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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

ASSISTANT COMPTROLLER GENERAL OF THE UNITED STATES

Frank H. Weitzel

GENERAL COUNSEL

Robert F. Keller

DEPUTY GENERAL COUNSEL

J. Edward Welch

ASSOCIATE GENERAL COUNSELS

John T. Burns

Ralph E. Ramsey

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[B-144839]

Quarters Allowance—Evacuation of Dependents—Government Furnished Occupancy

A member of the uniformed services who must continue to maintain and pay rental for private housing in anticipation of the return of his dependents evacuated to Government housing facilities at a temporary safe haven for a relatively short period pending further transportation to a designated place pursuant to paragraph M7101-1 of the Joint Travel Regulations, or return to the place from which evacuated, during which time he occupies single-type quarters at his permanent station may continue to be credited in his pay account with a basic allowance for quarters on account of dependents and the type II family separation allowance until his dependents are authorized to return to the member's permanent duty station or arrive at the designated place contemplated by paragraph M7101-1, in view of the fact that the occupancy of Government quarters by the member and his dependents will be of short duration and will have resulted from circumstances beyond their control. 46 Comp. Gen. 869, modified.

To the Secretary of Defense, January 2, 1968:

Further reference is made to letter dated September 28, 1967, from the Assistant Secretary of Defense (Comptroller), in effect requesting further consideration of certain aspects of our decision of June 21, 1967, 46 Comp. Gen. 869. In that decision we held that a member of the uniformed services is not entitled to basic allowance for quarters and family separation allowance under 37 U.S.C. 427(b) during a period his dependents are evacuated under emergency conditions from private housing at his permanent station and occupy Government housing at a safe haven area and he, as a result of the emergency, occupies single-type quarters at his permanent station. The circumstances giving rise to the request are set forth and discussed in Department of Defense Military Pay and Allowance Committee Action No. 402.

The circumstances set forth are as follows:

Due to conditions beyond the member's control, and because of the emergency evacuation, his furniture and personal belongings are left in his private housing. As a result, he is required to maintain and continue payment of rental for such housing in order to have quarters available upon return of his dependents after termination of the temporary emergency absence, and to provide a safeguard for his household goods and personal belongings for the duration of the emergency.

The Committee refers particularly to our decision of October 18, 1960, 40 Comp. Gen. 215, which we cited in our decision of June 21, 1967. In 40 Comp. Gen. 215, we held that a member receiving basic allowance for quarters as a member with one dependent would not be entitled to the quarters allowance during periods of hospitalization of the dependent in a Government facility, if during such periods the member occupies Government quarters. The Committee says that this decision apparently is based on the premise that normally a member is not put to additional expense to provide quarters for his de-

pendents during the period they are furnished Government housing and he occupies quarters at his permanent station.

It indicates, however, that under our decision of June 21, 1967, and in the circumstances set forth above, inequities are created by the emergency evacuation when, due to circumstances beyond his control, the member must continue to maintain and pay rental for his private housing during the emergency period. Further, the Committee says that the continued maintenance of private quarters by a member during an emergency evacuation period appears to come within the principle contained in the long-standing rule that a member without dependents in receipt of basic allowance for quarters at his permanent station continues to be entitled to such payment while on temporary duty away from his permanent station, even though single-type quarters are occupied at the temporary duty station.

In this connection, the Committee cites our decision of August 24, 1962, 42 Comp. Gen. 122, in which we recognized that the purpose of such continuing payment is to enable the member to meet the additional expense of maintaining his privately financed quarters at his permanent station during his absence therefrom.

Section 403 of Title 37, U. S. Code, provides that, except as otherwise provided by law, a member of a uniformed service entitled to receive basic pay is entitled to a basic allowance for quarters. Subsection (b) provides that, except as otherwise provided, no such allowance shall accrue to a member assigned to Government quarters or housing facilities under the jurisdiction of a uniformed service appropriate to his grade or rank and adequate for himself and dependents, if with dependents.

Executive Order No. 11157, June 22, 1964, relating to regulations governing basic allowance for quarters, issued pursuant to section 403 and set out in a note under section 301 of Title 37, U. S. Code, provides in part as follows:

> Sec. 403. Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a member and his dependents, or (b) at his permanent station by a member without dependents, or (c) by the dependents of a member on field duty or on sea duty or on duty at a station where adequate quarters are not available for his dependents, shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances * * *.
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> * * * * * * *
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> Sec. 405. A member away from his permanent station may occupy quarters of the United States designated for members without dependents at his temporary duty station without affecting his right to receive payment of basic allowances for quarters or assignment of quarters, if any, at his permanent station. Under such circumstances, a member may not occupy quarters of the United States which exceed the minimum standards for members of his grade without dependents, as prescribed by the Secretary concerned, unless the only quarters available (a) exceed the minimum standards, and (b) are made available for joint occupancy with other members.

Basically, the law and regulations contemplate that any quarters or housing facilities under the jurisdiction of the uniformed services occupied without payment of a rental charge by the member and his dependents shall be deemed to be adequate. With respect to a member occupying Government quarters at his temporary duty station, the Executive order specifically makes an exception in those cases so as to permit such occupancy without affecting his right to continue to receive the quarters allowance to which he was otherwise entitled when he departed for the temporary duty assignment. 42 Comp. Gen. 122. No such exception is provided in the law or the Executive order to cover the situation where the member occupies Government quarters at his permanent station and continues to maintain his privately financed quarters at his permanent station and we may not provide such an exception on the basis that it is inequitable not to do so. The absence of such an exception stems from the law which provides in substance that a member who is assigned Government quarters adequate for himself and his dependents if with dependents, is not entitled to a money allowance for quarters in his own right while in a nontravel status.

However, the temporary occupancy by the dependents of Government quarters at the safe haven is somewhat analogous to a dependent's occupancy of Government facilities while on a social visit of a temporary nature since in that case the member also continues to maintain quarters for his dependent. In our decision of February 11, 1958, 37 Comp. Gen. 517, we held that a member's wife may occupy Government facilities while on a social visit of a temporary nature without the loss to the member of his right to a basic allowance for quarters for her for a period of 3 months. Also, in our decision of October 9, 1963, 43 Comp. Gen. 332, in answer to question 19, we said that otherwise proper family separation allowance payments may be made to a member under 37 U.S.C. 427(a) and clause (1) of 37 U.S.C. 427(b) for a similar maximum period where the facts clearly show that the dependents are merely visiting at or near the permanent duty station and have not effected a change of residence.

Also, in the decision of October 9, 1963, in answer to question 18, we held that when dependents are evacuated from areas outside the United States, under paragraph M7101 of the Joint Travel Regulations, due to unusual or emergency circumstances (such as war, riots, civil unrest, etc.), the effect of such forced evacuation would be to convert the member's post of duty to a restricted station. In such cases, we said that payment of family separation allowance would be proper if the conditions of the statute otherwise are met. No consideration, however, was given to the matter of occupancy of Government quarters at the safe haven area.

Presumably, dependents who are evacuated to a temporary safe haven will remain there for only a relatively short period pending further transportation to a designated place as provided in paragraph M7101–1 of the regulations, or return to the place from which evacuated. In view of the representations made that the member must continue to maintain and pay rental for his private housing during the emergency evacuation period in order to have quarters available upon return of his dependents and to house his personal effects during such emergency period, we have concluded upon further consideration of the matter that, since the occupancy of Government quarters by the member and his dependents will be of short duration and results from circumstances beyond their control, the basic allowance for quarters on account of dependents and family separation allowance, type II, may continue to be credited to the member's pay account in the circumstances presented until such time as the dependents are authorized to return to member's permanent duty station or arrive at the designated place as contemplated by paragraph M7101 of the Joint Travel Regulations.

The decision of June 21, 1967, 46 Comp. Gen. 869, is modified accordingly.

[B–163021]

Compensation—Holidays—Duty Status—Ten-Hour Workday

Wage board employees assigned to weekly tours of four 10-hour days—8 hours regular time and 2 hours overtime—who are relieved or prevented from working because of the occurrence of a holiday within the purview of 5 U.S.C. 6104, are entitled only to basic compensation for any 10-hour day on which a holiday occurs, section 6104 prescribing the same pay for holiday on which no work is performed "as for a day in which an ordinary day's work is performed." Therefore, the employees are only entitled to compensation at straight time for the entire 10-hour day on which they did not work because of the holiday, absent authority for paying overtime compensation under the Work Hours Act of 1962, 5 U.S.C. 5544, for any part of the employees scheduled hours of duty on holidays on which no work is performed.

To the Secretary of the Interior, January 8, 1968:

The Deputy Assistant Secretary for Administration by letter of November 30, 1967, requested our decision whether wage board employees of the Department who work weekly tours of four 10-hour days are entitled to 2 hours overtime compensation under the Work Hours Act of 1962, 5 U.S.C. 5544, on workdays when they are relieved or prevented from working solely because of the occurrence of a holiday within the purview of the Joint Resolution of June 29, 1938, as amended, now codified in 5 U.S.C. 6104.

5 U.S.C. 6104, so far as here pertinent, reads as follows:

> When a regular employee * * * is relieved or prevented from working on a day
>
> * * * * * * *
>
> (3) solely because of the occurrence of a legal public holiday
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> * * * * * * *
>
> he is entitled to the same pay for that day as for a day on which an ordinary day's work is performed.

The Deputy Assistant Secretary's letter suggests that the above-described employees who work weekly tours of four 10-hour days might, under the quoted language of 5 U.S.C. 6104, be entitled to basic compensation for 8 hours and overtime compensation for 2 hours as for "an ordinary day's work" when they are relieved or prevented from working on any of their 10-hour days solely because of the occurrence of a holiday.

A similar question was considered in 23 Comp. Gen. 415. That case concerned wage board employees whose administrative workweeks at the time consisted of six 8-hour days, Saturday, the sixth day, being their overtime day for purpose of the 40-hour week statute of March 28, 1934, 48 Stat. 522, 5 U.S.C. 5544(a). The employees were relieved or prevented from working on Saturday, Christmas Day, 1943, because of the holiday. At page 417 of that decision we ruled:

> The 1938 holiday law was intended, so far as possible, to equalize holiday pay for per diem, per hour, and piece workers with holiday pay enjoyed by other classes of Federal employees. That purpose would be defeated if it were to be concluded that anything said in the cited decisions relating to the 1934 statute must operate to deny this class of Federal workers holiday pay next Christmas. Of course, as the holiday law expressly authorizes only "the same pay for such days as for other days on which an ordinary day's work is performed" the overtime rate may not be paid to this class of employees who do not work on Christmas Day.

In 42 Comp. Gen. 195, the Chairman, United States Civil Service Commission asked (question 2):

> An employee has a regularly scheduled workweek of one 8-hour day, two 10-hour days, and one 12-hour day. If a holiday occurs on his scheduled 12-hour day, is he paid at straight time for the entire 12 hours, or is he entitled to the overtime rate for the last 4 hours?

Our answer to question 2 was as follows:

> Where no work is performed the employee is only entitled to compensation at straight time for the entire period. See our answer to question 1(b). Question 2 is answered accordingly.

In our answer to question 1(b) cited in our answer to question 2, we said:

> The language of the foregoing provision (referring to 5 U.S.C. 5544), specifically requires that overtime *work* "in excess of eight hours per day shall be compensated for at not less than time and one-half the basic rate of compensation." * * * [Italic supplied.]

Applying the rationale of those decisions to the question presented by the Deputy Assistant Secretary's letter, we must conclude that there is no lawful authority for paying the employees concerned overtime compensation for any part of their scheduled hours of duty on holidays on which they perform no work.

[B-162943]

Contracts—Awards—Small Business Concerns—Subcontracting Limitation

The refusal of the Small Business Administration (SBA) to grant a certificate of competency to a bidder proposing to perform only the managerial and supervisory functions under a construction contract and to subcontract the actual construction work because of inability to meet the requirements of a SBA directive to perform "a significant portion of the contract, measured in dollar value, with its own facilities and personnel on its own payroll" is persuasive with respect to the nonresponsibility of the bidder and under 15 U.S.C. 637(b), the determination must be given legal finality, and the bidder's offer to furnish a performance bond may not be accepted as a substitute for the faithful performance of the contract.

To A. Geris, Inc., January 10, 1968:

Reference is made to your telegram of November 17, and letter of December 5, 1967, protesting against the refusal of the Small Business Administration to grant you a certificate of competency in connection with your bid, under invitation for bids No. EA 7-20027, issued by the Federal Aviation Agency (FAA), Airway Facilities Branch, Rocky River, Ohio.

Your bid in the amount of $588,000 was the only bid submitted in response to the invitation. Since FAA had doubt as to your ability to perform the resulting contract, it requested the Small Business Administration (SBA) to determine your capacity and credit for the purposes of this procurement under the certificate of competency procedures. SBA conducted an in-depth survey of your competence to perform the contract. After a careful investigation, SBA determined that there was insufficient evidence to demonstrate that you had the necessary capacity to perform. On November 15, 1967, you were notified that your application for a certificate of competency (COC) was denied. By telegram of November 17, 1967, you protested that denial to our Office.

It is your contention that the refusal of SBA to issue a COC was arbitrary, capricious and contrary to substantial evidence. Furthermore, you say that this refusal to issue the COC does not conform to the realities of bid preparation and is contrary to the definition of responsibility as laid down by prior decisions of this Office (B-144614, January 5, 1961; B-146348, April 5, 1962; 38 Comp. Gen. 778, May

19, 1959; 26 Comp. Gen. 676, March 14, 1947). You submitted evidence indicating the availability and responsibility of subcontractors for the project advertised. Lastly, you state that you have met the financial requirements and have the ability to provide a bid and performance bond as required by our decision 33 Comp. Gen. 549, May 12, 1954.

We have been advised that your firm proposed to perform only the managerial and supervisory functions and to subcontract all of the actual construction. In this regard, paragraph 4(b) of SBA National Directive (ND) 615–1A states:

(b) A manufacturing, construction, or service concern shall not be eligible for a COC unless it performs a significant portion of the contract, measured in dollar value, with its own facilities and personnel on its own payroll.

Under these circumstances, SBA concluded that you would not be performing "a significant portion of the contract, measured in dollar value, with its own facilities and personnel on its own payroll." Your firm therefore was ineligible for a COC under SBA procedures.

We have held that the refusal of SBA to issue a COC as to the competence of a small business offeror must be regarded as persuasive with respect to the nonresponsibility of the bidder. 39 Comp. Gen. 705. Insofar as is here pertinent, section 8(b) of the Small Business Act of 1958, as amended, 15 U.S.C. 637(b), provides as follows:

It shall also be the duty of the [Small Business] Administration and it is empowered, whenever it determines such action is necessary—

* * * * * * *

(7) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to the competency, as to capacity and credit, of any small-business concern or group of such concerns to perform a specific Government contract. In any case in which a small-business concern or group of such concerns has been certified by or under the authority of the Administration to be a competent Government contractor with respect to capacity and credit as to a specific Government contract, the officers of the Government having procurement or property disposal powers *are directed to accept such certification as conclusive*, and are authorized to let such Government contract to such concern or group of concerns without requiring it to meet any other requirement with respect to capacity and credit; [Italic supplied.]

In view of the above statutory provision, we have concluded it would be improper for this Office to review determinations of the Small Business Administration as to a firm's capacity or credit. B–151977, October 3, 1963; B–152831, January 8, 1964; B–155392, November 9, 1964.

The decisions of our Office cited by you to support your viewpoint are not inconsistent with our holding here. Those decisions dealt with administrative decisions by either the contracting officer or SBA. In each case, we declined to take issue with the administrative determination of nonresponsibility which we have recognized to be a procurement prerogative not ordinarily subject to our review, especially when it has been affirmed by SBA. Our decision 33 Comp. Gen. 549, May

12, 1954, held that a performance bond is only a factor for consideration in determining the responsibility of the contractor. However, we have never regarded a performance bond as a satisfactory substitute for the faithful performance of the contract. Accordingly, an offer to furnish such a bond does not make a bidder responsible within the meaning of the applicable statute and regulations.

Accordingly, we are required to accord legal finality to the refusal of SBA to issue COC's in your case.

Your protest is therefore denied.

[B-161180]

Station Allowances—Military Personnel—Excess Living Cost Outside United States, Etc.—Reimbursement Basis

The payment of a higher housing per diem rate to members of the uniformed services for the first 2 months of entitlement after entering on an overseas tour of duty and a lower rate for the remainder of the tour for the purpose of accelerating the reimbursement of moving-in expenses would constitute an advance payment of that portion of the per diem allocable to the accelerated reimbursement, and such a payment is not within the contemplation of 37 U.S.C. 405 authorizing a per diem that considers all elements of the cost of living to members stationed outside the United States, regardless of when costs may have to be paid. Therefore, the proposal to establish two housing allowance indexes, one applying for the preponderance of a member's tour which would reflect recurring costs and one applying during the first 2 months of the tour which would reflect the inclusion of the nonrecurring expenses may not be legally adopted.

To the Secretary of the Navy, January 12, 1968:

Further reference is made to letter of June 5, 1967, from the Under Secretary of the Navy, requesting decision whether the proposed procedures explained therein for determining rates of housing allowances for members of the uniformed services stationed outside the United States are legally permissible. The request was assigned PDTATAC Control No. 67-18 by the Per Diem, Travel and Transportation Allowance Committee.

The Under Secretary says that in constructing a housing allowance rate, an average cost is derived by computing the actual expense data contained in required periodic reports submitted by the individual members at the overseas duty stations. The expense data include the cost of rent, utilities, heat, water, and moving-in expenses.

Under the present method of computing the housing index the average initial occupancy (moving-in) and departure (moving-out) costs, if any, are prorated over the average tour of duty and the prorated cost, if any, is added to the average recurring monthly expenses and the total is divided by the average basic allowance for quarters to obtain the indexes.

The Under Secretary states that in many of the foreign countries, the houses available for rental by the members of the uniformed services are lacking in the facilities customarily found in rented houses in the United States, and that in order to make the house livable, the member is required to expend a considerable amount of his personal funds for such things as installation of gas or electricity, supplemental heating equipment, painting, papering, plastering, screening, shelving, kitchen cabinets and counters, transformers, water cans, filters, purifiers, hot water heaters, real estate or legal fees, etc.

The Under Secretary further says it is proposed that in cases where the initial occupancy costs are significant that two indexes be derived—one applying for the preponderance of the tour which would reflect recurring costs only, and one applying during the first 2 months which would reflect the inclusion of the nonrecurring expense. In such cases an amount equal to one-half the average nonrecurring expenses would be added to the recurring expenses and the index derived from this total would apply during the first 2 months.

Also, he says it is proposed that in cases where departure expenses are fairly significant, an amount equal to the average of such expenses would be added to the recurring expenses and the index derived from this total would apply during the last month. It is explained, however, that there are presently no cases where this procedure would be appropriate.

In justification of the proposed change, the Under Secretary says that the suggested method has advantages in that it would provide a greater allowance during the month in which the greater costs (nonrecurring expenses) are incurred. Also, he says that should a member not complete the average tour he will be assured of compensation for the average nonrecurring expenses. Further, he says that if the exchange rate changes substantially, a member generally will be compensated for the nonrecurring expenses at the rate at which the expenses were incurred.

The Under Secretary attached an example of the proposed change showing the Housing Allowance Index under the circumstances described and requests our decision whether this procedure is within the intent and scope of the statutory authority of 37 U.S.C. 405.

As we understand it, the nonrecurring expenses are the moving-in costs or initial occupancy expenses such as initial repairs, alterations, and improvements and the recurring expenses are primarily rent and utility type costs. The record before us shows that it has long been the administrative view that since all the expenses (nonrecurring and recurring expenses) were housing expenses, which in the United States would be paid by the landlord and passed on to the tenant in the

monthly rental, they could be considered as a form of rental averaged among all members entitled to the allowance and distributed over the entire tour of duty for the area involved. Further, it appears from a memorandum dated October 5, 1967, and enclosures, to us from the Per Diem, Travel and Transportation Allowance Committee relative to this matter that it has long been the administrative practice to include the nonrecurring expenses as well as the recurring expenses as elements of rental cost in the computation of the overseas housing allowance.

Section 405 of Title 37, U.S. Code, provides that without regard to the monetary limitations of that title, the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost-of-living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside the United States or in Hawaii or Alaska, whether or not he is in a travel status, except that dependents may not be considered in determining the per diem allowance for a member in a travel status. The statute authorizes the payment of a per diem and not separate housing and cost-of-living allowances.

The purpose of the statute is to provide some measure of reimbursement for the excess living costs experienced by members on duty at places outside the United States. This purpose is expressly recognized by the Joint Travel Regulations. Paragraph M4301–1 of those regulations declares that 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, the excess costs to be derived by comparison of the costs in each area outside the United States with the average cost-of-living and housing of similar members in the United States.

With respect to the proposal to establish two housing allowance indexes, one applying for the preponderance of the member's tour which would reflect recurring costs and one applying during the first 2 months which would reflect the inclusion of the nonrecurring expense, it appears that basically, the purpose is to permit the member to be reimbursed for the moving in expenses in the first 2 months of his tour of duty.

As indicated above, 37 U.S.C. 405 does not authorize reimbursement of actual expenses but authorizes the payment of a per diem. In authorizing a per diem, it clearly has reference to the overall cost-of-living of members serving in overseas areas, regardless of when any of the particular costs may have to be paid; and, when a per diem is prescribed in accordance with the statute it represents a commutation on a daily basis of the average excess living costs of all members con-

cerned and is payable in proper cases without regard to when or whether the actual costs in any individual care are incurred.

The payment of a higher housing per diem rate for the first 2 months of entitlement after entering on an overseas tour of duty and a lower rate for the remainder of the tour for the purpose of accelerating the reimbursement of any housing cost-of-living element would constitute an advance payment of that portion of the per diem allocable to the element concerned. Section 405 does not authorize or contemplate advance payments of per diem based on special elements of the expenses involved and it is our view that the proposed procedures may not be legally adopted under that section.

Our decision of December 11, 1967, 47 Comp. Gen. 333 is not in conflict with the conclusion reached herein. In that decision we held that 37 U.S.C. 405 authorized the Secretaries to prescribe, on a basis consistent with the language and intent of the statute as indicated in the decision and with appropriate administrative controls, different per diem rates at a given station on the basis of different costs incurred by different groups of military personnel at that station. That application of the statute, however, does not stand for the proposition that under the terms of the law, different per diem rates may be fixed within any of the different groups of individuals for the purpose of accelerating reimbursement of any particular element of cost-of-living by advancing the payment of a portion of the per diem.

[B–161195]

Contracts—Negotiation—Mistakes—Item Error in Aggregate Bid

Under a negotiated procurement providing for an award of a requirements contract in the aggregate to the lowest bidder, where the contracting officer is not required to compare bid prices on individual items, and where a 13-percent difference between the low aggregate offer and the next lowest aggregate offer is not sufficient to place the contracting officer on notice of the probability of error, an alleged mistake in the bid price of one item may not be corrected, no mutual mistake having been made in the drawing of the contract, which reflecting the intended agreement of the parties is considered to have been awarded in good faith, and the fact that the error was a mistake in judgment on the part of the bidder, and that the actual requirements of the Government substantially exceeded the estimated requirements does not provide a legal basis for reforming the contract or for granting relief by an increase in price.

To the Hammarlund Manufacturing Co., Inc., January 12, 1968:

Further reference is made to your letter of April 3, 1967, requesting relief in connection with an error alleged to have been made in your bid upon which negotiated General Services Administration contract No. GS–OOS–53583 is based.

On December 10, 1965, the General Services Administration, Federal Supply Service, POD, Washington, D.C., issued solicitation for offers

No. FPNME–W–57107(ME)–N–12–27–65, requesting quotations for a 1 year open-end indefinite quantity requirements contract for VHF–FM–1 and VHF–FM–5 transceivers and accessory items consisting of a total of 20 items to fill the requirements of the Agency for International Development, as needed during the period January 1, 1966, or date of award, whichever is later, through December 31, 1966. The solicitation specified both estimated and guaranteed minimum quantities. Prospective offerors were advised in the solicitation that award would be made to the lowest responsive offeror in the aggregrate for all items specified therein and offerors were required to quote on all items. Four offers were received as follows:

Offeror	Total aggregate price FOB point of origin	Discount
The Hammarlund Mfg. Co., Inc.	$1,786,929	1 percent—20 days.
Motorola Overseas Corp.	$2,153,123	
Hallicrafters Radio Industries Division.	$2,520,720	2 percent—20 days.
	$2,450,185 (Alt.)	

On December 30, 1965, a representative of your firm was contacted by telephone and was requested by the procuring agency to ascertain whether your quoted prices were your best offer. In this connection, you state in your letter of April 3, 1967, that at that time, your representative was requested to verify whether all your costs were included in your quotations. By letter dated December 31, 1965, you advised the contracting officer that your offer was prepared in accordance with the latest pricing data and that in the absence of any new conditions, your initial offer should be considered as its final offer. On January 10, 1966, contract No. GS–OOS–53583 was awarded to your firm as the lowest responsive offeror. The record indicates that the contract was subsequently amended on March 1, 28, 31 and April 21, 1966.

On February 2, 1967, you alleged that your company had submitted an exceptionally low price of $32.11 for the FM–5 power supply unit covered by item 12 of your proposal and that because of such low price, your firm had suffered a loss of approximately $75,000. You were advised that if a mistake was being alleged with reference to item 12, evidence in support thereof should be submitted for consideration as to whether any relief could be granted.

In a letter dated April 3, 1967, to our Office, you requested that the contract unit price for the power supply units covered by item 12 be increased from $31.96 to $86.75. You state that the closing date for submission of offers was 5 p.m., December 27, 1965, and that upon receipt of the request for proposals on December 13, 1965, you pro-

ceeded with all reasonable diligence consistent with the limited time available to prepare your prices. Further, you advise that in view of the fact that the power supply unit called for under item 12 had first to be designed by your firm prior to establishment of detail material and processing requirements, and since it was not possible to do this within the limited time available for submission of proposals, you attempted to establish a price based on less than complete knowledge of what the unit should consist and estimated the value of the unit at $32.11 each. Although you believed that the estimated price for item 12 appeared to be conservative, based on the limited knowledge then available, you recognized that even if your estimate for item 12 was low within the tolerance of reasonable estimates, the net effect on total costs would be negligible in the light of the limited quantities specified for item 12 (300 guaranteed minimum—250 estimated) when compared to the total scope of the procurement.

In your letter of November 14, 1967, you state that it is apparent from the record that at least three valid premises exist upon which the requested relief can and should be granted.

The first premise is that the contracting officer should, in this instance, be charged with actual or constructive notice of the mistake in your bid as he either knew, or should have known, of the deficiency in your bid price for item 12. You point out that the procuring agency has admitted that less than 6 months prior to the issuance of the solicitation, it had purchased 100 similar power supply units at a price of $112 each. Your second premise is that the contracting officer had not only the right, but the duty, to point out questionable areas of your pricing, especially in those areas where the difference between your price and the Government's estimates, or the price of other offerors, was so great as to place him on actual or constructive notice that the price could be erroneous.

The contracting officer has advised us that in the evaluation of the offers received, it was noted that the unit prices quoted on most items by your firm were substantially lower than the prices quoted by other offerors. The contracting officer also advised that since the price differentials were substantial on most items for all offerors, he had no more reason to suspect a mistake in your price for item 12 than for any other item.

The record indicates that your prices were substantially lower than those of the other offerors on a number of items. The following is a comparison of the approximate percentage differences between your quotations on these items and the quotations of the second lowest offeror:

Item	Percentage by which Hammarlund was lower
12	66 percent
2	24 percent
3	61 percent
6	47 percent
13	64 percent
18	66 percent
19	72 percent
20	65 percent
Total Evaluated Price	13 percent

Assuming that there was a substantial difference between your bid and the other bids on item 12, that factor is not controlling under the circumstances of this case. As stated above, the solicitation provided for an award in the aggregate. In other words, award was required to be made to the lowest aggregate bidder. Our Office and the courts have held that a contracting officer is not under a duty to compare bid prices on individual items where award is to be made in the aggregate. See 17 Comp. Gen. 534, 42 *id.* 383. The contracting officer has reported that he had no constructive notice of the possibility of error prior to award. He also noted that the difference between your low aggregate offer and the next lowest aggregate offer was only 13 percent. In our view, this 13-percent discrepancy was not sufficiently great to have placed the contracting officer on notice of the claimed mistake. So far as the present record shows, the acceptance of your bid was made in good faith—no error having been alleged by your firm until more than a year after date of the award. The acceptance of the bid under the circumstances involved, consummated a valid and binding contract which fixed the rights and liabilities of the parties thereto. See *Edwin Dougherty and M. H. Ogden* v. *United States*, 102 Ct. Cl. 249, 259, and *Saligman* v. *United States*, 56 F. Supp. 505, 507.

Attention is also invited to the case of *Allied Contractors, Inc.* v. *United States*, 159 Ct. Cl. 548. In that case the invitation for bids provided that the work involved would "be awarded as a whole to one bidder." There was a great discrepancy between the plaintiff's bid and the other bids on one item. However, the court found that the variance was not such as to place the contracting officer on notice of error since his attention was directed primarily to the overall bid, and since on such basis the plaintiff's bid was in line with others, there was nothing to make the contracting officer suspect a mistake had been made and the plaintiff's petition was dismissed.

The responsibility for the preparation of a bid is that of a bidder. See *Frazier-Davis Construction Company* v. *United States*, 100 Ct. Cl. 120, 163. If, as appears from the record in this case, you under-

estimated the cost of manufacturing the power supply unit covered by item 12, such error was due solely to your own negligence. Any error that was made in your offer was unilateral—not mutual—and, therefore, there is no basis for granting you relief. See 40 Comp. Gen. 326, 332. Moreover, in view of your statement that you "attempted to establish a price based on less than complete knowledge of what the unit should consist," it appears that the alleged error in your offer was a *mistake in judgment*, for which relief may not be granted after acceptance in good faith without prior notice, actual or constructive, of any error in the offer. When submitted the offer was as intended. Consequently, the conclusion is warranted that your request for relief in this case is solely an attempt to avoid the consequences of what has become an ill-advised offer. See 11 Comp. Gen. 445; 14 *id.* 612.

Your third premise is that the estimated quantities for item 12 as stated by the procuring agency in its request for proposals, upon which your firm relied upon in establishing your price for item 12, were so erroneously understated as to fall far beyond the bounds of reasonableness and, thus, may be categorized as a mutual mistake. In that connection, you point out that in the request for proposals the procuring agency showed the estimated quantity of item 12 to be procured as 250 units with a guaranteed minimum quantity of 300 units. You state that during the contract period, the procuring agency actually ordered, and your firm ultimately delivered, a total of 1,421 units, which quantity was approximately 568 percent of those estimated and 473 percent of those guaranteed under item 12. In this regard, you refer to our decision of September 9, 1960, B–143438, which held, in your opinion, that when actual requirements exceed estimated requirements by more than 100 percent under a requirements type contract, such as here, it is to be considered a *unilateral mistake* by the Government. On this basis, you contend that so great a variance between estimated and actual quantities involved here must be categorized as a mistake since the stated estimated quantities may not be considered as a reasonable estimate of quantity. While we did acknowledge in our September 9, 1960, decision that a unilateral mistake was made by the Government in estimating the quantities of trash to be removed and disposed of by the contractor, we held that a mistake by one party coupled with the ignorance thereof by the other party does not constitute a mutual mistake as to which a legal basis exists for reformation of the contract under the established principles applicable thereto.

The contract here involved provided that the estimated quantities were for the information of offerors only and that "the Contractor is obligated to deliver hereunder all such quantities as may be so ordered

from time to time to meet supply requirements." It further provided that the stated estimated requirements of the Government " shall not be construed to represent any amount which the Government shall be obligated to purchase under the contract nor relieve the Contractor of his obligation to fill all orders which may be placed hereunder." Moreover, offerors were permitted to submit with their offers limitations on the quantity of any item which may be ordered on orders which are issued for quantities in excess of the guaranteed minimum quantity. Since you did not limit the quantity you would furnish under item 12, you were obligated to deliver all quantities ordered by the Government to meet its needs for the equipment covered by item 12.

Under a requirements contract, such as here, where the contract provides that the quantities mentioned are estimates only and the measure of goods to be ordered must be the needs of the buyer, the courts have held that there may be substantial variations from the estimates as long as the buyer acts in good faith. *Brawley* v. *United States*, 96 U.S. 168; *James D. Walters* v. *United States*, 131 Ct. Cl. 218; *Shader Contractors, Inc. et al.* v. *United States*, 149 Ct. Cl. 535; *Standard Magnesium Corporation* v. *United States*, 241 F. 2d 677; and 37 Comp. Gen. 688.

See, in particular, the case of *Carstens Packing Co.* v. *United States*, 52 Ct. Cl. 430, where the plaintiff entered into a contract with the United States for the delivery at the Puget Sound Navy Yard of 165,000 pounds of meat, more or less, with the provision that the quantities called for in the contract were only estimated and the right was reserved to exact more than the amount at the contract price, or to accept less than the full amount, *as the needs of the public service might require.* After the contract was executed, the price of meats increased and after the contractor had delivered, under protest, about 900,000 pounds of meat, it sought the aid of the court to recoup its pecuniary losses. The court held that the contractor was not entitled to any monetary relief and that it was required to furnish the quantities determined by the Chief of the Bureau of Supplies and Accounts of the Navy Department as necessary to the needs of the public service.

With regard to your request to reform the contract because of an alleged mutual mistake of the parties in estimating the quantity of power supplies to be procured under item 12, there is no legal justification for such action here. Reformation of an instrument must be predicated upon the mutual mistake of the parties, as where the contract, as finally drawn, does not reflect the actual intent of the parties and it is established clearly what the contract actually was or would have been but for the mistake. 30 Comp. Gen. 220; 26 *id.* 899; 37 *id.* 688; 20 *id.* 533. The purpose of reformation is not to make a new agreement between the parties, but, rather, to establish the already existing

one. In order to justify the reformation of any instrument, the mutual mistake must have been in drawing the instrument and not in making the contract out of which it grew or which it evidences. See 76 C.J.S., Reformation of Instruments, § 25(c), and authorities there cited.

Applying the above rules to the present case, there can be no doubt that the contract, as made, was the intended agreement of the parties. While a mistake may have been made in estimating the quantity of power supplies to be procured, there is no evidence in the record that you or the Government were aware of the actual quantities to be ordered prior to the reduction of the agreement to writing. Nor was there any mistake in drawing the contract; as finally formalized it clearly expressed the intention and agreement of the parties. Upon acceptance of your offer, the contract was complete. Under the circumstances, we have no alternative but to conclude that there is no legal basis for reforming the contract or for granting relief by an increase in price for any of the power supply units ordered and furnished to the Government.

[B-163102]

Pay—Retired—Annuity Elections For Dependents—Beneficiary Eligibility—Certification Acceptability

A statement from a chiropractor certifying that the unmarried daughter of a member of the uniformed services who is over 18 years of age suffers from a paralysis may be considered "a certificate of the attending physician" to substantiate her eligibility as a beneficiary under the Retired Serviceman's Family Protection Plan, the "practice of chiropractic" constituting the practice of medicine within the meaning of paragraph 8b(2)(c) BuPers Instruction 1750.1D, which permits not only the attending physician but an "appropriate official of a hospital or institution, "who may or may not be a practicing physician, to certify to the physical incapacity or mental incompetence of a beneficiary. Therefore, the disability of the dependent within the scope of chiropractic attention, the chiropractor is qualified to express an expert opinion as to the extent and permanency of the disability to which he is certifying.

To Commander D. G. Sundberg, Department of the Navy, January 18, 1968:

Further reference is made to your letter dated November 17, 1967, forwarded here by second endorsement dated December 12, 1967, of the Comptroller of the Navy, requesting an advance decision whether or not a statement from a chiropractor certifying to the physician incapacity of Barbara Joyce Swenson, daughter of Malcolm E. Swenson, 328 77 52, MMC, USNFR F6 is considered "a certificate of the attending physician" to substantiate her eligibility as a beneficiary under the Retired Serviceman's Family Protection Plan. Your request has been assigned submission No. DO-N-974 by the Department of Defense Military Pay and Allowance Committee.

You say that Mr. Swenson was transferred to the Fleet Reserve on June 10, 1960, in accordance with 10 U.S.C. 6330; that under 10 U.S.C. 1431 he made a valid election of option 2 at one-half reduced retainer pay combined with option 4; and that as of the date of his election on September 12, 1958, the only beneficiary eligible to receive the annuity provided by his election was a daughter, Barbara Joyce Swenson, born October 13, 1947.

Because the beneficiary became 18 years of age on October 13, 1965, monthly deductions of $0.70 to cover the costs of annuity under the election were terminated October 1, 1966, and deductions made from November 1, 1965, through September 30, 1966, were refunded to Mr. Swenson. When he received notification of the termination of deductions of monthly annuity cost, Mr. Swenson advised that his daughter has been handicapped since birth with spastic paralysis and being unable to walk is homebound and unable to support herself. On being requested to substantiate his daughter's eligibility as a beneficiary there were furnished statements from two chiropractors which described Miss Swenson's disability (stated to be cerebral palsy) and indicate that she will never be able to be self-supporting.

Paragraph 8b(2)(c), BuPers Instruction 1750.1D provides, in pertinent part, as follows:

> In the case of a child over 18 years of age and unmarried who is incapable of self-support because of being mentally defective or physically incapacitated if that condition existed prior to reaching age 18, a certificate of the attending physician or appropriate official of a hospital or institution certifying to the physical incapacity or mental incompetence will be required.

You express doubt as to whether the term "physician" as used in the quoted instruction includes a chiropractor.

Since the instruction permits not only the attending physician but an "appropriate official of a hospital or institution," who may or may not be a practicing physician, to certify as to the physical incapacity or mental incompetence of a beneficiary, it is our view that the words "attending physician" must be construed as having been used in a broad sense. A physician is defined as a person skilled in the art of healing; a doctor of medicine, and it has been held that anyone engaged in the practice of any of the fields in the healing art, after having been duly licensed, stands for all practical purposes in a position of a "physician" in the orthodox fields of medicine, at least to the extent that he limits his action in the recognized scope of his particular profession. See *Williams* v. *Capital Life & Health Ins. Co.*, 41 S.E. 2d 208 (1947).

A "chiropractor" is one who engages in the practice of "chiropractic," which is a system or method of adjusting the joints, especially of the spine, by hand for the curing of disease. It has been held that

the "practice of chiropractic" constitutes the "practice of medicine." See *Wideman* v. *State*, 104 So. 438 (1924); and *Dean* v. *State*, 116 N.E. 2d 503 (1954).

Since Mr. Swenson's daughter is suffering from a paralysis, her disability seems to be one within the scope of chiropractic attention and a chiropractor should be qualified to express an expert opinion as to the extent and permanency of its disabling effects. We have no objection to the acceptance of the statements of the chiropractors certifying as to her incapacity in this case. Your question is answered accordingly.

[B–161977]

Contracts—Negotiation—Evaluation Factors—Administrative Determination

The determination by a contracting officer under a request for proposals that a Canadian subcontractor was nonresponsible having been reported deficient in technical capability and ability to meet delivery schedules does not evidence abuse of administrative discretion judged on the basis of the information available to him at the time of the determination, therefore, the exclusion of the subcontractor from negotiations and the award to another offeror were proper even though the prime contractor should have been notified before award of the nonresponsibility determination and requested to clarify information questioning the determination, but should not have been requested after the determination was made to extend its offer. However, the determination of nonresponsibility does not preclude consideration of the subcontractor for future procurements, and guidelines for determining the responsibility of Canadian firms should be promulgated.

To the Canadian Commercial Corporation, January 22, 1968:

Further reference is made to your telegrams of July 6 and 14, 1967, and supplemental correspondence protesting in your behalf and in behalf of your subcontractor, Beaconing Optical and Precision Materials Company, Ltd. (BOP), against award of a contract to Servo Corporation of America by the United States Army Electronics Command, Philadelphia, Pennsylvania, under request for proposals No. DAABO5–67–R–1270.

The subject request for proposals was issued on December 30, 1966, and called for proposals on furnishing 42 AN/TRQ–23 ( ) radio receiving sets, related equipment, spares and repair parts, and literature and data. The closing date for receipt of proposals, as amended, was February 27, 1967, with a 60 day acceptance period. The procurement was assigned an 02 priority designator under the Uniform Material Movement Issue Priority System, indicating an urgent requirement for the equipment. Nine proposals were received and BOP was third lowest under the initial offers, with Servo being the sixth lowest. The first four offerors, including BOP, were determined by the contracting officer to be nonresponsible under the standards established by Armed Services Procurement Regulation (ASPR) 1–903

after preaward surveys of all offerors were conducted pursuant to ASPR 1-905.4. Thereafter, negotiations were conducted with the remaining offerors and Servo was awarded a contract at the lowest negotiated price of $2,811,793, which is approximately $510,000 above BOP's proposal price.

The contracting officer's determination of nonresponsibility, dated May 11, 1967, the validity of which is the crux of your protest, was made on the basis of the negative recommendation dated May 8, 1967, of the U.S. Army Electronics Command, Fort Monmouth, New Jersey. The Electronics Command was requested by the contracting officer on March 20, 1967, to make a complete survey. The survey was conducted on April 11, 12, and 13 at BOP's facilities and included evaluation of eight factors. BOP was found to be unsatisfactory in two areas, technical capability and ability to meet required delivery schedule. In addition to the above survey, on March 23, 1967, the contracting officer also requested a preaward survey by the Defense Contract Administration Services Office, Ottawa. The request, Department of Defense Form 1524, contained the following note:

NOTE: IN THE INTEREST OF EXPEDITIOUS HANDLING OF THIS CASE. REQUEST YOUR INVESTIGATION BE LIMITED ONLY TO FACTORS CHECKED. THIS COMMAND *DOES NOT* REQUIRE INVESTIGATION AND/OR REPORT IN THE AREAS NOT CHECKED ABOVE.

Except for technical capability, the factors to be checked by DCASO were almost identical to those considered by Fort Monmouth. DCASO found BOP satisfactory in all areas checked, and recommended award in its report of April 10, 1967.

As noted above, your primary objection to the administrative action in this case is the contracting officer's determination that BOP was nonresponsible. You contend that the contracting officer's determination was based on erroneous facts concerning BOP's capabilities and competency in this technical field and, in view of his failure to attempt to resolve the apparent contradictory survey reports, was not based on sound and independent judgment. Although certain information and evidence was produced by you subsequent to the award of the contract to Servo which casts some doubt on the correctness of the contracting officer's determination and raises serious questions as to the propriety of the administrative actions thereafter, we believe the validity of the contracting officer's determination of nonresponsibility must be judged on the basis of the information before him at the time it was made.

In addition to the preaward survey normally requested of the appropriate contract administration office, the contracting officer reports that he requested a survey by Fort Monmouth because he considered

technical capability of the prospective contractor of paramount importance and the technical personnel of that activity better qualified than DCASO personnel to make a judgment in this area. The importance attached to technical capability is reported to stem from the fact that this is a first-time production of a complex item which must conform to military specifications and a model to which more than 140 exceptions apply, requiring a considerable amount of redesign and reverse engineering by experienced and qualified engineering personnel familiar with direction finding techniques. Moreover, timely delivery was of great importance due to the priority assigned this procurement.

The detailed survey report of the Fort Monmouth team before the contracting officer at the time he made his decision appears reasonably to support his determination of nonresponsibility. In brief, the findings of the survey team were that BOP's L.A.B. package tester and temperature and humidity chamber were inadequate; that the inside storage area for GFT equipment was severly limited and the outside area which could be used for storage was not secure; that the area to be used for modifying the shelters was very limited; that prices had not been obtained on several items that were to be secured from various suppliers; and that there were no plans as to where the company was to run the Munson road tests and the railroad humping tests. More importantly, they concluded that there was no evidence that BOP had successfully produced any high frequency receivers or any complex direction finding systems, and that the company's experience in intercept and direction finding equipment consisted of fabricating a limited number of low frequency receiving sets as a subcontractor to a prime development contractor. The survey team also concluded from the project plan and resumes of the senior engineers in charge of each of the five phases thereof furnished by BOP that the lack of experience would seriously limit the company's technical capability. These resumes indicated that two engineers had approximately 1 year's experience, one had a little more than 6 months' experience, and the fourth was not a graduate engineer but had about 6 years' experience. A final factor having great influence on the survey team's negative recommendation was information it reports having received from Mr. G. S. Elliott, Electronics Warfare Section, Navy Bureau of Ships, Washington, D.C., to the effect that BOP had received contract No. NOBSR-87713 for development of direction finder AN/URD-7 in January 1962 and had not at that time produced an acceptable model even though the normal time for completion of such a project would be 1½ to 2 years. It is also reported that the AN/URD-7 is considerably less complex than the AN/TRQ-23. Furthermore, Mr. Elliott is reported to have stated that he did not believe BOP had the technical capability to

complete the AN/URD–7 project. In addition to the reported unsatisfactory performance with respect to the above contract, the survey report states that BOP was 2 months late in furnishing a preproduction model of an AN/VRC–24, a set of minor complexity, under one contract and 10 months late on first delivery of the AN/VRC–24 under another contract. It was also reported that BOP was 7 months late in delivery of a preproduction model of the AN/TRC–68 radio set under another contract. The latter three contracts were with the activity performing the survey.

Although DCASO found BOP satisfactory in all areas checked and recommended award, no evaluation or rating of technical capability was made as this area was not included on the request form. We note that DCASO's conclusions are at variance with those of Fort Monmouth in at least two important areas. DCASO concluded that BOP had the necessary engineering and skilled personnel to perform the the contract. However, it appears that DCASO based its conclusion on the BOP furnished resume of its key personnel and not as did Fort Monmouth, on the qualifications and experience of the five men directly responsible for the five phases of the project plan. DCASO also concluded that based on prior satisfactory performance of contracts BOP had the ability to meet the required delivery schedule on the subject procurement. The list of contracts upon which this judgment was made appears to have been prepared by BOP and does not include the Navy contract referred to by Forth Monmouth. Although this list refers to AN/VRC–24 and VRC–24 contracts and a TRC–68 contract, it does not indicate whether delivery was timely.

The determination of a prospective contractor's ability to perform is of necessity a matter of judgment. While such determination should be based on fact and should be arrived at in good faith, it must properly be left largely to the sound administrative discretion of the contracting officer involved. This Office will not substitute its judgment for that of the officers charged with the duty and responsibility of making such decisions unless there is clearly no substantial basis for their action or there is evidence of bad faith. 45 Comp. Gen. 4; 43 *id.* 257. We have carefully reviewed and considered the information relied upon by the contracting officer in making the determination that BOP was nonresponsible and find no basis upon which our Office would be justified in concluding that there was an abuse of the administrative discretion permitted. Although there is a dispute as to whether BOP has the necessary technical experience from its performance of past contracts, we do not feel that Fort Monmouth's and the contracting officer's conclusion in this respect was plainly without basis. In view thereof, we may not properly object to the exclusion of BOP from negotiations and the subsequent award of a contract to Servo.

However, we believe there are certain aspects of this case which, although not affecting the validity of the award to Servo, require noting. Although the contracting officer made his determination of nonresponsibility on May 11, it was not until after the award of a contract to Servo on June 22 that you were apprised of this fact. We believe, as you contend, that under the provisions of ASPR 3-508.2 the contracting officer was required to provide you with notice of the fact that he intended to conduct further negotiations only with the firms he had determined responsible. The Army contends that the notice required under this regulation is limited to situations where the proposal itself is unacceptable. However, we believe that the language "or in which a limited number of suppliers have been selected for additional negotiation" and the reference to ASPR 3-805.1, which requires negotiations with all *responsible* offerors within a competitive range, indicates an intention for the regulation to also apply in the situation presented in the instant case. Aside from any regulation requiring notice of the determination of nonresponsibility, we believe the contracting officer acted improperly in requesting a 30-day extension of your offer on May 27 when he had already determined BOP nonresponsible. We do not believe he has satisfactorily explained this action by stating that it was taken "for any unforeseen amendment to requirements that may affect the 'responsibility' of the four low firms."

We also believe that the contracting officer should have taken some action subsequent to the debriefing session on July 12 to clarify the questions you raised with respect to the Fort Monmouth report. Since he conceded that several of the deficiencies would not support a determination of nonresponsibility on the basis of information you presented, we believe he had an obligation to verify the information reportedly obtained from Mr. Elliott of the Navy and to at least reconsider the question of BOP's technical capability in light of your position on these matters. Information you have presented our Office with respect to the AN/URD-7 contract, including a statement from Mr. Elliott, indicates the strong possibility that a check with Mr. Elliott may have altered the conclusions with respect to BOP's performance thereunder. It is also our opinion that recognition of the Department of Defense policy with respect to Canadian purchases, as expressed in ASPR 6-501, *et seq.*, should have prompted the contracting officer to resolve the questions raised by you immediately after the meeting of July 12. In what has been said above, we do not mean to imply that the contracting officer was under any legal compulsion to take the action suggested or that he would have necessarily reached a different conclusion on the question of BOP's responsibility. However, we do believe that such action was indicated by and would have been proper under the circumstances.

Furthermore, we believe ASPR is deficient in furnishing the contracting officer procedures or guidelines to follow in determining the responsibility of Canadian firms. Although ASPR 1-903 prescribes minimum standards for prospective contractors and ASPR 1-904 requires the contracting officer to make a determination of responsibility before the award of a contract, the provisions of section 1, part 9, of ASPR are not applicable to Canadian Commercial Corporation. ASPR 1-901. We have, therefore, called this apparent deficiency to the attention of the Secretary of Defense for his consideration.

You have also expressed concern over BOP's status on future procurements. The determination in the instant case does not preclude consideration of BOP on future procurements. The determination of BOP's responsibility as a prospective contractor on future procurements must be based on the facts and circumstances then existing.

In the circumstances, there is no basis upon which our Office may properly disturb the award of the contract to Servo.

[B-162515]

Contracts—Specifications—Deviations—Deliberate

A low bidder having obtained a corrosion control facility construction contract by submitting a bid that conformed to specifications but who deliberately planned to disregard using the paving equipment prescribed in the invitation in the belief the specifications would not be enforced, when compelled to conform in accordance with the specifications may not recover the additional amount expended by alleging bid mistake, absent a showing the contracting officer was chargeable with notice that the required equipment was unobtainable and that it was unreasonable for him in light of his experience with similar projects not to check sub-items to suggest possible areas of error to the contractor when he found the overall price differential did not require verification. Therefore, the contractor having accepted the award without objection is estopped from questioning the validity of the contract upon failing to have the contract interpreted and enforced as hoped.

Contracts—Disputes—Contract Appeals Board Decision—Finality

The findings by the Armed Services Board of Contract Appeals that the use of other than the paving equipment specified in an invitation to construct a corrosion control facility would be inadequate for the performance of the contract awarded, and that the contractor had mistakenly interpreted that the specifications permitted the use of alternate equipment on a trial basis, are factual findings that are final and binding, subject to the provisions of the Wunderlich Act of May 11, 1954, 41 U.S.C. 321.

To Sellers, Conner & Cuneo, January 22, 1968:

Reference is made to your letters of September 15 and November 29, 1967, as attorneys for Ramco, Inc., Fort Walton Beach, Florida, presenting a claim on behalf of that firm for a contract price increase of $16,366.52 due to an alleged mistake in bid discovered after award of

contract No. DA-01-076-ENG-6385 by the Army Corps of Engineers, Mobile (Alabama) District, for construction of a corrosion control facility at Elgin Air Force Base in Florida.

Paragraph 33-12 of the specifications for the concrete pavement, which was the major item of the contract work, required the contractor to provide a concrete batching plant which could be located on or off the Government premises as approved, and subparagraph (c)(1) provided for use of paving type of concrete mixers at the worksite unless other types of concrete mixers were approved in writing. Under paragraphs 33-13 and 33-15 the placing, spreading, vibration and finishing of the concrete was required to be performed in a continuous and rapid manner (not less than 100 feet of 25-foot width paving lane per hour) by use of specified power equipment except the finishing specifications (33-15) permitted use of the hand method of finishing on odd slab widths or strips, and subparagraph 33-15(a)(4) of such specification permitted use of other type of finishing equipment as follows:

(4) *Other Types Of Finishing Equipment.* Concrete finishing equipment of types other than specified above may be used on a trial basis. The use of equipment that fails to produce finished concrete of the quality and consistency required by these specifications shall be discontinued, and the concrete shall be finished with equipment and in the manner specified above.

Paragraph 33-26 provided:

EQUIPMENT: All machines, tools, and equipment used in the performance of the work required by this section [33] shall be approved and shall be maintained in satisfactory condition.

A similar provision requiring approval of equipment was also contained in paragraph 33-10.

You state the factual background, in part, as follows:

Toward the end of 1964 the U.S. Army Corps of Engineers solicited bids on a contract to construct a corrosion control facility at Eglin Air Force Base in Florida. The project involved pouring 3,900 cubic yards of concrete over an area of roughly 125 x 175 square feet. The specifications outlined in some detail the paving equipment to be used but provided that other types of equipment may be used on a trial basis provided it produces the quality and consistency specified and meets certain other requirements.

The equipment specified by the contract is heavy duty, high speed power paving equipment such as is used on large highway projects. The contract further required that a concrete batching plant be constructed at the site. Ramco did not believe that the cost of such equipment was warranted for a job involving only 3,900 cubic yards of concrete. Accordingly, Ramco based its bids upon the use of equipment of a smaller scale, and less fully mechanized, which Ramco believed would perform a satisfactory job and be acceptable under the contract provision for alternate equipment. Ramco's bid was low at $77,978.50. The next lowest bid was approximately $21,000 higher or roughly $99,000.

After signing the contract, but before commencing performance, Ramco submitted to the Government a list of equipment it intended to use for placing the concrete. The Government took the position, without permitting a trial demonstration, that the equipment Ramco desired to use did not meet the specification requirements. To avoid a default termination with its attendant assessment of

reprocurement costs, Ramco obtained the heavy duty equipment that the Government claimed had to be used to meet specification requirements, an added direct cost of $16,366.52.

Ramco diligently pursued its administrative remedies. It appealed to the Armed Services Board of Contract Appeals on the ground that the specifications describing equipment to be used on the job also provided for the alternate use of contractor-submitted equipment on a trial basis (Specification Provision 33-15(A)(4)). The Board denied Ramco's appeal on the ground that it had mistakenly interpreted the specifications allowing for the submission of alternate equipment. It also felt that the alternate equipment was of such a nature that it would not perform the desired contract results and, as such, there was no reason for the Government to even allow the contractor to use his equipment on a trial basis.

You say that the difference ($18,693.55) between Ramco's bid ($77,978.50) and the next low bid ($96,672.05) roughly corresponds to the difference in cost between the power equipment specified and the hand-operated equipment which Ramco intended to use. You contend that the contracting officer had administered several contracts of Ramco's for similar projects and knew what basic paving equipment Ramco used as well as the company's past methods of performing such contracts; that the resident engineer told Ramco that it could use transit truck mixers when it was computing its bid, which caused Ramco to feel that such use of alternate equipment was representative of the allowability of substitution of other equipment; and that the contracting officer's representative was well acquainted with Ramco's practices of substituting equipment pursuant to specification modifications which it had been able to obtain on prior occasions.

You cite various decisions of this Office regarding a contracting officer's detection of error responsibility and where upward adjustments in contract prices were allowed, and you conclude as follows:

On the basis of the facts surrounding the preparation of Ramco's bid, it is apparent that the company was in error as to the interpretation that the Government would place on the alternate machinery clause. Relying upon past Government practice on similar jobs and that the specifications of this contract would be interpreted in the same manner, Ramco submitted its bid on the basis of its substitute hand-operated equipment—a bid that was 21 percent lower than that of the next bidder. This disparity in bid price, when coupled with the contracting authority's knowledge of the method in which Ramco had performed similar jobs in the past, gives rise to the inescapable conclusion that, if the contracting officer did not know of Ramco's mistake, he most clearly should have been apprised of it.

The contracting officer erred in his error detection duty and that this error resulted in the award of a contract at a price far below Ramco's intended cost of performance under Government specification interpretation. Therefore, your office should require a price increase in the amount of $16,366.52, which was the additional cost incurred due to the Government's failure to point out that the bid was grossly understated and that the contractor would not be allowed to substitute alternate methods of performance as it had been permitted in past instances.

A copy of the successor contracting officer's complete response to your contentions has been furnished you, and will not be repeated here. That report states in part that your contention that it was customary to permit Ramco to deviate from specification requirements

and to use other equipment in performing similar contracts for the Corps of Engineers is completely unsubstantiated by administrative records. It is reported that the files of the Corps of Engineers, Mobile District, indicate that Ramco has been the successful bidder on eight other Corps contracts for work at Eglin Air Force Base. While three of such contracts involved the placing of flexural strength concrete pavement to some extent, none of the specifications there concerned required use of mechanical equipment such as that specified in the subject contract. It is further reported that the records of the Mobile District do not indicate that Ramco obtained waivers of specification requirements in such paving contracts, nor has it been customary in that District to permit deviations from such, or comparable, specifications with respect to paving equipment which have been used and enforced on similar jobs in the Mobile District. While the contracting officer permitted the use of truck mixers by decision of May 14, 1965, the report states that such approval was authorized by the clear terms of the contract and was given as being in the best interest of the Government rather than because of any prebidding understanding. Although it is stated in the above-mentioned decision of the Armed Services Board of Contract Appeals (ASBCA No. 10839, January 11, 1967) that the contracting officer did honor a prior understanding between Ramco and a Government engineer that ready-mix concrete trucks owned by Ramco could be used and that he omitted the specification requirement for a power-driven spreader, provided the power-driven transverse finishing machine was adapted for use also as a spreader, the Board made no finding of any prior understanding with the contracting officer or his representative that Ramco would be permitted to substitute hand-operated placement and finishing equipment for the power-driven placement and finishing equipment considered by the Government to be essential to produce the desired results. Neither do we see any finding or indication by the Board that paving-type concrete mixers constituted such an integral part of the mechanical equipment specified that the use of ready-mix trucks precluded the use of other designated power-driven equipment (such as hopper spreaders or concrete bucket and crane, or vibrating units and finishing machines) or rendered impracticable the use of such equipment in conjunction with the ready-mix concrete trucks. That the possible use of truck mixers was clearly contemplated is indicated by subparagraph (c)(2) of the specifications, which provided that "Truck mixers shall be equipped with accurate revolution counters" and by subparagraph (d)(2) which provided in connection with the transportation of mixed concrete that "truck mixers used for complete concrete mixing shall be capable of delivering and discharging the concrete without segregation."

Regarding any prior understandings, paragraph 1 of the Instructions to Bidders (Standard Form 22) clearly states that any explanation desired by a bidder regarding the meaning or interpretation of the invitation for bids, drawings, specifications, etc., must be requested in writing, and that oral explanations or instructions given before the award of the contract will not be binding. Paragraph GC–3 of the contracts' General Conditions also provides that the Government assumes no responsibility for any understanding or representations made by its officers or agents during or prior to the execution of the contract unless such understanding or representations are expressly stated in the contract. Paragraph GC–1 requires that the work be performed in strict accordance with the specifications, which Ramco also specifically proposed to do in submitting its bid (Standard Form 21). That performance of the work by use of Ramco's manually operated equipment would not have produced the required quality of concrete, was determined by the Armed Services Board of Contract Appeals in its decision, and it was also determined that Ramco, in fact, never intended to comply with the specification requirement of performing the paving operations at the rate of 100 lineal feet per hour. See that portion of the decision where it is stated:

> The specifications are explicit that the machinery was to pour, spread, vibrate, screed, float and finish continuously and rapidly at a rate of 100 lineal feet per hour, the stiff concrete mix at the prevailing temperatures at 85 degrees F. Mr. Davis, appellant's President, testified that the manual equipment and hand labor could not have performed the operations at such speed, and that he never intended to comply with this requirement. Instead he scheduled a performance rate of 85 feet per hour (Tr. (1), p. 76). Even had he been able to hand-finish concrete at this rate, an assumption not supported by the record, it would not at these temperatures have produced concrete of the quality required by the contract.
>
> We conclude that appellant's equipment at the site, or which it intended to use, would have been inadequate to produce the specified results for high test paving at the stipulated rate, and that no trial was necessary to demonstrate its inadequacy.

The Board also agreed with the Government's position that the provision in subparagraph 33–15(a)(4) of the specifications permitting use of other types of concrete finishing equipment on a trial basis refers only to possible substitution of other types of power-driven equipment and not hand-operated equipment.

Although a price adjustment is now claimed by Ramco on the basis of an alleged mistake in its bid price, it is evident that Ramco's situation does not involve any error in the computation of its price. The price set forth in Ramco's contract is the price which it intended to bid, and the only mistake which may have been involved was in Ramco's judgment that it would not be required to conform to the specification requirements concerning use of high-speed power-driven paving equipment.

No claim of mistake was made by Ramco prior to award of the contract, and in this situation the primary question is whether a valid and binding contract was created by acceptance of its bid. 36 Comp. Gen. 27. Whatever the nature of the mistake claimed, it would have no effect upon the validity of the contract unless at the time of the award the Government, represented by the contracting officer, was on notice, actual or constructive, that the bid did not represent the actual intent of the bidder. If, as you claim, the Government was on notice of the fact that Ramco's bid was not based upon the advertised specifications, or was based upon an erroneous interpretation of them, then the acceptance of Ramco's bid was not effective to bind it, and the purported contract was not binding but subject to rescission. In that event, Ramco would be entitled to be paid the reasonable value of the work done, which under the principles followed by this Office would be limited to the amount of the next higher bid, or in the usual case of a mistake in the amount bid, to the amount clearly proven to have been intended, whichever was lower. See 37 Comp. Gen. 398.

In the recent case of *United States* v. *Utah Construction Co.*, 384 U.S. 394, the Supreme Court held that the Court of Claims had erred in holding that a contractor's claims for breach of contract damages for delays were subject to *de novo* determination in that Court, without reference to the administrative disputes clause findings regarding responsibility for the same delays which had been made by the ASBCA upon the contractor's claims before that Board for relief under the contract. Referring to its decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, the court said (p. 420):

> * * * We there held that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by the court on the administrative record. This result, which was required both by the contract of the parties and by the Wunderlich Act, avoids "a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end," 373 U.S., at 717, and it encourages the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation. H.R. Rep. No. 1380, 83d Cong., 2d Sess., 5 (1954). These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute "arising under" the contract.

On this authority, we conclude that to the extent the contentions now urged before us were presented to and passed upon by the ASBCA in resolving the Ramco claims which were within the Board's jurisdiction, we are bound to consider the Board's factual findings thereon as final and binding, subject to the provisions of the Wunderlich Act of May 11, 1954, 68 Stat. 81, 41 U.S.C. 321.

The case before us is therefore a claim for relief by a bidder who "read and understood" the requirements of the specifications, but de-

liberately submitted a bid on a different basis because "he did not believe they would be enforced." The claim made to the contracting agency was based upon the theory that the bid was based upon a reasonable and permissible interpretation of the specification by the bidder, but the above-quoted finding of the Board does not support that theory as a matter of fact, and the Board also concluded as a matter of law that the specifications were not reasonably susceptible of the interpretation contended for. We see no reason to disagree with the Board's interpretation.

On the record we cannot consider the case as one in which the bidder submitted a bid based upon a bona fide misinterpretation of the specification. Rather it appears to be one where a bidder deliberately chose to offer to perform a contract according to specifications to which he did not in fact intend to conform, without including in his bid any indication of his true intent. Had the contracting officer actually known the bidder's intention, he might have been under a duty to reject the bid, but we would be most reluctant to impute knowledge to the contracting officer of such a deliberate undisclosed exception on anything less than the most compelling proof of facts within the knowledge of the contracting officer.

You contend that the contracting officer was on notice, because of Ramco's previous performance of contracts involving similar work, that he probably expected to do the work in the same manner. We are told, however, that none of the previous contracts contained the same requirements as to the type of spreading and finishing equipment to be used, and we are therefore unable to accept the logic of your contention. As to the alleged knowledge of the contracting officer (or other personnel whose knowledge might be charged to him) concerning the kind of equipment owned by or available to Ramco, we feel that only if it were shown that the contracting officer was chargeable with notice that Ramco would have been unable to obtain the use of specified equipment to perform the contract would we be justified in agreeing with your argument. No such showing has been made.

There remains for consideration only your basic contention that the Ramco bid was so far below any other bid as to put the contracting officer on inquiry as to possible mistake. In this connection you rely also on the principle stated in *Kemp* v. *United States*, 38 F. Supp. 568, and *United States* v. *Metro Novelty Mfg. Co., Inc.*, 125 F. Supp. 713, that the contracting officer's duty is not merely to request verification of the suspected bid, but to direct the bidder's attention specifically to the nature of the mistake which the contracting officer suspects.

We are not satisfied that in this case the contracting officer, even if he had decided to request verification of the Ramco bid, would have

been required to direct the bidder's attention to the paving item, since Ramco's price on that item was only $2,500, or between 7 and 8 percent, less than the price of the next bidder, whereas on the second largest individual bid item, the construction of a control center and equipment building, its price was $5,090, or more than 20 percent, lower. While we have held that a contracting officer's error detection responsibility does not encompass a duty to examine individual item prices, this rule is applied in cases where the total bid price is not out of line and the contracting officer is not thereby put upon inquiry by discrepancies in sub-item prices. Where as in this case there appears to be a substantial difference between the total prices of the low bid and others, we believe it would be quite reasonable and natural for the contracting officer, before deciding whether verification should be requested, to examine the individual item prices to ascertain whether there appeared to be a marked discrepancy in any particular item or items which might suggest a specific area of possible error to which the bidder's attention should be directed. In this instance the most likely such area would have been the building rather than paving, and we doubt that the principle referred to would be held to require any inquiry to be directed specifically to the paving item.

Looking at the bids in detail, as they were abstracted item by item, and noting that the Ramco prices were lower than the next lowest bidder's on 18 of the 26 bid items and higher on 8, and lower than the Government estimate on 17 items, higher on 6, and equal on 2, we do not believe that the contracting officer was unreasonable in concluding that the overall differences were not so great, in the light of his experience with similar projects in recent years, as to require verification of the low bid.

Even if Ramco had been asked for verification, we find no compelling reason to conclude that such request would necessarily have resulted in full disclosure of the basis of its bid. As indicated above, the only basis the contracting officer would have had for requesting verification was the price differential, and Ramco was fully aware of that. Since it had chosen not to ask for any clarification or interpretation of the specifications before submitting its bid, and did not make any claim of error or misunderstanding after hearing the other bids, we cannot see why a request for verification would have been likely to cause it to do so. Clearly, it would not have been alerted to anything of which it was not already fully aware.

Since it deliberately chose to bid in the hope or belief that it would not be required to comply fully with the specifications, and did not after bid opening undertake to advise the contracting officer of its position but accepted the award without objection, we feel that Ramco

effectively estopped itself from questioning the validity of the contract and that its attempt to do so now, after its failure to have the contract interpreted and enforced as it hoped, comes too late.

We find nothing in the record which requires a conclusion that the Government directly contributed to the formation of Ramco's belief, or was in any way responsible for it, or had any specific or constructive knowledge of it. The fact that Ramco used manual-type equipment on other jobs under different specifications which permitted use of such equipment, and was permitted to use truck mixers in the subject case, does not in our view provide an adequate or reasonable basis for its assumption that it could use equipment which was neither of the general type called for by the specifications nor adequate for the performance of the paving work at the speed specified, so as to produce concrete paving of the quality required.

In view of the foregoing we find no legal basis for any adjustment of the contract price, and Ramco's claim is therefore disallowed.

[B–163199]

Compensation—Increases—Retroactive—Nonworkdays Between Separation and Reemployment

An employee separated by resignation, as required by the employing Government agency, on Friday, December 15, 1967, in order to accept employment on Monday, December 18, 1967, in another Government agency may be considered, in view of the various situations in which nonworkdays falling between continuous periods of service are not regarded as interrupting the service, as being "in the service of the United States" within the purview of section 218(a) of the Federal Salary Act of 1967, which provides that to be entitled to the retroactive compensation prescribed by the act, an individual must have been on the rolls of an agency on December 16, 1967, the date of enactment of the act and, therefore, the employee is entitled to payment in the amount of the retroactive increase authorized by the act for the period October 8 through December 15, 1967.

To Maurice F. Row, Department of Justice, January 22, 1968:

This refers to your letter of December 29, 1967, requesting a decision concerning the propriety of certifying for payment a voucher transmitted therewith in favor of Miss Lena Sutphin in the amount of $51.12 representing retroactive compensation for the period October 8 through December 15, 1967, under the provisions of the Federal Salary Act of 1967, Public Law 90–206, approved December 16, 1967, 81 Stat. 624, 5 U.S.C. 5332 note.

The following facts were set forth in letter of December 29, 1967:

* * * Miss Sutphin resigned from this Bureau effective December 15, 1967; however, she entered on duty with the St. Elizabeth's Hospital, Washington, D.C., on December 18, 1967, the next workday following her separation from this Bureau.

The "Postal Revenue and Federal Salary Act of 1967," Public Law 90–206, approved December 16, 1967, provides in part in Section 218(a) that "Retroactive pay, compensation, or salary shall be paid by reason of this title only in the case of an individual in the service of the United States (including service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this title * * *." Technically, Miss Sutphin was not on the rolls of either the FBI or St. Elizabeth's Hospital on December 16, 1967, the date of the enactment of Public Law 90–206. However, it is felt that it was not the intent of Congress to deny retroactive pay to an employee who resigned from a position in one agency and entered on duty with another Federal agency on the following workday even though the Public Law was enacted on an intervening nonworkday.

In various situations the nonworkdays falling between otherwise continuous periods of service are not regarded as interrupting such service. For example, the prior regulations of the Civil Service Commission pertaining to longevity increases provided that the continuous period of service required by law as one of the conditions for entitlement to such increases was not broken by a break in service of less than 4 workweeks. The current regulations of the Commission pertaining to pay under the Classification Act, 5 CFR 531.202, refer to a break in service as 1 workday in defining the terms "reemployment" and "transfer." In addition, we have held that nonworkdays intervening between separation from one agency and appointment in another do not constitute a break in service within the meaning of the uniform leave regulations then in effect. See 17 Comp. Gen. 414; 16 *id.* 212.

We have been informally advised that employees are not transferred into nor out of the Federal Bureau of Investigation. When an employee leaves the Bureau he is separated by resignation and new employees are appointed without regard to civil service register. Miss Sutphin tendered her resignation to the Bureau on Friday in order to accept employment on Monday in another Government agency.

In view of the above we believe that there is reasonable basis for the view that for the intervening period of nonworkdays between separation in one agency by resignation and appointment in another the employee may be considered "in the service of the United States" within the purview of section 218(a) of the Federal Salary Act of 1967.

Therefore, the voucher which is returned herewith may be certified for payment if otherwise correct.

[B–162704]

Equipment—Automatic Data Processing Systems—Use by Private Parties

Upon concurrence by the Administrator of the General Services Administration (GSA), who under 40 U.S.C. 759 has the primary responsibility for the purchase and utilization of automatic data processing equipment (ADPE) for the Federal Government, the Administrator of Veterans Affairs (VA) or his designee may grant a revocable license that conforms to the criteria established in General

Accounting Office decisions, to a private party to use Government-owned computers on a reimbursable basis when the equipment is not in use by VA, and the feasibility of making arrangements under which Government-owned ADPE equipment might be made available to the public during periods in which the equipment is not in use is being considered by the GSA Administrator.

To the Administrator, Veterans Administration, January 23, 1968:

Your letter of October 13, 1967, submits for our consideration and decision the question whether the Administrator of Veterans Affairs, or his designee, may grant a revocable license to a private party to use Government-owned computers on a reimbursable basis when not in use by the Veterans Administration.

Your letter discloses that there is located at the Southern Research Support Center, Veterans Administration Hospital, Little Rock, Arkansas, an IBM 1620 computer. Currently, you have for consideration a request from Little Rock University, for the use of the computer for educational purposes not to exceed 5 hours per month on a reimbursement basis. In addition, you also have requests from two other educational institutions to use the computer facilities. You state that the requested use by the University would not interfere with the Research Support Center's utilization of the computer.

You advise that you are aware that under section 759 of Title 40, United States Code, the Administrator of the General Services Administration (GSA) has the primary responsibility for the purchase and utilization of automatic data processing equipment for the Federal Government; and that the availability of computer time on this computer has been properly reported to the General Services Administration (Forms GSA 2068 A & B), and there has been no request for utilization by any other Federal agency.

While you point out that there is no specific authority under which the Veterans Administration can enter into agreements for the use of Government-owned data processing equipment by private parties, you express the idea that it would appear that such an arrangement would be consistent with the intent of Congress expressed in section 5053 of Title 38, United States Code, which authorizes the Administrator of the Veterans Administration by contract or other agreement to share and exchange specialized medical resources with public and private hospitals in the medical community. Moreover, you state the proposed revocable license on a reimbursable basis would be an extension of the type of licensing arrangement approved by us in our decision of June 24, 1965, 44 Comp. Gen. 824. However, you feel that as we have not given specific approval to such licensing agreements in the instant area, our views should be sought before such an agreement is consummated.

As we stated in 44 Comp. Gen. 824, there are many decisions of this Office and of the Attorney General of the United States relative to

granting revocable licenses for the use of Government property under certain circumstances and conditions. See, for example, 38 Comp. Gen. 36; 36 *id.* 561; 25 *id.* 909; B–57383, February 25, 1947; 34 Op. Atty. Gen. 320; 30 *id.* 470; 22 *id.* 240. Such decisions have held generally that the head of a Government department or agency has authority to grant to a private individual or business a revocable license to use Government property, subject to termination at any time at the will of the Government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the Government itself. The Attorney General has stated that the question as to whether the granting of such a license in any given case is beneficial to the Government is for the exercise of the judgment of the official vested with the power to grant, rather than a question of law to be determined in advance by the law officers of the Government. 30 Op. Atty. Gen. 470, 482.

However, since—as indicated in your letter—under Public Law 89–306, 79 Stat. 1127, the Administrator of the General Services Administration has the primary responsibility for the purchase and utilization of automatic data processing equipment, we requested an expression of his views in the matter.

The Administrator of the General Services Administration by letter dated December 12, 1967, replied to us as follows:

Public Law 89–306 vested in the General Services Administration considerable authority with regard to Government-wide management of automatic data processing equipment (ADPE). Our interest in the question asked by VA extends, therefore, not only to the legal issues involved but to questions of management policy.

We have for some time been considering the possibility of making arrangements under which Government-owned ADPE might be made available to the public, during periods in which it is not in use. Although our preliminary analyses of the problem indicated that such arrangements can legally be made, we have not as yet determined that they would necessarily best serve the Government's interests.

We are inclined to believe, for example, that the existence of computer time, excess to the needs of all Federal agencies, reflects, at least in part, the fact that the Government's ADP needs might be served by less hardware than is presently installed. It might be far more efficient in cases in which substantial amounts of excess time were available, to establish a computer center which could operate full time and serve the needs of several agencies, with less equipment.

However, even in cases in which satisfactory arrangements for joint use of ADPE could not be made, many factors would have to be considered before a sale to the general public could be made. Some of these factors are:

1. The methods by which Government costs, which should be recovered in any rental arrangement should be computed.
2. The extent to which the costs of support services incident to the rental, such as light, heat and supervision, might be credited to the appropriations from which such costs are paid.
3. The methods by which available time would be screened through Federal agencies and eligible donees.
4. The possibility that the equipment might be damaged by the user.
5. The extent of the Government's responsibility for injuries to third parties during periods in which private parties use the equipment.

6. The methods by which and terms under which sales of surplus time could be effected.

Since we cannot be certain, from the information furnished by VA, that all of these matters have been considered, we are not in a position to concur in the proposal at this time. We therefore propose to contact VA and examine in more detail the feasibility of their proposal, and if found to be feasible, develop suitable plans for putting it into effect.

In light of the foregoing you are advised that if the Administrator of GSA subsequently concurs in your proposal, we would not object to you, or your designee, granting a revocable license to a private party to use Government-owned computers on a reimbursable basis when not in use by the Veterans Administration, provided that such license conforms to the criteria set out in the decisions cited.

[B-162826]

Contracts—Specifications—"New Material" Clause—Exception

Under a solicitation that provided no exception to furnishing new outer cylinders for aircraft, the rejection of a low proposal offering to furnish "overhauled certified" cylinders was proper, notwithstanding delayed award information, and was within the purview of paragraph 1-1208 of the Armed Services Procurement Regulation which authorizes the procurement of used and reconditioned material and former Government surplus material, and in view of the fact that the word "overhauled" in industry and in Government engineering and procurement areas is accepted to indicate a condition other than new and to imply a repaired condition, and that the low confirmed prices offered support the conclusion new material was not proposed and would not be used in the performance of the contract, the contracting officer is considered not to have had the duty to "ferret" out the unique meaning of and company policy attached to the use of the words "overhauled certified." However, in future procurements, award information should issue promptly.

To the Smith and Smith Aircraft Co., January 23, 1968:

Reference is made to your letter of October 23, 1967, signed by Mr. Jay P. Cooper as your attorney, protesting against the award by the Department of the Air Force of a contract to AN-AIR Aircraft Parts (AN-AIR) for the furnishing of outer cylinders for T-33 aircraft pursuant to Solicitation No. F42600-67-R-8639, issued May 8, 1967, by Ogden Air Materiel Area, Hill Air Force Base, Utah. The substance of your protest is that you submitted the low proposal, but due to misinterpretation by the procuring activity of a notation which you had included in your proposal, on the page setting forth the item description and listing your prices, you were considered to be nonresponsive and therefore ineligible for award.

The solicitation was issued to nine possible sources of supply. Request was made for prices on a basic quantity of 80 units under item 1 and three different optional quantities of the same cylinder under items 2, 3 and 4. For evaluation purposes, only the prices quoted for item 1 were to be considered. Under the list of General Provisions

of the solicitation, included as attachment No. 1 thereto, the clauses entitled "New Material" and "Government Surplus," as prescribed by Armed Services Procurement Regulation (ASPR) 1–1208(a) and (d), respectively, were incorporated by reference. The clauses read as follows:

New Material (January 1965)

Except as to any supplies and components which the Specification or Schedule specifically provides need not be new, the Contractor represents that the supplies and components including any former Government property identified pursuant to the "Government Surplus" clause of this contract to be provided under this contract are new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). If at any time during the performance of this contract, the Contractor believes that the furnishing of supplies or components which are not new is necessary or desirable, he shall notify the Contracting Officer immediately, in writing, including the reasons therefor and proposing any consideration which will flow to the Government if authorization to use such supplies is granted.

Government Surplus (January 1965)

(a) In the event the bid or proposal is based on furnishing items or components which are former Government surplus property or residual inventory resulting from terminated Government contracts, a complete description of the items or components, quantity to be used, name of Government agency from which acquired, and date of acquisition shall be set forth on a separate sheet to be attached to bid or proposal. Notwithstanding any information provided in accordance with this provision, items furnished by the Contractor must comply in all respects with the specifications contained herein.

(b) Except as disclosed by the Contractor in (a) above, no property of the type described herein shall be furnished under this contract unless approved in writing by the Contracting Officer.

There was no provision in the solicitation authorizing the furnishing of anything but new material.

Five proposals, one of which was late, were received. The late proposal was opened, as is provided in ASPR 3–506(a), and found to offer new manufactured cylinders. The prices quoted therein were noted, but the proposal was not considered for award. Each of the four timely proposals indicated that Government surplus parts were being offered. Two offerors, AN-AIR and California Airframe Parts Co. (California Airframe), quoted prices for 50 and 25 new surplus units, respectively, under item 1, and also offered "overhauled certified" units at substantially lower prices. Sources from which each offeror had purchased the offered quantities of all four items were stated in accordance with the provisions of the "Government Surplus" clause. A third offeror quoted a unit price for all quantities of each item, which was the lowest price quoted in all of the proposals, but a notation entered by the offeror on page 7 of its proposal (the same page of the offer form on which your notation was made) specifically stated that the parts offered had been procured at various surplus Government sales from 1961 through 1965 and would therefore be "refurbished in accordance with factory approved engineering data." Your

proposal offered to supply all quantities of each item, and your unit price of $522 for item 1 was approximately $100 lower than the unit price which AN-AIR had quoted for 50 new surplus units under the same item. However, since you had inserted the notation "OVER-HAULED CERTIFIED" on the offer form, as stated above, the procuring activity construed your proposal as offering to supply items which were not new surplus units.

Shortly after the proposals were opened, the procuring activity communicated with you and the other three timely offerors and invited all of you to make any desired revisions in your proposals. There is no indication in the record that the offeror who proposed to furnish "refurbished" units made any change in its original proposal. The remaining three proposals were revised as to price before award as follows:

1. In a telegram dated June 20, 1967, you offered to furnish all quantities of all four items at a reduced unit price of $372.50 conditioned on an "all or none" award, but you specifically stated that all other terms and conditions of your proposal remained unchanged.

2. AN-AIR reduced its unit price for overhauled cylinders to approximately the same amount as your "all or none" unit price but specified that the original unit price quoted on the "new unused surplus cylinders" was unchanged.

3. California Airframe reduced to $750 its original unit price on the 25 new surplus cylinders offered under item 1 but stipulated that all other conditions of its original proposal were unchanged. (In this connection, it may be noted that the unit price which California Airframe had quoted for overhauled cylinders was only slightly higher than your "all or none" unit price.)

Although new cylinders were required by the terms of the solicitation, the procuring activity took note of the fact that the prices at which overhauled or refurbished cylinders could be obtained were substantially lower than the prices at which the total of 75 new surplus cylinders had been offered by the combined offers of AN-AIR and California Airframe and therefore requested the technical personnel at the Ogden Air Materiel Area to make a determination as to which units would satisfy the exact Air Force requirements. The technical staff verbally advised the procuring activity on August 11 and 23 that its recommendation was for the procurement of new surplus items only rather than overhauled items. In a memorandum dated August 25, confirming the recommendation, the Chief, Service Engineering Division, Operations and Support Branch, Directorate, Materiel Management, explained that normally the procurement of overhauled or refurbished items is not preferred because there is no method of deter-

mining the usage or conditions to which such items were subjected prior to overhaul and usually the remaining service life of overhauled items is considerably shorter than the service life of new items; accordingly, it was stated, the procurement of the new surplus items (available in this case) was preferred to the purchase of the overhauled surplus items even though the initial price of the new items might be slightly higher than the price of the overhauled items.

In view of the foregoing, all proposals for other than new surplus units were rejected by the procuring activity as nonresponsive, and there being only 75 new units available, the procurement quantity was reduced accordingly. Therefore, the award which was made to AN-AIR on September 28 of contract No. F42600-68-C-1097 covered only 50 new surplus cylinders and the award on the same date to California Airframe of contract No. F42600-68-C-1098 covered only 25 new surplus cylinders at the respective unit prices of $623 and $750.

You state that you first learned of the award to AN-AIR upon reading a notice in the Commerce Business Daily of October 16, 1967. In addition, you state that you were not advised of the basis for rejection of your low proposal until you communicated with the procuring activity by telephone on October 17, at which time you were informed that the procuring activity had interpreted the words "Overhauled Certified" in your proposal as indicating that the material which you offered had been reworked thus rendering the proposal nonresponsive to the solicitation.

You assert that your definition of the term "Overhauled Certified" is that "any part which has been in storage for any length of time, although unused and in like-new condition, is, prior to fulfilling a Government contract requirement, removed from the container and inspected for corrosion, scratches, replacement of cure-dated items, and compliance to current data." You state that it is your policy to subject all parts which you furnish to the Department of Defense to such procedure and to certify to the Government that such processing is accomplished by a Federal Aviation Agency approved shop. Such practice, you contend, is not only in the best interest of the Government but, in fact, meets the intent of paragraph A.1.a. on page 7 of the solicitation, which reads as follows:

A. INSPECTION REQUIREMENTS FOR MANUFACTURER FURNISHED SURPLUS PARTS: Offeror hereby certifies that he ( ) is, ( ) is not, offering Government Surplus Parts.

Parts furnished by the surplus dealer must meet standard Air Force quality requirements for military use and conform with the criteria i.e., dimensions, material, finish, etc., specified on the applicable engineering data. Inspection requirements will be as specified below:

1. The following inspection requirements apply to item(s) of this contract, and will be accomplished by QAR

a. All items will be visually inspected for any defects; e.g., corrosion, physical damage, packaging wear, or indications of rework or prior use.

In the circumstances, you contend that the rejection of your proposal was based on a nebulous technicality, that is, the procuring activity's determination, which you claim is arbitrary, that the long established inspection procedure employed by you in performing defense contracts, constituted rework of the items offered. You further contend that the failure of the procuring activity to discuss your proposal with you in order to afford you an opportunity to clarify the matter before award was improper since you were well within the competitive range, as contemplated by ASPR 3-805.1, and that such omission, as well as the procuring activity's further failure to furnish you post-award information setting forth the reasons for not accepting your proposal, as required by ASPR 3-508.3, violated the basic tenet of Government procurement. Accordingly, you request that the award to AN-AIR be canceled and that award be made to you.

The contracting officer points out that your proposal did not describe your policy regarding surplus items as outlined in your protest and that when you were given an opportunity to revise your proposal you did not clarify or explain your proposal. Further, the contracting officer states that since the "all or none" price of $372.50 per unit, which you offered in your revised proposal, was very close to the unit prices for which both AN-AIR and California Airframe offered "Overhauled Certified" items and to the lowest unit price on all four items for which the only other offeror offered "refurbished" surplus units, it was concluded that all of the "overhauled certified" items, as well as the refurbished" items, were not new surplus items. In addition, the contracting officer states that he concluded that if you had been offering new surplus items, your price (for item 1) would have been comparable to the prices quoted by AN-AIR and California Airframe for the 75 new surplus units.

With respect to the meaning of the word "overhauled," the contracting officer reports that the commonly used and accepted definition of the word in industry and in Government engineering and procurement is indication of a condition other than new and implication of a repaired condition. Further, the contracting officer urges that it is obvious that both AN-AIR and California Airframe recognized this fact and therefore offered alternate prices for new surplus items and overhauled items. The Staff Judge Advocate at the procuring activity concurs with the contracting officer's conclusions and calls attention to the following definition of the word "overhaul" in the United States Air Force Dictionary (1956 Air University Press):

> The rebuilding, or the extensive repairing and reconditioning, of a piece of equipment as an aircraft, truck or the like or of a component part thereof which has deteriorated especially through fair wear and tear.

Concerning the issuance of post-award notifications to the unsuccessful offerors, the contracting officer reports that the failure to take such action with the promptness contemplated by the procurement regulation was unintentional and was occasioned by the procuring activity's heavy workload at the time of the awards and the fact that the contract negotiator for this procurement had terminated his employment on September 8. It is further stated, however, that after the notice of the awards was published in the Commerce Business Daily, each unsuccessful offeror was notified of the awards by letter.

With reference to the significance of paragraph A.1.a. on page 7 of the solicitation, the contracting officer states that such provision was included specifically to emphasize that the items to be furnished would be inspected for the purpose of compliance with the requirements of the "New Material" clause and that such provision does not, and was not intended to, change the requirements of that clause.

In view of the foregoing, Headquarters United States Air Force states that the contracting officer had no duty to "ferret" out your unique meaning and company policy applicable to the words "overhaul certified;" that your "all or none" unit price of $372.50, which it is observed, was lower by 50 and 60 percent, respectively, than the prices quoted by AN-AIR and by California Airframe for cylinders made of new materials, which the Government considers reasonable, supports the conclusion that you did not propose to furnish the new materials required by the solicitation; and that since new material was determined to be necessary to meet the Government's requirement, the rejection of your offer as nonresponsive to such requirement in the solicitation was proper. Accordingly, Headquarters USAF concurs with the contracting officer's recommendation that your protest be denied.

ASPR 1-1208, which authorizes procurement of used and reconditioned material and former Government surplus property in certain circumstances, reads, in part, as follows:

(a) Generally, all supplies or components thereof, including former Government property, purchased by the Military Departments shall be new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). However, the needs of the Government may sometimes be met, and economies effected, through the purchase of items which are not new. Solicitations and the resulting contracts shall include a clause, substantially as set forth below, except when the clause would serve no useful purpose. This clause is appropriate for use not only in supply contracts, but also in service contracts which may involve an incidental furnishing of parts, such as contracts for overhaul, maintenance or repair.

* * * * * * *

(b) In all procurements in which the contracting officer has determined that supplies and components which are used or reconditioned but which fully comply with the specifications and other contract requirements are acceptable, the solicitation and resulting contract shall include provisions clearly indicating the supplies or components which need not be new, and details concerning their ac-

ceptability. In determining whether such supplies and components may be purchased, the following criteria shall be considered:

(i) safety of persons or property;
(ii) final cost to the Government (including maintenance, inspection, testing, and useful life);
(iii) performance requirements; and
(iv) availability and cost of new supplies and components (for example, out-of-production items).

(c) Items previously sold as Government surplus shall not be accepted unless it is determined that the surplus property offered fully meets the applicable specifications and other contract requirements. In addition, care must be exercised to insure that the prices paid for such items are reasonable giving due consideration to overall cost savings to the Government without affecting quality. Where a contract calls for material to be furnished at cost, the allowable charge for any Government surplus property furnished shall be the cost at which the contractor or his affiliate acquired the property.

Under such regulations, in the absence of any language in the solicitation indicating that the cylinders in question need not be new, the furnishing of new cylinders, either new surplus or new manufactured, as required by the "New Material" clause incorporated in this solicitation by reference, was mandatory. Further, the technical memorandum of August 25 verifies that only new cylinders were desired by the Government. The basic question for determination in resolving your protest, therefore, is whether the use by you of the words "OVERHAULED CERTIFIED" in your proposal warranted the rejection of the proposal as an offer of other than new cylinders without affording you an opportunity to explain the condition of the items which you intended to furnish.

Although you state that it is your practice to inspect new items before their delivery to the Government and that you term such procedure "overhauling," you do not allege that the procuring activity was aware of the practice or of your peculiar terminology therefor. Further, while one of the meanings listed for the word "overhaul" in Webster's Seventh New Collegiate Dictionary, i.e., "to examine thoroughly," might be construed as support for your interpretation of the word, the second definition listed in the same publication, i.e., "repair," and the definitions "to subject to strict examination with a view to correction or repair * * *" and "to repair (as by replacement of worn parts and readjustment) so as to restore to satisfactory working order * * *," which are listed in Webster's Third International Dictionary, give even stronger support to the meanings which are reportedly ascribed to the term "overhaul" by the Government and industry, i.e., indicating a condition other than new and implying a repaired condition. In addition, the definition given in the Air Force Dictionary is in accord with the reported Government and industry usage of the word. Accordingly, and since two other offerors drew a distinction between new surplus cylinders, which they offered at prices substantially higher than any of your unit prices, and "overhauled certified" cylinders, which they offered at greatly reduced prices,

approximating your "all or none" price, it is our view that the procuring activity's interpretation of your proposal, carrying the words "OVERHAULED CERTIFIED" on the same page as the purchase description and without any indication that the term "overhauled" should be accorded any special meaning, as offering cylinders which were not new was not without a reasonable basis. In the circumstances, we concur with the view of Headquarters USAF that there was no obligation on the part of the contracting officer to raise any question regarding the meaning which you attached to the words "OVERHAULED CERTIFIED" at the time you were afforded the same opportunity as the other offerors to revise your proposal or at any other time before a decision was reached regarding award. It is further noted that neither the letter of protest submitted by your attorney nor the supporting affidavit of your representative who signed your proposal states that you were in fact offering new surplus cylinders, and we find nothing in the entire record to justify the conclusion that you would have been obligated upon acceptance of your proposal to furnish new units.

It is regrettable that the procuring activity was lax in the matter of issuing award information to you and to the other unsuccessful offeror, whose proposal tendering "refurbished" items was likewise rejected as nonresponsive, and we have called this matter to the attention of the Secretary of the Air Force. However, on the facts of record, we are unable to conclude that the awards were not proper, and your protest must therefore be denied.

[B–162852]

Pay—Retired—Combat Citations—Enlisted Man Advanced to Rank of Officer on Retired List

A master sergeant who when retired under 10 U.S.C. 3914 is awarded a 10 percent increase in retired pay by reason of extraordinary heroism performed in the line of duty, upon advancement to the officer rank of captain on the retired list pursuant to 10 U.S.C. 3964, is not eligible to continue receiving the 10 percent additional retired pay authorized only for enlisted members, the entitlement to the increase not attaching by reason of his retirement, and 10 U.S.C. 3992, which prescribes the formula for the recomputation of retired pay for members advanced on the retired list, not providing a 10 percent increase in retired pay for extraordinary heroism, the member's recomputed retired pay may not be increased from the date of his advancement on the retired list to the rank of captain by 10 percent.

To Lieutenant Colonel Frank Berrish, Department of the Army, January 23, 1968:

Further reference is made to your letter of September 22, 1967 (file reference FINCS-E Dalton, William A. O 2 262 498 (retired), requesting an advance decision as to the propriety of making payment on a

voucher in the amount of $30.08 in favor of Captain William A. Dalton, retired, representing the difference in retired pay computed at 50 percent of the pay of a captain with over 18 years of service for basic pay purposes and that computed in a like manner increased by 10 percent for extraordinary heroism for the period August 1 through August 31, 1967. Your request was forwarded here on October 30, 1967, by the Office of the Comptroller of the Army and has been assigned D.O. number A-968 by the Department of Defense Military Pay and Allowance Committee.

As stated in your letter, the member was placed on the retired list effective September 1, 1957, in the grade of master sergeant, under authority of 10 U.S.C. 3914, with 21 years 10 months and 12 days of service for basic pay purposes and 20 years 2 months and 12 days active service. Since it is reported that he was eligible for a 10-percent increase in retired pay by reason of extraordinary heroism in line of duty, you say that his retired pay was computed—presumably commencing September 1, 1957—to include this additional credit. See 10 U.S.C. 3991, formula C, column 3. Effective June 19, 1967, the member was advanced on the retired list to the grade of captain under authority of 10 U.S.C. 3964, with entitlement to retired pay computed as provided in 10 U.S.C. 3992. You say that a 10-percent increase in his retired pay as a captain was allowed for heroism but such increase has been excluded since August 1, 1967.

You say that if the entitlement to additional retired pay for heroism is dependent upon the member's status as an enlisted member, doubt exists as to whether he may retain his enlisted status for the purpose of increasing his retired pay entitlement by 10 percent of the pay of the higher grade to which he was advanced. If the entitlement attaches to the statutory authority for retirement (10 U.S.C. 3914) it is your view that in the light of section 205(b) of the act of June 29, 1948, ch. 708, 62 Stat. 1081, 1086, 10 U.S.C. 1007 (1952 ed.), this entitlement is not lost subsequent to advancement but continues to accrue under that authority, the computation for retired pay only having been changed.

You state that in view of the ambiguity of the source statutes, the wording of the implementing regulation and the absence of any mention of this credit in the applicable formula for computation of retired pay upon advancement on the retired list, doubt exists as to whether Captain Dalton's retired pay may be increased commencing June 19, 1967, by 10 percent for credit of extraordinary heroism.

The provisions of section 3914 of Title 10, U.S. Code—which authorize the retirement of a Regular "enlisted" member of the Army with 20 or more years of services—were derived from section 4 of the act of October 6, 1945, as amended by section 6(a) of the act of August 10,

1946, ch. 952, 60 Stat. 996, 10 U.S.C. 948 (1952 ed.), which also provided for a 10-percent increase in retired pay for any "enlisted" man who was credited with extraordinary heroism in line of duty. While paragraph 4*b* of Army Regulations 635–230 dated August 19, 1960, implementing 10 U.S.C. 3914, cited in your submission, refers to an "individual" who has been awarded the medal of honor, etc., for extraordinary heroism for purposes of the 10-percent increase in retired pay, since the law clearly limits the 10-percent increase to "enlisted" members who retired under 10 U.S.C. 3914, we doubt that the use of the term "individual" in the regulation is intended to cover individuals other than enlisted members. In any event, regulations must not be inconsistent with the law but must conform to the law and it is our view that such regulations have no bearing in this case on and after June 19, 1967.

An enlisted man retired under 10 U.S.C. 3914 is entitled to have his retired pay computed under formula C, 10 U.S.C. 3991, which includes in column 3 thereof, a 10-percent increase for extraordinary heroism in line of duty. An enlisted member of the Army who is advanced under 10 U.S.C. 3964—which was derived from section 203(e) of the above-cited act of June 29, 1948—to a higher temporary grade on the retired list after 30 years of active and inactive service is entitled, under 10 U.S.C. 3992, to recompute his retired pay by multiplying the monthly basic pay of the grade to which advanced by a percentage factor, not to exceed 75 percent, obtained by allowing 2½ percent for each year of active service. This recomputation formula does not provide for a 10-percent increase in retired pay for extraordinary heroism. It would appear that Dalton's advancement on the retired list under 10 U.S.C. 3964 from master sergeant to captain was with his consent since such advancement substantially increased his retired pay. Compare 44 Comp. Gen. 510 and see decision of November 14, 1967, B–155940, addressed to you.

With respect to your reference to the savings provision in section 205(b) of the act of June 29, 1948, your attention is invited to the fact that such provision was expressly repealed by section 53*b* of the act of August 10, 1956, ch. 1041, 70A Stat. 641, 678, which act codified Titles 10 and 32, U.S. Code. Whatever may have been the effect of section 205(b), it is clear that the repealed savings provision of that section could have no effect on the advancement provision now codified in 10 U.S.C. 3964.

Section 3992 clearly sets forth the formula to be used in recomputing retired pay when a member is advanced on the retired list under section 3964 and no provision is made in such formula authorizing a 10-percent increase in retired pay for extrordinary heroism. We believe the codifiers would have included such authority in section 3992 had there been an intent to authorize such increase. Compare 45

Comp. Gen. 793. In the absence of a provision in section 3992 authorizing the 10-percent increase in retired pay, it is our view that there is no authority for increasing Captain Dalton's retired pay by 10 percent for extraordinary heroism from June 19, 1967, the date of his advancement on the retired list to captain.

Accordingly, payment on the voucher is not authorized and the voucher and supporting papers will be retained here.

[B–163159]

Compensation—Withholding—Commission of Criminal Offenses

The retainer pay of a fleet reservist arrested and indicated for mail theft while employed as a career substitute postal carrier is not subject to administrative set-off under 5 U.S.C. 5511, which authorizes the involuntary withholding of a civilian employee's salary upon removal for cause, the general rule being that retired or retainer pay is not subject to administrative set-off without the debtor's consent and, therefore, section 5511 is applicable only to the final pay due the former member in his civilian position.

To the Secretary of the Navy, January 24, 1968:

Further reference is made to letter dated December 21, 1967, from the Assistant Secretary of the Navy (Financial Management) requesting a decision on the question whether unrecovered Government losses chargeable to a career substitute carrier in the postal service may be involuntarily collected from his retainer pay account. The request has been assigned No. SS–N–975 by the Department of Defense Military Pay and Allowance Committee.

It is reported that after a member of the uniformed services had been transferred to the Fleet Reserve and became entitled to receive retainer pay he was appointed in the postal service as a career substitute carrier; that while so employed he was arrested and indicted for mail theft; that postal inspectors concluded that he was responsible for many Government losses in connection with the disappearance of small insured parcels containing valuable coins believed to have been taken by him; that the Post Office Department has advised that Government losses in the amount of $9,561.29 are chargeable to him, of which amount $2,620.90 is unrecovered; and that the U.S. Navy Finance Center, Cleveland, Ohio, has been requested by the Post Office Department to collect the latter amount from his retainer pay account under the authority of 5 U.S.C. 5511.

It is stated that it is the opinion of the Judge Advocate General of the Navy that the cited section relates to the accrued civilian salary of a civil employee who is removed from his civilian office for cause and that it does not afford any authority for an involuntary withholding from the military retired or retainer pay of a member.

Title 5, section 5511, U.S. Code, provides as follows:

(a) Except as provided by subsection (b) of this section, the earned pay of an employee removed for cause may not be withheld or confiscated.
(b) If an employee indebted to the United States is removed for cause, the pay accruing to the employee shall be applied in whole or in part to the satisfaction of any claim or indebtedness due the United States.

The source statute of that section (act of February 24, 1931, ch. 287, 46 Stat. 1415), was enacted to overcome certain decisions of the Comptroller General holding that because of a violation of the oath of office no pay accrued between the date of last payment and removal where civil employees were removed for such causes as thieving and embezzling. The obvious purpose of the proviso in the 1931 act, now subsection 5511(b), was to preserve the common law right of set-off which might otherwise be construed to have been forfeited by the first part of the statute.

Section 7(a) of the codification act of September 6, 1966, Public Law 89-554, 80 Stat. 631, provides that it was the legislative purpose in enacting sections 1-6 of the act—section 5511 is included therein—to restate, without substantive change, the laws replaced by those sections on the effective date of the act. There is nothing in the legislative history relating to section 5511 which indicates any intention other than that stated in section 7(a), the minor changes in wording having been made to conform with the definitions applicable and the style of the revised Title 5. See Historical and Revision Notes to section 5511 contained in supp. II, U.S. Code, 1964 ed.

As a general rule, retired or retainer pay is not subject to administrative set-off without the debtor's consent. See *Baker* v. *McCarl*, 24 F. 2d 897 (1928). Where Congress has intended that current pay be subject to involuntary withholding by the Government in payment of an indebtedness, it has provided specific statutory authority for that purpose. See 5 U.S.C. 5512, 5513 and 5514, none of which sections are applicable to the involved case.

It is our view that 5 U.S.C. 5511 is applicable only to the final pay due the former member in his civilian position. Accordingly, on the basis of the present record, we find no legal basis for withholding the retainer pay as requested by the Post Office Department.

[B-162984, B-162985, B-163056]

Sales—Bids—Deposits—Unacceptable Form

The negotiation of a bid deposit check accompanying the high bid under a surplus sales invitation having been conditioned on receiving a contract award, the rejection of the bid as nonresponsive was proper, for in qualifying the check its use as either a negotiable instrument, or as a draft, check, or demand note, as well as acceptance as a bid bond, was precluded and, therefore, the qualification constituted a material exception to the invitation which contemplated the negotiability of bid deposits and not promises to pay under certain conditions,

and adequate competition having been secured under the invitation to establish that the fair market value of the surplus materials would be obtained in making an award to the highest responsive bidder, the nonresponsive bid was not for evaluation and comparison, and the award is considered to have been made in good faith and in the best interests of the Government.

To the Surplus Tire Sales, January 26, 1968:

Further reference is made to your letters of November 20 and 24, and December 7 and 9, 1967, with enclosures, protesting against the rejection of your various bids as nonresponsive under Defense Supply Agency sales invitations Nos. 44–8035; 44–8044; and 46–8027, which were opened on November 2, November 28, and November 14, 1967, respectively.

Your protests had their inception with the opening of bids November 2, 1967, on invitation No. 44–8035, issued by the Defense Surplus Sales Office, Oakland, California. In response to this invitation, you submitted a bid along with 152 other bidders. In evaluating the high bids, it was noted that you were the highest bidder on items 60, 61 and 93, but had annotated certain restrictions on your bid deposit check concerning its negotiation. On advice of counsel of Defense Logistics Services Center, you were advised that the conditions included on the personal check submitted by you as a bid deposit rendered it nonnegotiable and that your bid was nonresponsive because the bid did not conform to the invitation for bids. Therefore, items 60, 61 and 93 were awarded to the highest responsible, responsive bidders. You have protested rejection of your bid as nonresponsive and question whether the Government received a fair return for its property in rejecting your higher bid for the items and accepting lower bids. The questions raised by you under each of the above invitations are the same, and will be considered and disposed of in this decision wherein sales invitation No. 44–8035 is discussed.

You submitted Surplus Tire Sales company check No. 5161, dated November 1, 1967, payable to the Treasurer of the United States, in the amount of $500.50 as a *bid deposit* to the Defense Surplus Sales Office, Oakland, California, under its sales invitation No. 44–8035. On the face of your check you handprinted the following:

Bid deposit: DSSO Oakland.
Sale 44–8035—Notice: Do not deposit, cash or negotiate this check unless an award & contract is made pursuant to bid submitted. Otherwise this check will be dishonored.

On the reverse side of this check, there was handprinted the following similar notation:

Notice to Government: Do not deposit, cash or negotiate this check unless a valid award & contract results from the submission of the bid accompanying this bid deposit check, otherwise this check will be dishonored by payor. Fred Schwartz.

The invitation for bids contains Special Condition AA entitled "Bid Deposits" which provides as follows:

All bids must be accompanied by a bid deposit of 20% of the total amount bid which must be in the possession of the Sales Contracting Officer by the time set for bid opening. Deposit Bond-Individual Invitation, Sale of Government Personal Property (Standard Form 150) properly executed, or reference to an approved Deposit Bond-Annual, Sale of Government Personal Property (Standard Form 151) is acceptable in lieu of the above. Any bid which is not timely supported by an acceptable bond or bid deposit may be rejected as non-responsive. Any bond or bid deposit received after bid opening will be considered in the same manner as late bids.

The required form of the bid deposit is clearly defined in article D of the Special Conditions entitled "Payment" which provides, in pertinent part, as follows:

* * * bid deposits and payments must be made in U.S. currency or any other form of credit instrument, made payable, in U.S. dollars, to the Treasurer of the United States *on demand*, including first party personal checks but *excluding promissory notes* * * *. [Italic added.]

Also, article E of the Special Conditions of the sales invitation provides as follows:

The Bidder or Purchaser hereby agrees that the Department of Defense may use all or any portion of any refund due him to satisfy, in whole or in part, any debt arising out of prior transactions with the Department of Defense.

The record reveals that you have submitted such checks as bid deposits at other Defense Surplus Sales Offices sales wherein your bids were not the highest received. By letter dated November 1, 1967, from the Counsel, Defense Logistics Services Center, you were advised that such bids accompanied by qualified personal checks as bid bonds would be rejected as nonresponsive should you submit a high bid under these conditions. However, you have persisted in submitting qualified bid deposit checks in connection with your bids for surplus materials, and examination of the record reveals that your purpose in so doing is to circumvent the set-off of your bid deposits to satisfy your indebtedness arising out of prior sales transactions with the Department of Defense.

Your tender of the qualified personal checks as bid deposits constitutes a material exception to the applicable clauses of the sales invitation and thus rendered your bids nonresponsive. We have found this clause to be valid and proper for use in the best interests of the Government. *Cf.* 45 Comp. Gen. 504, 505 and 38 *id.* 476.

Special Condition AA, above, clearly provides that either a bid deposit of 20 percent of the total amount bid must accompany the bid or that an approved bid bond be furnished on Standard Forms 150 or 151 to support the bid. While you refer to your personal checks as a "bid bond" or a "one-time" bid bond, you subjected such bid deposits to the requirements of the sales invitations. It is quite evident that bid deposits contemplated by the sales invitations in the form of

credit instruments must be negotiable and not promises to pay under certain conditions subsequent.

In this regard, the expressions of law contained in the Uniform Commercial Code (UCC) may be utilized to determine the legal effect of your qualified personal checks. The UCC provides, in pertinent part, as follows:

§ 3–104—
(1) Any writing to be a negotiable instrument within this Article must
* * * * * * *
(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order or obligation or power given by the maker or drawer except as authorized by this Article; and
(c) be payable on demand or at a definite time;
* * * * * * *
(2) A writing which complies with the requirements of this section is
* * * * * * *
(b) a "check" if it is a draft drawn on a bank and payable on demand;
* * * * * * *

§ 3–108 Payable on Demand—Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.
§ 3–109(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

The conditions affixed to your personal checks precluded their use as either negotiable instruments, or as drafts, or checks, or demand notes. Nor can they be viewed or accepted as bid bonds either in form or effect in view of the qualified notations placed thereon as conditions to their negotiability. In the circumstances, you failed to submit acceptable bid deposits which could have served the purposes intended by the sales invitations. Since you were not responsive to the bid guarantee requirements, which constitute a material part of the sales invitations, we must conclude that the action taken by DSA in rejecting your bids was proper.

You have raised further questions concerning the propriety of awarding items 60, 61 and 93 at a total price of $870.04 as opposed to your purported bid of $1,606.18 for the items. Generally, a nonresponsive bid is not for consideration in arriving at a fair market price unless special factors are present, which is not the case here, indicating that the bid of the nonresponsive bidder is more representative of the market value. Since you had submitted a nonresponsive bid your relatively high bid price was not for evaluation or comparison. The only question, therefore, is whether the highest responsive bids represented a fair return to the Government. It is well established that in the sale of surplus personal property, the fair market value of a commodity is established through the competitive bidding system. Prior to making an award of the items in question, the sales contracting officer compared the highest responsive bids with the current

market appraisals furnished by the Merchandising Division. Bids on items 60 and 93 exceeded the appraisal by almost one hundred percent. Bids on item 61 proved to be only a little over 50 percent of the appraisal. However, the Federal stock number of the hose contained in item 61 was then checked against Defense Logistics Services Center's sales performance history for past sales information and it was found that the average return for this category of surplus material was 5.9 percent of the acquisition cost. It was found further that the award of items 60, 61, and 93 to the highest responsive bidders would result in a return of 6.4 percent of the acquisition cost for used and unused material of this category. Based on the foregoing and the fact that there were nine responsive bidders on item 60 and eight responsive bidders on items 61 and 93, respectively, which is considered adequate competition, we must conclude that the award was made in good faith and in the best interests of the Government.

Accordingly, your protests are denied.

[B-162989]

Travel Expenses—Military Personnel—Leaves of Absence—Incident to Enlistment Extension

The payment of mileage or a monetary allowance to members of the uniformed services in lieu of transportation for travel performed at personal expense pursuant to the special leave provided by 10 U.S.C. 703(b), which authorizes transportation to and from a duty station "at the expense of the United States" incident to the extension of an enlistment for at least 6 months, may not be authorized by revising paragraph M5501 of the Joint Travel Regulations, as amended, absent specific authority in section 703(b) for the payment of commuted travel and transportation allowances and, therefore, travel performed by members at personal expense while on leave pursuant to 10 U.S.C. 703(b) may be reimbursed only on an actual expense basis.

To the Secretary of the Army, January 26, 1968:

Reference is made to letter of October 23, 1967, from the Under Secretary of the Army, requesting a decision whether paragraph M5501, Volume 1, chapter 5, part J, of the Joint Travel Regulations may be revised to authorize payment of a monetary allowance in lieu of transportation to members for travel performed by privately owned vehicle, or otherwise at personal expense, incident to the special leave authorized under the provisions of 10 U.S.C. 703(b), for the extension of enlistment for at least 6 months in certain specified areas. This request has been assigned control No. 67-36, by the Per Diem, Travel and Transportation Allowance Committee.

The Under Secretary states that the present regulations preclude the payment of mileage or the payment of a monetary allowance in lieu of transportation for any travel performed at personal expense. The reason given for this restriction is it appeared that the statute did

not provide authority for prescribing payment of those allowances. However, he expresses doubt as to whether such restriction is a legal necessity.

In his letter, the Under Secretary quotes an opinion of the Judge Advocate General of the Army relative to the question presented, in which there was referred to the fact that the Comptroller General has frequently stated that authorization for the reimbursement of travel expenses does not authorize the payment of mileage, or per diem, or other forms of commuted allowances, and that the commutation of such expenses is allowable only when authorized by statute, citing 23 Comp. Gen. 875, and decisions cited therein. It was stated in the opinion, however, that none of the statutory language considered in the Comptroller Generals decisions is as broad as that contained in 10 U.S.C. 703(b)(2), which authorizes transportation "at the expense of the United States" without limitation or qualification. It was therefore considered that a legal basis exists for approving the proposed revision as authorized by that language.

Section 703(b) was added to Title 10, United States Code, by Public Law 89–735, approved November 2, 1966. The subsection provides in pertinent part as follows:

(b) Under regulations prescribed by the Secretary of Defense, and notwithstanding subsection (a), a member who is on active duty in an area described in section 310(a)(2) of title 37 and who, by reenlistment, extension of enlistment, or other voluntary action, extends his required tour of duty in that area for at least six months, may be—

(1) Authorized not more than thirty days of leave, exclusive of travel time, at an authorized place selected by the member; and

(2) transported at the expense of the United States to and from that place.

Paragraph M5501, Joint Travel Regulations, promulgated pursuant to the statutory authority quoted above, provides as follows:

M5501 TRANSPORTATION AUTHORIZED

A member who is entitled to transportation under this Part will be furnished Government transportation or Government-procured transportation to the maximum extent practicable. When Government or Government-procured transportation is not utilized and the member procures transportation at personal expense, he will be reimbursed:

1. for transoceanic travel, in accordance with par. M4159–4;
2. for land travel by surface means, at the cost actually paid by the member;
3. for overland air travel, on the same basis, as for transoceanic air travel under item 1.

Payment of mileage, monetary allowances in lieu of transportation, or per diem allowances is not authorized.

It has been well established that commuted payments, such as mileage, monetary allowance in lieu of transportation, or per diem lawfully may be made for authorized travel only if based upon a specific statutory authorization. 15 Comp. Gen. 206; 23 *id.* 875–877; 40 *id.* 221; *id.* 226–230; and 45 *id.* 814. In section 404 of Title 37, United States Code, the statute authorizes "travel and transportation allowances" to members of the uniformed services performing travel under orders. Subparagraph d thereof, specifically sets forth the travel and trans-

portation allowances authorized, for each kind of travel. Based on this authorization, the Joint Travel Regulations, promulgated thereunder, properly authorize the payment of mileage and per diem to members performing official travel under competent orders. See also in this connection the provisions of 5 U.S.C. 5723(b). A statutory assumption, however, by the Government of an obligation to pay necessary travel expenses without such an express authorization for the payment of commuted allowances has consistently been construed as authority for reimbursement on an actual expense basis only. 45 Comp. Gen. 814.

The language contained in section 703(b) of Title 10, United States Code, which provides that members entitled to leave thereunder may be "transported at the expense of the United States to and from that place," clearly does not contain specific authorization for the payment of commuted travel and transportation allowances. Furthermore, even if as stated in the opinion of the Judge Advocate General, the language authorizes such transportation "without limitation or qualification," the legislative history of Public Law 89–735, 10 U.S.C. 703(b), indicates that the sole purpose of that provision was to provide for only necessary transportation at no expense to the member, or, as stated in the hearings, that the members would get "free transportation." There is no indication in the legislative history that they are to be paid a commuted allowance for travel performed at personal expense, which may or may not cover the cost of the travel performed. *Cf.* 43 Comp. Gen. 378.

It must therefore be considered that paragraph M5501, Joint Travel Regulations, may not be revised under the authority of the provisions of section 703(b) of Title 10, United States Code, to provide for the payment of mileage or a monetary allowance in lieu of transportation for any travel performed by members at personal expense while on leave.

[B–163164]

Station Allowances—Military Personnel—Dependents—Children—Divorced Daughter

The divorced daughter of an officer of the uniformed services under 21 years of age who has custody of her minor child with the obligation to support and care for the child without any assistance from her husband, and who resides and is dependent on her father for her support is a "dependent" of the officer within the meaning of the term as used in 37 U.S.C. 401 and, therefore, he is entitled to a station allowance increase.

To Capt. R. C. Dee, Department of the Army, January 30, 1968:

Further reference is made to your letter of July 17, 1967, AEZNS–FO, requesting a decision whether Lieutenant Colonel Jack J. Russell's divorced daughter, Mrs. Sharon E. Paulson, is his dependent

under the circumstances set forth in your letter, for the purpose of increased station allowance. The request was assigned PDTATAC Control 67–39 by the Per Diem, Travel and Transportation Allowance Committee.

You say that Mrs. Paulson is Lieutenant Colonel Russell's legitimate daughter; that she is under the age of 21 and that she and her child receive their entire support from him and reside with him at his current duty station. A copy of a decree of divorce issued by the Superior Court of the State of Arizona in and for the County of Cochise, Arizona, on December 10, 1965, shows that Sharon Russell Paulson was granted an absolute divorce from her husband, Lauren Paulson, together with custody of their minor daughter and with the complete obligation to support and care for such child without assistance from her husband.

Section 401 of Title 37, United States Code, defines the term "dependent" in the case of a member of the uniformed services as including his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent upon the member) who either is under 21 years of age, or is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support. These provisions were derived from section 102 of the Career Compensation Act of 1949, 63 Stat. 80h.

Unmarried children under the age of 21 were defined as dependents of members of the uniformed services by section 4 of the act of June 10, 1922, 42 Stat. 627. The act of February 21, 1929, 45 Stat. 1254, provided that the words "child" or "children" as used in sections 4 and 12 of the act of June 10, 1922, as amended, should be held to include stepchildren, where such stepchildren are in fact dependent upon the person claiming dependency allowance. In decision of December 29, 1937, A–90535, we held that a member's divorced stepdaughter, under 21 years of age, who was entirely dependent upon him for support, was his dependent within the meaning of those statutory provisions.

Insofar as here material there has been no substantial change in the definition of dependents of members of the uniformed services since the decision of December 29, 1937, and no reason is otherwise apparent why the definition should now be given an interpretation different from that given in that decision. Accordingly, since the child here involved is the legitimate daughter of Lieutenant Colonel Russell, has been unmarried since the divorce was granted on December 10, 1965, and again is dependent upon him for her support, it is concluded that she is his dependent for the purpose of increased station allowance. *Cf.* 37 Comp. Gen. 129. The papers which accompanied your request are returned.