Decisions of The Comptroller General of the United States

VOLUME 53 Pages 67 to 156

AUGUST 1973

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300104900

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1974

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

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[B-178762]

Mileage—Travel by Privately Owned Automobile—More Than One Employee Traveling—Permanent Duty Travel

Although an agency cannot require two or more employees to travel together in the private automobile of one of the employees on permanent duty travel, if employees find it convenient to do so and the proper administrative determination is made that the arrangement is advantageous to the Government, pursuant to section 2.3c(2) of the Office of Management and Budget Circular A-56, a higher mileage rate may be authorized up to 12 cents per mile on the same basis the rate scale is graduated in section 2.3b of the Circular when authorized members of an employee's family accompany him. Therefore, an employee on a house-hunting trip incident to a permanent change of station who transports another employee to the same location for the same purpose, even though separate travel was authorized and the administrative regulation is silent concerning joint travel, may be paid at the rate of 8 cents per mile, the rate specified in section 2.3b for an employee traveling with one member of his immediate family.

To C. H. Jenkins, Jr., August 1, 1973:

We refer to your letter of May 24, 1973, reference ADFF:sb, together with your subsequent letter of June 27, 1973, reference ADFF:lw, requesting our determination as to the propriety of your agency authorizing a mileage rate of 8 cents per mile in the case of an employee who, while traveling by privately owned automobile on a house-hunting trip, transported another employee traveling to the same location for the same purpose. If such rate is allowable, you ask whether it would therefore be proper to prescribe higher mileage rates, not in excess of 12 cents per mile and in accordance with the graduated rates authorized by section 2.3b of Office of Management and Budget (OMB) Circular No. A-56 for employees traveling with members of their immediate family, in all cases where two or more employees travel in one privately owned automobile incident to a permanent change of station.

The record indicates that two Internal Revenue Service (IRS) employees, Ms. Linda Lyons and Ms. Connie Ritter, were authorized round trips to seek permanent quarters incident to changes in official stations from Covington, Kentucky, to Memphis, Tennessee. Ms. Lyons' authorization is dated October 8, 1971, and Ms. Ritter's is dated October 12, 1971, and each was authorized to travel by privately owned vehicle. However, in making the actual trip Ms. Ritter accompanied Ms. Lyons in the latter's personal automobile. Ms. Lyons seeks reimbursement for the round trip of 959 miles at the rate of 8 cents per mile, the rate specified in section 2.3b of OMB Circular No. A-56 for an employee traveling with one member of his immediate family. No transportation costs are being claimed by Ms. Ritter; however, she would have been entitled to transportation costs by privately owned automobile had she incurred such expenses.

The regulations governing house-hunting trips were contained in section 7 of OMB Circular No. A-56 at the time of the travel. Section 7.2 provides that when use of a privately owned vehicle is authorized, the "mileage allowance while en route between the old and new official station locations will be as provided in (Circular No. A-56 sections) 2.3b and c." Sections 2.3b and 2.3c provide in pertinent part as follows:

b. *Mileage rates prescribed.* Payment of mileage and per diem allowances, when authorized or approved in connection with the transfer, will be allowed as follows:

Occupants of automobile	Mileage rate (cents)
Employee only, or 1 member of immediate family	6
Employee and 1 member, or 2 members of immediate family	8
Employee and 2 members, or 3 members of immediate family	10
Employee and 3 or more members, or 4 or more members of immediate family	12

c. *Mileage rates in special circumstances.* Heads of departments may, however, prescribe that travel orders or other administrative determinations may specify higher mileage rates, not in excess of 12 cents, for individual transfers of employees or transfers of groups of employees when—

* * * * * * *

(2) the common carrier rates for the facilities provided between the old and new stations, the related constructive taxicab fares to and from terminals, and the per diem allowances prescribed under 2.3d below justify a higher mileage rate as advantageous to the Government * * *

It is seldom that circumstances are such that two or more employees, other than members of an immediate family, might travel together in one private automobile incident to a permanent change of station, and the regulations do not deal specifically with the question of prescribing mileage rates in such cases. However, when such occasions do arise it would appear that, taking into account the cost to the Government if each employee traveled separately, an administrative determination to authorize a higher mileage rate based on the number of employees occupying the automobile would be proper under section 2.3c(2), *supra.*

Therefore, while an agency cannot require two or more employees to travel together in the private automobile of one of the employees on permanent duty travel, where the employees involved find it convenient to do so and the proper administrative determination is made that such an arrangement is advantageous to the Government, we can see no objection to prescribing higher mileage rates in such cases up to 12 cents per mile on the same basis the rate scale is graduated in section 2.3b of OMB Circular No. A-56 when authorized members of the employee's family accompany him.

As to the claim of Ms. Lyons, it is a general rule that legal rights and liabilities in regard to travel allowances vest as and when the travel is performed under valid travel orders and that such orders may not be

revoked or modified retroactively so as to increase or decrease rights which have become fixed under the applicable statutes or regulations. However, in this case Ms. Lyons and Ms. Ritter traveled under general travel authorizations which did not prescribe on their face the allowable mileage rate, but which instead were issued in accordance with existing IRS regulations and the mileage rates listed in the regulations. The pertinent part of those regulations is worded similarly to section 2.3b of OMB Circular No. A–56 and provides for graduated rates for employees performing permanent duty travel with one or more members of their immediate family. The IRS regulations are also silent with regard to allowable mileage rates when two or more employees travel together incident to a permanent change of station. Therefore, since such circumstances are not specifically covered in the regulations, and since the method of traveling chosen by Ms. Lyons and Ms. Ritter was advantageous to the Government, we would have no objection to reimbursing Ms. Lyons for the travel at the rate of 8 cents per mile.

The vouchers are returned herewith for handling in accordance with the foregoing.

[B–176967]

Taxes—State—Government Immunity—Tax Clause in Contract Effect

A room rental transient tax included pursuant to section 84–33 of the Montgomery County (Maryland) Code in invoices for housing and subsistence furnished under contract to outpatient participants in the National Institutes of Health Leukemia Program may not be certified for payment, even though the Government is not exempt from the tax on the theory of sovereign immunity since the relationship between the Government and the transients created under contract is insufficient to effectuate a shift in the burden of the tax directly to the Government in view of the fact all applicable Federal, State, and local taxes and duties were included in the contract price. However, future contracts for sleeping accommodations in Montgomery County may provide for the Government to pay the transient tax applicable to individuals furnished housing and subsistence as beneficiaries.

To Samuel W. George, August 2, 1973:

This is in response to your letter of June 27, 1972, addressed to our Transportation and Claims Division, requesting a decision as to whether certifying officers at the National Institutes of Health (NIH) may certify for payment a room rental transient tax included in invoices submitted by the United Inn of America, Bethesda, Maryland.

On January 25, 1971, NIH awarded contract No. NIH 71–5644 CC, to the Chevy Chase Motor Lodge to provide housing and subsistence for outpatient participants in NIH's Leukemia Program and accompanying parents or guardians from January 1, 1971, through December 31, 1971. The contract was modified effective June 5, 1971, to incorporate the change of name agreement in which the corporate

name of the contractor was changed from the Chevy Chase Motor Lodge to the United Inn of America. In addition, on January 13, 1972, the terms of the contract were modified to extend the period of the contract through February 29, 1972.

By contract No. NIH 72–C–466 CC, NIH awarded a subsequent contract on February 8, 1972, for the period of March 1, 1972, through December 31, 1972, to the United Inn of America, the terms of which are identical to those of the previous contract.

Section 84–33 of the Montgomery County [Maryland] Code 1965 provides in part as follows:

> a. There is hereby levied and imposed on each and every transient a tax at a rate of three percent of the total amount paid for room rental by or for any such transient to any hotel, motel or other similar place providing sleeping accommodations after July 1, 1971.
>
> b. The following words and phrases when used herein shall, for the purposes of this tax, have the following meanings, except where the context clearly indicates a different meaning:
>
> (1) Transient: An (sic) person who for any period of not more than seven consecutive days obtains sleeping accommodations, either at his own expense or at the expense of another, in any hotel, motel or other similar place providing sleeping accommodations for which a charge is made.
>
> * * * * * * *
>
> c. Every person receiving any payment for room rental with respect to which a tax is levied shall collect the amount of tax hereby imposed from the transient on whom the same is levied or from the person paying for such room rental, at the time payment for such room rental is made. The taxes required to be collected hereunder shall be deemed to be held in trust by the person required to collect the same until remitted as hereinafter required.
>
> * * * * * * *

In their invoices submitted to NIH, United Inn of America included the room rental transient tax imposed by section 84–33 of the Montgomery County Code on those individuals furnished housing and subsistence after July 1, 1971.

First, it must be determined whether the imposition of the county tax infringes on the Government's constitutional immunity from State and local taxation. It has been the consistent position of our Office that the applicability of the doctrine of sovereign immunity rests upon a determination as to the identity of the taxpayer upon whom the legislature has placed the legal incidence of the tax. The Federal Government is exempt from the payment of a State or local tax only if it is shown that the legal incidence of the tax falls directly on the Government or an instrumentality thereof. (*See* 51 Comp. Gen. 367, 368 (1971), modified for other reasons by 52 Comp. Gen. 83 (1972)).

In the present situation, it is apparent from the above-cited provisions of the Montgomery County Code that the County Council has imposed the legal incidence of the transient tax directly upon the transient, and the responsibility for the collection of the tax upon the owner or operator of the motel. The transients are neither employees

of the Government nor its agents; they are merely beneficiaries under the contracts. The relationship between the Government and the transients, as created by the contracts to provide for their housing and subsistence, is insufficient to effectuate a shift in the burden of the tax directly to the Government. Consequently, the transient tax is an indirect tax on the Federal Government and the Government would not be exempt from the payment of such a tax pursuant to the theory of sovereign immunity.

Notwithstanding the fact that the Government would not be immune from the tax in question, the determination of whether the United States must reimburse United Inn for the transient tax depends upon the provisions of the contracts awarded to United Inn. Both contracts contain the following provision:

Federal, State, and Local Taxes
Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and Local taxes and duties.

Since the contracts contain no clause providing for the payment of any taxes in excess of those stipulated in the contract price, the above-quoted provision, which limits payment to those taxes as included in the contract price, is controlling. *Cf.* 41 Comp. Gen. 719 (1962).

In addition, we have been informally advised by the Assistant County Attorney for Montgomery County that a room rental transient tax was imposed by resolution No. 6–503 effective July 1, 1967, and remained in effect until July 1, 1971. The tax imposed by resolution was identical in form to the 1971 codification except for the percentage rate. Since a transient tax had been in effect in Montgomery County from 1967 to the present time, there is no basis to conclude that United Inn was unaware of the tax at the time it entered into either of the two contracts in question.

Accordingly, certifying officers are without authority to certify for payment to United Inn room rental transient tax as included in invoices submitted under the contracts.

However, our Office would have no objection to the inclusion of a provision in future contracts awarded by NIH to motels located in Montgomery County, Maryland, which would obligate the Government to pay the transient tax applicable to those individuals provided housing and subsistence as beneficiaries under future similar contracts.

[B–177900]

Meals—Furnishing—General Rule

The cost of providing food to Federal Protective Services Officers of the General Services Administration who were kept in readiness pursuant to 40 U.S.C. 318 in connection with the unauthorized occupation of the Bureau of Indian Affairs

building is reimbursable on the basis of the emergency situation which involved danger to human life and the destruction of Federal property, notwithstanding that the expenditure is not a "necessary expense" within the meaning of the Independent Agencies Appropriation Act of 1973; that 31 U.S.C. 665 precludes one from becoming a voluntary creditor of the United States; and the general rule that in the absence of authorizing legislation the cost of meals furnished to Government employees may not be paid with appropriated funds. However, payment of such expenses in future similar cases will depend on the circumstances in each case.

General Accounting Office—Decisions—Advance—Voucher Accompaniment

While no voucher as required by 31 U.S.C. 82d accompanied the request from a certifying officer for a decision concerning the propriety of reimbursing the cost of providing food to the protectors of life and Federal property in an emergency situation, the problem being a general one, the requested decision is addressed to the head of the agency under the broad authority of 31 U.S.C. 74, which directs the United States General Accounting Office to provide decisions to the heads of departments on any question involving the propriety of making a payment.

To the Administrator, General Services Administration, August 2, 1973:

We have received a letter dated January 19, 1973, from Mr. B. G. Loveless, Authorized Certifying Officer, Region 3, General Services Administration, requesting our decision concerning payment for food provided to General Services Administration (GSA) Federal Protective Services Officers under the conditions described therein.

Under the authority contained in 31 U.S. Code 82d a certifying officer is entitled to a decision by the Comptroller General on a question of law involved in payment on a specific voucher that has been presented to him for certification prior to payment of the voucher, which should accompany the submission to this Office. *See* 52 Comp. Gen. 83 (1972).

While no voucher accompanied the request for decision, inasmuch as the problem involved in the instant situation is general in nature we are rendering our decision to you under the broad authority of 31 U.S.C. 74 which authorizes us to provide decisions to the heads of departments on any question involved in payments which may be made by that department.

In describing the circumstances giving rise to his questions, Mr. Loveless states that during the period November 3 to 8, 1972, it was necessary for GSA to assemble a cadre of approximately 175 GSA special police in connection with the unauthorized occupation of the building of the Bureau of Indian Affairs. This special cadre was assembled initially on Friday, November 3, and daily thereafter on tours of duty that for some extended to 24 hours. These groups were kept in readiness to reoccupy the building and they were not permitted to leave the marshalling area because of the imminence of court orders and administrative directives.

It is explained that the first need of food for the special police arose shortly after midnight Friday when it was decided that the force must remain on alert throughout the night until relieved later Saturday morning. As a consequence, GSA officials purchased and distributed to the cadre sandwiches and coffee costing $85.25.

Subsequently, arrangements were made with Government Services, Inc. (GSI) to open a cafeteria line in the Department of the Interior building and food was served to the special police officers on Saturday and Sunday until regular tours of duty started Monday, November 6. It is explained that during this time the police force was under orders to remain on duty until relieved, and were equipped appropriately for such disturbances as riots, fires, or retaking of the building by whatever method directed, and thus were unable to leave the marshalling area during the period of the alert. It is contemplated that a bill of about $500 will be submitted by GSI for the cost of the food provided the special police on those days.

In view of the above circumstances Mr. Loveless asks whether GSA officials may be reimbursed for the food purchased for the special police; whether GSI may be paid for its costs in serving the special police over the weekend of November 5 and 6; and, whether similar costs may be incurred and paid in the event other GSA buildings are similarly occupied in the future.

Concerning the protection of Federal property under jurisdiction of the Administrator, 40 U.S.C. 318 provides in pertinent part as follows:

> The Administrator of General Services or officials of the Administration duly authorized by him may appoint uniformed guards of said Administration as special policemen without additional compensation for duty in connection with the policing of public buildings and other areas under the jurisdiction of the Administrator of General Services. Such special policemen shall have the same powers as sheriffs and constables upon such Federal property to enforce the laws enacted for the protection of persons and property, and to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce any rules and regulations made and promulgated by the Administrator or such duly authorized officials of the Administration for the property under their jurisdiction: * * *.

In view of such provisions it is clear that the Administrator was authorized to use the special police force in order to protect the occupied building. Consequently, there is for consideration the question whether the costs of providing food to such special police can be deemed to be "necessary expenses" within the meaning of that term as used in the Independent Agencies Appropriation Act, 1973, approved July 13, 1972, Public Law 92-351, 86 Stat. 479, under the heading "General Services Administration, Public Buildings Service, Operating Expenses," which provides in pertinent part as follows:

> For necessary expenses, not otherwise provided for, of real property management and related activities as provided by law * * *.

It is, of course, the general rule that in the absence of authorizing legislation the cost of meals furnished to Government employees may not be paid with appropriated funds. Following such rule we have refused to authorize the payment of such costs in a number of decisions even though, as here, there were involved unusual circumstances.

For example, in 16 Comp. Gen. 158 (1936) we held, quoting from the syllabus, that—

An Internal Revenue investigator required to perform twenty four hour daily duty on a special assignment at headquarters may not be allowed a per diem in lieu of subsistence to cover meals necessarily taken at place of assignment, nor may he be reimbursed for the actual expense of such meals, there not having been incurred expenses other than those which would have been incurred in the performance of usual duties.

In 42 Comp. Gen. 149 (1962) reimbursement to a Post Office Department official was denied for expenditures made by him from personal funds to provide carry-out restaurant food for postal employees conducting an internal election and who were required to remain on duty beyond regular office hours. Such denial was based primarily on the general rule stated above; however, reference was made also to 31 U.S.C. 665 and the rule that no person may make himself a voluntary creditor of the United States by incurring, and paying, obligations of the Government which he is not legally required or authorized to incur or pay and reimbursement therefor generally is not authorized.

Similarly, in decisions of December 15, 1959, B–141142, and April 6, 1970, B–169235, we applied the general rule stated above, and held that meals could not be supplied at Government expense to Federal mediators who were required to conduct mediation sessions considerably beyond regular hours and, at certain times, until completion.

We believe that in the above decisions payment or reimbursement for the cost of food purchased for or distributed to officials and employees under the unusual circumstances considered therein properly was denied in each case. However, there was noticeably absent in those cases the existence of an extremely emergent situation involving danger to human life and the destruction of Federal property such as is involved in the instant case. (For a full discussion of such situation see the Hearings entitled "Seizure of Bureau of Indian Affairs Headquarters" before the Subcommittee on Indian Affairs, House Committee on Interior and Insular Affairs, 92d Cong., 2nd sess., Serial No. 92-54.)

The provisions of 31 U.S.C. 665 do not prohibit the acceptance of voluntary services under such circumstances and, while we are reluctant to make an exception to the general rule followed in the above cases, we would not—in the instant case—question a determination by you that the expenses in question were necessarily incidental to the protection of property of the United States during an extreme emergency.

However, whether payment of such expenses would be proper in similar cases that may arise in the future would necessarily depend on the facts and circumstances present in each case, having in mind that work in occupations such as those of policemen, firemen, security guards, etc., often is required to be performed under emergent and dangerous conditions and that such fact alone does not warrant departure from the general rule against payment for employees' meals from appropriated funds. Consequently, and since such cases are rare, we do not believe it necessary or feasible to attempt to describe herein the circumstances under which similar payments may be deemed to be proper in future cases.

[B-141025]

Checks—Delivery—Banks—Retired Pay

Although the permissive authority in 31 U.S.C. 492(b) for the issuance by disbursing officers, in accordance with regulations prescribed by the Secretary of the Treasury, of composite checks to banks or financial institutions for credit to the accounts of persons requesting in writing that recurring payments due them be handled in this manner includes the issuance of Military Retired Pay checks, composite checks should not be issued without a determination, pursuant to regulations to be prescribed by the Secretary, of the continued existence and/or eligibility of the persons covered, and if provided by regulation deposits may be made to joint accounts as well as single accounts.

To the Secretary of Defense, August 3, 1973:

By letter of March 27, 1973, the Honorable Don R. Brazier, Acting Assistant Secretary of Defense (Comptroller), requested our decision on questions presented in Committee Action No. 472 of the Department of Defense Military Pay and Allowance Committee, which was transmitted with such letter.

The questions presented are as follows:

1. Is it the intent of PL 92-366, Authority for Agency Heads to Draw Checks in Favor of Financial Organizations, that Composite Military Retired Pay Checks be issued without the requirement for Reports of Existence from retired members, except as indicated in paragraph 2, discussion below?
2. May a composite check drawn payable to a bank (or financial organization) and credited to the accounts of retirees involved be deposited to joint accounts, if so directed by the retirees?

Public Law 92-366, approved August 7, 1972, 86 Stat. 506, amended section 3620 of the Revised Statutes, as amended (31 U.S. Code 492), by adding a new subsection (d) thereto, as follows:

(d) Procedures authorized in subsection (b) of this section, for the making of a payment in the form of a check drawn in favor of a financial organization, may be extended to any class of recurring payments, upon the written request of the person to whom payment is to be made and in accordance with regulations to be prescribed by the Secretary of the Treasury under authority of such subsection.

The amendment extended, on a permissive basis, to "any class of recurring payments," the authority contained in 31 U.S.C. 492(b) for

the head of an agency, upon the written request of the person to whom payment is to be made, to authorize a disbursing officer to make the payment by sending to a financial organization designated by the person a check drawn in favor of such organization for credit to the account of the person and, if more than one person designates the same financial organization, send all such payments in one composite check drawn in favor of the organization for deposit to the accounts of such persons. All such authority is to be exercised in accordance with regulations to be prescribed by the Secretary of the Treasury.

The permissive authority granted by Public Law 92–366 would clearly include the issuance of Military Retired Pay Checks. However, there is nothing in the statute or in the provision of law amended thereby indicating an intent that composite retired pay checks should be issued with no regard to the continued existence and/or entitlement of the persons included therein. On the contrary, the legislative history of the act clearly reveals that this was one of the principal administrative problems contemplated during committee consideration of H.R. 8708, 92d Congress, which became Public Law 92–366. In its report on said bill, Report No. 92–977, the Senate Committee on Government Operations stated (page 3) as follows:

> The hearing record also contains communications from the U.S. Civil Service Commission, the Department of Health, Education, and Welfare, the Veterans' Administration, and the Railroad Retirement Board, indicating certain administrative problems which enactment of the legislation would cause, but stating that these could be overcome and that they had no objection to enactment.
>
> The administrative problems referred to would result from loss of direct contact with the beneficiaries concerned with respect to those whose checks were sent directly to designated banks. It was noted that direct contact through monthly check mailings is the agency's primary means of (1) keeping informed of the current addresses of beneficiaries; (2) reaching them with prompt notice of changes in their status; (3) obtaining prompt notice of death of a beneficiary; and (4) learning of departure of beneficiaries from the country. In addition, there would be a loss of certain advantages in compliance with the provisions of existing law on continuing eligibility for benefits, which, under present methods, is accomplished by the individual's endorsement of his check which attests to his continuing eligibility.
>
> Despite these problems, the agencies concerned stated that the potential benefits derived from these procedures, in the form of potential economies to the Government and improved service to beneficiaries, were greater than the administrative problems involved. They stated further that the basic problem of direct contact could be overcome by maintaining two address systems—one for check writing and deposits, and the other for official correspondence.

There is also for consideration the fact that the authority granted by Public Law 92–366 is permissive only, not mandatory, and by express provision of the act is to be exercised only "in accordance with regulations to be prescribed by the Secretary of the Treasury under authority of such subsection." There is no requirement that this authority be used in lieu of any existing authority. On page 3 of the report cited above, the Committee stated in this regard as follows:

> The committee is mindful of the fact that implementation of these procedures will necessitate administrative adjustments by agencies concerned. However,

since implementation is permissive and not mandatory, the agencies will have ample opportunity to work out the details with the Treasury Department, and the ultimate benefits to be derived by both the Government and the payees should more than justify the additional effort required to institute these procedures.

Chairman John S. Monagan of the Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations stated on page 4 of the Hearings on H.R. 8708 before his Subcommittee on September 29, 1971, that:

H.R. 8708 would allow extension of the direct-deposit technique to recurring payments made to the public—such as those for social security benefits, veterans' benefits, and civil service and railroad retirement benefits. It does not require implementation—it doesn't require implementation—but merely paves the way for voluntary adoption if and when the Treasury and the program agencies determine it to be feasible. We think it desirable, however, to have the option available at the earliest possible time so that the procedure could be readily implemented if and when the joint agency-Treasury studies show it to be possible.

In the same Hearings, Mr. David Mosso, Commissioner, Bureau of Accounts, Department of the Treasury, stated (page 6):

The Treasury Department would again have the responsibility for issuing the regulations necessary to implement the procedure authorized by the proposed legislation. It goes without saying that we would not use the permissive authority for any program until all procedural and administrative elements had been exhaustively studied and conclusions reached that the procedure could be applied without having an adverse impact on the payees, the program, or the Treasury.

In that connection, we have been participating with the Social Security Administration in a feasibility study of providing a direct-deposit option to social security beneficiaries. There are a number of issues in these public payment programs that are not present in the application to Federal salary payments.

Hence, it is our view that it is not the intent of Public Law 92–366 that composite checks be issued thereunder without the use of some means of determining the continued existence and/or eligibility of the persons covered thereby, and that the procedures to be used and the extent of such determinations to be required are, in the first instance, for the consideration of the Secretary of the Treasury in the regulations he prescribes in accordance with the act.

With regard to the question as to depositing a composite check issued under the authority of Public Law 92–366 to the credit of joint accounts, this matter also would be for consideration by the Secretary of the Treasury in the regulations to be prescribed by him under the act. However, it may be noted in this connection that Treasury Department Circular No. 1076 (First Revision), issued November 27, 1968 (31 CFR 209), entitled "Payments to Financial Organizations for Credit to Accounts of Employees," which was issued under 31 U.S.C. 492 prior to the enactment of Public Law 92–366 and applies only to salaries or wages payable to civilian employees of the Government, permits the credit of amounts paid thereunder to either single or joint accounts. Said Circular also provides as follows (31 CFR 209.8):

§ 209.8 Financial organization as agent.

A financial organization which receives checks under the procedure set out in §§ 209.3 and 209.4 does so in each case as the agent of the employee who has

designated the financial organization to receive the check and credit his account. The death of that employee revokes the authority of the financial organization to credit the amount to the account of that employee. In the case of a check covering a payment to one employee, the proceeds of which cannot be credited to the account because of death or any other reason, the financial organization shall promply return the check to the issuing disbursing officer or remit its own check in an equal amount, with a statement in either case identifying the reason therefor and the employee. In the case of a check covering payment to more than one employee, a portion of which cannot be credited to an account because of death or for any other reason, the financial organization shall promptly remit to the agency responsible for making payment a check in an amount equal to that portion which could not be properly credited to the account, with a statement identifying the employee and the reason for refund.

The Treasury Department has not yet issued the regulations required by Public Law 92-366. However, we have been advised informally by that Department that a revision of Department Circular No. 1076 incorporating that act is under consideration and will be issued as soon as practicable. The Department also advised us informally that such revision will not specifically address the problem of determining the continued existence and/or eligibility of the persons involved, but that the in-depth study of the Social Security Administration mentioned hereinabove, which would cover such problem, was nearing its conclusion and it was expected that regulations covering the problem would be issued thereafter. The Department further indicated its intent to make studies of other departments and agencies having similar problems with a view to resolving such problems to the mutual satisfaction of both the Treasury Department and the department or agency involved.

The questions presented are answered accordingly.

[B-177481]

Subsistence—Per Diem—Military Personnel—Training Duty Periods—Entitlement to Per Diem

A Reserve Marine officer detached from duty upon completion of basic training at Quantico and ordered to report for temporary duty on April 15, 1970, at Camp Lejeune for 8 weeks of instruction, then to be attached to a designated division at the camp, whose orders were amended April 9, 1970, to change his permanent duty station upon completion of the temporary duty from Camp Lejeune to Okinawa were not received by him until April 27, 1970, is entitled to per diem for the entire period of the temporary duty—April 16 through June 4—since his entitlement to per diem became fixed upon issuance of the amendatory order on April 9, 1970, changing his permanent duty station, and since he was in a temporary duty status while at Camp Lejeune, it is immaterial that he was not timely notified of the amendatory order as he fully complied with the basic order, as amended.

To Major F. D. Brady, United States Marine Corps, August 6, 1973:

By letter dated September 29, 1972, file reference CD-WMM 7293, with enclosures, forwarded here by endorsement dated November 16, 1972, of the Per Diem, Travel and Transportation Allowance Com-

mittee, you request an advance decision concerning the entitlement of First Lieutenant Timothy D. Jones, 307 52 78 64, U.S. Marine Corps Reserve, to per diem for the period April 16 through June 4, 1970, incident to temporary duty performed at Camp Lejeune, North Carolina. Your request was assigned PDTATAC Control No. 72–56.

Headquarters United States Marine Corps permanent change-of-station orders, dated January 20, 1970, addressed to a number of Marine Corps officers including Lieutenant Jones, directed him after detachment from duty under instruction at the Basic School, Quantico, Virginia, about March 11, 1970, to proceed and report on April 15, 1970, to the Marine Corps Base, Camp Lejeune, North Carolina, for temporary duty under instruction for a period of about 8 weeks. Those orders further directed him to proceed to the 2nd Marine Division, Fleet Marine Force, Camp Lejeune, upon completion of the stated temporary duty and provided for the travel of his dependents and household goods at Government expense.

Pursuant to the above orders Lieutenant Jones reported to Camp Lejeune on April 15, 1970. However, prior to that date, that is, on April 9, 1970, by message of the Commandant of the Marine Corps, addressed to the Commanding General, Marine Corps Base, Camp Lejeune, the above orders were amended so as to direct Lieutenant Jones to report for duty with Fleet Marine Force Pacific (Marine Corps Base, Camp Butler, Okinawa) rather than with 2nd Marine Division, Fleet Marine Force, Camp Lejeune, upon completion of temporary duty about June 5, 1970. The Commandant's message was received by Headquarters, Marine Corps Service Support Schools, Marine Corps Base, Camp Lejeune, on April 22, 1970, and on the basis thereof the personnel officer of that Command addressed a modification of orders notification to Lieutenant Jones. That notification letter was received by Lieutenant Jones on April 27, 1970, 12 days after he had reported to Camp Lejeune.

You say in your letter of September 29, 1972, that there is no evidence that Lieutenant Jones had knowledge of the amendment before April 27, 1970, and that he was detached from Camp Lejeune on June 5, 1970.

In your comment concerning the entitlement of Lieutenant Jones to per diem for the period April 16 through June 4, 1970, you refer to our decision, 34 Comp. Gen. 427 (1955), in which we held that a member ordered to report for permanent duty at one Washington, D.C., installation and to perform prior "temporary duty" at another Washington installation may not be considered to have been travelling away from his designated post of duty so as to be entitled to per diem for the "temporary duty" or duty period, even though at the time he was performing such "temporary duty" amendatory orders were issued which

directed him to proceed to another permanent duty station. You express doubt concerning the applicability of that holding in this case inasmuch as the amendatory orders involved in the case covered by the decision were not actually issued until *after* the member had commenced "temporary duty." You also refer to our decision, 43 Comp. Gen. 833 (1964), in which we said that, as a general rule an order, individual in its operation, does not become effective until delivered to the person concerned, unless he had prior knowledge of the contents of the order or was responsible for any delay in its delivery.

You also say that you are in doubt whether the amendatory orders should be effective on April 27, 1970, when Lieutenant Jones was notified of the change of his permanent duty station or April 9, 1970, the date of those amendatory orders. In this connection, you mention that if the April 27, 1970, date is considered as the effective date, the rule set forth in 34 Comp. Gen. 427, *supra*, would apply, thus precluding payment of per diem during the period of Lieutenant Jones' "temporary duty" at Camp Lejeune.

The governing statutory authority, 37 U.S. Code 404, provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under competent orders upon a change of permanent station, or otherwise, or when away from his designated post of duty regardless of the length of time he is away from that post. The pertinent implementing regulation, paragraph M4201–4 (Change 206, dated March 1, 1970) of the Joint Travel Regulations (now paragraphs M4201–4 and M4201–5), precludes payment of per diem to a member for any period prior to the day of departure from the limits of the permanent duty station or for any travel or temporary duty performed within the limits of the permanent duty station other than that authorized for the day of return to the permanent duty station under paragraph M4205.

Concerning the principle enunciated in 43 Comp. Gen. 833, *supra*, mentioned above, that as a general rule an order, individual in its operation, does not become effective until delivered to the person concerned, that principle has its limitations.

It is not for application in cases, such as Lieutenant Jones', where a member's right to certain entitlements become fixed upon the issuance of orders and amendments which establish his particular duty status which continues so long as the member properly complies with those orders and amendments prior to the issuance of additional amendments or new orders. In other words, Lieutenant Jones' entitlement to per diem for temporary duty performed away from his permanent duty station, Camp Butler, became fixed upon the issuance of the amend-

atory orders of April 9, 1970, which changed the new permanent duty station from Camp Lejeune to Camp Butler. Since he was in a temporary duty status for the entire period he was undergoing instruction at Camp Lejeune, for this purpose it is immaterial whether he was timely notified of the amendatory orders inasmuch as he fully complied with the basic order, as amended.

These circumstances must be distinguished from those in which a member serving at a temporary duty station is issued orders designating it as his permanent station. In such event, under the principle stated in 43 Comp. Gen. 833, *supra*, where the member had no knowledge of the orders or was not responsible for its delayed receipt, he will be permitted to continue to receive temporary duty allowances until receipt of orders.

In view of the above, per diem is properly payable to Lieutenant Jones for the entire peroid he was on temporary duty at Camp Lejeune.

[B-178759]

Intergovernmental Personnel Act—Assignment of Federal Employees—Per Diem *v.* Station Allowances

Under the Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371-3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for the same assignment, even though 5 U.S.C. 3375 permits the payment of both the benefits associated with a permanent change of station and those normally associated with a temporary duty status, since nothing in the statute or its legislative history suggests both types of benefits may be paid incident to the same assignment. Therefore, on the basis of the interpretation of similiar provisions in the Government Employees Training Act, an agency should determine, taking cost to the Government into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C., Chapter 57, subchapter I to employees on an intergovernmental assignment.

To the Acting Administrator, Environmental Protection Agency, August 6, 1973:

We refer to the letter of May 25, 1973, from your Chief, Fiscal Policies and Procedures Branch, in which certain questions are raised regarding payment of travel expenses under the Intergovernmental Personnel Act of 1970, approved January 5, 1971, Public Law 91-648, 84 Stat. 1909, 5 U.S. Code 3375. The questions are presented for our consideration so that your agency may be guided in developing appropriate travel policies for employees on Intergovernmental Personnel Act (IPA) assignments.

Under title IV of the IPA, 84 Stat. 1920, codified at 5 U.S.C. 3371-3376, provisions are made for the temporary assignment of personnel between the Federal Government and State and local governments and

institutions of higher education. 5 U.S.C. 3375 provides, in part, as follows:

§ *3375. Travel expenses*

(a) Appropriations of an executive agency are available to pay, or reimburse, a Federal or State or local government employee in accordance with

(1) subchapter I of chapter 57 of this title, for the expenses of—

(A) travel, including a per diem allowance, to and from the assignment location;

(B) a per diem allowance at the assignment location during the period of the assignment; and

(C) travel, including a per diem allowance, while traveling on official business away from his designated post of duty during the assignment when the head of the executive agency considers the travel in the interest of the United States;

(2) section 5724 of this title, for the expenses of transportation of his immediate family and of his household goods and personal effects to and from the assignment location;

(3) section 5724a(a)(1) of this title, for the expenses of per diem allowances for the immediate family of the employee to and from the assignment location;

(4) section 5724a(a)(3) of this title, for subsistence expenses of the employee and his immediate family while occupying temporary quarters at the assignment location and on return to his former post of duty; and

(5) section 5726(c) of this title, for the expenses of nontemporary storage of household goods and personal effects in connection with assignment at an isolated location.

While this language authorizes the use of appropriations for the expenses listed, it does not state whether an employee on an IPA assignment may receive reimbursement for all such expenses. The Chief, Fiscal Policies and Procedures Branch, therefore asks whether the intent of the IPA is to allow personnel reassigned thereunder both per diem and change of station allowances or whether either one or the other may be allowed but not both. If only one is allowed it is questioned whether there is a maximum allowable, based on the lesser cost of the other.

In 39 Comp. Gen. 140 (1959) we addressed the question of whether, under somewhat similar provisions in the Government Employees Training Act, 5 U.S.C. 4109(a)(B), an employee was entitled to receive *both* per diem and certain change of station allowances when assigned for training away from his permanent duty station. The pertinent language in the Training Act authorizes payment of travel and subsistence expenses and payment of the cost of transportation of an employee's immediate family and household goods and personal effects to the training location when the total cost of the latter is estimated to be less than the aggregate per diem paymens for the period of training. We stated, in interpreting that language:

When the facts are such that the head of a department could authorize either type benefit—per diem to the employee for the period of training or transportation of the employee's immediate family and household goods and personal effects—the entitlement of the employee would depend upon which benefit is authorized much in the same manner as the benefits of an employee traveling on official business ordinarily are determined, that is, whether the employee is issued temporary duty orders or orders directing a change of official station. Therefore,

we conclude that an employee selected for training may receive only one or the other of such benefits when the length of the period of training is known in advance. [39 Comp. Gen. at 142.]

The legislative history to the IPA indicates that Congress intended the language in section 3375 to be broad enough to provide for the needs of Federal, State, and local employees en route to, from, and during their assignments in either the Federal Government or State and local governments. H. Rept. No. 91–1733, 91st Cong., 2d Sess. 20. However, it would appear that these needs can be met without the necessity of applying a different rule for employees traveling on IPA assignments from that which applies to employees traveling on training assignments or on official business generally. Supportive of this position is the fact that under section 3375 various allowances are authorized to be paid under the provisions of Chapter 57 of Title 5, U.S. Code. In general under those provisions an employee is entitled to per diem only when in a travel status and when the employee arrives at his new permanent duty station the travel status ends as does his entitlement to per diem. While section 3375 permits the payment of both the benefits associated with a permanent change of station and those normally associated with a temporary travel status, we find nothing in the statute or its history suggesting that both types of benefits may be paid incident to the same assignment. In the absence of express statutory language so authorizing we must conclude that employees traveling on IPA assignments may receive either per diem in lieu of subsistence or the change of station allowances authorized in section 3375 but not both.

As to whether there is a maximum amount allowable for either change of station or per diem allowances, based on the lesser cost of one or the other, there is no limitation in the IPA similar to the one in the Government Employees Training Act, 5 U.S.C. 4109(a)(B), which authorizes payment of family and household goods transportation expenses only when the cost of such expenses and related services are less than the estimated aggregate per diem payments for the period of training. Therefore, noting that IPA assignments may last as long as 4 years in some circumstances, we believe that the agency concerned should determine administratively whether an employee is to be authorized expenses applicable to a change of station or whether he is to be paid per diem in lieu of subsistence under subchapter I, Chapter 57, Title 5, U.S. Code, and the applicable regulations. Once that determination is made, the employee should receive appropriate allowances under the chosen alternative. The cost to the Government should of course be one of the factors taken into account in making such determinations.

[B–178983]

Airports—Federal Aid—Development Projects—Facilities Use by Government

Payment by a civilian agency of landing fees assessed by the Missoula County Airport Commission who had received Federal assistance under the 1946 Federal Airport Act is not prohibited since section 11(4) of the act only exempted military aircraft from paying landing and take-off fees, and then only if the use of the facilities was not substantial. Furthermore, the Commission received no Federal assistance under the 1970 Airport and Airway Development Act, section 18(5) of which replaced section 11(4) of the 1946 act to exempt all Government aircraft from paying for the use of airport facilities developed with Federal financial assistance and to authorize, if the use was substantial, the payment of a charge based on a reasonable share, proportional to use, of the cost of operating and maintaining the facilities used.

To Lila B. Hannebrink, August 6, 1973:

Reference is made to your letter of June 22, 1973, your reference 1376(D–832), asking if you properly may pay a bill—which you enclosed—in the amount of $143.45 submitted by the Missoula County Airport Commission, Missoula, Montana. The amount involved represents landing fees assessed in connection with aircraft owned and operated by the Bureau of Land Management.

Question as to the payment of such fees arises in that the airport involved received Federal assistance pursuant to the Federal Airport Act, approved May 13, 1946, Ch. 251, 60 Stat. 170, 49 U.S. Code 1101 note (1964 ed.). Section 11(4) of such act (60 Stat. 176) provides, in effect, that approval for such assistance shall be given only upon assurance by the sponsor that—

all the facilities of the airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used.

While the above language could be viewed as exempting all Government aircraft from the payment of landing fees except when the use of such airport by military aircraft was excessive, we believe that, based on the legislative history of section 11(4), it must be concluded that under such provision only military aircraft are entitled to such exemption and then only if their use of the airport is not substantial.

Examination of the legislative history of the above provisions discloses that S. 2, the bill subsequently enacted as the Federal Airport Act, as originally passed by the Senate contained language in section 15(a)(4) thereof, similar to that as finally enacted as section 11(4).

The House, however, deleted such language and substituted therefor the following provision (section 10(4)):

(4) all the facilities of such airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United

States for use by Government aircraft at all times without charge other than (a) a charge sufficient to defray the cost of repairing damage done by such aircraft, and (b) if the use by military or naval aircraft shall be substantial, a charge which is reasonable in consideration of the character and extent of such use.

However, the Committee of Conference recommended language similar to that as passed by the Senate and, as indicated above, such recommended language was enacted into law.

Under the House version of S. 2, there is no question that the exemption would have applied to all Government aircraft. However, since such language ultimately was rejected and language similar to that first passed by the Senate was finally adopted, we think it clear that only military aircraft are exempt from the payment of landing fees at such federally assisted airports by the 1946 act.

Any possible question in this regard is completely dispelled when considered in the light of the Airport and Airway Development Act of 1970, approved May 21, 1970, Public Law 91-258, 84 Stat. 219, 49 U.S.C. 1701 note. This act, insofar as pertinent here, repealed and replaced the Federal Airport Act. Language identical to that of section 11(4) of the earlier act was contained in section 18(4) of the House-passed bill, H.R. 14465. However, the Committee of Conference recommended the language which subsequently was enacted as section 18(5) of Public Law 91-258 (49 U.S.C. 1718(5)) and which reads as follows:

(5) Government use; charge.
all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used.

Such provisions are explained by the Committee of Conference, at page 42 of House Report No. 91-1074, as follows:

Section 18(5) of the House bill provided that, as a condition precedent to his approval of an airport development project, the Secretary of Transportation must receive assurances in writing, satisfactory to him, that all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft would be available to the United States for use by military aircraft in common with other aircraft at all times without charge, except, if the use by military aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used.

Section 208(5) of the Senate amendment contained a similar provision except that it used the term "Government aircraft" in lieu of the term "military aircraft." The term "Government aircraft" is broader than the term "military aircraft" and is defined in section 11(7) of the conference agreement to mean aircraft owned and operated by the United States. This would include not only military aircraft but also aircraft owned and operated by civilian agencies.

Section 18(5) of the conference agreement follows the Senate version.

Accordingly, and since the airport here involved has received no Federal assistance under Public Law 91-258, it appears, as indicated

earlier, that landing fees properly were assessed against the aircraft operated by the Bureau of Land Management and, if otherwise proper, are payable by the Bureau.

The bill forwarded with your letter is returned herewith.

[B-178780]

Contracts—Negotiation—National Emergency Authority—Use Propriety

The award by the Air Force of a domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to a Class Determinations and Findings to a Government corporation that is to be transferred to the individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of the fact the contract will contain a termination provision in the event approval is withheld; the Office of Management and Budget Circular A-76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Government operation of a commercial activity "to maintain or strengthen mobilization readiness;" the services of the intended buyer during Government control does not make him an "officer or employee" within the conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207-208; there is no evidence of unfair competition; and the contracting agency has broad discretionary authority to award the contract in the interest of national defense.

General Accounting Office—Jurisdiction—Commercial Activities of Government

Although Office of Management and Budget Circular A-76 expresses a general policy preference for contracting with private, commercial enterprises, it also provides for the use of Government-furnished services when the "service is available from another agency," and allows Government operation of a commercial activity "to maintain or strengthen mobilization readiness." Therefore, the provisions of the circular are regarded as matters of executive policy which do not establish such legal rights and responsibilities that would come within the decision functions of the General Accounting Office.

To Wilner & Scheiner, August 8, 1973:

This is in reference to the May 31, 1973, telefax from Saturn Airways, Incorporated, and to your subsequent correspondence on its behalf, protesting against a proposed award of a contract to Southern Air Transport, Incorporated (SAT), by the United States Air Force under requests for proposals No. F11626-73-R-0018 and -0019, issued by the Military Airlift Command, Scott Air Force Base, Illinois.

The solicitations, for domestic cargo airlift, were issued pursuant to a Class Determinations and Findings signed by the Secretary of the Air Force, which authorized the negotiation of contracts under 10 U.S. Code 2304(a)(16) in support of the Department of Defense airlift mobilization base program. Proposals were received from Saturn, SAT, and Overseas National Airways, Incorporated (ONA). The Air Force has awarded contracts worth approximately $18.2 million to Saturn and $16.3 million to ONA, and proposes to award a contract to SAT

for approximately $3.8 million. The proposed contract would call for airlift services worth $1.1 million through December 1973, and additional services worth $2.7 million starting in January 1974.

You claim that any award to SAT would be improper because that company is owned and controlled by a Government agency and, therefore, is not a qualified offeror. You further claim that the situation is not changed because of the existence of an agreement to transfer ownership of SAT to a private individual, since the agreement provides that it will not take effect until it is approved by the Civil Aeronautics Board. In addition, you assert that the proposed transfer of ownership would not be in accordance with the laws and regulations dealing with disposal of Government property.

The Air Force reports that, pending a CAB decision on the proposed transfer, SAT is being operated by the intended buyer (a private individual) for his own benefit, that no element of the Government is currently subsidizing or aiding the company, and that any profits or losses from the date of the agreement (February 1973) will accrue to the buyer if the CAB approves the transfer. It is further reported that should CAB not approve the transfer, SAT will be liquidated, and any DOD contracts with SAT will be terminated. In this connection, we are advised that the Air Force proposes to include in its contract with SAT a provision calling for contract termination, without cost, by unilateral action of the contracting officer in the event CAB approval is not obtained.

You state, however, that the Air Force is not correct in viewing SAT as an essentially independent operation, and assert that there is actually more Government control and subsidization involved in the current operation of SAT than admitted to by the Air Force. You contend that such an award would be improper because it would be contrary to Bureau of the Budget (now Office of Management and Budget [OMB]) Circular A–76 and to certain Defense Department directives, would involve the Government in a conflict of interest, and would result in unfair competition. In this respect, you state that it is "fundamentally unfair that a taxpaying privately-owned company should be compelled to bid against another firm * * * actually supported by public funds." You further point out that the existing CAB rate structure for the aircraft and routes involved is based on operating costs, and claim that an award to a Government-subsidized firm could result in a downward revision of the rates, which would be unfair to Saturn. You also assert that the private individual currently operating SAT pending CAB approval of his purchase of SAT's stock from the nominal stockholders (of which he is one) is actually a Government employee who would obviously personally benefit from the proposed award if the transfer of ownership is approved.

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OMB Circular A–76, and the Defense Department's implementing directives (DOD Instruction 4100.33, Air Force Regulation 26–12), express a general policy preference for contracting with private, commercial enterprises as opposed to the Government's performing the required services "in house." However, the Circular specifically provides for the use of Government-furnished services when the "service is available from another Federal agency." Since it is not asserted that SAT is controlled by the Department of the Air Force, it appears that the Air Force would not be precluded by the provisions of the Circular from awarding a contract to SAT. In addition, the Circular also allows Government operation of a commercial activity "to maintain or strengthen mobilization readiness," and as noted above, these procurements are based on the negotiation authority of 10 U.S.C. 2304(a)(16) and Armed Services Procurement Regulation (ASPR) 3–216, which deal with the maintenance of an industrial mobilization base. In any event, we have always regarded the provisions of Circular A–76 as matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision functions of the General Accounting Office. B–170079, September 15, 1970.

We do not agree with the contention that the awarding of a contract to SAT would involve the Government in a conflict of interest. The statutory provisions to which you make reference, 18 U.S.C. 205, 18 U.S.C. 207–208, prohibit an officer or employee of the United States, during the period of employment and for a 1-year period thereafter, from representing anyone other than the United States before a court or a Federal agency if the United States is a party to or has an interest in the matter. The record shows that SAT's intended buyer has been serving as the president, as well as a director and a nominal stockholder, of SAT during the period of reported Government control. However, we do not believe that this makes him an "officer or employee" of the United States within the meaning of the above provisions, nor do we see anything in the record which indicates that he is or would be involved in the type of conduct prohibited even if he were such an employee.

Similarly, we do not believe that ASPR 1–302.6, which states that contracts shall not be entered into between the Government and its employees or business organizations controlled by such employees, can preclude an award to SAT. As indicated, we do not view SAT's president as a Government employee. More significantly, the regulation prohibits awards to a corporation "controlled" by a Government employee, while, of course, you have contended that ultimate corporate control of SAT has been exercised by the Government and not by a Government employee.

For the above reasons, we cannot agree that any statutory or regulatory provision precludes the proposed contract award to SAT. Furthermore, we do not believe that this procurement involves any element of unfair competition, since the proposed award to SAT is based on evaluation of its airlift capability and not on its proposed price. While SAT may have received prior Government aid, we have stated, in another connection, that "while it is the policy of the United States Government to eliminate the competitive advantage that accrues to a prospective contractor from the use of United States Government-furnished property and facilities, it is obviously not possible to eliminate the advantage which might accrue to a given firm by virtue of other Federal, state or local programs. * * * We know of no requirement for equalizing competition by taking into consideration these types of advantage * * *." B–175496, November 10, 1972.

Furthermore, we think it is clear that under 10 U.S.C. 2304(a)(16), ASPR 3–316, and a proper Determinations and Findings executed in accordance therewith, a procuring agency has broad discretionary authority to award contracts in the interest of the national defense. "* * * ASPR 3–216 * * * provides that the Secretary shall determine when it is in the interest of the national defense *to negotiate a contract with a particular manufacturer* in order to assure that property or services will be available to the Government during a national emergency." 49 Comp. Gen. 463, 471 (1970). [Italic supplied.]

We see no reason to object to the exercise of that authority. The record establishes that the Air Force has a legitimate basis for making an award to SAT. It is reported that the aircraft offered by SAT are desired for the Civil Reserve Air Fleet (CRAF) and, therefore, are essential to the airlift mobilization base program. It is further reported that these aircraft were in the mobilization base during the previous fiscal year and that SAT has participated in these mobilization base procurements each year since 1961. The Class Determinations and Findings signed by the Secretary of the Air Force states that "it is in the interest of national defense that contracts with CRAF air carriers * * * be consummated so as to assure availability to the DOD of a commercial airlift augmentation fleet best adapted to DOD needs in case of national emergency." Pursuant to that D & F, the Air Force has determined that DOD needs will best be served by an award to SAT. It has further determined that SAT is a CAB-certified air carrier and is qualified to perform the contract in accordance with the provisions of the solicitations, and is otherwise a qualified offeror.

Accordingly, since it appears that the proposed award to SAT would be in accordance with the Determinations and Findings and would not be contrary to any provision of law or of implementing directives, we are unable to interpose an objection to an award to SAT.

You also contend that the proposed sale of SAT would contravene the statutory provisions regarding disposal of Government property. The degree to which the Government possesses any legal or beneficial interest which may be disposed of by sale has not been established. In any event, such sale has apparently not yet taken place and we do not have sufficient information with respect to the procedure expected to be followed in connection with the proposed disposition to render any judgment as to its legality. We think it is appropriate to point out, however, that 40 U.S.C. 484(e)(3) provides for disposal by negotiation with such competition as is "feasible under the circumstances" in given situations, one of which is where the national security will thereby be promoted.

For the foregoing reasons, your protest is denied.

[B-178477]

Officers and Employees—Transfers—Relocation Expenses—House Sale—Title in Wife's Name

An employee who subsequent to receiving notice of a transfer but prior to the actual date of transfer marries and thereafter establishes a residence in a dwelling which was owned and occupied by his wife at the time he was officially informed of his transfer, and the employee and his wife were occupying the dwelling at the time of transfer is not precluded under section 4.1 of Office of Management and Budget Circular A-56 from being reimbursed the expenses of selling the dwelling incident to the move to the new official station since the literal language of section 4.1 permitting reimbursement of the expenses of the sale of a dwelling at the old official station only if an employee acquired interest in the dwelling and if the dwelling was his actual residence at the time he was informed of the transfer is not for application where the employee had established a bona fide residence in his wife's home prior to transfer.

To R. J. Schullery, August 13, 1973:

Your letter of June 4, 1973, requests our decision as to the propriety of certifying for payment a voucher in the amount of $2,016 submitted by Mr. Matthias J. Strahm for reimbursement of expenses incurred in July 1972 incident to the sale by Mr. Strahm of a residence in Prairie Village, Kansas, in connection with his transfer of official station from Kansas City, Missouri, to Des Plaines, Illinois.

The record indicates that Mr. Strahm was officially notified of his change of station by letter dated January 3, 1972; however, his actual transfer was delayed until July 1972 because of the nonavailability of office space at the new station. He was verbally authorized to proceed with the permanent change of station on May 1, 1972, and that authorization was confirmed by a written travel order dated June 9, 1972. Mr. Strahm reported for duty at his new station on July 6, 1972.

Mr. Strahm had, in the meantime, been married on April 26, 1972, and after that marriage moved into the dwelling in Prairie Village in

which his wife and her children were residing at the time of the marriage. That dwelling, which was apparently acquired by Mrs. Strahm in 1968, was later sold incident to the transfer.

You have expressed doubt as to whether the claim may be certified for payment since the dwelling sold by Mr. Strahm was not his residence in January 1972 at the time he was first informed by competent authority that he was to be transferred, and in that regard you refer to the provisions of section 4.1d of Office of Management and Budget (OMB) Circular No. A–56. You point out, however, that the employee did not acquire the dwelling he sold for the purpose of obtaining personal financial gain and believe that because the transfer was delayed by the agency for 6 months, Mr. Strahm may have a just claim.

Section 4.1 of OMB Circular No. A–56, to which you refer, provides in part as follows:

> * * * To the extent allowable under this provision, the Government will reimburse an employee for expenses required to be paid by him in connection with the sale of one residence at his old official station; purchase (including construction) of one dwelling at his new official station; or the settlement of an unexpired lease involving his residence or a lot on which a mobile home used as his residence was located at the old official station; *provided that*:
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> * * * * * * *
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> c. * * * In order to be eligible for reimbursement of costs of selling a dwelling or terminating a lease at the employee's old official station, acquisition of the employee's interest in the property must have occurred prior to the date when the employee was first definitely informed that he is to be transferred to the new official station.
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> d. * * * The dwelling for which reimbursement of selling expenses is claimed was the employee's residence at the time he was first definitely informed by competent authority that he is to be transferred to the new official station.

The literal language of section 4.1 permitting reimbursement of the expenses of the sale of a dwelling at the old official station only if the employee acquired his interest in the dwelling and if the dwelling was his actual residence at the time he was first definitely informed of the transfer would appear to preclude any reimbursement of selling expenses of a house which an employee neither had title in nor used as his residence at the time he was first officially informed of the transfer. However, our view is that the regulation was not intended for application in a situation such as here where the employee had in fact established a bona fide residence in his wife's home prior to transfer. Accordingly, where an employee, subsequent to receiving notice of a transfer but prior to the actual date of transfer, marries and thereafter establishes a residence in a dwelling which had been owned and occupied by his wife at the time he was first officially informed of the transfer, and the employee and his wife occupy the dwelling at the time of transfer, we do not think he should be precluded from claiming the expenses of selling the dwelling incident to the move with his family to the new official station.

Accordingly, we would not object to reimbursing Mr. Strahm for the selling expenses to the extent they are otherwise proper under Circular No. A-56. The voucher, which is returned herewith together with supporting papers, may be certified for payment in accordance with the above.

[B-178106]

Bids—Discarding All Bids—Administrative Determination—Faulty

The rejection under a November 29, 1972 solicitation for the construction of an anchored concrete retaining wall to provide erosion protection at Chalk Island, South Dakota, of all bids after bid opening on January 4, 1973, because phases of the work had to be performed in December while the water was at its lowest level was within the scope of the broad authority granted agencies to discard bids and readvertise a procurement. Although the contracting agency should have recognized before bids were exposed that the ideal time to start the work was in December to allow the contractor to work during the entire non-navigation season and should have issued the invitation early enough to make an award by December, to proceed with the procurement solely because of the administrative deficiencies would be contrary to sound procurement principles.

To Cole and Groner, August 14, 1973:

By letter dated March 1, 1973, and subsequent correspondence, you protest on behalf of your client, the J. V. Bailey Company, Incorporated (Bailey) of Rapid City, South Dakota, the rejection of all bids under invitation for bids (IFB) No. DACW45-73-B-0048, dated November 29, 1972, issued by the United States Army Corps of Engineers (Corps), Omaha District, Nebraska. It is your contention that the Army's rejection of all bids after bid opening is not supported by cogent and compelling reasons.

The solicitation is for the construction of an anchored concrete retaining wall to provide erosion protection at Chalk Island, which is below the Gavins Point Dam, Lewis and Clark Lake, Yankton, South Dakota. Bids were opened on January 4, 1973, and four bids were received as follows:

Bidder	Bid
J. V. Bailey Co., Inc.	$242,900.00
Industrial Builders, Inc.	$254,025.00
Brower Construction Co.	$384,195.00
Eagle Construction Corp.	$422,550.00
Government estimate	$240,024.80

However, on January 24, 1973, the Deputy District Engineer determined that Bailey was a nonresponsible contractor, and the Small Business Administration (SBA), Denver, Colorado, was so notified. Prior to a final determination by the SBA of Bailey's responsibility, all bids were rejected by letter dated February 5, 1973. You protested the rejection of all bids to the contracting officer, when denied the pro-

test by letter of February 20, 1973. Thereafter, you protested to our Office.

The contracting officer explained his reasons for canceling the solicitation in his letter of February 20, as follows:

> While it is true that the provisions of the contract would have allowed a contractor a total of 300 days to complete the work, there are certain phases of the work which would have had to be accomplished while the water was at its lowest level. If the contract would have been awarded, the first order of work would have been to excavate the slope of the island to proper grade, and establish a shelf or work area in order to start the trench for the lower section of the concrete wall. The lowest excavation for the trench would have been at Elevation 1150.00 MSL which is approximately 10 feet below the power plant tailwater (1159.80) with the present water discharge of 20,000 CFS. The Gavins Point Power Plant is scheduled to start increasing water releases in mid March, and it is expected that full plant capacity of 34,000 to 35,000 CFS will be reached in 5 days. Tailwater elevation for this discharge in 1972 was about 1163.2 MSL. If spillway releases are required, this will raise the tailwater even higher, making the work in the trench excavation that much more complicated.
>
> Due to the lateness in the non-navigation season, it is felt that a contractor would not have the time to do the excavation of the slope, establish the work shelf and excavate the trench prior to the scheduled increased releases. If award was made immediately, it would be nearly the 1st of March before work could be started near the tailwater surface leaving the contractor only 15 days before he was faced with the higher releases. With this particularly in mind, the decision was made that the proposed work be withdrawn for the present and readvertised so that a later award of contract can be made allowing the Contractor to work during the entire non-navigation season. It is our position that if the work could be started in December of 1973, a contractor would have a full 3½ months to complete the lower section, and be clear of the tailwater by the start of the increased flows in mid March 1974.

You contend that there is no cogent and compelling reason to justify the rejection of bids since the projected tailwater conditions were contemplated by and contained in the solicitation, and since there have been no changes in the specifications. You state that the tailwater conditions would not prevent Bailey from completing the project on time irrespective of when the award is made. Alternatively, it is your position that since the solicitation contains no date by which notice to proceed with the contract work must be given, the Corps could award the contract to Bailey and delay giving notice to proceed until December 1973, in which case Bailey would make no claim for additional compensation. In addition, you set forth several reasons for your belief that the contemplated readvertisement would result in increased costs to the Government. Finally, it is your belief that there is in this case an obvious inference that the Corps followed the "easier" course of bid rejection rather than contest the question of Bailey's responsibility at the SBA.

This Office has held that where no cogent or compelling reason exists for the rejection of bids, such rejection is improper. B–146213, July 26, 1961; *see also* 39 Comp. Gen. 396 (1959); 36 *id.* 62 (1956). However, we have consistently recognized that the administrative authority to reject all bids and readvertise the solicitation is very broad.

The record indicates that the cost of performing the initial phase of the work (the excavation work) is much less during a period of low tailwaters than during a period of high tailwaters. Therefore, the ideal time to start the work is in December, thereby allowing the contractor to work during the entire non-navigation season, which apparently ends in mid-March.

However, the invitation was not issued until November 29, 1972, and bids were opened January 4, 1973. Nevertheless, the Corps planned to make a prompt award in order to permit the contractor to complete the initial phase before mid-March. As indicated above, the Corps' plan was frustrated and the invitation was canceled.

We believe that it would have been better procedure for the Corps to have issued the solicitation early enough so that an award could have been made by December. A contracting agency should provide for performance meeting its requirements under the least onerous conditions, thus expanding competition, minimizing cost (and presumably price), and making satisfactory performance more likely. While we believe the deficiency in the procurement should have been recognized before bids were exposed, we do not think a procurement contrary to sound principles should be continued solely because of administrative deficiencies. It is clear that the work may be performed at a later time consistent with the Government's needs under less onerous conditions. Although you insist that a readvertisement of the procurement will result in increased costs, the administrative conclusion on this point is supported by the record.

Finally, you have suggested that an award could have been made to Bailey under this solicitation and the Corps then could have waited until December 1973 to give the contractor notice to proceed with the work. As the contracting officer points out, both the amount of work and the type or quality of work might change substantially after another navigation season has passed. Under the circumstances we believe it would be improper for the Corps to award a contract for the work before its needs are firmly established. *See* 47 Comp. Gen. 103, 107 (1967).

Accordingly, we believe that cancellation of the solicitation was a proper exercise of administrative discretion. Your protest is therefore denied.

However, we have pointed out to the Secretary of the Army by letter of today, copy enclosed, our views in the matter.

[B–165038]

Pay—Retired—Increases—Voluntary *v.* Involuntary Retirement

The court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that the words "shall if not earlier retired be retired on June 30,"

which are contained in the mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid the Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as the officers held on active duty beyond the mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that the officers were entitled to compute their retired pay on the higher rates in effect on July 1, will be followed by the General Accounting Office (GAO). Therefore, under the *res judicata* principle, payment to the claimants for periods subsequent to the court's decision may be made at the higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of the fact the court's decision is an original construction of the law changing GAO's construction, may be made both retroactively and prospectively, subject to the October 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B-165038 and other contrary decisions.

Pay—Retired—Annuity Elections for Dependents—Effect of Judgment Increasing Retired Pay

Since the ruling in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, only establishes that a higher active duty pay rate was required to be used in computing plaintiff's retired pay entitlement, and 10 U.S.C. 1436(b) makes no provision for a voluntary reduction of an annuity elected under the Retired Serviceman's Family Protection Plan (RSFPP) in the circumstances of a retroactive increase in active duty pay, only the costs of an annuity may be recomputed on the basis of the higher retired pay rate, and a retroactive change in the annuity elected, or withdrawal from the Plan may not be retroactively authorized. However, pursuant to 10 U.S.C. 1436(b) a retired member may apply prospectively for an annuity reduction, or under 10 U.S.C. 1552 military records may be retroactively changed to correct an error or remove an injustice.

To the Secretary of Transportation, August 16, 1973:

Reference is made to United States Coast Guard letter dated November 17, 1972, file reference 7500, to our Transportation and Claims Division concerning the application of the ruling in the case of *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, in the computation of retired pay of other Coast Guard officers. Specifically, that letter asks the following questions:

(1) As to future payments to claimants under the referenced decision, will we be able to apply the principle of Res Judicata, and pay the increased rates of pay to the officer claimants for periods subsequent to the date of the Court of Claims Decision?

(2) Will this decision be followed for other claimants, retroactively or prospectively? That is, will the Comptroller General permit us to follow the decision for all purposes?

(3) We assume that costs for RSFPP must be recomputed (for participants) based on the higher rates of pay. Is this correct?

We have also received a letter dated June 1, 1973, file reference 7500, from the Commandant of the Coast Guard elaborating on and presenting further the Coast Guard's views regarding question (3).

The plaintiffs in the *Chester* case were 18 Regular Coast Guard captains retired in 1968 or 1969 who had each completed 30 years of active commissioned service in the Coast Guard in the year of their retirement. Each was qualified for voluntary retirement under either 14 U.S. Code 291 or 292 at the time of his retirement and each was within the purview of the mandatory retirement provisions of 14 U.S.C. 288(a)

Thirteen of the plaintiffs were voluntarily retired pursuant to 14 U.S.C. 291 or 292 on July 1, 1968, or July 1, 1969. The remaining five plaintiffs were retained on active duty to varying dates in 1968 or 1969 after July 1, for medical evaluation. Of this group, four were placed on the temporary disability retired list after July 1 of the year in which retired and the last one was voluntarily retired under 14 U.S.C. 292 (nondisability) on September 30, 1968.

The plaintiffs fell into two general classes, those who were purportedly voluntarily retired under 14 U.S.C. 291 or 292 on July 1, and those who were retained on active duty beyond July 1 for medical reasons and subsequently voluntarily retired. As indicated previously, all plaintiffs in that case were subject to mandatory retirement pursuant to 14 U.S.C. 288(a) on June 30 of the year in which retired, and were also qualified for voluntary retirement pursuant to 14 U.S.C. 291 or 292.

Subsection 288(a) of Title 14, U.S. Code, provides as follows:

> (a) Each officer of the Regular Coast Guard serving in the grade of captain whose name is not carried on an approved list of officers selected for promotion to the grade of rear admiral shall, *if not earlier retired*, be retired on June 30 of the fiscal year in which he, or any captain junior to him on the active duty promotion list who has not lost numbers or precedence, completes thirty years of active commissioned service in the Coast Guard. [Italic supplied.]

In our decisions, B-165038, January 6, 1969, and B-165038(1) and (2), June 2, 1969, we held that an officer subject to the mandatory retirement provisions of 14 U.S.C. 288(a) may not retire voluntarily under some other provisions of law (for example 14 U.S.C. 291 or 292), when such voluntary retirement becomes effective on the same date that the mandatory retirement is required under section 288(a); that an officer retired under 14 U.S.C. 288(a) must have his retired pay computed on the basis of the active duty pay to which he was entitled in June, not the rates of pay in effect on the following July 1; and that the fact that a Coast Guard captain subject to 14 U.S.C. 288(a) is retained on active duty beyond his mandatory retirement date does not add to his rights in any way in computing the amount of retired pay to which he is entitled.

The court in the *Chester* case declined to follow our construction of 14 U.S.C. 288(a). Instead, the court took the position that the words "shall, if not earlier retired, be retired on June 30 * * * *" are reasonably to be interpreted to mean that such an officer's retirement must occur no later than June 30, if earlier retirement, for whatever cause, has not obviated the necessity for retirement on June 30, and does not absolutely forbid voluntary retirement pursuant to 14 U.S.C. 291 or 292 on that terminal date. Therefore, the court held that officers in that situation were entitled to compute their retired pay on the higher

rates in effect on July 1. The court also held that those officers held on active duty beyond the mandatory retirement date and retired after June 30 are entitled to no less than the other officers and were, therefore, also entitled to compute their retired pay on the July 1 pay rates.

Since it appears that the court was fully aware of the reasons for the decisions of this Office to the contrary and since the court's interpretation of the statutes here involved is not unreasonable, we will now follow that interpretation and our decision B–165038, January 6, 1969, and B–165038(1) and (2), June 2, 1969, and other similar decisions to the contrary will no longer be followed.

Therefore, question (1) of the letter of November 17, 1972, is answered in the affirmative.

Regarding question (2), since this decision is a changed construction of the law based on an original construction of the law by the court, it should be applied retroactively as well as prospectively for other members in similar circumstances. *Cf.* 39 Comp. Gen. 321 (1959). However, it may not be applied retroactively beyond the period (10 years in most cases) provided by the barring act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a. *See* the answer to question 2b in 41 Comp. Gen. 812, 818 (1962). Doubtful cases should be submitted to this Office for determination.

In regard to question (3), the Coast Guard, in letter of June 1, 1973, says that after further consideration of that question, they have concluded that their interest requires elaboration of that issue, in effect asking the supplemental question whether certain of the claimants in the *Chester* case should be permitted to retroactively exercise their option to either reduce the amount of their participation in, or withdraw from, the Retired Serviceman's Family Protection Plan. In this regard, the Coast Guard has expressed the view that the claimants in the *Chester* case should be offered the opportunity to choose to have their annuities under the Retired Serviceman's Family Protection Plan (RSFPP, 10 U.S.C. 1431 *et seq.*) remain at the amount which they had elected prior to the Court of Claims decision or to have it computed on the basis of the retired pay to which the Court of Claims decided they were entitled.

In support of that position there is cited 10 U.S.C. 1436(b) which was amended by section 1, clause (6) of the act of August 13, 1968, Public Law 90–485, 82 Stat. 753, to, among other things, authorize the Secretary concerned, upon application by the retired member, to allow the member to reduce the amount of the annuity specified by him under 10 U.S.C. 1434(a) and (b) but to not less than the prescribed minimum. The law requires that a retired member may not so reduce an annuity earlier than the first day of the seventh calendar month beginning after he applies for reduction.

In that letter, it was explained that eight of the captain/plaintiffs in the *Chester* case elected to participate in the Retired Serviceman's Family Protection Plan prior to the enactment of Public Law 90-485, and subsequent to the 1968 amendments to the act, they chose to come within the purview of the amended provisions. However, after having made that choice and prior to the court's decision in the *Chester* case it is stated that certain of the plaintiffs had seen no necessity to exercise their right under 10 U.S.C. 1436(b) to reduce the annuities they had elected. It is indicated that because of the court's ruling, they are now faced with the prospect of an involuntary retroactive increase in the amount of the annuity they elected and the cost of their contribution to the Retired Serviceman's Family Protection Plan. Further, such increases could be viewed by these members as a penalty in that they are being treated differently than they would have been on retirement due to an error by the Coast Guard in computing their retired pay. The Coast Guard, therefore, proposes that the eight retired captains, who have the right to reduce their annuity under 10 U.S.C. 1436(b), be permitted to exercise that right retroactively, effective the first day of the seventh calendar month from the date of retirement.

It is further stated that since all the issues in this case are being settled retroactively, a request for retroactive reduction of an annuity under 10 U.S.C. 1436(b) presents no particular problem.

Retroactive reduction of annuities under the Retired Serviceman's Family Protection Plan was not an issue in the *Chester* case and the court did not refer to it. That ruling established only that a higher active duty pay rate was required to be used in computing the plaintiffs' retired pay entitlement. Neither the ruling in the *Chester* case nor the applicable provisions of law governing voluntary reduction of annuities (10 U.S.C. 1436(b)) make any provision for retroactive reductions in annuities under these circumstances. There is also for noting that 10 U.S.C. 1436(b) specifically provides that no amounts by which a member's retired or retainer pay is reduced prior to the effective date of a reduction of annuity, withdrawal, change of election or election under that subsection may be refunded to or credited on behalf of the member by virtue of an application made by him under that subsection.

We have held that under the Uniformed Services Contingency Option Act of 1953 (renamed the Retired Serviceman's Family Protection Plan) only one computation of the amount of reduction in retired pay is contemplated, and that the amount of the annuity to be paid to the designated dependents of the member making the election is to be based on the retired pay at the time such computation is made. *See* 33 Comp. Gen. 491 (1954). And, we have held that when the computation

of a member's reduction in retired pay for the annuity he has elected is erroneously computed because it is based on a rate of retired pay which he is receiving but which is not the rate to which he is legally entitled, the reduction is to be recomputed based on the correct rate of retired pay. *See* 34 Comp. Gen. 151 (1954).

It is our view, therefore, that the computations of reduction in retired pay for annuities for the plaintiffs in the *Chester* case must be recomputed on the basis of the rates of retired pay to which they are entitled under the court's decision and we may not authorize a retroactive change in the annuity elected other than such recomputation on the basis of the changed pay rates. Accordingly, question (3) of the November 17 letter is answered in the affirmative and the supplemental question indicated in the June 1 letter is answered in the negative.

Of course, pursuant to 10 U.S.C. 1436(b) any retired member may now apply prospectively for a reduction in his annuity if he so chooses. And, should an error or injustice result from these members' changed rates of retired pay, under 10 U.S.C. 1552 the Secretary of Transportation has ample authority, acting through boards of civilians, to correct any military record of the Coast Guard when he considers it necessary to correct such error or remove such injustice. A correction of an election under the Retired Serviceman's Family Protection Plan pursuant to 10 U.S.C. 1552 would be retroactive. *See* 32 Comp. Gen. 242 (1952), 34 *id.* 7 (1954), 43 *id.* 245 (1963), and 44 *id.* 143 (1964). Also, *cf. McDonald* v. *United States*, 193 Ct. Cl. 795 (1971).

[B-172594]

Travel Expenses—Reemployment After Separation—Liability for Expenses

The phrase "in the same manner" contained in 5 U.S.C. 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to a former employee separated by reduction in force or transfer of function and reemployed within 1 year, as though the employee had been transferred in the interest of the Government without a break in service to the reemployment location from the separation location, when construed in conjunction with 5 U.S.C. 5724(e), which provides similar expenses for employees transferred from one agency to another because of reduction in force or transfer of function, permits payment of costs in whole or in part by the gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under section 5724a(c) or section 5724(e), they may be paid by the gaining or losing agency within a 1-year period. 51 Comp. Gen. 14, 52 Comp. Gen. 345, and B-172594, June 8, 1972, overruled.

To the Assistant Secretary of the Navy, August 16, 1973:

We refer to your letter of May 2, 1973, assigned PDTATAC Control Number 73-19, by which you request reconsideration of our decision of December 14, 1972, 52 Comp. Gen. 345, concerning the funding of

travel and transportation expenses and other benefits paid to employees who have been reemployed in the Federal service within 1 year after being separated due to a reduction in force or transfer of function. You also ask, in the event the decision remains unchanged, whether for the purposes of the DOD Program for Stability of Civilian Employment, the Department of Defense may be considered a single agency and thereby authorize the losing DOD activity to pay relocation expenses within the United States.

You state that the Department of Defense Program for Stability of Civilian Employment is a comprehensive program for locating civilian positions within the Department in which displaced career and career-conditional employees may be placed. As an integral part of this program, the losing activity is required to fund the allowable relocation expenses for employees who are reemployed in another DOD activity within 1 year after being separated due to a reduction in force, transfer of function, or base closure. You state that "In the operation of the DOD Program for Stability of Civilian Employment, about eighty percent of the displaced employees who are placed in other positions within the United States and require relocation are placed after separation." Accordingly, our decision of December 14, 1972, adversely affects the operation of this program because prospective receiving activities are reluctant to accept displaced employees if they are required to fund the relocation expenses of such employees.

Section 5724a(c) of Title 5, U.S. Code, provides:

> (c) Under such regulations as the President may prescribe, a former employee separated by reason of reduction in force or transfer of function who within 1 year after the separation is reemployed by a nontemporary appointment at a different geographical location from that where the separation occurred may be allowed and paid the expenses authorized by sections 5724, 5725, 5726(b), and 5727 of this title, and may receive the benefits authorized by subsections (a) and (b) of this section, in the same manner as though he had been transferred in the interest of the Government without a break in service to the location of reemployment from the location where separated.

As to the obligation of an agency to fund or pay the allowable relocation expenses of an employee transferring from one agency to another, as distinguished from a former employee reemployed by a different agency within one year after his separation, 5 U.S.C. 5724(e) provides:

> When an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by this section. However, under regulations prescribed by the President, in a transfer from one agency to another because of a reduction in force or transfer of function, expenses authorized by this section and sections 5726(b) and 5727 of this title (other than expenses authorized in connection with a transfer to a foreign country) and by section 5724a (a), (b) of this title may be paid in whole or in part by the agency from which the employee transfers or by the agency to which he transfers, as may be agreed on by the heads of the agencies concerned.

Our decisions of July 7, 1971, 51 Comp. Gen. 14, and June 8, 1972, B-172594, involved the funding of relocation expenses of overseas em-

ployees who are returned to the United States after their separation due to a reduction in force, but are reemployed within a year after their separation. In 51 Comp. Gen. 14 we noted that 5 U.S.C. 5724a(c) relates only to an employee's entitlement to reimbursement for relocation expenses and that it is silent as to whether these expenses are to be funded by the losing or receiving agency. However it was noted in the June 8, 1972 decision that under 5 U.S.C. 5722(a)(2) the losing agency's liability for such expenses is terminated when the employee is removed from its rolls and separated at his actual place of residence upon his return from an overseas assignment. Accordingly we concluded that the receiving agency should, consistent with the general authority of 5 U.S.C. 5724a, pay the expense of any additional travel required by the reemployment of a former employee within 1 year after his separation due to a reduction in force or transfer of function. On the basis of these decisions, we held in our decision of December 14, 1972, that there is imposed by statute upon the department which employs a former employee within 1 year after his separation due to a reduction in force or transfer of function an obligation to fund the allowable relocation expenses to the new duty station. In so holding we took the position that the procedural provisions of 5 U.S.C. 5724(e) relating to the funding or payment of relocation expenses are applicable only to transfer situations and not to reemployment situations where an employee is entitled to relocation expenses under 5 U.S.C. 5724a(c).

Upon reconsideration we now conclude that our prior decisions were unnecessarily restrictive. In this regard section 5724a(c) expressly provides that a former employee separated by reason of reduction in force or transfer of function who is reemployed within 1 year may be allowed travel, transportation and relocation benefits "in the same manner as though he had been transferred in the interest of the Government without a break in service to the location of reemployment from the location where separated." Under section 5724(e) the travel, transportation and relocation expenses of an employee who is transferred from one agency to another because of a reduction in force or transfer of function may be paid in whole or in part by the gaining or losing agency as the heads of such agencies may agree upon.

It is now our view that the language "in the same manner" appearing in section 5724a(c), above, reasonably may be construed not only as authorizing payment of the same substantive benefits to employees transferred in reduction-in-force proceedings and to those who are separated and reemployed by a different agency within 1 year, but also as authorizing payment of such benefits by the gaining or losing agency to the same extent whether the reduction in force involves a direct transfer or a separation and rehiring by a different agency with the 1-year period.

We note that the statutory regulations promulgated under the statutory provisions in question make no provision governing funding of the benefits paid to employees involved in reduction-in-force proceedings. In the absence thereof we would have no objection to funding authorized expenses in reduction-in-force situations in any manner authorized by the cited statute.

To the extent that our decisions of December 14, 1972 (52 Comp. Gen. 345), June 8, 1972 (B-172594), and July 7, 1971, 51 Comp. Gen. 14, are inconsistent with this conclusion, they no longer should be followed.

From the foregoing it follows that no reply is required to the second question.

[B-176949, B-177228]

Bids—Competitive System—Geographical Location Restriction

Although the basic principle underlying Federal procurement is to maximize full and free competition, legitimate restrictions on competition may be imposed when the needs of a procuring agency so require, and the Home Port Policy to perform ship repairs in a vessel's home port to minimize family disruption is not an illegal restriction since a useful or necessary purpose is served. Therefore a low bidder under two invitations to perform drydocking and repair of utility landing craft in the San Diego area who offered to perform at Terminal Island properly was denied the contract awards. However, where all or most of a vessel's crew are unmarried, the home port restriction does not serve to foster the Home Port Policy and, therefore, if a feasible determination can be made prior to the issuance of a solicitation that a geographical restriction has no applicability, it should not be imposed.

To R. D. Sweeney, August 17, 1973:

This is in reference to the September 8 and October 11, 1972, telefax messages from Harbor Boat Building Company, and to your subsequent correspondence on its behalf, protesting against the award of contracts under invitations for bids (IFB) No. N62791-73-B-0433 and N62791-73-B-0471, issued by the Supervisor of Shipbuilding, 11th Naval District, San Diego, California.

IFB-0433 was for the drydocking and repair of utility landing craft LCU-1628, and IFB-0471 called for similar work on LCU-1617. Both solicitations contained a requirement that the work be performed in the San Diego area. Your client's bids on the two procurements, while apparently low, were rejected because they indicated Terminal Island, California, a distance of approximately 100 miles from San Diego, as the place of performance. Awards in both instances were then made to the second low bidders.

You object to the use of the geographic restriction in these invitations, and to the Navy's Home Port Policy which results in such restrictions. You assert that this policy violates various procurement laws and regulations because it restricts competition and because it is contrary to various national policies regarding a broad mobiliza-

tion and industrial base. You also claim that the requirement for performance in the San Diego area was not a material requirement of these solicitations and therefore should have been waived so as to permit acceptance of your client's bids.

The Navy reports that the Home Port Policy, which calls for the maximum possible amount of ship maintenance to be performed on a naval vessel in the vessel's home port, was established by the Chief of Naval Operations to "minimize disruption to Navy Families" in an effort to eliminate a significant problem with respect to personnel retention. This policy was implemented by a revision dated April 29, 1971, to section 7-3.4 of the Naval Ship Systems Command's Ship Repair Contract Manual. The revised section provides that, except in certain limited circumstances, "the performance of work shall be restricted to the home port area to which such ships and craft have been assigned, and bids or proposals shall be solicited only from qualified firms within the home port area." The section also provides for the broadening of the geographical area if adequate competition or reasonable prices cannot be obtaned within the home port area. It is further reported that the geographic restrictions in the two IFBs were included therein pursuant to the Manual provision quoted above, since both the LCU-1628 and LCU-1617 were homeported in San Diego, and that your client's failure to meet these IFB provisions required rejection of its bids.

The basic principle underlying Federal procurement is that full and free competition is to be maximized to the fullest extent possible, thereby providing qualified sources an equal opportunity to compete for Government contracts. *See* 10 U.S. Code 2305; Armed Services Procurement Regulation (ASPR) 1-300.1. However, it is well established that legitimate restrictions on competition may be imposed when the needs of procuring agencies so require. 42 Comp. Gen. 102 (1962). Many of these restrictions are specifically provided for in the ASPR (*see*, for example, ASPR 1-1101, *et seq.*, regarding qualified products lists). Others, which are not specifically mentioned in ASPR, are imposed in accordance with the particular need of the Government, and may involve such things as product experience, 48 Comp. Gen. 291 (1968); ability to demonstrate a complex system having specified performance features, 49 Comp. Gen. 857 (1970); and geographic requirements. B-157053, August 2, 1965, and B-157219, August 30, 1965. Our Office has taken the position that these various solicitation provisions, while obviously restrictive of competition in the broadest sense, need not be regarded as *unduly* restrictive when they represent the actual needs of the procuring agency. 52 Comp. Gen. 640 (1973); B-157053, *supra*. Further, the fact that one or more bidders

or potential bidders cannot comply with the requirements of particular solicitation provisions does not automatically make those provisions unduly restrictive. 52 Comp. Gen. 640, *supra*.

In support of its policy of restricting ship repair work to home ports, the Navy states the following:

> The intent of this policy is not to favor the award of overhaul contracts to any particular area but, instead, to minimize disruption to Navy families. While family separation has always been, and always will be, an expected part of Navy life, unnecessary separations must be avoided if the Navy is to retain the trained manpower necessary for the future. * * *
>
> * * * Family separation is a hardship and is one of the more compelling reasons cited for not adopting a Navy career. With the advent of an all volunteer Navy, and with strenuous competition for manpower from the other Armed Forces and from the civilian sector, it is imperative that the quality of Navy life be maintained at an acceptable level. One important way we can improve the average Navy man's life is to allow him time with his family; one way chosen to do this is to accomplish the maximum possible amount of ship maintenance in the ship's homeport.

Our records indicate that prior to implementation of the Home Port Policy, procurements of this type were generally restricted to potential contractors located within the particular naval district involved. As you point out, we stated, in our Report to the Congress, B-133170, March 19, 1970, that this limitation was "not conducive to keen competition." The Congress refused, however, to legislatively prohibit the use of such geographic restrictions in ship repair procurements. *See* 114 Cong. Rec. 29341-45, 29346-47. Therefore, while it is clear that this policy may sometimes result in increased costs to the Government and may prevent some bidders who are otherwise qualified from competing for an award, we cannot agree that the Home Port Policy is unduly restrictive of competition so as to contravene the statutory requirement for competitive procurements. We think the record in this case adequately shows that the Navy's restrictive requirement "serves a useful or necessary purpose" in meeting its needs, B-157053, *supra*, since personnel morale and retention will be better served by minimizing the occasions on which its ship crew personnel must be separated from their families. Furthermore, as the Navy points out, home port restrictions are not to be applied if they would "prevent the obtaining of adequate competition" or would result in unreasonably high costs. (The Navy further points out that adequate competition was obtained in these procurements since bids were received from four firms within the restricted area in response to each solicitation.) Accordingly, we do not believe that application of Home Port Policy to Federal procurements is illegal.

You have asserted, however, that none of the crew members attached to the LCU-1617 was married. It appears to us that where all or most of the crew of a particular vessel are unmarried, the home port restriction does not serve to foster the stated purpose of the Home Port

Policy and, therefore, the policy should not be applied. However, we are not in a position to know whether it would be administratively feasible for procurement officials to determine, prior to the issuance of solicitations, if Home Port Policy considerations are applicable to specific vessels. If such a determination feasibly can be made, we believe the geographic restrictions of the Home Port Policy should not be imposed when it is shown that the policy has no applicability to a given procurement. Therefore, in our letter of today to the Secretary of the Navy, copy enclosed, we are suggesting that appropriate steps be taken to waive the home port restriction in those cases where its application would not further the intent of the Home Port Policy.

[B-178167]

Military Personnel—Separation—Election of Separation Point

A Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to the Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Government aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, the debarkation point for Treasure Island, and to be entitled to a mileage allowance pursuant to M4157(1)(c) and M4150-1, Joint Travel Regs., for the distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Government transportation, which was available at the time he traveled.

Transportation—Dependents—Military Personnel—Release From Active Duty—Payment Basis

Entitlement to the expenses incurred for the travel of a Navy member's wife who accompanied him via commercial air from his overseas station in Hawaii, where his orders made no provision for her travel and authorized him to proceed to the Brooklyn, N.Y. Naval Station for separation to his home of record, Niagara Falls, N.Y., depends on whether her presence overseas was command sponsored. If so, reimbursement may be made for the cost of Government air from Hickam AFB to Travis AFB, the initially contemplated debarkation point, and for mileage from the Hawaii residence to Hickam AFB, and from Travis AFB to home of record. If not command sponsored, there is no entitlement to overseas transportation at Government expense and transportation within continental United States is limited in view of paragraph M7003-3b(3), Joint Travel Regs., to a monetary allowance for the distance between New York, N.Y., the aerial port of debarkation, and Niagara Falls.

To the Department of the Navy, August 17, 1973:

Your letter dated December 13, 1972, file reference FT:MO:gon 7240, forwarded to this Office by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 73-6) by endorsement dated March 7, 1973, requests an advance decision concerning the entitlement of AG2 Gerard M. Cahill, USN, 126 36 5293, to reimbursement for the cost of commercial air transportation for his

wife and himself from Honolulu, Hawaii, to New York, New York, under the circumstances described below.

Incident to his separation from the Navy, the member was directed by Standard Transfer Order No. 152-72 dated September 12, 1972, to report to an intermediate station, Hickam Air Force Base (AFB), Honolulu, Hawaii, for his departure to the continental United States. The member's ultimate destination was his home of record. He was further directed to report to the nearest naval separation activity to his port of debarkation in CONUS (continental United States), not later than September 17, 1972, for temporary duty in connection with separation processing.

The normal port of debarkation for members reporting from Honolulu, Hawaii, for separation processing is Travis AFB, California. Your letter indicates that Travis AFB was the contemplated port of debarkation in the present case at the time the orders were issued. An appropriate separation activity for members whose port of debarkation is Travis AFB is Naval Station, Treasure Island, San Francisco, California. *See* article 3810260-4 of Bureau of Naval Personnel Manual (BUPERSMAN), NAVPERS 15791B.

However, the member was authorized, at his request, to report to Naval Station, Brooklyn, New York, for his separation processing. In authorizing the member to report to this station instead of the separation activity nearest to the contemplated port of debarkation (Naval Station, Treasure Island), the endorsement on the member's transfer orders provided:

> At your request you are authorized to report to NAVSTA Brooklyn, NY instead of the separation activity nearest to the port of debarkation, for temporary duty in connection with separation processing, with the understanding that you are not entitled to reimbursement for mileage or expenses in excess of that allowed for travel to the separation activity nearest to the port of debarkation and thence to your home of record or place of acceptance. In case you do not desire to bear this expense, you will regard this authorization as canceled and carry out your basic orders.

It is noted that the above endorsement is required to be inserted in a member's transfer orders, as stated, where he is authorized at his request to report to a naval station for separation processing other than the appropriate separation activity nearest the port of debarkation. *See* article 3810260-2(1) of BUPERSMAN, NAVPERS 15791B.

In addition to the above, the transfer orders directed travel by Government aircraft, where available, from OUTUS (outside the United States) to CONUS (continental United States). You say that although travel by Government aircraft was directed and available to CONUS, the member elected to travel direct from Honolulu, Hawaii, to New York, New York. This travel was apparently accomplished by commercial aircraft. In this connection, you say that the member was

informed at his last permanent duty station that he could elect to travel with his dependent wife at his own expense from Hawaii to New York and be reimbursed on a mileage basis for the distance from Travis AFB to his home of record.

In view of the above facts, you indicate that it is the opinion of your office that by bypassing the port of debarkation on the west coast of the United States the member acquired a new port of debarkation at New York, New York, and therefore entitlement to allowances for his travel and his dependent's travel would change. As a result of this conclusion, you ask the following questions:

A. If orders direct travel by Government air and the member elects to travel at his own expense from Honolulu, Hawaii, to New York, New York, is the member entitled to mileage allowance from the west coast of the United States (Travis AFB) to his home of record (Niagara Falls, New York)?
B. How is the member's entitlement for his dependent's travel determined?

Concerning the member's entitlement to mileage allowance for his travel to New York, New York, he had been authorized to report to a separation station of his own choice (Naval Station, Brooklyn, New York) rather than the normal separation for members returning from Honolulu, Hawaii (Naval Station, Treasure Island, San Francisco, California). In this connection, paragraph M4157(1)(c) of the Joint Travel Regulations (JTR) provides that contingent upon implementation in regulations of the service concerned, a member who is authorized, as distinguished from directed, to travel from his last permanent duty station to a separation station of his own choice and for his own convenience and from such separation station to home of record or place from which called to active duty, as the member may elect, will be entitled to the travel allowances prescribed in paragraph M4150 or M4159, as applicable, for such travel not to exceed the travel allowances which would have been allowed had the member been ordered to the appropriate separation activity prescribed by service regulations and separated thereat. *See* implementing paragraph 4002–1a(3) of the U.S. Navy Travel Instructions, NAVSO P–1459.

Paragrah M4157–1b, JTR, provides that a member who is separated from the service or relieved from active duty outside the United States will be entitled to travel allowances as provided in paragraph M4159 of the regulations. Under paragraph M4159–4a, when Government transportation is available and when travel is directed (as distinguished from authorized) by Government transportation and the member performs transoceanic travel by another mode of transportation at personal expense, no reimbursement for the transoceanic travel is authorized.

The transfer orders in the present case specifically directed travel by Government aircraft where available from OUTUS (outside the

United States) to CONUS (continental United States). The member's contemplated port of debarkation in the continental United States at the time the transfer orders were issued was Travis AFB, California. Thus, it appears that when travel by Government aircraft was directed, such direction was only intended to apply to the member's anticipated overseas travel from Honolulu, Hawaii, to Travis, AFB, California.

In the absence of orders specifically directing the use of Government transportation to New York, New York, the actual port of debarkation, or of provision of law requiring that we consider that the overseas portion of the member's travel terminated there and not at the appropriate port of debarkation, Travis AFB, it is our view, in the circumstances, that the overseas travel may be regarded as having terminated at Travis AFB. Consequently, transportation to New York, New York, will not be regarded as part of the overseas travel, nor as subject to the direction to use Government aircraft. *See* 41 Comp. Gen. 100 (1961), wherein we stated that where a member is not expressly directed by orders to use Government transportation he is to be regarded as only having been authorized to use such transportation. *See also* 52 Comp. Gen. 297 (1972), copy enclosed.

Payment of mileage allowance may therefore be made, under the authority of paragraphs M4157(1)(c) and M4150–1, JTR, not to exceed the distance from Travis AFB, California, the member's appropriate and contemplated port of debarkation in this case, to Naval Station, Treasure Island, San Francisco, California, the appropriate separation activity for members whose port of debarkation is Travis AFB, and then to Niagara Falls, New York, the member's home of record.

As to the member's travel from Honolulu, Hawaii, to Travis AFB, paragraph M4159–1a precludes reimbursement thereof since the transfer orders directed travel by Government transportation between these two points, and Government transportation was available to the member for such travel.

With respect to the member's entitlement to reimbursement of the travel expenses for the transportation of his dependent wife from Honolulu, Hawaii, to New York, New York, such reimbursement depends upon whether or not the wife's presence at the overseas duty station was authorized or approved by the appropriate military overseas commander (i.e., whether or not the member's wife was "command sponsored"). The member's transfer orders made no provision for the travel of his wife. Also, other than an indication that his wife flew with him to New York via commercial air, the present record does not contain any evidence regarding this matter.

Paragraph M7000 of the JTR entitles members to transportation of dependents at Government expense upon a permanent change of station for travel performed from the old station to the new permanent station or between points otherwise authorized, except for travel to the United States when the presence of the dependents at the overseas duty station was not authorized or approved by the appropriate military commander (subpar. 17). Paragraph M7009-1 provides that a member on active duty who is separated from the service or relieved from active duty is entitled to transportation of dependents not to exceed the entitlement from his last permanent duty station, or place to which his dependents were last transported at Government expense, to the place to which the member elects to travel under the provision of paragraph M4157.

Paragraph M7002-1b of the regulations provides that when a dependent who is authorized to travel by available aircraft at Government expense elects to travel at personal expense by water or air transportation other than that offered by the Government, reimbursement will be limited to the cost of Government air transportation or Government-procured air transportation, whichever is the lesser, except in several situations which apparently are not applicable here.

Therefore, if the member's wife were command sponsored, it appears that she would be entitled to reimbursement for the cost of Government air from Hickam AFB, Hawaii, to Travis AFB, California, and additionally, to mileage from her residence in Hawaii to Hickam AFB, and from Travis AFB, to Niagara Falls, New York.

In the event that the member's wife was not command sponsored, she would not be entitled to overseas transportation at Government expense, her entitlement being limited to transportation within the continental United States. However, in view of paragraph M7003-3b(3) of the JTR, her monetary allowance would be limited to the distance from the aerial port of debarkation actually used, New York, New York, to Niagara Falls, New York, in accord with our decisions B-175340, June 9, 1972, and B-177479, July 12, 1973, copies enclosed.

Your questions are answered accordingly. Supporting documents are returned herewith.

[B-178604]

Property—Public—Damage, Loss, etc.—Measure of Damages—Restoration of Claimant's Position

The inclusion of overhead by an Air Force installation in damages collected from the REA Express for the Government's repair of radar sets damaged in transit was not improper because the overhead constituted 43 percent of the damages assessed since the law is concerned with the restoration of a claimant to the position he would have occupied had there been no loss or damage to its shipment, and the overhead cost assessed is sustained by cost accounting records. Moreover,

the courts in addition to direct cost of labor and materials have included overhead in damages allowed, and REA previously accepted overhead charged when the overhead represented 20 percent of repair costs. The courts also require any enhancement of value by reason of repair to be proved defensively by competent evidence and, therefore, consideration may not be given to REA's unsupported allegation that the value of the radar sets was enhanced by the repair job.

To REA Express, August 20, 1973:

Consideration has been given to your request by letter dated April 24, 1973, REA Express Claim No. GBL D-4014432, for review of the action taken by our Transportation and Claims Division by letter dated April 4, 1973, TC-SR-014986-EJW, which disallowed your claim for $316 ($316.60) deducted by the Department of the Air Force Freight Claims Branch from revenues otherwise due REA Express (hereafter REA).

The amount deducted represents overhead assessed by the Sacramento Air Material Area, McClellan Air Force Base, California, as part of the cost of repairing damage to three radar sets (electrical instruments NOI) for which REA is responsible incident to transportation of the property from McGuire Air Force Base, New Jersey, to McClellan Air Force Base, California, under Government bill of lading No. D-4014432, dated October 15, 1968. REA accepts responsibility for the damage and has voluntarily refunded $423.33 which was billed as direct material cost ($246) and direct labor ($177.33) but rejects the overhead costs of $316.60 (39 direct man-hours at $8.118) billed by the work center. You contend that the overhead costs amounting to 43 percent of the total expenditure for direct material and labor costs in repair of the radar sets are unreasonable and that the Department of the Air Force failed to allow any consideration for the enhancement in value to the Air Force of the radar sets by reason of the repair job.

Section 20(11), Part I, of the Interstate Commerce Act, 49 U.S. Code 20(11), made applicable to motor carriers by section 219 of Part II of the act (49 U.S.C. 319, 1964 ed.), provides that a carrier that receives and transports property shall be liable "for the full actual loss, damage, or injury to such property" which the carrier causes or which is caused by a connecting carrier to which the property is delivered. The law is concerned with restoration of the claimant to the position he would have occupied had there been no loss or damage to the shipment. *Atlantic Coast Line Railway Co.* v. *Roe*, 118 So. 155 (1928).

It is generally held that where goods are damaged which are susceptible of repair, the owner is obligated to accept the property and to do whatever is necessary to mitigate the extent of the damages. The owner, however, is entitled to recover the cost of such replacements and repairs as are necessary to restore him to the position he would have occupied had there been no loss or damage to the shipment. See *United States* v. *Delaware Bay & River Pilots Assoc.* (*The L-1*),

10 F. Supp. 43 (1935); *Brown* v. *Roland*, 104 P. 2d 138 (1940); *Kohl* v. *Arp*, 17 N.W. 2d 824 (1945).

You state that reliance by the Government upon *Conditioned Air Corporation* v. *Rock Island Motor Transit Co.*, 114 N.W. 2d 304 (1962) and *The L–1*, *supra*, to support the general application of a 43 percent burden is misplaced. In both of these cases overhead costs were included in the damages allowed. In *Conditioned Air Corporation*, the Iowa Supreme Court stated at pages 309, 310 and 311:

> The authorities generally distinguish between operating and overhead expense. The former consists of those items inseparably connected with the productive end of the business. The latter consists of charges generally of a nonproductive or indirect nature such as administrative costs incident to the management, supervision or conduct of the capital outlay of the business. Lytle, Campbell & Co. v. Somers, Fitler & Todd Co., 276 Pa 409, 120 A 409, 27 ALR 41, 43–44; Mann v. Schnarr, 228 Ind 654, 95 NE2d 138, 141, 142–143.
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> "Overhead" cannot be defined with precision. "It may be said to include broadly the continuous expenses of a business irrespective of the outlay on particular contracts." Wynkoop Hallenbeck Crawford Co. v. Western Union Tel. Co., 268 NY 108, 196 NE 760, 761; Grand Trunk Western R. Co. v. H. W. Nelson Co., 6 Cir, Mich, 116 F2d 823, 839.
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> Gordon Form Lathe Co. v. Ford Motor Co., 6th Cir, Mich, 133 F2d 487, 500–501, is a patent infringement case which considers the effect of overhead in determining profits. We quote from the opinion: "It is a matter of common knowledge that all well-managed manufacturing businesses recognize overhead costs as financial outlays expended in the production of an article or process * * *.
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> There is probably no single phase of determining cost of manufacturing a device or machine which is more elusive or difficult than the allocation of overhead to a particular article. The impossibility of precise allocation is generally recognized and the law is not so exacting as to require a delicately balanced scientific method of determination, which reaches a mathematical certainty * * *.
>
> The cost of manufactured products consists of the sum of direct costs, that is, direct material and direct labor, plus indirect costs, or manufacturing expense. Because of its indirect and general nature, manufacturing expense cannot be charged directly to each production order as can direct material and direct labor. It must therefore be distributed over production in such manner that each kind of product and each lot of work produced will be charged with its fair share of the indirect expense.

In the *Conditioned Air Corporation* case the objection raised by the defendant was not primarily to the extent of the allowance for operating and overhead expense in addition to the direct cost of labor and material but was to any allowance at all for operating and overhead expense. The court there did not accept defendant's contention and allowed operating and overhead expense.

You contend that overhead expense to be recoverable must be reasonably foreseeable and properly allocated and such overhead items are capable of being established by competent proof and as reasonably related to the repairs performed as a result of carrier's negligence.

The above-cited cases hold that in addition to direct cost of labor and materials, damages include a fair allowance for operating and overhead expense. It is our view that since the item assessed for overhead was based upon cost developed by the Air Force installation cost

accounting records, there was a reasonable basis therefor and since the cost was reasonably related to the repairs and materials in restoring the radar sets, the overhead item is clearly supportable. In this connection, Air Force regulations specify that overhead is the product of actual direct hours times the predetermined or standard overhead rate. Such rate is based on the fiscal year overhead budget and activity estimate. The rate is determined from the depot and field maintenance cost accounting system. You apparently accept an allowance for overhead as being an item of damages since you indicate that in similar situations REA has been willing to accept a charge of 20 percent for overhead.

Your reference to "special damages" which are not a natural and probable result of the loss or damage and for which the carrier is not generally liable in the absence of notice of special conditions is inapposite. As shown above there is ample authority for including overhead costs in any damage claim and, if the repairs had not been made at the Government facility, there would have been an additional charge for transporting the damaged property to and from the place of repair plus profit for a private contractor.

You indicate that the Department of the Air Force should have allowed you some consideration for the enhancement in value of the radar sets by reason of a presumably competent repair job. In *Pasadena State Bank* v. *Isaac*, 228 S.W. 2d 127, 129 (1950), involving cost of repairing in transit damage to an accounting machine, the decision states:

> When the plaintiff introduced evidence to show the reasonable and necessary cost of restoring the accounting machine, including labor and transportation, to the identical condition it was in immediately prior to the damage thereto, a prima facie case was made out by the plaintiff. Presumably, if the expense incurred restored the machine to the same condition it was in prior to the accident, there was no enhancement in its value. Under such a fact showing, if the defendant desired to allege and prove by competent evidence that the value of the machine had been enhanced by the repairs made on it, then it was incumbent upon him to show defensively that there had been an enhancement. While the burden of the whole case was upon the plaintiff, still when the prima facie showing was made, as in this instance, the burden of proceeding shifted to the defendant to show that the repairs, as made, resulted in added value to the article in question.

The disallowance of your claim was, therefore, proper and is sustained.

[B-176012, B-176131]

Contracts—Specifications—Restrictive—Justification

Although the visual inspection of carlot quantities of produce at the growing areas is unduly restrictive of competition, the use of such source inspection by the Defense Supply Agency in its solicitations issued under the negotiating authority of 10 U.S.C. 2304(a)(9), concerned with the procurement of perishable or nonperishable subsistence supplies, was justified in view of the wide latitude in prescribed standards and, therefore, the rejection of the noncomplying low bidder under two solicitations for carlot quantities of fresh vegetables was proper.

However, the attention of the Director of the agency is being drawn to the June 25, 1973 General Accounting Office audit report in which recommendation is made that consideration be given to the possibility of drafting more exacting specifications so that the number of items requiring field inspection might be reduced.

To Amigo Foods Corporation, August 21, 1973:

We refer to your letter dated May 17, 1972, and supplemental correspondence, on behalf of the New York Produce Trade Association, protesting against the procurement policies of the Defense Personnel Support Center (DPSC) in connection with the purchase of fresh fruits and vegetables.

Your protest resulted from two procurements for carlot quantities of fresh vegetables, one awarded on May 16, 1972, by the Subsistence Regional Headquarters (SRH), Oakland, DPSC, Defense Supply Agency (DSA), and the other awarded on May 25, 1972, by SRH, New Orleans.

The May 6, 1972 award was for 330 cartons of iceberg lettuce, unwrapped, regular pack, and 550 cartons of iceberg lettuce, celo pack, to be delivered to Bayonne, New Jersey, on May 22, 1972. This procurement was a New York requirement which was forwarded for the purpose of effecting the purchase to the Salinas Seasonal Purchasing Office, a purchasing activity of SRH Oakland, located in the lettuce growing area. On April 21, 1972, Notice–To–Trade No. OAK–14–(72) was furnished to known suppliers soliciting oral offers. Awards under the notice were to be made pursuant to a Blanket Purchase Agreement issued under the negotiating authority of 10 U.S. Code 2304(a)(9). The notice provided that "all interested suppliers are required to notify the procurement agent and acquaint him with the location of packing and loading facilities and furnish full information with regard to anticipated supply of fresh fruit and vegetables available for purchase." The notice also provided that "Procurement of fresh fruits and vegetables shall be based upon the following mandatory specifications in the order listed:

a. Federal Specification
b. Coordinated Military Specification approved by the Department of Defense for its use
c. U.S. Standard for Grade"

The notice further specified that "awards will be made with due regard to quality, condition and other factors" and that "all offers submitted will be F.O.B. destination unless otherwise specified."

We are informed that in accordance with DSA procedures a Government purchasing agent visited the fields identified by the offerors to examine their products. Three of the nine offerors determined to have products of suitable quality and condition submitted prices. The pur-

chasing agent evaluated these offers and made award to Interharvest, Incorporated, at $3.91 a carton for unwrapped lettuce and $4.81 a carton for wrapped lettuce. A member of your trade association offered prices of $3 a carton for unwrapped lettuce and $3.75 for wrapped lettuce. This offer, and others from your trade association, were determined to be unacceptable because of the failure of the offerors to comply with the provision of the notice which required disclosure of the location of packing and loading facilities.

Since the basis for your protest and the relevant facts of both procurements are the same, we will limit our consideration to the Oakland procurement. In addition, it should be noted that our audit division has conducted an evaluation of the same DPSC field buying procedures which are the subject of this protest and its findings are included in a report entitled "Policies for Procurement of Fresh Fruits and Vegetables by the Defense Supply Agency," B-176012, B-176131, dated June 25, 1973, to Congressman Mario Biaggi, copy enclosed.

You contend that the requirement for source disclosure before award is arbitrary and unreasonably restricts competition. It is your position that since fresh vegetables (in this case lettuce) are purchased according to specifications at time of delivery, award should be made to the firm offering the lowest priced product which conforms to the specifications, notwithstanding any failure to disclose the origin of the product.

You contend that the source inspection is not necessary because all suppliers are required to meet Federal specifications at the time of delivery, which may occur as much as 12 days after the initial inspection. In this regard, you insist that the only operative factor is whether the produce complies at destination with United States Department of Agriculture (USDA) grade classifications and any other applicable specifications. You contend that you and other terminal market vendors (as distinguished from growers) can provide the Government with produce which complies with the specifications if the source inspection procedures are eliminated. In your view, DSA inspection procedures eliminate a large portion of the produce industry (terminal market vendors) who find it difficult to identify their sources without establishing specific growing area affiliations.

DSA insists that identification of the supply source is required in purchases of carlot quantities (source identification is not required when lesser quantities are involved) to enable the purchasing agent to visually inspect the product at the growing area. This inspection is necessary in DSA's opinion for proper evaluation of the offers. We are informed that USDA standards specify the maximum permissible defects that a product may have and still meet the minimum standards

for grade. Accordingly, the lowest priced offer may not be the best value because it may be for a product that barely meets the minimum standards.

The requirement to inspect the produce prior to award is based on the assumption that the visual inspection of fresh fruits and vegetables in the fields assures the best value for the Government. It is reported that the latitude in the USDA standards can cause variations in the actual market value of the produce being offered. For example, lettuce is very perishable and begins to deteriorate at time of harvest. We are informed that the degree of deterioration at any point in time after harvest is directly affected by the time lapse from harvest and temperature changes to which the lettuce may be subjected. These factors affect the amount of trim at the time and point of consumption, which makes a difference in the actual market value even though all the lettuce may grade within the tolerances of the USDA standard. DSA insists that without source inspection there is no practical way by which the actual harvest time of a product can be discerned prior to award.

In this connection, it has been brought to our attention that several of the larger chain stores utilize a similar technique in procuring fresh fruit and vegetables. Although they do not actually inspect the produce in the field during each procurement, they have employees in the growing area who provide intelligence as to the general conditions of the fields and crop quality.

It is also reported that USDA officials have acknowledged the value of the buyer being informed as to the reputation of growers and packers, as well as to the general condition of the growing areas and crops. On the other hand, they state that their field personnel can inspect to any specifications established by the buyer. Therefore, they suggest that DPSC develop tighter specifications and USDA field personnel will inspect to those specifications.

Although you have offered convincing arguments in support of your position that visual inspection of carlot quantities of produce at the growing area is unduly restrictive, we are unable to conclude that DSA's use of this procedure is without justification in view of the fact that the applicable specifications do not appear to be sufficiently stringent to assure the quality produce required. In this connection, by letter of today to the Director of the Defense Supply Agency, we are directing his attention to the recommendation in our audit report of June 25, 1973, that consideration be given to the possibility of drafting more exacting specifications so that the number of items requiring field inspections might be reduced.

[B-161261]

Military Personnel—Discrimination—Between the Sexes—Removal

The distinction between the dependents of male and female members of the uniformed services having been removed by the Supreme Court of the United States in *Frontiero* v. *Richardson*, decided May 14, 1973, and by the enactment of Public Law 93-64, effective July 1, 1973, the language in paragraph M1150-9 of the Joint Travel Regulations (JTR) reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of the date of the decision, May 14, 1973. Also recommended is the amendment of paragraph M7151-2 by deleting reference to lawful "wife" and substituting the word "spouse," but since the use of the term "dependent" in paragraphs M7151-2 and M7107 of the JTR is not discriminatory in the light of the *Frontiero* decision, no change in the language of the paragraphs is required.

To the Secretary of the Navy, August 27, 1973:

Reference is made to letter dated June 28, 1973, from the Assistant Secretary of the Navy, Manpower and Reserve Affairs, requesting a decision as to whether the definition of a dependent in paragraph M1150-9 of the Joint Travel Regulations properly may be amended in regard to a dependent of a female member of the uniformed services. This request has been assigned PDTATAC Control No. 73-32 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Assistant Secretary refers to the decision of the Supreme Court of the United States in the case of *Frontiero* v. *Richardson*, No. 71-1694, decided May 14, 1973, which held that the provisions of 37 U.S. Code 401, 403, and 10 U.S.C. 1072, 1076, requiring a female member to prove the dependency of her husband for basic allowance for quarters purposes and for his medical and dental benefits, which requirement is not imposed on a male member, were so unjustifiably discriminatory as to violate the Due Process Clause of the Fifth Amendment.

The Assistant Secretary also states that portions of the Joint Travel Regulations (JTR) which provide for the payment of other allowances based on dependency are predicated on sections of Chapter 7 (Allowances) of 37 U.S.C. other than those which were before the court. For the purposes of those regulations, it is stated that the definition of dependent contained in 37 U.S.C. 401 (which appears in Chapter 7) has been considered to be controlling of most entitlements contained in the JTR for dependent travel purposes, for station allowances outside the 48 contiguous United States and the District of Columbia, and for dislocation allowances. Consequently, it is explained that the sense of 37 U.S.C. 401 has been used as the basis of the definition of dependents contained in the JTR, paragraph M1150-9, except as defined in paragraphs M7107-1 and M7151-2.

It is further stated by the Assistant Secretary that based on the belief that the Supreme Court decision discussed above applies full force to the JTR entitlements prescribed under the authority of Chapter 7 of Title 37, U.S. Code, it is intended to amend the regulations by removing, effective May 14, 1973, from paragraph M1150–9 so much thereof as reads: "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support."

It is stated that this action will provide dependents of female members all of the entitlements provided for dependents of male members, except those covered by paragraphs M7107–1 and M7151–2, JTR, without a showing of support.

Our decision as to the propriety of the proposed action is requested. Additionally, the Assistant Secretary indicates that the definitions of the term "dependent" contained in paragraph M7107–1 of the regulations, used only to determine entitlement outside the United States for medical care, and the definition contained in paragraph M7151–2, incident to entitlements under Part D, Chapter 7, of the JTR, are believed not to be affected by the *Frontiero* decision, but our opinion regarding these definitions also is requested.

Since receipt of the Assistant Secretary's letter there has been enacted the act of July 9, 1973, Public Law 93–64, 87 Stat. 148, 37 U.S.C. 401(2), which, among other things, amends section 401 of Title 37, U.S. Code, by striking out the first sentence after clause (3) thereof which reads, "However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support." Clearly, such distinction between the dependents of male and female members is removed effective July 1, 1973, under the terms of that law.

Since paragraph M1150–9 of the JTR defines a dependent of a member to include the husband of a female member only if he is in fact dependent upon her for over one-half of his support, a requirement similar to that contained in 37 U.S.C. 401 prior to July 1, 1973, upon which the present definition in paragraph M1150–9 apparently is based, it appears that the standard for the determination of dependency of a female member's spouse contained therein would likewise be considered as violative of the Due Process Clause of the Fifth Amendment to the Constitution, prior to the date of enactment of Public Law 93–64, *supra*. Accordingly, we have no objection to deleting that part of paragraph M1150–9 of the regulation as proposed.

It may be noted that since there now should be no distinction in the definition of dependent as contained in JTR paragraph M1150–9,

subparagraph 1 thereof also should be amended to read, "1. his or her spouse."

Paragraph M7107 of the regulations (Transportation of Dependents Outside the United States for Medical Care) provides in subparagraph 1 that "the term 'dependent' means a person who has an active duty member sponsor and who has been authorized medical care in a uniformed service medical treatment facility without reimbursement by the Secretary of the service concerned or his designated representative." Since the term "dependent" is there defined to include a person who has an active duty member sponsor, and no distinction is made between male and female sponsors or their spouses, the provision would not appear to be objectionable in view of the *Frontiero* decision.

Paragraph M7151-2 of the JTR provides, in pertinent part, that the term "dependent" as used in Part D of Chapter 7 (travel of dependents upon the member's being officially reported as dead, injured, absent for a period of more than 29 days in a missing status, or upon decease) includes a "lawful wife." This regulation as it pertains to a member who dies while entitled to basic pay, is based on 37 U.S.C. 406(f) which provides that under regulations prescribed by the Secretary concerned, transportation for dependents of a member is authorized if he dies while entitled to basic pay under Chapter 3 of Title 37. As section 406(f) is included in Chapter 7 of Title 37, the definition contained in section 401 thereof is controlling and would include as a dependent the spouse of a member regardless of sex in accord with our prior comments regarding this provision.

The provision for dependent travel in other circumstances enumerated in Part D of Chapter 7 of the JTR, apparently is based on authority contained in Chapter 10, section 554 of Title 37, U.S. Code. Section 551(1)(A) of that Chapter defines a dependent with respect to a member of a uniformed service to mean "his wife." It is our opinion that the objection raised in the *Frontiero* decision regarding unjustifiable discrimination against female members also would be for application to a definition of dependency which excludes the husband of a female member. Consequently, we believe that paragraph M7151-2 of the JTR should be amended to delete reference to lawful "wife" and that the word "spouse" be substituted therefor.

In connection with the effective date of May 14, 1973, proposed for the regulation change under consideration, we have no objection at this time to such date. However, we have before us for consideration the question of retroactive entitlement to certain other allowances, such as basic allowance for quarters, etc., of female members of the uniformed services prior to May 14, 1973, the date on which the *Frontiero* case was decided.

It is also suggested that in view of the sense of the Supreme Court decision, the terms "he" or "his" as used in the regulations should be changed to include "she" or "her" as appropriate.

[B-177788]

Ceremonies and Cornerstones—Dedication—Expense Reimbursement

Since the holding of dedication ceremonies and the laying of cornerstones connected with the construction of public buildings and public works are traditional practices the costs of which are chargeable to the appropriation for the construction of the building or works, the expense of engraving and chrome plating of a ceremonial shovel used in a ground breaking ceremony would be reimbursable and chargeable in the same manner as any reasonable expense incurred incident to a cornerstone laying or dedication ceremony but for the fact evidence has not been furnished as to who authorized the chrome plating and engraving of the shovel; where the shovel originated; the subsequent use to be made of the shovel; and why there was a 1-year lag between the ground breaking ceremony and the plating and engraving of the shovel.

To C. A. Page, August 27, 1973:

Your letter of December 22, 1972, with enclosures (your reference 600:CAP:lb 7200) requesting an advance decision as to the legality and propriety of reimbursement pursuant to voucher 10-73 (SF 1129) in favor of Paul T. Buckner, Imprest Fund Cashier, Naval Support Activity, Fort Omaha, Nebraska, 68111, was forwarded here by second endorsement of January 9, 1973, from the Commander, Navy Accounting and Finance Center, Washington, D.C.

The voucher represents a claim for reimbursement by the Imprest Fund cashier for $24 paid for the engraving and chrome plating of a ceremonial shovel used by the Commandant, Third Naval District, in a groundbreaking ceremony on November 5, 1971, at the Armed Forces Reserve center, Staten Island, New York. Your doubt in the matter arises because of our decision reported in 15 Comp. Gen. 278 (1935) which held that the appropriation for the Naval Reserve was not available for the purchase of a trophy to reward the Naval Reserve Aviation Base standing first in efficiency each year.

It is settled that:

The holding of dedication ceremonies and the laying of cornerstones connected with the construction of public buildings and public works have been traditional practices, and any expenses necessarily incident thereto have generally been charged to the appropriation for construction of the building or works. B-158831, June 8, 1966.

In our decision B-11884, August 26, 1940, the expense of printing programs and invitations in connection with cornerstone ceremonies for the erection of a new Government agency office building was held

not to be chargeable to the agency's 1941 appropriation for "Miscellaneous and Contingent Expenses." Rather, such printing expenses were made chargeable to the funds available for the construction of the new building. In A-88307, August 21, 1937, we held that the appropriation for *expenses* of the Federal Trade Commission was not available for payment for recordings of a presidential speech and a group photograph of Commission members at the laying of the cornerstone of its building, since such expenses were not required in the performance of the Commission's legal duties. However, we noted that:

* * * the laying of cornerstones has been connected with the construction of public buildings from time immemorial and any expenses necessarily incident thereto are generally chargeable to the appropriation for *construction* of the building.

The appropriation cited in the reimbursement voucher is Operation and Maintenance, Navy 1973. Notwithstanding that this appropriation includes a provision for the expenses of "medals, awards, emblems and other insignia," it is evident that the expense of chrome plating and engraving a ceremonial shovel used in a groundbreaking ceremony should be treated in the same manner as any reasonable expense incurred incident to a cornerstone laying or dedication ceremony.

The aforementioned decisions concerning the authorization of expenses incurred in cornerstone and dedication ceremonies, rather than the decision reported in 15 Comp. Gen. 278 (1935), are for application here.

However, absent evidence as to who authorized the chrome plating and engraving of the shovel; where the shovel originated; the subsequent use that is to be made of the shovel; and why there was a 1-year lag (November 5, 1971, to November 20, 1972) between the groundbreaking ceremony and the plating and engraving of the shovel, this Office is unable to approve the requested $24 payment from any appropriation.

Accordingly, you are advised that reimbursement may not be effected (on the present record) and the voucher will be retained in the files of this Office.

[B-178904]

Officers and Employees—Death or Injury—Transportation of Remains

The cost of transporting the remains of a deceased Forest Service employee from Juneau, Alaska, where the employee had completed an agreed tour of duty, to Missoula, Montana, may not be reimbursed to the decedent's widow in the absence of specific authority for the Government to assume the expense. Since the deceased employee had completed a tour of duty 5 U.S.C. 5742(b)(1), authorizing the Government to defray the expense of preparing and transporting the remains of civilian employees who die while in a travel status, has no application, and furthermore, the authority in sections 1 or 7 of the Administrative Expenses

Act of 1946, which prescribes travel and transportation expenses in connection with transfer to and from a duty station outside the continental limits of the United States, and section 1.11d of the Office of Management and Budget Circular No. A–56, which provides for the return travel and transportation of employees serving under agreements has application only to living individuals.

To C. E. Tipton, United States Department of Agriculture, August 27, 1973:

We refer to your letter of June 12, 1973, reference 6540, requesting our decision as to whether the claim of Mrs. Dolores Peacock in the amount of $223.58, for reimbursement of expenses incurred in transporting the remains of her deceased husband, Clyde E. Peacock, a former employee of the Forest Service, from Juneau, Alaska, to Missoula, Montana, may be certified for payment.

While recognizing that our decisions 39 Comp. Gen. 716 (1960) and 40 *id.* 196 (1960) indicate that the expense in question may not be reimbursed, you express the belief that since Office of Management and Budget Circular No. A–56, as amended August 17, 1971, was promulgated and became effective after these decisions were issued, section 1.11d thereof may presently be interpreted as authorizing the return of employees, both living and dead, from Alaska to the United States at Government expense, provided of course that the conditions contained therein have been satisfied.

Section 1.11d of the Circular provides in pertinent part:

When an employee is eligible for return travel and transportation to his place of actual residence upon separation after completion of the period of service specified in an agreement executed under 1.5a(2) or separated for reasons beyond his control and acceptable to the agncy concerned he may receive travel and transportation to an alternate location provided the cost to the Government will not exceed the cost of travel and transportation to his residence at the time he was assigned to an overseas station * * *.

You state in this regard that Mr. Peacock did complete the agreed upon period of service as required by section 1.5a(2) of that regulation.

In our decision 40 Comp. Gen. 196, we considered the question of whether it was permissible to pay the expenses of return transportation of the remains of an employee who died while stationed in Alaska or Hawaii, under the authority of sections 1 and 7 of the Administrative Expenses Act of 1946, 5 U.S. Code 73b-1 and b-3. These sections provided for the reimbursement of travel and transportation expenses incurred by employees in connection with their transfers to duty stations outside the continental limits of the United States and return therefrom. In concluding that payment of expenses incurred for the transportation of an employee's remains could not be effected under the authority of section 1 and section 7 of the Administrative Expenses Act of 1946, we stated:

There is no express language in either section 1 or section 7 of the act authorizing the transportation of the remains of an employee under any cir-

cumstance. We think it significant that at the time of enactment of the Administrative Expenses Act of 1946 permanent legislation was in existence—the act of July 8, 1940, 5 U.S.C. 105a—specifically dealing with the matter of transporting the remains of deceased employees and prescribing the conditions under which the Government would pay for such transportation. Thus, at the time of enactment of the 1946 statute, there was no necessity for including provisions in that act governing the transportation of the remains of deceased employees. Hence, in the absence of an express provision in that act to the contrary, we are of the view that the authority for the transportation of an employee and his immediate family granted by the 1946 act applies only to living individuals and that the 1940 statute constitutes the exclusive statutory authority for the transportation of remains. It follows, therefore, that the transportation at Government expense of the remains of a deceased employee who dies while stationed in Alaska or Hawaii may not be effected under the authority of either section 1 or section 7 of the Administrative Expenses Act of 1946.

We believe that the same reasoning should be applied to the question before us, especially in view of the fact that the currently applicable provisions of law, 5 U.S.C. 5722, 5724 and 5742(b)(1), are codifications without substantive change in the provisions of law which were cited in that decision. Thus, there existed permanent legislation—5 U.S.C. 5742(b)(1)—specifically dealing with the matter of transporting the remains of deceased employees at the time Circular No. A-56 was revised on August 17, 1971. Further, section 1.11d of the Circular contains no express language authorizing the transportation of the remains of an employee. In view of the provisions of section 5742(b)(1) of Title 5, referred to above, we believe that section 1.11d must necessarily be considered as applying only to living individuals and that the provisions of section 5742(b)(1) govern entitlement for the return transportation of the remains of a deceased employee.

Section 5742(b)(1), Title 5, U.S. Code, provides in the above connection:

> (b) When an employee dies, the head of the agency concerned, under regulations prescribed by the President and, except as otherwise provided by law, may pay from appropriations available for the activity in which the employee was engaged—
>
> (1) the expense of preparing and transporting the remains to the home or official station of the employee, or such other place appropriate for interment as is determined by the head of the agency concerned, if death occurred while the employee was in a travel status away from his official station in the United States or while performing official duties outside the United States or in transit thereto or therefrom * * *.

Under the above provisions the remains of an employee who dies while stationed in the United States, including Alaska, may not be prepared and transported at Government expense unless at the time of his death the employee was in a travel status. Since it appears that Mr. Peacock was not in a travel status at the time of his death in Alaska, we must conclude that reimbursement of the expenses incurred for preparing and transporting his remains to Missoula, Montana, is not authorized under the terms of section 5742(b)(1) above.

The voucher which is returned herewith may not be certified for payment.

[B–178911]

Officers and Employees—Transfers—Relocation Expenses—Transportation for House Hunting—Successive Changes

An employee whose spouse did not perform the round-trip house hunting travel authorized pursuant to 5 U.S.C. 5724a(a)(2) in connection with his September 3, 1972 transfer to Atlanta, Ga., from Jackson, Miss., where his family remained until his second transfer in March 1973 to Richmond, Va., to which point his wife was authorized and did travel on a house hunting trip, may be reimbursed for the entire round-trip air fare from Jackson to Richmond, notwithstanding the cost exceeded the round-trip fare between Atlanta and Richmond, a determination that is in accord with 27 Comp. Gen. 267 and 48 Comp. Gen. 651, approving reimbursement to employees who before they moved their household goods or dependents to a new station were transferred a second time.

To Carmella J. Rizzo, United States Treasury Department, August 27, 1973:

Reference is made to your letter of May 30, 1973, reference A:F:F:V, concerning the disallowance of a house hunting expense claim for $57.26 of Mr. Emmett Cameron.

Mr. Cameron was transferred from Jackson, Mississippi, to Atlanta, Georgia, effective September 3, 1972, and was transferred from that duty station to Richmond, Virginia, in March 1973. In connection with the first transfer Mr. Cameron and spouse were authorized round-trip travel to the new official station to seek residence quarters. Both the employee and his spouse were also authorized such travel in connection with the second transfer. However, Mr. Cameron's family remained in Jackson during the period he was assigned to Atlanta and his spouse did not perform the round-trip travel authorized until March 1973 when she traveled from Jackson to Richmond in connection with the second transfer. Mr. Cameron's claim for reimbursement of the costs involved in that travel was disallowed to the extent that the cost of air travel as performed from Jackson to Richmond and return exceeded the cost of round-trip travel between Atlanta and Richmond. The reclaim voucher you submitted with your letter is for reimbursement of the amount which was disallowed.

In the decision 27 Comp. Gen. 267 (1948) we held that an employee who is transferred from one official station to another and who before shipment of his household goods to such new station is transferred to a third station within the 2-year allowable period is entitled to reimbursement for shipment of his household goods from the first to the third station. In the decision 48 Comp. Gen. 651 (1969) it was held that a similar rule should be applied to the reimbursement of an employee for the travel of his immediate family.

We see no reason for applying a different rule in cases involving round-trip travel to seek residence quarters as authorized under 5 U.S. Code 5724a(a)(2) and section 7 of Office of Management and Budget Circular No. A-56, effective September 1, 1971, effective at the time the travel in question was performed, now paragraph 2.4 of the Federal Travel Regulations (FPMR 101-7). This is particularly true where, as here, the spouse who went on the house hunting trip never moved from the original duty station.

Accordingly, the voucher which is returned herewith may be certified for payment.

[B-174314]

Contracts—Novation Agreements—Propriety

A proposed novation agreement among the contractor—a wholly owned subsidiary of a large concern—awarded two Government contracts for hydraulic turbines and other items, the subcontractor who assumed the responsibility to complete the contracts upon the closing down of the subsidiary plant and sale to a foreign corporation of those assets not needed to perform the contracts, and the Government may be approved if in the best interest of the Government. Although the novation agreement will contravene the Anti-Assignment Act, 41 U.S.C. 15, since the exception in ASPR 23-102(a) that permits recognition of a third party as a successor in interest to a Government contract is not applicable as the subcontractor's interests in the contracts are not "incidental to the transfer" of the subsidiary, there is no objection to recognition of the assignment if it is administratively determined to be in the best interests of the Government.

To the Secretary of the Army, August 28, 1973:

We refer to correspondence from the attorneys for Baldwin-Lima-Hamilton Corporation (BLH), requesting our opinion as to whether the Nashville District Engineer and the Kansas City District Engineer, United States Army Corps of Engineers, may, as representatives of the Government, legally enter into novation agreements with BLH and the Allis-Chalmers Corporation (AC). The matter was the subject of a report dated January 31, 1973, from the General Counsel, Office of the Chief of Engineers.

BLH was awarded contract No. DACW41-68-C-0131 on April 15, 1968, by the District Engineer, Kansas City District, Corps of Engineers, Kansas City, Missouri. The contract required the design, manufacture, and delivery of six 42,400-hp. hydraulic slant type pump turbines and other miscellaneous items and services for the Truman Dam and Reservoir Project (formerly the Kaysinger Bluff Reservoir Project). Upon receipt of the contract award, BLH proceeded with performance.

BLH was also awarded contract No. DACW62-70-C-0012 on August 18, 1969, by the Nashville District, Corps of Engineers, Nashville, Tennessee. The contract required the design, manufacture, and delivery of one 98,000-hp. hydraulic turbine and other miscellaneous

items and services for the Laurel Project. The supplies and services to be provided under the contract were divided into two schedules. Upon award of the contract, only schedule I was released for performance and BLH proceeded to perform in accordance therewith.

BLH is a wholly owned subsidiary of Armour and Company and on July 6, 1971, Armour and Company publicly announced that it was closing its Baldwin–Lima–Hamilton Industrial Equipment plant at Eddystone, Pennsylvania. The plant closing effectively took place on April 30, 1972, at which time all manufacturing operations ceased.

Between the date of announcement of the closing and the effective date of such closing, BLH sold all of its Industrial Equipment Division's real estate, machinery and product lines. The BLH hydraulic turbine and valve product line was sold on October 20, 1971, to an Austrian corporation. The assets included in this particular sales agreement did not include any backlog work or work-in-process. BLH retained responsibility for completion of performance of all contracts in backlog and for all executed contracts still in warranty. Both contracts mentioned above were among those in BLH's backlog which required completion of performance.

As of the effective date of the plant closing, BLH had substantially completed performance under contract -0131. Schedule I of contract -0012 had been completed and notice to proceed with schedule II had been received. (In this connection, *see* B–174314, April 6, 1972.) To assure continuity of performance after the plant closing, BLH subcontracted its complete scope of performance obligations (except for design responsibility under -0131) and the assumption of all terms, conditions, obligations and liabilities of BLH under these contracts to AC. BLH transferred to AC all of its special assets that in any way pertained to the performance of the above contracts and not already possessed by AC.

A novation agreement among BLH, AC and the United States Government, in accordance with the provisions of section XXVI, part 4, of the Armed Services Procurement Regulation (ASPR) is the desire of both BLH and AC. Reportedly, on August 24, 1972, Colonel W. R. Needham of the Kansas City District, Corps of Engineers, advised BLH by telephone that the District had decided that there were sufficient advantages to the Government to warrant requesting our Office to render a decision with respect to the legality of entering into such a novation agreement.

BLH contends that the proposed novation agreement will be to the Government's advantage for several reasons, among which are the following: AC is a highly qualified contractor and the only remaining producer of hydraulic turbines in the United States; the Government

would have direct contact with the contractor performing the work; BLH's parent company, which is not now responsible for performance of the contract, would be willing to act as guarantor under the novation agreement; and certain of the warranty rights which will expire prior to completion of the projects would be extended. Furthermore, BLH argues that the novation agreement may be legally consummated, notwithstanding the provisions of the Anti-Assignment Act, 41 U.S. Code 15, because (1) its award of subcontracts to AC was an involuntary assignment and, therefore, not prohibited, citing several court cases, and (2) ASPR 26-402(a) provides that the Government may recognize a third party as the successor in interest to a Government contract where the third party's interest is incidental to the transfer of "* * * all that part of the contractor's assests involved in the performance of the contract."

It is the Corps' position that the proposed novation agreement would be contrary to the Anti-Assignment Act notwithstanding the exception provided in the cited regulation because AC's interest in the contracts would not be incidental to transfer of "* * * all that part of the contractor's assets involved in the performance of the contract." In this connection, it is pointed out that the bulk of the assets of the product lines was sold to the Austrian corporation and not to AC. However, we understand that the Corps is not otherwise opposed to a novation and, in fact, recognizes that it would be advantageous to the Government in certain respects. We agree with the Corps' position.

The Anti-Assignment Act, with certain exceptions, declares void the assignment by a contractor of an interest in a contract so far as the United States is concerned. However, in 32 Comp. Gen. 227, 228 (1952), we stated that—

> While section 3737, Revised Statutes [the Anti-Assignment Act] prohibits the transfer of contracts with the United States, it has been held that this section is intended for the protection of the Government which may treat a contract as annulled by an assignment or recognize the assignment as the circumstances in a particular case may warrant. * * *.

With regard to the provision in ASPR 26-400, concerning the transfer of assets, we stated in B-173331, August 19, 1971, as follows:

> The Government is generally not so much interested in what assets are transferred, or in what manner the transfer of property or interest therein is accomplished, the main concern of the agency concerned being whether the new contractor is in fact a successor in interest to the Government contract and whether the novation agreement is consistent with the Government's interest. * * *.

Accordingly, it is our opinion that the desired novation would be in contravention of 41 U.S.C. 15. However, should it be determined that the best interests of the Government require that the novation agreement be approved, our Office would interpose no objection to such a proper exercise of administrative discretion to recognize the assignment.

[B–178136]

Transportation—Household Effects—Delivery—Attempted First Delivery

A supplemental billing for an alleged attempted first delivery of an employee's household effects, where the alleged advance notice of the consignee's inability to accept delivery as originally scheduled is not rebutted by a record that does not suggest the telephonic cancellation of the original delivery date was inadequate or not in compliance with any tariff provision relating to formal requisites of notice, may not be certified for payment. Furthermore, the hold-up delivery message left with an employee of the transfer and storage concern presenting the supplemental billing is imputed to the concern, and also no Government agent was at fault; no notice of attempted delivery, as required by the bill of lading, was left at the designated place of delivery; no inquiry was made as to when redelivery should be made, and no request was made for further instructions.

To Donald E. Muldoon, Department of Housing and Urban Development, August 28, 1973:

Your letter of March 2, 1973, reference 9AF, concerns a supplemental billing presented by Las Vegas Transfer and Storage, Inc., in connection with the transportation of household effects from Las Vegas to Reno, Nevada, belonging to Andrew McGuire, an employee of the Department of Housing and Urban Development. The Public Voucher for transportation charges contains, among other charges, an item in the amount of $200 for an alleged attempted first delivery. In view of the assertion by the employee's wife that notice by telephone of the consignee's inability to accept delivery as originally scheduled on November 22, 1972, was given to claimant's delivery agent, Bender Moving and Storage, Inc., 2 days in advance of that date, you request our advice concerning the propriety of paying the $200.

The carrier's Combination Bill of Lading and Freight Bill No. WO 41578 indicates that the shipment was received by Las Vegas Transfer and Storage on November 10, 1972, and was placed in Bender's storage facilities at Reno on November 13, 1972. Actual delivery was effected, apparently, on December 7, 1972. In controversy are two factual questions: whether notice was given on November 20, and whether delivery was attempted on November 22.

In responses to an inquiry from our Office dated May 8, 1973 (copy enclosed), Las Vegas Transfer and Storage, Inc. forwarded a reply, dated January 22, 1973, to a message from claimant, dated January 18, 1973 (copy enclosed), in which Bender stated that Mrs. McGuire called and wanted her household effects delivered on November 22, 1972. Mrs. McGuire's letter of February 1, 1973, by implication, agrees that November 22, 1972, was the delivery date originally agreed upon by the parties. But the record contains no rebuttal to Mrs. McGuire's assertion that she also called Bender 2 days before November 22, 1972,

canceling the original delivery date, and there is nothing in the record suggesting that the notice was inadequate or not in compliance with any tariff provision relating to formal requisites of notice. In the absence of such rebuttal, notice to the employee who received Mrs. McGuire's message is imputed to the employer, Bender. Therefore, if delivery was attempted by Bender on November 22, 1972, it was through no fault of the consignee, and there is nothing in the record indicating that an agent of the Government was at fault.

There is no documentary evidence in the record supporting the claim that delivery was in fact attempted on November 22, 1972. Section 4(a) of the Contract Terms and Conditions on the reverse of the carrier's Bill of Lading states in pertinent part:

> * * * In the event the consignee cannot be found at the address given for delivery, then in that event, notice of the placing of such goods in said warehouse or other available place shall be left at the address given for delivery and mailed to any other address given on the bill of lading for notification, showing the warehouse or other place in which such property has been stored, subject to the provisions of this paragraph.

We realize that these provisions relate to consignee's liability for storage charges and the extent of carrier's liability for loss or damage to the household effects, but the notice therein specified is the type of evidence, if given, that could support the contention that delivery was in fact attempted. Although Bender asserts delivery was attempted on November 22, 1972, and that no one was at the place designated for delivery, Bender's employees apparently left no notice there, such as that provided for by section 4(a) of the Contract Terms and Conditions of the Bill of Lading.

Another factor undermines Bender's contention that delivery was attempted on November 22. The Storage-In-Transit section of the Statement of Accessorial Services Performed (DD Form 619), relating to GBL F-7857055, shows "Date In" as November 13, 1972, and "Date Out" as December 6, 1972 (or December 7, 1972). The absence of any reference to November 22, 1972, as a date on which the household effects were taken out of storage and in, is not consistent with Bender's position. Moreover, if Bender did make an attempted delivery on November 22, the record does not indicate Bender made any inquiry as to when redelivery should be made nor that any request for further instructions was sought thus lending credence to Mrs. McGuire's statement that she notified Bender on November 20th not to make delivery on the 22nd. It was not until Mrs. McGuire notified Bender to make delivery on December 6 that the redelivery was effected, indicating that Bender had acquiesced in the cancellation notice of November 20.

Under these circumstances, which include an unrebutted affirmation that advance notice canceling the originally established delivery date

was given, we are of the opinion that the $200 charge for attempted first delivery should not be allowed.

Accordingly, the $200 item may not properly be certified for payment.

[B–164081]

Appropriations—Fiscal Year—Availability Beyond—Federal Aid, Grants, etc.—School Assistance in Federally Affected Areas

The Second Supplemental Appropriations Act, 1973, Public Law 93–50, approved July 1, 1973, although not specifically providing funds for the increase from 54 to 68 percent authorized for section 3(b) School Assistance in Federally Affected Areas, is considered by reason of raising the limitation on fund availability for section 3(b) students during fiscal year 1973, as having appropriated the additional funds, thus bringing the availability for obligation of the 1973 funds, notwithstanding the prohibition against the availability of appropriations beyond the current year, and the failure to extend the availability of impact aid funds, prescribed for 1973 by the so-called "Continuing Resolution," P.L. 92–334, approved July 1, 1972, within the intent of the Public Works for Water and Power Appropriation Act, 1974, approved August 16, 1973, P.L. 93–97, extending the period for obligation of appropriations contained in the Second Supplemental Appropriations Act, 1973, for a period of 20 days following enactment of the 1974 act.

To the Secretary, Health, Education, and Welfare, August 30, 1973:

Reference is made to letter of August 21, 1973, from the Acting Assistant Secretary, requesting our opinion as to whether the Public Works for Water and Power Appropriation Act, 1974, approved August 16, 1973, Public Law 93–97, 87 Stat. 318, makes additional funds available for obligation under Public Law 81–874, as amended, 20 U.S. Code 236, *et seq.*, to provide assistance under the impact aid program to local educational agencies in areas affected by Federal activity.

The background of the matter leading up to your request is briefly set out below.

Appropriations for departments and agencies whose fiscal year 1973 annual appropriation act had not been enacted into law as of July 1, 1972, were provided by the so–called "Continuing Resolution," Public Law 92-334, approved July 1, 1972, 86 Stat. 402.

Since no annual appropriation act was enacted for fiscal year 1973 for the Department of Health, Education, and Welfare (HEW) the obligations and expenditures of the Department were governed by the provisions of the Continuing Resolution, as amended, during the entire fiscal year.

Under such circumstance, funds available for the impact aid program were required to be apportioned to educational agencies in a manner so as not to distinguish between "section 3(b) students" under Public Law 81–874—children whose parents reside or are employed on Federal property—and "section 3(a) students"—children whose parents reside on *and* are employed on Federal property (64 Stat. 1102).

However, Public Law 93-25, approved April 26, 1973, 87 Stat. 26, making supplemental appropriations for certain agencies, contains the following provision--

School Assistance in Federally Affected Areas

None of the funds made available by the Continuing Resolution as amended (Public Law 92-334, Public Law 93-9) for carrying out title I of the Act of September 30, 1950, as amended (20 U.S.C., ch. 13), shall be available to pay any local educational agency in excess of 54 per centum of the amounts to which such agency would otherwise be entitled pursuant to section 3(b) of said title I and none of the funds shall be available to pay any local educational agency in excess of 90 per centum of the amounts to which such agency would otherwise be entitled pursuant to section 3(a) of said title I if the number of children in average daily attendance in schools of that agency eligible under said section 3(a) is less than 25 per centum of the total number of children in such schools.

Thereafter, the 54 percent limitation provided with respect to "section 3(b) students" was increased to 68 percent by a provision contained in the Second Supplemental Appropriations Act, 1973, Public Law 93-50, approved July 1, 1973, 87 Stat. 106, as follows:

School Assistance in Federally Affected Areas

The paragraph under this heading in Public Law 93-25 is amended by striking out "54%" and inserting in lieu thereof "68%."

It should be noted here that Public Law 93-50 also provides in section 301 thereof that--"No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."

Although the Second Supplemental Appropriations Act, 1973, was passed by both bodies of the Congress prior to June 30, 1973, it was not--as indicated above--approved by the President until July 1, 1973. Consequently, since the funds provided therein could not properly be obligated for the purposes for which they were appropriated, provision was made in the Public Works for Water and Power Appropriation Act, 1974 (Pub. L. 93-97, 87 Stat. 129) to permit the obligation of such funds within a period of 20 days following the approval of that act (Public Law 93-97). Such provision, contained in section 502, reads as follows:

Notwithstanding the provisions of section 301 of the Second Supplemental Appropriations Act, 1973 (Public Law 93-50) appropriations contained in that Act shall remain available for obligation for a period of 20 days following the enactment of this Act into law.

The purpose of such provision was stated by Senator Bible, the manager of the appropriation bill, as follows:

The committee has added a new section 502 under "title V--general provisions" in the bill which provides for an extension of the availability of appropriations provided in the Second Supplemental Appropriations Act, 1973.

Section 301 of the Second Supplemental Appropriations Act, 1973 (Public Law 93-50) reads as follows:

No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.

Since the supplemental was not enacted until the first day after the "current fiscal year," agencies were technically barred from obligating some of the funds appropriated under accounts no longer available for obligation after June 30, 1973. *The language in section 502 of this bill confirms the intent of Congress*

to allow the obligation of all funds appropriated in the supplemental, including those which technically become unavailable after June 30, 1973. For this purpose, obligations will be permitted for 20 days following the enactment of this bill. Appropriations made available for longer period will be unaffected by this section.

It is the committee's intention that obligations made within the 20-day period allowed by section 502 shall be considered for purposes of the 1974 Continuing Resolution (Public Law 93-52), part of the "current rate." [Italic supplied.]

See Cong. Rec., July 23, 1973, p. S14362.

This provision also was referred to by the committee of conference in House Report No. 93-409 wherein on page 29 it is stated that—

Amendment No. 16: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which will permit appropriations contained in the Second Supplemental Appropriations Act, 1973 (Public Law 93-50) to remain available for obligation for a period of 20 days following enactment of this Act. *This will allow the appropriations to be used only for those persons originally contemplated in that legislation and is needed because it was not signed into law until July 1, 1973.* [Italic supplied.]

The question regarding the availability of additional funds for the impact aid program thus arises because the provision in the Second Supplemental Appropriations Act, 1973, raising the limitation on section 3(b) students from 54 percent to 68 percent, did not specifically appropriate any funds for the impact aid program as such. Nor did such act contain a provision specifically extending the availability of impact aid funds provided by the Continuing Resolution for fiscal year 1973.

While, as indicated above, the Second Supplemental Appropriation Act, 1973, did not specifically appropriate additional funds for the impact aid program, it would have authorized the obligation of additional amounts of funds theretofore appropriated for such program had it been enacted into law prior to July 1, 1973. Consequently, while not technically making an appropriation, we believe such provision, by increasing the limitation on funds available for section 3(b) students during fiscal year 1973, can be considered as being at least tantamount to an appropriation of those additional funds, and thus clearly within the intent, if not the actual purview, of that provision in the Public Works for Water and Power Appropriation Act, 1974, extending the period for obligation of appropriations contained in the Second Supplemental Appropriations Act, 1973, for a period of 20 days following the enactment of the Public Works for Water and Power Appropriation Act, 1974.

Accordingly, the question on which our opinion is requested is answered in the affirmative.

[B-177640]

Transportation—Automobiles—Military Personnel—Ferry Transportation—Constitutes Transoceanic Travel

Since there is no highway system in the Goose Bay area, Canada, over which a member could drive his automobile to his new United States duty station without

using long distance ferries - Goose Air Force Base to Lewisporte, Newfoundland, overland to Port-aux-Basques, then by ferry to Sydney, Nova Scotia- paragraphs M4159-3 and M7003-3c of the Joint Travel Regulations, pursuant to 37 U.S.C. 404 and 406, may be changed to treat the long distance ferry transportation as transoceanic travel, thus necessitating amending the distance tables used in computing mileage between the AF Base and bases on the island portion of Newfoundland and continental U.S. duty stations to eliminate mileage over the ferry routes. Furthermore, under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may be used in the absence of the availability of American vessels, and if a member must arrange for the vehicle transportation, his travel orders should authorize the arrangement and his reimbursement voucher attest to the nonavailability of U.S.-registered vessels.

To the Secretary of the Air Force, August 31, 1973:

Further reference is made to letter dated November 28, 1972, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs), requesting a decision concerning proposed amendments to the Joint Travel Regulations relating to the travel and transportation allowances of members traveling by private automobile on permanent change of station from Goose Air Force Base, Canada, to duty stations in the United States. The request has been assigned control number 72-52 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary indicates that currently, uniformed members and their dependents are normally moved to and from Goose Air Force Base and the continental United States by air via McGuire Air Force Base, New Jersey, and their automobiles are apparently shipped separately. The Assistant Secretary also indicates that available cargo shipping schedules from the Goose Air Force Base area do not often coincide with the permanent change of station movement of families from Goose Air Force Base and, consequently, in many instances members are faced with considerable delays and additional expense in obtaining their privately owned automobiles for onward movement with their families.

It is further stated that to make sure that their automobiles will be available in the continental United States when they arrive, many members are traveling by privately owned vehicle via car ferry from Goose Air Force Base, Canada, to Lewisporte, Newfoundland, then overland by highway to Port-aux-Basques, Newfoundland, then via car ferry to Sydney, Nova Scotia, and then by highway to their new duty stations in the United States. Members who travel by privately owned vehicle by this route are presently limited by paragraph M4159-1, items 1 and 3 of the Joint Travel Regulations, to reimbursement at the rate of $0.06 per mile for the official distance between the old permanent station and the appropriate aerial or water port of embarkation, and for the official distance between the appropriate aerial or water port of debarkation in the continental United States and the

new permanent duty station. Since the appropriate port of embarkation and the old permanent duty station are the same (Goose Air Force Base), members traveling by this route are limited to mileage for the official distance from the appropriate port of debarkation (McGuire Air Force Base) to their new permanent duty stations. It is stated that this results in financial loss to the members.

It is pointed out in the Assistant Secretary's letter that section 10.4b of OMB Circular No. A–56 which implements section 5727 of Title 5, U.S. Code, permits the transportation at Government expense of privately owned vehicles of Government employees between alternate origins and destinations at a cost not to exceed the cost of transportation between the authorized place of origin and the official station.

The Assistant Secretary asks whether this Office would object to the following proposed changes in the Joint Travel Regulations which changes would alleviate the situation discussed above:

a. Amend Joint Travel Regulations par. M4159–3 to authorize the payment of mileage for the official highway distance from Lewisporte, Newfoundland to Port aux Basques, Newfoundland and from Sydney, Nova Scotia to the various CONUS destination points concerned; and,

b. Amend Joint Travel Regulations par. M1150–14 to omit the specific reference contained therein to the "island portion of Newfoundland" so that travel on the previously referenced long distance ferries would be classified as "transoceanic" travel. Reimbursement for expenses incurred for the transoceanic travel of the member and/or his dependents on the long distance ferries used in travelling on a permanent change of station from Goose Air Force Base, Canada, to various CONUS destinations over the previously specified routes would then be properly payable in accordance with JTR paragraphs M4159-1 and 4, and M7002–2, and

c. Arrange for shipments on Government Bills of Lading of privately owned vehicles on the ocean going car ferries concerned in accordance with section 2634, title 10, United States Code.

In this regard, the Assistant Secretary says that it is contemplated that reimbursement in this manner would be limited to a cost not to exceed the total cost of moving the member and his dependents from Goose AFB to the appropriate CONUS aerial port of debarkation by air, and the cost of shipping his privately owned vehicle to the appropriate CONUS water port of debarkation.

In addition the Assistant Secretary indicates that the only shipping services available over the water portions of the above described routes are long distance car ferries operated by the Canadian Pacific Railroad. Therefore, in view of 10 U.S.C. 2634, he asks whether, in the event it is impracticable for the Government to procure those shipping services, the member may personally arrange for the transportation of his privately owned automobile on those long distance car ferries and be reimbursed therefor by the Government.

Also, we have been informally advised that it is contemplated that if the regulations are changed as proposed, the long distance ferry from Port–aux–Basques, Newfoundland, to North Sydney, Nova Sco-

tia, would also be considered transoceanic travel for members on permanent change of station between the island portion of Newfoundland to the continental United States for travel by privately owned vehicle. Thus, the entitlement of those members for that portion of travel would be on an equal basis with the entitlement of members on permanent change of station from Goose Air Force Base, to the continental United States via privately owned vehicle.

The long distance ferries involved here apparently operate in the Atlantic Ocean and the Gulf of Saint Lawrence along the Atlantic Coast of Canada. The distance via ferry from Goose Bay to Lewisporte appears to be over 500 miles and the distance from Port aux Basques to North Sydney is over 100 miles. There does not appear to be any highway system in the Goose Bay area over which a member could drive his automobile directly to the continental United States without using the long distance ferries. *See* Standard Highway Mileage Guide, Rand McNally & Co., 1967, pages 314–315.

Paragraph M1150–14 of the Joint Travel Regulations to which the Assistant Secretary refers currently defines transoceanic travel as follows:

> Transoceanic travel is all travel which, if performed by surface means of commercial transportation over a usually traveled route, would require the use of ocean-going vessels. (For special provisions relating to travel between the United States and Newfoundland, Alaska, or Central America, see pars. M4159 3 and M7003–3c.)

Paragraphs M4159–3 and M7003–3c make specific reference to the "island portion of Newfoundland" in providing for travel allowances for members and their dependents under permanent change of station orders and, therefore, presumably it is those paragraphs which would be changed and not necessarily paragraph M1150 14, as indicated by the Assistant Secretary, since that paragraph (M1150 14) does not make reference to the "island portion of Newfoundland."

Broad authority is granted the Secretaries concerned by 37 U.S.C. 404 and 406 to prescribe the conditions under which travel and transportation allowances are payable under those statutes to members for their travel and their dependents' travel under orders directing a change of permanent station. In a somewhat similar situation we have not objected to the payment of mileage for the land travel to and from English Channel ports and the treatment of travel by ferry across the English Channel as transoceanic travel. *See* 40 Comp. Gen. 497 (1961). Also, in 41 Comp. Gen. 637 (1962) we held that our decision at 40 Comp. Gen. 497, *supra*, does not apply in a case involving the use of a ferry between North Sydney, Nova Scotia, and Port aux–Basques, Newfoundland, since paragraphs M4159–3 and M7003–3c of the Joint Travel Regulations make specific provision for travel to and from the island portion of Newfoundland. However, in view of the Secretar-

ies' broad authority under 37 U.S.C. 404 and 406 we would have no objection to changing the regulations to allow the payment of mileage and the treatment of the long distance ferry transportation as transoceanic travel as proposed by the Assistant Secretary.

In this regard, attention is invited to the fact that changes should also be made in the official table of distances used in computing mileage between Goose Air Force Base and bases on the island portion of Newfoundland and continental United States duty stations to eliminate mileage over the ferry routes.

In regard to whether a member may personally procure such ferry transportation for his automobile subject to reimbursement by the Government, 10 U.S.C. 2634(a) provides, as the Assistant Secretary indicates, that when a member of an armed force is ordered to make a change of permanent station, one motor vehicle owned by him and for his personal use or the use of his dependents may, under certain conditions, be transported at the expense of the United States, to his new station or such other place as the Secretary concerned may authorize—

(1) on a vessel owned, leased, or chartered by the United States,
(2) by privately owned American shipping services; or
(3) by foreign-flag shipping services if shipping services described in clauses (1) and (2) are not reasonably available.

Since the Assistant Secretary states that the services described in clauses (1) and (2) of 10 U.S.C. 2634(a) are not available over the routes in question, we would have no objection to the use of the Canadian Pacific Railroad ferries over those routes for the transportation of members' personally owned motor vehicles. And, if it is impractical for the Government to arrange to procure such ferry service directly, we would not object to members personally arranging for such transportation for their vehicles subject to reimbursement therefor by the Government, provided that the use of such service is properly authorized in advance in the members' travel orders and the statement relating to the non-availability of United States registered carriers required by paragraph M2150–3 of the Joint Travel Regulations is appended to the members' reimbursement voucher.

The Assistant Secretary's questions are answered accordingly.

[B–178054, B–174959, B–153784]

Pay—Retired—Increases—Members Retained on Active Duty After Retirement Date

Officers of the Air Force and other military services whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled, to the extent feasible, to the computation of disability retired pay at the higher basic pay in effect on their respective dates of retirement and to an adjustment for the underpayments that resulted

because retired pay had been computed at the lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional active duty for longevity purposes, in view of *Edward P. Chester, et al.* v. *United States*, 199 Ct. Cl. 687, which held that Regular Coast Guard officers continued on active duty for physical evaluation were entitled to "no less" than members entitled to compute their retired pay at the July 1 higher rates because they were not precluded from voluntarily retiring on June 30, their mandatory retirement dates. Retroactive application of the *Chester* case is restricted by the October 9, 1940 barring act, and doubtful cases should be submitted to GAO. Overrules 43 Comp. Gen. 742, B-153784, September 17, 1969, B-172047, February 23, 1972, and other similar decisions.

To N. R. Breningstall, Department of the Air Force, August 31, 1973:

Further reference is made to your letter dated January 22, 1973, file reference RPTT, requesting an advance decision as to the propriety of making payment on 12 vouchers covering increased retired pay on behalf of the following 11 retired Regular Air Force officers and the widow of one retired Regular Air Force officer:

1. Donley, John Bland (Col.)	068 01 6186
2. Fitzwater, John T. (Brig. Gen.)	579 01 7579
3. Cellini, Oliver G. (Col.)	358 01 3414
4. Simeral, George A. (Col.)	551 01 9181
5. Bane, Edwin Ronald (Col.)	455 22 2975
6. Ploetz, Mrs. Thelma, widow of Frederick F. (Col.)	307 14 0019
7. Creyts, Harold G. (Col.)	357 10 3994
8. Sealy, Harry H. (Col.)	541 12 6644
9. Remele, Courtney A. (Lt. Col.)	562 03 7976
10. Thompson, Donald V. (Col.)	472 12 2614
11. Magers, James W. (Lt. Col.)	426 05 6505
12. Little, Robert D. (Col.)	237 12 4946

The vouchers represent the difference in the retired pay of each officer computed on the rates of active duty pay in effect on their mandatory retirement dates and the higher rates effective at the time of their actual release from active duty.

Your letter was forwarded to this Office by letter from the Office of the Assistant Comptroller for Accounting and Finance (HQ USAF) dated February 16, 1973, and has been assigned Air Force Request No. DO-AF-1182 by the Department of Defense Military Pay and Allowance Committee.

Apparently all 12 officers were subject to mandatory retirement under the provisions of 10 U.S. Code 8916, 8921, or 8922. You say that in all 12 cases the officers were held on active duty past their mandatory retirement dates for physical evaluation purposes and after being so held over, nine of the officers were then retired for physical disability under 10 U.S.C. 1201 and the other three were placed on the Temporary Disability Retired List under 10 U.S.C. 1202.

You say further that in each officer's case there was a change (increase) in the monthly basic pay to which he was entitled while on

active duty which change occurred after each officer's mandatory retirement date but before his actual release from active duty.

In Colonel Donley's case the change in basic pay was a longevity increase which resulted from his completion of 26 years of duty for pay purposes on March 2, 1968, after his January 23, 1968, mandatory retirement date. In the remaining cases the increases in basic pay were the result of the general active duty pay raises effective either July 1, 1968, or July 1, 1969.

You say that in view of the ruling by this Office in 43 Comp. Gen. 742 (1964), which ruling was upheld and reaffirmed in B–165038(1), June 2, 1969; and B–153784, September 17 and October 27, 1969, the retired pay of all the officers here involved has been computed and paid on the lower rates of active duty pay in effect on their mandatory retirement dates rather than the higher rates in effect on the dates they were released from active duty. However, you say that in the recent case of *Edward P. Chester, et al.* v. *United States*, 199 Ct. Cl. 687, decided October 13, 1972, the Court of Claims rejected the position that this Office took in our decision B–165038(1), June 2, 1969, with respect to plaintiff Chester.

Since the cases of the twelve claimants in the submission are similar to those in the class typified by the case of the plaintiff Chester, you now ask whether, based on the ruling of the Court of Claims in the *Chester* case, the retired pay of the before-listed members may be adjusted to reflect the higher rates of basic pay in effect on their respective dates of retirement.

In the *Chester* case the plaintiffs were Regular Coast Guard captains who in June 1968 or 1969 became subject to the mandatory retirement provisions of 14 U.S.C. 288 and who were also eligible for voluntary retirement under other provisions of law in June 1968 or 1969.

The mandatory retirement statute to which the plaintiffs were subject, 14 U.S.C. 288, provides that a Coast Guard captain in their circumstances "shall, if not earlier retired," be retired on June 30 of the fiscal year in which he, or any captain junior to him, completes 30 years of active commissioned service in the Coast Guard. Under the provisions of that statute and the Uniform Retirement Date Act, 5 U.S.C. 8301, we had held that members in their circumstances were entitled to compute their retired pay based on the active duty pay rates in effect on June 30 of 1968 or 1969, as the case may be, and not on the higher rates effective July 1 of those years. And, it was our view that although they were also eligible for voluntary retirement under other statutes on June 30 which would have authorized them to compute their retired pay at the rates effective July 1, because of the manda-

tory nature of 14 U.S.C. 288 and the language of the statute which provided "if not earlier" retired, they could not be retired voluntarily on the same day they were to be mandatorily retired. *See* B-165038, January 6, 1969, and B-165038(1) and (2), June 2, 1969.

In the *Chester* case, the court held that the plaintiffs were not precluded from voluntarily retiring on June 30, the mandatory retirement date to which they were subject under 14 U.S.C. 288(a), and they were therefore entitled to compute their pay at the higher rates effective July 1. In regard to those members held on active duty beyond June 30 for physical evaluation, the court held that they were entitled to "no less" than the other plaintiffs.

In our decision of August 16, 1973, 53 Comp. Gen. 94, copy enclosed, addressed to the Secretary of Transportation, we said that we will now follow the court's ruling in the *Chester* case in the computation of the retired pay of other Coast Guard officers similarly situated, both retroactively and prospectively. However, we limited retroactive application of that decision to the period (generally 10 years) provided by the barring act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a, with doubtful cases to be submitted here for determination. *See* the answer to question 2 of the decision of August 16, 1973.

While the mandatory retirement statutes applicable to the Air Force and the other armed services are not identical to those of the Coast Guard, in view of the general congressional policy in recent years to treat the services uniformly in pay and allowances matters, when practicable, we will follow the rules enunciated in the *Chester* case to the extent feasible in computing the disability retired pay of members of the other services, including the Air Force. Therefore, officers of the Air Force who are retained on active duty beyond their mandatory retirement dates for physical evaluation to determine their eligibility for disability retirement and are so retired may count such additional active duty for longevity purposes and for determining the effective rates of active duty pay upon which their retired pay is to be computed. To the extent that our decisions 43 Comp. Gen. 742 (1964); B-153784, September 17, 1969; B-172047, February 23, 1972; and other similar decisions conflict with the above, they will no longer be followed. In this regard, it is to be noted that in addition to the case of Colonel Harry H. Sealy (B-153784, September 17, 1969), the voucher in the case of Colonel George A. Simeral was the subject matter of our earlier decision, 51 Comp. Gen. 563 (1972).

Accordingly, if otherwise correct, payment may be made on the vouchers submitted with your letter, which vouchers are returned herewith.

[B-178212]

Contracts—Protests—Timeliness—Untimely Protest Consideration Basis

Since the improprieties alleged in the solicitation procedures for the furnishing of reinforced plastic weathershields on a multiyear basis—a price leak, reopening negotiations, and a change from a request for proposals to an invitation for bids procedure—were apparent prior to the opening of bids, the exception taken after bid opening to the procedure was untimely filed pursuant to the General Accounting Office Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a). However, in accordance with section 20.2(b), which provides that "The Comptroller General, for good cause shown, or where he determines that the protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely," the merits of the protest are for consideration.

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

The exceptions taken by the low offeror to the option provision in the request for proposals to furnish reinforced plastic weathershields on a multiyear basis was properly determined to make the offer unacceptable at the close of the first round of negotiations since the acceptance of the offer to change the option clause constituting discussion would require the reopening of negotiations to carry on discussions with all offerors within a competitive range. Furthermore, canceling the second round of negotiations and changing the procurement procedure to formal advertising was a reasoned exercise of procurement judgment on the basis that further negotiations after the leak of the low offeror's price would be improper and in view of the fact that the substantial changes made in the specifications warranted formal advertising and made negotiation of the procurement no longer feasible.

To Swedlow, Inc., c/o Gold & Gold, August 31, 1973:

Reference is made to your letter of May 17, 1973, and prior correspondence, protesting against award of a contract to any other bidder under invitation for bids (IFB) NOO197-73-B-0215, issued by the Naval Ordinance Station, Louisville, Kentucky (NOSL), on February 22, 1973. It is your contention that a contract should have been awarded to Swedlow, Inc., under request for proposals (RFP) NOO197-73-R-0018, previously issued by the same agency on November 3, 1972.

The RFP covered the furnishing of 140 glass reinforced plastic weathershields on a multiyear basis. The closing date for receipt of proposals was December 16, 1972. Eight offers were submitted, the lowest of which was that of CTL-Dixie, Inc. Following receipt of proposals, negotiations were conducted with all offerors, each of which was notified by telegram that it could submit its best and final offer no later than 4 p.m., December 28, 1972, at which time negotiations would close. At the close of this round of negotiations, Swedlow had replaced CTL as the low offeror, having made a reduction in its unit price for the multiyear items from $10,930 to $9,767.

As a result of these negotiations, the Government was prepared to make an award to Swedlow. However, a preaward review of the pro-

posed contract revealed that the wrong defective pricing clauses had been specified in the RFP. Also, it was questioned as to whether Swedlow had in fact taken several exceptions to the terms and conditions of the RFP or if it had merely "requested" such changes. Neither of these discrepancies had been corrected during negotiations. Therefore, NOSL determined that the solicitation should be amended to insert the correct clauses, and on January 9, 1973, negotiations were opened for a second time, best and final offers being requested no later than 4 p.m. on January 17, 1973.

Concerned about entering a second round of negotiations, a representative from Swedlow contacted counsel for NOSL. The basis for its concern was the allegation that an employee of NOSL had informed Swedlow's closest competitor, CTL–Dixie, that Swedlow was the former low offeror and that most likely Swedlow's price on the RFP had been leaked to the competition. Upon investigation by NOSL, these allegations were borne out. Furthermore, it was discovered during the course of the investigation that certain drawings and specifications had been substantially revised by the requiring activity. In light of all of these circumstances, the contracting officer made the determination to cancel the second round of negotiations and to reprocure the shields at a later date. All offerors were advised of this determination by telegram dated January 11, 1973. None of the offerors protested the decision to cancel at that time.

On February 22, 1973, the requirement for the shields was resolicited under IFB N00197–73–B–0215. The solicitation contained revised drawings and specifications. Eight bids were submitted under the IFB, the two low of which (for the multiyear items) were at identical prices and both below the bid of Swedlow.

The day after bid opening, March 16, 1973, Swedlow filed a formal protest with our Office protesting against award of a contract under the IFB and against all of the actions taken by NOSL after the close of the first round of negotiations on December 28, 1972. It is Swedlow's contention that it is entitled to an award under the initial RFP.

Before reaching the merits of this protest, there is a significant timeliness question that must be considered. Swedlow's protest is based upon alleged improprieties in the solicitation procedure. However, these improprieties (the price leak, the reopening of negotiations and the change from an RFP to an IFB) were all apparent prior to the opening of bids on March 15, 1973. Our Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a), state that:

> * * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. * * *

The improprieties alleged here were apparent and all prior to bid opening. On this basis, the protest filed after bid opening appears to have been untimely filed under our above regulation.

Nevertheless, counsel for Swedlow, recognizing the untimeliness under section 20.2(a), has sought to have this protest considered under section 20.2(b) of our Interim Bid Protest Procedures and Standards. That provision reads:

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

It is our opinion that the issue raised questioning the action taken by the contracting officer under the circumstances prevailing at the close of the first round of negotiations is one of significance to procurement procedures.

Turning then to the merits of the protest, Swedlow makes several contentions. It first contends that it was authorized to include in its proposal a request to delete an option providing for exercise 90 days prior to final delivery and substitute therefor a 30-day after-award option provision, as well as requests for other changes, by a representative of NOSL. Swedlow further contends that inclusion of such requests did not qualify its proposal to render it unacceptable without further negotiation. The Swedlow representative spoke with Mr. Edward Mickey (Head of the NOSL Programs Management Office), Mr. James M. Archer (contract negotiator) and Mr. Fred W. Cross (contracting officer) concerning its "requests" for proposal changes. However, Mr. Mickey is a technical employee of NOSL without contracting authority. That being the case, any commitments made by Mr. Mickey did not bind the contracting officer or otherwise constitute authorization to deviate from the RFP provisions. Further, Mr. Cross has sworn in an affidavit that he made no such representations to Swedlow, only that such changes should be discussed with Mr. Archer. Mr. Archer alleges that he told Swedlow that the option provision would not be changed to a shorter period. Also, he claims that if such a decision to shorten the option period was to be made, an amendment to the RFP would be necessary to place all offerors on the same footing.

This dispute of fact as to what Swedlow was actually told to do concerning its requests for changes has not been refuted by Swedlow by convincing evidence to the contrary. Rather, the administrative version seems to be in consonance with the tenor of the record wherein it is shown that the preservation of the competitive character of the procurement required cancellation of the RFP.

Swedlow next alleges that even if its offer did contain exceptions to the RFP, it was willing to withdraw such exceptions on its own or

through an additional negotiation session. We feel that this would have been prejudicial to all other offerors. To allow Swedlow to submit one proposal and then alter it to obtain the award would have been in contradiction with the finality accorded the close of negotiations. As was stated in our decision 51 Comp. Gen. 479, 481 (1972):

> We have reviewed several of our more recent decisions bearing on the question of what constitutes discussions and conclude that resolution of the question has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror. Consequently, an offeror's late confirmation as to the receipt of an amendment and its price constituted discussions (50 Comp. Gen. 202 (1970)), as does a requested "clarification," which result in a reduction of offer price (48 Comp. Gen. 663 (1969)) and the submission of revisions in response to an amendment to a solicitation (50 Comp. Gen. 246 (1970)). On the other hand, an explanation by an offeror of the basis for its price reductions without any opportunity to change its proposal was held not to constitute discussions (B-170989, B-170990, November 17, 1971). We believe, therefore, that a determination that certain actions constitute discussions must be made with reference to the opportunity for revision afforded to offerors by those actions. If the opportunity is present, the actions constitute discussions.

Applying this rule to the specific situation at hand, we are of the opinion that Swedlow's offer of shortening the option provision provided it with the opportunity to change its proposal and, thus, constituted discussions. Since discussions with one offeror necessitate discussions with all offerors within the competitive range (*see* 50 Comp. Gen. 202 (1970)), the contracting officer's contention that Swedlow's proposal could not be accepted without reopening negotiations is well taken. Therefore, Swedlow's offer was unacceptable at the close of the first round of negotiations.

In view of the above, it is our opinion that the contracting officer was justified in not awarding a contract to Swedlow under the RFP. Therefore, we need not discuss the other contentions you raise and your protest is denied.

However, there remains for consideration the question of what course of action the contracting officer should have taken when he learned of the price leak after the close of negotiations. In our opinion, the course of action chosen by the contracting officer was proper under the circumstances. The record demonstrates that negotiation was no longer feasible since formal advertising became practicable with the changes in specifications. While it is regrettable that Swedlow's price was leaked during the course of negotiations, the contracting officer had reason not to continue negotiations when to do so would have subjected the procurement process to charges of further irregularity and auction techniques. Though it may be argued, with some merit, that the prejudice to Swedlow outweighed the advantages of cancellation and resolicitation on a formal competitive basis, we cannot say on the record before us that the course of action followed did not represent a

reasoned exercise of procurement judgment. The protest is therefore denied.

[B-178321]

Small Business Administration—Contracts—Subcontracting—Legality

The legality of the Small Business Administration's determination that concerns owned and controlled by socially or economically disadvantaged persons should be the beneficiaries of the subcontracting of contracts entered into with other Government agencies pursuant to section 8(a) of the Small Business Act was sustained in *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, in which the U.S. Court of Appeals, 5th Circuit, on April 18, 1973, held that section 8(a) "clearly constitutes specific authority to dispense with competition," and since the determination to initiate a subcontracting set-aside is a matter within the jurisdiction of the SBA and the contracting agency, the General Accounting Office is unable to object to a proposed award for mortuary services to an eligible disadvantaged concern.

Small Business Administration—Contracts—Subcontracting—Set-Asides—Impact Statement To Justify Set-Aside

The contents of the impact statement prepared by the Small Business Administration prior to determining to set-aside the subcontracting of mortuary services pursuant to a contract entered into under the authority of section 8(a) of the Small Business Act with another Government agency are not for release since Comptroller General's Order No. 1.3, January 4, 1968, exempts from disclosure commercial or financial information which is privileged or confidential, an exemption that pertains to information which would not customarily be made public by the person from whom it was obtained by the Government.

Small Business Administration—Contracts—Subcontracting—Contractor Eligibility Determination

Under a Small Business Administration regulation that provided procurements will not be selected pursuant to section 8(a) of the Small Business Act program—the authority to subcontract contracts entered into by SBA with other Government agencies—"where small business concerns are dependent in whole or in significant part on recurring Government contracts," the reliance of the SBA on the use of sales rather than profit as the measuring standard to determine the contractor under an expiring contract for mortuary services was ineligible for a section 8(a) subcontract award must be accorded the greatest deference in line with *Allen M. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F. 2d 261, even though the Administration's interpretation of its regulation was merely one of several reasonable alternatives and may not appear as reasonable as some other.

To the New York Funeral Services Company, Inc., August 31, 1973:

This is in reply to your letter of June 7, 1973, and prior correspondence, protesting the proposed award of a contract for mortuary services by Fort Hamilton, New York, to the Small Business Administration (SBA) under section 8(a) of the Small Business Act (15 U.S. Code 637(a)).

The SBA intends to subcontract all of the services under this contract to an eligible disadvantaged company pursuant to the provisions of section 8(a) of the act. Your protest is based on the allega-

tion that such action would discriminate against the small business concerns which have performed the contract in the past and, secondly, that no impact study was performed prior to the determination to set aside the contract for purposes of 8(a) subcontracting. You are the present contractor under the expiring contract and desire an opportunity to compete for the pending contract.

Section 8(a) of the Small Business Act empowers SBA to enter into contracts with any Government agency having procurement powers, and the contracting officer of such agency is authorized "in his discretion" to let the contract to SBA "upon such terms and conditions" as may be agreed upon between SBA and the procuring agency. Because the statute is couched in general terms, the SBA, pursuant to the above-referenced statute, has promulgated standards and regulations to implement the 8(a) program, which regulations are contained in Title 13, Chapter 1, Part 124 of the Code of Federal Regulations. Under these regulations, the SBA has determined that concerns owned and controlled by socially or economically disadvantaged persons should be the beneficiaries of the 8(a) program in order for such firms to achieve a competitive position in the market place. 13 CFR 124.8-1(b).

As regards your contention that the action taken by SBA will discriminate against other small business firms, your attention is directed to the holding of the United States Court of Appeals, Fifth Circuit, on April 18, 1973, sustaining the legality of the 8(a) program. (*Ray Baillie Trash Hauling Inc.* v. *Kleppe*, No. 72-1163.) In that case, the Court of Appeals held that section 8(a) "clearly constitutes specific authority to dispense with competition." Moreover, our Office held in B-174293, February 16, 1973, that the determination to initiate a setaside under section 8(a) is a matter within the jurisdiction of the SBA and the contracting agency under the statute. Therefore, in the circumstances, our Office is unable to object to the present determination.

Secondly, you contend that no impact statement was prepared for the instant solicitation and furthermore, the report dated June 1, 1973, from SBA concerning your protest makes no reference to the financial position of the eligible 8(a) subcontractor while discussing your firm's financial state in terms of sales instead of net profit.

Contrary to your contention, SBA did prepare an impact statement for the subject contract. Further, the SBA has furnished our Office the financial statement of the 8(a) subcontractor. However, our Office is precluded from disclosing the contents to you under Comptroller General's Order No. 1.3, January 4, 1968, which exempts from disclosure commercial or financial information which is privileged or confidential. The order states that this exemption pertains to information which would not customarily be made public by the person from

whom it was obtained by the Government. The business plan and financial information of the subcontractor is the type of information encompassed by the exemption and therefore not available for release.

With respect to the SBA reliance upon sales instead of net profit in determining whether small business concerns are dependent upon recurring Government contracts, the SBA regulation in effect at the time the impact statement was prepared provided that procurements will not be selected under the 8(a) program "Where small business concerns are dependent in whole or in significant part on recurring Government contracts." SBA decided to use sales rather than profit as the measuring standard for this determination. In *Allen M. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F. 2d 261, 265 (1971), the court stated:

> * * * The specific determination of which businesses are to be the beneficiaries of the [Small Business] Act is thus primarily committed by the legislative branch to the administrative agency.
>
> Of course, once having exercised this broad rulemaking authority, the agency cannot thereafter arbitrarily construe or apply its rules in a manner inconsistent with fundamental procedural fairness. *Greene* v. *McElroy*, 360 U.S. 474, 507-508, 79 S.Ct. 1400, —, 3 L.Ed.2d 1377, 1397. But it is an axiom of judicial review that an administrative agency's interpretation of its own regulations must be accorded the greatest deference. *Udall* v. *Tallman*, 1965, 380 U.S. 1, 16-17, 85 S.Ct. 792, *reh. denied*, 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283; —, 13 L.Ed.2d 616, 625, *Bowles* v. *Seminole Rock & Sand Co*, 1945, 325 U.S. 410, 413-14, 65 S.Ct. 1215, —, 89 L.Ed. 1700, 1702. When, as here, that interpretation obviously incorporates quasi-Technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme, judges should be particularly reluctant to substitute their personal assessment of the meaning of a regulation for the considered judgment of the agency. If the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other.

As the quoted portion of the *Campbell* case holds, where the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other. Therefore, our Office will raise no objection to the use of sales as the selection criteria. Moreover, we note that effective May 25, 1973, the above-cited regulation was modified to specifically include sales as the standard:

> * * * and the extent to which other small concerns have historically been dependent upon the contract in question for a significant percentage of their sales. 13 CFR 124.8-2(b).

For the foregoing reasons, your protest is denied.

[B-178607]

Subsistence—Per Diem—Military Personnel—Reserve Officers' Training Corps—Recruiting Duties

A cadet in a Reserve Officers' Training Corps (ROTC) at the University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—a matter of 2 hours and 3 hours duty on separate days—and

returned each time to the University is not entitled to a per diem allowance, having used Government transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Government employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such a person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from his home or regular place of business. However, since the cadet at the University of Detroit incurred no additional subsistence expenses incident to his recruiting duties he is not considered to have been in a travel status within the meaning of 5 U.S.C. 5703(c).

To K. J. Gors, Department of the Army, August 31, 1973:

Further reference is made to your letter dated February 13, 1973, reference ALBLCC-F, forwarded to this Office by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 73-24), requesting an advance decision concerning the entitlement to per diem allowances in the case of Reserve Officers' Training Corps (ROTC) cadet James K. Boyd, 369-58-2488.

The record indicates that Mr. Boyd, a Senior Division ROTC cadet at the University of Detroit, Detroit, Michigan, by Invitational Orders No. 11-0014, dated November 2, 1972, Headquarters, Fifth United States Army, confirming verbal orders of October 16, 1972, was invited to proceed on October 16, 1972, from the University of Detroit to Denby High School in Detroit for ROTC cadet recruiting activities. Upon completion of the mission Mr. Boyd was to return to the point of origin. By similar Orders No. 11-0012 of the same date, the cadet was invited to proceed to Osborne High School, Detroit, on October 23, 1972.

The orders further provide:

* * * Travel to be performed is necessary in the public service. A per diem allowance is authorized per authority of CONARC Message 141929Z Jul 71, subject: Use of Cadets in ROTC Recruiting Activities, and reimbursement will be made in accordance with Joint Travel Regulations Volume 2, paragraphs C5000-4C and 10100-5. When travel for this recruiting trip requires a fraction of a day, per diem rate of $11.80 is authorized for a full calendar day, or any fraction thereof, and is not subject to further reduction, for each day travel is performed under these orders. When travel for this recruiting trip requires overnight lodging, per diem rate of $25.00 is authorized for a full calendar day, or any fraction thereof, and is not subject to further reduction, for each day travel is performed under those orders. If you do not use Government transportation, you will be reimbursed for the costs of transportation upon completion of the trip. * * *.

By voucher dated November 29, 1972, Mr. Boyd made claim for per diem of $11.80 for October 16, 1972, having left the University of Detroit at 7:30 in the morning, proceeding to Denby High School and returning to the University 2 hours later. He also claimed an additional $11.80 in connection with a visit to Osborne High School on October 23, 1972; the period of time here involved was 3 hours. The voucher submitted by Mr. Boyd did not indicate that he incurred any personal expense. Government transportation was utilized.

You say that question arises as to whether Mr. Boyd as a ROTC cadet was in fact in a "travel status" so as to entitle him to per diem allowances as he did not perform travel away from the corporate limits of his place of business or home. You refer to paragraph C8050–3 of the Joint Travel Regulations (JTR) as stating that per diem allowances are not authorized for travel or duty within a permanent duty station area, with one exception which is not applicable to this case. It appears to you that in all instances per diem allowance conditions must be met prior to considering the rate payable in the circumstances. Further, if ROTC cadets performing temporary duty on invitational travel orders are not classified as consultants or experts but are considered to be private individuals serving without compensation, you express the opinion that the provisions of paragraph C8101–4b of the regulations also would preclude payment of per diem since the voucher presented shows no cost for subsistence having been incurred by the cadet.

ROTC cadets have no military status nor are they employees of the Government, and in the absence of indication that in the present circumstances they are utilized as consultants or experts, they must be considered as persons serving without pay.

Section 5703(c) of Title 5, U.S. Code, provides that an individual serving without pay or at $1 a year may be allowed transportation expenses and a per diem allowance while en route and at his place of service or employment away from his home or regular place of business.

Paragraph C5000, volume II, of the JTR, provides for transportation allowances and expense reimbursement for persons other than Government employees who perform travel in connection with official activities of the Department of Defense. Subparagraph 4c provides that per diem, actual expense, and mileage allowances will be in accordance with the applicable provisions of Chapter 8 of the regulations. Chapter 8, paragraph C8000, states that rates of reimbursement for allowances within the legal maximum should be so fixed as to approximate the necessary costs of official travel so that travelers are neither financially rewarded nor penalized by reason of their travel status.

Paragraph C8101–4b of the regulations states that a per diem rate in accordance with subparagraph 2a of C8101 is authorized for persons who perform invitational travel under the provisions of paragraph C5000 of the regulations.

In 32 Comp. Gen. 477 (1953), involving a claim for per diem allowance by a person serving without compensation pursuant to section 710(b) of the Defense Production Act of 1950, 64 Stat. 798, 819 (50 U.S.C. App. 2160), which provided for transportation of such persons and for a "per diem in lieu of subsistence while away from their

homes or regular places of business pursuant to such appointment," we stated that the apparent purpose of the per diem allowance was to reimburse persons serving without compensation for additional subsistence expense incurred by reason of such absence, and per diem allowance was permitted where a bona fide home was maintained outside of the metropolitan area of the place where the services were performed. *See also* decision B-148205, April 24, 1962, copy enclosed.

While in the circumstances before us an ROTC cadet receives no compensation for his services, the purpose of the per diem allowances is to reimburse persons for additional subsistence expenses, and a cadet who remains within the city where he resides or attends an educational institution is not likely to incure additional subsistence expenses.

The University of Detroit, where he is a student, and the two high schools visited by him are all located in Detroit. Since he was furnished Government transportation to both high schools and spent 2 hours one morning and 3 hours another morning at each school, it is our view that in the absence of a showing that he incurred additional subsistence expenses in compliance with the invitational orders, he may not be considered as being away from his home or regular place of business within the meaning of 5 U.S.C. 5703(c) and implementing regulations so as to be in a travel status for per diem purposes.

Since payment is not authorized on the vouchers submitted by you, they will be retained here.

[B-178979]

Family Allowances—Separation—Female Members—Entitlement to Allowance

On the bases of the Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to the effect that the differential treatment accorded male and female members of the uniformed services with regard to dependents violates the Constitution, and Public Law 93-64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 the sentence causing the differential treatment, the regulations relating to the two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under the same conditions as authorized for the civilian wives of male members, and for other dependents in the same manner as provided for male members with other dependents. Since the *Frontiero* case was an original construction of the constitutionality of 37 U.S.C. 401 and 403, payments of the family allowance may be made retroactively by the services concerned, subject to the October 9, 1940 barring act, and the submission of doubtful claims to the General Accounting Office.

Quarters Allowance—Government Quarters—Husband and Wife Service Members

Although the *Frontiero* decision has no effect on the dependency status of service members married to each other as prescribed by 37 U.S.C. 420, since a member may not be paid an increased allowance on account of a dependent for any period during which the dependent is entitled to basic pay, the differential treatment accorded male and female members in assigning quarters requires

amendment of Department of Defense Directive to prescribe entitlement to both male and female members to a basic allowance for quarters at the without dependent rate when adequate public quarters for dependents are not available, notwithstanding the availability of adequate single quarters; to reflect that neither husband nor wife occupying Government quarters for any reason who has only the other spouse to consider as a dependent is entitled to basic allowance for quarters in view of 37 U.S.C. 420; and to provide that when husband and wife are precluded by distance from living together and are not assigned Government quarters, each is entitled to a quarters allowance as prescribed for members without dependents.

Quarters Allowance—Dependents—Female Members—Entitlement Restrictions Removed—Claims Procedure

As the *Frontiero* decision, decided May 14, 1973, in which the Supreme Court ruled on the inequality between male and female military members with regard to quarters allowances, was an original construction of the constitutionality of 37 U.S.C. 401 and 403, the decision is effective as to both active and former members from the effective date of the statute, subject to the barring act of October 9, 1940 (31 U.S.C. 71a). The documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish the member's entitlement to the increased allowances. Although claims for the 10-year retroactive period may be processed by the services concerned, since filing a claim in the administrative office does not meet the requirements of the barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to the service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement.

Quarters Allowance—Dependents—Children—Female Members

Regulations relating to the payment of basic allowances for quarters that require that a female member of the military service must provide more than one-half of the support for her dependent child before she may receive payment of basic allowances for quarters may be revised to authorize payment of the allowance for a dependent child of a female member on the same basis as that prescribed for a male member in view of the fact that although the *Frontiero* decision by the Supreme Court was concerned with the right of a female member to receive allowances and benefits on behalf of a civilian husband, the rationale and language of the decision connote an intent by the court that the decision should be broadly applied.

Quarters Allowance—Leave or Travel Status—Unused Accrued Leave Payments—Sex Discrimination Removal

Since the act of July 9, 1973, Public Law 93-64, repealed the provision of 37 U.S.C. 401 relating to proof of dependency by a female member, the quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in the computation of a male member's unused accrued leave that is payable at the time of his discharge, may be allowed female members on the basis they are entitled to the same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. The allowance may be paid retroactively by the service concerned, subject to the October 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims.

To the Secretary of Defense, August 31, 1973:

This refers to letter dated June 20, 1973, from the Acting Assistant Secretary of Defense (Comptroller) in which decisions are requested on certain questions which have arisen as a result of the ruling of the

United States Supreme Court in the case of *Frontiero* v. *Richardson*, No. 71–1694, decided May 14, 1973. The questions, together with discussion pertaining thereto, are contained in Department of Defense Military Pay and Allowance Committee Actions 482–486, enclosed with the letter.

Committee Action 482 presents the following questions:

1. May regulations be changed, pursuant to Supreme Court Decision Number 71–1694, *Frontiero* v. *Richardson*, to authorize family separation allowances to female members for civilian husbands under the same conditions as presently authorized male members for civilian wives?
2. If your answer is in the affirmative, may the regulations also be changed to authorize family separation allowances to female members for other dependents in the same manner as now provided for male members with other dependents?
3. In the event that it is determined that family separation allowance payments are now payable to female members, are such payments authorized for periods before 14 May 1973 (date of decision)? If so, what retroactive date should be used for processing such claims and should such claims be processed by the Services or the General Accounting Office? See Committee Action 484.

The discussion pertaining to family separation allowance contained in Committee Action No. 482 points out that 37 U.S. Code 427 authorizes family separation allowances to members of the uniformed services with dependents. The purpose of the allowances, it is indicated, is to reimburse a member for the extra expenses incurred as a result of separation of the member from his family. The above-cited code provision authorizes two types of allowances.

The first type of family separation allowance is payable to a member at a permanent duty station outside the United States to which the transportation of his dependents is not authorized, when Government-furnished quarters are not available to him. The rate of this allowance is equal to the monthly rate of quarters allowance payable to a member without dependents.

The second type of family separation allowance is fixed at the rate of $30 per month and is payable to a member when separated from his dependents for more than 30 days by reason of temporary duty or when, incident to a change of permanent station, his dependents are not authorized Government transportation to the new station.

The discussion also refers to the various provisions in the Department of Defense Military Pay and Allowances Entitlements Manual implementing 37 U.S.C. 427, which set forth the criteria which must be met by members in order to be entitled to the allowance.

It is noted that the Committee action indicates that the question ruled upon by the Supreme Court pertains to the right of a female member of the uniformed services to claim her spouse as a "dependent" on equal footing with a male member for the purpose of obtaining increased quarters allowance and medical and dental benefits under 37 U.S.C. 401, 403 and 10 U.S.C. 1072, 1076. It is stated that the question

therefore arises as to whether the said decision applies to family separation allowance payments to a female member with a dependent. It is indicated that a strict interpretation would not exend the application of the decision to family separation allowance payments. However, on the other hand, that decision makes the provisions of 37 U.S.C. 401 relative to dependents of a female member equal to those of male members, and consequently payments in such cases would appear to be authorized.

In the *Frontiero* case the Supreme Court held that "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband."

Chapter 7 of Title 37, U.S. Code, authorizes the payment of certain allowances to members of the uniformed services, among which are basic allowance for quarters and family separation allowance. Section 401 of Title 37 defines the term "dependent" as it is to be applied to the various allowances authorized by Chapter 7. Since the court in the *Frontiero* case held that the requirement stated in section 401—"However, a person is not a dependent of a female person unless he is in fact dependent on her for over one-half of his support"—was unconstitutional, it seems clear that the holding must be applied to all the sections of Chapter 7 to which section 401 is applicable.

Subsequent to receipt of the Assistant Secretary's letter, Public Law 93–64, July 9, 1973, 87 Stat. 147, 37 U.S.C. 401(2), was enacted and approved by the President with an effective date of July 1, 1973. Section 103(2) of that act amended section 401 of Title 37, U.S. Code, by striking out the sentence quoted above relating to dependents of female members. The legislative history of the act indicates that the amendment to section 401 was a direct result of the court's ruling in the *Frontiero* case.

Therefore, since the Supreme Court has ruled that the differential treatment accorded male and female members with regard to dependents violates the Constitution and the Congress has amended section 401 of Title 37, deleting the sentence causing the differential treatment, it is required that the regulations relating to the family separation allowances be amended in consonance with the court's ruling and Public Law 93–64. Questions 1 and 2 of Committee Action No. 482 are answered in the affirmative.

With regard to the answer to question 3 of Committee Action No. 482, see the responses to questions 2c and 2d of Committee Action No. 484.

Committee Action No. 483 presents the following questions for decision:

1. Does the *Frontiero* decision have any effect on the dependency status of service members married to each other as prescribed by 37 U.S.C. 420?
2. If the answer to the above is affirmative, may one, but not both, claim the other as a dependent for allowance purposes?
3. If the answer is negative:
a. When both husband and wife are members of the Uniformed Services and are assigned to the same or adjacent military installations, are both members entitled to BAQ prescribed for a member without dependents when public quarters for dependents are not assigned, nothwithstanding the availabiilty of adequate single quarters for assignment to either or both?
b. Under the above circumstances, will both members continue to be entitled to BAQ when single quarters are actually occupied by one or the other but not both, including cases where Navy members are involuntarily required to occupy quarters aboard Naval Vessels?
c. When husband and wife members are precluded by distance from living together, would entitlements in questions 3a. and b., above be the same?

Section 420 of Title 37, U.S. Code, provides that a member of a uniformed service may not be paid an increased allowance under Chapter 7, on account of a dependent, for any period during which that dependent is entitled to basic pay under section 204 of Title 37.

The above-cited sections precludes the payment of increased allowances on account of any person who is entitled to basic pay. No distinction is drawn by the statute with regard to male or female members. Accordingly, your first question is answered in the negative. Therefore, question 2 need not be answered.

While the *Frontiero* decision by the Supreme Court does not specifically affect 37 U.S.C. 420, current regulations promulgated by the Department of Defense and in line with prior decisions of this Office concerning the assignment of husband and wife members to public quarters under 37 U.S.C. 403 now appear to be questionable in light of the court's ruling.

It has been the policy of the Department of Defense prior to the *Frontiero* decision to assign a husband and wife who are members of a uniformed service stationed at the same or adjacent military installations to family type quarters when possible. However, the eligibility for assignment to public quarters or to the payments of basic allowance for quarters rested with the male member. The female member was not eligible for assignment to family quarters or basic allowance for quarters unless adequate single quarters were not available for her use.

Enclosed with the Acting Assistant Secretary's letter is a proposed Department of Defense Instruction 1338.1, which presumably replaces the current policy guidelines referred to above.

Paragraph III A of the proposed instruction is as follows:

It is the policy of the Department of Defense to encourage maintenance of the family unit. When both husband and wife are members of the Uniformed Services both members are authorized the basic allowance for quarters prescribed for

a member without dependents when public quarters for dependents are not assigned, notwithstanding the availability of adequate single quarters for either or both, or actual occupancy of single quarters by either member. When both members occupy single quarters for whatever reason, both are denied the basic allowance for quarters for such period of occupancy.

As we pointed out above in response to question 1 of Committee Action No. 483, it is our view that the *Frontiero* decision does not affect the dependency status of members as prescribed in 37 U.S.C. 420. However, the questions presented in question 3 of the Committee Action No. 483 do not actually relate to increased allowances on behalf of a dependent receiving basic pay, but rather to the policy of assigning quarters to members who are husband and wife and the payment of an allowance to either or both in lieu of quarters assignment.

It is our view that policies to be followed by the services in the assignment of quarters in such cases is within the purview of the Department of Defense, and the economic feasibility regarding quarters assignments and the interests of the services and the members concerned would best be for determination by the Department of Defense. However, the matter of the payment of allowances to members of the uniformed services when adequate quarters are not furnished must be determined under the provisions of 37 U.S.C. 403. *See*, *generally*, 52 Comp. Gen. 64 (1972).

Question 3a is answered in the affirmative, since it appears to be the proposed policy to assign family type quarters to such members when possible and, in the alternative, when adequate quarters are not available for them as a family unit, they would each be entitled to a basic allowance for quarters at the without dependent rate.

Question 3b appears to be for determination solely under the provisions of 37 U.S.C. 403. Subsection (b) of that section provides that a member who is assigned to appropriate and adequate quarters is not entitled to a basic allowance for quarters. This is also the case when a member without dependents occupies public quarters for any reason. Therefore, under the circumstances presented, a husband or wife who occupies Government quarters for any reason and has only the other spouse for consideration as a dependent is not entitled to the basic allowance for quarters under 37 U.S.C. 403, since section 420 of Title 37 precludes payment of an increased allowance on account of a dependent who is entitled to basic pay. Question 3b is answered in the negative.

When husband and wife members are precluded by distance from living together, family type quarters obviously would not be assigned, and it would appear reasonable to accord the same treatment to these members as to any member without dependents, since the maintenance of a family unit is precluded due to distant duty stations. In such circumstances, the husband and the wife would be entitled to a basic

allowance for quarters as prescribed for members without dependents if they are not assigned to Government quarters. Question 3c is answered accordingly.

In view of the answers to the above questions, the proposed Department of Defense Directive 1338.1 should be amended accordingly.

Committee Action No. 484 presents the following questions:

1. Is quarter allowance entitlement by female service members on behalf of civilian spouses, under Supreme Court Decision No. 71-1694, *Frontiero* v. *Richardson et al.*, 14 May 1973, for retroactive application, and if so, for what period?
2. If the answer to "1" above is affirmative:
   a. May former female service members, as well as those still in service, claim quarters allowance on behalf of civilian spouses for the retroactive period?
   b. What type of supporting documentation will be required?
   c. Should claims for the retroactive period, regardless of the period involved, be processed by the Services or by Claims Division, GAO?
   d. If all such claims are to be processed by the Finance Centers, should the maximum 10 year retroactive period be computed from the date of receipt of the claim by the Services or some other date?

The Supreme Court's decision in the *Frontiero* case was an original construction of the constitutionality of certain of the provisions of 37 U.S.C. 401 and 403 by that court. We find no indication in the court's decision of an intention to limit that decision to a prospective application only. Since the court ruled that inequality of treatment as between male and female members with regard to entitlement and payment of quarters allowances for the sole purpose of achieving administrative convenience is a violation of the Due Process Clause of the Fifth Amendment to the Constitution, such a ruling must be regarded as effective from the effective date of the statute. Therefore, the Supreme Court's construction of 37 U.S.C. 401 and 403 in the *Frontiero* case must be given retroactive application. *Cf.* 40 Comp. Gen. 14, 17 (1960) and 53 Comp. Gen. 94, August 16, 1973. The first part of question 1 is answered in the affirmative.

Claims arising as a result of the *Frontiero* decision are subject to the 10-year limitation provided in the barring act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a, which provides in pertinent part as follows:

(1) Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim * * * shall be received in said office within ten full years after the date such claim first accrued: *Provided*, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.

Therefore, claims which accrued prior to the 10-year period and not received in this Office within the period specified by that act would be barred from consideration. The second part of question 1 is answered accordingly.

Regarding question 2a, the fact that a member has left the service would not serve to divest him of his right to an increased allowance to which he was otherwise entitled while in the service. Accordingly, question 2a is answered in the affirmative.

Question 2b is answered by saying that the documentation required to support such claims should be similar to that required of male members under similar circumstances. Such documentation should be sufficient to reasonably establish the member's entitlement to the increased allowance. *See* in this regard 37 U.S.C. 403(b) and 420, and Chapter 2 of Part 3 of the Department of Defense Military Pay and Allowances Entitlements Manual.

Claims for the 10-year retroactive period may be processed by the services concerned. However, we have long held that the filing of a claim in the administrative office concerned does not meet the requirements of the barring act of October 9, 1940, *supra*. *See* 32 Comp. Gen. 267 (1952), and 42 Comp. Gen. 337, 339 (1963). Therefore, claims on which the limitation period prescribed in that act is about to expire should be promptly transmitted to this Office for recording after which they will be returned for payment, denial or referral back to the General Accounting Office for adjudication. *See* Title 4 GAO 7. Also, any such claim which is doubtful as to the facts or the law should be transmitted here for settlement. Questions 2c and 2d are answered accordingly.

Committee Action No. 485 presents the following question:

> Does the recent decision rendered by the Supreme Court of the United States in the case of *Frontiero* v. *Richardson* (No. 71–1694) require or permit the uniform services to revise regulations to authorize the payment of basic allowances for quarters for a dependent child of a female member on the same basis as that prescribed for a male member?

The Committee Action discussion indicates that current Department of Defense regulations relating to the payment of basic allowance for quarters require that a female member of the military services must provide more than one-half of the support for her dependent child before she may receive payment of basic allowance for quarters on behalf of such child. It is indicated that those regulations are based upon that portion of 37 U.S.C. 401 which states, "However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support."

As is pointed out in the Committee Action discussion, the issue in the *Frontiero* case was the right of a female member to receive allowances and benefits on behalf of a civilian husband; however, the rationale and language of the decision connote an intent by the court that the decision should be broadly applied. This view is further supported by other recent decisions of the Supreme Court, cited in

the *Frontiero* case, striking down as unconstitutional statutory schemes which discriminate on the basis of sex. See *Stanley* v. *Illinois*, 405 U.S. 645 (1972) and *Reed* v. *Reed*, 404 U.S. 71 (1971).

Accordingly, in answer to the question in Committee Action No. 485, it is our view that a revision of the regulations to authorize payment of basic allowance for quarters for a dependent child of a female member on the same basis as that prescribed for a male member is required.

Committee Action No. 486 presents the following questions:

1. Is the applicable allowance prescribed in 37 U.S.C. 501(b) for a member with dependents includable in the computation of payment for unused accrued leave in the case of a female member who has a dependent (civilian husband or child) even though dependency on her for over one-half of the dependent's support has not been established?
2. If the answer is in the affirmative, may the allowance be paid retroactively and, if so, should such claims be settled by the Services or the General Accounting Office. See Committee Action 484.

As the Committee Action discussion indicates, 37 U.S.C. 501(b) as implemented by Rule 4, Table 4–4–5 of the Department of Defense Military Pay and Allowances Entitlements Manual, provides that, with certain exceptions not material here, an officer who has accrued leave to his credit at the time of his discharge is entitled to be paid for that leave on the basis of the basic pay and allowances to which he was entitled on the date of discharge. Section 501(b) as implemented by Rule 1, Table 4–4–5, of the Manual, also provides that an enlisted member in pay grades E–5 and above, with dependents, who has accrued leave to his credit at the time of his discharge, is entitled to be paid a quarters allowance for that leave at the rate of $1.25 per day.

As indicated previously, section 103(2) of the act of July 9, 1973, repealed the provision of 37 U.S.C. 401 relating to proof of dependency of a female member.

In view of our answer to the question posed in Committee Action No. 485 and since male members are not normally required to establish that their wives or children are in fact dependent on them for over one-half of the dependents' support, question 1 of Committee Action No. 486 is answered in the affirmative.

In view of our answers to the questions presented in Committee Action No. 484, question 2 of Committee Action No. 486 is answered by saying that such allowances may be paid retroactively by the service concerned, subject, however, to the provisions of the barring act of October 9, 1940, *supra*. Doubtful claims or claims upon which the period prescribed in the barring act is about to expire should be transmitted to this Office as indicated above.

U.S. GOVERNMENT PRINTING OFFICE : 1974 O - 533-869