended, 40 U.S.C. 471, *et seq.*, to provide for the financing, acquisition, construction, alteration, maintenance, operation and protection of public buildings.

One of the major purposes of the act was the establishment under section 3 thereof of a fund (Federal Buildings Fund) to finance real property management and related activities of the General Services Administration (GSA). Among revenues and collections to be deposited into the fund are user charges to be made to GSA pursuant to section 4. Section 4 amends section 210 of the Federal Property and Administrative Services Act of 1949, as amended (Property Act), 40 U.S.C. 490, by adding new subsections (j) and (k) as follows:

(j) The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services, except that with respect to those buildings for which the Administrator of General Services is responsible for alterations only (as the term "alter" is defined in section 13(5) of the Public Buildings Act of 1959 (73 Stat. 479), as amended (40 U.S.C. 612(5)), the rates charged the occupant for such services shall be fixed by the Administrator so as to recover only the approximate applicable cost incurred by him in providing such alterations. The Administrator may exempt anyone from the charges required by this subsection if he determines that such charges would be infeasible or impractical. To the extent any such exemption is granted, appropriations to the General Services Administration are authorized to reimburse the fund for any loss of revenue.

(k) Any executive agency, other than the General Services Administration, which provides to anyone space and services set forth in subsection (j) of this section, is authorized to charge the occupant for such space and services at rates approved by the Administrator. Moneys derived by such executive agency from such rates or fees shall be credited to the appropriation or fund initially charged for providing the service, except that amounts which are in excess of actual operating and maintenance costs of providing the service shall be credited to miscellaneous receipts unless otherwise authorized by law.

The provisions of section 4 become effective under section 11 of the act when determined by the Administrator of General Services but no later than the beginning of fiscal year 1975. Also, under section 7 the rates established pursuant to section 4 must be approved by the Director of the Office of Management and Budget (OMB), and the regulations issued must be coordinated with OMB.

You state that since enactment of Public Law 92-313 a task force within GSA has initiated studies to determine the alternatives available for implementing the user charges to be assessed for use of GSA controlled space and services. The charges, designated as Standard Level User Charges (SLUC), in accordance with the act will approximate commercial charges for comparable space and services. It is explained that, as a general rule, the user rate, based upon commercial charges, will cover the value of the space itself plus cleaning, utilities, operation and maintenance of elevators and electric heating, air-conditioning, ventilating, refrigeration, plumbing and sewage systems, repairs and maintenance, including approaches, sidewalks and roads; the furnishing and maintenance of building equipment such as directory and bulletin boards, electrical outlets, door keys, and window

shades or venetian blinds; and overhead (i.e., the total cost of GSA's Public Buildings Service (PBS), including space occupied by PBS, except costs covered by reimbursements). It is stated that the list is not intended to be all inclusive, but to illustrate that the SLUC charge is to include services normally provided by private building owners in rental agreements.

It is explained, however, that in many cases—

> * * * it is not always possible to make comparisons to commercial practices. For example, in many instances, the building is occupied totally by the Federal Government and auxiliary services must be provided which are not usually provided in private commercial buildings. In fulfilling its responsibility for the operation of public buildings, GSA has an allied responsibility in many cases to arrange for food and other essential services which may not be conveniently available from commercial sources and which are required for the health, comfort, or efficiency of Government employees while on duty. In addition, many public buildings include so-called joint use space such as auditoriums and conference rooms which are available for use by all tenants occupying the building.
>
> The space occupied by concessionaires in our buildings would, in many instances under commercial practices, be leased for a different use, since the concessionaire could not maintain a profitable operation if required to pay the full commercial value of the space. However, the overall benefit to the Government in terms of the health, comfort or efficiency of the employee in such cases requires that the services rendered by concessionaires continue in the interests of the Government and, moreover, that the prices to Government employees for such services be kept as low as possible. GSA's authority for arranging concessions has long been recognized as inherent in its general authority under section 210 of the Property Act, 40 U.S.C. 490, for the maintenance and operation of public buildings. With respect to blind stands and Federal Credit Unions. the authority is specifically provided for under the Randolph-Sheppard Act, 20 U.S.C. 107, and the Federal Credit Union Act, 12 U.S.C. 1752, respectively.

It is stated in your letter that the task force referred to above is in the process of preparing its initial draft of regulations to be submitted to OMB and, in view of the broad language of new subsection 210(j) of the Property Act, is considering various alternatives. Prior to final consideration of the regulations, and to assure that as many options as possible are open to GSA and OMB, you ask whether we consider any of the alternatives hereinafter set forth as being contrary to the act, or otherwise beyond the authority of the Administrator of GSA.

The first of the alternatives presented for consideration involves the space occupied by concessionaires as discussed above. Those alternatives are set forth and explained in your letter as follows—

> The task force is inclined toward the view that concession space and joint use space be assigned for purposes of assessment of the SLUC rate to the occupying agency or agencies of the building. This is consistent with the concept that agency budgets reflect all agency costs since the need for such space was generated by the employees of the agency or the agency itself.
>
> Concession contracts awarded by GSA consist generally of the following three categories: (1) blind stands operated in public buildings pursuant to the Randolph-Sheppard Act, *supra*, (2) Federal Credit Unions, which are private cooperative associations formed by Government employees pursuant to the Federal Credit Union Act, *supra;* and (3) other concessions such as barbershops, beauty parlors, dry cleaning and laundry facilities, and cafeterias. The Federal Credit Union Act specifically permits the allotment to the credit unions of space in

Federal buildings without charge for rent or services. 12 U.S.C. 1770. * * * [However] our General Counsel has interpreted new subsection 210(j) of the Property Act as being controlling in this regard and, therefore, agencies whose employees are serviced by such credit unions may, in our opinion, be charged for space occupied by them.

With respect to concessions which support or service employees of more than one agency, as is usually the case in multi-tenant Government-owned buildings, the cost of such space would be charged pro rata between the occupying agencies on a reasonable basis.

There are, however, two additional alternatives other than charging all the concessionaires, including credit unions and blind stands, the commercial value of the space. One would be a determination by the Administrator that to charge the full SLUC would not be feasible nor practicable in cases where the full SLUC, if charged, would make it impossible for the concessionaire to continue business or result in unreasonable prices to Government employees for essential services. In such cases, a reduced SLUC could be charged, as we believe that the Administrator's authority to exempt from the SLUC includes the authority to charge less than the full SLUC. Following such a determination and charging the concessionaire a substantially reduced rate, or nothing, GSA could request appropriations to cover the difference between the rate and the amounts paid * * *.

The second alternative would be to take all concession space in GSA controlled buildings and include the cost thereof to the SLUC on a uniform basis. We have considerable doubts as to our authority to do so since the SLUC should reflect only costs for services normally provided in commercial rental agreements.

We have been informally advised that GSA does not now anticipate using this last-mentioned alternative. Also, it is understood that GSA does not contemplate directly charging any Federal credit unions for space occupied by them. Accordingly, we shall not give consideration to either of these alternatives at this time.

The second area on which several alternatives are set out concerns the manner in which the SLUC rate is proposed to be applied to parking areas in and around federally owned or leased buildings. Concerning such matter you state that—

GSA, rather than assign parking spaces directly to agencies for its use, could assign such space directly to individual Federal employees or to a private parking firm which would rent the space to employees. Under each alternative, the SLUC will be assessed. The present GSA policy is to allot parking spaces to agencies for assignment to its employees unless the agency requests GSA to assign spaces at a particular facility. We believe each of the alternatives, including charging of employees for parking, would be permitted by new section 210(j) of the Property Act. The task force believes, consistent with the concept that agency budgets should reflect all program costs for space, that the alternative of assigning the space directly to the agency is the most desirable.

Generally, we believe that in applying SLUC, the alternative which permits an agency budget to reflect actual costs (i.e., SLUC through GSA) is the most appropriate. The value of such an approach was reflected in House Report 92-989, accompanying H.R. 10488, 92d Congress, a prior version of the enacted legislation. In that report the Committee on Public Works stated that "* * * a building fund to finance the acquisition, construction, alteration, maintenance, operation and protection of all public buildings is the logical mechanism for one-time project funding * * *." Furthermore, with reference to the means of financing the Federal Building Fund, the Committee said, "When the fund proposed is implemented, each agency would have to budget for its space needs, just as it now budgets for its personnel, travel and administrative costs. Making agencies accountable for the space they use should result in more efficient space utilization by agencies."

Concerning the above-discussed matters, in view of the broad authority contained in new subsections 210(j) and 210(k) of the Property Act, and considering the provisions of 602(c) of such act, we agree that the Administrator has wide discretionary powers consistent with the purposes of the statute, in the manner of defining and charging for space occupied by Federal agencies and others, including related space such as building lobby areas, elevator areas, restrooms, etc. We believe that charges for space based on any one of the alternatives set forth above (but not considering the last mentioned alternative relating to concession space) are consistent with the Public Buildings Amendments of 1972 and properly may be adopted by GSA.

We assume, however, that GSA would not place concessionaires (other than blind stands and Federal Credit Unions) in space in Federal buildings or in leased buildings under GSA control without consulting the tenant agency or agencies, or without the tenant agency or agencies requesting for its employees the services to be provided by the concessionaire. Further, the availability of an agency's appropriation to pay rent for concessionaire-occupied space would depend upon the manner in which the funds were budgeted and appropriated and on whether the concessionaire services were necessary for the health or efficiency of the agency's employees while on duty.

You next raise a question as to the particular categories of space for the use of which GSA has authority under section 4 of the act to charge agencies.

Concerning such matter you state that—

* * * GSA has authority to assign and reassign space, with certain exceptions, in all Government owned and leased buildings by virtue of section 210(e) of the Property Act (40 U.S.C. 490(e)), Reorganization Plan No. 18, effective July 1, 1950, 15 F.R. 3177, 64 Stat. 1270; 40 U.S.C. 285; and Executive Order 11512, dated February 27, 1970. 35 F.R. 3979. The exceptions to this authority are set forth in section 1 of Reorganization Plan No. 18 and subsection 210(d) of the Property Act.

We believe that generally new section 210(j) is intended to encompass all space over which GSA has space assignment authority. In several instances, GSA assigns space in buildings to which a right of occupancy has been granted by permit from another Federal agency. A typical example of this is four buildings located at Fort Wingate Army Depot, Gallup, New Mexico, which are under the custody and control of the Department of Defense, and occupied by the Department of the Interior. It is our intention to assess the SLUC for use of such space and to reimburse the controlling agency the amount charged GSA, if any, for use of the space. It is pointed out, in this regard, the new subsection 210(k) authorizes other agencies to charge for such space at rates approved by the Administrator.

Concurrent with the activation of the U.S. Postal Service on July 1, 1971, GSA assumed sole responsibility for the support of congressional state and district offices wherever located. Public Law 92-184, approved December 5, 1971, entitled each U.S. Senator to office space suitable for his official use at not more than three places designated by him in the state he represents. Order No. 1, revised February 29, 1972, by the Committee on House Administration under the authority of House Resolution 457, adopted by the House of Representatives on July 21, 1971, entitles each member of the House of Representatives, the Resident Com-

missioner of Puerto Rico, and the Delegate from the District of Columbia to three offices within their districts. The resolution also provides that the Sergeant at Arms shall secure office space satisfactory to the member in Federal buildings at not more than two locations if such space is available. In view of the mandatory provisions of amended section 210(j), as interpreted by our General Counsel, discussed above, GSA believes that it will have no alternative, to charge the SLUC rate for use of any space furnished.

Finally, there is discussed in your letter the outleasing of Federal building sites made pursuant to section 210(a)(13) of the Property Act.

In connection therewith you state that section 210(a)(13)—

> * * * permits GSA to enter into outleases of Federal building sites and additions to sites until they are needed for construction at their fair rental value. Since this authority and the authority to charge the SLUC rate are contained in the same section of the Property Act, it is clear that Congress intended that GSA continue its present practice of outleasing Federal building sites at fair rental value under subsection 210(a)(13). As a practical matter, we perceive no difference with respect to outleasing between fair rental value and a user rate equivalent to "approximate commercial charges."

Section 602(c) of the Property Act, 40 U.S.C. 474, provides in part that—

> The authority conferred by this Act shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith * * *.

In view of such provision and those of new subsection (j) it seems clear that the SLUC rate must be charged with respect to all space under GSA control including those instances in which GSA assigns space in buildings to which a right of occupancy has been granted by permit from another Federal agency, unless the Administrator determines that such charges would be infeasible or impractical.

Also, for the reasons set forth in your letter, particularly the provisions of 40 U.S.C. 474, quoted above, we agree that GSA will have no alternative but to charge the SLUC rate for space provided for congressional offices in Federal buildings. We agree also that the present practice concerning outleases of Federal building sites at rates based on the fair rental value properly may be continued in that we too perceive no difference between that rate and a rate equivalent to "approximate commercial charges."

[B-178038]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Spouse Entitled to Military Allowances

The payment of temporary quarters subsistence expenses (TQSE) to a transferred civilian employee for up to 30 days while he and his dependents occupy temporary quarters, which expenses are computed on the basis of actual expenses or a per diem percentage for each 10-day period, will not violate the prohibition against duplicate payments in paragraph C8253 of the Joint Travel Regulations and section 8.2i of Office of Management and Budget Circular No. A-56 because his spouse as a military member on active duty receives basic allowances for

quarters and for subsistence. The TQSE allowance is intended to lessen the economic hardship employees face when transferred for the convenience of the Government, whereas the permanent military allowances cover normal day-to-day expenses for food and shelter when not provided by the Government, and being in the nature of compensation they are not viewed as duplicating the TQSE allowance.

To the Secretary of the Navy, June 22, 1973:

This is in reply to the lettter of your Assistant Secretary (Manpower and Reserve Affairs) of February 1, 1973, which was transmitted to this Office by letter dated February 9, 1973, from the Per Diem, Travel and Transportation Committee (PDTATAC Control No. 73–5).

The Assistant Secretary requests our decision as to whether payments made for temporary quarters subsistence expenses (TQSE) to an employee would violate the prohibition against duplicate payments as stated in paragraph C8253 of the Joint Travel Regulation (JTR) and section 8.2i of Office of Management and Budget Circular No. A–56, August 17, 1971, in the circumstances described below. He further inquires as to the amount of TQSE payable in the event that such payment does not violate the prohibition in paragraph C8253, JTR.

The Assistant Secretary indicates that a review of permanent change of station travel vouchers for civilian employees revealed instances where employees with spouses who were military members on active duty were reimbursed for TQSE during the same period that the spouse was receiving basic allowances for quarters (BAQ) and for subsistence (BAS). Paragraph C8253, JTR, provides in pertinent part:

Temporary quarters subsistence expenses will not be allowed when they duplicate, in whole or in part, payments received under other laws or regulations covering similar costs.

The provisions of paragraphs C8250–8255, JTR, in keeping with section 8 of Circular No. A–56, provide for the payment of a TQSE allowance to an employee for a period of up to 30 days while he and his dependents occupy temporary quarters in connection with a transfer. This allowance includes, to the extent of the maximum amount authorized, the actual cost of meals, lodging, fees and tips incident to meals and lodging, laundry and cleaning and pressing of clothing. Under the controlling regulations the amount which may be reimbursed is the lesser of either the actual amount of allowable expenses for each 10-day period or a stated percentage of the maximum per diem rate authorized under paragraph C8100, JTR, which percentage rate decreases for each 10-day period.

The TQSE allowance is one of several benefits conferred on civilian employees of the Government by the act of July 21, 1966, Public Law 89–516, 80 Stat. 323, now 5 U.S. Code 5724a. The legislative history of

the act of July 21, 1966, shows that its primary purpose was to lessen the economic hardship employees must face when transferred at the convenience of the Government, by providing for reimbursement of many expenses incurred by such employee which were not previously reimbursable. *See* generally, S. Rept. No. 1357 on H.R. 10607, 2d sess., 89th Cong., dated June 30, 1966.

The basic allowances for subsistence and for quarters, on the other hand, are designed to cover the normal day-to-day expenses of members of the uniformed services for food and shelter when not provided in kind by the Government. They are permanent allowances paid under the concept that basic pay for military members is in addition to the furnishing of subsistence and lodging in kind or the payment of an allowance to cover such items of expense. As such BAQ and BAS payments are more in the nature of compensation. Further, it is clear that these allowances are not paid to cover the additional costs incurred when temporary lodgings are occupied incident to a change of official station.

Therefore, we do not consider that BAQ and BAS payments received by the spouse of a transferred civilian employee should be viewed as duplicating a TQSE allowance which the civilian employee may otherwise be entitled to receive incident to a permanent change of station.

The submission is answered accordingly.

[B–178574]

Departments and Establishments—Services Between—Disputes—General Accounting Office Settlement

The Air Force vouchers submitted by the Army Finance Center pursuant to 7 GAO 8.4(c), which provides for the submission of a disputed interagency bill for goods or services to GAO for settlement, will be considered to be a request for an advance decision. The bills submitted which cover the cost of the inadvertent movement of commissary goods outside the United States (U.S.) in a space-required rather than a space-available airlift that the Military Airlift Command refuses to cancel, may be paid from appropriated funds, for although commissaries are required to be self-sustaining, they are appropriated fund activities and, furthermore, Public Law 92–204 excludes transportation costs incurred outside the U.S. from the cost of purchase in the operation of commissaries. Since interagency orders are obligations upon appropriations the same as orders or contracts with private contractors, the Army operation and maintenance appropriation stated on the vouchers is properly chargeable.

Post Exchanges, Ships Stores, Etc.—Transportation of Supplies—Erroneous Transportation Request—Loss Liability

Although the pecuniary liability for the errors that led to the request for space-required rather than space-available Military Airlift Command services to move commissary goods outside the United States would seem to rest on the commissary personnel making the erroneous request, there is no basis for assessing the charges for the services on the commissary officer since his custodial relationship with the Government as an accountable officer relates to property and funds,

and there is no general authority for the assessment of charges for losses sustained by the Government as a result of errors in judgment or neglect of duty by Government personnel. Moreover, interagency reimbursement for the cost of services performed by the billing agency pursuant to lawful authority cannot be viewed as a "loss" to the Government in the usual sense of the word.

To Lieutenant Colonel J. R. Love, Department of the Army, June 22, 1973:

With letter of October 31, 1972, file FINCY–AB, the Army Finance Center forwarded here several Air Force vouchers in the total amount of $1,159.56 under the provisions of section 8.4 of Title 7, GAO Manual for Guidance of Federal Agencies. Section 8.4(c), relating to goods and services furnished by one agency of the Government to another agency on a reimbursable basis under section 601 of the Economy Act (31 U.S. Code 686) or similar provision of law, provides that—

> Accounts receivable established on the basis of bills to another Government agency should be collected promptly. A disputed interagency bill for goods or services, together with applicable documents and reports, may be submitted by the billing agency to the Claims Division [now Transportation and Claims Division] United States General Accounting Office * * * for settlement.

We will consider the submission as made a request for an advance decision.

Your letter of September 19, 1972 (with attachments) was submitted with the letter of October 31. The papers show that requisitions submitted by various U.S. Military Advisory Group (MILGP) personnel, stationed in Paraguay and Uruguay, specified airlift of commissary goods from the Canal Zone on a space-available basis only; but it appears that some unidentified persons assigned to the U.S. Army Forces Southern Command (USARSO) Commissary erroneously represented to the Military Airlift Command (MAC) Headquarters, Scott Air Force Base, Illinois, the eligibility of three shipments for space-required airlift.

The limit by local authority for airlift of commissary goods was space-available, but regulations in effect at the time did not provide for space-available airlift. AFR 76–11, par. 3i. The record is clear on these points, but the inadvertent nature of their violation encouraged requests of MAC, by the commanders of the various procuring groups involved, for cancellation of the airlift charges. MAC refused, and we believe rightfully so, as also recognized by the U.S. SOUTHCOM Legal Advisor, based on pertinent regulations cited in his memorandum of November 22, 1971. A memorandum from G4 to Chief of Staff SCARGD, dated August 30, 1972, shows that this view is shared by the USARSO Staff Judge Advocate.

You ask whether appropriated funds may be obligated in payment of the approved vouchers which have been prepared by the billing agency. In the event appropriated funds are chargeable, there is a

question of whether reimbursement should be sought from the individuals who requisitioned the goods.

Considering the questions in the order presented, we conclude that it would not be improper to charge appropriated funds. Although commissaries are required generally to be operated on a self-sustaining basis, they are appropriated fund activities. *See* 10 U.S.C. 4621(i). Section 714 of the Department of Defense Appropriation Act, 1972, Public Law 92–204, 85 Stat. 716, 729 (as well as various previous acts), authorizes exclusion of transportation outside the United States from the cost of purchase in the operation of commissary stores. We construed this exclusion in 39 Comp. Gen. 385 (1959) to embrace carriage from one place to another outside of the United States.

The report by the Special Subcommittee on Exchanges and Commissaries of the Committee on Armed Services (H.A.S.C. No. 91–77), House of Rep., 91st Congr., 2d sess., at page 12379, discloses congressional interest in distinguishing commissary costs to be supported by funds collected from patrons, from costs supported by appropriated funds, and refers approvingly to new Armed Services Commissary Store Regulations. Section IV (enclosure 1) of DOD Directive 1330.17, October 29, 1971, adheres to the aforementioned intentions. While the policy set forth in section 714 of the appropriation act is reflected in section 4–401, sections 4–405 and 4–405.1 provide that all transportation costs of commissary store supplies and equipment outside the United States are costs not requiring reimbursement from funds collected from commissary store patrons.

But for the absence of local authority to ship commissary goods as space-required cargo, there appears to be no question that appropriated funds are chargeable for the airlift services, and we believe that especially where the violation of local policy is inadvertent, payment from appropriated funds for MAC airlift services is not objectionable.

With reference to identification of the funds chargeable, we refer again to the memorandum of the SOUTHCOM Legal Advisor. In paragraph 2.d. it is stated that the Department of the Army is the Administrative Agency for USCINCSCO areas of responsibility. Paragraph 4–3a. of AR 1–75/OPNAVINST 4900.31C/AFR 400–45, March 23, 1971, states that commissary services, among others, are expenses chargeable to the military functions appropriations of the administrative agent.

Other references point to the same conclusion. Section 686(c) of Title 31, U.S. Code, provides that orders placed by one agency with another are considered obligations upon appropriations the same as orders or contracts with private contractors. Paragraph 4.A(2) of DOD Directive 7220.6 provides that orders for specific services should be recorded as obligations against the appropriations of the ordering agency.

There is no dispute in the record that USARSO was the responsible administrative agent for the area; that it was the agency that ordered the MAC airlift services; that it was responsible for determining the eligibility of the goods for space-required airlift; and that USARSO commissary personnel committed the manifesting error. Under these circumstances we concur with the opinion of USSOUTHCOM in its letter to USARSO of April 26, 1972, that appropriated funds available to USARSO should be charged with the MAC billings. Under these circumstances we would not object to charging the Army operation and maintenance appropriation cited on the vouchers.

Pecuniary liability for the error commencing the series of events that led to the MAC airlift charges would seem to rest, if anywhere, on USARSO commissary personnel. However, we see no basis for assessing the charges on the commissary officer since his custodial relationship with the Government as an accountable officer relates to property or funds. In the absence of any specific regulations that would impose liability on individuals, there is no general authority for the assessment of charges against employees of the Government for losses sustained by the Government as a result of errors in judgment or neglect. *See* 26 Comp. Gen. 866, 868 (1947) and 25 Comp. Gen. 299, 301 (1945). Moreover, interagency reimbursement for the cost of services performed by the billing agency pursuant to lawful authority cannot be viewed as a "loss" to the Government in the usual sense of the word.

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

[B–175028]

Contracts—Specifications—Deviations—Informal *v.* Substantive—Model Numbers

Under an invitation for bids (IFB) for numerous drill items that waived preproduction samples for bidders whose products had been previously procured and approved, and that required product identification by model number and other pertinent information, the holding that the low bidder on one of the items was nonresponsive because the letter accompanying the bid made reference to model 754G2 and not to its catalog model 754 will no longer be followed. The automatic finding of bid nonresponsiveness was not required as the catalog model did not deviate from the IFB requirements, and the two omitted specification characteristics created no ambiguity. Furthermore, bid acceptance would obligate the bidder to furnish a conforming drill notwithstanding the gratuitous model designation. B–175028, April 28, 1972, overruled.

To the Acting Administrator, General Services Administration, June 26, 1973:

As a result of an inquiry from the Chairman, Government Activities Subcommittee of the Committee on Government Operations, House of

Representatives, we have reviewed our decision B-175028, April 28, 1972, involving the protest of The Black & Decker Manufacturing Company (B&D) against award to any other bidder of a contract for item 6 (FSN5130-889-8993 Drill) under invitation for bids (IFB) No. FPNT 2-B5-41801-A-1-17-72, issued December 14, 1971, by the Federal Supply Service.

Rockwell Manufacturing Company (Rockwell) was the apparent low bidder on item 6 of the IFB. However, B&D offered lower prices on an "all or none" basis for items 2, 3, 4, 5, 6, 12 and 13. B&D contended that Rockwell's bid was nonresponsive because the firm had included an unsolicited model number in a letter accompanying its bid, thereby rendering the bid ambiguous. We sustained the protest and B&D was awarded the contract. Performance under the contract has been completed.

Based on a reconsideration of the record, including supplemental information recently received, the decision of April 28 is overruled.

The pertinent facts are restated from our decision of April 28, 1972. The IFB provided for the submission of preproduction samples, as follows:

> The Government reserves the right to waive the requirements for preproduction samples as to those offerors offering a product which has been previously procured and approved by General Services Administration under the same specifications applicable to this procurement. Offerors offering such products are requested to furnish with their offers information identifying the product by citing the number, date and item of the purchase order and/or contract number involved in such prior purchase.

Attached to Rockwell's bid was a letter requesting waiver of the requirement for providing preproduction samples.

The letter stated, in pertinent part:

> In the event that Rockwell Mfg. Co. is awarded a contract for item 6 or item 10, or item 13, this letter is to request a waiver of preproduction samples for the following reason:
>
> > Item 6: FSN 5130-889-8993 Drill (RMC Model 754G2). This machine similar to FSN 5130-293-1386 Drill now being furnished on GSA term contract GS-008-89548 (March 1, 1970-Thru February 29, 1972) except for filter for suppression.

The then current Rockwell catalog lisited an RMC model 754, but not a model 754G2. The contracting officer stated that an examination of the operating characteristics of model 754 as set forth in the catalog indicated no deviation from those stated in IFB specifications. However, there was no mention in the catalog reference to model 754 of two specification requirements: (1) suppression of electromagnetic interference; (2) treatment to resist fungus growth. Notwithstanding this lack of reference to the two requirements, the contracting officer felt that there was no ambiguity in the bid and that Rockwell was indeed offering a drill in strict accordance with the IFB specifications.

It was our view, however, that the bid was ambiguous because there was no basis for determining that the model 754G2 met the specifications.

Subsequent to our April 28, 1972, decision, we were furnished the detailed specifications governing the drill previously supplied by Rockwell and the drill covered by the IFB. A comparison of the specifications and the schedule description for the IFB drill with the detailed specifications governing the drill previously supplied by Rockwell (FSN–5130–293–1386) indicates that the specification requirements for both drills are the same, except that the prior drill did not have to be suppressed for electromagnetic interference or treated for fungus control.

Viewed against this background, we now believe that Rockwell's parenthetical identification of a model number in its bid cover letter can reasonably be viewed only as a representation that its model 754G2 conforms to the IFB specifications. The inclusion of an unsolicited model number may create a question, but it is clear that "* * * the mere inclusion of numbers in a bid should not constitute an automatic finding of nonresponsiveness and * * * our Office should judge each case on its merits * * *." B–170908, March 5, 1971. Further, we should not ignore the purpose for which the bid cover letter was written—namely, obtaining waiver of first article testing. In this context, we believe that Rockwell equated its model 754G2 to the FSN 5130–889–8993 drill called for by the IFB. Rockwell further noted in the letter that "this machine," referring to both its model 754G2 and the drill called for by the IFB, was "similar" to the previously furnished drill, except for suppression of electromagnetic interference. The fair import of this statement is that the model 754G2 would have a filter for suppression. The only remaining difference between the drill called for by the IFB and the previously furnished drill was the requirement that the former be treated to control fungus. In the circumstances, we do not believe that the reference for preproduction waiver purposes to the model supplied earlier without mention of fungus control may reasonably be construed as an exception to the fungus control requirement. Therefore, we conclude that acceptance of Rockwell's bid would have obligated it to furnish a conforming drill notwithstanding the gratuitous model designation and the bid should have been regarded as responsive.

[B–176404]

Housing—Military Personnel—Construction Cost Limitations—Waiver

Although offerors who submitted acceptable technical proposals for the construction of any or all of three Bachelor Officers Quarters (BOQ) and therefore were entitled to bid on a project or projects under the subsequent invitation for

bids should have been given more detailed information concerning the application of the per man statutory limitation imposed by section 706 of the Military Construction Act of 1972, and the possibility of waiver, nevertheless the contracting officer's recommendation that the limitation placed on one of the projects should be waived for the low overall bidder who was not low on the major construction item was not unfair to the second low bidder who should have been aware that section 706, and the implementing paragraphs 11-110(a) and (c) of the Armed Services Procurement Regulation provide both for limiting costs and for waiver when the limitation is impracticable to impose.

To Gallagher, Evelius & Jones, June 26, 1973:

Reference is made to your letter of January 29, 1973, and prior correspondence, protesting on behalf of the Knott Development Company, against the award of a contract to Urban Systems Development Corporation for the construction of a 150 Man Bachelor Officers Quarters (BOQ) at Aberdeen Proving Ground, Maryland, under Schedule C of invitation for bids No. DACA31-72-B-0074, the second step of a two-step procurement.

The United States Army Engineer District, Baltimore, Maryland, as the first step of the procurement, issued on November 23, 1971, Request for Technical Proposals (RFTP), Serial No. DACA31-72-R-0003, for the design and construction of Bachelor Officers' Quarters (BOQ) at Aberdeen Proving Ground, Maryland, Fort Belvoir and Fort Lee, Virginia. Separate technical proposals were invited for each of the three projects. Those bidders who submitted acceptable technical proposals for any or all of the three projects were entitled to submit a bid for such project or projects under the subsequent invitation for bids. Prospective offerors were advised on page TR-6 of the RFTP as follows:

8. *COST LIMITATIONS:*

a. The available amount for construction of these projects is as follows:

(1) Fort Lee 300 Man BOQ	$3,634,078
(2) Fort Belvoir 300 Man BOQ	3,337,758
(3) Aberdeen Proving Ground 150 Man BOQ	1,894,823

The amount available for construction includes cost of BOQ structures, all utility and site work but exclusive of the contractor's design. There is a statutory limitation of $10,890 per man at Aberdeen Proving Ground and $11,000 per man at Fort Lee and Fort Belvoir inside the 5-foot line, exclusive of design costs, special foundation conditions, etc. This limitation does not apply to utilities or site work beyond the 5-foot line.

Acceptable technical proposals for the Aberdeen Proving Ground BOQ were received from several offerors, including Knott. On April 27, 1972, invitation for bids No. DACA31-72-B-0074, was issued to bidders who had submitted acceptable technical proposals under the first step of the procurement. Bidders were to submit bid prices for Schedule A—Fort Lee, Schedule B—Fort Belvoir, and Schedule C—Aberdeen Proving Ground. Each of the three schedules called for separate prices for Item 1, "BOQ Structure with Utilities 5 feet beyond

building line," Item 2, "Design Cost, Outside Utilities and all site work not included in Item 1 above," and a total price for both items.

Bids under IFB–0074 were opened on May 24, 1972. The lowest three bids for the Aberdeen BOQ, Schedule C, were as follows:

Bidder	Item 1	Item 2	Total
Stauffer Construction Co	$1, 633, 500	$266, 410	$1, 899, 910
Urban Systems Development Corp	1, 665, 552	415, 715	2, 081, 268
Henry J. Knott Development Co	1, 490, 000	600, 000	2, 090, 000

Stauffer's bid was rejected because it failed to submit the required bid guarantee with its bid. Urban's price for Item 1 exceeded the statutory per-man cost limitation by approximately $213, without taking into consideration the cost of the Government supervision, inspection, contingencies, and Government-furnished equipment. The contracting officer advises that taking these costs into consideration, the unit cost per man under the Urban's bid increased to $11,903. After careful consideration, he decided Urban's bid price was realistic and that it was unlikely that readvertising the project would result in lower bids. On June 5, 1972, the contracting officer submitted to the Division Engineer, North Atlantic, Corps of Engineers, a recommendation for waiver of the statutory cost limitation for the Aberdeen BOQ.

By letter dated June 12, 1972, Knott protested any award to Urban for the Aberdeen BOQ on the ground that Urban had submitted a nonresponsive bid since its bid price under Item 1 revealed a cost of $11,103 per man, a sum in excess of the statutory cost limitation of $10,890 per man. In a letter dated June 14, 1972, the Chief, Procurement and Supply Section, advised Knott that the provisions of the RFTP concerning cost limitations were intended only as a guideline for design purposes and could not be used for the purpose of determining the responsiveness of bids received under step II and, further, since the Military Construction Authorization Act of 1972, 85 Stat. 394, 10 U.S. Code 2674 note, specifically authorized the waiver of per man statutory limits for BOQs, the Government had initiated action to obtain a waiver of such statutory limits for the Aberdeen BOQs.

By letter dated June 16, 1972, Knott further protested the proposed award and the matter was submitted to the General Counsel, Office of the Chief of Engineers, for a decision. On June 28,1972, the General Counsel denied Knott's protest. On June 29, 1972, the Office of the Chief of Engineers issued a directive, which stated that the Office of the Assistant Secretary of Defense had granted a waiver to increase the statutory limitation from $10,890 to $11,903 per man for the Aberdeen project. On June 30, 1972, a contract was awarded to Urban for

the construction of the 150-man BOQ at the Aberdeen Proving Ground.

You contend that the action of the contracting officer in requesting, upon Urban's behalf, waiver of the statutory unit cost limitation on the structure covered by Item 1 was unfair to Knott and, in effect, changed the rules of the bidding procedure. You also maintain that the fact that Knott was able to arrive at a reasonably competitive figure, within $10,000 of Urban's bid without exceeding the statutory unit cost limitation is probative of the practicability of complying with the statutory limitation.

Section 706 of the Military Construction Authorization Act of 1972, approved October 27, 1971, 85 Stat. 394, 10 U.S.C. 2674, limits the amount which may be expended for construction of BOQ to an amount determined by applying the local construction cost index to a basic figure of $11,000 per man. The limit for the Aberdeen BOQ was determined to be $10,890. Section 706 further provides that the statutory limit may be exceeded if the "Secretary of Defense or his designee determines that because of special circumstances, application to such project of the limitations on unit costs * * * is impracticable." The imposition of a statutory limit on unit costs and a provision for waiver of the limit are long-established, well-recognized features of military construction projects of the type involved here. In implementation of the provisions contained in the annual Military Construction Authorization Acts, paragraphs 18–110(a) and (c) of the Armed Services Procurement Regulation (ASPR) provide as follows:

> (a) Contracts for construction shall not be awarded at a price in excess of statutory cost limitations unless the limitations for the particular contract can be and have been waived and shall not be awarded at a price, which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project.
>
> * * * * * * *
>
> (c) A bid or proposal containing prices within statutory cost limitations only because such bid or proposal is materially unbalanced shall be rejected. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work, and prices which are overstated for other work. A bid or proposal containing prices that exceed applicable statutory cost limitations shall be rejected, unless for construction of cold storage or regular (general purpose) warehousing, barracks for enlisted personnel or bachelor officer's quarters, and the determination of the Assistant Secretary of Defense (Installations and Logistics) has been obtained that the limitations on construction costs in the annual Military Construction Act shall not apply as impracticable. In addition, where appropriate provision is made in the invitation for bids or requests for proposals, separate award may be made on individual items whose price is within or not subject to any applicable cost limitation, and those items whose price is in excess of the limitations shall be rejected. Such a provision for separate award shall not be made unless determined to be in the best interest of the Government.

Under paragraph (e), where the bid covers the construction of BOQ and a determination has been obtained that the limitations on

construction costs in the annual Military Construction Act shall not apply as impracticable, the bid need not be rejected.

While paragraph 8 of the RFTP advised offerors of the unit cost limitation for the Aberdeen BOQ, we believe that as a matter of procurement policy bidders should have been given more detailed information concerning the application of the statutory limitation and, in particular, the possibility of a waiver. We are drawing this matter to the attention of the Secretary of the Army for appropriate corrective action. Nevertheless, we do not think that the procedure used by the contracting officer in this procurement was inherently unfair to Knott since the procedure used was clearly defined and authorized by statute and the implementing ASPR—matters which Knott was bound to know. Thus, although it is contended that Knott could have designed the project at a $10,500 lower total cost by exceeding the statutory limit under a waiver, we note that Knott was not restricted to submitting a single design for approval. In that connection, paragraph 1.1.5, on RFTP page TP–2, encouraged offerors to submit for approval in the first step multiple technical proposals presenting different basic approaches. Hence, if Knott had submitted its alternate approach and it had been determined acceptable, Knott would have been free to bid and be considered on that basis as well.

Moreover, we can attach no significance to the fact that Knott's bid price on Item 1 was lower than Urban's bid price. Urban, nevertheless, submitted the lowest price for construction of the entire facility. Further, the existence of a bid which is within the statutory limit but not low overall does not preclude a discretionary waiver of the statutory limit on the grounds of impracticability. B–162173, September 29, 1967, copy enclosed.

In view of the foregoing, we must conclude that the actions of the contracting officer in requesting a waiver of the statutory cost limitation, subsequent waiver and the award of a contract to Urban for the Aberdeen BOQ were proper.

Accordingly, the protest is denied.

[B–178270]

Pay—Retired—Annuity Elections for Dependents—Incompetents—Election by Secretary Concerned

An election under the Survivor Benefit Plan (10 U.S.C. 1447–1455) on behalf of a mentally incompetent member for the coverage of a natural person (10 U.S.C. 1448(b)) may be made by the Secretary concerned who stands in the place of the incompetent and under 10 U.S.C. 1449 is required to make the election which in his discretion, after careful consideration of the facts and circumstances in each case, he believes the person would make if capable, and the Secretary must take into consideration whether the retiree would elect to give up a substantial amount of his retired pay for the rest of his life to provide the annuity. An insurable interest is any pecuniary interest in the continued life of another, and no evidence

of an insurable interest is required of a near relative, but a contract relationship would have to be proved; only one person may be named as survivor (5 CFR 831.601); and the person requesting an annuity would have no preference.

To the Acting Secretary of Defense, June 26, 1973:

We refer to letter dated March 20, 1973, of the Acting Assistant Secretary of Defense (Comptroller) requesting a decision on certain questions which have arisen under the Survivor Benefit Plan, 10 U.S. Code 1447–1455, concerning the circumstances under which an election may be made on behalf of a mentally incompetent member under the applicable insurable interest provisions in the circumstances pertaining to a particular case set forth in Department of Defense Military Pay and Allowances Committee Action No. 471.

There were enclosed copies of Committee Action No. 471 setting forth and discussing the following questions:

1. Before an election is made on behalf of an incompetent member for coverage of a natural person with an insurable interest, is evidence required of an insurable interest, in the form of any financial benefit derived from the retiree while alive?
2. Is coverage limited to one person or may more than one person be covered?
3. If coverage for only one person is authorized, on what basis is that person selected? Must that person also be the person who requested an election on behalf of the retiree?
4. If coverage for more than one person is authorized, on what basis is the cost determined and how is the annuity payable? In equal shares or in lump sum by one check?

Subsection 1448(b), Title 10, U.S. Code, provides as follows:

(b) A person who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person.

Section 1449, Title 10, U.S. Code, provides in pertinent part that:

If a person to whom section 1448 of this title applies is determined to be mentally incompetent by medical officers of the armed force concerned or of the Veterans' Administration, or by a court of competent jurisdiction, any election described in the first sentence of subsection (a), or subsection (b), of section 1448 of this title may be made on behalf of that person by the Secretary concerned. * * *

Subsection 1452(c), Title 10, U.S. Code, states that:

(c) The retired or retainer pay of a person who has elected to provide an annuity to a person designated by him under section 1450(a)(3) of this title shall be reduced by 10 percent plus 5 percent for each full 5 years the individual designated is younger than that person. However, the total reduction may not exceed 40 percent.

Subsection 3(b) of the act of September 21, 1972, Public Law 92–425, 86 Stat. 711, 10 U.S.C. 1447, which established the Survivor Benefit Plan, provides that any person who is entitled to retired or retainer pay on the effective date of this act may elect to participate in the plan before the first anniversary of that date.

The committee action states that the married daughter of a retired Army member who was in a nursing home following several severe

strokes with resulting paralysis and senility requested that an election be made on his behalf for coverage under the Survivor Benefit Plan for herself and her sister, as natural persons with an insurable interest in the retired member. The daughter has been appointed guardian of her father and according to his will she and her sister are the only heirs of his estate. A completed election form signed by the daughter in her capacity as legal guardian, dated and postmarked January 15, 1973, was received at the Army Finance Support Agency. The retiree died January 17, 1973.

It is stated that the retired member's date of birth was April 11, 1893. One daughter was born August 10, 1921, and the other daughter was born November 15, 1922. It is pointed out that the cost of a survivor annuity under 10 U.S.C. 1452(c) for the first daughter would be $488.03 for a monthly annuity of $498.49 and the cost of an annuity for the second daughter would be $557.74 for a monthly annuity of $460.14. However, there would be no cost charge as the retiree's death occurred before February 1, 1973, the date cost would have initially become due.

The legislative history of the act of September 21, 1972, throws no light upon the provisions referred to above. Hence, it must be concluded that except as to specific definitions contained in the law, Congress intended the language used to be given the usual or literal meaning. Any pecuniary interest in the continued life of another is an insurable interest. It may be the result of relationship by blood or affinity or that of debtor and creditor and is any reasonable expectation of pecuniary benefit or advantage from the continued life of the insured (retiree). *Cf.* 22 Comp. Gen. 85. Generally, any near relative would have an insurable interest in the retiree, such as spouse, children, dependent parents. It is our view that no evidence of an insurable interest would be required of a near relative, but that relationship by contract or otherwise would require proof of an insurable interest. Question 1 is answered accordingly.

Any person, by virtue of family, financial or other relationships, usually has more than one person with an insurable interest in him. Hence, the language of the law must be given its literal meaning, that is to say, the phrases "a natural person," "a person designated by him" and "that person" as used in the statute must be construed as meaning that the retiree must designate the one person having an insurable interest in him whom he wants to provide an annuity to the exclusion of all others, having in mind that he must forego a substantial reduction in his retired pay to do so. Furthermore, the law makes no provision for computation of the cost or annuity for more than one designated person with an insurable interest in the retiree.

Also, it is to be noted that with respect to a civil service annuity to a named person having an insurable interest in the employee or member, 5 CFR 831.601 provides, in pertinent part, as follows:

> (a) The right to receive annuity with survivor benefit to widow or widower attaches to a married employee or Member retiring under any provision of subchapter III of chapter 83 of title 5, United States Code, unless he elects instead annuity without survivor benefit. An unmarried employee or Member in good health retiring under any provision (except section 8337) of that subchapter may elect, instead of annuity without survivor benefit, an annuity with survivor benefit to a named person having an insurable interest in him.
>
> (b) An employee or Member may name only one natural person as survivor under this option. The Commission will not accept the designation of a contingent survivor annuitant, and such a designation is a nullity.
>
> * * * * * * *

The above regulation precludes an employee or member from naming more than one natural person as survivor. The legislative history of the Survivor Benefit Plan indicates the intent was to attain comparability, to the extent practicable, with the survivorship plan for retirees from the Federal civil service system.

Accordingly, question 2 is answered by saying that coverage is limited to one person and question 4 requires no answer.

Under the provisions of 10 U.S.C. 1449, the Secretary concerned stands in the place of the mentally incompetent person and must make the election which in his discretion, after a careful consideration of all the facts and circumstances in each case, he believes that person would make if he had been capable of doing so. The language of the law specifically permits the Secretary to make an election to provide an annuity under 10 U.S.C. 1448(b). However, he must consider whether the retiree would have elected to give up a substantial amount of his retired pay for the rest of his life to provide an annuity to a person with an insurable interest.

In view of the answer to question 2, the Secretary in making an election under 10 U.S.C. 1448(b) must also determine the person to be designated. The selection of that person will depend upon the facts and circumstances involved taking into consideration such things as the extent of the pecuniary interest of the persons to be considered in the continued life of the retiree, the closeness of relationship by blood or affinity and any other facts which might have influenced the member in electing to provide an annuity to a particular person having an insurable interest. It is our view that the person requesting an election on behalf of the retiree would have no special preference to be designated to receive an annuity. Question 3 is answered accordingly.

[B-172061]

Bidders—Qualifications—Administrative Determinations—Propriety

A determination of bidder responsibility by a contracting officer who virtually ignored the initial preaward survey favorable to an offeror under a solicitation for the Inspection and Repairs As Necessary (IRAN) of aircraft and relied exclusively on unfavorable data, including a second preaward survey, without rationalizing the basis for the rejection of the initial preaward survey in which he participated and concurred in the "award" recommendation to the rejected offeror although of doubtful validity, and the contracting officer, as required by paragraph 1-900, *et seq.* of the Armed Services Procurement Regulation, should have resolved the inconsistencies and uncertainties in the record before reaching a reasoned judgment of responsibility, the record does not establish arbitrariness or capriciousness which is the prerequisite to recovering preparation costs. However, similar occurrence should be avoided in the future.

To the Acting Secretary of the Air Force, June 27, 1973:

By decision B-172061, August 24, 1971, we considered and denied a protest against a nonresponsibility determination which precluded an award to Lear Siegler, Inc., under a 1970 solicitation for the Inspection and Repair as Necessary (IRAN) of C-130 aircraft. This decision was sustained in a decision dated February 22, 1972. Both of these decisions, which took into account documented reports from the Directorate of Procurement Policy, were furnished to your department. We have been requested by counsel for Lear Siegler to reconsider these decisions on the basis that the determination was "arbitrary, capricious, not supported by substantial evidence and was erroneous as a matter of law." If we conclude that such was the case, claim is made for proposal preparation expenses.

Specifically, it is contended that Lear Siegler was a responsible prospective contractor which had comparable aircraft maintenance experience to that contemplated by the solicitation. In order to be responsive to this contention we requested and received comments thereon from the Assistant Secretary of Defense (Installations and Logistics) and the Commander, Naval Air Systems Command. We understand that Department of Defense representatives discussed the Lear Siegler matter with the Assistant Secretary of the Air Force (Installations and Logistics) and his staff.

Though the Federal courts have recognized that offerors are entitled to have their proposals considered fairly and honestly for award and that the recovery of proposal preparation expenses is possible if it can be shown that proposals were not so considered, arbitrariness or capriciousness must be established as a prerequisite to recovery. *Continental Business Enterprises, Inc.* v. *United States*, 452 F. 2d 1016, 196 Ct. Cl. 627. The record available to us does not establish that the standard of administrative misconduct is present here.

We have reviewed the determination by the contracting officer that Lear Siegler was nonresponsible for purposes of the 1970 procurement and we believe that such determination was not fully supported by the record before the contracting officer. Briefly, the nonresponsibility determination related to (1) Lear Siegler's lack of IRAN fixed facility experience on C–130 aircraft comparable to that required of a prospective contractor; (2) Lear Siegler's fixed facility experience on a noncomparable Navy contract for Progressive Aircraft Rework (PAR) on S–2 aircraft which was unsatisfactorily performed, and (3) the inadequacy of Lear Siegler's proposed key management team. At the time of the determination, the contracting officer had before him a comprehensive preaward survey in which he participated and concurred, which recommended "Complete Award" to Lear Siegler. At the same time, he had the following data for consideration: (1) a second preaward survey which recommended no award, and (2) a management evaluation of Lear Siegler. While dated subsequent to his nonresponsibility determination, the February 20, 1971, letter from the Deputy Chief, Weapons Systems and Major Equipment Division, Warner Robins Air Materiel Area, served to further support his action. That letter stated:

> In summary the approximately 1,577,000 manhours of Field Team Effort shown as C–130 experience by LSI and the PAS in no way qualifies as comparable experience under IRAN. Satisfactory performance under Field Team Effort is not even remotely similar to the effort required of a contractor to accomplish IRAN in a Fixed Facility. The degree of experience, management of production expertise required for IRAN is not or cannot be attained under Contractor Field Team Effort. Again, the Field Team Effort is not the same skill level and the workers may be 2500 miles from the contractor's proposed IRAN facility. Even if these skills were possibly available to LSI it is unlikely that he could afford to "PCS" a total work force of about 500 people.

In making his determination of nonresponsibility, the contracting officer virtually ignored the initial preaward survey favorable to Lear Siegler. He relied exclusively on unfavorable data, including the second preaward survey, without rationalizing the basis for rejection of the initial preaward survey in which he participated and concurred in the "award" recommendation.

We are advised by a letter dated January 31, 1973, from the Assistant Secretary of Defense that Lear Siegler not only had comparable C–130 IRAN experience at other than a fixed facility, but that the firm's S–2 PAR fixed facility experience was at least comparable to the experience required in the solicitation. Also, the fact, as indicated in a Navy letter of November 13, 1972, that the Navy attempted to exercise an option for additional PAR work contained in the contract shows it was satisfied with Lear Siegler's eventual performance even though Lear Siegler encountered difficulties in performing the S–2 contract. We note that the option could not be exercised since a satis-

factory price for "option" work could not be obtained from Lear Siegler, not because of any dissatisfaction with the firm's contract performance.

Practically every basis for determining Lear Siegler to be nonresponsible was contrary to data in the initial favorable preaward survey. In our decision of August 24, 1971, *supra*, we noted that the record before the contracting officer contained further documentation raising a serious question as to the correctness of the conclusions of the second preaward survey relative to commitments made by Lear Siegler to obtain adequate facilities. As far as Lear Siegler's performance on the Navy S–2 contract—considered to be relevant and pertinent by the preaward survey as to comparability—is concerned, the initial survey team's findings on performance record states:

1. Lear Siegler has performed on more than six (6) contracts at their Mobile Facility. All of these except the large S–2 contract for the Navy were delivered on time and in a very satisfactory manner. One particular contract, Aircraft Engine Test Stand overhaul, was of considerable significance and performance has been unusually good.
2. In the initial stages of the S–2 Modification and Repair contract for the Navy Lear Siegler became delinquent and the schedule had to be revised twice. The contractor isolated Lear Siegler's inadequacies relative to these delinquencies and took positive remedial action. As a result, deliveries were on time for the balance of the contract and the contractor managed to get the last few aircraft out under extremely difficult conditions because these air planes had been used for cannibalization.
3. The contractor's performance on the S–2 aircraft was inadequate in the work request portion. There was a definite failure to timely submit work requests and work requests were not estimated in a manner that the Government's production personnel could readily verify the contractor's man-hours and material. The contractor has been carefully investigated concerning this inadequacy and he has provided again positive evidence of remedial action. The Administrative and Management write-up herein covers some of the contractor's plans as well as other write-ups in this Pre-Award Survey where definite plans have been made to submit work requests and detailed estimates for material and manhours timely and in accordance with the contract. As a result we are convinced that Lear Siegler, Inc. will not have the same difficulties regarding work requests on this aircraft.
4. *Since Lear Siegler has performed satisfactorily on many contracts at the Mobile Facility and has taken positive action on certain weak areas on their S–2 contract, performance record at this facility is satisfactory.* [Italic supplied.]

The management and administration findings of the initial preaward survey—which were signed by the contracting officer as a member of the preaward survey team—concluded as follows:

The corporation (LSI) has committed itself to support of the program by other divisions as necessary. The corporation possesses extensive experience in various phases of C130 aircraft work (reference Attachment 4). They intend to supply some of this talent (mainly from field team operations) as necessary to insure timely production of aircraft under this contract, attachment 1.

It is the opinion of this team that Lear Siegler, Inc. has the necessary management personnel in sufficient depth and experience to perform the MOD IRAN of the C130 aircraft.

* * * * * * *

It is the combined opinion of this team that Lear Siegler, Inc. has the proper management structure and procedures within its administrative area of operations to effectively administer this contract should it be awarded.

The technical capability findings of the initial preaward survey team were as follows:

1. LSI/MSD, one of the many divisions of Lear Siegler, Inc., has a wide range of experience in maintenance and modification type work on a number of different aircraft including various models of the F84, F86, F89, F100, F102, B26, B57, B58, T28, T29, T33, C119, C123, C130, RB66, H21, Q-2, V-6, NG104 and CH21. In addition LSI/MMC has just completed a contract for the Navy to perform PAR requirements on 141 various models of S-2 series aircraft. The proposed contractor's technical ability proved satisfactory.

2. Management personnel, both from LSI/MSD and LSI/MMC were present for the survey and displayed a comprehensive understanding of the RFQ requirements. The organizational structure, production planning, work flow sequence charting and availability of equipment and tooling were found to be in detail and complete.

3. The LSI/MMC is headed up by Mr. John Henson, Facility Manager. Mr. Henson has placed in key positions, personnel with vast experience in aircraft overhaul programs. Resumes of experience of these key personnel are enclosed * * *.

4. LSI/MSD has in excess of 1.5 million manhours of experience in the maintenance of C130 aircraft. This maintenance was performed primarily by field teams. Mr. Art Lenz, Vice President of LSI/MSD has committed field team members to this proposed program as necessary to accomplish the mission (see Attachment 2). Applications on file in the personnel department revealed that experienced personnel are available for all phases of operations. In addition, LSI/MMC has a planned training program to insure the further availability of skilled personnel. An outline of this proposed program is enclosed as Attachment 3. Also, the contractor's VOL 1 "Technical Proposal" submitted to WRAMA substantiates and verifies his technical capability.

5. Based on a detailed review of the RFQ, a study of contractor's technical proposal, and conversations with the management group, it is the conclusion of the undersigned that LSI/MMC has a thorough understanding of the technical requirements for the C-130 IRAN Program and can perform the requirements of this RFQ. Technical capability is satisfactory.

From all this data now of record we believe that the determination of nonresponsibility is of doubtful validity. This belief further reinforces our recommendation of August 24, 1971, to your department that steps should be taken to insure that such a determination is carefully made in light of all significant facts. Of course, it is particularly important to consider the information and opinion from informed sources available to and before the contracting officer at the time a determination of responsibility is made. Counsel for Lear Siegler concedes that "a Contracting Officer may obtain information from experts in areas where he may have little or no specialized knowledge, and that if he in good faith relies upon such information, in all probability he cannot be held at fault in case he makes an erroneous decision." In this regard, a determination of responsibility is subject to review for legal sufficiency notwithstanding the fact that the judgment may have been based on information furnished by technical personnel. *See* B-171407(1), July 14, 1971, at page 5.

The provisions of paragraph 1-900, *et seq.*, of the Armed Forces Procurement Regulation (ASPR) dealing with responsibility de-

terminations impose affirmative duties on contracting officers when resolving the responsibility of a prospective contractor. Where, as here, conflicting information on the responsibility of a prospective contractor is a matter of record, a contracting officer has an information-gathering duty that cannot be avoided, and this duty has a direct relationship to the existence of reasonable doubts as to capacity. *See* 50 Comp. Gen. 281, 289 (1970). Incident to this duty is a correlative responsibility to resolve for the record inconsistencies and uncertainties before reaching a reasoned judgment of responsibility.

There are enclosed copies of our decisions of August 24, 1971, and February 22, 1972, together with a copy of our transmittal letter to your department of August 24. Also, enclosed are copies of the reports from the Departments of Defense and Navy.

We recommend that the circumstances of this nonresponsibility determination be brought to the attention of procurement personnel to minimize future similar occurrences.

[B-175723]

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Rule

In the procurement under a request for quotations of technical services in support of a Tactical Air Control and Defense Systems Interface Program on a cost-plus-a-fixed-fee basis, which because the services were previously furnished on a sole-source basis provided for a three-month indoctrination period for any non-incumbent selected for award, the recommendation of the Procurement Advisory Committee, accepted by the contracting officer, that the incumbent was the best qualified on the basis of technical capabilities and competence, although not the lowest offeror, evidences no unreasonableness or favoritism, for even after applying the Indoctrination Learning Adjustment factor the incumbent rated higher, and it was proper under negotiation procedures to consider factors other than price and to use a point system that included, in addition to price, personnel, experience, technical approach, etc., as an evaluation technique.

To the Comtre Corporation, June 28, 1973:

Reference is made to your telefax dated April 17, 1972, and subsequent correspondence, protesting the award of a contract to System Development Corporation (SDC) under request for quotations (RFQ) F19628-72-Q-0015, issued at Hanscom Field, Massachusetts.

The RFQ, issued on December 1, 1971, was for the procurement of technical services in support of the Tactical Air Control Systems/ Tactical Air Defense Systems (TACS/TADS) Interface Program on a cost-plus-a-fixed-fee basis. Prior to the present procurement these services had been furnished by SDC under contracts awarded on a sole-source basis. Because of this, the Statement of Work in the present RFQ was revised to provide a 3-month indoctrination period beginning on February 1, 1972, and ending on April 30, 1972, for any non-incumbent who might be selected for award. During the indoctrina-

tion period contractor personnel would work with the incumbent contractor to observe tasks being performed and learn about the program.

The subject RFQ, as amended, contained the following pertinent provisions:

> 2.b. The offeror is advised that background information related to the level of technical support utilized by the 485L Program Office for accomplishment of TACS/TADS tasks during the period 1 Aug 71 thru 30 Apr 72 will average ten to fourteen (10–14) man-months/month of incumbent's professional labor and two (2) man-months/month of MITRE Corporation Members of the Technical Staff (MTS).* * *.
>
> c. An estimate of 800 M/M is provided and was furnished by the MITRE Corporation based on MITRE experience, capabilities and corporate structure. The estimate was based on 18–22 M/M per month for the effort under Line Item 0001.
>
> d. Nothing contained herein should inhibit the contractor from proposing his own approach and level of effort to accomplishing the tasks outlined in the Statement of Work.
>
> 3. *EVALUATION FACTORS*
>
> 1. All offerors' technical proposals will be evaluated in accordance with the following technical evaluation factors which are listed in the order of greatest to least importance. These factors will be given paramount consideration in the awarding of any resultant contract.
>
> a. *Understanding of the problem.* The offeror has shown that he fully understands the complexity, uniqueness and other pertinent characteristics of each task to be performed and how each relates to the overall effort. This standard of judgment is somewhat related to "soundness of approach" and "level of effort."
>
> b. *Soundness of Approach.* The offeror has explained how he will perform the tasks or groups of tasks, justified technically his approach, and indicated the probability of success.
>
> c. *Compliance with Requirements.* The offeror has set forth how he will comply with the Statement of Work and the Request for quotation in a clear, complete, and coherent manner. Only those proposed deviations which are of benefit to the Government or do not prejudice the success of the Program will be considered acceptable.
>
> d. *Level-of-Effort.* This factor includes a proper balance of engineers, technicians, and administrative personnel. The numbers, skills, and skill levels of the personnel to perform the tasks or group of tasks are set forth to support his proper balance of manning.
>
> e. *Credibility.* The facts or other evidence in the quotation support the offeror's statements.
>
> 2. Other factors to be considered in determining final qualifications of the offerors are:
>
> a. Corporate Experience
> (1) Experience in related work.
> (2) Past performance in related work.
> b. Individual qualifications and experience of personnel proposed.
> c. Technical Organization and proposed project management structure.
> d. Cost.

The solicitation was sent to 45 potential offerors, including the incumbent, SDC, and 5 offerors responded. The five proposals were evaluated by an Air Force technical team and scored on technical merit in descending order as follows:

Firm E (SDC)	81.4
Firm D	52.6

Firm B	51.6
Firm C	49.5
Firm A (Comtre)	40.7

According to the Air Force, the total man-months (M/M) proposed by the above firms were as follows:

Firm A (Comtre)	967
Firm B	616
Firm C	759
Firm D	873
Firm E (SDC)	583

On March 9, 1972, best and final offers were received, and they were as follows:

	Million
Firm A (Comtre)	$2.254
Firm B	1.333
Firm C	2.412
Firm D	2.127
Firm E (SDC)	1.397

The Procurement Advisory Committee (PAC) recommended to the contracting officer that award be made to SDC on the basis of its technical capabilities and competence, although another firm, which was less qualified technically, had submitted a lower offer.

By letter of April 17, 1972, you protested to this Office, alleging that "the level of effort proposed by SDC is *significantly* below the Government estimate provided and *is therefore not responsive to requirements*, and/or the Government significantly revised its assessment of the level of effort necessary to meet requirements and *failed to notify all qualified bidders.*" It is Air Force's position that the estimate by MITRE (see paragraph 2c quoted above) was purely a rough estimate and not a minimum and that this should be clear from the language of paragraph 2d, also quoted above.

In your letter of June 15, 1972, you point out that at a debriefing on April 27, 1972, specific evaluation facts were presented that were in direct conflict with the above. You state that you were advised at the debriefing that Comtre had scored at least 70 points whereas the technical score indicated above was only 40.7 which you seem to feel does not qualify you technically. As a result you appear to be of the view that not only your firm, but none of the nonincumbents who scored less than 70, should have been asked to negotiate a best and final offer.

You also point out that in its original proposal the total M/M proposed by Comtre was 836 M/M, which was reduced to 822 M/M on your final proposal, rather than 967. You say that subparagraphs 2b and 2c, quoted above, of the RFQ were furnished as guidance to prospective offerors and were misleading. You state that the failure of the RFQ to specify a required level of effort not only provided a loophole that could be taken advantage of by SDC as a result of its intimate knowledge of the program, but the PAC could also disqualify any

offeror who was close to SDC in level of effort, even if such offeror was lower in price, i.e., any level of effort by SDC could be justified by the PAC due to SDC's incumbency but a similar offer by a competitor could be rejected because of risk.

You further state that there was certainly nothing in the stated requirements which indicated that only the incumbent could perform without risk and that the indoctrination period would have removed any nonincumbent risk factors. Therefore, you state that risk cannot legitimately be used as a justification for selecting the incumbent over a lower bidder and that the award should have been based on a man-month cost with the amount of labor desired in each category predefined.

You also contend that SDC was considered "uniquely qualified" during the PAC evaluation for this program and that this is substantiated by the language in paragraph 4 of the Department of the Air Force letter of June 6, 1972, to our Office. Paragraph 4 states, in pertinent part, as follows:

> The recommendation of the Procurement Advisory Committee (PAC) to award to SDC was accepted by the Contracting Officer. The selection of SDC for contract award was based on the technical capabilities and competence of the contractor as exemplified in the technical proposal and the findings of the PAC. This factor, among others, justifies the selection of SDC over another contractor whose proposal offered a lower estimated cost. Further, from the standpoint of intimate knowledge of the program, gained from two years exposure to the numerous details of research and analyses, the selection is deemed to be most advantageous to the Air Force and would offset any monetary savings that might accrue from an award to a lower offeror particularly in view of the cost reimbursable nature of this procurement.

You also take exception to the language in paragraph 5 of the above letter, to the effect that "A controlling factor in determining the probable total number of man-months required, would be the 'mix' of the capability and experience levels of the personnel to be used in performing the contract work." You contend that the implication of this language is that the personnel assigned to this program by SDC were considered to be superior to personnel offered by nonincumbent contractors. You imply that this is further evidence of the fact that SDC was considered to be "uniquely qualified." It is your position that if an impartial engineering group were to examine the "mix" and "qualifications" of individual resumés furnished by both companies, there is not enough difference in personnel to justify SDC's bid of 583 M/M.

Regarding your contention that since none of the nonincumbent's technical evaluation team scores exceeded 70, none of you were technically qualified and, therefore, none of you should have been requested to negotiate a best and final offer, we are advised that all of the nonincumbents, Comtre included, were considered to be technically qualified and within the competitive range. Under 10 U.S. Code 2304(g)

and Armed Services Procurement Regulation (ASPR) 3-805.1, the contracting officer has a duty to negotiate with all such qualified offerors.

With regard to your question as to why your technical team evaluation score was 40.7 whereas at an April 17, 1972, debriefing you were advised that you had scored at least 70 points, it should be pointed out that the 70-point score referred to at the debriefing was the final technical rating arrived at after an Indoctrination Learning Adjustment. The Air Force agreed with your contention that since SDC had worked 2 years in the area it would have a higher technical evaluation score than would the nonincumbent offerors. The reason for this is that a major basis for the technical team ratings of the contractor's proposals was the degree to which the individual contractors were acquainted and familiar with the Air Force TACS/TADS effort. The incumbent contractor, SDC, was the most familiar with the effort whereas the nonincumbent contractors were downgraded on all five technical criteria mentioned above to varying degrees that could be improved by the indoctrination period. Because of the fact that it was recognized that the proposals would not reflect the knowledge and experience to be gained by a nonincumbent during the indoctrination period, it was decided that it was necessary to establish an item called the Indoctrination Learning Adjustment to be added to the technical team evaluation rating. The following formula was used to compute the Indoctrination Learning Adjustment:

100—(technical team evaluation) x 50%=learning adjustment

Thus, allowance was made for the obvious technical evaluation advantage that SDC had as a result of its experience. However, even after applying the adjustment factor for the experience that would be gained during the indoctrination period, SDC was rated higher than the other four offerors. In this regard, we have no reason to believe that had the technical proposals been written after an on-the-job indoctrination period, as suggested by you (which would not appear to be a practical approach since all four nonincumbents would presumably be given an on-the-job indoctrination), that the end result would have been any different. It is your contention that had this been done, all of the technical proposals would have been essentially the same and the technical evaluation should have determined only whether each bidder was essentially responsive, had a basic understanding of the job and could supply competent, technically experienced personnel. You further state that the results of the technical evaluation should have merely determined whether the offeror was, or was not, qualified, and numerical ratings should not have been used.

It appears to be your position that subsequent to this technical

"leveling out," award would be on the basis of a man-month cost with the amount of labor desired in each category predefined. However, under the Government's contract negotiation procedures, a contracting agency is authorized in its discretion to rely upon factors other than cost in making an award. *See* ASPR 3–805.2. Moreover, the use of a point rating system in evaluating pertinent factors including, in addition to cost, such matters as personnel, experience, technical approach, etc., is a recognized technique in the consideration of proposals received under negotiation procedures where, as in the present case, more than one responsive proposal has been received from responsible concerns. *See* B–168724, February 18, 1970; B–166052(2), May 20, 1969. In the present case SDC was not considered "uniquely qualified," but was the best qualified offeror on the basis of the criteria set forth in the RFQ.

In regard to your contention that the total M/M of 967, which the Air Force states you proposed, was erroneous, it appears that the Air Force was, in fact, in error. However, even using the correct figure of 836 M/M, only one other offeror proposed more M/M than did Comtre. Therefore, we do not believe that the relative standings of the offerors would be appreciably changed since your proposal was rated last within the group of five acceptable proposals. Moreover, the award was not made on the basis of M/M alone. In regard to your contention that the level of effort proposed by SDC, 583 M/M, is significantly below MITRE's estimate shown in paragraph 2c, quoted above, and therefore is nonresponsive, we note that at least one other offeror, whose proposal was rated number two, proposed a level of effort significantly below that estimate. Although paragraph 2c of the RFQ provides an estimate of 800 M/M, in light of the language of paragraph 2d, also quoted above, we believe that the estimate of 800 M/M was purely a rough estimate and not a minimum. It does not appear to us that the procuring activity was seeking that specific level of effort without regard to other criteria. Also, we believe that paragraph 2b must be read in conjunction with 2d which invited the offeror to propose his own level of effort to accomplish the tasks.

In the present procurement, a comprehensive technical evaluation was performed and a point system of evaluation of criteria was established to weigh the proposals against the requirements of the RFQ. The PAC reviewed the evaluations and ranked SDC as number one. Although your proposal, as well as the other proposals, were within the acceptable technical range, it was found that SDC was the best qualified offeror.

Procedurally, this process of a technical team evaluating each proposal and the PAC reviewing the evaluations was adequate to insure

a thorough consideration of all proposals, and the resulting award must be treated by this Office as a proper exercise of discretion, absent a showing of unreasonableness or favoritism. In our view, there has been no showing of unreasonableness or favoritism in connection with this procurement.

Accordingly, your protest is denied.

[B-177691]

Contracts—Negotiation—Sole Source Basis—Broadening Competition

Under a solicitation for the conduct of experiments to test and evaluate a Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—the noncompetitive awards of the phase II portion of the demand experiment to other than the contractor whose performance under phase I was deficient, and of the supply and administrative agency experiments (AAE) indicate a proclivity for sole source awards and a departure from the regulatory requirements for competitive bidding (FPR 1-3.101(c)) that is not justified on the basis of "unique" contractor capabilities. The selection of the AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and the severable portions of the unjustified award should be terminated and resolicited on a competitive basis, and this recommendation for corrective action reported to the appropriate congressional committees.

To the Secretary of Housing and Urban Development, June 28, 1973:

We have considered your departmental reports of January 30, March 2, March 26 and April 18, 1973, on the protest of the Consad Corporation against the noncompetitive award of contract H-2040 to ABT Associates, Inc., for phase II of the demand experiment of the Housing Allowance Experimental Program in the estimated amount of $17.9 million. From our review of the procurement, which is set out in detail below, we recommend that severable portions of the contract be terminated and resolicited competitively, if feasible.

After publication of an advance solicitation of interest on September 9, 1971, in the Commerce Business Daily, request for proposals (RFP) H-11-72 was issued November 5, 1971, for the conduct of experiments to test and evaluate a Housing Allowance Experimental Program (HAEP). As defined in the RFP, a housing allowance is "* * * a direct subsidy payment to a low or moderate income family to be used primarily for housing." The goal of HAEP as stated in the RFP is "* * * to provide reliable information to help policy-makers decide whether the potential advantages of such an approach would justify its full implementation as an operating program and to define the most effective means to operate the program." HAEP has been divided into three separate experiments: demand, supply and administrative agency. The demand experiment concerns the manner in which

a household receiving different kinds of housing allowances spends it. The supply experiment concerns the behavior of suppliers of housing and housing services in a market in which the demand is increased by the introduction of housing allowances. The administrative agency experiment involves the manner in which existing governmental agencies, Federal, State and local, or nonprofit organizations may best be utilized to administer the actual payment procedures.

The scope of work was defined generally in attachment C to the RFP:

> * * * furnish the necessary professional, technical and clerical services, equipment, and facilities to perform all the work required under the contract.
>
> The conduct of the field operations covers the administration of the experiments at various sites including selecting households, maintaining contact with them, conducting interviews, collecting and processing data from the experiments, and reporting results. * * *.

The specific requirements of the demand experiment were divided into two phases: phase I, design, and phase II, implementation. Phase I required the contractor to provide assistance and advice in the design of the experiments being developed by the Urban Institute and definition of material required for program implementation. Phase II covered the implementation of the experiments developed as a result of the phase I effort. Phase II provided: "To test various administrative structures, part of the final design may incorporate use of local housing authorities and/or state housing agencies. Where these organizations are used, the requirements of tasks 1 through 4 will be altered accordingly to fit the operating procedures of these organizations."

The RFP further provided:

> The contract(s) resulting from this Request for Proposal will cover both phases, although approval for work will initially include only Phase I.
>
> Negotiation for Phase II work, including estimated costs and fixed fee, if any, and the details of the work, will begin only after HUD has accepted the final design of the experiment and identified the experimental location. * * * The proposals covering accomplishment of Phases I and II will be evaluated in accordance with the Factors for Award * * *. If after the award of the contract, HUD determines that the Contractor is not competent to perform the required work in Phase II, * * * then the Contractor will not be authorized to undertake Phase II work * * *.

In recognition that diverse talents were necessary to successfully conduct the experiments, the RFP indicated that proposals from consortia would be considered so long as clear program and management responsibility and authority were defined and authenticated.

Seven proposals were received on December 13, 1971, and presented to a Proposal Evaluation Board for review. Oral interviews were conducted with the proposers by the Board on December 20 through 29. Competitive range determinations were made after technical discussions with four of the offerors on February 14 and 15, 1972. Revised proposals were invited from such offerors and revisions were received

on February 25, 1972. Thereafter, the Board presented its recommendations to the Source Selection Official, the Assistant Secretary for Research and Technology (ASRT).

The Board recommended that the consortium of the Stanford Research Institute (SRI), as prime contractor, and the National Opinion Research Center and National Urban League, as approved subcontractors, be the contractor for the entire demand experiment. By memorandum of March 14, 1972, to the Director, Contracts and Agreements Division, ASRT determined the SRI consortium to have the best capability for, and highest probability of, successful performance, and requested that negotiations be conducted with SRI for the conduct of the demand experiment. Also contained in the memo was the following:

> Because of limitations upon the Stanford Research Institute's consortium's capability to handle the other elements (Administrative Agency Demonstrations and Supply Experiment) of the Housing Assistance Research Program, I also request that you assist us in discussions with the firm of ABT Associates, Inc., to determine their possible participation in other parts of the Program.

As a result of discussions held during the week of March 27, 1972, contract H–1773 was awarded to SRI on March 31, 1972, for the demand experiment.

The file contains a memorandum from ASRT dated April 7, 1972, to the Director, Contracts and Agreements Division, requesting that a contract be negotiated with ABT Associates, Inc., for the administrative agency experiment (AAE). Thereafter, the contracting officer issued a determinations and findings (D&F) for the negotiation of a cost-reimbursement contract with ABT. Negotiations were held with ABT which led to award of contract H–1782 dated April 5, 1972.

The third part of HAEP, the supply experiment, was awarded noncompetitively to the Rand Corporation based on a memorandum dated April 18, 1972, from ASRT:

> Rand Corporation has the expertise and the capability to move ahead at the earliest possible moment. It is the only firm we know of that has the ability and capability to undertake this experiment with the time constraint to move this project ahead compatible with the other program elements already under contract with SRI and ABT Associates.
>
> Time does not permit attempting to develop other sources through the competitive process as this program must move forward at the earliest possible time.
>
> My staff knows of no other source at the level of expertise and experience presently available in the Rand Corporation to accomplish the objectives of this effort without excessive program start-up costs and serious schedular delay.

Ultimately, HUD decided not to continue wth SRI for phase II because of its serious performance deficiencies and delays. Of the specific milestones established in contract H–1773 and modifications, SRI missed most. The first milestone was the beginning of pilot enrollment by July 5, in order to allow for regular enrollment in HAEP by September 1. SRI requested and received an extension to July 21, which was later extended to July 31. Due to extended negotiations to modify

the contract to conform with SRI's performance, further extensions for the completion of phase I milestones were granted to August 14, September 11, September 25, and November 16, 1972.

Although SRI was seriously deficient in its performance of phase I, it was contractually required to submit a phase II proposal. However, it is evident that ABT was the sole choice for the phase II effort. Therefore, on November 15, 1972, ABT was given all the work reports that SRI was obligated to furnish HUD and was requested to submit a proposal for the phase II effort by December 1, 1972. It is noted that ABT had access to some of SRI's reports during the preceding months as part of an overall plan to insure compatibility between the AAE and the phase I demand experiment. On December 2, 1972, ASRT recommended to the Secretary that a contract be awarded to ABT. A memorandum of December 4, 1972, justified the sole-source negotiations of the phase II contract with ABT in the following manner:

> We have further concluded that ABT Associates, * * * has the expertise and experience available to accomplish the objectives of this effort. Of critical importance to the EHAP is the capability to continue the Demand Experiment without any serious schedular delays. Because of ABT's familiarity with the EHAP and because ABT has the necessary prerequisite total capability, it is the only known source that can perform this effort without very serious schedular delays and excessive costs.

Award of a letter contract to ABT was made on December 4, 1972. This contract was definitized on March 2, 1973, on a cost-plus-a-fixed-fee basis in the total estimated amount of $17.9 million for a contract period from December 1972 to March 31, 1977.

Counsel for Consad asserts that this sole-source award to ABT violated Federal Procurement Regulations (FPR) 1–3.101(c), which requires that proposals be solicited from the maximum number of qualified sources, consistent with the nature of the services. Counsel contends that the services required under phase II of the demand experiment are not unique to ABT. Consad was to play a significant role in assisting in the design of the payments procedure for phase I and in the operation of the payment tasks in phase II, as outlined in ABT's response to the initial RFP. In this regard, counsel suggests that since ABT's experience acquired under the AAE was primarily evaluative, rather than supervisory or administrative as contemplated by phase II of the demand experiment, negotiations for a phase II contractor should have included the original ABT consortium.

In the alternative, counsel contends that HUD had sufficient time to competitively negotiate the phase II procurement. In support of this, counsel points to the fact that the proposals in response to RFP II–11–72 indicate that many firms were familiar with the requirements of phase II. It is asserted that since HUD had received periodic progress reports on SRI's phase I activities, it should have been able to de-

scribe phase II requirements in sufficient detail to permit competition. Finally it is suggested that the urgency of the phase II procurement was created by HUD's delay even though it had clear indications as early as August 1972 that it would not continue with SRI for the phase II effort.

The decision to award noncompetitively to ABT appears to have been based upon the opinion of ASRT, adopted by the contracting officer, that ABT was the only known firm that could effect an orderly and swift takeover of the phase II tasks in sufficient time to avoid any schedular disruption of the overall HAEP. While the record shows that HUD felt that ABT was the only firm that could accomplish the necessary tasks within the time constraints, HUD has not, in our opinion, demonstrated that ABT possessed unique capabilities to the exclusion of all other interested firms.

The record evidences HUD's concern with SRI's performance under phase I and the modified phase I. However, it appears that HUD's efforts in this regard were directed towards improving SRI's performance. There is no specific time that we are able to point to before November 15 when it was, or should have been, apparent to HUD that SRI would not submit an acceptable proposal for phase II or cure its past unsatisfactory performance of phase I. Contract H–1773 recognized the possibility that HUD would not continue with the phase I contractor into phase II. However, while recognizing this possibility, HUD made no contingency plans for the selection of a replacement phase II contractor. Even at the time the initial RFP was issued, HUD was aware of the need for phase II of the demand experiment to be implemented immediately following the conclusion of phase I. While SRI's phase I performance from August to November 1972 may not have required termination action, a distinct possibility existed that HUD would not continue with SRI as its phase II contractor. Even in this light, no steps were taken to establish any other firm's interest or capability for the phase II effort.

The record shows that there were other firms which had already expressed interest in participating in the experiment, i.e., the firms responding to RFP H–11–72. While ASRT places great reliance on the Board's evaluation report which found only SRI and ABT capable of performing, that evaluation was concerned with a wider scope of tasks than were necessary for the accomplishment of phase II alone. Specifically, the Board stated that the proposals were evaluated in light of the entire demand experiment, not just phase II. Moreover, the determination concerning the capability of an offeror with regard to a particular procurement should be limited to the particular task to be covered by contract. ASRT also relied upon a General Accounting Office (GAO) ranking of HAEP contractors as supporting the selec-

tion of ABT. This reliance is evidenced by a memorandum dated December 2, 1972, from ASRT to Secretary Romney, which reads in part:

> The concerns that we have about SRI's ability to perform are shared by GAO. GAO has independently reviewed our contractors and has concluded that: "There is good reason to question the ability of SRI to perform its contractual obligations satisfactorily and on time." In the GAO evaluation, SRI ranked at the bottom of the list of our contractors in overall performance. Although I disagree with some of the rating factors used by GAO, I do not disagree with their overall evaluation of the contractors.
>
> By contrast, Abt Associates, the organization which last winter was rated a close second to SRI in the initial evaluation of the Experimental Housing Allowance Program proposers, has performed outstandingly in developing the evaluation design for the Administrative Agency Experiments portion of the Program. The final design has been accepted. Six experiments are now being set up in accordance with this design by State, County and local agencies; and Abt is under a Phase II contract with HUD to evaluate these experiments.
>
> GAO also independently ranked Abt first among Experimental Housing Allowance Program contractors, concluding: "This is the best of the contractors and the one most likely to provide satisfactory research outcomes."

It appears that the conclusion attributed to the GAO was taken out of context. The results of the GAO investigation were contained in a memorandum dated November 27, 1972, from the GAO Assistant Director, Research and Economic Development, to HUD's Director of Housing Assistance and Economics Research. As stated therein, "* * * the purpose of the review and evaluation by the General Accounting Office was to determine whether it was likely the contractors could bring to a successful conclusion the part of the experiment contracted out to them." From this, ASRT attributed to GAO the conclusion that ABT was most capable of performing. The implication of ASRT's memorandum is that the GAO view was related to the overall capability of HAEP contractors to successfully perform phase II of the demand experiment. However, it is clear that the GAO comments were limited to ABT's performance in the AAE.

Our review of the HAEP procurement process indicates a proclivity to sole-source awards under selection methods wherein "unique" capabilities are pointed to in justification for departures from the regulatory requirements for competitive negotiation. In our view, what has occurred is, in effect, a prequalification of ABT alone and, as such, is inconsistent with FPR 1.3-101(c) which requires the solicitation of proposals from the maximum number of qualified sources consistent with the nature and requirements of the services to be rendered. 52 Comp. Gen. 593 (1973); 52 Comp. Gen. 569 (1973). While the December 4, 1972, memorandum, quoted above, states that ABT was "* * * the only known source that can perform this effort without very serious schedular delays and excessive costs," there were in fact other sources which were not solicited, i.e., those firms that competed under

RFP H-11-72, as well as the Rand Corporation which was performing the supply experiment. In this vein, we have held that the conclusions or opinions of the contracting officer on the availability of qualified offerors may not be accepted as controlling prior to solicitation of offerors. 41 Comp. Gen. 484, 490 (1962).

In view of our conclusion that the noncompetitive award of contract H-2040 to ABT was not justified, we recommend that HUD evaluate the contract to determine whether certain tasks can be severed therefrom without a deleterious effect on the overall HAEP. If, as a result of this review, it is ascertained that portions of the contract are amenable to severance, we further recommend that such portions be terminated for the convenience of the Government and resolicited on a competitive basis.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S. Code 1172. In view thereof, your attention is directed to section 236 of the act which requires that you submit written statements of the action to be taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

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

[B-178428]

Leaves of Absence—Lump-Sum Payments—Rate at Which Payable—Allowances Inclusion—Foreign Post Differential

In accordance with the long-standing rule established by Comptroller General decisions, two employees of the Agency for International Development, State Department, who were separated from Federal service in Vietnam, Laos, are entitled to lump-sum leave payments that include the foreign post differential applicable to their service in Vientiane on the basis they continued in service at the foreign post for the period covered by the lump-sum payment, 5 U.S.C. 5551 providing that a "lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave." On the basis of this decision, contrary regulations may be revised.

To the Secretary of State, June 28, 1973:

We refer to the letter of the Acting Assistant Administrator for Program and Management Services, Agency for International Development (AID), Department of State, dated April 12, 1973, concerning the entitlement of two former employees of that agency to the inclusion of foreign post differential in their lump-sum leave pay-

ments incident to their separation from Federal service in Vientiane, Laos. The two employees involved, Robert and Ruth Peeters (husband and wife), were separated on March 14 and March 3, 1973, respectively, while in Vientiane. Apparently they departed Vientiane subsequent to the dates on which they were finally separated having no excess annual leave to be used as terminal leave.

A question arises with regard to the lump-sum payments involved under certain Department of State and AID regulations which appear to be in conflict with decisions of this Office. The Department of State regulation in question is 3 Foreign Affairs Manual 372 which provides:

372 Effect on Other Payments

* * * * * * *

Post differential shall not be included in any lump-sum leave payment, except for settlement of a deceased Foreign Service employee's accounts.

Similarly, AID Manual Order 761.4, VI. C. of June 6, 1962, which authorizes the separation of employees at foreign posts and the payment for lump-sum leave in connection therewith, provides that such payments "may not include differential." The Comptroller General's decisions which are cited in the submission and others not cited therein established the rule that cost-of-living allowances and post differentials paid under section 207 of the Independent Offices Appropriation Act, 1949, 62 Stat. 1205, and Parts I and II of Executive Order 10000, September 16, 1948, are to be included in the lump-sum leave payments of employees who are separated at their overseas posts. *See* 38 Comp. Gen. 594 (1959); 33 *id.* 287 (1954); 32 *id.* 323 (1953); 29 *id.* 10 (1949); 28 *id.* 465 (1949); and 28 *id.* 377 (1948).

Authority for payment of a lump sum for an employee's accumulated leave at the time of separation is contained in 5 U.S. Code 5551, which was derived from the act of December 21, 1944, 58 Stat. 845. That statute provides that the "lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave."

In the cited decisions this Office had for consideration the provisions of the law and regulations cited above which included in sections 106(a)(1) and 208(a)(1) of Executive Order 10000, provisions authorizing the payment of foreign differentials and territorial allowances and differentials from the date of arrival at the post on assignment, transfer or detail to the date of departure from the post for separation, transfer or detail. Under those provisions an employee whose right to a differential or allowance had not terminated under the controlling regulation prior to separation was allowed to include such differential or allowance in his lump-sum payment based apparently

on the presumption that he would have continued to serve at the overseas post but for his separation.

On the other hand State Department implementation of the authority to pay differentials to Foreign Service employees under section 443 of the Foreign Service Act of 1946, 60 Stat. 1006, and the delegation in Part IV of Executive Order 10000, provided specifically that differentials paid thereunder would not be included in lump-sum payments of employees separated at foreign posts. *See* section 374.8, Volume 1, part 4, Foreign Service Manual, in effect from 1950 to 1953 and section 373.2 of that part in effect until April 3, 1961. That provision was recognized by this Office as precluding payment of foreign post differentials to Foreign Service employees separated at their foreign posts. *See* our letter B–111734, January 14, 1953, copy enclosed. This decision was reached even though the Standardized Regulations in force at the time did not provide specifically for the exclusion of foreign differentials from lump-sum payments.

The post differential here in question is paid under 5 U.S.C. 5925 which was derived from the Overseas Differentials and Allowances Act, Public Law 86–707, September 6, 1960, and the Standardized Regulations (Government Civilians, Foreign Areas) issued by the Department of State pursuant thereto. That act consolidated various authorities for paying cost-of-living allowances and post differentials to employees at foreign posts including section 207 of the Independent Offices Appropriation Act, 1949, under which the cited decisions and the regulations involved therein had been issued, and section 443 of the Foreign Service Act of 1946.

It is noted at this point that the inclusion of an allowance or differential in a lump-sum payment is dependent upon the allowance or differential being additional pay and not in the nature of reimbursement for expenses incurred. Thus, cost-of-living allowances paid to nonforeign service personnel at foreign posts under the authority of section 204 of the Independent Offices Appropriation Act, 1949, 62 Stat. 1205, were not to be included in a lump-sum payment. 28 Comp. Gen. 465, *supra*. However, the Overseas Differentials and Allowances Act continued treatment of post differentials as additional pay which would be subject to lump-sum leave payments in appropriate circumstances. *See* S. Rept. 1647, 86th Cong., 2d sess., page 10, and the implementation thereof in section 511a of the Standardized Regulations.

Thus, post differentials paid under the current provisions are for consideration in determining an employee's lump-sum payment if otherwise authorized by the controlling regulation. The pertinent regulation, section 532 of the Standardized Regulations, provides in effect that the employee's entitlement to a differential terminates as of the close of business on the date of separation if not terminated earlier for

some other reason listed in that section, such as departure from the post for return to the United States under transfer orders. That language does not specifically prohibit the payment of differentials as part of an employee's lump-sum payment as was the case in the former State Department regulations; however, it is not identical to the wording of Executive Order 10000 which was considered in our decisions under that regulation.

The wording of the current Civil Service Commission regulation with respect to the termination of nonforeign differentials and allowances is similar to that contained in the Standardized Regulations. That wording as contained in section 591.401(c) of the Code of Federal Regulations (title 5) provides that "payment of an allowance or differential shall cease on separation, or as of the date of departure or transfer to a new post of regular assignment." It is significant that our Office interpreted that provision as being subject to the same interpretation as the regulations considered in the cited decisions in that individuals separated at posts where they were receiving an allowance or a differential under that regulation were found to be entitled to have the allowance or differential included in their lump-sum payments. *See* B–155978, February 9, 1965; B–155356, November 20, 1964, copies enclosed.

It is also of note that although a specific provision denying inclusion of foreign differentials in the lump-sum computation of employees separated at foreign posts was not included in the Standardized Regulations either before or after the enactment of the Overseas Differentials and Allowances Act such a provision was retained in the administrative provisions of the Foreign Affairs Manual and the pertinent AID regulations as cited in the submission and quoted above.

The question, then, is whether the rule applicable under Part I of Executive Order 10000 pertaining to differentials for nonforeign service employees is to be applied subsequent to the consolidation of those authorities under the Overseas Differentials and Allowances Act or whether the rule applicable under Part IV of that order pertaining to differentials for Foreign Service personnel is the one which should be applied. In that connection it does not appear that it would be practical to require agencies to include differentials in lump-sum payments based on determinations in each case as to the length of time the employee concerned would have remained at the foreign post but for separation.

There is no indication that when the Department of State incorporated 3 FAM 372 in the Foreign Affairs Manual any consideration was given as to whether the Foreign Service rule denying differential in lump-sum payments made to employees separated at foreign posts should be continued in the light of the consolidated statute, particu-

larly since, as indicated above, no mention thereof was made in the Standardized Regulations issued after 1960. Further, we note that Civil Service Commission instructions in section S2–3f, book 550, FPM Supp. 990–2, reflect that the rule applicable under Part I of Executive Order 10000, as stated in decisions of this Office, continued to be in force permitting the inclusion of differentials in lump-sum payments made to individuals separated at foreign posts.

Although the matter is not entirely free from doubt, we feel that the better view is that an employee separated at a foreign post should have his lump sum computed on the basis of continued service at the foreign post for the period covered by the lump-sum payment.

Therefore, the differential applicable to service in Vientiane should be included in the lump-sum leave payments made to Robert and Ruth Peeters. You may wish to take the actions necessary to revise the regulations concerned in accordance with this decision.

[B–177887]

Bids—Evaluation—Factors Other Than Price—Government Inspectors Expenses

The procedure in the evaluation of bids of assessing the travel and per diem costs of Government inspectors at prospective contractors' plants located outside the metropolitan St. Louis, Missouri, area, and justified as "Foreseeable Costs," is not for application to bidders who already have a Government representative in residence as there is no actual cost to the Government in such circumstances, nor is an imputation of constructive inspection costs justified on the basis of equalizing competition. Furthermore, although pursuant to 10 U.S.C. 2305(c) factors other than price may be considered in evaluating bids, Government costs incident to a procurement which cannot be quantified with reasonable certainty may not be used as a bid evaluation factor.

To the Director, Defense Mapping Agency, June 29, 1973:

We have considered the protest of the Artcraft Company against the bid evaluation provisions of invitations Nos. DMA700–73–B–0170 and –0197 relating to the costs of travel and per diem of Government inspectors at prospective contractors' plants located outside the Metropolitan St. Louis, Missouri, area. Your Chief of Staff has submitted to our Office reports dated March 2 and April 30, 1973, justifying the use and application of these travel costs at "Foreseeable costs * * * resulting from differences in inspection * * *" (Armed Services Procurement Regulation 2–407.5). Specifically, it is stated:

* * * Providing a person to perform such a function represents a real cost to the Department of Defense, both in terms of salary and travel. Since the salary of an inspector is a constant not dependent upon the location of the contractor, it is not a necessary consideration in pre-award evaluation. That cost will always be the same (once the contractor has developed the capacity to perform). However, the cost of travel is dependent upon the location of the contractor's production facility and represents a variable real cost—one that can be identified for each bidder.

The evaluation provision reads as follows:

4. OTHER EVALUATION FACTORS: One of the methods described in a. and b. below shall be used, as appropriate, to determine the amount to be used in evaluating each bid submitted by a bidder who plans contract performance outside the metropolitan St. Louis, MO area.

a. TRAVEL AND PER DIEM COSTS: The cost of seven (7) round trips by one DMAAC technical representative to spend a total of forty-nine (49) days at the contractor's facility to perform inspection and/or quality surveillance. Costs will be computed for travel by commercial air (tourist class) and per diem at the maximum daily rate allowable in accordancec with the Joint Travel Regulations (JTR) in effect the date the solicitation is opened. *Travel and per diem costs will apply to all contractors except those where the place of performance * * * is located in the metropolitan St. Louis, MO area.* The JTR prohibits payment of travel and per diem to Government personnel who perform temporary duty within normal commuting distance of their residences.

b. RELOCATION COSTS: The appropriate proportion of the cost to relocate government personnel by a permanent change of station (PCS) shall be added to bids submitted under the following conditions:

(1) *Where a government representative is already located at a contractor facility outside the St. Louis, MO metropolitan area for the purpose of performing similar administrative duties under one or more existing contracts with DMAAC.*

(2) Where, because of the nature of the services or the item to be furnished, a full time government representative at the performance site is required and such requirement necessitates a permanent change of station.

c. *If the amount computed for PCS in accordance with paragraph 5 below exceeds the cost of travel and per diem as computed in accordance with paragraph 4.a. above, the cost for travel and per diem shall be used for evaluation purposes.* [Italic supplied.]

Arteraft's principal contention is that the cost of permanent change of station or per diem and travel should not be assessed against those bidders, like Arteraft, who already have a DMAAC representative in residence at their plants. We agree.

Section 2305(c) of Title 10, U.S. Code, requires that award be made to that responsible bidder whose bid conforms to the invitation and will be most advantageous to the Government, price and "other factors" considered. We have recognized that the "other factors," mentioned in the statute and regulations, may be considered in evaluating bids if it is determined by the contracting agency that such factors are essential to the purposes of the procurement. *See* B–152593, December 4, 1963. However, it has been our consistent position that Government costs incident to a procurement which cannot be quantified with reasonable certainty may not be used as a factor in bid evaluation. *See*, e.g., B–177344, December 21, 1971.

On the present record, we find no basis to question the inspection procedure adopted by DMA or the realism of the estimate of inspection costs that might be incurred. However, there is no basis to apply the evaluation factor to those bidders who have inspectors already stationed in their plants. Where a Government inspector is in residence,

no actual cost to the Government is incurred nor can it be said at the time of evaluation of bids that any costs would, in fact, be incurred if the award were made to a prospective contractor with an inspector already in residence. Moreover, we do not think that an imputation of constructive inspection costs can be justified on the basis of equalizing a competitive advantage. If anything, the application of the evaluation formula to bidders with resident Government inspectors only enhances the competitive advantage of a bidder who will perform the contract within the St. Louis metropolitan area. Consequently, we recommend that the soliciations be appropriately modified to also provide a waiver of the evaluation formula in the case of bidders with resident inspectors.

Please advise us of the action taken on our recommendation.

TABLE OF DECISION NUMBERS

	Page
B-95832, May 17, 1973	809
B-108439, Oct. 31, 1972	248
B-114874, Oct. 5, 1972	179
B-115505, Oct. 4, 1972	175
B-119969, Dec. 6, 1972	325
B-124046, Sept. 11, 1972	125
B-127318, May 1, 1973	755
B-131836, June 5, 1973	912
B-133972, Feb. 5, Apr. 16, 1973	471, 700
B-140144, Aug. 18, 1972	97
B-148044, Nov. 28, 1972	300
B-148324, B-175376, Aug. 18, 1972	99
B-150847, Feb. 28, 1973	556
B-151106, Oct. 4, 1972	177
B-156058, Apr. 6, 1973	671
B-156550, Mar. 21, 1973	597
B-157179, Feb. 28, 1973	558
B-158315, B-159829, Apr. 9, 1973	673
B-158368, July 18, 1972	37
B-158458, Aug. 2, 1972	63
B-159950, June 6, 1973	923
B-160096, Mar. 7, 1973	572
B-161261, July 3, 1972	1
B-162502, Dec. 1, 1972	309
B-162852, Mar. 22, 1973	599
B-163375, Aug. 9, 1972	71
B-163536, Jan. 18, 1973	436
B-163764, Feb. 13, 1973	504
B-165632, Mar. 14, 1973	584
B-166200, Mar. 27, 1973	609
B-167015, Feb. 5, 1973	476
B-167486, B-172733, Apr. 16, 1973	702
B-168921, July 5, 1972	10
B-169472, Nov. 14, 1972	270
B-170098, Jan. 17, 1973	429
B-170536, Sept. 21, 1972	145
B-170618, Apr. 11, 1973	684
B-170675, Apr. 12, 1973	695
B-171637, Apr. 4, 1973	626
B-171728, Oct. 12, 1972	196
B-172061, June 27, 1973	977
B-172594, Dec. 14, 1972	345
B-173224, Sept. 13, 1972	135
B-173735, July 25, 1972	45
B-173815, Apr. 4, 1973	629
B-173976, Apr. 4, 1973	631
B-174012, July 25, 1972	47
B-174207, Oct. 27, 1972	236
B-174213, Aug. 14, 1972	83
B-174478, Aug. 4, 1972	64
B-174527, July 3, 1972	11
B-174685, Aug. 11, 1972	75
B-174725, Nov. 7, 1972	253
B-174829, Aug. 1, Sept. 14, 1972	57, 136
B-174866, Dec. 4, 1972	312
B-174870, Dec. 21, 1972	382
B-174946, Feb. 5, 1973	479
B-175004, Oct. 12, 1972	198
B-175028, June 26, 1973	967
B-175113, Dec. 5, 1972	317
B-175116, July 3, 1972	3
B-175190, July 17, 1972	23
B-175208, Apr. 18, 1973	718
B-175222, Apr. 4, 1973	633
B-175252, Dec. 7, 1972	332
B-175254, Aug. 16, 1972	87
B-175254(1), Apr. 4, 1973	640
B-175254(2), Apr. 4, 1973	647
B-175275, May 15, 1973	794
B-175317, Sept. 8, 1972	118
B-175359, May 14, 1973	769
B-175364, Dec. 6, 1972	327
B-175439, Aug. 4, 1972	69
B-175444, July 17, 1972	28
B-175508, Sept. 6, 1972	113
B-175526, July 5, 1972	13
B-175608, Jan. 22, 1973	446
B-175633, Oct. 18, 1972; May 31, 1973	219, 886
B-175661, Sept. 19, 1972	142
B-175723, June 28, 1973	981
B-175779, July 13, 1972	20
B-175781, July 24, 1972	43
B-175787, Aug. 11, 1972	78
B-175791, July 3, 1972	8
B-175809, Aug. 30, 1972	105
B-175838, Aug. 16, 1972	94
B-175895, Feb. 21, 1973	530
B-175902, Nov. 17, 1972	278
B-175920, Feb. 21, 1973	534
B-175935, Sept. 25, 1972	155
B-175975, July 17, 1972	34
B-175988, May 16, 1973	801
B-176060, B-177845, Apr. 17, 1973	713
B-176083, July 7, 1972	15
B-176111, Nov. 7, 1972	258
B-176138, Oct. 19, 1972	223
B-176182, Dec. 20, 1972	358
B-176203, Jan. 16, 1973	420
B-176206, Dec. 21, 1972	389
B-176209, Sept. 11, 1972	128

524-843 O—74——7

	Page
B-176212, Apr. 9, 1973	675
B-176216, Nov. 7, 1972	262
B-176217, Dec. 14, 1972	346
B-176218, July 21, 1972	40
B-176223, Sept. 25, 1972	161
B-176226, Aug. 14, 1972	85
B-176227, Oct. 27, 1972	240
B-176230, Sept. 1, 1972	111
B-176281, July 26, 1972	54
B-176287, Feb. 5, 1973	482
B-176310, Nov. 14, 1972	273
B-176326, Dec. 29, 1972	400
B-176334, Jan. 16, 1973	425
B-176343, Sept. 8, 1972	123
B-176346, Mar. 29, 1973	614
B-176348, Oct. 30, 1972	242
B-176392, Oct. 10, 1972	184
B-176393, Oct. 13, 1972	215
B-176394, Feb. 9, 1973	500
B-176395, June 15, 1973	941
B-176404, June 26, 1973	969
B-176409, Dec. 14, 1972	352
B-176415, Oct. 11, 1972	190
B-176424, Sept. 26, 1972	169
B-176436, Oct. 12, 1972	211
B-176438, Dec. 27, 1972	393
B-176447, Mar. 13, 1973	580
B-176466, Dec. 20, 1972	372
B-176483, Jan. 26, 1973	458
B-176486, Aug. 9, 1972	73
B-176491, July 17, 1972	35
B-176509, Sept. 18, 1972; Feb. 21, 1973	139, 538
B-176536, Oct. 10, 1972	188
B-176539, Nov. 13, 1972	265
B-176542, Nov. 13, 1972	268
B-176564, Apr. 4, 1973	653
B-176567, Nov. 27, 1972	293
B-176592, Apr. 4, 1973	667
B-176596, Dec. 20, 1972	377
B-176597, Feb. 13, 1973	506
B-176602, Feb. 2, 1973	469
B-176613, Jan. 2, 1973	405
B-176630, Nov. 30, 1972	306
B-176647, Nov. 21, 1972	285
B-176759, Oct. 30, 1972	246
B-176763, Apr. 11, 1973	686
B-176764, May 14, 1973	773
B-176773, Oct. 12, 1972	213
B-176839, Nov. 17, 1972	281
B-176841, Nov. 27, 1972	297
B-176843, Oct. 26, 1972	230
B-176848, Jan. 26, 1973	462
B-176879, Nov. 16, 1972	275
B-176881, June 7, 1973	930
B-176892, May 15, 1973	797
B-176901, Apr. 20, 1973	732
B-176913, Jan. 5, 1973	409
B-176923, Jan. 17, 1973	432
B-176932, Nov. 24, 1972	291
B-176934, Mar. 19, 1973	587
B-176940, Mar. 2, 1973	569
B-176963, Feb. 22, 1973	544
B-176972, Mar. 12, 1973	575

	Page
B-176985, Apr. 20, 1973	738
B-177008, Jan. 31, 1973	466
B-177015, Jan. 22, 1973	452
B-177032, Dec. 5, 1972	319
B-177035, Jan. 23, 1973	454
B-177043, Feb. 27, 1973	552
B-177049(1), Feb. 13, 1973	510
B-177049(2), Feb. 13, 1973	514
B-177050, Mar. 22, 1973	602
B-177053, Feb. 5, 1973	487
B-177063, Feb. 21, 1973	542
B-177076, May 22, 1973	851
B-177095, Oct. 19, 1972; Feb. 16, 1973	226, 517
B-177115, May 14, 1973	778
B-177118, May 24, 1973	874
B-177122, Feb. 22, 1973	546
B-177127, Mar. 27, 1973	612
B-177152, June 6, 1973	924
B-177165, May 23, 1973	863
B-177173, Jan. 11, 1973	416
B-177184, May 23, 1973	865
B-177206, May 22, 1973	854
B-177214, Feb. 20, 1973	526
B-177220, May 14, 1973	783
B-177230, Feb. 6, 1973	491
B-177284, Apr. 19, 1973	726
B-177313, Apr. 20, 1973	748
B-177368, Mar. 23, 1973	604
B-177400, June 15, 1973	945
B-177401, Jan. 10, 1973	412
B-177412, Mar. 20, 1973	593
B-177423, May 18, 1973	821
B-177435, May 21, 1973	847
B-177445, Apr. 13, 1973	698
B-177455, Jan. 2, 1973	407
B-177478, Feb. 6, 1973	493
B-177482, Apr. 16, 1973	706
B-177507, Apr. 23, 1973	751
B-177515, June 13, 1973	936
B-177518, Feb. 16, 1973	519
B-177519, May 18, 1973	827
B-177520, May 18, 1973	834
B-177522, Feb. 7, 1973	496
B-177528, Jan. 18, 1973	444
B-177531, May 18, 1973	837
B-177540, Apr. 3, 1973	621
B-177542, May 23, 1973	870
B-177593, May 18, 1973	841
B-177596, Feb. 6, 1973	495
B-177610, June 21, 1973	957
B-177617, May 7, 1973	764
B-177655, Feb. 22, 1973	549
B-177691, June 28, 1973	987
B-177707, Apr. 3, 1973	624
B-177716, May 3, 1973	756
B-177721, May 14, 1973	792
B-177750, May 31, 1973	905
B-177763, Apr. 10, 1973	679
B-177875, May 7, 1973	765
B-177879, May 18, 1973	842
B-177887, June 29, 1973	997
B-177896, May 30, 1973	883
B-177909, Apr. 19, 1973	730

	Page
B-178010, June 4, 1973	909
B-178020, June 5, 1973	917
B-178038, June 22, 1973	962
B-178084, Apr. 17, 1973	716
B-178104, May 4, 1973	761
B-178114, May 25, 1973	878
B-178122, May 22, 1973	859
B-178132, June 12, 1973	932
B-178137, June 20, 1973	952
B-178154, May 17, 1973	815
B-178156, June 5, 1973	920
B-178170, May 17, 1973	817
B-178237, June 6, 1973	927
B-178240, May 25, 1973	881
B-178270, June 26, 1973	973
B-178362, June 18, 1973	950
B-178414, June 20, 1973	955
B-178425, May 8, 1973	768
B-178428, June 28, 1973	993
B-178514, May 22, 1973	860
B-178574, June 22, 1973	964

LIST OF CLAIMANTS, ETC.

	Page
AAA Van & Storage Co	756
Abatsis, George C	675
Abbott Power Corp	87, 640
Accon International Team	223
Afghan Carpet Cleaners	530
Allen, Alonzo M., III	580
Alvord and Alvord	253
American Construction Co., Inc	569
American Export Lines, Inc	809
American Federation of Government Employees, National Vice President	626
Amron-Orlando Corp	169
Apache Flooring Co	145
Apeco Corp	941
Arent, Fox, Kintner, Plotkin & Kahn	874
Arndt, Ernst-Theodore	145
Aronold & Porter	161, 604, 653
Artcraft Co	997
Artko Corp	546
Attorney General, The	621
AVCO International Services Division	718
Babbin, R. T	452
Bahle, W. W	881
Baker & McKenzie	352
Barlow, Pauline R	262
Birmingham Trust National Bank	462
Black & Decker Manufacturing Co	967
Bordley, R. G	139, 538
Braddock, Dunn and McDonald, Inc	870
Bradshaw, James P	538
Brady, F. D	416. 542
Bransby, John H	63
Breningstall, N. R	420
Bristol Electronics, Inc	886
Brown Boveri Corp	265
Byars, R. V	950
Caddell, Azierah	599
Cadwalader, Wickersham and Taft	332
Callicotte, Betty M	510
Canal Zone Government, Governor of	188
Carlson, John A	794
Chastain, Robert W	416
Cincinnati Electronics Corp	886
Ciseck, B	10
Clark, Thomas W	273
Clarry, Clifford Frank	526
Cloonan, Fred M	3
Cole and Groner	198, 372, 821
Collins Radio Co	393
Computer Time Corp	905
Computing and Software, Inc	686
Comtre Corp	981
Consad Corp	987
Cooper, William I	584
Cornell, W. G., Co	40
Crawford, E. S	135
Crawford, Kenneth C	268
Croley, Randal D	291
Dairy Sales Corp	215
Dalux Inc	792
Davey, John M	751
Davies, C. R	3, 797
Dawson, Gilbert H	43, 755
Dean, Johnny L	542
Defense Mapping Agency, Director	997
Defense Supply Agency, Director	130, 215, 400, 458
Delones, Robert Carl	454
Denning & Wohlstetter	624
De Witt Transfer and Storage Co	624
Dillingham Corp. of Honolulu	327
District of Columbia, Commissioner	597
District of Columbia Courts, Executive Officer	111
District of Columbia Redevelopment Land Agency, Executive Director	85
Dittmer, Dick L	28
Donohue, John T	405, 482
Donovan Construction and Incorporated Systems Co	726
Downy, William S	834
Duffy, W. J	317
Dumont Oscilloscope Laboratories, Inc	604, 653
Dunn, C. A	273
Durniak, Robert M	667
Dynalectron Corp	346
Dynamics Corp. of America, Massa Div	372
Ehlers, James L	28
Eidal International Corp	534
Electro-Mechanical Industries, Inc	281
Electrospace Corp	219
Emerson G. M. Diesel, Inc	87
Environmental Protection Agency, Administrator	128
Environmental Tectonics Corp	7, 955
Fanucci, Carl E	495
Federal Aviation Administration, Administrator	491
Federal Judicial Center, Director	268
Flake, Glade F	647
Fortec Constructors	544
Freel, Richard D	834
Freeman, Kenneth F	491
Fried, Frank, Harris, Shriver & Kampelman	546, 738, 932
Fusco, A. A	34
Gallagher, Evelius & Jones	969

	Page
Galland, Kharasch, Calkins & Brown	327
Gamble, Dick	446
Gaskin, Charles	495
General Electric Co	118, 198
General Services Admiuistration, Acting Administrator	40, 83, 226, 230, 240, 285, 517, 593, 700, 768, 957, 967
George, Watkin L	78
Gittings, Thomas M., Jr	702
Global Marine Engineering Co	466
Goodyear Aerospace Corp	196
Goodyear Tire and Rubber Co	778
Grainger, Paul J	45, 407
Gray, Cary, Ames & Frye	756
Green, William D	920
Gregory, Donald L	69
Grimberg, John C., Co., Inc	40, 63
Gurule, Augustin T	34
Hagel, Fred C	878
Haney, Franklin L	462
Harper, Leslie W., Jr	275
Hasler, F. R	236
Hass, Fredrick J	698
Heller, Steve F	446, 493
Hemenway, John D	859
Hercules Inc	783
Hernandez, Daniel P	273
Hewes Engineering Co., Inc	854
Hiss, Alger	175
Howell Instruments, Inc	773
Hudson, Creyke, Koehler, Brown & Tacke	706
Hughes Tool Co.—Aircraft Div	253
Humphrey, James L	11
Hurn, Pansy Lee	602
Hyde, Hugh J	587
Hydraprise Corp	827
Illinois Central Railroad Co	713
Ingersoll-Rand Co	352
International Harvester Co	500
International Telephone and Telegraph Corp	358, 761
Interstate Commerce Commission, Chairman	556
Interstate Manufacturing Corp	377
Ische, Larry C., Jr	609
Jamar Corp., The	13
Jets Services, Inc	184
Johnson, Howard W	407
Johnson, John V	135
Jones, Dan, Jr	797
Jones, J. A., Construction Co	783
Joy, Floyd C	113
Kazalonis, John J	909
Kearney, R. C., II	917
Kennedy, Doris M	113
Kispert, Lane A	452
Knott Development Co	969
Krueger, Robert E	28
Kwiecinski, Warren T	917
Larsen, Jeanne Janise	960
Law Enforcement Assistance Administration, Administrator	558
Lear Siegler, Inc	977
Leibert, H. A	841
Levin Metals Corp	258
Lewis, Charles A	83
Lewis, Mitchell & Moore	389
Liberty Pole Cheese Co., Inc	94
Lockheed Propulsion Co	312
Love, J. R	964
Lowe, Garnett R., Jr	702
Lyle, Donald W., Inc	196
Magaldi, J. M	454
Magnavox Co., The	57, 136
Malvaso, P. J	580
Marland, Albert E	621
Martin Bakery, Inc	932
Martinson, Herbert R	11
McDaniel, H.C	599, 952
McGinn, Rosemary A	626
McGown, Godfrey, Decker, McMackin, Shipmant & McClane	773
McGuire, Mary	493
McGuire, Richard J., Jr	493
McNeill, C. W	602
McNutt, Dudley, Easterwood & Losch	726
Meixler, W. H	242
Miller, Alwin V	878
Miller, Lyle S	78
Mine Safety Appliances Co	801
Minnis, M. W	667
Mission Van & Storage Co	756
Mitola, Joseph, III	755
Molecular Energy Corp	679
Montejano, Rodolfo	556
Moore, L. R	487
Morderosian, Lawrence D	860
Mulloy, Norman J	297
Murphy Motor Freight Lines, Inc	930
Murry, Merritt L	883
Nakashima, Y	177
National Advisory Council on Extension and Continuing Education, Chairman	270
National Technical Information Service	764
National Trend-In Corp	883
Nationwide Building Maintenance, Inc	389
Neumann, Donald L	841
North American Van Lines	851
Office of Federal Contract Compliance, Acting Director	476
Okami, Kiyonao	629
Oldaker & Oldaker	534
Ono, Shuichi	177
Overseas Private Investment Corp	54
PAE International	425
Palmer, C.B	909
Panoramic Studios	20
Pare, A. Maurice	878
Pasco, Nicholas D	809
Passalacqua, W. M., Builders, Inc	874
Paul & Gordon	383
Peeters, Robert	993
Peeters, Ruth	993
Peppers, Marvin F	952
Philadelphia Naval Shipyard, Commander	10
Phillips, Rowland G	242
Postmaster General	179

	Page
Prentice Corp	377
Professional Air Traffic Controllers Organization	631
Public Building Authority of Birmingham	462
Purcell & Nelson	462
Quality Outdoor Lighting, Inc	792
R. F. Communications, Inc	
R & O Industries, Inc	155
R & R Contractors, Inc	842
Ratliff, Mary L	8
Reasor, Gerald A	510
Reaves, Pogue, Neal and Rose	686
Renegotiation Board, Office of Administration, Director	530
Riley, M. E	291
Ringsby Truck Lines	575
Ringsby United	575
Rivera, Jeanne E	405
Rizzo, Carmella J	275
Rogers, B. C., & Sons, Inc	837
Runyon, Philip H	482
Ryder, G. B	609
Samarkos, A. C	113
Sample, Robert W	751
Sanders Associates, Inc	738
San Francisco, City of	83
San Francisco, County of	83
Satellite Computer Service	409
Schullery, R. J	78
Secretary of Agriculture	94, 196, 412, 436, 519, 815, 920
Secretary of the Air Force	213, 293, 432, 552, 633, 765, 842, 847, 941
Secretary of the Air Force, Acting	977
Secretary of the Air Force, Assistant	345
Secretary of the Army	28, 35, 57, 184, 300, 444, 526, 673, 886
Secretary of Commerce	258, 764
Secretary of Defense	1, 15, 23, 37, 73, 99, 105, 126, 429, 469, 471, 496, 506, 572
Secretary of Defense, Acting	973
Secretary of Defense, Deputy	817
Secretary of Health, Education, and Welfare	47
Secretary of Housing and Urban Development	987
Secretary of the Interior	248, 569, 827, 860
Secretary of Labor	71
Secretary of the Navy	64, 75, 87, 97, 297, 409, 466, 479, 675, 730, 769, 801, 863, 913. 936, 962
Secretary of State	246, 859, 878, 993
Secretary of Transportation	309, 761
Secretary of the Treasury	684
Sellers, Connor & Cuneo	358, 732
Sentinel Electronics, Inc	886
Serv-Air, Inc	161
Shaw, Robert W	236
Siems International Electron Microscope Service	47
Sloan, Kendall, Co	827
Small Business Administration, Administrator	306
Smith, Mildred C	420
Smith, Timothy K	69
Smith & Wesson Electronics Co	458
Space Center Medical Associates	865
Spen, Henry & Co., Inc	400
Staley, L. Jack	514
Stasiak, J. W	751
Stewart & Stevenson Services, Inc	87, 647
Stiles, Michael H	15
Strasburger, Richard	175
Sullivan Security Service, Inc	593
Sullivan Storage & Transfer Co	756
Swauger Contractors	262
Taylor, Lois R	514
Tarr, Robert C	43
Teledyne Inet	382
Texarkana Airport Authority, Joint Board	444
Thornton, Guy	881
Towne Realty Co	706
Towner, Brand T	487
Trans Country Van Lines, In	612, 927, 945
Transvac, Inc	886
Turci, B	10
Uniroyal, Inc	142
United Buckingham Freight Lines	575
United Office Machines	240
United States Civil Service Commission, Chairman	175, 671, 695, 716, 748, 923
United States Courts, Administrative Office, Director	549
United States Dept. of Justice, Asst. Attorney General	319
United States Fidelity & Guaranty Co	262, 633
United States Information Agency, Asst. Director	325
United States Steel International, Inc	278
Usher, F. G	8
Vincent, Charles R	504
vom Baur, Coburn, Simmons & Turtle	393
Wabash Tape Corp	732
Wachtel, Wiener & Ross	679
Wanamaker, William E	878
Ward School Bus Manufacturing, Inc	614
Wayne Manufacturing Co	815
Weinschel Engineering Co., Inc	821
Western Janitorial Service, Inc	633
Westinghouse Electric Corp	265
Whitten, C. I., Transfer Co	211, 924
Wiley, John, & Sons, Inc	332
William & Jensen	614
Wilmer, John W., Jr	700
Woerfel Corp	706
Zutz, Lillian	123

TABLES OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page
1866, July 18, 14 Stat. 183	331
1893, Feb. 13, 27 Stat. 445	331
1898, Feb. 17, 30 Stat. 248	331
1929, Feb. 21, 45 Stat. 1254	677
1946, Aug. 2, 60 Stat. 790	85
1946, Aug. 13, 60 Stat. 1006	995
1949, July 15, 63 Stat. 441	86
1949, Aug. 18, 62 Stat. 1205	994
1957, Sept. 2, 71 Stat. 597	516
1967, Dec. 16, 81 Stat. 654	18
1970, July 29, 84 Stat. 510	111
1970, Oct. 21, 84 Stat. 1055	624
1970, Oct. 21, 84 Stat. 1057	624
1971, Jan. 2, 84 Stat. 1903	302
1971, Sept. 28, 85 Stat. 348	469
1971, Nov. 24, 85 Stat. 490	497
1971, Dec. 8, 85 Stat. 716	966
1972, May 17, 86 Stat. 146	20
1972, June 22, 86 Stat. 234	339
1972, July 1, 86 Stat. 402	71, 271
1972, July 1, 86 Stat. 404	272
1972, July 13, 86 Stat. 471	505
1972, Aug. 29, 86 Stat. 638	598
1972, Oct. 26, 86 Stat. 1184	555
1972, Oct. 26, 86 Stat. 1200	658

UNITED STATES CODE

See, also, U.S. Statutes at Large

	Page
5 U.S. Code Ch. 41	836
5 U.S. Code Ch. 55	323
5 U.S. Code 56 (1964 ed.)	557
5 U.S. Code Ch. 57	269
5 U.S. Code Ch. 83	176
5 U.S. Code Ch. 89	124
5 U.S. Code 552	787
5 U.S. Code 2309 (1964 ed.)	685
5 U.S. Code 3106	859
5 U.S. Code 4109	496, 686, 836
5 U.S. Code 4110	496
5 U.S. Code 5301	819
5 U.S. Code 5305 note	18
5 U.S. Code 5307	189
5 U.S. Code 5308	818
5 U.S. Code 5341	20, 749
5 U.S. Code 5343 note	749
5 U.S. Code 5343(f)	716
5 U.S. Code 5345	749
5 U.S. Code 5346	749
5 U.S. Code 5503(a)(2)	557
5 U.S. Code 5503(b)	557
5 U.S. Code 5515	326
5 U.S. Code 5517	141, 539
5 U.S. Code 5517 note	141
5 U.S. Code 5519	473
5 U.S. Code 5531(2)	755
5 U.S. Code 5532	755
5 U.S. Code 5533	755
5 U.S. Code 5533(a)	756
5 U.S. Code 5537	627
5 U.S. Code 5542	320, 492, 589, 795
5 U.S. Code 5542(b)(2)	323, 449
5 U.S. Code 5542(b)(2)(B)	491
5 U.S. Code 5542(b)(2)(B)(iv)	449
5 U.S. Code 5544(a)	588, 717, 923
5 U.S. Code 5545	323, 588, 796
5 U.S. Code 5545(a)	717
5 U.S. Code 5545(c)	321
5 U.S. Code 5545(c)(2)	321
5 U.S. Code 5548(b)	924
5 U.S. Code 5550	923
5 U.S. Code 5551	994
5 U.S. Code 5551(a)	142
5 U.S. Code 5581	115
5 U.S. Code 5584	592, 701
5 U.S. Code 5595	293
5 U.S. Code 5596	592, 632, 701, 861
5 U.S. Code 5596(b)(1)	592
5 U.S. Code 5701	87, 732
5 U.S. Code 5702(b)	99, 124
5 U.S. Code 5702(c)	685
5 U.S. Code 5703	98
5 U.S. Code 5721	87, 269

	Page
5 U.S. Code 5723	270
5 U.S. Code 5724	296, 835
5 U.S. Code 5724a	276, 296, 835, 963
5 U.S. Code 5724a(a)(2)	836
5 U.S. Code 5724a(c)	345, 882
5 U.S. Code 5724(a)(2)	883
5 U.S. Code 5724(e)	346
5 U.S. Code 5726(b)	883
5 U.S. Code 5726(c)	883
5 U.S. Code 5742	494
5 U.S. Code 5742(d)	494
5 U.S. Code 5924	880
5 U.S. Code 5925	995
5 U.S. Code 5946	496
5 U.S. Code 6101(b)(2)	449
5 U.S. Code 6301	113
5 U.S. Code 6305(a)	861
5 U.S. Code 6322(a)	326
5 U.S. Code 6322(b)	10
5 U.S. Code 6323(a)	473
5 U.S. Code 6323(c)	473
5 U.S. Code 8311	175
5 U.S. Code 8332(c)	528
5 U.S. Code 8332(j)	431
5 U.S. Code 8336(a)	430
5 U.S. Code 8338(a)	431
5 U.S. Code 8340	176
5 U.S. Code 8345(d)	529
5 U.S. Code 8348(a)	176
5 U.S. Code 8348(c)	176
6 U.S. Code 6	187, 550
6 U.S. Code 13	187
6 U.S. Code 14	550
7 U.S. Code 135	413
7 U.S. Code 135k	413
7 U.S. Code 450j	94, 413
7 U.S. Code 450l	94
7 U.S. Code 612c	521
7 U.S. Code 1431	439
7 U.S. Code 1692	439
10 U.S. Code Ch. 61	508
10 U.S. Code 101	329
10 U.S. Code 505(e)	508
10 U.S. Code 508(b)	508
10 U.S. Code 509	508
10 U.S. Code 802	756
10 U.S. Code 857	910
10 U.S. Code 871	910
10 U.S. Code 871(d)	910
10 U.S. Code 1169	508
10 U.S. Code 1171	508
10 U.S. Code 1201	100, 669
10 U.S. Code 1202	801
10 U.S. Code 1208	601
10 U.S. Code 1210	99
10 U.S. Code 1210(a)	98
10 U.S. Code 1210(g)	98
10 U.S. Code 1221	100, 669
10 U.S. Code 1401	798
10 U.S. Code 1401a	471, 601, 798, 819
10 U.S. Code 1401a(d)	470
10 U.S. Code 1401a(e)	469
10 U.S. Code 1402	600
10 U.S. Code 1402(a)	469, 799
10 U.S. Code 1402(b)	601
10 U.S. Code 1402(d)	601
10 U.S. Code 1447	430, 974
10 U.S. Code 1448(b)	974
10 U.S. Code 1449	974
10 U.S. Code 1452(c)	974
10 U.S. Code 1455	974
10 U.S. Code 1475	114
10 U.S. Code 1480	114
10 U.S. Code 1481	31
10 U.S. Code 1481(a)(3)	33
10 U.S. Code 1552	421, 508, 800, 953
10 U.S. Code 1552(a)	423, 953
10 U.S. Code 1552(c)	422
10 U.S. Code 2107	497
10 U.S. Code 2109	755
10 U.S. Code 2205	126
10 U.S. Code 2208	127
10 U.S. Code 2303(b)	329
10 U.S. Code 2304	139, 387
10 U.S. Code 2304(a)	139
10 U.S. Code 2304(a)(2)	59, 169, 804
10 U.S. Code 2304(a)(6)	425
10 U.S. Code 2304(a)(10)	347, 458, 548
10 U.S. Code 2304(a)(11)	870
10 U.S. Code 2304(g)	139, 164, 170, 348, 387, 427, 548, 782, 872, 984
10 U.S. Code 2305(c)	218, 758, 956, 998
10 U.S. Code 2310(b)	62, 349, 548
10 U.S. Code 2631	328, 810
10 U.S. Code 2667	301
10 U.S. Code 2674	972
10 U.S. Code 2674 note	971
10 U.S. Code 2680 (1964 ed.)	300
10 U.S. Code 2771	114
10 U.S. Code 2771(a)	114
10 U.S. Code 2771(a)(1)	115
10 U.S. Code 2774	457, 510, 917
10 U.S. Code 3914	527, 600, 953
10 U.S. Code 3925	600
10 U.S. Code 3991	600, 820
10 U.S. Code 4621(i)	966
10 U.S. Code 4837(d)	510
10 U.S. Code 6148	100, 667
10 U.S. Code 6148(a)	32, 670
10 U.S. Code 6161	510
10 U.S. Code 6380	4
10 U.S. Code 8911	243, 421, 820
10 U.S. Code 8918	820
10 U.S. Code 8963	421
10 U.S. Code 8991	421, 820
10 U.S. Code 9837(d)	510
11 U.S. Code 701	374
12 U.S. Code 1904 note	16
14 U.S. Code 461	510
15 U.S. Code 290	333
15 U.S. Code 290a	333
15 U.S. Code 290b	334
15 U.S. Code 290d	334
15 U.S. Code 290e(a)	334
15 U.S. Code 290f	333
15 U.S. Code 631	170

	Page
15 U.S. Code 634(b)(8)	585
15 U.S. Code 636(b)	586
15 U.S. Code 636(b)(2)	586
15 U.S. Code 636(b)(2)(A)	586
15 U.S. Code 637(b)(6)	897
15 U.S. Code 714b(h)	438
15 U.S. Code 714c(d)	438
15 U.S. Code 714c(f)	438
15 U.S. Code 1152	765
15 U.S. Code 1153	765
18 U.S. Code 3006A	622
18 U.S. Code 3041	550
20 U.S. Code 241(a)	291
20 U.S. Code 1009	271
20 U.S. Code 1009 note	271
20 U.S. Code 1221	271
20 U.S. Code 1224	271
20 U.S. Code 1233d	271
21 U.S. Code 111	520
21 U.S. Code 114a	521
21 U.S. Code 123	520
21 U.S. Code 127	520
22 U.S. Code 810	859
22 U.S. Code 1064	630
22 U.S. Code 1071	630
22 U.S. Code 1076	629
22 U.S. Code 1116	630
22 U.S. Code 1136	247
22 U.S. Code 1925	441
22 U.S. Code 2151 note	38
22 U.S. Code 2162	55
22 U.S. Code 2196	55
22 U.S. Code 2321b	37
22 U.S. Code 2671	859
25 U.S. Code 161a	249
25 U.S. Code 162a	249
26 U.S. Code 104(a)(4)	422
26 U.S. Code 3402	422
26 U.S. Code 3402(a)	424
26 U.S. Code 3403	424
26 U.S. Code 3404	422
26 U.S. Code 6301	424
26 U.S. Code 6302	424
26 U.S. Code 6323 note	265
26 U.S. Code 6511(a)	422
28 U.S. Code 625(e)	268
28 U.S. Code 1498	762
28 U.S. Code 1871	627
29 U.S. Code 651 note	71
29 U.S. Code 657	72
31 U.S. Code 71a	28
31 U.S. Code 74	84
31 U.S. Code 82d	83, 505
31 U.S. Code 203	463
31 U.S. Code 223e	490
31 U.S. Code 241	489
31 U.S. Code 241(b)(2)	489
31 U.S. Code 241(c)(2)	489
31 U.S. Code 484	46, 55, 126
31 U.S. Code 627	620
31 U.S. Code 686	127, 129, 965
31 U.S. Code 686(a)	129
31 U.S. Code 686(c)	966

	Page
31 U.S. Code 701	181
31 U.S. Code 701(a)	183
31 U.S. Code 701(a)(1)	183
31 U.S. Code 701(a)(2)	183
31 U.S. Code 701(c)	183
31 U.S. Code 701(d)	183
31 U.S. Code 703(a)	183
31 U.S. Code 708	182
31 U.S. Code 724a	175
31 U.S. Code 1172	219, 290, 597, 847, 993
31 U.S. Code 1176	128, 219, 290, 412, 597, 834
31 U.S. Code 1201	550
31 U.S. Code 1201(a)	550
31 U.S. Code 1201(c)	550
31 U.S. Code 1202	550
32 U.S. Code 318	31
32 U.S. Code 318(2)	32
32 U.S. Code 321	33
32 U.S. Code 321(a)(3)	33
32 U.S. Code 502	32, 36, 103
32 U.S. Code 502(a)(1)	29
32 U.S. Code 505	103
32 U.S. Code 716	510
33 U.S. Code 1155(a)	129
33 U.S. Code 1155(c)	130
35 U.S. Code 1	764
35 U.S. Code 89 (1946 ed.)	762
35 U.S. Code 96 (1946 ed.)	762
37 U.S. Code Ch. 7	516
37 U.S. Code 101(18)	318
37 U.S. Code 203	17, 819
37 U.S. Code 203(a)	16
37 U.S. Code 203(c)	18
37 U.S. Code 203(c)(2)	18
37 U.S. Code 203(c)(3)	19
37 U.S. Code 204	31, 516
37 U.S. Code 204(a)	318
37 U.S. Code 204(b)(2)	30
37 U.S. Code 204(d)	474
37 U.S. Code 204(g)	104
37 U.S. Code 204(h)	104
37 U.S. Code 204(h)(2)	30
37 U.S. Code 204(i)	104, 670
37 U.S. Code 205	318
37 U.S. Code 206(a)	30
37 U.S. Code 209	497
37 U.S. Code 209(b)	497
37 U.S. Code 308	508
37 U.S. Code 308a	106
37 U.S. Code 308a(a)	106
37 U.S. Code 308a(b)	106
37 U.S. Code 308(a)	108
37 U.S. Code 308(f)	109
37 U.S. Code 308(g)	107, 416, 573
37 U.S. Code 323	7
37 U.S. Code 401	1, 406, 513, 603, 677
37 U.S. Code 401(3)	406
37 U.S. Code 402	24
37 U.S. Code 403	1, 24, 66, 456, 511, 603
37 U.S. Code 403(a)	65, 511, 603
37 U.S. Code 403(b)	65, 511
37 U.S. Code 403(g)	66, 511, 603
37 U.S. Code 404	77, 98, 239, 245, 453, 939

	Page
37 U.S. Code 404(a)	298, 582, 611, 938
37 U.S. Code 404(a)(2)	912
37 U.S. Code 404(a)(3)	508, 912
37 U.S. Code 404(a)(5)	912
37 U.S. Code 404(b)	938
37 U.S. Code 404(b)(2)	77
37 U.S. Code 404(c)	243
37 U.S. Code 404(d)	938
37 U.S. Code 404(d)(2)	77
37 U.S. Code 404(f)	508, 938
37 U.S. Code 405	274, 939
37 U.S. Code 406	70, 214, 245, 294, 405, 480, 553
37 U.S. Code 406(a)	770, 938
37 U.S. Code 406(b)	214, 480, 767, 771, 938
37 U.S. Code 406(c)	243, 480, 770, 938
37 U.S. Code 406(d)	214
37 U.S. Code 406(e)	294, 772, 848
37 U.S. Code 406(g)	243
37 U.S. Code 406(h)	849
37 U.S. Code 407	406
37 U.S. Code 407(a)	64
37 U.S. Code 408	238
37 U.S. Code 409	70, 481
37 U.S. Code 410(a)	74, 180, 307
37 U.S. Code 418	489
37 U.S. Code 420	516
37 U.S. Code 427(a)(1)	916
37 U.S. Code 427(b)(1)	916
37 U.S. Code 427(b)(2)	913
37 U.S. Code 427(b)(3)	916
37 U.S. Code 501(b)	508
37 U.S. Code 501(e)	911
37 U.S. Code 503(a)	544
37 U.S. Code 551	24
37 U.S. Code 552	25
37 U.S. Code 558	24
37 U.S. Code 801(c)	4
37 U.S. Code 906	508
38 U.S. Code 106(d)	33
38 U.S. Code 211(a)	33
38 U.S. Code 3104	528
38 U.S. Code 3105	528
39 U.S. Code 101	188
39 U.S. Code 410	307
39 U.S. Code 410(a)	180
39 U.S. Code 411	307
39 U.S. Code 2002(a)(2)	182
39 U.S. Code 2002(c)(5)	181
39 U.S. Code 2002(c)(6)	181
39 U.S. Code 2003	180, 308
39 U.S. Code 2003(a)	180
39 U.S. Code 2003(b)(5)	180
40 U.S. Code 276a	637
40 U.S. Code 278a	166, 232
40 U.S. Code 471	957
40 U.S. Code 474	962
40 U.S. Code 474(16)	261
40 U.S. Code 484(c)	765
40 U.S. Code 484(e)(2)	885
40 U.S. Code 490	958
40 U.S. Code 601	957
40 U.S. Code 602a	226, 518
40 U.S. Code 602a(b)	229
40 U.S. Code 602a(e)	229
40 U.S. Code 607	231
41 U.S. Code 10a	14, 904
41 U.S. Code 10d	14, 904
41 U.S. Code 15	463
41 U.S. Code 35	896
41 U.S. Code 36	637
41 U.S. Code 45	896
41 U.S. Code 252(c)(4)	343
41 U.S. Code 252(c)(10)	394, 569, 594
41 U.S. Code 252(c)(14)	41
41 U.S. Code 253(b)	572
41 U.S. Code 351	167, 855
41 U.S. Code 352(a)	635
42 U.S. Code 291	874
42 U.S. Code 1855	586
42 U.S. Code 1855g	586
42 U.S. Code 1857a(b)	130
42 U.S. Code 1857b	130
42 U.S. Code 2000e	149
42 U.S. Code 2000e(b)	2
42 U.S. Code 2000e-2	2, 513
42 U.S. Code 2651	126
42 U.S. Code 2652	126
42 U.S. Code 3253	130
42 U.S. Code 3301 note	564
42 U.S. Code 3305(d)	564
42 U.S. Code 3312	564
42 U.S. Code 3701	559
42 U.S. Code 3725	564
42 U.S. Code 3731(b)(9)	566
42 U.S. Code 3731(c)	559
42 U.S. Code 3733(10)	562
42 U.S. Code 3736	559
42 U.S. Code 3736(a)	563
42 U.S. Code 4401	586
42 U.S. Code 4402	586
42 U.S. Code 4601	300
42 U.S. Code 4601(6)	301
42 U.S. Code 4621 note	304
42 U.S. Code 4622	304
42 U.S. Code 4623	305
42 U.S. Code 4631(c)	304
43 U.S. Code 1061 note	248
43 U.S. Code 1605	249
43 U.S. Code 1605(a)	250
43 U.S. Code 1608	249
45 U.S. Code 661 note	309
45 U.S. Code 662	309
45 U.S. Code 662(a)	310
45 U.S. Code 662(b)(4)	309
45 U.S. Code 662(e)	310
45 U.S. Code 664(a)	310
46 U.S. Code 11	813
46 U.S. Code 192	331
46 U.S. Code 221	812
46 U.S. Code 316	331
46 U.S. Code 883	331
46 U.S. Code 1241(b)	810
49 U.S. Code 11	557
49 U.S. Code 16(3)(e)	715
49 U.S. Code 20(11)	852
49 U.S. Code 20(12)	852

	Page
49 U.S. Code 22	616, 947
49 U.S. Code 66	713
49 U.S. Code 317(a)	946
49 U.S. Code 317(b)	947
49 U.S. Code 319	212, 852
50 U.S. Code 1431	534
50 U.S. Code 1435	534
50 U.S. Code App. 1622	445
50 U.S. Code App. 2201	406
50 U.S. Code App. 2216	16

CONSTITUTION OF THE UNITED STATES

	Page
Art. I, sec. 8	74
Art. II, sec. 2, cl. 3	557

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL

	Page
1 Comp. Gen. 321	957
4 Comp. Gen. 653	435
7 Comp. Gen. 203	87
8 Comp. Gen. 284	46
10 Comp. Gen. 302	112
10 Comp. Gen. 402	683
10 Comp. Gen. 510	46
12 Comp. Gen. 546	232
14 Comp. Gen. 106	46
18 Comp. Gen. 262	132
18 Comp. Gen. 285	796
19 Comp. Gen. 544	132
19 Comp. Gen. 565	638
19 Comp. Gen. 662	280
19 Comp. Gen. 785	638
20 Comp. Gen. 264	132
21 Comp. Gen. 1128	83
22 Comp. Gen. 85	975
22 Comp. Gen. 885	270
23 Comp. Gen. 71	457, 603
23 Comp. Gen. 207	24
23 Comp. Gen. 216	603
23 Comp. Gen. 360	27
23 Comp. Gen. 454	603
23 Comp. Gen. 625	603
23 Comp. Gen. 895	25
23 Comp. Gen. 962	718
24 Comp. Gen. 450	326
25 Comp. Gen. 299	967
26 Comp. Gen. 49	886
26 Comp. Gen. 212	718
26 Comp. Gen. 613	490
26 Comp. Gen. 864	246
26 Comp. Gen. 866	533, 967
27 Comp. Gen. 176	486
27 Comp. Gen. 293	326
27 Comp. Gen. 313	270
27 Comp. Gen. 686	3, 105
28 Comp. Gen. 183	703
28 Comp. Gen. 285	409
28 Comp. Gen. 377	994
28 Comp. Gen. 465	994
28 Comp. Gen. 484	528
28 Comp. Gen. 547	704
29 Comp. Gen. 10	994
29 Comp. Gen. 160	246
29 Comp. Gen. 509	101
30 Comp. Gen. 23	533
30 Comp. Gen. 80	246
30 Comp. Gen. 210	677
31 Comp. Gen. 357	509
31 Comp. Gen. 562	509
32 Comp. Gen. 15	496
32 Comp. Gen. 194	246
32 Comp. Gen. 242	423
32 Comp. Gen. 294	954
32 Comp. Gen. 323	994
32 Comp. Gen. 364	1, 513
32 Comp. Gen. 449	592
33 Comp. Gen. 34	544
33 Comp. Gen. 126	496
33 Comp. Gen. 287	994
33 Comp. Gen. 496	638
34 Comp. Gen. 7	423
34 Comp. Gen. 95	911
34 Comp. Gen. 241	771
34 Comp. Gen. 427	752
34 Comp. Gen. 684	284
35 Comp. Gen. 144	638
35 Comp. Gen. 531	755
35 Comp. Gen. 663	109
36 Comp. Gen. 42	652
36 Comp. Gen. 84	3, 105
36 Comp. Gen. 111	796
36 Comp. Gen. 116	246
36 Comp. Gen. 173	318
36 Comp. Gen. 378	628
36 Comp. Gen. 380	908
36 Comp. Gen. 421	842
36 Comp. Gen. 441	260, 404
36 Comp. Gen. 444	557
36 Comp. Gen. 692	101
36 Comp. Gen. 741	114
36 Comp. Gen. 774	244
37 Comp. Gen. 143	392
37 Comp. Gen. 162	683
37 Comp. Gen. 199	763
37 Comp. Gen. 210	626
37 Comp. Gen. 255	474
37 Comp. Gen. 285	696
37 Comp. Gen. 330	217
37 Comp. Gen. 430	789
37 Comp. Gen. 558	100
37 Comp. Gen. 579	262, 710
37 Comp. Gen. 669	753
37 Comp. Gen. 688	734
37 Comp. Gen. 695	326
38 Comp. Gen. 28	295, 848
38 Comp. Gen. 89	457
38 Comp. Gen. 175	701

	Page
38 Comp. Gen. 445	769
38 Comp. Gen. 470	7
38 Comp. Gen. 532	186, 225
38 Comp. Gen. 594	994
38 Comp. Gen. 686	660
38 Comp. Gen. 758	505
38 Comp. Gen. 819	607
38 Comp. Gen. 864	89, 391
39 Comp. Gen. 17	280
39 Comp. Gen. 133	623
39 Comp. Gen. 140	836
39 Comp. Gen. 173	53
39 Comp. Gen. 247	392
39 Comp. Gen. 385	966
39 Comp. Gen. 435	904
39 Comp. Gen. 498	671
39 Comp. Gen. 561	64
39 Comp. Gen. 583	632
39 Comp. Gen. 595	267
39 Comp. Gen. 655	241, 650
39 Comp. Gen. 774	617
39 Comp. Gen. 834	93
39 Comp. Gen. 875	135
39 Comp. Gen. 881	392
39 Comp. Gen. 892	898
40 Comp. Gen. 51	691
40 Comp. Gen. 106	89
40 Comp. Gen. 126	283
40 Comp. Gen. 132	392
40 Comp. Gen. 167	124
40 Comp. Gen. 184	673
40 Comp. Gen. 199	613
40 Comp. Gen. 207	632, 922
40 Comp. Gen. 221	87
40 Comp. Gen. 279	284
40 Comp. Gen. 294	222
40 Comp. Gen. 321	195
40 Comp. Gen. 419	799
40 Comp. Gen. 432	607
40 Comp. Gen. 479	862
40 Comp. Gen. 482	299
40 Comp. Gen. 561	93
40 Comp. Gen. 590	46
41 Comp. Gen. 82	324, 705
41 Comp. Gen. 100	299
41 Comp. Gen. 217	796
41 Comp. Gen. 402	215
41 Comp. Gen. 431	116
41 Comp. Gen. 460	431
41 Comp. Gen. 484	54, 572, 596, 993
41 Comp. Gen. 536	289
41 Comp. Gen. 555	392
41 Comp. Gen. 784	6
41 Comp. Gen. 799	6
42 Comp. Gen. 32	6
42 Comp. Gen. 87	6
42 Comp. Gen. 172	510
42 Comp. Gen. 236	6
42 Comp. Gen. 317	508
42 Comp. Gen. 346	313
42 Comp. Gen. 436	493
42 Comp. Gen. 464	391
42 Comp. Gen. 491	826
42 Comp. Gen. 502	956
42 Comp. Gen. 558	76
42 Comp. Gen. 642	456, 603
42 Comp. Gen. 723	262, 710
42 Comp. Gen. 728	392
42 Comp. Gen. 748	759
43 Comp. Gen. 39	528
43 Comp. Gen. 77	392
43 Comp. Gen. 128	494
43 Comp. Gen. 193	777
43 Comp. Gen. 228	91, 652
43 Comp. Gen. 257	241
43 Comp. Gen. 293	450
43 Comp. Gen. 332	913
43 Comp. Gen. 353	54, 824
43 Comp. Gen. 408	6
43 Comp. Gen. 412	30
43 Comp. Gen. 444	913
43 Comp. Gen. 527	913
43 Comp. Gen. 596	436
43 Comp. Gen. 733	100, 670
43 Comp. Gen. 792	814
43 Comp. Gen. 805	601
43 Comp. Gen. 833	486
44 Comp. Gen. 65	481
44 Comp. Gen. 127	27
44 Comp. Gen. 386	195
44 Comp. Gen. 392	908
44 Comp. Gen. 417	677
44 Comp. Gen. 495	225, 639, 653
44 Comp. Gen. 518	672
44 Comp. Gen. 623	46
44 Comp. Gen. 753	545
44 Comp. Gen. 759	579
45 Comp. Gen. 4	53, 241, 391, 652, 789
45 Comp. Gen. 24	728
45 Comp. Gen. 30	239
45 Comp. Gen. 88	696
45 Comp. Gen. 96	415
45 Comp. Gen. 103	755
45 Comp. Gen. 159	295, 772
45 Comp. Gen. 163	1
45 Comp. Gen. 208	295, 772
45 Comp. Gen. 218	544
45 Comp. Gen. 221	827
45 Comp. Gen. 251	326, 628
45 Comp. Gen. 379	107, 418, 509
45 Comp. Gen. 384	579
45 Comp. Gen. 397	225
45 Comp. Gen. 417	171, 383, 724
45 Comp. Gen. 551	920
45 Comp. Gen. 700	839
45 Comp. Gen. 766	319
45 Comp. Gen. 800	934
46 Comp. Gen. 11	186
46 Comp. Gen. 73	132
46 Comp. Gen. 123	356
46 Comp. Gen. 178	638
46 Comp. Gen. 261	486
46 Comp. Gen. 322	417, 509
46 Comp. Gen. 337	923
46 Comp. Gen. 400	755
46 Comp. Gen. 418	735, 845

	Page
46 Comp. Gen. 430	619
46 Comp. Gen. 434	606
46 Comp. Gen. 554	46
46 Comp. Gen. 606	62
46 Comp. Gen. 671	798
46 Comp. Gen. 713	945
46 Comp. Gen. 813	15
47 Comp. Gen. 29	207, 384
47 Comp. Gen. 252	723
47 Comp. Gen. 263	644
47 Comp. Gen. 279	172, 428
47 Comp. Gen. 390	411
47 Comp. Gen. 397	601
47 Comp. Gen. 414	417, 510, 574
47 Comp. Gen. 418	557
47 Comp. Gen. 468	517
47 Comp. Gen. 531	101, 670
47 Comp. Gen. 633	207
47 Comp. Gen. 696	821
47 Comp. Gen. 716	104
47 Comp. Gen. 769	844
48 Comp. Gen. 1	101
48 Comp. Gen. 110	98
48 Comp. Gen. 158	650
48 Comp. Gen. 216	64
48 Comp. Gen. 258	921
48 Comp. Gen. 291	89, 643, 649, 787
48 Comp. Gen. 314	385, 724
48 Comp. Gen. 334	322
48 Comp. Gen. 397	9
48 Comp. Gen. 429	814
48 Comp. Gen. 502	630
48 Comp. Gen. 624	417, 510, 573
48 Comp. Gen. 672	534
48 Comp. Gen. 681	623
48 Comp. Gen. 722	165
48 Comp. Gen. 731	289
48 Comp. Gen. 748	711
48 Comp. Gen. 762	33
48 Comp. Gen. 773	215
49 Comp. Gen. 1	901
49 Comp. Gen. 9	89, 649
49 Comp. Gen. 51	510
49 Comp. Gen. 120	42
49 Comp. Gen. 206	417, 574
49 Comp. Gen. 211	289
49 Comp. Gen. 229	164, 690
49 Comp. Gen. 233	473
49 Comp. Gen. 274	549
49 Comp. Gen. 309	389, 724
49 Comp. Gen. 315	116
49 Comp. Gen. 330	156
49 Comp. Gen. 369	726
49 Comp. Gen. 444	701, 755
49 Comp. Gen. 480	709
49 Comp. Gen. 553	156, 652, 936
49 Comp. Gen. 558	358
49 Comp. Gen. 581	431
49 Comp. Gen. 709	238
49 Comp. Gen. 718	355
49 Comp. Gen. 782	63
49 Comp. Gen. 821	295, 772
49 Comp. Gen. 857	907
50 Comp. Gen. 1	166, 388
50 Comp. Gen. 16	723
50 Comp. Gen. 28	700
50 Comp. Gen. 50	660
50 Comp. Gen. 59	387, 723
50 Comp. Gen. 80	430, 529
50 Comp. Gen. 110	387
50 Comp. Gen. 184	782
50 Comp. Gen. 193	831
50 Comp. Gen. 215	572
50 Comp. Gen. 232	470
50 Comp. Gen. 246	365, 428, 690, 745
50 Comp. Gen. 281	981
50 Comp. Gen. 332	696
50 Comp. Gen. 337	827
50 Comp. Gen. 343	74
50 Comp. Gen. 357	864
50 Comp. Gen. 379	193
50 Comp. Gen. 390	372, 689, 723, 746
50 Comp. Gen. 519	447
50 Comp. Gen. 565	389, 619
50 Comp. Gen. 613	465
50 Comp. Gen. 619	694
50 Comp. Gen. 627	145
50 Compl Gen. 655	404
50 Comp. Gen. 670	723
50 Comp. Gen. 674	449
50 Comp. Gen. 718	423
50 Comp. Gen. 729	754
50 Comp. Gen. 788	660
50 Comp Gen. 844	876
50 Comp. Gen. 850	632
50 Comp. Gen. 863	181
51 Comp. Gen. 1	709
51 Comp. Gen. 3	419, 574
51 Comp. Gen. 12	71, 453
51 Comp. Gen. 14	345
51 Comp. Gen. 17	294
51 Comp. Gen. 72	167
51 Comp. Gen. 145	900
51 Comp. Gen. 168	597
51 Comp. Gen. 237	817
51 Comp. Gen. 247	806
51 Comp. Gen. 255	892
51 Comp. Gen. 261	510
51 Comp. Gen. 267	304
51 Comp. Gen. 293	826
51 Comp. Gen. 329	392, 650, 876
51 Comp. Gen. 352	892
51 Comp. Gen. 367	84
51 Comp. Gen. 372	728
51 Comp. Gen. 380	319
51 Comp. Gen. 384	470
51 Comp. Gen. 403	898
51 Comp. Gen. 413	604
51 Comp. Gen. 431	207
51 Comp. Gen. 479	165, 360
51 Comp. Gen. 513	68
51 Comp. Gen. 518	817
51 Comp. Gen. 525	18
51 Comp. Gen. 528	619, 897
51 Comp. Gen. 543	608

	Page
51 Comp. Gen. 561	858
51 Comp. Gen. 621	164, 690, 724, 872
51 Comp. Gen. 656	697
51 Comp. Gen. 658	62
51 Comp. Gen. 727	492
51 Comp. Gen. 733	653
51 Comp. Gen. 755	549
52 Comp. Gen. 1	513
52 Comp. Gen. 20	793, 823
52 Comp. Gen. 57	805
52 Comp. Gen. 69	295
52 Comp. Gen. 87	643, 648
52 Comp. Gen. 97	951
52 Comp. Gen. 99	670
52 Comp. Gen. 142	782
52 Comp. Gen. 161	690, 709, 746
52 Comp. Gen. 198	748, 873
52 Comp. Gen. 223	653
52 Comp. Gen. 226	517
52 Comp. Gen. 258	710
52 Comp. Gen. 293	772
52 Comp. Gen. 510	516
52 Comp. Gen. 514	514
52 Comp. Gen. 569	596, 992
52 Comp. Gen. 593	992
52 Comp. Gen. 604	892
52 Comp. Gen. 612	949
52 Comp. Gen. 614	897

DECISIONS OVERRULED OR MODIFIED

	Page
32 Comp. Gen. 364	3
34 Comp. Gen. 21	3
37 Comp. Gen. 330	219
37 Comp. Gen. 558	103
38 Comp. Gen. 445	769
43 Comp. Gen. 733	103
44 Comp. Gen. 753	546
45 Comp. Gen. 24	728
45 Comp. Gen. 163	3
48 Comp. Gen. 71	45
48 Comp. Gen. 638, 1st digest	99
50 Comp. Gen. 28	700
51 Comp. Gen. 367	85
51 Comp. Gen. 372	728
52 Comp. Gen. 345	345
52 Comp. Gen. 626	626
B-137634, July 5, 1963	769
B-140144, Aug. 24, 1959	97
B-148509, May 8, 1962	103
B-152908, Dec. 17, 1963	475
B-154829, Aug. 26, 1964	103
B-158898, Apr. 22, 1966	103
B-160324, Feb. 16, Apr. 5, 1967	728
B-161210, June 14, 1967	546
B-161337, May 17, 1967	546
B-164743, Sept. 19, 1968	546
B-164826, Aug. 29, 1968	219
B-165841, Jan. 22, 1969; Dec. 7, 1970	13
B-166268, Mar. 27, 1969	45
B-167241, July 3, 1969	544
B-167558, July 31, Oct. 15, 1969	103
B-167926, Jan. 15, 1970	700
B-168076, Nov. 24, 1969	103
B-168392, Dec. 16, 1969; June 12, 1970	45
B-168654, Jan. 20, 1970	103
B-169752, June 2, 1970	13
B-171440, Mar. 3, 1971	13
B-171882, Apr. 2, 1971	45
B-172339, July 20, 1971	13
B-172369, May 27, 1971	13
B-173224, Aug. 30, 1971	136
B-173680, Dec. 10, 1971	700
B-173870, Aug. 30, 1971	13
B-175028, Apr. 28, 1972	968
B-175409, Apr. 14, 1972	546
B-176387, Jan. 3, 1973	700

OPINIONS OF THE ATTORNEY GENERAL

	Page
17 Op. Atty. Gen. 521	558
41 Op. Atty. Gen. 463	557

DECISIONS OF THE COURTS

	Page
Abbott et al *v.* United States, Ct. Cl. No. 317-71	703
Aetna Insurance Co. *v.* United States, 197 Ct. Cl. 713	264
Albano Cleaners, Inc. *v.* United States, 197 Ct. Cl. 450	393
Allison *v.* United States, 426 F. 2d 1324	755
Alloys and Chemicals Corp. *v.* United States, 163 Ct. Cl. 229	700
Andre *v.* Resor, 313 F. Supp. 957	543
Aragona Construction Co. *v.* United States, 165 Ct. Cl. 382	255
Arkansas Oak Flooring Co. *v.* Louisiana & Arkansas Ry. Co., 166 F. 2d 98	715
Armour & Co. *v.* Wantock, 323 U.S. 126	589
Bell *v.* United States, 366 U.S. 393	509
Berger *v.* Dynamic Imports, Inc., 274 N.Y.S. 2d 537	927
Blass, Guss *v.* Powell Bros. Truck Lines, 53 MCC 603	579

	Page
Bradley *v.* Laird, 315 F. Supp. 544	543
Brawley *v.* United States, 96 U.S. 168	734
Breen *v.* Selective Service Local Board No. 16 et al., 396 U.S. 460	543
Brown & Son Electric Co. *v.* United States, 163 Ct. Cl. 465	218
Brownlee *v.* Southern Ry., 192 I.C.C. 119	927
Burich *v.* United States, 177 Ct. Cl. 139	322
Burlington Northern, Inc. *v.* United States, 462 F. 2d 526	931
Byrnes, et al. *v.* United States, 163 Ct. Cl. 167	322
Campbell "66" Express, Inc. *v.* United States, 157 Ct. Cl. 365	579
Casida *v.* United States, 193 Ct. Cl. 262	916
Central Cheese Co., Inc. *v.* Dept. of Agriculture, State of Wisconsin, Case No. 119-480, Cir. Ct. of Dane County, Wis	96
Chesapeake & Ohio Ry. Co. *v.* Wiener, 58 N.W. 2d 918	715
Chicago Great Western R. Co. *v.* Hopkins, 48 F. Supp. 60	852
Chicago, M. St. P. & P. R. Co. *v.* Acme Fast Freight, 336 U.S. 465	212
Chicago, and N.W. *v.* Connor Lumber & Land Co., 212 F. 2d 712	715
Cities Service Oil Co. *v.* Erie R. Co., 237 ICC 387	927
Coastwise, The, D.C. Mass., 230 F. 505	331
Coleman *v.* United States, 100 Ct. Cl. 41	923
Concordia—Arrow Flying Service Corp. *v.* City of Concordia, 289 P. 955	446
Consolidated Freightways Corp. of Delaware *v.* Admiral Corp., 442 F. 2d 56	853
Continental Business Enterprises, Inc. *v.* United States, 196 Ct. Cl. 627	977
Detling *v.* United States, 193 Ct. Cl. 125	589
Dianish *v.* United States, 183 Ct. Cl. 702	632, 923
Dougherty, P. Co. *v.* United States, 97 F. Supp. 287	330
Evansville-Vanderburgh Airport Authority District *v.* Delta Airlines, Inc., 92 S. Ct. 1349	73
Exposition Cotton Mills *v.* Southern Ry. Co., 234 ICC 441	213, 852
Ezee Flow Corp. *v.* Illinois Central R. Co., 287 ICC 281	213
Fix, et al. *v.* United States, 177 Ct. Cl. 369	322
Ford Motor Co. *v.* United States, 81 Ct. Cl. 30	151
Freedman's Savings & Trust Co. *v.* Shepherd, 127 U.S. 494	466
Frontiero *v.* Laird, 341 F. Supp. 201	513
Frontiero, Sharron A., and Joseph *v.* Melvin R. Laird, Sec. of Defense, Civil Action No. 3232-N, Apr. 5, 1972	3
General Electric Co. *v.* Robert C. Seamans, Jr., Civil Action No. 248-72	200
Gerace *v.* United States, 198 Ct. Cl. 978	10
Goddard, et al. *v.* United States, 287 F. 2d 343	86
Gordon *v.* United States, 134 Ct. Cl. 840	7
Griggs *v.* United States, Ct. Cl. No. 336-65	703
Gutknecht *v.* United States, 395 U.S. 295	543
Hantman, Harry, United States *v.*, Criminal No. 1446-68	621
Hartford Accident & Indemnity Co. *v.* Gulf Refining Co., D.C. La., 127 F. Supp. 469	330
Hawkins, Ward Roland *v.* United States, 167 Ct. Cl. 852	796
Hertzog, Jack M., *v.* United States, 167 Ct. Cl. 377	954
Hiss *v.* Hampton, 338 F. Supp. 1141	175
Home Indemnity Co. *v.* United States, 180 Ct. Cl. 173	639
Illinois Steel Co. *v.* Baltimore & Ohio R. Co., 320 U.S. 508	852
Independent Lock Co. *v.* Acme Fast Freight, 116 N.E. 2d 841	212
Independent, The, C.C.A. La., 122 F. 2d 141	330
Keco Industries, Inc. *v.* United States, 192 Ct. Cl. 773	504
Keef *v.* United States, 185 Ct. Cl. 454	509
Kittelsaa *v.* United States, D.C. N.Y., 75 F. Supp. 845	330
Lake *v.* United States, 97 Ct. Cl. 477	66
Lehigh Valley R.R., United States *v.*, 220 U.S. 257	151
Lipshitz & Cohen *v.* United States, 269 U.S. 90	700
Locke, Harvey Ward *v.* United States, 151 Ct. Cl. 262	736
Lowe, Garnett E., Jr. *v.* United States, Ct. Cl. No. 302-69	703
Lundblad *v.* United States, 98 Ct. Cl. 397	66
Manhattan General Equipment Co. *v.* Commissioner of Internal Revenue, 297 U.S. 129	796
Marden Corp. *v.* United States, 194 Ct. Cl. 799	255
Mason & Dixon Lines, United States *v.*, 222 F. 2d 646	852
Massman Construction Co. *v.* United States, 102 Ct. Cl. 699	288
Maxwell, United States *v.*, 278 F. 2d 206	796
McDaniel, United States *v.*, 21 CMR 182	910
McVane *v.* United States, 118 Ct. Cl. 500	66
Meister *v.* United States, 162 Ct. Cl. 667	30
Missouri Pac. R. Co. *v.* Austin, 292 F. 2d 415	715
Missouri Pacific Railroad Co. *v.* National Milling Co., 409 F. 2d 882	853
Moss *v.* United States, 173 Ct. Cl. 1169	589
Munsey Trust Co., United States *v.*, 332 U.S. 234	264, 638
Murrell, The, D.C. Mass., 200 F. 826	331
National Carloading Corp. *v.* United States, 105 Ct. Cl. 479	927
Nettie Quill, The, D.C. Ala., 124 F. 667	330
Nordstrom *v.* United States, 177 Ct. Cl. 818	632
Northeast Construction Co. *v.* Romney, Nos. 71-1891 and 71-1893	876
Ogden & Dougherty *v.* United States, 102 Ct. Cl. 249	538
Pacific Intermountain Express Company *v.* United States, 167 Ct. Cl. 266	576
Padbloc Company, Inc. *v.* United States, 161 Ct. Cl. 369	769
Parker, Kendall Gordon *v.* United States, 198 Ct. Cl. 661	510
Pearlman *v.* Reliance Insurance Co., 371 U.S. 132	636

Page

Phillips *v.* Martin Marietta Corp., 400 U.S. 542 ---- 2
Prairie State Bank *v.* United States, 164 U.S. 227 ---- 636
Prestex Inc. *v.* United States, 162 Ct. Cl. 620 ---- 218
Prince *v.* United States, 127 Ct. Cl. 612 ---- 423
Proper, Francis J., *v.* United States, 139 Ct. Cl. 511 ---- 954
Purcell Envelope Co., United States *v.*, 249 U.S. 313 ---- 736
Rapp *v.* United States, 167 Ct. Cl. 852 ---- 589, 796
Ray, Clyde A. *v.* United States, 197 Ct. Cl. 1 ---- 422
Ready-Mix Concrete Co. *v.* United States, 131 Ct. Cl. 205 ---- 637
Reiner, John, & Co. *v.* United States, 163 Ct. Cl. 381 ---- 218
Roanoke, The, D.C. Cal., 209 F. 114 ---- 330
Robey *v.* United States, 71 Ct. Cl. 561 ---- 457
Rose, J. H., Truck Line, Inc. *v.* United States, Nos. 194-69, 28-70 ---- 577
Rosencrans *v.* United States, 165 U.S. 257 ---- 2
Ruggiero *v.* United States, 190 Ct. Cl. 327 ---- 261
S&E Contractors, Inc. *v.* United States, Sup. Ct. No. 70-88 ---- 63
S&E Contractors, Inc. *v.* United States, 406 U.S. 1 ---- 197
Sacramento Nav. Co. *v.* Salz, 273 U.S. 326 ---- 330
Sah Quah, In re, 31 Fed. 327 ---- 252
Saligman et al. *v.* United States, 56 F. Supp. 505 ---- 538
Savage Truck Line, United States *v.*, 209 F. 2d 442 ---- 932
Seaboard Air Line Railroad Co. *v.* Red Diamond Mills, 128 F. Supp. 606 ---- 716
Security Insurance Co. *v.* United States, 192 Ct. Cl. 754 ---- 637
Shnitzer, Assignment of Claims Arising Out of Govt. Contracts, 16 Fed. B. J. 376 ---- 466
Shoenbrod *v.* United States, 187 Ct. Cl. 627 ---- 218
Silberblatt & Lasker, Inc. *v.* United States, 101 Ct. Cl. 54 ---- 256
Southern Knitwear Mills, Inc. *v.* Associated Transport, Inc., 9 Fed. Carrier Cases 710 ---- 579
Southern Pacific Co. *v.* United States, 243 F. Supp. 834 ---- 853

Page

Southern Pacific Co., United States *v.*, 325 I.C.C. 200 ---- 212, 852
Space Corp. *v.* United States, Ct. Cl. No. 328-70 ---- 536
St. Louis Cooperage Co. *v.* Baltimore & Ohio R., 161 ICC 258 ---- 213
Standard Accident Ins. Co. *v.* United States, 119 Ct. Cl. 749 ---- 264
Stein Potato Co. *v.* Northern Pacific Ry. Co., 144 ICC 123 ---- 927
Sweetser *v.* Fox, 134 P. 599, 602 ---- 715
Taliaferro *v.* Stafseth, 455 Fed. 2d 207 ---- 301
Tasker *v.* United States, 178 Ct. Cl. 56 ---- 916
Texas Trunk Co., ASBCA No. 3681, Nov. 20, 1957, 57-2 BCA 1528 ---- 256
Thompson *v.* Commissioner of Internal Revenue, 205 F. 2d 73 ---- 466
Tierney *v.* United States, 168 Ct. Cl. 77 ---- 632
Trinity Universal Insurance Co. *v.* United States, 382 F. 2d 317 ---- 637
United Van Lines, Inc. *v.* United States, 448 F. 2d 1190 ---- 673
Updike, Trustee *v.* United States, 69 Ct. Cl. 394 ---- 734
Valco Manufacturing Co. *v.* C. Richard & Sons, 92 A. 2d 501 ---- 212, 852
Vitarelli *v.* United States, 150 Ct. Cl. 59 ---- 862
Warren Brothers Roads Co. *v.* United States, 173 Ct. Cl. 714 ---- 218
Watkins, United States *v.*, 8 CMR 87 ---- 910
Wheelabrator Corp. *v.* Chafee, 455 F. 2d 1306 ---- 202
Willard, Sutherland & Co. *v.* United States, 262 U.S. 489 ---- 734
Williams *v.* New Orleans Steamship Association, 341 F. Supp. 613 ---- 149
Williams, United States *v.*, 302 U.S. 46 ---- 509
Woerfel Corp. and Towne Realty Co. *v.* Dr. James C. Fletcher, Admin., NASA, and Morrison-Knudsen Co., Civil Action No. 72-311 ---- 708
Wood *v.* Western Beef Factory, Inc., 378 F. 2d 96 ---- 225
Yale Express System, Inc. *v.* Nogg, 362 F. 2d 111, n. 2 ---- 931

INDEX DIGEST

July 1, 1972—June 30, 1973

Page

ABSENCES

Leaves of absence. (*See* **LEAVES OF ABSENCE**)

ACCOUNTABLE OFFICERS

Certifying officers. (*See* **CERTIFYING OFFICERS**)
Liability

Errors in judgment or neglect of duty

Although pecuniary liability for errors that led to request for space-required rather than space-available Military Airlift Command services to move commissary goods outside U.S. would seem to rest on commissary personnel making erroneous request, there is no basis for assessing charges for services on commissary officer since his custodial relationship with the Govt. as an accountable officer relates to property and funds, and there is no general authority for assessment of charges for losses sustained by Govt. as result of errors in judgment or neglect of duty by Govt. personnel. Moreover, interagency reimbursement for cost of services performed by billing agency pursuant to lawful authority cannot be viewed as a "loss" to Govt. in usual sense of the word---------- 964

ADMINISTRATIVE DETERMINATIONS

Conclusiveness

Contracts

Amendments and modifications

Determination of Secretary of Agriculture to uphold denial by Regional Forester of claim for additional road construction costs under timber sales contract—denial reversed and restored administratively and then appealed to Secretary by contractor—was in conformance with 36 CFR 221.16(a), which provides for modification of timber sales contracts only when modification will apply to unexecuted portions of contract and will not be injurious to U.S., is final administrative determination within purview of 36 CFR 211.28(b), and Supreme Court ruling in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, concerning finality of administrative determinations and, therefore, Secretary's decision is final and conclusive insofar as other agencies of Govt. are concerned, and it is not subject to review by GAO---------- 196

ADMINISTRATIVE DETERMINATIONS—Continued Page
Conclusiveness—Continued
Contracts—Continued
Disputes
Fact *v.* law questions

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine ---------- 253

Weight accorded indisputes

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon ---------- 306

ADMINISTRATIVE ERRORS
Military matters
Record correction
Not a ministerial duty

Although the Secretaries of military depts. concerned may delegate performance of certain ministerial duties to correct administrative errors in members' records, changes that involve material fact or create new record require a Board for Correction of Military Records action pursuant to 10 U.S.C. 1552. Therefore, in absence of such proceeding, Adjutant General of the Army may not correct record of member retired as an Army Sergeant who received bad conduct discharge in 1949 from Navy and shortly thereafter used papers and name of a Marine to enlist in Regular Army, from which he was retired in 1960, under 10 U.S.C. 3914, recalled in 1965, and retired again in 1972, also under sec. 3914, to evidence continued service under his own name until effective date of second retirement, as such an action would be ineffective to authorize pay and allowances, including retired pay, for retirement periods ------ 952

ADVERTISING Page

Advertising *v.* negotiation

Negotiation propriety

Procurement of idler pulleys by negotiation rather than by formal advertising and use of brand name or equal purchase description, solicitation of offers from approved sources only, and restriction of procurement to named-part number was in absence of adequate specification data in accord with 10 U.S.C. 2304(a)(10) and par. 3-210.2(xv), Armed Services Procurement Reg. (ASPR), which authorizes negotiation for replacement parts or components in support of specially designed equipment, with ASPR 1-313(c), which provides for procurement of replacement parts from sources that satisfactorily manufactured or furnished parts in past, and with ASPR 1-1206.2(b), which requires salient characteristics to be listed when brand name or equal provision is used, and procurement did not restrict competition since proposals from unapproved sources were not prohibited, and offers on other than named part were considered---------- 546

Negotiation procedures pursuant to determinations and findings for restoration of National Monument historical structure on basis it was impracticable to secure competition by formal advertising within meaning of 41 U.S.C. 252(c)(10), as implemented by sec. 1-3.210 of the Federal Procurement Regs., having been used to prequalify firms since procurement otherwise was treated as formally advertised, any award under solicitation would be improper, and if resolicited, procurement should be formally advertised. The preselection method of qualifying firms and the failure to synopsize procurement in Commerce Business Daily was restrictive of full and free competition contemplated by advertising statutes. Furthermore, even under negotiation procedures, prequalification of offerors would be inconsistent with requirement that negotiated procurements be on competitive basis to maximum practical extent---- 569

Although failure to inquire why incumbent contractor furnishing security watchman services, whose proposal was administratively lost, had not submitted proposal was not sound procurement practice, contract negotiated pursuant to sec. 1-3.210 of the Federal Procurement Regs. (FPR) on the basis of a determination and findings (D&F) that it was impracticable to secure competition because only three sources had top security clearance need not be terminated for that reason as lost proposal could only be established by self-serving statements. However, termination of award nevertheless is recommended in view of fact negotiation procedures were used to convert successful contractor's secret clearance to top secret, and the D & F did not satisfy criteria in FPR sec. 1-3.305(b), but rather prequalified the three firms thus restricting competition. Any resolicitation should consider using formal advertising and should treat top security clearance as matter of bidder responsibility---------- 593

ADVERTISING—Continued Page

Advertising *v.* negotiations—Continued

Specifications availability

Use of formal advertising procedures by the Naval Facilities Engineering Command to procure 2,000 KW gas turbine engine driven power plants and related data packages was proper since adequate specifications were available and use of the two-step formal advertising procedure is authorized pursuant to par. 2-501 of the Armed Services Procurement Regulation (ASPR) only when there are no adequate specifications to permit formal advertising. Moreover, record does not indicate that negotiation of procurement should have been authorized under the circumstances spelled out in ASPR 3-200 *et seq.* and ASPR 3-102(b)(1) .. 640

AGRICULTURE DEPARTMENT

Commodity Credit Corporation. (*See* **COMMODITY CREDIT CORPORATION**)

Indemnity payments

Contamination of cheese

Removal from commercial market

Cheese that contained dieldrin which was removed from commercial market at direction of State of Wisconsin Dept. of Agriculture under 14-day hold orders beginning Apr. 11, 1967, but final determination that cheese was adulturated pursuant to both State and Federal law and should not move in interstate or foreign commerce was not made until May 14, 1971, is considered to have been removed from commercial market after Nov. 30, 1970, thus permitting indemnity payments under sec. 204(b) of Agricultural Act of 1970, approved Nov. 30, 1970, in view of fact legal effectiveness of hold orders to remove cheese from commercial market prior to May 14, 1971, is doubtful. However, before making indemnity payment action should be taken to insure claimant will not also collect or benefit under its judgment against farmer responsible for contamination 94

Contamination of milk

Contaminant registration and approval requirement

Fact that the only statute requiring registration of chemicals is Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135-135k) does not imply waiver of registration and approval requirement in 7 U.S.C. 450j to permit indemnity payments to dairy farmers who were directed to remove their milk from commercial market because it contained residues of chemical which was not registered and approved for use by Federal Govt. at time of use since, under express language of the statutes pertaining to Milk Indemnity Program, use of contaminant must have been registered with and affirmatively endorsed or recommended by Govt. Therefore, indemnity claims for milk contaminated from consumption by dairy cattle of ensilage stored in silo coated with paint containing "Arcolor 1254," compound not required to be registered and approved, may not be allowed 412

AGRICULTURE DEPARTMENT—Continued Page

Losses sustained by producers, etc.

Turkey growers

Indemnification

Losses sustained by five turkey growers in connection with Dept. of Agriculture's quarantine program for control and eradication of exotic Newcastle disease—highly virulent communicable disease of poultry—which was imposed under Dept.'s authority to prevent interstate dissemination of disease, may not be indemnified under terms of 21 U.S.C. 114a or pursuant to authority in 7 U.S.C. 612c. 21 U.S.C. 114a authorizes indemnity payments for destruction of animals, including poultry, when performed under supervision of Dept., whereas growers sold their flocks and eggs upon their own initiative, disposition that is not considered "constructive destruction" that resulted from quarantine. 7 U.S.C. 612c is intended for application only when entire commodity is in distress and, furthermore, indemnity payments have been founded upon specific legislation 519

AIRPORTS

Government use of municipal airports

"Reasonable share" of costs determination

Since it is impossible that reasonable share of extraordinary maintenance costs, proportionate to Federal Govt.'s disproportionate use of taxiway and runway at airport transferred to Joint Board of Texarkana Municipal Airport Authority can be determined under indenture agreement executed between General Services Administration and Board or from authorizing statute, 50 U.S.C. App. 1622, as no objective standard is provided to give concrete meaning to what is considered "reasonable share," proportional to use, of cost of operating and maintaining facilities, use and maintenance charges that are abnormally burdensome as result of Govt.'s damaging use of runway may be negotiated with Board.. 444

ALASKA

Natives

Status

Claims payment purposes

As natives of Alaska—ultimate beneficiaries of Alaska Native Fund established by Alaska Native Claims Settlement Act, Pub. L. 92-203, approved Dec. 18, 1971, for distribution to regional corporations—are aboriginal groups, legal position of individual Alaskan native is assimilated to that of other Indians in U.S. Therefore, lack of formal tribal organization of natives is not determinative of status of fund, and it may be properly classified as Indian tribal trust fund that is eligible for interest payments under 25 U.S.C. 161a, and for investment pursuant to 25 U.S.C. 162a, pending enrollment of natives and distribution of fund to regional corporations established by act 248

ALLOWANCES Page

Double

Prohibition

Payment of temporary quarters subsistence expenses (TQSE) to transferred civilian employee for up to 30 days while he and his dependents occupy temporary quarters, which expenses are computed on basis of actual expenses or per diem percentage for each 10-day period, will not violate prohibition against duplicate payments in par. C8253 of Joint Travel Regs. and sec. 8.2i of OMB Cir. No. A–56 because his spouse as a military member on active duty receives basic allowances for quarters and for subsistence. The TQSE allowance is intended to lessen economic hardship employees face when transferred for convenience of Govt., whereas permanent military allowances cover normal day-to-day expenses for food and shelter when not provided by Govt., and being in the nature of compensation they are not viewed as duplicating TQSE allowance 962

Military personnel

Dependents

Status of dependents for allowances

Children

Children provisionally adopted by Navy member while stationed in Great Britain pursuant to the Adoption Act of 1958 (7 Eliz. 2, C.5) Part V, Sec. 53, are considered dependents of the member under 37 U.S.C. 401, so as to entitle him to a dependents' allowance and all other benefits incident to dependency status while member resides in Great Britain in view of fact that although provisional adoption order only authorizes custody and removal of children from Great Britain for adoption elsewhere, sec. 53(4) of the act provides that the rights, duties, obligations, and liabilities prescribed in other sections of the act for an adopter shall equal those of natural parents or those created by an adoption order. However, unless children are actually adopted by member after he is transferred from Great Britain, they may not continue to be regarded as his adopted children 675

Dislocation allowance

Members without dependents

Quarters not assigned

Payment of dislocation allowance to officer of Army Nurse Corps as member without dependents who is receiving basic allowance for quarters as member with dependents for her mother who will not join her at new duty station where she was not assigned Govt. quarters depends on whether mother resided with officer at old station. If she did not, officer is entitled to dislocation allowance pursuant to par. M9002, JTR, in amount equal to applicable monthly rate of quarters allowance prescribed for member of officer's pay grade without dependents, but if mother did reside with her at time of transfer, her entitlement to transportation for mother precludes payment of allowance even though mother may not have changed residence 405

ALLOWANCES—Continued Page
Military personnel—Continued
Excess living costs outside United States, etc. (*See* STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.)
Family separation allowances, (*See* FAMILY ALLOWANCES, Separation)
Quarters allowance. (*See* QUARTERS ALLOWANCE)
Subsistence allowance. (*See* SUBSISTENCE ALLOWANCE, Military personnel)
Subsistence. (*See* SUBSISTENCE ALLOWANCE)
Separation allowance for civilian overseas employees. (*See* FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES, Separate maintenance allowance)

ANTITRUST MATTERS
Contracting officers responsibility
Record on award of operation and maintenance contracts to low offeror does not evidence determination was influenced by pending merger of low offeror's firm and competitor where firm's past preformance under contracts of similar difficulty, its corporate history, and its financial picture were evaluated. Furthermore, to require contracting officer to consider antitrust aspects of pending merger in absence of judicial authority speaking directly to point would impose intolerable burden on officer and inordinately delay procurement and, moreover, since disclosure of prices was intended only to effectuate merger, "Certification of Independent Price Determination" designed to alleviate competition, was not inaccurately executed 161

APPOINTMENTS
Presidential
Recess
Continuation of service upon expiration of term
A presidential recess nominee, appointed under Art. II, sec. 2, clause 3 of Constitution, whose appointment was not confirmed by Senate and he continued to serve after expiration on Dec. 31, 1972, of his recess term pursuant to 49 U.S.C. 11, which provides for continued service until successor is appointed and confirmed, and whose nomination to full term was not submitted within 40 days after beginning of next session of Congress, is not entitled pursuant to 5 U.S.C. 5503(b) to receive compensation after expiration of 40 days after beginning of first session of 93d Congress. However, since prohibition against paying recess appointee does not affect his right to hold office until the confirmation of nominee or end of 1st session of 93d Congress, should recess appointee be nominated and confirmed his right to pay would relate back to 41st day 556

APPOINTMENTS—Continued Page

Status

Manpower shortage category

As Federal Judicial Center is considered part of judicial branch, its employees are within scope of 5 U.S.C. 5721 *et seq.* regardless of fact Center is not specifically listed in statute which authorizes reimbursement for travel and transportation expenses incurred in reporting to position determined by CSC to be in manpower shortage category. However, since Center under authority in 28 U.S.C. 625(e) to incur expenses incident to operation of Center and not Commission determined position of Director of Continuing Education and Training was manpower shortage position, expenses incurred by Director in moving to first duty station are not reimbursable under 5 U.S.C. 5723, and rule in 22 Comp. Gen. 885 that officer or employee of Govt. must place himself at first duty station at own expense applies 268

APPROPRIATIONS

Availability

Christmas trees, ornaments, and decorations

Not a "necessary expense"

Seasonal items such as artificial Christmas trees, ornaments, and decorations purchased for Government offices do not constitute office furniture designed for permanent use so as to qualify as kind of "necessary expense" that is chargeable to appropriated funds since items have neither direct connection nor essentiality to carrying out of stated general purpose for which funds are appropriated. Therefore, Bureau of Customs may not charge purchase of such seasonal items to its appropriated funds as legitimate expense unless it can be demonstrated purchase was a "necessary expense," phrase construed to refer to current or running expenses of miscellaneous character arising out of and directly related to work of agency 504

Membership fees

Professional organizations

Annual dues employee is required to pay for membership in professional organization is not reimbursable to employee, even though savings would accrue to Govt. from reduced subscription rates, and notwithstanding Govt. would benefit from employee's development as result of membership, since 5 U.S.C. 5946 prohibits use of appropriated funds for payment of membership fees or dues of officers and employees of Govt. as individuals, except as authorized by specific appropriation, by express terms in general appropriation, or in connection with employee training pursuant to 5 U.S.C. 4109 and 4110. However, agency is not precluded by 5 U.S.C. 5946 from becoming member and paying required dues if it is administratively determined to be necessary in carrying out authorized agency activities 495

APPROPRIATIONS—Continued Page

Availability—Continued

Refund of expenditures

Post Office Department expenditures

Refunds of transportation charges paid from funds appropriated to former Post Office Dept. for fiscal year 1970, and obligated funds for 1970 and prior fiscal years transferred to the Postal Service and then deobligated are for reversion to general fund of the Treasury pursuant to 31 U.S.C. 701(a)(2) and not to Postal Service Fund as 39 U.S.C. 410(a) of the Postal Reorganization Act, which exempts Postal Service from Federal laws dealing with budgets or funds, was not effective until July 1, 1971, and, therefore, appropriations to former Post Office Dept. are subject to 31 U.S.C. 701–708 prescribing closing of appropriation accounts available for obligation for definite period, and providing for reversion to general fund of Treasury, and lapsed appropriations of Post Office Dept. may not be considered assets of Postal Service in absence of specific provisions in act to this effect 179

Continuing resolutions

Availability of funds

Functions prescribed by Pub. L. 92–318, approved June 23, 1972, for National Advisory Council on Extension and Continuing Education, which was established by and its authority and responsibility stated in sec. 109 of Higher Education Act of 1965, as amcnded (20 U.S.C. 1009), do not constitute new "project or activity" within purview of prohibition in sec. 106 of Continuing Resolution, approved July 1, 1972 (Pub. L. 92–334) since primary effect of new functions is to require Council to evaluate educational programs and projects which theretofore were more or less discretionary and, therefore, funds provided by Continuing Resolution, pending passage of Dept. of Health, Education, and Welfare appropriations (HEW), may be made available by HEW to implement Council's functions under sec. 106 270

Restrictions

In permanent appropriations

Although in considering bill for "Department of Labor, and Health, Education and Welfare Appropriation Act, 1973," House was more restrictive than Senate as to number of Federal employees authorized to determine compliance with Occupational Safety and Health Act of 1970, inspection activities of Labor Dept. under 1970 act remain unchanged during effective period of Joint Resolution (Pub. L. 92–334), which provides continuing appropriations for fiscal year 1972 projects until fiscal year 1973 funds become available, for notwithstanding that pursuant to sec. 101(a)(3) of Joint Resolution, more restrictive language governs, sec. 101(a)(4) controls to make restriction on inspection services inapplicable under Joint Resolution in view of fact similar restriction was not contained in 1972 appropriation act 71

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc.**)

Federal grants, etc., to other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)

APPROPRIATIONS—Continued Page

Obligation

Section 1311, Supplemental Appropriation Act, 1955

Contracts

Between agencies

Air Force vouchers submitted by Army Finance Center pursuant to 7 GAO 8.4(c), which provides for submission of a disputed interagency bill for goods or services to GAO for settlement, will be considered to be request for an advance decision. Bills submitted which cover cost of inadvertent movement of commissary goods outside the United States (U.S.) in space-required rather than space-available airlift that Military Airlift Command refuses to cancel, may be paid from appropriated funds, for although commissaries are required to be self-sustaining, they are appropriated fund activities and, furthermore, Pub. L. 92–204 excludes transportation costs incurred outside U.S. from cost of purchase in operation of commissaries. Since interagency orders are obligations upon appropriations the same as orders or contracts with private contractors, Army operation and maintenance appropriation stated on vouchers is properly chargeable 964

ASSIGNMENT OF CLAIMS (*See* **CLAIMS, Assignment**)

ATTORNEYS

Fees

Employee litigation

The legal fees awarded a former Foreign Service Officer of the Department of State in a grievance proceeding brought under section 1820 of Volume 3 of the Foreign Affairs Manual are not reimbursable since neither the authority in 22 U.S.C. 810 to procure legal services for the protection of the interests of the Government or to enable an officer or employee of the Service to carry on his work efficiently, nor the authority in Public Law 84–885 to incur expenses in unforeseen emergencies arising in the diplomatic and consular services apply in the circumstances of a grievance proceeding 859

AUTOMATIC DATA PROCESSING SYSTEMS. (*See* **EQUIPMENT, Automatic Data Processing Systems**)

AUTOMOBILES

Generally. (*See* **VEHICLES**)

Transportation. (*See* **TRANSPORTATION, Automobiles**)

AWARDS

Contract awards. (*See* **CONTRACTS, Awards**)

BALANCE OF PAYMENTS PROGRAM. (*See* **FUNDS, Balance of Payments Program**)

BANKRUPTCY Page

Carriers

Reorganization, etc.

Government to maintain services

Option obtained from Central Railroad of New Jersey by Secretary of Transportation pursuant to sec. 3(b)(4) of Emergency Rail Service Act of 1970 incident to guaranteeing trustee certificates issued in reorganization proceedings of railroad, which option provides that Secretary acquire by purchase or lease trackage rights and equipment to maintain railroad services in event of actual or threatened cessation of such services, may not be exercised without further action by Congress. Legislative history of act contains no indication Secretary is authorized to take over railroad and operate it, but rather evidences that he may exercise option, following favorable congressional action, without awaiting outcome of proceedings before reorganization court or Interstate Commerce Commission 309

BIDDERS

Allegation of unfairness, etc.

Although offerors who submitted acceptable technical proposals for construction of any or all of three Bachelor Officers Quarters (BOQ) and therefore were entitled to bid on project or projects under subsequent invitation for bids should have been given more detailed information concerning application of per man statutory limitation imposed by sec. 706 of Military Construction Act of 1972, and possibility of waiver, nevertheless the contracting officer's recommendation that limitation placed on one of the projects should be waived for low overall bidder who was not low on major construction item was not unfair to second low bidder who should have been aware that sec. 706, and implementing pars. 11–110(a) and (c) of Armed Services Procurement Reg. provide both for limiting costs and for waiver when limitation is impracticable to impose 969

Bids, generally. (*See* **BIDS**)

Invitation right

Amendments

Incorrectly addressed

Bid transmitted by Telex system because amendment advancing bid opening date was not received until within 4 hours of bid opening time due to incorrect listing of bidder's address was properly rejected, even though bidder was advised during telephonic inquiry to use whatever means were available to transmit bid and had subsequently confirmed bid, since invitation for bids did not authorize telegraphic bids and late receipt of confirmation bid was not excusable. Although amendment changes are required to be furnished everyone sent invitation, procurement activity is not insurer of prompt delivery and, therefore, cancellation of amendment is not required because it was inadvertently misdirected. Propriety of procurement rests on obtaining adequate competition and reasonable prices and not on affording every possible prospective bidder opportunity to bid 281

BIDDERS—Continued Page

Qualifications

Administrative determinations

Acceptance

Under total small business set-aside solicitation for pastry requirements that listed estimated quantities for each of 33 items solicited and required both unit and total estimated prices for each of the items, and indicated any items might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Govt., multiple awards to low bidder on two of three groupings submitted and to protestant for remainder of the items would result in lowest aggregate price to the Govt. as provided by solicitation, and as statement of group bidder that each group of items "are bid as a Total All or None Bid" does not qualify its bid, since in listing items in groups, bidder indicated that an award of individual items would not be acceptable, the group bidder, administratively determined to be responsible bidder, is eligible to receive award 932

Discretionary authority

Although record of contract awarded under an invitation for bids on skid mounted power plants is not clear as to successful bidder's prior experience, and procedures and facilities to be used in connection with engineering services to be furnished, the validity of the affirmative administrative determination of bidder responsibility will not be questioned absent showing of bad faith or lack of any reasonable basis for discretionary judgment made since failure to meet literal requirements of experience clause provisions does not require bid rejection if bidder otherwise qualifies to perform the contract awarded 647

Propriety

Determination of bidder responsibility by contracting officer who virtually ignored initial preaward survey favorable to an offeror under solicitation for Inspection and Repairs As Necessary (IRAN) of aircraft and relied exclusively on unfavorable data, including second preaward survey, without rationalizing basis for rejection of intitial preaward survey in which he participated and concurred in the "award" recommendation to the rejected offeror although of doubtful validity, and contracting officer, as required by par. 1–900, *et seq.* of Armed Services Procurement Reg., should have resolved inconsistencies and uncertainties in record before reaching reasoned judgment of responsibility, record does not establish arbitrariness or capriciousness which is prerequisite to recovering preparation costs. However, similar occurrence should be avoided in future 977

BIDDERS—Continued Page

Qualifications—Continued

Administrative determinations—Continued

Reasonable

In the procurement under request for quotations of technical services in support of Tactical Air Control and Defense Systems Interface Program on cost-plus-a-fixed-fee basis, which because services were previously furnished on sole-source basis provided for three-month indoctrination period for any nonincumbent selected for award, the recommendation of the Procurement Advisory Committee, accepted by the contracting officer, that incumbent was best qualified on basis of technical capabilities and competence, although not lowest offeror, evidences no unreasonableness or favoritism, for even after applying Indoctrination Learning Adjustment factor the incumbent rated higher, and it was proper under negotiation procedures to consider factors other than price and to use a point system that included, in addition to price, personnel, experience, technical approach, etc., as an evaluation technique 981

As bid evaluation factor

Employees of bidder

Failure to call in offerors in competitive range for detailed discussions of specific deficiencies in their proposals, and requirement that engineers have Bachelor of Science Degree resulted in award of contract to other than low offeror at substantial increase in price to Govt., which indicates that manner and extent of discussions of proposals with offerors in competitive range were not conducive to obtaining maximum competition. One of primary purposes of conducting negotiations with offerors is to raise to acceptable status those proposals which are capable of being made acceptable, and thereby increase competition, and it is incumbent upon Govt. negotiators to be as specific as practical considerations will permit in advising offerors of corrections required in their proposals. Furthermore, Bachelor of Science Degree requirement should be reconsidered before it is included in future procurements 466

Capacity, etc.

Determination

Determination bidder was not responsible to perform requirements contract to repair adding machines and calculators because he could not furnish loan equipment during periods of repair, and because operating from home there was little indication bidder was regularly engaged in repair business, is not invalid determination as contracting agency is vested with considerable degree of discretion in deciding responsibility of prospective contractor. However, bidder should have been given opportunity to establish ability to furnish loan equipment by performance time in view of statement made during preaward survey of ability to obtain equipment, and award of contract on similar terms to repair typewriters. It is, therefore, suggested that in future information received in connection with particular procurement should be utilized, where relevant, in similar concurrent procurement 240

BIDDERS—Continued Page

Qualifications—Continued

Capacity—Continued

Plant facilities, etc.

An offeror under request for technical proposals (RFTP) of two-step procurement for the design, construction, and performance testing of nitric acid-sulfuric acid concentration plants who possesses "in-depth" technological skill and experience but who had never designed and constructed a plant exactly like that outlined in the RFTP—the position of protestant, the only other responsive bidder—satisfied experience requirements of solicitation and was, therefore, acceptable for advancement to step two, and having submitted lowest bid, as protestant's bid errors could not be waived as minor informality, properly was awarded contract. Experience provisions of solicitation only required a showing that components offered had performed satisfactorily in an operating plant of similar design for 2 years and not that all components had been put together in a facility and operated successfully in that facility for 2 years 783

Qualifications *v.* qualified products

The issuance of a request for proposals for stationary brake discs to be used as spare parts to the "only known qualified sources" does not mean the item being procured involves a qualified product. Establishment of procedures to determine qualifications of a source to manufacture a part in accordance with required specifications is discretionary and within the ambit of the expertise of the cognizant technical activity, whose responsibility it is to determine the criteria necessary to insure the safety, dependability and interchangeability of the part on an *ad hoc* basis 778

Technical criteria utilization

Where offerors were not required to submit technical proposals to service electron microscopes but only to offer to conform to best practices of industry, and factors making up technical criteria were evaluation of capacity factors, determination offeror was technically unacceptable amounted, in essence, to determination of nonresponsibility for reasons of capacity that required referral to SBA under 1–1.708.3 of Federal Procurement Regs. Furthermore, award of nonpersonal service, fixed price, contract to offeror determined capable of providing highest quality services was without authority and, therefore, if SBA will issue Certificate of Competency to rejected offeror, award made should be terminated for convenience of Govt 47

BIDDERS—Continued Page

Qualifications—Continued

Experience

Administrative determination

Experience requirement provision in invitation for bids to furnish gas turbine power generators which stated that low bidder may be required to establish supplier experience in furnishing of gas turbine power plants, and, if not, written certificates would have to be obtained from manufacturer of engines—one before award assuring compliance with criteria to which engines were designed and manufactured, and one after Govt. acceptance of delivery warranting that engines are proper and adequate for use to which they have been put—involves matter of bidder responsibility for determination by contracting officer, except where Certificate of Competency had been or would be issued. However, since literal compliance with certifications required was not intended or sought in procurement, future solicitations should state requirements more precisely.. 87

Product reliability and manufacturing capability

The inclusion in an invitation for bids to procure gas turbine units of an experience, performance bond, and two liquidated damage clauses in order to protect interests of the Govt. is not restrictive of competition where experience clause is intended to establish prior experience—a matter of bidder responsibility and not bid responsiveness—and its use is appropriate to substantiate product reliability and manufacturing capability; where performance bond is a necessary and proper means to secure the contractor's obligation under contract, even though a 100 percent performance bond was required; and where the liquidated damages at different per diem rates for delayed delivery and failure of units to operate each day for the first year was warranted on basis of administrative needs and prior experiences, and furthermore, determination of whether penalty is involved depends on facts as they arise.. 640

Responsibility *v.* responsiveness

In procurement of 2,000 KW gas turbine engine driven power plants and related data packages, and skid mounted power plants, the experience clause in the solicitations which is directed to the performance history of smaller related generators rather than to specific performance experience of the KW generator solicited is a matter of bidder responsibility and not bid responsiveness since clause relates to bidder experience and not to history of product performance. Also matters of responsibility are the experience level specified for supplier of gas turbine engine, and capability of bidder to meet qualification requirements for engineering services personnel and facilities. Furthermore, even if warned to the contrary, documentary evidence to show compliance with experience clause requirements may be submitted after bid opening since such information relates to bidder's qualifications to perform.. 647

BIDDERS—Continued Page

Qualifications—Continued

Financial responsibility

Subsidiary of parent corporation undergoing reorganization

Administrative determination that low bidder, subsidiary of corporation undergoing Chap. XI Bankruptcy Act reorganization (11 U.S.C. 701), did not possess financial strength to perform multiyear contract for transducers and parts at low price bid is determination that is within contemplation of par. 1-902 of ASPR to effect that any doubt as to financial strength of bidder that cannot be resolved affirmatively requires determination of nonresponsibility. Record confirms that price bid would result in loss, that contracting agency's estimate of costs on separate yearly quantities is not contrary to terms of solicitation or ASPR 1-322.1 (b)(3), and that refusal to rely on bidder's material and labor cost estimates was not arbitrary and, furthermore, consideration of parent corporation's reorganization in determining its subsidiary's responsibility was within administrative discretion 372

Inspection and product facilities

Responsibility determination

As matters involving points of production and inspection have traditionally been treated as matters affecting responsibility of bidder rather than responsiveness of bid, low bidder—small business concern—who offered to provide alternative production points for several items of engineer wrenches he selected to bid on from 59 items solicited, without indication as to which point would be used on each of items, was properly determined to be nonresponsible bidder, since although given opportunity to correct nonresponsibility determination, bidder refused plant facilities survey to revise production points to be consistent with bid samples submitted, thus meeting requirement that samples must be from production of manufacturer whose product is to be supplied, and also refused to file for Certificate of Competency 155

Manufacturer or dealer

Determination

Whether low bidder on non-set-aside portion of a procurement with a 50 percent set aside for award to labor surplus area concerns who on date of bid opening is negotiating to acquire the performance activity from a large business concern is eligible as a manufacturer or regular dealer ("going concern") for purposes of award under Walsh-Healey Contracts Act (41 U.S.C. 35-45) is for determination initially by contracting officer subject to review by Dept. of Labor (ASPR 12-601, *et seq.*). To qualify as a manufacturer a firm newly entering into manufacturing activity must show before award that it has made all necessary prior arrangements for space, equipment, and personnel, and if qualifying commitments are made prior to award for entering into manufacturing business, a new firm is not barred from receiving an award because it has not yet done any manufacturing 886

BIDDERS—Continued Page

Qualifications—Continued

Preaward survey

Favorable but not considered

Determination of bidder responsibility by contracting officer who virtually ignored initial preaward survey favorable to an offeror under solicitation for Inspection and Repairs As Necessary (IRAN) of aircraft and relied exclusively on unfavorable data, including second preaward survey, without rationalizing basis for rejection of initial preaward survey in which he participated and concurred in the "award" recommendation to the rejected offeror although of doutful validity, and contracting officer, as required by par. 1-900, *et seq.* of Armed Services Procurement Reg., should have resolved inconsistencies and uncertainties in record before reaching reasoned judgment of responsibility, record does not establish arbitrariness or capriciousness which is prerequisite to recovering preparation costs. However, similar occurrence should be avoided in future 977

Prequalification of bidders

Propriety

Negotiation procedures pursuant to determinations and findings for restoration of National Monument historical structure on basis it was impracticable to secure competition by formal advertising within meaning of 41 U.S.C. 252(c)(10), as implemented by sec. 1-3.210 of the Federal Procurement Regs., having been used to prequalify firms since procurement otherwise was treated as formally advertised, any award under solicitation would be improper, and if resolicited, procurement should be formally advertised. The preselection method of qualifying firms and the failure to synopsize procurement in Commerce Business Daily was restrictive of full and free competition contemplated by advertising statutes. Furthermore, even under negotiation procedures, prequalification of offerors would be inconsistent with requirement that negotiated procurements be on competitive basis to maximum practical extent 569

Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient, and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1-3.101(c)) that is not justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portions of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees 987

BIDDERS—Continued Page

Qualifications—Continued

Security clearance

Although failure to inquire why incumbent contractor furnishing security watchman services, whose proposal was administratively lost, had not submitted proposal was not sound procurement practice, contract negotiated pursuant to sec. 1-3.210 of the Federal Procurement Regs. (FPR) on the basis of a determination and findings (D&F) that it was impracticable to secure competition because only three sources had top security clearance need not be terminated for that reason as lost proposal could only be established by self-serving statements. However, termination of award nevertheless is recommended in view of fact negotiation procedures were used to convert successful contractor's secret clearance to top secret, and the D & F did not satisfy criteria in FPR sec. 1-3.305(b), but rather prequalified the three firms thus restricting competition. Any resolicitation should consider using formal advertising and should treat top security clearance as matter of bidder responsibility 593

Responsibility *v.* bid responsiveness

Bidder ability to perform

Determination bidder was not responsible to perform requirements contract to repair adding machines and calculators because he could not furnish loan equipment during periods of repair, and because operating from home there was little indication bidder was regularly engaged in repair business, is not invalid determination as contracting agency is vested with considerable degree of discretion in deciding responsibility of prospective contractor. However, bidder should have been given opportunity to establish ability to furnish loan equipment by performance time in view of statement made during preaward survey of ability to obtain equipment, and award of contract on similar terms to repair typewriters. It is, therefore, suggested that in future information received in connection with particular procurement should be utilized, where relevant, in similar concurrent procurement 240

Bid rejection erroneous

Where offerors were not required to submit technical proposals to service electron microscopes but only to offer to conform to best practices of industry, and factors making up technical criteria were evaluation of capacity factors, determination offeror was technically unacceptable amounted, in essence, to determination of nonresponsibility for reasons of capacity that required referral to SBA under 1-1.708.3 of Federal Procurement Regs. Furthermore, award of nonpersonal service, fixed price, contract to offeror determined capable of providing highest quality services was without authority and, therefore, if SBA will issue Certificate of Competency to rejected offeror, award made should be terminated for convenience of Govt 47

BIDDERS—Continued Page

Responsibility *v.* bid responsiveness—Continued

Bond requirements

Bidder required to furnish bid guarantee in penal sum of only $300,000 who submitted bond signed by two sureties—one having net worth of $625,500, the other $27,500—was responsible bidder whose bid should not have been rejected. Even though one of the sureties did not show on his Affidavit of Individual Surety at bid opening net worth at least equal to penal sum of bid bond, the bond itself is enforceable and bidder is considered to have tendered valid bid bond, executed by sureties that are jointly and severally liable in penal sum sufficient to satisfy requirements of solicitation. Moreover, as net worth information does not relate to bid responsiveness but rather to responsibility of surety, rejected bid may be considered on basis of corrected affidavit submitted by deficient surety 184

Experience

Experience requirement provision in invitation for bids to furnish gas turbine power generators which stated that low bidder may be required to establish supplier experience in furnishing of gas turbine power plants, and, if not, written certificates would have to be obtained from manufacturer of engines—one before award assuring compliance with criteria to which engines were designed and manufactured, and one after Govt. acceptance of delivery warranting that engines are proper and adequate for use to which they have been put—involves matter of bidder responsibility for determination by contracting officer, except where Certificate of Competency had been or would be issued. However, since literal compliance with certifications required was not intended or sought in procurement, future solicitations should state requirements more precisely 87

The inclusion in an invitation for bids to procure gas turbine units of an experience, performance bond, and two liquidated damage clauses in order to protect interests of the Govt. is not restrictive of competition where experience clause is intended to establish prior experience—a matter of bidder responsibility and not bid responsiveness—and its use is appropriate to substantiate product reliability and manufacturing capability; where performance bond is a necessary and proper means to secure the contractor's obligation under contract, even though a 100 percent performance bond was required; and where the liquidated damages at different per diem rates for delayed delivery and failure of units to operate each day for the first year was warranted on basis of administrative needs and prior experiences, and furthermore, determination of whether penalty is involved depends on facts as they arise 640

BIDDERS—Continued Page

Responsibility *v.* responsiveness—Continued

Information

Requirement that bids under invitation soliciting custodial services be accompanied by outline of bidder's proposed method of operation as to job and work force, method of supervision, types and quantities of equipment, performance schedule is matter of bidder responsibility and not bid responsiveness, notwithstanding invitation provision for mandatory rejection of bids that failed to furnish required information, since method of operation pertains to "know-how," which is element of responsibility as specifications form basis for actual work requirement. However, should it be deemed desirable to require outline of bidder's method of operation, invitation should state purpose of requirement and how outline will be considered in selection of successful bidder and in administration of contract 389

Holding in *Albano Cleaners, Inc.* v. *U.S.*, 197 Ct. Cl. 450, does not require conclusion that procuring activity's established treatment of outline of bidder's proposed method of operation as matter of bid responsiveness rather than bidder responsibility must be adhered to and is not subject to change as court recognized that contracting agency is not estopped from ceasing a particular treatment employed in prior procurements in awarding new contracts 389

Points of production and inspection

As matters involving points of production and inspection have traditionally been treated as matters affecting responsibility of bidder rather than responsiveness of bid, low bidder—small business concern—who offered to provide alternative production points for several items of engineer wrenches he selected to bid on from 59 items solicited, without indication as to which point would be used on each of items, was properly determined to be nonresponsible bidder, since although given opportunity to correct nonresponsibility determination, bidder refused plant facilities survey to revise production points to be consistent with bid samples submitted, thus meeting requirement that samples must be from production of manufacturer whose product is to be supplied, and also refused to file for Certificate of Competency 155

Subsidiaries

De facto control

Although in determining whether parent and its subsidiary should be treated as separate entities term "day-to-day" control was erroneously injected into Labor Dept.'s criteria of de facto control by contracting agency reviewing equal employment opportunity (EEO) compliance of successful contractor with E.O. 11246, ruling in 50 Comp. Gen. 627 (1971) that affirmative action plan was not required to be submitted by prime contractor for each establishment is upheld upon reconsideration of decision at request of third party, as record establishes criteria used to determine separate entities of contractor and its subsidiary was not unreasonable, arbitrary or capricious and that, furthermore, there is no evidence of attempt to evade EEO obligations 145

BIDS Page

Acceptance time limitation

Computation

Saturdays, Sundays and holidays

Acceptance of a bid, subject to acceptance within 60 calendar days from date of receipt of the offer, on Monday, Feb. 5, 1973, the 62nd day because the 60th calendar day occurred on Saturday, Feb. 3, 1973, did not consummate a valid contract, notwithstanding the law of the situs—New York State—provides that when an act is authorized or required to be performed on a Saturday, Sunday, or public holiday, it may be done on the next succeeding business day, since applicability of the statute is academic in view of the incorporation of Standard Form 33A in the invitation for bids, which provided that "Time if stated as a number of days, will include Saturdays, Sundays and holidays." Modifies 38 Comp. Gen. 445 and B–137634, dated July 5, 1963 768

Dissimilar provisions

Cross-referencing

Three invitations for bids soliciting vehicle operation and maintenance services which stated a 90-day bid acceptance period without requiring further action by bidder, and which included a SF 33 indicating a 60-day bid acceptance period would result unless a different period was inserted by bidder, without cross-referencing the provisions, were defective as evidenced by 10 out of 13 bids being nonresponsive, thus indicating the conflicting provisions were misleading, and although bidders are expected to scrutinize carefully the entire solicitation package and to timely request assistance, the Govt. has the initial responsibility of clearly stating what is required. The two invitations under which awards were withheld should be canceled and readvertised, clearly stating bid acceptance terms, but award made in reliance on previous Comptroller General decisions will not be disturbed 842

Recommendation that conflicting bid acceptance periods in invitations should have been cross-referenced to avoid misleading bidders requires corrective administrative action pursuant to sec. 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, and therefore copies of the Comptroller General decision containing the recommendation are being transmitted to appropriate congressional committees. Also, sec. 236 of the act requires written statements by administrative agency of action to be taken with respect to the recommendation to be submitted to the House and Senate Committees on Government Operations not later than 60 days after date of recommendation and to the Committees on Appropriations in connection with the first request for appropriations made more than 60 days after date of the recommendation 842

BIDS—Continued Page

Acceptance time limitation—Continued

Extension

Protest determination

Although in 50 Comp. Gen. 357 it was held that protest of a procurement to the United States GAO within the offeror's acceptance period would be viewed as continuing the protestant's bid in being, pending disposition of protest and, if proper, for a reasonable time thereafter, even without an express extension of the bid, the period for which an extension should be considered binding upon the protesting bidder must be decided on the basis of all of the circumstances involved. Therefore, in view of the contention of protestant that due to changes in production and manufacturing economics its bid was not extended beyond the last extension of bid acceptance time period, which expired on date of the Comptroller General's decision sustaining its protest, because to accept an award at its bid price would result in a loss contract, contracting agency's attempt to award a valid contract on basis of the original bid price was ineffective. But see B–177165, August 23, 1973 ---- 863

Aggregate *v.* separable items, prices, etc.

Cancellation of items

Effect on nonresponsive bid

Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by statement no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bidders. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresponsive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids ---- 190

Failure to bid on all items

Failure of low bidder to include price for quantity increment of 16 thru 25 in response to second step of a two-step formal advertisement for oscilloscopes to be furnished under 1-year requirements contract was properly corrected in consonance with par. 2–406.2 of the Armed Services Procurement Reg. since unit price of $1,491 offered on initial order quantity as well as for follow on quantities of 1 thru 5, 6 thru 15, and 26 thru 35 established definite and easily recognizable pattern of prices which clearly indicated the single unit price applied to all bid increments. An exception to general rule that nonresponsive bid may not be corrected is permitted where consistency of pricing pattern is discernible and establishes both existence of error and bid intended—to hold otherwise would convert an obvious clerical error of omission to matter of nonresponsiveness ---- 604

BIDS—Continued Page

Aggregate *v.* separable items, prices, etc.—Continued

Partial award

Propriety

Under an invitation for bids (IFB) which provided for preparation of personal property for shipment under three schedules—outbound services; inbound services; and intra-city and intra-area moves—each schedule further divided into three distance areas, and for evaluation of bids on the total aggregate price of all items within an area of performance under a given schedule, and that bidder must bid on all items within specified area of performance for a given schedule, the acceptance of an "all or none" bid which was not low in all areas was not precluded, and award to the bidder submitting the low, responsive bid for the combined Schedules I and II was proper. Furthermore, bidder erroneously informed that "all or none" bids must be low in all areas of all schedules, who made no effort to see that a clarifying amendment was issued, assumed the risk that resolution of question of law raised would not be sustained upon review 756

Subitem pricing

Omissions

Failure to furnish separate prices for subitems in bid to furnish circuit breakers and related items under solicitation stating that offers which do not show unit prices *will* be rejected as not responsive is immaterial as deviation does not affect price, quantity or quality. Bidder by inserting word "included" in spaces available for all subitems will be obligated to furnish subitems as well as basic circuit breakers at price bid for basic circuit breakers. Furthermore, requirement in solicitation is not necessarily material simply because it was expressed in positive terms with warning that failure to comply "may" or "will" result in rejection of bid as nonresponsive 265

All or none

Omission of item effect

Under invitation for bids for preparation of personal property of military personnel for shipment or storage that divided delivery requirements into schedules I, II, and III, each schedule further divided into three geographical areas, a bidder who when awarded contract for schedules II and III as low bidder alleged intent to bid on "all-or-none" basis, except for indicated exclusion of area I, schedule III, may not have its bid corrected as for a minor error, nor may bid be disregarded, since error in designating all-or-none portion of bid is not ascertainable from bid documents and correction would displace low bidder on schedule I (ASPR 2-406.3(a)(3)). Although award for three schedules on all-or-none basis would be precuniarily advantageous to Govt., preservation of competitive system requires rights of other bidders to be considered 624

BIDS—Continued Page

All or None—Continued

Separate groupings

Under total small business set-aside solicitation for pastry requirements that listed estimated quantities for each of 33 items solicited and required both unit and total estimated prices for each of the items, and indicated any items might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Govt., multiple awards to low bidder on two of three groupings submitted and to protestant for remainder of the items would result in lowest aggregate price to the Govt. as provided by solicitation, and as statement of group bidder that each group of items "are bid as a Total All or None Bid" does not qualify its bid, since in listing items in groups, bidder indicated that an award of individual items would not be acceptable, the group bidder, administratively determined to be responsible bidder, is eligible to receive award 932

Bidders, generally. (*See* **BIDDERS**)

Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)

Bonds. (*See* **BONDS, Bid**)

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Buy American Act

Buy American Certificate

Acceptance

Participation by a large foreign business concern in performance of proposed contract award to a self-certified small business concern, either by way of joint venture or subcontract, does not change the "small business" status of bidder where cognizant SBA regional office found no evidence of improper affiliation through common ownership, personnel, management, or contractual relationship as precluded by SBA 121-Small Business Size Standards; where small business concern in subcontracting a major portion of work to be performed to large business meets requirement to make a significant contribution to the manufacture or production of contract end item; where Buy American Act restrictions are satisfied by bidder's certification that end product to be supplied will be a domestic source end product; and where compliance with act, as well as military specifications, is one of contract administration and properly the responsibility of the contracting agency 886

Noncompliance

Under invitation for bids to supply softballs that contained "U.S. Products Certificate" clause that required bidders to certify only U.S. End Products and Services would be furnished thus implementing Balance of Payments Program, sending American produced softball core, with covers, needles and thread to Haiti to have covers sewn on softball core would constitute manufacturing outside U.S. and precludes consideration of bid since phrase "U.S. End Product" stems from Buy American Act and requires end product to be supplied to be manufactured in U.S. Fact that services to be performed in Haiti would constitute less than 3% of cost does not make applicable provision in U.S. Products and Service clause that 25% or less of services performed outside U.S. will be considered U.S. services since contract contemplated is for product, not services 13

BIDS—Continued Page

Buy American Act—Continued

Generally. (*See* **BUY AMERICAN ACT**)

Price differential

Small business or labor surplus area concerns

Bid under invitation for bids that offered to furnish foreign source end items in response to solicitation for circuit breakers and related items, properly was evaluated by adding 12 percent factor required by sec. 1–6.104–4(b) of Federal Procurement Regs. (FPR) when bidder submitting low acceptable domestic bid is small business concern or labor surplus area concern, or both, as defined in FPR 1–1.801. The fact that low domestic bidder failed to indicate which labor surplus area it was claiming did not limit adjustment factor to 6 percent since location of performance information submitted by domestic bidder permitted determination that contract would be performed in substantial labor surplus area and, furthermore, for purposes of Buy-American preference, domestic bidder was not required to be "certified-eligible concern"---- 265

Cancellation. (*See* **BIDS, Discarding all bids**)

Competitive system

Adequacy of competition

Determination base

In absence of clear and convincing evidence that contracting officials erred in judging minimum needs of Govt., U.S. GAO will not substitute its judgment as to sufficiency of technical data package furnished under invitation for radio sets, nor is invitation considered to be legally defective since fair competition was not precluded where bidders were informed contractor would be required to successfully manufacture contract end items and to bear cost of attaining stated functional or performance requirements, which is adequate notice to sophisticated bidders to scrutinize technical requirements and to price any significant unknowns for which they and not Govt. would be responsible for correcting, and which is sufficient allocation of performance risk to assure competition---- 219

Equipment procurement

Adding cost of program duplication and the time required to check out time-sharing computer services program solicited to bids submitted by new sources did not favor current contractor, or prevent competition because of high cost of changover as compared with bid prices, since evaluation factor represents an accurate depiction of costs to Govt. to change contractors, and method of transferring services employed by the contracting agency is not subject to question in absence of fraud or capricious action since different practice used by business does not alter terms of invitation for bids. Furthermore, the quantum of service evaluation criteria was not misleading as effect of the criteria on bid price was determinable by each bidder at bid preparation time. However, substantial difference in bid prices received indicating inadequare competition to insure a reasonable price, future procedures should be revised so bidders can compete effectively against an incumbent contractor---- 905

BIDS—Continued Page

Competitive system—Continued

Compliance requirement

Deviation justification

Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency —noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient, and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1-3.101(c)) that is not justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portions of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees---------- 987

Delivery provisions

Rates secured after bid opening

In evaluation of bids on trucks solicited by Federal Supply Service of the General Services Administration (GSA) for United States Postal Service, GSA properly did not consider lower bilevel loading freight rates secured by bidder pursuant to sec. 22(1) of the Interstate Commerce Act after bid opening since sec. 1-19.203-3 of Federal Procurement Regs. prohibits use of freight rates that become available after bid opening unless no applicable rates are available at bid opening time, for to permit bidders to shop for special rates after bid opening time would be inconsistent with competitive bidding requirements. Moreover, although there were no rates for movement of trucks in multilevel flat cars at bid opening time, there were rates published on same commodity loaded on other transport vehicles, and lowest available rates in effect at bid opening time were used by GSA-------- 614

Deviation clauses

Restrictive of competition

Forest Service invitation for bids (IFB) to furnish brush chippers that called for a "braking system that will stop the cutter blades instantly" without defining "instantly," but contracting officer stated a willingness to accommodate reasonable tolerances from the normally accepted meaning of the word is unduly restrictive of competition and should be canceled since needs of Govt. were overstated, and there is no evidence the low bid, held nonresponsive on the braking time, would not satisfy actual needs of Govt. as well as the bid being considered for award. The IFB should be readvertised, eliminating restrictive specification feature and stating a reasonable time tolerance for braking of the cutter, and also eliminating minor deviation clause used since deviation clauses have no place in formally advertised procurements as they do not generally permit free and equal competition---------- 815

BIDS—Continued Page

Competitive system—Continued

Equal bidding basis for all bidders

Ambiguous specifications

Where specification provision for procurement of turbine power generators which stated gear box component of generator "shall be of proven design recommended and in use by manufacturer of gas turbine engine" was literally interpreted to require furnishing more expensive gear box currently in use by manufacturer as opposed to furnishing less expensive gear box that has been used by manufacturer, bidders did not compete on equal terms to prejudice of bidder who would have submitted lower bid if gear requirement had been clearly stated and, therefore, invitation for bids should be canceled since award under solicitation would be invalid because one bidder had been prejudiced in preparation of its bid, and any resolicitation should make prospective bidders aware of actual needs as required by par. 1.1201 of ASPR 87

Approximated *v.* minimum requirements

Since weight of ripper required to be mounted on crawler tractors was significant in determining ruggedness, strength, and desirability of ripper, low bid that offered ripper with weight deficiency of 22 percent from approximate requirements stated in invitation for bids properly was rejected in light of contracting agency's responsibility to draft specifications that meet actual needs of Govt. and to determine responsiveness of bids, and record does not show rejection was arbitrary, capricious, or was not based on substantial evidence. Doubt as to weight difference and its effect on competition, and belief minimum and not approximate requirements should have been used to insure equal bidding, are matters that must be raised prior to bid opening as provided in 4 CFR 20.2(a), the Interim Bid Protest Procedures and Standards 500

Evaluation factors determinability

Procedure in evaluation of bids of assessing travel and per diem costs of Govt. inspectors at prospective contractors' plants located outside metropolitan St. Louis, Mo., area, and justified as "Foreseeable Costs," is not for application to bidders who already have Govt. representative in residence as there is no actual cost to Govt. in such circumstances, nor is an imputation of constructive inspection costs justified on basis of equalizing competition. Furthermore, although pursuant to 10 U.S.C. 2305(c) factors other than price may be considered in evaluating bids, Govt. costs incident to procurement which cannot be quantified with reasonable certainty may not be used as a bid evaluation factor 997

BIDS—Continued Page

Competitive system—Continued

Federal aid, grants, etc.

Equal Employment Opportunity Programs

Although Fedl. Govt. is not a party to the contract awarded by recipient of a construction grant from the Dept. of Health, Education, and Welfare (HEW) under the Hill-Burton Act (42 U.S.C. 291 *et seq.*), HEW had the responsibility of determining whether the conditions of grant had been met, and review of records supports advice of HEW to grantee that low bidder on the hospital addition solicited failed to meet competitive bidding requirements because certification of part I affirmative action requirements for equal employment opportunity only committed the bidder to the local, Cleveland Plan, and because bidder had not committed itself to part II affirmative action requirements of solicitation, which involved trades not covered by part I, by merely signing bid, since nothing in bid would bind bidder to conform to part II criteria, and no independent commitment to that part had been submitted by the bidder 874

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)

Preservation of system's integrity

Invitation canceled and resolicited

Fact that specifications are inadequate, ambiguous, or otherwise deficient is not of itself compelling reason to cancel invitation for bids and, therefore, canceled invitation for manual typewriters and bid samples that was resolicited in order to delete key tension requirement and modify height requirement should be reinstated without key tension requirement since there is no test method available to evaluate samples for key tension and height requirement alone is not compelling reason for cancellation. Readvertising procurement created auction atmosphere where all bidders—total compensation—but one offered models previously offered but at reduced prices, and cancellation of invitation was not only prejudicial to competitive system, it was inappropriate in view of fact award under initial solicitation would have served needs of Govt 285

Pecuniarily disadvantageous to Government

Under invitation for bids for preparation of personal property of military personnel for shipment or storage that divided delivery requirements into schedules I, II, and III, each schedule further divided into three geographical areas, a bidder who when awarded contract for schedules II and III as low bidder alleged intent to bid on "all-or-none" basis, except for indicated exclusion of area I, schedule III, may not have its bid corrected as for a minor error, nor may bid be disregarded, since error in designating all-or-none portion of bid is not ascertainable from bid documents and correction would displace low bidder on schedule I (ASPR 2-406.3(a)(3)). Although award for three schedules on all-or-none basis would be pecuniarily advantageous to Govt., preservation of competitive system requires rights of other bidders to be considered 624

BIDS—Continued Page

Competitive system—Continued

Restrictions on competition

Prequalification of bidders

Negotiation procedures pursuant to determinations and findings for restoration of National Monument historical structure on basis it was impracticable to secure competition by formal advertising within meaning of 41 U.S.C. 252(c)(10), as implemented by sec. 1-3.210 of the Federal Procurement Regs., having been used to prequalify firms since procurement otherwise was treated as formally advertised, any award under solicitation would be improper, and if resolicited, procurement should be formally advertised. The preselection method of qualifying firms and the failure to synopsize procurement in Commerce Business Daily was restrictive of full and free competition contemplated by advertising statutes. Furthermore, even under negotiation procedures, prequalification of offerors would be inconsistent with requirement that negotiated procurements be on competitive basis to maximum practical extent---------- 569

Protect interests of Government

The inclusion in an invitation for bids to procure gas turbine units of an experience, performance bond, and two liquidated damage clauses in order to protect interests of the Govt. is not restrictive of competition where experience clause is intended to establish prior experience—a matter of bidder responsibility and not bid responsiveness—and its use is appropriate to substantiate product reliability and manufacturing capability; where performance bond is a necessary and proper means to secure the contractor's obligation under contract, even though a 100 percent performance bond was required; and where the liquidated damages at different per diem rates for delayed delivery and failure of units to operate each day for the first year was warranted on basis of administrative needs and prior experiences, and furthermore, determination of whether penalty is involved depends on facts as they arise-- 640

Specifications

Conformance

Provision in an invitation for bids (IFB) prohibiting consideration of discounts for payment within less than 20 days does not become inapplicable because bidder requested progress payments if awarded a contract and, therefore, a prompt payment discount of 2 percent for payment within a 10-day period was properly disregarded in evaluation of bids pursuant to sec. 1-2.407-3(c) of the Federal Procurement Regs., which prohibits evaluation of prompt payment discounts for time periods less than specified in the IFB. Although the Govt. is entitled to a discount on any part of delivery payments applied in liquidation of progress payments, bids under competitive bidding requirements must be evaluated on basis prescribed in the invitation---------- 614

BIDS—Continued Page

Competitive system—Continued

Specifications—Continued

Development to enable competition

Low bidder under canceled ambiguous invitation for bids on 2,000 KW gas turbine engine driven power plants and related data packages who did not submit a bid under the reissued invitation because it included a revised, more broadened experience clause, a requirement for 100 percent performance bond, and two liquidated damage clauses at different per diem rates, provisions bidder contended were designed to eliminate competition, was not prejudiced by use of clauses as they were developed to protect the Govt.'s interests in view of the responses to the initial solicitation from relatively inexperienced firms and, furthermore, use of such clauses is not improper or unduly restrictive of competition because one or more bidders or potential bidders cannot comply with their requirements 640

Restrictive

Forest Service invitation for bids (IFB) to furnish brush chippers that called for a "braking system that will stop the cutter blades instantly" without defining "instantly," but contracting officer stated a willingness to accommodate reasonable tolerances from the normally accepted meaning of the word is unduly restrictive of competition and should be canceled since needs of Govt. were overstated, and there is no evidence the low bid, held nonresponsive on the braking time, would not satisfy actual needs of Govt. as well as the bid being considered for award. The IFB should be readvertised, eliminating restrictive specification feature and stating a reasonable time tolerance for braking of the cutter, and also eliminating minor deviation clause used since deviation clauses have no place in formally advertised procurements as they do not generally permit free and equal competition 815

Two-step procurement. (*See* **BIDS, Two-step procurement**)

Contracts, generally. (*See* **CONTRACTS**)

Correction

Rule

Failure of low bidder to include price for quantity increment of 16 thru 25 in response to second step of a two-step formal advertisement for oscilloscopes to be furnished under 1-year requirements contract was properly corrected in consonance with par. 2-406.2 of the Armed Services Procurement Reg. since unit price of $1,491 offered on initial order quantity as well as for follow on quantities of 1 thru 5, 6 thru 15, and 26 thru 35 established definite and easily recognizable pattern of prices which clearly indicated the single unit price applied to all bid increments. An exception to general rule that nonresponsive bid may not be corrected is permitted where consistency of pricing pattern is discernible and establishes both existence of error and bid intended—to hold otherwise would convert an obvious clerical error of omission to matter of nonresponsiveness 604

BIDS—Continued Page

Delivery provisions

Evaluation. (*See* **BIDS, Evaluation, Delivery provisions**)

Deviations from advertised specifications. (*See* **CONTRACTS, Specifications, Deviations**)

Discarding all bids

Invitation defects

Fact that specifications are inadequate, ambiguous, or otherwise deficient is not of itself compelling reason to cancel invitation for bids and, therefore, canceled invitation for manual typewriters and bid samples that was resolicited in order to delete key tension requirement and modify height requirement should be reinstated without key tension requirement since there is no test method available to evaluate samples for key tension and height requirement alone is not compelling reason for cancellation. Readvertising procurement created auction atmosphere where all bidders—total compensation—but one offered models previously offered but at reduced prices, and cancellation of invitation was not only prejudicial to competitive system, it was inappropriate in view of fact award under initial solicitation would have served needs of Govt 285

Prices excessive

A price reduction from second low bidder after discarding of bids, because low bid was nonresponsive and remaining bids received were unreasonable as to price, was properly rejected since bid determined to be unreasonably high cannot be said to be that of "otherwise successful" bidder who pursuant to sec. 1-2.305 of Federal Procurement Regs. is entitled voluntarily to reduce its bid after bid opening. Therefore, decision to cancel invitation for bids and resolicit procurement under 41 U.S.C. 252(c)(14), which permits use of negotiation procedures where bid prices after advertising are unreasonable, was proper determination. 40

Reinstatement

General Accounting Office direction

Under sec. 236 of Legislative Reorganization Act of 1970, action taken to recommendation to reinstate canceled invitation for bids, copy of which was submitted to congressional committees named in sec. 232 of act, must be sent by contracting agency to appropriate committees within time limitations prescribed in sec. 236 285

Sale of surplus property

Generally. (*See* **SALES, Bids, Discarding all bids**)

BIDS—Continued Page

Discarding all bids—Continued

. Specifications defective

Ambiguous

Where specification provision for procurement of turbine power generators which stated gear box component of generator "shall be of proven design recommended and in use by manufacturer of gas turbine engine" was literally interpreted to require furnishing more expensive gear box currently in use by manufacturer as opposed to furnishing less expensive gear box that has been used by manufacturer, bidders did not compete on equal terms to prejudice of bidder who would have submitted lower bid if gear requirement had been clearly stated and, therefore, invitation for bids should be canceled since award under solicitation would be invalid because one bidder had been prejudiced in preparation of its bid, and any resolicitation should make prospective bidders aware of actual needs as required by par. 1.1201 of ASPR---------- 87

Brand name or equal requirement

The cancellation after bid opening of an invitation for bids for marine sanitary facilities because brand name or equal clause required by sec. 1-1.307-6(a)(2) of the Federal Procurement Regs. had been omitted, and inclusion of the clause in the reissued invitation was proper as clause provides a vehicle for identifying and evaluating product offered. However, inclusion of a descriptive literature requirement in the new invitation for purpose of determining the "general overall compliance with the specifications and drawings" is not in consonance with the brand name or equal requirement and nonresponsiveness of bidders to the requirement is symptomatic of deficiencies in the invitation. In addition, because use of the descriptive literature clause was unnecessary, and because invitation contained no specific component designation of the equal product, second invitation was ambiguous and misleading and also should be canceled and readvertised under revised specifications---------- 827

Conflicting provisions

Three invitations for bids soliciting vehicle operation and maintenance services which stated a 90-day bid acceptance period without requiring further action by bidder, and which included a SF 33 indicating a 60-day bid acceptance period would result unless a different period was inserted by bidder, without cross-referencing the provisions, were defective as evidenced by 10 out of 13 bids being nonresponsive, thus indicating the conflicting provisions were misleading, and although bidders are expected to scrutinize carefully the entire solicitation package and to timely request assistance, the Govt. has the initial responsibility of clearly stating what is required. The two invitations under which awards were withheld should be canceled and readvertised, clearly stating bid acceptance terms, but award made in reliance on previous Comptroller General decisions will not be disturbed---------- 842

BIDS—Continued Page

Discarding all bids—Continued

Specifications defective—Continued

Effect on competition

Forest Service invitation for bids (IFB) to furnish brush chippers that called for a "braking system that will stop the cutter blades instantly" without defining "instantly," but contracting officer stated a willingness to accommodate reasonable tolerances from the normally accepted meaning of the word is unduly restrictive of competition and should be canceled since needs of Govt. were overstated, and there is no evidence the low bid, held nonresponsive on the braking time, would not satisfy actual needs of Govt. as well as the bid being considered for award. The IFB should be readvertised, eliminating restrictive specification feature and stating a reasonable time tolerance for braking of the cutter, and also eliminating minor deviation clause used since deviation clauses have no place in formally advertised procurements as they do not generally permit free and equal competition 815

Discounts

Evaluation. (*See* **BIDS, Evaluation, Discount provisions**)

Evaluation

Aggregate *v.* separable items, prices, etc.

All or none bids

Under an invitiation for bids (IFB) which provided for preparation of personal property for shipment under three schedules—outbound services; inbound services; and intra-city and intra-area moves—each schedule further divided into three distance areas, and for evaluation of bids on the total aggregate price of all items within an area of performance under a given schedule, and that bidder must bid on all items within specified area of performance for a given schedule, the acceptance of an "all or none" bid which was not low in all areas was not precluded, and award to the bidder submitting the low, responsive bid for the combined Schedules I and II was proper. Furthermore, bidder erroneously informed that "all or none" bids must be low in all areas of all schedules, who made no effort to see that a clarifying amendment was issued, assumed the risk that resolution of question of law raised would not be sustained upon review 756

Approximated requirements

Since weight of ripper required to be mounted on crawler tractors was significant in determining ruggedness, strength, and desirability of ripper, low bid that offered ripper with weight deficiency of 22 percent from approximate requirements stated in invitation for bids properly was rejected in light of contracting agency's responsibility to draft specifications that meet actual needs of Govt. and to determine responsiveness of bids, and record does not show rejection was arbitrary, capricious, or was not based on substantial evidence. Doubt as to weight difference and its effect on competition, and belief minimum and not approximate requirements should have geen used to insure equal bidding, are matters that must be raised prior to bid opening as provided in 4 CFR 20.2(a), the Interim Bid Protest Procedures and Standards 500

BIDS—Continued Page

Evaluation—Continued

Change of contractor costs

Adding cost of program duplication and the time required to check out time-sharing computer services program solicited to bids submitted by new sources did not favor current contractor, or prevent competition because of high cost of changeover as compared with bid prices, since evaluation factor represents an accurate depiction of costs to Govt. to change contractors, and method of transferring services employed by the contracting agency is not subject to question in absence of fraud or capricious action since different practice used by business does not alter terms of invitation for bids. Furthermore, the quantum of service evaluation criteria was not misleading as effect of the criteria on bid price was determinable by each bidder at bid preparation time. However, substantial difference in bid prices received indicating inadequate competition to insure a reasonable price, future procedures should be revised so bidders can compete effectively against an incumbent contractor. 905

Computer method

Mistake detection

A bidder who after performance of a contract awarded for cut-up chickens alleges omission of freight charges on one delivery destination out of 50 bid on, and that error would have been discovered but for fact the computer evaluation of bids made impossible comparison with prices submitted by firms in same general locality is not entitled to a price increase since the Govt. did not have actual notice of error before award, and the computer evaluation method used is practicable and feasible in view of the multiple offers and destinations involved, and the severe week-to-week time constraints imposed on a contracting agency in this type procurement. Moreover, computer method does provide for preaward checks to protect bidders from consequences of their bid mistakes, and in addition all bids are compared with weekly market prices of whole chickens delivered in New York adjusted to reflect cutting, packing and transportation, and the range of prices submitted by all offerors to all destinations 837

Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

Cost estimates

Administrative determination that low bidder, subsidiary of corporation undergoing Chap. XI Bankruptcy Act reorganization (11 U.S.C. 701), did not possess financial strength to perform multiyear contract for transducers and parts at low price bid is determination that is within contemplation of par. 1-902 of ASPR to effect that any doubt as to financial strength of bidder that cannot be resolved affirmatively requires determination of nonresponsibility. Record confirms that price bid would result in loss, that contracting agency's estimate of costs on separate yearly quantities is not contrary to terms of solicitation or ASPR 1-322.1(b)(3), and that refusal to rely on bidder's material and labor cost estimates was not arbitrary and, furthermore, consideration of parent corporation's reorganization in determining its subsidiary's responsibility was within administrative discretion 372

BIDS—Continued Page

Evaluation—Continued

Delivery provisions

Freight rates

Erroneous

Partial cancellation of contract erroneously awarded for handling of surplus butter made available to Dept. of Defense by Dept. of Agriculture because erroneous freight rate evaluation resulted in award to other than low bidder should be changed to partial termination for convenience of Govt. since, while award was improper, it was not plainly or palpably illegal for displaced contractor had not contributed to use of erroneous freight rate furnished by Govt. activity and, therefore, it could successfully maintain action for damages computed under termination for convenience of Govt. clause of contract. 37 Comp. Gen. 330 and B–164826, Aug. 29, 1968, overruled 215

Guaranteed shipping weight

Estimate acceptability

Non-use of postbid corrected shipping data under amended invitation for bids that required bidders to furnish guaranteed maximum shipping weights and dimensions for use in evaluation of transportation costs on air compressors mounted on Govt.-furnished trailers rather than skid-mounted—change that was not misleading to bidder—was proper either on basis exceptions in pars. 2–304 and 2–305 of ASPR permitting bid modification do not apply or that correction as bid mistake is unacceptable since mistake is not ascertainable from bid. Furthermore, contracting officer in accepting transportation expert's shipping dimensions, which were based on standard procedures because Govt. can only require contractor to use standard loading and shipping procedures, rather than bidder's special loading arrangements, made use of best information available 352

Location determination

Impracticable to estimate

Bids under solicitation that did not provide for evaluation of transportation costs, state destination points, or include a gross shipping weight and dimensions clause, for an f.o.b. origin shipment of torpedo batteries to be delivered over an 8- to 22-month period properly were evaluated without transportation costs in accordance with par. 19–208.4(b) of Armed Services Procurement Reg. (ASPR), which provides for f.o.b. origin shipment when it is impracticable to estimate any tentative or general delivery points. Therefore, bidder advantageously located geographically with respect to earlier shipments who would have been low bidder if transportation costs were evaluated is not entitled to consideration on basis the invitation did not specifically exclude transportation costs from bid evaluation, and that ASPR 19–301.1(a) and (b), and 2–407.5(i) provide for evaluating transportation costs. However, future solicitations, when appropriate, should state that transportation costs will not be evaluated 679

BIDS—Continued Page
Evaluation—Continued
Delivery provisions—Continued
Lowest overall cost to Government

In evaluation of f.o.b. origin shipment of barbed wire coils to Far East under invitation that contained two delivery provisions, use of clause providing for evaluation by adding lowest *land* transportation cost rather than clause using term "lowest laid down cost to Government at overseas port of discharge," which would have made protestant low bidder on basis of using barges for inland transportation, was proper under rule intent and meaning of invitation is not to be determined by consideration of isolated section or provision but, rather, from consideration of invitation in its entirety, and two clauses read together indicate bids must be evaluated on lowest laid down cost to Govt. based on, among other things, *land* transportation for inland shipping costs..... 278

Rates secured after bid opening

In evaluation of bids on trucks solicited by Federal Supply Service of the General Services Administration (GSA) for United States Postal Service, GSA properly did not consider lower bilevel loading freight rates secured by bidder pursuant to sec. 22(1) of the Interstate Commerce Act after bid opening since sec. 1-19.203-3 of Federal Procurement Regs. prohibits use of freight rates that become available after bid opening unless no applicable rates are available at bid opening time, for to permit bidders to shop for special rates after bid opening time would be inconsistent with competitive bidding requirements. Moreover, although there were no rates for movement of trucks in multilevel flat cars at bid opening time, there were rates published on same commodity loaded on other transport vehicles, and lowest available rates in effect at bid opening time were used by GSA..... 614

Discount provisions
Applicable regulation

Under solicitation for trucks conducted pursuant to an agreement between Federal Supply Service of the General Services Administration (GSA) and United States Postal Service, which provides that GSA procurement regulations shall apply to procurement, offer by bidder of a prompt payment discount of $20 per vehicle for payment within 21 days was properly evaluated by GSA pursuant to sec. 1-2.407-3 of Federal Procurement Regs., notwithstanding such discounts are prohibited by Postal Service procurement regulations..... 614

Deviation from terms of invitation

Provision in an invitation for bids (IFB) prohibiting consideration of discounts for payment within less than 20 days does not become inapplicable because bidder requested progress payments if awarded a contract and, therefore, a prompt payment discount of 2 percent for payment within a 10-day period was properly disregarded in evaluation of bids pursuant to sec. 1-2.407-3(c) of the Federal Procurement Regs., which prohibits evaluation of prompt payment discounts for time periods less than specified in the IFB. Although the Govt. is entitled to a discount on any part of delivery payments applied in liquidation of progress payments, bids under competitive bidding requirements must be evaluated on basis prescribed in the invitation..... 614

BIDS—Continued Page
Evaluation—Continued
Factors other than price
Government inspectors expenses

Procedure in evaluation of bids of assessing travel and per diem costs of Govt. inspectors at prospective contractors' plants located outside metropolitan St. Louis, Mo., area, and justified as "Foreseeable Costs," is not for application to bidders who already have Govt. representative in residence as there is no actual cost to Govt. in such circumstances, nor is an imputation of constructive inspection costs justified on basis of equalizing competition. Furthermore, although pursuant to 10 U.S.C. 2305(c) factors other than price may be considered in evaluating bids, Govt. costs incident to procurement which cannot be quantified with reasonable certainty may not be used as a bid evaluation factor..... 997

Method of evaluation
Change of propriety

Holding in *Albano Cleaners, Inc.* v. *U.S.*, 197 Ct. Cl. 450, does not require conclusion that procuring activity's established treatment of outline of bidder's proposed method of operation as matter of bid responsiveness rather than bidder responsibility must be adhered to and is not subject to change as court recognized that contracting agency is not estopped from ceasing a particular treatment employed in prior procurements in awarding new contracts..... 389

Model numbers

Under invitation for bids (IFB) for numerous drill items that waived preproduction samples for bidders whose products had been previously procured and approved, and that required product identification by model number and other pertinent information, the holding that low bidder on one of the items was nonresponsive because letter accompanying bid made reference to model 754G2 and not to its catalog model 754 will no longer be followed. The automatic finding of bid nonresponsiveness was not required as catalog model did not deviate from IFB requirements, and the two omitted specification characteristics created no ambiguity. Furthermore, bid acceptance would obligate bidder to furnish a conforming drill notwithstanding gratuitous model designation. B-175028, April 28, 1972, overruled..... 967

Negotiated procurement. (*See* **CONTRACTS, Negotiation, Evaluation factors**)
Options
Evaluation exclusive of option

Where an invitation for bids contained "Option to Increase Quantities" and "Method of Award" clauses, but d d not provide for evaluation or exercise of an option at the time of contract award, contracting agency properly did not evaluate option prices in determining low bid. Furthermore, lack of any reference to the evaluation or exercise of option at time of award was sufficient to inform bidders that option prices were not to be considered in evaluation of bids, and in any event if a bidder is unsure as to meaning of a provision in an invitation, proper time for raising a question is prior to bid opening..... 614

BIDS—Continued Page

Evaluation—Continued

Options—Continued

Evaluation exclusive of option

A bid that contains higher prices for the option than those offered on basic quantities does not disqualify bidder where invitation for bids (IFB) provision states that "Evaluation of bids or offers for award will be made on the basis of the quantities to be awarded exclusive of option quantities," and in absence of provision calling for evaluation of option prices, evaluation of option prices would not be proper in determining low bid. Where IFB contains no prohibitions against quoting a higher price for option quantities, pursuant to par. 7-104.47(b) of the Armed Services Procurement Reg., option price may reflect recurring costs and reasonable profit necessary to furnish additional option quantities, and it is the responsibility of contracting officer to monitor contract awarded to assure compliance with price escalation clause---------- 886

Qualified bids. (*See* **BIDS, Qualified**)

Two-step procurement. (*See* **BIDS, Two-step procurement, Evaluation**)

Failure to furnish something required. (*See* **CONTRACTS, Specifications, Failure to furnish something required**)

Housing

Military personnel. (*See* **HOUSING, Military personnel**)

Invitations to bid

Advertising. (*See* **ADVERTISING**)

Labor stipulations. (*See* **CONTRACTS, Labor stipulations**)

Labor surplus area performance. (*See* **CONTRACTS, Awards, Labor surplus areas**)

Late

Confirmation bid

Bid transmitted by Telex system because amendment advancing bid opening date was not received until within 4 hours of bid opening time due to incorrect listing of bidder's address was properly rejected, even though bidder was advised during telephonic inquiry to use whatever means were available to transmit bid and had subsequently confirmed bid, since invitation for bids did not authorize telegraphic bids and late receipt of confirmation bid was not excusable. Although amendment changes are required to be furnished everyone sent invitation, procurement activity is not insurer of prompt delivery and, therefore, cancellation of amendment is not required because it was inadvertently misdirected. Propriety of procurement rests on obtaining adequate competition and reasonable prices and not on affording every possible prospective bidder opportunity to bid---------- 281

BIDS—Continued Page

Late—Continued

Modification

Shipping data

Non-use of postbid corrected shipping data under amended invitation for bids that required bidders to furnish guaranteed maximum shipping weights and dimensions for use in evaluation of transportation costs on air compressors mounted on Govt.-furnished trailers rather than skid-mounted—change that was not misleading to bidder—was proper either on basis exceptions in pars. 2-304 and 2-305 of ASPR permitting bid modification do not apply or that correction as bid mistake is unacceptable since mistake is not ascertainable from bid. Furthermore, contracting officer is accepting transportation expert's shipping dimensions, which were based on standard procedures because Govt. can only require contractor to use standard loading and shipping procedures, rather than bidder's special loading arrangements, made use of best information available 352

Proposals and quotations. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)

Telegraphic modification

Mistake establishment

Bidder who, when contacted by telephone to confirm unit prices quoted and basis for delivery, referred to earlier telegram which procurement agency never received that increased unit prices based on delayed supplier final quotations, and then furnished copy of telegram to agency, does not have option of withdrawing or correcting its bid because of mistake. Correction of bid may not be permitted since revised prices represent recalculation of bid based on factors not considered until after bid was prepared and submitted, situation that does not come within rule that permits bid correction upon establishment of evidence of mistake and bid intended if correction does not displace lower bids. However, as evidence does establish mistake occurred but not bid intended, bid may be withdrawn 400

Two-step procurement procedure

Where literal application of the late receipt provisions in a Request for Technical Proposals would preclude consideration of late proposals, reliance by General Services Admin. on the decisions of the Comptroller General of the U.S. holding that acceptance of late proposals or amendments may be considered under step one of a two-step procurement issued pursuant to subpart 1-2.5 of the Federal Procurement Regs. was proper and consistent with philosophy that the first step of a two-step procurement is intended to be a more flexible process than the more formal second step in order to maximize competition and, furthermore, a limitation on the time for submitting proposals is primarily for the Govt.'s benefit. However, future solicitations should advise offerors that proposals under step one will be treated in strict accordance with terms of solicitation, and of the consequences of failing to submit timely proposals. Modifies 51 C.G. 372, 45 C.G. 24, B-160324, dated Feb. 16, 1967 and Apr. 5, 1967 726

BIDS—Continued Page

Mistakes

"All or none" bid

Item omission

Under invitation for bids for preparation of personal property of military personnel for shipment or storage that divided delivery requirements into schedules I, II, and III, each schedule further divided into three geographical areas, a bidder who when awarded contract for schedules II and III as low bidder alleged intent to bid on "all-or-none" basis, except for indicated exclusion of area I, schedule III, may not have its bid corrected as for a minor error, nor may bid be disregarded, since error in designating all-or-none portion of bid is not ascertainable from bid documents and correction would displace low bidder on schedule I (ASPR 2-406.3(a)(3)). Although award for three schedules on all-or-none basis would be pecuniarily advantageous to Govt., preservation of competitive system requires rights of other bidders to be considered 624

Allegation after award. (*See* **CONTRACTS, Mistakes**)

Computer method of evaluation

A bidder who after performance of a contract awarded for cut-up chickens alleges omission of freight charges on one delivery destination out of 50 bid on, and that error would have been discovered but for fact the computer evaluation of bids made impossible comparison with prices submitted by firms in same general locality is not entitled to a price increase since the Govt. did not have actual notice of error before award, and the computer evaluation method used is practicable and feasible in view of the multiple offers and destinations involved, and the severe week-to-week time constraints imposed on a contracting agency in this type procurement. Moreover, computer method does provide for preaward checks to protect bidders from consequences of their bid mistakes, and in addition all bids are compared with weekly market prices of whole chickens delivered in New York adjusted to reflect cutting, packing and transportation, and the range of prices submitted by all offerors to all destinations 837

Correction

Clerical error

Failure of low bidder to include price for quantity increment of 16 thru 25 in response to second step of a two-step formal advertisement for oscilloscopes to be furnished under 1-year requirements contract was properly corrected in consonance with par. 2-406.2 of the Armed Services Procurement Reg. since unit price of $1,491 offered on initial order quantity as well as for follow on quantities of 1 thru 5, 6 thru 15, and 26 thru 35 established definite and easily recognizable pattern of prices which clearly indicated the single unit price applied to all bid increments. An exception to general rule that nonresponsive bid may not be corrected is permitted where consistency of pricing pattern is discernible and establishes both existence of error and bid intended—to hold otherwise would convert an obvious clerical error of omission to matter of nonresponsiveness 604

BIDS—Continued Page

Mistakes—Continued

Evidence of error

Withdrawal *v.* bid correction requirements

Under sales invitation for bids on surplus ships, which provided for bid deposit equal to 25 percent of bid, bidder who after bid opening alleged bid price increase was overstated by Western Union, and that excessive bid deposit made was in anticipation of offering another increase, may be permitted to withdraw its bid or waive mistake. Bidder unable to establish by clear and convincing evidence existence of mistake and bid actually intended as required by sec. 1–2.406–3 of Federal Procurement Regs. and applicable to sale pursuant to 40 U.S.C. 474(16), may not be permitted to correct its bid, but mistake having been made, bidder may be allowed to either withdraw bid, since degree of proof justifying withdrawal is in no way comparable to that necessary for bid correction, or to waive mistake under exception to rule against waiver of mistake 258

Intended bid uncertainty

Bid rejection

Non-use of postbid corrected shipping data under amended invitation for bids that required bidders to furnish guaranteed maximum shipping weights and dimensions for use in evaluation of transportation costs on air compressors mounted on Govt-furnished trailers rather than skid-mounted—change that was not misleading to bidder—was proper either on basis exceptions in pars. 2–304 and 2–305 of ASPR permitting bid modification do not apply or that correction as bid mistake is unacceptable since mistake is not ascertainable from bid. Furthermore, contracting officer in accepting transportation expert's shipping dimensions, which were based on standard procedures because Govt. can only require contractor to use standard loading and shipping procedures, rather than bidder's special loading arrangements, made use of best information available 352

Correction inconsistent with competitive bidding system

The refusal to permit an error in low bid for construction of spacecraft assembly and encapsulation facilities to be corrected because low bidder failed to establish the bid price intended, and to disregard the bid did not obligate the National Aeronautics and Space Administration to consider original bid, to query the bidder as to its desire in the matter before disregarding bid, or to withhold award pursuant to NASA PR 2.406–3(e) pending the General Accounting Office decision on the merits of the mistake in bid claim. To permit waiver of bid rejection would be tantamount to allowing the ostensible low bidder to stand on its bid or withdraw, and to accept the original bid if still low when corrected and not prejudicial to other bidders would not be proper if public confidence in the integrity of the competitive bidding system would be adversely affected. Furthermore, bidder failed to request award at the original price if bid correction was not permitted 706

BIDS—Continued Page

Mistakes—Continued

Recalculation of bid

Correction *v.* withdrawal

Bidder who, when contacted by telephone to confirm unit prices quoted and basis for delivery, referred to earlier telegram which procurement agency never received that increased unit prices based on delayed supplier final quotations, and then furnished copy of telegram to agency, does not have option of withdrawing or correcting its bid because of mistake. Correction of bid may not be permitted since revised prices represent recalculation of bid based on factors not considered until after bid was prepared and submitted, situation that does not come within rule that permits bid correction upon establishment of evidence of mistake and bid intended if correction does not displace lower bids. However, as evidence does establish mistake occurred but not bid intended, bid may be withdrawn 400

Multiple

Propriety

Fact that the sale by a large business concern to a small business firm of the activity needed to manufacture radio sets and receiver-transmitters solicited under an invitation for bids with 50 percent set aside for award to labor surplus area concerns is not consummated before bid opening and, therefore, both firms submitted bids on non-set-aside portion of procurement which were signed by same officer does not require rejection of bids since multiple bidding is not prejudicial to other bidders; possibility that common manufacturing facilities might preclude one of the firms from performing is not disqualifying; and a preaward survey will protect Govt.'s interest. However, because of affiliation of the two firms, the small business concern, the low bidder on the non-set-aside, does not qualify for participation in the set-aside as a small business labor surplus concern, notwithstanding its good-faith self-certification, nor does it qualify on basis of acquiring involved facilities in a post-bid-opening sale 886

Negotiated procurement. (*See* **CONTRACTS, Negotiation**)

Omissions

Prices in bid

Discernible pattern effect

Failure of low bidder to include price for quantity increment of 16 thru 25 in response to second step of a two-step formal advertisement for oscilloscopes to be furnished under 1-year requirements contract was properly corrected in consonance with par. 2–406.2 of the Armed Services Procurement Reg. since unit price of $1,491 offered on initial order quantity as well as for follow on quantities of 1 thru 5, 6 thru 15, and 26 thru 35 established definite and easily recognizable pattern of prices which clearly indicated the single unit price applied to all bid increments. An exception to general rule that nonresponsive bid may not be corrected is permitted where consistency of pricing pattern is discernible and establishes both existence of error and bid intended—to hold otherwise would convert an obvious clerical error of omission to matter of nonresponsiveness 604

BIDS—Continued Page
Omissions—Continued
Prices in bid—Continued
Material deviation

A bid on radio sets and receiver-transmitters that failed to insert price or evidence "no charge" for first article testing and test reports, where bidder did not have previous experience and lack of space for insert is not excusable, properly was rejected since omission may not be waived as minor deviation, or corrected as clerical error. Fact that omitted price was intended to be $2,000 on a $14,000,000 contract, and that relative standing of bidders would not be affected by waiver or correction of omission is not for consideration since par. 2-405 of Armed Services Procurement Reg. does not define waivable or correctible deficiencies only in terms of price impact and relative standing but requires that deficiency have no or merely negligible effect on quality, quantity, or delivery, and first article testing was critical necessity. Furthermore, omission may not be corrected as bid mistake as bid does not establish what corrected amount should be---------- 886

Options
Evaluation. (*See* **BIDS, Evaluation, Options**)
Price higher than basic bid

A bid that contains higher prices for the option than those offered on basic quantities does not disqualify bidder where invitation for bids (IFB) provision states that "Evaluation of bids or offers for award will be made on the basis of the quantities to be awarded exclusive of option quantities," and in absence of provision calling for evaluation of option prices, evaluation of option prices would not be proper in determining low bid. Where IFB contains no prohibitions against quoting a higher price for option quantities, pursuant to par. 7-104.47(b) of the Armed Services Procurement Reg., option price may reflect recurring costs and reasonable profit necessary to furnish additional option quantities, and it is the responsibility of contracting officer to monitor contract awarded to assure compliance with price escalation clause---------- 886

Prebid conference effect

Failure of low bidder to attend prebid site inspection required by an invitation for manufacture and installation of Thermal Shock Chamber that provided "in no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract," does not require rejection of low bid on basis acceptance of bid would be prejudicial to other bidders as purpose of site visit provisions of invitation was to warn bidders that site conditions would affect cost of performance and that bidder assumed risk of any cost of performance due to observable site conditions, as well as to provide for Govt.'s acceptance notwithstanding bidder's failure to inspect—an acceptance which would effectively bind bidder to perform in accordance with advertised terms and specifications—and to protect the Govt. against bid withdrawal or claim after contract award---------- 955

BIDS—Continued Page

Peddling. (*See* **CONTRACTS, Subcontracts, Bid shopping**)

Preparation

Costs

Recovery

Prerequisite requirements

Determination of bidder responsibility by contracting officer who virtually ignored initial preaward survey favorable to an offeror under solicitation for Inspection and Repairs As Necessary (IRAN) of aircraft and relied exclusively on unfavorable data, including second preaward survey, without rationalizing basis for rejection of initial preaward survey in which he participated and concurred in the "award" recommendation to the rejected offeror although of doubtful validity, and contracting officer, as required by par. 1–900, *et seq.* of Armed Services Procurement Reg., should have resolved inconsistencies and uncertainties in record before reaching reasoned judgment of responsibility, record does not establish arbitrariness or capriciousness which is prerequisite to recovering preparation costs. However, similar occurrence should be avoided in future 977

Prices

Below cost

Effect on bidder responsibility

Administrative determination that low bidder, subsidiary of corporation undergoing Chap. XI Bankruptcy Act reorganization (11 U.S.C. 701), did not possess financial strength to perform multiyear contract for transducers and parts at low price bid is determination that is within contemplation of par. 1–902 of ASPR to effect that any doubt as to financial strength of bidder that cannot be resolved affirmatively requires determination of nonresponsibility. Record confirms that price bid would result in loss, that contracting agency's estimate of costs on separate yearly quantities is not contrary to terms of solicitation or ASPR 1–322.1(b)(3), and that refusal to rely on bidder's material and labor cost estimates was not arbitrary and, furthermore, consideration of parent corporation's reorganization in determining its subsidiary's responsibility was within administrative discretion 372

Reduction propriety

Reduction after cancellation of invitation

A price reduction from second low bidder after discarding of bids, because low bid was nonresponsive and remaining bids received were unreasonable as to price, was properly rejected since bid determined to be unreasonably high cannot be said to be that of "otherwise successful" bidder who pursuant to sec. 1–2.305 of Federal Procurement Regs. is entitled voluntarily to reduce its bid after bid opening. Therefore, decision to cancel invitation for bids and resolicit procurement under 41 U.S.C. 252(c)(14), which permits use of negotiation procedures where bid prices after advertising are unreasonable, was proper determination 40

Protests. (*See* **CONTRACTS, Protests**)

BIDS—Continued Page
Qualified
All or none
Partial award legality

Under total small business set-aside solicitation for pastry requirements that listed estimated quantities for each of 33 items solicited and required both unit and total estimated prices for each of the items, and indicated any items might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Govt., multiple awards to low bidder on two of three groupings submitted and to protestant for remainder of the items would result in lowest aggregate price to the Govt. as provided by solicitation, and as statement of group bidder that each group of items "are bid as a Total All or None Bid" does not qualify its bid, since in listing items in groups, bidder indicated that an award of individual items would not be acceptab'e, the group bidder, administratively determined to be responsible bidder, is eligible to receive award 932

Specification changes after bid opening
Not prejudicial to other bidders

Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by statement no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bidders. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresponsive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids 190

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Rejection
Erroneous basis

Under invitation for bids (IFB) for numerous drill items that waived preproduction samples for bidders whose products had been previously procured and approved, and that required product identification by model number and other pertinent information, the holding that low bidder on one of the items was nonresponsive because letter accompanying bid made reference to model 754G2 and not to its catalog model 754 will no longer be followed. The automatic finding of bid nonresponsiveness was not required as catalog model did not deviate from IFB requirements, and the two omitted specification characteristics created no ambiguity. Furthermore, bid acceptance would obligate bidder to furnish a conforming drill notwithstanding gratuitous model designation. B–175028, April 28, 1972, overruled 967

BIDS—Continued Page

Rejection—Continued

Mandatory effect incident to bidder responsibility

Requirement that bids under invitation soliciting custodial services be accompanied by outline of bidder's proposed method of operation as to job and work force, method of supervision, types and quantities of equipment, performance schedule is matter of bidder responsibility and not bid responsiveness, notwithstanding invitation provision for mandatory rejection of bids that failed to furnish required information, since method of operation pertains to "know-how," which is element of responsibility as specifications form basis for actual work requirement. However, should it be deemed desirable to require outline of bidder's method of operation, invitation should state purpose of requirement and how outline will be considered in selection of successful bidder and in administration of contract ---------- 389

Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)

Samples. (*See* **CONTRACTS, Specifications, Samples**)

Signatures

Multiple bids

Low bidder on non-set-aside portion of procurement for radio sets and receiver-transmitters, with 50 percent set aside for labor surplus area concerns, whose bid was signed by same official as bid submitted by third low bidder who was negotiating to sell low bidder the performance activity may not be given priority on set-aside portion of procurement since on date of bid opening low bidder was not a "going concern" as it had no place of business of its own, and although meeting size limitation for a small business concern, it did not meet the "independently owned and operated" test required for a small business by Sec. 3 of the Small Business Act. Both firms having the same officials are affiliated through common management within meaning of Sec. 121.3-2(a) of SBA Size Standards Regs., and low bidder on non-set-aside does not qualify for set-aside priority on basis of a subsequent novation agreement ---------- 886

Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Specifications. (*See* **CONTRACTS, Specifications**)

Subcontracts

Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)

Surplus property. (*See* **SALES**)

BIDS—Continued Page

Telegraphic submission

Authorization requirement

Bid transmitted by Telex system because amendment advancing bid opening date was not received until within 4 hours of bid opening time due to incorrect listing of bidder's address was properly rejected, even though bidder was advised during telephonic inquiry to use whatever means were available to transmit bid and had subsequently confirmed bid, since invitation for bids did not authorize telegraphic bids and late receipt of confirmation bid was not excusable. Although amendment changes are required to be furnished everyone sent invitation, procurement activity is not insurer of prompt delivery and, therefore, cancellation of amendment is not required because it was inadvertently misdirected. Propriety of procurement rests on obtaining adequate competition and reasonable prices and not on affording every possible prospective bidder opportunity to bid 281

Two-step procurement

Addenda acknowledgment

Under a two-step procurement, failure of offerors to acknowledge receipt of amendments to the first step of the solicitation as provided in the Request for Technical Proposals does not require rejection of their proposals since any defects in the acknowledgement of amendments in the first step of a two-step procurement may be waived by the Govt. to maximize competition, which is the fundamental purpose of the two-step procedure. Moreover, unlike procedure under a formally advertised procurement, consideration of an offer that failed to acknowledge an amendment to the first step would not be prejudicial to other offerors in view of fact there is no public opening of proposals or submission of prices, and as a result no binding contract arises from acceptance and evaluation of a technical proposal. Furthermore, purpose of amendments is conformity to the substantive content of an amendment and not conformity with the acknowledgment requirement 726

Alternate basis

Quantity increments

Failure of low bidder to include price for quantity increment of 16 thru 25 in response to second step of a two-step formal advertisement for oscilloscopes to be furnished under 1-year requirements contract was properly corrected in consonance with par. 2-406.2 of the Armed Services Procurement Reg. since unit price of $1,491 offered on initial order quantity as well as for follow on quantities of 1 thru 5, 6 thru 15, and 26 thru 35 established definite and easily recognizable pattern of prices which clearly indicated the single unit price applied to all bid increments. An exception to general rule that nonresponsive bid may not be corrected is permitted where consistency of pricing pattern is discernible and establishes both existence of error and bid intended—to hold otherwise would convert an obvious clerical error of omission to matter of nonresponsiveness 604

BIDS—Continued Page

Two-step procurement—Continued

Bond requirement

Coventurers

The second-step bid, a turnkey project, submitted under two-step invitation for bids to design and construct family housing by group composed of architects, engineers, land planners, and builders, who was joined in second-step by construction firm who had not participated in first step—an invitation requirement—but was only principal named in bid bond, was properly rejected since construction company, separate legal entity, had no authority to bind conventurers responsible for design, and bid bond coverage being incomplete was defective. Furthermore, information submitted prior to second-step bid identifying construction company as coventurer, which was erroneously held to have no legal significance, served notice construction firm had no authority to bind its coventurers 223

Evaluation

Experience

An offeror under request for technical proposals (RFTP) of two-step procurement for the design, construction, and performance testing of nitric acid-sulfuric acid concentration plants who possesses "in-depth" technological skill and experience but who had never designed and constructed a plant exactly like that outlined in the RFTP—the position of protestant, the only other responsive bidder—satisfied excperience requirements of solicitation and was, therefore, acceptable for advancement to step two, and having submitted lowest bid, as protestant's bid errors could not be waived as minor informality, properly was awarded contract. Experience provisions of solicitation only required a showing that components offered had performed satisfactorily in an operating plant of similar design for 2 years and not that all components had been put together in a facility and operated successfully in that facility for 2 years 783

First-step

Evaluation criteria

Under first step of a two-step procurement to obtain services and facilities for management and operation of a Publications Distribution Center, fact that offerors are required to show understanding of the work and their management capability, and to observe current contractor's operations for 30 days, and that the Govt. will assist with traffic matters does not affect validity of the two-step procurement. An understanding of work requirements, prior experience, and qualifications and capabilities of an offeror although relating to contractor responsibility are proper for consideration in evaluating proposals as matter of responsibility will not be determined until after second-step bids are received; a 30-day observation period is not inappropriate considering complexity of the work; and in absence of supervising contractor's employees, proposed transportation assistance is not improper. Moreover, provision for protection of Govt. property is reasonable, and omitted service contract requirements were not needed to prepare first-step technical proposals .. 854

BIDS—Continued Page

Two-step procurement—Continued

Housing

Although offerors who submitted acceptable technical proposals for construction of any or all of three Bachelor Officers Quarters (BOQ) and therefore were entitled to bid on project or projects under subsequent invitation for bids should have been given more detailed information concerning application of per man statutory limitation imposed by sec. 706 of Military Construction Act of 1972, and possibility of waiver, nevertheless the contacting officers' recommendation that limitation placed on one of the projects should be waived for low overall bidder who was not low on major construction item was not unfair to second low bidder who should have been aware that sec. 706, and implementing pars. 11–110(a) and (c) of Armed Services Procurement Reg. provide both for limiting costs and for waiver when limitation is impracticable to impose ---------- 969

Offers and bids

Same source requirement

Where low bid under the step-two solicitation of a two-step procurement for a peak power calibration system was submitted in the name of the parent corporation and an activity that formally became a division of the corporation prior to issuance of the step-one proposal and remained a division throughout the procurement, there is no question that the technical proposal and bid were submitted by same firm, and that low bid is eligible for consideration. Furthermore, bid is responsive as submission of the firm name and the technical proposal number and date satisfied requirement that the firm state its bid was in accordance with the technical proposal found acceptable by the Air Force; as failure to acknowledge receipt of a corrected amendment to step one was properly waived as minor informality; and as deviation from the first article test sample requirement did not qualify bid but assured contracting office it would receive a quality product ---------- 821

Specifications

Basis of two-step usage

Use of formal advertising procedures by the Naval Facilities Engineering Command to procure 2,000 KW gas turbine engine driven power plants and related data packages was proper since adequate specifications were available and use of the two-step formal advertising procedure is authorized pursuant to par. 2–501 of the Armed Services Procurement Regulation (ASPR) only when there are no adequate specifications to permit formal advertising. Moreover, record does not indicate that negotiation of procurement should have been authorized under the circumstances spelled out in ASPR 3–200 *et seq.* and ASPR 3–102(b)(1) ---------- 640

BIDS—Continued Page

Two-step procurement—Continued

Technical proposals

Late receipt

Where literal application of the late receipt provisions in a Request for Technical Proposals would preclude consideration of late proposals, reliance by General Services Admin. on the decisions of the Comptroller General of the U.S. holding that acceptance of late proposals or amendments may be considered under step one of a two-step procurement issued pursuant to subpart 1–2.5 of the Federal Procurement Regs. was proper and consistent with philosophy that the first step of a two-step procurement is intented to be a more flexible process than the more formal second step in order to maximize competition and, furthermore, a limitation on the time for submitting proposals is primarily for the Govt.'s benefit. However, future solicitations should advise offerors that proposals under step one will be treated in strict accordance with terms of solicitation, and of the consequences of failing to submit timely proposals. Modifies 51 C.G. 372, 45 C.G. 24, B–160324, dated Feb. 16, 1967 and Apr. 5, 1967 726

Status

Under a two-step procurement, failure of offerors to acknowledge receipt of amendments to the first step of the solicitation as provided in the Request for Technical Proposals does not require rejection of their proposals since any defects in the acknowledgment of amendments in the first step of a two-step procurement may be waived by the Govt. to maximize competition, which is the fundamental purpose of the two-step procedure. Moreover, unlike procedure under a formally advertised procurement, consideration of an offer that failed to acknowledge an amendment to the first step would not be prejudicial to other offerors in view of fact there is no public opening of proposals or submission of prices, and as a result no binding contract arises from acceptance and evaluation of a technical proposal. Furthermore, purpose of amendments is conformity to the substantive content of an amendment and not conformity with the acknowledgment requirement 726

Use basis

Specifications unavailable

Use of the two-step procurement method authorized by par. 2–501 of the Armed Services Procurement Reg. to obtain services and facilities for the management and operation of an Air Force (AF) Publications Distribution Center because of inability to adequately specify technical needs to meet requirements of a single-step procurement was a proper exercise of administrative authority where the AF was unable to specify its requirements in areas of automatic data processing equipment and software for the operation, notwithstanding its ability to state requirements in other work areas, since regulation states the word "technical" has broad connotation and includes engineering approach, special manufacturing processes and special testing techniques, and further provides that the management approach, and manufacturing plan, or facilities to be used may also be clarified in the technical proposals 854

BIDS—Continued Page

Withdrawal

Prebid site inspection

Failure of low bidder to attend prebid site inspection required by an invitation for manufacture and installation of Thermal Shock Chamber that provided "in no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract," does not require rejection of low bid on basis acceptance of bid would be prejudicial to other bidders as purpose of site visit provisions of invitation was to warn bidders that site conditions would affect cost of performance and that bidder assumed risk of any cost of performance due to observable site conditions, as well as to provide for Govt.'s acceptance notwithstanding bidder's failure to inspect—an acceptance which would effectively bind bidder to perform in accordance with advertised terms and specifications—and to protect the Govt. against bid withdrawal or claim after contract award 955

BONDS

Bid

Deficiencies

More than one surety

Bidder required to furnish bid guarantee in penal sum of only $300,000 who submitted bond signed by two sureties—one having net worth of $625,500, the other $27,500—was responsible bidder whose bid should not have been rejected. Even though one of the sureties did not show on his Affidavit of Individual Surety at bid opening net worth at least equal to penal sum of bid bond, the bond itself is enforceable and bidder is considered to have tendered valid bid bond, executed by sureties that are jointly and severally liable in penal sum sufficient to satisfy requirements of solicitation. Moreover, as net worth information does not relate to bid responsiveness but rather to responsibility of surety, rejected bid may be considered on basis of corrected affidavit submitted by deficient surety 184

Joint venturers

Bond principal and bidder discrepancy

The second-step bid, a turnkey project, submitted under two-step invitation for bids to design and construct family housing by group composed of architects, engineers, land planners, and builders, who was joined in second-step by construction firm who had not participated in first step—an invitation requirement—but was only principal named in bid bond, was properly rejected since construction company, separate legal entity, had no authority to bind coventurers responsible for design, and bid bond coverage being incomplete was defective. Furthermore, information submitted prior to second-step bid identifying construction company as coventurer, which was erroneously held to have no legal significance, served notice construction firm had no authority to bind its coventurers 223

BONDS—Continued Page
Bid—Continued
Penal sum
Performance and payment bonds comparison

Fact that penal sums of performance and payment bonds are required in lesser amounts than sum stated for bid guarantee in invitation for bids is not indicative that bid guarantee requirement was excessive where contracting officer exercised discretion under par. 10–102.3 of Armed Services Procurement Reg. by requiring bid bond to be in amount not less than 20 percent of bid price. Furthermore, complaint in matter having been filed after bid opening, it is untimely under sec. 20.2 of the Interim Bid Protest Procedures and Standards of the U.S. GAO (Title 4 of Code of Federal Regs.) which prescribes that protest of an impropriety that is apparent before bid opening must be filed prior to bid opening ---- 184

Surety requirements
At least two individual sureties

Absent safeguards in case of individual surety that is prescribed by Treasury Dept. Circular 570 (31 CFR part 223), for corporate surety, and covered by par. 10–201.2(a)(2) of Armed Services Procurement Regulation, the Defense Dept. requirement that there be at least two individual sureties possessing requisite worth is a valid and well-founded protective measure ---- 184

Fidelity bonds
Other than Federal employees

Obtaining of bonds for employees of State courts who process bonding of Federal offenders detained pursuant to 18 U.S.C. 3041, and for employees who handle bail and fine money for part-time U.S. magistrates is not precluded by sec. 101(a) of act of June 6, 1972, as prohibition against requiring or obtaining surety bonds applies only to civilian employees or military personnel of Federal Govt. which is charged with assuming risks of fidelity losses. Since neither State court employees nor employees of part-time magistrates are within scope of act, Administrative Office of the U.S. Courts is not precluded from determining to bond employees or assume risks of fidelity losses, and if bonded the cost of bonding State court employees is payable under 18 U.S.C. 3041, and cost to part-time magistrates for bonding their employees is reimbursable expense ---- 549

Payment
Munsey Trust Company rule

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by surety under its payment bond ---- 262

BONDS—Continued Page

Performance

More than principal's name on bond

Performance bond equal to 100 percent of contract price which was made out to the contractor as "principal" and another firm as "subcontractor" is not an invalid bond, for unlike a bid bond which is considered deficient when principal differs from bidder in view of rule of suretyship law that one does not incur liability to pay debts or perform duties of another unless specifically agreeing to do so, the performance bond, notwithstanding the inclusion of the names of contractor and subcontractor, will protect the Govt. against the failure of performance by the prime contractor, but, in any event, furnishing of performance bond was a condition of the contract and was not a condition precedent to the award 647

Purpose

The inclusion in an invitation for bids to procure gas turbine units of an experience, performance bond, and two liquidated damage clauses in order to protect interests of the Govt. is not restrictive of competition where experience clause is intended to establish prior experience—a matter of bidder responsibility and not bid responsiveness—and its use is appropriate to substantiate product reliability and manufacturing capability; where performance bond is a necessary and proper means to secure the contractor's obligation under contract, even though a 100 percent performance bond was required; and where the liquidated damages at different per diem rates for delayed delivery and failure of units to operate each day for the first year was warranted on basis of administrative needs and prior experiences, and furthermore, determination of whether penalty is involved depends on facts as they arise 640

Surety

Liability, obligation, etc.

A surety who requested the Govt. to withhold funds due a defaulting contractor under janitorial service contract and who met its obligations under performance bond for the excess costs to the contracting agency to complete the contract is not liable in an amount that exceeds its obligation under the payment bond for the withheld funds that were turned over by agency to Labor Dept. to cover wage deficiencies under defaulted contract as well as another contract. The surety did not complete contract itself and having only guaranteed contract performance at specified price, it is not liable for wage underpayments that it did not guarantee. To hold surety liable for obligations not contemplated by performance bond would violate general rule of the Law of Suretyship that no one incurs liability for another unless expressly agreeing to be bound 633

BUY AMERICAN ACT Page

Applicability

Contractors' purchases from foreign sources

End product *v.* components

Under invitation for bids to supply softballs that contained "U.S. Products Certificate" clause that required bidders to certify only U.S. End Products and Services would be furnished thus implementing Balance of Payments Program, sending American produced softball core, with covers, needles and thread to Haiti to have covers sewn on softball core would constitute manufacturing outside U.S. and precludes consideration of bid since phrase "U.S. End Product" stems from Buy American Act and requires end product to be supplied to be manufactured in U.S. Fact that services to be performed in Haiti would constitute less than 3% of cost does not make applicable provision in U.S. Products and Service clause that 25% or less of services performed outside U.S. will be considered U.S. services since contract contemplated is for product, not services 13

Bids. (*See* **BIDS, Buy American Act**)

Small business concerns

Subcontracting to large foreign concern

Participation by a large foreign business concern in performance of proposed contract award to a self-certified small business concern, either by way of joint venture or subcontract, does not change the "small business" status of bidder where cognizant SBA regional office found no evidence of improper affiliation through common ownership, personnel, management, or contractual relationship as precluded by SBA 121–Small Business Size Standards; where small business concern in subcontracting a major portion of work to be performed to large business meets requirement to make a significant contribution to the manufacture or production of contract end item; where Buy American Act restrictions are satisfied by bidder's certification that end product to be supplied will be a domestic source end product; and where compliance with act, as well as military specifications, is one of contract administration and properly the responsibility of the contracting agency 886

CANAL ZONE

Employees

Postal

Compensation

Administratively fixed

Postal employees of Canal Zone Govt. whose pay rates and increases pursuant to 2 C.Z.C. 101 are administratively determined and were in past fixed to conform with rates prescribed for Post Office Dept. employees may not be granted same pay increases provided for Postal Service employees, even though compensation of Postal Service employees is used as measure of compensation to be paid Canal Zone postal employees, as increases exceeded percentage limitation imposed by wage-price freeze instituted on Aug. 15, 1971. Canal Zone employees are executive branch employees who come within scope of 5 U.S.C. 5307, thus making them subject to guideline on pay increases prescribed in Jan. 11, 1972 Presidential Memorandum 188

CARRIERS Page

Railroad

New Jersey Central

Reorganization

Option obtained from Central Railroad of New Jersey by Secretary of Transportation pursuant to sec. 3(b)(4) of Emergency Rail Service Act of 1970 incident to guaranteeing trustee certificates issued in reorganization proceedings of railroad, which option provides that Secretary acquire by purchase or lease trackage rights and equipment to maintain railroad services in event of actual or threatened cessation of such services, may not be exercised without further action by Congress. Legislative history of act contains no indication Secretary is authorized to take over railroad and operate it, but rather evidences that he may exercise option, following favorable congressional action, without awaiting outcome of proceedings before reorganization court or Interstate Commerce Commission 309

CERTIFYING OFFICERS

Submissions to Comptroller General

Questions general in nature

Although, normally, Comptroller General of U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department 83

CITIES, CORPORATE LIMITS

"Official duty station" status

Term "official duty station" in Civil Service Commission Federal Manual Supp. 990–2, book 550, subch. S1–3, which is stated to mean "employee's designated post of duty, limits of which will be corporate limits of city or town in which employee is stationed," may only be redefined by Commission and, therefore, Dept. of Agriculture may not consider "official duty station" in terms of mileage radius in order to better effectuate purpose of overtime provision contained in 5 U.S.C. 5542(b)(2). However, matter of authorizing mileage to employee for use of his automobile incident to official travel is discretionary with employing agency 446

CITIES, CORPORATE LIMITS—Continued Page

Per diem for military personnel

Temporary duty at headquarters

An officer who when released from his duty station at a university is assigned to the Pentagon in Arlington, Va., with temporary duty en route at the Center for Naval Analyses, also located in Arlington 2 miles from the Pentagon, and who establishes a residence within commuting distance to both duty points, is not entitled to per diem since boundaries of Arlington County are considered to be comparable to the corporate limits of a city within contemplation of par. M1150–10a of Joint Travel Regs. (JTR) and, therefore, officer is not in a "travel status" within meaning of JTR M3050–1 while performing temporary duty at his permanent duty station as defined in JTR M1150–10a.... 751

Transfers within corporate limits, etc.

Travel and transportation expenses

When member of uniformed services stationed in U.S. is ordered to hospital, treatment generally is temporary and does not justify transportation of dependents. However, if period of hospitalization is prolonged or member is returned from overseas, station change is regarded as permanent and member is entitled to transportation of dependents and dislocation allowance, and all members, irrespective of having dependents, are eligible to have their household effects transported. Although members who have basic eligibility for permanent change of station allowances incident to hospitalization may not be authorized per diem and other temporary duty allowances when assigned duty within corporate limits of city or town wherein hospital is located, such allowances are payable to members whose home port or duty station is in U.S. and whose treatment will not be prolonged..... 432

CLAIMS

Assignments

"Financing institutions" requirement

Tax exempt bonds method of financing

Rents to be received by lessor constructing Social Security Building to be leased to General Services Administration, with option to purchase and assign to builder land owned by Housing Authority of Birmingham, issuer of bonds to finance building, may be assigned under Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15, to Birmingham National Bank as agent or trustee of all parties, including bondholders, participating in financing. Bank qualifies as "financial institution" both as bondholder and in its capacity as trustee for individual bondholders that may not qualify as assignees since group as lender of money to make construction of building possible may be considered financing institution. Also, conveyance of land by lessor to Housing Authority is not assignment that is prohibited by act because conveyance will be subject to lease..... 462

CLAIMS—Continued Page
Evidence. (*See* **EVIDENCE**)
Review
By Comptroller General

In absence of any evidence rebutting the Govt.'s *prima facie* case of carrier liability for damages to shipment of switches which moved under a Govt. bill of lading, the Comptroller General upon review sustained action taken by Transportation and Claims Div. in offsetting freight charges due carrier against the Govt.'s damage claim on same shipment. Carrier's *prima facie* liability having been established, it had burden of proving otherwise but failed to show lack of negligence and improper packing—in fact its agent participated in loading shipment (209 F. 2d, 442, 445). Legal justification for offset was recently restated in *Burlington Northern, Inc.* v. *United States*, 462 F. 2d 526. Amount of damage claim in excess of freight charges is for prompt refund or collection by other means 930
Set-off. (*See* **SET-OFF**)
Statutes of limitation. (*See* **STATUTES OF LIMITATION**)

CLOTHING AND PERSONAL FURNISHINGS
Damage, loss, etc.
Government liability
Payment status

Value of military clothing lost at same time member of uniformed services lost his life when his housetrailer was destroyed in flood may not be paid to heirs or legal representatives of member since 37 U.S.C. 418 and implementing regulations prescribe that claim for loss, damage, or destruction of personal clothing is personal right and on basis of rationale in 26 Comp. Gen. 613, right does not extend beyond life of beneficiary. Although claim for clothing is cognizable under both 31 U.S.C. 241 and 37 U.S.C. 418, jurisdiction of claims under 31 U.S.C. 241 is vested in appropriate Secretary and limited to losses occurring in Govt-assigned quarters, even though claim may be made by survivor, and under 37 U.S.C. 418, which relates to clothing furnished in kind or monetary loss, claim for loss is personal to member sustaining loss ... 487

COLLECTIONS (*See* **DEBT COLLECTIONS**)

COMMODITY CREDIT CORPORATION
Barter program and agreements
Expansion of program

Barter program which was originally conceived as means of making productive use of surplus agricultural commodities owned by Commodity Credit Corporation (CCC) to acquire strategic and critical materials; expanded to generate supplies to meet offshore and overseas needs; and further broadened to increase exports of agricultural commodities; to realize balance of payments advantages; and to assist in achieving international policy goals, may be modified to assure exporters of barter eligibility at time of sale rather than at time of export thereby enabling them to take immediate advantage of favorable markets, and to permit CCC to promptly revise eligibility criteria in response to shifting world market forces, thus increasing overall exports and expanding foreign markets in accordance with congressional intent. Modification should provide for access to books and records of barter contractors until expiration of 3 years after final payment 436

COMPENSATION Page

Double

Civilians on military duty

National Guard technicians

National Guard technician employed under 32 U.S.C. 709, who upon completion of civilian workday departs for 2 weeks full-time training duty as National Guardsman for course of instruction pursuant to 32 U.S.C. 505, and returns home in military travel status shortly after midnight, reporting to civilian position same day, is entitled to civilian pay without charge to military or civilian leave for day of departure since civilian duties were performed by member before he became subject to military control and performance of military duties, and to civilian compensation for day he reported back to civilian position at which time he no longer was subject to military control, and entitlement to military pay incident to return travel from training is not incompatible to performance of civilian duties or payment therefor after termination of active military training duty---------- 471

National Guard technician who became subject to military control upon reporting for full-time training duty to National Guard School for recruiters pursuant to 32 U.S.C. 504 after completion of civilian workday is entitled under principle in 49 Comp. Gen. 233 to civilian pay without charge to leave for day of reporting, even though he may be entitled to military pay for that day. However, since full-time training duty is active duty under 37 U.S.C. 204(d), which is incompatible with civilian service, there is no entitlement under rule in 37 Comp. Gen. 255 to civilian pay without charge to appropriate leave—military, annual, or LWOP—for days subsequent to coming under military control, even though duties of military assignment were such that member was able to perform civilian duty on those days---------- 471

National Guard technician who after 4 hours of civilian duty takes 4 hours of annual leave in order to perform military recruiting under orders issued pursuant to 32 U.S.C. 505 may receive 4 hours civilian pay and 4 hours annual leave as well as any military compensation which accrues under his orders since civilian compensation may be paid for time worked prior to reporting for military duty, and reservist or member of National Guard may be placed on leave, including annual leave, while performing active or full-time training duty, and if technician wishes to charge absence to allowable military leave charge must be for 1 day as there is no authority for charging military leave in increments of less than 1 day. Since incompatibility rule should not prevent charging of less than full 8 hours of annual leave when civilian employee performs services for part of day before becoming subject to military control, B–152908, Dec. 17, 1963, is modified---------- 471

COMPENSATION—Continued Page
Double—Continued
Civilians on military duty—Continued
National Guard technicians—Continued

National Guard technician who for period of 5 days performs 4 hours of civilian duty each day followed by active military duty as part of year around training authorized under 32 U.S.C. 503, defined as "training performed from time to time throughout calendar year in varying increments as contrasted to 15 consecutive days," is entitled to civilian pay without charge to leave for 4 hours worked in civilian capacity on day he reported for military duty, with charge of 4 hours annual leave or full day of military leave for 4 remaining hours of civilian duty day. In order for technician to receive compensation from both civilian and military sources, 8 hours of annual leave or full day of military leave is chargeable for balance of 5-day period, since no additional pay would result for part-time performance of civilian duties without charge to leave ---------- 471

Holding two offices
Civilian position and ROTC training

A civilian employee attending ROTC advanced camp under authority of 10 U.S.C. 2109, which is not considered active duty in the Armed Forces, may be allowed annual leave available to him for the period he was performing field training as an ROTC cadet since longstanding rule that actual military service is incompatible with concurrent Federal service is not for application in view of fact that ROTC training is distinct in many respects from active military service, and as performance of ROTC field training does not involve the holding of a civilian position for purposes of 5 U.S.C. 5533a, which prohibits receipt of basic pay for more than one position for more than an aggregate of 40 hours in any 1 calendar week ---------- 755

Military personnel in civilian positions
Payment approved

Notwithstanding rule that a person on active military duty may not be employed to perform services as civilian employee of the Govt. and that any member who by mistake or otherwise is so employed may not receive compensation of the civilian position, a Navy enlisted member erroneously employed for temporary intermittent period of civilian service by Council on Environmental Quality may nevertheless be paid in view of fact had the civilian compensation been paid, the member could retain the payment under the *de facto* rule or the erroneous payment could be waived under 5 U.S.C. 5584. Since no payment occurred, it is appropriate to consider for purposes of the waiver statute that the administrative error and "overpayment" arose at time the member entered on duty with the understanding of a Govt. obligation to pay for his services ---------- 700

COMPENSATION—Continued Page

Double—Continued

Military retired pay and civilian retirement

Retired member of uniformed services who at age 57 after 10 years of Federal employment is immediately granted civil service annuity based on 30 years' military and civilian service, military service having been used to establish eligibility for civil service annuity, may not upon reaching age 62 and becoming eligible for deferred annuity revoke waiver of military retired pay, with a concurrent reduction of civil service annuity by excluding credit for military service since restoration and payment of retired military pay would amount to double benefit based on same service contrary to 5 U.S.C. 8332(j). Any recomputation of civil service annuity is within jurisdiction of CSC, and member who failed to apply for immediate civil service annuity based on military and civilian service, upon becoming eligible at 62 to deferred civil service annuity would not receive civil service benefits for period prior to reaching age 62 ---- 429

Increases

Cost-of-living allowances

Former wage board employees

Rate establishment

In establishing pay rates for wage board (WB) employees in Hawaii and Guam whose positions are converted to the General Schedule (GS), Part 539 of the Civil Service Commission (CSC) regulations, which provides for setting an employee's GS salary at rate closest to his basic WB rate prior to conversion is for application and thus as the pyramiding of cost-of-living allowances cannot be avoided, employee is assured of retaining his basic compensation for retirement purposes. However, when employees transfer to GS positions, their salaries are determined pursuant to "highest previous rate rule" in Part 531 of the CSC regs. and, therefore, only if Commission amends the rule to the effect that the basic (gross) compensation of a WB position from which an employee transfers should be related to the statutory step rates of the GS grade without regard to cost-of-living allowance, will 45 Comp. Gen. 88 be considered superseded ---- 695

Effective date

Rate change

The simultaneous benefits rule in sec. 531.203(f) of Civil Service Commission Regulations (CSCR) is not for application to a wage board employee who came under the General Schedule (GS) on Jan. 9, 1972, the date increases in GS rates became effective, whether employee transferred to GS or he was brought under GS by position conversion. If transferred, in absence of a contrary agency regulation or policy, 44 Comp. Gen. 518 applies and use of the highest previous rate rule (CSCR 531.203(d)(4)) will provide maximum benefit to employee. If a position conversion, both under CSCR 539.203, as well as agency regulations which require similar treatment in transfer or promotion, the GS rate increases operating on GS rates the day immediately preceding effective date of the increase, the new rates are basis for fixing GS salary rate of emloyee ---- 671

COMPENSATION—Continued Page

Longevity increase

Basic compensation purposes

The longevity step increases provided by sec. 110 of District of Columbia Police and Firemen's Salary Act Amendment of 1972 may be considered an element of basic compensation in computing overtime and holiday pay since act provides longevity pay shall be paid in same manner as basic compensation except that it shall not be subject to deduction and withholding for retirement and insurance and shall not be considered salary for purpose of computing annuities, and although legislative history of act makes no reference to including longevity compensation increases as part of basic compensation in computing overtime and holiday payments, in view of fact that prior to 1972 act longevity rates were scheduled rates of pay, any intent to exclude longevity compensation from basic compensation for all purposes should have been reflected in legislative history of the act 597

Military pay. (*See* **PAY**)

Night work

Basic compensation determinations

Leave and overtime

The night differential authorized in 5 U.S.C. 5343(f), as enacted by Pub. L. 92-392, approved Aug. 19, 1972, may be considered basic pay for purposes of annual and sick leave, and overtime pay for regular or irregular hours worked in view of the fact the legislation was enacted to unify the long established principle and policies for setting the pay of prevailing rate employees, including the Coordinated Federal Wage System and decisions of the Comptroller General of the United States 716

Overpayments

Waiver. (*See* **DEBT COLLECTIONS, Waiver**)

Overtime

Entitlement

Employees receiving premium pay

Preliminary and postliminary ministerial duties performed at headquarters by employees of Border Patrol, component of Immigration and Naturalization Service, and traveltime to and from regularly scheduled duty at traffic checkpoints located at least 35 miles from headquarters—matter of 2 hours of employees' time outside of regularly scheduled 8-hour tour of duty—is compensable as regularly scheduled overtime under 5 U.S.C. 5542, notwithstanding employees receive annual premium pay for administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2), for not only is time involved in traveling and performing ministerial duties reasonably constant and susceptible of determination, traveltime is viewed as hours of employment for purposes of 5 U.S.C. 5542(b)(2) since employees while traveling perform essentially their regular duties that involve search and apprehension of illegal aliens 319

COMPENSATION—Continued Page

Overtime—Continued

Irregular, unscheduled

Annual premium pay in lieu of overtime

Employees of Border Patrol, component of Immigration and Naturalization Service, who in addition to performing preliminary and postliminary regularly scheduled duties at headquarters in connection with regularly scheduled 8-hour tour of duty at traffic checkpoints, which is compensable at overtime rates under 5 U.S.C. 5542, as is traveltime to checkpoints, process cases and handle other enforcement dutics after their regularly scheduled 8-hour tours of duty and overtime have ended may be paid annual premium pay in addition to regularly scheduled overtime, if additional work qualifies as administratively uncontrollable under 5 U.S.C. 5545(c)(2) since payment under both 5 U.S.C. 5542 and 5545(c) is not precluded as premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work..... 319

Premium pay

Sunday work regularly scheduled. (*See* **COMPENSATION, Premium pay, Sunday work regularly scheduled**)

Standby, etc., time

Home as duty station

A wage board employee serving as Duty Security Officer in a standby status at or near residence located in Govt. quarters that required him to perform occasional inspection tours of short duration after regular duty hours—standby duty he alternately shares with two other employees and which does not limit his normal activities—is not entitled to overtime prescribed by 5 U.S.C. 5544(a) and implcmenting regulations, which provide that when an employee is required to remain at or within confines of duty station in excess of 8 hours in a standby or on-call status he is entitled to overtime only for duty hours, exclusive of eating and sleeping time, in excess of 40 hours a week, since employee was not confined to his post of duty, notwithstanding he resided in Govt. quarters, nor does time he spent in standby status constitute "hours of work"..... 587

Trial vessel trips

Service of civilian employee assigned aboard a vessel for purpose of conducting post repair testing vibration surveys of equipment to determine feasibility of the equipment for operation in the vessel does not constitute standby time to entitle employee to overtime authorized in 5 U.S.C. 5542, notwithstanding Navy regulations provide than an employee on a trial trip to test equipment is considered to be in a standby status since regulations are invalid as they do not meet criteria established in Federal Personnel Manual Supp. 990-2, Book 610, Subch. S1-3d, to the effect that "standby time consists of periods in which an employees is officially ordered to remain at or within confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called"..... 794

COMPENSATION—Continued Page

Overtime—Continued

Traveltime

Administratively controllable

Where employee's regularly scheduled duties involve assignments to which he commutes daily from headquarters or residence, travel to and from home to perform those regularly scheduled duties is not considered imposition upon his private life significantly different from travel required of employee to report to permanent duty station, and such travel is not regarded as overtime hours within meaning of 5 U.S.C. 5542(b)(2). Therefore, travel to perform requests to Dept. of Agriculture for grading and inspection services which is subject to control—scheduling—even though event giving rise to travel resulted from event which was not controllable, is not payable as overtime compensation 446

Between headquarters and work assignment

When employees of Dept. of Agriculture are required to report first to headquarters and from there to travel to their grading or inspection assignments, if requirement is for purposes other than merely facilitating their use of Govt. transportation and is regarded as within their regularly scheduled tours of duty, including regularly scheduled overtime, or where requirement is incident to work of employees, time in travel from headquarters may be regarded as hours of work. Furthermore, if employee actually performs work while traveling, regardless of whether he reports first to headquarters, time involved may properly be considered hours of work 446

Emergencies

Air safety investigators who pilot private, rented, or agency-owned aircraft to proceed to scene of an accident, or use commercial airlines, are not entitled to overtime compensation for travel outside their regular workweek since the travel is not inseparable from work performed, and mode of travel does not constitute an arduous mode of transportation in view of *Griggs* v. *United States*, dated November 24, 1967, Ct. Cl. No. 336–65, which holds that overtime for investigators is payable only for overtime work performed on-site accident investigations and when "jump-seat" in aircraft cockpit is occupied while traveling on commercial airlines. Furthermore, 28 Comp. Gen. 547 held, with respect to the effect of 28 Comp. Gen. 183 on general rule that overtime is not payable solely because of official travel outside basic workweek, that no rigid rule may be stated for determining when traveltime is compensable at overtime rates 702

"Official duty station" concept

Term "official duty station" in Civil Service Commission Federal Manual Supp. 990–2, book 550, subch. S1–3, which is stated to mean "employee's designated post of duty, limits of which will be corporate limits of city or town in which employee is stationed," may only be redefined by Commission and, therefore, Dept. of Agriculture may not consider "official duty station" in terms of mileage radius in order to better effectuate purpose of overtime provision contained in 5 U.S.C. 5542(b)(2). However, matter of authorizing mileage to employee for use of his automobile incident to official travel is discretionary with employing agency .. 446

COMPENSATION—Continued Page

Overtime—Continued

Traveltime—Continued

Performance of work status

Time spent by employee after his normally scheduled duty hours in taking care of Govt. vehicle which broke down while in use by him is not compensable as overtime under 5 U.S.C. 5542(b)(2)(B), even though employee took steps to protect vehicle beyond standard established by GSA regulation (41 CFR 101-39.701). Fact that employee was required to do more than mere driving and incidental care of vehicle does not constitute "the performance of work while traveling," nor did responsibility placed on employee under GSA regulation require him to take additional steps to protect vehicle. Therefore, time and effort expended by employee that was beyond standard of care required under regulation to protect vehicle entrusted to him is not compensable as work and does not provide basis for payment of premium compensation 491

Work in excess of daily and weekly limitation

Preliminary and postliminary ministerial duties performed at headquarters by employees of Border Patrol, component of Immigration and Naturalization Service, and traveltime to and from regularly scheduled duty at traffic checkpoints located at least 35 miles from headquarters—matter of 2 hours of employees' time outside of regularly scheduled 8-hour tour of duty—is compensable as regularly scheduled overtime under 5 U.S.C. 5542, notwithstanding employees receive annual premium pay for administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2), for not only is time involved in traveling and performing ministerial duties reasonably constant and susceptible of determination, traveltime is viewed as hours of employment for purposes of 5 U.S.C. 5542(b)(2) since employees while traveling perform essentially their regular duties that involve search and apprehension of illegal aliens 319

Employees of Border Patrol, component of Immigration and Naturalization Service, who in addition to performing preliminary and postliminary regularly scheduled duties at headquarters in connection with regularly scheduled 8-hour tour of duty at traffic checkpoints, which is compensable at overtime rates under 5 U.S.C. 5542, as is traveltime to checkpoints, process cases and handle other enforcement duties after their regularly scheduled 8-hour tours of duty and overtime have ended may be paid annual premium pay in addition to regularly scheduled overtime, if additional work qualifies as administratively uncontrollable under 5 U.S.C. 5545(c)(2) since payment under both 5 U.S.C. 5542 and 5545(c) is not precluded as premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work 319

COMPENSATION—Continued Page

Premium pay

Annual premium pay for irregular, unscheduled overtime. (*See* **COMPENSATION, Overtime, Irregular, unscheduled, Annual premium pay in lieu of overtime**)

Sunday work regularly scheduled

Forty hour weekly tour of duty requirement

Prevailing rate employees of nonappropriated fund instrumentalities of military departments and Coast Guard who work regularly scheduled tours of duty of less than 40 hours a week may not be allowed Sunday premium pay under 5 U.S.C. 5550, as added by sec. 10 of Pub. L. 92–392, Aug. 19, 1972. Legislative history of act shows it was intent of Congress to provide Sunday premium pay for nonappropriated fund employees in same amounts and under same conditions as such pay is authorized for other Federal prevailing rate employees. Accordingly, Civil Service Commission regs. issued pursuant to 5 U.S.C. 5548(b) under which Sunday premium pay is allowed prevailing rate employees of nonappropriated fund activities should require that such employees have basic full-time workweeks of 40 hours, exclusive of regularly scheduled overtime, for entitlement to Sunday premium pay 923

Promotions

Delayed

Freeze on promotions

Where the Federal Aviation Administration elected, in the exercise of its executive function to appoint persons to civilian Govt. service, not to promote development Air Traffic Controllers who had satisfied criteria for promotion until clarification of Presidential order of Dec. 11, 1972, placing freeze on promotions, employees did not become entitled to higher salaries prior to date of the agency's promotional action, notwithstanding controllers performed the duties and otherwise qualified for promotions, or that an employment agreement may have been executed, since under E.O. 11491, the right of promotion is retained by the management officials of an agency. Furthermore, failure to promote is not the "unjustified or unwarranted personnel action" contemplated by 5 U.S.C. 5596 to entitle employees to back pay 631

Effective date

Regular *v.* discrimination action promotions

Notwithstanding 4-year delay in promoting Foreign Service Officer from FSO–4 to FSO–3 due to age discrimination, officer who will reach mandatory retirement age within 8 months of his promotion may not be permitted for purpose of increasing annuity payments to pay into Foreign Service and Disability Fund additional amounts that would have been deducted from his salary and deposited into fund but for the delay. Compulsory contributions to retirement fund are based on actual salary received and since employee may not be retroactively promoted upon removal of age discrimination, his annuity payments are not for computation on salary of grade FSO–3 prior to date he was promoted to that grade 629

COMPENSATION—Continued Page

Promotions—Continued

Retroactive

Rule

Exceptions to rule

A GS–12 employee detailed on July 26, 1971, on temporary basis to GS–13 position of Chief, Employee Relations Branch in Pacific Northwest Region of the Forest Service, pending receipt from headquarters of certificate of candidates to fill position, who was not selected when position was filled on Aug. 20, 1972, may not be retroactively temporarily promoted to GS–13 for period involved. Exceptions to rule that a personnel action may not be effected retroactively to increase right of employee to compensation are permitted where personnel action intended is not effected through administrative error; where an error deprives employee of a right granted by statute or regulation; and where nondiscriminatory administrative regulations or policies have not been carried out, and the higher level assignment not falling within any of the exceptions, employee is only entitled to salary of position to which appointed ---------- 920

Removals, suspensions, etc.

Deductions from back pay

Outside earnings

An employee prematurely retired from Government service who is awarded back pay pursuant to 5 U.S.C. 5596 for erroneous separation upon restoration to duty, but administrative office failed to deduct from payment the amount attributable to the employee's outside employment, is not entitled to waiver of overpayment since collection of overpayment would not be against equity and good conscience as employee was aware that he was responsible to repay amount of his outside earnings during period of erroneous separation, and collection would not be against best interests of the United States, the criteria established in 5 U.S.C. 5584 for waiver of erroneous administrative payments ---------- 587

Severance pay

Eligibility

Nature of appointment

Superintendent-Principal of Air Force Dependents' School whose employment under 20 U.S.C. 241(a) for period of approximately 10 years was terminated on basis of management's perogative not to employ as provided in par. 8b, sec. 9833, Air Force Civilian Personnel Manual, is entitled to severance pay prescribed by 5 U.S.C. 5595. Employee held indefinite tenure appointment, even though he was granted limited access to procedural rights, and was involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, requirements that establish eligibility to receive severance pay provided by 5 U.S.C. 5595 ---------- 291

COMPENSATION—Continued Page

Simultaneous benefits rule

Wage board position conversion and General Schedule rate increase

The simultaneous benefits rule in sec. 531.203(f) of Civil Service Commission Regulations (CSCR) is not for application to a wage board employee who came under the General Schedule (GS) on Jan. 9, 1972, the date increases in GS rates became effective, whether employee transferred to GS or he was brought under GS by position conversion. If transferred, in absence of a contrary agency regulation or policy, 44 Comp. Gen. 518 applies and use of the highest previous rate rule (CSCR 531.203(d)(4)) will provide maximum benefit to employee. If a position conversion, both under CSCR 539.203, as well as agency regulations which require similar treatment in transfer or promotion, the GS rate increases operating on GS rates the day immediately preceeding effective date of the increase, the new rates are basis for fixing GS salary rate of employee 671

Traveltime

Overtime compensation status. (*See* **COMPENSATION, Overtime, Traveltime**)

Wage board employees

Conversion to classified positions

Rate establishment

Cost-of-living allowances

In establishing pay rates for wage board (WB) employees in Hawaii and Guam whose positions are converted to the General Schedule (GS) Part 539 of the Civil Service Commission (CSC) regulations, which provides for setting an employee's GS salary at rate closest to his basic WB rate prior to conversion is for application and thus as the pyramiding of cost-of-living allowances cannot be avoided, employee is assured of retaining his basic compensation for retirement purposes. However, when employees transfer to GS positions, their salaries are determined pursuant to "highest previous rate rule" in Part 531 of the CSC regs. and, therefore, only if Commission amends the rule to the effect that the basic (gross) compensation of a WB position from which an employee transfers should be related to the statutory step rates of the GS grade without regard to cost-of-living allowance, will 45 Comp. Gen. 88 be considered superseded 695

Federal Wage System

Job-grading

Conversion *v.* demotion in grades

When an employee's grade in a prevailing rate position is reduced as result of initial application o job-grading standards under Federal Wage System, Public Law 92-392, during the period beginning Nov. 17, 1972, and ending Oct. 1, 1974, the employee may retain his pay indefinitely, but for those employees whose grades are reduced other than because of initial conversion, 5 U.S.C. 5345, as enacted by the Public Law, is for application with a maximum of a 2-year period for salary retention since law in establishing principles and policies relating to blue collar workers generally covered under the Coordinated Wage System, continued recognition of the practice of a 2-year pay retention period for demotions, and an indefinite pay retention period for initial conversions 748

COMPENSATION—Continued Page

Wage-price freeze. (*See* **WAGE AND PRICE STABILIZATION, Wage changes**)

Withholding

Taxes

State

Pennsylvania

Nonresident Federal employee who will not return to duty station in Philadelphia upon termination of sick leave status at which time disability retirement becomes effective is subject to Pennsylvania Income Tax imposed on Federal employees by agreement between Federal and State Govts. pursuant to 5 U.S.C. 5517, and E.O. No. 10407, for period of sick leave, July 19, 1972 until Dec. 1973, during which time he will remain on agency rolls since sick leave payments constitute wages for taxation purposes. Income tax withholding for leave period is for computation in accordance with par. 3(b) of Pennsylvania Personal Income Tax Information Bulletin, which excludes nonworkdays—Saturdays, Sundays, holidays and days of absence—and amount actually subject to tax and tax ultimately due is for settlement between employee and State 538

CONGRESS

Members

District offices

Charge for space assigned

Where General Services Admin. (GSA) cannot establish Standard Level User Charges (SLUC) for space and services furnished pursuant to Public Buildings Amendments of 1972 on basis of commercial rates, the GSA Administrator has broad discretion under act to assess charges and may assign concessions for blind stands and Federal Credit Unions, with concurrence of occupying agencies, and this space together with joint use space and parking facilities may be considered to establish user charges, and cost of concessions for cafeterias, beauty parlors, etc., may be charged occupying agencies on a pro rata reasonable basis. Under its authority to assign and reassign space in Govt. owned and leased buildings, GSA may assess SLUC rates in buildings occupied by permit from another agency, reimbursing the controlling agency; may charge for congressional district offices; and may outlease sites until needed for construction at fair rental value 957

CONTRACTORS Page

Privity

Subcontractors

Concept

Subcontractor's claim for value of inventory delivered to Govt. following partial termination of prime contract and suspension of all subcontracting work may not be paid since Govt. met its contract obligations by payment to prime contractor even though prime failed to satisfy subcontractor claims within 10 days from payment by Govt. as stipulated in termination settlement agreement. Contention that contracting agency held itself out as final customer is not for consideration in view of fact par. 8–209.1, ASPR, denies subcontractors any contractual rights against Govt., and circumstances involved do not negate "no privity" rule, and furthermore subcontractor's termination inventory is required to be disposed of in accordance with secs. VIII and XXIV of ASPR 377

Successors

Cost of changing contractors

Bid evaluation factor

Adding cost of program duplication and the time required to check out time-sharing computer services program solicited to bids submitted by new sources did not favor current contractor, or prevent competition because of high cost of changeover as compared with bid prices, since evaluation factor represents an accurate depiction of costs to Govt. to change contractors, and method of transferring services employed by the contracting agency is not subject to question in absence of fraud or capricious action since different practice used by business does not alter terms of invitation for bids. Furthermore, the quantum of service evaluation criteria was not misleading as effect of the criteria on bid price was determinable by each bidder at bid preparation time. However, substantial difference in bid prices received indicating inadequate competition to insure a reasonable price, future procedures should be revised so bidders can compete effectively against an incumbent contractor 905

CONTRACTS Page

"Affirmative action programs." (*See* **CONTRACTS, Labor stipulations, Nondiscrimination, "Affirmative action programs"**)

Amounts

Approximated

Since weight of ripper required to be mounted on crawler tractors was significant in determining ruggedness, strength, and desirability of ripper, low bid that offered ripper with weight deficiency of 22 percent from approximate requirements stated in invitation for bids properly was rejected in light of contracting agency's responsibility to draft specifications that meet actual needs of Govt. and to determine responsiveness of bids, and record does not show rejection was arbitrary, capricious, or was not based on substantial evidence. Doubt as to weight difference and its effect on competition, and belief minimum and not approximate requirements should have been used to insure equal bidding, are matters that must be raised prior to bid opening as provided in 4 CFR 20.2(a), the Interim Bid Protest Procedures and Standards 500

Requirement contracts. (*See* **CONTRACTS, Requirements**)

Assignments. (*See* **CLAIMS, Assignments**)

Automatic Data Processing Systems. (*See* **EQUIPMENT, Automatic Data Processing Systems**)

Awards

Abeyance

Pending General Accounting Office decision

Award of a contract during the pendency of a protest alleging restrictive specifications was proper where determinations and findings of contracting officer to justify award met the criteria in par. 2-407.8(b)(3) of Armed Services Procurement Regulation to the effect that the procurement was urgently needed, or that delivery or performance will be unduly delayed by failure to make award promptly, or that prompt award will otherwise be advantageous to the Government 640

Aggregate basis

Best interests of Government

Cancellation of request for proposals (RFP) for inspection, maintenance and repair of 3 types of electron microscopes because specifications were considered inadequate for competitive procurement, and reissuance of RFP on basis award "would be made in the aggregate, price, and other factors considered," did not result in price competition contemplated by 1-3.807-1(b)(1) of Federal Procurement Regs. since separate awards under initial RFP would have obtained services for less. Therefore, since justification for aggregate award is sound only if Govt. realizes substantial savings from consolidation, aggregate award requirement was both unnecessary and improper, and rejection of low offeror (on 2 items) who had not complied with aggregate requirement was not justified 47

CONTRACTS—Continued Page

Awards—Continued

Cancellation

Erroneous awards

Bid evaluation error

Partial cancellation of contract erroneously awarded for handling of surplus butter made available to Dept. of Defense by Dept. of Agriculture because erroneous freight rate evaluation resulted in award to other than low bidder should be changed to partial termination for convenience of Govt. since, while award was improper, it was not plainly or palpably illegal for displaced contractor had not contributed to use of erroneous freight rate furnished by Govt. activity and, therefore, it could successfully maintain action for damages computed under termination for convenience of Govt. clause of contract. 37 Comp. Gen. 330 and B–164826, Aug. 29, 1968, overruled---------- 215

Erroneous

Reliance on Comptroller General decisions

Three invitations for bids soliciting vehicle operation and maintenance services which stated a 90-day bid acceptance period without requiring further action by bidder, and which included a SF 33 indicating a 60-day bid acceptance period would result unless a different period was inserted by bidder, without cross-referencing the provisions, were defective as evidenced by 10 out of 13 bids being nonresponsive, thus indicating the conflicting provisions were misleading, and although bidders are expected to scrutinize carefully the entire solicitation package and to timely request assistance, the Govt. has the initial responsibility of clearly stating what is required. The two invitations under which awards were withheld should be canceled and readvertised, clearly stating bid acceptance terms, but award made in reliance on previous Comptroller General decisions will not be disturbed---------- 842

Labor surplus areas

Award criteria

Whether low bidder on non-set-aside portion of a procurement with a 50 percent set aside for award to labor surplus area concerns who on date of bid opening is negotiating to acquire the performance activity from a large business concern is eligible as a manufacturer or regular dealer ("going concern") for purposes of award under Walsh-Healey Contracts Act (41 U.S.C. 35–45) is for determination initially by contracting officer subject to review by Dept. of Labor (ASPR 12–601, *et seq.*). To qualify as a manufacturer a firm newly entering into manufacturing activity must show before award that it has made all necessary prior arrangements for space, equipment, and personnel, and if qualifying commitments are made prior to award for entering into manufacturing business, a new firm is not barred from receiving an award because it has not yet done any manufacturing---------- 886

CONTRACTS—Continued Page

Awards—Continued

Labor surplus areas—Continued

Award criteria—Continued

Fact that the sale by a large business concern to a small business firm of the activity needed to manufacture radio sets and receiver-transmitters solicited under an invitation for bids with 50 percent set aside for award to labor surplus area concerns is not consummated before bid opening and, therefore, both firms submitted bids on non-set-aside portion of procurement which were signed by same officer does not require rejection of bids since multiple bidding is not prejudicial to other bidders; possibility that common manufacturing facilities might preclude one of the firms from performing is not disqualifying; and a preaward survey will protect Govt.'s interest. However, because of affiliation of the two firms, the small business concern, the low bidder on the non-set-aside, does not qualify for participation in the set-aside as a small business labor surplus concern, notwithstanding its good-faith self-certification, nor does it qualify on basis of acquiring involved facilities in a post-bid-opening sale ---------- 886

Price differentials

Foreign bid price

Bid under invitation for bids that offered to furnish foreign source end items in response to solicitation for circuit breakers and related items, properly was evaluated by adding 12 percent factor required by sec. 1-6.104-4(b) of Federal Procurement Regs. (FPR) when bidder submitting low acceptable domestic bid is small business concern or labor surplus area concern, or both, as defined in FPR 1-1.801. The fact that low domestic bidder failed to indicate which labor surplus area it was claiming did not limit adjustment factor to 6 percent since location of performance information submitted by domestic bidder permitted determination that contract would be performed in substantial labor surplus area and, furthermore, for purposes of Buy-American preference, domestic bidder was not required to be "certified-eligible concern" ---------- 265

Prohibition

In the evaluation of labor surplus set-aside offers under request for proposals (RFP) that contemplated a multi-year, requirements type, life cycle cost (LCC) contract for oscilloscopes on Qualified Products List, the contracting officer, in accordance with terms of RFP, properly adjusted highest unit price awarded on non-set-aside portion of procurement to reflect total anticipated life cost—the LCC procurement method resting upon the premise that it is logical to consider total anticipated life cycle of an item rather than merely its purchase price—and reduced transportation and other cost factors that were considered in evaluating non-set-aside portion of procurement in order to comply with statutory prohibition against payment of a price differential for purpose of relieving economic dislocation in labor surplus areas ---------- 653

CONTRACTS—Continued Page

Awards—Continued

Labor surplus areas—Continued

Set-asides

Price comparison with non-set-asides

Allegations that low unit price and life cycle costs (LCC) offered on non-set-aside portion of a multi-year, requirements type, contract for oscilloscopes on Qualified Products List (QPL) were so unreasonably low they should not have been used as basis for computing the set-aside offers, and that low unit price resulted from an "auction," constituted a "buy-in," and was a "token" offer, and that projected life cycle costs were understated, are not supported by the record. The use of a multi-year procurement, as well as the fact the item is on QPL, eliminates probability of a "buy-in," and failure of low offeror on non-set-aside portion to advance its priority for negotiation of the set-aside portion, does not make non-set-aside offer a "token" offer. Furthermore, the LCC, consisting of initial logistic costs and recurring costs, must be accepted as realistic in absence of evidence the evaluation of the LCC information was arbitrary 653

Legality

Award not plainly or palpably illegal

Partial cancellation of contract erroneously awarded for handling of surplus butter made available to Dept. of Defense by Dept. of Agriculture because erroneous freight rate evaluation resulted in award to other than low bidder should be changed to partial termination for convenience of Govt. since, while award was improper, it was not plainly or palpably illegal for displaced contractor had not contributed to use of erroneous freight rate furnished by Govt. activity and, therefore, it could successfully maintain action for damages computed under termination for convenience of Govt. clause of contract. 37 Comp. Gen. 330 and B–164826, Aug. 29, 1968, overruled 215

Multiple

Lowest overall cost to Government

Under total small business set-aside solicitation for pastry requirements that listed estimated quantities for each of 33 items solicited and required both unit and total estimated prices for each of the items, and indicated any items might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Govt., multiple awards to low bidder on two of three groupings submitted and to protestant for remainder of the items would result in lowest aggregate price to the Govt. as provided by solicitation, and as statement of group bidder that each group of items "are bid as a Total All or None Bid" does not qualify its bid, since in listing items in groups, bidder indicated that an award of individual items would not be acceptable, the group bidder, administratively determined to be responsible bidder, is eligible to receive award 932

CONTRACTS—Continued Page

Awards—Continued

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Awards**)

Propriety

Noncompetitive situation created

Award of interim procurement for a less than optimum individual emergency breathing device to one of the developers of device under basic order agreement pursuant to a determination and findings (D&F) under 10 U.S.C. 2304(a)(2), which was followed by a Navy implementation of a research and development program to significantly increase effectiveness of device for eventual procurement on competitive basis, although not legally questionable as the D&F authority is final, determination based upon the D&F is. Practices and procedures involved in testing, evaluation, and eventual award indicates informalities that generated noncompetitive situation and, therefore, it is recommended that other qualified firms be given opportunity to submit emergency escape devices for approval as interim sources of supply pending results of the research and development program---------- 801

Status of bidder, offeror, etc.

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1-1.301-1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated_ 332

Small business concerns

"Independently owned and operated" test

Low bidder on non-set-aside portion of procurement for radio sets and receiver-transmitters, with 50 percent set aside for labor surplus area concerns, whose bid was signed by same official as bid submitted by third low bidder who was negotiating to sell low bidder the performance activity may not be given priority on set-aside portion of procurement since on date of bid opening low bidder was not a "going concern" as it had no place of business of its own, and although meeting size limitation for a small business concern, it did not meet the "independently owned and operated" test required for a small business by Sec. 3 of the Small Business Act. Both firms having the same officials are affiliated through common management within meaning of Sec. 121.3-2(a) of SBA Size Standards Regs., and low bidder on non-set-aside does not qualify for set-aside priority on basis of a subsequent novation agreement--------- 886

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Set-asides
Eligibility

Fact that the sale by a large business concern to a small business firm of the activity needed to manufacture radio sets and receiver-transmitters solicited under an invitation for bids with 50 percent set aside for award to labor surplus area concerns is not consummated before bid opening and, therefore, both firms submitted bids on non-set-aside portion of procurement which were signed by same officer does not require rejection of bids since multiple bidding is not prejudicial to other bidders; possibility that common manufacturing facilities might preclude one of the firms from performing is not disqualifying; and a preaward survey will protect Govt.'s interest. However, because of affiliation of the two firms, the small business concern, the low bidder on the non-set-aside, does not qualify for participation in the set-aside as a small business labor surplus concern, notwithstanding its good-faith self-certification, nor does it qualify on basis of acquiring involved facilities in a post-bid-opening sale---------- 886

Postal service procurements

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon---------- 306

Size
Basis for determination

Determination by SBA Size Appeals Board that two of the firms bidding on a procurement containing a 50 percent set aside for award to labor surplus area concerns were affiliated through common management and low bidder on the non-set-aside, one of the two firms, could not be classified as a small business concern as of 'date of bid opening for purposes of the set-aside priority is a "conclusive" determination that will not be reviewed by the U.S. General Accounting Office (GAO) since no evidence or argument was presented that was not considered by Board. Furthermore, protest to Board without a prior decision thereon by cognizant SBA regional office is permitted pursuant to 13 CFR 121.3-6(b)(1)(ii); allegations that protest procedures were not followed should have been presented to Board; and delayed protest filed with GAO is untimely under 4 CFR 20.2(a) and will not be considered---------- 886

CONTRACTS—Continued Page

Awards—Continued

Small business concerns—Continued

Status

Other than in set-asides

Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity.... 169

Subcontracting limitation

Participation by a large foreign business concern in performance of proposed contract award to a self-certified small business concern, either by way of joint venture or subcontract, does not change the "small business" status of bidder where cognizant SBA regional office found no evidence of improper affiliation through common ownership, personnel, management, or contractual relationship as precluded by SBA 121-Small Business Size Standards; where small business concern in subcontracting a major portion of work to be performed to large business meets requirement to make a significant contribution to the manufacture or production of contract end item; where Buy American Act restrictions are satisfied by bidder's certification that end product to be supplied will be a domestic source end product; and where compliance with act, as well as military specifications, is one of contract administration and properly the responsibility of the contracting agency..... 886

Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)

Bids, generally. (*See* **BIDS**)

Bonds. (*See* **BONDS**)

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Breach of contract

"Cardinal change" doctrine

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine..... 253

CONTRACTS—Continued Page

Construction

Intention of parties

Determined from entire contract

A contract awarded under a Federal Supply Service invitation for bids which solicited in the Scope of Contract provision the "normal supply requirements" for electronic data processing tapes, and which included in the Estimated Sales provision the clause "no guarantee is given that any quantities will be purchased" is not an invalid contract or contract that is unenforceable for lack of mutuality, for under rule of contract construction, the intent and meaning of a contract is not determined from an isolated section or provision but from the entire contract, and "no guarantee" clause appearing in Estimated Sales provision rather than Scope of Contract provision containing the requirements language, is indicative the clause refers to schedule of previous purchases, or to estimates reflected in Estimated Sales provision, and not to the purchase obligations of the Government under the contract 732

Cost-plus

Cost-plus-incentive fees

Evaluation

Under a National Aeronautics and Space Administration (NASA) solicitation for on-site data processing services on a cost-plus-award-fee basis which indicated both technical and cost factors would be accorded substantially equal weight, NASA PR 3-805.2 does not preclude consideration of cost—evaluated in terms of cost realism, and probable and maximum cost to the Govt.—as significant factor in determining most advantageous proposal, and NASA properly selected low offeror whose proposal although containing minor weaknesses was relatively equivalent technically to the only other acceptable offer received. A spread of 81 points between the two proposals, the low offer scoring 649 points out of a possible 1,000 as compared to 730, does not automatically establish that the higher rated proposal was materially superior, for although technical point ratings are useful as guides, the question of superiority depends on facts and circumstances of each procurement .. 686

Evaluation factors

"Realism" of costs and technical approach

Fact that negotiations pursuant to 10 U.S.C. 2304(a)(11), which contemplated a cost-plus-fixed-fee contract (CPFF) for systems engineering and research analysis investigation to develop technical interface plan in support of General and Amphibious Military Operations Program at Fort Monmouth, were limited to price on basis technical discussions would compromise proposals through transfusion of ideas, methology, and concepts, and the most adantageous CPFF proposal was determined on evaluated rather than proposed costs, does not reflect adversely on the award to offeror who received the highest technical rating and offered only realistic, although highest, cost since the written or oral discussion prescribed in 10 U.S.C. 2304(g) is required only when there is an opportunity for meaningful discussion and when discussion will not result in preferential treatment or disclose one offeror's innovative solution to another 870

CONTRACTS—Continued Page

Damages

Liquidated

Effect of different per diem rates

The inclusion in an invitation for bids to procure gas turbine units of an experience, performance bond, and two liquidated damage clauses in order to protect interests of the Govt. is not restrictive of competition where experience clause is intended to establish prior experience—a matter of bidder responsibility and not bid responsiveness—and its use is appropriate to substantiate product reliability and manufacturing capability; where performance bond is a necessary and proper means to secure the contractor's obligation under contract, even though a 100 percent performance bond was required; and where the liquidated damages at different per diem rates for delayed delivery and failure of units to operate each day for the first year was warranted on basis of administrative needs and prior experiences, and furthermore, determination of whether penalty is involved depends on facts as they arise.. 640

Data, rights, etc.

Acquisition by the Government

Reverse-engineering procedure

Inclusion in a request for proposals of a stationary brake disc drawing furnished without restriction to the Air Force under sole-source contracts in order to create competition or for reverse engineering purposes did not violate proprietary data rights where Govt. contracts law in recognizing data rights also recognizes such data may be lawfully obtained by reverse engineering when the data is not restricted and the Govt. acquires title, and since it is incumbent upon contracting agency to maximize competition where the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement as well as from sole-source buys from current manufacturer of the item. Furthermore, contracting officer in making an award is not obliged to consider possible foreign patent problems since such a possibility is too speculative, complex, and burdensome..... 778

Subcontractors

End *v.* precursor formulas

In development of second source subcontractor for Short Range Attack Missile (SRAM) propulsion subsystem of SRAM rocket motor, release to selected subcontractor of end formulas for SRAM liner, insulation, and adhesive materials, did not violate proprietary rights or primary subcontractor in precursor formulas since end formulas furnished second source subcontractor were wholly new and independent and not just routine extensions of precursor formulas. Furthermore, contracting agency had acquired more than limited rights to end formulas even though technical data requirements of both prime contract and subcontract were broadly stated, and administrative determinations that precursor formulas did not comprise basic end formulas for SRAM liner, insulation, and adhesive materials or components thereof were neither arbitrary nor capricious..... 312

CONTRACTS—Continued Page

Data, rights, etc.—Continued

Use by Government

Basis

The revised purchase description issued by the Navy which eliminated restricted drawings of a subcontractor that had been contained, contrary to par. 4–106.1(e) of ASPR, in a canceled request for technical proposals to furnish engine trim test sets, but which included information depicted in drawings—information readily disclosed by physical examination of the sets, and which did not detail how components would be manufactured or assembled—does not violate the subcontractor's proprietary rights since disputed information is contained in the subcontractor's manual furnished the Navy by prime contractor with unlimited rights by reason of the fact the "Rights in Technical Data" clause prescribed by ASPR 9–203(b) and included in prime contract was incorporated by reference in the manual, thus giving the Navy the right to use the information for procurement purposes 773

Default

Monies owing contractor

Disposition

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by surety under its payment bond 262

Procurement from another source

Excess cost liability

Disposition of collection

Excess costs that are due Govt. incident to replacement contract awarded upon default by original contractor may be deducted from amount earned but withheld from defaulting contractor and excess costs transferred from appropriation account in which held to miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with general rule that excess costs recovered from defaulting contractors of their sureties are required by sec. 3617, R.S., 31 U.S.C. 484, to be deposited in 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 45

CONTRACTS—Continued Page

Default—Continued

Procurement from another source—Continued

Excess cost liability—Continued

Surety

A surety who requested the Govt. to withhold funds due a defaulting contractor under janitorial service contract and who met its obligations under performance bond for the excess costs to the contracting agency to complete the contract is not liable in an amount that exceeds its obligation under the payment bond for the withheld funds that were turned over by agency to Labor Dept. to cover wage deficiencies under defaulted contract as well as another contract. The surety did not complete contract itself and having only guaranteed contract performance at specified price, it is not liable for wage underpayments that it did not guarantee. To hold surety liable for obligations not contemplated by performance bond would violate general rule of the Law of Suretyship that no one incurs liability for another unless expressly agreeing to be bound 633

Discounts

Partial and progress payments

Provision in an invitation for bids (IFB) prohibiting consideration of discounts for payment within less than 20 days does not become inapplicable because bidder requested progress payments if awarded a contract and, therefore, a prompt payment discount of 2 percent for payment within a 10-day period was properly disregarded in evaluation of bids pursuant to sec. 1-2.407-3(c) of the Federal Procurement Regs., which prohibits evaluation of prompt payment discounts for time periods less than specified in the IFB. Although the Govt. is entitled to a discount on any part of delivery payments applied in liquidation of progress payments, bids under competitive bidding requirements must be evaluated on basis prescribed in the invitation 614

Disputes

Administrative determinations

S.&E. Contractors, Inc., **case effect**

Although holding in *S. &E. Contractors, Inc.* v. *U. S.*, 406 U.S. 1, that Federal agency's settlement of claim under Disputes clause of contract is binding on Govt., that there is not another tier of Federal or administrative review and that, save for fraud or bad faith, agency's decision is "final and conclusive" involved review by other agencies of Govt. of final "Disputes" decision in favor of contractor, ruling is applicable equally to final agency decision against contractor 196

Contract Appeals Board decision

Review by the General Accounting Office

S&E Contractors, Inc., **case effect**

In view of holding by U.S. Supreme Court in *S&E Contractors, Inc.* v. *U.S.*, No. 70-88, Apr. 24, 1972, that decisions rendered pursuant to disputes clause of contract in favor of contractor are final and conclusive and not subject to review by U.S. GAO absent fraud or bad faith, GAO no longer will object to payment of claim for refund of amount withheld from contractor on basis Maryland State sales tax determined to be inapplicable had been included in contract price and paid, refund approved by Board of Contract Appeals but not returned to contractor because GAO in 49 Comp. Gen. 782 held Board was wrong as matter of law 63

CONTRACTS—Continued Page

Disputes—Continued

Contract Appeals Board decision—Continued

Review by the General Accounting Office—Continued

S&E Contractors, Inc., **case effect—Continued**

Determination of Secretary of Agriculture to uphold denial by Regional Forester of claim for additional road construction costs under timber sales contract—denial reversed and restored administratively and then appealed to Secretary by contractor—was in conformance with 36 CFR 221.16(a), which provides for modification of timber sales contracts only when modification will apply to unexecuted portions of contract and will not be injurious to U.S., is final administrative determination within purview of 36 CFR 211.28(b), and Supreme Court ruling in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, concerning finality of administrative determinations and, therefore, Secretary's decision is final and conclusive insofar as other agencies of Govt. are concerned, and it is not subject to review by GAO ---------- 196

Equal opportunity clause compliance

Determination

Although suspension of progress payments for violations of standard Equal Opportunity clause in contract is sanction which is authorized by sec. 209(a)(5) of E.O. 11246, under regulations of Dept. of Labor final decision for invoking sanctions referred to in 41 CFR 60–1.24(c)(3) is for determination only after contractor has been afforded opportunity for hearing. Furthermore, even though contractor's compliance or non-compliance with Equal Opportunity clause is question of fact, 41 CFR 60–1.1 specifically excludes equal opportunity matters from determination under Disputes clause, and determination responsibility therefore vests in Contract Compliance Officer or other officials regularly involved in equal opportunity programs. Thus, contractor's compliance posture is for consideration under regulations and not Progress Payment clause and progress payments may not be suspended without hearing ---------- 476

Dual system of contracting

Construction and financing

Public buildings

The so-called "dual system" of contracting proposed to carry out purchase contracting authority contained in sec. 5 of Public Buildings Amendments of 1972 that provides for financing acquisition, construction, alteration, maintenance, operation, and protection of public buildings, is legally within framework of sec. 5, since section does not prohibit use of such plan which contemplates separate contracts secured through competitive bidding—"Construction Contract" for building projects on Govt. sites and "Purchase Contract" for financing projects, funds for payment of construction to be obtained by Trustee through issuance and competitive sale of Participation Certificates—presumably to be reoffered to public investors—to be redeemed by Govt. within 30 years by installment payments of principal and interest, with title in property vesting in U.S ---------- 226

Proposed modifications in dual system program procedures for procurement of public buildings, procedure which provides for separate construction contracts and purchase contracts for financing building projects, does not require any change in conclusions reached in 52 Comp. Gen. 226 that dual system of contracting is within legal framework of sec. 5 of

CONTRACTS—Continued Page

Dual system of contracting—Continued

Construction and financing—Continued

Public buildings—Continued

Public Buildings Amendments of 1972 since decision will be equally applicable to dual system as modified to provide alternatives in method and timing of construction contracting; timing of issuance of Participation Certificates; and terms of redemption and purchase of Participation Certificates, and committees of Congress advised of original plan should be informed of proposed modifications to plan 517

Escalation clauses

Monitoring responsibility

A bid that contains higher prices for the option than those offered on basic quantities does not disqualify bidder where invitation for bids (IFB) provision states that "Evaluation of bids or offers for award will be made on the basis of the quantities to be awarded exclusive of option quantities," and in absence of provision calling for evaluation of option prices, evaluation of option prices would not be proper in determining low bid. Where IFB contains no prohibitions against quoting a higher price for option quantities, pursuant to par. 7-104.47(b) of the Armed Services Procurement Reg., option price may reflect recurring costs and reasonable profit necessary to furnish additional option quantities, and it is the responsibility of contracting officer to monitor contract awarded to assure compliance with price escalation clause 886

Equal employment opportunity requirements. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Federal Supply Schedule

Purchases elsewhere

Firm who had yearly supply contract with General Services Administration (GSA) for carpet servicing in Govt. buildings within designated area at specified price but accepted oral order from agency in another contractor's area may not be paid higher price claimed on basis of entitlement to be reimbursed as for "open market" job at commercial prices. Firm cognizant of limitations imposed by GSA contracts is charged with notice of lack of employee authority to obligate Govt. and should have advised agency of its error. Since service was not within urgency exception of contract, error in procuring services on open market rather than from schedule contract does not legally obligate Govt. beyond extent of price stipulated 530

To other than low bidder or offeror

Justification

Although selection from multiple sources available under a Federal Supply Schedule (FSS) is within jurisdiction of procuring agency because it best knows its needs, nonetheless agency is required to comply with par. 5-106 of Armed Services Procurement Reg. Therefore, agency that issued request for quotations (RFQ) to FSS suppliers for rental of copier machines which did not clearly state variations from copiers available from FSS sources and placed delivery order for foreign-made copiers with low offeror under the RFQ whose FSS price list is not the lowest should have included justification for order in contract file to the effect the lower-priced copiers would not do and procuring higher

CONTRACTS—Continued Page
Federal Supply Schedule—Continued
To other than low bidder or offeror—Continued
Justification—Continued
priced copiers was necessary; should have timely submitted required Buy American information; and should if it continues to use the RFQ procedure to up-date information, clarify its requirements so suppliers unable to conform will be spared time and expense of responding to RFQ---- 941

Labor stipulations
Minimum wage determinations
Effect of new determination
The incorporation in a procurement by the National Aeronautics and Space Administration (NASA) of a wage determination received from the Dept. of Labor after selection of a contractor but before contract award without conducting further negotiations and allowing offerors to submit revised proposals for on-site data processing services although contrary to NASA PR 12.1005–3 was not an abuse of administrative discretion because validity of the contractor selection was not affected and relative cost position of the two acceptable firms responding to request for proposals did not change, notwithstanding the insignificant errors made by NASA in determining affects of the wage determination and, furthermore, unsuccessful offeror was not only aware of its competitor's proposed costs but was apprised in a debriefing of how its proposal was assessed---- 686

Failure to issue effect
Since issuance of wage determinations is within discretion of Dept. of Labor and failure to issue wage rates incident to performance of operation and maintenance contracts was in no way attributable to contracting agency, provisions of Service Contract Act of 1965, 41 U.S.C. 351, were not violated and, therefore, validity of contracts awarded is not affected, nor was low offer that was accepted nonresponsive because wages of unlisted categories of employees did not conform to those stated by Dept. of Labor as neither request for proposals nor Dept.'s regulation 29 CFR 4.6(b) imposed such requirement---- 161

Nondiscrimination
"Affirmative Action Programs"
Commitment requirement
Although Fedl. Govt. is not a party to the contract awarded by recipient of a construction grant from the Dept. of Health, Education, and Welfare (HEW) under the Hill-Burton Act (42 U.S.C. 291 *et seq.*), HEW had the responsibility of determining whether the conditions of grant had been met, and review of records supports advice of HEW to grantee that low bidder on the hospital addition solicited failed to meet competitive bidding requirements because certification of part I affirmative action requirements for equal employment opportunity only committed the bidder to the local, Cleveland Plan, and because bidder had not committed itself to part II affirmative action requirements of solicitation, which involved trades not covered by part I, by merely signing bid, since nothing in bid would bind bidder to conform to part II criteria, and no independent commitment to that part had been submitted by the bidder---- 874

CONTRACTS—Continued Page

Labor stipulations—Continued

Nondiscrimination—Continued

"Affirmative Action Programs"—Continued

Subsidiary's status

Although in determining whether parent and its subsidiary should be treated as separate entities term "day-to-day" control was erroneously injected into Labor Dept.'s criteria of de facto control by contracting agency reviewing equal employment opportunity (EEO) compliance of successful contractor with E.O. 11246, ruling in 50 Comp. Gen. 627 (1971) that affirmative action plan was not required to be submitted by prime contractor for each establishment is upheld upon reconsideration of decision at request of third party, as record establishes criteria used to determine separate entities of contractor and its subsidiary was not unreasonable, arbitrary or capricious and that, furthermore, there is no evidence of attempt to evade EEO obligations..... 145

Compliance

Violation sanctions

Although suspension of progress payments for violations of standard Equal Opportunity clause in contract is sanction which is authorized by sec. 209(a)(5) of E.O. 11246, under regulations of Dept. of Labor final decision for invoking sanctions referred to in 41 CFR 60–1.24(c)(3) is for determination only after contractor has been afforded opportunity for hearing. Furthermore, even though contractor's compliance or noncompliance with Equal Opportunity clause is question of fact, 41 CFR 60–1.1 specifically excludes equal opportunity matter from determination under Disputes clause, and determination responsibility therefore vests in Contract Compliance Officer or other officials regularly involved in equal opportunity programs. Thus, contractor's compliance posture is for consideration under regulations and not Progress Payment clause and progress payments may not be suspended without hearing..... 476

Wage underpayments

Surety's liability

A surety who requested the Govt. to withhold funds due a defaulting contractor under janitorial service contract and who met its obligations under performance bond for the excess costs to the contracting agency to complete the contract is not liable in an amount that exceeds its obligation under the payment bond for the withheld funds that were turned over by agency to Labor Dept. to cover wage deficiencies under defaulted contract as well as another contract. The surety did not complete contract itself and having only guaranteed contract performance at specified price, it is not liable for wage underpayments that it did not guarantee. To hold surety liable for obligations not contemplated by performance bond would violate general rule of the Law of Suretyship that no one incurs liability for another unless expressly agreeing to be bound..... 633

Labor surplus areas. (*See* **CONTRACTS, Awards, Labor surplus areas**)

Life cycle costs

Negotiated procurement (*See* **CONTRACTS, Negotiation, Evaluation factors, Life of equipment**)

CONTRACTS—Continued Page

Mistakes

Allegation before award. (*See* **BIDS, Mistakes**)

Contracting officer's error detection duty

Notice of error

Computer method of bid evaluation

A bidder who after performance of a contract awarded for cut-up chickens alleges omission of freight charges on one delivery destination out of 50 bid on, and that error would have been discovered but for fact the computer evaluation of bids made impossible comparison with prices submitted by firms in same general locality is not entitled to a price increase since the Govt. did not have actual notice of error before award, and the computer evaluation method used is practicable and feasible in view of the multiple offers and destinations involved, and the severe week-to-week time constraints imposed on a contracting agency in this type procurement. Moreover, computer method does provide for preaward checks to protect bidders from consequences of their bid mistakes, and in addition all bids are compared with weekly market prices of whole chickens delivered in New York adjusted to reflect cutting, packing and transportation, and the range of prices submitted by all offerors to all destinations---------- 837

Price adjustment

Specification misinterpretation

Fact that denial of claim under 50 U.S.C. 1431–1435, which authorizes amending and modifying contracts to facilitate national defense, is not subject to review by U.S. GAO does not preclude consideration of claim on basis of bid mistake. However, contractor is not entitled to price adjustment based on fact second error—first having been corrected before award—was due to misinterpretation of bid package because of missing Govt. drawing since contractor was cognizant of omission but failed to recognize its significance, situation similar to *Space Corp.* v. *U.S.*, Ct. Cl. No. 328–70, Dec. 12, 1972. Neither face of bid nor variance in price between low and second low bids puts contracting officer on notice of possibility of error, particularly since contractor had reexamined its bid incident to first error and, therefore, acceptance of bid consummated valid and binding contract---------- 534

Modification

Consideration

Waiver of a legal right

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine---------- 253

CONTRACTS—Continued Page

Multi-year procurements

Labor surplus set-asides

Evaluation

Allegations that low unit price and life cycle costs (LCC) offered on non-set-aside portion of a multi-year, requirements type, contract for oscilloscopes on Qualified Products List (QPL) were so unreasonably low they should not have been used as basis for computing the set-aside offers, and that low unit price resulted from an "auction," constituted a "buy-in," and was a "token" offer, and that projected life cycle costs were understated, are not supported by the record. The use of a multi-year procurement, as well as the fact the item is on QPL, eliminates probability of a "buy-in," and failure of low offeror on non-set-aside portion to advance its priority for negotiation of the set-aside portion, does not make non-set-aside offer a "token" offer. Furthermore, the LCC, consisting of initial logistic costs and recurring costs, must be accepted as realistic in absence of evidence the evaluation of the LCC information was arbitrary 653

Life cycle cost contract

In the evaluation of labor surplus set-aside offers under request for proposals (RFP) that contemplated a multi-year, requirements type, life cycle cost (LCC) contract for oscilloscopes on Qualified Products List, the contracting officer, in accordance with terms of RFP, properly adjusted highest unit price awarded on non-set-aside portion of procurement to reflect total anticipated life cost—the LCC procurement method resting upon the premise that it is logical to consider total anticipated life cycle of an item rather than merely its purchase price—and reduced transportation and other cost factors that were considered in evaluating non-set-aside portion of procurement in order to comply with statutory prohibition against payment of a price differential for purpose of relieving economic dislocation in labor surplus areas 653

Although protest relative to an award of a labor surplus set-aside at a unit price below that made on the non-set-aside portion of a procurement for oscilloscopes under request for proposals contemplating a multi-year, requirements type, life cycle cost (LCC) contract was untimely filed, since protest raises a significant question relative to proper method for determining unit purchase prices under labor set-aside portion of an LCC procurement, protest will be considered. However, as alleged improprieties other than those contained in the solicitation must be filed, pursuant to 4 CFR 20.2(a), "not later than 5 days after the basis for the protest is known or should have been known," the issue that auction technique prohibited by par. 3-805.1(b) of Armed Services Procurement Reg. was employed by contracting agency may not be considered 653

Although award of non-set-aside portion of a multi-year, requirements type, life cycle cost contract for oscilloscopes was made on basis of lowest evaluated target life cycle cost, the final amount to be paid contractor under price adjustment provision of solicitation will be based upon measured life cycle, and the total target price will be paid only if measured life cycle cost is equal to or less than the target (bid) life cycle cost, and if measured life cycle cost exceeds the target life cycle cost, the amount to be paid will be reduced pursuant to formula in

CONTRACTS—Continued Page

Multi-year procurements—Continued

Life cycle cost contract—Continued

request for proposals on basis the contractor provided hardware with demonstrated values less than the predicted values used as basis for award ---------- 653

Validity

Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by statement no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bidders. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresponsive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids ---------- 190

Negotiation

Awards

Advantageous to Government

Price

Under a National Aeronautics and Space Administration (NASA) solicitation for on-site data processing services on a cost-plus-award-fee basis which indicated both technical and cost factors would be accorded substantially equal weight, NASA PR 3-805.2 does not preclude consideration of cost—evaluated in terms of cost realism, and probable and maximum cost to the Govt.—as significant factor in determining most advantageous proposal, and NASA properly selected low offeror whose proposal although containing minor weaknesses was relatively equivalent technically to the only other acceptable offer received. A spread of 81 points between the two proposals, the low offer scoring 649 points out of a possible 1,000, as compared to 730, does not automatically establish that the higher rated proposal was materially superior, for although technical point ratings are useful as guides, the question of superiority depends on facts and circumstances of each procurement ---------- 686

Initial proposal basis

Award authority discretionary

Practice of U.S. Procurement Agency in Japan of conducting negotiations in all procurements with high dollar value or operational significance is proper exercise of discretionary right, even though par. 3-805.1, ASPR, permits awards on basis of initial proposals if offerors are so informed and circumstances so warrant. Therefore, fact that low offeror under solicitation for utility plant services was displaced because its best and final offer was its initial proposal that compared reasonably with Govt.'s estimate is not subject to question, although Govt. should have refined its estimate before proposal submission. Furthermore, use of estimate as negotiating tool was in nature of advice that proposals were too high, rather than use of auction technique, and there is no evidence in record that prices were leaked during negotiation ---------- 425

CONTRACTS—Continued Page

Negotiation—Continued

Changes, etc.

Reopening negotiations

Wage determination change

The incorporation in a procurement by the National Aerounautics and Space Administration (NASA) of a wage determination received from the Dept. of Labor after selection of a contractor but before contract award without conducting further negotiations and allowing offerors to submit revised proposals for on-site data processing services although contrary to NASA PR 12.1005–3 was not an abuse of administrative discretion because validity of the contractor selection was not affected and relative cost position of the two acceptable firms responding to request for proposals did not change, notwithstanding the insignificant errors made by NASA in determining affects of the wage determination and, furthermore, unsuccessful offeror was not only aware of its competitor's proposed costs but was apprised in a debriefing of how its proposal was assessed 686

Competition

Aggregate award basis effect

Cancellation of request for proposals (RFP) for inspection, maintenance, and repair of 3 types of electron microscopes because specifications were considered inadequate for competitive procurement, and reissuance of RFP on basis award "would be made in the aggregate, price, and other factors considered," did not result in price competition contemplated by 1–3.807–1(b)(1) of Federal Procurement Regs. since separate awards under initial RFP would have obtained services for less. Therefore, since justification for aggregate award is sound only if Govt. realizes substantial savings from consolidation, aggregate award requirement was both unnecessary and improper, and rejection of low offeror (on 2 items) who had not complied with aggregate requirement was not justified 47

Award under initial proposals

Fact that award was made on basis of initial proposals as provided by requests for proposals soliciting maintenance services and issued under 10 U.S.C. 2304(a)(10), which authorizes negotiation when it is "impracticable to obtain competition," does not mean adequate competition required by par. 3–807.1(b)(1) of ASPR was precluded, even though this exception to formal advertising makes no reference to competition. Moreover, evaluation formula of 80 points for technical compliance and 20 points for price that did not verify wage conformance by analysis of cost and pricing data (ASPR 12–1005) and that conducted price analysis (ASPR 3–807.2(b)) instead of cost analysis (ASPR 3–807.2(c)) did not result in pricing uncertainty that warranted negotiation as price analysis based on cost data indicated wage rates were realistic and cost analysis requirement in ASPR 3–807.2(c) does not apply since adequate competition was achieved 346

Commercial sources *v.* professional societies

Propriety of separate treatment

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using com-

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Commercial sources *v.* professional societies—Continued
Propriety of separate treatment—Continued
pilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1-1.301-1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated-- 332

Competitive range formula
Administrative determination
Reso ution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is nct arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range---------- 382

Basis for participation in negotiation
The elimination from negotiation of the incumbent contractor and 12 of the other 20 offerors responding to request for proposals to operate and maintain an Air Force Base under a 1-year cost-plus-a-fixed-fee contract by a Source Selection and Evaluation Board without regard to price, as prescribed by par. 3-805.2 of the Armed Services Procurement Reg., on basis the numerical scores for organization, management, phase-in planning, prior experience, and qualifications of key individuals were not within the competitive range established was proper as use of the point rating system is an appropriate method for determining which proposals are within a competitive range, and while predetermined scores for selecting offers within competitive range is contrary to the flexibility inherent in negotiated procurement, competitive range must be decided on actual array of scores achieved---------- 718

Discussion with all offerors requirement
Actions not requiring
Under request for proposals contemplating cost-plus-incentive fee contract for design, development, fabrication, test, and furnishing of prototypes of four different truck- and trailer-mounted satellite communications terminals, plant visit by team subsequent to submission of best and final offers to assure equitable treatment in cost realism evaluation did not effect reopening of negotiations since plant visits involved unilateral presentations, no offeror was afforded opportunity

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Actions not requiring—Continued
to revise its proposal, and final technical merit ratings had been assigned prior to plant visits. Selection of proposal that achieved highest technical merit rating and was judged to be most cost realistic, where offeror had satisfactory record of past performance, represents greatest value to Govt. rather than proposal based on lower estimated total cost, plus proposed fee 358

The low proposal to furnish occupational and environmental health support services at the Manned Spacecraft Center, Houston, Texas, in which offeror promised work would be done but made no creditable demonstration of how it would be accomplished contained weaknesses of such magnitude and nature so that offer was not within competitive range for procurement and, therefore, conducting written or oral discussions required by NASA Procurement Reg. 3.805–1(a), or definitive negotiation, would not be meaningful or advantageous, since proposal was so materially defective that it could not be made acceptable without major revisions. Furthermore, solicitation did not provide for minority-owned business preference; low offeror was not nonresponsible for reasons of capacity to require referral to Small Business Admin.; Source Evaluation Board was knowledgeable of requirements; and the protest against a solicitation impropriety was not timely filed 865

Failure to discuss

Failure to call in offerors in competitive range for detailed discussions of specific deficiencies in their proposals, and requirement that engineers have Bachelor of Science Degree resulted in award of contract to other than low offeror at substantial increase in price to Govt., which indicates that manner and extent of discussions of proposals with offerors in competitive range were not conducive to obtaining maximum competition. One of primary purposes of conducting negotiations with offerors is to raise to acceptable status those proposals which are capable of being made acceptable, and thereby increase competition, and it is incumbent upon Govt. negotiators to be as specific as practical considerations will permit in advising offerors of corrections required in their proposals. Furthermore, Bachelor of Science Degree requirement should be reconsidered before it is included in future procurements 466

Nonresponsive proposals

Determination by Source Selection Authority that incumbent contractor was technically superior and should be awarded another contract at its higher price for operation and maintenance services to be performed at Remote Tracking Stations based on recommendations of Source Selection Board composed of Evaluation Board and Advisory Council responsible for preparing request for quotations and evaluating offers is supported by record since cost considerations played subordinate role; elimination of incumbent contractor's advantages is not required; reasonable judgment of selection officials is entitled to great weight; rule that there is no obligation to hold discussions if unacceptable proposal would have to be completely revised applying equally to proposals within competitive range; and use of numerical scores for evaluation purposes is not required by statute 198

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Proposal revisions

Late unsolicited price reduction that reflected potential savings to Govt. in procurement of first article sample and quantity of Fuze Assemblies under public exigency provision in 10 U.S.C. 2304(a)(2) properly was not referred to Secretary of Army under par. 3-506(c)(ii), ASPR, for consideration on basis reduction was of extreme importance to Govt. and, therefore, contracting officer was not required to reopen negotiations and conduct further discussions pursuant to 10 U.S.C. 2304(g), since without clarification as to actions contemplated by regulation, monetary savings alone is not sufficient to bring late proposal or modification within category of "extreme importance to Govt."---- 169

Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity---------- 169

Award of contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning disputed differences as self-serving statements of contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution, contracting officials under their vested authority properly determined when to terminate negotiations---------- 393

Technical transfusion or leveling

Fact that negotiations pursuant to 10 U.S.C. 2304(a)(11), which contemplated a cost-plus-fixed-fee contract (CPFF) for systems engineering and research analysis investigation to develop technical interface plan in support of General and Amphibious Military Operations Program at Fort Monmouth, were limited to price on basis technical discussions would compromise proposals through transfusion of ideas, methodology, and concepts, and the most advantageous CPFF proposal was determined on evaluated rather than proposed costs, does not reflect adversely on the award to offeror who received the highest technical rating and offered only realistic, although highest, cost since the written or oral discussion prescribed in 10 U.S.C. 2304(g) is required only when there

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Technical transactions or leveling—Continued
is an opportunity for meaningful discussion and when discussion will not result in preferential treatment or disclose one offeror's innovative solution to another 870

What constitutes discussion

Satisfaction of requirement in 10 U.S.C. 2304(g) that written or oral discussions be held with all offerors within competitive range turns upon particular facts involved as no fixed, inflexible rule can be used to construe requirement. Therefore, content and extent of discussions needed to meet requirement is matter of judgment primarily for determination by procuring agency, and determination is not subject to question unless clearly arbitrary or without reasonable basis provided, of course, that discussions held do not operate to the bias or prejudice of any competitor. Therefore, where opportunity to revise prices constitutes discussion, competition contemplated by 10 U.S.C. 2304(g) was obtained and resulted in most advantageous contracts to Govt. for procurement of operation and maintenance services 161

Effect of negotiation procedures

Procurement of idler pulleys by negotiation rather than by formal advertising and use of brand name or equal purchase description, solicitation of offers from approved sources only, and restriction of procurement to named-part number was in absence of adequate specification data in accord with 10 U.S.C. 2304(a)(10) and par. 3-210.2(xv), Armed Services Procurement Reg. (ASPR), which authorizes negotiation for replacement parts or components in support of specially designed equipment, with ASPR 1-313(c), which provides for procurement of replacement parts from sources that satisfactorily manufactured or furnished parts in past, and with ASPR 1-1206.2(b), which requires salient characteristics to be listed when brand name or equal provision is used, and procurement did not restrict competition since proposals from unapproved sources were not prohibited, and offers on other than named part were considered 546

Although failure to inquire why incumbent contractor furnishing security watchman services, whose proposal was administratively lost, had not submitted proposal was not sound procurement practice, contract negotiated pursuant to sec. 1-3.210 of the Federal Procurement Regs. (FPR) on the basis of a determination and findings (D&F) that it was impracticable to secure competition because only three sources had top security clearance need not be terminated for that reason as lost proposal could only be established by self-serving statements. However, termination of award nevertheless is recommended in view of fact negotiation procedures were used to convert successful contractor's secret clearance to top secret, and the D & F did not satisfy criteria in FPR sec. 1-3.305(b), but rather prequalified the three firms thus restricting competition. Any resolicitation should consider using formal advertising and should treat top security clearance as matter of bidder responsibility 593

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Impracticable to obtain
Propriety of award

Negotiation procedures pursuant to determinations and findings for restoration of National Monument historical structure on basis it was impracticable to secure competition by formal advertising within meaning of 41 U.S.C. 252(c)(10), as implemented by sec. 1–3.210 of the Federal Procurement Regs., having been used to prequalify firms since procurement otherwise was treated as formally advertised, any award under solicitation would be improper, and if resolicited, procurement should be formally advertised. The preselection method of qualifying firms and the falure to synopsize procurement in Commerce Business Daily was restrictive of full and free competiton contemplated by advertising statutes. Furthermore, even under negotiation procedures, prequalification of offerors would be inconsistent with requirement that negotiated procurements be on competitive basis to maximum practical extent---- 569

Memorandum of Understanding in lieu
Canada

Award of research and development contract on "sole-source" basis to Canadian firm pursuant to "Memorandum of Understanding in Field of Cooperative Development Between U.S. Dept. of Defense and Canadian Dept. of Defense Production" (Par. 6–507, ASPR) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be awarded on competitive basis after solicitation from "maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by executive branch in conduct of foreign relations---------- 136

Sole source, generally. (*See* **CONTRACTS, Negotiation, Sole source basis**)
Sole source procurement replacement

Inclusion in a request for proposals of a stationary brake disc drawing furnished without restriction to the Air Force under sole-source contracts in order to create competition or for reverse engineering purposes did not violate proprietary data rights where Govt. contracts law in recognizing data rights also recognizes such data may be lawfully obtained by reverse engineering when the data is not restricted and the Govt. acquires title, and since it is incumbent upon contracting agency to maximize competition where the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement as well as from sole-source buys from current manufacturer of the item. Furthermore, contracting officer in making an award is not obliged to consider possible foreign patent problems since such a possibility is too speculative, complex, and burdensome---------- 778

Cost-plus-incentive fee contracts
Evaluation

Award of a cost-plus-incentive fee contract for Radio Receiving Systems to the low offeror whose proposal numerically scored on the seven technical criteria points established and evaluated as to Past

CONTRACTS—Continued Page

Negotiation—Continued

Cost-plus-incentives fee contracts—Continued

Evaluation—Continued

Performance/Management and cost considerations offered greatest value to the Govt. was a proper exercise of administrative discretion in view of fact a Source Selection Review Board, pursuant to Army Procurement Procedure 1–403.52, concluded the technical proposal of complainant was not technically significantly superior, and since both offerors were rated acceptable as to Past Performance/Management and cost considerations. Furthermore, technical differences between the two proposals did not warrant incurrence of additional costs where the realism of estimated costs was administratively assessed and price was considered an evaluation factor as evidenced in the handling of the use of Government property 738

Cut-off date

Common cut-off date requirement

Although par. 3–805.1(b), ASPR, permits advising offeror that its price is considered too high, there is no mandate that compels procurement activity to offer such advice. Also notwithstanding provision in paragraph for common cutoff date for negotiations, additional time given low offeror to submit best and final offer, which resulted from permitting each offeror same amount of time after discussions were held to submit its best and final offer, was not prejudical to other offerors, nor did it afford low offeror advantage as its offer to furnish operation and maintenance services was low at each stage of evaluation 161

Reopening negotiations

Award of contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning disputed differences as self-serving statements of contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution contracting officials under their vested authority properly determined when to terminate negotiations 393

The incorporation in a procurement by the National Aeronautics and Space Administration (NASA) of a wage determination received from the Dept. of Labor after selection of a contractor but before contract award without conducting further negotiations and allowing offerors to submit revised proposals for on-site data processing services although contrary to NASA PR 12.1005–3 was not an abuse of administrative discretion because validity of the contractor selection was not affected and relative cost position of the two acceptable firms responding to request for proposals did not change, notwithstanding the insignificant errors made by NASA in determining affects of the wage determination and, furthermore, unsuccessful offeror was not only aware of its competitor's proposed costs but was apprised in a debriefing of how its proposal was assessed 686

CONTRACTS—Continued Page
Negotiation—Continued
Determination and findings
Finality

Award of interim procurement for a less than optimum individual emergency breathing device to one of the developers of device under basic order agreement pursuant to a determination and findings (D&F) under 10 U.S.C. 2304(a)(2), which was followed by a Navy implementation of a research and development program to significantly increase effectiveness of device for eventual procurement on competitive basis, although not legally questionable as the D&F authority is final, determination based upon the D&F is. Practices and procedures involved in testing, evaluation, and eventual award indicates informalities that generated noncompetitive situation and, therefore, it is recommended that other qualified firms be given opportunity to submit emergency escape devices for approval as interim sources of supply pending results of the research and development program 801

Discussion with all offerors requirement. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)
Estimate basis
Propriety

Practice of U.S. Procurement Agency in Japan of conducting negotiations in all procurements with high dollar value or operational significance is proper exercise of discretionary right, even though par. 3-805.1, ASPR, permits awards on basis of initial proposals if offerors are so informed and circumstances so warrant. Therefore, fact that low offeror under solicitation for utility plant services was displaced because its best and final offer was its initial proposal that compared reasonably with Govt.'s estimate is not subject to question, although Govt. should have refined its estimate before proposal submission. Furthermore, use of estimate as negotiating tool was in nature of advice that proposals were too high, rather than use of auction technique, and there is no evidence in record that prices were leaked during negotiation 425

Evaluation factors
All offerors informed requirement

Award of contract for procurement of named brand electric siren that was negotiated under 10 U.S.C. 2304(a)(10), which authorizes exception to formal advertising when it is impossible to draft adequate specifications, to manufacturer of brand siren rather than to low offeror who had not been requested to submit sample for testing was improper where record does not indicate immediate award was essential or that there was insufficient time to qualify alternate product, and where use of 10 U.S.C. 2304(a)(10) authority was based on fact it was difficult and not impossible to draft adequate specifications, and request for proposals did not advise offerors of characteristics on which sirens would be tested and evaluated in qualifying alternate products. Future solicitations should contain all information necessary to permit the offer of equal item 458

Conformability of equipment, etc.
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., Technical deficiencies, Negotiated procurement**)

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Cost realism

Under request for proposals contemplating cost-plus-incentive fee contract for design, development, fabrication, test, and furnishing of prototypes of four different truck- and trailer-mounted satellite communications terminals, plant visit by team subsequent to submission of best and final offers to assure equitable treatment in cost realism evaluation did not effect reopening of negotiations since plant visits involved unilateral presentations, no offeror was afforded opportunity to revise its proposal, and final technical merit ratings had been assigned prior to plant visits. Selection of proposal that achieved highest technical merit rating was judged to be most cost realistic, where offeror had satisfactory record of past performance, represents greatest value to Govt. rather than proposal based on lower estimated total cost, plus proposed fee----- 358

Cost *v.* price analysis

Fact that award was made on basis of initial proposals as provided by requests for proposals soliciting maintenance services and issued under 10 U.S.C. 2304(a)(10), which authorizes negotiation when it is "impracticable to obtain competition," does not mean adequate competition required by par. 3-807.1(b)(1) of ASPR was precluded, even though this exception to formal advertising makes no reference to competition. Moreover, evaluation formula of 80 points for technical compliance and 20 points for price that did not verify wage conformance by analysis of cost and pricing data (ASPR 12-1005) and that conducted price analysis (ASPR 3-807.2(b)) instead of cost analysis (ASPR 3-807.2(c)) did not result in pricing uncertainty that warranted negotiation as price analysis based on cost data indicated wage rates were realistic and cost analysis requirement in ASPR 3-807.2(c) does not apply since adequate competition was achieved---------- 346

Criteria

Responsiveness of proposals

Determination that offer evaluated on basis of criteria and assigned weights contained in request for proposals did not meet mandatory requirements for rental of nationwide computer network facilities by means of commercially marketed system called "full-services teleprocessing" with access to common data base and, therefore, offeror should not be allowed to perform live benchmark/demonstration test that would measure proposed system's network capabilities and cost effectiveness was justified because proposal failed to offer for benchmarking system to be delivered and used in performance of contract, whereas successful offeror, operating national network at time of submitting its proposal, met experience requirements of RFP---------- 118

Employees of contractor

Failure to call in offerors in competitive range for detailed discussions of specific deficiencies in their proposals, and requirement that engineers have Bachelor of Science Degree resulted in award of contract to other than low offeror at substantial increase in price to Govt., which indicates that manner and extent of discussions of proposals with offerors in competitive range were not conducive to obtaining maximum competition. One of primary purposes of conducting negotiations with offerors is to

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Employees of contractors—Continued

raise to acceptable status those proposals which are capable of being made acceptable, and thereby increase competition, and it is incumbent upon Govt. negotiators to be as specific as practical considerations will permit in advising offerors of corrections required in their proposals. Furthermore, Bachelor of Science Degree requirement should be reconsidered before it is included in future procurements 466

Erroneous evaluation

Offer to furnish indefinite quantity of automatic data processing services under second request for proposals, following termination of contract for convenience of Govt. because first solicitation was misstated, that was evaluated by adding sum shown for rental and maintenance and ignoring "no charge" phrase, was erroneously evaluated since ambiguity was patent on its face and discrepancy, pursuant to par. 3-804 of ASPR, should have been resolved with offeror. Therefore, negotiations should be reopened for term remaining under contract and if protestant makes best offer, existing contract should be terminated for convenience of Govt. and contract awarded to protestant. This corrective recommendation requires action prescribed by sec. 236 of the Legislative Reorganization Act of 1970 409

Factors other than price

Rule

In the procurement under request for quotations of technical services in support of Tactical Air Control and Defense Systems Interface Program on cost-plus-a-fixed-fee basis, which because services were previously furnished on sole-source basis provided for three-month indoctrination period for any nonincumbent selected for award, the recommendation of the Procurement Advisory Committee, accepted by the contracting officer, that incumbent was best qualified on basis of technical capabilities and competence, although not lowest offeror, evidences no unreasonableness or favoritism, for even after applying Indoctrination Learning Adjustment factor the incumbent rated higher, and it was proper under negotiation procedures to consider factors other than price and to use a point system that included, in addition to price, personnel, experience, technical approach, etc., as an evaluation technique 981

Technical acceptability

Resolution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range 382

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Erroneous evaluation—Continued

Technical acceptability—Continued

Award of contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning disputed differences as self-serving statements of contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution contracting officials under their vested authority properly determined when to terminate negotiations..... 393

Life of equipment

Allegations that low unit price and life cycle costs (LCC) offered on non-set-aside portion of a multi-year, requirements type, contract for oscilloscopes on Qualified Products List (QPL) were so unreasonably low they should not have been used as basis for computing the set-aside offers, and that low unit price resulted from an "auction," constituted a a "buy-in," and was a "token" offer, and that projected life cycle costs were understated, are not supported by the record. The use of a multi-year procurement, as well as the fact the item is on QPL, eliminates probability of a "buy-in," and failure of low offeror on non-set-aside portion to advance its priority for negotiation of the set-aside portion, does not make non-set-aside offer a "token" offer. Furthermore, the LCC, consisting of initial logistic costs and recurring costs, must be accepted as realistic in absence of evidence the evaluation of the LCC information was arbitrary..... 653

In the evaluation of labor surplus set-aside offers under request for proposals (RFP) that contemplated a multi-year, requirements type, life cycle cost (LCC) contract for oscilloscopes on Qualified Products List, the contracting officer, in accordance with terms of RFP, properly adjusted highest unit price awarded on non-set-aside portion of procurement to reflect total anticipated life cost—the LCC procurement method resting upon the premise that it is logical to consider total anticipated life cycle of an item rather than merely its purchase price—and reduced transportation and other cost factors that were considered in evaluating non-set-aside portion of procurement in order to comply with statutory prohibition against payment of a price differential for purpose of relieving economic dislocation in labor surplus areas..... 653

Merger of firms consideration

Record on award of operation and maintenance contracts to low offeror does not evidence determination was influenced by pending merger of low offeror's firm and competitor where firm's past performance under contracts of similar difficulty, its corporate history, and its financial picture were evaluated. Furthermore, to require contracting officer to consider antitrust aspects of pending merger in absence of

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Merger of firms consideration—Continued
judicial authority speaking directly to point would impose intolerable burden on officer and inordinately delay procurement and, moreover, since disclosure of prices was intended only to effectuate merger, "Certification of Independent Price Determination" designed to alleviate competition, was not inaccurately executed ---- 161

Point rating
Advantage to Government award basis

Under request for proposals contemplating cost-plus-incentive fee contract for design, development, fabrication, test, and furnishing of prototypes of four different truck- and trailer-mounted satellite communications terminals, plant visit by team subsequent to submission of best and final offers to assure equitable treatment in cost realism evaluation did not effect reopening of negotiations since plant visits involved unilateral presentations, no offeror was afforded opportunity to revise its proposal, and final technical merit ratings had been assigned prior to plant visits. Selection of proposal that achieved highest technical merit rating and was judged to be most cost realistic, where offeror had satisfactory record of past performance, represents greatest value to Govt. rather than proposal based on lower estimated total cost, plus proposed fee ---- 358

Award of a cost-plus-incentive fee contract for Radio Receiving Systems to the low offeror whose proposal numerically scored on the seven technical criteria points established and evaluated as to Past Performance/Management and cost considerations offered greatest value to the Govt. was a proper exercise of administrative discretion in view of fact a Source Selection Review Board, pursuant to Army Procurement Procedure 1–403.52, concluded the technical proposal of complainant was not technically significantly superior, and since both offerors were rated acceptable as to Past Performance/Management and cost considerations. Furthermore, technical differences between the two proposals did not warrant incurrence of additional costs where the realism of estimated costs was administratively assessed and price was considered an evaluation factor as evidenced in the handling of the use of Government property ---- 738

Competitive range formula

The elimination from negotiation of the incumbent contractor and 12 of the other 20 offerors responding to request for proposals to operate and maintain an Air Force Base under a 1-year cost-plus-a-fixed-fee contract by a Source Selection and Evaluation Board without regard to price, as prescribed by par. 3–805.2 of the Armed Services Procurement Reg., on basis the numerical scores for organization, management, phase-in planning, prior experience, and qualifications of key individuals were not within the competitive range established was proper as use of the point rating system is an appropriate method for determining which proposals are within a competitive range, and while predetermined scores for selecting offers within competitive range is contrary to the flexibility inherent in negotiated procurement, competitive range must be decided on actual array of scores achieved ---- 718

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Point rating—Continued

Evaluation guidelines

Under a National Aeronautics and Space Administration (NASA) solicitation for on-site data processing services on a cost-plus-award-fee basis which indicated both technical and cost factors would be accorded substantially equal weight, NASA PR 3-805.2 does not preclude consideration of cost—evaluated in terms of cost realism, and probable and maximum cost to the Govt.—as significant factor in determining most advantageous proposal, and NASA properly selected low offeror whose proposal although containing minor weaknesses was relatively equivalent technically to the only other acceptable offer received. A spread of 81 points between the two proposals, the low offer scoring 649 points out of a possible 1,000, as compared to 730, does not automatically establish that the higher rated proposal was materially superior, for although technical point ratings are useful as guides, the question of superiority depends on facts and circumstances of each procurement..... 686

Predetermined score

Resolution of technical dispute as to acceptibility of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range... 382

Price primary consideration

Notwithstanding amendment to two requests for proposals (RFPs) that solicited operation and maintenance services to effect price would be specific factor in evaluation was withdrawn, offerors were on notice price would be evaluation factor as RFPs contained SF 33A, which provided that award would be made on basis of most advantageous offer to Govt., price and other factors considered. While failure to inform offerors of relative importance of price is contrary to sound procurement policy as each offeror has right to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality since there is little difference in technical quality of services offered, failure to indicate relative weight of price is not fatal..... 161

Fact that negotiations pursuant to 10 U.S.C. 2304(a)(11), which contemplated a cost-plus-fixed-fee contract (CPFF) for systems engineering and research analysis investigation to develop technical interface plan in support of General and Amphibious Military Operations Program at Fort Monmouth, were limited to price on basis technical discussions would compromise proposals through transfusion of ideas, methology, and concepts, and the most advantageous CPFF proposal

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Price primary consideration—Continued
was determined on evaluated rather than proposed costs, does not reflect adversely on the award to offeror who received the highest technical rating and offered only realistic, although highest, cost since the written or oral discussion prescribed in 10 U.S.C. 2304(g) is required only when there is an opportunity for meaningful discussion and when discussion will not result in preferential treatment or disclose one offeror's innovative solution to another ---- 870

Propriety of evaluation

Determination by Source Selection Authority that incumbent contractor was technically superior and should be awarded another contract at its higher price for operation and maintenance services to be performed at Remote Tracking Stations based on recommendations of Source Selection Board composed of Evaluation Board and Advisory Council responsible for preparing request for quotations and evaluating offers is supported by record since cost considerations played subordinate role; elimination of incumbent contractor's advantages is not required; reasonable judgment of selection officials is entitled to great weight; rule that there is no obligation to hold discussions if unacceptable proposal would have to be completely revised applying equally to proposals within competitive range; and use of numerical scores for evaluation purposes is not required by statute ---- 198

Where U.S. Court of Appeals for District of Columbia Circuit deferred action at request of contractor awarded contract to perform operation and maintenance services for Remote Tracking Stations to reverse or stay District Court's injunctive order until U.S. GAO ruled on protest of unsuccessful offeror that had been filed prior to request for injunctive relief, findings of fact and conclusions of law of District Court are not entitled to comity, for Court of Appeals made it plain that District Court's opinion was not to be considered on merits and, therefore, consistent with GAO's function as described in *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, Court will be advised of GAO's independent views and conclusions ---- 198

Source Selection Board evaluation

The low proposal to furnish occupational and environmental health support services at the Manned Spacecraft Center, Houston, Texas, in which offeror promised work would be done but made no creditable demonstration of how it would be accomplished contained weaknesses of such magnitude and nature so that offer was not within competitive range for procurement and, therefore, conducting written or oral discussions required by NASA Procurement Reg. 3.805–1(a), or definitive negotiation, would not be meaningful or advantageous, since proposal was so materially defective that it could not be made acceptable without major revisions. Furthermore, solicitation did not provide for minority-owned business preference; low offeror was not nonresponsible for reasons of capacity to require referral to Small Business Admin.; Source Evaluation Board was knowledgeable of requirements; and the protest against a solicitation impropriety was not timely filed ---- 865

CONTRACTS—Continued Page
Negotiation—Continued
Late proposals and quotations
Price reduction

Late unsolicited price reduction that reflected potential savings to Govt. in procurement of first article sample and quantity of Fuze Assemblies under public exigency provision in 10 U.S.C. 2304(a)(2) properly was not referred to Secretary of Army under par. 3-506(c)(ii), ASPR, for consideration on basis reduction was of extreme importance to Govt. and, therefore, contracting officer was not required to reopen negotiations and conduct further discussions pursuant to 10 U.S.C. 2304(g), since without clarification as to actions contemplated by regulation, monetary savings alone is not sufficient to bring late proposal or modification within category of "extreme importance to Govt."---- 169

Limitation on negotiation
Propriety

Award of contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning disputed differences as self-serving statements of contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution, contracting officials under their vested authority properly determined when to terminate negotiations---- 393

Prices
Best and final offer

Under request for proposals contemplating cost-plus-incentive fee contract for design, development, fabrication, test, and furnishing of prototypes of four different truck- and trailer-mounted sate lite communications terminals, plant visit by team subsequent to submission of best and final offers to assure equitable treatment in cost realism evaluation did not effect reopening of negotiations since plant visits involved unilateral presentations, no offeror was afforded opportunity to revise its proposal, and final technical merit ratings had been assigned prior to plant visits. Selection of proposal that achieved highest technical merit rating and was judged to be most cost realistic, where offeror had satisfactory record of past performance, represents greatest value to Govt. rather than proposal based on lower estimated total cost, plus proposed fee---- 358

Cost and pricing data evaluation

Fact that award was made on basis of initial proposals as provided by requests for proposals soliciting maintenance services and issued under 10 U.S.C. 2304(a)(10), which authorizes negotiation when it is "impracticable to obtain competition," does not mean adequate competition required by par. 3-807.1(b)(1) of ASPR was precluded, even though this exception to formal advertising makes no reference to competition. Moreover, evaluation formula of 80 points for technical compliance and

CONTRACTS—Continued Page

Negotiation—Continued

Prices—Continued

Cost and pricing data evaluation—Continued

20 points for price that did not verify wage conformance by analysis of cost and pricing data (ASPR 12–1005) and that conducted price analysis (ASPR 3–807.2(b)) instead of cost analysis (ASPR 3–807.2(c)) did not result in pricing uncertainty that warranted negotiation as price analysis based on cost data indicated wage rates were realistic and cost analysis requirement in ASPR 3–807.2(c) does not apply since adequate competition was achieved 346

Life cycle cost *v.* purchase price

In the evaluation of labor surplus set-aside offers under request for proposals (RFP) that contemplated a multi-year, requirements type, life cycle cost (LCC) contract for oscilloscopes on Qualified Products List, the contracting officer, in accordance with terms of RFP, properly adjusted highest unit price awarded on non-set-aside portion of procurement to reflect total anticipated life cost—the LCC procurement method resting upon the premise that it is logical to consider total anticipated life cycle of an item rather than merely its purchase price—and reduced transportation and other cost factors that were considered in evaluating non-set-aside portion of procurement in order to comply with statutory prohibition against payment of a price differential for purpose of relieving economic dislocation in labor surplus areas 653

Propriety of evaluation

Resolution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range ... 382

Technical status of low offeror

Under a National Aeronautics and Space Administration (NASA) solicitation for on-site data processing services on a cost-plus-award-fee basis which indicated both technical and cost factors would be accorded substantially equal weight, NASA PR 3–805.2 does not preclude consideration of cost—evaluated in terms of cost realism, and probable and maximum cost to the Govt.—as significant factor in determining most advantageous proposal, and NASA properly selected low offeror whose proposal although containing minor weaknesses was relatively equivalent technically to the only other acceptable offer received. A spread of 81 points between the two proposals, the low offer scoring 649 points out of a possible 1,000, as compared to 730, does not automatically establish that the higher rated proposal was materially superior, for although technical point ratings are useful as guides, the question of superiority depends on facts and circumstances of each procurement 686

CONTRACTS—Continued Page

Negotiation—Continued

Propriety

Procedures acceptability

Although par. 3-805.1(b), ASPR, permits advising offeror that its price is considered too high, there is no mandate that compels procurement activity to offer such advice. Also notwithstanding provision in paragraph for common cutoff date for negotiations, additional time given low offeror to submit best and final offer, which resulted from permitting each offeror same amount of time after discussions were held to submit its best and final offer, was not prejudicial to other offerors, nor did it afford low offeror advantage as its offer to furnish operation and maintenance services was low at each stage of evaluation 161

Procurement of idler pulleys by negotiation rather than by formal advertising and use of brand name or equal purchase description, solicitation of offers from approved sources only, and restriction of procurement to named-part number was in absence of adequate specification data in accord with 10 U.S.C. 2304(a)(10) and par. 3-210.2(xv), Armed Services Procurement Reg. (ASPR), which authorizes negotiation for replacement parts or components in support of specially designed equipment, with ASPR 1-313(c), which provides for procurement of replacement parts from sources that satisfactorily manufactured or furnished parts in past, and with ASPR 1-1206.2(b), which requires salient characteristics to be listed when brand name or equal provision is used, and procurement did not restrict competition since proposals from unapproved sources were not prohibited, and offers on other than named part were considered 546

Public exigency

Administratively created

Sole source award for procurement of band III variable heads for radio relay sets from Canadian Commerical Corporation, who together with its subcontractor—Canadian Marconi Corporation (CCC/CMC)—developed bands I and II in contemplation of U.S./Canada memorandum of understanding for defense production, which was made on basis of absence of engineering drawings suitable for competitive procurement due to delinquency of CCC/CMC in furnishing data package, and urgency of need for heads, will not be questioned, as urgency of procurement is supported by Determination and Findings of public exigency that is final pursuant to 10 U.S.C. 2310(b). However, decisions of procurement agency contributing largely to undesirable choice of sole source award, future procurement actions should reflect competition required by statutory procurement system 57

Record of negotiation

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes 393

CONTRACTS—Continued Page

Negotiation—Continued

Reopening

Erroneous evaluation of offer

Offer to furnish indefinite quantity of automatic data processing services under second request for proposals, following termination of contract for convenience of Govt. because first solicitation was misstated, that was evaluated by adding sum shown for rental and maintenance and ignoring "no charge" phrase, was erroneously evaluated since ambiguity was patent on its face and discrepancy, pursuant to par. 3-804 of ASPR, should have been resolved with offeror. Therefore, negotiations should be reopened for term remaining under contract and if protestant makes best offer, existing contract should be terminated for convenience of Govt. and contract awarded to protestant. This corrective recommendation requires action prescribed by sec. 236 of the Legislative Reorganization Act of 1970 409

Replacement contract

Propriety

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine 253

Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity 169

Cancellation

Cancellation of request for proposals (RFP) for inspection, maintenance, and repair of 3 types of electron microscopes because specifications were considered inadequate for competitive procurement, and reissuance of RFP on basis award "would be made in the aggregate, price, and other factors considered," did not result in price competition contemplated by 1-3.807-1(b)(1) of Federal Procurement Regs. since separate awards under initial RFP would have obtained services for less. Therefore, since justification for aggregate award is sound only if Govt. realizes substantial savings from consolidation, aggregate award requirement was both unnecessary and improper, and rejection of low offeror (on 2 items) who had not complied with aggregate requirement was not justified 47

CONTRACTS—Continued Page

Negotiation—Continued

Public exigency—Continued

Lost

Although failure to inquire why incumbent contractor furnishing security watchman services, whose proposal was administratively lost, had not submitted proposal was not sound procurement practice, contract negotiated pursuant to sec. 1-3.210 of the Federal Procurement Regs. (FPR) on the basis of a determination and findings (D&F) that it was impracticable to secure competition because only three sources had top security clearance need not be terminated for that reason as lost proposal could only be established by self-serving statements. However, termination of award nevertheless is recommended in view of fact negotiation procedures were used to convert successful contractor's secret clearance to top secret, and the D&F did not satisfy criteria in FPR sec. 1-3.305(b), but rather prequalified the three firms thus restricting competition. Any resolicitation should consider using formal advertising and should treat top security clearance as matter of bidder responsibility 593

Sole source basis

Broadening competition

Sole source award for procurement of band III variable heads for radio relay sets from Canadian Commercial Corporation, who together with its subcontractor—Canadian Marconi Corporation (CCC/CMC)—developed bands I and II in contemplation of U.S./Canada memorandum of understanding for defense production, which was made on basis of absence of engineering drawings suitable for competitive procurement due to delinquency of CCC/CMC in furnishing data package, and urgency of need for heads, will not be questioned, as urgency of procurement is supported by Determination and Findings of public exigency that is final pursuant to 10 U.S.C. 2310(b). However, decisions of procurement agency contributing largely to undesirable choice of sole source award, future procurement actions should reflect competition required by statutory procurement system 57

In the procurement under request for quotations of technical services in support of Tactical Air Control and Defense Systems Interface Program on cost-plus-a-fixed-fee basis, which because services were previously furnished on sole-source basis provided for three-month indoctrination period for any nonincumbent selected for award, the recommendation of the Procurement Advisory Committee, accepted by the contracting officer, that incumbent was best qualified on basis of technical capabilities and competence, although not lowest offeror, evidences no unreasonableness or favoritism, for even after applying Indoctrination Learning Adjustment factor the incumbent rated higher, and it was proper under negotiation procedures to consider factors other than price and to use a point system that included, in addition to price, personnel, experience, technical approach, etc., as an evaluation technique 981

Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient,

CONTRACTS—Continued Page

Negotiation—Continued

Sole source basis—Continued

Broadening competition—Continued

and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1–3.101(c)) that is not justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portions of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees 987

Replacement contract for diverted items

Military assistance to foreign countries

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine 253

Specifications unavailable

Basis for exception to formal advertising

Award of contract for procurement of named brand electric siren that was negotiated under 10 U.S.C. 2304(a)(10), which authorizes exception to formal advertising when it is impossible to draft adequate specifications, to manufacturer of brand siren rather than to low offeror who had not been requested to submit sample for testing was improper where record does not indicate immediate award was essential or that there was insufficient time to qualify alternate product, and where use of 10 U.S.C. 2304(a)(10) authority was based on fact it was difficult and not impossible to draft adequate specifications, and request for proposals did not advise offerors of characteristics on which sirens would be tested and evaluated in qualifying alternate products. Future solicitations should contain all information necessary to permit the offer of equal item 458

Procurement of idler pulleys by negotiation rather than by formal advertising and use of brand name or equal purchase description, solicitation of offers from approved sources only, and restriction of procurement to named-part number was in absence of adequate specification data in accord with 10 U.S.C. 2304(a)(10) and par. 3–210.2(xv), Armed Services Procurement Reg. (ASPR), which authorizes negotiation for replacement parts or components in support of specially designed equipment, with ASPR 1–313(c), which provides for procurement of replacement parts from sources that satisfactorily manufactured or furnished parts in past, and with ASPR 1–1206.2(b), which requires salient characteristics to be listed when brand name or equal provision is used, and

CONTRACTS—Continued Page

Negotiation—Continued

Specifications unavailable—Continued

Basis for exception to formal advertising—Continued

procurement did not restrict competition since proposals from unapproved sources were not prohibited, and offers on other than named part were considered 546

Two-step procurement. (*See* **BIDS, Two-step procurement**)

Offer and acceptance

Ambiguity effect

Patent ambiguity

Offer to furnish indefinite quantity of automatic data processing services under second request for proposals, following termination of contract for convenience of Govt. because first solicitation was misstated, that was evaluated by adding sum shown for rental and maintenance and ignoring "no charge" phrase, was erroneously evaluated since ambiguity was patent on its face and discrepancy, pursuant to par. 3-804 of ASPR, should have been resolved with offeror. Therefore, negotiations should be reopened for term remaining under contract and if protestant makes best offer, existing contract should be terminated for convenience of Govt. and contract awarded to protestant. This corrective recommendation requires action prescribed by sec. 236 of the Legislative Reorganization Act of 1970 409

Bid status

Site inspection failure

Failure of low bidder to attend prebid site inspection required by an invitation for manufacture and installation of Thermal Shock Chamber that provided "in no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract," does not require rejection of low bid on basis acceptance of bid would be prejudicial to other bidders as purpose of site visit provisions of invitation was to warn bidders that site conditions would affect cost of performance and that bidder assumed risk of any cost of performance due to observable site conditions, as well as to provide for Govt.'s acceptance notwithstanding bidder's failure to inspect—an acceptance which would effectively bind bidder to perform in accordance with advertised terms and specifications—and to protect the Govt. against bid withdrawal or claim after contract award 955

Patents. (*See* **PATENTS**)

Payments

Absence of unenforceability of contracts. (*See* **PAYMENTS, Absence or unenforceability of contracts**)

Assignments. (*See* **CLAIMS, Assignments**)

Conflicting claims

Surety *v.* Internal Revenue Service

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is

CONTRACTS—Continued Page
Payments—Continued
Conflicting claims—Continued
Surety *v.* Internal Revenue Service—Continued
under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by suerty under its payment bond ---- 262

Progress
Discount
Provision in an invitation for bids (IFB) prohibiting consideration of discounts for payment within less than 20 days does not become inapplicable because bidder requested progress payments if awarded a contract and, therefore, a prompt payment discount of 2 percent for payment within a 10-day period was properly disregarded in evaluation of bids pursuant to sec. 1–2.407–3(c) of the Federal Procurement Regs., which prohibits evaluation of prompt payment discounts for time periods less than specified in the IFB. Although the Govt. is entitled to a discount on any part of delivery payments applied in liquidation of progress payments, bids under competitive bidding requirements must be evaluated on basis prescribed in the invitation ---- 614

Suspension
Equal opportunity program compliance
Although suspension of progress payments for violations of standard Equal Opportunity clause in contract is sanction which is authorized by sec. 209(a)(5) of E.O. 11246, under regulations of Dept. of Labor final decision for invoking sanctions referred to in 41 CFR 60–1.24(c)(3) is for determination only after contractor has been afforded opportunity for hearing. Furthermore, even though contractor's compliance or noncompliance with Equal Opportunity clause is question of fact, 41 CFR 60–1.1 specifically excludes equal opportunity matters from determination under Disputes clause, and determination responsibility therefore vests in Contract Compliance Officer or other officials regularly involved in equal opportunity programs. Thus, contractor's compliance posture is for consideration under regulations and not Progress Payment clause and progress payments may not be suspended without hearing ---- 476

Withholding
Replacement contract excess costs liability
Excess costs that are due Govt. incident to replacement contract awarded upon default by original contractor may be deducted from amount earned but withheld from defaulting contractor and excess costs transferred from appropriation account in which held to miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with general rule that excess costs recovered from defaulting contractors or their sureties are required by sec. 3617, R.S., 31 U.S.C. 484, to be deposited in 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 ---- 45

CONTRACTS—Continued Page

Payments—Continued

Withholding—Continued

Surety's request

A surety who requested the Govt. to withhold funds due a defaulting contractor under janitorial service contract and who met its obligations under performance bond for the excess costs to the contracting agency to complete the contract is not liable in an amount that exceeds its obligation under the payment bond for the withheld funds that were turned over by agency to Labor Dept. to cover wage deficiencies under defaulted contract as well as another contract. The surety did not complete contract itself and having only guaranteed contract performance at specified price, it is not liable for wage underpayments that it did not gurantee. To hold surety liable for obligations not contemplated by performance bond would violate general rule of the Law of Suretyship that no one incurs liability for another unless expressly agreeing to be bound------- 633

Performance

Risk allocation

In absence of clear and convincing evidence that contracting officials erred in judging minimum needs of Govt., U.S. GAO will not substitute its judgment as to sufficiency of technical data package furnished under invitation for radio sets, nor is invitation considered to be legally defective since fair competition was not precluded where bidders were informed contractor would be required to successfully manufacture contract end items and to bear cost of attaining stated functional or performance requirements, which is adequate notice to sophisticated bidders to scrutinize technical requirements and to price any significant unknowns for which they and not Govt. would be responsible for correcting, and which is sufficient allocation of performance risk to assure competition-- 219

Price adjustment

Life cycle costs

Target *v.* measured life cycle

Although award of non-set-aside portion of a multi-year, requirements type, life cycle cost contract for oscilloscopes was made on basis of lowest evaluated target life cycle cost, the final amount to be paid contractor under price adjustment provision of solicitation will be based upon measured life cycle, and the total target price will be paid only if measured life cycle cost is equal to or less than the target (bid) life cycle cost, and if measured life cycle cost exceeds the target life cycle cost, the amount to be paid will be reduced pursuant to formula in request for proposals on basis the contractor provided hardware with demonstrated values less than the predicted values used as basis for award---------- 653

Prices

"Open market" *v.* Federal Supply System

Firm who had yearly supply contract with General Services Administration (GSA) for carpet servicing in Govt. buildings within designated area at specified price but accepted oral order from agency in another contractor's area may not be paid higher price claimed on basis

CONTRACTS—Continued Page

Prices—Continued

"Open Market" *v.* Federal Supply System—Continued

of entitlement to be reimbursed as for "open market" job at commercial prices. Firm cognizant of limitations imposed by GSA contracts is charged with notice of lack of employee authority to obligate Govt. and should have advised agency of its error. Since service was not within urgency exception of contract, error in procuring services on open market rather than from schedule contract does not legally obligate Govt. beyond extent of price stipulated 530

Privity

Subcontractors

Prime contractor nonresponsible

Subcontractor's claim for value of inventory delivered to Govt. following partial termination of prime contract and suspension of all subcontracting work may not be paid since Govt. met its contract obligations by payment to prime contractor even though prime failed to satisfy subcontractor claims within 10 days from payment by Govt. as stipulated in termination settlement agreement. Contention that contracting agency held itself out as final customer is not for consideration in view of fact par. 8-209.1, ASPR, denies subcontractors any contractual rights against Govt., and circumstances involved do not negate "no privity" rule, and furthermore subcontractor's termination inventory is required to be disposed of in accordance with secs. VIII and XXIV of ASPR 377

Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)

Protests

Abeyance pending court action

Consideration nonetheless by General Accounting Office

Notwithstanding the general policy of the General Accounting Office (GAO) is not to issue a decision on the merits of a protest where material issues involved are likely to be disposed of in litigation before a court of competent jurisdiction, since order of the United States District Court in connection with a mistake in bid claim reasonably contemplates a decision from GAO, the merits of the case have been considered 706

Award withheld pending General Accounting Office decision

Exceptions

The award of a contract for operation and maintenance of an Air Force Base while a protest from the incumbent contractor was pending was in accord with par. 2-407.8(b)(3) of the Armed Services Procurement Regulation (ASPR), which prescribes that award may be made during pendency of a protest if items are urgently needed, delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award will otherwise be advantageous to Govt. Prompt award of new contract, which called for an increased scope of work, was required in order to meet planned starting date and to avoid risk of labor problems and, furthermore, the contracting agency complied with ASPR 2-407.8(b)(2) by notifying the General Accounting Office of intent to award on date the award was made 718

524-843 O—74——15

CONTRACTS—Continued Page

Protests—Continued

Court injunction denied

Effect on merits of complaint

Where U.S. Court of Appeals for District of Columbia Circuit deferred action at request of contractor awarded contract to perform operation and maintenance services for Remote Tracking Stations to reverse or stay District Court's injunctive order until U.S. GAO ruled on protest of unsuccessful offeror that had been filed prior to request for injunctive relief, findings of fact and conclusions of law of District Court are not entitled to comity, for Court of Appeals made it plain that District Court's opinion was not to be considered on merits and, therefore, consistent with GAO's function as described in *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, Court will be advised of GAO's independent views and conclusions ---------- 198

Remedial relief requirement

Bidder whose letters to contracting agency protesting the successful contractor had submitted nonresponsive bid were ignored and whose protest was filed with the U.S. GAO after completion of contract did not file a timely protest under sec. 20.2(a) of the Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)), which provides means by which protests may be expeditiously received at a stage in the procurement when some effective remedial action may be taken on meritorious protests, and which states intent of the section is to secure resolution of the matter when some meaningful relief may be afforded, and since contract has been completely performed, and GAO is unable to grant any meaningful relief, the untimely protest will not be considered ---------- 792

Solicitation improprieties

Although timeliness of a protest that a bid evaluation factor was unreasonable failed to meet standard in par. 20.2(a) of Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)) that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening, protest will be considered by the U.S. General Accounting Office since it raises issues significant to practices and procedures utilized by contracting agency -- 905

Specificiations defective

Timeliness of protest

Since weight of ripper required to be mounted on crawler tractors was significant in determining ruggedness, strength, and desirability of ripper, low bid that offered ripper with weight deficiency of 22 percent from approximate requirements stated in invitation for bids properly was rejected in light of contracting agency's responsibility to draft specifications that meet actual needs of Govt. and to determine responsiveness of bids, and record does not show rejection was arbitrary, capricious, or was not based on substantial evidence. Doubt as to weight difference and its effect on competition, and belief minimum and not approximate requirements should have been used to insure equal bidding, are matters that must be raised prior to bid opening as provided in 4 CFR 20.2(a), the Interim Bid Protest Procedures and Standards ------ 500

CONTRACTS—Continued Page

Protests—Continued

Timeliness

Adverse action basis determination

The contention that low offeror under step one of a two-step procurement was unfairly granted additional time to qualify its initial unacceptable proposal and, therefore, should not have been permitted to participate in step two of the procurement not having been filed with the U.S. GAO within 5 days of notification of adverse action (4 CFR 20), the contention may not be considered as a timely protest, nor may the untimely protest be considered either for "good cause," since there was no compelling reason which prevented protestant from filing its protest within the required time, or on the basis that protestant raised issues significant to procurement practices or procedures, which refers to the presence of a principle of widespread interest---------- 821

Filing in other than General Accounting Office

Determination by SBA Size Appeals Board that two of the firms bidding on a procurement containing a 50 percent set aside for award to labor surplus area concerns were affiliated through common management and low bidder on the non-set-aside, one of the two firms, could not be classified as a small business concern as of date of bid opening for purposes of the set-aside priority is a "conclusive" determination that will not be reviewed by the U.S. General Accounting Office (GAO) since no evidence or argument was presented that was not considered by Board. Furthermore, protest to Board without a prior decision thereon by cognizant SBA regional office is permitted pursuant to 13 CFR 121.3-6(b)(1)(ii); allegations that protest procedures were not followed should have been presented to Board; and delayed protest filed with GAO is untimely under 4 CFR 20.2(a) and will not be considered---------- 886

Limitations

Time limitations imposed by 4 CFR 20.2(a) of Interim Bid Protest Procedures and Standards provisions for filing protest, first with contracting agency and then with U.S. GAO, are intended to provide effective remedial action and must be observed. Although protest that successful bidder was not responsible—protest that does not involve impropriety—was timely filed with contracting agency, may not be considered by GAO since protest was not filed within 5 days of notification of initial adverse agency action. Protest may not be considered for "good cause"—compelling reason for delayed filing beyond protestor's control—or on basis significant issue of procurement practices or procedures was raised, because protest challenging responsibility of bidder involves neither exception to timely filing of protest---------- 20

Since U.S. GAO bid protest regulations in effect prior to Feb. 7, 1972, effective date of "Interim Bid Protest Procedures and Standards," did not set specific limitation for filing of protests, contractor who protested July 29, 1971, award of contract to contracting agency on December 1, 1971, which was denied Feb. 16, 1972, may have subsequent protest filed with GAO within 5 days of notification of adverse agency action considered timely filed under bid protest procedures made effective Feb. 7, 1972, 4 CFR 20.2(a)---------- 332

CONTRACTS—Continued Page

Protests—Continued

Timeliness—Continued

Limitations—Continued

Protest against cancellation of an invitation for bids and the resolicitation of the procurement which was filed with the U.S. GAO 6 months after the cancellation and resolicitation, and only after the protestant was unsuccessful in obtaining an award for the resolicited procurement, was untimely filed pursuant to section 20.2(a) of the Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)), which provides that "bid protests shall be filed not later than 5 (working) days after the basis for the protest is known or should have been known, whichever is earlier"---------- 792

Solicitation improprieties

Fact that penal sums of performance and payment bonds are required in lesser amounts than sum stated for bid guarantee in invitation for bids is not indicative that bid guarantee requirement was excessive where contracting officer exercised discretion under par. 10–102.3 of Armed Services Procurement Reg. by requiring bid bond to be in amount not less than 20 percent of bid price. Furthermore, complaint in matter having been filed after bid opening, it is untimely under sec. 20.2 of the Interim Bid Protest Procedures and Standards of the U.S. GAO (Title 4 of Code of Federal Regs.) which prescribes that protest of an impropriety that is apparent before bid opening must be filed prior to bid opening-- 184

The low proposal to furnish occupational and environmental health support services at the Manned Spacecraft Center, Houston Texas, in which offeror promised work would be done but made no creditable demonstration of how it would be accomplished contained weaknesses of such magnitude and nature so that offer was not within competitive range for procurement and, therefore, conducting written or oral discussions required by NASA Procurement Reg. 3.805-1(a), or definitive negotiation, would not be meaningful or advantageous, since proposal was so materially defective that it could not be made acceptable without major revisions. Furthermore, solicitation did not provide for minority-owned business preference; low offeror was not nonresponsible for reasons of capacity to require referral to Small Business Admin.; Source Evaluation Board was knowledgeable of requirements; and the protest against a solicitation impropriety was not timely filed---------- 865

Untimely protest consideration basis

In view of fact U.S. Court of Appeals for District of Columbia appears to contemplate including decision of U.S. GAO in its consideration of appeal taken to denial by U.S. District Court for District of Columbia of request for preliminary injunction to prevent performance of operation and maintenance contracts pending decision by GAO to protest filed prior to filing of motion in District Court, issues raised in bid protest have been resolved notwithstanding bid protest would have been dismissed as untimely under GAO's Interim Bid Protest Procedures and Standards (4 CFR 20 *et seq.*) but for interest and involvement of Court of Appeals---------- 161

Although protest relative to an award of a labor surplus set-aside at a unit price below that made on the non-set-aside portion of a procurement for oscilloscopes under request for proposals contemplating a multi-year, requirements type, life cycle cost (LCC) contract was untimely

CONTRACTS—Continued Page

Protests—Continued

Timeliness—Continued

Untimely protest consideration basis—Continued

filed, since protest raises a significant question relative to proper method for determining unit purchase prices under labor set-aside portion of an LCC procurement, protest will be considered. However, as alleged improprieties other than those contained in the solicitation must be filed, pursuant to 4 CFR 20.2(a), "not later than 5 days after the basis for the protest is known or should have been known," the issue that auction technique prohibited by par. 3-805.1(b) of Armed Services Procurement Reg. was employed by contracting agency may not be considered 653

Although timeliness of a protest that a bid evaluation factor was unreasonable failed to meet standard in par. 20.2(a) of Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)) that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening, protest will be considered by the U.S. General Accounting Office since it raises issues significant to practices and procedures utilized by contracting agency .. 905

Tolling of bid acceptance period

Although in 50 Comp. Gen. 357 it was held that protest of a procurement to the United States GAO within the offeror's acceptance period would be viewed as continuing the protestant's bid in being, pending disposition of protest and, if proper, for a reasonable time thereafter, even without an express extension of the bid, the period for which an extension should be considered binding upon the protesting bidder must be decided on the basis of all of the circumstances involved. Therefore, in view of the contention of protestant that due to changes in production and manufacturing economics its bid was not extended beyond the last extension of bid acceptance time period, which expired on date of the Comptroller General's decision sustaining its protest, because to accept an award at its bid price would result in a loss contract, contracting agency's attempt to award a valid contract on basis of the original bid price was ineffective. But sec. B-177165, August 23, 1973 863

Purchase orders. (*See* **PURCHASES**)

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products.**)

Requirements

Estimated amount basis

Alternative bidding basis

The Federal Supply System in procurement of the Govt.'s requirements for electronic data processing tapes finding it unfeasible to contact the many using agencies to obtain estimates of future requirements in order to provide basis for bidding as required by sec. 1-3.409(b)(1) of Federal Procurement Regs. (FPR), properly listed past sales in the solicitation as a reasonable alternative, and fact that prior purchase figures if updated would have reflected significant increase is no basis to conclude bidders were misled or that the invitation for bids was defective, nor is there basis to object to the solicitation for failing to include a maximum limit on contractor's total obligation since FPR 1-3.409(b), which is stated in permissive language, imposes no mandatory direction to specify maximum and minimum quantity limitations when not feasible to do so 732

CONTRACTS—Continued Page

Requirements—Continued

Guarantees

"No guarantee" effect

A contract awarded under a Federal Supply Service invitation for bids which solicited in the Scope of Contract provision the "normal supply requirements" for electronic data processing tapes, and which included in the Estimated Sales provision the clause "no guarantee is given that any quantities will be purchased" is not an invalid contract or contract that is unenforceable for lack of mutuality, for under rule of contract construction, the intent and meaning of a contract is not determined from an isolated section or provision but from the entire contract, and "no guarantee" clause appearing in Estimated Sales provision rather than Scope of Contract provision containing the requirements language is indicative the clause refers to schedule of previous purchases, or to estimates reflected in Estimated Sales provision, and not to the purchase obligations of the Government under the contract..... 732

Research and development

Foreign Government participation

Canadian Commercial Corporation award

Award of research and development contract on "sole-source" basis to Canadian firm pursuant to "Memorandum of Understanding in Field of Cooperative Development Between U.S. Dept. of Defense and Canadian Dept. of Defense Production" (Par. 6-507, ASPR) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be awarded on competitive basis after solicitation from "maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by executive branch in conduct of foreign relations..... 136

Practices and procedures

Created noncompetitive situation

Award of interim procurement for a less than optimum individual emergency breathing device to one of the developers of device under basic order agreement pursuant to a determination and findings (D&F) under 10 U.S.C. 2304(a)(2), which was followed by a Navy implementation of a research and development program to significantly increase effectiveness of device for eventual procurement on competitive basis, although not legally questionable as the D&F authority is final, determination based upon the D&F is. Practices and procedures involved in testing, evaluation, and eventual award indicates informalities that generated noncompetitive situation and, therefore, it is recommended that other qualified firms be given opportunity to submit emergency escape devices for approval as interim sources of supply pending results of the research and development program..... 801

Sales. (*See* **SALES**)

Samples. (*See* **CONTRACTS, Specifications, Samples**)

Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)

CONTRACTS—Continued Page

Specifications

Addenda acknowledgment

Under a two-step procurement, failure of offerors to acknowledge receipt of amendments to the first step of the solicitation as provided in the Request for Technical Proposals does not require rejection of their proposals since any defects in the acknowledgment of amendments in the first step of a two-step procurement may be waived by the Govt. to maximize competition, which is the fundamental purpose of the two-step procedure. Moreover, unlike procedure under a formally advertised procurement, consideration of an offer that failed to acknowledge an amendment to the first step would not be prejudicial to other offerors in view of fact there is no public opening of proposals or submission of prices, and as a result no binding contract arises from acceptance and evaluation of a technical proposal. Furthermore, purpose of amendments is conformity to the substantive content of an amendment and not conformity with the acknowledgment requirement---------- 726

Adequacy

Legal *v.* technical acceptability considerations

In absence of clear and convincing evidence that contracting officials erred in judging minimum needs of Govt., U.S. GAO will not substitute its judgment as to sufficiency of technical data package furnished under invitation for radio sets, nor is invitation considered to be legally defective since fair competition was not precluded where bidders were informed contractor would be required to successfully manufacture contract end items and to bear cost of attaining stated functional or performance requirements, which is adequate notice to sophisticated bidders to scrutinize technical requirements and to price any significant unknowns for which they and not Govt. would be responsible for correcting, and which is sufficient allocation of performance risk to assure competition---------- 219

Operational methods requirement

Requirement that bids under invitation soliciting custodial services be accompanied by outline of bidder's proposed method of operation as to job and work force, method of supervision, types and quantities of equipment, performance schedule is matter of bidder responsibility and not bid responsiveness, notwithstanding invitation provision for mandatory rejection of bids that failed to furnish required information, since method of operation pertains to "know-how," which is element of responsibility as specifications form basis for actual work requirement. However, should it be deemed desirable to require outline of bidder's method of operation, invitation should state purpose of requirement and how outline will be considered in selection of successful bidder and in administration of contract---------- 389

Ambiguous

Bidder action requirement

Prior to bid opening

Where an invitation for bids contained "Option to Increase Quantities" and "Method of Award" clauses, but did not provide for evaluation or exercise of an option at the time of contract award, contracting agency properly did not evaluate option prices in determining low bid. Furthermore, lack of any reference to the evaluation or exercise of option at time

CONTRACTS—Continued Page

Specifications—Continued

Ambiguous—Continued

Bidder action requirement—Continued

Prior to bid opening—Continued

of award was sufficient to inform bidders that option prices were not to be considered in evaluation of bids, and in any event if a bidder is unsure as to meaning of a provision in an invitation, proper time for raising a question is prior to bid opening 614

Changes, revisions, etc.

Explanation, etc., requirement

Where specification provision for procurement of turbine power generators which stated gear box component of generator "shall be of proven design recommended and in use by manufacturer of gas turbine engine" was literally interpreted to require furnishing more expensive gear box currently in use by manufacturer as opposed to furnishing less expensive gear box that has been used by manufacturer, bidders did not compete on equal terms to prejudice of bidder who would have submitted lower bid if gear requirement had been clearly stated and, therefore, invitation for bids should be canceled since award under solicitation would be invalid because one bidder had been prejudiced in preparation of its bid, and any resolicitation should make prospective bidders aware of actual needs as required by par. 1.1201 of ASPR 87

Conflicting specification provisions

Brand name or equal and descriptive literature clauses

The cancellation after bid opening of an invitation for bids for marine sanitary facilities because brand name or equal clause required by sec. 1-1.307-6(a)(2) of the Federal Procurement Regs. had been omitted, and inclusion of the clause in the reissued invitation was proper as clause provides a vehicle for identifying and evaluating product offered. However, inclusion of a descriptive literature requirement in the new invitation for purpose of determining the "general overall compliance with the specifications and drawings" is not in consonance with the brand name or equal requirement and nonresponsiveness of bidders to the requirement is symptomatic of deficiencies in the invitation. In addition, because use of the descriptive literature clause was unnecessary, and because invitation contained no specific component designation of the equal product, second invitation was ambiguous and misleading and also should be canceled and readvertised under revised specifications ... 827

Amendments

Bidder's, etc., responsibility to request

Under an invitation for bids (IFB) which provided for preparation of personal property for shipment under three schedules—outbound services; inbound services; and intra-city and intra-area moves—each schedule further divided into three distance areas, and for evaluation of bids on the total aggregate price of all items within an area of performance under a given schedule, and that bidder must bid on all items within specified area of performance for a given schedule, the acceptance of an "all or none" bid which was not low in all areas was not precluded, and award to the bidder submitting the low, responsive bid for the combined Schedules I and II was proper. Furthermore, bidder erroneously

CONTRACTS—Continued Page
Specifications—Continued
Amendments—Continued
Bidder's etc., responsibility to request—Continued
informed that "all or none" bids must be low in all areas of all schedules, who made no effort to see that a clarifying amendment was issued, assumed the risk that resolution of question of law raised would not be sustained upon review---- 756

Furnishing requirement

Bid transmitted by Telex system because amendment advancing bid opening date was not received until within 4 hours of bid opening time due to incorrect listing of bidder's address was properly rejected, even though bidder was advised during telephonic inquiry to use whatever means were available to transmit bid and had subsequently confirmed bid, since invitation for bids did not authorize telegraphic bids and late receipt of confirmation bid was not excusable. Although amendment changes are required to be furnished everyone sent invitation, procurement activity is not insurer of prompt delivery and, therefore, cancellation of amendment is not required because it was inadvertently misdirected. Propriety of procurement rests on obtaining adequate competition and reasonable prices and not on affording every possible prospective bidder opportunity to bid---- 281

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)
Changes, revisions, etc.
After bid opening
Price, quantity, or quality effect

Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by statement no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bidders. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresponsive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids---- 190

"Cardinal change" doctrine

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine- 253

CONTRACTS—Continued Page

Specifications—Continued

Conformability of equipment, etc., offered

Administrative determination

Negotiated procurement

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes ---------- 393

Approximated requirements

Since weight of ripper required to be mounted on crawler tractors was significant in determining ruggedness, strength, and desirability of ripper, low bid that offered ripper with weight deficiency of 22 percent from approximate requirements stated in invitation for bids properly was rejected in light of contracting agency's responsibility to draft specifications that meet actual needs of Govt. and to determine responsiveness of bids, and record does not show rejection was arbitrary, capricious, or was not based on substantial evidence. Doubt as to weight difference and its effect on competition, and belief minimum and not approximate requirements should have been used to insure equal bidding, are matters that must be raised prior to bid opening as provided in 4 CFR 20.2(a), the Interim Bid Protest Procedures and Standards ---------- 500

Technical deficiencies

"Conformance to best practices of industry" requirement

Where offerors were not required to submit technical proposals to service electron microscopes but only to offer to conform to best practices of industry, and factors making up technical criteria were evaluation of capacity factors, determination offeror was technically unacceptable amounted, in essence, to determination of nonresponsibility for reasons of capacity that required referral to SBA under 1-1.708.3 of Federal Procurement Regs. Furthermore, award of nonpersonal service, fixed price, contract to offeror determined capable of providing highest quality services was without authority and, therefore, if SBA will issue Certificate of Competency to rejected offeror, award made should be terminated for convenience of Govt ---------- 47

Negotiated procurement

Resolution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to

CONTRACTS—Continued Page
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Negotiated procurement—Continued
request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range---------- 382
Award of contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning disputed differences as self-serving statements of contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution, contracting officials under their vested authority properly determined when to terminate negotiations---------- 393
Defective
Contractor *v.* Government responsibility
In absence of clear and convincing evidence that contracting officials erred in judging minimum needs of Govt., U.S. GAO will not substitute its judgment as to sufficiency of technical data package furnished under invitation for radio sets, nor is invitation considered to be legally defective since fair competition was not precluded where bidders were informed contractor would be required to successfully manufacture contract end items and to bear cost of attaining stated functional or performance requirements, which is adequate notice to sophisticated bidders to scrutinize technical requirements and to price any significant unknowns for which they and not Govt. would be responsible for correcting, and which is sufficient allocation of performance risk to assure competition---------- 219
Three invitations for bids soliciting vehicle operation and maintenance services which stated a 90-day bid acceptance period without requiring further action by bidder, and which included a SF 33 indicating a 60-day bid acceptance period would result unless a different period was inserted by bidder, without cross-referencing the provisions, were defective as evidenced by 10 out of 13 bids being nonresponsive, thus indicating the conflicting provisions were misleading, and although bidders are expected to scrutinize carefully the entire solicitation package and to timely request assistance, the Govt. has the initial responsibility of clearly stating what is required. The two invitations under which awards were withheld should be canceled and readvertised, clearly stating bid acceptance terms, but award made in reliance on previous Comptroller General decisions will not be disturbed---------- 842
Discarding all bids. (*See* **BIDS, Discarding all bids, Specifications defective**)

CONTRACTS—Continued Page

Specifications—Continued

Delivery provisions

Conflict

In evaluation of f.o.b. origin shipment of barbed wire coils to Far East under invitation that contained two delivery provisions, use of clause providing for evaluation by adding lowest *land* transportation cost rather than clause using term "lowest laid down cost to Government at overseas port of discharge," which would have made protestant low bidder on basis of using barges for in'and transportation, was proper under rule intent and meaning of invitation is not to be determined by consideration of isolated section or provision but, rather, from consideration of invitation in its entirety, and two clauses read together indicate bids must be evaluated on lowest laid down cost to Govt. based on, among other things, *land* transportation for inland shipping costs---------- 278

Deviations

Informal *v.* substantive

Failure to bid on each item

A bid on radio sets and receiver-transmitters that failed to insert price or evidence "no charge" for first article testing and test reports, where bidder did not have previous experience and lack of space for insert is not excusable, properly was rejected since omission may not be waived as minor deviation, or corrected as clerical error. Fact that omitted price was intended to be $2,000 on a $14,000,000 contract, and that relative standing of bidders would not be affected by waiver or correction of omission is not for consideration since par. 2-405 of Armed Services Procurement Reg. does not define waivable or correctible deficiencies only in terms of price impact and relative standing but requires that deficiency have no or merely negligible effect on quality, quantity, or delivery, and first article testing was critical necessity. Furthermore, omission may not be corrected as bid mistake as bid does not establish what corrected amount should be---------- 886

Information

Requirement that bids under invitation soliciting custodial services be accompanied by outline of bidder's proposed method of opertion as to job and work force, method of supervision, types and quantities of equipment, performance schedule is matter of bidder responsibility and not bid responsiveness, notwithstanding invitation provision for mandatory rejection of bids that failed to furnish required information, since method of operation pertains to "know-how," which is element of of responsibility as specifications form basis for actual work requirement. However, should it be deemed desirable to require outline of bidder's method of operation, invitation should state purpose of requirement and how outline will be considered in selection of successful bidder and in administration of contract---------- 389

"May" or "will" result in bid rejection effect

Failure to furnish separate prices for subitems in bid to furnish circuit breakers and related items under solicitation stating that offers which do not show unit prices *will* be rejected as not responsive is immaterial as deviation does not affect price, quantity or quality. Bidder by inserting word "included" in spaces available for all subitems will be obligated to furnish subitems as well as basic circuit breakers

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued
"May" or "will" result in bid rejection effect—Continued
at price bid for basic circut breakers. Furthermore, requirement in solicitation is not necessarily material simply because it was expressed in positive terms with warning that failure to comply "may" or "will" result in rejection of bid as nonresponsive---------- 265

Model numbers

Under invitation for bids (IFB) for numerous drill items that waived preproduction samples for bidders whose products had been previously procured and approved, and that required product identification by model number and other pertinent information, the holding that low bidder on one of the items was nonresponsive because letter accompaning bid made reference to model 754G2 and not to its catalog model 754 will no longer be followed. The automatic finding of bid nonresponsiveness was not required as catalog model did not deviate from IFB requirements, and the two omitted specification characteristics created no ambiguity. Furthermore, bid acceptance would obligate bidder to furnish a conforming drill notwithstanding gratuitous model designation. B-175028, April 28, 1972, overruled---------- 967

Failure to furnish something required
Addenda acknowledgment
"Trivial" and "negligible" effect of amendment

When amendment to invitation for bids has only "trivial" or "negligible" effect on total price of bid, failure to acknowledge amendment that does not affect price, quantity, delivery, or relative standing of bidders, may be waived as minor informality under par. 2-405(iv)(B) of Armed Services Procurement Reg., and whether change effected by amendment is trivial or negligible in terms of price must be determined in relation to overall scope of work and difference between low bids. Award of contract for construction of gymnasium to low bidder who failed to acknowledge amendment that increased costs by $966 was not improper, where difference between low bid of $702,000 and next low bid was $17,000, and failure had no effect on competitive standing of bidders. Prior inconsistent decisions overruled---------- 544

Two-step procurement procedure

Under a two-step procurement, failure of offerors to acknowledge receipt of amendments to the first step of the solicitation as provided in the Request for Technical Proposals does not require rejection of their proposals since any defects in the acknowledgment of amendments in the first step of a two-step procurement may be waived by the Govt. to maximize competition, which is the fundamental purpose of the two-step procedure. Moreover, unlike procedure under a formally advertised procurement, consideration of an offer that failed to acknowledge an amendment to the first step would not be prejudicial to other offerors in view of fact there is no public opening of proposals or submission of prices, and as a result no binding contract arises from acceptance and evaluation of a technical proposal. Furthermore, purpose of amendments is conformity to the substantive content of an amendment and not conformity with the acknowledgment requirement---------- 726

CONTRACTS—Continued Page

Specifications—Continued

Interpretation

Question of law

Under an invitation for bids (IFB) which provided for preparation of personal property for shipment under three schedules—outbound services; inbound services; and intra-city and intra-area moves—each schedule further divided into three distance areas, and for evaluation of bids on the total aggregate price of all items within an area of performance under a given schedule, and that bidder must bid on all items within specified area of performance for a given schedule, the acceptance of an "all or none" bid which was not low in all areas was not precluded, and award to the bidder submitting the low, responsive bid for the combined Schedules I and II was proper. Furthermore, bidder erroneously informed that "all or none" bids must be low in all areas of all schedules, who made no effort to see that a clarifying amendment was issued, assumed the risk that resolution of question of law raised would not be sustained upon review 756

Minimum needs requirement

Administrative determination

In absence of clear and convincing evidence that contracting officials erred in judging minimum needs of Govt., U.S. GAO will not substitute its judgment as to sufficiency of technical data package furnished under invitation for ratio sets, nor is invitation considered to be legally defective since fair competition was not precluded where bidders were informed contractor would be required to successfully manufacture contract end items and to bear cost of attaining stated functional or performance requirements, which is adequate notice to sophisticated bidders to scrutinize technical requirements and to price any significant unknowns for which they and not Govt. would be responsible for correcting, and which is sufficient allocation of performance risk to assure competition 219

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes 393

Proprietary data use. (*See* **CONTRACTS, Data, rights, etc.**)

Qualified products

Applicability

The issuance of a request for proposals for stationary brake discs to be used as spare parts to the "only known qualified sources" does not mean the item being procured involves a qualified product. Establishment of procedures to determine qualifications of a source to manufacture a part in accordance with required specifications is discretionary and within the ambit of the expertise of the cognizant technical activity,

CONTRACTS—Continued Page
Specifications—Continued
Qualified products—Continued
Applicability—Continued
whose responsibility it is to determine the criteria necessary to insure the safety, dependability and interchangeability of the part on an *ad hoc* basis---- 778

Changes
Approval
Production changes made by manufacturer of oscilloscopes on Qualified Products List (QPL), which were administratively approved without requalification or change in the QPL, did not preclude consideration of changed product by contracting agency under a multi-year, requirements type, life cycle cost, negotiated procurement since sec. 4–109 of the Defense Standardization Manual 4120.3–M—the basic instruction on qualified products and qualification procedures—places primary responsibility to decide what modifications require reexamination and retesting of a product, and in absence of a clear showing of arbitrary or capricious action, the administrative determination is acceptable to the United States General Accounting Office---- 653

Plant location
Low bidder under invitation for bids to furnish inflatable landing boats—qualified end product—who failed to comply with clause prescribed by par. 1–1107.2(a), ASPR, and included in invitation to effect any change in location of plant at which previously approved product is or was manufactured would require prior to bid opening reevaluation of plant's qualification for inclusion in appropriate Qualified Products List (QPL) submitted nonresponsive bid that properly was not considered for contract award as offer to supply end item to be produced at other than plant shown in QPL as approved place of performance was offer to supply unqualified product---- 142

Restrictive
Ability to meet requirements
Low bidder under canceled ambiguous invitation for bids on 2,000 KW gas turbine engine driven power plants and related data packages who did not submit a bid under the reissued invitation because it included a revised, more broadened experience clause, a requirement for 100 percent performance bond, and two liquidated damage clauses at different per diem rates, provisions bidder contended were designed to eliminate competition, was not prejudiced by use of clauses as they were developed to protect the Govt.'s interests in view of the responses to the initial solicitation from relatively inexperienced firms and, furthermore, use of such clauses is not improper or unduly restrictive of competition because one or more bidders or potential bidders cannot comply with their requirements---- 640

Adequacy of specifications
Forest Service invitation for bids (IFB) to furnish brush chippers that called for a "braking system that will stop the cutter blades instantly" without defining "instantly," but contracting officer stated a willingness to accomodate reasonable tolerances from the normally accepted meaning of the word is unduly restrictive of competition and should be canceled

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Adequacy of specifications—Continued
since needs of Govt. were overstated, and there is no evidence the low bid, held nonresponsive on the braking time, would not satisfy actual needs of Govt. as well as the bid being considered for award. The IFB should be readvertised, eliminating restrictive specification feature and stating a reasonable time tolerance for braking of the cutter, and also eliminating minor deviation clause used since deviation clauses have no place in formally advertised procurements as they do not generally permit free and equal competition 815

Particular make
"Or equal" product not solicited

Award of contract for procurement of named brand electric siren that was negotiated under 10 U.S.C. 2304(a)(10), which authorizes exception to formal advertising when it is impossible to draft adequate specifications, to manufacturer of brand siren rather than to low offeror who had not been requested to submit sample for testing was improper where record does not indicate immediate award was essential or that there was insufficient time to qualify alternate product, and where use of 10 U.S.C. 2304(a)(10) authority was based on fact it was difficult and not impossible to draft adequate specifications, and request for proposals did not advise offerors of characteristics on which sirens would be tested and evaluated in qualifying alternate products. Future solicitations should contain all information necessary to permit the offer of equal item 458

Purpose of brand name or equal clause

The cancellation after bid opening of an invitation for bids for marine sanitary facilities because brand name or equal clause required by sec. 1-1.307-6(a)(2) of the Federal Procurement Regs. had been omitted, and inclusion of the clause in the reissued invitation was proper as clause provides a vehicle for identifying and evaluating product offered. However, inclusion of a descriptive literature requirement in the new invitation for purpose of determining the "general overall compliance with the specifications and drawings" is not in consonance with the brand name or equal requirement and nonresponsiveness of bidders to the requirement is symptomatic of deficiencies in the invitation. In addition, because use of the descriptive literature clause was unnecessary, and because invitation contained no specific component designation of the equal product, second invitation was ambiguous and misleading and also should be canceled and readvertised under revised specifications 827

Salient characteristics

Procurement of idler pulleys by negotiation rather than by formal advertising and use of brand name or equal purchase description, solicitation of offers from approved sources only, and restriction of procurement to named-part number was in absence of adequate specification data in accord with 10 U.S.C. 2304(a)(10) and par. 3-210.2(xv), Armed Services Procurement Reg. (ASPR), which authorizes negotiation for replacement parts or components in support of specially designed equipment, with ASPR 1-313(c), which provides for procurement of replacement parts from sources that satisfactorily manufac-

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Salient characteristics—Continued
tured or furnished parts in past, and with ASPR 1-1206.2(b), which requires salient characteristics to be listed when brand name or equal provision is used, and procurement did not restrict competition since proposals from unapproved sources were not prohibited, and offers on other than named part were considered---- 546

Reverse-engineering basis for preparation

Inclusion in a request for proposals of a stationary brake disc drawing furnished without restriction to the Air Force under sole-source contracts in order to create competition or for reverse engineering purposes did not violate proprietary data rights where Govt. contracts law in recognizing data rights also recognizes such data may be lawfully obtained by reverse engineering when the data is not restricted and the Govt. acquires title, and since it is incumbent upon contracting agency to maximize competition where the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement as well as from sole-source buys from current manufacturer of the item. Furthermore, contracting officer in making an award is not obliged to consider possible foreign patent problems since such a possibility is too speculative, complex, and burdensome---- 778

Samples
Manufacturer's product requirement

Low bid submitted on several of 59 items of engineer wrenches solicited under invitation for bids that did not conform with Bid Samples clause requirement that bid samples submitted must be from production of manufacturer whose product is to be supplied—samples that were to be evaluated to determine compliance with all characteristics listed for examination—properly was determined to be nonresponsive bid pursuant to GSPR sec. 5A-2.202-4, which provides that Bid Samples clause that was used is mandatory one since samples required were intended to demonstrate compliance with subjective characteristics, and acceptance and examination of sample made by other than eventual supplier affords little assurance to contracting officer that items ultimately supplied will conform to sample---- 155

Preproduction sample requirement
Waiver

Under invitation for bids (IFB) for numerous drill items that waived preproduction samples for bidders whose products had been previously procured and approved, and that required product identification by model number and other pertinent information, the holding that low bidder on one of the items was nonresponsive because letter accompanying bid made reference to model 754G2 and not to its catalog model 754 will no longer be followed. The automatic finding of bid nonresponsiveness was not required as catalog model did not deviate from IFB requirements, and the two omitted specification characteristics created no ambiguity. Furthermore, bid acceptance would obligate bidder to furnish a conforming drill notwithstanding gratuitous model designation. B-175028, April 28, 1972, overruled---- 967

CONTRACTS—Continued Page
Specifications—Continued
Site visits

Failure of low bidder to attend prebid site inspection required by an invitation for manufacture and installation of Thermal Shock Chamber that provided "in no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract," does not require rejection of low bid on basis acceptance of bid would be prejudicial to other bidders as purpose of site visit provisions of invitation was to warn bidders that site conditions would affect cost of performance and that bidder assumed risk of any cost of performance due to observable site conditions, as well as to provide for Govt.'s acceptance notwithstanding bidder's failure to inspect—an acceptance which would effectively bind bidder to perform in accordance with advertised terms and specifications—and to protect the Govt. against bid withdrawal or claim after contract award 955

Superior product offered
Evaluation significance

Award of a cost-plus-incentive fee contract for Radio Receiving Systems to the low offeror whose proposal numerically scored on the seven technical criteria points established and evaluated as to Past Performance/Management and cost considerations offered greatest value to the Govt. was a proper exercise of administrative discretion in view of fact a Source Selection Review Board, pursuant to Army Procurement Procedure 1–403.52, concluded the technical proposal of complainant was not technically significantly superior, and since both offerors were rated acceptable as to Past Performance/Management and cost considerations. Furthermore, technical differences between the two proposals did not warrant incurrence of additional costs where the realism of estimated costs was administratively assessed and price was considered an evaluation factor as evidenced in the handling of the use of Government property 738

Tests
Benchmark
Computers

Determination that offer evaluated on basis of criteria and assigned weights contained in request for proposals did not meet mandatory requirements for rental of nationwide computer network facilities by means of commercially marketed system called "full-services teleprocessing" with access to common data base and, therefore, offeror should not be allowed to perform live benchmark/demonstration test that would measure proposed system's network capabilities and cost effectiveness was justified because proposal failed to offer for benchmarking system to be delivered and used in performance of contract, whereas successful offeror, operating national network at time of submitting its proposal, met experience requirements of RFP 118

Difference between sole-source and subsequent sources

While stationary brake discs to be used as spare parts which were furnished by a sole-source contractor to the Air Force were initially subject to more stringent testing than those of subsequent sources competing for the procurement, this inequality is attributable to the fact

CONTRACTS—Continued Page
Specifications—Continued
Test—Continued
Difference between sole-source and subsequent sources—Continued
the initial testing was necessary to prove the design, composition, and functional characteristics of the newly designed component, whereas subsequent sources were required to demonstrate only that their parts would meet specifications and functional characteristics of the accepted component previously proven through more rigorous qualification testing. The responsibility to determine amount of testing necessary is a matter of administrative discretion, and the U.S. GAO is not equipped to consider the technical sufficiency of the administrative determination ---------- 778

Subcontractors
Disputes with prime contractor
Government's obligations

Subcontractor's claim for value of inventory delivered to Govt. following partial termination of prime contract and suspension of all subcontracting work may not be paid since Govt. met its contract obligations by payment to prime contractor even though prime failed to satisfy subcontractor claims within 10 days from payment by Govt. as stipulated in termination settlement agreement. Contention that contracting agency held itself out as final customer is not for consideration in view of fact par. 8-209.1, ASPR, denies subcontractors any contractual rights against Govt., and circumstances involved do not negate "no privity" rule, and furthermore subcontractor's termination inventory is required to be disposed of in accordance with secs. VIII and XXIV of ASPR ---------- 377

Proprietary data. (*See* **CONTRACTS, Data, rights, etc., Subcontractors**)

Subcontracts
Bid shopping
Listing of subcontractors
Compliance requirement

Low bid for performance of boiler replacement and fuel conversion project that failed to list names of manufacturers or fabricators that would perform two categories or work of project to be subcontracted properly was rejected as nonresponsive since principles enunciated in 49 Comp. Gen. 120 that 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 purpose of listing requirement is to discourage bid shopping and encourage competition among construction subcontractors. Therefore, as other bids received were unreasonably priced, discarding of all bids and use of negotiation procedures to accomplish project were in accordance with 41 U.S.C. 252(c)(14) ---------- 40

Limitation on subcontracting

Participation by a large foreign business concern in performance of proposed contract award to a self-certified small business concern, either by way of joint venture or subcontract, does not change the "small business" status of bidder where congnizant SBA regional office

CONTRACTS—Continued Page

Subcontracts—Continued

Limitation on subcontracting—Continued

found no evidence of improper affiliation through common ownership, personnel, management, or contractual relationship as precluded by SBA 121-Small Business Size Standards; where small business concern in subcontracting a major portion of work to be performed to large business meets requirement to make a significant contribution to the manufacture or production of contract end item; where Buy American Act restrictions are satisfied by bidder's certification that end product to be supplied will be a domestic source end product; and where compliance with act, as well as military specifications, is one of contract administration and properly the responsibility of the contracting agency.. 886

Tax matters

Sales, etc.

Tax inclusion or exclusion

Reimbursement

In view of holding by U.S. Supreme Court in *S &E Contractors, Inc.* v. *U.S.*, No. 70-88, Apr. 24, 1972, that decisions rendered pursuant to disputes clause of contract in favor of contractor are final and conclusive and not subject to review by U.S. GAO absent fraud or bad faith, GAO no longer will object to payment of claim for refund of amount withheld from contractor on basis Maryland State sales tax determined to be inapplicable had been included in contract price and paid, refund approved by Board of Contract Appeals but not returned to contractor because GAO in 49 Comp. Gen. 782 held Board was wrong as matter of law.. 63

Termination

Convenience of Government

Cancellation converted to termination

Partial cancellation of contract erroneously awarded for handling of surplus butter made available to Dept. of Defense by Dept. of Agriculture because erroneous freight rate evaluation resulted in award to other than low bidder should be changed to partial termination for convenience of Gov't. since, while award was improper, it was not plainly or palpably illegal for displaced contractor had not contributed to use of erroneous freight rate furnished by Govt. activity and, therefore, it could successfully maintain action for damages computed under termination for convenience of Govt. clause of contract. 37 Comp. Gen. 330 and B-164826, Aug. 29, 1968, overruled.. 215

Recommendation that partial cancellation of contract awarded to bidder erroneously determined to be low bidder should be changed to partial termination for convenience of Govt. and settlement made with contractor in accordance with termination for convenience of Govt. clause of contract is recommendation for corrective action pursuant to sec. 236 of Legislative Reorganization Act of 1970, Pub. L. 91-510, and contracting agency is required to submit written statements of action taken with respect to recommendation to House and Senate Committees on Govt. Operations not later than 60 days from date of recommendation and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendations.. 215

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Erroneous awards

Where offerors were not required to submit technical proposals to service electron microscopes but only to offer to conform to best practices of industry, and factors making up technical criteria were evaluation of capacity factors, determination offeror was technically unacceptable amounted, in essence, to determination of nonresponsibility for reasons of capacity that required referral to SBA under 1-1.708.3 of Federal Procurement Regs. Furthermore, award of nonpersonal service, fixed price, contract to offeror determined capable of providing highest quality services was without authority and, therefore, if SBA will issue Certificate of Competency to rejected offeror, award made should be terminated for convenience of Govt---- 47

Offer to furnish indefinite quantity of automatic data processing services under second request for proposals, following termination of contract for convenience of Govt. because first solicitation was misstated, that was evaluated by adding sum shown for rental and maintenance and ignoring "no charge" phrase, was erroneously evaluated since ambiguity was patent on its face and discrepancy, pursuant to par. 3-804 of ASPR, should have been resolved with offeror. Therefore, negotiations should be reopened for term remaining under contract and if protestant makes best offer, existing contract should be terminated for convenience of Govt. and contract awarded to protestant. This corrective recommendation requires action prescribed by sec. 236 of the Legislative Reorganization Act of 1970---- 409

Negotiation procedures propriety

Although failure to inquire why incumbent contractor furnishing security watchman services, whose proposal was administratively lost, had not submitted proposal was not sound procurement practice, contract negotiated pursuant to sec. 1-3.210 of the Federal Procurement Regs. (FPR) on the basis of a determination and findings (D&F) that it was impracticable to secure competition because only three sources had top security clearance need not be terminated for that reason as lost proposal could only be established by self-serving statements. However, termination of award nevertheless is recommended in view of fact negotiation procedures were used to convert successful contactor's secret clearance to top secret, and the D&F did not satisfy criteria in FPR sec. 1-3.305(b), but rather prequalified the three firms thus restricting competition. Any resolicitation should consider using formal advertising and should treat top security clearance as matter of bidder responsibility---- 593

Severable portions of an unjustified award

Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient, and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1-3.101(c)) that is not

CONTRACTS—Continued Page

Termination—Continued

Severable portions of an unjustified award—Continued

justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portions of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees 987

Timber sales. (*See* **TIMBER SALES**)

Turnkey. (*See* **HOUSING, Turnkey developers, Contracts**)

COURTS

Administrative matters

Experts and consultants hire

Civil *v.* criminal proceedings

The fee and expenses of a psychiatrist for services in criminal case that arose under 24 D.C. Code 301(e), which provides for conditional release from mental hospital of persons committed when acquitted of criminal charges on basis of insanity defense, may be paid notwithstanding conditional release proceedings are civil in nature whereas judge's order appointing doctor was issued under Rule 28, Federal Rules of Criminal Procedure in view of court's inherent authority to procure expert services and, therefore, services are not for payment under Criminal Justice Act of 1964. Doctor's invoice is payable by Administrative Office from funds appropriated under Judiciary Appropriation Act of 1971 "for necessary travel and miscellaneous expenses, not otherwise provided for, incurred by the judiciary" 621

District of Columbia

Executive Officer

Benefits status

Fact that Executive Officer of District of Columbia Courts—position established in D.C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this nonjudicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained 111

Judgments, decrees, etc.

Acceptance as precedent by General Accounting Office

Clyde A. Ray *v.* United States, 197 Ct. Cl. 1

In settlement of claims for income tax refunds occasioned by correction of military records to show disability retirement in lieu of retirement for years of service, there is no objection to following the rule in *Clyde A. Ray* v. *United States*, 197 Ct. Cl. 1, to the effect that claims for amounts withheld for income tax purposes will be treated as "pecuniary benefits" due within meaning of 10 U.S.C. 1552(c) rather than claim for tax refunds. However, claims should be limited to amounts

COURTS—Continued Page

Judgments, decrees, etc.—Continued

Acceptance as precedent by General Accounting Office—Continued

Clyde A. Ray *v.* United States, 197 Ct. Cl. 1—Continued

withheld for income taxes in years for which IRS is barred from making refunds by applicable statute of limitations, and settlement of claims, without interest, may be paid from current appropriations available for claims under 10 U.S.C. 1552(c). Claimants' information and advice of IRS should be solicited as aids in computing amounts due, and whether refunds should be withheld from disbursement to IRS is for that agency to determine ---- 420

Effect on General Accounting Office's protest consideration

Where U.S. Court of Appeals for District of Columbia Circuit deferred action at request of contractor awarded contract to perform operation and maintenance services for Remote Tracking Stations to reverse or stay District Court's injunctive order until U.S. GAO ruled on protest of unsuccessful offeror that had been filed prior to request for injunctive relief, findings of fact and conclusions of law of District Court are not entitled to comity, for Court of Appeals made it plain that District Court's opinion was not to be considered on merits and, therefore, consistent with GAO's function as described in *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, Court will be advised of GAO's independent views and conclusions ---- 198

Interest

Civil Service retroactive annuity payments

Account chargeable with interest

Interest included in awards of retroactive payments of Civil Service annuities to plaintiffs in 338 F. Supp. 1141, from date of eligibility to date of judgment—awards based on fact that so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* under which payments were withheld was an *ex post facto* law that punished plaintiffs for conduct that occurred prior to its enactment—is payable, together with annuities, from Civil Service Retirement and Disability Fund and not from permanent indefinite appropriation for judgments contained in 31 U.S.C. 724a, since interest is part of damages awarded. However, as interest is payable only when provided for in statutes and contracts, in absence of court decision to contrary, obligation to pay interest does not extend to those individuals who did not sue but by virtue of 338 F. Supp. 1141 are entitled to retroactive payment of annuity ---- 175

Jurors

Fees

Government employees in Federal courts

Sequestered jurors

Fact that jury duty involves only 8 hours of absence from Federal position does not entitle Federal employee sequestered for 49 days as alternate juror in U.S. District Court to additional jury fees for 16 hours a day on basis of "two-thirds rule" for days that were within employee's regular tour of duty and for which jury fees were not paid in accordance with 5 U.S.C. 5537, which prohibits payment to employee of U.S. for jury duty in U.S. courts while in pay status in civilian position, as it is immaterial whether employee's pay status involved only part of period of jury service since there is no authority to pay jury fees on pro rata basis. Overruled by 53 Comp. Gen.——. (B-70371, Dec. 6, 1973) ---- 626

COURTS—Continued Page
Jurors—Continued
Fees—Continued
Government employees in State courts
Travel expenses in lieu of fees

When jury services are performed in courts of Calvert, Charles, Prince George's and St. Mary's counties in State of Maryland by Federal employees who are granted court leave pursuant to 5 U.S.C. 6322(a), and are required under 5 U.S.C. 5515 to turn over jury fees for credit against salary payments for periods of court leave, expense money received as authorized by article 51, section 19(f) of Maryland Code may be retained by such employees on basis moneys received are traveling expenses within contemplation of section 12 of article 51 of Code rather than jury fees and as traveling expenses payments are not within purview of 5 U.S.C. 5515 325

CREDIT CARDS
Use
Service to public

National Technical Information Service (NTIS), the central clearinghouse for collection and dissemination of scientific, technical, and engineering information and for the establishment of fees under 15 U.S.C. 1153 for making results of technological research available to industry, business, and the general public, may arrange to accept payment by means of credit card services since there is no statutory prohibition against the Govt. providing services on credit, although the Govt. ordinarily does not provide goods or services on a credit basis. Therefore, NTIS may contract with a national credit card company for use of its credit card service as means of paying for purchases from NTIS, an arrangement under which the Govt.'s interest will be adequately protected, and which will provide NTIS customers with more rapid and convenient service 764

DAMAGES
Property. (*See* **PROPERTY**)

DEBT COLLECTIONS
Waiver
Civilian employees
Compensation overpayments
Effect of employee's fault

An employee prematurely retired from Government service who is awarded back pay pursuant to 5 U.S.C. 5596 for erroneous separation upon restoration to duty, but administrative office failed to deduct from payment the amount attributable to the employee's outside employment, is not entitled to waiver of overpayment since collection of overpayment would not be against equity and good conscience as employee was aware that he was responsible to repay amount of his outside earnings during period of erroneous separation, and collection would not be against best interests of the United States, the criteria established in 5 U.S.C. 5584 for waiver of erroneous administrative payments 587

Erroneous payment requirement

Notwithstanding rule that a person on active military duty may not be employed to perform services as civilian employee of the Govt. and that

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Civilian employees—Continued
Compensation overpayments—Continued
Erroneous payment requirement—Continued
any member who by mistake or otherwise is so employed may not receive compensation of the civilian position, a Navy enlisted member erroneously employed for temporary intermittent period of civilian service by Council on Environmental Quality may nevertheless be paid in view of fact had the civilian compensation been paid, the member could retain the payment under the *de facto* rule or the erroneous payment could be waived under 5 U.S.C. 5584. Since no payment occurred, it is appropriate to consider for purposes of the waiver statute that the administrative error and "overpayment" arose at time the member entered on duty with the understanding of a Govt. obligation to pay for his services..... 700

Military personnel
Authority to waive
Public Law 92-453
Officer of uniformed services who gave wife at time of their divorce a promissory note for $1,500 that is being reduced by his mother in amount of $30 per month paid to father of his former spouse is not entitled, in absence of definitive court decree requiring child support payments for son born of marriage, to basic allowance for quarters for child who is in custody of his mother since payments are not support payments and there is no showing any part of monthly payments are used to support child. If requirements for payment of quarters allowance cannot be shown for periods officer received allowance, payments are subject to collection unless there is for application Pub. L. 92-453, authorizing waiver of certain claims of U.S. against members in prescribed circumstances..... 454

Navy members assigned in excess of 30 days to ship overhaul at Norfolk Naval Shipyard, located 3 miles from home port, Norfolk, Va., who had option to move their families at Govt. expense to Norfolk area but chose not to do so are not entitled to payment of family separation allowance provided by 37 U.S.C. 427(b)(2) as they have no greater right than those members who had moved their families to vicinity of Norfolk and because they continued to reside with their dependents are not entitled to separation allowance. Fact that member did not move his family to vicinity of Norfolk in anticipation of extended sea duty gives him no vested right to allowance since frequent changes, often at short notice, is an incident of military service. Any payments made on basis of misinterpreting 43 Comp. Gen. 527 would be proper for waiver under 10 U.S.C. 2774..... 912

DECEDENTS' ESTATES
Pay, etc., due military personnel
Beneficiary designations
Beneficiary predeceases member
Where brother named by member of uniformed services to share with sister retired pay due him at time of death predeceases member and only sister and two other brothers survive member, sister does not take undistributed one-half share since beneficiary designations made pursuant to 10 U.S.C. 2771(a)(1) became effective upon member's death and, therefore, order of precedence prescribed by sec. 2771(a) applies to undistributed share of retired pay due. As member was not survived by

DECENDENTS' ESTATES—Continued Page
Pay, etc., the military personal—Continued
Beneficiary designations—Continued
Beneficiary predeceases member—Continued
widow, child, grandchild, or parent, and no legal representative was appointed, distribution in accordance with sec. 2771(a)(6) should be made to persons, including corporate entity, entitled to take under law of domicile of deceased, which accords preference to creditors, or persons paying creditors, for funeral and last illness expenses---------- 113

DEFENSE DEPARTMENT
Military surplus articles
Distribution control
In implementation of sec. 402 of Foreign Assistance Act of 1971 (22 U.S.C. 2321b), Dept. of Defense required to consider value of excess Defense article ordered by any department, agency, or establishment, except AID, as expenditure made from funds appropriated under Foreign Assistance Act of 1961 for military assistance, unless ordering agency certifies to Comptroller General that excess Defense article is not to be transferred by grant to foreign country or international organization, may charge during fiscal year 1972 amounts not covered by certification to appropriate funds, and may adopt interim procedure beginning with fiscal year 1973, for use of "blanket" certification to be renewed each year, since these procedures will ensure congressional control of distribution of surplus arms---------- 37

Teachers employed in overseas areas
Compensation
Severance pay
Superintendent-Principal of Air Force Dependents' School whose employment under 20 U.S.C. 241(a) for period of approximately 10 years was terminated on basis of management's perogative not to employ as provided in par. 8b, sec. 9833, Air Force Civilian Personnel Manual, is entitled to severance pay prescribed by 5 U.S.C. 5595. Employee held indefinite tenure appointment, even though he was granted limited access to procedural rights, and was involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, requirements that establish eligibility to receive severance pay provided by 5 U.S.C. 5595---------- 291

DEPARTMENTS AND ESTABLISHMENTS
Administrative determinations. (*See* ADMINISTRATIVE DETERMINATIONS)
Management
General Accounting Office recommendation compliance
Since recommendation that collections made from third party tortfeasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation---------- 125

DEPARTMENTS AND ESTABLISHMENTS—Continued Page

Program implementation

Surplus agricultural programs

Barter program administered by Commodity Credit Corporation. (*See* **COMMODITY CREDIT CORPORATION, Barter program and agreements**)

Regulations. (*See* **REGULATIONS**)

Services between

Disputes

General Accounting Office settlement

Air Force vouchers submitted by Army Finance Center pursuant to 7 GAO 8.4(c), which provides for submission of a disputed interagency bill for goods or services to GAO for settlement, will be considered to be request for an advance decision. Bills submitted which cover cost of inadvertent movement of commissary goods outside the United States (U.S.) in space-required rather than space-available airlift that Military Airlift Command refuses to cancel, may be paid from appropriated funds, for although commissaries are required to be self-sustaining, they are appropriated fund activities and, furthermore, Pub. L. 92-204 excludes transportation costs incurred outside U.S. from cost of purchase in operation of commissaries. Since interagency orders are obligations upon appropriations the same as orders or contracts with private contractors, Army operation and maintenance appropriation stated on vouchers is properly chargeable 964

Jointly beneficial projects

Since sec. 601, Economy Act of 1932, as amended (31 U.S.C. 686a), restricts requisitioning of reimbursable services between agencies to utilization of material, supplies, and personnel belonging to one department or establishment to department or establishment that is not equipped to furnish material, work, or services for itself, authority of section is not available to Environmental Protection Agency (EPA) for jointly beneficial projects funded jointly since it is not one of departments and establishments specifically exempted from sec. 601 limitation and thus permitted to place orders to be rendered or obtained by contract and, therefore, EPA may not enter into agreements with other Govt. departments and establishments for performance of joint research and demonstration projects that relate to needs and interests of both agencies 128

Procurement of supplies and services

Postal Service

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon 306

DEPARTMENTS AND ESTABLISHMENTS—Continued Page

Services between—Continued

Reimbursement

Erroneous request for services

Although pecuniary liability for errors that led to request for space-required rather than space-available Military Airlift Command services to move commissary goods outside U.S. would seem to rest on commissary personnel making erroneous request, there is no basis for assessing charges for services on commissary officer since his custodial relationship with the Govt. as an accountable officer relates to property and funds, and there is no general authority for assessment of charges for losses sustained by Govt. as result of errors in judgment or neglect of duty by Govt. personnel. Moreover, interagency reimbursement for cost of services performed by billing agency pursuant to lawful authority cannot be viewed as a "loss" to Govt. in usual sense of the word 964

Status

Federal Judicial Center

As Federal Judicial Center is considered part of judicial branch, its employees are within scope of 5 U.S.C. 5721 *et seq.*, regardless of fact Center is not specifically listed in statute which authorizes reimbursement for travel and transportation expenses incurred in reporting to position determined by CSC to be in manpower shortage category. However, since Center under authority in 28 U.S.C. 625(e) to incur expenses incident to operation of Center and not Commission determined position of Director of Continuing Education and Training was manpower shortage position, expenses incurred by Director in moving to first duty station are not reimbursable under 5 U.S.C. 5723, and rule in in 22 Comp. Gen. 885 that officer or employee of Govt. must place himself at first duty station at own expense applies 268

DEPENDENTS

Status for allowances

Children

Children provisionally adopted by Navy member while stationed in Great Britain pursuant to the Adoption Act or 1958 (7 Eliz. 2, C. 5) Part V, Sec. 53, are considered dependents of the member under 37 U.S.C. 401, so as to entitle him to a dependents' allowance and all other benefits incident to dependency status while member resides in Great Britain in view of fact that although provisional adoption order only authorizes custody and removal of children from Great Britain for adoption elsewhere, sec. 53(4) of the act provides that the rights, duties, obligations, and liabilities prescribed in other sections of the act for an adopter shall equal those of natural parents or those created by an adoption order. However, unless children are actually adopted by member after he is transferred from Great Britain, they may not continue to be regarded as his adopted children 675

DETAILS

Compensation

Higher grade duties assignment

GS–12 employee detailed on July 26, 1971, on temporary basis to GS–13 position of Chief, Employee Relations Branch in Pacific Northwest Region of the Forest Service, pending receipt from headquarters

DETAILS—Continued
Compensation—Continued Page
Higher grade duties assignment—Continued
of certificate of candidates to fill position, who was not selected when position was filled on Aug. 20, 1972, may not be retroactively temporarily promoted to GS–13 for period involved. Exceptions to rule that a personnel action may not be effected retroactively to increase right of employee to compensation are permitted where personnel action intended is not effected through administrative error; where an error deprives employee of a right granted by statute or regulation; and where nondiscriminatory administrative regulations or policies have not been carried out, and the higher level assignment not falling within any of the exceptions, employee is only entitled to salary of position to which appointed 920

DISASTER RELIEF (*See* **STATES, Disaster relief**)

DISCHARGES AND DISMISSALS
Military personnel
Discharge erroneous
Validity of discharge
Discharge and reenlistment of member of Regular component before he was eligible for variable reenlistment bonus (VRB) he was promised may not be declared retroactively invalid, in absence of fraud, under principle of irrevocability of an executed discharge by competent authority, even should member consent to revocation of his reenlistment contract, and notwithstanding member's ineligibility for VRB was discovered subsequent to reenlistment, and recovery of benefits received by member incident to discharge and reenlistment is not required. However, since member did not qualify for VBR at time of reenlistment he is not entitled to bonus even though erroneously informed that he was, and later acquisition of required qualifications does not retroactively entitle member to bonus 506

DISCRIMINATION
Sex
Elimination of discrimination. (*See* **NONDISCRIMINATION, Sex discrimination elimination**)

DISTRICT OF COLUMBIA
Courts
Executive Officer
Benefits status
Fact that Executive Officer of District of Columbia Courts—position established in D.C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this nonjudicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained 111

DISTRICT OF COLUMBIA—Continued Page

Fireman and policemen

Compensation

Longevity increases

Basic compensation purposes

The longevity step increases provided by sec. 110 of District of Columbia Police and Firemen's Salary Act Amendment of 1972 may be considered an element of basic compensation in computing overtime and holiday pay since act provides longevity pay shall be paid in same manner as basic compensation except that it shall not be subject to deduction and withholding for retirement and insurance and shall not be considered salary for purpose of computing annuities, and although legislative history of act makes no reference to including longevity compensation increases as part of basic compensation in computing overtime and holiday payments, in view of fact that prior to 1972 act longevity rates were scheduled rates of pay, any intent to exclude longevity compensation from basic compensation for all purposes should have been reflected in legislative hsitory of the act..... 597

Redevelopment Land Agency

Travel expense reimbursement to prospective and new employees

District of Columbia Redevelopment Land Agency (RLA), although Federal corporation, is deemed to be local public agency within framework of D.C. Govt. for purposes of title I of Housing Act of 1949, as amended (5 D.C. Code 717a(g)), which provides for financial assistance to local communities, and as agency is not independent office of executive branch of Federal Govt., it is not subject to Dept. of Housing and Urban Development regulations authorizing payment of travel expenses for employment interviews and moving expenses for new employees but to regulations that govern D.C. employees, which are same as those for Federal employees and, therefore, in absence of specific authority, RLA may not pay travel expenses for preemployment interviews or relocation expenses to new employees..... 85

ECONOMIC STABILIZATION ACT OF 1970

Cost-of-living stabilization

Military pay increases, etc.

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92-129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15-Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act and, furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not melt requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases..... 15

ENLISTMENTS Page
Bonus. (*See* GRATUITIES)
Fraudulent
Correction of records

Although the Secretaries of military depts. concerned may delegate performance of certain ministerial duties to correct administrative errors in members' records, changes that involve material fact or create new record require a Board for Correction of Military Records action pursuant to 10 U.S.C. 1552. Therefore, in absence of such proceeding, Adjutant General of the Army may not correct record of member retired as an Army Sergeant who received bad conduct discharge in 1949 from Navy and shortly thereafter used papers and name of a Marine to enlist in Regular Army, from which he was retired in 1960, under 10 U.S.C. 3914, recalled in 1965, and retired again in 1972, also under sec. 3914, to evidence continued service under his own name until effective date of second retirement, as such an action would be ineffective to authorize pay and allowances, including retired pay, for retirement periods..... 952

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Coordination of efforts
Requisition of services between agencies

Since sec. 601, Economy Act of 1932, as amended (31 U.S.C. 686a), restricts requisitioning of reimbursable services between agencies to utilization of material, supplies, and personnel belonging to one department or establishment to department or establishment that is not equipped to furnish material, work, or services for itself, authority of section is not available to Environmental Protection Agency (EPA) for jointly beneficial projects funded jointly since it is not one of departments and establishments specifically exempted from sec. 601 limitation and thus permitted to place orders to be rendered or obtained by contract and, therefore, EPA may not enter into agreements with other Govt. departments and establishments for performance of joint research and demonstration projects that relate to needs and interests of both agencies..... 128

EQUAL EMPLOYMENT OPPORTUNITY
Labor stipulations. (*See* CONTRACTS, Labor stipulations, Nondiscrimination)
Nondiscrimination clause
Contracts
Violation of clause

Although suspension of progress payments for violations of standard Equal Opportunity clause in contract is sanction which is authorized by sec. 209(a)(5) of E.O. 11246, under regulations of Dept. of Labor final decision for invoking sanctions referred to in 41 CFR 60-1.24(c)(3) is for determination only after contractor has been afforded opportunity for hearing. Furthermore, even though contractor's compliance or noncompliance with Equal Opportunity clause is question of fact, 41 CFR 60-1.1 specifically excludes equal opportunity matters from determination under Disputes clause, and determination responsibility therefore vests in Contract Compliance Officer or other officials regularly involved in equal opportunity programs. Thus, contractor's compliance posture is for consideration under regulations and not Progress Payment clause and progress payments may not be suspended without hearing.. 476

EQUIPMENT Page

Automatic Data Processing Systems

Leases

Evaluation

Benchmark/demonstration test

Determination that offer evaluated on basis of criteria and assigned weights contained in request for proposals did not meet mandatory requirements for rental of nationwide computer network facilities by means of commercially marketed system called "full-services teleprocessing" with access to common data base and, therefore, offeror should not be allowed to perform live benchmark/demonstration test that would measure proposed system's network capabilities and cost effectiveness was justified because proposal failed to offer for benchmarking system to be delivered and used in performance of contract, whereas successful offeror, operating national network at time of submitting its proposal, met experience requirements of RFP 118

Service contracts

Cost of changing contractors

Adding cost of program duplication and the time required to check out time-sharing computer services program solicited to bids submitted by new sources did not favor current contractor, or prevent competition because of high cost of changeover as compared with bid prices, since evaluation factor represents an accurate depiction of costs to Govt. to change contractors, and method of transferring services employed by the contracting agency is not subject to question in absence of fraud or capricous action since different practice used by business does not alter terms of invitation for bids. Furthermore, the quantum of service evaluation criteria was not misleading as effect of the criteria on bid price was determinable by each bidder at bid preparation time. However, substantial difference in bid prices received indicating inadequate competition to insure a reasonable price, future procedures should be revised so bidders can compete effectively against an incumbent contractor 905

EVIDENCE

Best evidence

Transportation services

A motor carrier who transported electrical instruments from N.Y. to N. Mex. under Govt. bill of lading noted "Two Drivers Authorized," for which he was paid on line-haul basis that included regular driver's service is not entitled to reimbursement for driver's overtime service in absence of provision in either Govt. tender I.C.C. 50 or in Military Rate Tender IV authorizing such payment; is only entitled to regular charges prescribed for extra driver if services were not performed in N.Y., computed on basis of actual hours worked as evidenced by driver's logs, which is best support of the claim (4 CFR 54.5); and is not entitled to shipment charge based on minimum weight applicable in computation of line-haul charges but rather on basis of net weight shipped. Furthermore, round the clock charges for both drivers, as provided by contract or labor laws, is not responsibility of United States 945

EVIDENCE—Continued Page

Substantial new evidence rule

Supports revocation of retirement

Member of uniformed services whose temporary disability retirement effective Dec. 1, 1971, was canceled as of Feb. 24, 1972, because of continued hospitalization and member was restored to temporary disability list effective June 1, 1972, is entitled to active duty pay for period Dec. 1, 1971, to May 31, 1972, since the indicated need for further extensive hospital care of member prior to the contemplated Dec. 1, 1971, retirement date comprised substantial new evidence sufficient to support revocation of first retirement orders, and delay in initiating revocation of retirement orders under circumstances of hospitalization is not considered unreasonable. Furthermore, commencing June 1, 1972, member became entitled to receive retirement pay under 10 U.S.C. 1202, computed under Formula 2, 10 U.S.C. 1401, using rates of basic pay authorized by E.O. 11638, effective Jan. 1, 1972 797

EXPERTS AND CONSULTANTS

Authority to hire

Courts

The fee and expenses of a psychiatrist for services in criminal case that arose under 24 D.C. Code 301(e), which provides for conditional release from mental hospital of persons committed when acquitted of criminal charges on basis of insanity defense, may be paid notwithstanding conditional release proceedings are civil in nature whereas judge's order appointing doctor was issued under Rule 28, Federal Rules of Criminal Procedure in view of court's inherent authority to procure expert services and, therefore, services are not for payment under Criminal Justice Act of 1964. Doctor's invoice is payable by Administrative Office from funds appropriated under Judiciary Appropriation Act of 1971 "for necessary travel and miscellaneous expenses, not otherwise provided for, incurred by the judiciary" 621

FAMILY ALLOWANCES

Separation

Type 2

Ship duty

Residence location

Navy members assigned in excess of 30 days to ship overhaul at Norfolk Naval Shipyard, located 3 miles from home port, Norfolk, Va., who had option to move their families at Govt. expense to Norfolk area but chose not to do so are not entitled to payment of family separation allowance provided by 37 U.S.C. 427(b)(2) as they have no greater right than those members who had moved their families to vicinity of Norfolk and because they continued to reside with their dependents are not entitled to separation allowance. Fact that member did not move his family to vicinity of Norfolk in anticipation of extended sea duty gives him no vested right to allowance since frequent changes, often at short notice, is an incident of military service. Any payments made on basis of misinterpreting 43 Comp. Gen. 527 would be proper for waiver under 10 U.S.C. 2774 912

FEDERAL AVIATION ADMINISTRATION Page

Employees

Air Traffic Controllers

Promotions delayed

Where the Federal Aviation Administration elected, in the exercise of its executive function to appoint persons to civilian Govt. service, not to promote development Air Traffic Controllers who had satisfied criteria for promotion until clarification of Presidential order of Dec. 11, 1972, placing freeze on promotions, employees did not become entitled to higher salaries prior to date of the agency's promotional action, notwithstanding controllers performed the duties and otherwise qualified for promotions, or that an employment agreement may have been executed, since under E.O. 11491, the right of promotion is retained by the management officials of an agency. Furthermore, failure to promote is not the "unjustified or unwarranted personnel action" contemplated by 5 U.S.C. 5596 to entitle employees to back pay 631

FEES

Airport departures

Reimbursement

Airport fees military and civilian personnel are required to pay when departing from airports incident to official travel of themselves and their immediate families and dependents are reimbursable, if charges are reasonable, as transportation expenses on basis Supreme Court in 92 S. Ct. 1349 (1972) held that user fee imposed on departing passengers does not involve unconstitutional burden on interstate commerce, and that if funds received by local authorities do not exceed airport costs, it is immaterial whether they are expressly earmarked for airport use. However, as fees imposed on arriving passengers are held to be unreasonable interference with interstate commerce, they may not be reimbursed, but if found valid upon appeal, reimbursement is authorized on same basis as departure fees 73

Attorneys

Grievance proceedings

Employee entitlement to fees

The legal fees awarded a former Foreign Service Officer of the Department of State in a grievance proceeding brought under section 1820 of Volume 3 of the Foreign Affairs Manual are not reimbursable since neither the authority in 22 U.S.C. 810 to procure legal services for the protection of the interests of the Government or to enable an officer or employee of the Service to carry on his work efficiently, nor the authority in Public Law 84–885 to incur expenses in unforeseen emergencies arising in the diplomatic and consular services apply in the circumstances of a grievance proceeding 859

Jury. (*See* **COURTS, Jurors, Fees**)

Membership

Employee *v.* agency

Annual dues employee is required to pay for membership in professional organization is not reimbursable to employee, even though savings would accrue to Govt. from reduced subscription rates, and notwithstanding Govt. would benefit from employee's development as result of member-

FEES—Continued Page
Membership—Continued
Employee *v.* agency—Continued

ship, since 5 U.S.C. 5946 prohibits use of appropriated funds for payment of membership fees or dues of officers and employees of Govt. as individuals, except as authorized by specific appropriation, by express terms in general appropriation, or in connection with employee training pursuant to 5 U.S.C. 4109 and 4110. However, agency is not precluded by 5 U.S.C. 5946 from becoming member and paying required dues if it is administratively determined to be necessary in carrying out authorized agency activities 495

Parking
Occupancy tax
Legal incidence of tax on vendee

In view of administrative burdens to implement U.S. GAO decision of Dec. 10, 1971, 51 Comp. Gen. 367, holding that San Francisco City and county tax on occupancy of parking spaces is not chargeable to Federal Govt. when Govt-owned vehicle is involved, and that voucher for tax in favor of Govt. employee may not be certified for payment, decision is modified to permit certifying officers to certify vouchers for payment of parking tax in amount of 1 dollar or less in spite of Govt.'s immunity to tax, since correct procedure prescribed in 7 GAO 26.2 for use of tax exemption certificate when legal incidence of tax is on vendee is not available as its use is restricted to purchases on which taxes exceed 1 dollar. 51 Comp. Gen. 367, modified 83

Passports
Locally hired overseas employees

Expenses of obtaining passports and photographs for passports for himself and dependents, where no immediate travel is contemplated, by locally hired employee with whom transportation agreement was executed in accordance with par. C4002-3 of Joint Travel Regs. (JTR), Vol. 2, and who has earned renewal agreement travel (C4001 JTR), is reimbursable pursuant to C9010-2, JTR, even though actual travel may not occur and regulation does not expressly cover locally hired American citizens or their dependents, in view of fact that locally hired employee who meets conditions of eligibility for renewal agreement travel is generally entitled to same benefits as employee recruited stateside who is required to renew his passport as result of continued employment in foreign area 177

Psychiatrist
Court proceedings

The fee and expenses of a pyschiatrist for services in criminal case that arose under 24 D.C. Code 301(e), which provides for conditional release from mental hospital of persons committed when acquitted of criminal charges on basis of insanity defense, may be paid notwithstanding conditional release proceedings are civil in nature whereas judge's order appointing doctor was issued under Rule 28, Federal Rules of Criminal Procedure in view of court's inherent authority to procure expert services and, therefore, services are not for payment under Criminal Justice Act of 1964. Doctor's invoice is payable by

FEES—Continued Page

Psychiatrist—Continued

Court proceedings—Continued

Administrative Office from funds appropriated under Judiciary Appropriation Act of 1971 "for necessary travel and miscellaneous expenses, not otherwise provided for, incurred by the judiciary"---------- 621

Services to public

Credit card form of payment

National Technical Information Service (NTIS), the central clearinghouse for collection and dissemination of scientific, technical, and engineering information and for the establishment of fees under 15 U.S.C. 1153 for making results of technological research available to industry, business, and the general public, may arrange to accept payment by means of credit card services since there is no statutory prohibition against the Govt. providing services on credit, although the Govt. ordinarily does not provide goods or services on a credit basis. Therefore, NTIS may contract with a national credit card company for use of its credit card service as means of paying for purchases from NTIS, an arrangement under which the Govt.'s interest will be adequately protected, and which will provide NTIS customers with more rapid and convenient service---------- 764

FOREIGN CURRENCIES

(*See* **FUNDS, Foreign**)

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES

Post differentials

Inclusion in lump-sum leave payments

In accordance with long-standing rule established by Comptroller General decisions, two employees of Agency for International Development, State Dept., who were separated from Federal service in Vientiane, Laos, are entitled to lump-sum leave payments that include foreign post differential applicable to their service in Vientiane on basis they continued in service at foreign post for period covered by lump-sum payment, 5 U.S.C. 5551 providing that a "lump-sum payment shall equal the pay the employee or individual would have received had he remainded in the service until expiration of the period of the annual or vacation leave." On basis of this decision, contrary regulations may be revised---------- 993

Separate maintenance allowance

Divorced employee jointly responsible for children

The separate maintenance allowance (SMA) authorized in 5 U.S.C. 5924 to be paid to an employee when he is assigned to post in foreign area that is dangerous, unhealthful, or where living conditions are adverse in order to enable him to meet additional expense of maintaining his wife and/or dependents elsewhere, may be paid to employee whose minor children incident to divorce decree have been placed jointly in his care and his former spouse since children are his "dependents" within meaning of the term as defined in sec. 040m of Standardized Regs. (Govt. Civilians, Foreign Areas). However, employee must establish his child or children would have resided with him but for circumstances warranting payment of SMA, and an affidavit to this effect from employee's former spouse is sufficient to establish entitlement to SMA---------- 878

FOREIGN GOVERNMENTS Page

Contracts with United States

Furtherance of foreign relations

Award of research and development contract on "sole-source" basis to Canadian firm pursuant to "Memorandum of Understanding in Field of Cooperative Development Between U.S. Dept. of Defense and Canadian Dept. of Defense Production" (Par. 6-507, ASPR) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be awarded on competitive basis after solicitation from "maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by executive branch in conduct of foreign relations..... 136

Military assistance

Grants by other than Defense Department

In implementation of sec. 402 of Foreign Assistance Act of 1971 (22 U.S.C. 2321b), Dept. of Defense required to consider value of excess Defense article ordered by any department, agency, or establishment, except AID, as expenditure made from funds appropriated under Foreign Assistance Act of 1961 for military assistance, unless ordering agency certifies to Comptroller General that excess Defense article is not to be transferred by grant to foreign country or international organization, may charge during fiscal year 1972 amounts not covered by certification to appropriate funds, and may adopt interim procedure beginning with fiscal year 1973, for use of "blanket" certification to be renewed each year, since these procedures will ensure congressional control of distribution of surplus arms..... 37

FOREIGN SERVICE

Dependents

Advance travel

Divorce, etc., prior to employee's eligibility

Reimbursement to employee for advance return travel to U.S. of spouse and/or minor children who traveled to foreign post as dependents but ceased to be dependents as of date employee became eligible for return travel because of divorce or annulment of marriage may be provided and sec. 126.2, Vol. 6, FAM, amended accordingly under authority of 22 U.S.C. 1136—amendment to prescribe that reimbursable travel may not be deferred more than 6 months after employee completes travel. Govt. has obligation to return dependents at Govt. expense since employee and family are sent to overseas post for convenience of Govt. and, furthermore, amendment will bring regulation in harmony with 6 FAM 126.3 and sec. 1.11f of OMB Cir. A-56..... 246

Grievance proceeding

Legal fees reimbursement

The legal fees awarded a former Foreign Service Officer of the Department of State in a grievance proceeding brought under section 1820 of Volume 3 of the Foreign Affairs Manual are not reimbursable since neither the authority in 22 U.S.C. 810 to procure legal services for the protection of the interests of the Government or to enable an officer or employee of the Service to carry on his work efficiently, nor the

FOREIGN GOVERNMENTS—Continued Page
Grievance proceeding—Continued
Legal fees reimbursement—Continued
authority in Public Law 84–885 to incur expenses in unforeseen emergencies arising in the diplomatic and consular services apply in the circumstances of a grievance proceeding ---------- 859
Promotions
Delayed
Annuity computation
Notwithstanding 4-year delay in promoting Foreign Service Officer from FSO–4 to FSO–3 due to age discrimination, officer who will reach mandatory retirement age within 8 months of his promotion may not be permitted for purpose of increasing annuity payments to pay into Foreign Service and Disability Fund additional amounts that would have been deducted from his salary and deposited into fund but for the delay. Compulsory contributions to retirement fund are based on actual salary received and since employee may not be retroactively promoted upon removal of age discrimination, his annuity payments are not for computation on salary of grade FSO–3 prior to date he was promoted to that grade ---------- 629

FUNDS
Appropriated. (*See* **APPROPRIATIONS**)
Balance of Payments Program
Reduction of drain
Buy American Act restrictions usage
Under invitation for bids to supply softballs that contained "U.S. Products Certificate" clause that required bidders to certify only U.S. End Products and Services would be furnished thus implementing Balance of Payments Program, sending American produced softball core, with covers, needles and thread to Haiti to have covers sewn on softball core would constitute manufacturing outside U.S. and precludes consideration of bid since phrase "U.S. End Product" stems from Buy American Act and requires end product to be supplied to be manufactured in U.S. Fact that services to be performed in Haiti would constitute less than 3% of cost does not make applicable providion in U.S. Products and Service clause that 25% or less of services performed outside U.S. will be considered U.S. services since contract contemplated is for product, not services ---------- 13
Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc.**)
Federal grants, etc., to other than States
Applicability of Federal statutes
Competitive bidding system
Although Fedl. Govt. is not a party to the contract awarded by recipient of a construction grant from the Dept. of Health, Education, and Welfare (HEW) under the Hill-Burton Act (42 U.S.C. 291 *et seq.*), HEW had the responsibility of determining whether the conditions of grant had been met, and review of records supports advice of HEW to grantee that low bidder on the hospital addition solicited failed to meet competitive bidding requirements because certification of part I affirmative action requirements for equal employment opportunity only

FUNDS—Continued Page

Federal grants, etc., to other than States—Continued

Applicability of Federal statutes—Continued

Competitive bidding system—Continued

committed the bidder to the local, Cleveland Plan, and because bidder had not committed itself to part II affirmative action requirements of solicitation, which involved trades not covered by part I, by merely signing bid, since nothing in bid would bind bidder to conform to part II criteria, and no independent commitment to that part had been submitted by the bidder 874

Foreign

United States owned currencies

Interest earned

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)

Nonappropriated

Civilian employee activities

Premium pay for Sunday work

Prevailing rate employees of nonappropriated fund instrumentalities of military departments and Coast Guard who work regularly scheduled tours of duty of less than 40 hours a week may not be allowed Sunday premium pay under 5 U.S.C. 5550, as added by sec. 10 of Pub. L. 92–392, Aug. 19, 1972. Legislative history of act shows it was intent of Congress to provide Sunday premium pay for nonappropriated fund employees in same amounts and under same conditions as such pay is authorized for other Federal prevailing rate employees. Accordingly, Civil Service Commission regs. issued pursuant to 5 U.S.C. 5548(b) under which Sunday premium pay is allowed prevailing rate employees of nonappropriated fund activities should require that such employees have basic full-time workweeks of 40 hours, exclusive of regularly scheduled overtime, for entitlement to Sunday premium pay 923

Trust

Indian tribal funds

Alaska Native Claims Settlement Act

As natives of Alaska—ultimate beneficiaries of Alaska Native Fund established by Alaska Native Claims Settlement Act, Pub. L. 92–203, approved Dec. 18, 1971, for distribution to regional corporations—are aboriginal groups, legal position of individual Alaskan native is assimilated to that of other Indians in U.S. Therefore, lack of formal tribal organization of natives is not determinative of status of fund, and it

FUNDS—Continued Page
Trust—Continued
Indian tribal funds—Continued
Alaska Native Claims Settlement Act—Continued
may be properly classified as Indian tribal trust fund that is eligible for interest payments under 25 U.S.C. 161a, and for investment pursuant to 25 U.S.C. 162a, pending enrollment of natives and distribution of fund to regional corporations established by act 248

GENERAL ACCOUNTING OFFICE
Claims
Settlement
Precedent status
The fact that the Claims Division of the United States General Accounting Office erroneously allowed a claim affords no basis for concluding that other similar type claims should be allowed contrary to the provisions of the Joint Travel Regs. as construed by the decisions of the Comptroller General of the United States and, furthermore, collection action will be taken to recoup the amount erroneously paid .. 751

Contracts
Protest procedures. (*See* **CONTRACTS, Protests**)
Decisions
Advance
Voucher accompaniment
Although, normally, Comptroller General of U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department 83

Voucher submission
Air Force vouchers submitted by Army Finance Center pursuant to 7 GAO 8.4(c), which provides for submission of a disputed interagency bill for goods or services to GAO for settlement, will be considered to be request for an advance decision. Bills submitted which cover cost of inadvertent movement of commissary goods outside the United States (U.S.) in space-required rather than space-available airlift that Military Airlift Command refuses to cancel, may be paid from appropriated funds, for although commissaries are required to be self-sustaining, they are appropriated fund activities and, furthermore, Pub. L. 92–204 excludes transportation costs incurred outside U.S. from cost of purchase obligations upon appropriations the same as orders or contracts with private contractors, Army operation and maintenance appropriation stated on vouchers is properly chargeable 964

Court consideration
In view of fact U.S. Court of Appeals for District of Columbia appears to contemplate including decision of U.S. GAO in its consideration of appeal taken to denial by U.S. District Court for District of Columbia of

GENERAL ACCOUNTING OFFICE—Continued Page

Decisions—Continued

Court consideration—Continued

request for preliminary injunction to prevent performance of operation and maintenance contracts pending decision by GAO to protest filed prior to filing of motion in District Court, issues raised in bid protest have been resolved notwithstanding bid protest would have been dismissed as untimely under GAO's Interim Bid Protest Procedures and Standards (4 CFR 20 *et seq.*) but for interest and involvement of Court of Appeals--- 161

Requests

Persons authorized to request

Private parties

Although in determining whether parent and its subsidiary should be treated as separate entities term "day-to-day" control was erroneously injected into Labor Dept.'s criteria of de facto control by contracting agency reviewing equal employment opportunity (EEO) compliance of successful contractor with E.O. 11246, ruling in 50 Comp. Gen. 627 (1971) that affirmative action plan was not required to be submitted by prime contractor for each establishment is upheld upon reconsideration of decision at request of third party, as record establishes criteria used to determine separate entities of contractor and its subsidiary was not unreasonable, arbitrary or capricious and that, furthermore, there is no evidence of attempt to evade EEO obligations------ 145

Jurisdiction

Contracts

Disputes

Resolution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range-------- 382

Small business matters

Determination by SBA Size Appeals Board that two of the firms bidding on a procurement containing a 50 percent set aside for award to labor surplus area concerns were affiliated through common management and low bidder on the non-set-aside, one of the two firms, could not be classified as a small business concern as of date of bid opening for purposes of the set-aside priority is a "conclusive" determination that will not be reviewed by the U.S. General Accounting Office (GAO) since no evidence or argument was presented that was not considered by Board. Furthermore, protest to Board without a prior decision thereon by cognizant SBA regional office is permitted pursuant to 13 CFR 121.3-6(b)(1)(ii); allegations that protest procedures were not followed should have been presented to Board; and delayed protest filed with GAO is untimely under 4 CFR 20.2(a) and will not be considered------ 886

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Contracts—Continued
Specification compliance evaluations

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes 393

Recommendations
Implementation

Since recommendation that collections made from third party tort-feasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651-2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation 125

Recommendation that partial cancellation of contract awarded to bidder erroneously determined to be low bidder should be changed to partial termination for convenience of Govt. and settlement made with contractor in accordance with termination for convenience of Govt. clause of contract is recommendation for corrective action pursuant to sec. 236 of Legislative Reorganization Act of 1970, Pub. L. 91-510, and contracting agency is required to submit written statements of action taken with respect to recommendation to House and Senate Committees on Govt. Operations not later than 60 days from date of recommendation and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation 215

Under sec. 236 of Legislative Reorganization Act of 1970, action taken to recommendation to reinstate canceled invitation for bids, copy of which was submitted to congressional committees named in sec. 232 of act, must be sent by contracting agency to appropriate committees within time limitations prescribed in sec. 236 285

Offer to furnish indefinite quantity of automatic data processing services under second request for proposals, following termination of contract for convenience of Govt. because first solicitation was misstated, that was evaluated by adding sum shown for rental and maintenance and ignoring "no charge" phrase, was erroneously evaluated since ambiguity was patent on its face and discrepancy, pursuant to par. 3-804 of ASPR, should have been resolved with offeror. Therefore, negotiations should be reopened for term remaining under contract and if protestant makes best

GENERAL ACCOUNTING OFFICE—Continued Page
Recommendations—Continued
Implementation—Continued
offer, existing contract should be terminated for convenience of Govt. and contract awarded to protestant. This corrective recommendation requires action prescribed by sec. 236 of the Legislative Reorganization Act of 1970 409
When United States General Accounting Office decision contains recommendation for corrective action, copies of the decision are transmitted to congressional committees named in sec. 232 of the Legislative Reorganization Act of 1970, and contracting agency's attention is directed to sec. 236 of act which requires agency to submit written statements of action to be taken on recommendation to House and Senate Committees on Government Operations not later than 60 days after date of decision, and to the Committees on Appropriations in connection with the first request for appropriations made by agency more than 60 days after date of decision 593
The corrective recommendation that an ambiguous and misleading invitation for bids should be canceled and the procurement readvertised under revised specifications requires the contracting agency pursuant to section 236 of the Legislative Reorganization Act of 1970 to submit written statements to the Committees on Government Operations of both Houses not later than 60 days after the date of the recommendation and to the Committees on Appropriations in connection with the first request for appropriations made more than 60 days after the date of the recommendations 827
Recommendation that conflicting bid acceptance periods in invitations should have been cross-referenced to avoid misleading bidders requires corrective administrative action pursuant to sec. 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, and therefore copies of the Comptroller General decision containing the recommendation are being transmitted to appropriate congressional committees. Also, sec. 236 of the act requires written statements by administrative agency of action to be taken with respect to the recommendation to be submitted to the House and Senate Committees on Government Operations not later than 60 days after date of recommendation and to the Committees on Appropriations in connection with the first request for appropriations made more than 60 days after date of the recommendation 842
Reporting to Congress
Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient, and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1–3.101(c)) that is not justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portions of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees 987

GENERAL SERVICES ADMINISTRATION Page

Authority

Space assignment

User charges

Where General Services Admin. (GSA) cannot establish Standard Level User Charges (SLUC) for space and services furnished pursuant to Public Buildings Amendments of 1972 on basis of commercial rates, the GSA Administrator has broad discretion under act to assess charges and may assign concessions for blind stands and Federal Credit Unions, with concurrence of occupying agencies, and this space together with joint use space and parking facilities may be considered to establish user charges, and cost of concessions for cafeterias, beauty parlors, etc., may be charged occupying agencies on a pro rata reasonable basis. Under its authority to assign and reassign space in Govt. owned and leased buildings, GSA may assess SLUC rates in buildings occupied by permit from another agency, reimbursing the controlling agency; may charge for congressional district offices; and may outlease sites until needed for construction at fair rental value 957

GRANTS

To other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)

To States. (*See* **STATES, Federal aid, grants, etc.**)

GRATUITIES

Enlistment bonus

Military specialty requirement

Since payment of enlistment bonus authorized by sec. 203(a) of Pub. L. 92-129 (37 U.S.C. 308a) to aid in filling military combat positions by encouraging new enlistments and extension of initial enlistment terms is contingent on member qualifying and serving in designated military specialty, promulgated regulations should require member to be qualified and serving in specialty before gaining entitlement to $3,000 bonus prescribed for period of at least 3 years service—bonus to be paid in lump sum or periodic installments—and should provide that member to be eligible for continued bonus installments must maintain qualification in his specialty. Furthermore, right of qualified member who extends his service vests at time extension is executed, and if member is not qualified, his right vests after extension is executed and he completes retraining 105

Reenlistment bonus

Critical military skills

Failure to qualify

Discharge and reelistment of member of Regular component before he was eligible for variable reenlistment bonus (VRB) he was promised may not be declared retroactively invalid, in absence of fraud, under principle of irrevocability of an executed discharge by competent authority, even should member consent to revocation of his reenlistment contract, and notwithstanding member's ineligibility for VRB was discovered subsequent to reenlistment, and recovery of benefits received by member incident to discharge and reenlistment is not required. However, since member did not qualify for VRB at time of reenlistment he is not entitled to bonus even though erroneously informed that he was, and later acquisition of required qualifications does not retroactively entitle member to bonus 506

GRATUITIES—Continued Page
Reenlistment bonus—Continued
Critical military skills—Continued
Reenlistment for retraining purposes

Reenlistment that was not for purpose of continuing use of critical skill member of the uniformed services held at time of reenlistment but was for purpose of retraining member does not create entitlement to variable reenlistment bonus provided by 37 U.S.C. 308(g) as military service will not receive exact benefit intended from bonus since it will neither have continued use of critical skill possessed by member nor avoid necessity of training replacement in the skill. Therefore, when it is known at time of reenlistment that member will not continue to utilize critical skill upon which payment of variable reenlistment bonus is based, payment may not be authorized, and this is so even if skill is not critical one---- 416

Training leading to a commission
Naval Academy Preparatory School training

Variable reenlistment bonus prescribed by 37 U.S.C. 308(g) as an additional inducement to first-term enlisted personnel, who possess military skills in critically short supply, to reenlist so skills are not lost to service, is not payable to enlisted member who was discharged and reenlisted while undergoing training in Naval Academy Preparatory School (NAPS) program—program which will ultimately qualify him for admission to Academy—as there is no relationship between enlisted member's critical skill and his successful completion of NAPS program, and fact that member would revert to enlisted service in his critical skill if he does not successfully complete program provides no basis to pay him variable reenlistment bonus---- 572

Six months' death
Inactive duty training
Direct traveling requirement

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period---- 28

HISS ACT
Persons convicted of certain offenses
Civil service retirement annuity forfeiture. (*See* **RETIREMENT, Civilian, Annuities, Forfeiture, Persons convicted of certain offenses**)

HOSPITALS Page

Hill-Burton Act

Grants-in-aid

Competitive bidding system applicability

Although Fedl. Govt. is not a party to the contract awarded by recipient of a construction grant from the Dept. of Health, Education, and Welfare (HEW) under the Hill-Burton Act (42 U.S.C. 291 *et seq.*), HEW had the responsibility of determining whether the conditions of grant had been met, and review of records supports advice of HEW to grantee that low bidder on the hospital addition solicited failed to meet competitive bidding requirements because certification of part I affirmative action requirements for equal employment opportunity only committed the bidder to the local, Cleveland Plan, and because bidder had not committed itself to part II affirmative action requirements of solicitation, which involved trades not covered by part I, by merely signing bid, since nothing in bid would bind bidder to conform to part II criteria, and no independent commitment to that part had been submitted by the bidder 874

HOUSING

Military personnel

Construction cost limitations

Waiver

Although offerors who submitted acceptable technical proposals for construction of any or all of three Bachelor Officers Quarters (BOQ) and therefore were entitled to bid on project or projects under subsequent invitation for bids should have been given more detailed information concerning application of per man statutory limitation imposed by sec. 706 of Military Construction Act of 1972, and possibility of waiver, nevertheless the contracting officer's recommendation that limitation placed on one of the projects should be waived for low overall bidder who was not low on major construction item was not unfair to second low bidder who should have been aware that sec. 706, and implementing pars. 11–110(a) and (c) of Armed Services Procurement Reg. provide both for limiting costs and for waiver when limitation is impracticable to impose 969

Subsidies

Housing Allowance Experimental Program

Evaluation contracts

Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient, and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1–3.101(c)) that is not justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portion of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees 987

HOUSING—Continued Page

Turnkey developers

Contracts

Two-step procurement

The second-step bid, a turnkey project, submitted under two-step invitation for bids to design and construct family housing by group composed of architects, engineers, land planners, and builders, who was joined in second-step by construction firm who had not participated in first step—an invitation requirement—but was only principal named in bid bond, was properly rejected since construction company, separate legal entity, had no authority to bind conventurers responsible for design, and bid bond coverage being incomplete was defective. Furthermore, information submitted prior to second-step bid identifying construction company as coventurer, which was erroneously held to have no legal significance, served notice construction firm had no authority to bind its coventurers 223

HUSBAND AND WIFE

Divorce

Children

Joint custody of parents

The separate maintenance allowance (SMA) authorized in 5 U.S.C. 5924 to be paid to an employee when he is assigned to post in foreign area that is dangerous, unhealthful, or where living conditions are adverse in order to enable him to meet additional expense of maintaining his wife and/or dependents elsewhere, may be paid to employee whose minor children incident to divorce decree have been placed jointly in his care and his former spouse since children are his "dependents" within meaning of the term as defined in sec. 040m of Standardized Regs. (Govt. Civilians, Foreign Areas). However, employee must establish his child or children would have resided with him but for circumstances warranting payment of SMA, and an affidavit to this effect from employee's former spouse is sufficient to establish entitlement to SMA 878

Travel and transportation matters

Wife's travel prior to husband's eligibility

Reimbursement to employee for advance return travel to U.S. of spouse and/or minor children who traveled to foreign post as dependents but ceased to be dependents as of date employee became eligible for return travel because of divorce or annulment of marriage may be provided and sec. 126.2, Vol. 6, FAM, amended accordingly under authority of 22 U.S.C. 1136—amendment to prescribe that reimbursable travel may not be deferred more than 6 months after employee completes travel. Govt. has obligation to return dependents at Govt. expense since employee and family are sent to overseas post for convenience of Govt. and, furthermore, amendment will bring regulation in harmony with 6 FAM 126.3 and sec. 1.11f of OMB Cir. A-56 246

INDIAN AFFAIRS

Trust funds

Alaska Native Claims Settlement Act

As natives of Alaska—ultimate beneficiaries of Alaska Native Fund established by Alaska Native Claims Settlement Act, Pub. L. 92-203, approved Dec. 18, 1971, for distribution to regional corporations—are

INDIAN AFFAIRS—Continued Page

Trust funds—Continued

Alaska Native Claims Settlement Act—Continued

aboriginal groups, legal position of individual Alaskan native is assimilated to that of other Indians in U.S. Therefore, lack of formal tribal organization of natives is not determinative of status of fund, and it may be properly classified as Indian tribal trust fund that is eligible for interest payments under 25 U.S.C. 161a, and for investment pursuant to 25 U.S.C. 162a, pending enrollment of natives and distribution of fund to regional corporations established by act 248

INTEREST

Foreign currencies

Owned by United States

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

General rule

Interest included in awards of retroactive payments of Civil Service annuities to plaintiffs in 338 F. Supp. 1141, from date of eligibility to date of judgment—awards based on fact that so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* under which payments were withheld was an *ex post facto* law that punished plaintiffs for conduct that occurred prior to its enactment—is payable, together wih annuities, from Civil Service Retirement and Disability Fund and not from permanent indefinite appropriation for judgments contained in 31 U.S.C. 724a, since interest is part of damages awarded. However, as interest is payable only when provided for in statutes and contracts, in absence of court decision to contrary, obligation to pay interest does not extend to those individuals who did not sue but by virtue of 338 F. Supp. 1141 are entitled to retroactive payment of annuity 175

INTERNATIONAL ORGANIZATIONS

Military assistance

Grants by other than Defense Department

In implementation of sec. 402 of Foreign Assistance Act of 1971 (22 U.S.C. 2321b), Dept. of Defense required to consider value of excess Defense article ordered by any department, agency, or establishment, except AID, as expenditure made from funds appropriated under Foreign Assistance Act of 1961 for military assistance, unless ordering agency certifies to Comptroller General that excess Defense article is not to be transferred by grant to foreign country or international organization, may charge during fiscal year 1972 amounts not covered by certification to appropriate funds, and may adopt interim procedure

INTERNATIONAL ORGANIZATIONS—Continued Page
Military assistance—Continued
Grants by other than Defense Department—Continued
beginning with fiscal year 1973, for use of "blanket" certification to be renewed each year, since these procedures will ensure congressional control of distribution of surplus arms---- 37

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
Grants-in-aid
"Hard-match" requirement
Exempted funds
Purpose of "hard-match" requirement in Omnibus Crime Control and Safe Streets Act of 1968, as amended, which authorizes Law Enforcement Assistance Admin. (LEAA) to grant funds for strengthening and improving law enforcement, being to assure State and local governments share in LEAA programs with monies they appropriated, and not to exclude private organizations, the "hard-match" requirement does not prevent use in LEAA-sponsored National Scope projects of matching funds from private sources, or use of Model City funds allotted by grantees to LEAA projects, as such funds are considered "money appropriated" for purposes of the "hard-match" requirement. The "hard-match requirement" in connection with subgrants to nongovernmental units also may be interpreted to permit use of private sources, and as funds for the administration of American Samoa lose their Federal identity, they meet the requirement---- 558

LEASES
Congressional approval
Public buildings equitable distribution
Requirement in Public Buildings Act of 1959, as amended on June 16, 1972 (40 U.S.C. 607), that prospectuses of proposed leases be submitted to Public Works Committees when average annual rental will exceed $500,000 is interpreted to mean rental amount excludes cost of heat, light, water, and janitorial services, and to mean congressional approval is not required retroactively for leases entered into prior to June 16, 1972, in absence of express statutory provision; for lease amendments that would bring leases within prohibition; and for leases renewed as part of interim housing plan. However, since determination whether or not to exercise option is tantamount to making new lease, options exercised on leases entered into prior to June 16, 1972, that would cause rental to exceed $500,000, require presentation to Committees unless option was included in initial congressional approval---- 230

"Outlease" sites
Construction sites until needed
Where General Services Admin. (GSA) cannot establish Standard Level User Charges (SLUC) for space and services furnished pursuant to Public Buildings Amendments of 1972 on basis of commercial rates, the GSA Administrator has broad discretion under act to assess charges and may assign concessions for blind stands and Federal Credit Unions, with concurrence of occupying agencies, and this space together with joint use space and parking facilities may be considered to establish user charges, and cost of concessions for cafeterias, beauty parlors, etc., may be charged occupying agencies on a pro rata reasonable basis. Under

LEASES—Continued Page

"Outlease" sites—Continued

Construction sites until needed—Continued

its authority to assign and reassign space in Govt. owned and leased buildings, GSA may assess SLUC rates in buildings occupied by permit from another agency, reimbursing the controlling agency; may charge for congressional district offices; and may outlease sites until needed fo construction at fair rental value 957

LEAVES OF ABSENCE

Annual and Sick Leave Act

Coverage

District of Columbia Courts Executive Officer

Fact that Executive Officer of District of Columbia Courts—position established in D.C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this non-judicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained 111

Civilians on military duty

Entitlement

ROTC training

A civilian employee attending ROTC advanced camp under authority of 10 U.S.C. 2109, which is not considered active duty in the Armed Forces, may be allowed annual leave available to him for the period he was performing field training as an ROTC cadet since longstanding rule that actual military service is incompatible with concurrent Federal service is not for application in view of fact that ROTC training is distinct in many respects from active military service, and as performance of ROTC field training does not involve the holding of a civilian position for purposes of 5 U.S.C. 5533a, which prohibits receipt of basic pay for more than one position for more than an aggregate of 40 hours in any 1 calendar week 755

Leave, etc., status

National Guard technician employed under 32 U.S.C. 709, who upon completion of civilian workday departs for 2 weeks full-time training duty as National Guardsman for course of instruction pursuant to 32 U.S.C. 505, and returns home in military travel status shortly after midnight, reporting to civilian position same day, is entitled to civilian pay without charge to military or civilian leave for day of departure since civilian duties were performed by member before he became subject to military control and performance of military duties, and to civilian compensation for day he reported back to civilian position at which time he no longer was subject to military control, and entitlement to military pay incident to return travel from training is not incompatible to performance of civilian duties or payment therefor after termination of active military training duty 47

LEAVES OF ABSENCE—Continued Page

Civilians on military duty—Continued

Leave, etc., status—Continued

National Guard technician who became subject to military control upon reporting for full-time training duty to National Guard School for recruiters pursuant to 32 U.S.C. 504 after completion of civilian workday is entitled under principle in 49 Comp. Gen. 233 to civilian pay without charge to leave for day of reporting, even though he may be entitled to military pay for that day. However, since full-time training duty is active duty under 37 U.S.C. 204(d), which is incompatible with civilian service, there is no entitlement under rule in 37 Comp. Gen. 255 to civilian pay without charge to appropriate leave—military, annual, or LWOP—for days subsequent to coming under military control, even though duties of military assignment were such that member was able to perform civilian duty on those days 471

Computation

Night differential inclusion

The night differential authorized in 5 U.S.C. 5343(f), as enacted by Pub. L. 92–392, approved Aug. 19, 1972, may be considered basic pay for purposes of annual and sick leave, and overtime pay for regular or irregular hours worked in view of the fact the legislation was enacted to unify the long established principle and policies for setting the pay of prevailing rate employees, including the Coordinated Federal Wage System and decisions of the Comptroller General of the United States 716

Court

Witness

Private litigation

Employees summoned to appear as private individuals and not in official capacities in suit by fellow employee for overtime compensation are not entitled to court leave authorized by 5 U.S.C. 6322(b), as amended by Pub. L. 91–563, approved Dec. 19, 1970, for period of absence in which they appeared as witnesses on behalf of private party and without official assignment to such duty. Matter of granting court leave to Govt. employee to testify on behalf of private party was rejected in consideration of Pub. L. 91–563, and both FPM, Ch. 630, subch. 10–3–d, and FPM Letter 630–21, dated Mar. 30, 1971 provide that witness appearing for private party in nonofficial capacity is not entitled to court leave 10

Home leave travel of overseas employees

Effect of RIF separation and reinstatement on entitlement

An employee whose separation in a reduction-in-force action from position with Trust Territories of the Pacific Islands in Saipan prior to completion of 2 years' service on Apr. 15, 1972, was found to be invalid and he was reinstated to position in Saipan or an equivalent position but in lieu he accepted a position with Bureau of Reclamation in Denver, and his last day on rolls of Trust Territories was Sept. 10, 1972, is entitled pursuant to back pay statute, 5 U.S.C. 5596, to home leave credit authorized under 5 U.S.C. 6305(a) through Sept. 10, 1972. Although employee may count time he did not spend at his foreign post due to his erroneous separation for purpose of fulfilling the 24 months overseas service requirement, limitations imposed on granting

LEAVES OF ABSENCE—Continued Page

Home leave travel of overseas employees—Continued

Effect of RIF separation and reinstatement on entitlement—Continued

home leave disqualified employee for home leave at time he accepted the Denver position since there was no intent to return him overseas, and he will not qualify for home leave until he has served another qualifying period overseas 860

Lump-sum payments

Rate at which payable

Allowances inclusion

Foreign post differential

In accordance with long-standing rule established by Comptroller General decisions, two employees of Agency for International Development, State Dept., who were separated from Federal service in Vietnaine, Laos, are entitled to lump-sum leave payments that include foreign post differential applicable to their service in Vientiane on basis they continued in service at foreign post for period covered by lump-sum payment, 5 U.S.C. 5551 providing that a "lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave." On basis of this decision, contrary regulations may be revised 993

Taxable

Pennsylvania Personal Income Tax

Deduction for Pennsylvania Personal Income Tax from lump-sum annual leave payments to Federal employees separating from Government service (5 U.S.C. 5551(a)) is required notwithstanding that leave balance may include leave carried forward from agencies not geographically located within Pennsylvania regardless of when leave was earned or current residence of employee, and that leave accrued but was not paid prior to enactment of tax law or its effective date since for purposes of Federal income tax withholding, lump-sum leave payments are wages taxable as income for year of receipt and, therefore, payments are subject to agreement between U.S. Treasury Dept. and Commonwealth of Pa. respecting withholding of tax from compensation of Federal employees 139

Military personnel

Leave accrual, charges, etc., legality

Fractional days

National Guard technician who after 4 hours of civilian duty takes 4 hours of annual leave in order to perform military recruiting under orders issued pursuant to 32 U.S.C. 505 may receive 4 hours civilian pay and 4 hours annual leave as well as any military compensation which accrues under his orders since civilian compensation may be paid for time worked prior to reporting for military duty, and reservist or member of National Guard may be placed on leave, including annual leave, while performing active or full-time training duty, and if technician wishes to charge absence to allowable military leave charge must be for 1 day as there is no authority for charging military leave in increments of less than 1 day. Since incompatibility rule should not prevent charging of less than full 8 hours of annual leave when civilian employee performs services for part of day before becoming subject to military control, B–152908, Dec. 17, 1963, is modified 471

LEAVES OF ABSENCE—Continued Page

Military personnel—Continued

Leave accrual, charges, etc., legality—Continued

Fractional days—Continued

National Guard technician who for period of 5 days performs 4 hours of civilian duty each day followed by active military duty as part of year around training authorized under 32 U.S.C. 503, defined as "training performed from time to time throughout calendar year in varying increments as contrasted to 15 consecutive days," is entitled to civilian pay without charge to leave for 4 hours worked in civilian capacity on day he reported for military duty, with charge of 4 hours annual leave or full day of military leave for 4 remaining hours of civilian duty day. In order for technician to receive compensation from both civilian and military sources, 8 hours of annual leave or full day of military leave is chargeable for balance of 5-day period, since no additional pay would result for part-time performance of civilian duties without charge to leave 471

Payments for unused leave on discharge, etc.

Court martial forfeiture sentence

A Marine Corps officer whose sentence for violating Uniform Code of Military Justice on Nov. 22, 1972, was approved as to forfeiture of pay and allowances, but not as to dismissal, and finally executed on Dec. 18, 1972, following which officer was detached from duty and ordered to travel to his home of record without entitlement to active duty pay and allowances, where he was released on Dec. 31, 1972, and transferred to Reserves with 45 days unused leave is entitled to pay and allowances through Dec. 17, 1972, pursuant to interpretation of 10 U.S.C. 857 and 871 that day of execution of sentence controls; to mileage for authorized travel by privately owned automobile as provided by par. M4157 of Joint Travel Regs., but not to payment for unused leave as forfeiture imposed was "all pay and allowances" 909

Status during

At home awaiting orders

Graduate from Army nursing school on May 28, 1971, discharged from enlisted E-3 status effective Aug. 2, 1971, to accept commission of 2nd lieutenant on Aug. 3, 1971, who was not granted ordinary leave, did not request excess leave, and was not in absent without leave status for period he was at home following commission and compliance with active duty orders dated Nov. 1, 1971—Aug. 12, 1971, orders not having been received—did not become entitled to active duty pay and allowances as 2nd lieutenant until date of necessary compliance with Nov. 1, 1971, orders. However, member may retain pay and allowances he drew as private 1st class E–3 for period May 29 to Oct. 31, 1971, since participants in Army Student Nurse Program are retained on active duty for usually short period between graduation and commissioned service, and member told to remain at home considered himself on active duty 482

Without pay status

Unexcused leave

Reclassification and immediate induction of individual because he failed to keep draft board informed and therefore was declared delinquent does not make induction void but merely voidable, and upon discharge from Marine Corps, under honorable conditions by reason of erroneous induction, member who was absent without authority in nonpay status

LEAVE OF ABSENCE—Continued Page
Military personnel—Continued
Without pay status—Continued
Unexcused leave—Continued
for 1 year, 7 months, and 13 days out of 2 years, 3 months, and 9 days of service is considered de jure member of Corps until discharge for pay purposes, and is entitled to full pay and allowances credited to his account and remaining unpaid subject, of course, to 37 U.S.C. 503(a) which provides for forfeiture of all pay and allowances for period of absence without leave or over leave, unless absence is excused as unavoidable---------- 542

LEGISLATION
Continuing resolutions
Appropriation act restrictions effect
Although in considering bill for "Department of Labor, and Health, Education and Welfare Appropriation Act, 1973," House was more restrictive than Senate as to number of Federal employees authorized to determine compliance with Occupational Safety and Health Act of 1970, inspection activities of Labor Dept. under 1970 act remain unchanged during effective period of Joint Resolution (Pub. L. 92-334), which provides continuing appropriations for fiscal year 1972 projects until fiscal year 1973 funds become available, for notwithstanding that pursuant to sec. 101(a)(3) of Joint Resolution, more restrictive language governs, sec. 101(a)(4) controls to make restriction on inspection services inapplicable under Joint Resolution in view of fact similar restriction was not contained in 1972 appropriation act---------- 71

MARITIME MATTERS
Vessels
Cargo preference
American vessels
Foreign vessels registered in United States
Carriage of military cargoes in foreign-built vessels entitled to registry in U.S., and engaged in foreign trades or trade with trust territories, is not precluded by basic cargo preference statutes—act of Apr. 28, 1904, as amended, and act of Aug. 26, 1954, as amended. Objectives of 1904 act—to aid U.S. shipping, to foster employment of U.S. seamen, and to promote the U.S. shipbuilding industry—do not exclude foreign-built vessels registered in U.S., as such vessels are considered vessels of U.S. and entitled to benefits and privileges appertaining to U.S. vessels, to extent participation is limited to foreign commerce and trust territories, and is not precluded by act of 1954, which insures that at least 50 percent of all Govt. cargo, whether military or civil, will be transported in privately owned "U.S.-flag commercial vessels," a term that is not limited to vessels built in U.S---------- 809

Towage of empty barge
Prohibition in 10 U.S.C. 2631, Cargo Preference Act of 1904, as amended, to effect that "only vessels of U.S. or belonging to U.S. may be used in transportation by sea of supplies bought for Army, Navy, Air Force, or Marine Corps," does not apply to towage of empty barge by foreign-flag tug since tug is not supply item and language of act as well as court cases which distinguish between contracts of affreight-

MARITIME MATTERS—Continued Page

Vessels—Continued

Cargo preference—Continued

American vessels—Continued

Towage of empty barge—Continued

ment and contracts for tonnage services indicate preference granted U.S. vessels by 1904 Cargo Preference Act is limited to transportation by sea of military supplies under contracts of affreightment and preference does not extend to towage of empty vessels under ordinary towage contracts. Therefore payment under towage contract from appropriated funds was proper 327

Sales

Bid mistake

Under sales invitation for bids on surplus ships, which provided for bid deposit equal to 25 percent of bid, bidder who after bid opening alleged bid price increase was overstated by Western Union, and that excessive bid deposit made was in anticipation of offering another increase, may be permitted to withdraw its bid or waive mistake. Bidder unable to establish by clear and convincing evidence existence of mistake and bid actually intended as required by sec. 1–2.406–3 of Federal Procurement Regs. and applicable to sale pursuant to 40 U.S.C. 474(16), may not be permitted to correct its bid, but mistake having been made, bidder may be allowed to either withdraw bid, since degree of proof justifying withdrawal is in no way comparable to that necessary for bid correction, or to waive mistake under exception to rule against waiver of mistake 258

MEDICAL TREATMENT

Federal Medical Recovery Act

Payment for services

Disposition

Collections made under so-called Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651–2652, for hospital, medical, surgical, or dental care and treatment to persons who are injured or suffer disease under circumstances creating tort liability upon third person are for deposit in Treasury as miscellaneous receipts pursuant to sec. 3617, R.S., 31 U.S.C. 484, as disposition of monies collected from third party tortfeasors is not specified in FMCRA, and practice of depositing such collections to related appropriation accounts relying on authority in 10 U.S.C. 2205 should be discontinued since there is not involved sale of and payment for services that is contemplated by 10 U.S.C. 2205 125

Since recommendation that collections made from third party tortfeasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation 125

MEDICAL TREATMENT—Continued Page

Military personnel

Hospitalization

Duty within hospital vicinity

Status of duty

When member of uniformed services stationed in U.S. is ordered to hospital, treatment generally is temporary and does not justify transportation of dependents. However, if period of hospitalization is prolonged or member is returned from overseas, station change is regarded as permanent and member is entitled to transportation of dependents and dislocation allowance, and all members, irrespective of having dependents, are eligible to have their household effects transported. Although members who have basic eligibility for permanent change of station allowances incident to hospitalization may not be authorized per diem and other temporary duty allowances when assigned duty within corporate limits of city or town wherein hospital is located, such allowances are payable to members whose home port or duty station is in U.S. and whose treatment will not be prolonged 432

Reservists

Injured incident to inactive duty training

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period 28

MESSES

Availability determination

Distance factor

Member of uniformed services at temporary duty or delay point where Govt. mess, as defined in par. M1150–4 of Joint Travel Regs., is determined not to be available because of distance between lodgings and mess location, or because of incompatibility of mess hours with duty hours, may be paid per diem at rate authorized when Govt. mess is not available on basis that member in travel status is not required to use inadequate quarters, unless military necessity, and distance is factor in determining impracticability of utilizing Govt. facility. However, regardless of distance, if it is practicable to utilize mess for some but not all meals because of incompatability of duty hours, breakfast, lunch and dinner should be considered separately in determining impracticability of utilizing available mess 75

MILEAGE

Page

Military personnel

Travel by privately owned automobile

Between residence and departure terminal

Officer of uniformed services who used his privately owned automobile to reach airport departure point under orders authorizing travel to attend conference, but who is prevented from departing due to adverse weather conditions and returned home after absence of 4 hours, may not be paid per diem since par. M4205-4a of Joint Travel Regs. prohibits payment of per diem allowance for round trip performed entirely within 10-hour period of same calendar day. However, based on rationale in B-166490, Apr. 23, 1969, relating to civilian employee, officer for use of his automobile is entitled to travel allowance prescribed by par. M4401-2, item 2, of regulations, which authorizes mileage for one round trip from home to airport, plus parking fees, not to exceed cost of two taxicab fares between those points 452

Interstation travel *v.* travel within limits of duty station

Travel of Marine officer who was verbally directed to travel by privately owned vehicle from permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty—travel subsequently approved for reimbursement—is interstation travel within purview of 37 U.S.C. 404 and reimbursable at 7 cents per mile rate prescribed by par. M4203-3b of Joint Travel Regs. rather than at higher rate provided by par. M4502-1, pursuant to 37 U.S.C. 408, for travel within limits of member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of verbal orders by competent authority shortly after performance of travel as being advantageous to Govt. may be accepted for purpose of reimbursing officer 236

Release from active duty

A Marine Corps officer whose sentence for violating Uniform Code of Military Justice on Nov. 22, 1972, was approved as to forfeiture of pay and allowances, but not as to dismissal, and finally executed on Dec. 18, 1972, following which officer was detached from duty and ordered to travel to his home of record without entitlement to active duty pay and allowances, where he was released on Dec. 31, 1972, and transferred to Reserves with 45 days unused leave is entitled to pay and allowances through Dec. 17, 1972, pursuant to interpretation of 10 U.S.C. 857 and 871 that day of execution of sentence controls; to mileage for authorized travel by privately owned automobile as provided by par. M4157 of Joint Travel Regs., but not to payment for unused leave as forfeiture imposed was "all pay and allowances" 909

Travel by privately owned automobile

Administrative approval

Discretionary

Term "official duty station" in Civil Service Commission Federal Manual Supp. 990-2, book 550, subch. S1-3, which is stated to mean "employee's designated post of duty, limits of which will be corporate limits of city or town in which employee is stationed," may only be redefined by Commission and, therefore, Dept. of Agriculture may not consider "official duty station" in terms of mileage radius in order to better

MILEAGE—Continued Page

Travel by privately owned automobile—Continued

Administrative approval—Continued

Discretionary—Continued

effectuate purpose of overtime provision contained in 5 U.S.C. 5542(b)(2). However, matter of authorizing mileage to employee for use of his automobile incident to official travel is discretionary with employing agency.. 446

Incident to transfer

Temporary duty assignment

Family domicile established by employee, transferred from Fairbanks, Alaska, at Ann Arbor, Mich., where he will attend graduate school before reporting to new duty station, Wash., D.C., does not constitute permanent change of station within meaning of OMB Cir. No. A-56, and A-56 allowances become payable only when employee relocates in Washington. Since both old and new stations are not within continental U.S., employee is not entitled to a house-hunting trip, and cost of shipping his household effects to Ann Arbor is for deduction from his constructive cost entitlement to transportation of his effects from Fairbanks to Washington. Per diem is payable during training period in lieu of transporting family and effects to Ann Arbor (39 Comp. Gen. 140), and payment of mileage at 6 cents per mile for employee's travel to Ann Arbor by privately owned automobile, is upon completion of transfer to be deducted from entitlement to 12 cents per mile for travel from old to new station, and to 6 cents per mile for excess travel due to the training..... 834

MILITARY PERSONNEL

Allowances

Family. (*See* **FAMILY ALLOWANCES**)

Quarters. (*See* **QUARTERS ALLOWANCES**)

Station. (*See* **STATION ALLOWANCES**)

Annuity elections for dependent. (*See* **PAY, Retired, Annuity elections for dependents**)

Bachelor officers quarters. (*See* **QUARTERS, Government furnished**)

Cadets, midshipmen, etc.

Subsistence allowance

Entitlement period

Subsistence allowance of $100 per month authorized in 37 U.S.C. 209, as amended by act of Nov. 24, 1971, Pub. L. 92-171, and implemented by pars. 80401a, b, and d(2)(a) of Dept. of Defense Military Pay and Allowances Entitlements Manual, may not be paid to ROTC cadet or midshipman appointed under 10 U.S.C. 2107 for 10 full months of each academic year if academic year is of shorter duration. In accordance with legislative history of 1971 act, cadets and midshipmen became entitled to subsistence allowance for maximum of 20 months each during first 2 years and second 2 years of schooling to preclude payment of allowance during vacations when they had no military obligation and, therefore, there is no authority to pay allowance to cadets and midshipmen when they are not in school..... 496

MILITARY PERSONNEL—Continued Page

Conflict of interest statutes

Contracting with Government

Retired members. (*See* **MILITARY PERSONNEL, Retired, Contracting with Government**)

Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.**)

Courts-martial sentences

Pay. (*See* **PAY, Courts-martial sentences**)

Death or injury

Claims against estate. (*See* **DECEDENTS' ESTATES**)

Escorts

For disabled military personnel

Individual not in employ of U.S. Govt. who travels as attendant to military member on temporary disability list incapable of traveling alone to report for mandatory physical examination required by 10 U.S.C. 1210(a) in order to avoid termination of his disability retired pay may be reimbursed actual transportation costs notwithstanding sec. 1210(g), authorizing travel and transportation allowances for member, does not provide for attendant since use of governmental personnel involves two round trips, thus making single round trip travel of non-governmental personnel more economical and practicable and, therefore, beneficial to interests of U.S. B–140144, Aug. 24, 1959, overruled..... 97

Non-governmental personnel

Wife of Navy member on active duty who incident to travel from Libson, Portugal, to the U.S. Air Force Base Torrejon, Spain, via Madrid, Spain, and return, as attendant to her husband who was unable to travel unaccompanied, is furnished Govt. procured commercial air between Libson and Madrid and is provided Govt. quarters, may be reimbursed cost of travel via commercial auto from Air Base to Madrid Airport upon showing of actual expenses incurred. Payment to wife is approved on basis the rationale stated for paying expenses of individuals not employed by U.S. incident to traveling as attendant to military member on temporary disability retired list, and as attendant to civilian employee is equally applicable to member of uniformed services on active duty..... 950

Reservists. (*See* **MILITARY PERSONNEL, Reservists, Death or injury**)

Dependents

Proof of dependency for benefits

Children

Children provisionally adopted by Navy member while stationed in Great Britain pursuant to the Adoption Act of 1958 (7 Eliz. 2, C.5) Part V, Sec. 53, are considered dependents of the member under 37 U.S.C. 401, so as to entitle him to a dependents' allowance and all other benefits incident to dependency status while member resides in Great Britain in view of fact that although provisional adoption order only authorizes custody and removal of children from Great Britain for adoption elsewhere, sec. 53(4) of the act provides that the rights, duties, obligations, and liabilities prescribed in other sections of the act for an adopter shall equal those of natural parents or those created by an adoption order.

MILITARY PERSONNEL—Continued Page

Dependents—Continued

Proof of dependency for benefits—Continued

Children—Continued

However, unless children are actually adopted by member after he is transferred from Great Britain, they may not continue to be regarded as his adopted children 675

Transportation. (*See* **TRANSPORTATION, Dependents**)

Discharges. (*See* **DISCHARGES AND DISMISSALS, Military personnel**)

Dislocation allowance

Members without dependents

Quarters not assigned

Member of uniformed services without dependents who is transferred to permanent station and furnished certificate of nonavailability of Govt. quarters on basis it would be economically advantageous to U.S. not to require member to occupy available quarters is entitled to dislocation allowance pursuant to par. M9003-1 of Joint Travel Regs., implementing 37 U.S.C. 407(a), which authorizes payment of dislocation allowance to member that is not assigned to Govt. quarters and is furnished certificate of nonavailability of quarters 64

Payment of dislocation allowance to officer of Army Nurse Corps as member without dependents who is receiving basic allowance for quarters as member with dependents for her mother who will not join her at new duty station where she was not assigned Govt. quarters depends on whether mother resided with officer at old station. If she did not, officer is entitled to dislocation allowance pursuant to par. M9002, JTR, in amount equal to applicable monthly rate of quarters allowance prescribed for member of officer's pay grade without dependents, but if mother did reside with her at time of transfer, her entitlement to transportation for mother precludes payment of allowance even though mother may not have changed residence 405

Dual employment

Military and civilian services

Rule

Notwithstanding rule that a person on active military duty may not be employed to perform services as civilian employee of the Govt. and that any member who by mistake or otherwise is so employed may not receive compensation of the civilian position, a Navy enlisted member erroneously employed for temporary intermittent period of civilian service by Council on Environmental Quality may nevertheless be paid in view of fact had the civilian compensation been paid, the member could retain the payment under the *de facto* rule or the erroneous payment could be waived under 5 U.S.C. 5584. Since no payment occurred, it is appropriate to consider for purposes of the waiver statute that the administrative error and "overpayment" arose at time the member entered on duty with the understanding of a Govt. obligation to pay for his services 700

A civilian employee attending ROTC advanced camp under authority of 10 U.S.C. 2109, which is not considered active duty in the Armed Forces, may be allowed annual leave available to him for the period he was performing field training as an ROTC cadet since longstanding

MILITARY PERSONNEL—Continued Page
Dual employment—Continued
Military and civilian services—Continued
Rule—Continued
rule that actual military service is incompatible with concurrent Federal service is not for application in view of fact that ROTC training is distinct in many respects from active military service, and as performance of ROTC field training does not involve the holding of a civilian position for purposes of 5 U.S.C. 5533a, which prohibits receipt of basic pay for more than one position for more than an aggregate of 40 hours in any 1 calendar week 755

Enlistments
Bonus. (*See* **GRATUITIES**)
Generally. (*See* **ENLISTMENTS**)
Escort duty
Personnel unable to travel unaccompanied. (*See* **MILITARY PERSONNEL, Death or injury, Escorts**)
Family separation allowances. (*See* **FAMILY ALLOWANCES, Separation**)
Gratuities. (*See* **GRATUITIES**)
Household effects
Storage. (*See* **STORAGE, Household effects, Military personnel**)
Transportation. (*See* **TRANSPORTATION, Household effects, Military personnel**)
Induction into military service
Void *v.* voidable
Reclassification and immediate induction of individual because he failed to keep draft board informed and therefore was declared delinquent does not make induction void but merely voidable, and upon discharge from Marine Corps, under honorable conditions by reason of erroneous induction, member who was absent without authority in nonpay status for 1 year, 7 months, and 13 days out of 2 years, 3 months, and 9 days of service is considered de jure member of Corps until discharge for pay purposes, and is entitled to full pay and allowances credited to his account and remaining unpaid subject, of course, to 37 U.S.C. 503(a) which provides for forfeiture of all pay and allowances for period of absence without leave or over leave, unless absence is excused as unavoidable ... 542

Leaves of absence. (*See* **LEAVES OF ABSENCE, Military personnel**)
Medical treatment. (*See* **MEDICAL TREATMENT, Military personnel**)
Mileage. (*See* **MILEAGE, Military personnel**)
Missing, interned, etc., persons
Quarters and subsistence
Entitlement
Enlisted members of uniformed services, whether or not with dependents, who prior to being carried in missing status (37 U.S.C. 551–558) were quartered and subsisted by U.S. Govt., under concept of "changed conditions" may be credited with quarters and subsistence allowances from beginning of missing status. Statutory provisions involved in 23 C. G. 207, 895, which were basis for denying allowances to members entering "missing status," have been superseded by secs. 301, 302 of

MILITARY PERSONNEL—Continued Page

Missing, interned, etc., persons—Continued

Quarters and subsistence—Continued

Entitlement—Continued

Career Compensation Act of 1949 (37 U.S.C. 403) to provide that 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 missing status are entitled to monetary allowance in lieu of subsistence and quarters in kind from beginning of missing status, subject to 31 U.S.C. 71a 23

National Guard. (*See* **NATIONAL GUARD, Military personnel**)

Orders. (*See* **ORDERS**)

Overpayments

Waiver

Public Law 92-453 authority

Officer of uniformed services who gave wife at time of their divorce a promissory note for $1,500 that is being reduced by his mother in amount of $30 per month paid to father of his former spouse is not entitled, in absence of definitive court decree requiring child support payments for son born of marriage, to basic allowance for quarters for child who is in custody of his mother since payments are not support payments and there is no showing any part of monthly payments are used to support child. If requirements for payments of quarters allowance cannot be shown for periods officer received allowance, payments are subject to collection unless there is for application Pub. L. 92-453, authorizing waiver of certain claims of U.S. against members in prescribed circumstances 454

Navy members assigned in excess of 30 days to ship overhaul at Norfolk Naval Shipyard, located 3 miles from home port, Norfolk, Va., who had option to move their families at Govt. expenses to Norfolk area but chose not to do so are not entitled to payment of family separation allowance provided by 37 U.S.C. 427(b)(2) as they have no greater right than those members who had moved their families to vicinity of Norfolk and because they continued to reside with their dependents are not entitled to separation allowance. Fact that member did not move his family to vicinity of Norfolk in anticipation of extended sea duty gives him no vested right to allowance since frequent changes, often at short notice, is an incident of military service. Any payments made on basis of misinterpreting 43 Comp. Gen. 527 would be proper for waiver under 10 U.S.C. 2774 912

Pay. (*See* **PAY**)

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Quarters allowance. (*See* **QUARTERS ALLOWANCE**)

Quarters, Government furnished. (*See* **QUARTERS, Government furnished**)

Record correction

Actions that may not be delegated

Changes of material facts or creation of new records

Although the Secretaries of military depts. concerned may delegate performance of certain ministerial duties to corrrect administrative errors in members' records, changes that involve material fact or create new

MILITARY PERSONNEL—Continued Page
Record correction—Continued
Actions that may not be delegated—Continued
Changes of material facts or creation of new records—Continued
record require a Board for Correction of Military Records action pursuant to 10 U.S.C. 1552. Therefore, in absence of such proceeding, Adjutant General of the Army may not correct record of member retired as an Army Sergeant who received bad conduct discharge in 1949 from Navy and shortly thereafter used papers and name of a Marine to enlist in Regular Army, from which he was retired in 1960, under 10 U.S.C. 3914, recalled in 1965, and retired again in 1972, also under sec. 3914, to evidence continued service under his own name until effective date of second retirement, as such an action would be ineffective to authorize pay and allowances, including retired pay, for retirement periods 952

Retirement status
Disability in lieu of years of service
Income tax refund

Correction of military records under 10 U.S.C. 1552 to show deceased officer had been retired for disability and not years of service pursuant to 10 U.S.C. 8911, created entitlement to refund of income taxes withheld since sec. 104(a)(4) of Internal Revenue Code of 1954, as amended, provides that disability retired pay is not subject to Federal income tax. Claim of officer's widow for refund of taxes for years denied by IRS as barred by applicable statute of limitations may be allowed as being claim within meaning of 10 U.S.C. 1552(c) in view of *Clyde A. Ray* v. *United States*, 197 Ct. Cl. 1, in which court held plaintiff's claim was not for refund of taxes but to effectuate administrative remedy allowed under 10 U.S.C. 1552, and that shelter of income from taxation is "pecuniary benefit" flowing from record correction 420

In settlement of claims for income tax refunds occasioned by correction of military records to show disability retirement in lieu of retirement for years of service, there is no objection to following the rule in *Clyde A. Ray.* v. *United States*, 197 Ct. Cl. 1, to the effect that claims for amounts withheld for income tax purposes will be treated as "pecuniary benefits" due within meaning of 10 U.S.C. 1552(c) rather than claim for tax refunds. However, claims should be limited to amounts withheld for income taxes in years for which IRS is barred from making refunds by applicable statute of limitations, and settlement of claims, without interest, may be paid from current appropriations available for claims under 10 U.S.C. 1552(c). Claimants' information and advice of IRS should be solicited as aids in computing amounts due, and whether refunds should be withheld from disbursement to IRS is for that agency to determine 420

Reenlistment bonus. (*See* **GRATUITIES, Reenlistment bonus**)
Reservists
Death or injury
Disability benefits
Two distinct periods

A Navy Reservist who sustained back injury on June 5, 1971, the day he reported for 14-day period of training, and who was found physically fit to resume training on June 14, 1971, completing training

MILITARY PERSONNEL—Continued Page
Reservists—Continued
Death or injury—Continued
Disability benefits—Continued
Two distinct periods—Continued
on June 18, 1971, and who when recalled to extended active duty effective Sept. 28, 1971, reported in sick and continued to be treated for back injury until discharged on Mar. 9, 1972, for physical disability, is entitled to disability benefits prescribed by 10 U.S.C. 6148(a) and 37 U.S.C. 204(i) for period of training during which he was physically unfit, and notwithstanding the intervening period of apparent recovery—a time during which member was not entitled to disability benefits—the member unable to perform extended active duty to which ordered because of back injury is entitled to disability benefits from date of reporting on Sept. 28, 1971, until his case was settled on Mar. 9, 1972 667

Inactive duty training, etc.
Injured outside scope of duties

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period 28

Disability determinations
Administration of disability benefits program

In implementation of changes in administration of disability benefits program provided by act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report incurrence of disability to enable military services to provide proper medical and hospital care, as well as pay and allowances, to disabled member. Where member is not provided medical or hospital care so that current determination of entitlement to pay and allowances cannot be made, any payment to member should be supported each month by report from his civilian physician and by statement from member showing days of military duty or civilian employment, together with name and address of employer 99

Benefits entitlements

Upon reconsidering entitlements of National Guard members and other reservists under act of June 20, 1949, which prescribes same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although holding that ability to resume normal civilian employment is not standard for determining entitlement to disability pay where contemporaneous service medical data are avail-

MILITARY PERSONNEL—Continued Page
Reservists—Continued
Disability determinations—Continued
Benefits entitlements—Continued
able must be adhered to as termination of disability pay is based upon ability to perform military duty or final disposition of matter, decisions that hold physical presence at regular drill or conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but member must promptly report injury, disease, and current disability status to permit action to retire, separate, or refer him to Veterans Administration 99

Retired
Contracting with Government
Prohibition period
Active duty after retirement effect

Navy officer transferred pursuant to 10 U.S.C. 6380 to retired list eff. July 1, 1967, but retained on active duty and released July 1, 1969, when he was employed by subsidiary of boat building company and involved in all aspects of Govt. procurement, is subject to prohibition in 37 U.S.C. 801(c) against payment of retired pay to officer whose activities for 3 yrs. after placement of his name on retired list constitute "selling" to Govt. Since commencement of 3-yr. limitation began to run from date officer's name was placed on retired list, not from date he was released from active duty, retired pay forfeiture period ended June 30, 1970; as officer was not involved in any serious procurement discussion prior to July 1, 1970, he is entitled to retired pay for 3-yr. period subsequent to July 1, 1967 3

Pay. (*See* **PAY, Retired**)
Retirement
Re-retirement
Pay status. (*See* **PAY, Retired, Re-retirement**)
Revocation
New evidence

Member of uniformed services whose temporary disability retirement effective Dec. 1, 1971, was canceled as of Feb. 24, 1972, because of continued hospitalization and member was restored to temporary disability list effective June 1, 1972, is entitled to active duty pay for period Dec. 1, 1971, to May 31, 1972, since the indicated need for further extensive hospital care of member prior to the contemplated Dec. 1, 1971, retirement date comprised substantial new evidence sufficient to support revocation of first retirement orders, and delay in initiating revocation of retirement orders under circumstances of hospitalization is not considered unreasonable. Furthermore, commencing June 1, 1972, member became entitled to receive retirement pay under 10 U.S.C. 1202, computed under Formula 2, 10 U.S.C. 1401, using rates of basic pay authorized by E.O. 11638, effective Jan. 1, 1972 797

Six months' death gratuity. (*See* **GRATUITIES, Six months' death**)
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)

MILITARY PERSONNEL—Continued Page

Status

De jure

Reclassification and immediate induction of individual because he failed to keep draft board informed and therefore was declared delinquent does not make induction void but merely voidable, and upon discharge from Marine Corps, under honorable conditions by reason of erroneous induction, member who was absent without authority in nonpay status for 1 year, 7 months, and 13 days out of 2 years, 3 months, and 9 days of service is considered de jure member of Corps until discharge for pay purposes, and is entitled to full pay and allowances credited to his account and remaining unpaid subject, of course, to 37 U.S.C. 503(a) which provides for forfeiture of all pay and allowances for period of absence without leave or over leave, unless absence is excused as unavoidable 542

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem**)

Trailer shipments. (*See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment**)

Training

Leading to a commission

Variable reenlistment bonus prescribed by 37 U.S.C. 308(g) as an additional inducement to first-term enlisted personnel, who possess military skills in critically short supply, to reenlist so skills are not lost to service, is not payable to enlisted member who was discharged and reenlisted while undergoing training in Naval Academy Preparatory School (NAPS) program—program which will ultimately qualify him for admission to Academy—as there is no relationship between enlisted member's critical skill and his successful completion of NAPS program, and fact that member would revert to enlisted service in his critical skill if he does not successfully complete program provides no basis to pay him variable reenlistment bonus 572

Nursing school

Status upon graduation

Graduate from Army nursing school on May 28, 1971, discharged from enlisted E–3 status effective Aug. 2, 1971, to accept commission of 2nd lieutenant on Aug. 3, 1971, who was not granted ordinary leave, did not request excess leave, and was not in absent without leave status for period he was at home following commission and compliance with active duty orders dated Nov. 1, 1971—Aug. 12, 1971, orders not having been received—did not become entitled to active duty pay and allowances as 2nd lieutenant until date of necessary compliance with Nov. 1, 1971, orders. However, member may retain pay and allowances he drew as private 1st class E–3 for period May 29 to Oct. 31, 1971, since participants in Army Student Nurse Program are retained on active duty for usually short period between graduation and commissioned service, and member told to remain at home considered himself on active duty 482

MILITARY PERSONNEL—Continued Page

Training—Continued

ROTC advance training

Civilian employees

A civilian employee attending ROTC advanced camp under authority of 10 U.S.C. 2109, which is not considered active duty in the Armed Forces, may be allowed annual leave available to him for the period he was performing field training as an ROTC cadet since longstanding rule that actual military service is incompatible with concurrent Federal service is not for application in view of fact that ROTC training is distinct in many respects from active military service, and as performance of ROTC field training does not involve the holding of a civilian position for purposes of 5 U.S.C. 5533a, which prohibits receipt of basic pay for more than one position for more than an aggregate of 40 hours in any 1 calendar week 755

Transportation

Dependents. (*See* **TRANSPORTATION, Dependents, Military personnel**)

Household effects. (*See* **TRANSPORTATION, Household effects**)

Travel expenses. (*See* **TRAVEL EXPENSES**)

Uniforms. (*See* **UNIFORMS**)

Veterans. (*See* **VETERANS**)

MISCELLANEOUS RECEIPTS

Special account *v.* miscellaneous receipts

Collections

Third party tort liability

Collections made under so-called Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651–2652, for hospital, medical, surgical, or dental care and treatment to persons who are injured or suffer disease under circumstances creating tort liability upon third person are for deposit in Treasury as miscellaneous receipts pursuant to sec. 3617, R.S., 31 U.S.C. 484, as disposition of monies collected from third party tort-feasors is not specified in FMCRA, and practice of depositing such collections to related appropriation accounts relying on authority in 10 U.S.C. 2205 should be discontinued since there is not involved sale of and payment for services that is contemplated by 10 U.S.C. 2205 125

Since recommendation that collections made from third party tort-feasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation. 125

MISCELLANEOUS RECEIPTS—Continued Page

Special account *v.* miscellaneous receipts—Continued

Interest

Foreign currencies

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

Lapsed appropriations of Post Office Department

Refunds of transportation charges paid from funds appropriated to former Post Office Dept. for fiscal year 1970, and obligated funds for 1970 and prior fiscal years transferred to the Postal Service and then deobligated are for reversion to general fund of the Treasury pursuant to 31 U.S.C. 701(a)(2) and not to Postal Service Fund as 39 U.S.C. 410(a) of the Postal Reorganization Act, which exempts Postal Service from Federal laws dealing with budgets or funds, was not effective until July 1, 1971, and, therefore, appropriations to former Post Office Dept. are subject to 31 U.S.C. 701–708 prescribing closing of appropriation accounts available for obligation for definite period, and providing for reversion to general fund of Treasury, and lapsed appropriations of Post Office Dept. may not be considered assets of Postal Service in absence of specific provisions in act to this effect 179

Replacement contract excess costs

Excess costs that are due Govt. incident to replacement contract awarded upon default by original contractor may be deducted from amount earned but withheld from defaulting contractor and excess costs transferred from appropriation account in which held to miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with general rule that excess costs recovered from defaulting contractors or their sureties are required by sec. 3617, R.S., 31 U.S.C. 484, to be deposited in 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 45

NATIONAL GUARD

Civilian employees

Technicians

Training duty as guardsman

Compensation and leave status

National Guard technician employed under 32 U.S.C. 709, who upon completion of civilian workday departs for 2 weeks full-time training duty as National Guardsman for course of instruction pursuant to 32 U.S.C. 505, and returns home in military travel status shortly

NATIONAL GUARD—Continued Page
Civilian employees—Continued
Technicians—Continued
Training duty as guardsman—Continued
Compensation and leave status—Continued
after midnight, reporting to civilian position same day, is entitled to civilian pay without charge to military or civilian leave for day of departure since civilian duties were performed by member before he became subject to military control and performance of military duties, and to civilian compensation for day he reported back to civilian position at which time he no longer was subject to military control, and entitlement to military pay incident to return travel from training is not incompatible to performance of civilian duties or payment therefor after termination of active military training duty ---- 471

National Guard technician who became subject to military control upon reporting for full-time training duty to National Guard School for recruiters pursuant to 32 U.S.C. 504 after completion of civilian workday is entitled under principle in 49 Comp. Gen. 233 to civilian pay without charge to leave for day of reporting, even though he may be entitled to military pay for that day. However, since full-time training duty is active duty under 37 U.S.C. 204(d), which is incompatible with civilian service, there is no entitlement under rule in 37 Comp. Gen. 255 to civilian pay without charge to appropriate leave—military, annual, or LWOP—for days subsequent to coming under military control, even though duties of military assignment were such that member was able to perform civilian duty on those days ---- 471

National Guard technician who after 4 hours of civilian duty takes 4 hours of annual leave in order to perform military recruiting under orders issued pursuant to 32 U.S.C. 505 may receive 4 hours civilian pay and 4 hours annual leave as well as any military compensation which accrues under his orders since civilian compensation may be paid for time worked prior to reporting for military duty, and reservist or member of National Guard may be placed on leave, including annual leave, while performing active or full-time training duty, and if technician wishes to charge absence to allowable military leave charge must be for 1 day as there is no authority for charging military leave in increments of less than 1 day. Since incompatibility rule should not prevent charging of less than full 8 hours of annual leave when civilian employee performs services for part of day before becoming subject to military control, B–152908, Dec. 17, 1963, is modified ---- 471

National Guard technician who for period of 5 days performs 4 hours of civilian duty each day followed by active military duty as part of year around training authorized under 32 U.S.C. 503, defined as "training performed from time to time throughout calendar year in varying increments as contrasted to 15 consecutive days," is entitled to civilian pay without charge to leave for 4 hours worked in civilian capacity on day he reported for military duty, with charge of 4 hours annual leave or full day of military leave for 4 remaining hours of civilian duty day. In order for technician to receive compensation from both civilian and military sources, 8 hours of annual leave or full day of military leave is chargeable for balance of 5-day period, since no additional pay would result for part-time performance of civilian duties without charge to leave ---- 471

NATIONAL GUARD—Continued Page

Death or injury

Disability determinations

Upon reconsidering entitlements of National Guard members and other reservists under act of June 20, 1949, which prescribes same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although holding that ability to resume normal civilian employment is not standard for determining entitlement to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or final disposition of matter, decisions that hold physical presence at regular drill or conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but member must promptly report injury, disease, and current disability status to permit action to retire, separate, or refer him to Veterans Administration---------- 99

In implementation of changes in administration of disability benefits program provided by act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report incurrence of disability to enable military services to provide proper medical and hospital care, as well as pay and allowances, to disabled member. Where member is not provided medical or hospital care so that current determination of entitlement to pay and allowances cannot be made, any payment to member should be supported each month by report from his civilian physician and by statement from member showing days of military duty or civilian employment, together with name and address of employer---------- 99

While traveling to and from inactive duty training

Return home for equipment

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period---------- 28

Drill pay. (*See* **PAY, Drill**)

Pay, etc., entitlement

Disaster relief duty ordered by State

Duty performed by National Guard units ordered by State of Pennsylvania to aid in disaster relief necessitated by extensive flooding in State may be considered as annual summer training of units within

NATIONAL GUARD—Continued Page
Pay, etc., entitlement—Continued
Disaster relief duty ordered by State—Continued
purview of 32 U.S.C. 502, and Federal funds used for pay and allowance purposes, even though ordinarily sec. 502 training is conducted in accordance with established training policies, standards, and programs approved by Depts. of Army and Air Force in coordination with State National Guard organizations, in view of broad discretion vested in Secretaries concerned to regulate training of National Guard units--- 35

NONAPPROPRIATED FUNDS. (*See* **FUNDS, Nonappropriated**)

NONDISCRIMINATION
Contracts. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)
Discrimination alleged
Basis of sex
Female Air Force officer residing with her officer husband 'n non-Govt. housing who alleges discrimination in denial of her application for quarters allowance, which she claimed on basis bachelor officer quarters on Air Force base are unsuitable for her because she is married and wishes to reside with husband, since other married officers are entitled to BAQ at dependent rate but husband receives quarters allowance without dependents rate and she receives no allowance, properly was denied quarters allowance at without dependent rate as certification of responsible commander was not based on unavailability of quarters but on presumed unsuitablility of quarters for married woman who wishes to reside with husband, whereas pursuant to 37 U.S.C. 204 and implementing regulations, member is not entitled to BAQ on behalf of spouse who is on active duty and is entitled to basic pay in her own right. Further, see Sup. Ct. No. 71–1694, Jan. 17, 1973---------- 514

Notwithstanding 4-year delay in promoting Foreign Service Officer from FSO–4 to FSO–3 due to age discrimination, officer who will reach mandatory retirement age within 8 months of his promotion may not be permitted for purpose of increasing annuity payments to pay into Foreign Service and Disability Fund additional amounts that would have been deducted from his salary and deposited into fund but for the delay. Compulsory contributions to retirement fund are based on actual salary received and since employee may not be retroactively promoted upon removeal of age discrimination, his annuity payments are not for computation on salary of grade FSO–3 prior to date he was promoted to that grade---------- 629

Sex discrimination elimination
Quarters allowance
In view of sec. 703, 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 female member of uniformed services, in order to receive increased allowance for quarters on account of dependent husband under 37 U.S.C. 403, must not only meet test prescribed by 37 U.S.C. 401 that husband is dependent for over one-half his support but also incapable of self-support due to physical or mental incapacity, will no longer be for application prospectively as to incapacity. However, 1964 act does not overcome different dependency

NONDISCRIMINATION—Continued Page
Sex discrimination elimination—Continued
Quarters allowance—Continued
standards prescribed by statute for male and female members; until remedial legislation is enacted, 37 U.S.C. 401 controls; female member must continue to establish spouse is dependent for over one-half of his support to entitle her to increased quarters allowance contrary decisions will no longer be followed 1

Payment of basic allowance for quarters (BAQ) under 37 U.S.C. 403(a) to female Air Force captain, pay grade 0-3, as officer without dependents, who resides in non-Govt. quarters with her officer husband and his two dependent children by prior marriage, may not be authorized in absence of commanding officer's certification that Govt. quarters are unavailable or inadequate, adequacy of quarters to be determined on their fitness for use as bachelor quarters without regard to their suitability for married woman who desires to reside with husband since pursuant to Dept. of Defense Instructions 1338.1, which is for application notwithstanding Civil Rights Act of 1964, eligibility of married members for BAQ, without dependents, rests with male member and female member has no entitlement to allowance unless single quarters are not available to her. Further, see Sup. Ct. No. 71-1694, Jan. 17, 1973 510

OFFICERS AND EMPLOYEES
Accountable officers. (*See* **ACCOUNTABLE OFFICERS**)
Appointments. (*See* **APPOINTMENTS**)
Canal zone. (*See* **CANAL ZONE**)
Certifying officers. (*See* **CERTIFYING OFFICERS**)
Compensation. (*See* **COMPENSATION**)
Death or injury
Liability of Government
Employee on temporary duty

Widow of employee who died while on temporary duty away from his official station may be paid, pursuant to E.O. 8557, as amended by OMB Cir. A-92, issued under authority of 5 U.S.C. 5742, cost of preparing remains, limited to $250, charges incurred for transporting remains, including cost of outside shipping case, and preparation of casket for shipment, as well as cost of necessary copies of death certificate incident to transportation of remains, notwithstanding employee was not on authorized leave without pay. However, there is no authority to return deceased employee's privately owned automobile to his home, and in accordance with OMB Cir. A-7, per diem for period employee was absent without leave is not payable unless absence was due to illness or injury and not to employee's misconduct 493

Debt collections. (*See* **DEBT COLLECTIONS**)
De facto
Civilian employment by military personnel

Notwithstanding rule that a person on active military duty may not be employed to perform services as civilian employee of the Govt. and that any member who by mistake or otherwise is so employed may not receive compensation of the civilian position, a Navy enlisted member erroneously employed for temporary intermittent period of civilian

OFFICERS AND EMPLOYEES—Continued Page

De facto—Continued

Civilian employment by military personnel—Continued

service by Council on Environmental Quality may nevertheless be paid in view of fact had the civilian compensation been paid, the member could retain the payment under the *de facto* rule or the erroneous payment could be waived under 5 U.S.C. 5584. Since no payment occurred, it is appropriate to consider for purposes of the waiver statute that the administrative error and "overpayment" arose at time the member entered on duty with the understanding of a Govt. obligation to pay for his services 700

Dependents

Advance travel

Overseas employees. (*See* **TRANSPORTATION, Dependents, Overseas employees, Advance travel of dependents**)

Separation allowances

Divorced employee jointly responsible for children

The separate maintenance allowance (SMA) authorized in 5 U.S.C. 5924 to be paid to an employee when he is assigned to post in foreign area that is dangerous, unhealthful, or where living conditions are adverse in order to enable him to meet additional expense of maintaining his wife and, or dependents elsewhere, may be paid to employee whose minor children incident to divorce decree have been placed jointly in his care and his former spouse since children are his "dependents" within meaning of the term as defined in sec. 040m of Standardized Regs. (Govt. Civilians, Foreign Areas). However, employee must establish his child or children would have resided with him but for circumstances warranting payment of SMA, and an affidavit to this effect from employee's former spouse is sufficient to establish entitlement to SMA 878

Details. (*See* **DETAILS**)

Dual compensation. (*See* **COMPENSATION, Double**)

Experts and consultants. (*See* **EXPERTS AND CONSULTANTS**)

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Foreign Service. (*See* **FOREIGN SERVICE**)

Household effects

Storage. (*See* **STORAGE**)

Household effects

Transportation. (*See* **TRANSPORTATION, Household effects**)

Jury duty

Fees. (*See* **COURTS, Jurors, Fees**)

Leaves of absence. (*See* **LEAVES OF ABSENCE**)

Liability

Government losses

Errors, neglect of duty, etc.

Although pecuniary liability for errors that led to request for space-required rather than space-available Military Airlift Command services to move commissary goods outside U.S. would seem to rest on commissary personnel making erroneous request, there is no basis for assessing charges for services on commissary officer since his custodial relationship

OFFICERS AND EMPLOYEES—Continued Page

Liability—Continued

Government losses—Continued

Errors, neglect of duty, etc.—Continued

with the Govt. as an accountable officer relates to property and funds, and there is no general authority for assessment of charges for losses sustained by Govt. as result of errors in judgment or neglect of duty by Govt. personnel. Moreover, interagency reimbursement for cost of services performed by billing agency pursuant to lawful authority cannot be viewed as a "loss" to Govt. in usual sense of the word---------- 964

Membership fees. (*See* **FEES, Membership**)

Moving expenses

Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Overseas

Hired locally

Benefits entitlement

Expense of obtaining passports and photographs for passports for himself and dependents, where no immediate travel is contemplated, by locally hired employee with whom transportation agreement was executed in accordance with par. C4002–3 of Joint Travel Regs. (JTR), Vol. 2, and who has earned renewal agreement trave (C4001, JTR), is reimbursable pursuant to C9010–2, JTR, even though actual travel may not occur and regulation does not expressly cover locally hired American citizens or their dependents, in view of fact that locally hired employee who meets conditions of eligibility for renewal agreement travel is generally entitled to same benefits as employee recruited stateside who is required to renew his passport as result of continued employment in foreign area---------- 177

Home leave

RIF separation and reinstatement

Accrual and grant of leave

An employee whose separation in a reduction-in-force action from position with Trust Territories of the Pacific Islands in Saipan prior to completion of 2 years' service on Apr. 15, 1972, was found to be invalid and he was reinstated to position in Saipan or an equivalent position but in lieu he accepted a position with Bureau of Reclamation in Denver, and his last day on rolls of Trust Territories was Sept. 10, 1972, is entitled pursuant to back pay statute, 5 U.S.C. 5596, to home leave credit authorized under 5 U.S.C. 6305(a) through Sept. 10, 1972. Although employee may count time he did not spend at his foreign post due to his erroneous separation for purpose of fulfilling the 24 months overseas service requirement, limitations imposed on granting home leave disqualified employee for home leave at time he accepted the Denver position since there was no intent to return him overseas, and he will not qualify for home leave until he has served another qualifying period overseas---------- 860

Transportation

Household effects. (*See* **TRANSPORTATION, Household effects, Overseas employees**)

Overtime. (*See* **COMPENSATION, Overtime**)

OFFICERS AND EMPLOYEES—Continued Page

Per diem. (*See* **SUBSISTENCE, Per diem**)

Presidential appointees. (*See* **PRESIDENT, Presidential appointees**)

Promotions

Compensation. (*See* **COMPENSATION, Promotions**)

Reduction-in-force

Reemployment after break in service

Storage of household goods

An employee who incident to reinstatement to a permanent position at an isolated duty station in continental United States within 1 year after separation by reduction-in-force action overseas places his household effects in nontemporary storage, although entitled to benefits provided in 5 U.S.C. 5724a(c) as though he had been transferred in the interests of the Govt. without a break in service to location of reemployment from separation location, may not be reimbursed for cost of the nontemporary storage occasioned by isolated duty station assignment since this expense is specifically excluded by sec. 1.3a(7) of Office of Management and Budget (OMB) Cir. No. A–56, which implements 5 U.S.C. 5724a(c). However, pursuant to 5 U.S.C. 5724(a)(2), 60 days temporary storage, limited to authorized weight prescribed by sec. 6, OMB Cir. No. A–56, may be paid to employee 881

Reemployment or reinstatement

Travel and transportation expenses

When employee separated within U.S. from service in one component of Dept. of Defense (DOD) due to reduction in force or transfer of functions is reemployed at different location by different component within DOD after break in service of not more than 1 year, transfer expenses that employee is entitled to pursuant to 5 U.S.C. 5724a(c) are payable by activity acquiring employee's services as prescribed by 5 U.S.C. 5724 (e), which provides that when employee transfers from one agency to another, agency to which he transfers pays expenses to new duty station. Further authority in 5 U.S.C. 5274(e) and par. C1053–2b(1)(b) of Joint Travel Regs. permitting either losing or acquiring agency to pay relocation expenses is for application only in cases of transfer without break in service. Overruled by 53 Comp. Gen. —— (B–172594, Aug. 16, 1973) .. 345

Relocation expenses

Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Removals, suspensions, etc.

Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)

Retirement. (*See* **RETIREMENT**)

Severance pay

Eligibility

Overseas teachers

Superintendent-Principal of Air Force Dependents' School whose employment under 20 U.S.C. 241(a) for period of approximately 10 years was terminated on basis of management's prerogative not to employ as provided in par. 8b, sec. 9833, Air Force Civilian Personnel Manual, is entitled to severance pay prescribed by 5 U.S.C. 5595. Employee held indefinite tenure appointment, even though he was granted limited

OFFICERS AND EMPLOYEES—Continued Page

Severance pay—Continued

Eligibility—Continued

Overseas teachers—Continued

access to procedural rights, and was involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, requirements that establish eligibility to receive severance pay provided by 5 U.S.C. 5595 291

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem**)

Training

Expenses

Reimbursement

Payment to Fedl. employees who participate in training away from their official station of actual subsistence expenses instead of per diem in lieu of subsistence as authorized by 5 U.S.C. 5702(c) when in unusual circumstances the per diem provided is insufficient to cover expenses is not precluded by 5 U.S.C. 4109, the authority to reimburse an employee for various expenses of training including cost of necessary travel and per diem "instead of subsistence" (formerly "in lieu of subsistence") under 5 U.S.C. subch. I of ch. 57, since nothing in legislative history of the Government Employees Training Act indicates intent to restrict employees undergoing training to reimbursement for subsistence on a per diem basis as opposed to actual subsistence expenses. Furthermore 5 U.S.C. 5702(c) provides for payment of actual subsistence expenses in unusual circumstances when authorized per diem is insufficient, and authority to pay actual subsistence expenses depends upon entitlement to per diem ... 684

Family domicile established by employee, transferred from Fairbanks, Alaska, at Ann Arbor, Mich., where he will attend graduate school before reporting to new duty station, Wash., D.C., does not constitute permanent change of station within meaning of OMB Cir. No. A-56, and A-56 allowances become payable only when employee relocates in Washington. Since both old and new stations are not within continental U.S., employee is not entitled to a house-hunting trip, and cost of shipping his household effects to Ann Arbor is for deduction from his constructive cost entitlement to transportation of his effects from Fairbanks to Washington. Per diem is payable during training period in lieu of transporting family and effects to Ann Arbor (39 Comp. Gen. 140), and payment of mileage at 6 cents per mile for employee's travel to Ann Arbor by privately owned automobile, is upon completion of transfer to be deducted from entitlement to 12 cents per mile for travel from old to new station, and to 6 cents per mile for excess travel due to the training 834

Transfers

Relocation expenses

House purchase

Agency activity relocation pending

Employee of Geological Survey who on basis of announcement to all employees in Washington Metro. area, dated July 1, 1971, of award of building construction contract on June 28, 1971, incident to impending move early 1974 of agency to Reston, Va., relocated residence from Hyattsville, Md., to Herndon, Va., pursuant to which she and husband had

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
House purchase—Continued
Agency activity relocation pending—Continued
entered into agreement on Dec. 28, 1971, for purchase of residence and made settlement Feb. 18, 1972, is not entitled to relocation expenses reimbursement, although July 1, 1971, announcement established notice of agency's move; there is no authority for payment of real estate expenses until transfer of official stations is consummated or canceled since employee may separate from service prior to transfer 8

Expenses claimed included in selling price

Claim of employee for closing costs paid by seller and included in sales price of residence he purchased in connection with transfer of official station which had been denied on grounds the requirements of subsections 4.1f and 4.3a of OMB Cir. No. A-56, that provide expenses claimed must have been paid by employee and supported by documentation to this effect, had not been met, now may be allowed on basis that closing costs added to purchase price are clearly discernible and separable from price allocable to realty; that seller who initially paid costs regards that purchaser did, although the down and closing payments from purchaser's own funds exceeded closing costs; that documentation of costs and purchaser's liability for them have been furnished. Contrary holdings are overruled 11

Not consummated

Employee who incident to transferring to another agency and location terminated contract to purchase residence and its supplemental "Use and Occupancy Agreement" is considered to have occupied residence under lease arrangement and to be entitled to reimbursement for expenses incurred within terms of lease as provided by sec. 4.2h of OMB Cir. A-56. Under agreement, employee's claim for credit costs and cancellation fee may be recognized but not cost of cleaning and repairing residence since this obligation would be incurred by employee regardless of station change. Furthermore, property improvements are not provided under 5 U.S.C. 5724(a) or Cir. A-56 and, therefore, costs of erecting fence and installing bathroom vanity are not reimbursable 275

"Settlement date" limitation on property transactions
Extension

Notwithstanding contract for sale of residence incident to permanent change of station that had been entered into within 1-year time limit prescribed by sec. 4.1e of OMB Cir. No. A-56 had been canceled, and that subsequent contract of sale with another purchaser was not executed until shortly after expiration of 1-year period, cost of selling residence may be reimbursed to employee under sec. 4.1e, since head of agency, or his designee, may extend time limitation in situations other than litigation, and reasonable relationship between sale or purchase of residence and station transfer may be assumed when contract had been entered into in initial year, regardless of whether it had been canceled and was not in existence at expiration of initial year. Contrary holdings overruled. 43

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Temporary quarters
Owned by a relative, etc.

Employees who occupy temporary quarters and are furnished subsistence in homes of relatives in connection with permanent transfers of station may be reimbursed reasonable rental and subsistence charges under sec. 8.4, OMB Cir. No. A–56, effective Sept. 1, 1971. Charges are not reasonable when relatives are paid same amounts employees would pay in motels or restaurants, or are based upon maximum amounts reimbursable under regulation. Reasonableness depends on circumstances of each case, such as number of individuals involved, extra work performed by relatives, and need to hire extra help, and, therefore, employees should be required to furnish sufficient information to permit reasonableness determination to be made, and expenses based on estimates of average rates per day are not acceptable ---------- 78

Spouse entitled to military allowances

Payment of temporary quarters subsistence expenses (TQSE) to transferred civilian employee for up to 30 days while he and his dependents occupy temporary quarters, which expenses are computed on basis of actual expenses or per diem percentage for each 10-day period, will not violate prohibition against duplicate payments in par. C8253 of Joint Travel Regs. and sec. 8.2i of OMB Cir. No. A–56 because his spouse as a military member on active duty receives basic allowances for quarters and for subsistence. The TQSE allowance is intended to lessen economic hardship employees face when transferred for convenience of Govt., whereas permanent military allowances cover normal day-to-day expenses for food and shelter when not provided by Govt., and being in the nature of compensation they are not viewed as duplicating TQSE allowance ---------- 962

Transportation for househunting
Dependent's per diem allowance

Since OMB Cir. No. A–56 provides per diem payable to civilian employee for his dependents traveling with him incident to change of official station should be computed on basis of percentage of per diem rate employee would receive if traveling alone, employee who paid varying per diem rates while traveling with spouse on househunting trip to seek residence at new station and in connection with travel performed with dependents from his old to new station is entitled to per diem allowance for dependents computed by using average single rate applicable to rooms occupied as base upon which dependents' per diem is calculated ---------- 34

Location other than old or new station

Family domicile established by employee, transferred from Fairbanks, Alaska, at Ann Arbor, Mich., where he will attend graduate school before reporting to new duty station, Wash., D.C., does not constitute permanent change of station within meaning of OMB Cir. No. A–56, and A–56 allowances become payable only when employee relocates in Washington. Since both old and new stations are not within continental U.S.,

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Transportation for househunting—Continued
Location other than old or new station—Continued
employee is not entitled to a house-hunting trip, and cost of shipping his household effects to Ann Arbor is for deduction from his constructive cost entitlement to transportation of his effects from Fairbanks to Washington. Per diem is payable during training period in lieu of transporting family and effects to Ann Arbor (39 Comp. Gen. 140), and payment of mileage at 6 cents per mile for employee's travel to Ann Arbor by privately owned automobile, is upon completion of transfer to be deducted from entitlement to 12 cents per mile for travel from old to new station, and to 6 cents per mile for excess travel due to the training---- 834
Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Status for overtime compensation. (*See* **COMPENSATION, Overtime, Traveltime**)
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
Witnesses. (*See* **WITNESSES**)
ORDERS
Amendment
After travel commenced
Military personnel
Fact that Air Force officer's orders transferring him from overseas to Hancock Field, N.Y., with leave en route were amended to require him to interrupt his leave and report for temporary duty at Lowry Air Force Base did not change officer's basic entitlement under his initial orders to travel and transportation allowances from old to new station, and pursuant to par. M4207–2d of the Joint Travel Regs., officer was reimbursed for travel performed from old station to temporary duty station and from there to new station. In addition, officer having returned to his leave place for his own convenience although not entitled to travel allowance incident to return, may be paid an allowance for travel from leave place to temporary duty station since subpar. 2d make no reference to situation in which temporary duty was ordered after arrival of member at his place of leave---- 580
Cancellation after effective date
Member of uniformed services whose temporary disability retirement effective Dec. 1, 1971, was canceled as of Feb. 24, 1972, because of continued hospitalization and member was restored to temporary disability list effective June 1, 1972, is entitled to active duty pay for period Dec. 1, 1971, to May 31, 1972, since the indicated need for further extensive hospital care of member prior to the contemplated Dec. 1, 1971, retirement date comprised substantial new evidence sufficient to support revocation of first retirement orders, and delay in initiating revocation of retirement orders under circumstances of hospitalization is not considered unreasonable. Furthermore, commencing June 1, 1972, member became entitled to receive retirement pay under 10 U.S.C. 1202 computed under Formula 2, 10 U.S.C. 1401, using rates of basic pay authorized by E.O. 11638, effective Jan. 1, 1972---- 797

ORDERS—Continued Page

Oral

Confirmation

Subsequent

Timeliness

Travel of Marine officer who was verbally directed to travel by privately owned vehicle from permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty—travel subsequently approved for reimbursement—is inter-station travel within purview of 37 U.S.C. 404 and reimbursable at 7 cents per mile rate prescribed by par. M4203–3b of Joint Travel Regs. rather than at higher rate provided by par. M4502–1, pursuant to 37 U.S.C. 408, for travel within limits of member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of verbal orders by competent authority shortly after performance of travel as being advantageous to Govt. may be accepted for purpose of reimbursing officer..... 236

OVERSEAS PRIVATE INVESTMENT CORPORATION

Interest earned

Retention by corporation

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation..... 54

PATENTS

Devices used by Government

License agreements

Authority of Government to execute

In absence of specific authority to resort to additional methods for compensating patent holders for infringements by the Govt., such as the authority granted Dept. of Defense to purchase license agreements or administratively settle patent infringement claims, 28 U.S.C. 1498 prevails and the only remedy available to a patent owner for unauthorized patent infringement by the Govt. is by action in Court of Claims for recovery of reasonable and entire compensation for use and manufacture of a patented item, and since sec. 3 of the Royalty Adjustment Act of 1942 has expired, the Dept. of Transportation has no authority to enter into a royalty-bearing nonexclusive patent license based on past and future departmental procurements to avoid disruption incident to litigation in the Court of Claims..... 761

PATENTS—Continued Page

Foreign

Effect on evaluation of domestic bid, etc.

Inclusion in a request for proposals of a stationary brake disc drawing furnished without restriction to the Air Force under sole-source contracts in order to create competition or for reverse engineering purposes did not violate proprietary data rights where Govt. contracts law in recognizing data rights also recognizes such data may be lawfully obtained by reverse engineering when the data is not restricted and the Govt. acquires title, and since it is incumbent upon contracting agency to maximize competition where the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement as well as from sole-source buys from current manufacturer of the item. Furthermore, contracting officer in making an award is not obliged to consider possible foreign patent problems since such a possibility is too speculative, complex, and burdensome..... 778

PAY

Absence without leave

Unexcused, etc.

Reclassification and immediate induction of individual because he failed to keep draft board informed and therefore was declared delinquent does not make induction void but merely voidable, and upon discharge from Marine Corps, under honorable conditions by reason of erroneous induction, member who was absent without authority in nonpay status for 1 year, 7 months, and 13 days out of 2 years, 3 months, and 9 days of service is considered de jure member of Corps until discharge for pay purposes, and is entitled to full pay and allowances credited to his account and remaining unpaid subject, of course, to 37 U.S.C. 503(a) which provides for forfeiture of all pay and allowances for period of absence without leave or over leave, unless absence is excused as unavoidable..... 542

Active duty

After retirement

Conflict of interest statute prohibition. (*See* **PAY, Retired, Active duty, After Retirement, Conflict of interest statute prohibition**)

Re-retirement. (*See* **PAY, Retired, Re-retirement**)

Grade or rank

Orders reissued

Graduate from Army nursing school on May 28, 1971, discharged from enlisted E–3 status effective Aug. 2, 1971, to accept commission of 2nd lieutenant on Aug. 3, 1971, who was not granted ordinary leave, did not request excess leave, and was not in absent without leave status for period he was at home following commission and compliance with active duty orders dated Nov. 1, 1971–Aug. 12, 1971, orders not having been received—did not become entitled to active duty pay and allowances as 2nd lieutenant until date of necessary compliance with Nov. 1, 1971, orders. However, member may retain pay and allowances he drew as private 1st class E–3 for period May 29 to Oct. 31, 1971, since participants in Army Student Nurse Program are retained on active duty for usually short period between graduation and commissioned service, and member told to remain at home considered himself on active duty..... 482

PAY—Continued Page

Active duty—Continued

Period between retirement revocation and restoration

Member of uniformed services whose temporary disability retirement effective Dec. 1, 1971, was canceled as of Feb. 24, 1972, because of continued hospitalization and member was restored to temporary disability list effective June 1, 1972, is entitled to active duty pay for period Dec. 1, 1971, to May 31, 1972, since the indicated need for further extensive hospital care of member prior to the contemplated Dec. 1, 1971, retirement date comprised substantial new evidence sufficient to support revocation of first retirement orders, and delay in initiating revocation of retirement orders under circumstances of hospitalization is not considered unreasonable. Furthermore, commencing June 1, 1972, member became entitled to receive retirement pay under 10 U.S.C. 1202 computed under Formula 2, 10 U.S.C. 1401, using rates of basic pay authorized by E.O. 11638, effective Jan. 1, 1972 797

Reservists

Injured in line of duty

Disability determinations

Upon reconsidering entitlements of National Guard members and other reservists under act of June 20, 1949, which prescribes same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although holding that ability to resume normal civilian employment is not standard for determining entitlement to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or final disposition of matter, decisions that hold physical presence at regular drill or conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but member must promptly report injury, disease, and current disability status to permit action to retire, separate, or refer him to Veterans Administration 99

In implementation of changes in administration of disability benefits program provided by act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report incurrence of disability to enable military services to provide proper medical and hospital care, as well as pay and allowances, to disabled member. Where member is not provided medical or hospital care so that current determination of entitlement to pay and allowances cannot be made, any payment to member should be supported each month by report from his civilian physician and by statement from member showing days of military duty or civilian employment, together with name and address of employer 99

While under civil arrest

Member of uniformed services under sentence of confinement by civil authorities who while paroled to custody of military authorities on daily basis performed duties with his unit in accordance with court's work release recommendation, satisfactorily serving in capacity of noncommissioned officer squadron leader, position commensurate with his grade, military specialty, and length of service, is pursuant to 37 U.S.C. 204(a)

PAY—Continued Page

Active duty—Continued

While under civil arrest—Continued

and 101(18), which govern entitlement to basic pay, eligible to receive pay and allowances commensurate with his grade and specialty for each day of full-time duty performed while paroled to military authorities-- 317

Civilian employees. (*See* **COMPENSATION**)

Courts-martial sentences

Forfeitures

Execution

Effective date for forfeiture purposes

A Marine Corps officer whose sentence for violating Uniform Code of Military Justice on Nov. 22, 1972, was approved as to forfeiture of pay and allowances, but not as to dismissal, and finally executed on Dec. 18, 1972, following which officer was detached from duty and ordered to travel to his home of record without entitlement to active duty pay and allowances, where he was released on Dec. 31, 1972, and transferred to Reserves with 45 days unused leave is entitled to pay and allowances through Dec. 17, 1972, pursuant to interpretation of 10 U.S.C. 857 and 871 that day of execution of sentence controls; to mileage for authorized travel by privately owned automobile as provided by par. M4157 of Joint Travel Regs., but not to payment for unused leave as forfeiture imposed was "all pay and allowances."---------- 909

Disability retired pay. (*See* **PAY, Retired, Disability**)

Double

Active duty and civilian employment

Reimbursement status

National Guard technician who became subject to military control upon reporting for full-time training duty to National Guard School for recruiters pursuant to 32 U.S.C. 504 after completion of civilian workday is entitled under principle in 49 Comp. Gen. 233 to civilian pay without charge to leave for day of reporting, even though he may be entitled to military pay for that day. However, since full-time training duty is active duty under 37 U.S.C. 204(d), which is incompatible with civilian service, there is no entitlement under rule in 37 Comp. Gen. 255 to civilian pay without charge to appropriate leave—military, annual, or LWOP—for days subsequent to coming under military control, even though duties of military assignment were such that member was able to perform civilian duty on those days---------- 471

National Guard technician who after 4 hours of civilian duty takes 4 hours of annual leave in order to perform military recruiting under orders issued pursuant to 32 U.S.C. 505 may receive 4 hours ivilian pay and 4 hours annual leave as well as any military compensation which accrues under his orders since civilian compensation may be paid for time worked prior to reporting for military duty, and reservist or member of National Guard may be placed on leave, including annual leave, while performing active or full-time training duty, and if technician wishes to charge absence to allowable military leave charge must be for 1 day as there is no authority for charging military leave in increments of less than 1 day. Since incompatibility rule should not prevent

PAY—Continued Page

Double—Continued

Active duty and civilian employment—Continued

Reimbursement status—Continued

charging of less than full 8 hours of annual leave when civilian employee performs services for part of day before becoming subject to military control, B–152908, Dec. 17, 1963, is modified 471

Drill

Training assemblies

Status for benefits entitlement

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204 (h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period 28

Increases

Freeze pursuant to Executive Order 11615

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92–129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15–Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act and, furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases 15

Retired

Active duty

After retirement

Conflict of interest statute prohibition

Navy officer transferred pursuant to 10 U.S.C. 6380 to retired list eff. July 1, 1967, but retained on active duty and released July 1, 1969, when he was employed by subsidiary of boat building company and involved in all aspects of Govt. procurement, is subject to prohibition in 37 U.S.C. 801(c) against payment of retired pay to officer whose activities for 3 yrs. after placement of his name on retired list constitute "selling" to Govt. Since commencement of 3-yr. limitation began to run from date officer's name was placed on retired list, not from date he was released from active

PAY—Continued Page
Retired—Continued
Active duty—Continued
After retirement—Continued
Conflict of interest statute prohibition—Continued
duty, retired pay forfeiture period ended June 30, 1970; as officer was not involved in any serious procurement discussion prior to July 1, 1970, he is entitled to retired pay for 3-yr. period subsequent to July 1, 1967---- 3

Re-retirement. (*See* **PAY, Retired, Re-retirement**)
Annuity elections for dependents
Incompetents
Election by Secretary concerned
An election under the Survivor Benefit Plan (10 U.S.C. 1447–1455) on behalf of mentally incompetent member for coverage of a natural person (10 U.S.C. 1448(b)) may be made by Secretary concerned who stands in place of the incompetent and under 10 U.S.C. 1449 is required to make election which in his discretion, after careful consideration of facts and circumstances in each case, he believes the person would make if capable, and Secretary must take into consideration whether retiree would elect to give up a substantial amount of his retired pay for rest of his life to provide the annuity. An insurable interest is any pecuniary interest in continued life of another, and no evidence of an insurable interest is required of a near relative, but a contract relationship would have to be proved; only one person may be named as survivor (5 CFR 831.601); and person requesting an annuity would have no preference---- 973

Computation
Limitations imposed by statute
Retired pay of military personnel, upon initial retirement, whose basic pay rates as established by E.O. 11692 are in excess of $3,000 per month may not be computed at the prescribed 75 percent of basic pay on an amount in excess of $3,000, as limit imposed by 5 U.S.C. 5308 on civilian employees is equally applicable to military personnel, since Footnote 1 of the E.O. indicates the pay grade 0–10 officers enumerated are subject to sec. 5308, and nothing in 10 U.S.C. 8991, providing for the computation of retired pay "at rates applicable on date of retirement" warrants conclusion the $3,000 monthly limitation is removed for purpose of computing retired pay of officers whose basic salary rate exceeds $36,000. This conclusion is applicable to officers in all branches of armed services, despite language differences in the governing law provisions. However, pay limitation does not apply to retired pay adjustments for the cost-of-living increases authorized by 10 U.S.C. 1401a---- 817

Disability
Temporary retired list
Termination and restoration
Pay rate
Member of uniformed services whose temporary disability retirement effective Dec. 1, 1971, was canceled as of Feb. 24, 1972, because of continued hospitalization and member was restored to temporary disability list effective June 1, 1972, is entitled to active duty pay for period Dec. 1, 1971, to May 31, 1972, since the indicated need for further

PAY—Continued Page
Retired—Continued
Disability—Continued
Temporary retired list—Continued
Termination and restoration—Continued
Pay rate—Continued
extensive hospital care of member prior to the contemplated Dec. 1, 1971, retirement date comprised substantial new evidence sufficient to support revocation of first retirement orders, and delay in initiating revocation of retirement orders under circumstances of hospitalization is not considered unreasonable. Furthermore, commencing June 1, 1972, member became entitled to receive retirement pay under 10 U.S.C. 1202 computed under Formula 2, 10 U.S.C. 1401, using rates of basic pay authorized by E.O. 11638, effective Jan. 1, 1972 ---------- 797

Re-retirement
Recomputation of retired pay
Cost-of-living increases
Members of uniformed services initially retired on or before Oct. 1, 1967, with retired or retainer pay based on basic pay rates prescribed in Pub L. 92–129, effective Oct. 1, 1971, who are recalled to active duty and upon release from that duty become eligible to recomputation of their retired or retainer pay pursuant to 10 U.S.C. 1402(a), are within purview of 10 U.S.C. 1401a(e) and entitled to adjustment of such pay to reflect changes in Consumer Price Index, for under literal terms of of sec. 1401a(e) pay of members may not be less than it would have been had they become entitled to retired or retainer pay on Sept. 30, 1971, effective date of Pub. L. 92–129, in view of intended purpose of 10 U.S.C. 1401a to treat members as equal as possible in matters involving Consumer Price Index adjustments and, therefore, it would be inconsistent to limit application of sec. 1401a(e) "saved pay" provisions to initial retirement formulas only ---------- 469

Extraordinary heroism award
An enlisted member of uniformed services who subsequent to retirement under 10 U.S.C. 3914 is recalled to active duty, incurs a 60 percent disability, is awarded a 10 percent increase in retired pay based on the award of the Soldier's Medal, and is entitled to recompute his retired pay under 10 U.S.C. 1402, may not be paid the 10 percent increase upon re-retirement, even though under 10 U.S.C. 3914 he would have been entitled pursuant to Formula C, 10 U.S.C. 3991, to increase for extraordinary heroism in line of duty prior to retirement, as member's entitlement to retired pay upon re-retirement is under 10 U.S.C. 1402, which permits him to elect most favorable formula for computing retired pay (subsec. (d)), but makes no provision whereby member's recomputed retired pay may be increased for an act of heroism performed during post-retirement period of active duty ---------- 599

Waiver for civilian retirement benefits
Civil Service annuity purposes
Army sergeant who when retired on Dec. 1, 1960, under 10 U.S.C. 3914, entered Federal Civil Service from which he retired for disability on Nov. 21, 1969, and who on Oct. 1, 1970, both changed to full waiver

PAY—Continued Page
Retired—Continued
Waiver for civilian retirement benefits—Continued
Civil Service annuity purposes—Continued
his partial waiver of retired pay for Veterans Administration compensation, and waived retired pay to have his military service used in computation of civil service annuity pursuant to 5 U.S.C. 8332(c), may have retired pay retroactively waived to date of his civil service retirement if Civil Service Commission agrees to recompute his annuity and pay additional annuity due, since waiver of retired pay under 38 U.S.C. 3105 for VA compensation did not disturb military status of retiree, and VA compensation erroneously paid will be recouped, nor will double benefit prohibited by 38 U.S.C. 3104 result from use of military service for civil service annuity purposes as no military retired pay will be paid..... 526

Revocation

Retired member of uniformed services who at age 57 after 10 years of Federal employment is immediately granted civil service annuity based on 30 years' military and civilian service, military service having been used to establish eligibility for civil service annuity, may not upon reaching age 62 and becoming eligible for deferred annuity revoke waiver of military retired pay, with a concurrent reduction of civil service annuity by excluding credit for military service since restoration and payment of retired military pay would amount to double benefit based on same service contrary to 5 U.S.C. 8332(j). Any recomputation of civil service annuity is within jurisdiction of CSC, and member who failed to apply for immediate civil service annuity based on military and civilian service, upon becoming eligible at 62 to deferred civil service annuity would not receive civil service benefits for period prior to reaching age 62..... 429

Training
Assemblies. (*See* **PAY, Drill, Training assemblies**)

PAYMENTS
Absence or unenforceability of contracts
Quantum meruit
Reasonable charge

A mixed-truckload shipment of bomb fins and bodies (explosives and projectile parts) described in the Govt. bill of lading as "ammunition items" and tendered subject to C. I. Whitten Transfer Co. Tender I.C.C. No. 300 was erroneously classified and therefore the I.C.C. No. 300 tender is inapplicable. Bomb fins are not blasting supplies as term "supplies" refers to items furnished for operational or maintenance purposes whereas fins form part of completed product, nor are fins ammunition or explosives as they were not transported as accessory to larger unit also being transported at same time. However, services having been performed and received, under principle of *quantum meruit*, carrier is entitled to reasonable compensation, which will be obtained by computing charges due under Whitten's tariff rates on Component Parts of Explosives contained in MF–I.C.C. No. 64..... 924

PAYMENTS—Continued Page

Contracts, generally. (*See* **CONTRACTS, Payments**)

Indemnity

Effective date

Cheese that contained dieldrin which was removed from commercial market at direction of State of Wisconsin Dept. of Agriculture under 14-day hold orders beginning Apr. 11, 1967, but final determination that cheese was adulterated pursuant to both State and Federal law and should not move in interstate or foreign commerce was not made until May 14, 1971, is considered to have been removed from commercial market after Nov. 30, 1970, thus permitting indemnity payments under sec. 204(b) of Agricultural Act of 1970, approved Nov. 30, 1970, in view of fact legal effectiveness of hold orders to remove cheese from commercial market prior to May 14, 1971, is doubtful. However, before making indemnity payment action should be taken to insure claimant will not also collect or benefit under its judgment against farmer responsible for contamination---------- 94

POST EXCHANGES, SHIP STORES, ETC.

Transportation of supplies

Appropriation availability

Air Force vouchers submitted by Army Finance Center pursuant to 7 GAO 8.4(c), which provides for submission of a disputed interagency bill for goods or services to GAO for settlement, will be considered to be request for an advance decision. Bills submitted which cover cost of inadvertent movement of commissary goods outside the United States (U.S.) in space-required rather than space-available airlift that Military Airlift Command refuses to cancel, may be paid from appropriated funds, for although commissaries are required to be self-sustaining, they are appropriated fund activities and, furthermore, Pub. L. 92–204 excludes transportation costs incurred outside U.S. from cost of purchase in operation of commissaries. Since interagency orders are obligations upon appropriations the same as orders or contracts with private contractors, Army operation and maintenance appropriation stated on vouchers is properly chargeable---------- 964

Erroneous transportation request

Loss liability

Although pecuniary liability for errors that led to request for space-required rather than space-available Military Airlift Command services to move commissary goods outside U.S. would seem to rest on commissary personnel making erroneous request, there is no basis for assessing charges for services on commissary officer since his custodial relationship with the Govt. as an accountable officer relates to property and funds, and there is no general authority for assessment of charges for losses sustained by Govt. as result of errors in judgment or neglect of duty by Govt. personnel. Moreover, interagency reimbursement for cost of services performed by billing agency pursuant to lawful authority cannot be viewed as a "loss" to Govt. in usual sense of the word---------- 964

POSTAL SERVICE, UNITED STATES Page

Appropriations

Transferred from Post Office Department

Lapsed appropriations disposition

Refunds of transportation charges paid from funds appropriated to former Post Office Dept. for fiscal year 1970, and obligated funds for 1970 and prior fiscal years transferred to the Postal Service and then deobligated are for reversion to general fund of the Treasury pursuant to 31 U.S.C. 701(a)(2) and not to Postal Service Fund as 39 U.S.C. 410(a) of the Postal Reorganization Act, which exempts Postal Service from Federal laws dealing with budgets or funds, was not effective until July 1, 1971, and, therefore, appropriations to former Post Officer Dept. are subject to 31 U.S.C. 701–708 prescribing closing of appropriation accounts available for obligation for definite period, and providing for reversion to general fund of Treasury, and lapsed appropriations of Post Office Dept. may not be considered assets of Postal Service in absence of specific provisions in act to this effect 179

Contracts

Competitive system applicability

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon 306

Federal Supply Service

Regulation applicable to procurement

Provision in an invitation for bids (IFB) prohibiting consideration of discounts for payment within less than 20 days does not become inapplicable because bidder requested progress payments if awarded a contract and, therefore, a prompt payment discount of 2 percent for payment within a 10-day period was properly disregarded in evaluation of bids pursuant to sec. 1–2.407–3(c) of the Federal Procurement Regs., which prohibits evaluation of prompt payment discounts for time periods less than specified in the IFB. Although the Govt. is entitled to a discount on any part of delivery payments applied in liquidation of progress payments, bids under competitive bidding requirements must be evaluated on basis prescribed in the invitation 614

PRESIDENT Page

Presidential appointees

Service of predecessors until qualification of new appointees

Compensation

A presidential recess nominee, appointed under Art. II, sec. 2, clause 3 of Constitution, whose appointment was not confirmed by Senate and he continued to serve after expiration on Dec. 31, 1972, of his recess term pursuant to 49 U.S.C. 11, which provides for continued service until successor is appointed and confirmed, and whose nomination to full term was not submitted within 40 days after beginning of next session of Congress, is not entitled pursuant to 5 U.S.C. 5503(b) to receive compensation after expiration of 40 days after beginning of first session of 93d Congress. However, since prohibition against paying recess appointee does not affect his right to hold office until the confirmation of nominee or end of 1st session of 93d Congress, should recess appointee be nominated and confirmed his right to pay would relate back to 41st day ---------- 556

PRINTING AND BINDING

Purchases from other than public printer

Commercial sources *v.* professional societies

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1-1.301-1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated. 332

PROPERTY

Private

Acquisition

Relocation expenses to "displaced persons"

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, approved Jan. 2, 1971, in prescribing relocation benefits for persons displaced when Govt. acquires real property provides that date of moving from property is controlling regardless of whether date of acquisition was before or after Jan. 2, 1971, effective date of act and, therefore, priority lessees—former land owners and tenants who remainded on acquired Federal property on priority basis as lessees—are entitled to benefits of act. However, when priority lessees physically vacate properties, displacements will be those of tenants rather than homeowners and, therefore, those lessees who sold their homes before enactment of Pub. L. 91-646 are not entitled to extra benefits afforded homeowners under act ---------- 300

PROPERTY—Continued Page

Private—Continued

Damage, loss, etc.

Deceased personnel

Status of claim

Value of military clothing lost at same time member of uniformed services lost his life when his housetrailer was destroyed in flood may not be paid to heirs or legal representatives of member since 37 U.S.C. 418 and implementing regulations prescribed that claim for loss, damage, or destruction of personal clothing is personal right and on basis of rationale in 26 Comp. Gen. 613, right does not extend beyond life of beneficiary. Although claim for clothing is cognizable under both 31 U.S.C. 241 and 37 U.S.C. 418, jurisdiction of claims under 31 U.S.C. 241 is vested in appropriate Secretary and limited to losses occurring in Govt-assigned quarters, even though claim may be made by survivor, and under 37 U.S.C. 418, which relates to clothing furnished in kind or monetary loss, claim for loss is personal to member sustaining loss..... 487

Household effects

Transportation, etc., charges

The holding in *United Van Lines, Inc.* v. *United States*, 448 F. 2d 1190, that a motor carrier may retain payment made of line-haul transportation charges for shipment of serviceman's household goods destroyed while in temporary storage at destination awaiting delivery is not for general application since other contracts of carriage provide significant legal reason for confining the *United* decision, and because the Court did not consider the many carrier tariffs, quotations, or commercial bills of lading which impose liability on motor carrier or freight forwarder. Entitlement to transportation charges where household goods are destroyed or stolen while in temporary storage at destination before delivery depends in each case upon facts and controlling contract provisions in tariffs, tenders, and bills of lading. Charges paid where goods have been destroyed or stolen should be recovered..... 673

Public

Damage, loss, etc.

Carrier's liability

Burden of proof

In absence of any evidence rebutting the Govt.'s *prima facie* case of carrier liability for damages to shipment of switches which moved under a Govt. bill of lading, the Comptroller General upon review sustained action taken by Transportation and Claims Div. in offsetting freight charges due carrier against the Govt.'s damage claim on same shipment. Carrier's *prima facie* liability having been established, it had burden of proving otherwise but failed to show lack of neglience and improper packing—in fact its agent participated in loading shipment (209 F. 2d, 442, 445). Legal justification for offset was recently restated in *Burlington Northern, Inc.* v. *United States*, 462 F. 2d 526. Amount of damage claim in excess of freight charges is for prompt refund or collection by other means..... 930

PROPERTY—Continued Page

Public—Continued

Damage, loss, etc.—Continued

Shortages

Second delivery effect on cost

On shipment of wooden boxes of ammunition for cannon with explosive projectiles weighing 795 lbs. and subject to freight charges computed on minimum of 2,500 lbs., additional charges claimed by delivering and billing carrier on basis of second freight movement of boxes found astray at origin carrier's terminal because Govt. prepared bill of lading and incorrectly showed quantity shipped as five boxes instead of 15 boxes properly was disallowed since pursuant to sec. 219 of Interstate Commerce Act, 49 U.S.C. 319, carrier and not shipper is responsible for issuing appropriate bill of lading, and fact that shipper prepared bill of lading does not relieve carrier of duty of ensuring bill of lading was correctly prepared ---------- 211

Space assignment

Charge assessment

Where General Services Admin. (GSA) cannot establish Standard Level User Charges (SLUC) for space and services furnished pursuant to Public Buildings Amendments of 1972 on basis of commercial rates, the GSA Administrator has broad discretion under act to assess charges and may assign concessions for blind stands and Federal Credit Unions, with concurrence of occupying agencies, and this space together with joint use space and parking facilities may be considered to establish user charges, and cost of concessions for cafeterias, beauty parlors, etc., may be charged occupying agencies on a pro rata reasonable basis. Under its authority to assign and reassign space in Govt. owned and leased buildings, GSA may assess SLUC rates in buildings occupied by permit from another agency, reimbursing the controlling agency; may charge for congressional district offices; and may outlease sites until needed for construction at fair rental value ---------- 957

Surplus

Disposition

Sale. (*See* **SALES**)

Real. (*See* **REAL PROPERTY**)

PUBLIC BUILDINGS

Construction

Financing of construction

Dual system of contracting

The so-called "dual system" of contracting proposed to carry out purchase contracting authority contained in sec. 5 of Public Buildings Amendments of 1972 that provides for financing acquisition, construction, alteration, maintenance, operation, and protection of public buildings, is legally within framework of sec. 5, since section does not prohibit use of such plan which contemplates separate contracts secured through competitive bidding—"Construction Contract" for building projects on Govt. sites and "Purchase Contract" for financing projects, funds for payment of construction to be obtained by Trustee through

PUBLIC BUILDINGS—Continued Page

Construction—Continued

Financing of construction—Continued

Dual system of contracting—Continued

issuance and competitive sale of Participation Certificates—presumably to be reoffered to public investors—to be redeemed by Govt. within 30 years by installment payments of principal and interest, with title in property vesting in U.S. ---------- 226

Contracts

Dual system of contracting

Construction and financing

Proposed modifications in dual system program procedures for procurement of public buildings, procedure which provides for separate construction contracts and purchase contracts for financing building projects, does not require any change in conclusions reached in 52 Comp. Gen. 226 that dual system of contracting is within legal framework of sec. 5 of Public Buildings Amendments of 1972 since decision will be equally applicable to dual system as modified to provide alternatives in method and timing of construction contracting; timing of issuance of Participation Certificates; and terms of redemption and purchase of Participation Certificates, and committees of Congress advised of original plan should be informed of proposed modifications to plan ---------- 517

Leases

Congressional approval

To insure equitable distribution of buildings

Requirement in Public Buildings Act of 1959, as amended on June 16, 1972 (40 U.S.C. 607), that prospectuses of proposed leases be submitted to Public Works Committees when average annual rental will exceed $500,000 is interpreted to mean rental amount excludes cost of heat, light, water, and janitorial services, and to mean congressional approval is not required retroactively for leases entered into prior to June 16, 1972, in absence of express statutory provision; for lease amendments that would bring leases within prohibition; and for leases renewed as part of interim housing plan. However, since determination whether or not to exercise option is tantamount to making new lease, options exercised on leases entered into prior to June 16, 1972, that would cause rental to exceed $500,000, require presentation to Committees unless option was included in initial congressional approval ---------- 230

PURCHASES

Open market purchases

Failure to use Federal Supply System

Payment basis

Firm who had yearly supply contract with General Services Administration (GSA) for carpet servicing in Govt. buildings within designated area at specified price but accepted oral order from agency in another contractor's area may not be paid higher price claimed on basis of entitlement to be reimbursed as for "open market" job at commercial prices. Firm cognizant of limitations imposed by GSA contracts is charged with notice of lack of employee authority to obligate Govt. and should have advised agency of its error. Since service was not

PURCHASES—Continued Page

Open market purchases—Continued

Failure to use Federal Supply System—Continued

Payment basis—Continued

within urgency exception of contract, error in procuring services on open market rather than from schedule contract does not legally obligate Govt. beyond extent of price stipulated ---- 530

Payment

Credit cards

National Technical Information Service (NTIS), the central clearinghouse for collection and dissemination of scientific, technical, and engineering information and for the establishment of fees under 15 U.S.C. 1153 for making results of technological research available to industry, business, and the general public, may arrange to accept payment by means of credit card services since there is no statutory prohibition against the Govt. providing services on credit, although the Govt. ordinarily does not provide goods or services on a credit basis. Therefore, NTIS may contract with a national credit card company for use of its credit card service as means of paying for purchases from NTIS, an arrangement under which the Govt.'s interest will be adequately protected, and which will provide NTIS customers with more rapid and convenient service ---- 764

QUARTERS

Government furnished

Adequacy of quarters determination

Distance factor

Member of uniformed services at temporary duty or delay point where Govt. mess, as defined in par. M1150-4 of Joint Travel Regs., is determined not to be available because of distance between lodgings and mess location, or because of incompatibility of mess hours with duty hours, may be paid per diem at rate authorized when Govt. mess is not available on basis that member in travel status is not required to use inadequate quarters, unless military necessity, and distance is factor in determining impracticability of utilizing Govt. facility. However, regardless of distance, if it is practicable to utilize mess for some but not all meals because of incompatability of duty hours, breakfast, lunch and dinner should be considered separately in determining impracticability of utilizing available mess ---- 75

Assignment more costly than payment of an allowance

Commanding officers who in assignment or nonassignment of public quarters to members of uniformed services have duty to accomplish maximum practicable occupancy of Govt. quarters and to issue written statement or certificate to members upon assignment or nonassignment of quarters—and member's personal desire provides no basis for nonassignment of available quarters—may be granted some latitude in circumstances requiring that judgment be used as to whether assignment of quarters would be more costly to Govt. than payment of allowance prescribed by 37 U.S.C. 403, since there is no requirement that all available quarters must be occupied. However, determinations should be made on individual basis and approved allowance supported by written certificate or statement ---- 64

QUARTERS—Continued Page

Government furnished—Continued

Assignment more costly than payment of an allowance—Continued

Member of uniformed services without dependents who is transferred to permanent station and furnished certificate of nonavailability of Govt. quarters on basis it would be economically advantageous to U.S. not to require member to occupy available quarters is entitled to dislocation allowance pursuant to par. M9003-1 of Joint Travel Regs., implementing 37 U.S.C. 407(a), which authorizes payment of dislocation allowance to member that is not assigned to Govt. quarters and is furnished certificate of nonavailability of quarters 64

Service charges

Period of absence

An officer involuntarily assigned to bachelor officers quarters (BOQ) at temporary duty station, Clark Air Force Base (AB) in the Philippines, which he is directed to maintain while deployed to Taiwan because of adverse weather conditions, and where he is paid for period Aug. 8 through Oct. 1, 1972, maximum locality per diem rate of $13 is entitled to reimbursement of the $2 per day service charge he paid during absence from the AB notwithstanding pars. M4205-5 and M4254-1b of Joint Travel Regs. against increasing a maximum locality rate. Service charge is not a rental fee but is intended to defray operating expenses, and as service was not agreed to by officer, or required to be furnished during his absence, reimbursement will not constitute additional per diem 917

QUARTERS ALLOWANCE

Availability of quarters

Nonoccupancy for personal reasons

Marriage to another member of the uniformed services

Female Air Force officer residing with her officer husband in non-Govt. housing who alleges discrimination in denial of her application for quarters allowance, which she claimed on basis of bachelor officer quarters on Air Force base are unsuitable for her because she is married and wishes to reside with husband, since other married officers are entitled to BAQ at dependent rate but husband receives quarters allowance without dependents rate and she receives no allowance, properly was denied quarters allowance at without dependent rate as certification of responsible commander was not based on unavailability of quarters but on presumed unsuitability of quarters for married woman who wishes to reside with husband, whereas pursuant to 37 U.S.C. 204 and implementing regulations, member is not entitled to BAQ on behalf of spouse who is on active duty and is entitled to basic pay in her own right. Further, see Sup. Ct. No. 71-1694, Jan. 17, 1973 514

Not criteria for payment of allowance

Commanding officers who in assignment or nonassignment of public quarters to members of uniformed services have duty to accomplish maximum practicable occupancy of Govt. quarters and to issue written statement or certificate to members upon assignment or nonassignment of quarters—and member's personal desire provides no basis for nonassignment of available quarters—may be granted some latitude in

QUARTERS ALLOWANCE—Continued Page

Availability of quarters—Continued

Not criteria for payment of allowance—Continued

circumstances requiring that judgment be used as to whether assignment of quarters would be more costly to Govt. than payment of allowance prescribed by 37 U.S.C. 403, since there is no requirement that all available quarters must be occupied. However, determinations should be made on individual basis and approved allowance supported by written certificate or statement 64

Dependents

Children

Adopted

Adoption not finalized

Children provisionally adopted by Navy member while stationed in Great Britain pursuant to the Adoption Act of 1958 (7 Eliz. 2, C. 5) Part V, Sec. 53, are considered dependents of the member under 37 U.S.C. 401, so as to entitle him to a dependents' allowance and all other benefits incident to dependency status while member resides in Great Britain in view of fact that although provisional adoption order only authorizes custody and removal of children from Great Britain for adoption elsewhere, sec. 53(4) of the act provides that the rights, duties, obligations, and liabilities prescribed in other sections of the act for an adopter shall equal those of natural parents or those created by an adoption order. However, unless children are actually adopted by member after he is transferred from Great Britain, they may not continue to be regarded as his adopted children 675

Payments that do not constitute support

Officer of uniformed services who gave wife at time of their divorce a promissory note for $1,500 that is being reduced by his mother in amount of $30 per month paid to father of his former spouse is not entitled, in absence of definitive court decree requiring child support payments for son born of marriage, to basic allowance for quarters for child who is in custody of his mother since payments are not support payments and there is no showing any part of monthly payments are used to support child. If requirements for payment of quarters allowance cannot be shown for periods officer received allowance, payments are subject to collection unless there is for application Pub. L. 92–453, authorizing waiver of certain claims of U.S. against members in prescribed circumstances 454

Husband and wife both members of the armed services

An Air Force sergeant that contributes over one-half of support of daughter whose custody was awarded to her upon divorce from her husband, also member of uniformed services, may be paid basic allowance for quarters with dependents from date of the divorce, notwithstanding her former husband receives basic allowance for quarters at the "with dependents" rate based on dependent children of previous marriage and pays $75 per month toward the support of child born to their marriage, since her former husband does not receive increased quarters allowance on account of their daughter who appears to be dependent on the sergeant for over one-half of her support as required to qualify as dependent of female member within meaning of 37 U.S.C. 401 602

QUARTERS ALLOWANCE—Continued Page

Dependents—Continued

Husband's dependency

Status for entitlement to quarters

In view of sec. 703, 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 female member of uniformed services, in order to receive increased allowance for quarters on account of dependent husband under 37 U.S.C. 403, must not only meet test prescribed by 37 U.S.C. 401 that husband is dependent for over one-half his support but also incapable of self-support due to physical or mental incapacity, will no longer be for application prospectively as to incapacity. However, 1964 act does not overcome different dependency standards prescribed by statute for male and female members; until remedial legislation is enacted, 37 U.S.C. 401 controls; female member must continue to establish spouse is dependent for over one-half of his support to entitle her to increased quarters allowance. Contrary decisions will no longer be followed 1

Government quarters

Nonoccupancy

Personal convenience

Payment of basic allowance for quarters (BAQ) under 37 U.S.C. 403(a) to female Air Force captain, pay grade O–3, as officer without dependents, who resides in non-Govt. quarters with her officer husband and his two dependent children by prior marriage, may not be authorized in absence of commanding officer's certification that Govt. quarters are unavailable or inadequate, adequacy of quarters to be determined on their fitness for use as bachelor quarters without regard to their suitability for married woman who desires to reside with husband since pursuant to Dept. of Defense Instructions 1338.1, which is for application notwithstanding Civil Rights Act of 1964, eligibility of married members for BAQ, without dependents, rests with male member and female member has no entitlement to allowance unless single quarters are not available to her. Further, see Sup. Ct. No. 71–1694, Jan. 17, 1973 510

Increases

Wage–price freeze effect

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92–129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15–Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act and, furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases 15

QUARTERS ALLOWANCE—Continued Page

Members in a missing status

Monetary allowance in lieu

Enlisted members of uniformed services, whether or not with dependents, who prior to being carried in missing status (37 U.S.C. 551–558) were quartered and subsisted by U.S. Govt., under concept of "changed conditions" may be credited with quarters and subsistence allowances from beginning of missing status. Statutory provisions involved in 23 C. G. 207, 895, which were basis for denying allowances to members entering "missing status," have been superseded by secs. 301, 302 of Career Compensation Act of 1949 (37 U.S.C. 403) to provide that 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 missing status are entitled to monetary allowance in lieu of subsistence and quarters in kind from beginning of missing status, subject to 31 U.S.C. 71a 23

Status of allowance

Compensation

Payment of temporary quarters subsistence expenses (TQSE) to transferred civilian employee for up to 30 days while he and his dependents occupy temporary quarters, which expenses are computed on basis of actual expenses or per diem percentage for each 10-day period, will not violate prohibition against duplicate payments in par. C8253 of Joint Travel Regs. and sec. 8.2i of OMB Cir. No. A–56 because his spouse as a military member on active duty receives basic allowances for quarters and for subsistence. The TQSE allowance is intended to lessen economic hardship employees face when transferred for convenience of Govt., whereas permanent military allowances cover normal day-to-day expenses for food and shelter when not provided by Govt., and being in the nature of compensation they are not viewed as duplicating TQSE allowance 962

RAILROADS

Reorganization

Government to maintain services

Option obtained from Central Railroad of New Jersey by Secretary of Transportation pursuant to sec. 3(b)(4) of Emergency Rail Service Act of 1970 incident to guaranteeing trustee certificates issued in reorganization proceedings of railroad, which option provides that Secretary acquire by purchase or lease trackage rights and equipment to maintain railroad services in event of actual or threatened cessation of such services, may not be exercised without further action by Congress. Legislative history of act contains no indication Secretary is authorized to take over railroad and operate it, but rather evidences that he may exercise option, following favorable congressional action, without awaiting outcome of proceedings before reorganization court or Interstate Commerce Commission 309

REAL PROPERTY Page

Acquisition

Relocation costs

Effective date of entitlement

Unform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, approved Jan. 2, 1971, in prescribing relocation benefits for persons displaced when Govt. acquires real property provides that date of moving from property is controlling regardless of whether date of acquisition was before or after Jan. 2, 1971, effective date of act and, therefore, priority lessees—former land owners and tenants who remained on acquired Federal property on priority basis as lessees—are entitled to benefits of act. However, when priority lessees physically vacate properties, displacements will be those of tenants rather than homeowners and, therefore, those lessees who sold their homes before enactment of Pub. L. 91-646 are not entitled to extra benefits afforded homeowners under act 300

RECORDS

Access to Government records by public

Administrative documents submitted to the General Accounting Office

The administrative documents considered in a protest to a contract award that consisted of internal Government communications containing staff advice and evaluations of contractors' proposals by Goverment personnel will not be released by the United States General Accounting Office since the documents are not subject to release in accordance with the exemptions in paragraph 10e of Army Regulations 345-20 738

Agency

Procedural requirements

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes 393

"Public Information Law"

Refusal to disclose information procedure

An unsuccessful company under a two-step procurement for the design, construction, and performance testing of nitric acid-sulfuric acid concentration plants who when refused the name and location of facilities built by the successful bidder should have appealed its contention of entitlement to the information under 5 U.S.C. 552—the Public Information Act—as provided in 32 CFR 286.1 *et seq.* since the United States General Accounting Office has no authority under the act to determine what information must be disclosed by other Government agencies 783

REGULATIONS Page

Armed Services Procurement Regulation

Applicability

Postal Service

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon 306

Conflicting

Employing agency *v.* Civil Service Commission

Service of civilian employee assigned aboard a vessel for purpose of conducting post repair testing vibration surveys of equipment to determine feasibility of the equipment for operation in the vessel does not constitute standby time to entitle employee to overtime authorized in 5 U.S.C. 5542, notwithstanding Navy regulations provide than an employee on a trial trip to test equipment is considered to be in a standby status since regulations are invalid as they do not meet criteria established in Federal Personnel Manual Supp. 990–2, Book 610, Subch. S1–3d, to the effect that "standby time consists of periods in which an employee is officially ordered to remain at or within confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called." 794

Procurement agency *v.* General Services Administration

Under solicitation for trucks conducted pursuant to an agreement between Federal Supply Service of the General Services Administration (GSA) and United States Postal Service, which provides that GSA procurement regulations shall apply to procurement, offer by bidder of a prompt payment discount of $20 per vehicle for payment within 21 days was properly evaluated by GSA pursuant to sec. 1–2.407–3 of Federal Procurement Regs., notwithstanding such discounts are prohibited by Postal Service procurement regulations 614

RETIREMENT

Civilian

Annuities

Concurrent military and civilian retirement

Retired member of uniformed services who at age 57 after 10 years of Federal employment is immediately granted civil service annuity based on 30 years' military and civilian service, military service having been used to establish eligibility for civil service annuity, may not upon reaching age 62 and becoming eligible for deferred annuity revoke waiver of military retired pay, with a concurrent reduction of civil service annuity by excluding credit for military service since restoration and payment

RETIREMENT—Continued Page

Civilian—Continued

Annuities—Continued

Concurrent military and civilian retirement—Continued

of retired military pay would amount to double benefit based on same service contrary to 5 U.S.C. 8332(j). Any recomputation of civil service annuity is within jurisdiction of CSC, and member who failed to apply for immediate civil service annuity based on military and civilian service, upon becoming eligible at 62 to deferred civil service annuity would not receive civil service benefits for period prior to reaching age 62. 429

Forfeiture

Persons convicted of certain offenses

Interest included in awards of retroactive payments of Civil Service annuities to plaintiffs in 338 F. Supp. 1141, from date of eligibility to date of judgment—awards based on fact that so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* under which payments were withheld was an *ex post facto* law that punished plaintiffs for conduct that occurred prior to its enactment—is payable, together with annuities, from Civil Service Retirement and Disability Fund and not from permanent indefinite appropriation for judgments contained in 31 U.S.C. 724a, since interest is part of damages awarded. However, as interest is payable only when provided for in statutes and contracts, in absence of court decision to contrary, obligation to pay interest does not extend to those individuals who did not sue but by virtue of 338 F. Supp. 1141 are entitled to retroactive payment of annuity ---------- 175

Service credits

Military service

Waiver of retired pay

Army sergeant who when retired on Dec. 1, 1960, under 10 U.S.C. 3914, entered Federal Civil Service from which he retired for disability on Nov. 21, 1969, and who on Oct. 1, 1970, both changed to full waiver his partial waiver of retired pay for Veterans Administration compensation, and waived retired pay to have his military service used in computation of civil service annuity pursuant to 5 U.S.C. 8332(c), may have retired pay retroactively waived to date of his civil service retirement if Civil Service Commission agrees to recompute his annuity and pay additional annuity due, since waiver of retired pay under 38 U.S.C. 3105 for VA compensation did not disturb military status of retiree, and VA compensation erroneously paid will be recouped, nor will double benefit prohibited by 38 U.S.C. 3104 result from use of military service for civil service annuity purposes as no military retired pay will be paid. 526

District of Columbia

Executive Officer of courts

Fact that Executive Officer of District of Columbia Courts—position established in D.C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this nonjudicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement

RETIREMENT—Continued Page

District of Columbia—Continued

Executive Officer of courts—Continued

benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained 111

SALES

Bids

Discarding all bids

Price acceptability

Late bid price comparison

The discarding of all bids received under sales invitation for disposal of reels of used magnetic tape as being in best interest of the Govt. because prices received were unreasonable by comparison with higher priced late bid opened by mistake and returned, and because estimated quantity used in invitation was excessive, was justified under terms of invitation and 40 U.S.C. 484(e)(2). While it was improper to open late bid, consideration of price offered in evaluating timely bids was not, as purpose of regulations concerning late bids is to protect bidder against public disclosure where bid is not eligible for consideration, and there is no prohibition against using, after bid opening, information received in late bid for price comparison. Moreover, reduction of reels offered for sale could result in a higher price per reel because of smaller lot offered 883

Mistakes

Evidence of error

Withdrawal *v.* bid correction

Under sales invitation for bids on surplus ships, which provided for bid deposit equal to 25 percent of bid, bidder who after bid opening alleged bid price increase was overstated by Western Union, and that excessive bid deposit made was in anticipation of offering another increase, may be permitted to withdraw its bid or waive mistake. Bidder unable to establish by clear and convincing evidence existence of mistake and bid actually intended as required by sec. 1–2.406–3 of Federal Procurement Regs. and applicable to sale pursuant to 40 U.S.C. 474(16), may not be permitted to correct its bid, but mistake having been made, bidder may be allowed to either withdraw bid, since degree of proof justifying withdrawal is in no way comparable to that necessary for bid correction, or to waive mistake under exception to rule against waiver of mistake 258

Disclaimer of warranty

Erroneous description

Best available information

Description of a surplus lot of wrenches in a Sales Letter issued by the General Services Admin. (GSA) having been made as indicated in Standard Form 114–C on the best information available as shown in turn-in document from the disposal activity, in absence of knowledge on part of GSA that one group of wrenches had been misdescribed, or that the disposal activity acted in bad faith, sales contract may not be rescinded. The property was offered for sale on an "as is" or "where is"

SALES—Continued Page

Disclaimer of warranty—Continued

Erroneous description—Continued

Best available information—Continued

basis, without warranty, and had purchaser inspected the wrenches prior to bidding as cautioned by Sales Letter, the misdescription would have been readily apparent to him. B–176387, Jan. 3, 1973; B–173680, Dec. 10, 1971; 50 Comp. Gen. 28 (1970); and B–167926, Jan. 15, 1970, overruled ---------- 698

Timber. (*See* **TIMBER SALES**)

SET-OFF

Authority

Challenged by contractor's surety

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by surety under its payment bond ---------- **262**

Transportation

Property damage, etc.

Freight charges and damage claim arising in same shipment

In absence of any evidence rebutting the Govt.'s *prima facie* case of carrier liability for damages to shipment of switches which moved under a Govt. bill of lading, the Comptroller General upon review sustained action taken by Transportation and Claims Div. in offsetting freight charges due carrier against the Govt.'s damage claim on same shipment. Carrier's *prima facie* liability having been established, it had burden of proving otherwise but failed to show lack of negligence and improper packing—in fact its agent participated in loading shipment (209 F. 2d, 442, 445). Legal justification for offset was recently restated in *Burlington Northern, Inc.* v. *United States*, 462 F. 2d 526. Amount of damage claim in excess of freight charges is for prompt refund or collection by other means ---------- 930

SMALL BUSINESS CONCERNS

Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)

STATES

Disaster relief

National Guard services

Pay, etc., entitlement

Duty performed by National Guard units ordered by State of Pennsylvania to aid in disaster relief necessitated by extensive flooding in State may be considered as annual summer training of units within purview of 32 U.S.C. 502, and Federal funds used for pay and allowance purposes, even though ordinarily sec. 502 training is conducted in accordance with established training policies, standards, and programs approved

STATES—Continued Page
Disaster relief—Continued
National Guard services—Continued
Pay, etc., entitlement—Continued

by Depts. of Army and Air Force in coordination with State National Guard organizations, in view of broad discretion vested in Secretaries concerned to regulate training of National Guard units---------- 35

Federal aid, grants, etc.
Disaster relief
Separately declared disaster areas
Expense reimbursement to temporary employees

Since pursuant to E.O. 11575, Dec. 31, 1970, the States of N.Y., Pa., Va., Md., and Fla. were separately declared disaster areas on June 23, 1972, W. Va. on July 3, and Ohio on July 15, due to damage caused by Hurricane Agnes, for purposes of paying temporary employees of Small Business Administration per diem and travel expenses authorized by 15 U.S.C. 634(b)(8) in connection with their duties relating to providing loans to small business concerns, tropical storm need not be viewed as one disaster and each State therefore constituting a disaster area, employees may be reassigned and authorized per diem at new location for period not to exceed 6 months---------- 584

Matching fund activities
"Hard-match" requirement
Funds from private, etc., sources

Purpose of "hard-match" requirement in Omnibus Crime Control and Safe Streets Act of 1968, as amended, which authorizes Law Enforcement Assistance Admin. (LEAA) to grant funds for strengthening and improving law enforcement, being to assure State and local governments share in LEAA programs with monies they appropriated, and not to exclude private organizations, the "hard-match" requirement does not prevent use in LEAA-sponsored National Scope projects of matching funds from private sources, or use of Model City funds allotted by grantees to LEAA projects, as such funds are considered "money appropriated" for purposes of the "hard-match" requirement. The "hard-match requirement" in connection with subgrants to nongovernmental units also may be interpreted to permit use of private sources, and as funds for the administration of American Samoa lose their Federal identity, they meet the requirement---------- 558

STATION ALLOWANCES
Military personnel
Excess living costs outside United States, etc.
Members subsisted at Government expense
Leave period within United States

Enlisted men without dependents assigned to permanent duty station outside continental U.S. and subsisted at Govt. expense and, therefore, not entitled to cost-of-living allowance authorized by 37 U.S.C. 405 for purpose of defraying average excess costs experienced by members on permanent duty outside U.S. do not gain entitlement to allowance while on leave in U.S. on basis Govt. mess is not available to them in view of fact par. M4301-3b(1) of Joint Travel Regs. prescribes member at permanent overseas duty station without dependents is not entitled to cost-of-living allowance while absent on leave in U.S. or while being subsisted at Govt. expense at permanent duty station---------- 273

STATUTES OF LIMITATION Page

Claims

Transportation

Additional claims after tolling of statute

Erroneous payment

Where because of failure to properly route Feb. 9, 1967, shipments of Army tractor trucks, which were delivered during February, the Govt. was not entitled to transit privileges accorded the shipments and erroneously paid carrier on the basis of through rates, the additional freight charges filed Feb. 9 and July 27, 1971, based on higher local rates from transit point to destination, are barred since claim was not received by the General Accounting Office within 3 years of payment in May, 1967, as required by sec. 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66). The cause of action for freight charges accrues upon delivery, extended on interstate shipments transported for the U.S. to 3 years from the date of payment, refund, or deduction, whichever is later, and no refund or deduction being involved, the extended period of limitations commenced to run on dates of payment in May 1967 and expired during May 1970 713

STATUTORY CONSTRUCTION

Continuing resolutions

Appropriation act restrictions effect

Although in considering bill for "Department of Labor, and Health, Education and Welfare Appropriation Act, 1973," House was more restrictive than Senate as to number of Federal employees authorized to determine compliance with Occupational Safety and Health Act of 1970, inspection activities of Labor Dept. under 1970 act remain unchanged during effective period of Joint Resolution (Pub. L. 92–334), which provides continuing appropriations for fiscal year 1972 projects until fiscal year 1973 funds become available, for notwithstanding that pursuant to sec. 101(a)(3) of Joint Resolution, more restrictive language governs, sec. 101(a)(4) controls to make restriction on inspection services inapplicable under Joint Resolution in view of fact similar restriction was not contained in 1972 appropriation act 71

Prohibition on administrative actions

Functions prescribed by Pub. L. 92–318, approved June 23, 1972, for National Advisory Council on Extension and Continuing Education, which was established by and its authority and responsibility stated in sec. 109 of Higher Education Act of 1965, as amended (20 U.S.C. 1009), do not constitute new "project or activity" within purview of prohibition in sec. 106 of Continuing Resolution, approved July 1, 1972 (Pub. L. 92–334) since primary effect of new functions is to require council to evaluate educational programs and projects which theretofore were more or less discretionary and, therefore, funds provided by Continuing Resolution, pending passage of Dept. of Health, Education, and Welfare appropriations (HEW), may be made available by HEW to implement Council's functions under sec. 106 270

STATUTORY CONSTRUCTION—Continued Page

Legislative intent

Milk indemnity payments

Fact that the only statute requiring registration of chemicals is Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135–135k) does not imply waiver of registration and approval requirement in 7 U.S.C. 450j to permit indemnity payments to dairy farmers who were directed to remove their milk from commerical market because it contained residues of chemical which was not registered and approved for use by Federal Govt. at time of use since, under express language of the statutes pertaining to Milk Indemnity Program, use of contaminant must have been registered with and affirmatively endorsed or recommended by Govt. Therefore, indemnity claims for milk contaminated from consumption by dairy cattle of ensilage stored in silo coated with paint containing "Arcolor 1254," compound not required to be registered and approved, may not be allowed ---------- 412

Omissions in amendments to legislation

The longevity step increases provided by sec. 110 of District of Columbia Police and Firemen's Salary Act Amendment of 1972 may be considered an element of basic compensation in computing overtime and holiday pay since act provides longevity pay shall be paid in same manner as basic compensation except that it shall not be subject to deduction and withholding for retirement and insurance and shall not be considered salary for purposes of computing annuities, and although legislative history of act makes no reference to including longevity compensation increases as part of basic compensation in computing overtime and holiday payments, in view of fact that prior to 1972 act longevity rates were scheduled rates of pay, any intent to exclude longevity compensation from basic compensation for all purposes should have been reflected in legislative history of the act ---------- 597

Prospective effect of acts

Since decision changing prior construction of statute generally is prospective only, reconsideration of entitlements of National Guard members and other reservists under act of June 20, 1949, providing similar benefits for reservists injured or disabled in line of active duty or training as Regular members receive, may be considered tantamount to changed construction of law and, therefore, changes may not be given retroactive application. However, where no final action with respect to physical disability proceedings, or other final action has been taken, such cases may be considered to be within purview of changed entitlements ---------- 99

Standard Reference Data Act

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial

STATUTORY CONSTRUCTION—Continued Page

Standard Reference Data Act—Continued

publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1–1.301–1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated 332

STORAGE

Damage, loss, etc.

Household effects

Transportation charges

The holding in *United Van Lines, Inc.* v. *United States*, 448 F. 2d 1190, that a motor carrier may retain payment made of line-haul transportation charges for shipment of serviceman's household goods destroyed while in temporary storage at destination awaiting delivery is not for general application since other contracts of carriage provide significant legal reason for confining the *United* decision, and because the Court did not consider the many carrier tariffs, quotations, or commercial bills of lading which impose liability on motor carrier or freight forwarder. Entitlement to transportation charges where household goods are destroyed or stolen while in temporary storage at destination before delivery depends in each case upon facts and controlling contract provisions in tariffs, tenders, and bills of lading. Charges paid where goods have been destroyed or stolen should be recovered 673

Household effects

Military personnel

Temporary storage

Conversion to nontemporary storage

When Air Force members ordered to mobile Navy units are unable because of operational requirements to take delivery of household goods that had been shipped and placed in temporary storage at new home ports, temporary storage may not be converted to nontemporary storage, nor may 180-day limit on temporary storage be extended for period equivalent to period of member's absence. Temporary storage authorized in connection with shipment of household goods incident to permanent change-of-station and nontemporary storage prescribed in lieu of shipment are incompatible under 37 U.S.C. 406 and, therefore, combinations of shipment and nontemporary storage may not be authorized. Furthermore, as section does not contemplate temporary storage in excess of 6 months, 180-day limit on such storage may not be extended without congressional approval 213

Nontemporary

An employee who incident to reinstatement to a permanent position at an isolated duty station in continental United States within 1 year after separation by reduction-in-force action overseas places his household effects in nontemporary storage, although entitled to benefits provided in 5 U.S.C. 5724a(c) as though he had been transferred in the interests of the Govt. without a break in service to location of reemployment from separation location, may not be reimbursed for cost of the nontemporary storage occasioned by isolated duty station assignment

STORAGE—Continued Page

Household effects—Continued

Nontemporary—Continued

since this expense is specifically excluded by sec. 1.3a(7) of Office of Management and Budget (OMB) Cir. No. A–56, which implements 5 U.S.C. 5724a(c). However, pursuant to 5 U.S.C. 5724(a)(2), 60 days temporary storage, limited to authorized weight prescribed by sec. 6, OMB Cir. No. A–56, may be paid to employee 881

SUBSIDIES

Housing

Allowances

Evaluation contracts

Under solicitation for conduct of experiments to test and evaluate Housing Allowance Experimental Program, which was divided into three separate experiments—demand, supply, and administrative agency—noncompetitive awards of phase II portion of demand experiment to other than contractor whose performance under phase I was deficient, and of supply and administrative agency experiments (AAE) indicate proclivity for sole source awards and departure from regulatory requirements for competitive bidding (FPR 1–3.101(c)) that is not justified on basis of "unique" contractor capabilities. The selection of AAE contractor to complete phase II of the demand experiment was in effect a prequalification of that contractor, and severable portions of the unjustified award should be terminated and resolicited on competitive basis, and this recommendation for corrective action reported to appropriate congressional committees 987

Indemnity payments

Agricultural products. (*See* **AGRICULTURE DEPARTMENT, Indemnity programs**)

SUBSISTENCE

Per diem

Actual expenses

Employees undergoing training

Payment to Fedl. employees who participate in training away from their official station of actual subsistance expenses instead of per diem in lieu of subsistence as authorized by 5 U.S.C. 5702(c) when in unusual circumstances the per diem provided is insufficient to cover expenses is not precluded by 5 U.S.C. 4109, the authority to reimburse an employee for various expenses of training including cost of necessary travel and per diem "instead of subsistence" (formerly "in lieu of subsistence") under 5 U.S.C. subch. I of ch. 57, since nothing in legislative history of the Government Employees Training Act indicates intent to restrict employees undergoing training to reimbursement for subsistence on a per diem basis as opposed to actual subsistence expenses. Furthermore 5 U.S.C. 5702(c) provides for payment of actual subsistence expenses in unusual circumstances when authorized per diem is insufficient, and authority to pay actual subsistence expenses depends upon entitlement to per diem 684

SUBSISTENCE—Continued Page

Per diem—Continued

Area of entitlement

Mileage from permanent duty station

Under Standardized Govt. Travel Regs. which authorize payment of per diem for travel of 24 hours or less (sec. 6.6d), and provide for agency responsibility to prescribe individual rates (sec. 6.3), Dept. of Agriculture has authority and responsibility to establish radius of 25 miles from permanent duty station of employees within which per diem is not payable to graders and inspectors of Department who travel outside metropolitan area of their duty stations to provide requested service, if restriction on payment of per diem is predicated upon reasonable basis---- 446

Death of employee on temporary duty

Widow of employee who died while on temporary duty away from his official station may be paid, pursuant to E.O. 8557, as amended by OMB Cir. A–92, issued under authority of 5 U.S.C. 5742, cost of preparing remains, limited to $250, charges incurred for transporting remains, including cost of outside shipping case, and preparation of casket for shipment, as well as cost of necessary copies of death certificate incident to transportation of remains, notwithstanding employee was not on authorized leave without pay. However, there is no authority to return deceased employee's privately owned automobile to his home, and in accordance with OMB Cir. A–7, per diem for period employee was absent without leave is not payable unless absence was due to illness or injury and not to employee's misconduct---- 493

Delays

Weather conditions

Employee on official business who because of extraordinary weather conditions—blizzard—is prevented from returning to his residence after cancellation of flight and he as result occupied motel accomodations until weather moderated may be paid for diem per period spent in motel because new subsec. 6.6e of SGTR permits payment under such circumstances whereas subsec. 6.9c, which it supersedes, did not permit payment of per diem for interval between scheduled and actual departure from depot, airport, or dock if traveler could return home when delayed. B–173224, Aug. 30, 1971, overruled---- 135

Dependents

Transfer of employee

Since OMB Cir. No. A–56 provides per diem payable to civilian employee for his dependents traveling with him incident to change of official station should be computed on basis of percentage of per diem rate employee would receive if traveling alone, employee who paid varying per diem rates while traveling with spouse on househunting trip to seek residence at new station and in connection with travel performed with dependents from his old to new station is entitled to per diem allowance for dependents computed by using average single rate applicable to rooms occupied as base upon which dependents' per diem is calculated-- 34

SUBSISTENCE—Continued Page

Per diem—Continued

"Lodging-plus" basis

Computation

In application of "lodging-plus" provision of subsec. 6.3c, Standardized Govt. Travel Regs. to employee who while on temporary duty was hospitalized and received reimbursement for $80 per day room and board hospital charge, none of which is allocable to lodging *per se*, it may be assumed lodging rate for period of hospitalization was at least $13 per day on basis agency regulation implementing subsection prescribes daily subsistence allowance of $12 and maximum per diem rate of $25. Therefore, employee may be allowed lodging rate of $13 per day for entire period of temporary duty, including hospitalization, plus daily subsistence allowance of $12, and payment may be made to him at full $25 per diem rate 123

Military personnel

Departure from permanent station

Delayed

Officer of uniformed services who used his privately owned automobile to reach airport departure point under orders authorizing travel to attend conference, but who is prevented from departing due to adverse weather conditions and returned home after absence of 4 hours, may not be paid per diem since par. M4205–4a of Joint Travel Regs. prohibits payment of per diem allowance for round trip performed entirely within 10-hour period of same calendar day. However, based on rationale in B–166490, Apr. 23, 1969, relating to civilian employee, officer for use of his automobile is entitled to travel allowance prescribed by par. M4401–2, item 2, of regulations, which authorizes mileage for one round trip from home to airport, plus parking fees, not to exceed cost of two taxicab fares between those points 452

Headquarters

Prohibition against payment

An officer who when released from his duty station at a university is assigned to the Pentagon in Arlington, Va., with temporary duty en route at the Center for Naval Analyses, also located in Arlington 2 miles from the Pentagon, and who establishes a residence within commuting distance to both duty points, is not entitled to per diem since boundaries of Arlington County are considered to be comparable to the corporate limits of a city within contemplation of par. M1150–10a of Joint Travel Regs. (JTR) and, therefore, officer is not in a "travel status" within meaning of JTR M3050–1 while performing temporary duty at his permanent duty station as defined in JTR M1150–10a 751

Quarters and messing facilities furnished

Determination of availability

Member of uniformed services at temporary duty or delay point where Govt. mess, as defined in par. M1150–4 of Joint Travel Regs., is determined not to be available because of distance between lodgings and mess location, or because of incompatibility of mess hours with duty hours, may be paid per diem at rate authorized when Govt. mess is not available on basis that member in travel status is not required to

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Quarters and messing facilities furnished—Continued
Determination of availability—Continued
use inadequate quarters, unless military necessity, and distance is factor in determining impracticability of utilizing Govt. facility. However, regardless of distance, if it is practicable to utilize mess for some but not all meals because of incompatibility of duty hours, breakfast, lunch and dinner should be considered separately in determining impracticability of utilizing available mess 75

Temporary duty
En route to new permanent duty station
Under par. M4156, case 13 of Joint Travel Regs., change 232, effective June 1, 1972, a member of the uniformed services who receives permanent change-of-station orders which direct temporary duty en route at a location in area of his old or new permanent duty stations and who occupies his permanent residence from which he may commute daily to his temporary duty station, will be entitled to per diem and travel allowances while performing such duty as if he had not been detached from his old station or as if he had reported to his new permanent station 751

Hospital permanent station
When member of uniformed services stationed in U.S. is ordered to hospital, treatment generally is temporary and does not justify transportation of dependents. However, if period of hospitalization is prolonged or member is returned from overseas, station change is regarded as permanent and member is entitled to transportation of dependents and dislocation allowance, and all members, irrespective of having dependents, are eligible to have their household effects transported. Although members who have basic eligibility for permanent change of station allowances incident to hospitalization may not be authorized per diem and other temporary duty allowances when assigned duty within corporate limits of city or town wherein hospital is located, such allowances are payable to members whose home port or duty station is in U.S. and whose treatment will not be prolonged 432

Rates
Area or locality rates
Prohibition against increase
An officer involuntarily assigned to bachelor officers quarters (BOQ) at temporary duty station, Clark Air Force Base (AB) in the Philippines, which he is directed to maintain while deployed to Taiwan because of adverse weather conditions, and where he is paid for period Aug. 8 through Oct. 1, 1972, maximum locality per diem rate of $13 is entitled to reimbursement of the $2 per day service charge he paid during absence from the AB notwithstanding pars. M4205-5 and M4254-1b of Joint Travel Regs. against increasing a maximum locality rate. Service charge is not a rental fee but is intended to defray operating expenses, and as service was not agreed to by officer, or required to be furnished during his absence, reimbursement will not constitute additional per diem 917

SUBSISTENCE—Continued Page

Per diem—Continued

Rates—Continued

Lodging costs

Application of "lodgings-plus" system

In the application of the "lodgings-plus" provision of sec. 6.3c of the Standardized Government Travel Regs. to determine the average daily lodging costs for purpose of establishing per diem rates for civilian employees of the Dept. of Defense assigned to prolonged temporary duty at locations where hotel and motel accommodations are limited and employees rent living quarters at or near temporary duty station, there is for inclusion expenses that are ordinarily included in price of hotel or motel room, such as rent of an apartment, house or trailer, furnished or unfurnished; rental of furniture, including stoves, refrigerators, television sets, and vacuum cleaners; utilities, maid and cleaning charges; telephone and other user fees, but not the expenses incurred for tips, housekeeping items, and telephone installation. Furthermore, sec. 6.3c permits establishment of a specific per diem rate when use of the lodgings-plus system is not appropriate 730

Temporary duty

Several locations

Since pursuant to E.O. 11575, Dec. 31, 1970, the States of N.Y., Pa., Va., Md., and Fla. were separately declared disaster areas on June 23, 1972, W. Va. on July 3, and Ohio on July 15, due to damage caused by Hurricane Agnes, for purposes of paying temporary employees of Small Business Administration per diem and travel expenses authorized by 15 U.S.C. 634(b)(8) in connection with their duties relating to providing loans to small business concerns, tropical storm need not be viewed as one disaster and each State therefore constituting a disaster area, employees may be reassigned and authorized per diem at new location for period not to exceed 6 months 584

SUBSISTENCE ALLOWANCE

Military personnel

Cadets, midshipmen, etc.

Period of entitlement to allowance

Subsistence allowance of $100 per month authorized in 37 U.S.C. 209, as amended by act of Nov. 24, 1971, Pub. L. 92-171, and implemented by pars. 80401a, b, and d(2)(a) of Dept. Of Defense Military Pay and Allowances Entitlements Manual, may not be paid to ROTC cadet or midshipman appointed under 10 U.S.C. 2107 for 10 full months of each academic year if academic year is of shorter duration. In accordance with legislative history of 1971 act, cadets and midshipmen became entitled to subsistence allowance for maximum of 20 months each during first 2 years and second 2 years of schooling to preclude payment of allowance during vacations when they had no military obligation and, therefore, there is no authority to pay allowance to cadets and midshipmen when they are not in school 496

SUBSISTENCE ALLOWANCE—Continued Page

Military personnel—Continued

Members in a missing status

Monetary allowance in lieu

Enlisted members of uniformed services, whether or not with dependents, who prior to being carried in missing status (37 U.S.C. 551–558) were quartered and subsisted by U.S. Govt., under concept of "changed conditions" may be credited with quarters and subsistence allowances from beginning of missing status. Statutory provisions involved in 23 C. G. 207, 895, which were basis for denying allowances to members entering "missing status," have been superseded by secs. 301, 302 of Career Compensation Act of 1949 (37 U.S.C. 403) to provide that 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 missing status are entitled to monetary allowance in lieu of subsistence and quarters in kind from beginning of missing status, subject to 31 U.S.C. 71a---- 23

Status of allowance

Payment of temporary quarters subsistence expenses (TQSE) to transferred civilian employee for up to 30 days while he and his dependents occupy temporary quarters, which expenses are computed on basis of actual expenses or per diem percentage for each 10-day period, will not violate prohibition against duplicate payments in par. C8253 of Joint Travel Regs, and sec. 8.2i of OMB Cir. No. A–56 because his spouse as a military member on active duty receives basic allowances for quarters and for subsistence. The TQSE allowances is intended to lessen economic hardship employees face when transferred for convenience of Govt., whereas permanent military allowances cover normal day-to-day expenses for food and shelter when not provided by Govt., and being in the nature of compensation they are not viewed as duplicating TQSE allowance---------- 962

TAXES

Federal

Refunds

Military records correction

Disability in lieu of years of service

Correction of military records under 10 U.S.C. 1552 to show deceased officer had been retired for disability and not years of service pursuant to 10 U.S.C. 8911, created entitlement to refund of income taxes withheld since sec. 104(a)(4) of Internal Revenue Code of 1954, as amended, provides that disability retired pay is not subject to Federal income tax. Claim of officer's widow for retund of taxes for years denied by IRS as barred by applicable statute of limitations may be allowed as being claim within meaning of 10 U.S.C. 1552(c) in view of *Clyde A. Ray* v. *United States*, 197 Ct. Cl. 1, in which court held plaintiff's claim was not for refund of taxes but to effectuate administrative remedy allowed under 10 U.S.C. 1552, and that shelter of income from taxation is "pecuniary benefit" flowing from record correction---------- 420

In settlement of claims for income tax refunds occasioned by correction of military records to show disability retirement in lieu of retirement for years of service, there is no objection to following the rule in *Clyde A. Ray* v. *United States*, 197 Ct. Cl. 1, to the effect that claims for amounts

TAXES—Continued Page

Federal—Continued

Refunds—Continued

Military records correction—Continued

Disability in lieu of years of service—Continued

withheld for income tax purposes will be treated as "pecuniary benefits" due within meaning of 10 U.S.C. 1552(c) rather than claim for tax refunds. However, claims should be limited to amounts withheld for income taxes in years for which IRS is barred from making refunds by applicable statute of limitations, and settlement of claims, without interest, may be paid from current appropriations available for claims under 10 U.S.C. 1552(c). Claimants' information and advice of IRS should be solicited as aids in computing amounts due, and whether refunds should be withheld from disbursement to IRS is for that agency to determine---- 420

State

Federal employees

Leaves of absence effect on tax withholding

Nonresident Federal employee who will not return to duty station in Philadelphia upon termination of sick leave status at which time disability retirement becomes effective is subject to Pennsylvania Income Tax imposed on Federal employees by agreement between Federal and State Govts. pursuant to 5 U.S.C. 5517, and E.O. No. 10407, for period of sick leave, July 19, 1972 until Dec. 1973, during which time he will remain on agency rolls since sick leave payments constitute wages for taxation purposes. Income tax withholding for leave period is for computation in accordance with par. 3(b) of Pennsylvania Personal Income Tax Information Bulletin, which excludes nonworkdays—Saturdays, Sundays, holidays, and days of absence—and amount actually subject to tax and tax ultimately due is for settlement between employee and State---- 538

Government immunity

Vehicle parking tax

In view of administrative burdens to implement U.S. GAO decision of Dec. 10, 1971, 51 Comp. Gen. 367, holding that San Francisco City and County tax on occupancy of parking spaces is not chargeable to Federal Govt. when Govt-owned vehicle is involved, and that voucher for tax in favor of Govt. employee may not be certified for payment, decision is modified to permit certifying officers to certify vouchers for payment of parking tax in amount of 1 dollar or less in spite of Govt.'s immunity to tax, since correct procedure prescribed in 7 GAO 26.2 for use of tax exemption certificate when legal incidence of tax is on vendee is not available as its use is restricted to purchases on which taxes exceed 1 dollar. 51 Comp. Gen. 367, modified---- 83

Income tax

Federal employees

Pennsylvania Personal Income Tax

Deduction for Pennsylvania Personal Income Tax from lump-sum annual leave payments to Federal employees separating from Government service (5 U.S.C. 5551(a)) is required notwithstanding that leave balance may include leave carried forward from agencies not geographi-

TAXES—Continued Page

State—Continued

Income tax—Continued

Federal employees—Continued

Pennsylvania Personal Income Tax—Continued

cally located within Pennsylvania regardless of when leave was earned or current residence of employee, and that leave accrued but was not paid prior to enactment of tax law or its effective date since for purposes of Federal income tax withholding, lump-sum leave payments are wages taxable as income for year of receipt and, therefore, payments are subject to agreement between U.S. Treasury Dept. and Commonwealth of Pa. respecting withholding of tax from compensation of Federal employees 139

TIMBER SALES

Contracts

Sale and road construction costs

Additional road costs

Determination of Secretary of Agriculture to uphold denial by Regional Forester of claim for additional road construction costs under timber sales contract—denial reversed and restored administratively and then appealed to Secretary by contractor—was in conformance with 36 CFR 221.16(a), which provides for modification of timber sales contracts only when modification will apply to unexecuted portions of contract and will not be injurious to U.S., is final administrative determination within purview of 36 CFR 211.28(b), and Supreme Court ruling in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, concerning finality of administrative determinations and, therefore, Secretary's decision is final and conclusive insofar as other agencies of Govt. are concerned, and it is not subject to review by GAO 196

TIME

Computation

Saturdays, Sundays and holidays

Acceptance of a bid, subject to acceptance within 60 calendar days from date of receipt of the offer, on Monday, Feb. 5, 1973, the 62nd day because the 60th calendar day occurred on Saturday, Feb. 3, 1973, did not consummate a valid contract, notwithstanding the law of the situs—New York State—provides that when an act is authorized or required to be performed on a Saturday, Sunday, or public holiday, it may be done on the next succeeding business day, since applicability of the statute is academic in view of the incorporation of Standard Form 33A in the invitation for bids, which provided that "Time if stated as a number of days, will include Saturdays, Sundays and holidays." Modifies 38 Comp. Gen. 445 and B-137634, dated July 5, 1963 768

TRANSPORTATION

Accessorial charges

Additional charge for unusual services

Driver assignment, shipment charge, etc.

A motor carrier who transported electrical instruments from N.Y. to N. Mex. under Govt. bill of lading noted "Two Drivers Authorized," for which he was paid on line-haul basis that included regular driver's service is not entitled to reimbursement for driver's overtime service in absence

TRANSPORTATION—Continued Page

Accessorial charges—Continued

Additional charge for unusual services—Continued

Driver assignment, shipment charge, etc.—Continued

of provision in either Govt. tender I.C.C. 50 or in Military Rate Tender IV authorizing such payment; is only entitled to regular charges prescribed for extra driver if services were not performed in N.Y., computed on basis of actual hours worked as evidenced by driver's logs, which is best support of the claim (4 CFR 54.5); and is not entitled to shipment charge based on minimum weight applicable in computation of line-haul charges but rather on basis of net weight shipped. Furthermore, round the clock charges for both drivers, as provided by contract or labor laws, is not responsibility of United States---------- 945

Automobiles

Deceased personnel

Widow of employee who died while on temporary duty away from his official station may be paid, pursuant to E.O. 8557, as amended by OMB Cir. A-92, issued under authority of 5 U.S.C. 5742, cost of preparing remains, limited to $250, charges incurred for transporting remains, including cost of outside shipping case, and preparation of casket for shipment, as well as cost of necessary copies of death certificate incident to transportation of remains, notwithstanding employee was not on authorized leave without pay. However, there is no authority to return deceased employee's privately owned automobile to his home, and in accordance with OMB Cir. A-7, per diem for period employee was absent without leave is not payable unless absence was due to illness or injury and not to employee's misconduct---------- 493

Bills of lading

Description

Erroneous

Real character of article controls

A mixed-truckload shipment of bomb fins and bodies (explosives and projectile parts) described in the Govt. bill of lading as "ammunition items" and tendered subject to C.I. Whitten Transfer Co. Tender I.C.C. No. 300 was erroneously classified and therefore the I.C.C. No. 300 tender is inapplicable. Bomb fins are not blasting supplies as term "supplies" refers to items furnished for operational or maintenance purposes whereas fins form part of completed product, nor are fins ammunition or explosives as they were not transported as accessory to larger unit also being transported at same time. However, services having been performed and received, under principle of *quantum meruit*, carrier is entitled to reasonable compensation, which will be obtained by computing charges due under Whitten's tariff rates on Component Parts of Explosives contained in MF-I.C.C. No. 64---------- 924

Issuance

By shipper

Effect on carrier liability

On shipment of wooden boxes of ammunition for cannon with explosive projectiles weighing 795 lbs. and subject to freight charges computed on minimum of 2,500 lbs., additional charges claimed by delivering and billing carrier on basis of second freight movement of boxes found astray

TRANSPORTATION—Continued Page

Bills of lading—Continued

Issuance—Continued

By shipper—Continued

Effect on carrier liability—Continued

at origin carrier's terminal because Govt. prepared bill of lading and incorrectly showed quantity shipped as five boxes instead of 15 boxes properly was disallowed since pursuant to sec. 219 of Interstate Commerce Act, 49 U.S.C. 319, carrier and not shipper is responsible for issuing appropriate bill of lading, and fact that shipper prepared bill of lading does not relieve carrier of duty of ensuring bill of lading was correctly prepared 211

Notations

Compliance with tariff rule

Where destination Canadian carrier refused to refund overcharge occasioned by erroneous application of exclusive use charges on shipment of helium cylinders, and participating carriers are jointly and severally liable for overcharge, origin carrier properly was held liable and overcharge recovered by setoff since correction notice that added to bill of lading the notation "authorized use of single truck load by the carrier is mandatory to expedite shipment" did not satisfy tariff requirement for notation to indicate shipper requested exclusive use, and omission of such notation may not be waived. Furthermore, bill of lading does not show seals were applied, and as shipment was interchanged with foreign carrier, it is doubtful shipment was accorded exclusive use of a vehicle from origin to destination without transloading 575

Carriers

Railroad. (*See* **CARRIERS, Railroad**)

Contractor shipments

Prepaid

Government's liability for freight charges

A carrier's claim for transportation charges on shipment of furniture to a Veterans Admin. Hospital which was purchased f.o.b. destination and shipped on a commercial bill of lading prepared by shipper and executed by carrier as required by 49 U.S.C. 319, where bill of lading although marked "prepaid" also indicated delivery to consignee was without recourse on the consignor and carrier should not make delivery without payment of freight and other lawful charges, may not be allowed since the inconsistent "no recourse" and "prepaid" clauses mean some payment was made by consignor, and as claim is not for supplemental freight charges, Govt.'s liability has not been established. Furthermore the shipper no longer is in business and carrier failed to notify the Govt. of the difficulty in collecting freight charges until payment had been made to the contractor–consignor 851

Dependents

Children

Adopted

Children provisionally adopted by Navy member while stationed in Great Britain pursuant to the Adoption Act of 1958 (7 Eliz. 2, C.5) Part V, Sec. 53, are considered dependents of the member under 37 U.S.C. 401, so as to entitle him to a dependents' allowance and all

TRANSPORTATION—Continued Page

Dependents—Continued

Children—Continued

Adopted—Continued

other benefits incident to dependency status while member resides in Great Britain in view of fact that although provisional adoption order only authorizes custody and removal of children from Great Britain for adoption elsewhere, sec. 53(4) of the act provides that the rights, duties, obligations, and liabilities prescribed in other sections of the act for an adopter shall equal those of natural parents or those created by an adoption order. However, unless children are actually adopted by member after he is transferred from Great Britain, they may not continue to be regarded as his adopted children 675

Military personnel

Advance travel of dependents

Employment opportunities lacking

The advance return from overseas to the United States (U.S.) of those dependents of members of the uniformed services unable to locate acceptable employment overseas may be authorized at Govt. expense under the broad authority for advance returns when in the best interest of the individual and the U.S. which was added by Pub. L. 88-431 as subsec. (h) to 37 U.S.C. 406 because sec. 406(e) limited advance returns to "unusual or emergency circumstances," and par. M7103-2 of Joint Travel Regs. (JTR) may be amended accordingly. However, 37 U.S.C. 406(h) authority does not contemplate advance return of dependents because they "lack suitable recreational activities" at overseas station. Furthermore, advance returns are also authorized by par. M7102, JTR, when situations embarrassing to the U.S. are to be avoided, and by par. M7103-2, item 7, JTR, in situations which have an adverse effect on member's performance of duty 847

Prior to issuance of orders

Members of the uniformed services whose dependents travel long in advance of permanent change-of-station orders or release of members from active duty may not be reimbursed travel expenses under 37 U.S.C. 406(a) since par M7000-8, Joint Travel Regs., promulgated pursuant to 37 U.S.C. 406(c), prohibits reimbursement when dependents travel prior to the issuance of orders directing station change, or prior to receipt of official notice such orders would be issued, unless the travel is supported by statement of the commanding officer, or his designated representative, of the order-issuing headquarters that member was advised orders would be issued. However, certificates issued as much as 6 months prior to orders are not acceptable, unless there is a showing a determination actually had been made to issue orders to member, as the relatively short period contemplated between time of a change-of-station determination and time required to issue the orders would be exceeded 769

Dislocation allowance

Members without dependents

Payment of dislocation allowance to officer of Army Nurse Corps as member without dependents who is receiving basic allowance for quarters

TRANSPORTATION—Continued Page
Dependents—Continued
Military personnel—Continued
Dislocation allowance—Continued
Members without dependents—Continued
as member with dependents for her mother who will not join her at new duty station where whe was not assigned Govt. quarters depends on whether mother resided with officer at old station. If she did not, officer is entitled to dislocation allowance pursuant to par. M9002, JTR, in amount equal to applicable monthly rate of quarters allowance prescribed for member of officer's pay grade without dependents, but if mother did reside with her at time of transfer, her entitlement to transportation for mother precludes payment of allowance even though mother may not have changed residence 405

Residence establishment
Evidence
Selection of place as home by member of uniformed services upon retirement without traveling to home of selection within 1-year period prescribed by par. M4158–1a and 2a of Joint Travel Regs. for establishing bona fide residence does not create entitle ent to travel and transportation allowances to home selected. Therefore, Air Force officer retired under 10 U.S.C. 8911, effective July 1, 1970, who selected Marco Island, Fla., as home of selection but traveled with dependents from last permanent duty station to home of record, also shipping household effects to that point, where he continued to reside beyond 1-year period following retirement awaiting construction of home on Marco Island, is only entitled to travel and transportation allowances under 37 U.S.C. 404 and 406 on basis home of record was home of selection 242

Overseas employees
Advance travel of dependents
Divorce, etc., prior to employee's eligibility
Reimbursement to employee for advance return travel to U.S. of spouse and/or minor children who traveled to foreign post as dependents but ceased to be dependents as of date employee became eligible for return travel because of divorce or annulment of marriage may be provided and sec. 126.2, Vol. 6, FAM, amended accordingly under authority of 22 U.S.C. 1136—amendment to prescribe that reimbursable travel may not be deferred more than 6 months after employee completes travel. Govt. has obligation to return dependents at Govt. expense since employee and family are sent to overseas post for convenience of Govt. and, furthermore, amendment will bring regulation in harmony with 6 FAM 126.3 and sec. 1.11f of OMB Cir. A–56 246

Training periods
Family domicile established by employee, transferred from Fairbanks, Alaska, at Ann Arbor, Mich., where he will attend graduate school before reporting to new duty station, Wash., D.C., does not constitute permanent change of station within meaning of OMB Cir. No. A–56, and A–56 allowances become payable only when employee relocates in Washington. Since both old and new stations are not within continental

TRANSPORTATION—Continued Page

Dependents—Continued

Training periods—Continued

U.S., employee is not entitled to a house-hunting trip, and cost of shipping his household effects to Ann Arbor is for deduction from his constructive cost entitlement to transportation of his effects from Fairbanks to Washington. Per diem is payable during training period in lieu of transporting family and effects to Ann Arbor (39 Comp. Gen. 140), and payment of mileage at 6 cents per mile for employee's travel to Ann Arbor by privately owned automobile, is upon completion of transfer to be deducted from entitlement to 12 cents per mile for travel from old to new station, and to 6 cents per mile for excess travel due to the training 834

Facilities other than Government

Travel expense reimbursement

Military personnel. (*See* **TRAVEL EXPENSES, Military personnel, Use of other than Government facilities**)

Freight

Charges

Delivery requirement

The holding in *United Van Lines, Inc.* v. *United States*, 448 F. 2d 1190, that a motor carrier may retain payment made of line-haul transportation charges for shipment of serviceman's household goods destroyed while in temporary storage at destination awaiting delivery is not for general application since other contracts of carriage provide significant legal reason for confining the *United* decision, and because the Court did not consider the many carrier tariffs, quotations, or commercial bills of lading which impose liability on motor carrier or freight forwarder. Entitlement to transportation charges where household goods are destroyed or stolen while in temporary storage at destination before delivery depends in each case upon facts and controlling contract provisions in tariffs, tenders, and bills of lading. Charges paid where goods have been destroyed or stolen should be recovered 673

Household effects

Drayage

Between non-Government quarters overseas

Both military members and civilian employees at overseas permanent duty stations who are required to vacate local housing leased because no Govt. quarters were available may be paid drayage costs to move their household goods to other housing on local economy when quarters they occupy are declared by medical personnel to no longer meet established health and sanitation standards on basis military members must obey orders and civilian employees move for convenience of Govt. However, neither military members nor civilian employees are entitled to drayage when move to other non-Govt. quarters results from landlord refusing to renew lease or otherwise permit continued occupancy as such change of quarters is not for convenience of Govt 293

TRANSPORTATION—Continued Page

Household effects—Continued

Limitation on definition of term

Term "baggage and household effects" used in 37 U.S.C. 406 to authorize transportation incident to temporary or permanent station change for member of uniformed services and in implementing Joint Travel Regs., par. M8000–2, term that does not lend itself to precise definition and which has been interpreted to mean in its ordinary and common usage as referring to particular kinds of personal property associated with home and person, may not be redefined to include all personal property associated with home and person which will be accepted and shipped by carrier at rates established in appropriate tariffs for household goods on basis of risk involved in shipping items not covered by regulation since risk is responsibility of owner who may purchase insurance if he desires greater coverage than normally provided by carrier 479

Military personnel

Advance shipments

Prior to issuance of orders

Although household effects of members of the uniformed services may be moved at Govt. expense within prescribed weight allowances under authority of 37 U.S.C. 406(b) incident to permanent change-of-station, par. M8015–1, Joint Travel Regs., precludes shipment at Govt. expense when shipment occurs prior to issuance of orders, except upon certification by proper authority that shipment was due to an emergency, exigency of the service, or required by service necessity. Authority in 37 U.S.C. 406(e) for transportation of dependents, baggage and household effects between points in the U.S. in unusual or emergency circumstances when incident to military operations or need may not be extended to authorize transportation long prior to issuance of permanent change-of-station orders solely on the basis of dependents' need. However, erroneous payments will not be questioned, but procedures should be corrected 769

After acquired

Purchased overseas for delivery in United States

Where furniture ordered or contracted for overseas by member of the uniformed services from a U.S. firm conducting an overseas sales program for delivery and use of furniture at member's next permanent duty station in the U.S. is not available for shipment at time of the effective date of member's change-of-station orders, member is not entitled under 37 U.S.C. 406(b) to transportation of the effects ordered but not available as furniture is not considered as having been acquired by member prior to effective date of his permanent station change within contemplation of par. M8000–2, Joint Travel Regs., in the absence of evidence that title to furniture still in the possession of manufacturer had passed to the member prior to effective date of permanent change-of-station orders 765

TRANSPORTATION—Continued Page

Household effects—Continued

Military personnel—Continued

"Do It Yourself" movement

Benefits entitlement

A member of uniformed services who incident to permanent change of station orders participates in a "Do It Yourself" program and moved his household effects within continental U.S. using a rental truck and packing materials furnished through a contractual arrangement by the Govt. with national truck rental company and hired assistance to load and unload goods is not considered to have been afforded "transportation in kind" and consequently he is entitled to mileage allowance for his personal travel under par. M4150–1, item 1 of Joint Travel Regs. (JTR), but not to per diem which is predicated on denial of mileage allowance. A movement under temporary duty orders entitles member to monetary allowance pursuant to JTR M4203–3a; a travel allowance is payable for dependents riding in rental truck; and reasonable reimbursement may be made for hired help if supported by required evidence---------- 936

Local movement

Both military members and civilian employees at overseas permanent duty stations who are required to vacate local housing leased because no Govt. quarters were available may be paid drayage costs to move their household goods to other housing on local economy when quarters they occupy are declared by medical personnel to no longer meet established health and sanitation standards on basis military members must obey orders and civilian employees move for convenience of Govt. However, neither military members nor civilian employees are entitled to drayage when move to other non-Govt. quarters results from landlord refusing to renew lease or otherwise permit continued occupancy as such change of quarters is not for convenience of Govt---------- 293

Release from active duty

To other than selected home

Selection of place as home by member of uniformed services upon retirement without traveling to home of selection within 1-year period prescribed by par. M4158–1a and 2a of Joint Travel Regs. for establishing bona fide residence does not create entitlement to travel and transportation allowances to home selected. Therefore, Air Force officer retired under 10 U.S.C. 8911, effective July 1, 1970, who selected Marco Island, Fla., as home of selection but traveled with dependents from last permanent duty station to home of record, also shipping household effects to that point, where he continued to reside beyond 1-year period following retirement awaiting construction of home on Marco Island, is only entitled to travel and transportation allowances under 37 U.S.C. 404 and 406 on basis home of record was home of selection-- 242

TRANSPORTATION—Continued Page
Household effects—Continued
Military personnel—Continued
Trailer shipment
Change of duty station requirement

Costs incurred by staff sergeant incident to movement of housetrailer without permanent change of station from trailer court declared "off-limits" by Ellsworth Air Force Base commander in order to protect health and welfare of Armed Forces personnel living in trailer court may be reimbursed to member, even though there was no change in member's assignment to create entitlement to trailer allowance prescribed by 37 U.S.C. 409, as costs resulted from base commander's exercise of authority, pursuant to regulation, in connection with proper administration of Ellsworth Air Force Base, and reimbursement to member treated as operational expense chargeable to appropriation for Operation and Maintenance, Air Force---- 69

Weight limitation
Overseas assignment

Since under 37 U.S.C. 406, Defense Dept. Secretaries have broad authority to restrict entitlement of members of uniformed services to shipment of household goods between duty station in U.S. and overseas duty station, including that portion of shipment within continental U.S., they have authority to amend par. M8003-2, Joint Travel Regs. to prescribe that excess charges for shipment of household goods to and from overseas area that provides Govt-owned furniture should be based for portion of shipment within U.S. only on weight above that prescribed for member's rank or grade, provision which will be in addition to weight limitation applicable to overseas portion. However, any proposed revision should be prospective and should consider congressional expression of policy in legislative history of the Defense Department Appropriation Act, 1973, respecting cost of shipping members' possessions overseas---- 552

Overseas employees
Local movement

Both military members and civilian employees at overseas permanent duty stations who are required to vacate local housing leased because no Govt. quarters were available may be paid drayage costs to move their household goods to other housing on local economy when quarters they occupy are declared by medical personnel to no longer meet established health and sanitation standards on basis military members must obey orders and civilian employees move for convenience of Govt. However, neither military members nor civilian employees are entitled to drayage when move to other non-Govt. quarters results from landlord refusing to renew lease or otherwise permit continued occupancy as such change of quarters is not for convenience of Govt---- 293

TRANSPORTATION—Continued Page

Household effects—Continued

Training periods

Family domicile established by employee, transferred from Fairbanks, Alaska, at Ann Arbor, Mich., where he will attend graduate school before reporting to new duty station, Wash., D.C., does not constitute permanent change of station within meaning of OMB Cir. No. A–56, and A–56 allowances become payable only when employee relocates in Washington. Since both old and new stations are not within continental U.S., employee is not entitled to a house-hunting trip, and cost of shipping his household effects to Ann Arbor is for deduction from his constructive cost entitlement to transportation of his effects from Fairbanks to Washington. Per diem is payable during training period in lieu of transporting family and effects to Ann Arbor (39 Comp. Gen. 140), and payment of mileage of 6 cents per mile for employee's travel to Ann Arbor by privately owned automobile, is upon completion of transfer to be deducted from entitlement to 12 cents per mile for travel from old to new station, and to 6 cents per mile for excess travel due to the training 834

What constitutes

Limitation on term "household effects"

Term "baggage and household effects" used in 37 U.S.C. 406 to authorize transportation incident to temporary or permanent station change for member of uniformed services and in implementing Joint Travel Regs., par. M8000–2, term that does not lend itself to precise definition and which has been interpreted to mean in its ordinary and common usage as referring to particular kinds of personal property associated with home and person, may not be redefined to include all personal property associated with home and person which will be accepted and shipped by carrier at rates established in appropriate tariffs for household goods on basis of risk involved in shipping items not covered by regulation since risk is responsibility of owner who may purchase insurance if he desires greater coverage than normally provided by carrier. 479

Rates

Classification

Bomb fins and bodies

A mixed-truckload shipment of bomb fins and bodies (explosives and projectile parts) described in the Govt. bill of lading as "ammunition items" and tendered subject to C. I. Whitten Transfer Co. Tender I.C.C. No. 300 was erroneously classified and therefore the I.C.C. No. 300 tender is inapplicable. Bomb fins are not blasting supplies as term "supplies" refers to items furnished for operational or maintenance purposes whereas fins form part of completed product, nor are fins ammunition or explosives as they were not transported as accessory to larger unit also being transported at same time. However, services having been performed and received, under principle of *quantum meruit*, carrier is entitled to reasonable compensation, which will be obtained by computing charges due under Whitten's tariff rates on Component Parts of Explosives contained in MF–I.C.C. No. 64 924

TRANSPORTATION—Continued Page

Rates—Continued

Exclusive use of vehicle

Bill of lading notation requirement

Where destination Canadian carrier refused to refund overcharge occasioned by erroneous application of exclusive use charges on shipment of helium cylinders, and participating carriers are jointly and severally liable for overcharge, origin carrier properly was held liable and overcharge recovered by setoff since correction notice that added to bill of lading the notation "authorized use of single truck load by the carrier is mandatory to expedite shipment" did not satisfy tariff requirement for notation to indicate shipper requested exclusive use, and omission of such notation may not be waived. Furthermore, bill of lading does not show seals were applied, and as shipment was interchanged with foreign carrier, it is doubtful shipment was accorded exclusive use of a vehicle from origin to destination without transloading 575

Line-haul charges

Driver compensation

A motor carrier who transported electrical instruments from N.Y. to N. Mex. under Govt. bill of lading noted "Two Drivers Authorized," for which he was paid on line-haul basis that included regular driver's service is not entitled to reimbursement for driver's overtime service in absence of provision in either Govt. tender I.C.C. 50 or in Military Rate Tender IV authorizing such payment; is only entitled to regular charges prescribed for extra driver if services were not performed in N.Y., computed on basis of actual hours worked as evidenced by driver's logs, which is best support of the claim (4 CFR 54.5); and is not entitled to shipment charge based on minimum weight applicable in computation of line-haul charges but rather on basis of net weight shipped. Furthermore, round the clock charges for both drivers, as provided by contract or labor laws, is not responsibility of United States 945

Section 22

Agencies not party to quotations

Applicability of special rates to all agencies nonetheless

Payment for shipment of Electrical Instruments, NOI, by Coast Guard, which was transported in 40-foot trailer given exclusive use, with released valuation of 60 cents per pound, properly was computed under Trans Country Van Lines Tender I.C.C. No. 50—a sec. 22 Tender—that had been referenced in the Govt. bill of lading, and carrier is not entitled to additional charges claimed. Carrier's claim is based on Govt. Rate Tender I.C.C. No. 1–U, which names Coast Guard because Tender I.C.C. No. 50 does not, and on fact its commercial bill of lading makes reference to I.C.C. No. 1–U. However, I.C.C. No. 50, sec. 22 Tender is offered to the "United States Government" and until canceled is available to any Govt. agency, without giving special notice, that is willing to do business with offering carrier, unless agency is specifically excluded from Tender 927

TRANSPORTATION—Continued Page

Rates—Continued

Space reservation

Actual *v.* constructive weight rate base

On shipment of fabricated test structures from Deer Park, Long Island, N.Y., to Wright Patterson AFB, Ohio, on Govt. bill of lading showing actual weight of shipment as 1,725 pounds, and containing notation "space reserve for 1000 cu ft of space," carrier who was properly paid line-haul charges based on minimum weight of 10,000 pounds is only entitled to a "Shipment Charge" for space reserved on the actual weight of shipment, and exception was properly taken to higher charge based on constructive weight of 10,000 pounds since Item 15 of Government Rate Tender (GRT), I.C.C. 1–U, Supp. 8, effective May 1, 1968, provides that the shipment charge will apply to "net weight," which in accordance with applicable GRT provisions is interpreted to mean "actual weight." ---------- 612

Volume shipments

Conditions to constitute

Fact that shipment of pallets was covered by four bills of lading does not change character of shipment from volume shipment that is within contemplation of Sec. 5, Item 110, of the National Motor Freight Classification, which provides that shipment is "a lot of freight tendered to the carrier by one consignor at one place at one time for delivery to one consignee at one destination on one bill of lading," since all conditions but the "one bill of lading" requirement were met, and carrier on basis of correction notices and other evidence knew shipment was tendered as one lot on same day for delivery to one consignee at one destination, subject to applicable volume rate. Therefore, as carrier is only entitled to lower rate applicable to volume shipments, there is no basis for allowing claim for higher freight rate---------- 575

Remains

Death of employee on temporary duty

Widow of employee who died while on temporary duty away from his official station may be paid, pursuant to E.O. 8557, as amended by OMB Cir. A–92, issued under authority of 5 U.S.C. 5742, cost of preparing remains, limited to $250, charges incurred for transporting remains, including cost of outside shipping case, and preparation of casket for shipment, as well as cost of necessary copies of death certificate incident to transportation of remains, notwithstanding employee was not on authorized leave without pay. However, there is no authority to return deceased employee's privately owned automobile to his home, and in accordance with OMB Cir. A–7, per diem for period employee was absent without leave is not payable unless absence was due to illness or injury and not to employee's misconduct---------- 493

Transit privileges

Storage-in-transit

Misrouted shipment

Where because of failure to properly route Feb. 9, 1967, shipments of Army tractor trucks, which were delivered during February, the Govt. was not entitled to transit privileges accorded the shipments and erroneously paid carrier on the basis of through rates, the additional freight

TRANSPORTATION—Continued Page

Transit privileges—Continued

Storage-in-transit—Continued

Misrouted shipment—Continued

charges filed Feb. 9 and July 27, 1971, based on higher local rates from transit point to destination, are barred since claim was not received by the General Accounting Office within 3 years of payment in May, 1967, as required by sec. 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66). The cause of action for freight charges accrues upon delivery, extended on interstate shipments transported for the U.S. to 3 years from the date of payment, refund, or deduction, whichever is later, and no refund or deduction being involved, the extended period of limitations commenced to run on dates of payment in May 1967 and expired during May 1970 713

Vessels

American

Cargo Preference

Towage of empty barge

Prohibition in 10 U.S.C. 2631, Cargo Preference Act of 1904, as amended, to effect that "only vessels of U.S. or belonging to U.S. may be used in transportation by sea of supplies bought for Army, Navy, Air Force, or Marine Corps," does not apply to towage of empty barge by foreign-flag tug since tug is not supply item and language of act as well as court cases which distinguish between contracts of affreightment and contracts for tonnage services indicate preference granted U.S. vessels by 1904 Cargo Preference Act is limited to transportation by sea of military supplies under contracts of affreightment and preference does not extend to towage of empty vessels under ordinary towage contracts. Therefore payment under towage contract from appropriated funds was proper 327

Foreign

United States registry

Carriage of military cargoes

Carriage of military cargoes in foreign-built vessels entitled to registry in U.S., and engaged in foreign trades or trade with trust territories, is not precluded by basic cargo preference statutes—act of Apr. 28, 1904, as amended, and act of Aug. 26, 1954, as amended. Objectives of 1904 act—to aid U.S. shipping, to foster employment of U.S. seamen, and to promote the U.S. shipbuilding industry—do not exclude foreign-built vessels registered in U.S., as such vessels are considered vessels of U.S. and entitled to benefits and privileges appertaining to U.S. vessels, to extent participation is limited to foreign commerce and trust territories, and is not precluded by act of 1954, which insures that at least 50 percent of all Govt. cargo, whether military or civil, will be transported in privately owned "U.S.-flag commercial vessels," a term that is not limited to vessels built in U.S. 809

Foreign-built vessels which are documented under the registry laws of the United States (46 U.S.C. 221) subsequent to the issuance of bids or offers for transportation of military cargoes to foreign ports may be used to satisfy contract commitments pursuant to such bids or offers, provided the use of the vessels is consistent with their registry, provided

TRANSPORTATION—Continued Page
Vessels—Continued
Foreign—Continued
United States registry—Continued
Carriage of military cargoes—Continued
the use does not compromise the tonnage limitation of the act of Aug. 26, 1954, as amended, and provided the requests for bids or offers, or the contracts entered into pursuant thereto, do not prohibit such use..... 809

TRAVEL EXPENSES
Actual expenses
Reimbursement basis
Payment to Fedl. employees who participate in training away from their official station of actual subsistence expenses instead of per diem in lieu of subsistence as authorized by 5 U.S.C. 5702(c) when in unusual circumstances the per diem provided is insufficient to cover expenses is not precluded by 5 U.S.C. 4109, the authority to reimburse an employee for various expenses of training including cost of necessary travel and per diem "instead of subsistence" (formerly "in lieu of subsistence") under 5 U.S.C. subch. I of ch. 57, since nothing in legislative history of the Government Employees Training Act indicates intent to restrict employees undergoing training to reimbursement for subsistence on a per diem basis as opposed to actual subsistence expenses. Furthermore 5 U.S.C. 5702(c) provides for payment of actual subsistence expenses in unusual circumstances when authorized per diem is insufficient, and authority to pay actual subsistence expenses depends upon entitlement to per diem..... 684

Air travel
Airport departure fees
Airport fees military and civilian personnel are required to pay when departing from airports incident to official travel of themselves and their immediate families and dependents are reimbursable, if charges are reasonable, as transportation expenses on basis Supreme Court in 92 S. Ct. 1349 (1972) held that user fee imposed on departing passengers does not involve unconstitutional burden on interstate commerce, and that if funds received by local authorities do not exceed airport costs, it is immaterial whether they are expressly earmarked for airport use. However, as fees imposed on arriving passengers are held to be unreasonable interference with interstate commerce, they may not be reimbursed, but if found valid upon appeal, reimbursement is authorized on same basis as departure fees..... 73

Authorization
Travel directed not authorized effect
Enlisted Navy man who had served in Vietnam and was separated in Philippines where Govt. transportation to U.S. was available but who upon discharge returned to Saigon at personal expense to be married and then traveled by American commercial airline from Saigon to California is considered to have been authorized rather than directed to travel by Govt. conveyance to U.S. and he may be reimbursed for commercial air transportation as provided in par. M4159-4a of Joint Travel Regs., reimbursement not to exceed cost to Navy to transport him by Govt. air from Philippines to continental U.S. subsequent to discharge..... 297

TRAVEL EXPENSES—Continued Page

Circuitous routes

Administrative approval

Leave en route to temporary duty

Under rule that an employee assigned to temporary duty who departs prematurely for an alternate destination on authorized annual leave, which he would not have taken but for the temporary duty, should not be penalized by reason of a subsequent cancellation of temporary duty assignment, and that employee is entitled to travel expenses limited to expenses that would have been incurred had he traveled from headquarters to temporary duty station and returned by the usually traveled route, an employee whose temporary duty assignment at points in Louisiana is canceled while he is on annual leave in St. Louis is entitled to reimbursement for full cost of the travel performed, notwithstanding circuitous route travel via St. Louis, since the employee's expenditures did not exceed amount the Govt. would have paid for direct travel to temporary duty station and return to headquarters in Arlington, Va--- 841

Delays

Weather conditions

Departure at place of residence delay

Employee on official business who because of extraordinary weather conditions—blizzard—is prevented from returning to his residence after cancellation of flight and he as result occupied motel accommodations until weather moderated may be paid per diem for period spent in motel because new subsec. 6.6e of SGTR permits payment under such circumstances whereas subsec. 6.9c, which it supersedes, did not permit payment of per diem for interval between scheduled and actual departure from depot, airport, or dock if traveler could return home when delayed. B-173224, Aug. 30, 1971, overruled---------- 135

First duty station

Manpower shortage

No determination of shortage

As Federal Judicial Center is considered part of judicial branch, its employees are within scope of 5 U.S.C. 5721 *et seq.*, regardless of fact Center is not specifically listed in statute which authorizes reimbursement for travel and transportation expenses incurred in reporting to position determined by CSC to be in manpower shortage category. However, since Center under authority in 28 U.S.C. 625(e) to incur expenses incident to operation of Center and not Commission determined position of Director of Continuing Education and Training was manpower shortage position, expenses incurred by Director in moving to first duty station are not reimbursable under 5 U.S.C. 5723, and rule in 22 Comp. Gen. 885 that officer or employee of Govt. must place himself at first duty station at own expense applies---------- 268

Specific authority requirement

District of Columbia Redevelopment Land Agency (RLA), although Federal corporation, is deemed to be local public agency within framework of D.C. Govt. for purposes of title I of Housing Act of 1949, as amended (5 D.C. Code 717a(g)), which provides for financial assistance to local communities, and as agency is not independent office of executive branch of Federal Govt., it is not subject to Dept. of Housing and Urban

TRAVEL EXPENSES—Continued Page

First duty station—Continued

Specific authority requirement—Continued

Development regulations authorizing payment of travel expenses for employment interviews and moving expenses for new employees but to regulations that govern D.C. employees which are same as those for Federal employees and, therefore, in absence of specific authority, RLA may not pay travel expenses for preemployment interviews or relocation expenses to new employees 85

Illness

Status of illness

Widow of employee who died while on temporary duty away from his official station may be paid, pursuant to E.O. 8557, as amended by OMB Cir. A–92, issued under authority of 5 U.S.C. 5742, cost of preparing remains, limited to $250, charges incurred for transporting remains, including cost of outside shipping case, and preparation of casket for shipment, as well as cost of necessary copies of death certificate incident to transportation of remains, notwithstanding employee was not on authorized leave without pay. However, there is no authority to return deceased employee's privately owned automobile to his home, and in accordance with OMB Cir. A–7, per diem for period employee was absent without leave is not payable unless absence was due to illness or injury and not to employee's misconduct 493

Military personnel

Escort duty

Performed by non-governmental personnel

Individual not in employ of U.S. Govt. who travels as attendant to military member on temporary disability list incapable of traveling alone to report for mandatory physical examination required by 10 U.S.C. 1210(a) in order to avoid termination of his disability retired pay may be reimbursed actual transportation costs notwithstanding sec. 1210(g), authorizing travel and transportation allowances for member, does not provide for attendant since use of governmental personnel involves two round trips, thus making single round trip travel of non-governmental personnel more economical and practicable and, therefore, beneficial to interests of U.S. B–140144, Aug. 24, 1959, overruled 97

Wife of Navy member on active duty who incident to travel from Lisbon, Portugal, to the U.S. Air Force Base Torrejon, Spain, via Madrid, Spain, and return, as attendant to her hsuband who was unable to travel unaccompanied, is furnished Govt. procured commercial air between Lisbon and Madrid and is provided Govt. quarters, may be reimbursed cost of travel via commercial auto from Air Base to Madrid Airport upon showing of actual expenses incurred. Payment to wife is approved on basis the rationale stated for paying expenses of individuals not employed by U.S. incident to traveling as attendant to military member on temporary disability retired list, and as attendant to civilian employee is equally applicable to member of uniformed services on active duty 950

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
Retirement
To selected home
Residence establishment

Selection of place as home by member of uniformed services upon retirement without traveling to home of selection within 1-year period prescribed by par. M4158–1a and 2a of Joint Travel Regs. for establishing bona fide residence does not create entitlement to travel and transportation allowances to home selected. Therefore, Air Force officer retired under 10 U.S.C. 8911, effective July 1, 1970, who selected Marco Island, Fla., as home of selection but traveled with dependents from last permanent duty station to home of record, also shipping household effects to that point, where he continued to reside beyond 1-year period following retirement awaiting construction of home on Marco Island, is only entitled to travel and transportation allowances under 37 U.S.C. 404 and 406 on basis home of record was home of selection ---------- 242

Temporary duty
At permanent station
At hospital for treatment

When member of uniformed services stationed in U.S. is ordered to hospital, treatment generally is temporary and does not justify transportation of dependents. However, if period of hospitalization is prolonged or member is returned from overseas, station change is regarded as permanent and member is entitled to transportation of dependents and dislocation allowance, and all members, irrespective of having dependents, are eligible to have their household effects transported. Although members who have basic eligibility for permanent change of station allowances incident to hospitalization may not be authorized per diem and other temporary duty allowances when assigned duty within corporate limits of city or town wherein hospital is located, such allowances are payable to members whose home port or duty station is in U.S. and whose treatment will not be prolonged ---------- 432

Transfers
Leave and temporary duty en route

Fact that Air Force officer's orders transferring him from overseas to Hancock Field, N.Y., with leave en route were amended to require him to interrupt his leave and report for temporary duty at Lowry Air Force Base did not change officer's basic entitlement under his initial orders to travel and transportation allowances from old to new station, and pursuant to par. M4207–2d of the Joint Travel Regs., officer was reimbursed for travel performed from old station to temporary duty station and from there to new station. In addition, officer having returned to his leave place for his own convenience although not entitled to travel allowance incident to return, may be paid an allowance for travel from leave place to temporary duty station since subpar. 2d makes no reference to situation in which temporary duty was ordered after arrival of member at his place of leave ---------- 580

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Transfers—Continued

Outside continental United States

Port of embarkation

Under orders authorizing permanent change-of-station from Florida to Puerto Rico, with delay en route, orders modified to provide temporary duty at Quonset Point (QP), R.I., Navy ensign who traveled from his leave point to Miami, and under a Govt. transportation request to San Juan, is entitled pursuant to par. M4159–1 of Joint Travel Regs. not only to transoceanic travel at Govt. expense but to an allowance for official distance between the old permanent station and appropriate aerial or water port of embarkation serving old station. Since ensign's travel at own expense from QP to Miami via his leave address resulted in overseas travel from port of embarkation less distant from San Juan, in addition to mileage from QP to New York City, he is entitled to difference between cost of transportation from Miami to San Juan and Category "Z" transportation from New York to San Juan---------- 609

Travel status

Interstation travel *v.* travel within limits of duty station

Travel of Marine officer who was verbally directed to travel by privately owned vehicle from permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty—travel subsequently approved for reimbursement—is interstation travel within purview of 37 U.S.C. 404 and reimbursable at 7 cents per mile rate prescribed by par. M4203–3b of Joint Travel Regs. rather than at higher rate provided by par. M4502–1, pursuant to 37 U.S.C. 408, for travel within limits of member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of verbal orders by competent authority shortly after performance of travel as being advantageous to Govt. may be accepted for purpose of reimbursing officer---------- 236

Use of other than Government facilities

Authorizing *v.* directing travel

Enlisted Navy man who had served in Vietnam and was separated in Philippines where Govt. transportation to U.S. was available but who upon discharge returned to Saigon at personal expense to be married and then traveled by American commercial airline from Saigon to California is considered to have been authorized rather than directed to travel by Govt. conveyance to U.S. and he may be reimbursed for commercial air transportation as provided in par. M4159–4a of Joint Travel Regs., reimbursement not to exceed cost to Navy to transport him by Govt. air from Philippines to continental U.S. subsequent to discharge---------- 297

Overseas employees

Locally hired

Passport fee

Expense of obtaining passports and photographs for passports for himself and dependents, where no immediate travel is contemplated, by locally hired employee with whom transportation agreement was

TRAVEL EXPENSES—Continued Page
Overseas employees—Continued
Locally hired—Continued
Passport fee—Continued
executed in accordance with par. C4002–3 of Joint Travel Regs. (JTR), Vol. 2, and who has earned renewal agreement travel (C4001, JTR), is reimbursable pursuant to C9010–2, JTR, even though actual travel may not occur and regulation does not expressly cover locally hired American citizens or their dependents, in view of fact that locally hired employee who meets conditions of eligibility for renewal agreement travel is generally entitled to same benefits as employee recruited stateside who is required to renew his passport as result of continued employment in foreign area 177

Return for other than leave
Retirement, etc.
Time limitation
Forest Service employee who elected to remain in Alaska upon retirement and then approximately 1 year and 5 months after retirement requested travel and transportation expenses to return to residence in U.S. is not entitled to such expenses incident to Alaskan tour of duty in absence of explanation that delayed return was due to circumstances beyond his control. Cognizant agency regulation prescribed that travel and transportation of employee must be incident to termination of assignment and that date of return travel must be set at time of termination and be within reasonable time, normally within 6 months, provisions that are in accord with long-standing position of Comptroller General of the United States 407

Reemployment after separation
Liability for expenses
Different activities within same agency
When employee separated within U.S. from service in one component of Dept. of Defense (DOD) due to reduction in force or transfer of functions is reemployed at different location by different component within DOD after break in service of not more than 1 year, transfer expenses that employee is entitled to pursuant to 5 U.S.C. 5724a(c) are payable by activity acquiring employee's services as prescribed by 5 U.S.C. 5724(e), which provides that when employee transfers from one agency to another, agency to which he transfers pays expenses to new duty station. Further authority in 5 U.S.C. 5724(e) and par. C1053–2b(1)(b) of Joint Travel Regs. permitting either losing or acquiring agency to pay relocation expenses is for application only in cases of transfer without break in service. Overruled by 53 Comp. Gen. ——. (B–172594, Aug. 16, 1973) 345

Temporary duty
Cancellation after early departure on leave
Under rule that an employee assigned to temporary duty who departs prematurely for an alternate destination on authorized annual leave, which he would not have taken but for the temporary duty, should not be penalized by reason of a subsequent cancellation of temporary duty assignment, and that employee is entitled to travel expenses limited to

TRAVEL EXPENSES—Continued Page

Temporary duty—Continued

Cancellation after early departure on leave—Continued

expenses that would have been incurred had he traveled from headquarters to temporary duty station and returned by the usually traveled route, an employee whose temporary duty assignment at points in Louisiana is canceled while he is on annual leave in St. Louis is entitled to reimbursement for full cost of the travel performed, notwithstanding circuitous route travel via St. Louis, since the employee's expenditures did not exceed amount the Govt. would have paid for direct travel to temporary duty station and return to headquarters in Arlington, Va... 841

TRUST FUNDS (*See* **FUNDS, Trust**)

UNIFORMS

Military personnel

Damage, loss, etc., of uniforms

Deceased personnel

Value of military clothing lost at same time member of uniformed services lost his life when his housetrailer was destroyed in flood may not be paid to heirs or legal representatives of members since 37 U.S.C. 418 and implementing regulations prescribe that claim for loss, damage, or destruction of personal clothing is personal right and on basis of rationale in 26 Comp. Gen. 613, right does not extend beyond life of beneficiary. Although claim for clothing is cognizable under both 31 U.S.C. 241 and 37 U.S.C. 418, jurisdiction of claims under 31 U.S.C. 241 is vested in appropriate Secretary and limited to losses occurring in Govt.-assigned quarters, even though claim may be made by survivor, and under 37 U.S.C. 418, which relates to clothing furnished in kind or monetary loss, claim for loss is personal to member sustaining loss..... 487

VEHICLES

Government

Breakdown of vehicle

Standard of care by employee

Time spent by employee after his normally scheduled duty hours in taking care of Govt. vehicle which broke down while in use by him is not compensable as overtime under 5 U.S.C. 5542(b)(2)(B), even though employee took steps to protect vehicle beyond standard established by GSA regulation (41 CFR 101-39.701). Fact that employee was required to do more than mere driving and incidental care of vehicle does not constitute "the performance of work while traveling," nor did responsibility placed on employee under GSA regulation require him to take additional steps to protect vehicle. Therefore, time and effort expended by employee that was beyond standard of care required under regulation to protect vehicle entrusted to him is not compensable as work and does not provide basis for payment of premium compensation..... 491

Parking fees. (*See* **FEES, Parking**)

Transportation. (*See* **TRANSPORTATION**)

VESSELS Page

Foreign

United States registry

Status

Carriage of military cargoes in foreign-built vessels entitled to registry in U.S., and engaged in foreign trades or trade with trust territories, is not precluded by basic cargo preference statutes—act of Apr. 28, 1904, as amended, and act of Aug. 26, 1954, as amended. Objectives of 1904 act—to aid U.S. shipping, to foster employment of U.S. seamen, and to promote the U.S. shipbuilding industry—do not exclude foreign-built vessels registered in U.S., as such vessels are considered vessels of U.S. and entitled to benefits and privileges appertaining to U.S. vessels, to extent participation is limited to foreign commerce and trust territories, and is not precluded by act of 1954, which insures that at least 50 percent of all Govt. cargo, whether military or civil, will be transported in privately owned "U.S.-flag commercial vessels," a term that is not limited to vessels built in U.S. 809

Foreign-built vessels which are documented under the registry laws of the United States (46 U.S.C. 221) subsequent to the issuance of bids or offers for transportation of military cargoes to foreign ports may be used to satisfy contract commitments pursuant to such bids or offers, provided the use of the vessels is consistent with their registry, provided the use does not compromise the tonnage limitation of the act of Aug. 26, 1954, as amended, and provided the requests for bids or offers, or the contracts entered into pursuant thereto, do not prohibit such use... 809

Transportation. (*See* **TRANSPORTATION, Vessels**)

VETERANS

Compensation payments

Retired pay

Waiver

Army sergeant who when retired on Dec. 1, 1960, under 10 U.S.C. 3914, entered Federal Civil Service from which he retired for disability on Nov. 21, 1969, and who on Oct. 1, 1970, both changed to full waiver his partial waiver of retired pay for Veterans Administration compensation, and waived retired pay to have his military service used in computation of civil service annuity pursuant to 5 U.S.C. 8332(c), may have retired pay retroactively waived to date of his civil service retirement if Civil Service Commission agrees to recompute his annuity and pay additional annuity due, since waiver of retired pay under 38 U.S.C. 3105 for VA compensation did not disturb military status of retiree, and VA compensation erroneously paid will be recouped, nor will double benefit prohibited by 38 U.S.C. 3104 result from use of military service for civil service annuity purposes as no military retired pay will be paid.... 526

WAGE AND PRICE STABILIZATION

Military personnel

Pay increases

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92-129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15-Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not

WAGE AND PRICE STABILIZATION—Continued Page

Military personnel—Continued

Pay increases—Continued

be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act and, furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases 15

Wage changes

Federal employees

Administratively fixed employees

Postal employees of Canal Zone Govt. whose pay rates and increases pursuant to 2 C.Z.C. 101 are administratively determined and were in past fixed to conform with rates prescribed for Post Office Dept. employees may not be granted same pay increases provided for Postal Service employees, even though compensation of Postal Service employees is used as measure of compensation to be paid Canal Zone postal employees, as increases exceeded percentage limitation imposed by wage-price freeze instituted on Aug. 15, 1971. Canal Zone employees are executive branch employees who come within scope of 5 U.S.C. 5307, thus making them subject to guidelines on pay increases prescribed in Jan. 11, 1972 Presidential Memorandum 188

Freeze on wages

Effect on promotions

Where the Federal Aviation Administration elected, in the exercise of its executive function to appoint persons to civilian Govt. service, not to promote development Air Traffic Controllers who had satisfied criteria for promotion until clarification of Presidential order of Dec. 11, 1972, placing freeze on promotions, employees did not become entitled to higher salaries prior to date of the agency's promotional action, notwithstanding controllers performed the duties and otherwise qualified for promotions, or that an employment agreement may have been executed, since under E.O. 11491, the right of promotion is retained by management officials of an agency. Furthermore, failure to promote is not the "unjustified or unwarranted personnel action" contemplated by 5 U.S.C. 5596 to entitle employees to back pay 631

WITNESSES

Government employees

Private litigation, etc.

Employees summoned to appear as private individuals and not in official capacities in suit by fellow employee for overtime compensation are not entitled to court leave authorized by 5 U.S.C. 6322(b), as amended by Pub. L. 91-563, approved Dec. 19, 1970, for period of absence in which they appeared as witnesses on behalf of private party and without official assignment to such duty. Matter of granting court leave to Govt. employee to testify on behalf of private party was rejected in consideration of Pub. L. 91-563, and both FPM, Ch. 630, subch. 10-3-d, and FPM Letter 630-21, dated Mar. 30, 1971, provide that witness appearing for private party in nonofficial capacity is not entitled to court leave 10

WORDS AND PHRASES

Page

"De facto"

Although in determining whether parent and its subsidiary should be treated as separate entities term "day-to-day" control was erroneously injected into Labor Dept.'s criteria of de facto control by contracting agency reviewing equal employment opportunity (EEO) compliance of successful contractor with E.O. 11246, ruling in 50 Comp. Gen. 627 (1971) that affirmative action plan was not required to be submitted by prime contractor for each establishment is upheld upon reconsideration of decision at request of third party, as record establishes criteria used to determine separate entities of contractor and its subsidiary was not unreasonable, arbitrary or capricious and that, furthermore, there is no evidence of attempt to evade EEO obligations 145

"Foreseeable costs"

Procedure in evaluation of bids of assessing travel and per diem costs of Govt. inspectors at prospective contractors' plants located outside metropolitan St. Louis, Mo., area, and justified as "Foreseeable Costs," is not for application to bidders who already have Govt. representative in residence as there is no actual cost to Govt. in such circumstances, nor is an imputation of constructive inspection costs justified on basis of equalizing competition. Furthermore, although pursuant to 10 U.S.C. 2305(c) factors other than price may be considered in evaluating bids, Govt. costs incident to procurement which cannot be quantified with reasonable certainty may not be used as a bid evaluation factor 997

"Insurable interest"

An election under the Survivor Benefit Plan (10 U.S.C. 1447–1455) on behalf of mentally incompetent member for coverage of a natural person (10 U.S.C. 1448(b)) may be made by Secretary concerned who stands in place of the incompetent and under 10 U.S.C. 1449 is required to make election which in his discretion, after careful consideration of facts and circumstances in each case, he believes the person would make if capable, and Secretary must take into consideration whether retiree would elect to give up a substantial amount of his retired pay for rest of his life to provide the annuity. An insurable interest is any pecuniary interest in continued life of another, and no evidence of an insurable interest is required of a near relative, but a contract relationship would have to be proved; only one person may be named as survivor (5 CFR 831.601); and person requesting an annuity would have no preference .. 973

"Necessary expenses"

Seasonal items such as artificial Christmas trees, ornaments, and decorations purchased for Government offices do not constitute office furniture designed for permanent use so as to qualify as kind of "necessary expense" that is chargeable to appropriated funds since items have neither direct connection nor essentiality to carrying out of stated general purpose for which funds are appropriated. Therefore, Bureau of Customs may not charge purchase of such seasonal items to its appropriated funds as legitimate expense unless it can be demonstrated purchase was a "necessary expense," phrase construed to refer to current or running expenses of miscellaneous character arising out of and directly related to work of agency 504

WORDS AND PHRASES—Continued Page

"Official duty station"

Term "official duty station" in Civil Service Commission Federal Manual Supp. 990-2, book 550, subch. S1-3, which is stated to mean "employee's designated post of duty, limits of which will be corporate limits of city or town in which employee is stationed," may only be redefined by Commission and, therefore, Dept. of Agriculture may not consider "official duty station" in terms of mileage radius in order to better effecutuate purpose of overtime provision contained in 5 U.S.C. 5542(b)(2). However, matter of authorizing mileage to employee for use of his automobile incident to official travel is discretionary with employing agency 446

"Shipment"

Fact that shipment of pallets was covered by four bills of lading does not change character of shipment from volume shipment that is within contemplation of Sec. 5, Item 110, of the National Motor Freight Classification, which provides that shipment is "a lot of freight tendered to the carrier by one consignor at one place at one time for delivery to one consignee at one destination on one bill of lading," since all conditions but the "one bill of lading" requirement were met, and carrier on basis of correction notices and other evidence knew shipment was tendered as one lot on same day for delivery to one consignee at one destination, subject to applicable volume rate. Therefore, as carrier is only entitled to lower rate applicable to volume shipments, there is no basis for allowing claim for higher freight rate 575

"Technical"

Use of the two-step procurement method authorized by par. 2-501 of the Armed Services Procurement Reg. to obtain services and facilities for the management and operation of an Air Force (AF) Publications Distribution Center because of inability to adequately specify technical needs to meet requirements of a single-step procurement was a proper exercise of administrative authority where the AF was unable to specify its requirements in areas of automatic data processing equipment and software for the operation, notwithstanding its ability to state requirements in other work areas, since regulation states the word "technical" has broad connotation and includes engineering approach, special manufacturing processes and special testing techniques, and further provides that the management approach, and manufacturing plan, or facilities to be used may also be clarified in the technical proposals 854

U. S. GOVERNMENT PRINTING OFFICE : 1974 O - 524-043