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[B-176230]

District of Columbia—Courts—Executive Officer—Benefits Status

The fact that the Executive Officer of the District of Columbia Courts—a position established in the D.C. Court Reform and Criminal Procedure Act of 1970—is to receive the same compensation as an associate judge of the Superior Court for the purpose of giving this nonjudicial officer the same stature as a judge, in order to make him an effective administrator, does not entitle the officer to the leave and retirement benefits provided for judges of the D.C. courts in the absence of evidence in the legislative history of the act that the references to "pay," "salary," or "compensation" cover leave and retirement benefits. The application of civil service retirement benefits to the officer is for Civil Service Commission determination, and the Annual and Sick Leave Act of 1951, as amended, would apply if a regular tour of duty is established for the officer and leave records maintained.

To the Executive Officer, District of Columbia Courts, September 1, 1972:

Further reference is made to your letter of June 9, 1972, in which you have raised certain questions concerning the leave and retirement benefits to which the Executive Officer of the District of Columbia Courts is entitled. You indicate that it is uncertain whether such benefits were meant by Congress to be included in the word "compensation" as it is used in the statute creating the position of Executive Officer.

The position of the Executive Officer of the District of Columbia Courts was established in the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91-358, 84 Stat. 510; District of Columbia Code, Title 11, section 11-1703 (Supp. V., 1972). Subsections (b) and (c) of section 11-1703 provide as follows:

(b) The Executive Officer shall be selected by, and subject to removal by, the Joint Committee with the concurrence of the respective chief judges. He shall be selected from a list of at least three qualified persons submitted by the Director of the Administrative Office of the United States Courts.

(c) The Executive Officer shall receive the same compensation as an associate judge of the Superior Court.

Pursuant to the above-cited provisions of the law, you have asked the following questions:

If, as the statute provides, the Executive Officer receives the same compensation as an associate judge of the Superior Court, does that mean that he is entitled to the same leave and retirement as are the judges whose entitlement is spelled out in the District of Columbia Code, Section 11-1505 and in Chapter 15, subchapter III (Supp. V, 1972)?

(a) To what retirement plan does the Executive Officer of the District of Columbia Courts correctly belong? Is it the so-called Civil Service retirement contained in Chapter 83, Subchapter III of Title 5 of the United States Code or, on the other hand, is it that retirement system established in Chapter 15, Subchapter III of Title 11 of the District of Columbia Code?

(b) Is the Executive Officer of the District of Columbia Courts subject to the provisions of the Leave Act, Title 5, Chapter 63, of the United States Code or, on the other hand, is he entitled to the same vacation provided to judges of the District of Columbia Courts by the District of Columbia Code, Section 11-1505 (Supp. V, 1972)?

The legislative history of the statute indicates that it was the intention of Congress, in creating the position of Executive Officer, to improve court administration in the District of Columbia by providing for modern court management with the centralization of nonjudicial, administrative duties in a top-level court executive appointed by the Joint Committee on Judicial Administration. It is clear throughout the history that Congress intended to create a nonjudicial position designed so that the executive would function effectively with the judges in the operation of the court system, but whose appointment or removal would nevertheless be subject to the ultimate control of the Joint Committee on Judicial Administration. However, Congress designated the "compensation" of the Executive Officer to be the same as that of an associate judge of the Superior Court, apparently to help assure the desired close working cooperation between the judicial and nonjudicial branches of the court system. This is indicated in S. Report No. 91-405, 91st Congress, 1st Session, 14, as follows:

> * * * Experience has demonstrated, particularly in the well-run Los Angeles Superior Court, that the court executive or administrator, in order to perform a valuable function, must have the confidence and support of the judges with whom he works as well as stature within the system.
>
> To assure the recruitment of a top-flight court executive, section 11-1703 requires that he be selected from a list submitted by the Administrative Office of the U.S. Courts * * * To assure that the respective chief judges are inclined to accept and utilize the court executive, his selection must be concurred in by the respective chief judges. *To give the executive needed stature, he is to receive the salary of a local trial judge.*

Further, there is in the same report the testimony of a former Executive Officer of the Superior Court of Los Angeles County as follows:

> In my judgment it would be a serious mistake not to pay him exactly the salary the judge gets * * * salary is an evidence of stature. If he doesn't have the same status as a judge he isn't going to be completely effective.
>
> * * * * * * *
>
> * * * You can get just as qualified a guy possibly for less money, but he won't have the stature; he won't have the acceptance; a person who is one who is considered at a lower echelon, and you will get runners and you will get clerical types as your executive unless you meet this problem head on.

We note that throughout the legislative history there are references to granting the Executive Officer equal status by giving him equal "pay" or "salary." We have previously held that the words "salary," "pay," and "compensation" generally are considered synonymous in the construction of personnel statutes, 10 Comp. Gen. 302, 304 (1931). However, we fail to find any indication whatsoever that the Congress intended such word or words to cover other benefits such as leave and retirement. In that regard we note that section 11-904(b) of the D.C. Code, as amended by Public Law 91-358, provides in part that "Judges of the Superior Court shall be *compensated* at 90 per centum of the rate prescribed by law for judges of United States district courts."

Sections 11–1505 and 11–1561 *et seq.* then spell out the additional benefits that judges of the District of Columbia Courts are entitled to in addition to their basic salaries. Also, under subchapter III of Chapter 15 of Public Law 91–358 relating to retirement, a judge is defined in section 11–1561 as "any judge of the District of Columbia Court of Appeals or the Superior Court or any person with judicial service * * *," and there are no provisions for including a nonjudicial position such as that of Executive Officer. [Italic supplied.]

Accordingly, our view is that the Executive Officer of the District of Columbia Courts is not subject to the leave and retirement provisions applicable to the judges of the District of Columbia courts.

The applicability of the civil service retirement provisions to the position of Executive Officer would be for determinaton by the Civil Service Commission.

As to the Annual and Sick Leave Act of 1951, as amended, now 5 U.S. Code 6301 *et seq.*, we see no reason why such provisions would not apply to the position of Executive Officer, assuming that a regular tour of duty is established for the occupant thereof and that leave records are maintained.

The questions presented are answered accordingly.

[B–175508]

Decedents' Estates—Pay, Etc., Due Military Personnel—Beneficiary Designations—Beneficiary Predeceases Member

Where the brother named by a member of the uniformed services to share with a sister the retired pay due him at time of death predeceases the member and only the sister and two other brothers survive the member, the sister does not take the undistributed one-half share since the beneficiary designations made pursuant to 10 U.S.C. 2771(a)(1) became effective upon the member's death and, therefore, the order of precedence prescribed by section 2771(a) applies to the undistributed share of retired pay due. As the member was not survived by a widow, child, grandchild, or parent, and no legal representative was appointed, distribution in accordance with section 2771(a)(6) should be made to the persons, including a corporate entity, entitled to take under the law of the domicile of the deceased, which accords preference to creditors, or persons paying creditors, for funeral and last illness expenses.

To Lieutenant Colonel A. C. Samarkos, Department of the Army, September 6, 1972:

Further reference is made to your letter dated March 13, 1972 (file reference FINCS-ES), with enclosures, requesting an advance decision regarding the propriety of making payment on a voucher in the amount of $158.49 in favor of Doris M. Kennedy, representing the unpaid one-half share of the retired pay due in the case of the late Technical Sergeant Floyd C. Joy, SSAN 562–36–0391, in the circum-

stances described. Your letter was forwarded to this Office by letter from the Office of the Comptroller of the Army (file reference DACA-FIS-PP), and has been assigned submission No. DO-A-1151 by the Department of Defense Military Pay and Allowance Committee.

You state that Sergeant Joy retired from the Army on February 28, 1945, and on January 12, 1956, executed a FCUSA Form 1170, Designation of Beneficiary by Army Retired Individual, in which he provided that 50 percent of his unpaid retired pay due on the date of his death was to be paid to a brother, Emmett P. Joy, and 50 percent to a sister, Doris M. Kennedy. On June 13, 1971, the member died and was survived by his sister, Doris M. Kennedy, and two brothers, Charles R. Joy and Donald N. Joy. The brother who had been designated as a beneficiary for a share of the deceased member's retired pay predeceased the member on June 6, 1971.

You express uncertainty as to the proper distribution of payment under the provisions of 10 U.S. Code 2771 where two or more persons are designated as principal beneficiaries and one of the persons designated predeceases the serviceman. You ask whether the share which would have been paid to the deceased designee should be paid to the other person or persons designated, as held appropriate to the payment of 6 months' death gratuity in 36 Comp. Gen. 741 (1957) or should such share be paid to the undesignated person or persons highest on the list, living on the date of the member's death, as set forth in the order of precedence in 10 U.S.C. 2771(a).

Our decision of April 26, 1957, 36 Comp. Gen. 741, construed section 301 of the Serviceman's and Veterans' Survivor Benefits Act, 70 Stat. 868, 38 U.S.C. 1131, repealed and reenacted as sections 1475 to 1480, Title 10 U.S. Code, governing the payment of the 6 months' gratuity. Since the accounts of deceased service members are settled under 10 U.S.C. 2771, containing provisions materially different from the provisions governing the 6 months' death gratuity, our decisions regarding the death gratuity may not be for application in the settlement of a decedent's account.

Subsection 2771(a) of Title 10 U.S. Code, which governs the settlement of accounts of deceased members of the uniformed services who died on or after January 1, 1956, provides for payment of the amounts due deceased members at the date of death to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in the regulations to be prescribed by the Secretary concerned:
(2) Surviving spouse.
(3) Children and their descendants, by representation.
(4) Father and mother in equal parts or, if either is dead, the survivor.
(5) Legal representative.
(6) Persons entitled under the law of the domicile of the deceased member.

The above-quoted code provision is derived from the act of July 12, 1955, Ch. 328, 69 Stat. 295, which was enacted as a facility of payment statute for disposition of the accrued but unpaid pay and allowances (including retired pay) of a deceased member of an armed force, and was patterned after the provisions of the act of August 3, 1950, Ch. 518, 64 Stat. 395 (presently codified as 5 U.S.C. 5581, *et seq.*) governing settlement of accounts of deceased civilian employees. Because of the similarity between the two acts a uniform interpretation will be given whenever possible.

The legislative history of the 1955 act shows that the primary purpose of the act was to eliminate the problems arising under the former provisions of law which required the making of determinations concerning the validity of marriages, divorces, the legitimacy of children, etc., when settling the final accounts of deceased service personnel. This purpose was effectively accomplished by the 1955 law, to the extent possible, by permitting each member of the uniformed services to designate a beneficiary or beneficiaries of his or her own choice and providing for payment of the amount due to such designated beneficiary. Also, the law was designed to permit the Department concerned, subject to regulations prescribed by the Comptroller General of the United States, to make payment of the amount due a decedent to his designated beneficiary and that payment of such amount bars recovery by any other person.

It is clearly evident that, by virtue of the fact that the member is permitted to designate a person or persons under clause (1), the ability of the member to change such designation as well as the percentage of such designation at anytime provides in effect a testimentary disposition by the serviceman of that part of his estate representing his final pay. As such, designations made by a serviceman under 10 U.S.C. 2771(a)(1) are ambulatory, that is, they do not become effective until the death of the member for the purpose of passing an interest. In this connection, the following comment appears at page 20, Hearing before the Committee on Armed Services, United States Senate, April 21, 1955, "the rights of persons designated vest as of the date of death * * *."

It would thus appear that the language of subsection 2771(a) which provides that the amount due "shall be paid to the person highest on the following list living on the date of death," establishes that only those persons living on that date are eligible to receive the amounts in question and their rights under clauses (1) through (6) become fixed at that time. Thus, if there be no named beneficiary capable of receiving a portion of the amount due, then by the clear terms of the statute, payment of that portion is required to be made

to certain stated relatives in the designated order of precedence (clauses (2) through (4)) if the decedent is survived by such a person or persons.

With respect to the undistributed one-half share of the retired pay due in this case, since Emmett P. Joy, as a designated beneficiary under clause (1), was not living on the date of the member's death, such designation became ineffective by operation of law. *See* 41 Comp. Gen. 431 (1962). The FCUSA Form 1170 executed by the member in 1956 failed to provide a further designation of the beneficiary or beneficiaries to receive that share. Thus, entitlement to the share in question would pass to the person or persons next highest on the statutory list capable of receiving these funds. Accordingly, settlement may not be made with Doris M. Kennedy for the remaining one-half share under 10 U.S.C. 2771(a)(1).

The record shows that the member was not survived by a widow, child, grandchild or parent. In the absence of such relative, the undesignated share would be payable to the legal representative of the estate of the deceased member under clause (5) if one has been appointed.

There is no evidence that a legal representative has ever been appointed. However, in a letter dated November 29, 1971, Charles R. Joy states that he is responsible for all of the deceased member's bills. If he has been appointed the legal representative of the deceased member's estate and furnishes proof of such appointment he would qualify under clause (5) to receive payment of the undesignated one-half share. In the event that neither he nor anyone else has been appointed as the legal representative of the member's estate, then distribution of the amount in question must be made under clause (6) of subsection 2771(a) to the person or persons entitled under the laws of the domicile of the deceased member.

In this regard, you ask that if there are no persons eligible under clauses (2) through (5) of 10 U.S.C. 2771(a), whether payment should then be made to the person or persons entitled under the law of the domicile of the deceased member under the local law of descent and distribution as indicated by 49 Comp. Gen. 315 (1969), or should preference be given to persons who are preferred creditors such as funeral directors, friends, relatives or in-laws, who have paid the medical and funeral expenses of the decedent. You also ask whether the word "person" as used in clause (6) of subsection 2771(a) should be interpreted to mean only "heirs at law of the decedent" or should it also include preferred creditors. And, further, should the word "person" be construed to mean a natural person or does the meaning include "corporate entities," as well.

The legislative history of 10 U.S.C. 2771 does not amplify the scope or intent of clause (6). However, as previously stated, those provisions, especially the order of precedence set forth therein, were derived from the act of August 3, 1950, *supra*, the law governing settlement of accounts of deceased civilian employees. In Senate Report No. 1933, June 30, 1950, to accompany S. 3652, which became the 1950 act, the proposed order of precedence was discussed and reference was made to the necessity for "the interpretation of State laws of descent and distribution" and "consideration of claims of preferred creditors," in connection with settlements under that law where no designated beneficiary, spouse, children or parents survive.

In this regard, it has long been the practice of this Office in the settlement of accounts of deceased service personnel and civilian employees of the Government pursuant to State laws to give precedence to the claims of preferred creditors for funeral expenses and expenses of last illness, as well as the claims of persons who submit receipted bills showing payment of such expenses together with a statement that payment was made out of their own funds.

In 49 Comp. Gen. 315 (1969), the settlement authorized under clause (6) of 10 U.S.C. 2771(a) was based on Illinois law. While the laws of that State provide for payment out of the estate of a decedent to certain creditors before distribution is made to surviving relatives, no claims were presented by creditors or by persons who had paid the claims of creditors. In making settlement under clause (6) of 10 U.S.C. 2771(a) there are for consideration the applicable provisions of the law of the decedent's domicile with respect to the claims of creditors against his estate as well as the provisions with respect to descent and distribution.

In the present case it appears that the member was domiciled in California. Section 950 of Deering's California Probate Code provides in part that the debts of the decedent and other charges against the estate shall be paid in the following order:

(1) Expenses of Administration;
(2) Funeral Expenses;
(3) Expenses of last illness;
(4) Family Allowance * * *.

Thus, under the Probate Code of California, such creditors as may be represented by section 950 are entitled to receive amounts due from the estate of a decedent before distribution to brothers and sisters would be permitted.

As previously noted, Charles R. Joy has indicated assuming responsibility for the deceased member's debts, presumably those relating to burial and last illness. If there has been no legal representative appointed in this case, then if he furnishes receipted bills evidencing

payment by him of expenses of the kinds listed in section 950 of the California Probate Code out of his own personal funds, along with a statement that he has not been reimbursed by the estate of the deceased member or by another, such costs may be allowed to him. Should any amounts remain after payment is made to Charles R. Joy for these expenses or in the absence of any claim for such expenses, then distribution may be made under the provisions of section 225 of the California Probate Code which provides for payment in equal shares to a decedent's brothers and sisters.

With respect to your question concerning construction of the word "person" as used in subsection 2771(a), it is sufficient to say in this case that under clause (6) should any of the preferred creditors on the before-mentioned list be a corporate entity, it would not be precluded from receiving payment.

[B-175317]

Equipment—Automatic Data Processing Systems—Leases—Evaluation—Benchmark/Demonstration Test

The determination that an offer evaluated on the basis of the criteria and assigned weights contained in a request for proposals did not meet the mandatory requirements for rental of nationwide computer network facilities by means of a commercially marketed system called "full-services teleprocessing" with access to a common data base and, therefore, the offeror should not be allowed to perform the live benchmark/demonstration test that would measure the proposed system's network capabilities and cost effectiveness was justified because the proposal failed to offer for benchmarking the system to be delivered and used in performance of the contract, whereas the successful offeror, operating a national network at the time of submitting its proposal, met the experience requirements of the RFP.

To the General Electric Company, September 8, 1972:

Further reference is made to your protest against the award of a contract to Computer Sciences Corporation (CSC) by the Federal Supply Service, General Services Administration, pursuant to request for proposals No. FTPH-L-28587-71.

The subject RFP, issued November 8, 1971, solicited proposals for rental of nationwide computer network facilities by means of a commercially marketed system called "full-services teleprocessing" with access to a common data base for the period from date of award through June 30, 1973, with options for three yearly renewals. The RFP provided for evaluation on the basis of specified criteria and assigned weights. A live benchmark/demonstration test was also called for to measure network capabilities and cost effectiveness after an offeror's proposal had been found to meet specified mandatory requirements.

Eight firms submitted timely proposals by the December 17, 1971, closing date. A staff of 29 specialists from GSA and other agencies evaluated the proposals and obtained clarifications from the eight offerors. By telegram dated January 21, 1972, offerors were advised that technical modifications would not be accepted after January 25, 1972. Thereafter, three of the four offerors invited to benchmark did so successfully. GE was not allowed to perform the benchmark because GSA had determined that the firm failed to meet certain mandatory requirements. Proposals of the three successful offerors were reevaluated as to technical competence and cost effectiveness. CSC received the highest overall rating and was awarded the contract on March 21, 1972.

Basically, it is your position that GE, on technically dubious and minor grounds, has been improperly and unfairly denied the opportunity to benchmark its proposed system and that the real issue is the necessity for the demand that GSA personnel be physically present in GE's computer room during the benchmarking. You argue that GSA's determination that your proposal did not meet certain mandatory requirements results from its confusion and imprecision in stating its needs. With regard to the requirement for access to a common data base in both interactive and remote batch modes, it is your contention that GE's initial proposal complied by proposing as a temporary arrangement until September 1, 1972, both its Mark II and Resource systems to accommodate different terminals that would access only one or the other of the two computers. While this arrangement would require the use of two mainframes, you contend that this was permissible under the RFP and GSA wrongfully insisted upon the use of one mainframe. As a result GE was compelled to abandon the proposed combined use of both systems and to propose only its Resource system to run the benchmark and for use until September 1, 1972.

Since the Resource system will not support nonprogrammable high speed terminals, GSA concluded that GE failed to meet this mandatory requirement. However, you contend that while the RFP required support of high speed terminals, of which Resource is capable, GSA erroneously interpreted the requirement as including nonprogrammable terminals. It is your contention that the requirement in the benchmark documentation for supporting "IBM 2780 or equivalent" terminals does not necessarily mean that a high speed terminal must be nonprogrammable to be "equivalent" since the vast majority of 2780 equivalents are programmable.

Furthermore, you contend the benchmark documentation was received so late that there was not sufficient time to seek clarification

of the language before submitting your proposal. You point out that 2 days after issuance of the RFP an amendment advised offerors that the crucial benchmark material would be supplied later and that GE did not receive it until the due date for receipt of proposals. Also, you point out that your request for an extension of the closing date was denied. Therefore, you contend that offerors did not know precisely what the Government wanted or what to propose until the day proposals were due. In this connection, you state that by modification of February 1, 1972, GE committed itself to have Mark II support nonprogrammable high speed terminals by the time for acceptance testing, 90 days after award.

With regard to GSA's requirement of January 18, 1972, for on-site computer inspection, you say that no such requirement was called for in the RFP or benchmark documentation and it is not necessary to test the operation of the system. Furthermore, you contend that the requirement would violate GE's security procedures designed to protect the confidentiality of its commercial customers' files. Also, you point out that GE was willing to work out an alternate procedure such as closed-circuit TV monitoring.

Finally, you contend that Computer Sciences Corporation failed to meet mandatory requirements concerning a full service network, interactive Fortran, and security features. You point out that the RFP required that any proposed network be an operating, tried and proven national full service network and that prospective vendors must have had at least 1 year's experience in providing commercial teleprocessing services and 6 months prior operation of the proposed basic hardware and software in a teleprocessing environment. You argue that CSC could not have complied with these requirements because at the time proposals were due its system, Infonet, consisted of five unconnected Univac 1108s which could not practicably provide access to a common data base. You say that although CSC had a Fortran compiler which was conversational, it did not offer commercially interactive execution as required.

It is GSA's position that GE's fundamental deficiency was its failure to offer for benchmarking the system it proposed to deliver and use in performance of the contract. It is clear from your proposal as initially submitted, and as modified, and from your correspondence submitted in connection with this protest, that GSA is correct in this regard. As we understand it, you offered the Resource system for benchmarking, the addition of the Mark II system by acceptance time, and the Mark III system for the vast majority of the performance time.

Obviously, requiring benchmarking on the system proposed for performance is justified to determine its capability and cost effective-

ness. Furthermore, we see no basis for concluding that your failure to comply with this fundamental requirement resulted from any "confusion or imprecision" in the RFP, which was described in your February 4, 1972, letter to GSA as "extremely explicit and in fact, one of the best documented solicitations we have reviewed."

With regard to the contention that, contrary to the RFP, GSA compelled you to abandon your initial proposal by demanding the use of one mainframe, we note that GSA's request for clarification clearly asked how you proposed to support "access to the same common data bases when required (on a demand basis) regardless of whether the two modes of operation are supported on the same mainframe or not." According to GSA, the question was raised not because you proposed the use of two mainframes but because it was not clear what method would be used to transfer information between the two systems in order to achieve the clearly required common data base and what delays the procedure would impose on the use of all of the information. We believe the record supports GSA's position.

However, your response was to propose use of only the Resource system. GSA concluded that the Resource system did not meet the mandatory requirement for support of nonprogrammable terminals. In this connection, GSA points out that the requirement did not first appear in the benchmark documentation issued on December 10, 1972, as you contend, but was required by paragraph A–203 of the technical specifications which includes the following pertinent provisions:

a.

(1) The characteristics of high-speed remote batch terminals which *must be supported* are listed below; however, all of the features listed may not be included in *a single terminal.* The terminals for which support is required include those:

* * * * * * *

(f) which may be programmed to perform multiple functions such as editing and serving as controllers for multiple low-speed terminals. Support of nonprogrammable terminals is *also* required.

* * * * * * *

c. Vendors whose proposals meet all other mandatory requirements will be required to *demonstrate* operation of both high and low speed *terminals supported* during the benchmark. Terminals used in the benchmark demonstration will be those mutually agreed upon. [Italic supplied.]

With regard to the specification of "IBM 2780 or equivalent" in the benchmark documentation, GSA offers the following explanation:

It should be noted in this connection that the RFP requires non-programmable terminals, but not the terminals of a particular vendor. In fact, the equipment of three different vendors, other than IBM, was used during the benchmark tests. The benchmark documentation reference to IBM 2780 or equal is merely an emphasis of the non-programmable characteristic desired. There are perhaps a dozen other manufacturers whose equivalent equipment is used by the Government. Non-programmable terminals are not an IBM preserve. However, since some of the other equipment can act as programmable or nonprogrammable,

listing the equipment by name would have introduced a certain ambiguity. When such equipment is referred to by itself, it is not understood to be necessarily non-programmable. On the other hand, even GE admits the IBM 2780 is not programmable in any way * * *.

GSA also says that the benchmark documentation was released to GE's Mr. Dearborn on December 10, 1971, and not on the closing date for proposals. Further, GSA points out that GE's modification of February 1, 1972, reintroducing Mark II to comply with the non-programmable requirement was not timely and, in addition, did not offer to comply until acceptance testing or 90 days after award.

In view of our conclusion with respect to the foregoing we find it unnecessary to consider the other points raised as to the acceptability of the GE proposal.

So far as concerns the accepted proposal it is GSA's position that CSC met all the requirements of the RFP including network, Fortran and security capabilities. With regard to the latter two requirements, GSA has furnished our Office copies of the applicable parts of CSC's proposal and its evaluation thereof. On the basis of our examination of these documents, it appears that CSC clearly met those requirements. GSA found that CSC complied with the other mandatory requirements in that (1) it has provided commercial teleprocessing services more than the required year (since 1969), (2) the basic hardware and software proposed had been in operation more than the required 6 months and (3) its proposed INFONET system was an operating national full-service teleprocessing network as required by the RFP. In this connection, GSA has furnished our Office the following description of CSC's proposed network:

The Computer Sciences Corporation proposed to support the Government's requirements with its INFONET network. The INFONET network as it was then configured was a system of five (5) regional computer centers, three (3) of which were linked by dedicated, conditioned inter-regional communications lines. The network was composed of three major parts:

1. Communications Network
2. Hardware (U 1108)
3. Software

The communications network permitted data transmission at speeds up to 4800 bps and was capable of expansion to higher speeds. It supported interactive and remote batch processing at the five computer centers.

The center at El Segundo, California, was interconnected with the centers at Oak Brook, Illinois and Silver Spring, Maryland with dedicated, conditioned lines. With dedicated, conditioned communications lines in place, the capability existed for, and Oak Brook actually did support, not only its own area but the Western District as well, at the time the proposal was submitted. In like manner, the capability existed for Silver Spring to support the Western District or for El Segundo to support the Mid-Western and/or the Eastern District.

Accessibility to the network from Washington, Philadelphia, Dallas, Chicago, Denver, Los Altos, Los Angeles and Houston (installation in progress at the time the proposal was submitted) was accomplished using on site multiplexing and concentrating hardware at CSC branch offices in those cities.

In addition, accessibility to the network from Baltimore, Pittsburgh, Milwaukee, Santa Ana and Santa Monica was achieved via Foreign Exchange or dedicated high speed lines from other branch offices in those cities. Toll free

service was also provided to and from 32 other cities. The network did, in fact provide services throughout a significant portion of the continental United States as indicated by the shaded portion of the attached map. Also attached are these circuits in being at El Segundo, Oak Brook and Silver Spring at the time of the submission of CSC's proposal.

The hardware portion of the network consisted of one UNIVAC 1108 at all sites except El Segundo where two were installed.

The network at that time was operational using two versions of the CSC operating system. Most of the network was using the version called CSCX. This version supported interactive and remote batch processing concurrently to offer full service teleprocessing support. In use in the El Segundo center was a newer version of the CSC operating system called CSTS. This version was developed by CSC and became operational on March 14, 1971, at which time block time was scheduled for external applications development.

CSC proposed to support the Government's requirements with the INFONET network using the CSTS version of the operating system. The El Segundo center was proposed to be the National Center which would connect to each Federal Data Processing Center area as required by the RFP.

Accordingly, CSC had an operating national network at the time of the submission of their proposal. Their centers were linked to one another by dedicated, conditioned communications lines from coast to coast.

In view of the foregoing, there is no legal basis for our Office to object to the award to Computer Sciences Corporation.

[B-176343]

Subsistence—Per Diem—"Lodging-Plus" Basis—Computation

In the application of the "lodging-plus" provision of subsection 6.3c of the Standardized Government Travel Regulations to an employee who while on temporary duty was hospitalized and received reimbursement for the $80 per day room and board hospital charge, none of which is allocable to lodging *per se*, it may be assumed the lodging rate for the period of hospitalization was at least $13 per day on the basis the agency regulation implementing the subsection prescribes a daily subsistence allowance of $12 and a maximum per diem rate of $25. Therefore, the employee may be allowed a lodging rate of $13 per day for the entire period of temporary duty, including hospitalization, plus a daily subsistence allowance of $12, and payment may be made to him at the full $25 per diem rate.

To Lillian Zutz, National Aeronautics and Space Administration, September 8, 1972:

This refers to your letter of June 12, 1972, requesting an advance decision as to the proper method of computing per diem entitlement for an employee hospitalized while on temporary duty in order to conform with provisions of subsection 6.3c, Office of Management and Budget (OMB) Circular No. A-7, Standardized Government Travel Regulations (SGTR), as revised August 17, 1971.

Your letter states that Mr. Frank E. Rom, a National Aeronautics and Space Administration (NASA) employee whose official headquarters is Cleveland, Ohio, performed temporary duty at San Diego, California, requiring overnight lodging on January 16 and 17, 1972. On January 18 Mr. Rom departed San Diego for Washington, D.C., where he was ordered to attend meetings on January 19 and 20. After

spending one night, January 18, in commercial lodgings in Washington, Mr. Rom became ill at noon on January 19 and was hospitalized in Washington from January 19 until January 27 when he returned to Cleveland. Mr. Rom's hospital bill, including charges of $80 per day for room and board, was fully covered by his government employee's health insurance policy.

Your question concerns the application of the "lodgings-plus" provision of subsection 6.3c of SGTR to the 8 days Mr. Rom spent in the hospital.

As your letter states, subsection 5702(b) of Title 5, U.S. Code and subsection 6.5b of SGTR provide for continuing entitlement to per diem while in travel status for an employee whose duty is interrupted by a period of physical incapacitation. Also, our decision 40 Comp. Gen. 167 provides that this entitlement is not diminished because hospital expenses of an employee in such a case are reimbursable under health insurance plans provided for by Ch. 89 of Title 5, U.S. Code.

Subsection 6.3c provides, in pertinent part, as follows:

> c. *When lodgings are required.* For travel in the continental United States when lodging away from the official station is required agencies shall fix per diem for employees partly on the basis of the average amount that traveler pays for lodgings. To such amount, i.e., the average of amounts paid for lodging while traveling on official business during the period covered by the voucher, shall be added a suitable allowance for meals and miscellaneous expenses. The resulting amount rounded to the next whole dollar, if the result is not in excess of the maximum per diem, will be the per diem rate to be applied to the traveler's reimbursement in accordance with the applicable provisions of this section. If such result is more than the maximum per diem allowable such maximum will be the per diem allowed. No minimum allowance will be authorized for lodging since those allowances are based on actual lodging expenses. . . . An agency may determine that the lodgings-plus system as prescribed herein is not appropriate in given circumstances as when quarters or meals, or both, are provided at no cost or at a nominal cost by the Government or when for some other reason the subsistence costs which will be incurred by the employee may be accurately estimated in advance. In such cases a specific per diem rate may be established and reductions made in accordance with this section provided the exception from the lodgings-plus method is authorized in writing by an appropriate official of the agency involved.

The applicable NASA regulation implementing subsection 6.3c is quoted in your letter as follows:

> The allowable per diem rate for all travel within the continental United States will, except as otherwise provided for, be determined on the basis of the average amount paid for lodging while on official business during the period covered by the voucher plus a daily subsistence allowance of $12. The resulting amount, rounded to the next whole dollar not in excess of $25, will be the per diem rate applied to the traveler's voucher. Each traveler, * * *, shall show on his reimbursement voucher the total amount paid for lodging, includng tax, for the number of days spent at each location requiring lodging for official business. The traveler will also show the total cost of lodging for the period covered by the voucher and the average of such lodging.

The lodgings Mr. Rom occupied in San Diego on January 16 and 17 cost $12.78 per day. The lodging occupied in Washington on January 18 cost $13 per day. The hospital is unable to allocate any portion of its $80 a day charge to lodging *per se;* thus it is necessary to determine in these circumstances the application of the "lodgings-plus" requirement of subsection 6.3c, SGTR.

In this case, while the hospital is unable to separate the cost of lodging from meals and other elements of its $80 a day charge, we believe it can be assumed that this part of the charge would not be less than $13 which is the difference between the $12 addition for subsistence and the maximum allowance of $25. Accordingly, the lodging rate may be assumed to represent at least $13 per day for the period of hospitalization. This results in an average lodging rate of $13 for the entire period of temporary duty including hospitalization or a full per diem rate of $25 per day.

In response to your general question as to the method of reimbursement in the future for employees hospitalized while on temporary duty, we believe the method prescribed herein should be used in similar cases.

Since the voucher which is mentioned herewith has been computed using the $25 rate for the entire period of temporary duty it may be certified for payment if otherwise correct.

[B-124046]

Medical Treatment—Federal Medical Recovery Act—Payment For Services—Disposition

The collections made under the so-called Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651–2652, for hospital, medical, surgical, or dental care and treatment to persons who are injured or suffer a disease under circumstances creating a tort liability upon a third person are for deposit in the Treasury as miscellaneous receipts pursuant to section 3617, Revised Statutes, 31 U.S.C. 484, as the disposition of monies collected from third party tortfeasors is not specified in FMCRA, and the practice of depositing such collections to related appropriation accounts relying on the authority in 10 U.S.C. 2205 should be discontinued since there is not involved the sale of and payment for services that is contemplated by 10 U.S.C. 2205.

General Accounting Office—Recommendations—Implementation

Since the recommendation that the collections made from third party tortfeasors pursuant to the so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for the care and treatment of persons who are injured or suffer a disease under circumstances creating a tort liability upon a third person should be deposited in the Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to a related appropriation account requires corrective action, written

statements of the action taken are required by section 236 of the Legislative Reorganization Act to be submitted to the Committees on Government Operations of both Houses within 60 days and to the Committees on Appropriations in connection with the first request for appropriations that is made more than 60 days after the date of the recommendation.

To the Secretary of Defense, September 11, 1972:

By letter of August 3, 1971, addressed to you, attention: Assistant Secretary of Defense (Comptroller), we transmitted for your review and comment a draft report concerning procedures pertaining to collections under the so-called Federal Medical Care Recovery Act (FMCRA), Public Law 87-693, approved September 25, 1962, 76 Stat. 593, 42 U.S. Code 2651-2652.

The above-mentioned act provides that in any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment to a person who is injured or suffers a disease under circumstances creating a tort liability upon some third person to pay damages therefore, "the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished" and "shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person" to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The statute further provides that the Government may also require the injured or diseased person "to assign his claim or cause of action against the third person to the extent of that right or claim." To enforce such right the statute authorizes the United States to "intervene or join in any action or proceeding brought by the injured or diseased person" against the third person who is liable for the injury or disease or "if such action or proceeding is not commenced" by him within the time there prescribed, "institute and prosecute legal proceedings against the third person who is liable for the injury or disease."

This act does not specify the disposition to be made of monies collected from third party tortfeasors and, consequently, unless a different disposition is otherwise provided, such collections are for deposit in the Treasury as miscellaneous receipts as provided by section 3617, Revised Statutes, 31 U.S.C. 484.

As noted in our draft report, the Department of the Army has been depositing such collections as miscellaneous receipts. The Departments of the Navy and the Air Force, however, relying on the provisions of 10 U.S.C. 2205, have credited such collections to their related appropriation accounts.

We did not agree in our report that 10 U.S.C. 2205 authorized the collections in question to be credited to the related appropriations and, accordingly, we recommended that the Departments of the Navy and the Air Force follow the practice of the Department of the Army and deposit such collections into the Treasury as miscellaneous receipts as required by 31 U.S.C. 484.

By letter of December 2, 1971, the Assistant General Counsel (Fiscal Matters) forwarded the comments of the Department of Defense and, with reference to that recommendation, it was stated that in the absence of a definitive decision of the Comptroller General and the Department of the Army would henceforth follow the practice of the Departments of the Navy and Air Force and credit FMCRA collections to its related appropriation account.

10 U.S.C. 2205 reads as follows:

> Reimbursements made to appropriations to the Department of Defense or a department or agency thereof under section 686 of title 31, or other *amounts paid* by or on behalf of a department or agency of the Department of Defense to another department or agency of the Department of Defense, or *by or on behalf of personnel of any department or organization, for services rendered or supplies furnished, may be credited to authorized accounts.* Funds so credited are available for obligation for the same period as the funds in the account so credited. Such an account shall be accounted for as one fund on the books of the Department of the Treasury [Italic supplied.]

The language of 10 U.S.C. 2205 originally was enacted as section 408 of the National Security Act of 1947, as added by section 11 of Public Law 81–216, approved August 10, 1949, 63 Stat. 590. The legislative history thereof does not disclose any indication of the particular purpose of the italicized language, discussion in the hearings and reports being primarily limited to the effect of that section on transactions under section 601 of the Economy Act, 31 U.S.C. 686. It may be noted, however, that section 405 as also added to the National Security Act of 1947 by Public Law 81–216, 10 U.S.C. 2208, authorizes the establishment of working-capital funds to provide services and sell supplies to the departments and agencies of the Department of Defense and their personnel and provides for reimbursement on account of supplies furnished or services rendered. In view thereof, it appears that the italicized language in 10 U.S.C. 2205 above was inserted as a reference to the working-capital fund provisions.

In any event amounts collected under FMCRA obviously are not paid by the person for whom hospital service is furnished and, since such person is entitled thereto by law and under no obligation to pay therefor, we think it clear that an amount collected under FMCRA cannot be said to represent an amount paid on behalf of such person. Such amounts are in the nature of recoveries for damages and, while the amount in any given case is measured by the cost of the services

furnished to the victim, we think it clear that there is not involved a sale of services to any personnel of the military departments nor any payment made therefor on their behalf as contemplated by 10 U.S.C. 2205.

Accordingly, amounts collected pursuant to FMCRA should be deposited into the Treasury as miscellaneous receipts.

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

[B-176209]

Departments and Establishments—Services Between—Jointly-Beneficial Projects

Section 601 of the Economy Act of 1932, as amended (31 U.S.C. 686), which in effect prohibits agencies other than those specifically so authorized from obtaining interagency services to be procured by contract, does not prohibit the Environmental Protection Agency (EPA), under its statutory authority to cooperate in and coordinate environmental functions, from entering into jointly beneficial projects with other agencies requiring services to be procured by contract. However, section 601 will continue to apply to EPA with respect to the requisitioning or provision of interagency services to be procured by contract where such services are of benefit only to the requisitioning agency.

To the Administrator, Environmental Protection Agency, September 11, 1972:

By letter dated June 8, 1972, the Assistant Administrator for Planning and Management has requested our decision on several questions concerning the authority of the Environmental Protection Agency (EPA) to participate in and to contribute to contracts financed by interagency transfers of funds. The Assistant Administrator's letter states, in part:

It furthers the purposes and programs of this Agency to enter into agreements with other Government departments and agencies concerning joint research or demonstration projects, the performance of which is needed by both EPA and the other agency. Often the agreement provides that one of the agencies will execute a contract thereunder with a private contractor for the performance

of a project and that both agencies will contribute a portion of the contract cost. Through such an agreement there is avoided duplication of effort (on the part of both contractor and Government), and the work product's usefulness is greater, relative to cost to the Government.

While we feel that such agreements have great practical value to the Government, we have questions concerning the extent of our legal authority with respect to them. * * *.

The questions concerning EPA's legal authority in this regard arise in consideration of the act approved May 21, 1920, Ch. 194, section 7, 41 Stat. 613, revised by the act of June 30, 1932, Ch. 314, section 601, 47 Stat. 417, as amended, 31 U.S. Code 686, popularly known as section 601 of the Economy Act. 31 U.S.C. 686 provides in relevant part:

(a) Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, * * * all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned; * * * *Provided*, That the Department of the Army, Navy Department, Treasury Department, Federal Aviation Agency, and the Maritime Commission may place orders, as provided herein, for materials, supplies, equipment, work, or services, of any kind that any requisitioned Federal agency may be in a position to supply, or to render or to obtain by contract * * *.

Since EPA is not specifically authorized to place orders to be rendered or obtained by contract under the above-quoted proviso, it is suggested that 31 U.S.C. 686(a) might be interpreted to prohibit the transactions here contemplated by the agency. However, the Assistant Administrator maintains that this statute does not apply when both the requisitioning and the requisitioned agency have an interest in certain projects:

31 U.S.C. 686(a) is not indicative of a Congressional intent to cover the factual situation mentioned at the start of this letter, i.e., the jointly-beneficial project for which joint funding is contemplated. * * *.

* * * Both the statute itself and your decisions interpreting it indicate that Congress' intent was to provide a means for one agency to obtain property or services needed by it alone, through another agency which was better prepared to furnish the needed property or services.

The Assistant Administrator cites several statutory provisions which relate to such joint activities by EPA, quoted, in part, as follows: Section 5(a) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1155(a):

The [EPA] Administrator shall conduct and encourage, cooperate with, and render assistance to other appropriate public (whether Federal, State, interstate, or local) authorities, agencies, and institutions, private agencies and institutions, and individuals in the conduct of, and promote the coordination of, research, investigations, experiments, demonstrations, and studies, relating to the causes, control, and prevention of water pollution. * * *.

Section 5(c) of the same statute, 33 U.S.C. 1155(c):

> The [EPA] Administrator shall, in cooperation with other Federal, State, and local agencies having related responsibilities, collect and disseminate basic data * * *.

Section 204 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 3253:

> (a) The Secretary [EPA Administrator] shall conduct, and encourage, cooperate with, and render financial and other assistance to appropriate public (whether Federal, State, interstate, or local) authorities, agencies, and institutions, private agencies and institutions, and individuals in the conduct of, and promote the coordination of, research, investigation, experiments, training, demonstrations, surveys, and studies * * *.
>
> (b) In carrying out the provisions of the preceding subsection, the Secretary [EPA Administrator] is authorized to—
>
> * * * * * * *
>
> (2) cooperate with public and private agencies, institutions, and organizations, and with any industries involved, in the preparation and the conduct of such research and other activities; and
>
> (3) make grants-in-aid to public or private agencies * * * and provide for the conduct of research, training, surveys, and demonstrations by contract with public or private agencies and institutions and with individuals; * * *.

Section 102(b) of the Clean Air Act, as amended, 42 U.S.C. 1857a(b):

> The Administrator shall cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the Federal air pollution control program of all appropriate and available facilities and resources within the Federal Government.

Section 103 of the same statute, 42 U.S.C. 1857b:

> (a) The Administrator shall establish a national research and development program for the prevention and control of air pollution and as part of such program shall—
>
> * * * * * * *
>
> (2) encourage, cooperate with, and render technical services and provide financial assistance to air pollution control agencies and other appropriate public or private agencies, institutions, and organizations, and individuals in the conduct of such activities * * *.
>
> (b) In carrying out the provisions of the preceding subsection, the Administrator is authorized to—
>
> * * * * * * *
>
> (2) cooperate with other Federal departments and agencies, with air pollution control agencies, with other public and private agencies, institutions, and organizations, and with any industries involved, in the preparation and conduct of such research and other activities * * *.

We are asked to determine whether any or all of the above-quoted statutory provisions authorize EPA to enter into interagency agreements where—

(1) work is performed by a contractor under a contract with the other agency, where the work is needed by EPA but not by the other agency and where funds sufficient to cover the entire contract price are transferred by EPA to the contracting agency;

(2) work is performed by a contractor under a contract with EPA, where the work is needed by the other agency but not by EPA and where funds sufficient to cover the entire contract price are transferred to EPA by the other agency;

(3) work is performed by a contractor under a contract with EPA, where the work is needed by both agencies and where part of the contract price is borne by EPA and the remainder is covered by fund transfers to EPA by the other agency; or

(4) work is performed by a contractor under a contract with the other agency, where the work is needed by both agencies and where part of the contract price is borne by the other agency and the remainder is covered by fund transfers from EPA to the other agency.

We must first consider the effect of 31 U.S.C. 686(a). The purpose of this provision, enacted by section 601 of the Economy Act, 1932, was explained in H. Rept. No. 1126, 72d Congress., 1st sess. 15–16, as follows:

TITLE VIII

INTERDEPARTMENTAL WORK

PURPOSE OF LEGISLATION

The purpose of this title is to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practical for all departments.

Your committee also believes that very substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this title will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of its own.

REASONS FOR LEGISLATION

It frequently happens that one department may need certain services which it can not advantageously perform for itself. Where such services can be furnished by another department at a less cost or more conveniently, the department needing such services should have the privilege of calling upon any department of the Government that is equipped to provide such services. For illustration, the Navy maintains a highly specialized and trained inspection service. Why should not this personnel, when available, be used by other departments to inspect materials and supplies ordered to make certain that such materials comply strictly with specifications? Or if a department needs statistical work that can be more expeditiously done by another department it should have the right to call upon the agency especially equipped to perform the work. The Bureau of Standards is a highly specialized agency and its equipment and technical personnel should be made available to other services. Frequently the engineering staff of one department might be utilized by another department to great advantage.

The War and Navy Departments are especially well equipped to furnish materials, work, and services for other departments. Whenever such materials, work, and services can be furnished at a less cost, your committee believes that private concerns should not be called upon to furnish, do, and perform what Government agencies can do more cheaply for each other.

The Treasury Department, Department of Justice, Interior Department, and Shipping Board have many vessels at sea. The Government navy yards should be available to these whenever repairs or other work can be done by the Navy Department as expeditiously and for less money than the materials and services will cost elsewhere.

Illustrations might be multiplied but the above are sufficient to give a general idea of what may reasonably be expected under the title.

In the form enacted in 1932, the statute contained no specific provision relative to interagency requisitioning of services to be obtained by contract. The only express limitation upon the requisitioning authority here relevant was that the requisitioned agency "be in a position to supply or equipped to render" such services. 47 Stat. 418. However, several decisions of the Comptroller General construed this statute as not authorizing one agency to call upon another for the provision of services by contract. Thus a decision at 19 Comp. Gen. 544 (1939) disapproved a proposed order issued by the Civil Aeronautics Board to the Navy Department for the construction of air navigation stations on two remote islands at which Navy contractors were then engaged in construction projects for the Navy. Noting that the Navy contractors were not obliged to perform work beyond the scope of the ongoing Navy projects, the decision held that the Navy Department was not "in a position to supply or equipped to render" the requested services within the meaning of the statute. The foregoing approach was followed in 20 Comp. Gen. 264 (1940), a decision which also involved an effort to apply section 601 to the construction of aviation facilities. *See also* 18 Comp. Gen. 262, 266 (1938), and an unpublished decision of March 18, 1936, A–70486, to the general effect that this statutory provision cannot be used as a vehicle for the delegation by one agency to another of statutory duties vested in it. *Cf.*, on this point, 46 Comp. Gen. 73 (1966).

The version of the statute enacted by section 601 was amended generally by the act approved July 20, 1942, Ch. 507, 56 Stat. 661. Among other things, the 1942 amendment added the proviso granting to certain specific departments and agencies authority to requisition services to be obtained by contract. The Senate Report on the bill eventually enacted in 1942 (S. 2032) discussed proposed interdepartmental services by contract as follows:

There are a number of conditions under which work contemplated under S. 2032 could be performed. For example:

1. Where one department already has a contractor working at the desired location and the other department deems it advantageous to have the same contractor perform work for it at this place under the same contract.

2. Where two departments are to perform similar work at the same location, each has funds available therefor, and it is desired that the work be performed under a single contract.

3. Where one department desires another, due to its organization or special knowledge, to perform certain work for it. S. Rept. No. 840, 77th Cong., 1st Sess. 2.

The House Report contained a similar explanation of the scope of the bill. H. Rept. No. 2267, 77th Cong., 2d sess. 2. However, while the Senate-passed version would have extended the authority to obtain services by contract to all departments and agencies, the House limited its application to specified agencies, to avoid "trading going on among too many departments," 88 CONG. REC. 5622 (Remarks of Mr. May), and the House-passed version was accepted. *See* Conference Report on S. 2032, H. Rept. No. 2329, 77th Cong., 2d sess.

The legislative history discussed above clearly demonstrates that 31 U.S.C. 686(a) was designed for application, at least primarily, to work or services for the requisitioning agency—such as equipment maintenance inspection of agency supplies—with respect to which the requisitioned agency would have no need for its own purposes, and no specific interest apart from the provision of a routine service. In this connection, we note that the interagency requisitioning authority of 31 U.S.C. 686(a) is by its terms inapplicable where work or services can be as conveniently or more cheaply performed by private agencies. By contrast, EPA seeks, in part, to enter into agreements with other Government agencies concerning joint research and demonstration projects which relate directly to the substantive needs and interests of both agencies. The statutes administered by EPA quoted previously indicate by their nature that the subjects dealt with are of sufficient significance to more than one agency that interaction between or among various agencies is mandated or specifically authorized. Moreover, we recognize that the concept of EPA as a source for the coordination of Government interests and activities relating to the environment was a central factor in the creation of the Agency. The EPA was established by Reorganization Plan No. 3 of 1970, 35 F.R. 15623, 84 Stat. 2086, 5 U.S.C. App. In his message to the Congress of July 9, 1970, submitting this reorganization plan, H. Doc. No. 91-366, 1, 2, 4-5, 116 CONG. REC. 23528, 23529-30, the President stated, in part:

ENVIRONMENTAL PROTECTION AGENCY (EPA)

Despite its complexity, for pollution control purposes the environment must be perceived as a single, interrelated system. Present assignments of departmental responsibilities do not reflect this interrelatedness.

* * * * * * *

In organizational terms, this [an effective approach to pollution control] requires pulling together into one agency a variety of research, monitoring, standard-setting and enforcement activities now scattered through several departments and agencies. It also requires that the new agency include sufficient support elements—in research and in aids to State and local anti-pollution

programs, for example—to give it the needed strength and potential for carrying out its mission. The new agency would also, of course, draw upon the results of research conducted by other agencies.

* * * * * * *

This reorganization would permit response to environmental problems in a manner beyond the previous capability of our pollution control programs. The EPA would have the capacity to do research on important pollutants irrespective of the media in which they appear, and on the impact of these pollutants on the total evironment. Both by itself and together with other agencies, the EPA would monitor the condition of the environment—biological as well as physical. With these data, the EPA would be able to establish quantitative "environmental baselines"—critical if we are to measure adequately the success or failure of our pollution abatement efforts.

* * * * * * *

Because environmental protection cuts across so many jurisdictions, and because arresting environmental deterioration is of great importance to the quality of life in our country and the world, I believe that in this case a strong, independent agency is needed. That agency would, of course, work closely with and draw upon the expertise and assistance of other agencies having experience in the environmental area.

In view of the foregoing, it is our opinion that 31 U.S.C. 686(a)—including the limitations contained therein—does not apply to interagency agreements entered into by EPA in accordance with the cooperation and coordination functions set forth in the statutory provisions cited by the Assistant Administrator, and that these statutory provisions may be employed as authority for such interagency agreements in appropriate cases. With reference to the four specific situations set forth by the Assistant Administrator, the third and fourth items clearly fall within the purview of these conclusions. On the other hand, the first and second items describe situations in which work is needed by EPA or by another agency alone. These situations are not within the scope of the general statements contained in the Assistant Administrator's letter, and do not relate to the views expressed herein. Rather, they illustrate matters squarely within the application of 31 U.S.C. 686(a). Nothing contained herein questions the well-established effect of 31 U.S.C. 686(a) as it relates to agreements for services needed only by a requisitioning agency. Accordingly, since EPA is not one of the agencies specifically granted authority under 31 U.S.C. 686(a) to requisition or to provide (except, of course, to agencies which are included in the proviso) services to be obtained by contract, EPA may not undertake agreements under the circumstances described in items one or two of the submission, except, insofar as item two is concerned, as authorized by the proviso. Of course, we would not question the propriety of transactions described in item one where EPA acts as a grantor pursuant to specific authority to make grants to other Federal agencies.

[B-173224]

Subsistence—Per Diem—Delays—Weather Conditions

An employee on official business who because of extraordinary weather conditions—a blizzard—is prevented from returning to his residence after the concellation of his flight and he as a result occupied motel accommodations until the weather moderated may be paid per diem for the period spent in the motel because the new subsection 6.6e of the Standardized Government Travel Regulations permits payment under such circumstances whereas subsection 6.9c, which it supersedes, did not permit payment of per diem for the interval between a scheduled and actual departure from a depot, airport, or dock if a traveler could return home when delayed. B-173224, August 30, 1971, overruled.

To E. S. Crawford, Defense Supply Agency, September 13, 1972:

This refers to our decision to you, B-173224, August 30, 1971, wherein we disallowed the claim of Mr. John V. Johnson for per diem claimed during the period February 21-23, 1971.

Pursuant to Mr. Johnson's request we have reviewed the circumstances under which his claim arose and the applicable regulations.

In our August 30, 1971 decision we denied per diem to Mr. Johnson for the period between February 21, 1971, and February 23, 1971, which he spent in a motel in the vicinity of the Wichita, Kansas, airport as a result of a blizzard which forced cancellation of a flight he intended to take on February 21 to a temporary duty point. Because the motel was located in the area of Mr. Johnson's official duty station we applied subsection 6.8 of the Standardized Government Travel Regulations (SGTR) and paragraph C8050-3, Joint Travel Regulations, Volume 2, to deny per diem for the period for which it was claimed.

Subsection 6.9c of SGTR in effect at the time of his claim provided, in pertinent part, as follows:

> c. Generally for computing per diem allowances official travel begins when the train, airplane, boat, or other conveyance is scheduled to depart from its depot, airport, or dock * * *

That provision of SGTR has been applied to allow travelers whose mode of transportation is delayed to be paid per diem for the interval between the scheduled departure time and actual departure of a flight. 39 Comp. Gen. 875 (1960); B-154646 (July 23, 1964). However, we have not viewed it as applicable in a case in which the traveler was able to return to his residence during the intervening period. B-166490 (April 23, 1969).

In Mr. Johnson's case extraordinary weather conditions prevented his return to his residence after his flight was canceled and he was required to incur expenses for temporary accommodations until the

weather moderated. It could be argued that literally the regulation covers Mr. Johnson's situation regardless of the fact that his travel might have been postponed indefinitely. In this connection we point out that in the revision of SGTR effective October 10, 1971, the former subsection 6.9c was superseded by a new subsection 6.6e under which payment of per diem under circumstances such as those in Mr. Johnson's case would be permitted.

Accordingly, we now hold that Mr. Johnson's claim for per diem for the period stated above may be allowed if otherwise correct and our decision of August 30, 1971, is hereby overruled.

[B-174829]

Contracts—Negotiation—Competition—Memorandum of Understanding In Lieu—Canada

The award of a research and development contract on a "sole-source" basis to a Canadian firm pursuant to a "Memorandum of Understanding in the Field of Cooperative Development Between the United States Department of Defense and the Canadian Department of Defence Production" (paragraph 6-507 of the Armed Services Procurement Regulation) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be awarded on a competitive basis after solicitation from "the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as the section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by the executive branch in the conduct of foreign relations.

To the Magnavox Company, September 14, 1972:

We refer to your letter of June 16, 1972, and prior correspondence, protesting against award to the Canadian Commercial Corporation of a research and development contract covering the band IV variable head of the AN/GRC-103(v) radio relay set. The Department of the Army proposes to make the award on a "sole-source" basis pursuant to the 1963 "Memorandum of Understanding in the Field of Cooperative Development Between the United States Department of Defense and the Canadian Department of Defence Production."

The Memorandum of Understanding—complementing the U.S.-Canadian Defence Production Sharing Program, ASPR 6-507—provides generally for cooperation between the United States and Canada in defense research and development toward the purposes of making it possible for Canadian firms to undertake research and development work required by the United States; toward better utilization of the two countries' resources in the interests of mutual defense; and toward making possible a greater degree of standardization and interchangeability of equipment. In broad terms the agreement provides for jointly funded research and development projects to be performed

by Canadian firms to meet specific United States research and development requirements and for exemption of Canadian firms from "Buy American" restrictions when they are bidding for United States Department of Defense research and development and defense production contracts.

The full text of the Memorandum of Understanding appears at paragraph 6-507 of the Armed Services Procurement Regulation (ASPR). The following quoted portions are particularly pertinent to consideration of your protest:

2. Description of the Program:

a. The Defense Development Sharing Program will consist of research and development projects (such program projects being hereinafter referred to as "projects"):

(1) which are performed by Canadian prime contractors;

(2) which are designed to meet specific DOD research and development requirements;

(3) in which the Military Department of DOD which is the United States party to the project agreement acts as the design authority; and

(4) which are jointly funded by DOD and CDDP, (where DOD undertakes the research and development of a weapons system composed of several components, work funded by CDDP on one or more of such components will be considered to be jointly funded).

b. The Defense Development Sharing Program will not include efforts referred to in paragraph 13.

3. Funding:

The financial contribution of DOD in each project will not be less than 25 percent of the costs incurred subsequent to the date of the project agreement provided that in the case of work referred to in the parenthetical sentence of paragraph 2.a.(4), the financial arrangements shall be as agreed to by DOD and CDDP in the project agreement.

4. Selection of Projects:

A proposal to initiate a project may be made by CDDP to any of the Military Departments of DOD or by any of the Military Departments of DOD to CDDP. Each proposal will contain a complete and detailed description of the scope of the project and work to be performed and of the suggested cost sharing arrangement. Projects will be selected by mutual agreement of CDDP and the Military Department of DOD concerned.

* * * * * * *

6. Selection of Prime Contractors:

The selection of prime contractors for work to be performed under a project shall be subject to mutual agreement.

* * * * * * *

9. DOD Procurement of Project Developed Items:

Procurement by DOD from Canadian firms of items developed in a project will be made under the Defense Production Sharing Program and in accordance with the DOD Armed Services Procurement Regulation. Pursuant to that Regulation, procurement of items developed by Canadian firms under the defense Development Sharing Program will not be "set aside" for small business or for labor surplus areas.

* * * * * * *

13. Other Research and Development Efforts Not in Defense Development Sharing Program:

a. Consistent with normal DOD source selection procedures, Canadian firms may bid for DOD research and development contracts which are to be funded

solely by the United States. DOD will evaluate proposals from qualified Canadian firms on a parity with proposals received from United States firms. CDDP undertakes to ensure that Canadian firms comply with DOD procurement procedures.

The contract in question being one for research and development designed to meet a specific Department of Defense requirement, there is no question concerning applicability of the cited cooperative agreement. And under the terms of the agreement it is clear that provision is made for directing the procurement involved for performance by a Canadian firm. Appropriate determinations have been made to bring the procurement under the agreement. Thus, the validity of your protest must be judged solely upon whether the Secretary of Defense, as United States signatory to the agreement, was, in fact, authorized to commit the United States to the provisions agreed upon.

In implementation of the North Atlantic Treaty, 63 Stat. 2241, the President on October 26, 1950, issued a Statement of Principles for Economic Cooperation between the United States and Canada, 1 UST 716, T1AS2136, and 132 UNTS 247, which provided, in pertinent part, that:

> * * * In the interests of mutual security and to assist both governments to discharge their obligations under * * * the North Atlantic Treaty * * * [i]t is agreed, therefore, that our two governments shall cooperate in all respects practicable, and to the extent of their respective executive powers, to the end that the economic efforts of the two countries be coordinated for the common defense and that the production and resources of both countries be used for the best combined results.
>
> The following principles are established for the purpose of facilitating these objectives:
>
> 1. In order to achieve optimum production of goods essential for the common defense, the two countries shall develop a coordinated program of requirements, production, and procurement.
>
> * * * * * * *
>
> 5. Barriers which impede the flow between Canada and the United States of goods essential for the common defense effort should be removed as far as possible.
>
> 6. The two governments, through their appropriate agencies, will consult concerning any financial or foreign exchange problems which may arise as a result of the implementation of this agreement.

That cooperative agreement is an extension of arrangements between the United States and Canada of various steps which have been taken during and since World War II to coordinate their economic efforts in the common defense. When the agreement was executed in 1963 by the Secretary of Defense in furtherance of recognized congressional and Executive policy. Congress is aware of the agreement and it has been operative continuously since 1963. To our knowledge, question has never been raised regarding its implementation. *See* Senate Hearings Before the Committee on Appropriations, Department of Defense Appropriations, Fiscal Year 1972, part 2, Department of the Army (pages 1477–1479, 92d Cong., 1st sess.).

The basis for questioning the proposed award lies in the provisions of section 2304(g) of Title 10, U.S. Code, requiring that negotiated procurements be awarded on a competitive basis after solicitation from "the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." The basic contention is that the Department of the Army is violating section 2304(g) in refusing to solicit a proposal from your firm.

While we appreciate the thrust of your argument, we cannot conclude that the Department of the Army, in awarding the instant contract to the Canadian Commercial Corporation, would be in violation of law. Section 2304(g), in providing for competition in negotiated procurements, was enacted for the purpose of correcting a previous generalized resort to sole source awards upon determinations under section 2304(a) of Title 10 that particular procurements were not amenable to required formal advertising procedures. *See* Print No. 66, Committee on Armed Services, House of Representatives, June 9, 1960, H.R. 12572. We have examined the legislative history of section 2304 and find no basis for concluding that it was intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by the executive branch in the conduct of foreign relations.

In light of the historical background underlying the cooperative agreement; in light of the fact that the underlying purpose of 10 U.S.C. 2304(g) was not directed toward affecting country-to-country arrangements; and recognizing that the agreement covers significant matters affecting relations between the United States and Canada, we do not believe it appropriate for this Office to declare the agreement invalid in its effect on the instant procurement.

Accordingly, your protest is denied.

[B-176509]

Leaves of Absence—Lump Sum Payments—Taxable—Pennsylvania Personal Income Tax

A deduction for the Pennsylvania Personal Income Tax from lump-sum annual leave payments to Federal employees separating from Government service (5 U.S.C. 5551(a)) is required notwithstanding that a leave balance may include leave carried forward from agencies not geographically located within Pennsylvania regardless of when the leave was earned or the current residence of the employee, and that the leave accrued but was not paid prior to the enactment of the tax law or its effective date since for the purposes of Federal income tax withholding, lump-sum leave payments are wages taxable as income for the year of receipt and, therefore, the payments are subject to the agreement between the United States Treasury Department and the Commonwealth of Pennsylvania respecting the withholding of the tax from the compensation of Federal employees.

494-685 O—73——3

To R. G. Bordley, Defense Supply Agency, September 18, 1972:

Your letter of July 12, 1972 (your reference: DSAH-CFF), submits a request dated June 9, 1972, by Mr. Norman Mogul, Special Disbursing Agent, for our advance decision as follows:

The propriety of deductions for Pennsylvania Personal Income Tax from lump sum payments paid to employees separating from Government service has been questioned. In particular, the doubt lies in the taxability of: (a) those leave balances carried forward from other Government agencies not geographically located within the Commonwealth of Pennsylvania regardless of when it was earned or the current residence of employee and (b) leave accrued but not paid prior to the enactment of the tax law or its effective date as it would apply to: (1) all employees in general or (2) nonresident employees specifically.

Interim decision requested from Office of Counsel, DPSC (reference 1g) supports the non-deduction of taxes for all lump sum payments, However, tax deductions will continue and the monies placed in suspense pending receipt of your decision. At such time, the monies will be disbursed accordingly, i.e., transmitted to the state or to the respective employees.

The Pennsylvania personal income tax statute provides in part, quoting from Purdon's Pennsylvania Statutes Annotated, Title 72, section 7316 (Supp. 1972–1973):

Every employer maintaining an office or transacting business within this Commonwealth and making payment of compensation (i) to a resident individual, or (ii) to a nonresident individual taxpayer performing services on behalf of such employer within this Commonwealth, shall deduct and withhold from such compensation for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's compensation during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due for such year with respect to such compensation. The method of determining the amount to be withheld shall be prescribed by regulations of the department [of revenue].

Personal Income Tax Information Bulletin Number 3 (Withholding Instructions for Employers), issued by the Pennsylvania Department of Revenue, a copy of which was forwarded with your letter, states in part:

Compensation, including tips, salaries, wages, commissions, bonuses, overtime pay, vacation pay, incentive awards, etc., basically anything regarded as "wages" for Federal income tax withholding purposes are subject to withholding for purposes of Pennsylvania Personal Income Tax. * * *.

* * * * * * *

All compensation paid to a resident of Pennsylvania is subject to withholding, even though the services may have been rendered outside Pennsylvania. However, in the event a Pennsylvania resident employee is employed wholly without Pennsylvania and subject to the withholding tax of the state within which he is employed, the employer is not obligated to withhold Pennsylvania Personal Income Tax.

* * * * * * *

The tax shall be deducted and withheld on compensation paid to nonresident employees for services performed in Pennsylvania. Accordingly, if a nonresident employee performs all of his services in Pennsylvania, the tax shall be deducted and withheld from all compensation paid him.

If a nonresident employee performs services partly within and partly outside the Commonwealth, only compensation for services within the Commonwealth is subject to withholding. * * *.

The Secretary of the Treasury has entered into several agreements, each superseding the other, with the Commonwealth of Pennsylvania, pursuant to 5 U.S. Code 5517 and Executive Order No. 10407, 17 F.R. 10131 (November 8, 1952), 3 CFR 1949–1953 Comp., p. 905, 5 U.S.C. 5517 (note), providing for the withholding of Pennsylvania income tax from the wages of Federal employees. The most recent such agreement was signed by the Fiscal Assistant Secretary of the Treasury on March 14, 1972, and by the Secretary of Revenue, Commonwealth of Pennsylvania on May 10, 1972. It appears as Appendix No. 2 to part III, Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, and provides in relevant part:

> The head of each agency of the United States shall comply with the requirements of the withholding provisions of the Pennsylvania income tax law * * * except as otherwise provided herein, with respect to employees of such agency who are subject to such tax and whose regular place of Federal employment is within the Commonwealth of Pennsylvania.
>
> * * * * * * *
>
> The compensation of Federal employees on which the Pennsylvania income tax shall be withheld shall be their "wages" as defined in Section 3401(a), as amended, of the Internal Revenue Code of 1954 and regulations issued thereunder. * * *

Earlier agreements had substantially the same provisions.

The agreement governs the withholding of the Pennsylvania income tax with respect to Federal employees. *See* Treasury Fiscal Requirements Manual, *supra*, part III, section 4020.10. Under the terms of the agreement as quoted above, the question of whether or not lump-sum payments for annual leave are subject to withholding for Pennsylvania is determined by reference to their treatment for purposes of Federal income tax withholding. Section 3401(a) of the Internal Revenue Code of 1954 provides that, with certain exceptions not here relevant, the term "wages" for purposes of Federal income tax withholding means all remuneration for services performed by an employee for his employer. This definition is amplified in section 31.3401(a)–1 of the Internal Revenue Service Regulations, 26 CFR 31.3401(a)–1, as follows:

> (a) *In general.* (1) The term "wages" means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under 3402(e).
>
> (2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.
>
> * * * * * * *
>
> (5) Remuneration for services, unless such remuneration is specifically excepted by the statute, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

The Comprehensive Tax Guide to United States Civil Service Retirement Benefits, published by the Internal Revenue Service [Publication 721 (12–70)] deals specifically with lump-sum annual leave payments at page 6:

A lump sum payment for accrued annual leave received upon retirement is treated as a salary payment. It is taxable as ordinary income from wages in the tax year the payment is received.

Cf., Rev. Rul. 57–603, No. 1957–51 Internal Rev. Bull. 55 (December 23, 1957).

The provision of law authorizing lump-sum payments for annual leave (5 U.S.C. 5551(a)) specifically states that "The lump-sum payment is considered pay for taxation purposes only."

It is apparent from the foregoing that lump-sum annual leave payments are "wages" for purposes of Federal income tax withholding and are therefore, under the terms of the agreement with Pennsylvania, "compensation" from which Pennsylvania personal income tax must be withheld. It is also clear from the above-cited references, particularly Rev. Rul. 57–603 and the Comprehensive Tax Guide, that lump-sum annual leave payments are treated under Federal law and regulations as wages for the year of receipt. Under this approach, circumstances concerning the accrual of annual leave—e.g., balances carried forward from a Federal agency not located in Pennsylvania or leave accruing before the effective date of the Pennsylvania income tax law—are immaterial.

Accordingly, it appears that withholding of Pennsylvania income tax is generally required in making lump-sum annual leave payments to employees separating from the service. Of course, any question as to the amount actually subject to tax is for determination by the individual involved and the Commonwealth of Pennsylvania.

[B–175661]

Contract—Specifications—Qualified Products—Changes—Plant Location

The low bidder under an invitation for bids to furnish inflatable landing boats—a qualified end product—who failed to comply with the clause prescribed by paragraph 1–1107.2(a) of the Armed Services Procurement Regulation and included in the invitation to the effect any change in the location of a plant at which a previously approved product is or was manufactured would require prior to bid opening the reevaluation of the plant's qualification for inclusion in the appropriate Qualified Products List (QPL) submitted a nonresponsive bid that properly was not considered for contract award as the offer to supply an end item to be produced at other than the plant shown in the QPL as the approved place of performance was an offer to supply an unqualified product.

To Uniroyal, Inc., September 19, 1972:

Reference is made to your telefax received April 10, 1972, and your letter dated April 19, 1972, protesting the award of a contract on March 27, 1972, to Firestone Coated Fabrics Co., under invitation for bids (IFB) N00104–72–B–0922, issued February 8, 1972, by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania (NSPCC).

The invitation contemplated award of an indefinite quantity contract for a minimum of 117 inflatable landing boats with an option to purchase additional quantities, not to exceed 267. Since the subject item was a qualified end product, the procurement was restricted to 27 prospective bidders listed on Qualified Products List (QPL) No. MIL–B–17775. On February 24, 1972, by telegram and a telephone call you requested NSPCC to conduct a plant survey at your Mishawaka, Indiana, plant to accomplish a transfer of QPL production facility designation from Providence, Rhode Island, or to extend the bid opening date of February 29, 1972, for such time necessary to accomplish the reevaluation. NSPCC in a telex dated February 28, 1972, stated that an extension of bid opening could not be granted and that your request for reevaluation due to transfer of production facility should be directed to Naval Ship Engineering Center (NSEC), Norfolk, Virginia.

Three bids were received and opened on the scheduled opening date, February 29, 1972, as follows:

Offeror	U/Price	Est. amt.	Unit price if first article test waived
Uniroyal, Inc.	$994.00	$116, 2980.0	$994.00
Firestone Coated Fabr. Co.	1, 099.00	128, 583.00	1, 097.00
Rubber Fabricators, Inc.	1, 318.09	154, 216.53	1, 000.00

Included in the IFB at page 5 was clause B–3 "NOTICE—QUALIFIED END PRODUCTS (1969 Dec.) (ASPR 1–1107.2(a))" providing in pertinent part:

> Awards for any end items which are required to be qualified products will be made only when such items have been tested and are qualified for inclusion in a Qualified Products List identified below * * *, at the time set for opening of bids, or the time of award in the case of negotiated contracts. Offerors should contact the office designated below to arrange to have the products which they intend to offer tested for qualification.
>
> * * * * * * *
>
> Any change in location or ownership of the plant at which a previously approved product is, or was, manufactured requires re-evaluation of the qualification. Such re-evaluation must be accomplished prior to the bid opening date in the case of advertised procurements and prior to the date of award in the case of negotiated procurements. Failure of offerors to arrange for such re-evaluation shall pre-

clude consideration of their offers. Qualified Products List for this procurement is MIL–B–17775 Boat, Landing, Inflatable CO2 7-Person Capacity.

Manufacturers are urged to communicate with, and arrange to have the products that they propose to offer tested for qualification by the Naval Ship Engineering Center, Washington, D.C.

The Uniroyal bid specified the place of performance as Mishawaka, Indiana, whereas QPL No. MIL–B–17775 specified Providence, Rhode Island, as the approved place of performance.

The Department of the Navy reports that in response to your letter of September 1, 1971, informing NSEC, Hyattsville, Maryland, of your intent to relocate your plant, NSEC (Hyattsville) by a letter dated October 4, 1971, advised you that upon completion of the move to Mishawaka, Indiana, that Center should be notified so that a facility survey could be conducted at the new location. In addition, it is reported that as of March 6, 1972, NSEC (Hyattsville) had not been notified as requested and a facility survey at the new plant had not been conducted. Accordingly, QPL approval had not been transferred to the Mishawaka plant for production of MIL–B–17775 inflatable landing boats at the time of bid opening on February 29. The contracting officer determined Uniroyal's bid to be nonresponsive in failing to comply with clause B–3 of the invitation.

You contend that a survey of your Mishawaka plant took place prior to bid opening and on February 28, 1972, favorable findings were transmitted to NSPCC. You contend that all of the necessary steps for qualification were accomplished prior to the opening date except for the formality of official notification of approval which was subsequently obtained on April 11, 1972. Accordingly, you believe that the contract should have been awarded to Uniroyal.

In regards to your contentions that a plant survey took place before bid opening and that favorable findings were forwarded to NSPCC on February 28, 1972, by the Defense Contract Administration Services Office (DCASO) at South Bend, Indiana, the Department of the Navy advises that the message of February 28 was as follows:

Recognizing Uniroyal Mishawaka does not appear on QPL for subject item, they are currently manufacturing more complex items utilizing like material and incorporating identical manufacturing techniques. Therefore this office has every confidence in their ability to produce a quality landing craft if awarded the contract.

While the Department of the Navy reports that the DCASO records do not explain why the message was sent to NSPCC, it is stated that this message was not sent as a result of a formal request for a facility survey, nor was a survey made of the Mishawaka plant prior to bid opening. In this connection we note that you have neither alleged nor offered any evidence showing that you notified NSEC upon completion of the move to Mishawaka (as requested in its letter of October 4,

1971) or that you asked that Center for a facility survey of the Mishawaka plant before the opening of bids.

Accordingly, our Office is of the view that Uniroyal has failed to meet that portion of clause B–3 of the IFB, providing that any change in the location of a plant, at which a previously approved product was manufactured, requires the offeror to arrange for (and the accomplishment of) a reevaluation of the qualification prior to bid opening. Our Office has consistently held that an offer to supply an end product to be produced at a plant other than the one qualified is an offer to supply an unqualified product and is nonresponsive in a material respect. *See* B–171558, February 11, 1971; B–167304, August 27, 1969.

In view of the foregoing, your protest is denied.

[B–170536]

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Subsidiary's Status

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

To Ernst-Theodore Arndt, September 21, 1972:

Reference is made to your letter of May 30, 1971, requesting reconsideration of our decision on March 15, 1971, 50 Comp. Gen. 627; your supplemental letter of December 16, 1971; and your "Summation, Appeal for Review" forwarded here by your letter of July 16, 1972, all dealing with the same matter. This last mentioned document is largely a summary of the issues raised and discussed in your letters of March 15 and December 16, 1971, together with related exhibits and an attachment thereto that sets out your account of the discussion which took place regarding those issues during the conference with representatives of our Office on January 25, 1972.

Primarily, you are concerned with the conclusion reached in that decision with regard to allegations by Apache Flooring Company (Apache) that Armstrong Cork Company (Armstrong) had been given preferential treatment over Apache under a tile supply contract. It is contended that Armstrong was accorded preferential treatment in that Armstrong has not been required to comply with the equal

employment opportunity provisions of Executive Order 11246 and the regulations issued thereunder (41 CFR 60–1.40(c)) requiring the submission of an affirmative action plan for each of its establishments within 120 days from the commencement of its contract.

Concerning this matter, Executive Order 11246, September 24, 1965, as amended, sets forth policies regarding equal employment opportunity (EEO) requirements. Under section 201 of the order the Secretary of Labor is required to adopt rules and regulations and issue such orders *as he deems necessary and appropriate* to achieve the purposes of the order in Government contracts.

The facts concerned in this case are fully set forth in our earlier decision and, therefore, will not be repeated in detail here. It may be noted, however, that the guidelines established by the Department of Labor for determining whether a parent and subsidiary are to be considered as a single entity for the purpose of the Executive order and 41 CFR 60–1.40(a) which requires each prime contractor to "develop a written affirmative action compliance program for each of its establishments" were stated in letter of February 26, 1971, addressed to you by the Solicitor, Department of Labor, to be as follows: (1) common ownership (2) common directors and/or officers (3) *de facto* exercise of control (4) unity of personnel policies emanating from a common source and (5) the dependency of operations.

The General Services Administration (GSA), being the contracting agency, was primarily responsible for determining whether Armstrong had defaulted under its contract by reason of the fact that it had not complied with 41 CFR 60–1.40(a) in that it had not submitted an affirmative action compliance program for its subsidiary, the Thomasville Furniture Industries, Inc. (Thomasville).

The above criteria were considered by GSA in its legal memorandum of January 28, 1971, and it was concluded that Armstrong, although it had potential control over Thomasville, did not exercise *de facto* day-to-day control over the subsidiary. As stated in our earlier decision, the Department of Labor did not find such conclusion to be erroneous nor did we, upon review of the evidence and arguments considered by GSA, find its conclusions and interpretation of Labor's guidelines to be arbitrary or capricious or not supported by substantial evidence. Accordingly, and since, as stated above, the regulations here involved were issued pursuant to the Executive order and section 60–1.44 of those regulations provides that rulings under, or interpretation of such regulations shall be made by the Secretary, we concluded that there existed no valid basis for us to object to GSA's refusal to require Armstrong to submit an affirmative action program for its subsidiary, Thomasville.

In asking that we reconsider our earlier decision you list in your letter of May 30, 1971, what you believe constitutes seven errors therein. Such errors are set out and discussed separately below, although there will be some overlapping in discussing several of the alleged errors.

Error No. (1) Arbitrary addition of "day-to-day" control.

As set forth above, the Department of Labor guidelines provide only for *de facto* exercise of control and you urge that the additional criterion of *de facto* "day-to-day" control by GSA is a wholly arbitrary one.

In commenting on the five elements contained in the guidelines set out above, the Acting Solicitor, Alfred G. Albert, Department of Labor, in a letter to us dated September 27, 1971, noted that those elements closely parallel those used by the National Labor Relations Board in deciding similar questions.

With particular reference to *de facto* control he stated that:

> When this Department established these criteria, it turned to existing law in the area. De facto control is a dominant factor in determining corporate liablity, and it is defined as actual control rather than the potential control present where there is common ownership. In the field of labor law, the NLRB and the courts have required the existence of actual control by one business over another in order to consider the businesses a single employer for purposes of the Board's remedial orders. See *Roy & Sons Co.* v. *NLRB*, 251 F. 2d 771 (1st Cir. 1958); *Bachman Machine Company* v. *NLRB*, 266 F. 2d 599 (8th Cir. 1959); *Majestic Molded Products, Inc.* v. *NLRB*, 330 F. 2d 603 (2d Cir. 1964); *NLRB* v. *Supreme Dyeing and Finishing Corp.*, 340 F. 2d 493 (1st Cir. 1965).
>
> In the area of the liability of a parent corporation for the torts of its subsidiaries, the courts also have held that mere common ownership is not sufficient to justify imposing liability on the parent. There must be common, actual control as well. Where this element is absent, courts have refused to hold the parent responsible for the torts of its subsidiary. As in the above-cited labor cases, common ownership would normally presuppose a potential ability to control, but the courts have held that actual control is required in order to impose liability on the parent corporation. See *Baim & Blank, Inc.* v. *Philco Corp.*, 148 F. Supp. 541 (E.D. N.Y. 1957); *Garret* v. *Southern R. Co.*, 17 F. Supp. 915 (E.D. Tenn. 1959), aff'd., 278 F. 2d 424 (6th Cir. 1960), *cert. denied*, 364 U.S. 833 (1960); *Miller* v. *Bethlehem Steel Corp.*, 189 F. Supp. 916 (S.D. W.Va. 1960):
>
> The GSA memorandum prepared as a result of Apache Flooring Company's challenge to a bid award to Armstrong Cork Co. indicates that defacto control is to be interpreted as day-to-day control. That memorandum concludes that the compliance status under Executive order 11246 of Thomasville Furniture Co., a wholly owned subsidiary of Armstrong Cork Co., should not affect Armstrong's status as a responsible bidder on government contracts covered by the Executive order. Although this Department agrees with the conclusions of that memorandum, it has not taken the position that day-to-day control is required to consider the parent and subsidiary as a single entity for the purpose of coverage. Nash, *Affirmative Action Under Executive Order* 11246, 46 N.Y.U.L. Rev. 225, 250–51, (1971). From our review of the challenge, we found no evidence to reverse GSA's determination that there was no de facto, or actual, control, as defined in the above-cited cases, by Armstrong over the operations of Thomasville. Consequently, GSA's interpretation of de facto control as day-to-day control is not necessary to the ultimate decision that was reached.

You will note from the above that the Department of Labor in its review of GSA's findings found no evidence to reverse GSA's findings

even though GSA had injected the term "day-to-day" into the criterion. Nor have you indicated why a different result would have been reached in this particular case if such term had not been added thereto. Consequently, while the addition of that term may have been in error, it is our view that, in this particular case, it was a harmless one and no change in the ultimate conclusion is thereby required.

Error No. (2) Capricious Interpretation of Criteria.

In his letter to you of February 26, 1971, referred to above, the Solicitor, after setting out the criteria for determining whether a parent and subsidiary corporation are to be considered as a single entity for the purposes of Executive Order 11246, stated that:

> * * * This has been the legal position of the Office of Federal Contract Compliance under Executive Order 11246 which I have reconfirmed with the Director of that Office. If, for good and sufficient business reasons, a parent corporation chooses not to exercise actual control over its subsidiary, the subsidiary will not be considered to be part of the parent corporation for purposes of Executive Order 11246. If the business is organized this way to escape its equal employment opportunity obligations, it would be another matter. However, there is no indication that this is the case with the Armstrong Cork Company and Thomasville Furniture Industries, Inc.

Relative to this matter you state in part that:

> What sense does it make to prove conclusively the presence of all the criteria or guidelines if, in spite of this proof, a subsidiary will not be considered to be part of the parent corporation for purposes of Executive Order 11246, if, for so-called "good and sufficient business reasons," a parent corporation is permitted to *choose* not to exercise control over its subsidiary?
>
> Such a wanton departure from the established guidelines, however, motivated, being an obvious contradictio in adjecto, can only be deemed "capricious."

Where a parent corporation has potential control over a subsidiary the question as to whether or not it will actually exercise that control, must, of course, be a matter of choice on its part. Consequently, we do not agree that the Solicitor's statement concerning choice by the parent corporation constitutes a departure from the established guidelines. Also, we believe it significant that the Solicitor added that the choice not to exercise control must be for good and sufficient business reasons and that it would be a different matter if the business is organized this way to escape its equal employment opportunity obligations. According to GSA, Thomasville, after its acquisition by Armstrong, remained separate and distinct in its functions and operations, and its personnel and labor relations programs are the same as they were prior to such acquisition. Further, there is no evidence of record that there was here involved any action taken by Armstrong based upon a "choice" of any kind to evade its EEO obligations.

Error No. (3) Disregard of Mohasco Precedent.

The Mohasco case is said in your letter to be analogous to the Armstrong case. However, in that case you state that the Govern-

ment insisted on proof of corporate-wide EEO compliance prior to award of the contract involved. The facts there involved are described in your letter as follows:

> * * * Mohasco, the parent corporation, a long-time holder of Federal Supply Contracts for carpets, saw no reason to extend its EEO liability to its wholly-owned subsidiaries, mostly furniture plants, e.g. Futorian, Barcalo, Chromcraft, which had no connection with the carpet supply contract, Mohasco contending that its subsidiaries were separate corporate entities and were autonomously managed. Notwithstanding the President's Committee on Equal Employment Opportunity issued on July 30, 1965 Order No. (C-13) to all Government Departments, proscribing Mohasco from further contracts pending the submission of a "corporate-wide program of affirmative action."

In view of the foregoing, you state that:

> It would appear to be incompatible with the ruling of the President's Committee on Equal Employment Opportunity, whose functions were subsequently transferred to the Labor Department, to bar Mohasco Industries from receiving Government contracts for failure of its subsidiaries' EEO compliance and then to permit another, perhaps more powerful corporation, to exercise arbitrary control or waive control at its own choosing over a wholly-owned subsidiary under identical circumstances and thus qualify for a Government contract, without EEO compliance by the subsidiary.

At our request the Department of Labor furnished to us copies of certain material contained in the Mohasco files. While the facts in that case may be as stated by you, the material furnished does not disclose whether the question of *de facto* control was raised or considered. Also, it should be noted that the President's Committee on Equal Employment Opportunity was established under an earlier Executive Order, 10925, and its program administered under regulations pertinent thereto, which—according to the Department of Labor—differ in many respects to the requirements of Executive Order 11246, as amended.

In view of the foregoing we are unable to determine that the Mohasco case is completely analogous to the Armstrong case or that the Department of Labor acted arbitrarily or capriciously in not reaching a conclusion consistent with the holding in the Mohasco case. In any event in view of section 201 of Executive Order 11246 the Secretary of Labor would be authorized to issue rules, regulations, guidelines and orders that may result in rulings contrary to those reached in prior cases.

As to the court case (*Williams* v. *New Orleans Steamship Assoc.*, 341 F. Supp. 613 (1972)), cited for the first time in the "Summation" forwarded with your letter of July 16, 1972, while the court in that case held that individual companies "may" be treated as a single employer for purposes of coverage of title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, where certain facts exist, the court did not hold that such companies "must" be treated as a single employer in all cases. Further the facts that were present in that case are set forth therein as follows:

(3) Plaintiffs have pointed out, and it has not been refuted by the defendants, *that the New Orleans Steamship Association controls employment on the waterfront and establishes uniform employment policies and practices applicable to all member companies. It owns and operates a central hiring hall at which all longshoremen are hired on a day-to-day basis to work for the various member companies.* The New Orleans Steamship Association derives its broad authority by delegation from the member companies. In view of this, the Court finds itself in agreement with the plaintiffs that for purposes of Title VII coverage the individual companies which make up the New Orleans Steamship Association would be treated as a single employer. * * * [Italic supplied.]

As pointed out elsewhere herein GSA found that Thomasville remained separate and distinct in its functions and operations and that its personnel and labor relations programs remained the same as they were prior to acquisition by Armstrong. Thus, the factual situation as fas as Thomasville's employment policies and practices were concerned is clearly distinguishable from that existing in the above-cited *Williams* case. We might also point out that the *Williams* case discloses that some of the criteria the Equal Employment Opportunity Commission (EEOC) has applied in determining whether an enterprise is integrated for purposes of calculating the number of its employees are "interchange of employees, centralized control of labor relations and standards which have been used by the NLRB" (National Labor Relations Board). As indicated above, it appears that the Department of Labor gave consideration to decisions of the NLRB and the courts in adopting its guidelines for determining whether a parent corporation and a subsidiary are to be considered a single entity for purposes of Executive Order 11246 and 41 CFR 60–1.40(a).

Error No. (4) Failure to Recognize Substantial Evidence.

The material appearing under this heading in your letter relates to the question whether *de facto* exercise of control is practiced by Armstrong over Thomasville.

In urging that Armstrong does exercise *de facto* control over Thomasville you point out that six top executive officers of Armstrong control the "business and affairs" of Thomasville.

It is our understanding that at least after Armstrong acquired ownership of Thomasville—Thomasville had its own board of directors consisting of 10 members. Six of the ten were either directors or officers of Armstrong or both. However, one of the six was (and apparently still is) president of Thomasville and did not become an officer and director of Armstrong until after Armstrong had acquired ownership of Thomasville. Thus, four members of Thomasville's board of directors (after its acquisition by Armstrong) were neither directors nor officers of Armstrong. It should be noted here that Armstrong's board of directors consisted of 15 members including the six mentioned above.

To the extent that the six directors of Thomasville mentioned above (or any of the other directors) agreed with Armstrong policy they, of course, could have imposed such policy on Thomasville. Also, since Thomasville is a wholly owned subsidiary of Armstrong it is clear that Armstrong could completely dominate Thomasville if it chose to do so. However, as stated in letter of April 6, 1970, from the Solicitor, Department of Labor, to the Director of Equal Employment (your Exhibit "CC"), the cases of *United States* v. *Lehigh Valley R.R.*, 220 U.S. 257 (1911) and *Ford Motor Co.* v. *United States*, 9 F. Supp. 590, 81 Ct. Cl. 30, cert. denied, 296 U.D. 636 (1935), both appear to indicate that common ownership or an interlocking directorate alone would not constitute sufficient grounds for disregarding corporate entities.

As corollary evidence you point out that:

1) The parent corporation, Armstrong Cork Company, wholly owns Thomasville Furniture Industries, Inc.;
2) Armstrong and Thomasville file quarterly and annual Statements of Consolidated Earnings and Consolidated Balance Sheets;
3) The Senior Vice-President of Armstrong is President of Thomasville;
4) The common Secretary of Armstrong and Thomasville released to the trade a Resolution of Nov. 25, 1968 by Armstrong's Board of Directors and announced Armstrong's readiness, willingness and ability to extend to any lender and supplier of Thomasville, upon request, a guaranty authorized by this resolution.
The payments under a Government Contract to Armstrong will thus inure—see Resolution of Nov. 25, 1968 under 4 above—to the benefit of Thomasville.

* * * * * *

5) Armstrong and Thomasville commingle their operations, as evident from Armstrong's perennial nation-wide advertising in leading home and trade journals under the motto: "ARMSTRONG—CREATORS OF THE INDOOR WORLD."

As to this last point, while it may be that such advertising has established the image of a single corporate entity in the eyes of the public, such advertising cannot make Armstrong a single corporate entity if it is not in fact such an entity.

All of these facts and more were recognized and treated by GSA in their opinion of January 28, 1971. GSA stated in its opinion that—

* * * Its [Thomasville's] manufacturing operations have been continued in the basic pattern, in the same basic locations, and with the same end product as it had manufactured and sold prior to its acquisition. * * *

Also, while recognizing that some advertising by Armstrong included Thomasville's products, GSA found that Thomasville has remained functionally independent of Armstrong, neither manufacturing, selling, nor distributing Armstrong's other products. Further, GSA noted in the opinion that Thomasville's personnel director remained the same and that it maintained its own independent personnel policies notwithstanding the Affirmative Program issued by Armstrong.

GSA then concluded that:

> Under these conditions and these facts, it seems clear that while Armstrong has potential control over the day to day operations of Thomasville, it does not actually or actively exercise such control. For these reasons then, it is clear that the authority exercised by Armstrong is limited to certain financial matters inherent in common ownerships, and amounts to potential control, not the de facto control of the actual day to day direction and control of Thomasville. It seems clear that each corporation acts in its day to day operations as an autonomous separate corporate entity. Each operates in widely separated geographic areas in functionally distinct manufacturing processes producing functionally distinct independent end products.

GSA's conclusion that Armstrong did not exercise *de facto* control over Thomasville was concurred in by the Department of Labor.

Considering the evidence of record, there would not be a sufficient legal basis for us to conclude that GSA's findings as to *de facto* control, as concurred in by the Department of Labor, is either arbitrary or capricious.

Error No. (5). Incompatibility with Federal Procurement Regulations.

The material set out under this heading of your May 30 letter relates to the fact that the Department of Labor in administering Executive Order 11246 has borrowed its guidelines for determining the corporate relationship of affiliates or subsidiaries from rulings of the National Labor Relations Board, which primarily exercises jurisdiction over labor disputes.

It is your view that since Executive Order 11246 imposes on a Federal contractor certain obligations embodied in his Federal contract it would be more appropriate to adopt the provisions of Federal Procurement Regulations, 41 CFR 1-1.701-2, which for the purpose of making certain determinations under the Small Business Act defines "affiliates" as follows:

> Business concerns are affiliates of each other when either directly or indirectly (a) one concern * * * controls or has the power to control the other, or (b) a third party or parties * * * controls or has the power to control both.

While we might agree that for the purpose of uniformity or otherwise the Secretary of Labor could have adopted the above definition of the term "affiliate" for the purposes of Executive Order 11246, or, as referred to in your Summation, the definition of the term "Control" as that term is defined in the General Rules and Regulations of the Securities and Exchange Commission, 17 CFR 230.405(f), he was not required to do so under the controlling Executive order. We might note here that the rulings of the National Labor Relations Board involve generally employer-employee relations as do rulings under the equal opportunity program in many cases.

Error No. (6). Unequal Treatment of Bidders.

Under this heading it is stated in your May 30, 1971, letter that:

> If the interpretations by GSA and the Labor Department should prevail, it would pose a distinct hardship for corporations which are organized on a divisional basis, as there is no doubt that a division of a parent concern is eo ipso considered to be part and parcel of the parent corporation. Thus, corporations like General Electric Company, Container Corporation of America and Apache Flooring Company will be bidding at a distinct disadvantage when competing with a parent corporation which chooses to organize by dividing its corporate structure into wholly-owned subsidiaries. Under GSA's theory, the Government must then prove "day-to-day" control. Under the Labor Solicitor's theory, expressed in his latest letter of February 26, 1971, the parent corporation is *free to choose* not to exercise control over the wholly-owned subsidiary, thus permitting the subsidiary to escape the costly and time-consuming obligation of developing affirmative action plans. Such unfair advantage should not be given one bidder over another under our competitive bidding systems.

While it may be true that where parent and subsidiary corporations are treated as separate entities they may have a bidding advantage over other bidders, the manner in which corporations are organized, if otherwise authorized, is of course, a matter solely for consideration by the corporations themselves. The fact they may be less competitive or more competitive because of their internal organization is a matter within their own control. Also, as previously noted, the Solicitor in his letter to you of February 26, 1971, stated, in effect, that the business may not be organized in a way purposely designed to escape its equal employment opportunity obligations.

Error No. (7). Negation of the "Good Faith Effort" Mandate.

Concerning this heading you state that:

> Affirmative Action Plans, properly demonstrated, pre-suppose a "good faith effort." Judicial determinations of "good faith" have been rendered for many years. A parent corporation having pledged itself by the terms of its contract to put forth "*every good faith effort*" to comply with Executive Order 11246 cannot honestly condone discriminatory employment practices of a wholly-owned subsidiary within its complete domain when it has the power to eliminate such practices.
>
> Therefore, it follows that any pledge by a Federal contractor, if made "in good faith," should extend to any wholly-owned subsidiary within his complete domain.

While we agree that Armstrong, no doubt, could require an affirmative action program of Thomasville, we believe that, insofar as this particular contract is concerned, Armstrong is pledged only to apply "every good faith effort" with respect to the parent corporation and to all subsidiaries which under the criteria discussed herein cannot be considered as separate entities.

In your letter of December 16, 1971, you refer to an article written by the Solicitor, Department of Labor, which is contained in the April 1971 issue of the New York University Law Review. You quote a paragraph from that article as follows:

> B. ALL FACILITIES OF COVERED CONTRACTORS OR SUBCONTRACTORS ARE SUBJECT TO THE EXECUTIVE ORDER
>
> Section 204 of Executive Order 11246 makes clear that all facilities of contractors or subcontractors are subject to the requirements of the equal oppor-

tunity clause, whether or not they are directly or indirectly engaged in the performance of government contract work. Upon application, a contractor or subcontractor may secure an exemption for facilities "which are in all respects separate and distinct from activities of the contractor related to the performance of the contract." However, since an exemption may be granted only upon a determination that it will not interfere with or impede the effectuation of the order, it is not surprising that almost none have been granted since the order was issued in 1965. See Exhibit "II" as attached.

Relative to such matter you state that—

It is significant to observe in this connection that, to the best of our knowledge, Armstrong has neither applied for nor has been granted an exemption for any of its facilities.

What has been overlooked by the Labor Department, the legal successor to the President's Committee on Equal Employment Opportunity, the custodian of its files and executor of its former orders, consistent with Executive Order 11246—see Sec. 403(a) and (b) of this Order—and what your office has failed to cite in its March 15, 1971, decision is the specific provision of Sec. 204 of Executive Order 11246:

* * * "in the absence of such an exemption *all* facilities shall be covered by the provisions of this Order."

We think it evident that the facilities referred to above are those facilities which under the guidelines discussed herein would be subject to the Executive order. In other words if, in the instant case, Armstrong exercised *de facto* control over its subsidiary Thomasville, Thomasville would be subject to the provisions of the Executive order and could only be exempted from its provisions by an exemption granted under section 204.

The remaining items discussed in your letter of December 16, 1971, and in your Summation, are, as indicated above, similar to those presented in your letter of May 30, 1971, and, we feel, have been adequately covered in our above discussion of that letter.

In summary, it is our view that the criteria followed in this case to determine whether a parent and its subsidiary should be treated as separate entities closely parallel those used by the National Labor Relations Board in deciding similar questions and we cannot say that their use here was unreasonable, arbitrary, or capricious. Also, we agree with the views of the Solicitor, Department of Labor, that the question whether Armstrong and Thomasville qualified under that criteria to be considered as separate entities was a close one. However, we remain of the view that based on the record we cannot say that the result obtained here was either arbitrary or capricious.

We believe it important in this case to keep in mind that, as stated in connection with alleged error No. 2 and pertinent to other alleged errors where "choice" as to exercise of *de facto* control is mentioned, the subsidiary continued to be separate and distinct in its operation, and its personnel and labor relations program remained unchanged upon acquisition by Armstrong.

Accordingly, we see no proper basis to now reach a conclusion different from that reached in our earlier decision.

[B-175935]

Contracts—Specifications—Samples—Manufacturer's Product Requirement

The low bid submitted on several of the 59 items of engineer wrenches solicited under an invitation for bids that did not conform with the Bid Samples clause requirement that bid samples submitted must be from the production of the manufacturer whose product is to be supplied—samples that were to be evaluated to determine compliance with all the characteristics listed for examination—properly was determined to be a nonresponsive bid pursuant to GSPR section 5A-2.202-4, which provides that the Bid Samples clause that was used is a mandatory one since the samples required were intended to demonstrate compliance with subjective characteristics, and the acceptance and examination of a sample made by other than the eventual supplier affords little assurance to the contracting officer that the items ultimately supplied will conform to the sample.

Bidders—Responsibility *v.* Bid Responsiveness—Points of Production and Inspection

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

To R & O Industries, Inc., September 25, 1972:

Reference is made to your letter of July 27, 1972, and prior correspondence, protesting against a decision by the General Services Administration (GSA) concerning the application of the Bid Samples clause under solicitation No. FPNTN-D1-19198-A-1-14-72, issued by the Federal Supply Service, Washington, D.C.

The above invitation, issued December 14, 1972, was a requirements contract for furnishing estimated quantities for 59 items of engineer's wrenches, FSC 5120, during the period June 1, 1972, or date of award, whichever is later, through May 31, 1973. On page 10 of the invitation, paragraphs 15 and 16 provide as follows:

15. BID SAMPLES:

(a) Bid samples, in the quantities, sizes, etc., required for the items so indicated in this Invitation for Bids, must be (1) furnished as a part of the bid, (2) from the production of the manufacturer whose product is to be supplied, and (3) received before the time set for opening bids. Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation.

(b) Failure of samples to conform to all such characteristics will require rejection of the bid. Failure to furnish samples by the time specified in the Invitation for Bids will require rejection of the bid, except that a late sample transmitted by mail will be considered under the provisions for considering late bids as set forth elsewhere in this Invitation for Bids.

However, the requirement may be waived if (1) the bidder notates on GSA Form 434, Sample Record Sheet (copies attached), that the product he is offering to furnish is the same as a sample previously submitted by the bidder to Procurement Operations Division, Federal Supply Service, GSA, under Invitation for Bid No. ————————, (or library sample), Items(s) ———— , and (2) it has not been returned or disposed of as set forth in Paragraph (c) of the Bid Sample Requirements provision. BIDDERS MAY NOT RESUBMIT SAMPLES PREVIOUSLY SUBMITTED, UNLESS THEY ARE FROM THE PRODUCTION OF THE MANUFACTURER WHOSE PRODUCT IS TO BE SUPPLIED UNDER ANY RESULTING CONTRACT.

16. BID SAMPLE REQUIREMENT:

(a) Two bid samples are required for each of the following items in this Invitation for Bids:
Representing Items 1 through 15 (any one of items 1 through 15);
Representing Items 16 through 25 (any one of items 16 through 25);
Representing Items 26 through 39 (any one of items 26 through 39);
Representing Items 40 through 56 (any one of items 40 through 56);
Representing Items 57 through 59 (any one of items 57 through 59).

Where representative samples of a line are specified in lieu of requiring samples of each item and the bidder does not quote on one of the items indicated as the representative sample, the bidder shall furnish as a sample the item(s) quoted upon, otherwise, he will be required to furnish the representative sample specified. Samples will be evaluated to determine compliance with all characteristics listed below:

Subjective Characteristics
Workmanship and Design
In accordance with Federal Spec.
GGG–W–636d dated March 26, 1963 and Interim
Amendment 5 dated April 25, 1970.
Objective Characteristics
Dimensions
In accordance with Federal Spec.
GGG–W–63d dated March 26, 1963 and Interim
Amendment 5 dated April 25, 1970.

The abstract of bids shows that you were the low bidder on items 2, 3, 5, 7, 8, 21, 22, 24, 28, 29, 33, 34, 37, 40, 43, 44 and 45. Due to the quotation of excessive prices from all bidders on items 8, 33 and 46, these items were deleted from the solicitation and included in another procurement.

Under paragraph 18, Production Point, page 12 of the solicitation, your firm furnished specific information as to production points for items 2, 3, 5 and 7. Your firm provided alternative production points for the remaining items, but no indication as to which point would be used on each of the items. As matters involving points of production and inspection have traditionally been treated as matters affecting the responsibility of the bidder, rather than the responsiveness of the bid (*See* 49 Comp. Gen. 330 (1969) and 49 Comp. Gen. 553 (1970)), your firm was given an opportunity through a plant facilities survey to revise the points of production so that they would be consistent with the representative bid samples you had submitted. Your firm indicated to GSA that it preferred not to be restricted to the manufacturer of your submitted bid sample in satisfying any awards received and that on all foreign supplied items for which your firm is being considered

for award, your intention is to furnish wrenches from either of two foreign sources, as circumstances dictate. GSA has stated that because a representative bid sample for each item or group of items was received from only one foreign source in connection with your bid, such action would not be in compliance with the Bid Samples clause. GSA also stated that your firm has submitted samples which are not in fact representative of the production points for 13 line items. The record indicates that your firm has commitments from both Japanese and Spanish suppliers for the wrenches covered by items 21, 22, 24, 28, 29 and 34, and that you intend to use either supplier.

It is the position of GSA that the invitation requires that all products furnished under any contract awarded pursuant thereto must be from the production of the manufacturer whose sample was submitted and approved; that since it was apparently your firm's intention to retain flexibility in the satisfaction of any award received, by furnishing the products of two or more manufacturers for certain items or groups of items, samples of all manufacturers concerned should have been submitted by your firm; and that assuming approval of all samples, your firm would have obtained the flexibility desired.

In its report of June 20, 1972, GSA stated:

> The Bid Samples clause, paragraph 15 of the solicitation, is based on Federal Procurement Regulation (FPR) section 1-2.202-4 and General Services Administration Procurement Regulation (GSPR) section 5A-2.202-4 adopted pursuant thereto. When the Invitation for Bids (IFB) requires bid samples, as this one did, the language of GSPR 5A section 2.202-4(c), clause (a) of Bid Samples, is mandatory. It directs that "the sample (1) be furnished as part of the bid, (2) be *from the production of the manufacturer whose product is to be supplied*, and (3) be received before the time set for opening bids." Clause (2) above reflects a recent change (FSS P 2800.8A, CHGE 45, November 2, 1971) in the Bid Samples clause. This change resulted in part from the Service Tools Institute (STI) case (B-138114, September 27, 1971). There it was argued by STI that the GSA bid sample procedures permitted the acceptance of samples which did not necessarily represent the bidder's products, which often were not the bidder's own products, and which on most occasions misrepresented what the bidder would actually supply. Your Office, recognizing a possible need for a change in procedures, stated: "where samples are required to demonstrate compliance with subjective characteristics, the acceptance and examination of a sample made by someone *other than* the eventual supplier affords little assurance to the contracting officer that the items ultimately supplied will conform to the sample." In order to prevent such practices as STI complained of and to insure that the Government receives that which it bargains for, GSPR section 5A-2.202-4(c), clause (a) of Bid Samples, was promulgated, requiring any bid samples submitted to be from the production of the manufacturer whose product is to be supplied. Therefore, satisfaction of a contract requires that the product furnished be from the same manuacturer as the bid sample submitted, upon which award was based. [Italic supplied.]

A copy of the administrative report on the protest was furnished to you. In your letter of July 27, 1972, you questioned the accuracy of certain statements made by GSA in the report.

You state that in response to previous GSA solicitations Nos. FPNTN-D1-18820-A-1-8-71 and FPNTN-D3-70770-A-2-18-70

your firm submitted samples in exactly the same manner as under the subject solicitation and that since GSA had accepted the samples under those solicitations, it has established a precedent for accepting your firm's samples under the subject solicitation. In this connection, GSA reports that the new Bid Samples clause which provided, in part, that sample must be "from the production of the manufacturer whose product is to be supplied" became effective on November 2, 1971; that the change in the Bid Samples clause was conspicuously noted in the informational cover sheet which was attached to all invitations for bids; and that this change became effective prior to the issuance of the subject solicitation, but *after* issuance of the two solicitations cited by your firm.

Other significant objections made by you are set forth below, followed by the portions of the administrative report which are responsive to the questions raised in your letter of July 27, 1972, to our Office.

a. Allegation:

In paragraph two of the contracting officer's report it is erroneously stated that R & O has indicated that it preferred not to be restricted to the manufacturer of its submitted bid sample. R & O's clarifying letter of January 28, 1972, indicates the specific items that each specific manufacturer did furnish and that it is to be noted that there is no duplication of items with respect to one manufacturer or another.

Response:

R & O's clarifying letter of January 28, 1972, did not resolve the foregoing problems raised by the bid and accompanying samples. The bid, except for Items 2, 3, 5, and 7 showed alternate production points (Japan, Spain, or India). The clarifying letter, for example, with respect to Group 1 (Items 1 through 15) showed California as the production point for some items of the group and Japan for the rest of the group. However, the sole bid sample which was furnished for the group reflected a Japanese production point. Similar difficulties existed for each of the other groups. Therefore, even after the clarifying explanation, compliance with the Bid Samples clause was still absent.

b. Allegation:

GSA in determining that R & O's samples are not representative of the actual production points has failed to take into account that the invitation for bids specifically calls for the samples to be evaluated for certain of subjective and objective characteristics; that neither of these characteristics includes brand name; that section 18 on page 12 of the invitation in regard to the production point requests the *names* of the *manufacturers* of the *items* offered; and that it should be noted that all information required is specified in the plural, not singular.

Response:

The Bid Samples clause, which requires that the sample be submitted from the production of the manufacturer whose product is to be supplied, is a separate and distinct requirement from that of bid sample examination. The Bid Samples

clause, incorporated into Item 15(a), page 10 of the IFB, has no relationship to the characteristics for which the samples will be examined. Regarding examination of samples, "brand name" was not a requirement. We therefore do not understand the relevance of R & O's argument.

In Item 2(c) [section 18], the information request is written in the plural because more than one item was involved in the soliciation. In addition, offerors who had submitted more than one bid sample for a given item, could enter more than one production point.

c. Allegation:

The letter of our Office dated September 27, 1971, B–138114, to the Service Tools Institute, cited by GSA in support of its action in changing the Bid Samples clause, has no merit, for it concerned only manufacturers of which the Institute is composed and, therefore, it is prejudiced against regular dealers in favor of manufacturers.

Response:

The Service Tools Institute case is as relevant to dealers as it is to manufacturers. That decision recognizes the necessity of having the bid sample made by the eventual supplier. It is not prejudicial to regular dealers because it does not suggest that GSA require the offeror of a sample to have personally manufactured it. However, it does recognize the need for having the sample come from "the production of the manufacturer whose product is to be supplied."

In regard to the nonresponsibility of your firm, GSA has stated:

On page 4, paragraph 4 of our original response to this protest, we stated that "based on present information, R & O *may* be held to be a nonresponsible bidder." We did not state that they would be so held. Subsequent to our response of June 20, 1972, to your Office, we received another Plant Facilities Report dated May 25, 1972. It reinforces the statement made by us concerning R & O's potential nonresponsibility. However, R & O has submitted additional evidence with its supplemental letter to its protest which may bear on the question of their nonresponsibility. Until GSA has had an opportunity to evaluate such additional evidence, a determination will not be made.

The Small Business Administration (SBA) requires GSA to refer to it all cases involving a small business where a determination of nonresponsibility may be made. Accordingly, in our letter of June 16, 1972, GSA referred this solicitation to the SBA on behalf of R & O for the possible issuance of a Certificate of Competency (COC). Because a COC can be issued only for domestic products, Items 2, 3, 5, and 7 were involved. However, R & O declined to file for a COC. Because R & O intended to furnish domestic goods in satisfaction of any award received on Items 2, 3, 5, and 7, the opportunity to file for a COC would not have been a meaningless exercise.

You also alleged that "GSA has taken an arbitrary, not legal, position on this particular solicitation." You contend that the bid sample submitted by your firm is representative within the context of paragraph 16, Bid Sample Requirements, which allows for the submission of a representative sample for each group of items. Paragraph 16 lists five groups of items which total 59 items and the first group, which is illustrative of the four other groups, reads "Representing Items 1 through 15 (any one of items 1 through 15)." In your letter of April 11, 1972, to GSA, you state that in regard to the first group of items, you quoted on items 2, 3, 5 and 7 as being domestic and items 8, 10, 11, 14 and 15 as being foreign; that you submitted a sample of

item 10 as a representative sample of the group consisting of items 1 through 15; and that you cannot find anything in the provisions of the invitation which requires your firm to also furnish a domestic sample representative of items 2, 3, 5 and 7. However, paragraph 15(a) of the invitation requires that the sample be "from the production of the manufacturer whose product is to be supplied."

With your letter of May 9, 1972, you submitted a copy of page 2 of a recent GSA solicitation No. FPNTN-I-44877-A-5-26-72 and on that page appears the following:

> Bidders who propose to furnish an item or group of items from more than one manufacturer must submit two samples from the production of each of those manufacturers.

The response furnished by GSA in its June 20 report, upon which you submitted comments, seems to us a sufficient reply to this contention. Further, it may be said that the GSA response reflects a continuing policy to improve upon the contents of its solicitations.

As pointed out in the portion of GSA's report quoted above, paragraph 15(a) of the invitation, which requires that the sample be from the production of the manufacturer whose product is to be supplied, reflects a change in the Bid Samples clause that resulted in part from the request of the Service Tools Institute for a revision of the bid sample procedures used by GSA in the procurement of handtools. The request of the Institute was the subject of our decision of September 27, 1971, B-138114, to that organization, and that letter was brought to the attention of GSA by letter of the same date. In the September 27 decision, we stated, in pertinent part, as follows:

> It is your position that in situations where it is necessary to require bid samples in handtool procurements, GSA should reinstate its prior practice of requiring that the samples submitted actually be from the production of the manufacturer whose product is to be supplied. To this end, you further request that we modify our decision in 39 Comp. Gen. 254 (1959), which we understand led to the discontinuance of the prior practice.
>
> As noted by GSA, above, one of the issues presented in that case involved the propriety of the submission by one bidder of a product manufactured by the protesting bidder in satisfaction of the bid sample requirements of the invitation. With respect to the submission of samples, the invitation provided that: "If requested, samples representing what the bidder proposes to furnish will be submitted for the purpose of determining whether the item offered by the bidder complies with the specification." Focusing on this language, we concluded that "the plain terms of the invitation required only that the sample submitted be representative of what the bidder proposed to furnish; there was no requirement that the sample must actually have been manufactured by the bidder." It seems clear that the conclusion reached in 39 Comp. Gen., *supra*, turned on the specific language of the invitation and, in our opinion, if appropriate revisions are made to the language of GSA's bid sample provisions, the cited case would not be a bar to implementation of your requested modification.
>
> Insofar as implementation of your request is concerned, we agree that where samples are required to demonstrate compliance with subjective characteristics (which by definition cannot be adequately described in specifications), the acceptance and examination of a sample made by someone other than the eventual supplier affords little assurance to the contracting officer that the items ulti-

mately supplied will conform to the sample. We must also observe that while return to the prior practice would, as you point out, lessen GSA's administrative burden, the impact on competition must also be weighed. If, as you urge, the prior practice of requiring samples from the production of the manufacturer whose product is to be supplied did not adversely affect competition, this fact would be significant. In this connection, the expression of support for the institute's position by the Director, Office of Procurement Assistance, Small Business Administration, is also for consideration. However, the decision whether GSA should reinstate its prior practice is, as you recognize, a matter within the sound discretion of the Administrator.

On the record before us, we find no basis for questioning GSA's interpretation of the Bid Samples clause. Accordingly, the protest is denied.

[B-176223]

Contracts—Negotiation—Evaluation Factors—Price Primary Consideration

Notwithstanding an amendment to two requests for proposals (RFPs) that solicited operation and maintenance services to the effect price would be a specific factor in evaluation was withdrawn, offerors were on notice price would be an evaluation factor as the RFPs contained Standard Form 33A, which provided that an award would be made on the basis of the most advantageous offer to the Government, price and other factors considered. While the failure to inform offerors of the relative importance of price is contrary to sound procurement policy as each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality since there is little difference in the technical quality of the services offered, the failure to indicate the relative weight of price is not fatal.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—What Constitutes Discussion

The satisfaction of the requirement in 10 U.S.C. 2304(g) that written or oral discussions be held with all offerors within a competitive range turns upon the particular facts involved as no fixed, inflexible rule can be used to construe the requirement. Therefore, the content and extent of discussions needed to meet the requirement is a matter of judgment primarily for determination by the procuring agency, and the determination is not subject to question unless clearly arbitrary or without a reasonable basis provided, of course, that the discussions held do not operate to the bias or prejudice of any competitor. Therefore, where the opportunity to revise prices constitutes discussion, the competition contemplated by 10 U.S.C. 2304(g) was obtained and resulted in the most advantageous contracts to the Government for the procurement of operation and maintenance services.

Contracts—Negotiation—Propriety—Procedures Acceptability

Although paragraph 3-805.1(b) of the Armed Services Procurement Regulation permits advising an offeror that its price is considered too high, there is no mandate that compels the procurement activity to offer such advice. Also notwithstanding the provision in the paragraph for a common cutoff date for negotiations, the additional time given the low offeror to submit a best and final offer, which resulted from permitting each offeror the same amount of time after discussions were held to submit its best and final offer was not prejudicial to other offerors, nor did it afford the low offeror an advantage as its offer to furnish operation and maintenance services was low at each stage of evaluation.

Contracts—Negotiation—Evaluation Factors—Merger of Firms Consideration

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

Contracts—Labor Stipulations—Minimum Wage Determinations—Failure to Issue Effect

Since the issuance of wage determinations is within the discretion of the Department of Labor and the failure to issue wage rates incident to the performance of operation and maintenance contracts was in no way attributable to the contracting agency, the provisions of the Service Contract Act of 1965, 41 U.S.C. 351, were not violated and, therefore, the validity of the contracts awarded is not affected, nor was the low offer that was accepted nonresponsive because the wages of unlisted categories of employees did not conform to those stated by the Department of Labor as neither the request for proposals nor the Department's regulation 29 CFR 4.6(b) imposes such a requirement.

General Accounting Office—Decisions—Court Consideration

In view of the fact the United States Court of Appeals for the District of Columbia appears to contemplate including the decision of the United States General Accounting Office (GAO) in its consideration of the appeal taken to the denial by the United States District Court for the District of Columbia of a request for a preliminary injunction to prevent the performance of operation and maintenance contracts pending a decision by GAO to a protest filed prior to the filing of the motion in the District Court, the issues raised in the bid protest have been resolved notwithstanding the bid protest would have been dismissed as untimely under GAO's Interim Bid Protest Procedures and Standards (4 CFR 20 *et seq.*) but for the interest and involvement of the Court of Appeals.

To Arnold & Porter, September 25, 1972:

Reference is made to your letter of September 19, 1972, and prior correspondence on behalf of Serv-Air, Inc., protesting against the award of two operation and maintenance contracts to Page Aircraft Maintenance, Inc., by the Department of the Air Force.

After filing a protest with our Office, Serv-Air filed a motion with the United States District Court for the District of Columbia for a preliminary injunction pending our decision. That motion was denied by an order of June 30, 1972, in Civil Action No. 1237-72. Later that same day, the United States Court of Appeals for the District of Columbia Circuit, by order No. 72-1616, also denied Serv-Air's motion for an injunction pending appeal. A hearing on the appeal is scheduled for September 25, 1972.

The order of the Court of Appeals provided that a copy should be sent to our Office and appears to have contemplated that our decision would be included in the court's consideration of the matter. Consequently, we have considered issues raised by the protest which, but for the interest and involvement of the Court of Appeals, we would have dismissed as untimely under our Interim Bid Protest Procedures and Standards. 4 CFR 20, *et seq.*

Upon review and consideration of the bid protest issues, we conclude that no basis exists for sustaining the protest and, accordingly, it is denied for the reasons which follow.

Serv-Air contends that price was improperly deleted as an evaluation factor from the solicitations and then reinstated without notice being given to Serv-Air by amendment or otherwise. Two requests for proposals (RFPs) for the award of fixed-price incentive contracts are involved here: RFP F41689–72–R–0128, for services at Vance Air Force Base, Oklahoma; and RFP F41689–72–R–0129, for services at Sheppard Air Force Base, Texas. Amendment 0001 to each RFP added price as a specific factor in section "D" for the evaluation of proposals. Amendment 0002 to each RFP overcame the effect of the earlier amendment in that regard.

While the RFPs lack a statement concerning the relative importance of price, they do state that price would be an evaluation factor. Both RFPs contain Standard Form 33A, entitled "Solicitation Instructions and Conditions," paragraph 10(a) of which states that award will be made to that offeror whose offer is most advantageous to the Government, price and other factors considered. None of the amendments to the RFPs changed this paragraph. Offerors were, therefore, on notice at all times that price would be a factor in the evaluation of proposals and the awarding of the contracts.

The procurement activity maintains that price was erroneously included as an evaluation factor in section "D" of the respective RFPs, as amended, since paragraph 3–501(b) sec. D(i) of the Armed Services Procurement Regulation (ASPR), dealing with the format for solicitations, indicates that only factors other than price are to be listed in that part of a solicitation dealing with evaluation factors. We do not agree with this interpretation. Nothing in the ASPR provision requires the elimination of price as a listed evaluation factor. What is required is the listing of all factors other than price which are to be considered in the evaluation of proposals. While the RFPs indicated that price would be considered, since price was not listed in section "D" of the RFPs, offerors were not informed of its relative importance vis-a-vis the evaluation factors which were listed. This failure to show the relative importance of price is contrary to the longstanding

view of our Office that intelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. 49 Comp. Gen. 229 (1969). We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is hardly served if offerors are not given any idea of the relative values of technical excellence and price. We believe a complaint is justified if in such circumstances a materially superior offer is rejected in favor of one offering a lower price. However, that is not the case here. It is our understanding that the Air Force found little difference in the technical quality of the offers at issue. Consequently, an award selection based on price difference cannot be regarded as prejudicial to Serv-Air and the failure of the RFPs to indicate the relative weight of price as an evaluation factor cannot affect the validity of the proposed awards.

Serv-Air next contends that the procurement activity failed to conduct meaningful negotiations with respect to price. In support of this position, Serv-Air points to the brevity of the negotiation meetings; the lack of substance on the point in the Air Force's correspondence; the fact that no offer and counteroffer exchange took place between the parties; that it was not given an opportunity to discuss price; and that it was not told that its price was too high.

Section 2304(g) of Title 10 of the U.S. Code requires that written or oral discussions be held with all offerors within a competitive range. The duration *per se* of a negotiation session is by no means determinative of whether meaningful discussions have been held. Moreover, while recognizing that the term negotiation (which we equate to discussions) generally implies a series of offers and counteroffers we have not concluded that the presence of such offers and counteroffers is essential for compliance with 10 U.S.C. 2304(g). *See* B–164688, October 2, 1968. In 51 Comp. Gen. 621 (1972), we held that meaningful discussions had not been precluded by the fact that technical proposal deficiencies had not been brought to the attention of an offeror. In reaching that conclusion we stated that no fixed, inflexible rule could be used to construe the requirement for "written or oral discussions" but that satisfaction of the requirement turned upon the particular facts of each individual case. Therefore, it is our position that the content and extent of discussions needed to satisfy the requirements of 10 U.S.C. 2304(g) is "a matter of judgment primarily for determination by the procuring agency * * * and that such determination is not subject to question by our Office unless clearly arbitrary or without a reasonable basis," provided, of course, that

the discussions held do not operate to the bias or prejudice of any competitor. *Id.* at 31–32. *See also* B–172946(1), December 23, 1971.

The memoranda of negotiations with respect to the two procurements state, to one degree or another, that no attempt was made to negotiate individual cost elements. On the other hand, offerors were aware of the competitive nature of the procurements and Serv-Air in particular was cautioned at one point to respond only to the statement of work contained in the RFP and not to impute work to the procurements which it, as the incumbent contractor, might consider required. In addition, all offerors were afforded at least one opportunity with respect to each procurement to revise their price proposals. Serv-Air took advantage of this opportunity and the others which it was afforded by reducing its price. Whether a different result would have been obtained by the head-to-head bargaining which Serv-Air claims was required is conjectural.

In the case of the Vance procurement both offerors offered best and final prices which were below the Government's estimate and there is nothing otherwise in the administrative reports which indicates that the procurement activity believed that the prices offered by either offeror on either procurement were unreasonable. Moreover, it seems clear that the procurement activity believed, with respect to price, that the competitive nature of the procurements, the clarification of offerors' technical proposals, and the opportunity to revise proposals would maximize competition and result in contracts which are most advantageous to the Government.

We find nothing inconsistent with achieving the goal of maximized competition in this procedure and since competition was what 10 U.S.C. 2304(g) was designed to obtain, we find no basis for concluding that the purpose of that statute was not effectuated in the present case. (An extensive discussion of the legislative history of the statute is found in 51 Comp. Gen. 621 (1972), previously discussed.) Moreover, we believe that the opportunity to revise prices which was afforded to offerors constitutes, under the instant circumstances, discussions as required by 10 U.S.C. 2304(g). For other instances where the opportunity to revise a proposal price constituted discussions, *see* 51 Comp. Gen. 479 (1972) and especially B–172946(1), *supra*, where a request for best and final offers was held to be discussions.

We note that ASPR 3–805.1(b) permits advising an offeror that his price is considered too high. There is, however, no mandate which compels the procurement activity to offer such advice. Further, 48 Comp. Gen. 722 (1969), cited by Serv-Air as B–165261 for the proposition that a request for a price reduction without giving an offeror

the reason for the request does not constitute meaningful discussions, is not applicable here. In that case, the failure to advise a prospective lessor that his price offer concerning additional rent exceeded the limitation established by the Economy Act, 40 U.S.C. 278a, *et seq.*, eliminated whatever competition was involved in the procurement and led directly to the award of a sole source contract. This is exactly the situation that 10 U.S.C. 2304(g) was designed to preclude. It is not, however, the situation which exists in the instant case.

Serv-Air also contends that negotiations were conducted with Page subsequent to the time Serv-Air was required to submit its best and final offer. The Kidwell affidavit denies that such was the case and there is nothing to indicate that meetings were held with Page subsequent to May 1, 1972. What apparently did occur, at least with respect to RFP-0128, is that cutoff dates were established to give each offeror the same amount of time after discussions were held with him in which to submit his best and final offer. Thus Page was permitted to submit its best and final offer on May 3, 1972, 2 days after the deadline set for Serv-Air. We believe that ASPR 3-805.1(b) requires the establishment of a common cutoff date. B-173427, March 14, 1972. *See, also*, 50 Comp. Gen. 1 (1970); B-174492, June 1, 1972. However, there is, in this instance, no indication in the record that Page gained an advantage or Serv-Air suffered prejudice because of the fact that Page submitted its last revised proposal later than Serv-Air. At each stage in evaluation, with respect to both procurements, Page submitted the lower price proposal. Therefore, we do not feel that the propriety of the award is affected.

Serv-Air contends that the pending acquisition of Page by the Northrop Corporation influenced the Government's decision to award the contracts to Page. This accusation is denied by the procurement activity which maintains that the evaluation of Page and its proposal was based on the firm's past performance under contracts of similar difficulty, its corporate history, and corporate financial picture. While the procurement activity knew of the pending acquisition, we find nothing which sustains Serv-Air's contention and, therefore, cannot accept it.

Two other matters relating to the pending Page-Northrop merger are raised by Serv-Air. The first is that the Air Force should have considered the antitrust aspects of the merger. In this connection, Serv-Air cites a series of cases wherein, it is maintained, various regulatory agencies of the Government were required to consider the antitrust laws in the execution of their responsibilities even though they were not directly concerned otherwise with those laws. We believe that the imposition of such a requirement upon the contracting officers of

the Government would impose an intolerable burden and inordinately delay the procurement process. In the absence of judicial authority speaking directly to the point, we perceive no reason why our Office should endorse such a requirement.

Second, on the assumption that Page disclosed its prices to Northrop during the course of their merger negotiations, Serv-Air maintains that Page inaccurately executed the "Certification of Independent Price Determination" in its proposal. That certification requires, *inter alia*, that the "prices which have been quoted in this offer have not been knowingly disclosed by the offeror and will not knowingly be disclosed by the offeror * * * directly or indirectly to any other offeror or to any competitor." Northrop, it is maintained, was a competitor of Page. Although the point is not proven, Serv-Air's assumption may be granted for the sake of argument. Even so, it does not undermine the award in our opinion. Northrop was not an offeror on either of the procurements since it did not submit any offers. And while it may have been a competitor of Page, we think even Serv-Air recognizes, at page 48 of its memorandum of law, that the disclosure of price, if made, was made for purposes of effectuating the merger of the two firms and not for purposes of restricting competition—the problem which the certification was designed to alleviate. Therefore, we do not think that Northrop can be regarded as a competitor for this procurement within the context of the certificate language.

Finally, Serv-Air makes several contentions concerning violations of the Service Contract Act of 1965, 41 U.S.C. 351, which it claims invalidates the awarded contracts. The first violation alleged is the failure to issue any wage determination for Sheppard and only a partial determination for Vance. In 51 Comp. Gen. 72 (1971), at page 76, we concluded with respect to the failure of the Department of Labor to issue a wage rate determination that:

> Irrespective of whether this Office agrees with the reasoning on which the decision not to issue a wage rate determination was made, it is our opinion that such decisions are within the discretion of the Department of Labor in each individual case. Where, as in the instant case, the Department declines to issue a determination, and such declination is not attributable to any misfeasance or nonfeasance on the part of the contracting agency, it is our further opinion that the failure to include a wage rate determination in the RFP and in the resulting contract will not affect the validity of the contract.

This holding was further amplified by our statement, also on page 76 of the decision, that:

> With respect to your contention that Labor's failure to issue a determination is attributable to the contracting officer's failure to submit wage rate information with the Standard Form 98, there is nothing in the record as submitted by Navy, or in the report forwarded to this Office by the Department of Labor, to indicate that the lack of wage rate information with the Standard Form 98 contributed to, or resulted in, Labor's failure to issue a wage rate determination. We therefore see no misfeasance or nonfeasance on Navy's part in its request for a wage

rate determination which might affect the validity of the contract awarded to Dynalectron.

In the case of the Sheppard procurement, the Standard Form 98, Notice of Intention to Make a Service Contract and Response to Notice, dated November 4, 1971, submitted by the Air Force to the Department of Labor had, as an attachment, current payroll data on the employees working at Sheppard. In the case of the Vance procurement, item 7 of the Standard Form 98 indicated that a current wage determination was in effect and the same was attached. No wage information on all the employees at Vance was submitted but the transmittal letter accompanying the notice did indicate that the current wage determination represented coverage of only 11 of several hundred categories of employees.

There has been no showing whatever that the failure of Labor to issue a wage determination for Sheppard or a complete determination for Vance was in any way contributed to, or resulted from, the failure of the Air Force to include wage rate information. Current payroll data was submitted with the Standard Form 98 for Sheppard. In the case of the Vance procurement, current payroll data was not provided, contrary to the language of ASPR 12-1005.2(a), but this may well have been the result of the language of the notice form itself which implies that payroll data or other information need not be provided where there is a current wage rate, to wit: "(If no wage determination is currently applicable, attach whatever information is available on wages and fringe benefits being paid in the locality)." In any case, Labor was aware that the current wage rate determination covered only some of several hundred employee categories. We think it reasonable to conclude that if it had an intent to issue an expanded determination, it would have requested additional information. Such a request, however, was never made. It is our view, therefore, that the validity of the contracts awarded to Page is not affected by the action of either Labor or Air Force.

There remains only the contentions that the wages offered by Page in its proposal for unlisted categories of employees at Vance should have been conformed to the wages stated in the Department of Labor partial wage rate determination, and that the standards for such conformance are Serv-Air's existing wage rates. There is nothing in the language of the RFP or Labor regulation 29 CFR 4.6(b) which imposes such a requirement. In any case, we note that the regulation and ASPR contract clause use the terms "contract" and "contractor" rather than "offer" and "offeror." We believe this indicates that the conforming process is a post, not pre, award procedure. Accordingly, Serv-Air's contention regarding Page's proposed wage rates as compared to Serv-Air's is irrelevant in this context. Serv-Air has not directed our attention to any precedent contrary to this position and, in the absence of a clearer indication that its contention is supportable, we find no basis to hold that the Page proposal had to contain conformed wage rates for unlisted employees or that the failure to do so rendered its proposal "nonresponsive." B-167250, November 13, 1969.

[B-176424]

Contracts—Negotiation—Late Proposals and Quotations—Price Reduction

A late unsolicited price reduction that reflected a potential savings to the Government in the procurement of a first article sample and a quantity of Fuze Assemblies under the public exigency provision in 10 U.S.C. 2304(a)(2) properly was not referred to the Secretary of the Army under paragraph 3-506(c)(ii) of the Armed Services procurement Regulation for consideration on the basis the reduction was of extreme importance to the Government and, therefore, the contracting officer was not required to reopen negotiations and conduct further discussions pursuant to 10 U.S.C. 2304(g), since without clarification as to the actions contemplated by the regulation, a monetary savings alone is not sufficient to bring a late proposal or modification within the category of "extreme importance to the Government."

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Proposal Revisions

The reopening of negotiations upon receipt of a late unsolicited price reduction from a small business concern in its offer submitted under a request for proposals that did not provide for a small business set-aside was not required since the Small Business Act, 15 U.S.C. 631, although protecting the interests of small business concerns, does not impose an obligation on a contracting officer to reopen negotiations in an unrestricted procurement, and as negotiations were not reopened the offerer was not prejudiced by the failure to receive notice that its late price reduction would not be considered—the notice discrepancy being a matter of form—nor was the concern prejudiced by lack of notice of a protest made by another offerer of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity.

To the Amron-Orlando Corporation, September 26, 1972:

This is in reply to your telefax of June 30, 1972, and letters of July 20 and August 23, 1972, protesting the award of a contract to another firm under request for proposal DAAA21-72-R-0308, issued by the Department of the Army, Picatinny Arsenal, Dover, New Jersey.

The solicitation called for a preproduction effort, first article sample and a quantity of M567 Fuze Assemblies. The procurement was negotiated under the "public exigency" provisions permitting negotiations as authorized in 10 U.S. Code 2304(a)(2), and implemented by Armed Services Procurement Regulation (ASPR) 3-202.2. (The procurement carried an 02 priority rating under the Uniform Materiel Movement and Issue Priority System.) Offers were submitted by May 15, 1972, but subsequent to this date the solicitation was amended in certain respects and offerors were required to acknowledge the changes and submit their "best and final" offers by June 2, 1972. An award was made to the Bulova Watch Co. on June 26 on the basis of the lowest final offer received by June 2, at a fixed price of $1,403,124.91.

The record shows that by telegram dated June 9, 1972, your firm submitted an unsolicited modification which proposed to reduce your final price of June 2 by $76,488. This proposed reduction reflects a

potential savings to the Government of approximately $44,000 when compared to the price at which the award was made to Bulova.

Essentially, it is your position that pursuant to ASPR 3-506(c)(ii) the Secretary was required to consider the advantages to the Government of your late price reduction and that the rejection of the benefits implicit in your late price reduction without further negotiation or resolicitation was improper. Specifically, you refer to the following benefits which could have been realized as a result of your late low offer: (1) a cost savings of at least $44,098 and (2) since your firm was a small business and Bulova was not, a reopening of negotiations subsequent to your late low offer would have effected a more meaningful implementation of the policy enunciated in the Small Business Act, 15 U.S.C. 631. In pertinent part the act states that "the Government should aid, counsel, assist and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government . . . be placed with small-business enterprises. . . ." Finally, you contend that the reopening of negotiations and the call for "best and final" offers by June 2 should not be viewed as a discussion such as is contemplated by the provisions of 10 U.S.C. 2304(g) and you believe that the agency failed to conduct the discussions required by this law.

ASPR 3-506(c)(ii) provides, in pertinent part, that late proposals shall not be considered for award, except where the Secretary concerned determines that consideration of a late proposal is of extreme importance to the Government, as for example where it offers some important technical or scientific breakthrough.

10 U.S.C. 2304(g) provides as follows:

(g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however,* That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

The record shows that the contracting officer declined to submit your late modification, which was approximately $44,000 or 3 percent below Bulova's price, to the Secretary, or his delegate, for possible consideration under ASPR 3-560(c)(ii), and that he declined to

reopen negotiations because of the urgency of the procurement and fact that all offerors, including your firm and Bulova, had been afforded an opportunity to submit their "best and final" offers subsequent to the receipt of their initial proposals. It should also be noted that all offerors had been advised of the common cutoff date and that all modifications received after that date would be treated as late proposals.

You have taken the position that the contracting officer's handling of this matter amounts to an abuse, or unsound exercise, of discretion and, as such, is arbitrary and/or capricious. You regard the minimum savings of $44,098 as sufficiently significant to have obligated the contracting officer to attempt to realize those savings. You note that 17 days elapsed from the date of your late proposal and the date of award to Bulova, implying that sufficient time existed during which another round of offers could have been sought. With respect to the requirement in 10 U.S.C. 2304(g) for conducting discussions you submit "that the only meaningful definitions of NEGOTIATIONS and/or DISCUSSIONS connote verbal intercourse, dialogue, debate, a two-way give-and-take exchange of information" and in no way can one correctly interpret either of these terms to connote "silence." You say silence is precisely what your company received during this "negotiated" procurement.

We cannot agree with your interpretation of the provisions of 10 U.S.C. 2304(g) relating to the conduct of discussions. The absence of oral discussions is inconsequential since the cited provision itself also provides in the alternative for written discussions. In addition, we have held that a letter extending an opportunity to revise initial proposals as a result of a change in requirements, and the offerors' responses thereto, meet the requirement for "discussions" as set out in 10 U.S.C. 2304(g). *See* B–170297, May 26, 1971. It should be noted, however, that the cited decision expressly states that the holding was not intended to discourage more extensive negotiations of price in similar situations nor to imply that they would be inappropriate. Although we have observed that "negotiation" generally implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties (45 Comp. Gen. 417, 427 (1966)), we have recognized that such a meaning is not denoted in the above statutory references to discussions and that a series of offers is not essential for compliance with those provisions. B–164688, October 2 1968.

As to whether negotiations should have been reopened after receipt of your late modifications of June 9, the above-cited regulation ASPR

3-506(c)(ii)) does not state that the contracting officer must refer all late proposals and modifications (ASPR 3-506(c)(g)) to the Secretary, and the example shown therein of "extreme importance to the Government" is an important technical or scientific breakthrough. While our decision, 47 Comp. Gen. 279 (1967), which you cite, expresses the view (at pages 283 and 284) that the provisions of ASPR 3-506 were not intended to preclude the opening of negotiations upon receipt of a late modification which indicated such negotiations would be advantageous (pricewise) to the Government, our analysis of portions of the history leading up to the promulgation of the regulation (as since furnished this Office by the Department of the Navy) requires the conclusion that an indicated monetary savings, alone, was not considered sufficient to bring a late proposal or modification within the category of "extreme importance to the Government." Although we recognize that contracting officers have, on occasions, referred late modifications to the Secretary under that regulation, on the basis of substantial prospective savings to the Government, we cannot conclude that the regulation requires, or was intended to require, the contracting officer to submit late price modifications to the Secretary and, as you contend, that such a nonreferral constitutes an arbitrary or capricious action by the contracting officer.

In this connection, our records indicate that the uncertainty among contracting officers as to whether any late price modifications should be referred to the Secretary, on the basis of ASPR 3-506(c)(ii), is well known to the agencies concerned, and consideration has been given for several years by the appropriate officials to modifying the regulation to clarify the action to be taken when late proposals or modifications indicate that negotiations, or further negotiations, may obtain savings to the Government.

In view of the foregoing, we find no adequate basis in this case for questioning the efficacy of the competition. The record shows that seven proposals were considered for award on June 2 and that your "final" bid of June 2 was only 2.3 percent greater than Bulova's low bid. In our view, the record does not present a firm basis on which to question the reasonableness of the contract price, even though it may not have been the lowest possible price obtainable through further negotiations.

In this connection, we note that consideration of your late price modification would have required the establishment of a new cutoff date for further negotiations and submission of final offers during which time the price shown in your modication could have been amended so as to dissolve the indicated savings. Moreover, we are

informally advised that this requirement was such that it could have been formally advertised but for the urgency and, therefore, the reopening of negotiations would simply have amounted to another request for "best and final" offers. Even though we do not believe it is established that further negotiations could not have been concluded and the award made within the 2-week period between the time your late price reduction was received and the time of award to Bulova, we find no clear basis for concluding that the contracting officer improperly made the award on the basis of the "best and final" offer received by June 2.

As to your contention that the contracting officer failed to consider or to discharge his obligations under the Small Business Act, we see no basis for construing the above-quoted policy enunciated in 15 U.S.C. 631 of protecting the interests of small business concerns, as imposing an obligation to reopen negotiations in unrestricted procurements. Moreover, the procedures governing contract awards to small business firms make no provision for such action. *See* ASPR 1–700, *et seq.*

You also contend that you were improperly denied prompt notice that the contracting officer did not intend to consider your late price reduction, which notice you claim is required by ASPR 3–506(d). This regulation provides, as follows:

> Except where only one proposal is received, all late offerors shall be promptly notified that their proposals were received late and that their proposals will be evaluated but not considered for award unless found to qualify under one of the exceptions in (c)(ii) and (iii) above. Where it is not clear from available information whether the exception in (c)(iii) above applies, the notification shall include the substance of the notice in 2–303.6 (appropriately modified to relate to proposals and, if necessary, to telegraphic proposals).

We do not agree with your interpretation that the above-quoted regulation required notification of the decision not to consider your late proposal for award for failure to qualify under the criteria in (c)(ii). All that was required under this regulation was notice that your proposal was received late and would be evaluated pursuant to the criteria in (c)(ii), not notice of the results of that evaluation. Since we have concluded that the contracting officer did not act improperly in not reopening negotiations, we do not find that you were prejudiced by your failure to receive the notice contemplated by the regulation and the deficiency is therefore regarded as a matter of form rather than a material factor affecting the validity of the award.

Finally, you have protested the fact that you were not given notice of a protest of an ambiguity in the solicitation by another offeror,

Maxson Electronics Corporation, which you allege was required pursuant to the provisions of ASPR 2-407.8(a)(3). This regulation is made applicable to negotiated procurements by ASPR 3-509 and provides as follows:

> Other persons, including bidders, involved in or affected by the protest shall be given notice of the protest. They shall also be advised that they may submit their views and relevant information to the contracting officer within a specified period of time, normally within one week, and that copies of such submissions should be furnished directly to the General Acounting Office when the protest has been filed with that office.

The record indicates that Maxson obtained a resolution of its complaints with the contracting agency, which resulted in the issuance of Amendments Nos. 5, 6 and 7 to the solicitation and the withdrawal of the protest shortly after the closing date for negotiations. Our bid protest procedures and standards (*see* 4 CFR 20.2) encourage such resolutions. Moreover, as to preaward protests, ASPR 2-407.8(b) provides for notice of protest to affected offerors "in appropriate cases," such as when the contracting officer determines to withhold the award pending disposition of the protest. Where, as here, remedial action was taken by the agency to correct the alleged ambiguities in the solicitation and the protest was resolved administratively by amendments to the solicitation, with all parties being required to submit their final offers on an identical basis, it does not appear that you were prejudiced even if it could be concluded that notice of the protest should have been given the other offerors under the regulations. Accordingly, your protest is denied.

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

ACCOUNTABLE OFFICERS

Certifying officers. (*See* CERTIFYING OFFICERS)

AGRICULTURE DEPARTMENT

Indemnity payments

Contamination of cheese

Removal from commercial market

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

ALLOWANCES

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

APPROPRIATIONS Page
Continuing
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In permanent appropriations

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AUTOMATIC DATA PROCESSING SYSTEMS. (*See* EQUIPMENT, Automatic Data Processing Systems.)
BALANCE OF PAYMENTS PROGRAM
(*See* FUNDS, Balance of Payments Program)
BIDDERS
Qualifications
Capacity, etc.
Technical criteria utilization

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

Responsibility *v.* bid responsiveness
Experience

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

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

Subsidiaries
De facto control

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

BIDS
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Buy American Act
Buy American Certificate
Noncompliance

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

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Equal bidding basis for all bidders
Ambiguous specifications

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

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

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Qualified products. (*See* CONTRACTS, Specifications, Qualified products)
Small business concerns. (*See* CONTRACTS, Awards, Small business concerns)
Specifications. (*See* CONTRACTS, Specifications)
BUY AMERICAN ACT
Applicability
Contractors' purchases from foreign sources
End product *v.* components

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

Bids. (*See* BIDS, Buy American Act)

CERTIFYING OFFICERS Page

Submissions to Comptroller General

Questions general in nature

Although, normally, Comptroller General of U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department 83

COMPENSATION

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Awards

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Status

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Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity 169

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

Bids, generally. (*See* BIDS)

Default

Procurement from another source

Excess cost liability

Disposition of collection

Excess costs that are due Govt. incident to replacement contract awarded upon default by original contractor may be deducted from amount earned but withheld from defaulting contractor and excess costs transferred from appropriation account in which held to miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with general rule that excess costs recovered from defaulting contractors or their sureties are required by sec. 3617, R.S., 31 U.S.C. 484, to be deposited in Treasury as miscellaneous receipts. Furthermore, there is no distinction between amounts earned by but withheld from defaulting contractors and those recovered from voluntary payments, litigation, or otherwise 45

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Disputes

Contract Appeals Board decision

Review by the General Accounting Office

S&E Contractotor, Inc., case effect

In view of holding by U.S. Supreme Court in *S&E Contractors, Inc.* v. *U.S.*, No. 70-88, Apr. 24, 1972, that decisions rendered pursuant to disputes clause of contract in favor of contractor are final and conclusive and not subject to review by U.S. GAO absent fraud or bad faith, GAO no longer will object to payment of claim for refund of amount withheld from contractor on basis Maryland State sales tax determined to be inapplicable had been included in contract price and paid, refund approved by Board of Contract Appeals but not returned to contractor because GAO in 49 Comp. Gen. 782 held Board was wrong as matter of law 63

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Failure to issue effect

Since issuance of wage determinations is within discretion of Dept. of Labor and failure to issue wage rates incident to performance of operation and maintenance contracts was in no way attributable to contracting agency, provisions of Service Contract Act of 1965, 41 U.S.C. 351, were not voilated and, therefore, validity of contracts awarded is not affected, nor was low offer that was accepted nonresponsive because wages of unlisted categories of employees did not conform to those stated by Dept. of Labor as neither request for proposals nor Dept.'s regulation 29 CFR 4.6(b) imposed such requirement 161

Nondiscrimination

"Affirmative Action Programs"

Subsidiary's status

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

Negotiation

Competition

Aggregate award basis effect

Cancellation of request for proposals (RFP) for inspection, maintenance, and repair of 3 types of electron microscopes because specifications were considered inadequate for competitive procurement, and reissuance of RFP on basis award "would be made in the aggregate, price, and other factors considered," did not result in price competition contemplated by 1-3.807-1(b)(1) of Federal Procurement Regs. since separate awards under initial RFP would have obtained services for less. Therefore, since justification for aggregate award is sound only if Govt.

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Proposal revisions
Late unsolicited price reduction that reflected potential savings to Govt. in procurement of first article sample and quantity of Fuze Assemblies under public exigency provision in 10 U.S.C. 2304(a)(2) properly was not referred to Secretary of Army under par. 3-506(c)(ii), ASPR, for consideration on basis reduction was of extreme importance to Govt. and, therefore, contracting officer was not required to reopen negotiations and conduct further discussions pursuant to 10 U.S.C. 2304(g), since without clarification as to actions contemplated by regulation, monetary savings alone is not sufficient to bring late proposal or modification within category of "extreme importance to Govt." 169
Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity 169
What constitutes discussion
Satisfaction of requirement in 10 U.S.C. 2304(g) that written or oral discussions be held with all offerors within competitive range turns upon particular facts involved as no fixed, inflexible rule can be used to construe requirement. Therefore, content and extent of discussions needed to meet requirement is matter of judgment primarily for determination by procuring agency, and determination is not subject to question unless clearly arbitrary or without reasonable basis provided, of course, that discussions held do not operate to bias or prejudice of any competitor. Therefore, where opportunity to revise prices constitutes discussion, competition contemplated by 10 U.S.C. 2304(g) was obtained and resulted in most advantageous contracts to Govt. for procurement of operation and maintenance services 161
Memorandum of Understanding in lieu
Canada
Award of research and development contract on "sole-source" basis to Canadian firm pursuant to "Memorandum of Understanding in Field of Cooperative Development Between U.S. Dept. of Defense and Canadian Dept. of Defense Production" (Par. 6-507, ASPR) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Memorandum of Understanding in lieu—Continued
Canada—Continued
awarded on competitive basis after solicitation from "maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by executive branch in conduct of foreign relations------- 136
Evaluation factors
Criteria
Determination that offer evaluated on basis of criteria and assigned weights contained in request for proposals did not meet mandatory requirements for rental of nationwide computer network facilities by means of commercially marketed system called "full-services teleprocessing" with access to common data base and, therefore, offeror should not be allowed to perform live benchmark/demonstration test that would measure proposed system's network capabilities and cost effectiveness was justified because proposal failed to offer for benchmarking system to be delivered and used in performance of contract, whereas successful offeror, operating national network at time of submitting its proposal, met experience requirements of RFP---------- 118
Merger of firms consideration
Record on award of operation and maintenance contracts to low offeror does not evidence determination was influenced by pending merger of low offeror's firm and competitor where firm's past performance under contracts of similar difficulty, its corporate history, and its financial picture were evaluated. Furthermore, to require contracting officer to consider antitrust aspects of pending merger in absence of judicial authority speaking directly to point would impose intolerable burden on officer and inordinately delay procurement and, moreover, since disclosure of prices was intended only to effectuate merger, "Certification of Independent Price Determination" designed to alleviate competition, was not inaccurately executed---------- 161
Price primary consideration
Notwithstanding amendment to two requests for proposals (RFPs) that solicited operation and maintenance services to effect price would be specific factor in evaluation was withdrawn, offerors were on notice price would be evaluation factor as RFPs contained SF 33A, which provided that award would be made on basis of most advantageous offer to Govt., price and other factors considered. While failure to inform offerors of relative importance of price is contrary to sound procurement policy, as each offeror has right to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality, since there is little difference in technical quality of services offered, failure to indicate relative weight of price is not fatal--------- 161
Superior product offered
Where offerors were not required to submit technical proposals to service electron microscopes but only to offer to conform to best practices of industry, and factors making up technical criteria were evaluation of capacity factors, determination offeror was technically unac-

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Superior product offered—Continued
ceptable amounted, in essence, to determination of nonresponsibility for reasons of capacity that required referral to SBA under 1-1.708.3 of Federal Procurement Regs. Furthermore, award of nonpersonal service, fixed price, contract to offeror determined capable of providing highest quality services was without authority and, therefore, if SBA will issue Certificate of Competency to rejected offeror, award made should be terminated for convenience of Govt---------- 47
Late proposals and quotations
Price reduction
Late unsolicited price reduction that reflected potential savings to Govt. in procurement of first article sample and quantity of Fuze Assemblies under public exigency provision in 10 U.S.C. 2304(a)(2) properly was not referred to Secretary of Army under par. 3-506(c)(ii), ASPR, for consideration on basis reduction was of extreme importance to Govt. and, therefore, contracting officer was not required to reopen negotiations and conduct further discussions pursuant to 10 U.S.C. 2304(g), since without clarification as to actions contemplated by regulation, monetary savings alone is not sufficient to bring late proposal or modification within category of "extreme importance to Govt."------- 169
Notice of disqualification
Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity---------- 169
Propriety
Procedures acceptability
Although par. 3-805.1(b), ASPR, permits advising offeror that its price is considered too high, there is no mandate that compels procurement activity to offer such advice. Also notwithstanding provision in paragraph for common cutoff date for negotiations, additional time given low offeror to submit best and final offer, which resulted from permitting each offeror same amount of time after discussions were held to submit its best and final offer, was not prejudicial to other offerors, nor did it afford low offeror advantage as its offer to furnish operation and maintenance services was low at each stage of evaluation---------- 161
Requests for proposals
Ambiguous
Reopening of negotiations upon receipt of late unsolicited price reduction from small business concern in its offer submitted under request for proposals that did not provide for small business set-aside was not required since Small Business Act, 15 U.S.C. 631, although protecting

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Ambiguous—Continued

interests of small business concerns does not impose obligation on contracting officer to reopen negotiations in unrestricted procurement, and as negotiations were not reopened offeror was not prejudiced by failure to receive notice that its late price reduction would not be considered—notice discrepancy being matter of form—nor was concern prejudiced by lack of notice of a protest made by another offeror of an ambiguity in the solicitation in view of the amendments issued to correct the ambiguity--- 169

Cancellation

Cancellation of request for proposals (RFP) for inspection, maintenance, and repair of 3 types of electron microscopes because specifications were considered inadequate for competitive procurement, and reissuance of RFP on basis award "would be made in the aggregate, price, and other factors considered," did not result in price competition contemplated by 1-3.807-1(b)(1) of Federal Procurement Regs. since separate awards under initial RFP would have obtained services for less. Therefore, since justification for aggregate award is sound only if Govt. realizes substantial savings from consolidation, aggregate award requirement was both unnecessary and improper, and rejection of low offeror (on 2 items) who had not complied with aggregate requirement was not justified------- 47

Sole source basis
Broadening competition

Sole source award for procurement of band III variable heads for radio relay sets from Canadian Commercial Corporation, who together with its subcontractor—Canadian Marconi Corporation (CCC/CMC)—developed bands I and II in contemplation of U.S./Canada memorandum of understanding for defense production, which was made on basis of absence of engineering drawings suitable for competitive procurement due to delinquency of CCC/CMC in furnishing data package, and urgency of need for heads, will not be questioned, as urgency of procurement is supported by Determination and Findings of public exigency that is final pursuant to 10 U.S.C. 2310(b). However, decisions of procurement agency contributing largely to undesirable choice of sole source award, future procurement actions should reflect competition required by statutory procurement system---------- 57

Payments
Withholdings
Replacement contract excess costs liability

Excess costs that are due Govt. incident to replacement contract awarded upon default by original contractor may be deducted from amount earned but withheld from defaulting contractor and excess costs transferred from appropriation account in which held to miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with general rule that excess costs recovered from defaulting contractors or their sureties are required by sec. 3617, R.S., 31 U.S.C. 484, to be deposited in Treasury as miscellaneous receipts. Furthermore, there is no distinction between amounts earned by but withheld from defaulting contractors and those recovered from voluntary payments, litigation, or otherwise---------- 45

CONTRACTS—Continued Page

Protests

Timeliness

Time limitations imposed by 4 CFR 20.2(a) of Interim Bid Protest Procedures and Standards provisions for filing protest, first with contracting agency and then with U.S. GAO, are intended to provide effective remedial action and must be observed. Although protest that successful bidder was not responsible—protest that does not involve impropriety—was timely filed with contracting agency, it may not be considered by GAO since protest was not filed within 5 days of notification of initial adverse agency action. Protest may not be considered for "good cause"—compelling reason for delayed filing beyond protestor's control—or on basis significant issue of procurement practices or procedures was raised, because protest challenging responsibility of bidder involves neither exception to timely filing of protest..... 20

In view of fact U.S. Court of Appeals for District of Columbia appears to contemplate including decision of U.S. GAO in its consideration of appeal taken to denial by U.S. District Court for District of Columbia of request for preliminary injunction to prevent performance of operation and maintenance contracts pending decision by GAO to protest filed prior to filing of motion in District Court, issues raised in bid protest have been resolved notwithstanding bid protest would have been dismissed as untimely under GAO's Interim Bid protest Procedures and Standards (4 CFR 20 *et seq.*) but for interest and involvement of Court of Appeals..... 161

Research and development

Foreign Government participation

Canadian Commercial Corporation award

Award of research and development contract on "sole-source" basis to Canadian firm pursuant to "Memorandum of Understanding in Field of Cooperative Development Between U.S. Dept. of Defense and Canadian Production" (Par. 6–507, ASPR) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be awarded on competitive basis after solicitation from "maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by executive branch in conduct of foreign relations..... 136

Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Specifications

Ambiguous

Changes, revisions, etc.

Explanation, etc., requirement

Where specification provision for procurement of turbine power generators which stated gear box component of generator "shall be of proven design recommended and in use by manufacturer of gas turbine engine" was literally interpreted to require furnishing more expensive gear box currently in use by manufacturer as opposed to furnishing less expensive gear box that has been used by manufacturer, bidders did not compete on equal terms to prejudice of bidder who would have submitted lower bid if gear requirement had been clearly stated

CONTRACTS—Continued Page
Specifications—Continued
Ambiguous—Continued
Changes, revisions, etc.—Continued
Explanation, etc., requirement—Continued

and, therefore, invitation for bids should be canceled since award under solicitation would be invalid because one bidder had been prejudiced in preparation of its bid, and any resolicitation should make prospective bidders aware of actual needs as required by par. 1.1201 of ASPR..... 87

Qualified products
Changes
Plant location

Low bidder under invitation for bids to furnish inflatable landing boats—qualified end product—who failed to comply with clause prescribed by par. 1–1107.2(a), ASPR, and included in invitation to effect any change in location of plant at which previously approved product is or was manufactured would require prior to bid opening reevaluation of plant's qualification for inclusion in appropriate Qualified Products List (QPL) submitted nonresponsive bid that properly was not considered for contract award as offer to supply end item to be produced at other than plant shown in QPL as approved place of performance was offer to supply unqualified product..... 142

Samples
Manufacturer's product requirement

Low bid submitted on several of 59 items of engineer wrenches solicited under invitation for bids that did not conform with Bid Samples clause requirement that bid samples submitted must be from production of manufacturer whose product is to be supplied—samples that were to be evaluated to determine compliance with all characteristics listed for examination—properly was determined to be nonresponsive bid pursuant to GSPR sec. 5A–2.202–4, which provides that Bid Samples clause that was used is mandatory one since samples required were intended to demonstrate compliance with subjective characteristics, and acceptance and examination of sample made by other than eventual supplier affords little assurance to contracting officer that items ultimately supplied will conform to sample..... 155

Tests
Benchmark
Computers

Determination that offer evaluated on basis of criteria and assigned weights contained in request for proposals did not meet mandatory requirements for rental of nationwide computer network facilities by means of commercially marketed system called "full-services teleprocessing" with access to common data base and, therefore, offeror should not be allowed to perform live benchmark/demonstration test that would measure proposed system's network capabilities and cost effectiveness was justified because proposal failed to offer for benchmarking system to be delivered and used in performance of contract, whereas successful offeror, operating national network at time of submitting its proposal, met experience requirements of RFP..... 118

CONTRACTS—Continued Page

Subcontracts

Bid shopping

Listing of subcontractors

Compliance requirement

Low bid for performance of boiler replacement and fuel conversion project that failed to list names of manufacturers or fabricators that would perform two categories of work of project to be subcontracted properly was rejected as nonresponsive since principles enunciated in 49 Comp. Gen. 120 that subcontractor listing requirement does not apply to firms assembling off-the-shelf items do not encompass manufacturers or fabricators, who, although using off-the-shelf items, must conform to specifications, as purpose of listing requirement is to discourage bid shopping and encourage competition among construction subcontractors. Therefore, as other bids received were unreasonably priced, discarding of all bids and use of negotiation procedures to accomplish project were in accordance with 41 U.S.C. 252(c)(14)..... 40

Tax matters

Sales, etc.

Tax inclusion or exclusion

Reimbursement

In view of holding by U.S. Supreme Court in *S &E Contractors, Inc. v. U.S.*, No. 70–88, Apr. 24, 1972, that decisions rendered pursuant to disputes clause of contract in favor of contractor are final and conclusive and not subject to review by U.S. GAO absent fraud or bad faith, GAO no longer will object to payment of claim for refund of amount withheld from contractor on basis Maryland State sales tax determined to be inapplicable had been included in contract price and paid, refund approved by Board of Contract Appeals but not returned to contractor because GAO in 49 Comp. Gen. 782 held Board was wrong as matter of law..... 63

Termination

Convenience of Government

Erroneous award

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

DECEDENTS' ESTATES Page
Pay, etc., due military personnel
Beneficiary designations
Beneficiary predeceases member

Where brother named by member of uniformed services to share with sister retired pay due him at time of death predeceases member and only sister and two other brothers survive member, sister does not take undistributed one-half share since beneficiary designations made pursuant to 10 U.S.C. 2771(a)(1) became effective upon member's death and, therefore, order of precedence prescribed by sec. 2771(a) applies to undistributed share of retired pay due. As member was not survived by widow, child, grandchild, or parent, and no legal representative was appointed, distribution in accordance with sec. 2771(a)(6) should be made to persons, including corporate entity, entitled to take under law of domicile of deceased, which accords preference to creditors, or persons paying creditors, for funeral and last illness expenses 113

DEPARTMENTS AND ESTABLISHMENTS
Interagency participation
Excess Defense articles distribution

In implementation of sec. 402 of Foreign Assistance Act of 1971 (22 U.S.C. 2321b), Dept. of Defense required to consider value of excess Defense article ordered by any department, agency, or establishment, except AID, as expenditure made from funds appropriated under Foreign Assistance Act of 1961 for military assistance, unless ordering agency certifies to Comptroller General that excess Defense article is not to be transferred by grant to foreign country or international organization, may charge during fiscal year 1972 amounts not covered by certification to appropriate funds, and may adopt interim procedure beginning with fiscal year 1973, for use of "blanket" certification to be renewed each year, since these procedures will ensure congressional control of distribution of surplus arms 37

Management
General Accounting Office recommendation compliance

Since recommendation that collections made from third party tort-feasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation 125

Services between
Jointly beneficial projects

Sec. 601 of Economy Act of 1932, as amended (31 U.S.C. 686), which in effect prohibits agencies other than those specifically so authorized from obtaining interagency services to be procured by contract, does

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Services between—Continued
Jointly beneficial projects—Continued

not prohibit Environmental Protection Agency (EPA), under its statutory authority to cooperate in and coordinate environmental functions, from entering into jointly beneficial projects with other agencies requiring services to be procured by contract. However, sec. 601 will continue to apply to EPA with respect to requisitioning or provision of interagency services to be procured by contract where such services are of benefit only to requisitioning agency---------- 128

DISCRIMINATION
Sex
Elimination of discrimination. (*See* NONDISCRIMINATION, Sex discrimination elimination)

DISTRICT OF COLUMBIA
Courts
Executive Officer
Benefits status

Fact that Executive Officer of District of Columbia Courts—position established in D. C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this nonjudicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained---------- 111

Redevelopment Land Agency
Travel expense reimbursement to prospective and new employees

District of Columbia Redevelopment Land Agency (RLA), although Federal corporation, is deemed to be local public agency within framework of D.C. Govt. for purposes of title I of Housing Act of 1949, as amended (5 D.C. Code 717a(g)), which provides for financial assistance to local communities, and as agency is not independent office of executive branch of Federal Govt., it is not subject to Dept. of Housing and Urban Development regulations authorizing payment of travel expenses for employment interviews and moving expenses for new employees but to regulations that govern D.C. employees, which are same as those for Federal employees and, therefore, in absence of specific authority, RLA may not pay travel expenses for preemployment interviews or relocation expenses to new employees---------- 85

ECONOMIC STABILIZATION ACT OF 1970 Page
Cost-of-living stabilization
Military pay increases, etc.

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92-129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15-Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act, and furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases 15

ENLISTMENTS
Bonus. (*See* GRATUITIES, Enlistment bonus)

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Coordination of efforts
Requisition of services between agencies

Sec. 601 of Economy Act of 1932, as amended (31 U.S.C. 686), which in effect prohibits agencies other than those specifically so authorized from obtaining interagency services to be procured by contract, does not prohibit Environmental Protection Agency (EPA), under its statutory authority to cooperate in and coordinate environmental functions, from entering into jointly beneficial projects with other agencies requiring services to be procured by contract. However, sec. 601 will continue to apply to EPA with respect to requisitioning or provision of interagency services to be procured by contract where such services are of benefit only to requisitioning agency 128

EQUAL EMPLOYMENT OPPORTUNITY
(*See* CONTRACTS, Labor stipulations, Nondiscrimination)

EQUIPMENT
Automatic Data Processing Systems
Leases
Evaluation
Benchmark/demonstration test

Determination that offer evaluated on basis of criteria and assigned weights contained in request for proposals did not meet mandatory requirements for rental of nationwide computer network facilities by means of commercially marketed system called "full-services teleprocessing" with access to common data base and, therefore, offeror should not be allowed to perform live benchmark/demonstration test that would measure proposed system's network capabilities and cost effectiveness was justified because proposal failed to offer for benchmarking system to be delivered and used in performance of contract, whereas successful offeror, operating national network at time of submitting its proposal, met experience requirements of RFP 118

FEES Page

Airport departures

Reimbursement

Airport fees military and civilian personnel are required to pay when departing from airports incident to official travel of themselves and their immediate families and dependents are reimbursable, if charges are reasonable, as transportation expenses on basis Supreme Court in 92 S. Ct. 1349 (1972) held that user fee imposed on departing passengers does not involve unconstitutional burden on interstate commerce, and that if funds received by local authorities do not exceed airport costs, it is immaterial whether they are expressly earmarked for airport use. However, as fees imposed on arriving passengers are held to be unreasonable interference with interstate commerce, they may not be reimbursed, but if found valid upon appeal, reimbursement is authorized on same basis as departure fees 73

Parking

Occupancy tax

Legal incidence of tax on vendee

In view of administrative burdens to implement U.S. GAO decision of Dec. 10, 1971, 51 Comp. Gen. 367, holding that San Francisco City and County tax on occupancy of parking spaces is not chargeable to Federal Govt. when Govt-owned vehicle is involved, and that voucher for tax in favor of Govt. employee may not be certified for payment, decision is modified to permit certifying officers to certify vouchers for payment of parking tax in amount of 1 dollar or less in spite of Govt.'s immunity to tax, since correct procedure prescribed in 7 GAO 26.2 for use of tax exemption certificate when legal incidence of tax is on vendee is not available as its use is restricted to purchases on which taxes exceed 1 dollar. 51 Comp. Gen. 367, modified 83

FOREIGN GOVERNMENTS

Contracts with United States

Furtherance of foreign relations

Award of research and development contract on "sole-source" basis to Canadian firm pursuant to "Memorandum of Understanding in Field of Cooperative Development Between U.S. Dept. of Defense and Canadian Dept. of Defense Production" (Par. 6–507, ASPR) would not violate 10 U.S.C. 2304(g) requiring that negotiated procurement be awarded on competitive basis after solicitation from "maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," as section is not intended to affect otherwise legitimate country-to-country arrangements and agreements entered into by executive branch in conduct of foreign relations 136

Military assistance

Grants by other than Defense Department

In implementation of sec. 402 of Foreign Assistance Act of 1971 (22 U.S.C. 2321b), Dept. of Defense required to consider value of excess Defense article ordered by any department, agency, or establishment, except AID, as expenditure made from funds appropriated under Foreign Assistance Act of 1961 for military assistance, unless ordering agency certifies to Comptroller General that excess Defense article is not to be transferred by grant to foreign country or international organization, may charge during fiscal year 1972 amounts not covered by certi-

FOREIGN GOVERNMENTS—Continued Page

Military assistance—Continued

Grants by other than Defense Department—Continued

fication to appropriate funds, and may adopt interim procedure beginning with fiscal year 1973, for use of "blanket" certification to be renewed each year, since these procedures will ensure congressional control of distribution of surplus arms 37

FUNDS

Appropriated. (*See* APPROPRIATIONS)

Balance of Payments Program

Reduction of drain

Buy American Act restrictions usage

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

Foreign

United States owned currencies

Interest earned

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury- -and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

Miscellaneous receipts. (*See* MISCELLANEOUS RECEIPTS)

GENERAL ACCOUNTING OFFICE

Decisions

Advance

Voucher accompaniment

Although, normally, Comptroller General of U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department 83

GENERAL ACCOUNTING OFFICE—Continued Page
Decisions—Continued
Court consideration

In view of fact U.S. Court of Appeals for District of Columbia appears to contemplate including decision of U.S. GAO in its consideration of appeal taken to denial by U.S. District Court for District of Columbia of request for preliminary injunction to prevent performance of operation and maintenance contracts pending decision by GAO to protest filed prior to filing of motion in District Court, issues raised in bid protest have been resolved notwithstanding bid protest would have been dismissed as untimely under GAO's Interim Bid Protest Procedures and Standards (4 CFR 20 *et seq.*) but for interest and involvement of Court of Appeals 161

Requests
Persons authorized to request
Private parties

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

Recommendations
Implementation

Since recommendation that collections made from third party tortfeasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation 125

GRATUITIES
Enlistment bonus
Military specialty requirement

Since payment of enlistment bonus authorized by sec. 203(a) of Pub. L. 92–129 (37 U.S.C. 308a) to aid in filling military combat positions by encouraging new enlistments and extension of initial enlistment terms is contingent on member qualifying and serving in designated military specialty, promulgated regulations should require member to be qualified and serving in specialty before gaining entitlement to $3,000 bonus prescribed for period of at least 3 years' service—bonus to be paid in lump sum or periodic installments—and should provide that member to be eligible for continued bonus installments must main-

GRATUITIES—Continued Page

Enlistment bonus—Continued

Military specialty requirement—Continued

tain qualification in his specialty. Furthermore, right of qualified member who extends his service vests at time extension is executed, and if member is not qualified, his right vests after extension is executed and he completes retraining 105

Six months' death

Inactive duty training

Direct traveling requirement

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period 28

INTEREST

Foreign currencies

Owned by United States

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

LEAVES OF ABSENCE

Annual and Sick Leave Act

Coverage

District of Columbia Courts Executive Officer

Fact that Executive Officer of District of Columbia Courts—position established in D.C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this nonjudicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement

LEAVES OF ABSENCE—Continued Page
Annual and Sick Leave Act—Continued
Coverage—Continued
District of Columbia Courts Executive Officer—Continued

benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained---------- 111

Court
Witness
Private litigation

Employees summoned to appear as private individuals and not in official capacities in suit by fellow employee for overtime compensation are not entitled to court leave authorized by 5 U.S.C. 6322(b), as amended by Pub. L. 91–563, approved Dec. 19, 1970, for period of absence in which they appeared as witnesses on behalf of private party and without official assignment to such duty. Matter of granting court leave to Govt. employee to testify on behalf of private party was rejected in consideration of Pub. L. 91–563, and both FPM, Ch. 630, subch. 10–3–d, and FPM Letter 630–21, dated Mar. 30, 1971 provide that witness appearing for private party in nonofficial capacity is not entitled to court leave---------- 10

Lump sum payments
Taxable
Pennsylvania Personal Income Tax

Deduction for Pennsylvania Personal Income Tax from lump-sum annual leave payments to Federal employees separating from government service (5 U.S.C. 5551(a)) is required notwithstanding that leave balance may include leave carried forward from agencies not geographically located within Pennsylvania regardless of when leave was earned or current residence of employee, and that leave accrued but was not paid prior to enactment of tax law or its effective date since for purposes of Federal income tax withholding, lump-sum leave payments are wages taxable as income for year of receipt and, therefore, payments are subject to agreement between U.S. Treasury Dept. and Commonwealth of Pa. respecting withholding of tax from compensation of Federal employees---------- 139

LEGISLATION
Construction. (*See* **STATUTORY CONSTRUCTION**)

MEDICAL TREATMENT
Federal Medical Recovery Act
Payment for services
Disposition

Collections made under so-called Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651–2652, for hospital, medical, surgical, or dental care and treatment to persons who are injured or suffer disease under circumstances creating tort liability upon third person are for deposit in Treasury as miscellaneous receipts pursuant to sec. 3617, R.S., 31 U.S.C. 484, as disposition of monies collected from third party tort-feasors is not specified in FMCRA, and practice of depositing such collections to related appropriation accounts relying on authority in 10 U.S.C. 2205 should be discontinued since there is not involved sale of and payment for services that is contemplated by 10 U.S.C. 2205---------- 125

MEDICAL TREATMENT—Continued Page
Federal Medical Recovery Act—Continued
Payment for services—Continued
Disposition—Continued

Since recommendation that collections made from third party tort-feasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation 125

Military personnel
Reservists
Injured incident to inactive duty training

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period 28

MESSES
Availability determination
Distance factor

Member of uniformed services at temporary duty or delay point where Govt. mess, as defined in par. M1150–4 of Joint Travel Regs., is determined not to be available because of distance between lodgings and mess location, or because of incompatibility of mess hours with duty hours, may be paid per diem at rate authorized when Govt. mess is not available on basis that member in travel status is not required to use inadequate quarters, unless military necessity, and distance is factor in determining impracticability of utilizing Govt. facility. However, regardless of distance, if it is practicable to utilize mess for some but not all meals because of incompatibility of duty hours, breakfast, lunch and dinner should be considered separately in determining impracticability of utilizing available mess 75

MILITARY PERSONNEL Page

Conflict of interest statutes

Contracting with Government

Retired members. (*See* MILITARY PERSONNEL, Retired. Contracting with Government)

Death or injury

Claims against estate. (*See* DECEDENTS' ESTATES)

Escorts for disabled military personnel

Individual not in employ of U.S. Govt., who travels as attendant to military member on temporary disability list incapable of traveling alone to report for mandatory physical examination required by 10 U.S.C. 1210(a) in order to avoid termination of his disability retired pay, may be reimbursed actual transportation costs notwithstanding sec. 1210(g), authorizing travel and transportation allowances for member, does not provide for attendant since use of governmental personnel involves two round trips, thus making single round trip travel of nongovernmental personnel more economical and practicable and, therefore, beneficial to interests of U.S. B–140144, Aug. 24, 1959, overruled 97

Dislocation allowance

Members without dependents

Quarters not assigned

Member of uniformed services without dependents who is transferred to permanent station and furnished certificate of nonavailability of Govt. quarters on basis it would be economically advantageous to U.S. not to require member to occupy available quarters is entitled to dislocation allowance pursuant to par. M9003–1 of Joint Travel Regs., implementing 37 U.S.C. 407(a), which authorizes payment of dislocation allowance to member that is not assigned to Govt. quarters and is furnished certificate of nonavailability of quarters 64

Gratuities. (*See* GRATUITIES)

Missing, interned, etc., persons

Quarters and subsistence

Entitlement

Enlisted members of uniformed services, whether or not with dependents, who prior to being carried in missing status (37 U.S.C. 551–558) were quartered and subsisted by U.S. Govt., under concept of "changed conditions" may be credited with quarters and subsistence allowances from beginning of missing status. Statutory provisions involved in 23 Comp. Gen. 207, 895, which were basis for denying allowances to members entering "missing status," have been superseded by secs. 301, 302 of Career Compensation Act of 1949 (37 U.S.C. 403) to provide that member on active duty is entitled at all times to subsistence and quarters in kind or allowances in lieu thereof and, therefore, members determined to be in missing status are entitled to monetary allowance in lieu of subsistence and quarters in kind from beginning of missing status, subject to 31 U.S.C. 71a 23

National Guard. (*See* NATIONAL GUARD)

Pay. (*See* PAY)

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

Quarters allowance. (*See* QUARTERS ALLOWANCE)

Quarters, Government furnished. (*See* QUARTERS, Government furnished)

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MILITARY PERSONNEL—Continued Page

Reservists

Death or injury

Inactive duty training, etc.

Injured outside scope of duties

Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period..... 28

Disability determinations

Administration of disability benefits program

In implementation of changes in administration of disability benefits program provided by act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report incurrence of disability to enable military services to provide proper medical and hospital care, as well as pay and allowances, to disabled member. Where member is not provided medical or hospital care so that current determination of entitlement to pay and allowances cannot be made, any payment to member should be supported each month by report from his civilian physician and by statement from member showing days of military duty or civilian employment, together with name and address of employer..... 99

Benefits entitlements

Upon reconsidering entitlements of National Guard members and other reservists under act of June 20, 1949, which prescribes same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although holding that ability to resume normal civilian employment is not standard for determining entitlement to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or final disposition of matter, decisions that hold physical presence at regular drill or conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but member must promptly report injury, disease, and current disability status to permit action to retire, separate, or refer him to Veterans Administration..... 99

MILITARY PERSONNEL—Continued Page

Retired

Contracting with Government

Prohibition period

Active duty after retirement effect

Navy officer transfered pursuant to 10 U.S.C. 6380 to retired list effective July 1, 1967, but retained on active duty and released July 1, 1969, when he was employed by subsidiary of boat building company and involved in all aspects of Govt. procurement, is subject to prohibition in 37 U.S.C. 801(c) against payment of retired pay to officer whose activities for 3 yrs. after placement of his name on retired list constitute "selling" to Govt. Since commencement of 3-yr. limitation began to run from date officer's name was placed on retired list, not from date he was released from active duty, retired pay forfeiture period ended June 30, 1970; as officer was not involved in any serious procurement discussion prior to July 1, 1970, he is entitled to retired pay for 3-yr. period subsequent to July 1, 1967 3

Trailer shipments. (*See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment**)

MISCELLANEOUS RECEIPTS

Special account *v.* miscellaneous receipts

Collections

Third party tort liability

Collections made under so-called Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651–2652, for hospital, medical, surgical, or dental care and treatment to persons who are injured or suffer disease under circumstances creating tort liability upon third person are for deposit in Treasury as miscellaneous receipts pursuant to sec. 3617, R.S., 31 U.S.C. 484, as disposition of monies collected from third party tortfeasors is not specified in FMCRA, and practice of depositing such collections to related appropriation accounts relying on authority in 10 U.S.C. 2205 should be discontinued since there is not involved sale of and payment for services that is contemplated by 10 U.S.C. 2205 125

Since recommendation that collections made from third party tortfeasors pursuant to so-called Federal Medical Care Recovery Act, 42 U.S.C. 2651–2652, for care and treatment of persons who are injured or suffer disease under circumstances creating tort liability upon third person should be deposited in Treasury as miscellaneous receipts (31 U.S.C. 484) rather than to related appropriation account requires corrective action, written statements of action taken are required by sec. 236 of Legislative Reorganization Act to be submitted to Committees on Govt. Operations of both Houses within 60 days and to Committees on Appropriations in connection with first request for appropriations that is made more than 60 days after date of recommendation 125

MISCELLANEOUS RECEIPTS—Continued Page
Special account *v.* miscellaneous receipts—Continued
Interest
Foreign currencies

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

Replacement contract excess costs

Excess costs that are due Govt. incident to replacement contract awarded upon default by original contractor may be deducted from amount earned but withheld from defaulting contractor and excess costs transferred from appropriation account in which held to miscellaneous receipts account "3032 Miscellaneous recoveries of excess profits and costs" in accordance with general rule that excess costs recovered from defaulting contractors or their sureties are required by sec. 3617, R.S., 31 U.S.C. 484, to be deposited in Treasury as miscellaneous receipts. Furthermore, there is no distinction between amounts earned by but withheld from defaulting contractors and those recovered from voluntary payments, litigation, or otherwise 45

NATIONAL GUARD
Death or injury
Disability determinations

Upon reconsidering entitlements of National Guard members and other reservists under act of June 20, 1949, which prescribes same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although holding that ability to resume normal civilian employment is not standard for determining entitlement to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or final disposition of matter, decisions that hold physical presence at regular drill or conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but member must promptly report injury, disease, and current disability status to permit action to retire, separate, or refer him to Veterans Administration. 99

In implementation of changes in administration of disability benefits program provided by act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report incurrence of disability to enable military services to provide proper medical and hospital care, as well as pay and allowances, to disabled member. Where member is not provided medical or hospital care so that current determination of entitlement to pay and allowances cannot be made, any payment to member should be supported each month by

NATIONAL GUARD—Continued Page
Death or injury—Continued
Disability determinations—Continued
report from his civilian physician and by statement from member showing days of military duty or civilian employment, together with name and address of employer---------- 99
While traveling to and from inactive duty training
Return home for equipment
Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period---------- 28
Pay, etc., entitlement
Disaster relief duty ordered by State
Duty performed by National Guard units ordered by State of Pennsylvania to aid in disaster relief necessitated by extensive flooding in State may be considered as annual summer training of units within purview of 32 U.S.C. 502, and Federal funds used for pay and allowance purposes, even though ordinarily sec. 502 training is conducted in accordance with established training policies, standards, and programs approved by Depts. of Army and Air Force in coordination with State National Guard organizations, in view of broad discretion vested in Secretaries concerned to regulate training of National Guard units---------- 35
NONDISCRIMINATION
Contracts. (*See* CONTRACTS, Labor stipulations, Nondiscrimination)
Sex discrimination elimination
Quarters allowance
In view of sec. 703, Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–2), which prohibits job discrimination based on sex, 32 Comp. Gen. 364 and other similar decisions holding female member of uniformed services, in order to receive increased allowance for quarters on account of dependent husband under 37 U.S.C. 403, must not only meet test prescribed by 37 U.S.C. 401 that husband is dependent for over one-half his support but also incapable of self-support due to physical or mental incapacity, will no longer be for application prospectively as to incapacity. However, 1964 act does not overcome different dependency standards prescribed by statute for male and female members; until remedial legislation is enacted, 37 U.S.C. 401 controls; female member must continue to establish spouse is dependent for half of his support to entitle her to increased quarters allowance---------- 1

OFFICERS AND EMPLOYEES Page

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

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

Per diem. (*See* **SUBSISTENCE, Per diem**)

Transfers

Relocation expenses

House purchase

Agency activity relocation pending

Employee of Geological Survey who on basis of announcement to all employees in Washington Metro. area, dated July 1, 1971, of award of building construction contract on June 28, 1971, incident to impending move early 1974 of agency to Reston, Va., relocated residence from Hyattsville, Md., to Herndon, Va., pursuant to which she and husband had entered into agreement on Dec. 28, 1971, for purchase of residence and made settlement Feb. 18, 1972, is not entitled to relocation expenses reimbursement, although July 1, 1971, announcement established notice of agency's move; there is no authority for payment of real estate expenses until transfer of official stations is consummated or canceled since employee may separate from service prior to transfer---------- 8

Expenses claimed included in selling price

Claim of employee for closing costs paid by seller and included in sales price of residence he purchased in connection with transfer of official station which had been denied on grounds the requirements of subsections 4.1f and 4.3a of OMB Cir. No. A–56, that provide expenses claimed must have been paid by employee and supported by documentation to this effect, had not been met, now may be allowed on basis that closing costs added to purchase price are clearly discernible and separable from price allocable to realty; that seller who initially paid costs regards that purchaser did, although the down and closing payments from purchaser's own funds exceeded closing costs; that documentation of costs and purchaser's liability for them have been furnished. Contrary holdings are overruled---------- 11

"Settlement date" limitation on property transactions

Extension

Notwithstanding contract for sale of residence incident to permanent change of station that had been entered into within 1-year time limit prescribed by sec. 4.1e of OMB Cir. No. A–56 had been canceled, and that subsequent contract of sale with another purchaser was not executed until shortly after expiration of 1-year period, cost of selling residence may be reimbursed to employee under sec. 4.1e, since head of agency, or his designee, may extend time limitation in situations other than litigation, and reasonable relationship between sale or purchase of residence and station transfer may be assumed when contract had been entered into in initial year, regardless of whether it had been canceled and was not in existence at expiration of initial year. Contrary holdings overruled---------- 43

Temporary quarters

Owned by a relative, etc.

Employees who occupy temporary quarters and are furnished subsistence in homes of relatives in connection with permanent transfers of station may be reimbursed reasonable rental and subsistence charges under sec. 8.4, OMB Cir. No. A–56, effective Sept. 1, 1971. Charges are

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Temporary quarters—Continued
Owned by a relative, etc.—Continued

not reasonable when relatives are paid same amounts employees would pay in motels or restaurants, or are based upon maximum amounts reimbursable under regulation. Reasonableness depends on circumstances of each case, such as number of individuals involved, extra work performed by relatives, and need to hire extra help, and, therefore, employees should be required to furnish sufficient information to permit reasonableness determination to be made, and expenses based on estimates of average rates per day are not acceptable 78

Transportation for househunting
Dependent's per diem allowance

Since OMB Cir. No. A–56 provides per diem payable to civilian employee for his dependents traveling with him incident to change of official station should be computed on basis of percentage of per diem rate employee would receive if traveling alone, employee who paid varying per diem rates while traveling with spouse on househunting trip to seek residence at new station and in connection with travel performed with dependents from his old to new station is entitled to per diem allowance for dependents computed by using average single rate applicable to rooms occupied as base upon which dependents' per diem is calculated 34

Travel expenses. (*See* TRAVEL EXPENSES)
Witnesses. (*See* WITNESSES, Government employees)
OVERSEAS PRIVATE INVESTMENT CORPORATION
Interest earned
Retention by corporation

Interest on loans of excess foreign currencies made under sec. 234(c), Foreign Assistance Act of 1961, as amended (22 U.S.C. 2196)—currencies that are general assets of U.S. held in accounts of Treasury—and interest accrued on foreign currency acquired in administration of insurance or guaranty portfolios and held in interest bearing depositories designated by Treasurer of U.S. pending their sale for dollars need not be deposited into general fund of Treasury as miscellaneous receipts pursuant to 31 U.S.C. 484, but may be retained by Overseas Private Investment Corporation to carry out its purposes since interest constitutes "revenues and income transferred to or earned by the corporation from whatever source derived" within meaning of sec. 236 of act, which authorizes their retention by corporation 54

PAY
Active duty
Reservists
Injured in line of duty
Disability determinations

Upon reconsidering entitlements of National Guard members and other reservists under act of June 20, 1949, which prescribes same benefits for reservists injured or disabled in line of active duty or training as is accorded Regular members, although holding that ability to resume normal civilian employment is not standard for determining entitlement

PAY—Continued Page
Active duty—Continued
Reservists—Continued
Injured in line of duty—Continued
Disability determinations—Continued
to disability pay where contemporaneous service medical data are available must be adhered to as termination of disability pay is based upon ability to perform military duty or final disposition of matter, decisions that hold physical presence at regular drill or conditional temporary assignment to limited duty terminates entitlement to pay and allowances or medical care and hospitalization will no longer be followed, but member must promptly report injury, disease, and current disability status to permit action to retire, separate, or refer him to Veterans' Administration 99
In implementation of changes in administration of disability benefits program provided by act of June 20, 1949, for National Guard members and other reservists, members should be advised to promptly report incurrence of disability to enable military services to provide proper medical and hospital care, as well as pay and allowances, to disabled member. Where member is not provided medical or hospital care so that current determination of entitlement to pay and allowances cannot be made, any payment to member should be supported each month by report from his civilian physician and by statement from member showing days of military duty or civilian employment, together with name and address of employer 99
Drill
Training assemblies
Status for benefits entitlement
Three National Guard reservists who after reporting for multiple unit training assembly 2 incident to inactive duty training authorized by 32 U.S.C. 502(a)(1), answering roll call, and participating for 65 minutes in first assembly, were ordered home to pick up equipment, and while traveling in privately owned car were in collision in which 2 members were killed and 1 injured, passed out of military control when they ceased to perform inactive duty training. Since 65 minutes of scheduled training does not create eligibility for pay under 37 U.S.C. 206(a), and members were not in training for purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2), situation of deceased does not meet requirements of 10 U.S.C. 1481(a)(3), authorizing disposition of remains, nor entitle injured member to medical care and pay and allowances. However, for purposes of death gratuity provided by 32 U.S.C. 321, members are considered to have been traveling directly from inactive duty training period 28
Increases
Freeze pursuant to Executive Order 11615
Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92-129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15-Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the

PAY—Continued Page
Increases—Continued
Freeze pursuant to Executive Order 11615—Continued
President by Economic Stabilization Act and, furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases---------- 15
Retired
Active duty
After retirement
Conflict of interest statute prohibition
Navy officer transferred pursuant to 10 U.S.C. 6380 to retired list effective July 1, 1967, but retained on active duty and released July 1, 1969, when he was employed by subsidiary of boat building company and involved in all aspects of Govt. procurement, is subject to prohibition in 37 U.S.C. 801(c) against payment of retired pay to officer whose activities for 3 yrs. after placement of his name on retired list constitute "selling" to Govt. Since commencement of 3-yr. limitation began to run from date officer's name was placed on retired list, not from date he was released from active duty, retired pay forfeiture period ended June 30, 1970; as officer was not involved in any serious procurement discussion prior to July 1, 1970, he is entitled to retired pay for 3-yr. period subsequent to July 1, 1967---------- 3
PAYMENTS
Contracts. (See **CONTRACTS, Payments**)
Indemnity
Effective date
Cheese that contained dieldrin which was removed from commercial market at direction of State of Wisconsin Dept. of Agriculture under 14-day hold orders beginning Apr. 11, 1967, but final determination that cheese was adulturated pursuant to both State and Federal law and should not move in interstate or foreign commerce was not made until May 14, 1971, is considered to have been removed from commercial market after Nov. 30, 1970, thus permitting indemnity payments under sec. 204(b) of Agricultural Act of 1970, approved Nov. 30, 1970, in view of fact legal effectiveness of hold orders to remove cheese from commercial market prior to May 14, 1971, is doubtful. However, before making indemnity payment action should be taken to insure claimant will not also collect or benefit under its judgment against farmer responsible for contamination---------- 94
QUARTERS
Government furnished
Adequacy of quarters determination
Distance factor
Member of uniformed services at temporary duty or delay point where Govt. mess, as defined in par. M1150–4 of Joint Travel Regs., is determined not to be available because of distance between lodgings and mess location, or because of incompatibility of mess hours with duty hours, may be paid per diem at rate authorized when Govt. mess is not available on basis that member in travel status is not required to use inadequate quarters, unless military necessity, and distance is factor

QUARTERS—Continued Page
Government furnished—Continued
Adequacy of quarters determination—Continued
Distance factor—Continued
in determining impracticability of utilizing Govt. facility. However, regardless of distance, if it is practicable to utilize mess for some but not all meals because of incompatibility of duty hours, breakfast, lunch and dinner should be considered separately in determining impracticability of utilizing available mess 75

Assignment more costly than payment of an allowance
Commanding officers who in assignment or nonassignment of public quarters to members of uniformed services have duty to accomplish maximum practicable occupancy of Govt. quarters and to issue written statement or certificate to members upon assignment or nonassignment of quarters—and member's personal desire provides no basis for nonassignment of available quarters—may be granted some latitude in circumstances requiring that judgment be used as to whether assignment of quarters would be more costly to Govt. than payment of allowance prescribed by 37 U.S.C. 403, since there is no requirement that all available quarters must be occupied. However, determinations should be made on individual basis and approved allowance supported by written certificate or statement 64

Member of uniformed services without dependents who is transferred to permanent station and furnished certificate of nonavailability of Govt. quarters on basis it would be economically advantageous to U.S. not to require member to occupy available quarters is entitled to dislocation allowance pursuant to par. M9003–1 of Joint Travel Regs., implementing 37 U.S.C. 407(a), which authorizes payment of dislocation allowance to member that is not assigned to Govt. quarters and is furnished certificate of nonavailability of quarters 64

QUARTERS ALLOWANCE
Dependents
Husband's dependency
Status for entitlement to quarters
In view of sec. 703, Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–2), which prohibits job discrimination based on sex, 32 Comp. Gen. 364 and other similar decisions holding female member of uniformed services, in order to receive increased allowance for quarters on account of dependent husband under 37 U.S.C. 403, must not only meet test prescribed by 37 U.S.C. 401 that husband is dependent for over one-half his support but also incapable of self-support due to physical or mental incapacity, will no longer be for application prospectively as to incapacity. However, 1964 act does not overcome different dependency standards prescribed by statute for male and female members; until remedial legislation is enacted, 37 U.S.C. 401 controls; female member must continue to establish spouse is dependent for half of his support to entitle her to increased quarters allowance 1

QUARTERS ALLOWANCE—Continued Page

Increases

Wage-price freeze effect

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92–129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15-Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act and, furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases 15

Members in a missing status

Monetary allowance in lieu

Enlisted members of uniformed services, whether or not with dependents, who prior to being carried in missing status (37 U.S.C. 551–558) were quartered and subsisted by U.S. Govt., under concept of "changed conditions" may be credited with quarters and subsistence allowances from beginning of missing status. Statutory provisions involved in 23 Comp. Gen. 207, 895, which were basis for denying allowances to members entering "missing status," have been superseded by secs. 301, 302 of Career Compensation Act of 1949 (37 U.S.C. 403) to provide that member on active duty is entitled at all times to subsistance and quarters in kind or allowances in lieu thereof and, therefore, members determined to be in missing status are entitled to monetary allowance in lieu of subsistence and quarters in kind from beginning of missing status, subject to 31 U.S.C. 71a 23

RETIREMENT

District of Columbia

Executive Officer of courts

Facts that Executive Officer of District of Columbia Courts—position established in D.C. Court Reform and Criminal Procedure Act of 1970—is to receive same compensation as associate judge of Superior Court for purpose of giving this non-judicial officer same stature as judge, in order to make him effective administrator, does not entitle officer to leave and retirement benefits provided for judges of D.C. courts in absence of evidence in legislative history of act that references to "pay," "salary," or "compensation" cover leave and retirement benefits. Application of civil service retirement benefits to officer is for Civil Service Commission determination, and Annual and Sick Leave Act of 1951, as amended, would apply if regular tour of duty is established for officer and leave records maintained 111

STATES Page

Disaster relief

National Guard services

Pay, etc., entitlement

Duty performed by National Guard units ordered by State of Pennsylvania to aid in disaster relief necessitated by extensive flooding in State may be considered as annual summer training of units within purview of 32 U.S.C. 502, and Federal funds used for pay and allowance purposes, even though ordinarily sec. 502 training is conducted in accordance with established training policies, standards, and programs approved by Depts. of Army and Air Force in coordination with State National Guard organizations, in view of broad discretion vested in Secretaries concerned to regulate training of National Guard units 35

STATUTORY CONSTRUCTION

Continuing resolutions

Appropriation act restrictions effect

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

Prospective effect of acts

Since decision changing prior construction of statute generally is prospective only, reconsideration of entitlements of National Guard members and other reservists under act of June 20, 1949, providing similar benefits for reservists injured or disabled in line of active duty or training as Regular members receive, may be considered tantamount to changed construction of law and, therefore, changes may not be given retroactive application. However, where no final action with respect to physical disability proceedings, or other final action has been taken, such cases may be considered to be within purview of changed entitlements 99

SUBSISTENCE

Per diem

Delays

Weather conditions

Employee on official business who because of extraordinary weather conditions—blizzard—is prevented from returning to his residence after cancellation of flight and he as result occupied motel accommodations until weather moderated may be paid per diem for period spent in motel because new subsec. 6.6e of SGTR permits payment under such circumstances whereas subsec. 6.9c, which it supersedes, did not permit payment of per diem for interval between scheduled and actual departure from depot, airport, or dock if traveler could return home when delayed. B-173224, Aug. 30, 1971, overruled 135

SUBSISTENCE—Continued Page

Per diem—Continued

Dependents

Transfer or employee

Since OMB Cir. No. A–56 provides per diem payable to civilian employee for his dependents traveling with him incident to change of official station should be computed on basis of percentage of per diem rate employee would receive if traveling alone, employee who paid varying per diem rates while traveling with spouse on househunting trip to seek residence at new station and in connection with travel performed with dependents from his old to new station is entitled to per diem allowance for dependents computed by using average single rate applicable to rooms occupied as base upon which dependents' per diem is calculated..... 34

"Lodging-plus" basis

Computation

In application of "lodging-plus" provision of subsec. 6.3c, Standardized Govt. Travel Regs. to employee who while on temporary duty was hospitalized and received reimbursement for $80 per day room and board hospital charge, none of which is allocable to lodging *per se*, it may be assumed lodging rate for period of hospitalization was at least $13 per day on basis agency regulation implementing subsection prescribes daily subsistence allowance of $12 and maximum per diem rate of $25. Therefore, employee may be allowed lodging rate of $13 per day for entire period of temporary duty, including hospitalization, plus daily subsistence allowance of $12, and payment may be made to him at full $25 per diem rate..... 123

Military personnel

Quarters and messing facilities furnished

Determination of availability

Member of uniformed services at temporary duty or delay point where Govt. mess, as defined in par. M1150–4 of Joint Travel Regs., is determined not to be available because of distance between lodgings and mess location, or because of incompatibility of mess hours with duty hours, may be paid per diem at rate authorized when Govt. mess is not available on basis that member in travel status is not required to use inadequate quarters, unless military necessity, and distance is factor in determining impracticability of utilizing Govt. facility. However, regardless of distance, if it is practicable to utilize mess for some but not all meals because of incompatibility of duty hours, breakfast, lunch and dinner should be considered separately in determining impracticability of utilizing available mess..... 75

SUBSISTENCE ALLOWANCE

Military personnel

Members in a missing status

Monetary allowance in lieu

Enlisted members of uniformed services, whether or not with dependents, who prior to being carried in missing status (37 U.S.C. 551–558) were quartered and subsisted by U.S. Govt., under concept of "changed conditions" may be credited with quarters and subsistence allowances from beginning of missing status. Statutory provisions involved in 23 Comp. Gen. 207, 895, which were basis for denying allowances to members entering "missing status," have been superseded by secs. 301, 302 of Career Compensation Act of 1949 (37 U.S.C. 403) to provide that member on active duty is entitled at all times to subsistence and quarters

SUBSISTENCE ALLOWANCE—Continued Page
Military personnel—Continued
Members in a missing status—Continued
Monetary allowance in lieu—Continued
in kind or allowances in lieu thereof and, therfore, members determined to be in missing status are entitled to monetary allowance in lieu of subsistence and quarters in kind from beginning of missing status, subject to 31 U.S.C. 71a 23
TAXES
Federal
Income tax withholding
What constitutes wages
Lump sum leave payments
Deduction for Pennsylvania Personal Income Tax from lump-sum annual leave payments to Federal employees separating from government service (5 U.S.C. 5551(a)) is required notwithstanding that leave balance may include leave carried forward from agencies not geographically located within Pennsylvania regardless of when leave was earned or current residence of employee, and that leave accrued but was not paid prior to enactment of tax law or its effective date since for purposes of Federal income tax withholding, lump-sum leave payments are wages taxable as income for year of receipt and, therefore, payments are subject to agreement between U.S. Treasury Dept. and Commonwealth of Pa. respecting withholding of tax from compensation of Federal employees 139
State
Government immunity
Vehicle parking tax
In view of administrative burdens to implement U.S. GAO decision of Dec. 10, 1971, 51 Comp. Gen. 367, holding that San Francisco City and County tax on occupancy of parking spaces is not chargeable to Federal Govt. when Govt-owned vehicle is involved, and that voucher for tax in favor of Govt. employee may not be certified for payment, decision is modified to permit certifying officers to certify vouchers for payment of parking tax in amount of 1 dollar or less in spite of Govt.'s immunity to tax, since correct procedure prescribed in 7 GAO 26.2 for use of tax exemption certificate when legal incidence of tax is on vendee is not available as its use is restricted to purchases on which taxes exceed 1 dollar. 51 Comp. Gen. 367, modified 83
TRANSPORTATION
Household effects
Military personnel
Trailer shipment
Change of duty station requirement
Costs incurred by staff sergeant incident to movement of housetrailer without permanent change of station from trailer court declared "off-limits" by Ellsworth Air Force Base commander in order to protect health and welfare of Armed Forces personnel living in trailer court may be reimbursed to member, even though there was no change in member's assignment to create entitlement to trailer allowance prescribed by 37 U.S.C. 409, as costs resulted from base commander's exercise of authority, pursuant to regulations, in connection with proper administration of Ellsworth Air Force Base, and reimbursement to member treated as operational expense chargeable to appropriation for Operation and Maintenance, Air Force 69

TRAVEL EXPENSES Page

Air travel

Airport departure fees

Airport fees military and civilian personnel are required to pay when departing from airports incident to official travel of themselves and their immediate families and dependents are reimbursable, if charges are reasonable, as transportation expenses on basis Supreme Court in 92 S. Ct. 1349 (1972) held that user fee imposed on departing passengers does not involve unconstitutional burden on interstate commerce, and that if funds received by local authorities do not exceed airport costs, it is immaterial whether they are expressly earmarked for airport use. However, as fees imposed on arriving passengers are held to be unreasonable interference with interstate commerce, they may not be reimbursed, but if found valid upon appeal, reimbursement is authorized on same basis as departure fees 73

Delays

Weather conditions

Departure at place of residence delay

Employee on official business who because of extraordinary weather conditions—blizzard—is prevented from returning to his residence after cancellation of flight and he as result occupied motel accommodations until weather moderated may be paid per diem for period spent in motel because new subsec. 6.6e of SGTR permits payment under such circumstances whereas subsec. 6.9c, which it supersedes, did not permit payment of per diem for interval between scheduled and actual departure from depot, airport, or dock if traveler could return home when delayed. B–173224, Aug. 30, 1971, overruled 135

Interviews, qualifications, determinations, etc.

Authority

District of Columbia Redevelopment Land Agency (RLA), although Federal corporation, is deemed to be local public agency within framework of D.C. Govt. for purposes of title I of Housing Act of 1949, as amended (5 D.C. Code 717a(g)), which provides for financial assistance to local communities, and as agency is not independent office of executive branch of Federal Govt., it is not subject to Dept. of Housing and Urban Development regulations authorizing payment of travel expenses for employment interviews and moving expenses for new employees but to regulations that govern D.C. employees, which are same as those for Federal employees and, therefore, in absence of specific authority, RLA may not pay travel expenses for pre-employment interviews or relocation expenses to new employees 85

Military personnel

Escort duty

Performed by non-governmental personnel

Individual not in employ of U.S. Govt. who travels as attendant to military member on temporary disability list incapable of traveling alone to report for mandatory physical examination required by 10 U.S.C. 1210(a) in order to avoid termination of his disability retired pay may be reimbursed actual transportation costs notwithstanding sec. 1210(g), authorizing travel and transportation allowances for member, does not provide for attendant since use of governmental personnel involves two rounds trips, thus making single round trip travel of non-governmental personnel more economical and practicable and, therefore, beneficial to interests of U.S. B–140144, Aug. 24, 1959, overruled 97

WAGE AND PRICE STABILIZATION Page

Military personnel

Pay increases

Claim of Air Force sergeant for retroactive increase in basic pay and quarters allowance from effective date of act of Sept. 28, 1971, Pub. L. 92–129, through Nov. 13, 1971, end of 90-day wage-price freeze—Aug. 15-Nov. 13, 1971—imposed by E.O. 11615, dated Aug. 15, 1971, issued pursuant to Economic Stabilization Act of 1970, as amended, may not be allowed since freezing military pay and allowances at rates in effect on Aug. 14, 1971, is within broad scope of authority vested in the President by Economic Stabilization Act, and furthermore, increase for wage-price freeze period not having been provided by law prior to Aug. 15, 1971, and by appropriations to cover, increase does not meet requirements of sec. 203(c) of Economic Stabilization Act Amendments which authorize retroactive payment of increases 15

WITNESSES

Government employees

Private litigation, etc.

Employees summoned to appear as private individuals and not in official capacities in suit by fellow employee for overtime compensation are not entitled to court leave authorized by 5 U.S.C. 6322(b), as amended by Pub. L. 91–563, approved Dec. 19, 1970, for period of absence in which they appeared as witnesses on behalf of private party and without official assignment to such duty. Matter of granting court leave to Govt. employee to testify on behalf of private party was rejected in consideration of Pub. L. 91–563, and both FPM, Ch. 630, subch. 10–3–d, and FPM Letter 630–21, dated Mar. 30, 1971 provide that witness appearing for private party in nonofficial capacity is not entitled to court leave 10

WORDS AND PHRASES

"De facto"

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

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