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[B-174725]

Contracts—Negotiation—Sole Source Basis—Replacement Contract for Diverted Items—Military Assistance to Foreign Countries

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

To Alvord and Alvord, November 7, 1972:

Reference is made to your letters of July 7 and 17, and August 8, 1972, on behalf of Hughes Tool Company—Aircraft Division (Hughes), requesting reconsideration of our decision B-174725, June 16, 1972.

The primary issue presented by the protest was:

* * * whether Bell was induced to divert aircraft from its Army production, to satisfy the requirements of a foreign military sale, in the belief that the replacement of the diverted aircraft and the price to the foreign customer would be concluded through the subsequent negotiation of a contract with Bell as the sole source.

We concluded that:

* * * Bell agreed to [the diversion] Modification P00123 to Contract -1699 *and thereby materially altered its position under that contract*, only because of its understanding that it would receive a separate negotiated contract for replacement aircraft, the price of which would constitute the Canadian sale price. * * *

* * * * * * *

Upon consideration of all the facts and circumstances of this case, *including the fact that Bell materially changed its position under Contract -1699* in the belief that a separate contract would be negotiated with it as a sole source, we must agree with Bell's contention that it is legally entitled to have its price for the helicopters delivered to Canada determined on the basis of the price (not in excess of $88,750) [the Department of the Army] is able to negotiate for 74 OH-58A replacement helicopters. [Emphasis supplied.]

In regard to this issue, the principal contention of your request for reconsideration is that the above-quoted conclusion is erroneous as a matter of law. In this connection, you point out that contract -1699 contains the standard Changes clause, prescribed by Armed Services Procurement Regulation (ASPR) 7-103.2, which provides:

CHANGES (1958 JAN)

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or

the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change, *provided*, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

You maintain that the changes in specifications and delivery accomplished by modification P00123 to Contract −1699 could have been required by Bell by the issuance of a unilateral change order under this clause. Therefore, you state:

* * * Since the substance of Modification P00123 could have been unilaterally imposed upon Bell through the Changes Clause without its acquiescence, *no material change of position* can be gleaned from Bell's agreement to Modification P00123. In effect, by this modification Bell merely voluntarily agreed to perform the contract in the same fashion which the Army could have compelled Bell to have so performed. This cannot be deemed a sufficient change in position to support an estoppel. [Emphasis in original.]

You further maintain that in the event a change order had been issued, Bell would have been permitted equitable adjustments in the contract price and delivery schedule to compensate for the increased cost and time required for performance of the contract. You also contend that any failure by Bell to have agreed to such adjustments would have constituted a question of fact under the Disputes clause of the contract, and you therefore conclude that since Bell agreed to do nothing more than what the Army could have unilaterally imposed through a change order, and also agreed to the type of relief available to it under the disputes procedure, Bell gave up nothing and suffered no change in position by its execution of Modification P00123.

Bell addressed this issue in its initial letter of protest to our Office dated December 10, 1971. Therein, Bell agreed that if the changes provided for by Modification P00123 "were isolated matters unrelated to the basic objective of satisfying Canadian needs," then the issuance of a change order and the determination of an equitable adjustment thereunder would have been appropriate. However, Bell argued:

But the supplement does something much more fundamental than merely to effect a routine change subject to equitable adjustment. Insofar as the 74 helicopters covered by the supplement are concerned, the supplement altered the basic needs that Bell was acting to fulfill under Contract–1699. The helicopters are being used to meet not the needs of the Army but the needs of Canada.

Bell maintained that the fulfillment of Canadian needs was beyond the scope of Contract–1699; that issuance of a change order to satisfy those needs would require of Bell performance which was not "essentially the same work as the parties bargained for when the contract was awarded," *Aragona Constr. Co.* v. *United States*, 165 Ct. Cl. 382, 391 (1964); and requiring Bell to supply the Canadian needs under a change order would therefore have constituted a breach of contract under the "cardinal change" doctrine.

In *Marden Corp.* v. *United States*, 442 F. 2d 364, 194 Ct. Cl. 799, the court stated that the purpose of the cardinal change doctrine:

> * * * is to provide a breach remedy for contractors who are directed by the Government to perform work which is not within the general scope of the contract. In other words, a cardinal change is one which, because it fundamentally alters the contractual undertaking of the contractor, is not comprehended by the normal Changes clause. 442 F. 2d at 369.

The court then observed that since the contractor's cardinal change claim was not encompassed by the Changes clause or any other contract provision:

> * * * we must necessarily conclude that the claim is not redressable under the contract. The [Armed Services Board of Contract Appeals] therefore, was without jurisdiction to consider the claim. Even though the board evidently was of the opinion that the claim was properly before it, its findings of fact on that claim were gratuitous and such findings do not preclude or limit a trial de novo on the merits of [the breach of contract claim] in this court. 442 F. 2d at 370.

In the instant case, had the contracting officer issued a change order under Contract–1699 directing the modification and diversion of aircraft to satisfy the needs of the Government of Canada, Bell would have been in a position to institute an action in the Court of Claims for breach of contract damages upon the basis that the change was cardinal in nature. As indicated in *Marden Corp.* v. *United States*, *supra*, such a claim would not have been redressable under the provisions of the contract, and therefore would not be cognizable under the administrative disputes procedure. Thus, the relief sought by Bell would not be limited to that afforded by the equitable adjustment provisions of the Changes clause.

The contracting officer was not required to resort to the issuance of a change order to fulfill the Canadian requirement because the parties entered into a bilateral agreement therefor through the execution of Modification P00123. Of course, Bell has made the contention, with which we agreed in our decision of June 16, that it was induced to execute Modification P00123 in the belief that it would receive a separate negotiated contract for replacement aircraft. Thus, Bell agreed to perform work under Contract–1699 which it might otherwise have maintained was beyond the scope of that contract. The effect of performance by a contractor of work which might be deemed beyond the

scope of a contract was discussed in *Silberblatt & Lasker, Inc.* v. *United States*, 101 Ct. Cl. 54, 79–80 (1944):

> Plaintiff says that these changes were beyond the scope of the contract and, therefore, do not come within the provisions of [the Changes clause] thereof permitting the contracting officer to make changes within the general scope of the contract. The change was merely from one character of stone to another, and in our opinion was within the general scope of the contract. [Citation omitted.] Even if the change was beyond the scope of those permitted, the plaintiff acquiesced in the making of it; it claimed no breach of contract, but continued performance of it as changed. The change made, therefore, is governed by [the Changes and Disputes clauses] of the contract.

Similarly, in *Texas Trunk Co.*, ASBCA No. 3681, November 20, 1957, 57-2 BCA 1528, it was stated:

> While the Government did not have a right under the contract to require the contractor to produce replacement supplies, and a refusal by the contractor to comply with the directions of the contracting officer would not have been a breach of contract, nevertheless, when the contractor did accept the order of the contracting officer for replacement supplies and commenced performance, an order for extra services and supplies was established under the contract.
>
> When a contracting officer orders extra services which are beyond the scope of what the Government has a right to require by unilateral action under the "Changes" clause, but the contractor accepts the order and performs the services, the contractor thereby waives his right to object, and the contractor may be compensated for the services by price adjustment under the "Changes" clause.

Therefore, it would appear that Bell's acquiescence in, and performance of, the Canadian modifications and diversion would preclude Bell from subsequently maintaining a breach of contract action under the cardinal change doctrine. The merits of such an action, or the likelihood of Bell's success therein, would not be controlling in deciding whether Bell's relinquishment of its right to institute an action based upon the theory of cardinal change constituted legal consideration. *See* 1 Williston on Contracts, Third Edition, Section 135A; 1 Corbin on Contracts, Section 140 (1963). In view thereof, and after consideration of your present arguments, we remain of the opinion that Bell substantially altered its legal position, as set out above, by executing Modification P00123.

You further maintain that our decision upon the principal issue in the case was based upon an incomplete, and therefore misleading, record. Specifically, you suggest that Bell was aware of the Army's interest in exercising the Contract–1699 option at an earlier point in time than stated in our decision, and that Bell had been advised more fully than we had indicated that their statements of December 1 and 18, 1970, set forth on pages 6 and 7 of our decision, were in error.

In its initial letter of protest, Bell alleged that in early February, 1971:

> * * * the Army first indicated to Bell that it was seriously considering using the option clause of Contract 1699 to fill the gap in the Army inventory that would be left by the diversion of the 74 helicopters to Canada.

In the absence of any refutation of this assertion in the administrative report and supporting documents, we stated on page 9 of our decision of June 16 that:

> The contracting officer's communications in early February 1971 were the first indication to Bell that the Army was considering exercise of the option under Contract -1699 in connection with the Canadian military sales case, although this course of action had been contemplated by the Army in 1969 and 1970.

This statement, you contend, is in error and you have indicated that inquiries to the contracting officer, his legal officer, and a former project manager will reveal that Bell was informed as far back as 1969 that the Army was contemplating exercise of the Contract -1699 option. You assert that this shows Bell was not induced by the Army to change its position under that contract.

Even if it were established that Bell was advised by AVSCOM personnel in 1969 and 1970 that exercise of the option was being considered, we do not believe that this would sufficiently alter the total factual circumstances so as to require or justify any change in our basic conclusion.

Bell's message of December 1, 1970, and its proposal dated December 18, 1970, for the modification and diversion of aircraft for Canada expressed an understanding that the diverted aircraft would be replaced under a separate contract. These statements were set forth in Bell's initial letter of protest dated December 10, 1971. From our examination of the administrative report, we concluded that no response had been made to the December 1 message and that the Army disagreed with the provision of the December 18 proposal in such a manner and under such circumstances as to not clearly negate Bell's understanding.

You now suggest that an inquiry of the contracting officer will show our decision is erroneous in this respect. When, as in this case, an allegation has been clearly made, and responsible officials of the contracting agency have had the opportunity to refute it, in the absence of a request for reconsideration from that agency, we must decline to question the administrative position.

Upon consideration of the arguments which you have raised, we remain of the opinion that our decision upon the pivotal issue in this protest was correct. Since this issue is dispositive of the protest we deem it unnecessary to decide the merits of the subsidiary issues presented by your request for reconsideration.

However, in view of the emphasis which you placed thereon, we offer the following comment regarding our conclusion that IFB -0235 did "not provide an adequate competitive basis upon which to make an award." It was our opinion "that the fundamental impropriety of IFB -0235 requiring its cancellation is that it was improperly issued, since its purpose was to test the market against an option which may

not be exercised." Thus, even if the technical controversy regarding the doors-off flight capability of the OH-6A were resolved in Hughes' favor, it would be an academic matter since this issue was a secondary reason for finding IFB -0235 should be canceled. We therefore believe it would be inappropriate to undertake any further examination of this issue.

In view of the foregoing, the decision of June 16 is affirmed.

[B-176111]

Bids—Mistakes—Evidence of Error—Withdrawal *v.* Bid Correction Requirements

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

To the Secretary of Commerce, November 7, 1972:

Further reference is made to a letter of June 28, 1972, with enclosures, from the Acting Assistant Secretary for Maritime Affairs, concerning an alleged mistake in bid by Levin Metals Corporation on the USNS CATSKILL (MCS-1), offered by the Maritime Administration (MarAd), under sales invitation No. PD-X-934.

The subject invitation was issued on March 29, 1972, inviting sealed bids on 16 surplus ships for nontransportation use or for scrapping. Article V of the invitation required bids to be accompanied by a bid deposit equal to 25 percent of the bid. Bid opening was scheduled for 2:30 p.m., e.s.t., April 27, 1972, in Washington, D.C. Levin's bid was received by MarAd prior to the 27th. On the morning of the 27th, Levin contacted the contracting officer in Washington and arranged to post an additional bid deposit with MarAd's San Francisco office to cover a last-minute telegraphic increase in its bid. A cashier's check representing the additional bid deposit was posted with that office prior to bid opening. Also, on the morning of the 27th, the contracting officer received a telegram from Levin which reads, in pertinent part, as follows:

LEVIN METALS CORPORATION HEREBY MODIFIES BID PREVIOUSLY SUBMITTED WITH BID BOND NUMBER 139754 BID NO. PD-X-934 OPENING APRIL 27 2:30 P.M. E.S.T. AS FOLLOWS. USNS CATSKILL /MSC-1/ WE INCREASE BID BY $133,586.00 ADDITIONAL BID DEPOSITS HAS BEEN PROVDED.

RICHARD LEVIN PRESIDENT LEVIN METALS CORP. COLL 27 2:30 PM 139754 PD-X-934 27 $133,586.00.

Bids were opened as scheduled and Levin bid $70,000 on the CATSKILL and $1.00 on the SS HESPERIA. Accompanying its bid was a bid bond in the amount of $37,500. In view of the telegraphic modification, the contracting officer computed Levin's bid on the CATSKILL at $203,586, and noted that its bid bond of $52,500 ($37,500 plus $15,000) would cover a bid of up to $210,000. After being notified that it was the high bidder, Levin claimed that its bid was mistakenly increased by $133,586, when the increase intended was $33,586, and submitted certain evidence to prove its claim.

The contracting officer concluded that Levin's bid could not be corrected to reflect a price of $103,586, as Levin had not established by clear and convincing evidence the existence of a mistake and the intended bid price as provided by section 1–2.406–3 of the Federal Procurement Regulations. The contracting officer's decision was based primarily upon the reasoning that had Levin intended an increase of only $33,586, it would not have increased its bid bond deposit by an amount sufficient to cover a bid up to $210,000, particularly since it had submitted with its bid a bond more than sufficient to equal 25 percent of the bid increased by $33,586. Therefore, Levin was advised by letter dated May 19, 1972, of acceptance of its bid in the amount of $203,586, for purchase of the CATSKILL.

Levin requests that the contract be reformed to reflect a price of $103,586. To support its request, Levin contends that the evidence of mistake submitted to the contracting officer was clear and convincing and satisfactorily explained the reason for increasing the bid bond. The evidence submitted to the contracting officer consisted of affidavits of Mr. Levin and three employees, its worksheet, and a letter dated May 15, 1972, from Western Union. The affidavits are to the effect that on April 26, 1972, Mr. Levin instructed his secretary to send in a bid modification of $33,586; that the secretary phoned in a message to this effect to Western Union; that the Western Union clerk repeated the message, including the $33,586 figure; and that cognizant personnel of Levin immediately claimed mistake upon hearing that its bid was $203,586. It is explained that the bid bond was increased in the event Mr. Levin decided at the last minute to increase the bid price on the HESPERIA and make it an "all or none bid." In this connection, one of the employees states that he was told to increase the bid bond to cover $200,000 for this purpose, but increased it to cover $210,000, in case Mr. Levin wanted to bid above the former figure. However, it is reported that the bid on the HESPERIA was not increased because of the shortness of time. The pertinent paragraph from the Western Union letter is as follows:

The seventh word from the end of the text was accepted and recorded by our operator as $133,586.00 and while we have no records of any problems with this particular message, we cannot say with certainty what happened in this case. Our operator believes he heard the figure as $133,586.00. In dealing with people and machines it is not impossible that an error could occur in the dictation and/or transcription of the message by telephone.

In addition to the foregoing, Levin has furnished a chart comparing the sale price and physical characteristics, particularly light displacement tonnage, of other surplus ships with the CATSKILL to support its contention that the intended bid was $103,586. Levin also points out that the second and third high bids on the CATSKILL were $80,290 and $74,312. Furthermore, Levin takes issue with MarAd's statement that because the CATSKILL was a military ship it has valuable pieces of equipment which can be salvaged and resold and, therefore, is worth more than the other ships compared.

The contracting officer states that since Levin's telegraphic modification was dispatched at 5:35 p.m., p.s.t., April 26, 1972, to arrive before 2:30 p.m., e.s.t., April 27, 1972, it is unreasonable to conclude that a further modification was contemplated the following morning in view of the 3-hour time differential. Furthermore, he points out that if the intended increase in the bid on the CATSKILL was only $33,586, the increased bid deposit would have allowed a latitude of over $100,000 to bid on the HESPERIA, a Liberty class ship whose current scrap value is well fixed at approximately $40,000. Therefore, he concluded that the last minute increase in the bid deposit was to cover the last minute $133,586 increase in the CATSKILL bid. He also points out that although the Western Union manager stated that "it is not impossible" for an error to occur, he also stated that "Our operator believes he heard the figure as $133,586." He also points out that the telegram modifying the bid on the CATSKILL refers to the posting of the additional bid deposit, indicating that it was needed to meet the 25 percent requirement because of the amount of the increased bid. In view of these circumstances, he gave less weight to the affidavits and unverified worksheet than he would have otherwise accorded them and concluded that there was not clear and convincing evidence of a mistake.

The general rule is that acceptance of a bid with knowledge of a mistake therein does not consummate a valid and binding contract. 36 Comp. Gen. 441, 444 (1956). Where, as here, a mistake in bid is alleged after bid opening but before award, the cited regulation (FPR 1-2.406-3(a) (1), (2), and (3)) provides as follows:

§ 1-2.406-3 Other mistakes—disclosed before award.

* * * * * * *

(1) A determination may be made permitting the bidder to withdraw his bid where the bidder requests permission to do so and clear and convincing evidence establishes the existence of a mistake. However, if the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended, and if the bid, both as uncorrected and corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

(2) A determination may be made permitting the bidder to correct his bid where the bidder requests permission to do so and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. However, if such correction would result in displacing one or more lower acceptable bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

(3) If the evidence does not warrant a determination under subparagraph (1) or (2) of this paragraph, a determination may be made that a bidder may neither withdraw nor correct his bid. * * *.

Although the regulation is specifically applicable to the procurement of supplies or services by the Government, the regulation was applied by MarAd in this case pursuant to the authority of 40 U.S. Code 474(16). The General Services Administration regulation applicable to sales is to the same effect. *See* Federal Property Management Regulation 101–45.803.

The regulation permits correction of a bid only where there is "clear and convincing evidence" of both the existence of a mistake and as to the bid actually intended. In the instant case, the contracting officer found that there was not clear and convincing evidence as to either the mistake or the bid intended. Since we agree with the contracting officer's conclusion that the evidence submitted by Levin did not clearly and convincingly establish whether it intended to bid $103,586, or $203,586, we have no disagreement with his determination refusing to permit correction of the bid. However, we do not agree with his conclusion concerning withdrawal. While the regulation permitting withdrawal of a bid based upon a mistake also requires the establishment thereof by "clear and convincing evidence," we have held that the degree of proof required is in no way comparable to that necessary to allow correction. *See* 36 Comp. Gen. 441, 444 (1956), wherein we stated:

* * * In undertaking to bind a bidder by acceptance of a bid after notice of a claim of error by the bidder, the Government virtually undertakes the burden of proving either that there was no error or that the bidder's claim was not made in good faith. The degree of proof required to justify withdrawal of a bid before award is in no way comparable to that necessary to allow correction of an erroneous bid.

Also see *Ruggiero* v. *United States*, 420 F. 24 709 (1970), 190 Ct. Cl. 327.

Applying the foregoing principle to the instant case, we believe that the evidence submitted prior to the award must be considered as reasonably indicating that a mistake was made. While concededly

such evidence as employee affidavits and an unverified worksheet are self-serving and may not alone be considered sufficient to permit correction, as in this case, we believe that in the absence of evidence to the contrary it is sufficient to permit withdrawal. In these circumstances, it is our view that withdrawal should have been permitted, and that the award as made legally could not be enforced.

In anticipation of such a conclusion, Levin advised us in a letter dated October 5, 1972, in pertinent part, as follows:

1. Basically, we have alleged and in our opinion, proven that a mistake was made.
In our opinion G.A.O., as an appeal board, must rule whether we are right or wrong and award the ship accordingly.
2. Procedural requirements and changes in personnel have caused this appeal to take far longer than anticipated, resulting in undue hardship for our company should rebidding prove necessary. Neither MARAD or Levin Metals feel bid withdrawal is an acceptable solution.

Normally, we must hold that where a bidder alleges a mistake after bid opening, he is not then free to decide to waive his right to have the bid rejected because of mistake. To permit a bidder to do so would be "tantamount to allowing the ostensible low bidder to elect, after bid opening, whether to stand on the bid, or withdraw it, * * * depending upon which course of action appeared to be in its best interests." 37 Comp. Gen. 579, 582 (1958). However, we have permitted an exception to the rule against waiver of mistake, if it is clear that the bidder would have been lowest (in a procurement), absent the mistake, even though the amount of the intended bid could not be clearly proven for the purpose of bid correction. 42 Comp. Gen. 723, 725 (1963); also B-168673, April 7, 1970. We think the exception can be applied in this case since Levin's bid as corrected or uncorrected would be high.

Accordingly, we believe Levin should be permitted to either withdraw its bid or waive its alleged mistake.

[B-176216]

Contracts—Default—Monies Owing Contractor—Disposition

The claim of the surety for the amount owing a defaulting contractor which had been paid to the Internal Revenue Service for taxes due under contracts other than the defaulted contract may not be certified for payment. A third party and not the surety completed the defaulted contract and hence the surety's claim, which represents withholding taxes from the wages of laborers, is under the payment bond and not under the performance bond or as completing surety and, therefore, the rule of *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where the Government's right of setoff is challenged by the surety under its payment bond.

To Pauline R. Barlow, United States Department of the Interior, November 7, 1972:

Reference is made to your letter dated June 1, 1972, with enclosures, requesting a decision as to the propriety of payment of a voucher

covering a claim for reimbursement in the amount of $808.61, representing payment of an Internal Revenue Service claim for withholding taxes by United States Fidelity & Guaranty Company levied against its principal, Swauger Contractors.

The taxes involved in the levy against the principal, Swauger Contractors, arose from contract No. 53500-CTO-48 dated September 11, 1969, with the Bureau of Land Management (BLM) for construction of a four-wire barbed wire fence and gates. The claim filed in behalf of the surety, United States Fidelity and Guaranty, is asserted on the basis that the surety is entitled to payment by reason of equitable subrogation under a Miller Act payment bond.

The facts, as they are recited in your letter and enclosures, are as follows:

The contractor failed to complete the job, and the Bureau of Land Management had the work completed by another contractor. The total contract earnings of the defaulted contractor was $14,929.42, of which $8,340.92 was paid to the Bank of Vernal, Vernal, Utah, assignee of Swauger Contractors. Excess completion costs totaled $1,995.80 and actual damages accrued against Swauger by BLM was $2,514.97, leaving a net balance in the contract account as of October 21, 1971, of $2,077.73. On October 21, 1971, the contracting officer advised the contractor that the balance remaining due ($2,077.73) would be remitted to the Internal Revenue Service (IRS) in partial satisfaction of its "Request for Offset-Government Contracts" in the amount of $14,104.82, transmitted to the Bureau of Land Management on July 22, 1971. The balance due under the contract was transferred to IRS on January 13, 1972. It is stated that the taxes represented by this amount presumably arose from contracts other than the contract with BLM.

It is reported that the assignee-bank assumed an unusual posture in this case in that it paid, with the consent of the surety, labor and material claims directly to the claimants. In a letter dated April 12, 1972, from the bank to the contracting officer, it appears that the bank filed a claim for the balance under the contract at the time payment was made of the amount to IRS. The amount of the bank's claim is not indicated.

In a letter dated November 16, 1971, from surety's counsel, following BLM's advice to the contractor that the contract balance was being set off against the IRS claim, counsel reiterated its claim for reimbursement (on behalf of the contractor) for the payment to IRS of $808.61 for withholding taxes of the contractor due IRS by reason of equitable subrogation to the rights of the IRS to the extent of the payment. In addition, the surety advised that it had paid a materialman's claim in the amount of $259.65. The claim for reimbursement was denied on the

basis that the Government's right to setoff was established in *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947) and followed in *Standard Accident Ins. Co.* v. *United States*, 119 Ct. Cl. 749 (1951). Thereafter surety's counsel responded citing a number of Court of Claims cases in support of its claim of priority over the IRS claim.

On the basis of the facts and circumstances, our decision is requested on the following questions:

1. May the enclosed voucher be certified for payment?
2. If the answer to the first question is in the affirmative, is the surety also entitled to reimbursement for the payment to Idaho Bit & Steel, Inc., in the amount of $259.65?
3. If you conclude that the surety is entitled to payment of either or both of its claims, then is the bank entitled to payment of the balance of the $2,077.73 to the extent that the bank is able to establish that it stood in the shoes of the surety by paying laborer's and materialman's claims and completion costs under the financing arrangement with the contractor?
4. Assuming that the answer to question No. 1 is in the affirmative, what steps are available to BLM to obtain a refund from IRS of all or a sufficient part of the payment of $2,077.73 in order to satisfy claims of the surety and the Bank of Vernal?

At the outset it must be observed that the surety here did not complete the contract. The Government had to obtain a third party contractor to complete the work and paid this completing contractor from unpaid contract balances. Hence the surety's claim here is under the payment bond and not under the performance bond or as completing surety. The sum claimed, $808.61, as stated above, represents withholding taxes on wages from laborers under the contract concerned here.

In the recent case, *Aetna Insurance Company* v. *The United States*, 197 Ct. Cl. 713, the Court of Claims stated:

* * * that plaintiff does not ask us to overrule our decision in *Barrett* v. *United States*, 177 Ct. Cl. 380, 367 F. 2d 834 (1966). The dispute over contract retainages in *Barrett* was between a Miller Act payment bond surety, which had paid the claims of laborers and materialmen against their contractor, and the United States, which had set off against the retainages an amount for tax deficiencies assessed against the contractor. We held that the surety's claim was subordinate and inferior to the right of the United States to set off the amount of taxes owed to it by the contractor. The touchstone in *Barrett* was the Supreme Court's decision in *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), which permitted the Government to set off an amount owed to it by its contractor against retainages claimed by the Miller Act surety under its payment bond. In the course of that opinion, however, the Court suggested a different outcome where the surety completed the Government's contract pursuant to a performance bond.

Later cases, relying on *Munsey Trust*, have held that a Miller Act surety who completes the contract on default of the contractor is entitled to the contract retainages in the hands of the Government, free from setoff for taxes owed by the contractor. However, each of these decisions reaffirmed the *Munsey* rule in situations where the Government's right of setoff is challenged by the surety under its payment bond. See *Security Insurance Co.* v. *United States*, 192 Ct. Cl. 754, 428 F. 2d 838 (1970); *Trinity Universal Insurance Co.* v. *United States*, 382 F. 2d 317 (5th Cir. 1967); *cert. denied*, 390 U.S. 906 (1968); *Aetna Casualty and Surety Co.* v. *United States*, 435 F. 2d 1082 (5th Cir. 1970).

The Court then considered the prime question in that case which concerned the application of the Federal Tax Lien Act of 1966, 80 Stat.

1125, 26 U.S. Code 6323 note, and concluded that the statute does not affect the Government's right of setoff in payment bond cases.

Since we are here dealing with a payment bond matter, we must conclude that the rule of Munsey Trust is applicable and conclude that your first question must be answered in the negative. The voucher will be retained here.

The foregoing conclusion renders unnecessary consideration of your three remaining questions.

[B-176539]

Bids—Buy American—Price Differential—Small Business or Labor Surplus Area Concerns

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

Bids—Aggregate *v.* Separable Items, Prices, Etc.—Subitem Pricing—Omissions

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

To the Brown Boveri Corporation, November 13, 1972:

This is in reply to your letters dated August 24, August 31 and September 5, 1972, protesting the proposed award of a contract to Westinghouse Electric Corporation under Bonneville Power Administration Solicitation No. 2420.

The solicitation requested bids for furnishing 500 kv power circuit breakers and related items. The record shows that your firm offered to furnish foreign source end items, while Westinghouse offered domestic source end items. Federal Procurement Regulations (FPR) 1-6.104-4(b) requires, in part, that each foreign bid be adjusted, for purposes of evaluation and comparison with bids for domestic end products,

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by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid, except that a 12 percent factor is used if the firm submitting the low acceptable domestic bid is a small business concern or a labor surplus area concern (as defined in FPR 1–1.801), or both. The Administration determined that Westinghouse is a labor surplus area concern and therefore adjusted your low bid by adding a 12 percent factor, resulting in its displacement by the Westinghouse bid.

Essentially, it is your position that the Administration should reject the bid of Westinghouse as nonresponsive for failure to show unit bid prices, as called for by the terms of the solicitation. You also protest the propriety in this instance of applying the 12 percent differential, rather than 6 percent, since the Westinghouse bid did not indicate which labor surplus area preference was claimed.

The format of the solicitation listed five bidding groups, the first four covering the delivery of varying quantities of circuit breakers to four different locations. In each of the first four groups three related subitems were listed in addition to the basic circuit breakers. Blank spaces for inserting unit and extended prices were provided for the basic circuit breakers as well as for each of the related subitems. (The fifth bidding group covered only a single item, a spare parts set, and is not relevant to our discussion of the responsiveness of the Westinghouse bid.) While the solicitation provided that award would be made by group, it also provided for bidding a lump-sum amount, as follows:

> Offers for furnishing two or more of the items may be submitted in the following space. However, offers which do not show unit prices as called for herein * * * will be rejected as not responsive to the Solicitation. If award of contract is made on the basis of a lump-sum as shown below, the amount to be paid for any item shall bear the same ratio to the lump-sum offered that the price offered for such item bears to the sum of the prices offered for the items comprising the lump-sum offer. If sub-items a, b and c are to be included, the offeror must so state.

The record shows that Westinghouse bid a unit price for each of the basic items and indicated by inserting the word "Included" in the spaces available for all subitems that those prices included the cost of the subitems. Since separate prices for the subitems were not stated in its bid, it is your contention that such failure rendered the Westinghouse bid nonresponsive.

The contracting officer has taken the position that, notwithstanding the failure of Westinghouse to show separate prices for subitems, the bid binds the company to furnish the circuit breakers together with the related subitems at a price which can be determined, and the failure to price the subitems separately is therefore immaterial.

It is well established that bids which do not conform to the requirements of a solicitation must be rejected as nonresponsive, unless the deviation is immaterial or is a matter of form rather than substance.

A deviation is considered material, and is cause for rejection, if it affects price, quantity or quality (B–175243, June 16, 1972); however, a requirement in a solicitation is not necessarily material simply because it is expressed in positive terms with a warning that failure to comply "may" or "will" result in rejection of the bid as nonresponsive. *See* 39 Comp. Gen. 595 (1960) and FPR 1–2.405.

In the present case we believe the failure to insert prices for the subitems was not a material deviation from the terms of the solicitation, since the bidder, by inserting the word "Included" in the spaces available for all subitems, would be obligated to furnish the subitems, as well as the basic circuit breakers, at the price bid for the basic circuit breakers. While you have cited prior decisions of this Office in support of your position that the bid should be rejected as nonresponsive, in each of the decisions, unlike the present case, the bidder's failure to submit prices for all items raised substantial questions as to whether the bidder could be required to perform all of the work required at the prices set out in his bid.

In connection with your objection to the Government's action in applying the 12 percent differential on the basis that Westinghouse is a labor surplus area concern, you state that since Westinghouse failed to indicate which labor surplus preference it was claiming on BPA Form 972, which was submitted with the bid, the company was not entitled to receive any preference.

Our review of the Westinghouse bid reveals that while the company failed to indicate which preference it claimed, the company did specify the location at which it would perform 100 percent of the work under the contract, and that such information was required if the bidder was claiming a preference. Pursuant to FPR 1–6.104–4(b), your foreign bid is required to be adjusted by adding a 12 percent factor if the low domestic bidder is a labor surplus area concern as defined in FPR 1–1.801. Since the latter regulation includes in its definition of a labor surplus area concern any firm which will perform in a substantial labor surplus area as classified by the Department of Labor (DOL) in its publication entitled "Area Trends in Employment and Unemployment," and since the location at which Westinghouse is committed to perform the contract was so listed and is within such an area, we must conclude that the 12 percent factor was properly used in evaluating the bids.

We note that you have cited decisions of this Office wherein we have held that a bidder could not be permitted to establish priority as a "certified-eligible concern" for labor surplus set-aside negotiations if the bidder failed to furnish with its bid evidence of its certification by the DOL, as required by the terms of the solicitations and the applica-

ble regulations. However, the cases cited are not relevant to the situation at hand which, unlike the cited decisions, does not involve a labor surplus set-aside procurement. Moreover, for purposes of the Buy-American preference a domestic bidder need not be a "certified-eligible concern" but only needs to satisfy the broader definition of a labor surplus area concern as indicated above.

For the reasons stated your protest must be denied.

[B-176542]

Travel Expenses—First Duty Station—Manpower Shortage—No Determination of Shortage

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

To the Director, Federal Judicial Center, November 13, 1972:

This refers to your letter dated July 14, 1972, presenting for our decision the question of whether the Federal Judicial Center (Center) may properly reimburse as a necessary expense the travel and transportation costs incurred by the Center's new appointee to the position of Director of Continuing Education and Training, Mr. Kenneth C. Crawford, incident to his relocation from Dallas, Texas, to Washington, D.C.

You refer to the following provisions contained in 28 U.S. Code 625(e), as added by Public Law 90–219, approved December 20, 1967, 81 Stat. 666:

(e) The Director is authorized to incur necessary travel and other miscellaneous expenses incident to the operation of the Center.

The letter of July 14, 1972, states in pertinent part as follows:

The question assumes my determination, concurred in by the Director of the Administrative Office of the United States Courts, the lack of candidates qualified for the extraordinary demands of this unique office constituted a "manpower shortage," that the travel and moving costs actually offered to the candidate in this case constituted part of a package necessary to attract a man of extraordinary capabilities and salary potential, and that implicit in 28 U.S.C. 625(3) [(SIC) 625(e)] is the administrative authority to reimburse an appointee on an analogous basis to that which would obtain in executive agencies and other agencies covered by 5 U.S.C. 5721 *et seq.*

I have assumed that the provisions of Chapter 57, subch. II of Title 5, United States Code, do not apply to the Federal Judicial Center. (See 5 U.S.C. 5721 for definitions). I have also assumed that neither the new appointee of the Federal Judicial Center nor the Federal Judicial Center itself is covered by the regulations prescribed by the President (Circular A–56, revised). Under the definitions promulgated in Circular No. A–56, "employee" is defined as a "civilian officer or employee of a *department* as defined here . . ." (section 1.2(b)). *Department* is defined in section 1.2(c) as "an *executive* department, independent establishment or other executive agency." It is our belief that the Federal Judicial Center was not intended to be included in the scope of the transportation statutes or the regulations issued pursuant thereto, but has been given legislative authority to develop its own administrative policies in this area in cooperation with the Director of the Administrative Office (28 U.S.C. 604).

Chapter 57, subchapter II of Title 5, U.S. Code, pertains to the travel and transportation entitlements of certain Government employees including new appointees to positions in the United States for which the Civil Service Commission has determined there is a manpower shortage. The following definitions of the agencies of the Government, whose employees are subject to such provisions, are set forth in 5 U.S.C. 5721:

For the purpose of this subchapter—
(1) "agency" means—

* * * * * * *

(C) a court of the United States;
(D) the Administrative Office of the United States Courts; * * *.

The provisions of 5 U.S.C. 5721 were derived from sections 18 and 19 of the Administrative Expenses Act of 1946, 60 Stat. 806, approved August 2, 1946, and were previously codified in 5 U.S.C. 73b–4 (1964 ed.) as follows, without any substitution or clarification of wording:

§ 73b–4. Definitions.

The word "department" as used in this Act shall be construed to include independent establishments, other agencies, wholly owned Government corporations (the transactions of which corporations shall be subject to the authorizations and limitations of this Act, except that section 5 of Title 41 shall apply to their administrative transactions only), and the government of the District of Columbia, but shall not include the Senate, House of Representatives, or office of the Architect of the Capitol, or the officers or employees thereof. The words "continental United States" as used in sections 73b–1 and 73b–3 of this title shall be construed to mean the forty-eight States and the District of Columbia. The word "Government" shall be construed to include the government of the District of Columbia. The word "appropriation" shall be construed as including funds made available by legislation under section 849 of Title 31.

When Title 5, U.S. Code, was codified and enacted as positive law in 1966 the Congress made it clear that the purpose of the 1966 act was to "restate in comprehensive form, *without substantive change*, the statutes in effect before July 1, 1965." *See* Senate Report No. 1380, page 18. In accordance with that purpose, we understand the revisors of Title 5 made clarifications and changes in language to express uniformity and to reflect the interpretations of language by appropriate authority. [Italic supplied.]

Under the wording of the statute, as indicated in 5 U.S.C. 73b–4 (1964 ed.), we held in 27 Comp. Gen. 313 (1947) that although the "judicial branch" was not specifically mentioned therein, the definition of "department" was sufficiently broad to include the judicial branch. Apparently, the revisors of Title 5 were aware of this interpretation and specifically listed "the Administrative Office of United States Courts" and "a court of the United States" to accord with such interpretation. At that time those two activities embraced the entire judicial branch. However, we do not believe the listing in that manner requires our Office to exclude any new activity which might be created as a part of the judicial branch in the future. Our view is that employees of the Federal Judicial Center as a part of the judicial branch would come within the scope of 5 U.S.C. 5721 *et seq.*, regardless of the fact that such activity is not specifically listed therein. It follows that the travel and transportation expenses of the employee here in question would be reimbursable only if the position to which he was appointed was one for which the Civil Service Commission had determined a manpower shortage to exist pursuant to 5 U.S.C. 5723.

While we recognized the basis for your view that the provisions of 5 U.S.C. 5721 *et seq.* are not applicable to the Center, we point out that even if that view be adopted there still would be no authority for payment of the expenses here involved. As indicated in 22 Comp. Gen. 885, it long has been held that unless otherwise provided by statute or regulations having the force of statutes an officer or employee of the Government must place himself at his first duty station at his own expense. It was because of this rule that the provisions of 5 U.S.C. 5723 authorizing travel expenses of new appointees to their first duty station in manpower shortage situations were enacted.

[B–169472]

Appropriations—Continuing Resolutions—Availability of Funds

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

To the Chairman, National Advisory Council on Extension and Continuing Education, November 14, 1972:

Reference is made to your letter of August 21, 1972, asking, in effect, whether Public Law 92–334 (Continuing Resolution), 86 Stat. 402, approved July 1, 1972, as amended, permits the Secretary of Health, Education, and Welfare to provide funds to the National Advisory Council on Extension and Continuing Education (Council) to carry out its functions under section 103 of the Education Amendments of 1972, Public Law 92–318, approved June 23, 1972, 86 Stat. 237, 20 U.S.C. 1009 note.

The Council was established by section 109 of the Higher Education Act of 1965, Public Law 89–239, approved November 8, 1965, 79 Stat. 1223, as amended, 20 U.S. Code 1009. The duties of the Council are set out in section 109(b) as being to advise the Commissioner of Education in the preparation of general regulations and with respect to policy matters arising in the administration of title I of the act, including policies and procedures governing the approval of State plans, and policies to eliminate duplication and to effectuate the coordination of programs offering extension or continuing education activities and services. Section 109(c) provides that the Council shall review the administration and effectiveness of all federally supported extension and continuing education programs and make annual reports concerning its activities together with its recommendations and furnish such reports to the Secretary, HEW, and to the President.

The Council receives no direct appropriations to carry out its functions but the Secretary, HEW, is directed by 20 U.S.C. 1233d to provide to the Council such personnel and technical assistance as the Council may require to carry out its functions. It is understood that funds provided for the Council under the above authority in prior years have been approximately $100,000 annually.

Title IV of the Elementary and Secondary Education Amendments of 1967, Public Law 90–247, approved January 2, 1968, as amended by title IV of Public Law 91–230, approved January 2, 1968, 20 U.S.C. 1221, *et. seq.*, authorized the appropriation of funds to be used by the Secretary, HEW, for, among other purposes, the planning and evaluation of all educational programs for which the Commissioner of Education is responsible. Under the provisions of 20 U.S.C. 1224 the Secretary, HEW, is required, no later than January 31 of each year, to transmit to the appropriate committees of the Congress a report evaluating the results and effectiveness of programs and projects receiving assistance during the preceding fiscal year.

Section 103 of Public Law 92–318, however, provides that—

SEC. 103. (a) During the period beginning with the date of enactment of this Act and ending July 1, 1974, the National Advisory Council on Extension and Continuing Education, hereafter in this section referred to as the National Advisory Council, shall conduct a review of the programs and projects carried out with assistance under title I of the Higher Education Act of 1965 prior to July 1, 1973. Such review shall include an evaluation of specific programs and projects with a view toward ascertaining which of them show, or have shown, (1) the greatest promise in achieving the purposes of such title, and (2) the greatest return for the resources devoted to them. Such review shall be carried out by direct evaluations by the National Advisory Council, by the use of other agencies, institutions, and groups, and by the use of independent appraisal units.

(b) Not later than March 31, 1973, and March 31, 1975, the National Advisory Council shall submit to the Committee on Labor and Public Welfare of the Senate and the Committee on Education and Labor of the House of Representatives a report on the review conducted pursuant to subsection (a). Such report shall include (1) an evaluation of the program authorized by title I of the Higher Education Act of 1965 and of specific programs and projects assisted through payments under such title, (2) a description and an analysis of programs and projects which are determined to be most successful, and (3) recommendations with respect to the means by which the most successful programs and projects can be expanded and replicated.

(c) Sums appropriated pursuant to section 401(c) of the General Education Provisions Act for the purposes of section 402 of such Act shall be available to carry out the purposes of this section.

Inasmuch as the annual appropriation bill providing funds to HEW for the current fiscal year has not been enacted into law, the Department is fiscally operating under the Continuing Resolution. Question regarding the availability of funds provided therein to carry out the functions of the Council under section 103, quoted above, arises by reason of section 106 of the Continuing Resolution which provides that—

No appropriation or fund made available or authority granted pursuant to this joint resolution shall be used to initiate or resume any project or activity which was not being conducted during the fiscal year 1972.

We have been informed by a representative of HEW that they consider the functions prescribed in section 103 to constitute a new activity of the Council because such section provides for the evaluation of specific programs and projects; it requires the issuance of reports to certain committees of the Congress; and the activity is a "one shot" project that will terminate upon the issuance of the two reports required by section 103(b). Furthermore, it is reported that estimates regarding annual costs of the Council in carrying out its functions under section 103 are approximately $223,000 as compared to about $100,000 annually in previous years.

On the other hand, it is your view that since for the last 7 years the Council has had responsibility for evaluating programs under title I of the Higher Education Act of 1965, the language of section 103 of Public Law 92–318 does not provide for a new Council program or activity.

In this connection you state that—

> Funds made available to the Secretary of Health, Education, and Welfare under Section 402(a) of the General Education Provisions Act are discretionary funds. These funds can be used to evaluate any existing educational program, including programs authorized under Title I of the Higher Education Act of 1965. Therefore, *even without the enactment of the Education Amendments Act of 1972*, we believe the Secretary of Health, Education, and Welfare is legally able to make available these discretionary monies for an evaluation of Title I (HEA) programs. To hold that because the Education Amendments Act of 1972 now specifically requires the Secretary to do exactly that, it consequently makes him unable to do so because it constitutes a "new activity," strikes us as logically unsound and clearly unintended by the Congress * * *.

It seems to us that since the Council had authority and responsibility to evaluate title I programs independently of section 103 of Public Law 92–318, the primary effect of such section, insofar as the question here under consideration is concerned, is to require the Council to evaluate certain programs and projects which theretofore were more or less discretionary with the Council.

Accordingly, while the application of section 106 of the Continuing Resolution in the instant situation is not entirely free from question, we agree with your view that the functions prescribed in section 103 of Public Law 92–318 do not constitute a new "project or activity" within the meaning of section 106 of the Continuing Resolution. Consequently, it is our view that such section does not preclude the provision of funds to the Council to carry out its functions under section 103.

A copy of this decision is being sent to the Secretary of Health, Education, and Welfare.

[B–176310]

Station Allowances—Military Personnel—Excess Living Costs Outside United States, Etc.—Members Subsisted at Government Expense—Leave Period Within United States

Enlisted men without dependents assigned to a permanent duty station outside the continental United States and subsisted at Government expense and, therefore, not entitled to the cost-of-living allowance authorized by 37 U.S.C. 405 for the purpose of defraying the average excess costs experienced by members on permanent duty outside the United States do not gain entitlement to the allowance while on leave in the United States on the basis a Government mess is not available to them in view of the fact paragraph M4301–3b(1) of the Joint Travel Regulations prescribes a member at a permanent overseas duty station without dependents is not entitled to a cost-of-living allowance while absent on leave in the United States or while being subsisted at Government expense at the permanent duty station.

To Lieutenant C. A. Dunn, Department of the Navy, November 14, 1972:

Further reference is made to your letter dated April 27, 1972, FD :gb 7222, with enclosures, forwarded to this Office by fourth endorsement

dated June 16, 1972, of the Per Diem, Travel and Transportation Allowance Committee, requesting a decision whether payment of cost-of-living allowance may be made to SN Daniel P. Hernandez, 455–96–6667, USN, and PC3 Thomas W. Clark, 033–36–5757, USN, incident to their absence from their permanent duty stations in a leave status. The request has been assigned Control No. 72–23 by the Committee.

You indicate that both Mr. Hernandez and Mr. Clark were assigned to permanent duty stations outside the continental United States but were not receiving station allowances at their duty stations at the time they departed such duty stations for ordinary leave within the United States. Apparently both members were "without dependents" and both were being subsisted at Government expense at their permanent duty stations prior to their departure on leave. The only difference you indicate between the two members' situations is that one was assigned to an "afloat" unit and the other to a shore activity.

Both members have filed claims for cost-of-living allowance for the periods of their leave in the United States—Mr. Hernandez for 15 days and Mr. Clark for 30 days.

The statutory authority for the payment of the cost-of-living allowance claimed is contained in 37 U.S. Code 405. As appears applicable in this case, that statute provides that the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside the United States or in Hawaii or Alaska, whether or not he is in a travel status. The cost-of-living allowance and housing allowance may be prescribed independently of each other.

Regulations issued pursuant to 37 U.S.C. 405 are contained in Part G of the Joint Travel Regulations, paragraph M4301–1 of which provides that housing and cost-of-living allowances are authorized for the purpose of defraying the average excess costs experienced by members on permanent duty at places outside the United States.

Paragraph M4301–3b(1) of the regulations authorizes payment of cost-of-living allowances "for any day during which a Government mess (3 meals a day) is not available to the member at his permanent duty station." You indicate that by virtue of the members' absence from their duty stations in this case, such Government mess was not available and this situation could presumably constitute entitlement. You also indicate, however, that it appears illogical that a member would become entitled to a station allowance which he is not entitled to at his permanent duty station merely by being absent from that station.

As is indicated by the regulations, the purpose of the cost-of-living allowance is to provide some measure of reimbursement for the excess living costs experienced by members on duty outside the United States. Entitlement to such allowance is, therefore, predicated upon the member incurring excess costs at his permanent duty station. While in certain circumstances a member who has become entitled to such an allowance at his duty station may continue to receive it while he is on leave outside the United States, he may not gain entitlement to such allowance where no entitlement otherwise existed merely by going on leave in the United States. *See* paragraph M4301–3b(1)2 of the Joint Travel Regulations and Note 1, Table 3–1–6 (effective January 1, 1972) of the Department of Defense Military Pay and Allowances Entitlements Manual.

In this regard subparagraph 4151–2b of the United States Navy Travel Instructions provides that, in accordance with paragraph M4301–3b(1) of the Joint Travel Regulations, a member without dependents is not entitled to cost-of-living allowances while absent on leave in the United States or while in fact being subsisted at Government expense at his permanent duty station. And, subparagraph 4151–5 of the United States Navy Travel Instructions specifically provides in part as follows:

> 5. COST-OF-LIVING ALLOWANCES WHEN IN A LEAVE STATUS. In accordance with the Joint Travel Regulations, par. M4301, members otherwise entitled to cost-of-living allowances will continue to receive such allowances while on leave not involving return to the United States. Also, an enlisted member who normally subsists in a Government mess at his permanent duty station is entitled to the cost-of-living allowances for any periods during which he is entitled to leave rations provided he remains attached to his permanent duty station, *the leave does not involve return to the United States*, and he is not, in fact, subsisted in a Government mess during such periods. * * *. [Italic supplied.]

Since both Mr. Hernandez and Mr. Clark were apparently being subsisted at Government expense prior to their departure on leave in the United States and were not entitled to cost-of-living allowances at that time, they are not entitled to cost-of-living allowances for the periods of their leave. Accordingly, their claims may not be allowed and will be retained in this Office.

[B–176879]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Not Consummated

An employee who incident to transferring to another agency and location terminated a contract to purchase a residence and its supplemental "Use and Occupancy Agreement" is considered to have occupied the residence under a lease arrangement and to be entitled to reimbursement for expenses incurred within the terms of the lease as provided by section 4.2h of OMB Circular A–56. Under the agreement, the employee's claim for credit costs and a cancellation fee

may be recognized but not the cost of cleaning and repairing the residence since this obligation would be incurred by the employee regardless of station change. Furthermore, property improvements are not provided under 5 U.S.C. 5724(a) or Circular A–56 and, therefore, the costs of erecting a fence and installing a bathroom vanity are not reimbursable.

To Carmella J. Rizzo, United States Treasury Department, November 16, 1972:

Reference is made to your letter, reference A : F : F : V, of August 17, 1972, requesting an advance decision as to certification of the enclosed voucher for $636 in favor of Mr. Leslie W. Harper, Jr., for reimbursement of certain expenses he incurred in connection with a real estate transaction at his old official station incident to his recent transfer.

The record shows that while Mr. Harper was employed as a Department of the Air Force civilian in California he entered into a contract to purchase a residence in Sacramento, California, on August 1, 1971. He occupied that residence on August 22, 1971, under a "Use and Occupancy Agreement" which by its terms became a supplement to the agreement of purchase. Among other things the use and occupancy agreement required the purchaser to pay the sum of $6 per day for the privilege of using the residence until settlement date. Shortly before and immediately after occupying the residence Mr. Harper contracted for certain improvements to the dwelling which included the installation of a bathroom vanity at a cost of $65 and the installation of a fence at a cost of $211.

Settlement on the residence was delayed and Mr. Harper apparently decided not to complete the purchase after receiving the offer of a transfer to the Internal Revenue Service in Philadelphia, Pennsylvania. He notified the seller that he was moving from the premises and the purchase transaction was terminated under the provisions of the contract for purchase as supplemented by the use and occupancy agreement. This resulted in charges to Mr. Harper of $35 for "Credit Costs and Cancellation Fee" and $325 for "Cleaning and Repairing Costs."

The voucher submitted covers the costs of the improvements as noted above and the charges which resulted from termination in the total amount of $636. Reimbursement is claimed under the provisions of 5 U.S. Code 5724a, section 4.2h, Office of Management and Budget (OMB) Circular No. A–56, revised August 17, 1971, and the implementing regulation of the Internal Revenue Service.

Mr. Harper believes the use and occupancy agreement he signed was in effect a lease and that his cancellation of the purchase agreement as a result of his transfer served to terminate his unexpired lease. Both he and the seller contemplated that the occupancy agreement would run until the settlement date which would have occurred at some point in

the future had the transfer not intervened. In the circumstances we believe that the arrangements under which Mr. Harper occupied the residence may be viewed as a lease for purposes of the law and regulations involved. Further, since those arrangements were terminated prior to settlement of the purchase transaction due to the claimant's transfer, the costs involved may be considered as having resulted from the settlement of an unexpired lease under such law and regulations.

Regarding the costs claimed by Mr. Harper in connection with the settlement in question, section 4.2h of OMB Circular No. A–56 provides:

> * * * Expenses incurred for settling an unexpired lease * * * are reimbursable when (1) applicable laws or the terms of the lease provide for payment of settlement expenses, (2) such expenses cannot be avoided by sublease or other arrangement, (3) the employee has not contributed to the expense by failing to give appropriate lease termination notice promptly after he has definite knowledge of the proposed transfer, and (4) the broker's fees or advertising charges are not in excess of those customarily charged for comparable services in that locality. * * *.

The above regulation authorizes reimbursement of settlement expenses provided for by the terms of the lease. A review of the use and occupancy agreement reveals the following pertinent provisions:

> 2. * * * [Lessees] further agree to pay any normal upkeep costs * * *.
>
> * * * * * * *
>
> 4. * * * [Lessees] hereby agree to pay * * * all costs reasonably necessary to repair damage to the premises caused by the * * * [lessee], or which occurred while the * * * [lessee] was in possession, in addition to making payment of other costs required to reimburse Owner for expenses incurred for loan applications, appraisal, and escrow fees, credit reports, etc. * * *.

Under the provisions of that agreement the credit cost and cancellation fee of $35 meets the criteria established by regulation and reimbursement of this expenditure is authorized. On the other hand, the cleaning and repairing costs of $325 involve costs which Mr. Harper was obligated to pay under paragraphs 2 and 4 of the agreement incident to his occupancy of the residence for normal upkeep. Costs involved in the upkeep of the residence including both cleaning and repair costs were obligations which the employee would have incurred regardless of any change of station incident to his Government service. Since such costs do not result from the termination of a lease or sale of a residence but are costs which the employee must incur for maintenance of this residence they are not considered to be reimbursable expenses incident to the sale of a residence or the termination of a lease. *See* B–163801, May 1, 1968, copy enclosed. Consequently, reimbursement of that expenditure is not authorized.

Mr. Harper's claim for reimbursement of the cost of the fence and vanity involve expenses for improvement of the property. Neither 5 U.S.C. 5724a nor OMB Circular No. A–56 purport to authorize reim-

bursement of such expenditures. The fact that Mr. Harper was not able to enjoy those improvements over the period he may have contemplated and the fact that he did not recover their value through sale of the property as improved furnish no basis for allowance of these costs. *Cf.* section 3.1c(13), OMB Circular No. A–56.

Accordingly, the voucher, which is returned herewith, may be certified for payment only in the amount of $35 for credit cost and cancellation fee.

[B–175902]

Bids—Evaluation—Delivery Provisions—Lowest Overall Cost to Government

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

To the United States Steel International, Inc., November 17, 1972:

This is in reference to your letters of May 5 and June 26, 1972, protesting the award of a contract to Davis Wire Corporation for barbed wire coils for shipment to Vietnam and Thailand, under invitation for bids (IFB) No. DSA 700–72–B–1748, issued February 29, 1972, by the Defense Supply Agency, Columbus, Ohio. Your protest is on the grounds that the method of evaluating the bids received in response to the IFB was improper, prejudicial, contrary to the expressed provisions of the invitation, and not in the best interests of the Government.

Eight offers were received in response to the IFB, including your offer which was submitted on an f.o.b. origin basis.

It was determined by the contracting officer after evaluation of the bids that Items 1 and 2 were to be awarded to Davis Wire Corporation and Items 3 and 4 to your firm. The awards were made on May 18, 1972, after notification to this Office, in accordance with paragraph 2–407.8 (b)(3)(i) of the Armed Services Procurement Regulation (ASPR).

In a telephone conversation of April 18, 1972, and in the contracting officer's letter of April 27, 1972, denying your protest, you were informed that the f.o.b. origin prices were being evaluated by adding the lowest *land* transportation costs in accordance with the provisions of clause DO6 (*see* ASPR 2–201(a) Sec. D (vi)) of the invitation, which reads as follows:

Land methods of transportation by regulated common carrier are normal means of transportation used by the Government for shipment within the United States (excluding Alaska and Hawaii). Accordingly, for the purpose of evaluating bids (or proposals), only such methods will be considered in establishing the cost of transportation between bidder's (or offeror's) shipping point and destination (tentative or firm, whichever is applicable), in the United States (excluding Alaska and Hawaii). Such transportation cost will be added to the bid (or proposal) price in determining the overall cost of the supplies to the Government. When tentative destinations are indicated, they will be used only for evaluation purposes, the Government having the right to utilize any other means of transportation or any other destination at the time of shipment.

ASPR 19-208.2(c) provides that clause D06, quoted above, may be modified when it is appropriate to use methods of transportation other than land transportation in evaluating bids or proposals. Although the specific method of modifying clause D06 is not set forth in the ASPR, you contend that it is logical to assume that it could be done by an additional special clause such as clause B15. (ASPR 2-201 (a) Sec. B (xiv)). Clause B15 provides that:

Bids (or proposals) will be evaluated and awards made on the basis of the lowest laid down cost to the Government at the overseas port of discharge, via methods and ports compatible with required delivery dates and conditions affecting transportation known at the time of evaluation. Included in this evaluation, in addition to the f.o.b. origin price of the item, will be the inland transportation costs from the point of origin in the United States to the port of loading, port handling charges at the point of loading, and the ocean shipping costs from the United States port of loading to the overseas port of discharge. . . . The Government may designate the mode of routing of shipment and may load from other than those ports specified for evaluation purposes.

It is your position that clause D06 of the solicitation merely sets forth the general rule with respect to evaluation of f.o.b. origin bids, and that clause B15, which was *intentionally* incorporated in the instant IFB by an affirmative act of the contracting agency, should be considered as modifying the provisions of clause D06, which were *automatically* included in the invitation.

You contend that since clause B15 modified clause D06, the term "lowest laid down cost to the Government" used in clause B15 is not restricted merely to the cost of land methods of transportation but instead applies to any or all inland transportation costs, including barges; and since, in this instance, barge transportation provides the lowest laid down cost to the Government, your bid should have been evaluated on the basis of such barge transportation costs, which would have resulted in your bid being the lowest for items 1 and 2.

While the language of clause B15 of the invitation standing alone might be subject to the interpretation advanced by you, the intent and meaning of an invitation for bids is not to be determined by consideration of an isolated section or provision but, rather, from consideration of the invitation in its entirety. 17A C.J.S. Contracts sec. 297.

Also, each provision must be construed in its relationship to other provisions and in the light of the general purpose intended to be accomplished. 39 Comp. Gen. 17, 19 (1959); B-171396, March 26, 1971. Furthermore, it is a well-established rule concerning the construction of such documents that an interpretation which gives a reasonable meaning to all parts of the instrument will be given preference over one which leaves a portion of it useless, inoperative, void, meaningless or superfluous. B-167566, December 4, 1969.

If your interpretation of the IFB were adopted, it is apparent that clause D06 would be subordinated to clause B15 and, in fact, would be superfluous. The two clauses must be read in conjunction with one another. Clause B15 provides, in part:

> Bids will be evaluated and awards made on the basis of the lowest laid down cost to the Government at the overseas port of discharge. . . . Included in this evaluation in addition to the f.o.b. origin price of the item will be the inland transportation costs from the point of origin in the United States to the port of loading . . .

It is clear that the quoted sentences from clause B15, which do not state how inland shipping costs will be determined, are controlled by clauseDO6 which does provide how those costs will be determined, i.e., through the use of land methods of transportation. Of course, the words "lowest laid down cost to the Government" cannot be ignored. These words apply, however, only to those transportation methods contemplated under the terms of the invitation, i.e., land methods of transportation. Thus, when read together, it is our view that the two clauses indicate that bids must be evaluated on the lowest laid down cost to the Government based on, among other things, *land* transportation for inland shipping costs.

In addition, we believe it is more logical to assume that had the Defense Supply Agency intended to modify clause DO6, so as to allow evaluation of bids based on the barge method of transportation, it would have done so by changing that clause to specifically provide for such evaluation. In this connection, we note that the contracting officer stated in his report of June 1, 1972, that it had been previously determined it was not feasible to amend clause DO6 to include barge transportation. Although the pertinent ASPR provisions do not specify the method for "modifying" clause DO6, we regard the use of such term as contemplating an actual change in the wording of the clause itself. *See* 19 Comp. Gen. 662 (1940), at page 666, wherein we defined "modify" as meaning "to change somewhat the form or qualities of; to alter somewhat." To attempt to modify an invitation provision, as you suggest, by adding another provision which is inconsistent with the first provision (and not covered by paragraph 19,

Order of Precedence, Standard Form 33A) would, in our opinion, only create an ambiguity in the invitation.

It is the position of the Defense Supply Agency that even though it was learned after bid opening and prior to award that barge shipments using rates more favorable to you would result in a lower evaluated cost, the relatively small cost difference and the urgency of the requirement made resolicitation with revised evaluation provisions an unacceptable alternative. The record provides no basis on which this Office can conclude that such determination constituted an unreasonable or arbitrary action by the agency so as to affect the validity of the awards, which were made in accordance with the IFB provisions. Although the agency has reported that further consideration is being given to the possible use of solicitation provisions permitting the use of barge rates for evaluation in future purchases of barbed wire, its decision can have no effect on the subject procurement.

In view of the foregoing, it would appear that consideration of the other points raised in your protest is unnecessary.

Accordingly, since we find no legal basis for this Office to disturb the award made to Davis Wire Corporation, your protest is denied.

[B-176839]

Bids—Telegraphic Submission—Authorization Requirement

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

To Electro-Mechanical Industries, Inc., November 17, 1972:

Further reference is made to your telegram of August 23, 1972, as supplemented by subsequent correspondence, protesting against the rejection of your bid under invitation for bids (IFB) F41608-73-B-0020, issued by Kelly Air Force Base, Texas, on July 31, 1972.

The procurement is for 2,379 transmitter modules and 2,534 receiver modules, components of the RT 10 survival radio. The record indicates your firm was originally added to the bidders list in early August 1972 as a result of a telephone call to the procurement activity, in which you requested a bid set. For some unknown reason, your address

was erroneously listed as San Benito, California, instead of San Benito, Texas, your correct address. You received the invitation in due course and began preparation of your bid. Due to an urgent requirement for the items, the procurement activity issued amendment 0001 to the IFB on August 8, 1972, which changed the bid opening date from August 30, 1972, to August 21, 1972, at 1:30 p.m., central time. The amendment was forwarded to all firms on the bidders list. Because your address was incorrectly listed, your amendment was misdirected to California from where it was redirected back to Texas. This delay resulted in your not being informed of the requirement for earlier bid submission until receipt of the amendment at 9:15 a.m., on August 21, 1972, the new bid opening day.

Inasmuch as there were only about 4 hours remaining until bid opening time, you contacted the contracting officer's representative by telephone and informed him of the problem and requested an extension of the bid opening date. He denied the request for an extension and you then inquired as to how you should submit your bid in view of the limited time remaining. It is reported that the contracting officer's representative advised you to use whatever means were available to submit your bid. You transmitted your bid over the Telex system, which arrived at the procurement activity just prior to bid opening time. The contracting officer rejected your telegraphic bid since the IFB did not authorize such method of bidding. You also mailed a confirmatory bid at 4:30 p.m. on August 21, 1972, which was classified as a late bid by the contracting officer.

You contend that the misdirection of your copy of the amendment by the procurement activity caused the delay in its delivery which effectively prevented you from submitting your bid on a timely basis. This situation, in your opinion, comes within the purview of subparagraph (c) of Armed Services Procurement Regulation (ASPR) 2-208 which reads as follows:

> (c) Any information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders, as an amendment to the invitation, whether or not a pre-bid conference is held, if such information is necessary to the bidders in submitting bids on the invitation or if the lack of such information would be prejudicial to uniformed bidders. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

You maintain that since you did not receive the amendment announcing an earlier bid opening date until approximately 4 hours prior to bid opening time, you were prejudiced thereby and no award should be made on the invitation because of the procuring activity's noncompliance with the mandatory requirements of ASPR 2-208(c).

Subparagraph (c) pertains to incorporating in an amendment any material information which was previously given to a prospective bidder. This does not appear to be a circumstance of your case. We believe that subparagraph (a) which concerns changes, including a change in the opening date, is the provision of ASPR 2–208 having a direct application to your situation. Subparagraph (a) provides:

> (a) If after issuance of an invitation for bids, but before the time for bid opening, it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation, such changes shall be accomplished by issuance of an amendment to the invitation for bids, using Standard Form 30 (see 16–101), whether or not a pre-bid conference is held. The amendment shall be sent to everyone to whom invitations have been furnished and shall be displayed in the bid room.

While this subparagraph requires that the amendment be sent to everyone to whom invitations have been furnished, we have held that such provisions do not make the procurement activity an insurer of the prompt delivery of amendments to each prospective bidder. The procurement activity discharges its responsibility when it issues and dispatches an amendment in sufficient time to permit all the prospective bidders time to consider such information in submitting their bids, notwithstanding the fortuitous loss or delay of a particular individual's copy of the amendment. The risk of nonreceipt of invitations and amendments thereto is upon the bidders. While the Government should make reasonable efforts to see that interested bidders receive timely copies of the invitation for bids and amendments thereto, the fact that there was a delay in a particular case, where the provisions of ASPR 2–208 have been complied with, does not warrant the acceptance of a bid or a modification thereof after the time fixed for opening, nor does it require the resolicitation of the procurement. 40 Comp. Gen. 126, 128 (1960); B–175409, April 14, 1972; B–174259, January 5, 1972; B–174230, November 17, 1971; B–167921, December 1, 1969.

We have also held that the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained, not upon whether every possible prospective bidder was afforded an opportunity to bid. B–147515, January 12, 1962. While it is unfortunate that your address was not correctly recorded on the bidders list, we do not find anything in the record to indicate that the error was other than an inadvertent mistake, or that it was occasioned by any deliberate attempt on the part of the procuring personnel to exclude you from participating in the procurement. In such circumstances, although we recognize the resulting hardship which may be experienced by your firm, it has been our consistent position that the

nonreceipt or delay in receiving bidding documents by a prospective bidder does not require cancellation or amendment of the invitation. 34 Comp. Gen. 684 (1955).

Your remaining contention is that your telegraphic bid should have been accepted by the contracting officer at bid opening, since his representative had earlier that same day, upon learning of the delayed delivery of your amendment, advised you to use whatever means were available to transmit your bid. During that telephone conversation, you told the contracting officer's representative that telegraphic means was about all there was available for transmitting your bid within the remaining time. You believed his failure to respond was tacit approval that telegraphic means would be acceptable.

We note that paragraph C–5(b) of the Solicitation Instructions and Conditions entitled "Submission of Offers" states that telegraphic offers will not be considered unless authorized *by the solicitation*, which was not done in the subject IFB. We have uniformly held that telegraphic bids, unless authorized by the invitation for bids, should be rejected, and we see no reason why this rule should not be applied in the present case. 40 Comp. Gen. 279, 280 (1960); B–169719, August 25, 1970; B–161595, August 17, 1967; B–160868, April 13, 1967. In addition, *see* paragraph C–3, Explanation to Offerors, of the Solicitation Instructions and Conditions, which provides that oral explanations or instructions given before the award will not be binding unless furnished all prospective offerors as an amendment of the solicitation.

Inasmuch as your formal bid was not mailed until several hours after the time for bid opening, the contracting officer determined that it could not be considered. Paragraph C–8 of the Solicitation Instructions and Conditions entitled "Late Offers and Modifications or Withdrawals" provides that bids received after bid opening, but before award, will not be considered unless the late receipt of the bid is excusable under the provisions of that paragraph. None of the enumerated factors excusing late receipt was present in your case. Under the circumstances, we find no basis for disturbing the administrative conclusion that your bid was inexcusably late. B–160868, April 13, 1967.

While it is regretted that you did not receive your copy of the amendment in sufficient time to respond in the prescribed manner by the time and date fixed for the opening of bids, our review of the record does not establish a legal basis for this Office to object to an award under this IFB.

Accordingly, your protest is denied.

[B-176647]

Bids—Discarding All Bids—Invitation Defects

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

General Accounting Office—Recommendations—Implementation

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

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

We refer to the administrative reports dated October 25 and September 15, 1972, regarding the cancellation of Federal Supply Service (FSS) invitation for bids (IFB) FPNHO-K-28592-A-5-17-72 and the resolicitation under IFB FPNHO-K-28592-RA-10-18-72 for manual typewriters during the current fiscal year.

For the reasons hereinafter stated, it is our opinion that no "cogent and compelling reason" existed to justify cancellation of the original IFB.

Incremental prices were solicited for eight different typewriter sizes, plus repair parts and attachments, for 11 different geographical zones. Bids were received and opened May 24, 1972, from Adler Business Machines, Inc., Facit-Odhner, Inc., Olivetti Corporation of America (Olivetti), Olympia USA, Inc. (Olympia), Remington Rand Office Machines, Inc., Division of Sperry Rand Corporation (Remington), and Royal Typewriter Company Division, Litton Business Systems, Inc. (Royal). It is our understanding that the foregoing list of bidders represents almost total participation of the available competition.

The abstract of bids indicates that Olivetti was low on all increments and zones for size 1. Olympia was low on all increments and zones for sizes 2, 3, 4, 6 and 8. For size 5, Remington was low on all increments and all zones, except on the first increment of zone 11 for which Royal was the low bidder.

Paragraph 8(a), Bid Sample Requirements, provided, in part:

Samples will be evaluated to determine compliance with all characteristics listed below:
Typing pressure—(with touch control in different positions), key movement, size of keyboard, size of keys, key separation, typing speed, clear legible printing workmanship, suitability of materials used, design and construction.

As pertinent, paragraphs (b) and (c) of section 7 of the Special Provisions provided:

(b) Failure of samples to conform to all such characteristics will require rejection of the bid. * * *.
(c) Products delivered under any resulting contract shall strictly comply with the approved sample as to the subjective characteristics listed for examination and shall conform to the specifications as to all other characteristics.

The Purchase Description, as pertinent, required the following:

* * * The typewriters shall be new, modern, current models intended for business and commercial purposes.

* * * * * * *

The typewriter shall be of the following minimum overall dimensions: Chassis width 13 inches (excluding carriage); chassis depth 13 inches; height to top of carriage (excluding levers, paper supports, etc.), 7½ inches.

* * * * * * *

The typewriter shall have a minimum clearance of 5¼ inches between the lowest point of the carriage assembly when extended and the surface on which the machine rests. This clearance requirement may be met by the use of a riser device which becomes an integral part of the machine by fastening to the base and which does not detract from the appearance or affect the useability of the machine. The riser height shall not exceed 1 inch.

* * * * * * *

The pressure required to operate the typewriter shall not be so excessive as to cause fatigue, and shall be varied in accordance with standard requirements (less resistance or tension for outer keys and more for inner keys).

Bid samples were evaluated for conformance with the characteristics listed in the IFB, except the variant key pressure requirement. With respect to the latter aspect, the technical report stated:

Note: The typing pressure required to operate all samples checked was considered to be satisfactory. This report does not include an evaluation of the parenthetical requirement (less resistance or tension for outer keys and more for inner keys) since there is no test method prescribed for this requirement, nor is there a method available that we are aware of that will satisfy this requirement and give reproducible results.

On the basis of the remaining characteristics, compliance was cited for the Olympia, Remington and Royal sizes 1 and 2, as well as the Olympia and Royal sizes 3, 4, 5 and 6.

As to the noncompliant products, noncompliance was due either to the failure to meet the requirement for a minimum clearance of 5¼ inches between the lowest point of the carriage assembly and the surface upon which it rests or the use of a riser exceeding 1 inch. As a corollary, noncompliance was noted in continuity in speed and accuracy at the 40–60 word per minute range due to vibration of the type-

writer. However, in the instances in which this occurred, it was noted that the riser height exceeded 1 inch and adversely affected both the appearance and stability of the typewriter, presumably causing the excessive vibrations.

Before the evaluation had been completed, Royal protested the award to our Office on May 25, 1972, B–176045. Royal alleged that it had submitted the only sample conforming to all of the requirements of the IFB, particularly carriage height, riser height and pressure requirement, and was therefore the sole responsive bidder. However, our file on the matter was closed on July 27, 1972, without further action upon advice from FSS that the IFB had been canceled on July 11, 1972, because the purchase description was deemed to be deficient.

By telefax of July 28, 1972, Olympia protested the cancellation to our Office contending that no cogent or compelling reason existed to reject all bids. Olympia points to the extent of competition as evidence that no prospective bidder was induced to forego bidding because of the advertised requirements. It is averred that any resolicitation will prompt bids on identical products and will constitute an auction since bid prices have been exposed. Finally, it is contended that the requirements in question are minor and may be waived pursuant to Federal Procurement Regulations (FPR) 1–2.405.

In response, Royal reiterated its contentions stated in B–176045, *supra.* Also, by letter of September 27, 1972, Royal further contended that there are two methods available to measure the key pressure requirement: The Chatelan scale model 25 which uses a static approach and dynamic methods instruments used by Royal's reliability engineering laboratory.

Olivetti has urged that the cancellation be sustained because the requirement for variant key pressure is ambiguous and restricts competition. Olivetti also alleges that the minimum carriage clearance of 5¼ inches necessitated the use of a riser which impacted upon the bid price, therefore prohibiting waiver of noncompliance with the requirement as a minor deviation. It further contends that this requirement was an unnecessary restriction of competition.

In the report dated September 15, 1972, GSA represents the key pressure requirement as affecting both price and quality, which cannot be waived as a minor deviation. Further, GSA views this requirement as restricting competition because it believes only Royal incorporates the desired feature in its typewriter. GSA concludes that the foregoing constitute a cogent and compelling reason to reject all bids and readvertise.

Therefore, on September 15, 1972, GSA resolicited its requirement in IFB FPNHO–K–28592–RA–10–18–72. The variant key pressure re-

quirement was deleted and the height requirement was modified as follows:

> The typewriter shall be of the following minimum overall dimensions: * * * height to the top of carriage (excluding levers, paper supports, etc.), 7¼ inches.
>
> * * * * * * *
>
> Sizes 1 through 4 shall have a minimum clearance of 4¼ inches between the lowest point of the moveable carriage assembly when extended and the surface in which the machine rests.

This invitation was opened on October 18, 1972, and bids were received from the same parties that participated in the first solicitation. Moreover, it is our understanding that, except for Olivetti, all bidders offered the same models as offered previously. We have been informed that Olivetti bid a new model which became commercially available in the interim between the two bid openings.

While the bids submitted on resolicitation evidence reductions in prices and the relative competitive standings have been changed, our inquiry concerning the cancellation of the original IFB must be confined to whether cogent and compelling reasons existed at the time to justify the rejection of all bids thereunder. The hindsight afforded by the exposure of the new bids does not control that inquiry.

The authority to cancel an invitation after bids are opened is contained in FPR 1–2.404–1 as follows:

> (a) Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.
>
> (b) Invitations for bids may be cancelled after opening but prior to award, and all bids rejected, where such action is consistent with 1–2.404–1(a) and the contracting officer determines in writing that cancellation is in the best interest of the Government for reasons such as the following:
>
> (1) Inadequate, ambiguous, or otherwise deficient specifications were cited in the invitation for bids.

In this case, FPR 1–2.404–1(b)(1) was cited as authority for the cancellation action.

While we recognize that the contracting officer is afforded broad authority to reject all bids and readvertise and ordinarily we will not question such action, we believe the cancellation of the IFB and readvertisement in this instance was not based on a "compelling reason." As stated in *The Massman Construction Co.* v. *United States*, 102 Ct. Cl. 699, 719 (1945):

> To have a set of bids discarded after they are opened and each bidder has learned his competitor's prices is a serious matter, and it should not be permitted except for cogent reasons.

The mere utilization in the IFB of inadequate, ambiguous or otherwise deficient specifications is not, itself, a "compelling reason" to cancel an IFB and readvertise. The rejection of all bids after they have been opened tends to discourage competition because it results in mak-

ing all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have extended manpower and money in preparation of their bids without the possibility of acceptance. 41 Comp. Gen. 536 (1962). Moreover, as a general proposition, it is our view that cancellation after bids are opened is inappropriate when an award under a solicitation would serve the actual needs of the Government. 49 Comp. Gen. 211 (1969); 48 *id.* 731 (1969).

As quoted above, paragraph 7 of the Special Provisions required the submission of bid samples to enable GSA to determine the conformability of the offered product to the required specifications, in accordance with FPR 1-2.202-4(a):

> * * * a sample required by the invitation for bids to be furnished by a bidder as a part of his bid to show the characteristics of a product offered in his bid. Such samples will be used only for the purpose of determining the responsiveness of the bid and will not be considered on the issue of a bidder's ability to produce the required items.

The question of responsiveness, in this regard, concerns the determination whether the bid sample indicates conformance with the essential requirements of the invitation. In that connection, we have been advised that there is no standard test method for evaluation of key pressure. As a result, and further because the key pressure requirement is considered to be restrictive, the determination was made to cancel the procurement and resolicit without the requirement for variant key pressure. However, while such requirement might ordinarily affect price and quality of the article being offered and would ordinarily require cancellation of the IFB where a change in the requirement is proposed after the opening of bids, in this case there was no reason to believe that firms other than the original six bidders would bid on the resolicitation or that such bidders would have offered any different equipment if the original specifications had reflected the change. In that regard, we note that bidders had offered the same equipment in prior procurements having the same requirement. Thus, the net effect of the new solicitation was to create an auction atmosphere—a situation where the new bids would constitute responses to the prior exposed bid prices rather than to the change in requirements. We therefore feel that the key tension requirement in the invitation did not, on the record, constitute a compelling reason for its cancellation.

Concerning Royal's contention that two methods are available to test the variant key pressure requirement, GSA responded by memorandum dated October 20, 1972, from the Acting Commissioner, Standards and Quality Control:

> We do not agree with [the] statement that the Chatelan scale is suitable for measuring the variant typing pressure. The Chatelan scale measures static pressure whereas typing pressure is applied by a striking force. We contend

that this pressure can best be determined through a subjective typing evaluation by qualified typists.

Having concluded that the key tension requirement does not constitute a compelling reason to have canceled the IFB, we turn to the Olivetti contention that the minimum height requirement afforded a sufficient reason to cancel because it was restrictive of competition. The record clearly indicates that the only basis relied upon by GSA to cancel the IFB was the key tension requirement. The height requirement was not a factor. Notwithstanding reduction of the minimum height requirement upon readvertisement, it is our understanding that GSA still considers the original height requirement material. Moreover, we have been informed that the reduction in minimum height does not reflect GSA's attitude that a prescribed height is no longer necessary, but rather evidences a change in approach to the height problem. We recognize that ordinarily a change in a material requirement would provide justification for cancellation and readvertisement. However, we believe that the overriding consideration in this case is the integrity of the competitive bidding system. Inasmuch as the typewriters offered under both invitations are the same (except Olivetti, for the reason stated previously), save the need for the risers—low-cost hardware items—and since the typewriters offered under the original IFB would meet the needs of the Government, we believe that the cancellation of the first invitation and the resolicitation would be far more prejudicial to the integrity of the competitive system than awards under the original invitation. In this light, it is our opinion that the minimum height requirement alone did not provide a cogent and compelling reason to cancel the IFB and readvertise.

In the circumstances, we conclude that no "cogent and compelling reason" existed to justify cancellation of the invitation. Therefore, it is our recommendation that the original IFB be reinstated, the key tension requirement waived, and award made to the resulting low responsive, responsible bidders.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, 31 U.S. Code 1172. In view thereof, your attention is directed to section 236 of the act, 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 ap-

propriations 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–176932]

Compensation—Severance Pay—Eligibility—Nature of Appointment

The Superintendent-Principal of an Air Force Dependents' School whose employment under 20 U.S.C. 241(a) for a period of approximately 10 years was terminated on the basis of management's prerogative not to employ as provided in paragraph 8b, section 9833, Air Force Civilian Personnel Manual, is entitled to the severance pay prescribed by 5 U.S.C. 5595. The employee held an indefinite tenure appointment, even though he was granted limited access to procedural rights, and was involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, requirements that establish eligibility to receive the severance pay provided by 5 U.S.C. 5595.

To Captain M. E. Riley, Department of the Air Force, November 24, 1972:

Your letter of July 31, 1972, reference ACF, with enclosures, forwarded to this Office by letter of August 30, 1972, reference ACF-(XSP), from the Director, Plans and Systems Assistant Comptroller for Accounting and Finance (HQ USAF), Department of the Air Force, requests our decision as to whether you may process for payment the enclosed voucher representing severance pay for Mr. Randal D. Croley, whose employment at the Air Force Section 6 Dependents' School, Tyndall Air Force Base, Florida, was terminated on the basis of management's prerogative not to reemploy under the authority of paragraph 8b, section 9833, Air Force Civilian Personnel Manual (AFM 40–1).

Mr. Croley's employment was terminated effective June 30, 1972. From October 15, 1961, through this date, he was Superintendent-Principal of the Tyndall Elementary School. He was employed under the authority of 20 U.S. Code 241(a), which provides in pertinent part:

> In the case of children who reside on Federal property—
> (1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or
> (2) if it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children,
>
> the Commissioner shall make such arrangements * * * as may be necessary to provide free public education for such children.
> * * * For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the

Civil Service Act and rules and the following: (1) the Classification Act of 1949, as amended; (2) the Annual and Sick Leave Act of 1951, as amended; (3) the Federal Employees' Pay Act of 1945, as amended; (4) the Veterans' Preference Act of 1944, as amended; and (5) the Performance Rating Act of 1950, as amended. * * *.

Your letter also states that:

* * * He was an excepted employee as defined by para 1–1b, subchapter 1, chapter 213–3, Federal Personnel Manual, and was employed under an annual contract subject to renewal. The most recent contract was effective 1 July 1971 through 30 June 1972 (Atch 1). He was an employee with tenure as defined in para 4b(3), AF 3612, AFM 40–1.

The basis for the authority to pay severance pay is found in 5 U.S.C. 5595 which provides in pertinent part:

(a) For the purpose of this section—

* * * * * * *

(2) "employee" means—

(A) an individual employed in or under an agency * * * but does not include—

* * * * * * *

(ii) an employee serving under an appointment with a definite time limitation, except one so appointed for full-time employment without a break in service of more than 3 days following service under an appointment without time limitation;

* * * * * * *

(b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who—

(1) has been employed currently for a continuous period of at least 12 months; and

(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;

is entitled to be paid severance pay in regular pay periods by the agency from which separated.

Although it is stated that Mr. Croley is "employed under an annual contract subject to renewal," we note that the "Employment Conditions" (apparently referred to as a contract) issued by the Board of Education, Tyndall Elementary School, and in effect at the time here involved contained the following provision: "Your appointment to the position is of indefinite tenure. In the event your services are not desired by the Government for the succeeding school year you will be advised on or before June 1, 1972." It seems to us that the "renewal" procedure as contained in such "Employment Conditions" is in reality a reservation to the agency of a right to discontinue the employee's employment without having to resort to adverse action or grievance procedures which are otherwise required by the agency's regulations. *See* paragraph 8d(4), section 9833, AFM 40–1. The agency could have drafted the regulations so as to obviate the requirement of adverse action and grievance procedures in all cases. That the employee is granted limited access to these procedural rights should not alter the nature of his appointment so as to deprive him of his right to severance pay when the intent of the regulations is clearly that the em-

ployee is being hired for a "continuing position" and that he be given an "indefinite excepted appointment." *See* paragraph 8c(1), section 9833, AFM 40–1. Apparently in most cases including Mr. Croley's, employees serve for a number of years in these positions. It should also be noted that the "renewal" procedure is not the only basis for a separation in which the employee has no right to adverse action or grievance procedures. An employee may also be separated, apparently at any time during the year, without appeal rights if his position is abolished for such reasons as closing the school, reduced budget requirements, or less positions required because of lower school enrollment than anticipated. *See* paragraph 8d(1), section 9833, AFM 40–1. On the basis of the foregoing, it is our view that for the purposes of the severance pay regulations Mr. Croley was not an employee "serving under an appointment with a definite time limitation."

As a further condition of eligibility for severance pay, Mr. Croley must have been "involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency." There is nothing in the record to establish that the reason given for Mr. Croley's separation, that is, "management's prerogative not to reemploy," should be characterized as other than involuntary. Likewise, there appears to be nothing in the record from which it could be concluded that Mr. Croley was removed for cause on charges of misconduct, delinquency, or inefficiency. On such basis Mr. Croley would be eligible for severance pay under the provisions of 5 U.S.C. 5595. *See* our decision of June 14, 1971, B–172682, copy enclosed.

Accordingly, the voucher returned herewith may be processed for payment if otherwise correct.

[B–176567]

Transportation—Household Effects—Drayage—Between Non-Government Quarters Overseas

Both military members and civilian employees at overseas permanent duty stations who are required to vacate local housing leased because no Government quarters were available may be paid drayage costs to move their household goods to other housing on the local economy when the quarters they occupy are declared by medical personnel to no longer meet established health and sanitation standards on the basis military members must obey orders and civilian employees move for the convenience of the Government. However, neither military members nor civilian employees are entitled to drayage when the move to other non-Government quarters results from a landlord refusing to renew a lease or otherwise permit continued occupancy as such a change of quarters is not for the convenience of the Government.

To the Secretary of the Air Force, November 27, 1972:

We refer further to letter dated July 6, 1972, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs), forwarded here by letter of July 17, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72–28), requesting an advance decision regarding the proposed revision of Volumes 1 and 2 of the Joint Travel Regulations to permit drayage at Government expense between local economy housing under certain circumstances.

In his letter, the Assistant Secretary of the Air Force states that at certain overseas permanent duty stations there are no Government quarters, and, accordingly, military members and civilian employees obtain housing on the local economy under a leasing arrangement. It is said that there are at least two instances where local economy housing may be terminated even though no permanent change of station is involved:

(a) reinspection by medical personnel declaring that the military member or civilian employee must move because the quarters no longer meet the established health and sanitation standards,
(b) landlord terminates the lease and will not renew it and the military member or employee must move to economy quarters.

Under (a) or (b) the personnel affected are said to have no option other than to move to other economy quarters in the same area.

While there is no provision in the Joint Travel Regulations which would authorize drayage in the described circumstances, it appears to the Assistant Secretary that the principles enunciated in our decision of July 7, 1971, 51 Comp. Gen. 17, upon which paragraph M8311 of the regulations is based, would be applicable to military members.

In the absence of statutory authority or implementing regulations pertaining to civilian employees in the described situations and in view of the unusual circumstances beyond the control of employees requiring their relocation, it is said that such movement, while not a transfer, might be considered to be for the convenience of the Government. Although not involving drayage between local economy housing, it is suggested in the Assistant Secretary's letter that the principles of our decision B–138678, April 22, 1959, may be applied in such circumstances.

In view of the foregoing, the Assistant Secretary asks if we would be required to object to the amendment of Volumes 1 and 2 of the Joint Travel Regulations to authorize drayage in the cited circumstances.

Section 406, Title 37, U.S. Code, provides that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation of household effects, including packing, crating, drayage, temporary storage and unpacking. Subsection (e)

also provides for the movement of household effects in unusual or emergency circumstances without regard to the issuance of orders directing a change of permanent station, where the member is serving on permanent duty outside the United States, in Hawaii or Alaska, or on sea duty.

We have held that the term "unusual or emergency circumstances" as used in 37 U.S.C. 406(e) refers to conditions of a general nature incident to military operations or military needs, and not to conditions or needs of a personal nature. *See* 38 Comp. Gen. 28 (1958); 45 *id.* 159 (1965); 45 *id.* 208 (1965); and 49 *id.* 821 (1970).

Involuntary extension of a member's tour of duty at an overseas station for reasons beyond his control was viewed in 51 Comp. Gen. 17, *supra*, as a circumstance of an unusual or emergency nature within the contemplation of 37 U.S.C. 406(e). Subsequently, paragraph M8311 of the regulations was promulgated to provide that where a member's tour of duty at a location outside the United States is involuntarily extended and he is required for reasons beyond his control, such as refusal of his landlord to renew the lease agreement, to change his residence on the local economy, he is entitled to drayage and storage incident to such change of residence.

However, without some specific element of military necessity or requirement, such as involuntary extension of a military member's tour of duty for reasons beyond his control, the termination of a lease between him and the landlord of local economy housing at an overseas location, is of a personal nature, and does not constitute unusual or emergency circumstances within the purview of 37 U.S.C. 406(e). Where a military member requires drayage of household goods incident to the assignment or termination of Government quarters due to personal problems, drayage at Government expense is forbidden by paragraph M8309–2 of the regulations.

Consequently, in the circumstances of instance (b) where the landlord terminates a lease and will not renew it and the member must move to other economy quarters, there is no proper basis for authorizing drayage at Government expense.

In decision of August 4, 1972 (52 Comp. Gen. 69), where as the result of an "off-limits" order issued to protect the health and welfare of personnel residing at a previously approved trailer park located in the continental United States, the member removed his housetrailer from such premises and installed it at a currently approved location, we held that he could be reimbursed for the necessary expenses he incurred as a result of such order.

Similarly, where a military member, as in instance (a), in obedience to orders vacates local economy housing because the residence is found

not to meet service health and medical standards, drayage at Government expense may be authorized.

Authority for the movement of household effects for civilian employees is set forth in sections 5724 and 5724a of Title 5, U.S. Code, and the statutory regulations issued pursuant thereto, Office of Management and Budget Circular No. A–56. Movement of household effects at Government expense may be made thereunder only when an employee is transferred or assigned to a new official station.

While movement of household effects may not be made between local quarters not involving a change of station under the above-cited law and regulations, in decision B–138678, *supra*, we held that drayage expenses for moving an employee's household goods between local Government quarters could properly be paid from Government funds, where such move was directed for the convenience of the Government. In decision B–163088, February 28, 1968, and in decision B–172276, July 13, 1971, payment was authorized for the cost of local shipment of household goods of employees who were required as an incident of their employment to leave private quarters and reside in Government housing.

Paragraph C7056 of the Joint Travel Regulations provides that local drayage of an employee's household goods is authorized when, for the convenience of the Government, the local commander issues written orders to the employee directing a change in place of residence from:

1. Government quarters to other Government quarters,
2. Government quarters to private quarters,
3. private quarters to Government quarters.

* * * The cost of local drayage authorized by this paragraph will be charged as an operating expense of the installation concerned.

The principle followed in the above-cited cases and in paragraph C7056 of the Joint Travel Regulations would appear equally applicable where at an overseas permanent duty station an employee is required by the Government to leave private quarters and necessarily must reside in other non-Government quarters in the same locality, as the result of an official determination that his previously approved housing no longer meets established health and sanitation standards. In regard to such official determination, it is understood from information developed informally that such determinations are made pursuant to the authority of AR 210–51, paragraph 4–7, USAREUR Supplement 1 to AR 210–51, and similar authorities relative to the housing referral service program. In view thereof where a civilian employee is required to move and has no option otherwise in the matter, drayage may be considered as in the interest of the United States and, as such, authorized as an administrative expense (instance (a)).

As in the case of military members, civilian employees who are obliged to obtain other non-Government quarters because their landlords refuse to renew leases or otherwise permit them to remain in their local economy housing, but who do not move their household goods as the direct result of or in connection with an official order or action, are not entitled to Government drayage as such change of quarters is not for the convenience of the Government (instance (b)).

Consequently, we would not object to the revision of Volumes 1 and 2 of the Joint Travel Regulations to permit drayage at Government expense between local economy housing in circumstances cited in (a) of the Assistant Secretary's letter, but we would object to provision for payment of drayage in instance (b).

[B-176841]

Travel Expenses—Military Personnel—Use of Other Than Government Facilities—Authorizing *v.* Directing Travel

An enlisted Navy man who had served in Vietnam and was separated in the Philippines where Government transportation to the United States was available but who upon discharge returned to Saigon at personal expense to be married and then traveled by American commercial airline from Saigon to California is considered to have been authorized rather than directed to travel by Government conveyance to the United States and he may be reimbursed for the commercial air transportation as provided in paragraph M4159–4a of the Joint Travel Regulations, the reimbursement not to exceed the cost to the Navy to transport him by Government air from the Philippines to the continental United States subsequent to discharge.

To the Secretary of the Navy, November 27, 1972:

We refer further to letter dated July 31, 1972, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), forwarded here by letter of August 12, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72–32), requesting a decision regarding the entitlement of Mr. Norman J. Mulloy, a former member of the U.S. Navy, to reimbursement for the cost of his commercial air transportation from Saigon, Republic of Vietnam to San Francisco, California, in March 1971.

By Standard Transfer Order No. 4906–70, September 16, 1970, Commander, U.S. Naval Support Activity, Saigon, Personnelman First Class Norman J. Mulloy, USNR, was ordered to proceed to an intermediate station, Naval Station Subic Bay, Republic of the Philippines, for separation processing with his home of record as his ultimate destination. He was directed to travel by Government aircraft from Saigon to the Republic of the Philippines.

At U.S. Naval Station Subic Bay, Petty Officer Mulloy was released from active duty and discharged on October 16, 1970. He was paid mileage allowances for travel from that station to Clark Air Force Base, Republic of the Philippines, the aerial port of embarkation for the United States, and from McChord Air Fore Base, Washington, port of debarkation in the continental United States, to Grosse Ile, Michigan, the place of acceptance for enlistment, to which point he elected to receive mileage allowances. Government transportation was available from Clark Air Force Base to the continental United States.

However, upon discharge, the former member traveled at personal expense to Saigon, Republic of Vietnam, married, and then sought Government transportation from there to the United States. Reportedly, because such transportation would have required separation from his family during travel, in March 1971 Mr. Mulloy utilized an American commercial airline for travel from Saigon to San Francisco, California, after having been assured by Government personnel that he would be reimbursed for his commercial air fare.

Mr. Mulloy's claim for reimbursement for his travel from Vietnam to the United States, which was denied by the Navy Regional Finance Center, Washington, D. C., on September 28, 1971, was received in this Office on April 10, 1972. The claim also was denied by our Transportation and Claims Division settlement of April 28, 1972, in which it was stated that, "Inasmuch as your order of September 16, 1970, which directed your separation at the Naval Station Subic Bay, Philippines, at your request, also directed your travel by Government air, if available, it must be assumed that any further transoceanic travel to which you may have been entitled was also limited to Government air, if available."

Regarding the above statement, the Assistant Secretary of the Navy refers to paragraph M4159–4(a) of the Joint Travel Regulations, and indicates that the disallowance may have been in error, as it was based not on the directed use of Government transportation after separation from the service but on the assumption that such direction made in regard to travel to the separation activity, also was applicable to subsequent travel. Also, reference is made to our decision B–173250, June 30, 1971, in which reimbursement was authorized under somewhat similar circumstances.

In accord with 37 U.S. Code 404(a), paragraph M4157–1b of the Joint Travel Regulations provides that a member who is separated from the service or relieved from active duty outside the United

States, will be entitled to travel allowances as provided in paragraph M4159 of the regulations, subject to the provision of paragraph M4157–6, that entitlement to transoceanic travel will terminate in any case where such travel is not completed within one year following separation or relief from active duty.

Paragraph M4159–1 authorizes allowances, including mileage, for the official distance between the old (last) permanent station and the appropriate port of embarkation serving that station. Similar allowance is authorized for the official distance from the appropriate port of debarkation to the new station (place to which the member is to receive mileage upon separation or discharge). Also authorized is 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 (see subparagraph 4).

Paragraph M4159–4a further provides that when Government transportation is available and when travel is directed by Government transportation, and the member performs transoceanic travel by another mode of transportation at personal expense, no reimbursement for the transoceanic travel is authorized. When travel by Government transportation is authorized (as distinguished from directed) and the member performs transoceanic travel by another mode of transportation at personal expense, the member is entitled to reimbursement for the cost of the transportation utilized not to exceed the applicable tariff charge which the sponsoring service would have been required to pay for the the available Government transportation.

In 41 Comp. Gen. 100 (1961) we said that where a member is not expressly directed by orders to use Government transportation he is to be regarded as having been authorized to use such transportation within the contemplation of our decision at 40 Comp. Gen. 482 (1961) which concluded that members of the uniformed services who are authorized, as distinguished from specifically directed, to travel by Government conveyance, and who do not use available Government transportation but use commercial transportation at personal expense, may be reimbursed for the cost of such travel on the basis of the standard prices which the sponsoring service would have been required to pay had the overseas travel been by Government transportation.

In decision B–173250, *supra*, reimbursement for overseas travel for the amount of the charge to the Government for such travel was approved where the member was directed to travel from Germany via Government air to the United States for the purpose of retirement

from the service and he chose Bamberg, Germany, as his home of selection, traveling there via commercial air, his orders being silent regarding the mode of travel from the place of his retirement to his home of selection.

In view of the above, in the absence of orders directing the use of Government transportation for overseas travel from the separation location to the place of the member's acceptance for enlistment, such travel by Government conveyance is regarded as having been authorized, rather than directed. Consequently, the member may be reimbursed for commercial air transportation as provided in paragraph M4159–4a of the regulations.

Therefore, we are instructing our Transportation and Claims Division to allow reimbursement for travel performed by Mr. Mulloy from Saigon, Republic of Vietnam, to San Francisco, California, in March 1971, such reimbursement not to exceed the cost to the Navy to transport him by Government air from Clark Air Force Base, Republic of the Philippines, to McChord Air Force Base, Washington, subsequent to his discharge from the U.S. Navy on October 16, 1970, at U.S. Naval Station Subic Bay, Republic of the Philippines.

[B–148044]

Real Property—Acquisition—Relocation Costs—Effective Date of Entitlement

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91–646, approved January 2, 1971, in prescribing relocation benefits for persons displaced when the Government acquires real property provides that the date of moving from the property is controlling regardless of whether the date of acquisition was before or after January 2, 1971, the effective date of the act and, therefore, priority lessees—former land owners and tenants who remained on acquired Federal property on a priority basis as lessees—are entitled to the benefits of the act. However, when the priority lessees physically vacate the properties, the displacements will be those of tenants rather than homeowners and, therefore, those lessees who sold their homes before enactment of Public Law 91–646 are not entitled to the extra benefits afforded homeowners under the act.

To the Secretary of the Army, November 28, 1972:

By letter dated September 15, 1972, Mr. Paul W. Johnson, the Acting Deputy for Installations and Housing, requested our decision with respect to the propriety of the payment of relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91–646, 84 Stat. 1894, approved January 2, 1971, 42 U.S. Code 4601, and the Resettlement Act, 10 U.S.C. 2680

(1964 ed.). The matters submitted for decision concern situations where real property was acquired for public use prior to January 2, 1971, the effective date of Public Law 91–646, but the former owners or tenants did not vacate the property until on or after that date. That part of the Resettlement Act cited above was one of the provisions repealed by Public Law 91–646.

Under the authority of 10 U.S.C. 2667 where property is not needed immediately for project requirements, the Corps of Engineers has long had a policy which permits former land owners and tenants to remain on acquired Federal property on a priority basis as lessees. As a result of this policy, at the time of the enactment of Public Law 91–646 there were numerous former owners and tenants who had not physically vacated the properties following acquisition by the Government. In some cases these lessees have occupied the property for a number of years after acquisition. In implementing Public Law 91–646, the Corps of Engineers had taken the position that priority lessees who vacate project property on or after January 2, 1971, regardless of the date of acquisition, are moving as a result of the acquisition of such real property and were therefore "displaced persons" within the meaning of subsection 101(6) of Public Law 91–646, 42 U.S.C. 4601(6). That subsection reads in pertinent part as follows:

> The term "displaced person" means any person who, on or after the effective date of this Act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; * * *.

Recently a question has been raised with respect to the Corps of Engineers' interpretation of Public Law 91–646. Specifically, it has been suggested that a former owner or tenant holding a priority lease may not be vacating as a result of acquisition within the meaning of Public Law 91–646 when he moves from leased premises acquired prior to January 2, 1971, and is, therefore, not entitled to a relocation payment. It was suggested that this position is supported by the recent court decision, *Taliaferro* v. *Stafseth*, 455 Fed. 2d. 207 (1972). The *Taliaferro* case involves similar facts under the Federal-Aid Highway Act of 1968 and in that case the court upheld a lower court verdict that under the Federal-Aid Highway Act a displaced former owner of real estate whose title divested before enactment of the act but who continued to occupy subsequent thereto was entitled to the relocation payments applicable to displaced persons but was not entitled to payments applicable to displaced owners. In reaching this

decision the court stated that acts of Congress are generally to be applied uniformly from the date of effectiveness onward and that it is encumbent on the person who argues for retrospective application to show that Congress intended for an act to be applied in that fashion. The court went on to state that the legislative history of the Federal-Aid Highway Act demonstrates that the Congress intended for the act to take effect on the date of its enactment except for certain provisions which were not applicable to all States until July 1, 1970.

The September 15 letter notes that while House Rept. No. 91–1656 in commenting on the definition of "displaced persons" states that it is immaterial whether the real property is acquired before or after the effective date of the act, section 219 of the act, 84 Stat. 1903, indicates that the Congress felt it necessary to make special provision for the act's application to one group of persons residing on a particular property which had been acquired prior to such effective date.

In view of what is presented above our decision was requested on the following questions:

1. Whether Public Law 91–646 applies only to acquisitions made after the 2 January 1971 effective date, or whether the date of moving from the property is controlling regardless of the date of acquisition;

2. Whether, if it should be determined that Public Law 91–646 does not apply to acquisitions made prior to 2 January 1971, former owners or tenants holding priority leases of such property after 2 January 1971 would be entitled to resettlement benefits under Title 10, U.S.C., section 2680, at the time their lease is terminated. If not, neither law would be applicable to this class of individuals, which would appear to be a result not intended by Congress; and,

3. Whether, if it should be determined that priority leases whose land was acquired prior to 2 January 1971 are entitled to benefits under Public Law 91–646 at the time their leases are terminated, former owners are entitled to benefits as such rather than as tenants.

The legislative history of Public Law 91–646 discloses that section 233 of the Senate-passed version of S. 1, 91st Congress, the derivative source of Public Law 91–646, provided in pertinent part as follows:

> Notwithstanding any other provision of this title, a person—
> (1) who moves or discontinues his business, moves other personal property, or moves from his dwelling on or after January 1, 1969, and before the effective date prescribed in section 253(a), as the result of the contemplated demolition of structures or the construction of improvements on real property acquired, in whole or in part, by a Federal agency; and
> (2) who has lived on, or conducted a business on such real property for at least one year prior to the date of enactment of this Act;
>
> may be considered a displaced person * * *.

See S. Rept. No. 91–488, 15, in explanation thereof. This Senate language was apparently prompted, at least in part, by the testimony of Congressman Edward I. Koch to the effect that allowing for the time of property acquisition to be pivotal would work unfairly on certain of his constituents in the Murray Hill district of New York City who were still residing on property that was purchased by the Post Office Department in June of 1962. The Congressman suggested that the residents of Murray Hill were probably not unique in that he felt sure that there were other sites across the country which had been acquired but still had former residents living on them. *See* Hearings Before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, United States Senate, on S. 1, 91st Congress, 164–169 and Hearings Before the Committee on Public Works, House of Representatives, on S. 1, 91st Congress and related bills, 65–69.

During consideration of S. 1 by the House Committee, representatives of the Bureau of the Budget recommended deletion of section 233 of the Senate-passed bill. They argued that this section would open the door to broader and increasing demands for retroactive benefits for many other special groups and programs. *See* House Hearings, *supra*, 572, 579.

During consideration of S. 1 in the House of Representatives, section 233 was deleted and the current section 219 was added, apparently to take care of the specific Murray Hill situation described by Congressman Koch. Section 219 reads in pertinent part as follows:

> Notwithstanding any other provision of this title, a person—
> (1) who moves or discontinues his business, moves other personal property, or moves from his dwelling on or after January 1, 1969, and before the 90th day after the date of enactment of this Act as the result of the contemplated demolition of structures or the construction of improvements on real property acquired, in whole or in part, by a Federal agency *within the area in New York, New York, bounded by Lexington and Third Avenues and 31st and 32d streets; and*
> (2) who has lived on, or conducted a business on, such real property for at least one year prior to the date of enactment of this Act;
>
> may be considered a displaced person * * *. [Italic supplied.]

In explanation of section 219 the House Committee Report states that it was to cover a specific situation resulting from the acquisition and long-holding by the Federal Government of certain real property in New York City and was not to be construed as a precedent of any nature. *See* H. Rept. No. 91–1656, 21.

In reviewing the legislative history of section 219, particularly the opposition of the Bureau of the Budget to the Senate language, we feel that the statement in the House Report was only for the purpose of precluding retroactive payments to others who in fact moved before

the enactment of Public Law 91–646. Therefore we view section 219 as basically a design to provide benefits to an identified group who had moved prior to enactment of the Act and should not be determinative of the first question.

With further regard to the first question, in addition to the statement in H. Rept. No. 91–1656, 4, that for the purpose of defining a displaced person it is immaterial whether the real property was acquired before or after the date of the act, the act itself contains a provision which indicates that the date the move takes place rather than the date of acquisition should trigger the application of the act. Specifically, section 211(c), 42 U.S.C. 4631(c), reads in pertinent part as follows:

> Any grant to, or contract or agreement with, a State agency executed before the effective date of this title, under which Federal financial assistance is available to pay all or part of the cost of any program or project which result in the displacement of any person on or after the effective date of this act, shall be amended to include the cost of providing payments and services under sections 210 and 305. * * *.

In considering this language, our Office in 51 Comp. Gen. 267, 271 (1971) ruled:

> The language of section 211(c), in requiring the amendment of prior contracts, evidences an intent to insure that all persons under preexisting grants or contracts who would be displaced after the effective date of the Act would receive the relocation benefits provided by the Act. This intent is in harmony with the declared purpose of the Act to establish a uniform policy for the fair and equitable treatment of persons displaced and with the definition of "displaced person" in section 101(6) as meanng "any person who on or after the effective date of this act moves from real property, or moves his personal property from real property, as the result of the acquisition of such real property * * *" for any Federal or federally assisted program or project.

In addition, section 202(a), 42 U.S.C. 4622, in providing for moving and related expenses obviously contemplates that the date of moving rather than the date of acquisition controls when it provides for benefits "Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after the effective date of this Act * * *."

Accordingly, in answer to the first question, the date of moving rather than the date of acquisition is determinative in the matter of whether benefits are available under Public Law 91–646.

This response precludes the need to consider the issue raised in the second question. *See*, however, 51 Comp. Gen. 267 for discussion of our views of the savings provision of section 220(b), 42 U.S.C. 4621 note, as to existing rights and liabilities under prior acts for use in other considerations that may arise in the application of Public Law 91–646.

Having decided that the date of moving rather than the date of acquisition controls and that therefore the priority lessees of the Corps are entitled to benefits under Public Law 91–646, there remains for decision the question of the nature of entitlement due. Restated, the third question presented is whether priority lessees of the Corps who were owners before the enactment of Public Law 91–646 but who are not now owners are entitled to the extra benefits afforded homeowners by section 203 of Public Law 91–646.

The benefits afforded by section 203, 42 U.S.C. 4623, build in part on the specific section of the Highway Act that was considered in the *Taliaferro* case (*see* H. Rept. No. 91–1656, 8), and—as in that case—the persons being considered for homeowner entitlement were not in fact homeowners when the law granting these entitlements to homeowners was passed.

In applying the rule of the *Taliaferro* case we sought without success to find legislative history that would evidence an intent that owner benefits are available to those former owners. In this regard, the statement in H. Rept. No. 91–646, page 4, to the effect that it is immaterial whether the real property was acquired before or after the effective date of the act, in its context, simply stands for the proposition of appropriate entitlement to persons displaced from property acquired for a federally assisted program or project and does not address the vital issue of whether their entitlement should be as former owners as opposed to tenants. We therefore do not feel that this legislative history meets the test of the *Taliaferro* case, and, hence, is not determinative of the issue. Moreover, while the retroactive aspect of section 219 concerns persons who had actually moved before the effective date of the act and thus does not concern persons of the class here considered, it remains that in enacting section 219 Congress specifically provided some retroactive entitlements in a limited situation to the exclusion of any other retroactive entitlements.

Accordingly, when these priority lessees physically vacate the properties, the displacements will—under the law—be those of tenants rather than homeowners, and consequently, in answer to the third question, these priority lessees who sold their homes before enactment of Public Law 91–646 are not entitled to the extra benefits afforded homeowners under that law.

In view of the Office of Management and Budget's responsibilities in the issuance of guidelines and instructions for the implementation of Public Law 91–646, a copy of this decision is being furnished to the Office of Management and Budget.

[B-176630]

Contracts—Awards—Small Business Concerns—Set-Asides—Postal Service Procurements

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

To the Administrator, Small Business Administration, November 30, 1972:

By letter of July 21, 1972, the Associate Administrator for Procurement and Management Assistance of your office requests that our Office consider the refusal of the Corps of Engineers to make a small business set-aside in connection with a procurement it was making on behalf of the United States Postal Service.

The Associate Administrator states in part that—

> Rejection by the Army was based on a Memorandum of Understanding between the Postal Service and the Corps of Engineers. Under this memorandum the Postal Service must give written approval for the application of individual set-asides, and the Postal Service declines to give such approval. The rejection letter stated that the "Corps of Engineers must, of course, abide by the terms of the Memorandum of Understanding and cannot unilaterally provide for set-asides in construction associated with Postal Service facilities." Our appeal to the Assistant Secretary of Defense (I&L) pointed out that this Memorandum could not modify procurement law and regulations. The Department of Defense (DOD) rejected this appeal on the grounds that the Postal Service is exempt from the provisions of the Small Business Act, and that the Postal Service had limited the authority of the Corps of Engineers. Further, DOD argued. "the funds of the Postal Service which are used to finance these procurements are not 'appropriated funds' as that term is used in ASPR."

Your agency considers that Postal Service funds must be treated as appropriated money for the following reasons:

1. The Postal Reorganization Act "appropriated to the Postal Service all revenues received by the Postal Service." (38 USC 2401)
2. Annual appropriations are to be made for the use of the Postal Service (39 USC 2401) and these funds will not be separately identifiable after intermingling with postal receipts in the Postal Fund; therefore, all Postal Service funds should be treated by DOD as appropriations.

3. DOD appears to recognize these expenditures as being from appropriated funds, but argues that the term is not the same as that used in ASPR. SBA is unable to find any authority for distinguishing between the ASPR meaning of the term, "appropriated funds" and the definition used elsewhere.

The Associate Administrator expresses the view that if the funds provided by the Postal Service are appropriated funds, then there can be no question of the applicability of ASPR 1-102, which applies ASPR to all purchases and contracts made by DOD for procurement of supplies and services which obligate appropriated funds except certain types of transportation services. He states that it therefore follows that small business set-aside procedures are valid and required, regardless of the provision of a Memorandum of Understanding.

The Associate Administrator requests that we provide a determination of whether DOD is free under the Armed Service Procurement Act and the Postal Reorganization Act to modify the procedures of ASPR in regard to small business, for the expenditure of funds on behalf of the Postal Service.

Subsection 410(a) of Title 39, U.S. Code, provides that:

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

Further, 39 U.S.C. 411 provides that:

Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.

As pointed out by the Assistant Secretary of Defense (Installation and Logistics) in his letter of June 28, 1972, to SBA, the first provision of law (39 U.S.C. 410(a)) quoted above exempts Postal Service procurements from the provisions of the Small Business Act, as well as from the provisions of all other Federal laws dealing with Federal contracts with certain exceptions not pertinent here. Under this provision of law it is immaterial whether or not the Postal Service funds involved be considered "appropriated" funds. Further, while the "Memorandum of Understanding" between the Postal Service and the Corps of Engineers may not modify procurement law and regulations, it is clear that 39 U.S.C. 410 exempts the Postal Service from procurement laws and regulations issued pursuant thereto.

The effect of the second provision of law (39 U.S.C. 411) quoted above is to permit Executive agencies to furnish services to the Postal Service on such terms and conditions as the Postal Service and the head of the agency concerned deem appropriate. In view of such authority it is our opinion that the Corps of Engineers may render services to the Postal Service in the construction of postal facilities as generally set out in the "Memorandum of Understanding." In this connection we might point out that on October 8, 1970, the Secretary of Defense advised the then Postmaster General that he was authorizing the Secretary of the Army to initiate negotiations to develop an agreement whereby the Corps of Engineers would furnish construction services to the Postal Service.

Further, insofar as the Corps of Engineers is concerned, the Assistant Secretary of Defense (Installations and Logistics), the official responsible for issuing the Armed Services Procurement Regulation, indicates that insofar as ASPR 1-102 is concerned, the funds of the Postal Service which are used to finance construction work for the Postal Service are not "appropriated funds" within the meaning of that term as used in the ASPR. The view of DOD as to what was intended by the term "appropriated funds" as used in ASPR is entitled to great weight since DOD issued the regulations. In this connection we note that the moneys used to finance the type of procurements involved here come from the "Postal Service Fund" established by 39 U.S.C. 2003, which consists of (1) revenues from services rendered by the Postal Service, (2) amounts received from obligations issued by the Postal Service, (3) amounts appropriated for use of the Postal Service, (4) interests which may be earned on investments of the Postal Service, (5) any other receipts of the Postal Service, and (6) the balance in the Post Office Department Fund (established under the prior law) as of the date of commencement of Postal Service operations. Considering the sources of the funds involved and the manner in which the Postal Service is authorized to operate by the Postal Service Act, we would not question the position of DOD that "the funds of the Postal Service which are used to finance these procurements are not 'appropriated funds' as that term is used in ASPR."

In light of the foregoing our Office would have no legal basis to object to the refusal of the Corps of Engineers—under its Memorandum of Understanding with the Postal Service—to set-aside contracts for small business except at the direction of the Postal Service.

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