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[B-176940]

Contracts—Negotiation—Competition—Impracticable to Obtain—Propriety of Award

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

To the Secretary of the Interior, March 2, 1973:

By letter dated February 1, 1973, the Deputy Assistant Secretary requested a decision on the protest of the American Construction Company, Inc., against the National Park Service's (NPS) proposed award of a contract to S. Puma Co., Inc., for the second phase of restoration of Castle Clinton National Monument, Battery Park, New York. This request was prompted by your Department's ultimate rejection of the informal proposal of representatives of the Department to conduct further negotiations with the interested parties. This proposal led to the withdrawal of American's protest on January 23, 1973. Similarly, Puma expressed no objection to the proposal. We therefore closed our file on the protest on January 29, 1973.

In response to the Deputy Assistant Secretary's request, we have considered the protest on the record which had been developed by our Office prior to American's withdrawal. Counsel for American has set forth numerous grounds for protesting against any award to Puma. However, upon close examination of the record, the overriding question, in our view, is whether an award properly can be made under the solicitation in view of the procurement practices and procedures utilized.

The record shows that on June 9, 1972, the contracting officer issued determinations and findings (D&F), wherein he determined to negotiate this procurement on the ground that it was impracticable to secure competition by formal advertising within the meaning of 41 U.S. Code 252(c)(10), as implemented by section 1-3.210 of the Federal Procurement Regulations (FPR).

The findings and determinations of the contracting officer provide, in pertinent part, as follows:

Findings

In accordance with the requirements of Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, as amended, I make the following findings:

1. The restoration of projects of historic buildings and structures present unique problems not generally associated with procurement and contracting procedures. The measures applicable to normal alterations, repair, or reconstruction work will not offer the needed protection to the Government interest. A high degree of skill and expertise based almost entirely upon experience with similar work and attendant conditions and upon competent personnel are required. *The procedure of public advertising for bids to be followed by an evaluation of bidders based to a large extent on factors other than price, such as experience and familiarity with similar conditions, is likely to result in bids from unqualified sources and to stimulate action by unsuccessful bidders in objecting to the evaluation result and in seeking a review of such result.* [Italic supplied.]

As a result of this problem, the Director of Survey and Review, by memorandum dated August 30, 1967, concurred in the recommendation of our memorandum of August 21, 1967, that negotiation for projects involving the restoration of historic structures and buildings was allowable under the provisions of Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, as amended, and was justifiable.

The Part II restoration of Castle Clinton, Battery Park, New York City, N.Y., is a historic structure and its restoration requires special expertise based upon experience with similar work, attendant conditions, and upon competent personnel. Representatives of the New York district and Historic Preservation will meet to discuss the restoration problem at Castle Clinton and to select responsible firms with these required qualifications from whom proposals might be solicited for the restoration work.

* * * * * * *

Determinations

1. Based upon the foregoing Findings, I hereby determine within the meaning of Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, as amended, that:

a. The restoration of Castle Clinton National Monument, Battery Park, New York City, is necessary.

b. Negotiation is necessary in this situation since the Government must be assured that it will have the high degree of skill and expertise based almost entirely upon experience with similar work and attendant conditions and upon competent personnel.

The facts and circumstances set forth in the D&F appear to indicate that the only reason for invoking the negotiation authority was to "prequalify" firms which had experience with similar work and attendant conditions. We note, however, that an examination of the memorandums referred to in the D&F suggests that subsection (a)(9) or (a)(13) of FPR 1–3.210 might provide a basis for negotiation under 41 U.S.C. 252(c)(10). Subsection (a)(9) provides for negotiation "When the contemplated procurement involves maintenance, repair, alteration, or inspection and the exact nature or amount of the work to be done is not known." Subsection (a)(13) provides for negotiation "When it is impossible to draft for an invitation for bids adequate specifications or any other adequately detailed description of the re-

quired property or services." Nevertheless, from our review of the D&F and the record before us, we cannot conclude that either subsection was relied upon to support the "negotiation" of this procurement. Apart from the silence of the D&F, the most compelling reason for reaching this conclusion is the fact that in all other respects this procurement was treated as a formally advertised procurement—an approach which is wholly inconsistent with the use of either exception. Indeed, in response to American's contention concerning the adequacy of the specifications, NPS has defended the adequacy of the specifications.

With respect to the formally advertised aspects of this procurement, the Acting Director of Survey and Review's letter of November 17, 1972, contains the following pertinent description of the circumstances surrounding this contemplated procurement:

> NPS, by solicitation of July 25, 1972, invited six firms, all of whom had been administratively determined to be qualified restoration firms, to submit offers on or before August 8, 1972, to perform the proposed work.
>
> The solicitation, Standard Form 20, states quite clearly that offers will be publicly opened. This is reiterated in paragraph 9, of Standard Form 22. Paragraph 10 of Standard Form 22, referenced in the BASIS OF AWARD statement at the end of Standard Form 21, provides for award on the basis of price and other factors.
>
> On August 1, 1972, a detailed inspection of the worksite was made by representatives of several of the prospective contractors, including both American and Puma. NPS officials reminded all contractors, in the course of the site visit and discussions at the NPS office in connection with the site visit, that there would indeed be a public opening of proposals. NPS officials also drew the prospective contractors' attention to the notations in the solicitation documents to the effect that award would be made to that responsible offeror whose offer, conforming to the offer, is most advantageous to the Government, price and other factors considered. This is, of course, the previously noted material in Standard Form 21 and Standard Form 22, regularly used in formally advertised construction contracts.
>
> Following the site inspection, the NPS issued the Memorandum of Understanding and Addendum 1. These documents were issued in the interest of clarifying technical points in the plans and specifications raised at the site inspection. Addendum 1 clearly states that there will be *"No change in time or place of proposal opening."* [Italic supplied.]
>
> Subsequently, on August 8, 1972, the two proposals submitted were opened as required by the solicitation and it was revealed that Puma offered $588,200 and American $1,221,000. The Government having an estimate, revised after the site inspection, of $584,500, contemplates award to Puma. This protest followed.
>
> Significantly here, the solicitation, the very documents prospective contractors reviewed while preparing their offers, effectively completely limited the competition to price by its unequivocal, lucid, and long established language indicating the basis of award and in providing for a public opening. These documents advised all prospective contractors that award was contemplated based upon the initial price submission. This was reinforced at the site inspection and conference. The proposers, having been made aware by NPS, made their submissions and no complaint should now be heard if award is made as all knew was originally contemplated.

Moreover, consistent with the use of the negotiation authority of 41 U.S.C. 252(c)(10) only for the purpose of "prequalifying" we understand that this procurement was not synopsized in the Commerce Business Daily as is contemplated by FPR 1-1.1003-2.

In our opinion, a desire to prequalify firms is not a sufficient basis for invoking the negotiation authority of 41 U.S.C. 252(c)(10). *See* 41 Comp. Gen. 484 (1962). In reality, the procurement was treated as formally advertised and would have been so denominated but for the desire to prequalify firms. Such being the case, we see no reason why the procurement should not be treated as formally advertised. In this posture, the resolution of a responsibility question—a firm's qualifications to perform the work—through an unauthorized preselection method is inconsistent and at odds with the full and free competitive advertising procedures. Generally, responsibility determinations required by 41 U.S.C. 253(b) are to be resolved after bid opening but, in any event, before award. This prequalification procedure, coupled with the deliberate decision not to circularize the procurement in the Commerce Business Daily in furtherance of prequalification, results in an unwarranted restriction on the full and free competition contemplated by the formal advertising statutes. Even under negotiation procedures, the prequalification procedure employed here would be inconsistent with the requirement that negotiated procurements be on a competitive basis to the maximum practical extent. FPR 1-1.301-1; *Cf.* 50 Comp. Gen. 215 (1970).

For the foregoing reasons, we must conclude that any award under the existing solicitation would be improper. Any resolicitation of the requirement should be administered in accordance with the requirements of subpart 1-2.2 of the FPR which governs the solicitation of bids by formal advertising.

Please advise us of the action taken in this matter.

[B-160096]

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Naval Academy Preparatory School Training

The 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 the skills are not lost to the service, is not payable to an enlisted member who was discharged and reenlisted while undergoing training in the Naval Academy Preparatory School (NAPS) program—a program which will ultimately qualify him for admission to the Academy—as there is no relationship between an enlisted member's critical skill and his successful completion of the NAPS program, and the fact that a member would revert to enlisted service in his critical skill if he does not successfully complete the program provides no basis to pay him a variable reenlistment bonus.

To the Secretary of Defense, March 7, 1973:

Further reference is made to letter dated November 22, 1972, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether a variable reenlistment bonus may be paid under

the circumstances set forth in Department of Defense Military Pay and Allowance Committee Action No. 466.

There was enclosed a copy of Committee Action No. 466 setting forth and discussing the following question:

Is an enlisted member, holding a critical skill and otherwise qualified, entitled to a variable reenlistment bonus if he is discharged and reenlisted while undergoing training in a program such as the Naval Academy Preparatory School?

The Committee Action discussion relates that the Naval Academy Preparatory School (NAPS) provides a full time course of instruction, 9 months in length, in high school and college mathematics, science and English subjects, which is designed to aid otherwise qualified enlisted members who have indicated a desire to complete the course and have demonstrated a potential to attend and graduate from the Naval Academy and serve as an officer in the naval service.

The discussion continues by saying that successful completion of the course of instruction at NAPS does not in itself guarantee qualification for, or admission to, the Academy. Enlisted members who graduate from a NAPS program merely become eligible to compete with other enlisted applicants for admission to the Academy. The Secretary of the Navy may appoint annually 85 enlisted members of the Regular Navy and Regular Marine Corps to the Academy and these appointments are normally awarded to graduates of the Naval Academy Preparatory School. It is stated further, that should a student be disenrolled from NAPS for any reason, or should a graduate not be selected for appointment as a midshipman, he is reassigned to the regular duties of his enlisted grade and military specialty for the remainder of his term of enlistment.

The discussion cites as having possible application our decision 48 Comp. Gen. 624 (1969), wherein we denied entitlement to a variable reenlistment bonus to an enlisted member who was discharged and reenlisted while under training in an "Officer Candidate School" program, which program leads directly to a commission, but doubt is expressed as to whether that decision would bar payment in the present situation. In this regard, the discussion points out that while a member under training in a NAPS program is in fact participating in the first step of a program, the ultimate objective being the member's commissioning, the NAPS program is unlike an Officer Candidate School program, in that successful completion of the NAPS does not, in itself, lead directly to a commission nor automatically qualify an enlisted member for appointment as a commissioned officer.

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

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

The legislative history of section 308(g) shows that it was enacted to authorize the payment of a variable reenlistment bonus as an additional inducement to first-term enlisted personnel, who possess military skills which are deemed to be in critically short supply, to reenlist so that such skills may continue to be utilized and not lost to the service. One of the considerations in authorizing this substantial bonus was the high cost to the Government of training a replacement for such a member who does not reenlist, an expense which would be avoided if the member reenlists to continue serving in the critical rating.

In 48 Comp. Gen. 624 (1969), we held that an enlisted member, holding a critical military skill, who is discharged and reenlisted while undergoing training in an Officer Candidate School program is not entitled to a variable reenlistment bonus incident to that reenlistment since the member reenlisted for the purpose of continuing in that program rather than for the purpose of continuing to serve in his critical skill.

In an earlier decision, 47 Comp. Gen. 414 (1968), we considered the case of an enlisted member of the Navy, also serving on active duty in a critical military skill, who was selected to enter the Navy Enlisted Scientific Education Program (NESEP), a college training program leading to a baccalaureate degree and appointment as a commissioned officer upon graduation. We said that members who are reenlisted in order to meet the obligated service requirements for that training and not for the purpose of continuing to serve in the critical skill for which the bonus is intended, are not entitled to receive the bonus since the Government would still be required to bear the expense of training a replacement, an expense which the bonus was intended to eliminate.

In 49 Comp. Gen. 206 (1969), involving a case where an enlisted member of the Regular Army, possessing a critical military skill, knowing that he had been tentatively appointed a Reserve officer, was discharged and reenlisted in his enlisted grade prior to the normal expiration of his term of service for the sole purpose of collecting the variable reenlistment bonus, we held that where it is obvious at the time of such reenlistment that the Government would not receive the benefits for which the bonus was intended, no entitlement to such bonus exists.

In contrast to the above, in 51 Comp. Gen. 3 (1971), we authorized payment of the variable reenlistment bonus to a member of the Regular Marine Corps who was reenlisted in order to acquire the necessary obligated service to enable him to participate in the Marine Corps

Assoicate Degree Completion Program (MADCOP). We said therein that where a major course of study pursued is reasonably related to the member's critical skill and who, upon completion of those studies, will resume the duties performed by him prior to entering the program, a variable reenlistment bonus may be paid.

Thus, in cases where an enlisted member, discharged and reenlisted while in a training program, is not being reenlisted for the purpose of continuing to serve in his critical skill upon which a variable reenlistment bonus is to be based, but rather is reenlisted merely to retain a military status which is required for continued participation in a training program which in no way relates to his critical skill, payment of a variable reenlistment bonus is not authorized.

In the present case, it is indicated that there is no relationship between an enlisted member's critical military skill and either the successful completion of a NAPS program or the described courses of study pursued thereunder. It is our view, therefore, that our decision 48 Comp. Gen. 624 (1969) is controlling in this matter.

His selection for the NAPS program is for the purpose of ultimately qualifying him for a commission. His reenlistment is not for the purpose of serving in his critical skill. In such circumstances we are of the opinion that the fact that he would revert to enlisted service in his critical skill if he does not successfully complete the prescribed courses does not provide a basis to pay him a variable reenlistment bonus. Accordingly, the question is answered in the negative.

[B-176972]

Transportation—Rates—Volume Shipments—Conditions to Constitute

The fact that a shipment of pallets was covered by four bills of lading does not change the character of the shipment from a volume shipment that is within the contemplation of Section 5, Item 110, of the National Motor Freight Classification, which provides that a 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 the carrier on the basis of correction notices and other evidence knew the shipment was tendered as one lot on the same day for delivery to one consignee at one destination, subject to the applicable volume rate. Therefore, as the carrier is only entitled to the lower rate applicable to volume shipments, there is no basis for allowing the claim for a higher freight rate.

Transportation—Rates—Exclusive Use of Vehicle—Bill of Lading Notation Requirement

Where the destination Canadian carrier refused to refund the overcharge occasioned by the erroneous application of exclusive use charges on a shipment of helium cylinders, and participating carriers are jointly and severally liable for the overcharge, the origin carrier properly was held liable and the overcharge recovered by setoff since the correction notice that added to the bill of lading the notation "authorized use of single truck load by the carrier is mandatory to expedite shipment" did not satisfy the tariff requirement for a notation to indicate

the shipper requested exclusive use, and the omission of such a notaton may not be waived. Furthermore, the bill of lading does not show seals were applied, and as the shipment was interchanged with a foreign carrier, it is doubtful the shipment was accorded the exclusive use of a vehicle from origin to destination without transloading.

To Ringsby United, March 12, 1973:

Your letter of September 6, 1972, requests review of the action taken by our Transportation and Claims Division regarding claims totaling $4,905.25. Certain of the claims involved were made by United Buckingham Freight Lines and others by Ringsby Truck Lines which we understand are affiliates of your company and, for the purposes of this letter, will be referred to as your claims. We also have your tracer letter of February 8, 1973, asking for a report as to the current status of the matter.

Your claim for $1,899.92, your files R–609X1 ($643.86), R–607X1 ($702.65), and R–608X1 ($553.41), was disallowed by settlement certificate dated June 28, 1972 (TK–937744) and your claim for $2,090.19, your file R–599X1, was disallowed by settlement certificate dated October 26, 1972 (TK–937745). Your claim for $915.14, file U–519X1, relates to a notice of overcharge (Form 1003) dated November 20, 1970, sent to Miller & Brown Freight Lines Ltd., the destination carrier, for a shipment under Government bill of lading A–6284173. Your protest of this action by letters dated June 7, 1972, and July 18, 1972, was considered by our Transportation and Claims Division and denied in a letter dated July 31, 1972, TC–SR–TK–173309–EPD. The amount involved ($915.14) was collected on October 25, 1972, by offset against your bill 4623 72.

Your claims for $1,899.92 and $2,090.19 relate to the charges collected by you for transportation of "PALLETS I/S PER ITEM 1605 RM TDR 15A" from Carriers Terminal, Oakland, California, to the Navy Ammunition Depot, Crane, Indiana, during May and June 1969. The pallets moved under Government bills of lading E–8385709 (42,627 pounds), E–8385712 (42,570 pounds), E–8385713 (35,592 pounds), and E–8385714 (33,500 pounds).

The descriptions of the articles shipped on the four bills of lading indicate the pallets were to move under rates shown in item 1605 of Rocky Mountain Motor Tariff Bureau Quotation 15–A, U.S. Government Quotation I.C.C. 24, which provides rates of $2.81 a 100 pounds where the minimum weight of the shipment is 60,000 pounds subject to a minimum weight of 30,000 pounds per vehicle used. Also, that item of the tender provides for a higher rate of $4.11 a 100 pounds where the minimum weight of the shipment is 40,000 pounds subject to a minimum weight of 40,000 pounds per vehicle used. The bills of lading each also contain notations showing the dollar amount of what the charges were to be on the weight carried under the particular bill of

lading. Such dollar amounts in each case equal the charges at the lower rate of $2.81 per 100 pounds when added to the transloading charges which are not disputed. Your claims under the four bills of lading are predicated on the application of the higher rate of $4.11 per 100 pounds. The Government bill of lading correction notices Forms DD 1352, were issued on July 27, 1970, and signed by your representative, Ed Perry, the same person who signed the four Government bills of lading as your agent. Each correction notice shows that the bill of lading to which it applies was issued to cover the first, fourth, fifth, and sixth and final part of a complete shipment comprising approximately 241,599 pounds.

In your letter of March 30, 1971, to our Transportation Division (now Transportation and Claims Division), you refer to Section 5, Item 110 of the National Motor Freight Classification which provides:

> A 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*. [Italic supplied.]

It appears to be your contention that the correction notices issued about a year after tender of the property for shipment do not bring this movement within the single shipment rule so as to apply the 60,000-pound volume rate provided by RM Quotation 15–A.

The correction notices signed by your agent are not the only evidence showing that this material was tendered to your company as one lot on the same day. We enclose a copy of a letter dated July 31, 1972, signed by J. S. Paonessa, Chief, Traffic Services Division, Oakland Army Base, Oakland, California, stating:

> Entire shipment was offered to the carrier on 20 May 1969. It moved under GBLs E–8385709 through 714.

The receipts by your agent, Ed Perry, on all four bills of lading are dated May 28, 1969. Additionally each of the bills of lading refers to Rocky Mountain Motor Tariff Bureau, Inc., Quotation 15–A, U.S. Government Quotation I.C.C. 24, item 1605, which provides the 60,000-pound volume rate of $2.81 a 100 pounds, and the charges indicated on each bill of lading by the shipping officer are derived from that rate.

These facts are substantially the same as those relating to some of the shipments considered by the Court of Claims in *J. H. Rose Truck Line, Inc.* v. *The United States*, Nos. 194–69 and 28–70 (decided July 14, 1972). Regarding these shipments the court stated:

> Most of the volume shipment claims remaining for disposition arose out of situations in which a military installation issued two or more Government bills of lading to the same carrier on the same day to cover the movement to the same consignee at the same location of a quantity of material requiring a number of vehicles corresponding to the number of bills of lading, with the first bill in the series stating that it was the 1st bill of lading issued to cover a portion of a volume shipment, with each other bill in the series indicating its proper place in the sequence (2d bill, 3rd bill, etc.) and containing a cross-reference to the bill

or bills preceding it, and with the last bill in the series containing the statement that it was the final bill of lading issued to cover the remainder of a volume shipment.

In a situation such as that described in the preceding paragraph, the carrier knew that the entire quantity of material was tendered as a single volume shipment, irrespective of the number of bills of lading issued by the shipping installation on the particular shipment. The carrier also knew that the defendant was asking it to transport the entire quantity as a single volume shipment and subject to the applicable volume rate. By accepting the material for transportation under such circumstances, the plaintiff impliedly agreed to handle it on the basis thus indicated by the defendant in its tender. Accordingly, the plaintiff is now bound by its agreement and is estopped from asserting that such agreement was inconsistent with its own tariff definition of the term "shipment." It necessarily follows that the plaintiff is not entitled to recover on the volume shipment claims which arose out of transactions that fitted the factual pattern outlined in the preceding paragraph.

See also B–156463, July 11, 1966, copy enclosed.

Your claim for $915.14, file U–519X1, relates to a shipment of Helium Cylinders, Full, weighing 20,520 pounds, and manifolding weighing 60 pounds from New Brighton, Minnesota, to Edmonton, Alberta, Canada, under Government bill of lading No. A–6284173, dated July 15, 1969. The destination Canadian carrier, Miller & Brown Freight Lines Ltd., assessed and collected charges of $1,830.18 during January 1970 for this transportation. In the postpayment audit of this bill our Transportation Division determined that the charges should be $915.04 based on the truckload rate of $3.68 a 100 pounds applied to 24,000 pounds minimum weight plus a service charge of $1.58 and a warehouse charge of $5. A notice of overcharge (Form 1003), dated November 20, 1970, was sent to Miller & Brown requesting refund of $915.14. United Buckingham Freight Lines, now part of Ringsby United, was the origin carrier and since the Canadian carrier refused to refund the overcharge and participating carriers are jointly and severally liable for overcharges, the overcharge was recovered by setoff from you.

In support of your protest of this overcharge, and in effect contending exclusive use charges were proper, you submitted a bill of lading correction notice dated February 14, 1972, which purports to correct Government bill of lading A–6284173 by adding a notation as follows:

Authorized exclusive use of single truck load by the carrier is mandatory to expedite this shipment for "Project BUCKSHOT."

You also submitted a copy of a letter dated June 26, 1972, from David W. Caine, Head, Industrial Facilities and Transportation Division, Office of Naval Research Branch Office, Chicago, Illinois, which states in pertinent part:

Unfortunately, Mr. Brill who was the issuing Transportation officer for the original GBL was deceased last December 1971. I have issued the GBL correction notice based on his pencilled back-up notations for the shipment which are on file. These notes indicated a rate of $3.57 CWT for 24,000 lbs., NW50 B class, 1 truck load and $4.55 CWT for 5,000 lbs. It was also shown that use of an "exclusive van" was a requirement of the shipment. The rates indicated are those issued

for Government Contracts by the Military Traffic Management and Terminal Service (MTMTS), for using DoD Agencies.

Exclusive use charges on a shipment such as here involved would be payable under Tariff 50–B of the Middlewest Motor Freight Bureau MF–I.C.C. 387, item 14(2) of which, in part, provides:

(2) Upon request of the consignor, the carrier will furnish a vehicle * * * which will be assigned to, and exclusively used by the carrier for the transportation of a shipment. * * * a bill of lading bearing notation indicating that the shipper requests such exclusive use must be provided for each shipment. * * *.

(3) Subject to conditions specified in paragraph (5) hereof, (not here applicable) a shipment moving under the provisions of this item will be transported in the vehicle so assigned, from origin to destination without transfer of lading. [Parenthetical matter supplied.]

The Interstate Commerce Commission in *Guss Blass* v. *Powell Bros. Truck Lines*, 53 M.C.C. 603 (1951), citing the well-established principle that the rules in a tariff cannot be waived, held that the omission of a required bill of lading endorsement was a defect fatal to the application of transportation charges based on an exclusive use of vehicle rule even though exclusive use of vehicle service actually was requested and furnished. See also *Southern Knitwear Mills, Inc.* v. *Associated Transport, Inc.*, 9 Fed. Carrier Cases 710 (1953); *Campbell "66" Express, Inc.* v. *United States*, 302 F. 2d 276 (1962), 157 Ct. Cl. 365. In these circumstances, the omission of the required bill of lading annotation, a defect which is not cured by later statements of shippers' intention, defeats the claim for charges for exclusive use even if they otherwise were properly payable. 45 Comp. Gen. 384.

Also, for a carrier to be entitled to exclusive use of vehicle charges provided by item 14 of Middlewest Motor Freight Bureau Tariff 50–B, MF-I.C.C. 516, it is not enough for the carrier to show that the premium service was requested on the bill of lading. It is also incumbent upon the carrier to prove the Service promised in that item was rendered. The Court of Claims found that the consignee's signature accepting the goods in good order and condition without exception was not sufficient to prove that the service was actually rendered. See *Pacific Intermountain Express Company* v. *United States*, 167 Ct. Cl. 266, 270–271 (1964).

There is nothing in the present record to show that the involved shipment from New Brighton to Edmonton was accorded exclusive use of a vehicle without transloading. The bill of lading fails to show that seals were applied, and although item 14 does not require that the service be expedited, it is clear from the evidence you have furnished to back up the correction notice that it was mandatory to expedite the shipment for "Project BUCKSHOT." The property was delivered to United Buckingham on July 15, 1969, and the desired delivery date (DDD) is shown as July 21, 1969, which was Monday. The consignee's certificate shows that the property was delivered on

July 23, 1969, 2 days late. The fact that the shipment was interchanged with a foreign carrier, Miller & Brown Freight Lines Ltd., raises a further question as to whether the shipment was accorded the exclusive use of a vehicle from origin to destination without transloading.

In 44 Comp. Gen. 799, 781–782 (1965) we stated:

> The best evidence of the actual performance of authorized exclusive use services is a showing of a clear seal record on the bill of lading. This can be done by proof that a shipment was sealed at origin and that the seals were not broken when the shipment arrived at destination. In the absence of a clear seal record we consider whatever documentary evidence a carrier cares to submit which reasonably establishes that the premium service was furnished. For example, satisfactory evidence may take the form of a certification on the bill of lading in accordance with administrative regulations issued by the shipping agency, or of copies of carrier's records made contemporaneously with the shipment showing that no other freight was transported on the truck or trailer in which the shipment moved. Also, various other records prepared by carriers in their normal business operations might contain sufficient pertinent information to satisfactorily establish the performance of the premium service. These records include road manifests, trip tickets and reports, dispatch sheets and other documents describing the cargo carried on the truck or trailer over the entire route of movement.

Since the evidence clearly shows that the property received by your agent, Ed Perry, at Oakland, California, on or about May 28, 1969, for transportation to Crane, Indiana, was tendered as a single shipment and since the bill of lading correction notices are acknowledged by the signature of the same agent, Ed Perry, the settlements dated June 28, 1972, and October 26, 1972, by our Transportation and Claims Division which disallowed your claims for $1,899.92 and $2,090.19 are sustained.

Also, for the reasons shown above, the denial of your claim for $915.14 relating to the shipment from New Brighton, Minnesota, to Edmonton, Canada, is sustained.

[B–176447]

Travel Expenses—Military Personnel—Transfers—Leave and Temporary Duty En Route

The fact that an 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 the officer's basic entitlement under his initial orders to travel and transportation allowances from the old to the new station, and pursuant to paragraph M4207–2d of the Joint Travel Regulations, the officer was reimbursed for the travel performed from the old station to the temporary duty station and from there to the new station. In addition, the officer having returned to his leave place for his own convenience although not entitled to a travel allowance incident to the return, may be paid an allowance for travel from the leave place to the temporary duty station since subparagraph 2d makes no reference to a situation in which the temporary duty was ordered after the arrival of a member at his place of leave.

To Captain P. J. Malvaso, Department of the Air Force, March 13, 1973:

We refer further to your letter dated April 18, 1972, with attachments, file reference 416CSG/ACF, forwarded here by endorsement of June 30, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72–27), requesting an advance decision regarding the entitlement of Captain Alonzo M. Allen III, 425–82–9053, to travel allowances incident to temporary duty performed at Lowry Air Force Base, Colorado.

Special Order No. AB–167, January 13, 1971, Headquarters 388th Combat Support Group (PACAF), APO San Francisco, California 96288, ordered Captain Allen's permanent change of station to 21st Air Division (ADC), Hancock Field, New York 13225. It provided that he would proceed on or about March 7, 1971, with a reporting date at the new station not later than 40 days after the officer's arrival in the continental United States. Delay en route chargeable as leave was authorized provided it not interfere with the specified reporting date. Travel by privately owned conveyance was authorized at the option of and for the officer's personal convenience. Ten days traveltime was authorized and Captain Allen's leave address was shown as Moorhead, Mississippi.

Special Order No. AB–792, March 30, 1971, 4624th Support Squadron (ADC), Hancock Field, Syracuse, New York 13225, amended the prior order to provide for 37 days' temporary duty at Lowry Air Force Base, Colorado 80230, to attend a supply management staff officer course, the class starting on April 7 and graduating on May 11, 1971. It further provided that Captain Allen would depart from the temporary duty station not later than 1 day after graduation.

The record shows that Captain Allen departed from Karat Air Base, Thailand, on March 5, 1971, arrived at Travis Air Force Base, California, on the same date and proceeded to Mill Valley, California. On March 10, 1971, he left there, arriving at Moorhead, Mississippi, later the same day. On April 1, 1971, while at Moorhead, Captain Allen received a telegram from the Chief, Career Control Section, Hancock Field, informing him of the provisions of Special Order AB–792, which amended his original orders, and informing him that a copy of it would be forwarded to his temporary duty station.

Additionally, the message of April 1, 1971, was to the effect that Captain Allen had desired that the temporary duty commence en route from his leave address "SO AS NOT TO CREATE A HARDSHIP ON OFFICER AND SAVE THE GOVT MONEY." In questioning this part of the message, the officer now states that the hardship that

he wanted to avoid was driving to Syracuse (his new station) and making arrangements to leave his personal items and car there and then proceed from there to Lowry (his temporary duty station). He further states that he merely asked his sponsor (at Syracuse) if he had to come to Syracuse prior to departing on temporary duty and the sponsor said he would try to arrange for him to depart from his leave address (Moorhead, Mississippi).

On April 5, 1971, the officer traveled by commercial air carrier to Denver, Colorado, and reported at Lowry Air Force Base. Captain Allen completed his course of instruction on May 10, 1971, and the next day, via commercial plane, departed from Denver and arrived at Greenville, Mississippi. He left there by private automobile on May 14 and arrived at Hancock Field on May 17, 1971.

Travel allowances totaling $533.20 (Voucher T-9480, $165.84; Voucher T-31578, $364.06; and Voucher T-32956, $3.30) were paid to Captain Allen, including mileage allowances computed on the basis of constructive travel from Travis Air Force Base, California, to Lowry Air Force Base, Colorado, and from there to Hancock Field, New York. The officer has made claim for additional mileage allowances totaling $166.32, based on his actual travel from Travis Air Force Base to Moorhead, Mississippi, then to Lowry Air Force Base, from there to Greenville, Mississippi, and then to Hancock Field.

You say that you have limited Captain Allen's traveltime and reimbursement to what would have been authorized if he had proceeded from his old station, overseas, on temporary duty en route to his new station, Hancock Field. In this regard you ask if the Air Force had the authority to amend the original orders and, in effect, eliminate an existing entitlement that had been partially exercised by Captain Allen who had commenced permanent change of station travel pursuant to the original orders. Concerning this question, under the original orders the officer was entitled to travel and transportation allowances from his overseas duty station to his new duty station at Hancock Field, Syracuse. Those orders as amended did not in any way decrease that right. The mere fact that the orders as amended required the officer to perform temporary duty en route at a location other than his leave address did not change his basic entitlement to travel and transportation allowances from the old to the new station.

Section 404(a) of Title 37, 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 a permanent change of station, or otherwise, or when away from his designated post of duty.

Paragraph M6454 of the Joint Travel Regulations provides that expenses incurred during periods of travel under orders which do not involve public business are not payable by the Government.

Where a member is ordered to temporary duty while on leave of absence and the temporary duty is at a place other than the leave point, paragraph M4207–2 of the regulations provides as follows:

b. *Authorized to Resume Leave After Termination of Temporary Duty.* Per diem allowances are payable for the period of travel from the leave address or place of receipt of orders to the temporary duty station, whichever is shorter, and from the temporary duty station to the leave address, and for the period of temporary duty, plus transportation in kind or a monetary allowance in lieu thereof between such points as prescribed in par. M4203–3.

c. *Directed to Return to Permanent Station Upon Completion of Temporary Duty.* Per diem allowances and transportation in kind or a monetary allowance in lieu thereof are payable from the leave address or place of receipt of orders, whichever is shorter, to the temporary duty station, and from the temporary duty station to the permanent station. Per diem is also payable for the period of temporary duty directed at the temporary duty station.

d. *Directed to Proceed to New Permanent Duty Station Upon Completion of Temporary Duty.* A member will be entitled to the travel and transportation allowances prescribed for a change of permanent station from the old permanent duty station to the leave address and thence to the temporary duty station and from the temporary duty station to the new permanent duty station not to exceed the allowances payable for the official distance from the old permanent duty station to the temporary duty station and from the temporary duty station to the new permanent duty station. Per diem is payable for the period of temporary duty directed at the temporary duty station.

After Captain Allen's arrival at Travis Air Force Base, California, on March 5, 1971, he was to report to Hancock Field 40 days later (April 14, 1971), the orders providing for 10 days' traveltime and for a delay en route chargeable as ordinary leave providing it did not interfere with the specified reporting date. However, amending orders dated March 30, 1971, notice of which Captain Allen received on April 1, 1971, while on leave at Moorhead, Mississippi, ordered him to attend a course of instruction at Lowry Air Force Base which commenced April 7, and concluded on May 11, 1971.

In accord with paragraph 1–4e, AFM 35–22, Captain Allen reverted to a duty status as a result of orders requiring temporary duty. These orders made no provision for leave following completion of such duty, but did require the officer to depart from Lowry Air Force Base on the day after graduation. Since this temporary duty was not to be completed until after the date on which his permanent duty orders required him to report at Hancock Field, the departure requirement in the temporary duty orders appears to indicate that Captain Allen was to report to his new permanent duty station upon completion of the temporary duty. This is the view expressed in letter dated January 19, 1972, from the Air Force Accounting and Finance Center, in denying the officer's claim. Moreover, Captain Allen's right to leave at any specific time was subject to the needs of the service.

The fact that his delay en route authorized incident to permanent change of station orders was for a 30-day period, and because of ordered temporary duty he was unable to have leave for all that time, does not provide authority for the resumption of leave after temporary duty, in the absence of orders so providing. Moreover, there is nothing in the record to indicate that the travel arrangements from Lowry Air Force Base to the leave address in Mississippi were other than for the personal convenience of the officer.

In such circumstances, it is not entirely clear as to the extent to which the officer's travel status falls within the purview of subparagraphs M4207-2c or 2d, Joint Travel Regulations. Under the literal language of subparagraph 2d he was entitled to travel allowances in an amount not to exceed his entitlement for the official distance from the old permanent station to the temporary duty station and from there to the new station. The officer has received payment on that basis. That subparagraph, however, does not expressly refer to a situation in which the temporary duty was ordered after arrival of the member at the place of leave.

Unlike subparagraph 2c, which provides for travel allowances from the place of leave to place of temporary duty and then to the old station when the temporary duty orders are received at the place of leave, subparagraph 2d does not provide for travel allowance from the place of leave to the place of temporary duty. We understand that such provision is presently being revised to correct this inequity.

In these circumstances, we would not object to payment of travel allowances in this case for the additional travel from the place of leave to Lowry Air Force Base.

The voucher and supporting papers are returned herewith, payment being authorized on the basis indicated.

[B-165632]

Subsistence—Per Diem—Temporary Duty—Several Locations

Since pursuant to Executive Order 11575, December 31, 1970, the States of New York, Pennsylvania, Virginia, Maryland, and Florida, were separately declared disaster areas on June 23, 1972, West Virginia on July 3, and Ohio on July 15, due to the damage caused by Hurricane Agnes, for the purposes of paying temporary employees of the Small Business Administration the 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, the 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 the new location for a period not to exceed 6 months.

To William I. Cooper, Small Business Administration, March 14, 1973:

Reference is made to your letter of December 15, 1972, requesting our decision as to what constitutes a "disaster" for the purposes of

per diem and travel expenses as authorized by 15 U.S. Code 634(b) (8) under the circumstances hereinafter described.

The letter stated that the tropical storm known as "Hurricane Agnes" was unprecedented in not only the geographic areas which it affected but also the destruction created thereby. Due to the damage caused by such hurricane, there were issued declarations (of both presidential and nonpresidential origin) which stated that on certain dates specified areas in the Eastern United States were considered disaster areas. You say that the President, on June 23, 1972, in separate declarations, declared the States of New York, Pennsylvania, Virginia, Maryland, and Florida disaster areas; on July 3, the State of West Virginia; and on July 15, the State of Ohio. You listed the following declarations made by the Small Business Administration for the Hurricane Agnes disaster:

Declaration No.	Date	Area
911	6/21/72	Putnam and Bronx Counties, New York (non-presidential)
914	6/27/72	New York
915	6/27/72	Florida
916	6/27/72	Pennsylvania Maryland Virginia
918	7/1/72	New Jersey (non-presidential)
921	7/7/72	West Virginia
922	7/11/72	District of Columbia (non-presidential)

Based upon the foregoing, you stated the problem here involved as follows:

To date, we have held that, for per diem purposes to temporary employees, Hurricane Agnes is and was a single disaster regardless of the time of actual damage or location; however, such decision limits Agency flexibility in reassignment of personnel to disaster locations. While we have many disaster locations to which temporary personnel working in Hurricane Agnes Disaster Offices for 6 months may be reassigned, and clearly be entitled to per diem, the needs of the service might better be served by reassignments to locations within the Hurricane Agnes destruction area. However, the affected personnel cannot afford to work in an area where they will not receive the per diem allowance.

The provision of law in question, 15 U.S.C. 634(b) (8), which was derived from section 5(b) (8) of the Small Business Act as added by Public Law 85–536, approved July 18, 1958, 72 Stat. 387, provides as follows:

(b) Powers of Administrator.

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—

(8) pay the transportation expenses and per diem in lieu of subsistence expenses, in accordance with the Travel Expense Act of 1949, for travel of any person employed by the Administration to render temporary services not in excess of six months in connection with any disaster referred to in section 636(b) of this title from place of appointment to, and while at, the disaster area and any other temporary posts of duty and return upon completion of the assignment * * *

Although loans are authorized to be processed for various purposes by the Small Business Administration pursuant to 15 U.S.C. 636(b), reference to the word "disaster" was only made in subsection 636(b)(2) which provided in pertinent part as follows:

(2) to make such loans * * * to any small business concern located in an area affected by a disaster, if the administration determines that the concern has suffered a substantial economic injury as a result of such disaster and if such disaster constitutes—

(A) a major disaster, as determined by the President under sections 1855 to 1855g of Title 42, or

(B) a natural disaster, as determined by the Secretary of Agriculture pursuant to section 1961 of Title 7;

Since Hurricane Agnes is the basis of your question, we are here concerned only with subsection 636(b)(2)(A), *supra*, a major disaster as determined by the President under 42 U.S.C. 1855–1855g. It is noted that Public Law 91–606, approved December 31, 1970, repealed 42 U.S.C. 1855–1855g. The substance of such sections was however incorporated by reference by section 301(1) of the 1970 act and now appears in 42 U.S.C. 4401 *et seq.*

42 U.S.C. 4402 defines "major disaster" as follows:

§ 4402. Definitions.

As used in this chapter—(1) "major disaster" means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire, or other catastrophe in any part of the United States, which, in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government to supplement the efforts and available resources of States, local governments, and relief organizations in alleviating the damge, loss, hardship, or suffering caused thereby, and with respect to which the Governor of any State in which such catastrophe occurs or threatens to occur certifies the need for Federal disaster assistance under this chapter and gives assurance of the expenditure of a reasonable amount of the funds of such State, its local governments, or other agencies for alleviating the damage, loss, hardship or suffering resulting from such catastrophe * * *.

The authority to declare a major disaster is reserved to the President. *See* section 1(a) of Executive Order 11575, December 31, 1970. Since, as indicated above, the only reference to "disaster" in 15 U.S.C. 636(b) related to a major disaster declared by the President, we may only here consider for the purposes of your submission the Presidential declarations of disaster.

There is nothing in the legislative history of the Small Business Act as revised by Public Law 85–536, pertinent to determination of the question you have raised, i.e., whether for the purposes of the 6-month limitation on the payment of per diem for temporary employees as contained in section 5(b)(8) of that act, Hurricane Agnes must be viewed as one disaster. However, as pointed out in our decision B–165632, January 6, 1969, statutory authority to pay travel costs and per diem to the temporary employees in question was required under the rules that the place at which a temporary employee is expected to perform the greater part of his duties must be considered his head-

quarters at which no per diem is payable, and that travel expenses to the employee's first duty station are a personal expense. Where, as in the case of Hurricane Agnes, extensive damage occurred in several of the States, and each such State was declared by the President as a disaster area, it is our view that each such State may be considered as a "disaster" for the purposes of section 5(b)(8), codified as 15 U.S.C. 634(b)(8). Therefore, should it be determined necessary to reassign an employee to another State which has been declared by the President as a disaster area in connection with Hurricane Agnes damages, no objection would be raised by our Office to the payment of per diem for not to exceed 6 months at the new location.

Your question is answered accordingly.

[B-176934]

Compensation—Overtime—Standby, Etc., Time—Home as Duty Station

A wage board employee serving as Duty Security Officer in a standby status at or near his residence located in Government 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 the overtime prescribed by 5 U.S.C. 5544(a) and implementing regulations, which provide that when an employee is required to remain at or within the confines of his 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 the employee was not confined to his post of duty, notwithstanding he resided in Government quarters, nor does the time he spent in a standby status constitute "hours of work."

Compensation—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 the erroneous separation upon restoration to duty, but the administrative office failed to deduct from the payment the amount attributable to the employee's outside employment, is not entitled to waiver of the overpayment since collection of the overpayment would not be against equity and good conscience as the employee was aware that he was responsible to repay the amount of his outside earnings during the period of erroneous separation, and collection would not be against the best interests of the United States, the criteria established in 5 U.S.C. 5584 for the waiver of erroneous administrative payments.

To Hugh J. Hyde, March 19, 1973:

We refer to your letter received December 12, 1972, regarding your claim for overtime compensation for time spent in a standby status which was disallowed by our Transportation and Claims Division's Settlement Certificate dated November 14, 1972, and to your request for waiver of an erroneous overpayment of compensation in the amount of $5,600.

Your claim for additional overtime compensation arises in connection with your performance of the duties of the Duty Security Officer

(DSO) at the Naval Ship Research and Development Center, Acoustic Research Detachment, Bayview, Idaho, during off-duty hours. You have received overtime compensation in consideration for the actual work performed as DSO. You were not, however, compensated for the remainder of the period that you were confined to the facility as DSO inasmuch as your residence, Government quarters, was at the facility and you were able to perform such duty at and near your residence.

Subsection 5544(a) of Title 5 of the U.S. Code, which is applicable, authorizes compensation for time spent in a standby status as follows:

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. * * *.

Subchapter S8–4b(2) of Federal Personnel Manual (FPM) Supplement 532–1, Coordinated Federal Wage System, further provides:

(2) *Standby and oncall duty.* A wage employee who is regularly required to remain at or within the confines of his post of duty in excess of eight hours a day in a standby or an oncall status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. (For callback overtime work, see S8–4b(8).)

The Department of the Navy's regulation, Civilian Manpower Management Instruction (CMMI) 610.S1–A, applicable to General Schedule and Wage employees, affords the following explanation of "standby or on-call status:"

Standby time consists of periods in which an employee is officially ordered to remain at or within the confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called. * * * The word "station" as used in this paragraph has the following meaning:

(a) The employee's regular duty station.

(b) Quarters provided by the Government expressly for the use of personnel who are required to stand by in readiness to perform actual work as the need arises.

(c) The employee's living quarters, whether within or outside the activity, when authorized by local command in accordance with such controls as may be imposed by the official in charge of the appropriate headquarters organization.

(d) Aboard vessels when making trial trips as described in (5) below.

By that regulation the definition of the phrase "at or within the confines of his station [or post of duty]" contained in FPM Supp. 990–2, Book 550, subchapter S1–6(c)(b) implementing 5 U.S.C. 5545 applicable to General Schedule employees, is made applicable to wage board employees. Subchapter S1–6(c)(b) explains the circumstances in which an employee may be regarded as within the confines of his station or post of duty as follows:

(b) The words *at, or within the confines of, his station,* in section 550.141 mean one of the following:

(1) At an employee's regular duty station.

(2) In quarters provided by an agency, which are not the employee's ordinary living quarters, and which are specifically provided for use of personnel required to stand by in readiness to perform actual work when the need arises or when called.

(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required.

The fact that an employee's residence or living quarters may be located upon a Government installation does not serve to take his situation outside the scope of the above regulations. *See* B–153666, August 11, 1964; B–167742, September 9, 1969; B–176924, December 15, 1972, copies enclosed.

In the case of *Armour and Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) where, in determining what constituted "work," the Supreme Court used the criterion of whether the time in question was spent "predominantly for the employer's benefit or for the employee's" and stated that this was "dependent upon all the circumstances of the case." In *Rapp* v. *United States*, 167 Ct. Cl. 852 (1964) and *Moss* v. *United States*, 173 Ct. Cl. 1169 (1965), the Court of Claims considered the overtime claims of employees who performed standby duty at their homes, outside of regular duty hours and in excess of their regular 40-hour workweeks. In each case the employee was required to be within hearing distance of his home telephone in order to receive calls and take appropriate action. In each of those cases the court held that where an employee is allowed to stand by in his own home with no duties to perform for his employer except to be available to answer the telephone, the time spent in such standby status does not amount to "hours of work" within the meaning of 5 U.S.C. 5542, relating to overtime compensation for other than wage board employees. We note that the above cases did not involve statutory language such as contained in 5 U.S.C. 5544(a). However, we believe such wording was merely added to express the various court holdings to the effect that while overtime compensation was payable for standby time within the confines of an employee's official station it was not payable for eating and sleeping time occurring during the period of such standby duty. Accordingly, the provisions of 5 U.S.C. 5544(a) and the Navy's implementing regulations, CMMI 610.S1–A should be similarly interpreted. See *Detling* v. *United States*, 193 Ct. Cl. 125 (1970).

Regarding the DSO function, the Department of the Navy reports as follows:

3. To accommodate the safety and security needs of the station, a determination was made some years ago to establish a Duty Security Officer (DSO) function. This basically involves a Detachment employee being responsible on a rotating shift, for the security/safety aspects of the station during non-duty hours. In the past few years, three civilian employees of the Detachment have been involved in this assignment, including Mr. Hyde. (Prior to that time, two civilian employees and the military Officer in Charge shared the rotation.) These three employees reside in government quarters located within the confines of the Bayview facility. The DSO assignment is not made a condition of employment for these individuals but is a requirement if they wish to reside in the facility's government quarters. Rent is paid for these quarters in an amount determined by the Naval Facilities Engineering Command. In addition to their standard 40 hour workweek in performance of regularly assigned duties, the three employees serve as "Duty Security Officer" for the facility. Each employee serves in this capacity every third day and every third weekend, with each duty watch beginning at 1530 one day and ending at 0700 the following day. Each employee was originally credited with two hours of overtime pay per each duty assignment with this amount changed to three hours a few years ago.

4. * * * When the employee is assigned this duty, he makes two inspection trips of the facility on workdays; one at the completion of the normal workday and another between 8:00 PM and midnight. The exact time of the evening tour is arbitrary and made at the discretion of the employee. On weekends and holidays, the employee assigned makes one additional inspection trip at approximately 8:00 AM. Each inspection takes approximately twenty minutes to accomplish. In addition to the station inspections, the DSO has the responsibility of responding to local community emergency situations including utilizing the Detachment's station wagon for emergency ambulance service, participating in firefighting activities, and assisting in rescues of drownings in the lake. Such emergencies are estimated to occur approximately six to eight times a year. Except for these inspection trips and emergencies, the employee is free to remain in his quarters or other areas of the station and to resume his normal activities.

The Navy is of the opinion that while performing the DSO function your whereabouts were not narrowly limited nor were your activities substantially restricted. They concluded that since your living quarters were not designated as your duty station, you were not in a standby or on-call status within the confines of your post of duty as defined in the above-quoted regulations. They regard as particularly persuasive the facts that you and other employees had been relatively free to exchange assignments and that, except for actual inspection tours for which you received overtime compensation, you were free to pursue personal activities provided that you remain on the base and within hearing distance of an outside speaker system.

Although Station Order 1–71, describing the functions of the DSO, provides that "no exchange or relief from duty will be permitted without prior approval from the Officer in Charge," the Navy states that in practice arrangements have been considerably more flexible. They explain:

In the past and at present, a schedule is posted listing the person assigned for each shift. The employees in general have been free to exchange assignment dates among themselves without necessity for formal approval by the Officer in Charge; although the complete degree of freedom in this regard has varied with the respective Officer in Charge. An analysis of the Detachment's pay records for

the past year by the Naval Supply Center, Puget Sound was conducted which demonstrates trading of assignments between the three individuals involved; i.e., there are some irregularities in the regular, every third day, pattern. Employees involved are also free to leave the station during their duty watch assignment if they can arrange for someone else to take their place. While firm dates or times that this has occurred cannot be established at this time, Center personnel utilizing the Detachment are confident that such trade-offs, both for the entire tour or a portion thereof, have been made.

We are advised by the officer currently in charge that employees may exchange assignments only with his permission, and that actual practice in this regard has varied in accordance with the policy of the officer then in charge. It does appear that practical considerations may somewhat restrict the freedom with which assignments may be changed and certainly there have been instances in which another employee has been unavailable to relieve the employee serving as DSO. This lack of flexibility is not critical however. We note that in *Moss* v. *United States*, *supra*, the Court concluded that time spent by a duty officer in his home where he was required to be within hearing distance of his home phone, but was otherwise free to eat, sleep, read and entertain friends, was spent predominantly for his own rather than his employer's benefit, even though the plaintiff in that case apparently was not free to leave his residence upon diverting incoming calls to his supervisor. We point out that in that case the employee's freedom of movement appears to have been considerably more restricted than in your situation. We understand in this connection that your residence was equipped with a system of three alarm bells and a short wave radio and that both systems are connected with a loud speaker, permitting you to pursue your personal activities outside of your home but within the geographical area of the base.

We note your statement and that of Mr. Greenfield, formerly the Officer in Charge, that you were required to live in Government quarters as a condition of your employment. You further state that for the past 12 years you have owned a home in Bayview where you would have preferred to have lived. The record is not entirely clear in this regard, but in any event, such is not determinative of your claim.

In B–176924, December 15, 1972, copy enclosed, we held that an employee was not entitled to overtime compensation for standby duty performed at his residence notwithstanding that he resided in Government quarters which he was required to occupy as a condition of his employment. This conclusion is equally applicable in your case.

In view of the above, we cannot conclude that the Navy's determination that your whereabouts were not narrowly limited and that your activities were not substantially restricted was incorrect, or that their failure to designate your residence as your duty station was improper. In the absence of any showing that you received a substantial number

of calls or alarms which would militate toward a contrary conclusion, we are unable to find that the time spent by you or other employees while serving as DSO was spent predominantly for the Navy's benefit. *See* B–141846, November 7, 1966; B–143982, February 16, 1968; B–160306, December 14, 1966; B–160475, January 27, 1967, copies enclosed. The determination by our Claims Division is therefore affirmed.

Your request for waiver of an erroneous overpayment of compensation in the amount of $5,600 arises in connection with your premature retirement from Government service. We are advised that due to an administrative error you were separated on September 26, 1971, prior to having attained the 30 years of service required for optional retirement. This error was discovered by the Civil Service Commission in December of 1971, and on January 17, 1972, you were restored to the rolls to complete the necessary service requirement. At that time you were apparently awarded back pay in the amount of $5,517.52, covering the period of your erroneous separation, from which the disbursing officer failed to deduct the amounts earned by you attributable to your employment during that same period. The record indicates you were employed as a consultant with the Naval Ship Research and Development Center, Acoustic Research Detachment, Bayview, Idaho, during the period of your erroneous separation.

This Office has held that in certain situations where an employee is separated, voluntarily or involuntarily, under a misapprehension regarding his eligibility for a retirement annuity and subsequently reinstated that he is entitled to back pay in accordance with 5 U.S.C. 5596 for the period of his separation. 32 Comp. Gen. 449 (1953).

Pursuant to 5 U.S.C. 5596(b)(1) an employee is entitled to back pay "less any amounts earned by him through other employment during that period." Under the above-cited provision of law the disbursing officer was required to deduct the amount of your earnings as a consultant from the amount of back pay to which you were otherwise entitled for the period of your separation. This requirement extends to all outside earnings regardless of source. Amounts which you received as a result of his failure to do so constitute an erroneous payment of pay.

The standards for waiver of claims arising out of an erroneous overpayment of pay are found in 4 CFR 91–93, which implements 5 U.S.C. 5584 as amended by Public Law 92–453. Section 91.5 provides in part that such claims may be waived in whole or in part when:

(b) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employees * * *. Any significant unexplained increase in pay or allowances which would require

a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case. * * *.

The record shows that by action dated January 17, 1972, you were retroactively reinstated with back pay in the amount of $5,517.32 covering the period September 27, 1971, through January 22, 1972. In your letter of January 25, 1972, you stated that it was your understanding that you had to repay the amount of your actual earning during the period of your erroneous separation, and requested a letter to that effect for income tax purposes. Since you were aware of your liability in the matter at the time the back pay was paid, which payment was erroneous to the extent no deductions were made for outside earnings, it cannot be said that collection action would be against equity and good conscience and not in the best interests of the United States. Your request for waiver of the claim is therefore denied.

[B–177412]

Contracts—Negotiation—Requests for Proposals—Lost

Although the failure to inquire why the incumbent contractor furnishing security watchman services, whose proposal was administratively lost, had not submitted a proposal was not sound procurement practice, the contract negotiated pursuant to section 1–3.210 of the Federal Procurement Regulations (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 the lost proposal could only be established by self-serving statements. However, termination of the award nevertheless is recommended in view of the fact negotiation procedures were used to convert the successful contractor's secret clearance to top secret, and the D&F did not satisfy the criteria in FPR section 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 a matter of bidder responsibility.

General Accounting Office—Recommendations—Implementation

When a United States General Accounting Office decision contains a recommendation for corrective action, copies of the decision are transmitted to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, and the contracting agency's attention is directed to section 236 of the act which requires the agency to submit written statements of the action to be taken on the recommendation to the House and Senate Committees on Government Operations not later than 60 days after the date of the decision, and to the Committees on Appropriations in connection with the first request for appropriations made by the agency more than 60 days after the date of the decision.

To the Acting Administrator, General Services Administration, March 20, 1973:

The views of the General Services Administration (GSA) on the protest of Sullivan Security Service, Inc. (Sullivan), against the

award of a contract to the Ensec Corporation (Ensec) under request for proposals (RFP) GS–03B–17977 (Neg), issued by Region 3 of the Public Buildings Service, were transmitted to our Office by reports dated December 15, 1972, and February 12, 1973, from the General Counsel and Acting Chief Counsel, respectively.

This RFP for security watchman services was negotiated pursuant to the authority of section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, 41 U.S. Code 252(c)(10), implemented by section 1–3.210 of the Federal Procurement Regulations (FPR), because it was impracticable to secure competition. The determination and findings (D&F) provided:

FINDINGS

In accordance with the requirements of Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, as amended, I make the following findings:

1. The Federal Aviation Administration, through our West Maryland Field Office, has requested that security guard services at the FAA Records Center, Martinsburg, West Virginia, be continued for another year.
2. It is a requirement of the specifications and FAA that the contractor's personnel have Top Secret Clearances.
3. Only 3 firms are known to have Top Secret Clearances. They are as follows:

Sullivan Security Agency, Inc., Martinsburg, WV
Federal Services, Inc., Washington, DC
Ensec Services Corporation, Timonium, MD

DETERMINATION

Based on the foregoing findings, I hereby determine within the meaning of Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, as amended, that: "It is impracticable to secure competition for the required services," and I do hereby authorize negotiation with the firms mentioned above.

The initial solicitation for these services was issued July 7, 1972, and offers received by July 17, 1972. Before award could be made, new wage rate determinations were issued by the Department of Labor. Consequently, that RFP was canceled and this solicitation was issued on October 2, 1972, incorporating the new wage rates. Offers were required to be submitted to the bid receiving office, Region 3, room 7065B, by close of business October 13, 1972.

The record shows that Ensec's proposal was the only one received by the required time. On October 27, 1972, a notice of award was mailed to Ensec. Since Sullivan had not received any notice concerning award, it telephoned the contracting officer on November 2, 1972, for information concerning its proposal. It is reported by the contracting officer that this was his first indication that Sullivan had submitted a proposal. An investigation established that Sullivan sent a certified letter (No. 730719), apparently addressed as indicated in the RFP, which was received and signed for in the GSA mailroom at approx-

imately 3:20 p.m. on October 11, 1972. The course of the letter was traced by the mailroom employee who signed for it as follows:

When a letter is received in the Mail Room marked "Certified" I sign for it. If the letter reflects a bid, it is sent to the Bid Room on the First Floor of the ROB. The letter is not logged into the Mail Room log but is logged in at the Bid Room upon receipt there. If the letter is not accepted in the Bid Room, it is delivered to Room 7065. In this case, the Certified Bid No. 730719 was sent to the Bid Room, but since it was not logged into the log book there it was delivered to Room 7065, as reflected in our log, a copy of which is attached hereto. The person delivering a Certified Bid to Room 7065 is not required to have the addressee sign upon receipt thereof.

Certified Bid No. 730719 was handled in the regular manner as set forth above. I have no knowledge of what happened after delivery to Room 7065.

To date, the lost letter has not been located.

It is Sullivan's contention that since its proposal was received timely by GSA, Sullivan should not be denied the opportunity to compete for the award because GSA was negligent in handling the proposal. The General Counsel concludes, in this regard, that since the proposal is lost and the only means of establishing its contents would be on the basis of Sullivan's self-serving statements after Ensec's prices have been exposed, no basis exists to cancel the award.

We concur with the General Counsel's conclusion so far as it relates to the lost proposal.

Sullivan has been the incumbent contractor for the past 5 consecutive years. Moreover, Sullivan extended its contract at the request of the procurement officer on a monthly basis from June 1972 through February 1973. Commencing in September 1972, Sullivan requested and received increased hourly wage rates from $2.65 to $3. Moreover, on October 10, 1972, one of Sullivan's officers telephoned the contracting officer to query him concerning the minimum man-hour requirements and also informed him that Sullivan's proposal under the instant RFP was being mailed that same day.

Our consideration of the circumstances surrounding Sullivan's aborted attempt to compete for this award leads us to conclude that since the contracting officer knew from the beginning of Sullivan's ongoing interest and that the field of potential competitors was limited to three sources, including Sullivan, sound procurement practice should have prompted an inquiry to determine whether Sullivan had submitted a proposal. While we do not believe that these circumstances themselves warrant our Office to recommend termination of the contract awarded Ensec, for the following reasons, we do make such a recommendation.

The findings supporting the determination to negotiate this procurement state that it is a requirement that the contractor have a top secret clearance and that only the three listed firms are known to possess the requisite clearance. On this basis, the contracting officer

determined that negotiation was necessary because it was impracticable to obtain competition. In this regard, FPR 1–3.305(b) provides:

> Each determination and findings required * * * shall be signed by the official making the determination and findings and shall set out enough facts and circumstances to clearly justify the specific determination made. Each determination and findings required to negotiate either an individual contract or a class of contracts under §§ * * * 1–3.210 * * * shall set forth enough facts and circumstances to clearly and convincingly establish that the use of formal advertising would not have been feasible or practicable.

We note that, contrary to the D&F, Ensec did not have the requisite top secret clearance, but held only a secret clearance. In a supplementary report of February 9, 1973, the contracting officer proferred the following:

> Basis for c(10) negotiation was due to the security requirements for the contract. It was felt that it was necessary to solicit offers only from firms who held a secret clearance, which could readily be converted to a top secret. We did not restrict the offers to companies who already possessed a top secret clearance, because it was felt this would too stringently restrict the possible offerors.

The inconsistency between the D&F and the above statement concerning the need to utilize negotiation procedures because of security requirements is apparent. In either event (secret or top secret clearance), we do not believe that the findings satisfy the criteria established in FPR 1–3.305(b). Moreover, we do not think that the use of neogtiation is justified to facilitate the conversion of a secret clearance to top secret when procedures are available to GSA under DOD Industrial Security Regulation, DOD Directive No. 5220.22–R, for the issuance of an interim top secret clearance. See section 2–102b. We are informed that Ensec's conversion to top secret took 80 days, which necessitated the continued extension of Sullivan's contract from November 1972 through February 1973.

In our view, the D&F is, in effect, a prequalification of only three firms 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). While only three firms were "known" to the contracting officer to possess top secret clearance, there is no indication that any attempt was made to establish the existence of any others. Apparently due to this supposed lack of qualified sources, the solicitation was not synopsized in the Commerce Business Daily in accordance with FPR 1–3.103. Moreover, we have held that conclusions or the opinions of contracting officers on the availability of qualified offerors may not be accepted as controlling prior to solicitation of offerors. 41 Comp. Gen. 484, 490 (1962). Further, we note that the RFP is devoid of any indication of the level of security clearance required of a proposed contractor's employees to perform the work.

In view of the above, we are not persuaded that the use of formal advertising was either impracticable or unfeasible. In reaching this conclusion we are not unmindful of the need for a top secret clearance and we have held in this regard that such a requirement is a matter to be considered in determining the responsibility of a bidder. B-173627, February 10, 1972; 51 Comp. Gen. 168 (1971) and cases cited therein. The critical time for meeting the security (responsibility) requirement is the time set for commencement of performance, plus any necessary leadtime.

Under the circumstances, we believe the prequalification of sources on the limited basis of the contracting officer's knowledge constitutes an undue restriction on the competition contemplated by FPR 1-3.101 (c). Therefore, we recommend the award to Ensec be terminated for the convenience of the Government. In this connection, since the procurement was handled substantially as if it had been formally advertised, we recommend that consideration be given to using formal advertising for any resolicitation.

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.C. 1172. In view thereof, your attention is directed to section 236 of the act, 31 U.S.C. 1176, 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-156550]

District of Columbia—Firemen and Policemen—Compensation—Longevity Increases—Basic Compensation Purposes

The longevity step increases provided by section 110 of the 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 the act provides longevtiy pay shall be paid in the 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 the purpose of computing annuities, and although the legislative history of the act makes no reference to including longevity compensation increases as part of basic compensation in computing overtime and holiday payments, in view of the fact that prior to the 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 the legislative history of the act.

505-737 O - 73 - 3

To the Commissioner of the District of Columbia, March 21, 1973:

Reference is made to your letter of January 11, 1973, requesting an expression of our views with regard to the calculation of overtime and holiday pay for policemen and firemen in the District of Columbia. Specifically, the question you raise is whether the longevity pay increases provided by section 4–832, of the District of Columbia Code as amended by section 110 of the District of Columbia Police and Firemen's Salary Act Amendment of 1972, Public Law 92–410, 86 Stat. 638, approved August 29, 1972, should be applied in the computation of the rate of overtime and holiday pay authorized in D.C. Code sections 4–904 and 4–807, respectively.

You indicate that the bill originally proposed by the District of Columbia provided that longevity pay would be base pay for purposes of computing retirement and life insurance withholdings. Under such a provision you believe that longevity pay would have been part of base pay for purposes of computing overtime and holiday pay. The bill passed by the House of Representatives, however, excluded longevity pay from withholdings for retirement and life insurance. Although the Senate amended the bill to incorporate the wording similar to that suggested by the District of Columbia the House provisions were adopted in conference and became part of the act.

The amendment adopted concerning longevity step increases is in pertinent part:

> (a) (1) In recognition of long and faithful service, each officer and member in the active service on or after the effective date of the District of Columbia Police and Firemen's Salary Act Amendments of 1972 shall receive per annum, in addition to the rate of basic compensation prescribed in the salary schedule contained in [D.C. Code, section 4–823 as amended] an amount computed in accordance with the following table:
>
> * * * * * * *
>
> (3) * * * Such compensation shall be paid in the same manner as the basic compensation to which such officer or member is entitled, except that it shall not be subject to deduction and withholding for retirement and insurance, and shall not be considered as salary for the purpose of computing annuities * * *.

Although that provision indicates that longevity pay will be in addition to the basic rate of compensation prescribed, it also provides that longevity pay will be paid in the same manner as basic compensation except that it will not be subject to deduction and withholding for retirement and insurance and will not be considered salary for the purpose of computing annuities. The legislative history of Public Law 92–410 indicates that the purpose of excluding longevity pay from retirement was to discourage a police officer from retiring immediately and receiving the benefit of a longevity increase in the computation of his annuity. Apparently, it was felt that an increase in life insurance which continues after retirement should be treated in the same manner.

We could find no mention in such history as to the inclusion of the longevity increases as a part of basic compensation in computing overtime and holiday payments.

The authorization of longevity pay is similar to the authorizations for pay in excess of the scheduled salary rates for members performing duties as helicopter pilots, those assigned to render explosive devices ineffective and to technicians, dog handlers and detective sergeants. We were informally advised that all of those additional amounts are considered part of the basic compensation of those members who are entitled to receive them although they are also paid "in addition to" the scheduled rate applicable. See page 8 of Senate Report No. 92–994. We note further that longevity rates authorized prior to the enactment of Public Law 92–410 were scheduled rates of pay and as such were part of the members' basic compensation for all purposes. If in changing the method of paying members for long service it was intended to exclude such pay from basic compensation for all purposes, we would expect to see an expression of such intent in the legislative history.

In view of the above we believe it reasonable to view longevity pay as one of the elements of basic compensation except for those purposes for which the act provides that it will not be considered basic compensation.

The question presented is answered accordingly.

[B–162852]

Pay—Retired—Re-Retirement—Recomputation of Retired Pay—Extraordinary Heroism Award

An enlisted member of the 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 an increase for extraordinary heroism in line of duty prior to retirement, as the member's entitlement to retired pay upon re-retirement is under 10 U.S.C. 1402, which permits him to elect the most favorable formula for computing his retired pay (subsection (d)), but makes no provision whereby a member's recomputed retired pay may be increased for an act of heroism performed during a post-retirement period of active duty.

To H. C. McDaniel, Department of the Army, March 22, 1973:

Further reference is made to your letter (file reference FINCS–EC Caddell, Azierah—SSAN 248–16–6032 (Retired)), with enclosures, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $389.88 in favor of Master Sergeant Azierah Caddell, retired, representing increased retired pay for the period February 26, 1972, through August 31, 1972, in the circum-

stances described. Your request was forwarded here by letter from the Office of the Comptroller of the Army, dated October 4, 1972 (file reference DACA-FIS-PP), and has been assigned Control No. DO-A-1176 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Caddell was retired on November 1, 1963, under the provisions of 10 U.S. Code 3914 in the grade of Sergeant First Class (E-7) with 20 years, 6 months and 17 days of service for basic pay purposes and had an equal period of active service. You say that he was recalled to active duty on May 1, 1965, was released from that duty on February 26, 1972, and became entitled to recompute his retired pay under the provisions of 10 U.S.C. 1402, in the grade of Master Sergeant (E-8) at which time he was credited with 28 years, 10 months and 13 days of service for basic pay purposes and 27 years, 4 months and 13 days of active service for retirement purposes.

You also say that while Sergeant Caddell was serving on active duty during the latter period, he incurred disability in line of duty rated at 60 percent, and, in addition, was certified by The Adjutant General to be entitled to receive a 10 percent increase in retired pay based on the award of the Soldier's Medal while performing active duty during the post-retirement period, in accordance with General Order No. 6437, dated November 22, 1966. You express doubt as to whether the member is entitled to receive the 10 percent increase in retired pay for extraordinary heroism subsequent to February 26, 1972, despite the certification of entitlement, since none of the provisions of 10 U.S.C. 1402 authorize such an increase.

A member's right to be retired and receive retirement pay is based on the provisions of law in effect at the time of his retirement. An enlisted member of the Army, retired for years of service under the provisions of 10 U.S.C. 3914, is authorized to compute the amount of his retired pay under the provisions of Formula C, 10 U.S.C. 3991. Under that formula, the monthly retired pay is computed by taking the member's monthly basic pay to which he was entitled on the day before he retired and multiplying by 2½ percent of the years of service credited to him under 10 U.S.C. 3925. Column 3 of that formula provides for a 10 percent increase in that product for the certified performance of an act of extraordinary heroism in line of duty prior to retirement.

An enlisted member of the Armed Forces who has been retired under any provision of law and recalled to active duty, upon release from that duty reverts to the retired list and is entitled to recompute his retired pay under the provisions of 10 U.S.C. 1402. That section—which was derived from sections 402(d) and 516 of the Career

Compensation Act of 1949, approved October 12, 1949, ch. 681, 63 Stat. 819, 832—authorizes recomputation of retired pay to reflect generally, post-retirement periods of active duty, grade advancements, and subject to the limitations imposed by the various footnotes to the subsections, increases in the monthly basic pay rates authorized during that latter period, thereby permitting the retired member's retired pay to be increased accordingly.

Section 1402 of Title 10, U.S. Code, clearly sets forth the methods by which retired pay may be recomputed upon a member's release from post-retirement active duty. The provisions of that section which would be for application in Sergeant Caddell's case would be subsections (b) and (d). Subsection (b) provides that:

> (b) A member of an armed force who has been retired other than for physical disability, and who while on active duty incurs a physical disability of at least 30 percent for which he would otherwise be eligible for retired pay under chapter 61 of this title, is entitled, upon his release from active duty, to retired pay under subsection (d).

While subsection (b) authorizes a new basis for the computation of retired pay, it is not a retirement statute. It merely provides for the return of a member to his retired status with retired pay, but permits him to elect under subsection (d) the method of computing the amount of the retired pay entitlement most favorable to him. Those subsection (d) elections are that he may either (1) resume receiving the "retired pay to which he became entitled when he retired," increased by the applicable Consumer Price Index adjustments in that pay authorized by 10 U.S.C. 1401a, or (2) retired pay computed by taking the highest monthly basic pay received by him while serving on active duty after retirement and multiplying it, at his option, by either 2½ percent of the years of service creditable to him under 10 U.S.C. 1208, or by "the highest percentage of disability attained while on active duty after retirement."

Although Formula C, 10 U.S.C. 3991, provides for a 10 percent increase in a member's retired pay for the performance of an act of extradordinary heroism prior to retirement, nowhere in the retired pay recomputation formulas authorized by 10 U.S.C. 1402 is there any provision whereby a member's recomputed retired pay may be increased for a similar act performed during a post-retirement period of active service. We recognize the apparent inequity involved in such a situation; however, it is our view that in the absence of a specific provision in 10 U.S.C. 1402, an additional increase in recomputed retired pay for an act of post-retirement extraordinary heroism is not autorized. *Cf.* 47 Comp. Gen. 397 (1968) and 43 *id.* 805 (1964).

Accordingly, payment on the voucher in Sergeant Caddell's case is not authorized, and it will be retained here.

[B-177050]

Quarters Allowance—Dependents—Husband and Wife Both Members of the Armed Services

An Air Force sergeant that contributes over one-half of the support of the daughter whose custody was awarded to her upon divorce from her husband, also a member of the uniformed services, may be paid a basic allowance for quarters with dependents from the date of the divorce, notwithstanding her former husband receives a basic allowance for quarters at the "with dependents" rate based on dependent children of a previous marriage and pays $75 per month toward the support of the child born to their marriage, since her former husband does not receive an 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 the dependent of a female member within the meaning of 37 U.S.C. 401.

To Major C. W. McNeill, Department of the Air Force, March 22, 1973:

Further reference is made to your letter dated August 25, 1972, ACF, forwarded to this Office by Headquarters United States Air Force letter dated September 15, 1972, in which you request a decision concerning the entitlement of Sergeant Pansy Lee Hurn, 446-48-5405, to basic allowance for quarters with dependents beginning May 9, 1972. The request has been assigned number DO-AF-1171 by the Department of Defense Military Pay and Allowance Committee.

Pursuant to a decree of divorce of the District Court, 131st Judicial District, Bexar County, Texas, entered May 9, 1972, Pansy Lee Hurn was divorced from Thomas Edward Hurn; the custody of their minor daughter was awarded to Pansy Lee Hurn; and, Thomas Edward Hurn was ordered to pay $75 per month in child support.

Sergeant Pansy Lee Hurn and her daughter are apparently residing off-base and Sergeant Hurn is receiving basic allowance for quarters at the "without dependents" rate. Apparently, Sergeant Hurn's former husband, Thomas Edward Hurn, is also a member of the armed services and is currently receiving basic allowance for quarters at the "with dependents" rate based on dependent children of a previous marriage for whom he is also paying $130 per month child support.

Sergeant Pansy Lee Hurn states in her application for quarters allowance that the living expenses of her child amount to $180 per month of which she contributes $110 (over one-half) and, therefore, she is claiming basic allowance for quarters as a member with a dependent on that basis beginning May 9, 1972, the date of her divorce.

You indicate that you are uncertain as to Sergeant Hurn's entitlement to basic allowance for quarters at the with-dependents rate since paragraph 6-4h of Volume I, Air Force Manual 177-105, appears to preclude payment at the with-dependents rate when the father has not been relieved from providing child support. You also note that paragraph 30242b of the Department of Defense Military Pay and

Allowances Entitlements Manual provides that a female member is entitled to basic allowance for quarters for a minor child only when the child is in fact dependent upon her for over one-half of his support.

Section 403(a) of Title 37, U.S. Code, states that except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters. Subsection (g) provides that the President may prescribe regulations for the administration of this section.

As applicable here, section 401 of Title 37 defines the term "dependent" to include a member's unmarried legitimate child who is under 21 years of age. Section 401 further provides that a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support.

Provisions substantially similar to 37 U.S.C. 401 and 403 have been contained in the military pay and allowances laws since 1922, their basic purpose being to at least partially reimburse the members concerned for the expense of providing private quarters for their dependents when Government quarters are not available, and not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. *See* 42 Comp. Gen. 642, 644 (1963).

Sections 401 and 403 of Title 37, U.S. Code, and their predecessor statutes, and the regulations implementing them, were drawn with the view that as a general rule a father is responsible for the support of his children and such children are, therefore, generally considered dependent upon him. Consequently, we have long held that in the absence of a showing that a divorced male member has been absolved from the responsibility of supporting his children, or that his children have been emancipated, or that he has in fact not contributed to their support, he is entitled to basic allowance for quarters with dependents on their behalf, provided he is otherwise qualified. *See* 23 Comp. Gen. 71, 73 (1943); 23 *id.* 454 (1943); and 23 *id.* 625 (1944).

In construing sections 4, 5, and 6 of the Pay Readjustment Act of 1942, approved June 16, 1942, Ch. 413, 56 Stat. 359, 361 (provisions of law similar to 37 U.S.C. 401 and 403), we have held in the case of a Women's Army Corps officer that if she and her husband are divorced, at least ordinarily, the father's obligation to support his child would not be removed and, therefore, in the absence of an affirmative showing that the responsibility of support had shifted to the mother, she would not be entitled to increased allowances on account of a child. *See* 23 Comp. Gen. 216, 227 (1943), answer to question (13)(e).

In the instant case the members are divorced and living apart and the child is living with Sergeant Hurn. Although the child's father is contributing to her support, he apparently is not receiving an increased

quarters allowance on account of this child. The child appears to be dependent on Sergeant Hurn for over one-half of her support as required to qualify as the dependent of a female member within the meaning of 37 U.S.C. 401. While the law does not contemplate the payment of an increased quarters allowance to more than one member on account of the same dependent (51 Comp. Gen. 413 (1972)), it is our view that in the circumstances here involved the child may be considered the dependent of Sergeant Hurn and payment to Sergeant Hurn of basic allowance for quarters at the with-dependents rate is authorized.

The documents received with your letter are returned herewith.

[B-177368]

Bids—Omissions—Prices in Bid—Discernible Pattern Effect

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

To Arnold & Porter, March 23, 1973:

Reference is made to your letters of November 2, November 7 and December 5, 1972, protesting, on behalf of Dumont Oscilloscope Laboratories, Inc. (Dumont), against any award to the Hewlett-Packard Company under invitation for bids (IFB) No. F41608-73-B-0475, issued September 8, 1972, by the Directorate of Procurement and Production, Department of the Air Force, San Antonio Air Materiel Area, Kelly Air Force Base, Texas.

The IFB was issued by the Air Force for the purpose of procuring, under a requirements contract, Oscilloscopes (85 Megahertz) in accordance with purchase description MME-PP-6625-161A (9/15/71), and was the second stage of a two-step formal advertisement under Armed Services Procurement Regulation (ASPR) 2-503.

The IFB was furnished to the three offerors who qualified under Step I, and it provided for a 1-year requirements contract with a 50 percent labor surplus set-aside. The IFB called for bids on an initial order quantity of 55 oscilloscopes, and on 4 follow-on order quantities of 5, 10, 10 and 10 oscilloscopes. Under section E (Supplies/Services and Prices), bidders were required to insert bid prices for the initial

order quantity of 55 oscilloscopes, and for the 4 follow-on quantities, in the following manner:

		Quantity	Unit	Unit Price	Amount
0001AA	Initial Order Quantity	55	ea		
0001AB	Follow On Quantity per Order	1 thru 5 6 thru 15 16 thru 25 26 thru 35			

The face sheet of the IFB (Standard Form 33) contained the standard clause indicating that the bidder offered to furnish any or all items upon which prices are offered, at the price set opposite each item. Also, under paragraph C–10 (Award of Contract, Standard Form 33A) of the IFB, the bidder was notified that the contract would be awarded to that responsible offeror whose offer conforming to the solicitation would be most advantageous to the Government.

To supplement these standard clauses, and to indicate to the bidders the importance of offering a price for each item, the Air Force admonished the bidders, in paragraph C–39, as follows:

This solicitation contemplates award of a Requirements Contract. Offerors are cautioned that a unit price must be offered for the initial order quantity, when a quantity is shown, and each increment of the follow-on quantity. Offerors failing to set forth a price for the initial order quantity, if applicable, and each increment of the follow-on quantity shall be considered nonresponsive and rejected (or in the case of proposals; *may* be rejected). If more than one line item is being solicited, the offeror must set forth prices for the Initial Order Quantity, if applicable, and each of the follow-on increments for each line item on which an offer is being made. *Offerors are further cautioned to read the Section hereof entitled "Evaluation of Offers."*

Paragraph D–5 (Evaluation of Offers) provides, in pertinent part:

Offers shall be evaluated in accordance with paragraph C–10 hereof and the following: The most advantageous offer shall be considered to be the lowest evaluated total price. The term "lowest evaluated total price" means the lowest prices adjusted by deduction of any allowable discounts, and computed in the following manner:

(a) Step 1. The initial order quantity shall be multiplied by the offered unit price for that quantity.

(b) Step 2. The total price for follow-on increments will be developed by multiplying the quantity represented in each increment (i.e., the "quantity represented" is defined to be one plus the difference between the highest quantity and the lowest quantity in the increment) of the follow-on portion by *two* and then by the unit price for that increment.

(c) Step 3. The products derived in Step 1 shall be added to the products arrived at in Step 2. * * * this shall be the evaluated total price.

On October 31, 1972, the date specified, the bids were opened. Although Hewlett-Packard was apparently the low bidder, with a unit price of $1,491 for the initial order quantity and for the follow-on quantities of 1 thru 5, 6 thru 15, and 26 thru 35, the bid failed to either include a price for the quantity increment of 16 thru 25 or explain the omission of such price. On the following day Hewlett-Packard dis-

patched a letter to the Air Force indicating that, pursuant to ASPR 2–406.2, the company considered its failure to submit a price for the follow-on quantity of 16 thru 25 an apparent clerical mistake, and offered written vertification that the company's unit price of $1,491 is, and was, intended to be applicable to all of the follow-on quantities.

By telegram dated October 31, 1972, Dumont indicated to the Air Force that it considered the Hewlett-Packard bid nonresponsive, and that the telegram in question represented a notification of protest should the bid be considered for acceptance. As a consequence of this telegram, the contracting officer issued a Statement of Facts and Findings holding that the bid in question established a definite and easily recognizable pattern of prices which clearly indicated that Hewlett-Packard intended $1,491 to apply to all bid increments; that the intended increment (16–25) price of $1,491 a unit was apparent from the face of the bid; and that the intended price in question was clearly compatible with the bidding pattern of Hewlett-Packard. In view thereof, a correction of the Hewlett-Packard bid was effected, on the ground that it was in consonance with ASPR 2–406.2 and decision B–150318(2), June 6, 1963, of this Office.

By letter dated November 20, 1972, Headquarters, Air Force Logistics Command adopted the position of the contracting officer and recommended that the subject protest be denied. By letter of November 27, 1972, the Department of the Air Force (Headquarters) concurred in this decision and forwarded the subject file to our Office. As of this date, award has not been made to the Hewlett-Packard Company.

The grounds for your protest are that the IFB specifically and forcefully indicated that failure to bid on all items would render a bid nonresponsive and cause it to be rejected; that the decision B–150318(2), *supra*, was inapplicable to the present situation for several significant reasons; that a nonresponsive bid could not be modified so as to make it responsive; that the fact that the bidder could not have been required to perform the complete contract by the Government indicated that the bid did not conform to the solicitation requirements; and that consideration of a price savings for the Government does not permit the correction of a nonresponsive bid.

A fundamental rule of the competitive bid system is that in order to be considered for an award a bid must comply in all material respects with the IFB at opening. 46 Comp. Gen. 434, 435 (1966); B–162793, January 18, 1968. The bidder cannot add to or modify the bid after opening to make the bid comply with the IFB, and it does not matter whether an error is due to inadvertence, mistake or otherwise. B–161950, November 2, 1961. The question of responsiveness of a

bid is for determination upon the basis of the bid as submitted and it is not proper to consider the reasons for nonresponsiveness. B–148701, June 27, 1962.

A bid is generally regarded as nonresponsive on its face for failure to include a price on every item as required by the IFB and may not be corrected. B–176254, September 1, 1972; B–173243, July 12, 1971; B–165769, January 21, 1969; B–162793, *supra;* B–161929, August 28, 1967. The rationale for these decisions is that where a bidder failed to submit a price for an item, he generally cannot be said to be obligated to perform that service as part of the other services for which prices were submitted. B–170680, October 6, 1970; B–129351, October 9, 1956.

To promulgate a rule which would allow bidders to correct a price omission after an allegation of mistake in bid would generally grant the bidder an option to explain after opening whether his intent was to perform or not perform the work for which the prices were originally omitted. B–176254, *supra.* To extend this option would in effect be tantamount to granting the opportunity to submit a new bid. B–166778, July 9, 1969; B–161628, July 20, 1967; B–150168, November 13, 1962. We have therefore held that an allegation of error is proper for consideration only where the bid is responsive and otherwise proper for acceptance. 40 Comp. Gen. 432, 435 (1961); 38 *id.* 819, 821 (1959); B–160663, January 26, 1967; B–148701, *supra.* Although the Government could effect savings in some procurements by allowing correction of nonresponsive bids, the many decisions holding that a nonresponsive bid may not be corrected are manifestations of the principle that it is more in the interest of the Government to maintain integrity in the competitive bid system than it is to obtain a monetary gain in an individual award. B–161628, *supra.*

Our Office has recognized, however, a very limited exception to these rules, and it is upon this exception that the Air Force recommends the correction of Hewlett-Packard's bid be permitted to stand. Basically, even though a bidder fails to submit a price for an item in a bid, that omission can be corrected if the bid, as submitted, indicates not only the probability of error but also the exact nature of the error and the amount intended. B–151332, June 27, 1963. The rationale for this exception is that where the consistency of the pricing pattern in the bidding documents establishes both the existence of the error and the bid actually intended, to hold that the bid is nonresponsive would be to convert what appears to be an obvious clerical error of omission to a matter of nonresponsiveness. B–157429, August 19, 1965.

The decisions which have turned on this concept and which have allowed correction of omissions have generally involved bidding schedules soliciting bids on similar items. These decisions are based on the

proposition that the bidder indicates his intent to bid a certain price for an item otherwise not bid upon by bidding the same amount for the same material in other parts of his bid. For example, in B-150318(2), *supra*, although a bidder failed to bid on manholes in 4 of 78 subitems, whenever he bid on similar manholes in the other 74 items, he bid the same price consistently. We upheld the decision to correct the four subitem price omissions and stated the rule that:

> * * * an apparent low bidder may correct a price omission alleged prior to award, on an item which might or might not be ordered under the resulting contract, if the erroneous bid itself establishes a definite and easily recognizable pattern of prices which clearly indicates not only that the alleged error is anomalous to the pattern but also that the allegedly intended figure is one which is solely compatible with the pattern.

Similarly, where a bidder failed to show a price on a subitem involving a particular type of upholstery, he was allowed to correct the bid by inserting a price for the subitem which the bidder had consistently bid on the same material elsewhere in the schedule. B-137971, December 9, 1958. The pattern of uniform pricing as established in the bidding documents is the essence of the exception which allows the determination and insertion of the intended bid price. B-146329, August 28, 1961.

Applying these principles to the instant situation, it is apparent that the Hewlett-Packard bid itself establishes a discernible pattern of a single price per unit for the initial order quantity and all follow on quantity increments contained in the bid. In our view, the bid clearly shows that the only price intended to be charged by Hewlett-Packard for an oscilloscope under the IFB is $1,491, regardless of the number or the incremental sequence in which the oscilloscopes are ordered.

You argue that the bid price for the follow on quantity of 16 thru 25 cannot be ascertained from the bid because the price for an arbitrary quantity of oscilloscopes may involve unknown variables that could make the unit price for that quantity different than the price for lesser and greater quantities. We do not find any indication, however, that Hewlett-Packard did not take such diverse and unknown variables into consideration in determining its bid of $1,491 for the specified quantities of oscilloscopes.

You also contend that the bid of Hewlett-Packard gave that company an option to accept or reject the contract, and that such a bid has traditionally been declared nonresponsive because of this "option" quality. Generally, where any substantial doubt exists as to whether a bidder upon award could be required to perform all the work called for if he chose not to, the integrity of the competitive bid system requires rejection of the bid unless the bid otherwise affirmatively indicates that the bidder contemplated performance of the work. 51

Comp. Gen. 543, 547 (1972). This rule, however, does not prohibit the correction of a price omission in a bid when the figure intended is established by the bid itself. Absent clear and convincing evidence that the bidder intended a price different than the one established under the pricing pattern rule, it is our opinion that the bidder would not have an option to refuse the contract at the price which was evidenced by the bid.

You say that the principle enunciated in B–150318(2), *supra*, is inapplicable to the present case because the item in question must be ordered and, thus, does not conform to the statement in that decision that the item "might or might not be ordered." We believe that you have attached undue importance to that statement which merely described an additional feature of the procurements being compared. It was not intended to establish the uncertainty of ordering as a criterion for application of the pricing pattern rule which was there being observed.

You further contend that the existence of the various specific admonitions to the bidder that failure to bid on an item would cause the bid to be rejected prohibits the corrective action taken by the contracting officer. Contrary to your contention, application of the pricing pattern rule is not precluded by the various cautionary provisions of the IFB. *See* B–150318(2), *supra*, where the bidder was allowed to correct a price omission although a provision of the IFB stated that failure to bid on all items would disqualify the bid.

Finally, you cite B–160663, *supra*, for the proposition that even if the omitted price in the bid could be construed from other portions of the bid, the nonresponsiveness cannot be cured by correction. As indicated above, the correction of an omission in a bid pursuant to a pricing pattern evidenced in that bid, constitutes an exception to the general rule that a nonresponsive bid cannot be cured by correction. Since the cited case did not involve a pricing pattern situation, it is not regarded as providing support for rejection of the significance of the pricing pattern in the case at hand.

In view of the foregoing, we are of the opinion that the correction of the Hewlett-Packard bid, to reflect a unit price of $1,491 for the quantity increment of 16 thru 25, was proper.

Accordingly, your protest against the proposed acceptance of that company's bid is denied.

[B–166200]

Travel Expenses—Military Personnel—Transfers—Outside Continental United States—Port of Embarkation

Under orders authorizing a permanent change-of-station from Florida to Puerto Rico, with delay en route, orders modified to provide temporary duty at Quonset

Point (QP), Rhode Island, a Navy ensign who traveled from his leave point to Miami, and under a Government transportation request to San Juan, is entitled pursuant to paragraph M4159–1 of the Joint Travel Regulations not only to transoceanic travel at Government expense but to an allowance for the official distance between the old permanent station and the appropriate aerial or water port of embarkation serving the old station. Since the ensign's travel at his own expense from QP to Miami via his leave address resulted in overseas travel from a port of embarkation less distant from San Juan, in addition to mileage from QP to New York City, he is entitled to the difference between the cost of transportation from Miami to San Juan and Category "Z" transportation from New York to San Juan.

To G. B. Ryder, Department of the Navy, March 27, 1973:

This refers to your letter of October 4, 1972, with attachments, file reference CRD:en 4650, forwarded to this Office by endorsement of January 30, 1973, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 73–3) in which you request an advance decision regarding the claim of Ensign Larry C. Ische, Jr., for reimbursement incident to circuitous travel performed on permanent change-of-station orders.

The record shows that Ensign Ische, by orders dated April 24, 1972, was ordered on a permanent change of station from Naval Air Station, Pensacola, Florida, to Naval Air Station, Roosevelt Roads, Puerto Rico. A delay en route was authorized. These orders were modified on May 16, 1972, to provide for temporary duty at Naval Air Station, Quonset Point, Rhode Island, for about seven weeks. Upon completion of the temporary duty, Ensign Ische was to carry out his basic orders and report to Roosevelt Roads, Puerto Rico, with 30 days' delay en route chargeable as leave being authorized.

While on leave at Minneapolis, Minnesota, Ensign Ische received a Government transportation request to obtain air transportation for himself and his wife for the portion of their travel to his new duty station from Miami, Florida, to San Juan, Puerto Rico. The letter dated August 4, 1972, forwarding the transportation request contained a statement that transportation was being furnished from Miami in order to allow concurrent travel and that overall reimbursement for Ensign Ische was limited to mileage from Providence, Rhode Island, to New York City, and the difference in Category "Z" fares from Miami to San Juan, and from New York to San Juan.

It is indicated that the Category "Z" fare from New York to San Juan is $55.50 while the Category "Z" fare from Miami to San Juan is $36.10.

Since Ensign Ische departed for San Juan from Miami, and the fare for that travel is less than the fare from New York to San Juan, you question whether he may be reimbursed for the difference in fare cost in addition to receiving mileage from his temporary duty location in Rhode Island to New York City. He has received mileage allowances from Pensacola, Florida, to Quonset Point, Rhode Island.

Section 404(a) of Title 37, 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, without regard to the comparative costs of various modes of transportation, upon a change of permanent station. Paragraph M4159–1 of the Joint Travel Regulations, promulgated pursuant to this statutory authority, provides that a member traveling under permanent change-of-station orders to, from, or between points outside the United States will be entitled to:

1. allowances for the official distance between the old permanent station and the appropriate aerial or water port of embarkation serving the old duty station;
2. transportation by Government aircraft or vessel, if available, otherwise Government procured transportation or reimbursement for transportation procured at personal expense for the transoceanic travel involved.

In decision B–166200, March 20, 1969 (copy enclosed), which is referred to by the Comptroller of the Navy in forwarding your letter to this Office the member was transferred from Davisville, Rhode Island, to the U.S. Naval Station, Roosevelt Roads, Puerto Rico, with leave en route in Oklahoma. He was furnished a transportation request for air transportation from Dallas, Texas, via Miami, Florida, to San Juan, Puerto Rico, instead of utilizing Category "Z" transportation from New York to San Juan, the shortest and most direct route to his new permanent station. We held that the additional outlay of Government funds which enabled the member to travel to his destination via a circuitous route should be charged against his pay account, as the Government's obligation is limited to furnishing transportation or reimbursement therefor from the old to the new duty station via the direct or shortest usually traveled route which was from Davisville to New York City to San Juan. Therefore, in adjusting the member's indebtedness for the transportation furnished by an indirect route, he was credited with the cost to the Government for travel by the direct route.

Ensign Ische was entitled to mileage from Quonset Point to New York City, and Category "Z" transportation from there to San Juan. He was furnished transportation only from Miami to San Juan. His travel at his own expense from Quonset Point to Miami via his leave address resulted in overseas travel from a port of embarkation less distant from San Juan. Therefore, he may be allowed mileage for travel from Quonset Point to Miama not to exceed the mileage from Quonset Point to New York City plus the difference between the cost of the transportation furnished from Miami to San Juan and Category "Z" transportation from New York to San Juan. This will result in Ensign Ische's receipt of either Government procured transportation or mileage allowances for all necessary travel performed incident to his ordered change of permanent station.

Ensign Ische's voucher and supporting papers are returned herewith for payment on the basis indicated.

[B-177127]

Transportation—Rates—Space Reservation—Actual *v.* Constructive Weight Rate Base

On a shipment of fabricated test structures from Deer Park, Long Island, New York, to Wright Patterson AFB, Ohio, on a Government bill of lading showing the actual weight of the shipment as 1,725 pounds, and containing the notation "space reserved for 1000 cu ft of space," the carrier who was properly paid line-haul charges based on a minimum weight of 10,000 pounds is only entitled to a "Shipment Charge" for the space reserved on the actual weight of the shipment, and exception was properly taken to the higher charge based on the constructive weight of 10,000 pounds since Item 15 of Government Rate Tender (GRT), I.C.C. 1–U, Supplement 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."

To Trans Country Van Lines, Inc., March 27, 1973:

Reference is made to your letter of September 25, 1972, in which you request review of our settlement of January 21, 1972 (TK-928590), partially disallowing your claim for $74.85 on supplemental bill No. 32311.

This claim relates to a shipment of fabricated test structures transported by your company from Deer Park, Long Island, New York, to Wright Patterson AFB, Ohio, on GBL E-8905340, dated July 26, 1968. The GBL shows the actual weight as 1,725 pounds, and contains the notation "SPACE RESERVED FOR 1000 CU FT OF SPACE."

Pursuant to Item 1, page 2 of your individual tender, I.C.C. 50, Supplement 9, for the purpose of computing the line-haul transportation charges, the shipment is subject to a minimum weight based on 7 pounds per cubic foot of the vehicle space ordered when a shipper orders space reservation for a portion of a vehicle; however, item 12 of the tender would make the shipment subject to a minimum weight of 10,000 pounds. You were paid line-haul charges on that basis, and the Government does not question the propriety of those charges. The partial disallowance relates to a "Shipment Charge" billed in the amount of $24.85.

In the settlement certificate $18.50 of the claim for a shipment charge of $24.85 was disallowed, and $6.35 was allowed. Both amounts—$6.35 and $24.85, the amount billed—appear as shipment charges in Item 15 of Government Rate Tender (GRT), I.C.C. 1–U, Supplement 8, effective May 1, 1968. The GRT is cited in item 16 of your individual tender. Item 15 provides that "When Shipment Weighs" from "1,000 to 1,999 pounds," the charge per shipment will be $6.35. Since the actual weight of the shipment as stated is 1,725 pounds, settlement was

made on that basis; however, since the constructive weight of the shipment was 10,000 pounds, and falls within the weight bracket from 8,000 to 11,999 pounds in the column headed "When Shipment Weighs," you contend that the corresponding charge per shipment is $24.85.

Note 1 of Item 15 provides that the shipment charge will be applied to net weight of the shipment. Obviously, the issue is whether "net weight" means actual weight, as determined in our audit, or a constructive weight of 10,000 pounds, as contended by you. It is recognized that "net weight" is defined in paragraph (i) of Application of Tender (in GRT 1–U). Paragraph (i), added in Supplement 3 to GRT 1–U, pertains to Definition of Weights, and states in pertinent part:

> All rates and charges herein are based on the net weight (sometimes referred to as actual weight) of the shipment subject to minimum weight as provided herein. Net weight includes the weight of the goods plus cartons, barrels, fiber drums, wardrobes, crates (mirror, marble, etc.) * * *.

There is a dispute as to the scope of the phrase, "as provided herein."

Item 15 is not clear as to whether "herein" relates only to that item; however, if it is broad enough to include the GRT generally, the logical provision to which it would relate is item 12 of the uniform tender of rates form in the GRT, which provides a minimum weight per shipment of 500 pounds. You believe "herein" covers paragraph (e) of the GRT, and conclude that when the Government requests specific vehicle service, such as space reservation for a portion of a vehicle, the transportation charges are to be computed on actual weight subject to a minimum weight based on seven pounds per cubic foot of the space ordered. You state that "transportation charges" include shipment charge and line-haul charge, among others.

While your position appears to have some validity, we believe that a more reasonable view of paragraph (e) would be that it is limited to use for determining line-haul services; other tender provisions which are intended to be made subject to the minimum weight basis there authorized should include language specifically indicating that intent. We are advised that generally other motor carriers subject to the same tender terms bill and accept shipment charge payments on the basis of the actual, rather than constructive, weight.

Paragraph (e) does not state that the term "transportation charges" includes a shipment charge, nor does the minimum weight relate to the constructive weight formula in your individual tender, which you seem to assume. The term "transportation charges" generally refers to line-haul or inter-city charges for transportation services. 40 Comp. Gen. 199, 201 (1960). Transportation services involve physical services by the carrier, and Note 2 of Item 15 of the GRT provides that the shipment charge "is not related to physical services performed by or

for the carrier." We view this statement as justifying the application of the shipment charge to the actual weight, and not the constructive minimum weight, of the shipment involved.

We also note that the minimum weight in paragraph (e) refers to the minimum weight provided for in "carrier's applicable published tariff on file with the Interstate Commerce Commission." Since your individual tender is not a tariff, there is a technical question as to whether paragraph (e) would relate to the constructive weight formula and minimum weight in Tender 50, Supplement 9.

You state that since in the Table of Contents of GRT 1–V, the term "Shipment Charge" precedes the term "Transportation Rates," the shipment charge is a transportation charge founded on such tariff provisions applicable to all transportation charges. We do not understand that any particular significance may be attributed to the term in question merely because of its listing in the manner indicated. As we indicated above, Note 2 of Item 15 seems to limit consideration of the shipment charge as one independent of the formula used for the computation of the transportation charges.

The shipment charge is based on net weight as defined in paragraph (i), subject to a 500-pound minimum weight. Since the actual weight is 1,725 pounds, the minimum weight is irrelevant, and the $6.35 allowed by our settlement certificate is correct because this is the charge specified in Item 15 "when shipment weighs" 1,000 to 1,999 pounds.

You were previously advised that there would be justification for applying Item 15 if the item contained a provision similar to the one in Item 190, Note 1, pertaining to Ferry, Bridge and Service Charges, and in Item 200, Note 3, pertaining to Additional Transportation Charge. With exceptions not here pertinent each item provides that the charges "will be assessed on weight at which transportation rate is based." Also see Item 190 and compare Items 20 and 120.

Since we believe that the charge basis applied in the pertinent settlement certificate is correct, the disallowance of your claim for $18.50 is sustained. Our Transportation and Claims Division will continue collection action on similar transactions involving the shipment charge issue.

[B–176346]

Bids—Evaluation—Delivery Provisions—Rates Secured After Bid Opening

In the evaluation of bids on trucks solicited by the Federal Supply Service of the General Services Administration (GSA) for the United States Postal Service, GSA properly did not consider the lower bi-level loading freight rates secured by a bidder pursuant to section 22(1) of the Interstate Commerce Act after bid opening since section 1–19.203–3 of the Federal Procurement Regulations prohibits the use of freight rates that become available after bid opening unless no applic-

able 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 the movement of trucks in multi-level flat cars at bid opening time, there were rates published on the same commodity loaded on other transport vehicles, and the lowest available rates in effect at bid opening time were used by GSA.

Bids—Evaluation—Discount Provisions—Deviation From Terms of Invitation

The provision in an invitation for bids (IFB) prohibiting consideration of discounts for payment within less than 20 days does not become inapplicable because a 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 the evaluation of bids pursuant to section 1-2.407-3(c) of the Federal Procurement Regulations, which prohibits the evaluation of prompt payment discounts for time periods less than specified in the IFB. Although the Government is entitled to a discount on any part of delivery payments applied in liquidation of progress payments, bids under competitive bidding requirements must be valuated on the basis prescribed in the invitation.

Bids—Evaluation—Discount Provisions—Applicable Regulation

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

Bids—Evaluation—Options—Evaluation Exclusive of Option

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

To Williams & Jensen, March 29, 1973:

We refer to your letter dated June 26, 1972, and subsequent correspondence, protesting on behalf of Ward School Bus Manufacturing, Incorporated, against the award of contract No. GS-OOS-13551 to AM General (AM), a subsidiary of American Motors, by the General Services Administration (GSA).

This procurement was conducted by GSA for the United States Postal Service (Postal Service) pursuant to "Interim Agreement Between General Services Administration and the United States Postal Service Covering Real And Personal Property Relationships And Associated Services" dated July 1, 1971.

Invitation for bids EPNML-T1-44048-A, which was issued on March 2, 1972, by the Federal Supply Service of GSA, solicited bids for a definite quantity contract for one-half ton, right-hand-drive, light trucks. The invitation called for bids to be submitted on an

"f.o.b. contractor's shipping dock" basis for alternate quantities. For evaluating bids, the following basing points were listed for the quantity eventually awarded:

Basing Points	Quantity Alternate Item 3
Chicago, Illinois	2, 385
Philadelphia, Pennsylvania	2, 472
New York, New York	104
Memphis, Tennessee	1, 643
San Francisco, California	1, 369
Total	7, 973

On the bid opening date of May 3, 1972, only bids from the two previously mentioned firms were received, and it was decided to make award for alternate item 3 quantities. Transportation costs were added to the basic alternate item 3 unit prices of $2,570 by AM and $2,560.61 by Ward, and AM was thereby evaluated the low bidder. Under the evaluation AM's total vehicle price including discount ($20.00 per vehicle) was $20,331,150 plus $808,582.97 freight costs, for a total of $21,139,732.97. Ward's vehicle price was $20,415,743.53 plus a freight cost of $965,369.78, resulting in a total cost of $21,381,113.31. (Ward's offered discount of 2 percent, 10 days, was not included in the evaluation.) The contract was awarded to AM as low bidder on June 23, 1972.

Your protest is based primarily on the argument that contracting officer improperly evaluated Ward's bid and that Ward's bid is, in fact, the most advantageous to the Government. Initially, you urge that GSA should have evaluated Ward's bid in accordance with the lower freight rates which Ward had obtained pursuant to section 22(1) of the Interstate Commerce Act of 1887 (49 U.S. Code 22), and the lower freight rates for bi-level loading. If these freight rates had been included in the evaluation, it is alleged that Ward would have been determined as the low bidder.

Section 1–19.203–3 of the Federal Procurement Regulations (FPR) prescribes the standards for evaluation of freight costs as follows:

> The lowest available freight rates and related accessorial and incidental costs in effect on, or to become effective prior to, the expected date of initial shipment and on file or published at the date of the bid opening shall be used in the evaluation of bids. When rates or related costs become available after the bid opening, such rates or costs shall not be used in the evaluation unless they cover traffic for which no applicable rates or accessorial or incidental costs were in existence at the time of bid opening.

We are advised that Ward succeeeded in having section 22, bi-level (double decked freight cars) rates published by the railroad from Conway to San Francisco on June 9, 1972, effective June 1, 1972, and to Memphis and Chicago published on June 15, 1972, effective May 18,

1972. Although these rates were published prior to the award and during the bid evaluation period, they were not available until after the May 3 bid opening date.

In an attempt to overcome the general FPR prohibition against the evaluation of freight rates which are not available at the time of bid opening, you have noted that the regulation permits the evaluation of freight rates that have not been available at the time of bid opening if at that time there are no applicable rates in existence. In this connection, you contend that at the time of bid opening there existed no applicable rates between the subject points. Accordingly, it is your position that Ward's reduced rates which became effective during the evaluation period were the proper rates to be considered.

It is GSA's position that as of the bid opening date there were in existence applicable freight rates from Conway to the three basing points. GSA states that single deck rail car rates on a commodity basis were applicable to freight trucks. According to GSA, if a carload of freight trucks, i.e., postal vehicles, had been tendered to the railroad at Conway on the bid opening date the single-deck rates would have been applicable. In the evaluation, therefore, GSA states that it utilized the lowest available freight rates in effect on the date of bid opening, consisting of a combination of single drive-away charges to Little Rock, and bi-level rail charges to the basing points beyond. Since an applicable rate was in existence at the time of bid opening, it is GSA's position that under proper interpretation of the FPR use of the section 22, bi-level rates in the evaluation would have been improper.

With regard to your contention that the exception to the regulation is for application here because no rates were in effect at the time of bid opening, GSA reports that although the same commodity is often assessed different transportation charges depending on the manner in which it is packaged or shipped or the type of conveyance on or in which it is packaged or shipped, it is the basic commodity which is rated, not the container or transport vehicle. Therefore, GSA points out that while there were no rates published from Conway to the three basing points under section 22 or for the movement of trucks in multi-level flat cars, there were rates published on the same commodity loaded on other transport vehicles, and that the lowest available rates in effect at the time of bid opening were used by GSA in evaluating Ward's bid.

As GSA states, FPR 1–19.202–3 was designed to preclude bidders from seeking special rates after the opening of bids, thereby avoiding confusion in the evaluation of bids. To permit bidders to shop for special rates after bid opening would be inconsistent with competitive bidding requirements. 39 Comp. Gen. 774, 775 (1960).

Although you have argued that the regulation could be interpreted as permitting the use of the lower rates published after bid opening on the theory that the rates in existence at the time of bid opening were not applicable to the mode of transportation covered by the later rates, we believe that GSA's interpretation of the regulation to the contrary is reasonable and consistent with the language therein. Accordingly, we must conclude that Ward's bid was properly evaluated without regard to the section 22 bi-level rates. *See* B–162881, January 9, 1968.

You also contend that GSA's freight evaluation was defective in several other respects. In this connection, you have submitted freight evaluations prepared on Ward's behalf by transportation experts to illustrate errors in the GSA evaluation.

GSA has admitted the validity of some of your contentions in this regard. Accordingly, the agency conducted a re-evaluation which has resulted in a reduction of the evaluated freight costs from Ward's plant. However, the standing of the bidders was not changed by the re-evaluation, since AM's bid was still low by $240,807.71. Although there remain several areas of disagreement in connection with the evaluation of transportation costs, it is clear that in the absence of the application of section 22, bi-level rates that their resolution in favor of Ward will not result in the displacement of AM as the low bidder.

In addition, you contend that GSA erred in not considering Ward's prompt payment discount of 2 percent for payment within a 10-day period. Although you acknowledge that provisions of the subject invitation prohibit the consideration of discounts for payment within less than 20 days, you claim that this provision is inapplicable to the instant case because Ward has requested progress payments if it is awarded the contract.

As GSA states, on the first page of the invitation, block 9 of SF 33, Solicitation, Offer, and Award, bidders are specifically informed that all offers are subject to the "attached Solicitation Instructions and Conditions, SF 33A." Paragraph 9 of the latter form warns bidders that notwithstanding the fact that a blank is provided for a 10-day discount, prompt payment discounts offered for less than 20 days will not be considered in the evaluation of offers. Federal Procurement Regulations 1–2.407–3(c) prohibits evaluation of prompt payment discounts for time periods less than specified in the invitation for bids. GSA states that since the consideration of payment discounts of less than 20 days was not otherwise specified in the invitation, all bidders were entitled to rely upon paragraph 9 of SF 33A and the 10-day discount offered by your client could not be considered without prej-

udice to the other bidders. With respect to your argument concerning a relationship between progress payments and discounts, GSA takes the position that for purposes of bid evaluation there is no relationship whatever between discounts and progress payments and that they are entirely separate and distinct matters.

We have recognized that the Government is entitled to a discount on any part of delivery payments applied in liquidation of progress payments. *See* 46 Comp Gen. 430, 433 (1966). Therefore, we are not prepared to agree with the GSA statement that there is no relationship whatever between discounts and progress payments. On the other hand, it is a long-established rule of competitive bidding that bids must be evaluated on the basis prescribed in the invitation. In this case the bids were evaluated in accordance with the discount provision set forth in the invitation. There is no legal basis upon which we could properly object to the award which resulted from this evaluation.

Next you assert that GSA improperly evaluated AM's prompt payment discount offer of $20 per vehicle for payment within 21 days. It is your position that such discounts are prohibited by Postal Service Procurement Regulations and, therefore, cannot be evaluated in this procurement since it is being conducted by GSA on behalf of the Postal Service. In this regard, we note that the procurement is being conducted pursuant to an agreement between GSA and the Postal Service which provides that GSA procurement regulations shall apply. Since the invitation provides, pursuant to FPR 1-2.407-3, that discounts such as that offered by AM shall be evaluated, we cannot conclude that the agency's evaluation of AM's discount was improper.

You also contend that the agency failed to properly evaluate Ward's prices under the option provisions of alternate 3. In addition, you insist that the invitation is ambiguous regarding the evaluation of the option.

Neither the "Option to Increase Quantities" nor the "Method of Award" provisions of the invitation provided for evaluation or exercise of the option at the time of award. In the absence of such provisions in the invitation, it would not be proper to evaluate the option prices in determining the low bid. *See* 51 Comp. Gen. 528 (1972); B-159586, September 23, 1966. It is our opinion that the lack of any reference to the evaluation or exercise of the option at the time of the award was sufficient to inform you that option prices were not to be considered in the evaluation of bids. In any event, if a bidder is unsure as to the meaning of a provision in the invitation, the proper time for raising such question is prior to bid opening. *See* 50 Comp. Gen. 565, 576 (1971).

In regard to your contention that the subject procurement is in violation of the Budget and Accounting Act of 1921, as amended, 31 U.S.C. 627, we note that this act does prohibit the execution of a contract involving the payment of money in excess of appropriations made by law. We have been informed by GSA that the Postal Service has obligated funds to cover this award.

For the reasons set forth above, we find no legal basis upon which to object to the award to AM. Accordingly, your protest is denied.

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ADVERTISING

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

ADVERTISING—Continued
Advertising *v.* negotiation—Continued
Negotiation property—Continued Page
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
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Contamination of milk
Contaminant registration and approval requirement
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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

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"Reasonable share" of costs determination Page
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

ALLOWANCES
Military personnel
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

Quarters allowance. (*See* **Quarters Allowance**)
Subsistence allowance. (*See* **Subsistence allowance, Military personnel**)

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

APPROPRIATIONS
Availability
Christmas trees, ornaments, and decorations
Not a "necessary expense" Page

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

ASSIGNMENT OF CLAIMS (*See* Claims, Assignment)

BIDDERS
Qualifications
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

BIDDERS—Continued
Qualifications—Continued
Security clearance Page
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
BIDS
Addenda acknowledgment. (*See* **Contracts, Specifications, Failure to furnish something required, Addenda acknowledgment**)
Aggregate *v.* separable items, prices, etc.
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
Competitive system
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

BIDS—Continued
Competive system—Continued
Equal bidding basis for all bidders
Approximated *v.* minimum requirements Page

Since weight of ripper required to be mounted on crawler tractors was significant in determing 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

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

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

BIDS—Continued
Evaluation—Continued
Discount provisions
Applicable regulation Page
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
Options
Evaluation exclusive of option
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 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
Labor stipulations. (*See* **Contracts, Labor stipulations**)
Mistakes
Allegation after award. (*See* **Contracts, Mistakes**)
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

BIDS—Continued
Omissions—Continued
Prices in bid—Continued
Discernible pattern effect—Continued Page
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
Specifications. (*See* Contracts, Specifications)
BONDS
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
BUILDINGS
Public. (*See* Public Buildings)
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
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
Assignment
"Financing institutions" requirement
Tax exempt bonds method of financing Page
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
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

Double

Civilians on military duty

National Guard technicians

Page

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

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

COMPENSATION—Continued
Double—Continued
Civilians on military duty—Continued
National Guard technicians—Continued Page

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

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

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 pruposes should have been reflected in legislative history of the act---------- 597

Military personnel. (*See* **Pay**)
Overpayments
Debt collection
Waiver. (*See* **Debt Collections, Waiver, Civilian employees, Compensation overpayments**)
Overtime
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 implementing regu-

COMPENSATION—Continued
Overtime—Continued
Standby, etc., time—Continued
Home as duty station—Continued Page

lations, 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

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

"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
Overtime—Continued
Traveltime—Continued
Performance of work status Page

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

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 487

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

CONTRACTS

Assignments. (*See* Claims, Assignments)
Bids, generally. (*See* Bids)
Brand name or equal. (*See* Contracts, Specifications, Restrictive, Particular make)
Discounts
Partial and progress payments Page

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

Dual system of contracting
Construction and financing
Public buildings

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

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

CONTRACTS—Continued
Labor stipulations
Nondiscrimination
Compliance
Violation sanctions Page

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

Mistakes
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

Negotiation
Awards
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
Negotiation—Continued
Competition
Discussion with all offerors
Failure to discuss Page

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

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
Negotiation—Continued
Competition—Continued
Impracticable to obtain
Propriety of award Page

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

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

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Employees of contractor Page

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 offerosrs 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

Requests for proposals
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

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 eonvenience 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

CONTRACTS—Continued

Payments

Progress

Discount Page

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

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 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

CONTRACTS—Continued
Specifications
Ambiguous
Bidder action requirement
Prior to bid opening Page

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 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

Conformability of equipment, etc. offered
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

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

CONTRACTS—Continued
Specifications—Continued
Restrictive
Particular make
"Or equal" product not solicited Page

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

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 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

Termination
Convenience of Government
Erroneous awards

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

CONTRACTS—Continued
Termination—Continued
Negotiation procedures propriety Page
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
COURTS
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 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
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

DEBT COLLECTIONS—Continued
Waiver—Continued
Military personnel
Authority to waive
Public Law 92–453 Page

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

DEPARTMENTS AND ESTABLISHMENTS
Program implementation
Surplus agricultural programs
Barter program administered by Commodity Credit Corporation. (*See* **Commodity Credit Corporation, Barter program and agreements**)
Regulations. (*See* **Regulations**)

DISASTER RELIEF (*See* **States, Federal aid, grants, etc., Disaster relief**)

DISCHARGES AND DISMISSALS
Military personnel
Legality of discharge
Irrevocability of a 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 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

DISCRIMINATION
Labor stipulations. (*See* **Contracts, Labor stipulations, Nondiscrimination**)
Sex
Elimination of discrimination. (*See* **Nondiscrimination**)

DISTRICT OF COLUMBIA
Firemen and policemen
Compensation
Longevity increases
Basic compensation purposes Page

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

EQUAL EMPLOYMENT OPPORTUNITY
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

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 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

FUNDS
Appropriated. (*See* **Appropriations**)
GENERAL ACCOUNTING OFFICE
Recommendations
Implementation Page
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
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
GRANTS
To States. (*See* **States, Federal aid, grants, etc.**)
GRATUITIES
Reenlistment bonus
Critical military skills
Failure to qualify
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 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
Reenlistment bonus—Continued
Critical military skills—Continued
Reenlistment for retraining purposes Page
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
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

LEAVES OF ABSENCE

Civilians on military duty

Leave, etc., status

Page

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

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

LEAVES OF ABSENCE—Continued
Civilians on military duty—Continued
Leave, etc., status—Continued Page
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
Military personnel
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 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
Construction. (*See* **Statutory Construction**)
MEDICAL TREATMENT
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

MEDICAL TREATMENT—Continued
Military personnel—Continued
Hospitalization—Continued
Duty within hospital vicinity—Continued
Status of duty—Continued Page

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

MILEAGE
Military personnel
Travel by privately owned automobile
Round trip from home to airport

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

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 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

MILITARY PERSONNEL

Cadets, midshipmen, etc.

Subsistence allowance

Entitlement period Page

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 Enitilements 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 midsbipmen 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

Dependents

Transportation. (*See* **Transportation, Dependents, Military personnel**)

Discharges. (*See* **Discharges and Dismissals, Military personnel**)

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

Gratuities. (*See* **Gratuities**)

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**)

Pay. (*See* **Pay**)

Per diem. (*See* **Subsistence, Per diem, Military personnel**)

MILITARY PERSONNEL—Continued
Private property losses. (*See* **Property, Private, Damage, loss, etc.**)
Quarters allowance. (*See* **Quarters Allowance**)
Record correction
Retirement status
Disability in lieu of years of service
Income tax refund Page

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**)
Retirement
Re-retirement
Pay status. (*See* **Pay, Retired, Re-retirement**)
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

MILITARY PERSONNEL—Continued
Training—Continued
Nursing school
Status upon graduation Page

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 untildate 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

Transportation
Dependents. (*See* **Transportation, Dependents**)
Household effects. (*See* **Transportation, Household effects**)
Travel expenses. (*See* **Travel Expenses**)
NATIONAL GUARD
Civilian employees
Technicians
Training duty as guardsman
Compensation and leave status

Nationed 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 .....

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—Continued
Civilian employees—Continued
Technicians—Continued
Training duty as guardsman—Continued
Compensation and leave status—Continued Page

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

NONDISCRIMINATION
Contract provisions. (*See* **Contracts, Labor stipulations, Nondiscrimination**)
Discrimination alleged
Basis of sex

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 bachelor quarters (BAQ) 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

NONDISCRIMINATION—Continued
Sex discrimination elimination
Quarters allowance Page
Payment of basic allownace 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
Appointments. (*See* Appointments)
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
Leaves of absence. (*See* Leaves of Absence)
Membership fees. (*See* Fees, Membership)
Overtime. (*See* Compensation, Overtime)
Per diem. (*See* Subsistence, Per diem)
Presidential appointees. (*See* President, Presidential appointees)
Retirement. (*See* Retirement)
Travel expenses. (*See* Travel Expenses)
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

ORDERS—Continued
Amendment—Continued
After travel commenced—Continued
Military personnel—Continued
Page
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
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
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
Civilian employees. (*See* Compensation)

PAY—Continued
Double
Active duty and civilian employment
Reimbursement status Page

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

Retired
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 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

PAY—Continued
Retired—Continued
Re-retirement—Continued
Recomputation of retired pay—Continued
Extraordinary heroism award Page

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 his partial waiver of ret red 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

PAYMENTS
Contracts. (*See* **Contracts, Payments**)

POSTAL SERVICE, UNITED STATES
Contracts
Federal Supply Service
Regulation applicable to procurement Page

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
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

PROPERTY
Private
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 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

PUBLIC BUILDINGS
Contracts
Dual system of contracting
Construction and financing Page

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

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 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

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 bachelor quarters (BAQ) 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

QUARTERS ALLOWANCE—Continued

Dependents

Children

Payments that do not constitute support Page

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

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 marrigae, 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

REGULATIONS
Conflicting
Procurement agency *v.* General Services Administration Page
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 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
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 ------- 759

STATES

Employees

Bonding. (*See* **Bonds, Fidelity bonds, Other than Federal employees**)

Federal aid, grants, etc.

Disaster relief

Separately declared disaster areas

Expense reimbursement to temporary employees Page

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 non-governmental 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

Municipal airports. (*See* **Airports, Government use of municipal airports**

STATUTORY CONSTRUCTION

Language of statute unambiguous

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

STATUTORY CONSTRUCTION—Continued

Legislative intent

Omissions in amendments to legislation Page

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 compenstion 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

SUBSIDIES

Indemnity payments

Agricultural products. (*See* Agriculture Department, Indemnity programs)

SUBSISTENCE

Per diem

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

SUBSISTENCE—Continued
Per diem—Continued
Military personnel
Departure from permanent station
Delayed Page

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

Temporary duty
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

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 Page

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 midshipmen 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

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 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

TAXES—Continued

State

Federal employees

Leaves of absence effect on tax withholding Page

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

TRANSPORTATION

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

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

TRANSPORTATION—Continued
Dependents
Military personnel
Dislocation allowance
Members without dependents Page
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
Household effects
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
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

TRANSPORTATION—Continued

Rates

Exclusive use of vehicle

Bill of lading notation requirement Page

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

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 reserved 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

TRAVEL EXPENSES

Illness

Status of illness Page

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

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. 2–d makes no reference to situation in which temporary duty was ordered after arrival of member at his place of leave..... 580

TRAVEL EXPENSES—Continued
Military personnel—Continued
Transfers—Continued
Outside continental United States
Port of embarkation Page

Under orders authorizing permanent change-of-station from Florida to Puerto Rico, with delay en route, orders modified to provide temorary 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

Overseas employees
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 prescribes 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

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 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

VEHICLES
Government
Breakdown of vehicle
Standard of care by employee Page

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

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

WORDS AND PHRASES
"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 expen e 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

"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 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 ..... Page 446

"Shipments"

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

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