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TABLE OF DECISION NUMBERS

Cite Decisions as 55 Comp. Gen. —.
Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-125037]

Pay—Aviation Duty—Flight Status—Limited Duration—Incentive Pay Entitlement

Air Force policy, which in unusual cases retains enlisted members on flight status by distributing flight duty among more enlisted members than necessary so as to prevent termination of flight status and incentive pay without 120 days' notice is questionable administrative practice, but it may not be said as a matter of law that members in such cases are not entitled to incentive pay.

Pay—Aviation Duty—Flight Status—Involuntary Removal

Proposed amendment to Executive Order 11157 which would authorize incentive pay for up to 120 days to enlisted members involuntarily removed from flight status without notice is reasonably restricted to effecting the primary purpose of the statute (37 U.S.C. 301) authorizing such pay and, therefore, would be valid.

In the matter of incentive pay for members removed from flying status, August 4, 1975:

This action is in response to a letter, with enclosures, from the Assistant Secretary of Defense (Comptroller), requesting a decision concerning the legality of payment of incentive pay under 37 U.S. Code 301 to certain enlisted aircrew members of the Armed Forces to be made in accordance with a new Air Force policy discussed therein. Additionally, a decision is also requested as to whether Executive Order 11157, June 22, 1964, as amended, may be further amended to authorize payment of incentive pay to such members after removal from flight status, or whether new legislation must be enacted for that purpose.

The Assistant Secretary indicates that the Committee on Armed Services, House of Representatives, during its consideration of H.R. 12670, which became the Aviation Career Incentive Act of 1974, Public Law 93-294 (May 31, 1974), 88 Stat. 177, expressed disapproval of the precipitate removal of enlisted members from flight status (ending their entitlement to incentive pay) after extended periods of continuous flying. The Committee indicated that such action represents insensitive and unnecessary personnel administration which can be avoided with proper personnel planning.

The Assistant Secretary points out that the Committee Report (H.R. Report No. 93-799, 93d Cong., 2d Sess., 17-18 (1974), states as follows:

GROUNDING OF ENLISTED CREW MEMBERS IN THE AIR FORCE

The present legislation concerns flight pay for commissioned-officer and warrant-officer personnel. Enlisted personnel receive incentive pay for hazardous duty under a separate pay scale and on the basis of receiving the incentive pay only when flying. Obtaining an adequate number of volunteers for flight duty among enlisted personnel in the Armed Forces has not been a problem; and their training as regards their flight duty is, in most cases, relatively low in cost and

shorter in terms of training time than is the case with officer personnel. Enlisted personnel, in addition, hold a particular specialty, and such additional compensation as may be required because of retention shortages in their specialty is paid through other methods, such as proficiency pay or enlistment or reenlistment bonuses.

However, testimony from the Air Force Sergeants Association brought to the attention of the committee a situation in the Air Force involving the precipitate removal from flying duty of enlisted air crew members after extended periods of continuous flying duty.

In December of 1971, for example, 607 Air Force enlisted air crew members were informed of their removal from flying duty. In some cases, notice of as little as a few days was given to the personnel involved, resulting in a sudden and unexpected loss of income.

The committee believes this was an example of insensitive and unnecessary personnel administration and can certainly be avoided with proper personnel planning. The committee recognizes that there would not be a sound basis for establishing an excusal program for enlisted personnel; but the committee strongly believes there should be a reasonable period of transition between notification of involuntary removal from flying duty and termination of flight pay, particularly in cases where the personnel involved have been flying for an extended period of years.

The committee directs, therefore, that the Department of Defense establish, by regulation, a requirement that enlisted men cannot be involuntarily removed from flying duty with less than 120 days' notice. The committee wants its intentions in this regard very clearly understood. It wants such regulation placed into effect on a priority basis, and it wishes to be informed of any delay on the part of any of the military departments in effecting such a policy change. The committee further directs that the departments study their policy to assure that in cases where an enlisted man has been on flight status for an extended period of years, he receive additional notice of a change in his status whenever possible. [Italic supplied.]

In conformity with the Committee's request, the Assistant Secretary indicates that, pending issuance of revised regulations the Deputy Assistant Secretary of Defense (MPP), by action dated March 22, 1974, advised the Military Departments to take prompt action to insure that, to the extent practicable, 120 days' advance notice is provided enlisted aircrew members who are involuntarily removed from flight status. The Assistant Secretary further indicates, however, that the Deputy Assistant Secretary advised that it would be difficult, if not impossible, to assure the 120 days' notification in all cases, and he noted that legislation would probably be necessary to pay incentive pay to enlisted aircrew members for up to 120 days when they were no longer on flight status.

The Assistant Secretary indicates that on July 15, 1974, the Air Force established a policy authorizing the temporary retention of enlisted aircrew members on flight status beyond the time when a valid manpower authorization exists for that many enlisted aircrew members at a particular duty station. It is stated that the overmanning authorized by this policy is intended to last only long enough to insure that each enlisted aircrew member receives 120 days' notice of removal from flight status and loss of incentive pay. Further, the policy applies only to members whose flight status was terminated involuntarily, and does not apply to members whose flight status was terminated as a result of the member being separated, confined, relieved for cause,

reduced in grade, no longer medically fit for such duty, absent without leave, or transferred to ground duty at his own request.

The Assistant Secretary further states that aircrew members affected by this policy would use "banked time"—we presume that to mean flying time already accumulated in excess of the current month's requirement—to qualify for incentive pay during the 120-day period. When banked time is insufficient or does not exist, such members would perform flight duties so as to qualify for incentive pay. The Assistant Secretary indicates that the Air Force policy does not intend that flight duties in excess of valid mission requirements would be performed but, rather, that the required flying would be divided among all the affected enlisted aircrew members on flight status at a particular station so that each member would perform an equitable share of the flight duties. Under normal circumstances, the Air Force anticipates that each member would qualify for incentive pay.

The Assistant Secretary notes that Executive Order 11157, which implements 37 U.S.C. 301, the statutory authority for incentive pay, provides that members who are required by competent orders to participate frequently and regularly in aerial flights, other than glider flights, must meet certain minimum flight requirements in order to be entitled to incentive pay as crew members. The minimum flight requirements for members on active duty are 4 hours of flight during 1 calendar month.

The Assistant Secretary requests the views of this Office regarding payments of incentive pay to enlisted aircrew members made in accordance with the Air Force policy described above. He indicates that no decision of the Comptroller General has been found which addresses the situation; however, he cites several decisions in which it was held that where an appropriation is made for a particular purpose, by implication it confers authority to incur expenses which are necessary and proper or incident to the proper execution of that purpose. 50 Comp. Gen. 534, 536 (1971), 29 *id.* 419, 421 (1950), 17 *id.* 636 (1938), and 6 *id.* 619, 621 (1927). He states that since the Air Force policy would result in the payment of incentive pay to enlisted aircrew members whose performance of flight duties is no longer required to fulfill valid mission requirements at a particular station, it would appear questionable that such payments can be considered "necessary and proper" to the fulfillment of mission requirements.

On the other hand, the Assistant Secretary states that the Air Force considers that its policy is "necessary and proper" to fulfill the legitimate purpose of effective incentive pay management, that is, to induce members to voluntarily perform certain hazardous duties. The resources authorized to achieve this goal are a certain number of flying

hours, a certain number of man-years, and a certain amount of funds for incentive pay, with the view being that management and distribution of these resources within the prescribed limitations is the responsibility of personnel managers. Providing adequate notice of termination of flying status is an important aspect of management of the incentive pay program. Consequently, the Air Force believes that orders authorizing temporary overmanning at a particular station in accordance with its policy are justified and that any payments made to enlisted aircrew members are "necessary and proper."

In addition, the Assistant Secretary requests the views of this Office as to whether Executive Order 11157, as amended, may be further amended to authorize payment of incentive pay to such members after removal from flight status, or whether new legislation must be enacted for this purpose. The Assistant Secretary also asks, if it is decided that the Executive order may be amended to authorize such payments, is the following proposed new section 114 of the Executive order sufficient for that purpose:

114. Under such regulations as the Secretary of Defense, the Secretary of Transportation with respect to the Coast Guard when not operating as a service in the Navy, or the Secretary of Commerce and the Secretary of Health, Education and Welfare, with respect to enlisted members within their respective jurisdiction, may prescribe, any enlisted member who has been required by competent orders to perform aerial flight as a crewmember and who is involuntarily removed from aerial flight duties under circumstances prescribed by such regulations with less than 120 days advance notice be deemed to have fulfilled all of the requirements for payment of incentive pay for aerial flight duties for a period of up to 120 days from the date he was notified of such removal.

The Assistant Secretary states that the amendment would permit the Secretary of Defense to prescribe circumstances when enlisted aircrew members involuntarily removed from flight status would continue to receive incentive pay for a period of 120 days after notice of termination of flight status. He further states that it is contemplated that, as in the case of the Air Force policy, this authority would be used only in such circumstances as national emergencies, short notice unit deactivations, and manpower authorization reductions where it is not possible to give 120 days' advance notice. Where members are removed from flight status because they are separated, confined, relieved for cause, reduced in grade, no longer medically fit, absent without leave, or transferred to ground duty at their own request, incentive pay would still terminate on the date of removal from flight status regardless of how much, if any, advance notification is given.

The Assistant Secretary states that the justification for this procedure is much the same as described for the new Air Force policy, i.e., it is necessary for effective incentive pay management. However, it is stated that such procedure would have the additional advantages of (1) not encouraging any overmanning, thus permitting quicker transfers to new duty stations, and (2) applying to all eligible mem-

bers without their having to meet subsequent flying hour requirements (unlike the Air Force policy which retains the member on flying status, but cannot always guarantee that he will fly the hours necessary to receive incentive pay).

As support for the proposed amendment, the Assistant Secretary notes that section 110 of Executive Order 11157 authorizes a similar policy in providing that a member required by competent orders to perform hazardous duty who becomes injured or incapacitated as a result of performing such duty shall continue to receive incentive pay for a period of not to exceed 3 months. Under this provision members continue to receive incentive pay for a limited period although they are not and may never again perform hazardous duty.

The statute authorizing incentive pay for enlisted aircrew members is 37 U.S.C. 301(a), as amended by section 2 of the Aviation Career Incentive Act of 1974, *supra*, and provides in pertinent part as follows:

> (a) Subject to regulations prescribed by the President, a member of a uniformed service who is entitled to basic pay is also entitled to incentive pay, in the amount set forth in subsection (b) or (c) of this section, for the performance of hazardous duty required by orders. For the purposes of this subsection, "hazardous duty" means duty—
>
> (1) as an enlisted crew member, as determined by the Secretary concerned, involving frequent and regular participation in aerial flight; * * *

Section 104 of Executive Order 11157 prescribes the minimum flight requirements for the receipt of incentive pay as an enlisted aircrew member. As a general rule, members who are in a flight status and fulfill the minimum flight requirements of the regulations are entitled to incentive pay. *See* 48 Comp. Gen. 81 (1968) and cases cited therein.

Concerning the Air Force policy, it appears that its application would be limited to a relatively few extraordinary instances, involving relatively few members, in whose cases 120 days' notice of removal from flying status could not be given. Incentive pay would still be paid only to members who met the requirements of the law and regulations and, therefore, funds appropriated for such pay would be used for the purpose for which it was appropriated. In such circumstances, it does not appear that we can say as a matter of law that incentive pay may not be paid to members who, under that policy, meet the requirements of the statute and regulations for such pay.

However, as a matter of sound administration and use of appropriate resources, the policy appears questionable in view of its overmanning features. Accordingly, it is our view that every effort should be made by the Air Force to manage personnel in such a way as to insure, whenever possible, 120 days' advance notice of termination of flying status and to discourage overmanning. We believe this view is entirely consistent with the view expressed in House Report No. 93–799, *supra*.

595-150 O - 75 - 2

Concerning the proposed amendment to Executive Order 11157, as the Assistant Secretary notes, section 110 currently provides similar authority to continue to pay incentive pay, not to exceed 3 months, to injured or incapacitated members under certain circumstances even though such members are not actually fulfilling the requirements for such pay. That provision, or similar provisions in previous Executive orders, has been in effect for many years. Concerning a similar provision, it was stated in 33 Comp. Gen. 436, 439 (1954), as follows:

> Incentive pay is a special pay authorized for the performance of hazardous duty, in this case the performance of aerial flights. The statute itself recognizes no right to the special pay for periods during which flights are not performed and, therefore, a regulation issued under the statute permitting, under certain conditions, the temporary continuance of incentive pay without performance of that special duty is subject to strict construction. Only on the basis that such a regulation is reasonably restricted to effecting the primary purpose of the statute can its validity be recognized.

We also note that under section 108(c) of Executive Order 11157, a member who is entitled to incentive pay for duty involving parachute jumping may have the minimum requirements for such pay waived for any period that he is unable to perform the required jumps by reason of being engaged in combat operations in a hostile fire area designated under 37 U.S.C. 310 (1970). *See* 45 Comp. Gen. 451 (1966).

The provisions of the proposed amendment limited in application by service regulations, as stated by the Assistant Secretary, in our view are reasonably restricted to effecting the primary purpose of the statute and, therefore, would validly authorize incentive pay to members who are involuntarily removed from flight duties with less than 120 days' notice. Accordingly, additional legislation does not appear necessary for this purpose.

It is also our view, for the reasons stated by the Assistant Secretary, that this procedure is superior to the Air Force policy discussed above.

As a technical matter, it is noted that section 105 of the Executive order provides that members "shall not be entitled to receive incentive pay for participation in aerial flights for any period while suspended from such participation * * * except as otherwise provided in section 110 hereof." It would appear that that section should also be amended to reference the new section 114 as an additional exception thereto.

The Assistant Secretary's questions are answered accordingly.

[B-182482]

Housing—Loans—Maturity Date of Loan

Since note dated May 1, 1970, submitted for insurance pursuant to Title I of National Housing Act contained projected maturity date 17 days in excess of 7 years and 32-days maximum that was prescribed by statute when loan was made, claim submitted by bank—which is primarily responsible for assuring

that term of note does not exceed statutory limitation—for reimbursement of its loss on note must be denied. Although note was not assigned to bank or funds disbursed thereby until May 19, 1970, statute specifically limits term of obligation or note underlying loan and makes no provision for exceptions.

In the matter of insurability of note under Title I of National Housing Act, August 4, 1975:

Mr. B. C. Tyner, Authorized Certifying Officer, Department of Housing and Urban Development (HUD), has requested our advice concerning the propriety of his certifying for payment a voucher in the amount of $2,566.55 covering a claim by the Security National Bank of Melville, New York, for reimbursement of a loss sustained on the note of Sylvester and Nilda Baez which was submitted to HUD for insurance pursuant to Title I of the National Housing Act as amended 12 U.S. Code § 1701 *et seq.* The bank's claim was initially denied by HUD because the term of the note was in excess of the statutory maximum of 7 years and 32 days that was in effect at the time the loan was made.

The pertinent facts and circumstances concerning this matter as disclosed in the certifying officer's letter are set forth below.

The note in question is dated May 1, 1970, and provides for 84 monthly installments of $79.72 each beginning on July 19, 1970. This repayment schedule projects the maturity date of the note to June 19, 1977, making the term of the note 7 years and 49 days. The note was payable to the contractor, the B. Hammer Co., Ltd., and on May 19, 1970, it was purchased by the Security National Bank.

When the loan was entered into, section 2(b) of the National Housing Act, as amended, 12 U.S.C. § 1703(b) read as follows:

> No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan * * * (2) if such obligation has a maturity in excess of three years and thirty-two days, except that the Commissioner may increase such maximum limitations to seven years and thirty-two days if he determines such increase to be in the public interest * * *.

As authorized under this section, the Commissioner did in fact increase the maximum maturity for notes of this type to 7 years and 32 days. *See* 24 CFR 201.2(d)(2)(i).

Since the term of the note was 17 days in excess of the maximum maturity prescribed by statute at the time the loan was entered into, HUD denied the bank's claim and so informed the appropriate bank officials by letter dated July 31, 1974, which read in pertinent part as follows:

> The note for the subject account is dated May 1, 1970 and provides for 84 installments of $79.72, beginning July 19, 1970. This repayment schedule projects the maturity date of the note to June 19, 1977, and the term of the loan would be 7 years and 49 days. We are sorry, but the term of a Class I(a) loan is restricted by the National Housing Act to 7 years and 32 days and the Commissioner has no authority to waive this requirement.

Upon being informed of HUD's decision in this regard, Security National Bank requested, by letter dated August 15, 1974, that their claim be given further consideration for the following reason:

> While the contract to which you refer is dated May 1st, 1970, the attached enclosures will bear out that this loan was not consumated [sic] and the funds [disbursed] [sic] until May 19, 1970, making the term of this loan 7 years and 31 days.

After examining certain of the documents contained in the bank's letter, the certifying officer apparently concluded, as he states in his letter to us, that:

> It appears therefore that the note was dated prior to commencement of the work that was financed with the loan proceeds, unless the date of the note can be considered to have been made in error and that the true date was May 19, 1970, the date on which the note was purchased by the bank.

The bank is contending that although the note referred to by HUD when it denied the bank's claim is dated May 1, 1970, since the loan itself was not actually consummated and the funds disbursed until May 19, 1970, the loan actually had a term of only "7 years and 31 days, and therefore was eligible for insurance." However, HUD's decision to deny the bank's claim was based neither on the May 1 date of the contract between Mr. and Mrs. Baez and the contractor nor on the date that loan funds were disbursed but, rather, in accordance with the applicable statutory provision, was based on the repayment schedule, of the actual note, which note has a maturity of 7 years and 49 days. The relevant statutory language states that "no insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan * * * (2) *if such obligation has a maturity in excess of* * * *" [Italic supplied.] a specified period. This language clearly refers to the term of the payment note or other equivalent written document acknowledging or underlying the loan. The dates on the note are thus controlling and we are not aware of any basis on which to reduce the term of the note by reference to any subsequent assignments thereof. Accordingly, although it does appear that the note in question was not assigned to the bank until May 19, 1970 (by the B. Hammer Co., Ltd., the original payee), and the funds were not disbursed by the bank until that date, such considerations are not relevant to our determination concerning the note's eligibility for insurance and the propriety of paying the bank's claim.

However, as suggested in the certifying officer's letter, some question does exist as to whether the note itself was properly dated. In this regard it should be noted that the note which is dated May 1, 1970, contains the following legend in bold type:

> The transaction which gives rise to this note is the furnishing of goods or services for repairs, alterations or improvements upon or in connection with real property. Do not sign this note until the work is fully completed.

Examination of relevant documentary evidence in the file including the "Notice of Right of Rescission" the bank furnished to the borrowers in accordance with the provisions of 12 CFR 226.9 as well as the actual contract between Mr. and Mrs. Baez and the contractor, B. Hammer Co., Ltd., indicates that said contract which provided for the addition of certain improvements to the Baez's home was originally signed on May 1, 1970. Insofar as the work to be done was fairly extensive and presumably somewhat time consuming and since the rescission notice provided that the Baez's had until May 5, 1970, to cancel the entire transaction, before which time no work was to be performed under the contract, it appears that the note was signed and dated in contravention of the proviso in the note that it not be signed until the work was fully completed.

Moreover, our letter to an authorized certifying officer at HUD, B–172121, April 12, 1971, would appear to be for application here. In that case we considered the question of whether a claim on a note having a maturity of 5 years and 36 days which was 4 days more then the maximum term then prescribed by statute could properly be paid. The note was dated April 26, 1955, and provided that the first of sixty consecutive monthly installments would become due on July 1, 1955, projecting the due date for the final payment to June 1, 1970. In our letter we advised the certifying officer to deny the bank's claim, stating in pertinent part the following:

> The insured bank states that there was a typographical error in the first payment date of July 1, 1965, and that the original note should have called for the first payment to be due June 1, 1965. It states that all information for the bank records and your reports would have to be encoded from the original note and that with the date of the note being April 26, 1965, your computer should have rejected July 1, 1965, as a first payment date. It contends that you do not now have a right to disallow insurance since you accepted the bank's information and insurance premiums at inception.
>
> Your letter to us states that under present operating procedures your computer is programmed to detect discrepancies such as this, however, it was not so programmed in 1965 and at that time there was no procedure to catch such errors. Your letter states that it has always been your position that the accuracy of the due date and the responsibility to make certain that notes do not have maturities in excess of that permitted by the National Housing Act rests upon the insured lending institution.
>
> Neither the act nor the regulations require that the Government must determine whether or not a loan is insurable before the Government will accept insurance charges paid on such loan. The regulations merely outline the requirements, as does the act, that a loan must meet before a contract of insurance will be binding on the Government. Also we are in agreement with your position that the responsibility to make certain that notes do not have maturities in excess of that permitted by the Naional Housing Act rests upon the insured lending institution.
>
> The note in this case had a maturity in excess of the maximum limitation of 5 years and 32 days provided in the applicable provision of the National Housing Act quoted above. The act is specific and makes no provisions for any exception. Therefore, the voucher which is returned herewith may not be certified for payment.

Similarly, in the case before us it is clear that whether or not the note was dated prematurely, the provisions of the note as written

projected a maturity date in excess of that permitted by statute, making the note ineligible for insurance at its inception. The bank clearly had sufficient information (*i.e.*, the note and supporting documentation) before it prior to its finally processing the loan. Hence, as stated in the above-quoted decision, since neither the act nor the regulations requires that the Government determine whether a loan is insurable before the Government will accept insurance charges paid thereon, the lending institution that applies to HUD for insurance, in this case Security National Bank, bears the basic responsibility for determining that "the obligation representing * * * such loan" does not have a maturity in excess of that permitted by the National Housing Act.

In accordance with the foregoing we must conclude that the voucher in question cannot be certified for payment. The voucher, together with the case file, is being returned to the Authorized Certifying Officer who submitted same.

[B–182205]

Subsistence—Per Diem—Military Personnel—Training Duty Periods—Reservists

Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1 JTR para. M6000–1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Government quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Government quarters for purposes of 1 JTR without consideration that such expenses would be incurred.

In the matter of per diem while on annual active duty for training, August 6, 1975:

This action is in response to a request for advance decision dated August 14, 1974, from the Officer in Charge, Navy Finance Office, U.S. Naval Base, Newport, Rhode Island. The question presented concerns the entitlement of Lieutenant Commander Delroy M. Richardson, USNR, 532–36–7355, to per diem allowance while occupying quarters at a Navy Lodge incident to annual active duty for training (ANACDUTRA). The request was forwarded to this Office by endorsement dated November 27, 1974, of the Per Diem, Travel and Transportation Allowance Committee and has been assigned PDTATAC Control No. 74–44.

The submission indicates that the member was ordered to ANACDUTRA, with pay, from his home in San Diego, California, to the Naval Justice School, Newport, Rhode Island, for a period of

14 days, by orders of June 20, 1974. It is indicated that Government mess was available but that Government bachelor quarters were not available, and that the member's place of lodging was the Navy Lodge, U.S. Naval Station, Newport, Rhode Island.

On August 6, 1974, the member requested payment of per diem allowances for the period from July 15 to July 27, 1974, during which time he stayed at a Navy Lodge at a daily cost of $9. The local Navy finance office withheld payment of this claim citing Volume 1, Joint Travel Regulations (1 JTR), paras. M6000–1a(3), M1150–5a and b (now "Government Quarters" and "Temporary Lodging Facilities," Appendix J), and M4205–3a as authority on the basis that even though the member paid $9 daily while at a Navy Lodge, since it is considered to be Government quarters, per diem is prohibited.

Travel entitlements of members of the Reserve components of the uniformed services are subject to section 3 of the act of December 1, 1967, Public Law 90–168, 81 Stat. 525, Reserve Forces Bill of Rights and Vitalization Act, which amended 37 U.S. Code 404(a) by adding clause (4). That provision is as follows:

> (a) Under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders * * *
>
> * * * * * * *
>
> (4) when away from home to perform duty, including duty by a member of the Army National Guard of the United States or the Air National Guard of the United States, as the case may be, in his status as a member of the National Guard, for which he is entitled to, or has waived, pay under this title.

In accord with the foregoing statutory authority, 1 JTR para. M6000–1 provides in pertinent part as follows:

> (3) * * * Except as specifically provided in subpar. c(1) [active duty for less than 20 weeks] when Government quarters and a Government mess are available, per diem allowances under subpar. c [per diem while at duty stations] are not payable to:
>
> * * * * * * *
>
> 2. members performing annual training duty.

In his endorsement to the submission the Executive, Per Diem, Travel and Transportation Allowance Committee stated as follows:

> It is believed that the statutory history of Public Law 90–168 will reveal that the real intent of Congress was to preclude the payment of per diem to members of the reserve components while performing annual training duty under conditions when both Government bachelor quarters (including quarters in the field) and a Government mess were available. The subsequent inclusion of the temporary lodging facilities within the definition of Government quarters was in recognition that the quarters were possessions of an instrumentality under Government control. Inclusion in the JTR also resulted in the modification of per diem provisions in JTR, par. M4205–3a(2)(b) to permit a greater reimbursement for the use of temporary lodging facilities than for the use of any other Government quarters but a lesser rate than usually permitted for the use of commercial accommodations. We failed to consider the use of these quarters in instances such as this case and did not make provisions therefor in the case of reserve forces personnel. It is not believed that this error of omission should penalize

these members unless you believe the literal interpretation of the current regulation is required by law. If you rule in favor of these cases, we will amend the JTR accordingly for future cases; that is, to permit the payment of per diem but in the manner shown in JTR, par. M4205–3a (2) (b).

In decision 48 Comp. Gen. 517 (1969), the Assistant Secretary of the Navy (Manpower and Reserve Affairs) asked (Question 1):

May the Secretaries of the uniformed services amend the JTR to deny the payment of per diem to members of the reserve components while performing annual active duty for training (ANACDUTRA) at the same location where they normally perform inactive duty training:

* * * * * * *

(c) where Government messing facilities are available but Government quarters are not available, considering that in each case the member's home and the active duty station are not located within the corporate limits of the same city or town and in some cases may be several hundred miles apart?

We answered in pertinent part as follows:

* * * the purpose of clause (4) is to provide, by payment of a per diem, a means of reimbursing the reservists concerned for the cost of quarters and subsistence which *they must procure for themselves* when "away from home," * * *

* * * * * * *

We recognize that the allowances provided by 37 U.S.C. 404(a) are subject to regulations prescribed by the Secretaries concerned, 37 U.S.C. 404(b) and 411; and that those officials are authorized to specify the conditions under which the allowances will be payable and, within prescribed limitations, the kind and amount of the allowances. However, it is clear from the legislative history of clause (4) that Congress intended that per diem shall be paid to reservists on duty away from their homes for short periods *when they are not furnished mess and quarters by the United States.* * * * [Italic supplied.]

In short, we have held that a reservist is entitled to per diem in a case where "absence from home * * * subjects the reservists to expenses for quarters and subsistence." 48 Comp. Gen. 517, *supra*, at page 521. Since a member, when assigned to "Government bachelor quarters (including quarters in the field)," does not incur any expense regarding such quarters, they are properly considered "Government quarters" for the purpose of 1 JTR para. M6000–1.

But this does not mean that "Temporary Lodging Facilities" may be considered to be "Government quarters" for the purpose of precluding per diem for reservists on ANACDUTRA. This is so even though they were designated as such "in recognition that the quarters were possessions of an instrumentality under Government control" as indicated in the endorsement of the Executive, Per Diem, Travel and Transportation Allowance Committee.

Paragraph M1150–5a (change 256, June 1, 1974) provided that the term "Government quarters" includes (item 5) temporary lodging facilities as defined in subpara. b (now contained in Appendix J) which states that "Temporary Lodging Facilities" are:

Specifically identified interim housing facilities operated by the military services with appropriated or nonappropriated funds in order to provide short term temporary housing accommodations for occupancy by military members, their dependents, families, and guests for which a *cash charge is levied* without direct

charge against the quarters allowances of the occupants. Temporary lodging facilities include guest houses except transient visiting officer quarters occupied by official visitors to the installation. Temporary lodging facilities do not include facilities used primarily for rest and recreation purposes, or bachelor officer and enlisted quarters. * * * Military members on temporary duty or temporary additional duty, as applicable, may occupy temporary lodging facilities voluntarily, on a space available basis, only if transient bachelor facilities are fully occupied. [Italic supplied.]

In view of the purpose of 37 U.S.C. 404(a)(4) and the statement of the Executive, Per Diem, Travel and Transportation Allowance Committee that in redefining "Government quarters" for purposes of 1 JTR generally, the Committee failed to consider the effect of that definition on per diem entitlement in this situation, we do not believe that occupancy of temporary lodging facilities operated by nonappropriated fund activities at which a substantial daily charge is made should be considered as precluding payment of per diem under 1 JTR para. M6000–1.

Accordingly, we find that Commander Richardson is entitled to per diem while at the Navy Lodge, Naval Station, Newport, Rhode Island, while on ANACDUTRA at the rate specified for those members utilizing temporary lodging facilities under 1 JTR para. M4205–3a(2)(b). Appropriate changes should be made in pertinent provisions of 1 JTR to reflect the conclusion herein.

[B–184400]

Contracts—Protests—Timeliness—Untimely Protest Consideration Basis

Protest alleging arbitrary and capricious action on part of contracting officer in restricting procurement wholly to small business without making independent examination of competitive market conditions, filed after bid opening, is untimely under 20.2(b)(1) of Bid Protest Procedures which requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening be filed prior to bid opening. Section 20.2(b)(3) exception to 20.2(b)(1), concerning protest by mailgram, is inapplicable, as mailgram was not sent by third day prior to final date for filing protest.

Contracts—Protests—Timeliness—Information Copy of Protest to Agency *v.* Formal Copy to GAO

Fact that information copy of protest to General Accounting Office (GAO) was received by procuring activity prior to bid opening does not convert otherwise untimely direct protest to GAO (protest was not received until after bid opening) under Bid Protest Procedures, since information copy was not protest to procuring activity such as to make that portion of procedures dealing with initial protests to agencies applicable.

In the matter of Society Brand, Inc., August 7, 1975:

This is a protest filed by counsel on behalf of Society Brand, Incorporated (SBI), involving invitation for bids (IFB) No. DSA100–

595-150 O - 75 - 3

75–B–1115, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. SBI contends "* * * that the contracting officer acted arbitrarily and capriciously in restricting the procurement only to small business and did not make an independent examination of competitive market conditions."

The record indicates that bids submitted in response to the IFB were opened on July 3, 1975. SBI's mailgram protest to our Office, although dated July 1, 1975, was not received by our Office until July 7, 1975. Section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), provides, in pertinent part, that "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." Under this section, SBI's protest was untimely filed.

Section 20.2(b)(3), which sets forth an exception to § 20.2(b)(1) in the case of a protest by mailgram states, in pertinent part, that, "* * * any protest received in the General Accounting Office after the time limits prescribed in this section shall not be considered unless it was sent by * * * mailgram not later than the third day, prior to the final date for filing a protest as specified herein." In the instant matter, the final date for filing a protest was July 3, 1975, making the third day prior to the final date June 30, 1975. As SBI's mailgram was dated July 1, 1975, § 20.2(b)(3) is inapplicable.

Accordingly, SBI's protest is untimely and will not be considered by our Office on its merits. We reach this conclusion cognizant of the fact that SBI did not learn until July 1, 1975, that the bid opening would not be postponed. According to SBI, the firm had previously contacted the contracting officer, among others, requesting that the bid opening be postponed to permit examination by SBI as to the propriety of the total small business set-aside. However, SBI is not now protesting the fact that bid opening was not postponed but rather the fact that the procurement was wholly restricted to small business. This issue, as discussed above, had to have been, but clearly was not, protested to our Office prior to bid opening.

We also are aware of the fact that the contracting officer received a copy of SBI's July 1, 1975, protest to our Office prior to the opening of bids. This does not convert an otherwise untimely direct protest to our Office into a timely protest. The telex message the contracting officer received was only an *information copy* of the protest sent to our Office (apparently to comply with § 20.1(c) of our procedures), not a protest to DPSC against the alleged improper use of a total small business set-aside or the rejection of SBI's request to postpone the date set for bid opening. As such, that portion of the procedures dealing with initial protests to agencies does not apply.

By letter dated July 11, 1975, counsel supplemented the protest mailgram by setting forth the following six issues of protest concerning this procurement:

1. Total small business set-aside was abuse of administrative discretion.
2. Instant procurement should not have been set aside for small businesses.
3. Inadequate competition existed under a total set-aside.
4. Prices received under a total set-aside were not reasonable.
5. All procurements within Standard Industrial Classification 2352 should not be made a class-set-aside for small business participation.
6. Pattern of bidding on this and related procurements by Waldman and two other bidders.

In view of the above conclusion, issues No. 1, 2 and 5, will not be considered.[1] However, issues No. 3 and 4 will be considered only to the extent that they concern the propriety of any proposed award and not to the extent that they question the propriety of the determination to utilize a total small business set-aside for this procurement. Issue No. 6 will be considered in its entirety. These timely issues will be considered by our Office in conjunction with the protest filed by counsel on behalf of Waldman Manufacturing Company, Inc. (Waldman), under the IFB. For administrative purposes, the timely protest issues of SBI and the protest of Waldman will be docketed as B-184400, B-184234.

[B-180412]

Station Allowances—Military Personnel—Excess Living Costs Outside United States, etc.—Reservists Performing Active Duty—Less Than 20 Weeks

In view of the broad authority contained in 37 U.S.C. 405, Volume 1, Joint Travel Regulations, may be amended to authorize payment of station allowances at with or without dependent rates as appropriate to members of Reserve components who perform active duty for less than 20 weeks outside the United States or in Hawaii or Alaska and who reside permanently in those areas with their families (if any).

In the matter of station allowances for members of Reserve components of the uniformed services called to active duty for less than 20 weeks, August 8, 1975:

This is in further reference to letter dated November 27, 1973, from the Assistant Secretary of the Army (Manpower and Reserve Affairs), in which our opinion is requested concerning whether Volume 1 of the Joint Travel Regulations (1 JTR) may be amended to provide station allowance entitlements to members of the Reserve components called

[1] *See* 55 Comp. Gen. — (B-184400, Oct. 9, 1975).

or ordered to active duty outside the United States for less than 20 weeks, when temporary duty allowances are not payable. The request was assigned PDTATAC Control No. 73–54 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Assistant Secretary points out that paragraph M6007 of 1 JTR was amended by change 245, effective July 1, 1973 (currently para. M6006) to provide station allowance entitlements to a member of a Reserve component called or ordered to active duty or active duty for training at a place located outside the United States whenever he is not entitled to per diem in accordance with paragraph M6001 (currently para. M6000), 1 JTR. It is stated that the following are circumstances under which a member of the Reserve components would not be entitled to per diem while performing active duty for periods of less than 20 weeks:

a. When commuting daily between home or place from which called (or ordered) to active duty and the permanent duty station (JTR, par. M6001–1a(2)).
b. When he is newly enlisted and is undergoing processing, indoctrination, initial basic training (including follow on technical training and/or home station training), or instruction, and Government quarters and a Government mess are available (JTR par. M6001–1a(3)).
c. When performing annual training duty and Government quarters and a Government mess is available (JTR, par. M 6001–1a(3)).

The Assistant Secretary also indicates that in addition to the above-mentioned categories of members, Public Health Service officers called to active duty for the purpose of participating in the Commissioned Officer Student Extern Program are not entitled to per diem.

The Assistant Secretary states that, generally, periods of active duty under Part A, Chapter 6, 1 JTR, are divided into two segments, active duty for less than 20 weeks and active duty of 20 weeks or more. It is indicated that provision is made to cover *bona fide* extensions of temporary duty in those cases where less than 20 weeks' duty was first contemplated but must be extended for unforeseen circumstances.

Under the pertinent regulations a member performing duty for 20 weeks or more will not be entitled to a travel per diem. However, a member performing such duty is entitled to permanent change of station entitlements provided for members of the uniformed services which would include the payment of housing and cost-of-living allowances, as well as temporary lodging allowances, in appropriate cases, either with or without dependents, on the same basis as members of the Regular components.

In the case of duty of less than 20 weeks, we are informed that the member is treated as if he were on temporary duty including denial of per diem if the conditions of his duty permit the member to do his duty "without disturbing his living pattern."

The Assistant Secretary points out that since some members serving for less than 20 weeks find themselves serving at a location and under conditions where temporary duty allowances are not proper and have been denied by regulation, the question arises as to the rights of these members to station allowances as for members stationed thereat for extended active duty of 20 weeks or more. It is also indicated that while the payment of per diem under 37 U.S. Code 404(a) (4) is clearly not proper in such cases since the member is not "away from home to perform duty," allowances under the provisions of 37 U.S.C. 405 do not appear to be improper since such allowances may be payable "whether or not he is in a travel status."

It is further indicated that provided annual active duty for training under conditions where both Government quarters and Government mess are available is not involved, it is believed that the payment of station allowances to this class of members with dependents is proper in the following cases where:

a. dependents are present in the vicinity of the member's duty station even though they were not moved to the area incident to his military service;
b. the member was not specifically authorized to have his dependents in the area, and;
c. he does not meet the normal tour of duty requirements contemplated by JTR, par. M 4300–1, Item 2.

The Assistant Secretary points out that a member in such circumstances will have no right to move dependents or household goods from the area upon relief from active duty since the active duty orders required no movement away from the former residence.

It is also noted that in the case of members without dependents present in the vicinity of the overseas duty station, payment of station allowances as members without dependents would appear to be proper unless he were performing annual training duty and both Government quarters and mess are available.

The Assistant Secretary requests our comments with regard to the foregoing.

The legislative history of the statutory provision for station allowances for military personnel serving in overseas areas, now contained in 37 U.S.C. 405, shows that it was intended by the Congress to provide a means for reimbursing such personnel for the excess of foreign living costs over the costs in the United States.

The language of the above-cited provision authorizes the Secretary concerned to make payment of a per diem, considering all the elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary and incidental expenses, to such a member

who is on duty outside the United States or in Hawaii or Alaska whether or not he is in a travel status.

Paragraph M4301 of 1 JTR provides the housing and cost-of-living allowances are authorized for the purpose of defraying the average excess costs experienced by members on permanent duty at places outside the United States.

We have indicated in the past that a reservist's training duty assignment of short duration is not permanent duty within the generally accepted meaning of the term permanent duty assignment, and thus payment of station allowances provided for in chapter 4, 1 JTR, requiring a permanent assignment overseas or in Hawaii or Alaska was not authorized. *See* 32 Comp. Gen. 444 (1953) and 45 *id.* 798 (1966).

However, in 45 Comp. Gen. 794 (1966) we have referred to the broad authority of 37 U.S.C. 405 and 411, under which the Secretaries concerned are authorized to prescribe regulations governing the payment of station allowances to a member on duty outside the United States or in Hawaii or Alaska, "whether or not he is in a travel status," except that dependents may not be considered in determining the allowances for a member in a travel status. We indicated that it was our opinion that this authority is broad enough to support the issuance of regulations authorizing the payment of a temporary lodging allowance incident to overseas training duty assignments of short duration.

Although in that decision the question presented involved the payment of temporary lodging allowances to members of the Alabama National Guard performing short periods of duty overseas, reference was made therein to questions considered in the decision 45 Comp. Gen. 798. One of those questions related to the payment of cost-of-living allowances to a member of the Hawaii and Colorado National Guard called to active duty for a short period in Hawaii. The changes made in 1 JTR as a result of that decision did not provide for payment of station allowances in the circumstances now in question.

In considering the questions presented we have reviewed the decisions of this Office relating to whether a member is entitled to increased station allowances on the basis of dependents residing in the vicinity of his duty station outside the United States or in Hawaii or Alaska. The determining criteria as to entitlement under 37 U.S.C. 405 and pertinent provisions of 1 JTR have been whether the dependents established a residence in the area in a military dependent status or whether their residence in the area was solely a matter of personal choice. It has been held that for the member to be entitled to station allowances at the with dependent rate, the dependents must be authorized travel and transportation at Government expense and be in the vicinity of the member's duty station in a military dependent

status. *See* 49 Comp. Gen. 548 (1970) and cases cited therein. This rule was applied in connection with entitlement to increased station allowances when dependents traveled to Alaska as a designated place incident to the member's assignment to a restricted area in Alaska where dependents were not authorized. Since the designated location was not in the vicinity of the member's duty station the dependents were not considered to be in a military dependent status even though their travel and transportation to the area had been accomplished at Government expense. We held in the circumstances that station allowances on account of the dependents were not payable. 53 Comp. Gen. 339 (1973).

Those decisions, however, relate to station allowances for members on extended active duty where entitlements to travel of dependents are applicable. In the situation under consideration the members do not become entitled to dependent travel because of the short periods of duty involved. Also, the member's presence in the area of his Reserve unit is also not the result of travel in a military status. Therefore, we do not believe that the restrictions imposed in 53 Comp. Gen. 339, *supra*, and similar cases cited with regard to payment of station allowances on account of dependents, must be applied in this situation.

In the circumstances and in view of the broad authority given the Secretaries concerned in 37 U.S.C. 405, we believe that regulations authorizing appropriate station allowances for members of the Reserve components while on active duty outside the United States or in Alaska or Hawaii and who reside permanently in those areas with their families (if any) for less than 20 weeks at the with or without dependent rates as appropriate would not be objectionable.

Accordingly regulations may be promulgated to provide station allowances at the with dependent or without dependent rate as appropriate for members of Reserve components outside the United States or in Alaska or Hawaii even though the member's dependents were not moved to the area incident to military service, the member is not specifically authorized to have his dependents in such area, and the normal tour of duty requirements as prescribed by regulation for members on extended active duty are not met.

The submission is answered accordingly.

[B-183497]

Contracts—Status—Federal Grants-in-Aid

General Accounting Office (GAO) will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views.

Equal Employment Opportunity—Grant Programs—Contract Awards

Where applicable regulations of Federal Government agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be allowed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in invitation for bids and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated.

In the matter of Thomas Construction Company, Inc., *et al.*, August 11, 1975:

Thomas Construction Company, Incorporated, DiCarlo/Brown, and J. E. Dunn, Jr., and Associates each protests rejection of its bid and award of a contract to another bidder by the Kansas City Area Transportation Authority (KCATA) under Urban Mass Transportation Administration (UMTA), Department of Transportation, Project No. IT-03-0020.

Pursuant to a capital grant contract between UMTA and KCATA executed on December 13, 1973, UMTA agreed to provide a grant to KCATA to assist in the construction of a centrally located transportation complex. Subsequently, KCATA, through Monroe and Lefebvre Architects, Incorporated, issued an invitation for bids (IFB) for the facility. All prospective bidders on the project were required to submit an acceptable Affirmative Action Assurance Plan (AAA Plan) in the areas of employment and utilization of minority subcontractors.

The KCATA's plan for utilization of minority subcontractors was based on a set-aside of eight craft areas for minority business. Under part I of the subcontractor program directions, all bidders were required to set aside for competitive bidding among prospective minority subcontractors the areas of electrical, excavation, mechanical, sprinkler system, asphalt, concrete, landscaping and fencing, and insurance work. Also, each bidder was to submit a program expressing the details of its AAA plan. Under part II, the program contents were spelled out, with examples of the attachments to be submitted. As part of its bid, each bidder was required to submit a specified letter of transmittal (Attachment A), the Affirmative Action Program Proposal (Attachment B—Part I), a Policy Statement on affirmative action (Attachment B—Part II), a Compliance Report Form (Attachment B—Part III), and an Affidavit of Intended Minority Entrepreneurship (Affidavit) (Attachment C). Under part IV of the program directions, KCATA advised that bids would be rejected for failure to submit an adequate and acceptable AAA plan.

On February 5, 1975, bid opening date, the following base bids were received:

Bidder	Bid
Thomas Construction Company	$9,320,000
DiCarlo/Brown	9,487,700
Sharp/White	9,696,727
J. E. Dunn, Jr. and Associates	9,825,200

Pursuant to the IFB, the Kansas City Department of Human Relations (DHR) evaluated the various AAA Plans required to be submitted by the bidders. The DHR concluded that the bids of Thomas and DiCarlo/Brown were nonresponsive due to affidavits which listed electrical subcontractors which were not then minorities, but that Sharp/White's plan was acceptable. Although the Board of Directors of KCATA passed a resolution concluding that the DHR exceeded its authority in determining the Thomas bid nonresponsive, UMTA subsequently advised KCATA that UMTA would submit its required concurrence only for an award to Sharp/White, or, alternatively, for rejection of all bids and readvertisement.

Subsequent to this notification, Thomas, DiCarlo/Brown, and Dunn protested to our Office relative to the rejection of their bids. Also, DiCarlo/Brown filed two suits in the Circuit Court of Jackson County, Missouri, regarding this entire matter. When the defendant Sharp/White's motion to add the Secretary of Transportation as a third party defendant (or alternatively as a defendant) was granted, the matters were removed to the United States District Court for the Western District of Missouri. These suits have been remanded to the State court, with the exception of certain matters regarding the Secretary of Transportation, and both Courts have expressed interest in the opinion of our Office regarding the matter. We are advised that KCATA awarded a contract to Sharp/White on July 15, 1975, and that such contract includes a "no-cost" termination clause.

Initially, it is argued by several parties to the matter, including UMTA, that this Office should not consider the protests for the reasons that this Office is without jurisdiction to do so and that as a matter of policy resolution of the questions presented are more properly determined by a local forum fully conversant with local law. Since this Office's bid protest authority runs to award of a contract by or for a Federal agency whose accounts are subject to settlement by GAO, GAO Bid Protest Procedures § 20.1(a), 40 Fed. Reg. 17979 (1975), it is argued that the award of a contract by a Federal grantee is not included therein for purposes of GAO jurisdiction, and that a question of a Federal payment is not involved. Also, UMTA believes that, pursuant to the Department of Transportation Act, 49 U.S. Code §§ 1651

et seq. (1970), the proceedings of the Department or any of its administrations or boards are to be reviewed in U.S. District Court, where such matters are more appropriately considered, citing *Pullman, Inc.* v. *Volpe*, 337 F. Supp. 432 (E.D. Pa. 1971). In this regard, Sharp/White argues that GAO's role in this matter, if any, is stipulated to be an accounting function under 49 U.S.C. § 1608(b) (1970), and that our bid protest authority has thereby been expressly precluded. Also, Sharp/White believes that our lack of decisional authority was recognized in *Lombard Corporation*, B–182515, December 17, 1974, regarding our inability to render an authoritative decision on a matter involving Federal revenue sharing funds. It is further contended that, since State law is to control the contract, GAO's Federal procurement expertise is inapposite to the problem.

We recognize that under contracts made by grantees of Federal funds, the Federal Government is not a party to the resulting contract. It is the responsibility, however, of the cognizant Federal agency, such as UMTA, to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including a requirement for competitive bidding. In such cases we have assumed jurisdiction in order to advise the agency whether the requirements for competitive bidding have been met. *F. J. Busse Company, Inc.*, B–180075, May 3, 1975; *Computer Communications, Inc.*, B–179797, May 3, 1974; 52 Comp. Gen. 874 (1973). Furthermore, as noted above, the Courts in which litigation pertaining to this matter is pending have expressed interest in receiving our views. In these circumstances, we believe the matter is appropriate for our consideration.

With regard to the *Lombard* case, the Federal revenue sharing funds involved therein were disbursed under the State and Local Assistance Act of 1972, Public Law 92–512, 31 U.S.C.A. §§ 1221 *et seq.* (Supp. 1975). As such, these funds were required to be expended in accordance with the laws and procedures applicable to State or local government revenues, 31 U.S.C.A. § 1243(a)(4) (Supp. 1975), and were not subject to Federal competitive bidding requirements. Therefore, we have declined to assume jurisdiction of protests involving revenue sharing funds.

A threshold question has also been raised as to the standards to be applied in reviewing the validity of the rejection of these bids. UMTA contends that since the contracts of its grantees are not Federal contracts they are not subject to the Federal Procurement Regulations, citing *Pullman, Inc.* v. *Volpe*, *supra*. Furthermore, it is argued that Federal Management Circular 74–7, issued by the General Services Administration (implemented in UMTA External Operating Manual, Chapter III C–5), which promulgates standards for establishing consistency and uniformity among Federal agencies in the administration

of grants, and requires that procurements by grantees be conducted "* * * so as to provide maximum open and free competition * * *," does not apply in this instance. UMTA's position in this regard is based upon the fact that FMC 74–7 also permits grantees to use their own procurement regulations to the extent they are not inconsistent with the standards set forth in FMC 74–7. It is argued, therefore, that it was within UMTA's discretion under the Department of Transportation Act, 49 U.S.C. §§ 1651, *et seq.* (1970), to determine in the first instance whether bids were properly rejected under the terms of the solicitation and in conformity with local law, which is reviewable by the State and local Federal courts and not by this Office.

In the case of *Illinois Equal Employment Opportunity regulations for public contracts*, 54 Comp. Gen. 6 (1974), we made the following statement with respect to the applicability of basic principles of Federal procurement law to awards by grantees:

> It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. 41 Comp. Gen. 134, 137 (1961); 42 *id.* 289, 293 (1962); 50 *id.* 470, 472 (1970), *State of Indiana* v. *Ewing*, 99 F. Supp. 734 (1951), case remanded, 195 F. 2d 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts.
>
> We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen., *supra*. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B–168434, April 1, 1970; B–168215, September 15, 1970; B–173126, October 21, 1971; B–178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen., *supra*. * * *

We believe these principles are applicable here, where 80 percent of the cost of the project is to be funded by the Federal Government and both the Federal Management Circular and UMTA's regulations contemplated grantee awards pursuant to competitive bidding principles. While UMTA certainly has the discretion to review and concur, or refuse to concur, in its grantees' awards, and courts may ultimately review the matter, we do not see this as a bar to our review, particularly where the cognizant Courts have expressed interest in our views.

Thomas, the low bidder, argues that its bid was not defective since its Affidavit listed minority subcontractors to the best of its knowledge as required, that the Affidavit did not require the minority firms to be minorities at bid opening, and that the bid did not indicate that failure to list a subcontractor not then a minority would require rejection of the bid as nonresponsive. Specifically, Thomas states that MacKay

Electric's original bid for electrical subcontract work was not accepted by Thomas because MacKay Electric was not a minority firm, and that Thomas advised MacKay that only a bid by a minority electrical firm would be acceptable. Thereafter, Thomas received a bid from MacKay & Associates, a "minority joint venture." Thomas further states that it accepted this bid only after verifying with MacKay that "MacKay & Associates" was a true minority firm within the meaning of the solicitation. On this basis, Thomas argues that it used its best efforts to solicit and submit a minority bid for the electrical work. Furthermore, Thomas contends that under the bid it is committed to the KCATA plan and therefore even if MacKay & Associates is not a proper minority subcontractor, Thomas should be permitted to remedy such "minor" defect by substituting a new electrical subcontractor pursuant to the substitution provision of the IFB.

UMTA contends that the IFB required listing of eight current minority subcontractors, that Thomas' bid was materially defective for failing to do so, and that Thomas did not make a commitment to the Plan since the Affidavit was the vehicle for the commitment and Thomas' affidavit was defective. UMTA regards any attempt by Thomas to cure its defective bid by substitution as an effort to cure a nonresponsive bid after opening.

As we stated in *Bartley, Incorporated*, 53 Comp. Gen. 451, 452 (1974):

> We have consistently held that a bidder's failure to commit itself, prior to bid opening, to affirmative action requirements of a solicitation requires rejection of the bid. * * * Accordingly, the responsiveness of [a] bid must be measured * * * by its commitment or noncommitment to the solicitation's affirmative action requirements * * *.

A bidder does not commit itself to affirmative action requirements of a solicitation merely by signing the bid when the IFB requires something more. *Locascio Electric Co., Inc.*, B–181746, December 13, 1974. However, failure to comply with each specific procedural requirement of the affirmative action provisions of an IFB need not result in bid rejection so long as the material commitment is evident. *Veterans Administration re Welch Construction, Inc.*, B–183173, March 11, 1975. In ascertaining whether the commitment requested was supplied by the bidder, the entire contents of the bid, plus supporting documentation, must be taken into account. *Chicago Bridge & Iron Company*, B–179100, February 28, 1974; B–177846, March 27, 1973. We consider these decisions to be controlling here since they reflect basic principles of Federal procurement policy which must be followed by the grantee in a procurement conducted pursuant to this grant. *Illinois Equal Employment Opportunity regulations for public contracts, supra.*

UMTA, and several bidders, urge that this situation is controlled by *Rossetti Contracting Company, Inc.* v. *Brennan*, 508 F. 2d 1039 (7th Cir. 1975), and, to a lesser extent, by *Northeast Construction Company* v. *Romney*, 485 F. 2d 752 (D.C. Cir. 1973). In *Rossetti*, the plaintiff was a bidder on a Federally assisted construction contract and failed to submit with its bid the appropriate commitment required by the "Chicago Plan" for minority hiring. Although Rossetti was required to state in Appendix A to the IFB its specific percentage of minority manpower utilization for the trades listed therein (within prescribed ranges), Rossetti placed brackets around the trades required and listed a utilization percentage not within the aforementioned ranges. Thus, its bid was nonresponsive because its failure to supply the proper information created doubt as to what commitment was made. In *Northeast*, concerning the similar "Washington Plan," the bid was nonresponsive because the bidder's failure to list any utilization goals whatsoever in Appendix A also cast doubt on the nature of the bidder's commitment. Our view of the Northeast bid (which preceded the Court action) was the same. 50 Comp. Gen. 844 (1971).

Here the IFB's Affidavit of Intended Minority Entrepreneurship provided in pertinent part:

Comes now _____, of lawful age, and being duly sworn,
(Affiant's Name)
upon his/her oath states as follows:

1. This affidavit is made for the purpose of complying with that part of the specifications of Kansas City Area Transportation Authority Affirmative Action Assurance Plan which requires that I, as a general contract bidder on the project, set forth the names of minority contractors, sub-contractors and suppliers with whom I will contract if awarded the general contract for construction of this project, the area(s) and scope of work of each listed contractor, sub-contractor and supplier, and the approximate dollar amount of each listed item; and that I provide a detailed narrative of efforts made to involve minority contractors, subcontractors and suppliers.

2. That the following list is true and accurate to the best of my knowledge:

Contractor	Area/Scope of Work	Dollar Amount
* *	* * *	* *

3. That the following narrative is a summary of efforts exhausted in attempts to involve minority contractors, sub-contractors and suppliers.

* * * * * * *

While we agree with UMTA that the Affidavit is the primary document to establish the bidder's commitment to the plan, we do not believe, as UMTA contends, that the listing of a subcontractor whose minority status is not established at bid opening negates the commitment otherwise established therein. An examination of paragraph 1 of the Affidavit indicates that it was made by Thomas for the express purpose of complying with the KCATA plan requirements for the utilization of minority subcontractors. Furthermore, Thomas included a listing of proposed subcontractors which, to the "best of my knowl-

edge," were minority firms, as required by the solicitation. In this regard, it appears that Thomas complied with the requirements of the IFB by receiving verification from MacKay & Associates prior to bid opening that it was a minority joint venture. Moreover, all other bid documents were completed as required by KCATA, including the cover letter which stated that the bidder submitted the attached plan "in order to comply with the Affirmative Action Program submission requirements of said requirements." Although UMTA argues that Thomas' listing of MacKay in paragraph 2 qualified the commitment expressed in the initial paragraph, we do not agree.

As noted in *Illinois Equal Employment Opportunity regulations for public contracts*, *supra*, one of the basic principles of competitive bidding is that all bidders must be advised in advance as to the basis upon which their bids will be evaluated, so that they may compete on an equal basis, and the solicitation must contain the necessary definite minimum standards and criteria apprising prospective bidders of the basis upon which their compliance with the affirmative action requirements will be judged. In the instant case, although bidders were required to list their proposed minority subcontractors in the eight set-aside categories, the solicitation contained no information, guidelines, or criteria as to what constituted a minority firm or what, if any, steps a bidder was required to take to establish the minority status of a proposed firm. In the absence of a definite statement in this regard, bidders were deprived of an intelligent basis upon which to determine the qualifications of proposed subcontractors, and were subject to having their bids rejected as nonresponsive on the basis of unannounced criteria. Therefore, it is our view that Thomas' bid was improperly rejected. 48 Comp. Gen. 326 (1968).

Ideally the procurement should be resolicited under standards and criteria which apprise bidders of the basis upon which their compliance with the affirmative action requirements will be determined. However, we recognize that this project already has been long delayed and that any further delay necessitated by a resolicitation may not be in the best interests of all concerned. We also recognize that the status of Thomas' proposed electrical subcontractor as a minority firm has been questioned. In this connection, we note that KCATA has proposed to permit Thomas to substitute a new electrical subcontractor prior to award. Accordingly, we recommend that Thomas be requested, if necessary, to substitute an acceptable electrical subcontractor in accordance with Article 7.1.3 of the Solicitations' Instructions to Bidders.

Thereafter, if Thomas' bid is determined responsive, and if Thomas is determined responsible, we recommend that UMTA advise KCATA that the contract with Sharp/White be terminated at no cost and

an award be made to Thomas. In view of our conclusion, the responsiveness of the other bids need not be considered.

As this decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 84 Stat. 1170, 31 U.S.C. § 1172 (1970).

[B-183107]

Compensation—Missing, Interned, Captured, etc., Employees—Overtime—Entitlement

Civilian employee is entitled to overtime compensation based on amount received prior to missing status if such compensation was part of his regularly scheduled pay and allowances and such overtime compensation continues throughout missing status period even though office to which employee was assigned is disestablished. However, where overtime compensation is not part of regularly scheduled pay and allowances, employee does not receive same unless he "may become entitled thereafter" and such entitlement would be based on overtime performed by his replacement or average irregularly scheduled overtime of employees in his unit. 54 Comp. Gen. 934, modified.

In the matter of overtime compensation while held as prisoner of war, August 12, 1975:

This matter concerns an appeal by Mr. Lawrence J. Stark of our decision of April 30, 1975, 54 Comp. Gen. 934, regarding the amount of compensation that Mr. Stark should receive for the period he spent as a prisoner of war.

In our previous decision we held that Mr. Stark was entitled under the Missing Persons Act, 5 U.S. Code § 5561, *et seq.* (1970), to receive overtime compensation during the period of his missing status. Such compensation was to be determined from the amount of overtime hours Mr. Stark's replacement worked, or in the alternative, on the basis of the average number of overtime hours worked by other employees performing similar duties in the same office where Mr. Stark was employed. Furthermore, we held that Mr. Stark was not entitled to overtime compensation subsequent to the disestablishment of his office, unless it could be shown that Mr. Stark would have been reassigned or transferred to another office where he would have continued to perform overtime work.

Mr. Stark appeals the method described to determine his overtime compensation, and the possible discontinuance of overtime pay after the disestablishment of his office. Mr. Stark claims that his overtime hours were part of his regularly scheduled workweek, thus his compensation should be based on such.

Under the Missing Persons Act, an employee in a "missing status" as defined by the act is "entitled to receive or have credited to his

account, for the period he is in that status, the same pay and allowances to which he was entitled at the beginning of that period or may become entitled thereafter." 5 U.S.C. § 5562(a) (Supp. III, 1973). The "same pay and allowances" includes overtime compensation if it was part of an employee's regularly scheduled workweek when the person's missing status began. That compensation does not diminish even if the office to which the employee was assigned is abolished during the period of the employee's missing status.

While the methods of computing overtime described in our previous decision would be proper in determining an employee's pay and allowances to which he would "become entitled thereafter," 5 U.S.C. § 5562 (a) (Supp. III, 1973), 22 Comp. Gen. 745, 750 (1943), it may not be proper if the pay and allowances which the "person was entitled at the time of the beginning of the absence" is greater.

The term "pay and allowances" is defined in 5 U.S.C. § 5561(6) (1970), which provides in pertinent part:

> (6) "pay and allowances" means—
> (A) basic pay;
> (B) special pay;
> (C) incentive pay * * *.

If Mr. Stark's overtime was part of his regularly scheduled workweek, then under 5 U.S.C. § 5562(a) it is included in the employee's pay and allowances. In this connection the Court of Claims held in *Dilks* v. *United States*, 119 Ct. Cl. 826, 829 (1951), that:

> Inasmuch as the language of the Act, taken by itself, would include *any* allowance of which a captured person was validly in receipt, proof that Congress intended to exclude any one type of allowance would have to be specific. * * * We merely held as a matter of law that under the broad and inclusive language of section 2 of the Missing Persons Act, one type of allowance of which Dilks was admittedly in receipt under competent, unrevoked and existing orders at the time of his captivity, could not be excluded from his account in the absence of proof of a specific congressional intent to so exclude it.

There is no indication of exclusionary intent as to regularly scheduled overtime pay to be found from either the statutory language or the legislative history of the Missing Persons Act. Indication of an exclusionary intent can be found in "Hearings on H.R. 4405 Before the House Committee on Naval Affairs," 78th Cong., 2d Sess. 2343 (1944).

> It has been administratively determined that pay and allowances to be credited during absence include *all* continuing pay and allowances to which entitled at beginning of absence but not temporary allowances such as per diem for travel expense. H.R. 4405 retains the present language and change is not deemed necessary. [Italic supplied.]

Whether Mr. Stark's overtime hours prior to his status as missing were part of his regularly scheduled workweek, or whether they were temporary allowances, is a question for consideration and determination by the Secretary of the Navy under 5 U.S.C. § 5566(c). B–140639,

November 13, 1959. If the determination is made in favor of the former, then Mr. Stark's compensation should be based on such. If Mr. Stark's overtime is found to be the latter, then his compensation shall be determined according to one of the methods discussed above and in 54 Comp. Gen. 934 (1975).

The record indicates that Mr. Stark and employees similarly situated performed overtime work prior to the period of Mr. Stark's internment. Also, the amount of overtime varied from pay period to pay period and there is nothing to show that such work was regularly scheduled. Therefore, on the basis of the present record, the method of determining Mr. Stark's overtime stated in our prior decision is for application. However, if additional evidence is obtained to show that any overtime hours were part of the regularly scheduled workweek, it should be included in the computation of Mr. Stark's compensation even past the date where the employee's office is disestablished. 22 Comp. Gen. 984 (1943).

Our prior decision, 54 Comp. Gen. 934, *supra*, is modified accordingly.

Payment in accordance with the foregoing decision should be made to Mr. Stark by the Department of the Navy.

[B–183243]

Aircraft—Carriers—Property Damage, Loss, etc.—Liability of Carrier—Burden of Proof

Air carrier is liable for damages sustained to shipment of Government property notwithstanding contention of improper packing, since applicable tariff filed with Civil Aeronautics Board provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff.

In the matter of Flying Tiger Line, Inc., August 12, 1975:

Flying Tiger Line, Inc. (Flying Tiger) has presented a claim for refund of $2,255.94, administratively deducted by the Department of the Army for damage to a shipment of office machines transported by Flying Tiger under that company's air waybill 023/2790–1915 but apparently converted to Government bill of lading H–6234799 at destination.

It appears that the shipment of office machines moved from Portland, Oregon, by air via Flying Tiger to Cleveland, Ohio, and then by truck via Quick Air Freight, Inc. (Quick Air) to the Defense Construction Supply Center, Columbus, Ohio. It is undisputed that the

shipment was received in a damaged condition with repair and replacement costs estimated by the Army at $2,255.94.

The Army in effect alleges that mishandling by Flying Tiger was the proximate cause of damage to the shipment. Flying Tiger, on the other hand, bases its denial of liability on improper packaging by the shipper. Relevant facts do not appear to be in dispute: the shipment was received in apparent good order by Flying Tiger in Portland, Oregon, and received in a damaged condition by Quick Air at the Cleveland airport. Quick Air's PRO No. H-32326 states on its face:

NOTE
CARTON [sic] WERE POORLY PACKED
AND IN CRUSHED CONDITION.

Therefore, it seems obvious that the shipment was damaged between the time Flying Tiger took possession in Portland, Oregon, and the time Quick Air took possession of the shipment at the airport in Cleveland from Flying Tiger.

Unlike the Interstate Commerce Act (see 49 U.S. Code § 20(11) (1970)), the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970) does not contain a codification of the common law rules of carriers' liability for loss or damage to goods in carriage. See *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134 (1964).

However, it has long been held that to the extent that applicable tariffs filed with the Civil Aeronautics Board (C.A.B.) are valid they constitute the contract of carriage between the parties and are "conclusive and exclusive," *Tishman & Lipp, Inc.* v. *Delta Air Lines*, 413 F. 2d 1401, 1403 (2nd Cir. 1969); *Lichten* v. *Eastern Airlines, Inc.*, 189 F. 2d 939 (2nd Cir. 1951). Therefore, in the instant situation we must resort first to the rules of the governing air tariff in determining the liability of the parties with resort to common law rules and presumptions only where such common law rules and presumptions do not conflict with applicable tariff provisions. See *Modern Wholesale Florist* v. *Braniff International Airways, Inc.*, 350 S.W. 2nd 539 (1961).

The Official Air Freight Rules Tariff No. 1-B, C.A.B. No. 96, to which Flying Tiger was a party at the time of the subject freight movement states:

> Shipments must be so prepared or packed as to insure safe transportation with ordinary care in handling. Carrier acceptance of the shipment shall be *prima facie* evidence of the shipper's compliance with this paragraph. (Rule No. 14)

Further, Rule No. 30(A)(2) thereof states:

> The carrier shall not be liable for loss, damage, deterioration, destruction, theft, pilferage, delay, default, misdelivery, non-delivery, or any other result not caused by the actual negligence of itself, its agent, servant or representative, acting within the scope of their authority, or not occurring on its own line or in its own service, or for any act, default, negligence, failure or omission of any

other carrier or any other transportation organization, *provided that, upon proof by shipper that the shipment was received by the carrier in an undamaged, disease-free, and proper shipping condition, and was lost, damaged, deteriorated, destroyed, stolen, pilfered, delayed, misdelivered or not delivered, while in carrier's possession, carrier shall have the burden of proving that such loss, damage, deterioration, destruction, theft, pilferage, delay, misdelivery or non-delivery was not the result of its negligence.* [Italic supplied.]

Pursuant to Rule No. 14, *supra*, Flying Tiger's acceptance of the shipment constitutes prima facie evidence that the shipper adequately packed the shipment. Although, as noted above, Quick Air's receipt contains a notation that the cartons were poorly packed, there is no suggestion that Quick Air based this conclusion on any evidence other than mere observation of the crushed condition of the cartons. Therefore it appears that Quick Air's conclusion of poor packing is not substantiated by the record and does not rebut the prima facie evidence of adequate packing by the shipper.

Other than the Quick Air notation discussed above, the record is devoid of substantive evidence tending to suggest that the shipment was not adequately packed. Mere allegations of improper packing (by Flying Tiger) unsubstantiated by evidence does not suffice to rebut prima facie evidence of adequate packing.

With the Army having established receipt of the shipment by the carrier in good condition, adequate packing by the shipper, and receipt of the shipment by the consignee in damaged condition, Rule No. 30(A)(2), *supra*, controls and puts the burden on the carrier of proving that such damage was not due to its negligence.

Flying Tiger has offered virtually no evidence to meet this burden of proof. Accordingly, since Flying Tiger has failed to sustain the burden of proving that it was not negligence, as required by Rule No. 30(A)(2), its claim for a refund of $2,255.94 is denied.

[B–183516]

Housing—Loans—Default—Mobile Home Repossessed and Sold—Computation of Government's Claim

Lender's claim on Government-insured mobile home loan in default may properly be certified for payment based on sale price of mobile home, notwithstanding that regulation calls for use of higher of sale price or appraised value, where lender complied with regulations and acted consistently with protection of Government's interest and where, through no fault of lender, appraised value cannot be ascertained.

In the matter of computation of claim of Government-insured lender when value of collateral cannot be determined as required by regulation, August 12, 1975:

This decision is in response to a letter dated March 24, 1975 (ref. AFMI:TI:CE), from Mr. B. C. Tyner, an authorized certifying of-

ficer of the Department of Housing and Urban Development (HUD), asking whether a voucher enclosed therewith, payable to Imperial Savings Association of Amarillo, Texas, in the amount of $4,788.21, may be certified for payment. The voucher covers a claim on a loan made by Imperial Savings Association to Clarence H. and Janet F. Amerine for the purchase of a mobile home. The lender was insured by HUD with respect to this loan pursuant to section 2 of title I of the National Housing Act, as amended, 12 U.S. Code § 1703 (1970).

The certifying officer explains the circumstances giving rise to the claim as follows:

> The borrowers purchased a 1973 Glenbrook Mobile Home, vehicle identification number 3B302R-512529. The cash price of the home was $9,163.00 with a down payment of $533.00 for a loan balance of $8,630.00. One payment of $93.56 was made on the loan and it subsequently went into default on July 1, 1973. The home was repossessed by the lending institution on February 4, 1974, and was offered for sale to the highest bidder for cash on February 27, 1974, at 2:00 p.m., in the offices of Imperial Savings Association of Amarillo, Texas, located at 415 West 8th Street, Amarillo, Texas. The borrower was given notice of the sale by certified mail on February 22, 1974. The lender failed to receive satisfactory bids at the first sale and set down a second sale on May 29, 1974. The borrower was given notice of the above sale by certified mail on May 24, 1974. Imperial Savings Association received three bids: (1) a bid of $3,000 from National Mobile Exchange, Inc.; (2) a bid of $2,785.00 from Amarillo Trailer Sales; and (3) a bid of $3,410.00 from King Mobile Homes. The home was sold to the highest bidder, King Mobile Homes, on May 31, 1974 for $3,410.00 and title was transferred to King Mobile Homes.

The method of computing the amount of reimbursement by HUD of an insured lender for losses on mobile home loans made pursuant to 12 U.S.C. § 1703 is prescribed in paragraphs (a) through (c) of 24 C.F.R. § 201.680. Paragraph (a) provides as follows:

> (a) Deduct from the unpaid amount of the obligation (net unpaid principal and the earned portion of the financing charge, at the time of default) the actual sales price obtained for the mobile home following its repossession, or the appraised value of the mobile home, whichever amount is the greater. The determination of appraised value (for the purposes of this paragraph) shall be made by the Commissioner, at his option, on the basis of either the value listed in a current accepted "blue or red book" value rating publication (establishing wholesale values for comparable mobile homes in the geographic rating area) or on the basis of an actual appraisal of the mobile home. The Commissioner's determination of appraised value shall be binding on the insured for the purposes of establishing its loss.

The certifying officer states that HUD has been unable to find a value listing in a current accepted "blue book or red book" value rating publication for the mobile home in question, and that the home is no longer available for an actual appraisal by an agent of the Secretary. Thus, determining an appraised value by either of the methods prescribed by regulation is not possible. The certifying officer asks, in effect, whether the voucher may be certified for payment, where the amount has been computed on the basis of the actual sales price obtained for the home, notwithstanding the fact that the regulation

requires that it be computed based on the appraised value where that is greater than the sales price.

The regulation cited above allows the use, for determining appraised value, of the "value listed in a current accepted 'blue or red book' value rating publication (establishing values for comparable mobile homes in the geographic rating area) * * *." It is incumbent upon HUD, in accordance with its regulation, to make every practicable effort to determine in a given case, whether there is a listing in a current accepted value rating publication for a mobile home, particularly where, as is the case in this instance, there is a lack of an actual appraisal. If it is administratively determined that the value of the mobile home in question as of the time of default is listed in a current value rating publication, the regulation requires that it be used to compute the amount of reimbursement to the insured lender.

We understand that the certifying officer's statement that a value listing could not be found for the particular make and model of home here involved was based on a check of one value rating publication. We have determined, however, that there are at least three such publications, and that the Glenbrook mobile home is listed in at least the current edition of one of these publications, the publication issued by the National Automobile Dealers Association (NADA). We have not attempted to determine what the NADA book value was at the time of default but presumably the book value of the mobile home in question would have been higher at that time than at present.

The NADA publication is used by financial institutions and can fairly be characterized, we believe, as a "current accepted" publication, within the meaning of the regulation. We understand that HUD has some question whether the NADA value listing is applicable to the particular model of Glenbrook mobile home which is here involved.

Until HUD has exhausted all reasonable efforts to determine the "blue or red book" value of the mobile home involved here, the voucher may not be certified for payment. We would point out in this connection that it appears that the claim file in this case includes sufficient information on the mobile home, including the manufacturer's serial number, that it may be possible, through inquiry to the manufacturer if necessary, to resolve any doubt concerning whether there is indeed a book value listing applicable to this particular model of mobile home, whether in the NADA "book," or another current accepted value rating publication.

If, however, upon diligent inquiry, it appears that there is no value listing for the mobile home, it would then be proper to consider whether the instant voucher may be certified for payment based on the actual sale price obtained for the mobile home. With respect to that possi-

bility, we note that the regulations which prescribe the procedure to be followed by the insured lender in the event of the borrower's default require that a claim shall not be filed by the lender until after default, repossession, and sale of the mobile home. 24 CFR § 201.665(b). That procedure was followed in this case. Thus, it is as a result of the lender's compliance with the HUD regulations that the collateral is not available for an actual appraisal of its value.

The present inability to determine whether the sales price is greater than the appraised value or not is thus not the result of non-compliance with regulations by the insured lender. Rather, the burden of establishing the value of the property in question is on the agency. The Commissioner is to determine appraised value, at his option, either by making an actual appraisal, a procedure which the same regulation has precluded in this case by requiring the sale of the mobile home before submission of the claim, or by using the "book" value, which, if in fact it should be unavailable, would be so through no fault of the lender.

We note that allowance of the claim based on the actual sale price would not deprive the United States of its rights as against the borrowers. The lender has assigned to the United States all its right, title, and interest in the note executed by the borrowers. Moreover, since the insured lender must, under the statute, bear at least 10 percent of the loss on the loan (12 U.S.C. § 1703(a)), the lender has an incentive to realize as much as possible on the sale of the collateral. Further, in the instant case the lender, when it did not receive satisfactory bids at a sale of the mobile home after repossession, held a second sale at which the highest of three bids was accepted.

Under the circumstances, and assuming that the "book" value cannot be ascertained after diligent effort, we believe that the voucher in the instant case may properly be certified based on the sale price alone, notwithstanding that no formal appraised value is available, if the Commissioner determines that the price received for the home in question was reasonable.

We note that, according to the certifying officer's submission, " * * * the issue affects a number of claims that have been submitted." Where the Commissioner cannot determine the appraised value of the collateral in circumstances such as those here presented (*i.e.* under either of the methods presented in the regulation), and where it appears that the insured lender has made adequate attempts to sell the collateral under conditions which will protect the interest of the Government, we would agree that the sale price—if administratively determined to be reasonable—may be used to compute the amount of reimbursement to the insured lender. We recommend that the regulation which gives rise to this anomalous situation be promptly amended.

[B-181246]

Claims—Assignments—Validity—Assignee Loan Not for Contract Performance

Assignment to bank of Government contract proceeds where bank's alleged financing is through intermediary holding company may not be recognized as statutory assignment since there has been no showing that intermediary or bank actually provided funds to Government contractor or that intermediary expended funds for the performance of the contract.

Set-Off—Contract Payments—Assignments—Claim Matured Prior to Assignment

Government contractor's assignment to bank of contract proceeds executed after contractor's operations ceased is invalid under 31 U.S.C. 203 since purpose of statute removing bar to assignments is to induce financial institutions to lend money to finance contractor's operations.

Claims—Assignments—"Financing Institutions" Requirement

Government contractor's grant of security interest in accounts receivable to holding company alleged to be intermediary for bank's financing of contractor is not valid assignment under 31 U.S.C. 203, even if properly filed with Government, since Government contract proceeds may be assigned only to financing institutions and holding company does not qualify as proper assignee.

In the matter of Bamco Machine, Inc., August 18, 1975:

The Accounting and Finance Officer of the Defense Supply Agency has requested an advance decision regarding the propriety of setting off certain funds which are now payable to Bamco Machine, Inc. (Bamco).

On June 24, 1971, contract N00197-71-C-0394 (hereinafter the Navy contract) was awarded to Bamco by the Naval Ordnance Station, Louisville, Kentucky, for 160 air flasks at a unit price of $140.99. On April 17, 1973, the procuring contracting officer (PCO) issued a partial termination for default for 70 of the 160 flasks and by modification No. P0005, dated June 15, 1973, the unit price of the remaining 90 flasks was reduced to $134.6175. These 90 flasks were shipped on September 27, 1973, and accepted at the destination on January 22, 1974. Upon examination, it was found that 23 of the 90 flasks were defective and required repairs amounting to $600, which the PCO requested be withheld. Bamco submitted its invoice in the amount of $12,115.57 for the 90 flasks with its final shipment.

Bamco's assets were seized by the Internal Revenue Service (IRS) on November 9, 1973, for nonpayment of taxes which apparently had the effect of closing down Bamco's operations. Also on November 9, 1973, the Seattle First National Bank (Bank) sent a letter to the disbursing officer advising that certain invoices, including the above invoice for $12,115.57, had been assigned to the Bank by Bamco. However, the assignment was not in the form required by clause 7-103.8 of

the Armed Services Procurement Regulation (Assignment of Claims) and the Bank was told to contact the administrative contracting officer (ACO) to properly establish the assignment. The ACO forwarded the appropriate forms and instructions to the Bank on January 17, 1974. The Bank forwarded the proper forms to the ACO on January 30, 1974.

At the time of the action by IRS, Bamco was also performing Air Force contract No. F09603–71–C–1978 (hereinafter the Air Force contract), and had received $66,121.76 in progress payments. On December 19, 1973, Bamco was default-terminated under this contract and is currently liable for the unliquidated progress payments and also for the reprocurement costs, if and when incurred. When IRS closed down Bamco, the ACO obtained $77,000 worth of inventory which will be applied to the replacement contract if one is awarded. It is reported that if a replacement contract is not awarded, the inventory will have little value other than as scrap.

The Accounting and Finance Officer has requested answers to the following questions based on the above-stated facts:

1. Does a valid Assignment relationship exist under contract N00197–71–C–0394 between the Seattle First National Bank and Bamco Machine Incorporated?

2. If a valid Assignment exists, does this take priority over the contingent and actual claims of the Government in connection with contract F09603–71–C–1978 existing prior to receipt of notice of this Assignment by the Government, thus permitting payment to the Seattle First National Bank as assignee?

3. If a valid Assignment does not exist, may payment be withheld from Bamco pending finalization of reprocurement cost and progress payment resolution under contract F09603–71–C–1978?

Based upon a review of the record before our Office the following appears to be the manner in which the financing of Bamco was arranged. On November 18, 1970, the Bank took a secured interest from Bamco in all accounts and contract rights by filing the required financing statement under the Uniform Commercial Code (UCC) with the Secretary of the State of Washington. On December 21, 1970, the Bank took a security interest in all equipment and machinery in the same manner. This was the status of the bank's security arrangement prior to the award of the Navy contract on June 24, 1971. Thereafter, on May 16, 1973, Bamco completed a security agreement with Associated Venture Capital, Inc. (AVC) granting AVC a security interest in all of the types of assets which the Bank had formerly held as security. We have ascertained that AVC is a holding company which owned 48 percent of Bamco's stock. On May 17, 1973, AVC filed a financing statement under the UCC pursuant to the above-mentioned security

agreement with Bamco as the debtor, AVC as the secured party and the Bank as the assignee of the secured party, AVC.

Generally, an assignment of accounts receivable from the United States can be lawfully accomplished only through compliance with the Assignment of Claims Act of 1940, as amended, 31 U.S. Code 203, 41 U.S.C. 15 (1970). Under 31 U.S.C. 203 (1970) moneys due under a Government contract may be assigned to a "bank, trust company, or other financing institution." Assignees are required to comply with requirement for written notice of assignments as provided in the Act. In addition, the Act limits the Government's right to reduction or setoff as follows:

> * * * payments to be made to the assignee * * * under such contract * * * shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract * * *.

We understand that Bamco's operations were indirectly financed by the Bank through the intermediary AVC. This fact does not invalidate an otherwise valid assignment to the Bank. In *Coleman* v. *United States*, 158 Ct. Cl. 490 (1962), the court stated that an assignment to the bank is valid to the extent that moneys were actually paid over to the Government contractor by the intermediary or the bank or to the extent that they were spent by the intermediary to aid the contractor in completing the contract. However, the court held that the burden of proving that the funds advanced by the bank were either used in the performance of the contract or were paid over to the contractor was on the plaintiff, that is on the Bank and the contractor's receiver in bankruptcy. *Coleman* v. *United States*, *supra*, at 497. In the instant case, the record does not show the extent of the Bank's financing which the intermediary or the Bank paid over to the Government contractor or the amounts used by the intermediary in the performance of the contract. Unless the bank or the contractor, upon request, can make such a showing, the Government may not recognize the assignment as valid, and notwithstanding the no-set-off provision, may apply the contract proceeds against debts of the contractor otherwise owed to the Government.

More basically, it has been held that the only effect of the 1940 amendment to the Act was to remove the bar to assignments so as to permit contractors to finance their Federal contracts upon the security of assignments of the contract proceeds. *Produce Factors Corp.* v. *United States*, 467 F. 2d. 1343 (199 Ct. Cl. 572 (1972)); *Continental Bank and Trust Company* v. *United States*, 416 F. 2d 1296 (189 Ct. Cl. 99 (1969)) and *Alanthus Peripherals, Inc.*, 54 Comp. Gen. 80 (1974). The Act's purpose, therefore, was to induce financial institutions to lend money to the contractors to finance them

in supplying goods to the Government. *Central Bank* v. *United States*, 345 U.S. 639 (Sup. Ct. 1953).

In the instant case the record does not establish that the Bank obtained an assignment from *Bamco* prior to such time as the contractor's operations had ceased. Although the instrument of assignment to the Bank and the notice of assignment were dated May 17, 1973, the record indicates that blank forms were furnished the bank by the ACO on January 17, 1974. It appears that the forms provided were completed to reflect the financing statement, dated May 17, 1973, filed by AVC with the State of Washington which names the bank as the assignee of *AVC*. In addition, the signature of Bamco's president appearing on the instrument of assignment was duly notarized on January 24, 1974. Thus, we must conclude that *Bamco's* assignment to the Bank was executed only after the contractor's operations had ceased and that the Bank did not finance Bamco's operations upon the security of the *contractor's* assignment to the Bank. Rather, it appears that the bank relied, if at all, upon Bamco's security agreement with AVC and the designation of the bank as *AVC's* assignee. However, the security interest granted AVC by Bamco may not be recognized even if properly filed with the Government since, AVC, as a holding company, is not a financing institution and therefore not a proper assignee under the Act. 22 Comp. Gen. 44 (1942).

For the reasons stated, we must conclude that the Government may not recognize the Bank as a valid assignee pursuant to the Assignment of Claims Act of 1940, 31 U.S.C. 703 (1970), as amended. Since we have been advised that the Air Force has incurred reprocurement costs far in excess of the amount due under the Navy contract, the contract proceeds may be applied against contractor's debts otherwise owed to the Government.

[B-183031]

Pay—Retired—Survivor Benefit Plan—Revocation, etc.—Administrative Error—Secretarial Prerogative

Members who retired before Survivor Benefit Plan effective date and elected to participate in the Plan under subsection 3(b) of Public Law 92-425 may not unilaterally revoke such elections during the 18-month period provided for such election or at any time thereafter. Revocation or correction of an SBP election based on "administrative error" is a secretarial prerogative under 10 U.S.C. 1454. 53 Comp. Gen. 393, modified.

Pay—Retired—Survivor Benefit Plan—Revocation, etc.—Election Based on Misinformation

Revocation or correction of an SBP election based upon "administrative error" is a secretarial prerogative under 10 U.S.C. 1454 and may be exercised to revoke

or modify SBP coverage based upon a finding that the member received erroneous or insufficient information and that such information caused him to make an election he would not otherwise have made.

In the matter of Survivor Benefit Plan revocation, August 19, 1975:

This action is in response to a request for an advance decision from the Finance and Accounting Officer, United States Army Finance and Accounting Center, Indianapolis, Indiana, concerning the propriety of making payment on a voucher in the amount of $1,668.44 in favor of Colonel Albert Birkenstein, USA, Retired, 356–05–7421. The amount represents the refund of deductions from his retired pay during the period August 1, 1973, through October 31, 1974, incident to his election to participate in the Survivor Benefit Plan (SBP) (Public Law 92–425, approved September 28, 1972, as amended, 10 U.S. Code 1447–1455 (1972 Supp.)). The Office of the Comptroller of the Army, Department of the Army, forwarded this request by letter dated January 10, 1975 (file reference DACA–FAJ–M), under Control Number DO–A–1229 assigned by the Department of Defense Military Pay and Allowance Committee.

The submission states that the member retired on January 1, 1969, under the provisions of 10 U.S.C. 3911 and that, while he was apparently married at the time, he had not elected to participate in the Retired Serviceman's Family Protection Plan. However, on July 2, 1973, the member elected to participate in the SBP, as authorized by section 3 of Public Law 92–425, *supra*, and designated his wife as beneficiary for the maximum amount of coverage under the Plan.

Following receipt of his certificate of election by the Army Finance and Accounting Center and his entry into the Plan, the member advised that activity by letter dated August 3, 1973, that an insufficient amount was being withheld from his retired pay and restated his desire for maximum coverage for his wife. Apparently, the matter was not immediately corrected, and by letter dated September 2, 1973, the member reiterated his request that an additional amount be taken from his retired pay for his selected coverage.

By letter dated September 17, 1973, the member requested cancellation of his SBP coverage for the reason that doctors had apparently just advised him that his wife had terminal cancer. The member's wife died on September 28, 1973, but the Army continued to make deductions from his retired pay for SBP coverage. By letter of December 28, 1973, the member repeated his request for cancellation of his SBP participation, citing our decision 53 Comp. Gen. 393 (1973), and requested a refund of all deductions made from his retired pay for SBP purposes.

The submission goes on to state that the member appears to be under the impression that he would be entitled to revoke his election

so long as he did so on or by March 20, 1974 (the last date for a pre-effective date retiree to elect into the Plan under subsection 3(b) of Public Law 92–425). However, doubt is expressed in the submission as to whether the member's request constitutes a sufficient basis for revocation of SBP coverage under our decision 53 Comp. Gen. 393 (1973), *supra.*

In 53 Comp. Gen. 393, *supra*, we were asked to decide whether a member, who retired prior to September 21, 1972 (the effective date of SBP), could change or revoke his election to participate in the Plan during the 1-year period (now 18 months) authorized for such election.

Our response to the questions asked took into consideration the three possible alternative courses that such a member could follow with regard to participation in the Plan. They were: (1) file a positive election to participate in the Plan; (2) file a positive statement of his desire not to participate; and (3) remain silent.

With regard to the last two alternatives, we took the position that, short of the expiration of the 18-month period, such courses of action or inaction on the member's part were of no legal significance regarding participation in the Plan. In this connection we said in that decision:

> * * * It is clear that a [subsection 3(b)] retired member may elect coverage under the Plan any time up to the end of the 18-month allowable period. His silence up to the last hour of that period could not be construed as an election not to be covered if in fact he elects to be covered before the period expires. We do not consider that a retired member who states he does not desire coverage should be given any lesser period of time to finally elect coverage than the member who fails to make any participation statement up to the last hour of the authorized period. * * *

As to the first alternative, we stated that in the case of a member who retired prior to September 21, 1972, and where the individual was not provided adequate information to make an intelligent election or where there was a misunderstanding on his or her part concerning such election, the individual could change or revoke such election provided the change or revocation was made within the 18-month period.

It appears from the material enclosed with the submission that our statement regarding the first alternative has been viewed by the member as authorizing him to revoke unilaterally his participation in the Plan, by merely asserting that he received insufficient, misleading or erroneous information prior to his entry into the Plan. In this regard, it is noted that the member's basis for requesting relief under our decision is his contention that when he elected into the Plan, he understood that he would be entitled to revoke his participation therein should his beneficiary die before the end of the 18-month election period.

Since there appears to exist some confusion as to how that decision should be applied to the present case, and since certain of the language used therein could be viewed as providing a means outside the cognizant Secretary's authority under 10 U.S.C. 1454 to revoke a member's election incident to correcting an administrative error, whereby *the member*, under certain circumstances, could revoke his election to participate in the SBP, it would appear that a modification of that decision is required.

In that regard, section 3 of Public Law 92-425, *supra*, as amended by Public Law 93-155, November 16, 1973, 87 Stat. 615, is applicable to the member in this case and provides in pertinent part:

(b) Any person who is entitled to retired or retainer pay on the effective date of this Act [September 21, 1972] may elect to participate in the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act at any time within eighteen months after such date. * * *

* * * * * * *

(e) An election made under subsection (a) or (b) of this section is effective on the date it is received by the Secretary concerned. * * *

When a pre-effective date retiree submits an election form which specifies that he wishes to participate in the Plan, such action carries with it the basic presumption that he intended to so participate and that the election form submitted and received by the Secretary concerned reflects his desires both as to level of participation and designation of beneficiary.

Unlike the provisions of the Retired Serviceman's Family Protection Plan which provided an option whereby a member could cancel participation in that Plan should all eligible beneficiaries predecease him (10 U.S.C. 1434(c)), the SBP as enacted does not so provide, it being intended that, in order for the Plan to remain actuarially sound and at a low cost, participation be perpetual. *See* 117 Cong. Rec. 37202, October 21, 1971.

However, like the Retired Serviceman's Family Protection Plan, the SBP does provide a means whereby the Secretary of the military department concerned may correct or revoke an otherwise valid election in certain circumstances. The section in question (10 U.S.C. 1454), provides:

The Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election made under this subchapter when he considers it necessary to correct an administrative error. Except when procured by fraud, a correction or revocation under this section is final and conclusive on all officers of the United States.

And section 1455 of the same title provides in part:

The President shall prescribe regulations to * * * (1) provide that * * * the member * * * be informed of the elections available and the effect of such elections * * *

Under the provisions of section 2(4) of Executive Order 11687, October 11, 1972, and section 705 of Department of Defense Directive

Number 1332.27, January 4, 1974, promulgated in implementation of that statutory authority, the Secretary of the military department concerned or his designee is authorized to determine the existence of an administrative error and revoke the member's election to participate in the Plan where warranted.

It is our view, therefore, that a member who retired prior to the effective date of the SBP and elected into the Plan under the provisions of subsection 3(b) of Public Law 92–425, may not unilaterally revoke such election and our decision 53 Comp. Gen. 393, is modified accordingly. However, actions previously taken by the services in reliance upon 53 Comp. Gen. 393 are not affected by this decision.

With regard to the present case, it would appear that if an appropriate determination is made under 10 U.S.C. 1454 that the member has reasonably established that he received erroneous or insufficient information and that the information so received caused him to make an election he would not otherwise have made, revocation of the member's election under the Plan would be appropriate.

We find nothing in the record to show that any secretarial determination as to the appropriateness of the member's request was made. Therefore, unless and until such a determination is made, it is our view that the member remains an SBP participant and deductions from his retired pay must continue. Accordingly, payment may not be made on the voucher.

[B–183083]

Compensation—Wage Board Employees—Increases—Retroactive

Wage survey at Interior installation, commenced in time to be effective February 4, 1973, was not effective until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973.

In the matter of retroactive wage increases, Department of the Interior, August 19, 1975:

This is an advance decision requested by the Secretary of the Interior concerning the propriety of a retroactive pay adjustment for wage board employees at the Yuma Projects Office, Bureau of Reclamation. Consistent with a longstanding practice at the Yuma Projects Office, wage rates are determined through the collective bargaining process, normally in the month of January. In January of 1973, however, a representation issue arising out of an earlier reorganization and involving the International Brotherhood of Electrical Workers (IBEW)

and the National Federation of Federal Employees (NFFE) was pending before the Department of Labor. The Bureau of Reclamation advised the IBEW that wage rates could not be negotiated until the representation issue was resolved. On May 7, 1973, however, while the representation issue was still unresolved, but with the written sanction of both disputants the Bureau approved a 5.5 percent pay adjustment. The Bureau has been requested by the IBEW to make the pay adjustment effective back to February 4, 1973, the date on which the adjustment would have been effective but for the representation dispute. The Secretary of the Interior, therefore, seeks a determination by this Office whether such an adjustment is permissible under the provisions of existing statutes and regulations.

It has long been the rule that in the absence of a controlling statute an increase in basic compensation authorized by a wage board or other wage fixing authority for employees, whose pay is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates, may not be made effective prior to the date of final action by the wage fixing authority. 24 Comp. Gen. 676 (1945); 40 *id.* 212 (1960). Section 5344 of Title 5, U.S. Code (Supp. II, 1972), however, in pertinent part provides:

> (a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.

However, it has been held that wage adjustments for Federal wage board employees which are determined through collective bargaining under labor-management agreements, as distinguished from those determined by wage surveys conducted by the administrative department or agency are not subject to the provisions of Public Law 85–872 (lated codified in 5 U.S.C. 5343 (1970)) which was designed to eliminate undue delay in effecting wage adjustments when the administrative department was solely responsible for the wage determination. 38 Comp. Gen. 538 (1959). The provisions of 5 U.S.C. § 5343 were reinacted as 5 U.S.C. § 5344(a) by Public Law 92–392, approved August 19, 1972, 86 Stat. 568. The reenactment does not affect the holding in 38 Comp. Gen. 568 since section 9(b) of Public Law 92–392, 86 Stat. 574 (5 U.S.C. 5343 note), provides that the amendments made by that act shall not affect current negotiated labor agreements or the renegotiation of such agreements in effect at the time that act became effective.

We also point out that in the past our Office has viewed tentative agreements between a competent wage fixing authority and a union which prospectively sets the effective date for wage increases as authorizing increased payments from that date even though the amount

of the increase is not determined or agreed to until a later date. B–62932, B–75121, July 5, 1950. In B–126868, April 8, 1963, it was stated that:

> The reasoning behind that rule is that the compensation paid employees subject to such agreements after the date set for increase is merely an advance and that the Government knows it will be required to pay additional compensation to such employees at a later date under the terms of a final agreement between the employees' union and either the Government or private industry.

The submission from the Department of the Interior does not indicate that any tentative agreement was reached on or before May 7, 1973. Therefore, on the basis of the information provided and in the light of past decisions, it must be concluded that a pay adjustment retroactive to February 4, 1973, would not be permissible.

[B–183247]

Payments—Absence or Unenforceability of Contracts—Volunteer Services—Unsolicited Proposals

Decision by U.S. Government, acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Government. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized.

In the matter of International Explosive Services, Inc., August 19, 1975:

This decision is in response to a further request by International Explosive Services, Inc. (IES) for reconsideration of claim No. Z–2563200 in the amount of $53,928.77 plus late charges for expenses allegedly incurred in connection with a proposed project for the reconstruction of the Suez Canal.

IES initially based its claim on the fact that it attempted to secure participation as a private contractor in the rehabilitation and reconstruction project, but was precluded from entering into commercial arrangements with the Government of Egypt when the United States Government decided to perform these functions at United States' expense. The Transportation and Claims Division of our Office disallowed the claim on the ground that there was no legal basis for United States liability.

By letter of February 3, 1975, IES stated that it was in accord with the United States Government's policy of providing the service to Egypt and it indicated that its claim was based on the fact that the work was given to Murphy Pacific Marine Salvage Co. (Murphy) by the United States without IES being provided an opportunity to bid.

However, by decision B–183247, May 13, 1975, our Office was of the position that since the United States had an existing term contract (N00024–71–C–0234) with Murphy for the services contemplated in the Suez Canal, competitive bidding on the Suez Canal project was unnecessary. On this basis the denial of the claim by the Transportation and Claims Division was sustained.

However, by letter dated July 22, 1975, IES has requested further reconsideration of its claim on the following basis:

> IES, Inc. made a full proposal of a six phase program to the Egyptian Government to assist them in their post war reconstruction efforts. Within ten days of this proposal, the United States Newspapers described our identical plan. Naturally IES, Inc. felt that it would be sharing in this program.

Since IES did not share in the program, it feels that it is justified in petitioning for its expenses actually incurred in preparation for the six-phase program.

For the reasons that follow, the further request of IES must be denied and this matter put to rest.

In our opinion, when the United States Government, acting in its sovereign capacity, determined that for foreign policy reasons it would take the action it did with respect to the clearance of the Suez Canal, it was not misappropriating any existing contractual right which IES had with Egypt. While it is a principle of law that a valuable contractual right is property within the meaning of the 5th Amendment, and when taken for public use must be paid for by the Government (*Omnia Commercial Co., Inc.* v. *United States*, 261 U.S. 502 (1923)), it has been further established that in the absence of a statutory mandate the sovereign must pay only for what it takes, not for opportunities which the owner may lose. It is well settled that frustration and appropriation are essentially different things. *United States* v. *Miller*, 317 U.S. 369 (1943); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266 (1943); *United States* v. *Easement and Right of Way 100 Feet Wide, Tenn.*, 447 F. 2d 1317 (6th Cir. 1971). In this instance IES had, at most, anticipated a contract with the Egyptian Government. Any losses incurred on the expectancy of the commercial undertaking are not the responsibility of the United States Government.

In our view, IES, in submitting an unsolicited proposal to the Egyptian Government, was acting as a pure volunteer. The typical cases wherein relief has been granted in similar circumstances have presented some element which would remove one from the fatal category of pure volunteer. See *J. C. Pitman & Sons, Inc.* v. *United States*, 317 F. 2d 366, 161 Ct. Cl. 701 (1963), and cases cited therein. The record before us, however, is devoid of any such saving elements, and without such, payment may not be authorized. *See* B–176498, October 2, 1973; B–164087, July 1, 1968.

Accordingly, we find no basis upon which to deviate from the prior denials of IES's claim.

[B-184557]

Discharges and Dismissals—Military Personnel—Discharged With Readjustment Pay—Travel and Transportation Allowances—To Selected Home

A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay.

In the matter of entitlements of Regular commissioned officer discharged under 10 U.S.C. 3814a, August 21, 1975:

This action is in response to a letter dated July 16, 1975, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting an advance decision on the question whether Regular Army commissioned officers "discharged with readjustment pay" under 10 U.S. Code 3814a (1970), as added by Public Law 93-558, approved December 30, 1974, may select their homes for the purpose of receiving travel and transportation allowances under 37 U.S.C. 404(c), 406(d) and 406(g). That letter was forwarded to our Office by the Per Diem, Travel and Transportation Allowance Committee, and has been assigned PDTATAC Control No. 75-22.

The request for decision states that officers discharged in accordance with 10 U.S.C. 3814a do not fit precisely either of the categories listed in 37 U.S.C. 404(c), 406(d) or 406(g), i.e., discharged with severance pay or involuntarily released from active duty with readjustment pay. It further states that while a literal interpretation of the statute would appear to deny such discharged officers any travel and transportation entitlements except to their home of record, it was the Secretary's belief that the act was not intended to be so restrictive.

The Secretary asks whether Regular officers discharged with a readjustment payment may be provided the same travel and transportation allowances based upon home of selection as are provided for Reserve officers "involuntarily released from active duty." If our answer is in the affirmative, the Secretary asks whether regulations issued regarding this allowance would have a retroactive effect to cover all cases falling under 10 U.S.C. 3814a.

The statute in question provides that commissioned officers of the Regular Army in grades below major may be involuntarily discharged whenever a reduction in the active duty officer personnel strength of the Army is required. The act provides that if the officer is not eligible

for retirement under 10 U.S.C. 3911, or any other provision of law, then under prescribed board recommendations he will be removed from the active list of the Regular Army and discharged. An officer so discharged who has completed immediately before his discharge at least 5 years of continuous active duty is entitled to readjustment pay as provided by 10 U.S.C. 3814a(c).

Other than the method authorized by 10 U.S.C. 3814a the involuntary release of Regular Army officers short of completion of a set number of years of service is prohibited except in specific situations. Officers in a probationary status (less than 3 years of active commissioned service in the Regular Army) may be separated at the discretion of the Secretary of the Army and officers holding the grade of captain or below may be separated because of promotion failure or pursuant to a court-martial, or show cause proceedings. Separated Regular officers of the Army may be eligible for *severance pay* under 10 U.S.C. 3786(b)(2).

In contrast, Reserve officers serving on active duty in grades below major can be released involuntarily at the discretion of the Secretary of the Army. *See* 10 U.S.C. 1162 (1970). Such involuntarily released officers may be entitled to *readjustment pay* under 10 U.S.C. 687.

The statutory authorities for travel and transportation allowances as cited above contain the phrases "discharged with severance pay" which is applicable to discharged Regular Army officers and "involuntarily released from active duty with readjustment pay" which is applicable to Reserve officers. The phrase "discharged with readjustment pay" is not used therein since prior to the enactment of 10 U.S.C. 3814a it would not have been applicable to either a Regular or Reserve officer.

The legislative history of Public Law 93–558 indicates that as a result of current events the number of officers authorized for the Army has been reduced. This has resulted in heavy reductions in force of Reserve officers in prior years and has resulted in careful screening of all Reserve officers on active duty in the grade of captain and below. Apparently, a comparison of the records of the Reserve officers remaining on active duty with those of their Regular contemporaries revealed that many Reserve officers had greater potential. Therefore, Congress determined that in the best interest of the Army any additional reduction in force should be applied to both Regulars and Reserves. In considering the legislation which allowed the reduction in force to be applicable to Regulars as well as Reserves, the statement was made that the readjustment payment provision of the act was designed with the same provisions as that for Reserve officers released from active duty.

It was also stated that it was anticipated that the Regular officers who were not selected for continuation would be treated similarly to Reserve officers who have been released from active duty and be given

the opportunity to accept a Reserve commission. This was done in order to place them in the same approximate position as their contemporaries in the Reserve who upon being released from active duty normally retain their status in the Reserves.

Thus it would appear that in enacting Public Law 93–558, *supra*, Congress intended to bestow upon a Regular separated from the service in accordance with this act all the rights and benefits applicable to a Reserve separated in similar circumstances. While it is true that the applicable sections of the statutes granting travel and transportation allowances do not specifically apply to a Regular who is discharged with readjustment pay as is the case under the new act, we believe the intent of Congress was to provide the Regular all the benefits of a Reserve separated under the same conditions. In view of that intent the technical terms used to describe the type of separation and the type of additional payment received upon separation should not be used to prevent the granting of travel benefits based upon home of selection. Accordingly, it is our view that Regular officers discharged under 10 U.S.C. 3814a are entitled to home of selection travel benefits to the same extent as if they had been "discharged with severance pay" or "released from active duty with readjustment pay." In view of the above interpretation of the controlling statutes no change in the regulations is required to implement this decision.

The submission is answered accordingly.

[B–184173]

Contracts—Specifications—Deviations—Not Prejudicial to Other Bidders—Alternate Bids

Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included in or is in addition to base bid price.

Bids—Mistakes—Correction—Base Bid and Alternative Items

Where bidder stated separate prices for both base bid and alternate item, even through amendment (which was acknowledged) required inclusion of alternate work and price in base bid, bidder may correct base bid price by adding alternate price thereto as bidder has submitted clear and convincing evidence as to both the existence of mistake and price intended and bid is low both as corrected and uncorrected. However, agency is advised that in future bid schedules should be revised to conform with revisions in bidding instructions.

In the matter of Herman H. Neumann Construction, August 22, 1975:

This decision is in response to a protest filed by Herman H. Neumann pursuant to invitation for bids (IFB) No. 12–FC108–75, issued

on April 18, 1975, by the United States Coast Guard for construction of a Coast Guard Air Station in Arcata, California.

The solicitation called for bids on a Base Item—the work required for the construction of the air station as shown on the drawings and described in the specifications—and two alternate additive bid items. Alternate No. 1 called for a bid on asphaltic concrete surfaces and parking bumpers, and Alternate No. 2 for a bid on fencing and a gatehouse.

An amendment to the solicitation was issued on May 19, 1975. Paragraph D of the amendment stated:

D. *Bid Itemization*

Delete "*Alternate* #1, Asphaltic concrete surfaces and parking bumpers on all streets and parking lots." *INCLUDE THIS WORK IN THE BASE BID.*

At bid opening on May 28, 1975, eight bids were received. The three lowest bids are as follows:

	Basic	Add #1	Add #2
1. Todd Construction Co	2,538,000	-------	24,000
2. Neumann	2,644,444	59,000	18,000
3. Paul V. Wright, Inc	2,800,000	-------	20,000

Although seven of the bidders acknowledged receipt of the amendment and, pursuant to provision D (*supra*), submitted bids on the Base Item and Alternate No. 2 only, Herman Neumann signed and returned the amendment, but included on his bid form prices for the Base Item, Alternate No. 1 and Alternate No. 2.

After withdrawal of the lowest bid due to a mistake in bid, the combined figures submitted by Herman Neumann resulted in the next lowest bid. By telegram of May 28, 1975, the Coast Guard received a protest from Paul V. Wright (the third low bidder) that Neumann's bid was nonresponsive for failing to comply with the amendment to the solicitation. Subsequently, after a review by the contracting officer on June 6, 1975, the Neumann bid was determined to be nonresponsive on the ground that the Government could not determine the total price bid from the submitted offer without further clarification.

On June 10, 1975, Neumann protested the rejection of its bid. Neumann alleges that by adding the Base bid price to Alternate No. 1, his bid is still almost $100,000 lower than the next lowest bid.

The Coast Guard argues, however, that it was unable to determine Neumann's total price from the bid as submitted since it is unclear whether Neumann complied with the amendment and included the work described in Alternate No. 1 in the Base bid and was just showing the cost he had included, or whether the two prices would have to be added to arrive at his total bid. Therefore, the Coast Guard feels Neumann's bid is ambiguous and that a contrary determination would

unfairly permit him "two bites at the apple" since Neumann could claim either of two prices as his bid. The Coast Guard relies on B–161231, June 2, 1967. The thrust of that decision is that a bidder's failure to comply with a material provision of the IFB renders the bid nonresponsive and, therefore, the bidder may not be permitted to make his bid responsive by changing, adding to, or deleting a material part of the bid on the basis of an error alleged after opening.

However, the holding in B–161231, *supra*, has been modified to the extent that it stands for the proposition that a bid is nonresponsive, *per se*, for deviating from a material provision of the IFB. *Keco Industries, Inc.*, 54 Comp. Gen. 967 (1975). The philosophy of this Office is to focus primarily on whether the deviation in the bid prejudices other bidders. *ABL General Systems, Corporation*, 54 Comp. Gen. 476 (1974) reflects this position. It states, in part:

> * * * the determinative issue is whether or not this deviation [from the manner of bidding specified in the IFB] worked to the prejudice of other bidders for the award.

In the instant case, it is clear that the deviation from the bidding requirement is not prejudicial to other bidders who adhered to bid instructions. Upon acceptance of his bid Neumann would be contractually bound to perform all the work and, despite Neumann's failure to comply with the IFB amendment with respect to the method of pricing, his total bid is still lower than that of the next lowest bidder, whether it is computed on the basis of the Base bid alone or on the basis of the total of the Base bid and the price stated under Alternate No. 1. In these circumstances, Neumann's bid should not be rejected as nonresponsive.

The remaining question concerns the price at which Neumann is obligated to perform. It is our view that since Neumann acknowledged Amendment No. 1, requiring that the bidders "INCLUDE THIS WORK IN THE BASE BID," he would normally be required upon acceptance of his bid to perform the basis and additive work initially called for under Alternate No. 1 at his Base bid price of $2,644,444. However, Neumann has alleged, and supported his allegation with affidavits and worksheets, that the statement of a price under Alternate No. 1 was made under the mistaken belief that this was the method of bidding required and that he intended the price of $59,000 to be in addition to the Base bid. It is our view from the evidence submitted that there is clear and convincing proof as to the existence of a mistake and the bid actually intended. Therefore, and since Neumann's bid is low both as corrected and uncorrected, award may be made at the corrected price of $2,703,444, if otherwise proper. *See* Federal Procurement Regulations § 1–2.406–3(a)(1) (1964 ed.).

Finally, it is our opinion that the mistake in Neumann's bid might have been avoided if the Coast Guard had included a revised bid schedule sheet along with Amendment No. 1 to the solicitation in order to have made the bid schedule consistent with the revised bidding instructions. We are recommending to the Coast Guard by letter of today that in the future solicitation bid schedules should be revised to conform to revisions in the bidding instructions.

Accordingly, the protest is sustained.

[B-180010]

Compensation—Overtime—Actual Work Requirement—Exception—Back Pay Arbitration Award

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid.

In the matter of arbitration award of backpay to employees deprived of overtime, August 25, 1975:

This action involves a request dated May 9, 1975, by the Federal Labor Relations Council (FLRC) for an advance decision as to the propriety of certain payments awarded by an arbitrator in the matter of *Naval Rework Facility, Naval Air Station, Jacksonville, Florida, and National Association of Government Employees, Local R5-82* (Goodman, Arbitrator), FLRC No. 73A-46.

The FLRC first issued a decision on the appeal from the arbitration award in this case on September 24, 1974, holding that the payments awarded by the arbitrator violated applicable law and regulations. The labor organization in the case, the National Association of Government Employees (NAGE), filed a motion with the FLRC on January 17, 1975, to reconsider and modify its decision in light of the decision in B-180010, issued by the Comptroller General on October 31, 1974 (54 Comp. Gen. 312). Hence, pursuant to 31 U.S. Code § 74, the FLRC has requested the Comptroller General to render a decision on the propriety of the payments awarded by the arbitrator.

The arbitration award resulted from a grievance filed by the employees of certain repair shops at the Naval Rework Facility concerning the number of employees scheduled to work on Thursday, January 25, 1973, and on Saturday, January 27, 1973. It had apparently been the practice of certain repair shops at the Facility to schedule overtime on Saturday in addition to the normal Monday through Friday administrative workweek. Thursday, January 25, 1973, was a

national holiday declared by President Nixon to mourn the death of former President Lyndon B. Johnson.

The arbitrator found that the agency, in scheduling work during the days in question, had violated Article XII, section 4, of the parties' negotiated agreement. The aforementioned section provides:

> Employees will be required to work on a holiday if necessary in order to effectively accomplish the mission of the facility; however, such holiday work will not be scheduled to avoid overtime.

The arbitrator determined that 56 employees were ordered to work on the national holiday, January 25, 1973, and that only 28 employees were ordered to work on the following Saturday, January 27, 1973. He found that, although there was no indication in the evidence as to the agency's intent on the matter of scheduling, the acts of the agency did, in fact, avoid overtime pay. Hence, the arbitrator sustained the union's grievance and ordered that "all personnel who worked on Thursday, January 25, 1973, and were not allowed to work on Saturday, January 27, 1973, are to be paid for four additional hours." The rationale for this award was that the employees who worked on the holiday but not on Saturday had received 48 hours of pay, consisting of compensation for the basic 40-hour week plus 8 hours of holiday pay, as compared to the 52 hours of pay received by the employees who worked on Saturday, consisting of compensation for the basic 40-hour week plus 8 hours of Saturday work at the overtime rate of time and one-half.

The agency apparently agreed with the findings and conclusions of the arbitrator, but believed that the payments awarded would be improper under the decisions of our Office. Therefore, the agency filed an exception to the payment portion of the award, relying on the rule stated in several of our decisions that employees may not be compensated for overtime work when they do not actually perform work during the overtime period. *See*, for example, 42 Comp. Gen. 195 (1962); 45 *id.* 710 (1966); 46 *id.* 217 (1966); and B–175867, June 19, 1972. The Federal Labor Relations Council upheld the exception in its decision of September 24, 1974, on the basis of the Comptroller General's decisions.

With respect to the "no work, no pay" policy, we had held in those decisions that the "withdrawal or reduction" in pay referred to in the Back Pay Act, now codified in 5 U.S.C. § 5596 (1970), meant only the actual withdrawal or reduction of pay or allowances which the employee had previously received or was entitled to. These holdings were followed in B–175867, June 19, 1972, where an employee was deprived of the opportunity to work overtime by the agency's failure to comply with its agreement with the union. We stated therein that the improper denial of the opportunity to perform overtime to the aggrieved employee was not an unjustified or unwarranted personnel

action under the Back Pay Act, 5 U.S.C. § 5596, and the implementing Civil Service Commission regulation, 5 C.F.R. § 550.803. We also held that the statute authorizing overtime, 5 U.S.C. § 5542(a), clearly contemplated the actual performance of overtime duty, citing the above-mentioned decisions. Accordingly, we concluded that, although the union-management agreement had been violated, there was no authority for overtime pay since no overtime work had been performed.

In our earlier decisions, we had also construed the Back Pay Act of 1966 as requiring positive or affirmative action by an agency official, rather than an omission or failure to take action for an improper reason, in order to provide a remedy in the form of backpay. For example, we held an employee was not entitled to backpay, where his agency had improperly failed to promote him. *See* 48 Comp. Gen. 502 (1969).

In our more recent decisions, however, we have held that the violation of a mandatory provision of a negotiated agreement resulting in the loss or reduction of an employee's pay, allowances or differentials, is an unjustified or unwarranted personnel action, provided that the mandatory provision was properly included in the agreement. Hence, we now believe that such violations are subject to the Back Pay Act, 5 U.S.C. § 5596, and that the Act is the appropriate statutory authority to compensate an employee for pay, allowances, and differentials he would have received but for the violation of the mandatory provision in the negotiated agreement. 54 Comp. Gen. 312 (1974), and 54 *id.* 403 (1974). Our present position is stated at 54 Comp. Gen. 312, 318 as follows:

> We believe that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that therefore the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. In that regard, to the extent that previous decisions of this Office may have been interpreted as holding to the contrary, such decisions will no longer be followed.

We have also recently held that a finding by an appropriate authority, such as the Assistant Secretary of Labor for Labor-Management Relations, that an employee has undergone an unjustified or unwarranted personnel action as a result of an unfair labor practice which directly caused the employee to be deprived of pay, allowances or differentials he would otherwise have received but for such action, would entitle the employee to backpay. 54 Comp. Gen. 760 (1975).

Finally, we ruled in our decision of June 20, 1975, 54 Comp. Gen. 1071, that an employee deprived of overtime pay in violation of a labor-management agreement may be awarded backpay under the Back Pay

Act for the overtime lost. In that decision, we expressly set aside the distinction between commission and omission in connection with improper personnel actions.

In view of the foregoing, our present position is that an unjustified or unwarranted personnel action may involve acts of omission as well as acts of commission. Such improper action may involve the failure to promote an employee in a timely manner when there is a mandatory requirement to do so or the failure to afford an employee an opportunity for overtime work in accordance with mandatory requirements of agency regulations or a negotiated agreement. Thus, an agency may retroactively grant backpay, allowances and differentials under the provisions of the Back Pay Act to an employee who has undergone an unjustified or unwarranted personnel action, without regard for whether such action was one of omission or commission.

The arbitrator concluded in the present case that 28 employees had been deprived of overtime work in violation of a provision of the negotiated agreement. The arbitrator also concluded, and the agency admitted, that had the 28 employees been properly scheduled, they would have received 52 hours of pay for 40 hours of work instead of 48 hours of pay for the 40 hours actually worked. Therefore, in accordance with 54 Comp. Gen. 1071, *supra*, we hold that the arbitrator's award of backpay for employees deprived of overtime work in this case may be implemented by the agency in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

[B–183940]

Statutes of Limitation—Claims—Transportation—Joint Carrier Service—Motor-Water and Rail-Water

When ocean carrier has issued joint tender with a motor or rail carrier and the motor or rail carrier is subject to 3-year statute of limitations under 49 U.S.C. 66 and that time period has expired, the ocean carrier's claim for the applicable transportation charges is barred.

In the matter of Sea-Land Service, Inc., August 27, 1975:

Sea-Land Service, Inc. (Sea-Land), by letter dated September 25, 1974, requests review of the action taken by the Transportation and Claims Division (TCD) of the General Accounting Office on its claims for transportation charges of $3,012.15. TCD returned Sea-Land's claim invoices to that carrier by letters of October 11, 1973, and June 24, 1974, because the claim was not received in the General Accounting Office prior to the expiration of the 3-year statute of limitations in 49 U.S. Code 66 (Supp. III 1973).

Sea-Land points out that the two transportation shipments for which their claim for transportation charges is made involve foreign ports and took place prior to the 1972 amendment of 49 U.S.C. 66,

Public Law 92–550. Sea-Land contends that the applicable code provision is 31 U.S.C. 71a (1970), with its 10-year limitation period, and that Sea-Land is not time barred.

TCD determined that the two claims for transportation charges were barred from consideration here by Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66 (Supp. III 1973). A similar decision involving a subsidiary of Sea-Land was rendered May 14, 1974, B–178546, and pertained to shipments from Puerto Rico to the United States.

Certificate in Lieu of Lost U.S. Government Bill of Lading (GBL) F–5378532 shows that the original bill of lading was issued on February 4, 1970, to cover the transportation of a shipment of chilled meat from Rochester, New York, to Rotterdam, Netherlands. The record also shows that the shipment was tendered to Beaney Transport Limited, thence Sea-Land, marked "FOR: EXPORT—THRU BILL," and the tariff or special rate authority is shown as Sea-Land Service, Inc., Freight Tariff #138.

The second shipment involves a Certificate in Lieu of Lost U.S. Government Bill of Lading F–0238104 which shows that the original bill of lading was issued on April 9, 1969, covering a shipment of freight of all kinds from Columbus, Ohio, to Kaiserslautern, Germany. The shipment was tendered at origin to the Baltimore and Ohio Railroad Company and routed via "B&O c/o Reading Co. c/o Central R.R. (C.R.N.J.) of N.J. c/o Sea-Land Service." The tariff authority is shown as Sea-Land Tender 567E.

Prior to October 25, 1972, section 66 of Title 49, U.S. Code provides:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier *subject to the Interstate Commerce Act*, as amended, or the Civil Aeronautics Act, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office * * *. *Provided further*, That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of War) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later. [Italic supplied.]

The 1972 amendment of section 66 of Title 49, Public Law 92–550, expanded the definition of overcharges to encompass all modes of transportation and all means of contractual arrangements or exemptions from regulations. Thus, it is true, as Sea-Land contends, that prior to the 1972 amendment charges for ocean carriage were not subject to the 3-year limitation period provided in 49 U.S.C. 66.

However, both the rail and motor carriers participating in these joint rail/water and motor/water movements are common carriers subject to Part I and Part II of the Interstate Commerce Act, 49 U.S.C. 1, 49 U.S.C. 301 (1970). Accordingly, their rates and charges

may be established and changed only in accordance with the procedures fixed by the Interstate Commerce Act. See *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480, 487 (1963). The jurisdiction of the Interstate Commerce Commission extends to combined motor/rail/water services and the extent of participation is not the determining factor as to whether motor/rail/water services constitute through route service. *Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 404 F. 2d 824 (D.C. Cir. 1968); *Alaska Steamship Company* v. *Federal Maritime Commission*, 399 F. 2d 623 (9th Cir. 1968).

That Sea-Land is subject to the Interstate Commerce Act is further substantiated by the fact that Sea-Land's tender 138–A and 567E, applicable here, were issued pursuant to Section 22 of the Interstate Commerce Act, 49 U.S.C. 22 (1970). And both tenders contain the following language:

> I am (we are) authorized to and do hereby offer on a continuing basis to the United States Government, hereinafter called the Government, pursuant to *Section 22 of the Interstate Commerce Act*, or other appropriate authority, the transportation services herein described, * * * [Italic supplied.]

In addition, both Sea-Land tenders contain, under the heading of "FILING WITH REGULATORY BODIES," the following statement:

> Carrier(s) certifies (certify) that, where required, the requisite number of copies of this tender is being filed concurrently with the Interstate Commerce Commission in accordance with Section 22(2), of the Interstate Commerce Act, or with other regulatory agencies as appropriate.

By becoming a party to the Section 22 quotation, the ocean carrier, Sea-Land, may be regarded as falling within the meaning of the phrase "common carrier subject to the Interstate Commerce Act," in 49 U.S.C. 66. See *United States* v. *Francis*, 320 F. 2d 191, 195 (9th Cir. 1963), wherein the court stated:

> By becoming a party to the Loretz (Section 22) Quotation, appellee must be considered to be within the meaning of the Section 322 phrase "common carrier subject to the Interstate Commerce Act." Appellee having voluntarily become bound as a carrier "subject to the Interstate Commerce Act," cannot now claim it is not so bound. We hold he has waived any claim he is excluded under Section 322.

The through GBL, which is the contract of carriage, upon which Sea-Land bases its claim, covered transportation from New York to the Netherlands, and from Ohio to Germany. It is a well accepted rule that a single cause of action on an entire claim or demand based upon a contract cannot be split or divided for the purpose of maintaining separate suits on the various individual parts, nor can a party divide the grounds of recovery and maintain successive actions for the cause of action thereon. *Von Der Ahe Van Lines, Inc.* v. *United States*, 358 F. 2d 999; 175 Ct. Cl. 281 (1966).

Thus, Sea-Land could not seek reimbursement for the portion of carriage within the United States under the 3-year statute of limita-

tions and reimbursement for the ocean transportation costs between the United States and Europe under the 10-year statute of limitations, 31 U.S.C. 71a, *supra*. Since the claim could not be split, and since a portion of the carriage was subject to the Interstate Commerce Act, the 3-year statute of limitations contained in 49 U.S.C. 66 would apply to the entire claim.

Accordingly, the 10-year limitation provision in 31 U.S.C. 71a (1970) is not applicable, and TCD's action in returning Sea-Land's claims is sustained.

[A–84336]

Names—Married Women—Use of Married Name—Payrolls

A woman, notwithstanding her marriage, has the right to use her maiden name on Government checks and payrolls provided that she uses the same name consistently on all Government records. This is, however, subject to any general regulation that might be issued by the Civil Service Commission. In addition, a female employee may be carried on the payroll as Ms., regardless of her marital status, if she so desires. 19 Comp. Gen. 203, modified.

In the matter of use of maiden name on payrolls by married women employees, August 28, 1975:

This action is in response to a request by the Railroad Retirement Board for review of Comptroller General decision A–84336 dated August 15, 1939, published at 19 Comp. Gen. 203, which held that:

The Government has the right to designate a married woman by the surname of her husband on pay rolls and checks covering compensation for services rendered by her, whether or not she elects to use her husband's surname, unless and until the name acquired by marriage be changed by appropriate court action, and there appears no impelling reason for changing the long established general rule that, when a woman employee of the Government marries, the surname of her husband is to be used on the pay roll instead of her maiden surname, but the General Accounting Office will not object to the continuance of the use of her maiden name where an employee continued its use after her marriage for practically all purposes, and the administrative office desires the continued use of her maiden name on the pay rolls. 4 Comp. Gen. 165, amplified.

In setting the policy 4 Comp. Gen. 165 (1924) relied upon legal doctrines and cultural mores which have been seriously eroded by accelerating changes in the legal and social status of women and the repudiation of a common law principle relative to this subject. On page 167 of 4 Comp. Gen. 165 it was stated that "* * * marriage is an institution contemplating homes and families. Each family is a unit * * * and it can hardly be imagined of husbands, wives, and children composing the same family bearing different names. The law in this country that the wife takes the surname of the husband is * * * well settled." The cited principle is stated on page 204 of 19 Comp. Gen. 203 as follows: "Notwithstanding any right a married woman may have to use and be known by her married name, I assume it would not be questioned that a woman upon her marriage legally acquires the

surname of her husband regardless of whether she does or does not elect to use it."

With growing recognition of and interest in women's rights, an increasing number of married women retain their maiden names in their work or profession. In the past, a Government agency had discretion in determining whether a married woman employee could be designated by a name other than her husband's surname on payrolls and checks. This discretion now seems outdated in light of the growing trend to allow a married woman to use a name other than her husband's surname. See *Custer* v. *Bonadies*, 318 A. 2d 639 (Conn. Super. Ct. 1974); *Stuart* v. *Board of Supervisors of Elections*, 295 A. 2d 223 (Md. 1972); *State* v. *Green*, 177 N.E. 2d 616 (Ohio Ct. App. 1961); *Kruzel* v. *Podell*, 226 N.W. 2d 458 (Wisc. 1975); *Dunn* v. *Palermo*, 522 S.W. 2d 679 (Tenn. 1975); and *Walker* v. *Jackson*, 391 F. Supp. 1395 (E.D. Ark. 1975).

In *Kruzel* one of the most recent "name" cases, the Wisconsin Supreme Court confronted the question of whether a woman upon marriage assumes her husband's surname by law. The court chose to accept the view expressed in *Custer*, *Green*, *Stuart*, and others, that a married woman adopts her husband's surname only by custom, and that under common law a person may adopt any name as long as he or she does so in good faith and with no intent to deceive or defraud. 226 N.W. 2d at 463. *Stuart* had earlier held that "the mere fact of marriage does not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding upon all." 295 A. 2d 223, at 226.

In the *Custer* case which involved a mandamus action to compel voting registrars to register women in their maiden names, the court held that women have a right to register to vote in their maiden names and that the voter registrar is obligated to correct voting lists to reflect a change of name for a woman upon marriage only in those cases where the woman in fact changes her name. The *Custer* court also noted the modern trends in our society as reflected in these recent name cases:

> * * * We live in the age of the women's rights movement, when federal law prohibits discrimination in employment on account of sex, [citing Civil Rights Act of 1964 Section 703(a)(1), 78 Stat. 255, 42 U.S.C. Section 2000e–2(a)(1) (1970)] when the equal rights amendment has passed the Congress (March 22, 1972) and * * * when women march in the streets to demand equal status before the law, and when some women go to court for the right to vote in their "own" names. It hardly seems the time * * * to accept an outdated rule of common law requiring married women to adopt their spouse's surnames contrary to our English common-law heritage and to engraft that rule as an exception to the recognized right of a person to assume any name that he or she wishes to use. (318 A. 2d at 641.)

In *Walker*, a 1975 decision by a United States District Court of three judges, the court held that a woman may register to vote in any

surname in Arkansas as long as she does not do so fraudulently. Since Arkansas common law permits a person to change his name at will, the court also concluded that it is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to require use of the prefix Miss or Mrs. for women registering to vote. The ground for that holding was that Arkansas voting laws did not require a man to show his marital status and there was no reasonable or rational basis for requiring such disclosure in the case of a woman. *Cf. Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *affirmed* 405 U.S. 970 (1972).

Thus in the years since our earlier decisions on this subject, the courts have shifted from a view that the common law requires the wife to take her husband's surname to the view that a married woman adopts her husband's surname only by custom and that under the common law she is not bound to do so.

In the light of the present social attitudes concerning the status of women and the current trends in the case law in the area of equal rights for women, we believe that 19 Comp. Gen. 203 should be modified. Therefore, we hold that a married woman has the right to be designated on agency payroll records by her maiden name if she desires to do so. However, in order to eliminate any confusion, the same name should be used consistently on all Government records.

Similarly, a woman employee may elect to use the prefix Ms. on the rolls instead of the traditional forms of Miss or Mrs.

Because of the Civil Service Commission's general jurisdiction over Government personnel matters, this decision is subject to any personnel regulations which may be issued by the Commission.

[B-184344]

Subsistence—Per Diem—Rates—Increases—Effective Date

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Department's regulations. On May 19, 1975, Temporary Regulation A-11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regulations (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished.

In the matter of effective date of increased per diem and mileage rates authorized under Travel Expense Amendments Act of 1975, August 28, 1975:

This action concerns a request for an advance decision from Richard F. Noyes, a certifying officer of the Department of Commerce, as

to the per diem and mileage rates which should be used for temporary duty travel authorized before the enactment of the Travel Expense Amendments Act of 1975, Public Law 94–22, approved May 19, 1975, 89 Stat. 84, 5 U.S.C. 5701 note (the Act), and performed on and after the date of enactment. The Act increased the maximum per diem allowance from $25 to $35 and increased the maximum mileage allowance for privately owned automobiles from 12 cents to 20 cents.

The particular case submitted is that of Norris C. Ellertson, an employee of the Four Corners Regional Commission, who performed temporary duty travel during the period May 15 through May 20, 1975, pursuant to a blanket travel order issued July 1, 1974, for necessary travel during fiscal year 1975. The blanket travel order authorized a per diem rate of $25 per day and a rate of 12 cents per mile for the use of a privately owned automobile in accordance with Commerce Department Administrative Order (DAO) 204–1.

Under DAO 204–1 and the travel order, Mr. Ellertson was entitled to the maximum per diem rate of $25, computed on the basis of his average cost of lodgings of $18 per day, plus $10 for meals and miscellaneous expenses. However, for the period of his travel performed on May 19 and 20, 1975, Mr. Ellertson has submitted a travel voucher claiming per diem at the rate of $33 per day. The submission of the certifying officer states that $18, the average cost of lodgings, plus an allowance of $14 for meals and miscellaneous expenses, would result in a per diem rate of $32, if payment may be made under regulations implementing the new Act. Mr. Ellertson also claims reimbursement for the use of his privately owned automobile on May 20, 1975, at the new rate of 15 cents per mile.

Since Mr. Ellertson's travel order was issued prior to the increase in per diem and mileage rates authorized by the Act, the certifying officer asks whether the voucher claiming the higher rates may be certified for payment. In this regard, the submission cites our decision, 35 Comp. Gen. 148 (1955), which held that a prior statutory per diem and mileage increase was not automatic and required administrative action before higher rates became effective, and which also held that per diem or mileage fixed by travel orders may not be increased retroactively.

The submission is answered as follows. For both the per diem increase and the mileage increase, the Act is expressly qualified by the phrase "[u]nder regulations prescribed under section 5707 of this title [title 5, United States Code] * * *." The Act further amends section 5707 of Title 5, U.S. Code, in pertinent part, to provide that "[t]he Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter [subchapter I of chapter 57 of title 5, United States Code, dealing with travel and subsistence expenses and mileage allowances] * * *."

Under the authority of the Act, the General Services Administration (GSA) on May 19, 1975, implemented the provisions of the Act by issuing to the heads of Federal agencies its Temporary Regulation A–11, Federal Property Management Regulations (FPMR), entitled "Changes to Federal Travel Regulations." Paragraph 2 of Temporary Regulation A–11 states that "[t]his regulation is effective for travel performed on or after May 19, 1975." Paragraph 4 thereof states that the regulation is applicable "to the official travel of employees of Government agencies as defined in 5 U.S.C. 5701, except employees of the judicial branch." The temporary regulation was published in the Federal Register on May 21, 1975 (40 F.R. 22182), and was corrected and republished on May 23, 1975 (40 F.R. 22617).

Accordingly, for official travel on or after May 19, 1975, travel orders issued by an agency are valid only to the extent that they are consistent with the provisions of Temporary Regulation A–11. *See* 49 Comp. Gen. 493 (1970). Therefore, insofar as the new regulation provides that an employee is entitled to a specific allowance or rate of reimbursement without providing administrative discretion to an agency to alter such rates or allowances, an agency may not properly provide for a different rate or allowance by travel regulations or travel orders.

In construing the last statutory per diem increase from $16 to $25 (Public Law 91–114, Nov. 10, 1969, 5 U.S.C. 5702a), we stated in 49 Comp. Gen. 493, 494, *supra*, that such an increase is not automatic but requires administrative action before it becomes effective and that there is no authority to retroactively increase rates in travel orders issued prior to the statutory date, citing 35 Comp. Gen. 148 (1955) as our authority. However, since both the Bureau of the Budget and the Per Diem, Travel and Transportation Allowance Committee of the Defense Department had promulgated changes in their respective regulations on November 10, 1969, to give immediate effect to the statute by prescribing mandatory per diem rates effective as of that date, we there held that such administrative action established the per diem entitlement of all employees in the Department of Defense and that travelers who were authorized per diem in accordance with the Joint Travel Regulations (JTR) should be allowed the difference between the $25 rate and the $16 rate. We further held that the prohibition on retroactive amendment of travel orders was not applicable. 49 Comp. Gen. 493, at 495.

We believe that the present situation in 1975 is the same as that in 1969 considered in 49 Comp. Gen. 493, *supra*, and we adhere to the conclusions reached therein. Furthermore, since 35 Comp. Gen. 148, *supra*, has been construed by the Department of Commerce and presumably by others to possibly preclude changing previously issued

travel orders to conform to new rates prescribed pursuant to statute, we wish to make it clear that that decision is to be distinguished from the present case. It does not apply to mandatory increases in rates of per diem or mileage pursuant to regulations implementing statutory per diem and mileage rate increases.

Accordingly, on and after May 19, 1975, the effective rates of per diem and mileage for official travel of civilian employees of Government agencies are the rates established by Temporary Regulation A–11, issued by GSA under the authority of the Act. The foregoing sentence applies both to travel orders issued prior to the date of enactment and those issued thereafter.

For travel in the conterminous United States when lodging is required, FTR para. 1–7.3c is changed by Temporary Regulation A–11 (May 19, 1975), to require an agency to establish the per diem rate on the basis of the average amount the traveler pays for lodging plus an allowance of $14 for meals and miscellaneous expenses, not to exceed a daily rate of $33. For this type of travel, the only discretion vested in an individual agency to set a per diem rate other than one computed in accordance with the lodgings-plus provisions arises when a proper agency official determines under the criteria specified that the lodgings-plus system is not appropriate for particular travel.

The record in the present case indicates that by travel order issued July 1, 1974, Mr. Ellertson was authorized per diem under the lodgings-plus system at a maximum per diem rate of $25, as provided for in DAO 204–1. In accordance with the foregoing discussion, Mr. Ellertson became entitled, under Temporary Regulation A–11, for travel performed on May 19 and 20, 1975, to per diem at a rate, not to exceed $33, computed on the lodgings-plus basis using an allowance of $14 for meals and miscellaneous expenses. Since the Commerce Department's audit shows that he is entitled to per diem of $32 only (average lodging of $18 per night plus $14 meals and miscellaneous expense), he should be reimbursed accordingly.

The same reasoning applies to Mr. Ellertson's claim for reimbursement for the use of a privately owned automobile on May 20, 1975, at the rate of 15 cents per mile. His travel voucher indicates that the only travel by a privately owned automobile for which he claims reimbursement at this rate was from the airport to his residence. In this regard, section 5 of Temporary Regulation A–11 amended FTR para. 1–4.2c(1), effective May 19, 1975, to provide that payment on a mileage basis at the rate of 15 cents per mile shall be allowed, in lieu of reimbursement for the use of a taxi, for the employee's use of a privately owned automobile from a terminal to his home.

Accordingly, Mr. Ellertson may be properly reimbursed for the use of his privately owned automobile on May 20, 1975, for travel from the airport to his residence at the rate of 15 cents per mile.