Decisions of The Comptroller General of the United States

VOLUME 49 Pages 527 to 648

MARCH 1970

WITH

INDEX DIGEST

JANUARY, FEBRUARY, MARCH 1970

UNITED STATES
GENERAL ACCOUNTING OFFICE

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1971

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C, 20402.
Price 25 cents (single copy); subscription price: $2.25 a year; $1 additional for foreign mailing.

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[B-167297]

Agents—Of Private Parties—Evidence—Time for Submitting

A low bid signed by the president of a company in receivership, where the power of attorney from the receiver authorizing the president to sign the bid was submitted after bid opening, is nevertheless a responsive bid. The rule that evidence of agency must be submitted before bids are opened is too restrictive in view of the fact that should a principal establish a bid was submitted on his behalf by an unauthorized individual the Government not only would have a possible cause of action against that individual, who no doubt would challenge a false disavowal of his authority, but in addition has ample means to protect itself againt fraudulent practices by bidders. However, evidence of agency submitted before bid opening would avoid challenges of proof of agency. 48 Comp. Gen. 369, modified.

Bonds—Bid—Individual Sureties *v.* Corporation

The fact that individual sureties are on a bond rather than a corporation does not make the bond submitted with a low bid unacceptable. Individual sureties are permitted pursuant to paragraph 10-201.2 of the Armed Services Procurement Regulation, provided they are financially responsible persons, and, therefore, where the individual sureties on the bid bond furnished by the low bidder are solvent and have undertaken to guarantee that the principal named in the bond will execute the contract identified in the bond if accepted by the Government, the bid bond is considered sufficient on the strength of the individual sureties.

To the Secretary of the Army, March 2, 1970:

We refer to the report dated August 22, 1969, from your Department concerning the protest by Square Deal Trucking Company, Incorporated, against the proposed award of a contract to Baldwin Trash Company under invitation for bids No. DABGO3-69-B-0049 issued May 7, 1969.

The subject invitation covers refuse collection at the Fort Lesley J. McNair installation for Fiscal Year 1970. Bids were opened on June 3, 1969, and the low bid was submitted by Baldwin Trash Company, Incorporated, in the amount of $27,000. The second low bid was submitted by Square Deal in the amount of $29,400.

On June 4, 1969, the day after the bid opening, Square Deal protested against award to the low bidder, Baldwin, based on the fact that the bidder was in receivership. It appears that on January 31, 1969, a receiver was appointed by the United States District Court, District of Columbia, for the Baldwin Trash Company. The record also shows that by a notarized power of attorney dated May 16, 1969, the receiver authorized Mr. Horace G. Baldwin to sign Government bids for the Baldwin Trash Company. However, this information came to the attention of your Department after the bid opening. The Baldwin bid dated May 21, 1969, and the accompanying bid bond, were signed by Horace G. Baldwin as President of the Baldwin Trash Company, Inc., and a signed statement was furnished by the Secretary of the Baldwin firm attesting to Mr. Horace G. Baldwin's authority to sign the bid in question. But the May 16 power of attorney from the receiver author-

izing Mr. Baldwin to sign the bid was not included with the bid, and it is reported by your Department that the contracting officer was not aware of the Baldwin receivership until after the bid opening, when Square Deal filed its protest. It is further reported that the Baldwin receivership was not communicated to the contracting officer while two other contracts with Baldwin were being performed. On those two existing contracts, your Department advises that payment was made to the Baldwin Trash Company, and problems which developed on the contracts were corrected by Mr. Horace G. Baldwin. In addition, it is reported that the required refuse services at Fort McNair are being performed by the incumbent contractor, Baldwin Trash Company, pending this protest.

Square Deal refers to paragraph 2(b) of the invitation instructions and conditions (GSA Standard Form 33A July 1966) which states that "Offers signed by an agent are to be accompanied by evidence of his authority unless such evidence has been previously furnished to the issuing office." It contends that Baldwin's bid is nonresponsive because Mr. Baldwin's authority to sign the bid in question was not established prior to bid opening as required by paragraph 2b, and that the company's bid bond neither binds a proper principal nor provides proper protection by a surety corporation.

Your Department believes the protest has merit. It concludes that even if Mr. Baldwin had authority to bind the receiver to the bid, he had no such authority under the May 16 power of attorney with respect to the bid bond. On this matter, your Department cites our decision B-167282, August 11, 1969, involving a bid bond signed by Mr. Baldwin for Baldwin Trash Company under a Navy procurement issued May 22, 1969. As noted by your Department, we stated in that decision to Baldwin Trash Company that the receiver's failure to sign the bond "would appear to be sufficient in itself to warrant a conclusion that the bid, as submitted, was not responsive to the invitation for bids in a material respect."

We do not believe, however, that our prior decision should be considered controlling on the bid bond issue. The Navy in that case had rejected all bids on the basis that the bid prices were excessive. Baldwin protested, contending that its bid price was not excessive. We rejected Baldwin's contention and, as an additional response to Baldwin, we made the statement quoted above. In the preceding comments, we stated in effect that even if the Navy had not canceled the invitation, there would be the question whether Baldwin's bid bond would have been sufficient in view of the fact that the receiver had not signed the bid. Thus, it is clear from the full context of the decision that our statement regarding the bid bond was not in the nature of a holding

and should not be considered binding in this case. (It should also be noted that B-167282 has been reopened at the request of Baldwin.) We are of the opinion that Baldwin's bid bond may be regarded as sufficient on the strength of the individual sureties. Square Deal has correctly noted that the surety on the bond is not a corporation. However, individual sureties are permitted, providing they are financially responsible persons. See Armed Services Procurement Regulation 10-201.2. We are advised by your Department that the sureties on the Baldwin bid bond are solvent. They have undertaken to guarantee that the principal named in the bond (Baldwin Trash Company), will execute the contract identified in the bond, if accepted by the Government. We see no reason why this bond is not acceptable.

The more troublesome question, in our opinion, concerns the sufficiency of the Baldwin bid. On this question we are referred by Square Deal to our decision at 48 Comp. Gen. 369 (1968). In that decision we upheld the right of a contracting officer to reject a low bid signed by an individual in the capacity of an agent, in the absence of evidence submitted with the bid of the agent's authority to bind the principal to the bid. After the bid opening the agent did establish that he was authorized to bid for the principal. Nevertheless, we concluded that, as provided by paragraph 2b of SF 33A, such evidence must be submitted by bid opening. We stated that if evidence of the agency were allowed to be submitted after bid opening, the principal would be in a position to make an election either to affirm the bid or to claim that the bid was submitted in error by a person not authorized to enter into contracts on his behalf. In order to avoid such a situation, we concluded that evidence of agency must be submitted before bids are opened.

Square Deal contends that the rule in 48 Comp. Gen. 369 is equally applicable in this case. It points out that under the Court order control of the Baldwin Trash Company was placed in the hands of the receiver. It further points out that, while Mr. Horace C. Baldwin was authorized by the receiver to act as an agent for the corporation in signing Government bids, evidence of this authority was not furnished to the Government until after the bid opening. Thus it concludes that the Baldwin bid may not be accepted.

We belive the rule stated in 48 Comp. Gen. 369 may be too restrictive. We see no reason to prohibit the furnishing of proof of agency after bid opening. In that case we expressed a fear that some principals might take advantage of such a rule. We now believe this fear is unfounded. If a principal should establish that a bid was submitted on his behalf by an individual not authorized to enter into contracts for him, the Government would have a possible cause of action

against such unauthorized individual. See Restatement of Agency, section 329, 330. Therefore, it can be expected that any false disavowals of an agent's authority by his principal would not go unchallenged by the agent. In any case, the Government has ample means to protect itself against fraudulent practices by bidders. Our rule at 48 Comp. Gen. 369 is accordingly modified.

However, we still advise agents signing bids to comply with the provision in paragraph 2(b) of SF 33A, by submitting proof of agency before bid opening. By following this procedure, the bidder and his agent can avoid challenges from other bidders and problems of proof before the contracting officer. If, for example, an agency relationship is based on an oral agreement, the bidder may not be able to establish to the contracting officer's satisfaction that the individual signing the bid was authorized to do so at the time of bidding. In the instant case, however, this burden of proof has been met by Baldwin Trash Company. We therefore conclude that the low bid may be accepted.

In view of our conclusion, there is no need to consider whether Square Deal qualifies for this procurement as a small business concern.

[B-168828]

Contracts—Mistakes—Government's Fault—Correction

An error made in the slope percentage factor used in computing redetermined stumpage rates under a timber sale contract may be corrected retroactively and the contractor credited with the overpayment that resulted from the Government's unilateral error, as no disagreement exists concerning the correct slope percentage to subject the correction to the limitations of the disputes clause of the contract, nor is the retroactive modification of the contract subject to the regulation that timber sale contracts may be modified only when the modification applies to the unexecuted portions of a contract and will not be injurious to the United States, as an exception to the rule that a contract may not be modified except in the Government's interest may be made to correct a unilateral error by the Government.

To the Secretary of Agriculture, March 2, 1970:

Reference is made to a letter (2430) dated January 15, 1970, with enclosure, from the Deputy Chief of the Forest Service requesting our opinion on a proposed amendment to a timber sale contract which would effect a downward adjustment of stumpage rates retroactive to April 1, 1969.

On May 10, 1966, the Rio Beaver timber sale was awarded to the Ketchikan Pulp Company (Ketchikan). The contract, as amended, required that stumpage rates be redetermined as of April 1, 1969. Preparatory to redetermining the rates, the Forest Service appraised the terrain on which the timber sale was located and determined the slope of the area to be 42 percent. However, in computing the new rates

a 30-percent slope factor was erroneously used. As a result of this error, the redetermined stumpage rates are greater than they should be and Ketchikan is paying more for the timber than was contemplated.

To rectify this error, which it admits was its fault, the Forest Service plans to amend the contract in the manner above indicated and to give Ketchikan credit for the amounts already overpaid. The delay in amending the contract prior to this time is apparently attributable to the belief held by the Forest Service that, since the error was not discovered by Ketchikan until after the time for appeal prescribed by regulation (36 CFR 211.30) had expired, it was precluded from taking remedial action.

In this connection, subsection B8.5 of the timber sale contract entitled "Disputes" provides in pertinent part:

> Except as otherwise specifically provided, it is the intent of this contract that Purchaser and Forest Service shall agree upon the interpretation and performance of this contract. Upon failure to reach an agreement on a question of fact, the decision of the Forest Service shall prevail within the limitations of law (41 U.S.C. 321, 322) and subject to appeal under the Regulations of the Secretary of Agricultural (36 C.F.R. 211.20 *et seq.*).

The disputes clause obviously contemplated appeals if, and only if, the parties failed to agree on questions of fact. However, we perceive no disagreement in this case since both the Government and the contractor accurately ascertained the percentage of slope and have never disagreed in the matter. Since the erroneous stumpage rates resulted solely from the Government's negligent use of an erroneous slope percentage in its computation of redetermined rates, we believe that rectification of the error is not subject to the limitations of the disputes clause of the contract.

In view of 36 CFR 221.16, a retroactive modification of the contract would appear to be objectionable. That regulation provides:

> (a) Timber sale contracts may be modified only when the modification will apply to unexecuted portions of the contract and will not be injurious to the United States. Modifications permitted by this section may be made by the officer approving the sale, by his successor, or by his superior.

However, we do not believe that the corrective action proposed falls squarely within the purview of this provision. What is involved here is a correction of a unilateral error made by the Forest Service in an internal computation of timber rates which was not contributed to or caused by any act of the contractor. While, as a general rule, a contract may not be modified except in the Government's interests, we believe an exception to the rule properly may be made to correct a unilateral error of the Government to provide for the payment of proper redetermined rates in accordance with the standard methods of the Forest Service as contemplated by section B3.31 of the contract. A contractor who is contractually bound to a rate determination is

entitled to have such determination made upon a correct factual basis and, if such determination is arrived at by application of data which is not factually accurate, the rate determinating agency should make such adjustments as may be necessary to reflect the proper application of correct data based on its standard rate methods.

Accordingly, the scheduled rate determination of May 6, 1969, effective April 1, 1969, should be adjusted to reflect the correct slope percentage figure and such corrected stumpage rate should be regarded as effective on and after April 1, 1969, in the administration of the contractor's timber sales account.

[B–168157]

Leases—Repairs and Improvements—Government's Obligation

The repair of window breakage by vandals and otherwise in a building occupied as a post office under a 30-year lease that exempted the lessee, the Government, from liability to repair damages caused by "acts of a stranger" is the responsibility of the lessor, even if the lease does not provide affirmatively that the lessor shall be liable for such repairs. On the basis of the absence of "Federal law" on the issue, conflict in State court decisions as to the legal liability of the lessee, the length of the lease term, the purpose for which the premises were leased and the lease provisions relating to repairs, the exceptions to the Government's liability for repairs should be strictly applied and the Government as lessee exempted from liability to make the repairs, except for the breakage not caused by vandalism.

To Lloyd S. Jacobson, March 3, 1970:

Further reference is made to your letter of October 17, 1969, with enclosures, requesting, on behalf of Harry N. Forman and Rose C. Forman, our decision regarding their liability as lessors for repairs to the Muncie, Indiana, Post Office.

The lease, dated October 3, 1963, provided that the Post Office Department would lease certain premises situated in Muncie, Indiana, and owned by the lessors, for a period of 30 years at an annual rental of $72,600, payable in equal installments at the end of each calendar month. The lease further provided for six 5-year renewals at the option of the Government at rentals ranging from $60,000 to $40,000 per annum.

By letter of September 30, 1969, the lessors were informed by the postmaster of the leased facility of broken windows caused by various acts of vandalism amounting in the aggregate to estimated replacement costs of $621.26. It appears that two of the breakages were caused by BB gun pellets while as to the third breakage there was no evidence of vandalism. You state, in effect, that while the lease provides (in paragraph 7(a)) that the Government has no liability to repair damages caused by "acts of a stranger," the lease does not provide affirmatively that the lessor shall be liable for such

repairs. You contend that the lease must be interpreted under applicable Indiana law, and you cite both Indiana and other authorities for the proposition that a lease provision exempting the lessee from making repairs necessitated by specific causes does not obligate the lessor to make such repairs. In essence, therefore, it is your position that although the breakages were caused by acts of third persons, which is an exception to the Government's repair responsibility, there is no provision in the lease that the lessor must make such repairs, and that under the Indiana law there would be no liability on the landlord in the absence of an express covenant. In this regard, you refer to 51c C.J.S. 966, Landlord and Tenant, § 368(9), which states as follows:

> A tenant's covenant to repair may be limited in nature and extent, and the exceptions of particular repairs in the covenant will be observed; but the fact that the tenant agrees to make specified repairs will not impose on the landlord the obligation to make repairs not so specified, nor does an agreement exempting the tenant from making repairs necessitated by specified causes obligate the landlord to make such repairs.

In construing the meaning of the covenant in a lease obligating the Government, as a lessee, to maintain the premises, the applicable law is Federal rather than State, although in the absence of cases in point, the courts may properly turn for guidance to the general law of landlord and tenant. See *Brooklyn Waterfront Terminal Corporation* v. *United States*, 117 Ct. Cl. 62, 90 F. Supp. 943, 948 (1950). The issue presented here has not been, as far as we have been able to ascertain, resolved by application of "Federal law." The State court decisions annotated at 51c C.J.S., Landlord and Tenant, § 368(9), are in conflict as to the legal liability of the lessee in similar situations. There is, however, some authority for the proposition that where a lease stipulates that the lessee will make all necessary repairs, with certain specified exceptions, the lease exempts the lessor from making any repairs other than those expressly excepted, but not from making repairs if they are needed and called for by the lessee. See *Jersey Silk & Lace Stores* v. *Best Silk Shops*, 235 N.Y.S. 277 (1929); *Cf. Ferro* v. *Ferrante*, 240 A. 2d 722 (1968). However, construing all provisions of the lease together, considering the length of the lease term and the purpose for which the premises were leased, and the lease provisions relating to repairs, we think it reasonable to conclude that the exceptions to the Government's liability for repairs should be strictly applied. With this broad view in mind, it is clearly indicated that the lessor is obligated to make any repairs as to which the lessee is exempted from liability.

It is highly improbable that the parties could have intended to leave any significant category of needed repairs in limbo to go unmade or

simply to be made by the party most needful of them. Under almost any circumstances, the party most needful of effecting prompt repairs would be the lessee, and it would be inconsistent and illogical to exempt the Government from making broad categories of repairs while at the same time requiring the Government to pay for such repairs if it wanted repairs made. Under paragraph 7(a) of the lease, there are only two kinds of repair for which the lessor is responsible; those for which the Government is exempted from liability, such as damages caused by acts of a stranger, and those required due to defects in building construction, as to which notice is given the landlord within the first year of the lease term. To hold otherwise would defeat entirely the Government's exemptive rights which are supported by the lease consideration over a 30-year term.

Accordingly, the cost of repairs ($482.05) to broken windows caused by "acts of a stranger" is an obligation of the lessor under the lease terms. See 20 ALR 2d 1331. However, the cost of repairing a window ($139.21) as to which there is no evidence of vandalism is an obligation of the Government under paragraph 7(a) of the lease.

The Post Office Department is being advised of this decision.

[B-167025]

Contracts—Specifications—Samples—Tests to Determine Product Acceptability

Under an invitation for bids that contained provisions for the submission of bid samples as part of the bid, and for inspection of production samples by the Government prior to delivery and by the contractor to insure that the delivered product was "manufactured and processed in a careful and workmanlike manner, in accordance with good practice," a bid that submitted acceptable samples but took exception to production sample inspection due to the lack of standard test equipment in the industry to assure the finished product would meet the Government's test, and offered to measure performance on the basis of the specifications and to meet the workmanship standards the inspection was intended to insure, was a qualified bid as it eliminated the requirement that the Government's test results would control and imposed a different standard of product acceptability.

Contracts—Protests—Consideration Mandatory

A telegram by an unsuccessful bidder stating the intent to protest to the United States General Accounting Office should a contract award be made to the low bidder alleged to have qualified its bid, and advising a supporting letter would follow, should have been treated as a protest and the award made to the low bidder the day before receipt of the promised letter withheld until the dispute was resolved, particularly in view of the fact the protestant's declaration of intent to file a protest with GAO in the event of a contract award, was sufficient standing alone to require the conclusion that the telegram constituted a protest. However, the contract having been substantially performed, it would not be in the best interests of the Government to require cancellation of the contract.

To the Secretary of the Air Force, March 5, 1970:

Reference is made to letter AFSPPOA of October 7, 1969, from the Chief, Procurement Operations Division, Directorate of Procurement

Policy, Deputy Chief of Staff, Systems and Logistics, and to previous correspondence, reporting on the protest of the Ampex Corporation against the award of a requirements contract to the Minnesota Mining and Manufacturing Company (3M) under invitation for bids (IFB) No. F08650–69–B–0073, issued by the Air Force Eastern Test Range, Base Procurement Branch, Patrick Air Force Base, Florida. Subsequent correspondence was received from both Ampex and 3M and informal discussions were conducted in our Office with representatives of 3M.

The invitation was issued on April 2, 1969, for the furnishing of estimated quantities of four different instrumentation tapes. The invitation specified that only one award would be made for all items and included the following provisions:

PART III—BID SAMPLES (1965 OCT)

a. Bid samples, in the quantities, sizes, etc., required for the items so indicated in this Invitation for Bids, must be furnished as a part of the bid and must be received before the time set for opening bids. * * *

* * * * * * *

c. Products delivered under any resulting contract shall conform to the approved sample as to the characteristics listed for test or evaluation and shall conform to the specifications as to all other characteristics.

* * * * * * *

PART IX—INSPECTION AND ACCEPTANCE

a. Inspection of Production Samples for the Government shall be performed at Air Force Eastern Test Range * * * Production Samples, as required, shall be submitted before the lot is offered for final delivery. * * *

b. The Contractor shall perform Production Sample Inspection to insure that the delivered lot shall be manufactured and processed in a careful and workmanlike manner, in accordance with good practice. * * *

Two bids were received and opened on May 1, 1969. The low bid in the total amount of $1,344,024.72 was submitted by 3M. The other bid in the total amount of $1,778,569.58 was submitted by Ampex. The 3M bid was accompanied by a letter of transmittal which stated:

The 3M Company is pleased to submit the enclosed original and 2 copies of our quotation in response to the above referenced IFB.

The instrumentation tape product in our bid has been provided by the 3M Company in the past on the basis of its ability to meet specified government needs and has in each instance successfully met those procurement requirements. We believe that the 3M Brand 888 tape will in all respects meet the government's operational requirements for this product. However, certain of the prescribed specifications concerning product sample inspection cannot be met with complete assurance because of the lack of standard reference test equipment within the industry and the resultant variables which are thereby introduced to inspection approval.

Accordingly, 3M Company offers its bid with the understanding that the applicable specifications will be applied to measure contract performance on the basis of the comments concerning those specifications as set forth in Part 9B of the IFB and that 3M shall deliver a product which is ". . . manufactured and processed in a careful and workmanlike manner in accordance with good practice."

On May 5, 1969, Ampex sent the Base Procurement Branch at Patrick Air Force Base the following telegram:

SUBJECT: IFB F08650-69-B-0073

AMPEX CORPORATION IS FORWARDING A LETTER TO YOUR OFFICE WHICH WILL INCLUDE RELEVANT LEGAL CITATIONS AND A SUMMARY OF THOSE ASPECTS OF THE 3-M BID WHICH CAUSE IT TO BE NONRESPONSIVE TO THE SUBJECT IFB. SHOULD A DECISION BE MADE TO MAKE AN AWARD TO 3-M, THIS IS TO ADVISE YOU OF OUR INTENTION TO FILE A FORMAL PROTEST WITH THE GENERAL ACCOUNTING OFFICE.

The contracting officer did not consider the telegram to be a protest and a contract was awarded to 3M on May 12, 1969. Ampex was advised by letter dated May 12, 1969, that the letter referred to in the telegram had not been received and that 3M's bid had been evaluated and determined to be responsive. It is reported that a letter from Ampex dated May 5, 1969, was received by the procurement office on May 13, 1969, the day following the award of the contract. By telegram dated May 19, 1969, Ampex advised the contracting agency of the protest to our Office. The main basis for the protest is that the 3M letter accompanying the bid was a material qualification of the requirements of the IFB.

The administrative reports indicate that the 3M letter was evaluated to determine if the language in the letter was worded so as to impose conditions on the Government not required by the IFB or took exception to a material requirement imposed by the IFB and was considered to have no material effect. This was because samples furnished with the bid were tested prior to award and found acceptable in all respects and paragraph "c" of part III of the invitation provided that:

> Products delivered under any resulting contract shall conform to the approved sample as to the characteristics listed for test or evaluation and shall conform to the specifications as to all other characteristics.

Since the products delivered under the contract are to conform to the sample which had been tested and found to be acceptable, it was believed that the Government would be able to enforce the contract requirement.

With respect to that part of the 3M letter dealing with "production sample inspection," it was stated that the only responsibility that 3M was to have met in the area of production sample inspection was to "insure that the delivered lot shall be manufactured and processed in a careful and workmanlike manner, in accordance with good practice." The 3M letter was considered to have affirmed that responsibility. It was therefore the administrative position that there was no language in the letter under question that would detract from the obligations on the part of 3M to furnish a product that would be in full conformance with the bid samples that had been tested prior to award.

In a letter of December 10, 1969, to our Office, 3M stated that the cover letter which accompanied the bid was intended to clearly state for the record that a lack of uniform testing equipment within both

the Air Force and industry laboratories would necessitate the use of different "production sample inspection" tests by the contractor during the course of contract performance. 3M considers its cover letter as indicating that any variables in test results between the contractor and the Air Force would be resolved in favor of the Government.

Although it may be that under the contract 3M would be required to furnish a product conforming to the previously approved sample, whether the product is found to conform could very well depend upon the equipment which tested it. By the letter accompanying the 3M bid, it has indicated that because of differences between Government test equipment and industry test equipment no assurance could be furnished that the product would meet the required characteristics when tested by Government equipment. 3M's letter then stated that "Accordingly" (in other words as a consequence) it was offering its bid with the understanding that contract performance would be measured on the basis set forth in part IXb of the invitation. Part IXb, as indicated above, provides for the contractor performing production sample inspection to insure that the delivered lot has been manufactured in a careful and workmanlike manner, in accordance with good practice. Part IXb does not override the Government's right of testing in part IXa and rejection on the basis of the results of Government testing. However, the 3M letter qualified the bid to provide that the measure of performance would depend upon the testing followed by the contractor in part IXb and thus eliminated the requirement that the Government's test results would control. It follows then that if as a result of Government testing it was found that an article did not meet the specification requirements, 3M could take the position that its offer was made with the understanding that the acceptability of the product would be dependent solely upon the results produced by the part IXb testing procedure.

It therefore appears that the 3M letter was an intentional attempt to impose a standard of determining product acceptability different from that contained in the invitation. Considered on this basis, the cover letter submitted by 3M qualified its bid in a material respect.

However, in view of the present posture of the case, that is, since the remaining period for placing orders under the contract expires on May 31, 1970, and the contract has been substantially performed, we do not believe it would be in the Government's best interest to require cancellation of the contract.

In addition to the foregoing, we believe that appropriate steps should be taken to insure that in the future a telegraphic message such as was filed with the procurement office by Ampex in this case is considered and handled as a protest. In our opinion, the fact that

Ampex advised the procurement office that it intended to protest to our Office in the event the award was made to 3M was sufficient standing alone to require the conclusion that the telegram was intended to constitute a protest to the procurement office against an award to 3M.

[B-168383]

Contracts—Specifications—Failure to Furnish Something Required—Information—Invitation to Bid Attachments

The five of the eight bids received under an invitation for bids (IFB) to perform cleaning services which were not accompanied by the complete IFB and did not specifically identify and incorporate all of the documents comprising the IFB are, nevertheless, responsive bids and the low bid must be considered for award. The bidders signed and returned the facesheet of the invitation in which the phrase "In compliance with the above" has reference to the listing of the documents that comprise the IFB and operates to incorporate all of the invitation documents by reference into the bids and, therefore, an award to the low bidder will bind him to performance in full accordance with the terms and conditions of the IFB. To the extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed.

To Albert S. C. Millar, Jr., March 5, 1970:

Reference is made to your letter dated November 14, 1969, with enclosure, on behalf of Royal Services, Inc., protesting the award of a contract to any other bidder under invitation for bids (IFB) No. 4PBE-13, issued by the General Services Administration (GSA), Public Buildings Service, Region 4, Atlanta, Georgia.

The invitation requested bids offering to furnish the cleaning service requirements at the Atlanta Regional Service Center, Chamblee, Georgia, for the period beginning December 1, 1969, through November 30, 1970. The facesheet of the invitation, GSA Form 1467, bore a notation that all bids are subject to the following:

1. The attached Bidding Instructions, Terms, and Conditions, GSA Form 1467A.
2. The General Provisions, GSA Form 1468.
3. The Contract Requirements.
4. Such other provisions, terms, conditions, specifications, schedules, and exhibits as are attached.

A total of eight bids was received and opened on November 12, 1969. The bid prices were as follows:

John R. Chrisman & Associates, Inc.	$150,000.00
Amcor, Inc.	158,296.80
Rice Cleaning Service	164,991.12
Eastern Service Management Co.	175,716.00
Space Services of Georgia, Inc.	176,811.36
Royal Services, Inc.	177,465.00
Crown Maintenance Company	183,627.00
Hughes Bros. Cleaning & Janitorial Service	377,230.44

The bid of Hughes Bros. was determined by the contracting officer to be nonresponsive since the bid was not accompanied by a bid guarantee as required by paragraph 5 of the Special Provisions of the IFB. The IFB contained a cover sheet bearing the notation "*THIS INVITATION FOR BID 4PBE-13 CONSISTS OF THE FOLLOWING*," and thereafter identified the documents included in the invitation. We are advised that Space Services submitted the complete IFB with its bid, and that your company submitted an attachment incorporating by reference each of the documents listed on the cover sheet. Aincor, Rice Cleaning Service, Eastern Service Management, and Crown Maintenance submitted bids which included only GSA Form 1467 (invitation, bid, and award), the schedule, cost evaluation sheet, and the bid bond. The contracting officer advises that the bid of John R. Chrisman & Associates was disassembled sometime after bid opening; that the award section of GSA Form 1467 was completed; and that a complete contract document was prepared by attaching the specifications and special and general conditions. This was done prior to the submission of your protest in anticipation of an award to that firm. The contracting officer, relying on memory and customary practices of bidders in the region, believes that the Chrisman bid only included forms necessary to convey the bid amount, the bid bond, and the requested statement of financial condition and experience (not required to be submitted with the IFB). At a minimum, from an examination of the record, it appears that the bid of Chrisman included an executed GSA Form 1467, the page entitled "Representations and Certifications," and pages 1 and 2 of the schedule which includes its monthly bid price of $11,500. Page 1 of the schedule contains the following language:

> The services to be furnished, the specifications, the time and place of performance and any other special terms and conditions applicable to the Invitation For Bid, are set forth below, and in the attached specifications, General Provisions and Special Provisions.
>
> * * * * * * *
>
> The contractor will be responsible for managing and performing efficient programs for cleaning at the Atlanta Regional Service Center, 4800 Buford Highway, Chamblee, Georgia, as itemized in the attached specifications, general provisions and special provisions.

You contend that none of the low bidders included a return of the full set of specifications, which you state are required to be returned with the bids. Therefore, you contend that the low bid of Chrisman, as well as the bids of the other apparent low bidders, must be considered nonresponsive and that award must be made to Royal Services as the lowest responsive bidder.

In our decision dated October 31, 1969, 49 Comp. Gen. 289, our

Office stated the following general rule governing the responsiveness of bidders who fail to return all portions of the IFB:

> There is no requirement in the procurement laws, in the applicable regulations, or in the provisions of the standard invitation for bid forms that bidders must return with their bids all portions of, and attachments to, the invitation in order to be eligible for award of a contract. In the absence of such a requirement this Office has held that the question to be decided, when a bidder fails to return all documents with his bid which were attached to the invitation, is whether the bidder has submitted his bid in such a form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all of the material terms and conditions of the invitation. * * *

Also, see *Lowry & Co.* v. *S. S. Le Moyne D'Iberville*, 253 F. Supp. 396, 398 (1966), where the court held: "It is not necessary, in order to incorporate by reference terms of another document, that such purpose be stated in haec verba or that any particular language be used."

In the present case, five bids were not accompanied by the complete IFB and did not specifically identify and incorporate all of the documents comprising the IFB. GSA Form 1467, signed by the bidders, contains the following:

> IN COMPLIANCE WITH the above, the undersigned agrees that, if this Bid is accepted within _____ days (60 calendar days unless a different period is inserted by the bidder) from the date of opening, he will within 15 calendar days (unless a longer period is allowed) after receipt of acceptance by the Government furnish performance bond and insurance if required and, upon receipt of notice from the Government to proceed, thereafter provide the services described in the Contract Requirements, in strict accordance with all provisions of the Invitation as set forth below.

The phrase "IN COMPLIANCE WITH the above" refers to the portion of the bid form which appeared immediately above the quoted paragraph and provided that all bids were subject to "(1) The attached Bidding Instructions, Terms, and Conditions, GSA Form 1647A; (2) The General Provisions, GSA Form 1468; (3) The Contract Requirements; and (4) Such other provisions, terms, conditions, specifications, schedules, and exhibits as are attached." See, in this regard, the above-quoted language appearing on page 1 of the schedule and the following language from 49 Comp. Gen. 289, *supra:*

> * * * it is our opinion that such references in the bid submitted by the low bidder clearly operated to incorporate all of the invitation documents into the bid, and that an award to the low bidder will therefore bind him to performance in full accord with the conditions set out in the referenced documents. * * *

Since Chrisman submitted at least two pages of the schedule with its bid, which pages make reference to the material provisions of the IFB, it is our opinion that such references in the bid submitted by Chrisman operated to incorporate the essential invitation documents into the bid. We therefore conclude that an award to Chrisman will bind him to performance in full accordance with the terms and conditions of the IFB.

We are therefore advising the Administrator of the General Services Administration that the low bid of Chrisman must be considered for award if proper in other respects. The holdings in B-167248, August 22, 1969, and 48 Comp. Gen. 171 (1968), cited by you, to the extent they are inconsistent with 49 Comp. Gen. 289, *supra*, will no longer be followed by our Office.

Accordingly, your protest is denied.

[B-168473]

Bids—Correction—Initialing Requirement

The failure to initial an erasure and correction of unit price in the low bid submitted under an invitation for an indefinite quantity of rods, where there was no doubt of the intended bid price and no need to question whether the person signing the bid effected the changes as the abstract of bids evidenced the price had been corrected prior to bid opening, was a minor informality of form that should have been waived pursuant to paragraph 2-405 of the Armed Services Procurement Regulation in the interest of the Government as the low bidder responsible for the contents of the bid submitted would be required to perform at the corrected bid price.

Contracts—Awards—Erroneous—Performance

Although the rejection of the low bid under an invitation for an indefinite quantity of rods was improper and the award of a contract to the second low bidder was unauthorized, in view of the expenses incurred by the contractor, the minimum quantity ordered under the contract may stand and payment made at the contract price. However, no additional orders may be placed under the contract, even though the bid price was computed in anticipation of obtaining orders for the maximum quantity stated in the contract, and the contractor purchased more material than needed to fill the minimum quantity ordered, as the extent of contractor performance is not for consideration in deciding whether to preclude further performance where the Government has the right not to exercise an option to purchase.

To the Secretary of the Army, March 5, 1970:

Reference is made to the protest of Tompkins Products against the award of a contract under invitation for bids No. DAAF01-70-B-0133, issued by Rock Island Arsenal, Illinois. This matter was the subject of a report dated December 18, 1969, from the Deputy Director of Procurement, Army Materiel Command, reference AMCGC-P.

The invitation requested bids on an indefinite quantity of Small Arms Cleaning Rods. The invitation proposed to obligate the Government to order a minimum quantity of 23,220 rods during the contract year and to commit the contractor to furnish to the Government, when and if ordered, up to and including the quantity of supplies designated in the schedule as the "maximum," 92,880 rods. The type of contract intended is an "Indefinite Quantity Contract" as defined in Armed Services Procurement Regulation (ASPR) 3-409.3.

The file submitted with the report of December 18, 1969, indicates that Tompkins Products submitted the lowest bid of $1.85 for each

rod, but that its bid was rejected as nonresponsive to the invitation for failure to initial the erasure in its bid price. An award was made to Jeffrey-Alan Manufacturing & Engineering Corporation at a unit price of $1.89 and a purchase order for the entire minimum quantity was issued on November 19, 1969. It is noted that such action was taken approximately 2 months after bid opening and after two preaward surveys had been requested on Tompkins, as a result of which the company was determined to be capable of performance.

Your report points out that initialing of erasures is required by paragraph 2(b) of the "Solicitation Instructions and Conditions," which advises that "Erasures or other changes must be initialed by the person signing the offer." The contracting officer has stated that his decision to reject the low bid was based upon the determination that failure to initial the erasure of the unit price was a material aspect of the bid, rather than a minor bid irregularity which could be waived pursuant to Armed Services Procurement Regulation (ASPR) 2-405. The contracting officer reasoned that no information was available to him to indicate that the person signing the bid effected the erasure and inserted the price of $1.85, or that the person subscribing the bid was aware of such erasure and subsequent insertion of this figure.

Your Department has taken the position that the contracting officer's decision to reject the low bid was not arbitrary, capricious or unreasonable and was, therefore, a proper exercise of his discretion in the matter.

A determination by a contracting officer that a bid is nonresponsive, which as in the present case, involves interpretation of the invitation and bid and the application of pertinent provisions of ASPR, has been held to be a legal question which is subject to final review by this Office. See B-161722, January 11, 1968. Regarding the contracting officer's determination that the low bid in the instant case was nonresponsive, we have consistently held that if a bidder fails to initial an erasure in the bid price, but the erasure and correction leave no doubt as to what the intended bid price is, such a bidder has made a legally binding offer, acceptance of which would consummate a valid contract which the bidder would be obliged to perform at the offered price. Under such circumstances we have concluded that the requirement for initialing changes is a matter of form which may be considered an informality and waived in the interest of the Government. See B-149134, September 20, 1962; B-147106(2), September 25, 1961; B-148081, March 5, 1962; B-148560, April 10, 1962; and B-159376, August 2, 1966.

We perceive no substantial reason in the present case for questioning whether the person signing the bid effected the erasure, since

it is apparent from the abstract of bids that the price had been corrected prior to the time sealed bids were publicly opened. In such circumstances a bidder must be held responsible for the contents of its bid, *United States* v. *Sabin Metal Corp.*, 151 F. Supp. 683 (1957), affirmed 253 F. 2d 956 (1958), and may therefore be held to perform at its bid price as submitted. It is therefore our opinion that rejection of Tompkins' low bid was improper.

Turning to the effect of the improper rejection of the Tompkins bid on the award to Jeffrey-Alan Manufacturing & Engineering Corporation, the applicable procurement statute, 10 U.S.C. 2305(c), with which the provisions of ASPR 2–103(iv) and 2–407.1, and paragraph 10(a), Standard Form 33A, are consistent, requires that award in a publicly advertised procurement be made to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. As the responsible bidder who quoted the lowest price, Tompkins was in line for award. However, the minimum quantity required to be ordered under the solicitation and the contract awarded to Jeffrey-Alan was ordered more than 2 months ago, and your Department has advised us that Jeffrey-Alan has purchased all materials for the minimum quantity ordered and has incurred labor and material costs of $18,500. Having regard for the interest of the Government, which has been complicated and compromised by the fact that Jeffrey-Alan has made substantial commitments based on the award and is proceeding with performance, it is our opinion that the award of the minimum quantity should be permitted to stand and payment made at the company's bid price.

However, we have been advised that your Department will have a definite requirement for at least 20,000 additional items during the period covered by the solicitation and the Jeffrey-Alan contract. In this regard Jeffrey-Alan has advised this Office that its bid price was computed in anticipation of obtaining orders for the maximum quantity stated in its contract, and it has therefore purchased substantial quantities of raw materials, in addition to those which would be required to fill the minimum quantity ordered. While we have consistently taken into consideration the extent of the contractor's performance in deciding whether the contractor should be precluded from further performance, we do not believe such matters are for consideration here since the Government, in any event, would have the legal privilege of not exercising its option to purchase the maximum quantity. See *Dynamics Corporation of America* v. *United States*, 182 Ct. Cl. 62, § 74 (1968).

With regard to the filling of future needs of the Government, over and above the 23,220 rods already ordered, we perceive no legal basis justifying additional purchases from Jeffrey-Alan under its unauthorized contract.

A copy of this decision has been sent to both Tompkins and Jeffrey-Alan.

The file forwarded with the report of December 18 is returned.

[B-168760]

Transportation—Dependents—Parents—Financial Support Requirement

An employee who incident to a permanent change of duty station has his mother-in-law moved by ambulance from a nursing home located at his old station to one in the vicinity of his new station so his wife could continue to handle the affairs of her mother, who although not a dependent for income tax purposes depends on her daughter to handle her financial and other affairs, may not be reimbursed the cost of the ambulance service. Even though the mother-in-law could be regarded as a member of the employee's household notwithstanding she receives domiciliary care elsewhere, she is not a "dependent" within the meaning of section 1.2d of the Bureau of the Budget Circular No. A-56, as the employee does not contribute to her support, and the fact that the parent relies on her daughter for other than financial support does not constitute her a dependent.

To E. W. Milot, United States Department of Agriculture, March 5, 1970:

Your letter of December 31, 1969, reference 6540, requests our advance decision whether you properly may certify the enclosed travel voucher in the amount of $285 claimed by Mr. Robert A. Harper for the ambulance transportation of his wife's mother (Mrs. Fannie W. McWhirter) from Tallahassee, Florida, to Cleveland, Georgia, incident to his change of station from Tallahassee to Gainesville, Georgia.

The employee's travel authorization dated May 7, 1969, listed the members of the "immediate family" authorized to travel at Government expense which included his wife's mother, Mrs. Fannie W. McWhirter, age 72.

The primary question posed by you is whether Mrs. McWhirter is a dependent parent as referred to in Attachment A, Bureau of the Budget Circular No. A-56, Revised (June 26, 1969). Section 1.2d thereof provides in part that "*Immediate family*" means "members of the employee's household at the time he reports for duty at his new permanent duty station" including "*dependent* parents * * * of the employee's spouse."

Mr. Harper's explanation of the pertinent facts and circumstances at the time of his change of station is as follows:

Mrs. Fannie W. McWhirter is my wife's mother. She has a small income and small capital reserve so that she is not yet financially dependent for income tax purposes. She is, however, in every other way totally dependent upon my wife.

Mrs. McWhirter has one other child, a son in the U.S. Army stationed in Korea. Until May of 1968 she lived in my home as part of my household but at that time she became bedridden to the point that we could no longer care for her at home and she was placed in a Tallahassee, Florida nursing home.

Since Mrs. McWhirter entered the nursing home it has been necessary for my wife to attend to all of her financial affairs such as banking and writing checks to pay her medical and other bills. Since Mrs. McWhirter has periods of senility when she has mental lapses she is not capable of handling her affairs personally and has given my wife unlimited power of attorney to handle them for her. In addition to handling financial affairs my wife must make decisions, based on doctors recommendations, concerning treatment. Just before our transfer to Gainesville, Georgia Mrs. McWhirter had to be hospitalized on short notice requiring my wife's permission immediately before she could be admitted.

Because of my transfer it was necessary to move Mrs. McWhirter from Tallahassee to the vicinity of Gainesville, Georgia. The nearest nursing home with a vacant bed was Huntington Convalescent Home 15 miles north of Gainesville. She was moved there by ambulance on June 20, 1969. I ask that I be allowed the moving expense since she is a member of my household, dependent upon my wife for care, and was moved solely because I was moved by the Forest Service.

Also, Mr. Harper submitted a statement from a physician, presumably acquainted with Mrs. McWhirter's case, to the effect that in his professional opinion it was necessary to transfer her by ambulance from Tallahassee to a convalescant hospital located near Gainesville.

The word "household" generally has been construed to mean the family members who dwell together under the same roof or reside in the same domestic establishment. However, a member temporarily absent from a household in order to receive domiciliary hospital type of care elsewhere should not for that reason alone be held to have lost status as a member of the household.

While it may be that Mr. Harper's mother-in-law could still be regarded as a member of his household, there is no indication that he contributed to her support. The fact that the mother-in-law is dependent on her daughter for the type of care and services described in Mr. Harper's statement, quoted above, does not constitute her a dependent within the meaning of the regulations. Our view is that the term "dependent" relates to financial support. See generally 25 Comp. Gen. 360.

Therefore, based upon the above stated facts and circumstances the voucher, which is returned herewith, may not be certified for payment.

[B–119959]

Courts—Judges—Leaves of Absence—Earned in Executive Branch of Government

Judges of the Tax Court who were removed from the Executive Branch of the Government by virtue of the enactment of section 951, Public Law 91–172, approved December 30, 1969, which established the Court as a constitutional court, may not be regarded as separated from the service within the contemplation of 5 U.S.C. 5551, in the absence of such an indication in the legislative history of the act, so as to permit lump-sum payments for accrued annual leave pursuant to the act of December 21, 1944, as amended, for Public Law 83–102, under which

the judges were credited with the leave when appointed to the court from a classified civil service position authorizes payment for the credited leave only upon separation from the service or upon return to a position subject to the Annual and Sick Leave Act of 1951, as amended. However, the entitlement of the judges to payment for the accrued annual leave to their credit remains undisturbed.

To William F. Huffman, Tax Court of the United States, March 9, 1970:

Your letter of January 21, 1970, asks whether certain Judges of the Tax Court who have substantial amounts of annual leave to their credit are now entitled by virtue of the enactment of section 951 of Public Law 91–172, Tax Reform Act, approved December 30, 1969, 83 Stat. 730, 26 U.S.C. 7441, to lump-sum payments for such annual leave.

Section 1 of Public Law 83–102, 5 U.S.C. 2061(c)(1), to which you refer, reads, in pertinent part, as follows:

(c)(1) This title shall not apply to the following officers in the executive branch of the Government * * *:

(A) persons appointed by the President by and with the advice and consent of the Senate, or by the President alone, whose rates of basic compensation exceed the maximum rate provided in the General Schedule of the Classification Act of 1949, as amended * * *

Section 2 thereof, 5 U.S.C. 2061a, reads as follows:

(a) The accumulated and current accrued annual leave to which any officer exempted from the Annual and Sick Leave Act of 1951 as a result of the enactment of this Act is entitled immediately prior to the date this Act becomes applicable to him shall be liquidated by a lump-sum payment in accordance with the Act of December 21, 1944 (5 U.S.C. 61b–61e) or the Act of August 3, 1950 (5 U.S.C. 61f–61k), except that payment under either such Act (1) shall be based upon the rate of compensation which he was receiving immediately prior to the date on which this Act became applicable to him, and (2) shall be made without regard to the limitations imposed by the amendments made by sections 4 and 5 of this Act with respect to the amounts of leave compensable under such Acts.

(b) In the event any such exempted officer, without any break in the continuity of his service, again becomes subject to the Annual and Sick Leave Act of 1951 upon the completion of his service as an exempted officer, the unused annual and sick leave standing to his credit at the time he was exempted from the Annual and Sick Leave Act of 1951 shall be deemed to have remained to his credit.

The foregoing provisions were the basis of the annual leave credit for each of the judges here involved and such provisions authorize payment for such leave upon separation from the service or recredit thereof upon again becoming subject to the Annual and Sick Leave Act of 1951, as amended. The above-quoted provisions are now contained in 5 U.S.C. 6301(2)(x)(xi), 5 U.S.C. 5551(b) and 5 U.S.C. 6302(e), respectively.

Section 951, Public Law 91–172, approved December 30, 1969, subtitle D, amends 26 U.S.C. 7441 of the Internal Revenue Code to read as follows:

There is hereby established, under article 1 of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

As of December 30, 1969, the Court by the foregoing amendment was removed from the executive branch. Thus, as referred to above, the question is whether by such legislation a situation has been created whereby the judges who have such annual leave to their credit would now be entitled to receive lump-sum payments therefor under the provisions of 5 U.S.C. 5551(a). That section reads as follows:

An employee as defined by section 2105 of this title or an individual employed by the governmnt of the District of Columbia, who is separated from the service or elects to receive a lum-sum payment for leave under section 5552 of this title, is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave, except that it may not exceed pay for a period of annual or vacation leave in excess of 30 days or the number of days carried over to his credit at the beginning of the leave year in which entitlement to payment occurs, whichever is greater. The lump-sum payment is considered pay for taxation purposes only.

You cite our decision in 33 Comp. Gen. 622 (1954) as paralleling the situation here involved. In that decision we held as follows, quoting from the syllabus:

An employee of the Justice Department who transferred to the office of a Federal judge where not statutory leave system is applicable and leave records are not maintained may not, under section 205(e) of the Annual and Sick Leave Act of 1951, as amended, transfer unused leave as a credit in the new position, and therefore the employee may be regarded as separated from the service, within the meaning of the act of December 21, 1944, as amended, so as to be entitled to a lump-sum payment for annual leave to her credit.

The basis of that holding was to avoid a forfeiture of the annual leave involved. In our decision 33 Comp. Gen. 85 (1953), question and answer No. 3, we also held to the same effect. The question of forfeiture is not involved in the matter you present because the annual leave has been credited to the judges for subsequent payment upon separation from the service or recredit upon return to a position subject to the Annual and Sick Leave Act of 1951, as amended.

In our decision 33 Comp. Gen. 209 (1953), question and answer No. 3(b), we pointed out that "the only basis for a lump-sum payment for annual leave under the act of December 21, 1944, as amended by Public Law 102, approved July 2, 1953, 67 Stat. 138, is the fact that the employee has 'separated from the service'." While the judges have been removed from the "Executive Branch" by the enactment of section 951 of Public Law 91–172, quoted above, we do not believe, in the absence of any indication in the legislative history thereof to the contrary, and we find none, that it was intended such judges should be regarded as separated from the service within the contemplation of 5 U.S.C. 5551 so as to permit current lump-sum payments for accrued annual leave. Rather our view is that it was intended that the situation of the judges as to their entitlement to payments for annual leave would remain undisturbed. Accordingly, the question presented is answered in the negative.

[B-168661]

Station Allowances—Military Personnel—Excess Living Costs Outside United States, Etc.—Dependents Military Dependent Status

A member of the uniformed services who incident to a permanent change of station to a restricted area overseas to which his dependents are not authorized to accompany him, elects to move his dependents from his old duty station in the United States (U.S.) to a designated place in Alaska, Hawaii, Puerto Rico, or any territory or possession of the U.S.—in fact to any place outside the U.S.—may not be paid station allowances—temporary lodging, housing, and cost-of-living allowances—as the dependents move overseas would be a personal choice, separate and apart from the member's overseas duty. The dependents while residing overseas would not be in a military dependent status and, therefore, the increased living costs incurred by the member would not be within the contemplation of 37 U.S.C. 405 for reimbursement purposes.

To the Secretary of the Air Force, March 9, 1970:

Further reference is made to letter dated December 16, 1969, from the Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting a decision whether the Joint Travel Regulations, Volume I, may be amended to authorize the payment of station allowances (temporary lodging allowances, housing allowances and cost-of-living allowances) in the case of a member whose dependents make an authorized move from a place in the United States, as defined in paragraph M1150–16 of the regulations, to a designated place in Alaska, Hawaii, Puerto Rico, or a territory or possession of the United States upon his permanent change of station from a duty station in the United States to a restricted area as defined in paragraph M1150–17 of the regulations. The request was assigned Control No. 69–52 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Acting Assistant Secretary says that paragraph M4305 of the Joint Travel Regulations has long provided for the payment of station allowances in similar cases where the member's former permanent duty station is located outside the original 48 United States and the District of Columbia on the premise that the member and his dependents were located within the area covered by 37 U.S.C. 405, from which station per diem allowance authority arises, both before and after the related transfer to a restricted area.

He says further that this has proven an irritant in the case of members referred to above (first paragraph), and has been the source of many congressional complaints charging that the regulation, as presently written, discriminates against such members and their families. Also, in the event our answer to the question presented is in the affirmative, the Acting Assistant Secretary asks whether our answer would be the same if the designated place to which the dependents were moved is located at any place outside the United States other than Alaska, Hawaii, Puerto Rico, or a territory or possession of the United States.

Under the provisions of 37 U.S.C. 405, 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 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.

Paragraph M4300–1 of the Joint Travel Regulations provides that a member with dependents is a member who is in a pay grade entitling him to transportation of dependents at Government expense and whose dependents are authorized to and do reside in the vicinity of the member's duty station outside the United States. In line with the purpose of 37 U.S.C. 405, paragraph M4301–1 of the regulations provides that station housing and cost-of-living allowances are authorized for the purpose of defraying the average excess costs experienced by members "on permanent duty" at places outside the United States. A member whose dependents do not accompany him from the United States to an overseas duty station incurs no excess living costs at his duty station on their account and the law has not viewed as authorizing the payment of the allowances for dependents in such cases.

Paragraph M4305–2a of the regulations provides for the payment of station allowances in the case of a member on duty outside the United States whose dependents are residing in the vicinity of his duty station when orders are issued reassigning him to duty in a restricted area outside the United States in which dependents are not permitted to establish a residence, in the same manner as if the member were present at the old duty station, if approved by the Secretary of the service concerned or his designated representative, and if the dependents continue to reside in the vicinity of such old duty station for the entire period for which allowances are claimed. Also, paragraph M4305–2b of the regulations provides in such cases that station allowances are payable under certain circumstances if the dependents are authorized to move from the overseas station to a designated place outside the United States.

Section 405 of Title 37, United States Code, as applied in the regulations issued thereunder, provides for increased cost of living allowances on the basis of dependency incident to a permanent duty assignment outside the United States, 43 Comp. Gen. 690 (1964). Thus, the member may be paid the station allowances for dependents only in the situation where his dependents initially are residing outside the United States with him in a military dependent status because of his duty assignment and continue their residence outside the United States. Consequently, it has been our view that no authority exists for the pay-

ment of such allowances on account of dependents if the dependents' residence outside the United States has no connection with the member's duty assignment. 38 Comp. Gen. 531 (1959). In cases where dependents, who are not authorized to accompany a member to an overseas duty station, move from the United States to an overseas residence as a designated place, their overseas residence is purely a matter of personal choice and, as such, is separate and apart from the member's overseas duty.

With respect to the specific provisions of the regulations (paragraph M4305–2a and b) prescribing conditions under which members with dependents are authorized to receive station allowances when reassigned from an overseas unrestricted area to a restricted area, we have not objected to such regulations and have held that the regulations reasonably may be viewed as authorizing station allowances, if approved by appropriate authority, as if the member had continued on duty at his old permanent station overseas. In such situation, however, the dependents were residing outside the United States in a military dependent status because of the member's duty assignment and not because they elected to establish a residence there for personal reasons. 43 Comp. Gen. 525 (1964). Therefore, the dependents in the situation described in the Acting Assistant Secretary's letter and the dependents covered by the regulations are not similarly situated and it is our view that if the regulations as presently written are discriminatory, such discrimination results from the personal choice of the member or his dependents and not from the member's overseas duty assignment.

Since under the circumstances presented in the letter the dependents would not be residing outside the United States in a military dependent status but because they elected to establish a residence there for personal reasons, it is our opinion that any increased living costs incurred by them do not come within the contemplation of 37 U.S.C. 405.

For the foregoing reasons, it is concluded that the proposed change in the Joint Travel Regulations is not authorized. Accordingly, the basic question is answered in the negative and no answer to the further question is required.

[B–168223]

Bids—Solicitation Packages—Availability

The procedure for issuing solicitation packages in the number determined by the contracting officer, which after obtaining competition by means of an automated bidders source file, by publicizing the procurement in the Commerce Business Daily, and by notice in the contractors information center results in insufficient copies to satisfy all mail requests does not achieve the maximum competition sought and, therefore, the fairness of the policy of filling requests on a first-come, first-served basis, regardless of whether the request is made via mail or in person should be reviewed. A firm should be able to obtain a copy of a solicitation without being left with the belief it must resort to engaging a local representative to do business with a Government agency.

To the Secretary of the Army, March 10, 1970:

Reference is made to a letter of December 16, 1969, from the Deputy Director for Procurement, Directorate of Requirements and Procurement, Headquarters, United States Army Materiel Command, furnishing a report on the protest by Kings Point Industries, Incorporated, concerning difficulties encountered in attempting to obtain solicitation packages in connection with procurements issued by the United States Army Missile Command, Redstone Arsenal, Alabama.

The report sets forth the procedures established by United States Army Missile Command in the issuance of solicitation packages for proposed procurements in this connection it is stated:

It is the U.S. Army Missile Command's policy to promote and obtain competition to the maximum extent feasible and practicable. This command utilizes an automated bidders source file which is rotated in accordance with ASPR 2-205.4(b). Notice of proposed procurements which may result in an award in excess of $10,000 are publicized promptly in the Commerce Business Daily "Synopsis of U.S. Government Proposed Procurement Sales and Contract Awards" in accordance with ASPR 1-1003. In addition to the aforementioned procedures, a copy of all solicitations for unclassified procurements in excess of $2500.00 are posted in the Contractor Information Center located in Bldg. 4488 at the Army Missile Command, pursuant to ASPR 1-1002.4.

Consistent with the policy of promoting and obtaining competition to the maximum extent feasible and practicable, this command has established formal procedures for determining the appropriate number of solicitation packages and filling of additional requests (copy attached as Incl 1).

The referenced enclosure 1, dated March 29, 1968, entitled "Determining Appropriate Number of Solicitation Packages and Filling of Additional Requests" provides:

1. It is the policy of this Command to promote and obtain competition to the maximum extent feasible and practicable. Consistent with this policy, the following procedures apply:

a. Contracting Officers are responsible for determining and ordering the total number of solicitation packages to be reproduced for solicitation purposes. Such determinations are critical if meaningful accomplishments are to be realized as a result of the above stated policy. In making these determinations—which requires the exercise of sound judgement—Contracting Officers will consider the type of item being procured, the estimated dollar value, extent of initial solicitation, competitive spread and intensity of competition on previous procurements and, within reason, the number of anticipated requests. In any case, Contracting Officers must assure that their decisions serve to both promote and obtain competition. Consistently, in all applicable cases, the Contracting Officer shall use the MICOM BILCO listing in formulating his initial distribution list, and supplement this list with at least five sources which were competitive on the previous procurement. Inclosure 1 provides guidance to assist Contracting Officers in determining the appropriate number of solicitation packages to be reproduced; however, this guidance is not cast in concrete and circumstances will arise which require either increases or decreases in the number required.

b. AMSMI-IUS will reproduce, store and distribute the initial solicitation in accordance with instructions received from Contracting Officers. Once initial stock is depleted, and additional requests are received, IUS will refer to the appropriate Contracting Officer for advice and consent as to the proper course of action.

c. AMSMI-ID will reproduce the initial order for TDP's in accordance with P&P Regulation 715-1, as amended by AMSI-I DF dated 5 March 1968. AMSMI-ID will fill the reorder quantity requested by AMSMI-IUS within two working days.

The recommended number of copies of solicitation packages in unlimited procurements of $2,500 to $9,999 is 30 copies, 15 to be issued on the initial solicitation, 4 to be held for record purposes, and 11 for shelf stock to be issued upon request. In unlimited procurements over $10,000, the recommended number is 50 copies, 25 to be issued on the initial solicitation, 5 to be held for record purposes, and 20 for shelf stock to be issued upon request.

A memorandum dated April 1, 1968, addressed TO WHOM IT MAY CONCERN, describes the basic policy as set forth above and states that contractor representatives are expected to be reasonable in the number of requests for solicitation packages and individuals representing more than one contractor will not be furnished more than two copies of any given solicitation; and that such requests will be honored only if the contractor representative is an authorized representative of the firm designated to receive the solicitation and proof of such authorization is in writing and on file at the command. The memorandum further provides that requests for solicitation documents will be filled on a first-come/first-served basis regardless of whether the request is via mail or in person.

The main objection of Kings Point is that they have not been able to obtain solicitation packages upon mail requests. Since their original protest Kings Point has advised us that they requested copies of two solicitations and in both instances they were advised that the supply was exhausted at the time the request was received. On solicitation DAAHO1-70-R-0326, scheduled to close January 27, 1970, Kings Point states that they requested a copy on December 24, 1969, and they were advised by form letter dated January 13, 1970, that the supply was exhausted. The firm's experience with solicitation DAAHO1-70-B-0324 was similar.

Kings Point states that they were orally advised that one method of obtaining solicitations would be that they retain a representative at Redstone Arsenal. It is reported that this statement is out of context in that it was *not* suggested that the firm retain a representative. Rather, the statement was made that the supply of solicitation packages was sometimes exhausted before Kings Point could request a copy, because so many companies have retained representatives at Redstone Arsenal and they avail themselves of the solicitation packages as soon as they are posted in the Contractor Information Center.

If the policy of filling requests for copies of solicitations on a first-come/first-served basis, regardless of whether the request is by mail or in person, results in mail requests being turned down frequently, as claimed by Kings Point, we question the fairness of the policy. Unless mail requests are normally filled a major purpose of publicizing

a proposed procurement in the Commerce Business Daily is not achieved. We believe that a firm that has expressed an interest in a proposed procurement by requesting a copy of the solicitation should ordinarily be able to obtain one. Furthermore, in our opinion it would be most undesirable to give bidders cause to believe that in order to do business with a particular agency it is necessary to engage a local representative.

[B-168518]

Contracts—Specifications—Failure to Furnish Something Required—Information—Points of Production and Inspection

To permit the low bidder under an invitation for steel pipe requirements to furnish production point and source inspection point information after the opening of bids did not give the bidder "two bites at the apple" as such information concerns the responsibility of the bidder rather than the responsiveness of the bid, and the information intended for the benefit of the Government and not as a bid condition therefore properly was accepted after the bids were opened. The bidder unqualifiedly offered to meet all the requirements of the invitation, and as nothing on the face of the bid limited, reduced, or modified the obligation to perform in accordance with the terms of the invitation, a contract award could not legally be refused by the bidder on the basis that the bid was defective for failure to furnish the required information with the bid.

Contracts—Specifications—Failure to Furnish Something Required—Information—Submission Time Specified

Noncompliance at the time of bid submission with the provision of an invitation for steel pipe requirements that stated "when pipe is furnished" from a supplier's warehouse, whether the supplier is a manufacturer or a jobber, evidence should be shown that the pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to the testing standard the contractor is obligated to meet the required procedure "when pipe is furnished," and a failure to do so would be a breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by the contractor would be absolutely and unquestionably impossible, any rejection of the bid for that reason would rest upon a determination of nonresponsibility rather than nonresponsiveness of the bid.

Bids—Delivery Provisions—Proof of Ability to Meet

Whether the low bidder offering Japanese steel can meet its delivery obligations under a requirements contract for steel pipe is a question of responsibility and, therefore, the fact that the bidder did not furnish a firm written commitment from the Japanese manufacturer did not require rejection of the bid. The bidder with full knowledge of the circumstances concerning its ability to meet the delivery schedule agreed to be bound by the specified delivery schedule, and the Government is entitled to rely on this promise.

Bidders—Responsibility *v.* Bid Responsiveness

In matters of responsibility, questions concerning the qualifications of a prospective contractor are primarily for resolution by the administrative officers concerned, and in the absence of a showing of bad faith or lack of any reasonable basis for the determination that the prospective contractor is responsible, the United States General Accounting Office is not justified in objecting to a determination made on the question of bidder responsibility by an administrative agency.

To Eugene Drexler, March 10, 1970:

Reference is made to your letters of December 9, 1969, and January 20, 1970, in behalf of the R. H. Pines Corporation (R. H. Pines) and a letter dated November 25, 1969, with enclosures, sent to this Office by R. H. Pines, protesting against the award of a contract to another firm under invitation for bids (IFB) SFE–4R–307–70, issued by the General Services Administration (GSA), Federal Supply Service, Region 9, San Francisco, California.

The above invitation, issued September 9, 1969, was for a requirements contract for various items of steel pipe for the period November 1, 1969, or date of award, whichever is later, through October 31, 1970. Bids were opened on September 29, 1969, and Heieck Supply of San Francisco (Heieck) was the low bidder. Heieck was awarded a contract for the above requirements on November 10, 1969.

It is your contention that Heieck's bid is nonresponsive. In support of this contention you refer to Articles 31 and 32 of the invitation. Article 32 states:

Production Point: Offerors shall furnish name of manufacturers and locations of plants of items to be furnished under this solicitation if other than inspection point(s) listed above.

Item No.	Manufacturer	Address

Article 31 of the invitation states:

SOURCE INSPECTION:

(a) Supplies to be furnished under this contract will be inspected at source by the Government prior to shipment from the manufacturing plant or other facility designated by the Contractor, unless (1) the Contractor is notified otherwise in writing by the Contracting Officer or his designated representative, or (2) the Contractor or his subcontractor, pursuant to a Quality Assurance Agreement with the General Services Administration, is authorized to issue a quality assurance certificate covering such supplies at the time of shipment.

(b) Offerors are requested to insert below the name and address of each manufacturing plant or other facility where supplies will be available for inspection, indicating the item number(s) to which each applies:
for inspection.

Item No.	Name of facility	Address

(c) The name and address of the Government office which will arrange for inspection of the supplies will be furnished to successful offerors at the time award is made. The Contractor shall notify, or arrange for his subcontractor to notify, that office at least 10 days prior to the date when supplies will be ready for inspection.

You state that Heieck, pursuant to Article 32, inserted the name of Kaiser Steel Corporation (Kaiser) as the production point for items 1 and 12, covering ¼ inch pipe, as well as the source inspection under Article 31. You point out the fact that Kaiser is not the manufacturer

of these items, but that Sharon Steel Corporation (Sharon) is the manufacturer. A review of the administrative record indicates that Heieck did not insert the name of Kaiser as the production point for items 1 and 12 under Article 32, but did insert Kaiser's name under Article 31 as the inspection point for these items. This resulted in conveying the impression that Kaiser was the manufacturer of items 1 and 12 since Article 32 requires the furnishing of the names of manufacturers and location of plants manufacturing items, if they are different from the inspection points listed in Article 31. Heieck admitted that Kaiser would purchase these items from Sharon, but stated that it (Heieck) would purchase these items from Kaiser and that inspection would take place with Kaiser. This appears to be entirely consistent with the information on the bid form, since Article 31 provides for inspection of the supplies to be furnished prior to shipment from the manufacturing plant or other facility designated by the contractor. Heieck indicated that Kaiser Steel Corporation was the location where items 1 and 12 could be inspected. It would appear that Heieck's only mistake was its failure to indicate, under Article 32, that Sharon was the manufacturer of items 1 and 12. You allege that Heieck cannot possibly have less than carload quantities of ¼ inch pipe inspected at Kaiser's plant in accordance with specifications.

You also state that Kaiser will be unable to furnish the documentation required under Paragraph 4.1.1 of specification WW–P–406b, which states:

4.1.1 Warehouse Procurement. When pipe is furnished from supplier's warehouse (whether supplier is a manufacturer or a jobber) evidence shall be shown that the pipe has been manufactured in accordance with ASTM (American Society for Testing Materials) A120. Such evidence shall include the identification marking outlined in 3.10 and the submission of certified copies of the manufacturer's inspection records of the examination and tests made on the pipe being submitted for acceptance approval. The inspection requirements of 4.2 to 4.5, inclusive, together with all the inspection procedures (including examinations and tests (outlined in ASTM A120, shall apply only to the manufacturer, providing the manufacturer's inspection records clearly indicate compliance with the provisions of this specification. The requirements of 4.6 are the supplier's responsibility.

You state that Sharon customarily ships to Kaiser without the documentation required by section 4.1.1 and that Kaiser does not perform independent ASTM A120 testing on Sharon's material, thus precluding a quality assurance agreement with GSA.

You have stressed the principle appearing in our decision of August 10, 1961, 41 Comp. Gen. 106, that an unfair advantage has been given to Heieck in the consideration of its bid, that is to say, Heieck has been given "two bites at the apple." It appears to be your position that Heieck could have avoided award by refusing to furnish the above information after bid opening if, at the time, such action had been to its advantage. We do not believe that Heieck has such an option in the

present instance. We have held on numerous occasions that the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive. 48 Comp. Gen. 685, April 23, 1969; B-160318, February 16, 1967. In the present case Heieck unqualifiedly offered to meet all the requirements of the invitation and there was nothing on the face of the bid limiting, reducing or modifying Heieck's obligation to perform in accordance with the terms of the invitation. We fail to see how Heieck could have legally refused to accept the award on the basis that its bid was defective because it did not initially furnish the required information. Moreover, this Office has held that matters concerning points of production and inspection concern the responsibility of the bidder, rather than responsiveness of the bid. See B-167110, November 4, 1969. In our decision of February 25, 1965, B-155600, involving a similar situation and clauses substantially the same as Articles 31 and 32, we stated:

> It seems clear that the request for advice as to the point of production and the origin and inspection points was solicited as a matter of information for the benefit and convenience of the Government rather than as a condition of the bid. Obviously, the furnishing of such information could not affect the obligation of the bidder, in the event of an award, to furnish supplies acceptable to the Government. Furthermore, the American Equipment Company legally could not refuse to accept an award on the ground that its bid was defective because it did not initially furnish the required information accurately. Consequently, we fail to see how any bidder could be prejudiced by consideration of the bid of the American Equipment Company.

We have consistently held that where the requirement for the submission of data is for the purpose of determining the capacity or responsibility of the offeror rather than whether the property or services offered conforms to the Government's needs as stated in the solicitation, the failure of the bidder to submit adequate data with his bid for such use is not fatal to consideration of the bid, inasmuch as a bidder's capacity or responsibility may be determined on the basis of information submitted after the bid opening. 39 Comp. Gen. 247 (1959); 39 *id.* 881 (1960); 41 *id.* 555 (1962). Consequently, since it has been determined that the questions of production points and source inspection are matters of responsibility, data concerning these matters can be submitted after bid opening. Concerning the documentation under paragraph 4.1.1 of the specifications, it is noted that the evidence that the pipe has been manufactured in accordance with the designated standard is to be shown "when pipe is furnished." Since no exception was

taken to this requirement, the contractor is obligated to meet it and a failure to do so would be a breach of the contract, rather than evidence of its invalidity. Even if it were possible to determine in advance that performance by the contractor would be absolutely and unquestionably impossible, any rejection of the bid for that reason would rest upon a determination of nonresponsibility rather than nonresponsiveness of the bid.

You also contend that Heieck's bid is nonresponsive because it is offering Japanese steel for most sizes for delivery 75 days after receipt of order. You state that this delivery period is impossible to achieve on open orders unless the Japanese manufacturer gives Heieck a firm written commitment. It is your view that unless Heieck can produce such a written commitment, it obviously cannot meet the 75-day delivery schedule and is, in effect, offering delivery later than specified in the invitation. You cite our decision B–152866, February 7, 1964, in support of this position. However, the cited decision is not determinative of the issues in this case since that decision involved the question of whether the product offered by the protestant would meet the needs of the procuring activity, which is a question of responsiveness. It was decided in that case that components manufactured by reverse engineering could not, because of such factors as critical manufacturing tolerances and quality control level, be accepted as identical to components manufactured by the successful offeror, who possessed the only blueprints and drawings for the components, without extensive testing, for which there was no time. See B–156249, October 22, 1965. The present case involves a question of whether the bidder *can* deliver the items within 75 days after receipt of order, which is a question of responsibility. B–160318, February 16, 1967; B–163979, May 24, 1968. What you say concerning Japanese suppliers may well be true, but the fact remains that Heieck offered to make delivery in accordance with the specifications. In our decision of February 16, 1967, in which we discussed the question of whether the successful bidder, who had unqualifiedly offered to meet the delivery schedule in accordance with the invitation, could in fact make timely delivery, we stated:

> It should be noted at this point that we believe the question of Hart's ability to meet the delivery schedule is a matter of responsibility * * *. With full knowledge of the circumstances concerning its ability to meet the delivery schedule Hart has agreed to be bound by the specified delivery schedule, and the Government is entitled to rely on this promise.

The observations made above with respect to the documentation under specification 4.1.1 are equally applicable here.

Concerning the responsibility of Heieck, the procuring activity states that it has no reason to believe that Heieck will not meet its commitments under the contract and that Heieck, Kaiser and Sharon are all

considered to be responsible firms with satisfactory performance records. In matters of responsibility we have held that questions concerning the qualifications of a prospective contractor are primarily for resolution by the administrative officers concerned. In the absence of a showing of bad faith or lack of any reasonable basis for the determination, we are not justified in objecting to a determination made on this question by an administrative agency. 37 Comp. Gen. 430 (1957); 36 *id.* 42 (1956).

On the record before us we find no basis for disturbing the award made, and your protest is therefore denied.

[B-168686]

Bids—Evaluation—Delivery Provisions—Guaranteed Shipping Weight

The verification of a bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for the containers to be shipped overseas, information needed to determine the lowest transportation cost to the Government, and the use of the Government's estimates with the bidder's consent to evalute the bid was proper. The verification of the suspected error required by paragraph 2-406.3 of the Armed Services Procurement Regulation was not prejudicial to other bidders, nor were the bidders prejudiced because the guarantee clause was shown to be erroneous on the basis of information contained in the Transportation Evaluation clause of the invitation, in view of the practice of permitting bidders to deliberately understate guaranteed weights, and the fact the successful bidder did not have an opportunity to elect to stand on the clause most advantageous to it.

To A. Matthew Fishman, March 10, 1970:

Reference is made to your letter of February 4, 1970, and prior correspondence, protesting the award to A. H. Helmig & Co., Inc., under Defense Supply Agency invitation for bids DSA100-70-B-0481.

The invitation contained two items of scoured carbonized wool to be shipped overseas. The first item covered 982,902 pounds and the second item 26,185 pounds. The purchase description referenced in each item provided that the wool stock shall be packed in bales having a gross weight not exceeding 600 pounds.

Bids on the items were solicited f.o.b. origin and f.o.b. destination, the latter designated by paragraph B(2) of the "Evaluation of Export Bids" clause as the port of loading. The clause provided that specified handling and ocean charge costs per cubic foot originating at the port of loading would be added to the bids for evaluation to determine the lowest laid down cost to the Government at the overseas port of discharge.

There was also included in the invitation a "Guaranteed Maximum Shipping Weights and Dimensions" clause which provided:

Each offer will be evaluated to the destination specified by adding to the FOB origin price all transportation costs to said destination. The guaranteed maximum

shipping weights (and cube, if applicable) of the supplies are required for determination of tranportation costs. The offeror is requested to state as part of his offer the weights and cube. The unit shipping weight (and cube, if applicable) shown represents the weight (and cube, if applicable) of the shipping container and its contents divided by the number of units required to be packed in such container. If separate containers are to be unitized into a single shipping unit, the weight of overpacking (exclusive of the weight of pallets or other materials moving free of freight charges) will be prorated for the number of containers in the unitized load and added to the weight of the individual shipping container. If delivered supplies exceed the guaranteed maximum shipping weights or cube, the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes based on the offeror's guaranteed maximum shipping weights or cube and the transportation costs that should have been used for offer evaluation based on correct shipping data.

Space was provided following the foregoing clause for bidders to state a maximum shipping weight and shipping cube. The clause then went on to provide:

If the offeror fails to state his guaranteed maximum shipping weight and cube for the supplies as requested, the Government will use the estimated weights and cube below for evaluation; and the contractor agrees this will be the basis for any reduction in contract prices as provided in this clause. The Government's estimated weights (and cube, if applicable) are as follows:

Item No.	Maximum Unit Shipping Weight (Pounds)	Maximum Unit Shipping Cube (Cubic Feet)
1 & 2	1,000 lbs.	.027 CU. FT.

Immediately following this clause was the "Transportation Evaluation" clause which solicited information including "DIMENSIONS OF SHIPPING CONTAINER (in inches) (Length x width x height)."

Six bids were received on the procurement. A. H. Helmig bid the same prices f.o.b. origin and f.o.b. destination. The other offerors bid f.o.b. origin only. A. H. Helmig and one other bidder took no exception to the maximum shipping weight and cube specified in the "Guaranteed Maximum Shipping Weights and Dimensions" clause. Another bidder specified a maximum shipping weight of 600 pounds and left the maximum cube unchanged. The remaining three bidders, including your company, completed the clause to show a maximum cube of 40 cubic feet. In the "Transportation Evaluation" clause, A. H. Helmig specified the dimensions of the shipping container as 58 x 42 x 30. Four other bidders, including your company, specified 27 x 44 x 58 for the dimensions and one bidder did not provide that information.

The bids were forwarded to the Bid and Price Analysis Branch of the procurement office for evaluation. On the basis of the cube contained in the "Guaranteed Maximum Shipping Weights and Dimensions" clause, to which A. H. Helmig had not stated any exception in its bid, the Branch determined that it was the low bidder for the entire quantity covered by items 1 and 2. However, the Branch stated that the cube appeared to be erroneous since three bidders showed a cube of

.0667 (40 cubic feet divided by 600 pounds) and a previous solicitation showed a cube of .0833. The Branch stated that a "realistic cube" would have resulted in a recommendation for a split award instead of a single award.

In view of the reply from the Branch, it was thought that A. H. Helmig might have omitted its own statement of guaranteed maximum shipping weight and cube in error. The buyer requested the bidder by telephone to verify the bid. To be certain that the bidder understood the guarantee clause, the buyer requested the bidder to reread the clause and explained the provision to the bidder. By letter dated the same day, the bidder advised that "since we did not state the guaranteed maximum shipping weights and cube of the above contract, we are accepting the Government's estimate weights and cube for evaluation of our bid." The award was subsequently made to A. H. Helmig and you thereafter protested to our Office.

You contend that A. H. Helmig should not have been provided with an opportunity to verify its bid since, while a possibility of error was recognized because of the "impossible" figures provided in the "Guaranteed Maximum Shipping Weights and Dimensions" clause by the Government, the bale dimensions furnished by A. H. Helmig in the "Transportation Evaluation" clause that followed showed an intention to deliver a bale of about 42.265 cubic feet which would provide a cube of .0704 taking into consideration the purchase description requirement that the bales not exceed 600 pounds. Further, you object to the discussion with the bidder and explanation furnished to it during the verification process. You state that the procedure of discussing the provisions of the clause with one bidder without discussing them with other bidders is contrary to paragraph 3 of the solicitation instructions which provides that "Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors." You state that once the contracting office was aware that the information in the guarantee clause was erroneous all bidders should have been informed of that fact. Further, you indicate that the request for verification is objectionable because it provided the bidder with an opportunity after the opening of bids to stand on the guarantee clause and obtain an award for the entire quantity or to rely upon the information in the "Transportation Evaluation" clause and obtain a partial award. You indicate that you believe that either a split award should have been made or the procurement readvertised.

While the information furnished by A. H. Helmig in the "Transportation Evaluation" clause showed an intention to furnish a differ-

ent cube than that specified in the guarantee clause, it may be said with equal validity that the bidder also intended to guarantee a smaller cube for evaluation purposes and contract liability. In that connection, our Office has recognized in 38 Comp. Gen. 819, 821 (1959), that "In order to meet competition a bidder may guarantee a weight which is less than actual rather than reduce the price for the item itself." However, in this case, because the Government stated the cube in the guarantee clause, which was apparently grossly overstated, and because a possibility existed that A. H. Helmig might have relied upon the Government's estimate to its detriment, it was provided an opportunity to verify its bid. Our Office has recognized that there can be situations where the disparity between the actual weight and the guaranteed weight can be sufficient to place a contracting officer on notice of error. See 49 Comp. Gen. 129 (1969); B–154291, August 27, 1964; and B–153323, May 7, 1964. In that connection, paragraph 2–406.3(e)(1) of the Armed Services Procurement Regulation (ASPR) provides that "In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid." The request for verification, therefore, does not appear to have been improper in the circumstances. Since you have objected to the manner in which the bid was verified, it should be noted that the cited regulation also provides that "To insure that the bidder concerned will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised, as is appropriate, of * * * (ii) important or unusual characteristics of the specifications, * * * or (iv) such other data proper for disclosure to the bidder as will give him notice of the suspected mistake." The discussion that was had with the bidder does not appear to have been inappropriate in view of these provisions. While you contend that it is inconsistent with paragraph 3 of the instructions to bidders, that paragraph has application to situations where explanations are furnished to bidders before bid opening and not after bid opening where the discussion is for the purpose of eliciting information as to the correctness of the bid submitted. Further, it was not necessary to discuss the guarantee weight provisions with the other bidders after the opening since no error was suspected in the bids of those who were otherwise eligible for award. Such other eligible bidders had not relied upon the Government's estimate and had made independent estimates arriving at a like result which was different than that stated in the invitation.

It is true that A. H. Helmig was provided with an opportunity to review its bid after other bids were opened. However, this is an opportunity that every bidder has whose bid is suspected of being in error.

However, the fact that an error is suspected in a bid is no assurance to a bidder that its allegation of error, or bid verification, will inure to its benefit.

Where error is alleged it must be supported by statements concerning the alleged mistake as well as pertinent evidence conclusively establishing the existence of the error. ASPR 2-406.3(e)(1). Where the evidence is not clear and convincing that the bid as submitted was not the intended bid, a determination may be made requiring that the bid be considered for award in the form submitted. ASPR 2-406.3(a)(4). Although ASPR 2-406.3(e)(1) provides that "If the bid is verified, the contracting officer will consider the bid as originally submitted," ASPR 2-406.3(e)(2) provides that a contracting officer may not consider the bid where there are "indications of errors so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders."

In this case, the bidder verified the bid and the verification was not inconsistent with the practice which permits bidders to deliberately understate guaranteed weights. Therefore, it is not apparent that the bid of A. H. Helmig as submitted was in error. The determination to consider the bid as submitted and verified does not appear to be legally objectionable.

Your protest is accordingly denied.

[B-168708]

Bids—Buy American Act—Evaluation—Balance of Payments Program Restrictions—Surplus Agricultural Products Effect

In the evaluation of the proposals submitted to construct a submarine cable subsystem linking Okinawa to Taiwan, proposals that were solicited on both a nonbarter basis and a barter basis under Public Law 80-806, which authorizes disposal by barter and exchange of surplus agricultural commodities for use outside the United States, the addition of the 50 percent Balance of Payments Program factor to the cost of the foreign source items offered in the proposals received on both a barter and nonbarter basis was proper and was not precluded by the barter procedures prescribed in section 4, Part 5, of the Armed Services Procurement Regulation. Therefore, it was reasonable to use a 50 percent balance of payments factor in evaluating the lowest priced barter proposal, even though when added to the cost of the foreign items the price became the highest offered.

Funds—Balance of Payments Program—Offset Credits Under Barter Agreements

Foreign source items purchased in the United Kingdom for use overseas that are offered in a proposal submitted on a barter basis pursuant to Public Law 80-806, which authorizes the disposal of surplus agricultural commodities overseas, properly were subject to a 50 percent Balance of Payments Program evaluation factor upon determination the offset credits provided under barter agreements between the United States and the United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of the balance of payments penalty, and that the balance of payments impact would

be adverse. The application of offset credits is not mandatory, nor is the application of the balance of payments procedure automatically waived when offsets are available.

Bids—Competitive System—Equal Bidding Basis for All Bidders—Oral Statements

The elementary principle of competitive procurement that awards are to be determined according to the rules set out in the solicitation rather than on the basis of the oral statements of procurement officials to individuals is for application when a proponent offering foreign components under Public Law 80–806, which authorizes the disposal by barter of agricultural commodities for use outside the United States, is orally informed that barter offset credits would be available to preclude application of the 50 percent balance of payments factor in the evaluation of the foreign supplies offered in its barter proposal. If the information was considered essential by the contracting agency, or the lack of such information would be prejudicial, it should have been furnished to all prospective offerors.

To Sellers, Conner & Cuneo, March 10, 1970:

We refer to a telegram of December 29, 1969, and supplemental communications, from your client, Federal Electric Corporation, protesting any award of a contract to United States Underseas Cable Corporation for a submarine cable subsystem linking Okinawa to Taiwan, under RFP F34601–69–R–0244A, issued by the Department of the Air Force, Oklahoma City Air Materiel Area, Tinker Air Force Base, Oklahoma.

The procurement was originally set out in RFP F34601–69–R–0244, which was issued during September 1968 and for which submission of proposals was extended indefinitely. The subject RFP appears to have been issued in April 1969, with closing dates for submission for technical and pricing proposals of June 13 and June 20, 1969, respectively. Fifteen domestic sources were solicited for proposals on both a barter and a nonbarter basis, and two sources, Federal Electric Corporation (FEC) and United States Underseas Cable Corporation (UCC), submitted proposals. The proposals of both firms, after subsequent revisions, were determined to be technically acceptable by the procuring activity during September 1969, and a price evaluation was made in accordance with the pertinent provisions of the RFP. While the actual price of FEC's proposal is lower than the actual price of the UCC proposal, the FEC proposal shows a much larger dollar amount of foreign purchases (mainly from the United Kingdom of Great Britain and Northern Ireland (UK)). Consequently, when the 50 percent Balance of Payments Program evaluation factor is added to the cost of the foreign purchases set out in the two proposals as provided by the RFP, the evaluated price of the FEC proposal becomes considerably higher than the evaluated price of the UCC proposal.

The Air Force proposes to make award to UCC on the basis of its lower evaluated price. However, you protest any use of the 50 percent balance of payments factor in the evaluation of FEC's price on two

grounds. First, that FEC's price must be evaluated in conjunction with its barter offer without adding a balance of payments penalty. Second, that if evaluation is to be made on a nonbarter basis, the Secretary of Defense must apply certain offset credits to FEC's proposed purchases in the UK pursuant to an existing balance of payments offset agreement between the United States and the UK. You contend that FEC is the low offeror when either the principles of barter or the offset agreement are properly considered.

Part XX, Balance of Payments, of the RFP includes the following clause:

EVALUATION OF BIDS

In implementation of the Balance of Payments Program, and for bid evaluation purposes only, fifty percent (50%) of the amount certified herein by the bidder as the cost of components of foreign origin and of work or services of foreign origin will be added to the total bid.

Part XXII of the RFP calls attention to the Commodity Credit Corporation Charter Act of 1948, Public Law 80-806, 62 Stat. 1070, 15 U.S.C. 714 note, and other statutory provisions which authorize disposal by barter or exchange of surplus agricultural commodities for use outside the United States. While paragraph d.4 of Part XXII states that the lowest proposal on a barter basis acceptable to the Commodity Credit Corporation will be considered and evaluated in connection with evaluation of the nonbarter proposals, and that preference will be given to the barter proposal where it is determined to be in the best interest of the Government, neither that paragraph nor paragraph (8) of the barter clause set out in paragraph 4-503.5 of the Armed Services Procurement Regulation (ASPR), and referred to in your protest, provides that foreign supplies are to be evaluated on an equal competitive basis with domestic supplies when barter is offered. To the contrary, paragraph e, Part XXII, entitled "Barter Bidding" states:

* * * Components and service of foreign origin will be evaluated as foreign as provided in Part I, Note A, of the Schedule, and the Foreign Cost included in the column entitled Foreign Cost, whether or not acquired by barter.

And Note A.2, Part I, of the schedule advises offerors that, except as modified by Note A.3 (concerning potential UK and Federal Republic of Germany competition), the 50 percent evaluation factor set forth in Part XX will apply to the foreign costs set forth in the specified items for both barter and nonbarter proposals.

You contend that it is erroneous to include provisions in the RFP which provide for application of the 50 percent evaluation factor to foreign costs on both the barter and nonbarter proposals, since there is no adverse balance of payments expenditure in a barter transaction; that such evaluation is contrary to the barter provisions of ASPR as

set out in section 4, Part 5; and that such evaluation runs counter to our report to the Congress of the United States of January 6, 1966, B–152980. While you point out that 7 U.S.C. 1692 directs the Secretary of Agriculture to barter or exchange, to the maximum extent practicable, agricultural commodities owned by the Commodity Credit Corporation for materials required in substantial quantities for offshore construction programs, and directs the procuring agencies to cooperate with the Secretary in the disposal of surplus agricultural commodities by means of barter or exchange, we note that paragraph 4–501 of Part 5 of ASPR specifically states that the barter procedures set out in that Part were developed in conjunction with the Commodity Credit Corporation.

Contrary to your contentions, we do not find that section 4, Part 5 of ASPR precludes application of the 50 percent balance of payments factor to foreign supplies in proposals submitted on a barter basis. The Air Force states in its report of January 30, 1970, that the above ASPR provisions do not pertain to the method for evaluation of foreign and domestic elements of proposals, and that the barter provisions apply only after proposals have been evaluated as prescribed by the solicitation. We cannot conclude that the Air Force view as to the application of the above ASPR barter provisions is unreasonable, or that such procedures clearly reflect an agreement with the Commodity Credit Corporation that the Department of Defense will evaluate foreign products in barter proposals on an equal competitive basis with domestic products in nonbarter proposals. Conversely, such an agreement would appear to entail a reversal (which is not indicated by the record, see paragraph 5f of supplemental Air Force report dated February 20, 1970) of the longstanding Department of Defense policy to evaluate barter offers only after application of the Department of Defense balance of payments directives.

That policy was considered in our decision of November 23, 1964, B–152980, on a protest by your client concerning a somewhat similar procurement of an underseas cable communications system by the Air Force. At that time, we made an extensive review of the Department of Defense policy, which did not permit consideration of a bidder's barter offer on foreign source items after the bidder's dollar bid had been rejected pursuant to balance of payment directives. Our review culminated in our report to the Congress of January 6, 1966, in which we stated (page 16) the basis for the Department of Defense rule as follows:

> Perhaps the principal reason for the established rule is that a barter bid offering foreign items is likely to be disadvantageous to the nation's balance of payments in that there is no assurance that the barter transaction, which eventually results in a sale cf American agricultural commodities, will not

displace a normal export sale. Unless the barter transaction results in an addition to the total foreign consumption of American agricultural commodities (i.e., additionality) such a displacement of exports will occur.

We also noted on page 17 of the report the following Department of Agriculture position in the matter:

The Department of Agriculture will not negotiate a barter contract for the Department of Defense unless the military has first determined that procurement can be made from foreign sources under its balance-of-payments regulations. It is considered proper for the Department of Defense to make the initial judgment in this respect.

We further observed (page 23) that barter programs have been extensively studied by responsible United States agencies to ensure the formulation of programs which would serve the overall interests of the United States, and that as a result the barter programs had been redirected toward the procurement of goods and services which would otherwise have been purchased abroad by the Department of Defense and other United States agencies.

During the course of our review, a special interagency study group was formed and its findings were approved by the Cabinet Committee on Balance of Payments. The Committee advised us that the overall volume of procurement through barter of surplus commodities was at an appropriate level and that any increase in the volume of barter procurement probably would result in the disposal of agricultural surpluses at the expense of normal commercial sales. The Committee also stated that there is no practical way to determine specifically, on a percentage basis, the extent to which a particular barter transaction might displace commercial sales. After taking into account the above and other factors, the Committee informed us that it did not plan to recommend changes in the procurement policies of the executive branch which permitted the procuring agency to ignore barter offers until and unless it was determined that procurement of foreign source items was permissible under applicable balance of payment directives.

While our report indicated that we retained the opinion that agencies should fully consider the merits of each barter offer, we did not recommend any changes to the executive branch in its procedures for evaluation of proposals offering barter, and our report was issued on the basis that the Congress might wish to inquire into the matter. We have not been apprised of any change in the position of the executive branch regarding the applicability of balance of payment directives to barter offers, or of any statutory or regulatory provisions clearly exempting barter offers from such directives. Further, we do not believe your protest has presented any new material which requires a modification of our position, as indicated in our 1966 report, that the policy considerations involved are for such attention as the Con-

gress may deem appropriate, rather than being subject to affirmative resolution by this Office. Accordingly, we will interpose no objection to the Air Force using the Department of Defense 50 percent balance of payments factor in evaluating your barter offer.

Regarding your contention that the Secretary of Defense must apply offset credits, pursuant to existing agreements between the United States and the UK, in evaluating FEC's proposed purchases of components in the UK, the pertinent provisions of the RFP are set forth in Part I, Note A.3, as follows:

> Notice of potential U.K. and FRG source competition. Proposals for this procurement are being solicited from sources which may offer end items or components (including the use of cable laying vessels or boats) produced in the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany. If a proposal offering such end items or components would be acceptable from the standpoint of price and other factors but for the balance-of-payments provisions of this procurement, then the matter will be forwarded to the Secretary of Defense for a determination as to whether it would be in the public interest to except the end product from the restrictions of the balance-of-payments program. If the Secretary of Defense decides to except the end product from the provisions of the balance-of-payments program, U.K. and FRG products will not be treated as being of foreign origin for the purpose of the balance-of-payment provisions of this procurement. *Provided:* Since, as the above notice indicates, the final decision as to whether components or end items from the indicated sources will be excepted from Balance-of-Payments restrictions rests with the Secretary of Defense, proposals submitted for this procurement will be evaluated *both* as required by the Balance-of-Payments provisions presently included in the Request for Proposals *and* as they might be if components or end items from the indicated sources were excepted.

As provided for by Note A.3, the proposals were evaluated both with and without application of the 50 percent balance of payments differential on UK and FRG components and, as FEC's proposal would have been acceptable except for the differential, the matter was submitted to the Secretary of Defense for a decision as to whether such components would be exempted from the balance of payments provisions of the solicitation. In a memorandum to the Air Force dated December 23, 1969, the Assistant Secretary of Defense, Installations and Logistics, determined that the dollar savings to be realized from an award on the FEC proposal were insufficient to warrant payment of the balance of payments penalty involved, and the UK and FRG components therefore were not exempted from the solicitation's balance of payments provisions.

You state that it was FEC's understanding the above notice set out in Note A.3 of the RFP implemented a US–UK offset arrangement concluded on February 26, 1966, and that it was on such basis that FEC decided to participate in the procurement. You refer to an implementing memorandum of July 21, 1966, by the Deputy Secretary of Defense, which provided for the establishment of a list of items having an apparent potential for UK competition, and pre-

scribed procedures for competitive procurement of such items from UK sources. The procedures required that a notice of the above type be included in each solicitation for an item on the list. Submarine cable, such as that which you proposed to use in the subject project, appears to have been entered on the list during the fall of 1967. While procedures established to implement the February 26, 1966 agreement, and made applicable to the latest special agreement relative to offset, provided for evaluation of such items from the UK without imposing any differentials under the Buy American Act or under the Department of Defense Balance of Payments Program, the memorandum of July 21, 1966, specifically stated that exceptions to such differentials would be authorized on a case-by-case basis.

You refer to a meeting in September 1969 between the Deputy Secretary of Defense and UK officials, and to a memorandum of that meeting prepared by one of the attending UK parties. You allege that during the meeting the Deputy Secretary reaffirmed that UK bids on the subject project would be evaluated under the offset agreement. You further contend that such action by the Deputy Secretary constitutes a decision by the Secretary of Defense to except the end product from the restrictions of the balance of payments program within the meaning of Note A.3, Part I, of the RFP.

In opposition to your statements concerning the meeting, the Air Force reports that the Deputy Secretary took no action in, or as a result of, that meeting which could in any manner be considered to constitute a decision under Note A.3. Further, the Air Force contends that the subject procurement is not reflected as having been discussed in the UK official's memorandum of the meeting of September 22, 1969. We have examined a copy of the memorandum, and do not find therein any reference to the procurement, or any indication of actions during the meeting by the Deputy Secretary which could reasonably be regarded as constituting a decision pursuant to Note A.3.

It seems that the US–UK offset arrangement of February 26, 1966, was originated as a means of offsetting a balance of payments deficit resulting from a UK agreement to purchase F-111 aircraft in the United States, and that the arrangement was effectively terminated in May 1968 after the UK canceled its agreement to purchase the F–111 aircraft. While it is stated in the Air Force report of January 30 that the United States subsequently made other special commitments to the UK for offset, and that Note A.3 is in response to such a special offset commitment, it is also stated therein that the offset commitments to UK are considered to be fully completed through

the current United States procurement of Harrier aircraft from the UK, which appears to have been consummated on December 20, 1969.

In rebuttal to the Air Force report, you say that the British Embassy has advised you that there is no agreement between the United States and the UK for inclusion of the Harrier procurement under offset. You contend, however, that there was an understanding between the Department of Defense and the British Embassy that, irrespective of what might be ultimately decided about the effect of the Harrier procurement on the special offset arrangement, procurements already accepted for offset treatment would not be affected, and that this procurement has been accepted for offset by including the Note A.3 clause in the present RFP. You further state that FEC was informed in all the prebidding negotiations, and in conversations with officials of the Department of Defense and the British Government, that offset would be applied if its bid, without reference to the 50 percent differential, was the low responsive bid.

Neither the Air Force nor the Department of Defense has been inclined to comment on your statements concerning the position of the British Government in this matter; however, in its supplemental report of February 20, 1970, the Air Force has affirmed, as follows, its prior statement that the Harrier contract fulfilled the special offset commitments to the UK:

> In the judgment of the Department of Defense. the special commitment which the U.S. Government made to the British Government as set forth in the Nitze-Healey letter of 8 May 1968 (which is the basis for Note A.3) is satisfied by the procurement of Harrier Aircraft by the Defense Department. It is understood that Treasury Department shares this view.

Although you contend that, in view of the statements allegedly made to FEC, a denial of offset would change the rules governing the procurement after FEC has submitted its proposal, it is an elementary principle of competitive procurement that awards are to be determined according to the rules set out in the solicitation to all prospective offerors, rather than by oral statements of procurement officials to individual offerors. Such matters are covered by paragraph 3 of the Solicitation Instructions and Conditions, Standard Form 33A, which provides that oral explanations or instructions given before award will not be binding, and that any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment to the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors. Had a preproposal decision been made exempting UK products from the solicitation's balance of payments provisions, and had FEC been informed of such a decision, then the solicitation

should have been amended so that UCC and the other solicited sources could likewise have had the benefit of such information. Note A.3 clearly shows that the Secretary of Defense decision was to be made after submission and evaluation of the individual proposals, and had a final decision been made prior thereto, and only FEC notified, such actions would have been in disregard of the rules governing the procurement, rather than a proper procedure under the rules as you seem to imply.

Concerning those statements which may have been made to you by representatives of the British Government as to application of offset to the procurement, and the effect of such statements on your actions in the matter, we believe it is sufficient to note that the British Embassy was not the facility designated in the solicitation to be contacted for information concerning the procurement.

While there may be a difference in views between the Department of Defense and the British Embassy as to the proper relationship of the US–UK offset commitments to the Harrier contract and to the subject procurement, we are not aware of any requirements of law, the RFP, or the offset procedures which would make it mandatory upon the Department of Defense to exempt UK products in this procurement from the Department of Defense Balance of Payments Program even if adequate offsets are available, as you contend. We believe that Note A.3 makes it amply clear that the decision of whether it is in the public interest to waive the balance of payments differential would be made after consideration of the factors revealed upon an evaluation of all proposals received, and we do not perceive anything therein which would justify a conclusion that the Secretary would automatically authorize waiver whenever there was a sufficient amount of remaining offsets to cover the procurement involved.

Although the standards which the Secretary would use in making his decision are not set out in the solicitation, the reasons for the denial of waiver are clearly stated in the Assistant Secretary's decision of December 23, 1969. In this connection, the Assistant Secretary has advised that he would have made the same determination as was actually rendered on December 23, whether or not the special offset commitment was fully satisfied by the Harrier contract, because of the substantial adverse balance of payments impact which would have resulted from acceptance of the FEC proposal. A resolution of whether offset credits are still available under the special US–UK agreement therefore is not considered essential for purposes of this procurement, inasmuch as the final outcome, whether favorable or unfavorable to the British Government, would not appear to have affected the action taken by the Assistant Secretary in the subject procurement.

From our review of this matter, and in light of the relatively small difference in the FEC and UCC prices, and considering the substantial dollar amount of foreign purchases involved in the FEC proposal, we cannot conclude that the Assistant Secretary's decision against waiving the balance of payments differential was either arbitrary or contrary to any express terms of the solicitation or offset agreement.

In view of the foregoing, your protest against the proposed award to UCC must be denied.

[B–168971]

Accountable Officers—Accounts—Credit For Waived Erroneous Payments

In accordance with Public Law 90–616, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under the authority of the act, as the payments are deemed valid for all purposes. Therefore, a refund to an employee of the overpayment which he had repaid prior to waiver of the erroneous payment by an authorized official is regarded as a valid payment that may not be questioned in the accounts of a responsible certifying officer regardless of the fact that he may not regard the erroneous payment as having been appropriately waived.

To D. E. Capen, Post Office Department, March 10, 1970:

We refer to your letter of January 29, 1970, 9132 :DEC :c, concerning a certifying officer's liability in a case where he certifies a refund following the approval of a Public Law 90–616 waiver claim at the agency level. Your letter reads in part as follows:

> As an example attached is a copy of a waiver claim that was disallowed, protested by the claimant, and then allowed at a higher level of authority within the Post Office Department. A refund of $92.50 would therefore be due the debtor.
>
> Does approval at the higher level of authority, within the Department, remove liability under 31 U.S.C. 82c of the certifying officer who is vested with the responsibility of certifying the refund payment, particularly if he is of the opinion that the claim should not have been allowed.

5 U.S.C. 5584(c), (d) and (e), as added by Public Law 90–616, read as follows:

> (c) A person who has repaid to the United States all or part of the amount of a claim, with respect to which a waiver is granted under this section, is entitled, to the extent of the waiver, to refund, by the employing agency at the time of the erroneous payment, of the amount repaid to the United States, if he applies to that employing agency for that refund within two years following the effective date of the waiver. The employing agency shall pay that refund in accordance with this section.
>
> (d) In the audit and settlement of the accounts of any accountable official, full credit shall be given for any amounts with respect to which collection by the United States is waived under this section.
>
> (e) An erroneous payment, the collection of which is waived under this section, is deemed a valid payment for all purposes.

Under the clear wording of the statute full credit shall be given in the accounts of an accountable officer for a payment which is waived under the authority of the act and an erroneous payment so waived is

regarded as valid for all purposes. Moreover, when a refund is made to an employee in accordance with subsection (c) that payment, too, is regarded as a valid payment and one which may not be questioned in the accounts of the responsible certifying officer. This is true in any case in which payment is made pursuant to a waiver granted by an official in whom waiver authority had been duly delegated regardless of the fact that the certifying officer may have regarded the erroneous payment as not being appropriate for waiver.

[B-133044]

Officers and Employees—Contributions From Sources Other Than United States—Acceptance

A Veterans Administration physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by a university whose medical college is affiliated with the hospital employing the physician may retain the contributions received from the university, which is a tax exempt organization within the scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training a Government employee, or his attendance at a meeting. However, pursuant to 5 U.S.C. 4111(b), and Bureau of the Budget Circular No. A-48, for any period of time for which the university makes a contribution there must be an appropriate reduction in amounts payable by the Government for the same purpose.

Travel Expenses—Contributions From Private Sources—Acceptance by Employee

When a Veterans Administration physician employed by a hospital affiliated with the medical college of a university is authorized both travel to attend a medical meeting to conduct Government business for a portion of the meeting, and to be absent without charge to leave to attend the remainder of the meeting, and he is reimbursed by the Government for the travel costs and per diem incurred on Government business and by the university for the balance of his expenses, the contribution by the university pursuant to its tax exempt status under 26 U.S.C. 501(c)(3), and authority under 5 U.S.C. 4111, may be retained by the employee.

Travel Expenses—Contributions From Private Sources—Acceptance by Agency

The funds received by a Veterans Administration physician from a university whose medical school is affiliated with the VA hospital employing the physician, to permit him to undertake university business while in a travel status, which funds are in addition to the travel and per diem authorized to conduct Government business for the entire period of a medical meeting, seminar, etc, may not be retained by the physician, and under the rule that the employee is regarded as having received the contribution on behalf of the Government, the amount of the contribution is for deposit into the Treasury as miscellaneous receipts, unless the employing agency has statutory authority to accept gifts, thus avoiding the unlawful augmentation of appropriations.

Officers and Employees—Contributions From Sources Other Than United States—Acceptance

Where a physician employed by a Veterans Administration hospital that is affiliated with the medical school of a university is authorized travel and per diem to undertake Government business for a specified period, performs duties for the

university when in a nonpay or annual leave status while traveling, the reimbursement by the university of the expenses incurred by the physician during nonduty days should not be construed as supplementing Veterans Administration appropriations.

To the Administrator, Veterans Administration, March 11, 1970:

We refer to your letter of January 16, 1970, requesting our decision on several questions concerning the supplementation of travel allowances by the University of Utah in the case of five physicians employed at the Veterans Administration (VA) Hospital in Salt Lake City.

38 U.S.C. 4108 is quoted in your letter as follows:

> Notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and conditions of employment and leaves of absence of physicians, dentists, and nurses.

In connection with the implementation of the authority to regulate concerning leaves of absence and hours and conditions of employment your letter says:

> The Department of Medicine and Surgery Supplement to Veterans Administration Manual MP-5, Part II, paragraph 7.10 sets out circumstances under which an employee can be authorized absence without charge to leave or loss of basic salary. Among these conditions, and particularly pertinent to this inquiry, are provisions permitting absence without charge to leave for the purposes of attending international, sectional, state and local, medical, dental, scientific conferences, as well as educational lectures, seminars, courses of instruction, etc. This authority, while issued pursuant to the provisions of title 38, cited above, and applicable only to physicians, dentists and nurses employed in the Department of Medicine and Surgery, does not appear to be substantially different from those circumstances under which classified employees may be authorized absence without charge to leave.
>
> Under certain circumstances, full-time physicians in the Department of Medicine and Surgery are authorized to participate in professional activities outside their Veterans Administration responsibilities. An important part of these activities is a teaching function which involves faculty appointments on the staff of the medical school affiliated with the particular Veterans Administration hospital. In the course of these activities, earnings may be generated which are deposited to special fund accounts.

Such special fund accounts are described in your letter as follows:

> Such special fund accounts are a common practice in most of the nation's medical schools. They are called by different names in different parts of the country. The most frequently used is the Academic Enrichment Fund. Under this broad heading, special funds are established by departments of the medical school. Examples of the departmental funds at the University of Utah are, to name only a few: (1) the Gastroenterology Development Fund; (2) Plastic Surgery Development Fund; (3) Fluid Research Account of Metabolic Division, Department of Medicine; (4) Orthopedic Division of the Department of Surgery; and (5) the Kidney Development Fund. These special "funds" are generally established by the Medical School of the University to provide financial support in whole or in part for supplementing academic staff members' salaries, provide for fringe benefits, retirement plans, life insurance, health benefits, and for defraying costs incurred in meeting professional responsibilities, travel expenses to professional societies, and professional membership dues. In addition, they are used to pay for periodicals, recruitment of prospective faculty members and residents. Upon affiliation with the University of Utah College of Medicine by the Veterans Administration Hospital in Salt Lake City, the benefits of these funds were extended to those Veterans Administration doctors that were given academic staff or teaching appointments.

The various departmental funds are supported generally by collections resulting from clinical practice by the academic staff, including those Veterans Administration doctors who are members of the teaching staff at the University of Utah College of Medicine. The Veterans Administration doctors' participation in the control of moneys in these accounts is minimal. The funds generated by this group as a by-product of their teaching assignment comes from fees collected for clinical practice and are usually held and administered by the University. Fees may also result from clinical practice by faculty members and by Veterans Administration physicians for their teaching assignments for services performed by residents and interns under their teaching supervision. In some instances, billings may be, or have been, made by the various departments in the name of a specific Veterans Administration attending physician.

At the University of Utah College of Medicine, moneys in the special fund accounts were disbursed on an individual consideration basis. Payments from the fund were made in most instances only with the approval of the Department Head and/or Assistant Dean. The report shows that at Salt Lake City, there was a difference of opinion as to not only who controlled such funds, but who had title to them. In this connection, see Dr. Snyder's claim that one of these funds was his property. This is now resolved by the letter from the University of Utah, dated December 1, 1969, copy enclosed.

You point out it is your understanding, based upon decisions of our Office, that donations from private sources for official travel to conduct Government business, in the absence of statutory authority to accept gifts, is prohibited as an unlawful augmentation of appropriations. You understand, further, that when an agency is authorized to accept gifts, the donation may not be directed to the employee, but must be made to the agency and reimbursement to the employee for travel expenses must be in accordance with the appropriate laws and regulations relating to travel. (36 Comp. Gen. 268 (1956), 46 Comp. Gen. 689 (1967), unpublished decision B–166850, June 13, 1969).

You request our views as to the application of the foregoing principles in the following situations:

(a) Where the employee is authorized absence without charge to leave to attend a medical meeting, seminar, etc., and his travel expenses are paid by or from funds controlled by the University;

(b) Where the employee is authorized travel to attend a medical meeting, seminar, etc., to conduct Government business for a portion of such meeting and authorized absence without charge to leave to attend the remainder of the meeting, where the Government pays his entire travel costs and per diem for those days in which he is engaged in Government business, and the University pays his expenses for those days he is authorized absence without charge to leave;

(c) Where the employee is authorized travel and per diem to conduct Government business for the entire period of a medical meeting, seminar, etc., and the University furnishes additional funds to permit him to undertake University business while in a travel status;

(d) Where the employee is authorized travel and per diem to undertake Government business for a specified period and either while on leave or administrative non-duty time while in a travel status, undertakes employment by the University and is reimbursed by them for his expenses during the non-duty days.

We note that under 38 U.S.C. 4113 the Administrator may pay the expenses, except membership fees, of physicians, dentists and nurses incident to attendance at meetings of associations for the promotion of medical and related sciences. Also, under 38 U.S.C. 4115 the Chief

Medical Director with the approval of the Administrator shall promulgate all regulations necessary to the administration of the Department of Medicine and Surgery and consistent with existing law, including regulations relating to travel, transportation of household goods and effects, etc.

We concur generally in your understanding of the requirements to be followed in connection with the receipt of donations by Government employees traveling on official business. However, at the time of our report dated October 6, 1969, to the Chairman, Committee on Veterans Affairs referred to in your letter, we did not consider whether the University of Utah was one of those tax exempt organizations described in section 501(c)(3) of Title 26, United States Code. An organization within the scope of 501(c)(3) is authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to a period of training by a Government employee or incident to attendance of the employee at a meeting. We have ascertained informally from the Internal Revenue Service that the University of Utah is, in fact, one of those tax exempt organizations described in section 501(c)(3) of Title 26. Thus, a physician who receives from the University of Utah a contribution for travel, subsistence, or other expenses incident to a period of authorized training or incident to attendance at a meeting is permitted to retain the full amount of such contribution. However, in accordance with subsection (b) of section 4111 and Bureau of the Budget Circular No. A–48, February 13, 1959, the amounts that otherwise would be payable by the Government on account of the employees' travel or subsistence are to be reduced by the contributions made by the University of Utah covering the same type expenses.

When a contribution is made by a tax exempt organization described in section 501(c)(3) of Title 26 incident to official duty of an employee which does not involve training or attendance at a meeting, the usual rule referred to in your understanding of the matter should be followed. That is, the employee is to be regarded as having received the contribution on behalf of the Government and the amount, therefore, would be for deposit into the Treasury as a miscellaneous receipt unless, of course, the employing agency had statutory authority to accept gifts in which event the donation could be accepted and utilized by the employing agency without deposit into the general fund of the Treasury. With these concepts in mind, the following conclusions are reached with respect to the four specific situations enumerated in your letter:

(a) The employee would be permitted to retain contributions received from the University.

(b) We understand that in this situation the Government pays the

entire travel cost and subsistence in going to and from the meeting and on those days when the employee is conducting Government business. On other days when the employee is on excused absence but is not actually conducting Government business but is still attending the meeting the University would pay his expenses. Under these circumstances acceptance of the contribution by the employee would be authorized.

(c) In this situation the employee's official travel status for which he receives reimbursement from the Government continues through the entire period of the medical meeting but the University furnishes the employee additional funds to permit him to perform certain University business separate and apart from his officially ordered attendance at the meeting. Unless this further University business involved other meetings related to his VA duties, the employee would not be permitted to retain the additional funds which would be paid him by the University. Rather, such funds would be for deposit in accordance with the principle previously mentioned.

(d) If, when performing the duties for the University, the employee is in a nonpay status or in a leave with pay status (assumed to be vacation leave) the amounts received from the University should not be construed as supplementing VA appropriations. In other situations the rules heretofore discussed would apply.

Concerning the specific vouchers submitted here our understanding is that the situation involved in each is one in which the University, in accordance with 5 U.S.C. 4111, is permitted to make and the VA physician involved is permitted to receive contributions covering traveling expenses. We understand also that the amounts paid by the University in each case are on an actual expense basis and cover specific periods of time. Thus, in accordance with 5 U.S.C. 4111(b) and Bureau of the Budget Circular No. A–48, for any period of time for which the University makes a contribution there must be an appropriate reduction in amounts payable by the Government for the same purpose. For example, if for any day the University pays the entire cost of meals, lodging, and other subsistence items no per diem would be payable by the Government. However, the employee would be authorized to retain the full contribution made by the University regardless of the amount thereof. For those days on which the contribution for lodging, meals and other subsistence items is less than the authorized per diem the employee may receive the full contribution but the authorized per diem must be reduced by the amount of such contribution.

The amount of the indebtedness of each of the employees involved should be redetermined on the foregoing basis. If, in connection with such redeterminations, any question arises concerning the application of the foregoing principles it may be transmitted here for a further decision.

[B-167804]

Compensation—Overtime—Inspectional Service Employees—Part-Time WAE Employees

Part-time immigration inspectors employed on an intermittent basis at hourly rates regardless of the day or time of day they are required to perform service, and who are paid overtime compensation for work performed in excess of 8 hours in a day under 5 U.S.C. 5542(a), having no regular hours of duty are not eligible for the extra compensation prescribed by the act of March 2, 1931 (8 U.S.C. 1353a) for work between 5 p.m. and 8 a.m. However, the inspectors are entitled to 2 days extra pay for Sunday and holiday duty pursuant to the 1931 act, but since they have no regular tour of duty, they may not receive their regular pay in addition to the extra pay.

To The Attorney General, March 11, 1970:

By letter dated August 22, 1969, reference CO 851.1–P, the Associate Commissioner, Management, Immigration and Naturalization Service, forwarded for our consideration the claims of seventeen part-time immigration inspectors for additional compensation under section 1 of the act of March 2, 1931, 8 U.S.C. 1353a.

The seventeen inspectors are employed on an intermittent basis and are paid at the basic hourly rate for their grades regardless of the day or time of day they are required to perform service. Although they are paid overtime compensation for work performed in excess of 8 hours in a day under 5 U.S.C. 5542(a), they are not paid extra compensation for overtime, Sunday and holiday work under 8 U.S.C. 1353a. In that regard, section 16 of the Immigration and Naturalization Service Administrative Manual provides as follows:

> Part-time immigration officers engaged in inspection of arriving passengers and crews or in other duties, whose hours or days of work are less than the prescribed hours or days of work for full-time employees (less than a basic 40-hour workweek), are not considered to be immigration officers within the meaning of these procedures. Accordingly, they are not entitled to extra compensation hereunder.

The part-time inspectors contend that they are entitled to extra compensation under 8 U.S.C. 1353a and point out that similar employees of the Customs Service are paid extra compensation for overtime, Sunday and holiday work under the act of February 13, 1911, 19 U.S.C. 267.

Section 1 of the act of March 2, 1931, 8 U.S.C. 1353a provides:

> The Attorney General shall fix a reasonable rate of extra compensation for overtime services of immigration officers and employees of the Immigration and Naturalization Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days'

pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Attorney General is vested with authority to regulate the hours of such employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for such employees or the overtime pay herein fixed.

We have construed the above language to mean that an employee, to be entitled to overtime pay thereunder, must perform at least 1 hour of work between the hours of 5 p.m. and 8 a.m. and such work must be in addition to his regular tour of duty. 10 Comp. Gen. 487 (1931), 24 id. 140 (1944). In *United States* v. *Myers*, 320 U.S. 561 (1944), the Supreme Court held that the extra compensation authorized for work between the hours of 5 p.m. and 8 a.m. could not be paid under the Customs overtime provisions contained in the act of 1911 (19 U.S.C. 267) until the employee had performed his regular tour of duty.

While the above decision of the Supreme Court with respect to work between 5 p.m. and 8 a.m. did not specifically refer to full-time employees with regular tours of duty our view is that it was so intended. Therefore, since the employees in question work intermittently and have no regular tours of duty they are not eligible for payment of extra compensation for work performed between 5 p.m. and 8 a.m. under 8 U.S.C. 1353a.

Concerning extra pay for Sunday and holiday duty, however, we quote the following statement from *United States* v. *Myers*, *supra*, at page 574:

> As to Sundays and holidays, we construe the statute to require extra compensation for inspectors without regard to the hours of the day or whether such services are additional to a regular weekly tour of duty.

Under that construction, which is equally applicable to the language of 8 U.S.C. 1353a, the intermittent employees are entitled to extra pay for Sunday and holiday service. However, since they have no regular tour of duty we believe they should not receive their regular pay for such work in addition to the 2 days pay allowable under 8 U.S.C. 1353a.

The claims are returned for administrative handling in accordance with the above. Also, for your information, we enclose a copy of our letter of today to the Commissioner of Customs concerning this matter.

[B–168541]

Transportation—Requests—Issuance, Use, Etc.—Nonappropriated Fund Activity

The use of Government transportation requests, Standard Form 1169, by the Army and Air Force Exchange Service—a nonappropriated fund activity, even though considered a Government instrumentality for some purposes, as appropriated funds are not made available for its operations—in order to procure air transportation for civilian employees and avoid payment of the 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. The travel of the Exchange

employees concerned with the recreation, welfare, and morale of the members of the uniformed services is not travel for the account of the United States, nor on official business, the two prerequisites in the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, section 2000, for the use of Government Transportation Requests to procure passenger transportation.

To the Secretary of the Army, March 11, 1970:

We refer to request made by the Office of the Deputy Chief of Staff for Logistics, Department of the Army, in letter dated October 10, 1969, file LOG/TM–PMB–T–3, addressed to the Director of our Transportation Division, for determination of the propriety of an Army and Air Force Exchange service proposal to change appropriate regulations for the purpose of authorizing the use of Government transportation requests in the procurement of transportation by air for civilian employees of that agency.

The Army and Air Force Exchange Service reports that, as a result of a recent reorganization, greater reliance on air transportation has become necessary to satisfy its travel needs. By using Government transportation requests, the Exchange Service seeks to avoid payment of a 5-percent tax on transportation of persons by air as imposed by section 4261 of the Internal Revenue Code (26 U.S.C. 4261). The resultant savings, estimated between $15,000 and $20,000, are to be used to provide articles of necessity and convenience to military personnel and other authorized customers and to contribute to their welfare and recreational activities.

The transportation request, Standard Form 1169, is primarily a device for exercising control over procurement, accounting, and auditing of Government travel. Pursuant to the authority contained in section 307 of the Revenue Act, 58 Stat. 64, the Secretary of the Treasury granted exemption from the tax when the transportation services are procured and performed under Government transportation requests.

The Army and Air Force Exchange Service takes the position that a restrictive interpretation given to the term "transportation request" is an obstacle to the general use of transportation requests by its employees, but believes that a change in the Army Regulations and the Air Force Manual could provide the necessary authority. The proposed change contemplates the inclusion of nonappropriated-fund employees within the definition of "transportation request" and would specifically state that Government transportation requests may be issued for official travel of nonappropriated-fund civilian employees of the Army and Air Force Exchange Service and their dependents.

In apparent support of the proposal, the Department of the Army emphasizes the status of the Exchange Service as an instrumentality of the United States and the close controls exercised by the United

States over its operations and funds. In view of this, it is the opinion of the Department that authorized travel of civilian Exchange Service employees is in essence official travel for the account of the United States Government.

In our opinion the Army and Air Force Exchange Service is a Government instrumentality which functions as an agency of the Army and Air Force under the executive control of the officers of the services concerned who continue to receive pay and allowances as officers. However, except for furnishing suitable facilities for the operations, appropriated funds are not available for exchange operations. In this connection section 4779(c) of Title 10, United States Code, provides:

*No money appropriated for the support of the Army may be spent for * * * Army exchanges.* However, this does not prevent Army exchanges from using public buildings or public transportation that, in the opinion of the office or officer designated by the Secretary, *are not needed for other purposes.* [Italic supplied.]

Although the preceding indicates substantial adherence to the proposition that the Exchange Service is a Government instrumentality, it also suggests limitations and urges caution in enlarging the scope and number of legal inferences that can safely be drawn from the Agency's instrumentality status.

There are two prerequisites in 5 GAO 2000 to the use of Government transportation requests for the procurement of passenger transportation services: That their use be limited for the account of the United States and that the travel be for the purpose of official business. Bureau of the Budget Circular No. A–7, issued pursuant to the Travel Expense Act of 1949, as amended, and the Administrative Expenses Act of 1946, as amended, specifically provides that Government transportation request forms are to be used only for official travel.

A distinction must be drawn on the purposes of travel performed by military members assigned to duty with post exchanges. Travel of members ordered for the purpose of purchasing post exchange supplies for resale cannot be considered as travel on public business, whereas travel for the purpose of inspecting, auditing, or investigating post exchange activities, attending post exchange conferences, coordinating post exchange matters, and attending post exchange schools may be considered public business. It is important to note that the basis for the above conclusion is that the latter activities be necessary for command supervision.

The history of nonappropriated funds shows that they were created to fulfill the needs of members of the Armed Forces with respect to their recreation, welfare, and morale. As a general rule this Office has disapproved the use of appropriations for travel of military personnel for recreational purposes because the travel was not performed in connection with a military activity. In 27 Comp. Gen. 679 (1948), it

was emphasized that, regardless of the desirability of recreational and entertainment programs for Federal employees, appropriated funds are not available in the absence of a clear expression on the part of the Congress.

The device of reimbursing appropriation accounts with nonappropriated funds to cover travel procured through Government transportation requests would constitute an evasion of applicable tax laws and regulations. Also, initial payment from appropriated funds would violate 31 U.S.C. 628 which requires that sums appropriated "shall be applied solely to the objects for which they are respectively made, and for no others."

We are of the opinion that the proposed use of Government transportation requests, Standard Forms 1169, by civilian employees of the Army and Air Force Exchange Service, whether payment for services furnished is from nonappropriated funds or from appropriated funds followed by reimbursement, would be in conflict with our decisions and applicable laws and regulations.

Accordingly, we regret that we are unable to approve the proposed change in current regulations which would authorize the use of Government transportation requests to procure air transportation for civilian employees of the Army and Air Force Exchange Service.

[B-168650]

Pay—Retired—Waiver for Civilian Retirement Benefits—Revocation

A Regular enlisted member of the uniformed services who subsequent to retirement was employed as a civilian in the Federal Government and waived his retired pay to have his military service credited for civilian retirement purposes may not if reemployed in the civil service revoke the waiver of retired pay. Revocation of the waiver would not terminate the former member's status as an annuitant or terminate his eligibility to receive an annuity, which pursuant to 5 U.S.C. 8344(a) would be deducted from the civilian compensation payable to the annuitant while reemployed in order to avoid a double benefit based upon the same period of military service. Therefore, the reemployed annuitant is entitled to continue to receive his annuity and to be paid by the employing agency only the difference between the annuity due and the salary payable to him.

To the Secretary of Transportation, March 11, 1970:

Further reference is made to letter dated December 12, 1969, from the Commandant, United States Coast Guard, asking several questions concerning the waiver of retired pay and the crediting of military service for civilian retirement in the case of Chief Machinist's Mate Ralph Davis, United States Coast Guard, retired.

It is stated that Mr. Davis retired on April 1, 1954, as a Regular enlisted man for years of service with 24 years and 10 months of active service. Thereafter, he was employed as a civilian employee of the Gov-

ernment and it is stated that he retired therefrom on May 1, 1968. Since at the age of 60 his civilian service was not sufficient to qualify him for civil service retirement, it is stated that he waived his military retired pay effective April 30, 1968, so that his military service was creditable for civilian retirement. The Commandant's letter states that Mr. Davis is considering reemployment in the civil service and that he would like to revoke his waiver of retired pay and again receive military retired pay while so employed.

Our views are asked on the following questions:

1. May Mr. Davis revoke his waiver and thereby again become entitled to military retired pay?
2. If he may do so, is it correct that his military service would no longer be creditable toward his civil service annuity; and that even if he is not reemployed in the civil service, his entitlement to a civil service annuity will terminate?
3. If your answer to question 1 is in the affirmative, may Mr. Davis at some later date again waive receipt of his military retired pay for the purpose of qualifying, if necessary at the time, for a civil service annuity, and for computation of that annuity?

Section 8347(a) of Title 5, U.S. Code, provides that the Civil Service Commission shall administer the civil service retirement program and prescribe such regulations as are necessary and proper to carry out the provisions of law authorized in that program. Section 8332(c) of Title 5 provides, insofar as is here material, that an employee shall be allowed credit for periods of military service, but that "his military service may not be credited" if he is awarded retired pay on account of military service. Section 8332(j) also provides for the exclusion of military service performed after 1956 if the member or his widow is or would be eligible for old age and survivor insurance benefits under the Social Security Act (42 U.S.C. 402) based upon his wages and self-employment income.

Regulations implementing the above statutory provisions provide in section S3–5 of the Federal Personnel Manual Supplement (Retirement), 831–1, in pertinent part, as follows:

a. Service which may be credited. Honorable active military service performed prior to separation from a position under the law is creditable, with the following exceptions:
(1) In determining eligibility for retirement or in computing the amount of annuity, no credit is given for any military service to an employee who receives military retired pay unless the retired pay is awarded:
(a) On account of a service-connected disability incurred in combat with an enemy of the United States, or
(b) On account of a service-connected disability caused by an instrumentality of war and incurred in line of duty during a period of war, or
(c) Under the provisions of chapter 67, of title 10, United States Code (pertaining to retirement from reserve component of the armed forces).

* * * * * * *

d. Double credit not permitted. Under no circumstances is credit allowed under the law for both civilian and military service covering the same period of time. The period of creditable service cannot exceed the actual calendar time.

Section 831.301(b), Appendix G of the same Manual provides that:

(b) An applicant for annuity who is in receipt of retired pay which bars credit for his military service may elect to surrender the retired pay and to have his military service added to his period of civilian service for the purpose of obtaining a greater benefit in the form of annuity. When it appears on the adjudication of a claim for annuity that the employee will benefit from relinquishment of retired pay and inclusion of his military service, the Bureau shall so advise him and permit him to exercise the right of election.

As indicated above, Mr. Davis waived his military retired pay and used his military service to determine his eligibility to receive his civil service annuity. The question now presented is whether by revoking that waiver he will become entitled to military retired pay. We have been advised informally by a representative of the Civil Service Commission that such a revocation of his waiver would not terminate his status as an annuitant or terminate his eligibility to receive an annuity. Such annuity would be continued at a reduced rate, that is, at a rate determined solely on the basis of his service as a civilian employee.

Where an annuitant is reemployed in the civil service, section 8344(a) of Title 5, U.S. Code, requires, with certain exceptions not here material, that "An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay." In other words, should Mr. Davis be reemployed in the civil service, he would be entitled, as an employed annuitant, to continue to receive his annuity and be paid by the employing agency only the difference between such annuity and his salary.

In our decision of January 16, 1962, 41 Comp. Gen. 460, we considered the right of an officer to receive retired pay, in addition to his annuity, where his military service had been used to determine his eligibility for an annuity. In holding that the member was not entitled to retired pay in that situation we said:

* * * a determination as to his right to retired pay based on his military service is for decision by this Office and it is our view that such retired pay should not be paid so long as his military service is used to determine his eligibility for an annuity or in the computation of the annuity. In order to qualify for a Member annuity he had to give up his right to receive disability retired pay as a retired Marine Corps Reserve officer. We are of the opinion that Congress did not intend that a retired officer in his situation should receive a double benefit based upon the same period of military service. While 5 U.S.C. 2264(d)—a provision which had for its purpose the protection of annuitants' rights to receive nonservice-connected Veterans Administration pensions—permits any person entitled to annuity to decline to accept all or any part of such annuity by waiver signed and filed with the Commission, we know of no provision of law which permits him to waive a period of military service and draw retired pay based thereon when that service has been credited to him establishing his eligibility to receive an annuity. Payment of disability retired pay based on his military service would not be authorized in the absence of a statute clearly granting him a double benefit for that service, 5 U.S.C. 2253(b) evidences an intent to the contrary since it is there indicated that a Member who is awarded retired pay on account of military service such as here involved may not be credited with such service in establishing entitlement to the annuity. It seems to be the intent of Congress that such double benefit is only to be allowed an employee or Member awarded retired pay on account of a service-connected

disability if the disability was incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in line of duty during a period of war. The record shows that Major Patterson is not in either of those categories.

In the light of the above decision, question 1 is answered in the negative, since Mr. Davis would continue to be paid his civil service annuity if he is reemployed and eligibility for such annuity had to be based, in part, on his military service.

Both questions 2 and 3 involve payment of civil service annuity and thus, as indicated above, are within the jurisdiction of the Civil Service Commission. However, in view of the negative answer to question 1, no answers are required to those questions.

[B–168697]

Bids—Discarding All Bids—Changed Conditions, Etc.—Affecting Price, Quantity, or Quality

The cancellation of an invitation for bids based on the determination the changes in the scope of the work and equipment to be furnished constituted a substantial deviation from the original specifications that affected price, quantity, or quality of the procurement, and the readvertisement of the procurement with an award to the second low bidder under the first invitation was in the best interest of the Government and is a proper action under section 1-2.404-1(b) of the Federal Procurement Regulations, even though the revision of specifications is not one of the examples cited in the section for canceling an invitation. The examples cited are not intended to be all inclusive, but to be indicative of the type of circumstance that justifies cancellation and, therefore, the contracting officer's determination to cancel the invitation prevails in the absence of a showing of abuse of administrative discretion.

To Seasonair of Virginia, Inc., March 16, 1970:

Further reference is made to your letter of November 24, 1969, protesting the action of the Department of Transportation, United States Coast Guard Aircraft Repair & Supply Center, Elizabeth City, North Carolina, in canceling invitation for bids (IFB) No. 95–70 and readvertising the procurement under IFB No. 219-70.

The original invitation, IFB No. 95-70, requested bids for furnishing and installing a heat pump and air-conditioning units in shop 211, hangar 2, at the Coast Guard Air Base, Elizabeth City, North Carolina, in accordance with the Government's specifications and drawing.

Three bids were received and opened on September 25, 1969. The lowest bid in the amount of $14,752.15 was submitted by your firm; the second lowest bid in the amount of $16,848.53 was submitted by the Gordon Sheet Metal Company; and the third bid in the amount of $18,000 was submitted by Electrical Mechanical Specialists Co.

It is reported that on September 26, 1969, the base commander directed the public works officer to have certain changes made in the construction and location of some walls with the result that an area

within the heat pump zone would now be within the air-conditioned zone. We are advised that this change required that the size of the heat pump be reduced, and that the heat pump ducting be reduced in size in one area with additional ducting to be extended from one of the air-conditioning units. On September 30, 1969, the contracting officer determined that the foregoing changes did affect the scope of the work and equipment to be furnished by the successful bidder and that such changes constituted a substantial deviation from the original specifications. It also was determined by the contracting officer that such changes would affect the price, quantity, or quality of the articles or services to be furnished by the successful bidder and that, therefore, the original invitation should be canceled and bids resolicited giving all bidders an opportunity to submit bids on an equal basis for the revised requirements. On October 3, 1969, all bidders, including your firm, were notified by letter of the cancellation of IFB No. 95-70.

On November 3, 1969, the procurement was readvertised under IFB No. 219–70 with revised specifications and drawings. In response to the invitation, three responsive bids were received. The lowest bid in the amount of $13,363.55 was submitted by the Gordon Sheet Metal Company; the second lowest bid in the amount of $15,582 was submitted by Electrical Mechanical Specialists Co.; and the third bid in the amount of $15,900 was submitted by your firm. On December 5, 1969, contract No. DOT-CG40-1986 was awarded to the Gordon Sheet Metal Company. It is reported that as of January 15, 1970, approximately 80 percent of the contract work had been completed by the Gordon Sheet Metal Company.

You allege that the original invitation was canceled and the procurement readvertised for the purpose of giving the second lowest bidder on the original invitation, Gordon Sheet Metal Company, a second chance at the job. You contend that IFB No. 219–70 revised the specifications for the original invitation by reducing the capacity of the heat pump from 7½ tons to 5 tons; that the heat pump is only one of four main pieces of equipment; and that the total equipment capacity for the job was reduced from 30 tons to 27½ tons, only a small amount costwise. You state that since all prices have been revealed and the change in the specifications are so minor as to cost, it is obvious that the procuring activity wants to do business with only Gordon Sheet Metal Company, thus granting that firm preferential treatment.

It has been consistently held that an invitation for bids does not import any obligation on the Government to accept any of the offers submitted in response thereto, and that all bids may be rejected where it is determined to be in the best interests of the Government to do so. 17 Comp. Gen. 554 (1938); 26 *id.* 49 (1946); 37 *id.* 760 (1958); 41 *id.* 709, 711 (1962).

Subparagraph (b) of 41 U.S.C. 253, the statutory authority governing formally advertised procurement by the civilian agencies of the Government, permits the rejection of all bids when it is determined that rejection is in the public interest. Section 1-2.404-1(b) of the Federal Procurement Regulations (FPR), implementing the advertising statute, sets forth seven examples of public interest justifying the cancellation of an invitation. While FPR 1-2.404-1(b) does not include as an example the situation where the specifications have been revised, as in the present case, we believe that the listed bases for cancellation are not intended to be all inclusive, but are indicative of the type of circumstance which justifies such action. In this connection, it is noted that paragraph 2-404.1(b)(ii) of the Armed Services Procurement Regulation, which implements a statute substantially similar to 41 U.S.C. 253(b), specifically provides for cancellation of an invitation when "specifications have been revised." Moreover, the right to reject all bids was specifically reserved to the Government by paragraph 10(b) of the Solicitation Instructions to Bidders.

Our Office has consistently held that, while the interest of the Government and the integrity of the competitive bidding system require that invitations be canceled only for the most cogent reasons, there necessarily is reserved in the contracting officials a substantial amount of discretion in determining whether or not an invitation should be canceled. We will, therefore, not object to the cancellation of an invitation unless there has been a clear showing of abuse of administrative discretion. See B-165206, January 8, 1969, B-164520, September 24, 1968, B-162382, May 17, 1968, B-159287, July 26, 1966.

We must conclude that there has been no abuse of discretion here. The contracting officer determined after bid opening that because of certain changes in the construction and location of some walls which were requested by the base commander, the scope of the work and equipment would be affected and that such changes constituted a substantial deviation from the original specifications which he determined would have to be revised. We believe that an attempt to negotiate these changes with your firm as the low bidder under IFB No. 95-70 would have been prejudicial to the other bidders submitting responsive bids under that invitation since the contract after negotiation offered to your firm would not be the same as offered the other bidders under that invitation. It is reported that the differences between the Government estimate and the bids received in response to invitations Nos. 95-70 and 219-70 are as follows:

	IFB 95-70	*IFB 219-70*	*Approx. % of Difference*
Government Estimate	$16,000.00	$14,000.00	−12½%
Gordon Sheet Metal Company	16,848.50	13,363.55	−20%
Electrical Mechanical Specialists Co.	18,000.00	15,582.00	−13%
Seasonair of Virginia, Inc.	14,752.15	15,900.00	+¾ of 1%

It is evident from the above comparison table that the change in the original specifications ordered by the base commander constituted a substantial change in the specifications and not a minor change, as alleged by your firm.

Our decision B-145109, May 1, 1961, was concerned with a situation analogous to yours in that after bid opening, but before award, the procuring activity proposed three significant changes in the contract specifications. The procuring activity requested our advice as to whether award could be made to the low bidder under the advertised specifications and the changes negotiated after award or whether the procurement should be readvertised under specifications incorporating the three proposed changes. In holding that readvertisement was required, we said:

> It is well established that the award of a contract pursuant to the advertising statutes must be made upon the same specifications offered to all bidders. 37 Comp. Gen. 524, 527 [1958], and cases there cited. In considering whether additional work required in connection with a contract could be awarded by negotiation to the contractor, we stated in 5 Comp. Gen. 508, 512 [1926]:
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> > * * * In general, an existing contract may not be expanded so as to include additional work of any considerable magnitude, without compliance with section 3709, Revised Statutes, unless it clearly appears that the additional work *was not in contemplation at the time of the original contracting* and is such an inseparable part of the work originally contracted for as to render it reasonably impossible of performance by other than the original contractor. The apparent probability that the additional work may be done more conveniently or even at less expense by the original contractor, because of being engaged upon the original work, or otherwise, is not controlling of the matter as to whether the provisions of section 3709 are for application. Whether the original contractor can do the work at less expense to the Government than can any other contractor is possible of definite determination only by soliciting competitive bids as contemplated under said section. * * * [Italic supplied.]
>
> The rule, which is equally applicable to competitive procurements under 10 U.S.C. 2304(a), has been consistently followed. See 39 Comp. Gen. 566 [1960], and 30 Comp. Gen. 34 [1950]. The rule applies whether the work is to be increased or decreased. * * *
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> * * * * * * *
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> * * * Where a contract is required to be awarded pursuant to competitive bidding, the low bid must be determined on the basis of bids on the work actually to be performed, not on the basis of bids on specifications known to call for more or less work, or work of a different type. The only proper way to determine the lowest bidder is by advertising the actual work to be performed, and this, in our opinion, is what the law requires. 17 Comp. Gen. 427, 430 [1937]; 15 *id.* 573, 576 [1935]. See also 37 Comp. Gen. 183, 184 [1957]. The adoption of any other view

would permit circumvention of the competitive bid requirement and would be contrary to the intent of the procurement statutes.

See also B-167216, December 9, 1969.

Accordingly, it is our opinion that the cancellation of IFB No. 95-70 was proper. In addition, we find no basis to question the award under IFB No. 219-70. Accordingly, your protest is denied.

[B-167676]

Bids—Unbalanced—Mistake-in-Bid Relief

Under an invitation for the procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which the services were to be performed, and that provided for award under each zone of each schedule to the low bidder on any schedule bid on who offered unit prices on all items, a contractor receiving a partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on an entire schedule, and because its item prices were computed on the basis the total price for a schedule would be competitive, is not entitled to relief on a mistake-in-bid theory as nothing on the face of the bid placed the contracting officer on actual or constructive notice of the possibility of error.

To Eastern Van Lines, March 17, 1970:

Reference is made to the letter of August 8, 1969, with enclosures, from Eastern Van Lines (Eastern) and the correspondence from your firm dated September 11, September 22 and October 23, 1969, in connection with Eastern's request for relief under contract No. F19617-69-C-0188, with Westover Air Force Base, Massachusetts. The contract was awarded on January 27, 1969, and was scheduled to end on December 31, 1969.

The facts surrounding this request are as follows. On November 12, 1968, the Base Procurement Division at Westover issued solicitation No. F19617-69-B-0020 for preparation of personal property for shipment, Government storage, and performing intra-city or intra-area movement. The procurement was "Small Business Restricted Advertising" under authority of 10 U.S.C. 2304(a)(1) and Armed Services Procurement Regulation (ASPR) 1-706.2.

The solicitation was divided into Schedules I, II, III, and IV. The services were described under various items within the Schedules and also there was a listing of the zones in which the services were to be performed.

Schedule I was for "Outbound Services" and under this Schedule prices were requested on items No. 1 through 8. Items 9 and 10 were also listed under this Schedule but both of these items were reserved and no bids were requested on these two items. The types of services to be provided under item No. 1 of Schedule I included, among others, premove survey, servicing of appliances, disassembly of furniture if required, preliminary packing, tagging, wrapping, and zones I through

XI were listed under this item. Item No. 2 under Schedule I was for Outbound Services (From Non-Temporary Storage) and the services under this item were similar to item No. 1 with certain listed exceptions. Item No. 2 was divided into "Pickup by Contractor" and "Delivered to Contractor" and eleven zones were listed under each of these categories. There were no requirements for certain of the zones listed under item No. 2. Item No. 3, Schedule I, was for "Complete Service-Outbound-(Overflow Articles or Shipments Requiring Other Than Type II or III Containers)." Requirements under item No. 3 were stated for eleven zones each under "Overseas Pack" "(1) Overflow Articles" and "(2) Other Shipments" and eleven zones each under "Domestic Pack" for "Overflow Articles" and "Other Shipments." Item No. 4 under Schedule No. I was for "Storage" and requirements were listed for eleven zones under this item. Item No. 5 for "Drayage" included requirements for two of the eleven zones listed. No requirements were listed under item No. 6. Item No. 7 called for type II Containers and included requirements for eleven zones. Item No. 8 for "Recooperage/Remarking Service" included requirements for four of the eleven zones listed.

The composition under Schedule II for "Inbound Services" was similar to the composition of Schedule I, and item Nos. 11 through 16 with various requirements for zones I through XI were listed under this Schedule.

Schedule III for "Unaccompanied Baggage Service" included items Nos. 17, 18, 19, 19.1, 19.2, 19.3 and 20 with various requirements for the zones listed under those items.

Schedule IV included item No. 21 for "Complete Service for Intra-City and Intra-Area Movements" and there was a requirement for one zone under this item.

At the end of Schedules I, II, and III, recapitulation totals were to be inserted by the bidders. The last column in each recapitulation was entitled "Schedule Total for Zone." In this column there was to be inserted a total price for each of the individual zones under a Schedule based on the prices quoted for the individual zones as requirements for such zone appeared under any of the items described in that particular schedule. Bidders were not requested to insert a total price for an entire Schedule.

Clause SP 10 under the Special Provisions on page 30 of the solicitation provided as follows:

Award shall be made to the low bidder under each schedule for each zone listed. The Government reserves the right to award additional contracts, as a result of this solicitation, to the extent necessary to meet its estimated maximum requirements. To be eligible for an award, a bidder must offer unit prices for all items under any schedule bid on. Failure to do so shall be cause for rejection of the bid for that schedule. Also, bidders failing to guarantee daily capabilities in the space provided in this Invitation for Bids shall be

considered not responsive and ineligible for award. Any bid which stipulates minimum charges or graduated prices for any or all items shall be rejected for that schedule.

The above provision appeared in section 22 603–7 of Defense Procurement Circular No. 64, dated October 28, 1968. The provision presently appears in ASPR 7–1603.7. The following provision entitled "AWARD INFORMATION" was inserted by the Government on the last "Continuation Sheet," page 25 of 37:

AWARD INFORMATION

See Special Provision 10, entitled "AWARD." This provision is further amplified to insure that an offeror must offer unit prices for all items having an estimated annual quantity indicated within a Schedule for the zone or zones selected.

Eastern received partial awards based on its capabilities for ten of the eleven zones under Schedule I, but did not receive an award for zone VII. Under Schedule II, Eastern did not receive awards for zones III, IV, VII. Partial awards were made to Eastern for the other eight zones under Schedule II based on the contractor's capabilities. Under Schedule III, Eastern did not receive an award for zones III and IV. Partial awards were made to it based on its capabilities for the other nine zones listed under Schedule III. Eastern was not the low bidder for those zones on which it did not receive an award.

The letter of August 8, 1969, from Eastern advises that its bid was balanced in anticipation that award would be made on the basis of the entire Schedule and that in computing its price per item, the price was computed on the basis that the total price for the Schedule would be competitive. Eastern's request for immediate release is based on the following contentions in its letter of August 8, 1969:

(a) Unauthorized deviation from standard DOD contract provisions as published by higher authority and agreed to by the Air Force.
(b) Two conflicting bid provisions in the same invitation which was misleading to Eastern Van Lines.
(c) Administrative error of the Air Force in originally denying Eastern's obviously valid protest on 10 December 1968.

In addition, Eastern has advised that it has reluctantly performed the contract and that a serious financial loss has been incurred. The letter of August 8, points out that in prior similar procurements awards were made by entire Schedules rather than zones.

Paragraph (a) of the above contentions refers to a letter dated November 20, 1968, issued by the Military Traffic Management and Terminal Service (MTMTS) Headquarters, Department of the Army, for guidance in implementing ASPR provisions relating to contracts for shipment of personal property. Paragraph 2 of the letter of November 20, 1968, states in part as follows:

2. Procedures for use of the contract

a. The contract format as contained in Item XI, Defense Procurement Circular 64, 28 October 1968, will be used for procurement of all services described therein. Deviations in the format other than modifications permitted by provisions of paragraph 22-603 will not be authorized. Provisions in ASPR 1-109.2 are not applicable when a contract will be awarded for services to multiple military departments. (Departmental procurement staffs concur in this provision).

Paragraph (b) of Eastern's quoted contentions refers to a telegram dated December 10, 1968, in which Eastern protested against the award to any other bidder on the basis that only Eastern's bid was in compliance with the requirements of the solicitation. The contracting officer recommended that Eastern's protest should be denied and that award should be made to the low responsive offeror for each zone for each of the Schedules.

A letter dated August 29, 1969, from Headquarters, Strategic Air Command to Air Force Headquarters in Washington, a copy of which was forwarded to your firm, states as follows:

2. The correspondence clearly supports that personnel responsible for this procurement made it abundantly clear to all prospective bidders the basis on which the government intended to make awards under Solicitation F19617-69-B-0020. Further, we do not note any material deviations from the format required by DPC 64 as alleged by the contractor. However, the supplemental information concerning award(s) listed at the end of the bid schedule and which was specifically brought to the attention of all prospective bidders during a pre-bid conference should be noted. It should also be noted that Mr. Leslie Moore, Sr., representing Eastern Van Lines, Inc., participated in the pre-bid conference * * *.

Paragraph 3 of the contracting officer's report on Eastern's protest of December 10, 1968, a copy of which was also furnished to your firm, states as follows:

3. In applying the guidelines of ASPR 22-601.2, *Zones of Performance* as contained in DPC 64, which related to determining the number of zones and boundaries thereof, consideration was given to total volume, size of overall area included in the solicitation, and the capacity of prospective bidders. The use of counties as zones was determined to be the most suitable method of division as each county is a clearly defined area and is easily ascertainable. The area of coverage for this solicitation includes four counties in western Massachusetts, Berkshire, Franklin, Hampden and Hampshire, and seven counties in Connecticut, Hartford, Litchfield, Middlesex, New Haven, New London, Tolland and Windham. In considering the size of the overall area to be included in the solicitation and the capacity of prospective bidders, the use of zones would permit the participation of all prospective bidders without any possible discrimination because of capacity.

* * * * * * *

5. At a Pre-Bid Conference held in the Base Procurement Division on 21 November 1968, all prospective bidders present were advised that they could select the zone or zones they desired, but that once a zone was selected all items within that Schedule for that zone must have unit prices offered. A representative from Eastern Van Lines was present at the conference but asked no questions whatsoever concerning this matter.

A Memorandum of a "Pre-Bid" Conference dated November 23, 1968, states in part as follows:

* * * Emphasis was placed on the amplification of the Award Provision to insure that all were aware of the opportunity to select one or more zones, but to insure that once a zone or zones was or were selected, unit prices were offered for all items within a Schedule for the zone or zones selected. * * *

Based on the above record it is Air Force's position that Eastern was aware, prior to submitting its bid, of the basis on which the award would be made.

The three procurements referred to in Eastern's letter of August 8, 1969, are identified as contract No. N00298-69-D-3064, effective January 20, 1969, awarded by the United States Naval Supply Center, Purchase Department, Newport, Rhode Island; contract No. N00298-69-D-5487, effective date January 2, 1969, also with the United States Naval Supply Center at Newport and contract No. F19603-C-0115 awarded by the Base Procurement Office, Otis Air Force Base, Massachusetts.

Bids under the instant invitation were opened on December 5, 1968; Eastern's bid to the instant procurement was therefore opened prior to the time that awards were made for the above procurements. We mention this to indicate that what happened in the above procurements does not conclusively establish that Eastern was misled into thinking that the awards under the instant solicitation would be made by entire Schedules. The above procurements were far more limited with respect to the number of zones for which bids were solicited. For example, only two zones were listed in each of the above solicitations. We have been advised that at least in the case of Otis Air Force Base, all of the offerors had authority to operate in all of the zones listed in that procurement, which was not necessarily the situation in the Westover procurement. Also the "AWARD INFORMATION" provision which amplified SP-10 was not included in the above procurements. It is our view that what transpired in prior solicitations for similar services would not be controlling with regard to the interpretation of the award provisions of the present solicitation.

The letter of October 23, 1969, from counsel for Eastern indicates agreement that Westover made an oral explanation at a "Pre-Bid" Conference regarding the basis for awards; however, it is urged that this oral explanation cannot be considered in view of paragraph 3 of Standard Form 33A which was incorporated by reference into the solicitation. This paragraph as quoted in counsel's letter provides in part as follows:

"* * * Oral explanation or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors."

Counsel for Eastern contends that what was said by the procuring activity at the "Pre-Bid" Conference was inconsistent with the terms of the solicitation. The key sentences in SP–10, Award, seem to be:

> Award shall be made to the low bidder under each schedule for each zone listed. * * * To be eligible for an award, a bidder must offer unit prices for all items under any schedule bid on.

As indicated the above provision was further amplified by the "AWARD INFORMATION" provision. Apparently all of the other bidders understood the award provisions in this procurement, and in this regard the letter of September 22, 1969, from Eastern's counsel, indicates that none of the other bidders submitted a bid on the same basis as the bid from Eastern. The memorandum dated November 23, 1969, regarding the "Pre-Bid" Conference states that the purpose of the Conference was to give prospective offerors the opportunity to have a clear understanding of the technical requirements and the terms for submitting offers. We find that the explanations given at the "Pre-Bid" Conference were consistent with the requirements of SP–10, "Award," as amplified by the "Award Information" provision; consequently, the "Pre-Bid" discussions were not precluded by paragraph 3 of Standard Form 33A. *Cf.* ASPR 2–207.

With respect to the contention that the awards to Eastern were contrary to Army's letter of guidance dated November 20, 1968, we do not find that the award provisions were inconsistent with any ASPR provisions. Consequently, even conceding the applicability of Army's letter to this procurement, we do not find that the procuring activity's action in this case was inconsistent with the guidelines set forth in paragraph 2a of that letter.

While not specifically raised by Eastern, we will consider whether Eastern is entitled to relief on a mistake-in-bid theory. Eastern's telegram of protest dated December 10, 1968, to the procuring activity, which was sent prior to award, stated as follows:

> HEREBY PROTESTS ANY AWARD TO OTHER THAN EASTERN VAN LINES UNDER INVITATION F 19617–69–B–0020 DUE TO NON-RESPONSIVENESS OF OTHER BIDDERS TO SP10 WHICH REQUIRES A BIDDER MUST OFFER UNIT PRICES FOR ALL ITEMS UNDER ANY SCHEDULED BID TO BE ELIGIBLE FOR AWARD. EASTERN IS THE ONLY BIDDER IN COMPLIANCE WITH THIS PROVISION OF THE INVITATION. REQUEST WITHHOLDING OF OTHER AWARDS PENDING DECISION, HIGHER AUTHORITY.

By letter of January 13, 1969, Westover Air Force Base advised Eastern that its protest was denied and a letter dated January 7, 1969, from Headquarters, Air Force Logistics Command, was enclosed which gave the reasons for the denial of the protest.

There is nothing in the above telegram which would indicate that the prices in Eastern's bid did not accurately reflect what Eastern

intended to bid. An examination of the face of Eastern's bid does not show that the prices quoted therein are other than what was intended by the bidder. No other conclusion is justified upon review of the abstract of bids. The fact that Eastern was the only bidder to quote a price for all the zones within a schedule would not establish that the quoted prices were not the prices intended. It was not until August 8, 1969, when relief was requested from our Office, that Eastern first alleged that its prices for the various zones were balanced in anticipation of receiving the award for an entire schedule.

The record in this case might at best support an argument that Eastern made a unilateral error in computing its bid prices on the basis of receiving the award for an entire schedule rather than individual zones. However, since it cannot be said that the contracting officer had actual or constructive notice of the possibility of error in Eastern's bid, the award to Eastern resulted in a binding contract and the contractor must bear the consequences of his own error. See *Ogden & Dougherty* v. *U.S.*, 102 Ct. Cl. 249 (1944); *Saligman* v. *U.S.*, 56 F. Supp. 505 (1944). See also B–166543, July 16, 1969, and cases cited therein.

In a recent case, *Anthony Ruggiero, et al.* v. *The United States*, 190 Ct. Cl. 327, the court considered a claim representing part of a deposit made on a bid for the sale of certain parcels of Government land. The invitation included a bid form which provided spaces for separate bids on some or all of the individual parcels advertised and a different space for the submission of a bid on any group of parcels (to be designated by the bidder); bids could also be submitted for the entire area. The plaintiffs were interested in bidding on three contiguous parcels as a group. Plaintiffs submitted separate bids on eight of the various parcels described in the invitation including the three parcels on which plaintiffs intended to submit a group bid. These three parcels were at issue in the case. Plaintiffs did not fill in the blank provided in the bid form for group bids. The invitation included a telephone number for bidders to call with questions on the sale. The court accepted plaintiffs' contention that prior to bid opening they called this number to advise the contracting officer that a group bid on the three parcels was intended and the court found that the contracting officer should have been aware of the call. After bid opening but prior to award plaintiffs advised the contracting officer by letter that a clerical mistake had been made and that they had intended to submit a group bid on the three parcels. Subsequently the contracting officer formally accepted plaintiffs' bid on two of the three contiguous parcels and rejected the bid on the third parcel. The difference between the prices in the rejected bid and the next high bid for that parcel was fairly sub-

stantial. In addition, access to one of the two parcels awarded could reasonably be obtained only through the third parcel.

With respect to the two accepted bids, the contracting officer demanded an additional remittance to cover the remainder of the down payments required under the terms of the invitation. When plaintiffs failed to furnish the required down payments, the contracting officer forfeited plaintiffs' deposits on the two accepted parcels. The suit was to recover these deposits.

The court held first that plaintiffs' oral advice could not be considered as a modification of its bid. After disposing of the modification issue, the court turned to the issue of mistake. After an analysis of certain of the cases in the area, the court stated that the sole question was whether the plaintiffs' bid was submitted in the mistaken belief that this was the way to bid for these three parcels as a group and not individually, and whether the contracting officer accepted two of the bids although he knew or should have known they were mistaken.

In concluding that the bid was mistaken and that the contracting officer should have known of the mistake, the court noted that prior to bid opening plaintiffs called the number designated in the invitation for the obvious purpose of advising the contracting officer that a mistake had been made; that prior to award the contracting officer was specifically advised by the plaintiffs that a mistake had been made and that there was a substantial discrepancy between plaintiffs' bid and the next high bid for the one contiguous parcel for which plaintiffs' bid was rejected.

The substance of Eastern's telegram of December 10, 1968, was to protest against the award of a contract for certain zones to other concerns and there was nothing in this telegram to indicate that Eastern's prices would have been different if it did not receive the awards for those zones which the procuring activity proposed to award to other concerns. Upon denial of its protest and prior to award, Eastern could have advised the procuring activity that in view of the Government's interpretation of the award provisions, the prices quoted in its bid were not actually the prices intended; however, no such advice was ever given to the procuring activity. Instead, Eastern undertook to perform without protest.

In the *Ruggiero* case there was nothing on the face of the bid which indicated that a mistake had been made, but it was found that prior to bid opening and to award the bidder communicated with the contracting officer or his representative for the purpose of pointing out the bidders' intention. The instant case also concerns a situation where there was nothing on the face of the bid to show that a mistake had

been made; however, there was no communication, either prior to bid opening or to award, with the contracting officer or his representative regarding the possibility of a mistake in Eastern's bid. Moreover, the bid abstract for the instant procurement does not show such substantial discrepancies between the prices in Eastern's bid and the prices in the other bids to put the contracting officer on notice of a mistake in Eastern's bid. In the circumstances we find that the *Ruggiero* case would not be applicable here.

For these reasons Eastern's request for relief is denied.

[B-168621]

Officers and Employees—Overseas—Registration to Vote—Effect on Benefits

Registering to vote in Guam does not deprive a civilian employee of the benefits prescribed for overseas service where neither the acts involved nor their legislative histories indicate an intent that an employee be denied entitled benefits because of the registration. Therefore, termination of the employee's entitlement to the nonforeign post differential authorized in 5 U.S.C. 5941(a)(2) and Executive Order No. 10,000 as a recruitment incentive; to the home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside the United States; to the up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); to travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to the "place of actual residence" established at the time of the employee's appointment or travel overseas, is not required.

To the Chairman, United States Civil Service Commission, March 18, 1970:

Reference is made to your letter of February 4, 1970, in which you state that you have received an inquiry from the Chairman of the House Committee on Interior and Insular Affairs and also from the Department of Defense on the question of whether an employee's registering to vote in Guam would cause termination of his nonforeign post differential and other fringe benefits.

Your letter states that it appears that employees who desire to register and vote in Guam have been refraining from doing so because of the fear that the attestation required in the Affidavit of Registration would have that effect although you have not been told of any instance in which an employee has registered with such a result.

Specifically you request our decision as to whether an employee's attesting as required in the Affidavit of Registration would require termination of his entitlement to (1) nonforeign differential under 5 U.S.C. 5941(a)(2) and Executive Order No. 10,000; (2) home leave under 5 U.S.C. 6305; (3) accumulation of unused annual leave up to 45 days under 5 U.S.C. 6304(b); (4) certain travel time without charge to leave under 5 U.S.C. 6303(d) and (5) payment of

travel and transportation expenses to the "place of actual residence" on vacation leave under 5 U.S.C. 5728.

The material enclosed with your letter did not include a copy of the "Affidavit of Registration" but it does disclose that the legislature of Guam enacted "PL 8–59, 9 August 1965," which *inter alia*, provides for a 1-year residence requirement. The Attorney General of Guam has interpreted this law to require, in addition to physical presence, the preexistence for a period of 1 year of an intent to remain permanently in the Territory of Guam. The oath which is a part of the "Affidavit of Registration" requires the applicant to attest to his intention of making Guam his home to the exclusion of all other places for a period of 1 year immediately preceding the day of the next general election and that he possesses no present intention to remove his home from Guam at any given future time.

The differential here involved is based upon 5 U.S.C. 5941(a) which provides:

(a) Appropriations or funds available to an Executive Agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on—

(1) living costs substantially higher than in the District of Columbia;

(2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or

(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies.

The substance of these provisions originally was included in section 207 of the Independent Offices Appropriation Act, 1949, approved April 20, 1948, Public Law 491, 80th Congress, 62 Stat. 194, as amended by section 104 of the Supplemental Independent Offices Appropriation Act, 1949, approved June 30, 1948, Public Law 862, 80th Congress, 62 Stat. 1205, 5 U.S.C. 118h.

Prior to the enactment of section 207, as amended, an administrative practice had arisen of paying a differential to persons who occupied positions outside the continental limits of the United States, either in the possessions of the United States or in foreign countries. This Office recognized that practice as long as the differential did not exceed by more than 25 percent the salary rates authorized to be fixed for the same or similar positions in the United States. That administrative practice arose because of conditions which made it impracticable for various administrative offices to recruit personnel for positions outside the United States without paying higher salary

rates than those prescribed by the Classification Act of 1923, 42 Stat. 1488, for the same or similar positions in the departmental service. See 22 Comp. Gen. 491 (1942) to the President of the United States Civil Service Commission. It was contemplated, by the enactment of section 207, that the President would promulgate rules and regulations which would make the practice uniform among the agencies affected. See H. Rept. No. 1288, January 30, 1948, 80th Cong., 2d sess. Executive Order No. 10,000 was issued for that purpose. Pursuant to Part II of Executive Order No. 10,000 the Civil Service Commission issued regulations which are found in 5 CFR § 591.101–591.401.

Under the statute and its legislative background as well as under Part II of Executive Order No. 10,000, as amended, and the applicable Civil Service Regulations it is apparent that the differential is payable primarily as a recruitment incentive. There is nothing in the statute, the legislative background, Executive Order No. 10,000, as amended, or the applicable Civil Service Regulations which would warrant a conclusion that the differential otherwise properly payable to an employee as a recruitment incentive would or should be withdrawn from the employee during any part of the period for which the employee was recruited, merely because he had registered to vote in a local election. Nor, in our opinion, is there anything about the voting requirements for Guam which would require such a conclusion.

Since 5 U.S.C. 6305(b) pertains to leave for Chiefs of Missions and 5 U.S.C. 6305(c) pertains to leave for crews of vessels it is presumed that your question as to home leave involves 5 U.S.C. 6305(a) which provides:

> (a) After 24 months of continuous service outside the United States, an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed 1 week for each 4 months of that service without regard to other leave provided by this subchapter. Leave so granted—
> (1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico;
> (2) accumulates for future use without regard to the limitation in section 6304(b) of this title; and
> (3) may not be made the basis for terminal leave or for a lump-sum payment.

This provision had its origin in section 203 of the Annual and Sick Leave Act of 1951, 65 Stat. 679, 680, as amended, by section 401 of the Overseas Differentials and Allowances Act, Public Law 86-707, approved September 6, 1960, 74 Stat. 799, 5 U.S.C. 2062. The declared congressional purpose of the Overseas Differentials and Allowances Act, as set out in section 101 of that Act, is to improve and strengthen the administration of overseas activities of the Government by among other things providing for the uniform treatment of employees stationed overseas to the extent justified by relative conditions of employ-

ment and by facilitating for the Government the recruitment and retention of the best qualified personnel for civilian service overseas.

We have found nothing in the last cited acts or in their legislative histories which would in any way indicate a congressional intention to deny home leave to an employee otherwise authorized to be granted such leave because the employee registered to vote in the local elections in the United States territory or possession where employed. Also, there is nothing in the regulations as to home leave prescribed by the Civil Service Commission under authority of Executive Order No. 11228, June 14, 1965, which would deny home leave to such an employee. See 5 CFR 630.601–607.

That part of 5 U.S.C. 6304 which authorizes the accumulation of unused annual leave by certain classes of employees stationed outside the United States until it totals not more than 45 days, as well as 5 U.S.C. 6303(d) which provides that necessary travel time and time necessarily occupied in awaiting transportation to or from a port of duty outside the United States, etc., shall not be charged to leave, like 5 U.S.C. 6305, *supra*, were largely derived from section 203 of the Annual and Sick Leave Act of 1951, as amended by section 401 of the Overseas Differentials and Allowances Act. The applicable Civil Service Regulations prescribed under authority of 5 U.S.C. 6311 are found in 5 CFR 630.302 and 5 CFR 630.207. For reasons similar to those stated in connection with home leave we conclude that accumulation of up to 45 days of unused annual leave as well as travel time without charge to leave may not be denied to an employee who registered and voted in the local elections in Guam provided the employee would otherwise be entitled to those benefits.

Travel and transportation expenses incident to vacation or home leave for employees whose posts of duty are outside the continental United States (other than certain Presidential appointees) is authorized by 5 U.S.C. 5728(a) which provides:

> (a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of roundtrip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty.

This provision is largely based on section 7 of the Administrative Expenses Act of 1946, as amended, which formerly appeared in 5 U.S.C. 73b–3. With reference to that provision we held in 37 Comp. Gen. 846 (1958) which involved an employee hired in Los Angeles,

California, under an agreement to serve in Hawaii for two years, and who had made Hawaii his home with Los Angeles no longer his legal or actual residence:

> Under the language of the statute, the location of the place of actual residence for both separation and home leave travel purposes is established at the "time" of the employee's appointment or transfer to the overseas post of duty and is not affected by changes in the employee's intentions subsequent to the time of such appointment or transfer. The legislative history of the act does not show a Congressional intent to the contrary. That part of the decision in 35 Comp. Gen. 270 (at page 272 which says that on abandonment of the residence in the United States *subsequent* to the appointment overseas is a basis for barring benefits of return to the United States under the Administrative Expenses Act of 1946, as amended, was not necessary to the conclusion reached in that case and is to be disregarded so far as it is inconsistent with the statement above that the location of the place of actual residence for the purpose of the act is established at the *time* of the employee's appointment or transfer.

What was said in that case would be equally applicable under the provisions of 5 U.S.C. 5728 to persons appointed or transferred for service in Guam. See also 37 Comp. Gen. 848 (1958). As to the regulations generally governing the allowance of travel and transportation expenses in connection with leave for returning to place of residence between tours of duty outside the continental United States, see section 7 of Bureau of the Budget Circular No. A–56.

The question presented is answered accordingly.

[B–168917]

Bidders—Qualifications—Tenacity and Perseverance—Determination Review

The determination by a contracting officer that the low bidder, a small business concern, is nonresponsible for lack of tenacity and perseverance within the meaning of paragraph 1–903.1 (iii) of the Armed Services Procurement Regulation (ASPR), which was based on a negative preaward survey of prior performance and preparation for an award under the current solicitation, is for consideration by the United States General Accounting Office on the merits, notwithstanding the Small Business Administration to whom the determination was submitted did not appeal the determination to the Head of the Procuring Activity within the 5 days prescribed in paragraph 1–705.4(c) (vi) of ASPR, because although the provision was revised to impose further restrictions and safeguards upon the use of the "perseverance or tenacity" exception to the Certificate of Competency procedure, existing bid protest procedures remain unaffected.

Bidders—Qualifications—Tenacity and Perseverance—Capacity to Perform

The finding by a contracting officer that a small business concern lacks tenacity and perseverance because insufficiently prepared to accept an award relates to the concern's capacity and cannot support a determination of nonresponsibility under paragraph 1–705.4(a) of the Armed Services Procurement Regulation, which defines capacity as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know how,' technical equipment and facilities or the ability to obtain them," factors that are covered by the Certificate of Competency procedure.

Bidders — Qualifications — Delivery Capabilities — Evidence Requirements

The assumption in the absence of information indicating otherwise, that the past delivery delinquencies of the low bidder—a small business concern—were his fault is not an adequate basis for concluding that the delinquent deliveries established a lack of perseverance or tenacity, and the matter of the concern's responsibility is for further consideration. If it is found upon review that the low bidder on the basis of substantial evidence does not possess the necessary tenacity or perseverance to do an acceptable job, additional documentation or explanation should be furnished to support the conclusion, otherwise the nonresponsibility determination should be referred on the basis of capacity and credit to the Small Business Administration under the Certificate of Competency procedure.

To the Secretary of the Air Force, March 18, 1970:

Reference is made to a letter dated January 28, 1970, and enclosures, from the Chief, Contract Placement Division, Directorate Procurement Policy, DCS/S&L, submitting for our consideration and decision the protest by Cambridge Waveguide Corporation under invitation for bids F09603–70–B–3344, issued by Robbins Air Force Base.

Cambridge submitted the lowest of the five bids received and the contracting officer requested performance of a preaward survey of the company by the Defense Contract Administration Services Region (DCASR), Boston, Massachusetts. On the basis of the negative findings of the preaward survey report the contracting officer on December 30, 1969, made the following written determination that the company was nonresponsible for failure to apply the necessary tenacity and perseverance to do an acceptable job:

1. The undersigned Contracting Officer hereby determines for the purpose of IFB F09603–70–B–3344 that Cambridge Waveguide Corporation is considered a non-responsible contractor based on tenacity and perseverance within the meaning of ASPR 1–903.1(iii). Said determination is based on the following:

a. Pre-Award Survey Serial Nr 11290041A performed by DCASR-Boston resulted in a recommendation of no award. The negative findings of the PAS were based on unsatisfactory management and planning of past government contracts and the current solicitation.

(1) Cambridge Waveguide Corporation did not interpret the drawings properly thereby they did not consider all the requirements of the IFB. At the time of Pre-Award Survey 07 Nov 69 Cambridge Waveguide Corp. had failed to properly prepare for the pending award as exemplified by his failure to prepare definitive flow-charts with lead time on parts and materials. Mr. J. B. Lewis, Vice President stated he had not prepared such documents. The corporation did not know the complete list of materials required and had not obtained firm quotations on price and delivery of materials. The corporation had not obtained firm quotations on special processing (dip brazing, cadmium plating and passivating) required to manufacture the item. Contractor's measuring equipment was out of date for calibration; numerous items such as signal generators and oscilloscopes had tags affixed stating calibration not required thus demonstrating non-compliance with equipment technical orders by management. Contractor does not have all the necessary test equipment on hand for contract performance and has no plans for procurement of special forming and holding jigs. The contractor has never made this item before and has not made any item with the electronic complexities of the item on this solicitation. The contractor has failed to perform adequate planning in that a complete Bill of Materials nor a break down of required labor were available. Insufficient material quotations were available and no commitment documents on subcontracting had been obtained. Management control and quality assurance are inadequate for the bid item. Calibration of test equipment is

inadequate. Cambridge Waveguide has not made firm supplier arrangements nor have adequate production and material controls been established in order to assure the bid delivery requirements can be made.

(2) During 1969, the company had 18 Government contracts that amounted to less than $25,000.00 with the largest being for $3,451.00. Two contracts were completed during the past year that were under the cognizance of DCASR-Boston. Contract N126-69-C-0010 was delivered 63 days delinquent as material was manufactured to the wrong specification and had to be remade. Contract N126-69-C-1995 was delivered 10 days late due to production problems. PAS states performance record indicates lack of proper management controls. Delinquency information on eleven purchase orders was furnished verbally by contractor QAR personnel with no indication of delinquency reasons. Late deliveries ranged from 10 days to 42 days behind schedule. In absence of information indicating otherwise, they must be assumed to be contractor fault.

(3) Contractor's bid dated 10 Oct 69 and signed by J. Bradford Lewis, Executive Vice President states on reverse side of Standard Form 30 under paragraph 5 that the corporation is not owned or controlled by a parent company. Defense Contract Administration Services Region, Boston, Mass. letter 12 Dec 69 advises that Dun and Bradstreet Reports Herley Industries Inc. acquired Cambridge Waveguide Corporation in late Sep 1969. This is in conflict with information furnished during Pre-Award Survey on 28 Oct 69. Mr. Lewis, Cambridge Waveguide, advised Pre-Award Team that Mr. John Smircina was the President and sole owner of Cambridge Waveguide Corp. Contractor's bid has not been amended to this date to advise of this acquisition. Herley Industries has been a marginal contractor for some time with Contracts F09603-69-C-3896 and F09603-69-C-3509 being under investigation for default action.

(4) Cambridge Waveguide Corp. is deemed nonresponsible due to his failure to apply necessary tenacity or perseverance to do an acceptable job. This finding is an accordance with AFSPP letter of 10 Sep 1969 on Denial of Award of Non-Responsible Contractors and further in accord with the five Comptroller General Decisions attached thereto.

2. The total amount of the proposed contract for Increment "A" initial award is $32,088.00 with a possible maximum of $96,264.00.

3. The findings stated in paragraphs 1a (1) and (2) above are extracted from the Pre-Award Survey Serial Nr 11290041A. (See Tab 4)

4. Within the purview of ASPR 1-903.1(iii), this case is not required to be submitted to the Small Business Administration for consideration in issuing a Certificate of Competency. Protest is denied based on the evidence and circumstances referred to above.

Essentially, Cambridge protests the contracting officer's determination that the company is nonresponsible for lack of tenacity and perseverance. It is the company's position that the contracting officer should have referred the nonresponsibility determination to the Small Business Administration (SBA) for possible issuance of a Certificate of Competency since it is a small business concern. Also, in a letter dated February 20, 1970, and enclosures, counsel for Cambridge has taken issue with several of the contracting officer's findings.

The record before us shows that in accordance with Armed Services Procurement Regulation (ASPR) 1-705.4(c)(vi) as revised by Defense Procurement Circular (DPC) #75 dated December 10, 1969, the determination of nonresponsibility and related information were forwarded to the SBA but no appeal of the contracting officer's determination was taken by SBA to the Head of the Procuring Activity or his designee within 5 days as permitted by this regulation.

It appears to be suggested in your Department's report that the reference of the contracting officer's determination to SBA, and the

failure of that agency to appeal that determination, make it unnecessary to follow the Certificate of Competency procedure. While this would be true in the absency of protest by Cambridge, we do not interpret the revised regulation as setting up the new procedure as a substitute for review by our Offiice of the contracting officer's findings. The purpose of the revision was, as we understand it, to impose further restrictions and safeguards upon the use of the "perseverance of tenacity" exception to the COC procedure, and we find no indication that existing bid protest procedures were intended to be affected. We will therefore consider the propriety of the contracting officer's determination on the merits, without regard to the lack of action by SBA.

In making his determination of nonresponsibility the contracting officer relied upon the authority stated in ASPR 1-903.1(iii) which provides as follows:

1-903 Minimum Standards for Responsible Prospective Contractors.
1-903.1 *General Standards.* Except as otherwise provided in this paragraph 1-903, a prospective contractor must:

* * * * * * *

(iii) have a satisfactory record of performance (contractors who are seriously deficient in current contract performance, when the number of contracts and the extent of deficiency of each are considered, shall, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to meet this requirement). Past unsatisfactory performance, due to failure to apply necessary tenacity or perserverance to do an acceptable job, shall be sufficient to justify a finding of nonresponsibility. (In the case of small business concerns, see 1-705.4(c)(vi) and 1-905.2)

ASPR 1-705.4(c)(vi) as revised by DPC #75 provides, in pertinent part, that a determination by a contracting officer that a small business concern is not responsible pursuant to 1-903.1(iii), must be supported by substantial evidence documented in the contract files.

While we recognize that a contracting officer's determination of a bidder's responsibility involves the exercise of a considerable range of discretion, where the bidder is a small business concern the contracting officer's determination of responsibility is subject, so far as concerns capacity and credit, to the authority of SBA under section 8(b)(7) of the Small Business Act, Public Law 85-536, 15 U.S.C. 637(b)(7), to certify to Government procurement officers with respect to the capacity and credit of a small business to perform a specific Government contract. We have held that a determination of nonresponsibility of a small business concern on the basis of a record of substantial delivery delinquencies without referral to SBA for certification of the concern's capacity and credit is unjustified absent a finding, based on substantial evidence, that the delinquencies arose out of something other than capacity and credit and are therefore not within the scope of a SBA certification. 43 Comp. Gen. 298 (1963). We stated that a limitation on the authority of the contracting officer in determin-

ing the responsibility of a small business bidder resulted from the certification authority vested in SBA and that such limitation could not be overcome by simply concluding that the reasons for the contracting officer's negative determination belong in the category of factors which could not be covered by the SBA certification.

We have carefully reviewed the above quoted determination by the contracting officer and the supporting documentation in the accompanying contract file. The findings stated in paragraph 1a(1) of this determination involve the sufficiency of preparations taken by Cambridge in anticipation of award under the current solicitation and must be deemed to relate to the firm's capacity, which the regulation defines as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know-how,' technical equipment, and facilities or the ability to obtain them." See ASPR 1-705.4(a). Since the findings in the above cited paragraph all relate to whether Cambridge can perform, they are covered by the Certificate of Competency procedure and cannot support a determination of nonresponsibility based upon lack of tenacity or perseverance under prior Government contracts.

With regard to Cambridge's past unsatisfactory performance, the contracting officer states in paragraph 1a(2) of his determination that Cambridge was delinquent in delivery under 11 purchase orders delivered during 1969 and, although he had no knowledge of the reasons for the delinquent deliveries, he states they must be assumed, in the absence of information indicating otherwise, to be the contractor's fault. In view of the applicable regulatory requirement that such a determination be supported by substantial evidence documented in the contract file and for the reasons stated in our decision 43 Comp. Gen. 298 (1963) as discussed above, we do not believe that such an assumption is an adequate basis for concluding that the delinquent deliveries established a lack of perseverance or tenacity.

The contracting officer's determination and the contract file indicate a reason for only two delinquent deliveries, with respect to the more recent of which counsel for Cambridge has submitted the contractor's copy of contract N126-69-C-1995, which appears to show that the Government erroneously computed the date by which delivery supposedly was required, and he alleges that Cambridge was not 10 days delinquent in delivery on this contract as stated in the survey report. This contract actually provided for delivery within 120 days *after receipt of contract*, rather than 120 days after date of execution of the contract by the Government, which apparently was the basis for the

allegation of delinquency. In any event, a delay of 10 days on a 120 day delivery schedule because of "production difficulties" appears to be a dubious basis for the determination. With respect to the delinquency of 63 days on contract N126-69-C-0010, the contracting officer states that this resulted from the fact that material was manufactured to the wrong specification and had to be remade, indicating to him a lack of proper management controls. We note, however, that delivery under this contract was completed more than a year ago, and the reason given for the delinquency may as well have resulted from a bona fide error in interpretation as from any lack of tenacity or perseverance. Certainly the record does not negate the possibility that the mistake may properly have been attributable to factors included within the term "capacity," as defined in the regulations.

The contracting officer also raises a question concerning the record of performance of Herley Industries with which the protestor has apparently become affiliated. While Herley's record of performance might have some relevance to a determination of Cambridge's responsibility pursuant to ASPR 1-904.3(b), the contracting officer merely states the conclusion that Herley is a marginal contractor and that two referenced contracts are under investigation for default. We have, however, been furnished with copies of correspondence from the Government's contracting officers regarding the two contracts allegedly under investigation for default, which show that in one case the Government recently approved the first article and authorized contractor to proceed in accordance with the contract terms, and in the other case that the contracting officer recently advised Herley that the Government was unable to complete first article inspection and evaluation in the time specified in the contract. In addition, counsel for Cambridge states that Herley is now providing Cambridge with considerable financial and management support, the lack of which caused some difficulty with previous contracts.

On the basis of the present record we must conclude that the evidence of record is not sufficient to support a determination that past performance establishes a lack of tenacity and perseverance, and the matter is therefore for further consideration as to Cambridge's responsibility. Enclosed herewith for consideration in connection therewith is a copy of the correspondence submitted here by counsel for Cambridge. If upon further review it should again be found that Cambridge does not possess the necessary tenacity or perseverance to do an acceptable job, it is requested that you furnish this Office with any additional documentation or explanation to support such a conclusion. Otherwise, it appears that the contracting officer's determination of nonresponsibility should be referred to SBA for review under the Certificate of Competency procedure.

[B-168791]

Appropriations—Restrictions—Buy American Requirement

Notwithstanding the cotton from which pads are to be manufactured in Japan for delivery in the United States is of domestic origin, the pads offered by the low bidder are considered of foreign origin and subject to the expenditure restriction appearing in the Department of Defense Acts since first introduced in 1953, and as the restriction was not waived on the basis the item cannot be procured in the United States, and as the item is not for use overseas, the low bid was properly rejected. The fact that the invitation refers to cotton "grown *or* produced in the United States" does not denote an alternative and make the place of production irrelevant, in view of the legislative history of the 1953 act, evidencing the congressional intent that any article of cotton may be considered "American" only when the origin of the fiber as well as each successive stage of manufacturing is domestic.

To National Graphics, Inc., March 19, 1970:

Reference is made to your protest by letters dated November 25 and 26, 1969, to the Defense Construction Supply Center (DCSC), Defense Supply Agency (DSA), and by telegram and letter dated January 12, 1970, and subsequent correspondence to our Office, against the award of a contract to any other bidder under invitation for bids (IFB) DSA 700-70-B-1086, issued by DCSC under date of October 7, 1969.

The IFB requested F.O.B. destination bids to furnish 4,000 cases of cotton lithographic wiping pads, 1,500 cases to be delivered to Columbus, Ohio, and 2,500 cases to Ogden, Utah. By an amendment dated October 29, the following pertinent clauses were included in the IFB terms:

6.106 IMPORT DUTY

Bidders offering other than domestic source end products, as defined by Clause 14, 7.101 General Provisions, which are manufactured and shipped from points outside the United States, must indicate below the amount of duty and estimated transportation costs included in the price of each item.

ITEM NO.	AMOUNT OF DUTY	ESTIMATED TRANSPORTATION COSTS
	(To be indicated in Solicitation)	

6.125 ASPR 6-305

PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES (1967 SEP)

The Contractor agrees that there will be delivered under this contract only such articles of food, clothing, cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric, coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) as have been grown, reprocessed, reused, or produced in the United States, its possessions, or Puerto Rico; *provided*, that this clause shall have no effect to the extent that the Secretary has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices; *provided further*, that nothing herein shall preclude the delivery of foods under this contract which have been manufactured or processed in the United States, its possessions, or Puerto Rico.

The latter clause states the restrictions contained in section 523 of the Department of Defense Appropriation Act of 1969, 82 Stat. 1120, 1133.

Nine bids were received by DCSC and opened on November 7 as

scheduled. Your bid, quoting a unit price of $20 with a 20-day prompt payment discount of 30 percent, net $14, for an end item manufactured in Japan from cotton produced in the United States, was ostensibly low. The remaining bids, ranging from a unit price of $18.08 offered by Columbia Ribbon & Carbon Manufacturing Co., Inc. (Columbia), to $19.25 per unit, all offered a domestic item manufactured by one source, Kendall Company (Kendall), Walpole, Massachusetts.

Examination of your bid disclosed that you had made the notation "APPROX $1.80/CASE" on page 7 in the space provided for entry of the amount of import duty. In a letter dated October 29, 1969, however, you informed DCSC that the normal duty is $2.23 per case but the estimated amount of $1.80 was used due to variation in the factory price of the end item. DCSC therefore requested you to provide documentary proof of the amount of duty paid on the end item, and you furnished certain papers with a letter dated November 12 stating that the exact duty was fractionally more than $2.12 per case.

By letter dated November 21, 1969, the contracting officer notified you that your bid could not be considered for award. The letter reads, in part, as follows:

> Your bid of 20 October 1969 submitted in response to the subject solicitation indicates that the cotton pads offered will be manufactured in Japan of domestic cotton.
>
> Because these articles are composed of cotton, they are subject to the restrictions of Section 523 of Defense Appropriation Act of 1969, the Second Supplemental Appropriation Act of 1969, and the Continuing Appropriation Act of 1970, the requirements of which are implemented by Armed Services Procurement Regulation 6-302 and 6-305 and incorporated into the subject solicitation under Clause 6.125 thereof.
>
> Basically, these requirements are that no article of cotton (whether in the form of fiber or yarn or contained in materials or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions may be procured by the Department of Defense. The Comptroller General of the United States has held that these restrictions require that in order for a cotton product to be considered to be of domestic origin, the origin of the raw fiber as well as each successive stage of manufacture must be domestic. Accordingly, since the items offered by your firm are to be manufactured in Japan, we cannot consider that they meet the requirements of the Defense Appropriation Acts.

In your protest to DCSC against the rejection of your bid, you pointed out that award to you would result in a saving of $16,200 on this procurement alone and that like savings could be realized on other similar procurements. Further, you took issue with a statement which DCSC had apparently made to you by telephone to the effect that the appropriation act restriction requires the cotton to be grown *and* manufactured in the United States. In this connection, you stressed that the Preference for Certain Domestic Commodities clause quoted above, which is prescribed by Armed Services Procurement Regulation (ASPR) 6-305, pursuant to the appropriation restriction referred to,

applies to "cotton * * * grown * * * *or* produced in the United States * * *." Presumably, it is your position that growth in the United States of the cotton from which the pads are made will serve to satisfy the statutory restriction, regardless of the place of production of the end item being purchased.

In addition, in the apparent belief that the procurement could be authorized under the exception in the Buy American Act of March 3, 1933, 47 Stat. 1520 (41 U.S.C. 10a–d) relating to purchase of items to be used outside the United States, and that even greater savings might be accomplished, you inquired whether the item is to be so used, whether it could be shipped from Japan directly to the using activities, and whether inspection and acceptance could be accomplished in Japan.

On the matter of competition, you stated that you and Kendall are the only sources of the procurement item; that the competition afforded by you has resulted in reduction of the previous prices of the item by 44 percent; and that exclusion of your bid from consideration will permit establishment of the market price by the sole domestic source at its own level with a resulting return to the earlier high price levels.

Finally, you stated that sometime ago Kendall indicated to you that it used long cotton staple fibers imported from Egypt or Pakistan to overcome certain problems in producing the end item, and you therefore urged that the matter be investigated from the standpoint of a possible violation of the contract and regulations.

On December 3, DCSC addressed a letter to Columbia requesting a written statement from either Columbia or Kendall as to the source of the cotton to be used in the end item proposed to be furnished by Columbia. The reply was unequivocally to the effect that the pads offered by Columbia are made of cotton grown and processed in the United States.

By letter dated December 5, 1969, DCSC advised you that the matter had been referred to Headquarters DSA for consideration of the issuance of a Secretarial determination invoking the exception authorized by the appropriation act restriction. The letter also included the following pertinent statements:

> In regard to your question concerning the ultimate destination of the supplies to be furnished under the subject solicitation, we find that it is not practicable to predetermine destinations in advance of receipt of actual demands. We have found that the most efficient procurement practice is to distribute these products to our depots according to current demand history.
>
> * * * * * * *
>
> We are unable at this time to state whether inspection and acceptance can take place in Japan, although the matter will receive our full consideration should the Appropriation Act restrictions be waived.

Following receipt of the statement from Columbia as to origin of the cotton, and of a denial by DSA Headquarters of waiver of the

appropriation act restriction, DCSC notified you by telegram dated January 13, 1970, of its intent to make award to Columbia as the low responsive, responsible bidder offering a domestic item and accorded you an opportunity to submit a formal protest by January 16. The protest to our Office ensued.

In a letter dated February 24, 1970, you request our Office to advise you whether the item you offer may be purchased by the Government in light of the provisions in the Department of Defense appropriation act. You assert that if, as you understand, a good percentage of the orders for the item are for use outside the United States, the Buy American Act does not apply, and you state that you are willing to accept award even though the actual duty of $2.12 will result in a loss to you since you wish to set a precedent for future orders. In addition, you advise that you are not pressing the issue of the origin of the raw cotton used in the product supplied by Kendall.

The procurement is subject to the provisions of the Department of Defense Appropriation Act, 1970, Public Law 91–171, December 29, 1969, 83 Stat. 469, section 624 of which reads, in pertinent part, as follows:

> No part of any appropriation contained in this Act shall be available for the procurement of any article of * * * cotton, * * * (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that a satisfactory quality and sufficient quantity of * * * any form of cotton, * * * grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations * * *.

Considering first the words "grown, reprocessed, reused, or produced in the United States," in the statutory restriction, we are mindful that the word "or" ordinarily is construed as denoting an alternative. However, reference to the legislative history of the Department of Defense Appropriation Act, 1953, 66 Stat. 517, in which the specific reference to cotton and wool and the words "reprocesses" and "reused" were first included in the restriction, clearly shows that the intent of the Congress was that any article of cotton (or wool) would be considered "American" only when the origin of the raw fiber, *as well as each successive stage of manufacture*, is domestic. See B–110974, September 5, 1952. At the time the restriction was first enacted, the Armed Services Procurement Regulation implementing the Buy American Act provided that in determining the origin of supplies to be purchased only the end item, and components directly incorporated therein, would be considered, so that clothing made in the United States from cloth made in the United States would be domestic, regardless of the origin of the thread, yarn, or fibers from which the cloth was made. The purpose of

the Congress was to overrule that regulation with respect to articles made of wool or cotton, but there is nothing in the legislation as written, or in the relevant legislative history, which could be construed as indicating any intention to modify or relax the basic mandate of the Buy American Act, that manufactured articles purchased for Government use be manufactured in the United States, as clarified and emphasized by the amendatory act of October 29, 1949, 63 Stat. 1024 (41 U.S.C. 10d).

We are not aware of any change of intent upon the part of the Congress with respect to the similar language which has since appeared in each annual appropriation act for the Department of Defense. Accordingly, we must conclude that the manufacture in Japan of the end item offered by you, even though it be made of cotton grown in the United States, brings the item within the purview of the restriction. This being so, procurement of the item may be made from you only if it can be justified under one of the exceptions permitted by the statutory provision as implemented by ASPR 6–303.

As to procurements outside the United States in support of combat operations, this exception, according to the legislative history of the Department of Defense and Appropriation Act, 1954, 67 Stat. 336, was intended to be restricted to purchases of items outside the United States for use in areas where combat operations or hostilities occur. Clearly, the instant procurement, which calls for delivery within the United States, and does not appear to be exclusively for use in such areas, does not come within this exception.

As to the exception relating to nonavailability of items grown or produced in the United States, of satisfactory quality and in sufficient quantity, as and when needed, at United States market prices, the determination by the Secretary concerned is not governed by the fact that the foreign grown or foreign produced item is offered at a much lower price than United States grown or produced items. Rather, the determination must be based on consideration of United States market prices for domestic grown or produced items. B–110974, *supra*. DSA has declined to make any such determination in this case, and we see no basis on which we may properly question its decision.

In the circumstances, neither exception in the appropriation act restriction being applicable, DCSC is precluded from purchasing the item of Japanese manufacture which you offer. Therefore, we concur with the contracting officer's determination that your bid may not be considered for award. With respect to future procurements, you are advised that no different conclusion would appear to be warranted in similar circumstances if the appropriation acts involved include the same or substantially similar restrictive language.

In the light of these conclusions, discussion of other questions suggested by you which relate to the applicability of the Buy American Act, as distinct from the appropriation rider, is not required.

For the reasons stated, we are unable to conclude that the actions which have been taken by DCSC and DSA have been other than in accord with the governing statutes and regulations. Accordingly, your protest is denied.

[B-160096]

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Reenlistment Prior to Approval of Training

The eligibility criteria established in paragraph 7d(2) of Bureau of Naval Personnel Instruction 1133.18B, dated December 1968, to the effect that petty naval officers who reenlist to meet the minimum service requirements for the Navy Enlisted Scientific Education Program (NESEP) or for other programs leading to commissioned status are not eligible for the variable reenlistment bonus authorized pursuant to 37 U.S.C. 308(g), does not preclude the additional eligibility requirement in paragraph 7d(2), deferring payment of the bonus to members who reenlist subsequent to applying for NESEP training, pending the results of their application, and providing for payment only to members not selected for training, as the subsection is in accord with paragraph V.A. 6 of the Department of Defense Instruction No. 1304.13, which implements 37 U.S.C. 308(g).

To the Secretary of the Navy, March 20, 1970:

Further reference is made to letter dated January 28, 1970, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), requesting a decision as to whether in view of a conclusion reached in decision of March 21, 1969, 48 Comp. Gen. 624, the Navy may continue to restrict payment of the variable reenlistment bonus in the manner set forth in paragraph 7d(2) of Bureau of Naval Personnel Instruction 1133.18B, dated December 19, 1968. Your request was assigned Department of Defense Military Pay and Allowance Committee Submission No. SS-N-1064.

Paragraph 7d(2) of Bureau of Naval Personnel Instruction 1133.18B provides that:

> VRB payments for reenlistments contracted subsequent to NESEP application but prior to selection for such training will be held in abeyance pending results of the section process. Applications not selected for training, and otherwise eligible, may receive VRB. Those selected for NESEP will not receive VRB.

The Assistant Secretary says that in accordance with those provisions the Navy is not paying the variable reenlistment bonus to members who are eligible therefor when they reenlist in the Regular Navy at the expiration of their first enlistment and who, prior to reenlistment, submitted an application for the Navy Enlisted Scientific Education Program (NESEP) which has yet to be acted upon by the Navy when the reenlistment occurs. Also he says that payment is only made to

such members when they are not selected for the program. He expresses the view that in the light of paragraph V.A. 6 of Department of Defense Instruction No. 1304.13, dated August 15, 1968, and the intent of the Congress as expressed during the legislative hearings on the statutory provisions involved, 37 U.S.C. 308(g), the pertinent regulation is valid and should continue to be the policy as it relates to eligibility for the bonus, but that our decision of March 21, 1969, has caused some doubt as to whether the restriction is valid.

In a decision to the Secretary of Defense, dated February 8, 1968, 47 Comp. Gen. 414, we concluded that no authority exists for the payment of a variable reenlistment bonus to enlisted members who have been selected for college training under the Navy Enlisted Scientific Education Program or other similar programs and who are reenlisted for the purpose of meeting the obligated service requirements for such training.

In the decision of March 21, 1969, we advised the Secretary of Transportation that the February 8, 1968, decision does not preclude a member from receiving a variable reenlistment bonus in an otherwise proper case if he reenlists before he has been selected for such training and his reenlistment is in fact for the purpose of serving in the specialty for which the bonus is authorized. On the premise that a member otherwise entitled to a variable reenlistment bonus, who submits his application for training leading to a commission under the Officer Candidate School or Aviation Cadet program and is discharged upon expiration of enlistment and reenlisted prior to his selection for such training, is obligated to serve for the period of his reenlistment contract, we said that it could not be concluded that his reenlistment was for the sole purpose of meeting the obligated service requirements of the educational program and since he became entitled to the bonus at the time of his reenlistment his subsequent selection for such officer training would not change his entitlement.

Subsection 308(g) of Title 37, U.S. Code, provides in pertinent part that, under regulations to be prescribed by the Secretary of Defense, a member of a uniformed service who is designated as having a critical military skill and who is entitled to a reenlistment bonus under subsection (a) of that section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The statute does not by its own terms confer any entitlement to the variable reenlistment bonus. It permits the issuance of regulations authorizing its payment and, with the exception of the critical military skill and entitlement to the regular reenlistment bonus requirements of the statute, eligibility criteria for entitlement to the bonus are left to administrative regulation.

Implementing regulations promulgated by the Department of Defense are contained in Department of Defense Instruction No. 1304.13, dated August 15, 1968, and Department of Defense Military Pay and Allowances Entitlements Manual. Paragraph V.A. of the Department of Defense Instruction is, in pertinent part, as follows:

V. Individual Eligibility for Receipt of Awards

A. *Variable Reenlistment Bonus.* An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:

* * * * * * *

6. Meets such additional eligibility criteria as may be prescribed by the Secretary of the Military Department concerned.

Paragraph 10911 of Department of Defense Military Pay and Allowances Entitlements Manual provides:

10911 Variable Reenlistment Bonus (VRB)

a. *Entitlement.* * * * Members in critical skills for which both proficiency pay and the VRB are authorized may receive both payments, providing eligibility requirements for each are met.

With regard to the Navy, eligibility criteria for the bonus are prescribed in Bureau of Naval Personnel Instruction 1133.18B, dated December 19, 1968, and paragraph 7d thereof expressly stipulates that petty officers reenlisting to meet the prescribed minimum service requirements for the Navy Enlisted Scientific Education Program or for other programs leading to commissioned status are not eligible for the variable reenlistment bonus for such reenlistment. Supplementing those provisions, subparagraph 7d(2) establishes a further eligibility requirement by deferring payment of the bonus to otherwise eligible members who reenlist subsequent to their application for NESEP training, pending the results on their applications, and provides for payment only to members not selected for such training.

We find nothing in the law which may be viewed as precluding the establishment of an eligibility requirement such as that contained in subparagraph 7d(2) of the Instruction and its establishment appears to be clearly authorized by paragraph V.A.6 of the Department of Defense Instruction. In our opinion, therefore, the provisions of subparagraph 7d(2) are not invalid. The decision of March 21, 1969, did not involve a regulation similar to paragraph 7d(2) and it is not to be considered as requiring a change in that regulation.

Your question is answered accordingly.

[B-168635]

Sales—Disclaimer of Warranty—Removal Difficulties

The high bidder under a sales contract disposing of cranes who inspected the surplus property to check the size, location, condition, and circumstances affecting removal is not entitled to rescission of the contract because the

cranes, with or without dismantling, can only be removed at prohibitive cost. The sales record evidences the actions of the Government were taken *in good* faith, and the sale having been made on an "as is" and "where is" basis without recourse against the Government and without guaranty, warranty, or representation as to quantity, kind, character, quality, weight, or size, the contractor assumed the risk of conditions which impaired removal, and the fact that it was economically unfeasible, or even too dangerous, to remove the cranes does not relieve the contractor from his contractual obligations.

To Edward Levy Metals, Inc., March 20, 1970:

Further reference is made to your letter of December 11, 1969, requesting rescission of Defense Surplus Sales Office (DSSO) contract No. 27-9075-004 issued by DSSO, Columbus, Ohio.

Bids responding to sales invitation No. 27-9075 for 11 items of surplus property consisting of gantry cranes, overhead cranes, and a rail scale were opened on March 13, 1969. Items 1 and 2, covering traveling gantry cranes, were awarded to your firm on March 14, 1969, as the lowest bidder on those items. The terms of sale provided that upon payment therefor the property was to be removed by April 28, 1969. The two items awarded to you were stated to be located outside of the Gateway Army Ammunition Plant, St. Louis, Missouri, and were advertised to be "Used—Fair Condition—Repairs Required."

By letter of April 8, 1969, to the sales office, you requested cancellation of the contract and return of your $15,000 bid deposit. You stated that "In addition to the cost of bringing in and out the necessary dismantling equipment over government-controlled tracks, due to the relatively short radius on Gateway tracks over which the dismantled crane must move, it would be necessary to cut the bridge into two pieces and refabricate it before re-erection." You say that this was not contemplated nor anticipated from the loading note in the invitation. On July 3, 1969, the Defense Supply Agency, Columbus, Ohio, responded to your correspondence advising you that it had no authority to rescind the contract and refund your bid deposit, but that in order to enable you to remove the cranes without having to cut the bridges into two pieces and refabricate them, that office was attempting to arrange for their removal over the Scullin Steel Company property, which company leases to the Government the land on which the cranes are situated. You were reminded therein that such arrangement, or lack of it, did not affect your obligation under the contract to pay for and take delivery of the cranes. You were further advised that as the matter then stood, the following options were available to you:

a. Take delivery of the cranes as specified in the contract.
b. Delay removal pending a determination as to whether such may be accomplished over Scullin Steel Company land (rather than Government rail spur through Gateway Army Ammunition Plant).
c. Default on payment and removal in which case you would forfeit 20% of the purchase price as liquidated damages.

Permission for removal over Scullin property was not forthcoming and it has been determined that access to the leased area is confined to the rail line through the Gateway plant designated in the invitation. In your letter of December 11, 1969, to this Office, you state that "Scullin Steel Company is not only uncooperative, but as a matter of fact, hostile, and has imposed conditions that make the cost of removal of these cranes prohibitive." You base your request for rescission of the contract on the fact that removal through the Gateway plant will necessitate dismantling and reassembling the cranes; that this fact was not made clear in the invitation; and that, therefore, the property should have been described as scrap. Further, you state that the problem relating to the use of rail facilities on the Government-leased easement through the Scullin Steel Company property should have been mentioned to prospective contractors.

The subject invitation for bids contained DLSC Form 653, General Information and Instructions—All Sales. Pertinent conditions contained in this form provide as follows:

1. INSPECTION. The bidder is invited, urged and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation.

2. CONDITION AND LOCATION OF PROPERTY. Unless otherwise specifically provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." If it is provided therein that the Government shall load, then "where is" means f.o.b. conveyance at the point(s) specified in the Invitation. The description of the property is based on the best information available to the sales office. However, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. * * *

* * * * * * *

7. DELIVERY, LOADING, AND REMOVAL OF PROPERTY. (a) Unless otherwise provided in the Invitation, the Purchaser shall be entitled to obtain the property upon full payment therefor, with delivery being made only from the exact place where the property is located within the installation. The Purchaser must make all arrangements necessary for packing, removal, and transportation of property. The Government will not act as liaison in any fashion between the Purchaser and carrier, nor will the Government recommend a specific common carrier. Loading will only be performed as set forth in the Invitation. * * *

* * * * * * *

27. GUARANTEED DESCRIPTIONS. Except as provided in subparagraphs a and b of this clause, and notwithstanding any other terms and conditions of the Invitation for Bids to the contrary, the Government hereby warrants and guarantees that the property to be delivered to the Purchaser under any contract resulting from the Invitation for Bids will be as described. * * *

* * * * * * *

b. THE GOVERNMENT DOES NOT WARRANT OR GUARANTEE ANY OF THE FOLLOWING:

* * * * * * *

(2) Stated condition of the property, the total cost of the property, the estimated total weight, the estimated shipping dimensions, suggested uses of the property, and its fitness for any use or purpose are not guaranteed.

The loading table, page 15 of the invitation referring to condition No. 7, General Sale Terms and Conditions, provides as follows:

> Purchaser shall provide all labor and equipment for dismantling and/or loading of property. Purchaser shall make necessary arrangements with the St. Louis-San Francisco Railroad for furnishing cars as needed to deliver and remove equipment required for dismantling and/or loading, and cars for delivery of purchased property. Rail cars will be delivered to the point where Government rail joins Frisco tracks. Switching of cars between that point and the property location will be accomplished by Government owned locomotive and will be limited to the period 8:30 AM to 11:30 AM and 1:00 PM to 3:00 PM, with the exception that switching is not to interfere with production requirements of the operating contractor at Gateway Army Ammunition Plant.

The provision that removal be made over the Government-controlled spur track is clear.

Your request for rescission of the contract is not supported by the facts of record or by applicable law. No representation was included in the invitation for bids or made by any authorized Government employees that the property you purchased could have been removed without dismantling. In fact, bidders were expressly informed of their responsibility for dismantling by the above provisions of the loading table. Both paragraphs 2 and 27(b)(2) are disclaimers of warranty and where such provisions are included in the contract of sale, it has been held that, in the absence of bad faith or fraud, buyers have no right to expect, have notice not to expect and contract not to expect any warranties whatever, the purpose and effect of these provisions being to impose all risks upon the buyer. *United States* v. *Hathaway*, 242 F. 2d 897 (1957); *American Sanitary Rag Co.* v. *United States*, 142 Ct. Cl. 293 (1958). It is apparent that the situation of which you complain, and upon which you base your claim for rescission, did not develop subsequent to the date of the sale but was in fact a preexisting condition. The record reveals that you inspected the property prior to bidding and ascertained, or could have ascertained by adequate inspection, its size, location, condition, and the circumstances affecting removal. The later investigation of the possibility of an alternative removal route through the Scullin property was undertaken for your convenience and, as you were advised by the holding agency, had no bearing on your responsibilities under the contract.

You further contend that the property should have been advertised as scrap and that the property must necessarily be reduced to that status for removal purposes. The sales information included in the invitation was based on the best information available to the sales office, and there is no evidence of record indicating that the sales actions were taken other than in good faith. Accordingly, your allegation, in effect, that the item description was made in bad faith is not supported by the record.

Even if it be conceded that a mutual mistake of fact existed at the time of the sale as to the description of the cranes and their removal, such mistake would render the contract voidable only if the parties failed to agree that the risk of such mistake was to be assumed by the purchaser. In view of the cited invitation provisions, it must be concluded that you agreed to assume the risk of any difficulty that might be encountered in removing the property. See *United States* v. *Hathaway*, *supra*, where, on facts almost identical to those present here, the United States Ninth Circuit Court of Appeals denied a purchaser's claim for relief under a surplus sales contract with the Government. In the *Hathaway* case the Government sold four sets of steel lock gates which were situated below the level of the waters of the lake formed by Bonneville Dam. After removing two lock gates the plaintiff discovered that one of the remaining two locks was sprung, and that this condition, combined with the depth of the locks and the accumulated silt and debris, made removal of the locks economically unfeasible and too perilous for diving operations. Work on the locks was then terminated, the plaintiff brought suit for breach of contract, and the Government counterclaimed for the unpaid balance due on the contract. The contract contained a clause entitled "Conditions of Property" which embodied provisions essentially the same as those contained in paragraph 2 of the General Sale Terms and Conditions in the present contract. The court held that under the contract of sale of steel offered by the Government on an "as is" and "where is" basis without recourse against the Government and without guaranty, warranty or representation as to quantity, kind, character, quality, weight or size, the contractor assumed the risk of conditions which impaired removal of the steel and the fact that it was economically unfeasible and too dangerous to remove the steel did not relieve the contractor from his contractual obligations. The court stated, in pertinent part, as follows:

> Prospective buyers were informed that the locks were located beneath the water surface. They were urged to inspect the locks before bidding and admonished by the express language of the contract that the Government would not bear the responsibility of failure to inspect. Ample opportunity was afforded for this purpose.
>
> * * * One can hardly envisage contractual terms which could more clearly impose on the purchaser the risk of loss resulting from such contingencies as here occurred. This was the very essence of the bid invitation. The Government's manifested intention was to shift the burden of responsibility for any fortuitous conditions which might arise upon the bidder. There can be no other interpretation given the plain and unequivocal terms of the bid invitation.
>
> * * * * * * *
>
> Plaintiff bought on a "grab bag" basis. The very term "as is, where is" tells the buyer to beware—to investigate. Plaintiff was aware that risks existed. He ventured and lost. His bargain was bad. However, the law provides no remedy for bad bargains willingly risked with wide opened eyes.
>
> The determination that plaintiff assumed the risk of the conditions which impaired the removability of all the steel answers not only the question as to his rights but also the matter of his duties. Just as the vicissitude of the sprung

lock and the accumulated silt does not bestow any rights in him neither does it absolve him of his obligations. This is not a case of either impossibility or commercial frustration justifying excuse from performance, for plaintiff assumed the risk of the difficulties he encountered. * * *

Accordingly, it must be concluded, as in the *Hathaway* case, that you assumed any and all risks involved in removing the cranes purchased. Your request for rescission of the contract is therefore denied.

[B-164281]

Pay—Retired—Grade, Rank, Etc., at Retirement—Service in Higher Rank Than at Retirement

A payment of retired pay computed at the pay of the higher grade in which a member or former member of the Armed Forces had served satisfactorily, without regard to whether the higher grade was of a temporary or permanent status, may be authorized, or credit passed in the accounts of disbursing officers for payments made, in view of the judicial rulings so holding, even though the Armed Force in which the individual held the higher grade is not the service from which he retired, subject of course to the statute of limitation contained in the act of October 9, 1940, 31 U.S.C. 71a., and administrative approval that the service at the higher grade was satisfactorily performed, if such a determination is required by statute. 47 Comp. Gen. 722, modified.

To the Secretary of Defense, March 23, 1970:

Further reference is made to letter of May 7, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision whether the Court of Claims decision in *Miller* v. *United States*, 180 Ct. Cl. 872 (1967), affects our decisions that, with certain exceptions, the retired pay of a military member may not be based upon a higher grade previously held in a branch of the Armed Forces other than that in which serving at the time of retirement. A discussion relating to that question was contained in Department of Defense Military Pay and Allowance Committee Action No. 413.

By decision of June 10, 1968, 47 Comp. Gen. 722, we advised you that, in view of the reservation of the Court of Claims in the *Miller* case concerning the correctness of our decisions under section 511 of the Career Compensation Act, 63 Stat. 829, 37 U.S.C. 311, and the differences between the various statutes with respect to retired grade, we considered the matter too doubtful to warrant our holding that the rule in the *Miller* case should be extended to similar or related statutes.

We have recently been advised by the Assistant Attorney General, Civil Division, that the Department of Justice is unaware of any argument not previously presented to the Court of Claims which might persuade it to reverse its holdings in *Satterwhite* v. *United States*, 123 Ct. Cl. 342 (1952); *Friestedt* v. *United States*, 173 Ct. Cl. 447 (1965); *Neri* v. *United States*, 145 Ct. Cl. 537 (1959); *Powers* v. *United States*, 185 Ct. Cl. 481 (1968); and *Miller* v. *United States*, *supra*, which he

stated indicate the disposition of the Court to hold that the language in the various statutes indicates the intent of Congress that the retired pay of members of the armed services should be based upon the highest rate of pay received on active duty.

Upon further review of the question it appears that the Department of Justice has presented to the Court of Claims every argument suggested by us in this class of cases. On the basis that further litigation would result in no material change in its interpretation of the law, we have concluded that we will follow the broad principle enunciated by the Court of Claims in those cases.

In other words, where an existing statute authorizes computation of the retired pay of a member or former member of an armed service on the basis of the pay of the grade in which the individual had served satisfactorily and which is higher than the pay of the grade on which he otherwise is entitled to compute his retired pay, we will authorize payment, or pass to credit in the disbursing officer's accounts, a payment of retired pay computed on the pay of the higher grade, without regard to whether that grade was a temporary or permanent grade, even though the armed service in which the individual held that higher grade is not the service in which he retired, subject, of course, to the act of October 9, 1940, ch. 788, 54 Stat. 1061, 31 U.S.C. 71a. However, such action in any particular case will depend upon an appropriate administrative determination as to satisfactory service where such determination is required by applicable statutes.

Our decision of June 10, 1968, 47 Comp. Gen. 722, is modified accordingly.

[B–168733]

Bidders—Qualifications—Financial Responsibility—Reconsideration

Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for a nonresponsible bidder to improve its position after a contracting officer's determination of nonresponsibility has been confirmed by the Small Business Administration (SBA), where a low bidder held financially nonresponsible on the basis of a preaward survey and SBA's adverse findings, has concluded negotiations for a technical data rights and patent license contract that involves millions of dollars and provides for an immediate substantial advance payment, the bidder's responsibility should be reconsidered and if necessary, time permitting, reviewed by SBA, because of the mandate in Armed Services Procurement Regulation 1–905.2, that financial resources should be obtained on as current a basis as feasible with relation to the date of contract award.

To Breed Corporation, March 25, 1970:

Further reference is made to your telegram of December 31, 1969, and subsequent correspondence protesting against the award of a contract to any other bidder under invitation for bids No. DAAA–

15–70–B–0158, issued by the United States Army's Edgewood Arsenal, Edgewood, Maryland.

The solicitation, issued on September 30, 1969, invited bids on 53,350 Fuzes, M918, with a priority designator of "02", in support of Southeast Asia operations. Forty-one sources were solicited and seven bids were received and opened on October 28, 1969, the date set for opening. Your firm submitted the lowest price at $5.388 per unit, and the AMRAM Manufacturing Corporation submitted the next lowest price at $5.59 per unit.

Since you were the lowest bidder, the contracting officer requested a preaward survey to be conducted of your firm. The survey was conducted by the Defense Contract Administration Services Region (DCASR), Springfield, New Jersey. On November 12, 1969, the survey team made a recommendation of "no award." The basis stated by the survey team for this recommendation was your failure to satisfactorily demonstrate your capability in the following areas:

(1) Production capability;
(2) Plant facilities and equipment;
(3) Financial capability;
(4) Plant safety; and
(5) Ability to meet required delivery schedules.

Thereafter on November 17, 1969, the contracting officer made a determination that you were not a responsible bidder within the standards set forth in section 1–903 of the Armed Services Procurement Regulation (ASPR), and the matter was referred to the Small Business Administration (SBA) for consideration of a possible issuance by that agency of a Certificate of Competency (COC). On January 12, 1970, the SBA issued a letter declining to issue a COC. By letter of February 6, 1970, the SBA advised the procuring agency that SBA's adverse finding was based upon the fact that your firm did not have the financial capability to perform on the contract.

While you do not take serious issue with this determination, you contend that you have concluded negotiations with the Army Materiel Command (AMC) for a technical data rights and patent license contract that will ultimately involve millions of dollars and includes an advance payment of $1,000,000 of which $500,000 is due immediately, and as a result thereof you have "now regained financial responsibility."

As of the date of your protest, the representative of the Government had not signed the data rights and patent license contract because the agreement was awaiting certification of funds prior to Government execution. On March 18, 1970, we were informally advised by AMC that the contract had been signed by the Government, but it would not

become effective until approved by the Judge Advocate General of the Army for Civil law. On March 17, 1970, we received a copy of your telegram addressed to SBA requesting a review by that agency of its refusal to issue a COC, based upon "additional information we are able to submit," (presumably the aforementioned contract which was executory at that time). We have been informally advised by SBA that it will take no further action unless requested by the contracting officer. In this regard, we have no authority to require SBA to issue a COC. B–153446, May 8, 1964; B–159933, November 18, 1966.

We do not feel that bid protest proceedings should be permitted to be used as a means for delaying contract awards to gain time for a nonresponsible bidder to improve its position after a contracting officer's determination of nonresponsibility has been in effect confirmed upon review by SBA. However, in view of the mandate of ASPR 1–905.2 that financial resources should be obtained on as current a basis *as feasible* with relation to the date of contract award, we are today advising the Department of the Army that we feel it would be desirable, in view of your low bid, that the determination as to your responsibility be reconsidered and, if necessary, reviewed by SBA, in the light of this change in your financial position, if time permits. 39 Comp. Gen. 655 (1960); B–156619, June 8, 1965.

Unless requested by you, no further action is contemplated by our Office.

[B–152420]

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

To equalize the entitlement of members of the National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in a temporary duty status are entitled to per diem, subject to the exception in the legislative reports with respect to section 3 of Public Law 90–168 (37 U.S.C. 404(a)), that no member of a Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at a military installation where quarters and mess are available. 48 Comp. Gen. 517, and B–152420, July 8, 1969, modified.

Regulations—Retroactive—Administrative Error Correction

The general rule that regulations may not be made retroactively effective when the law has been previously construed or proposed regulations amend regulations previously issued, does not apply to the reinstatement of properly issued regulations. Therefore, upon reinstatement of regulations that authorized per diem to reservists ordered to active duty for less than 20 weeks where quarters and mess are available, no objection will be raised to per diem payments heretofore or hereafter made for any period on or after January 1, 1968, and prior to the effective date of the new regulations to give effect to per diem entitlement, if such payments are in accordance with paragraph M6001 of the Joint Travel Regulations, issued April 1, 1968, to implement section 3 of Public Law 90–168.

Subsistence—Per Diem—Military Personnel—Reservists

Where due to unforeseen circumstances, it is impossible for a reservist to complete ordered duty within a scheduled 20-week period, per diem payments may be continued for short additional periods and regulations amended accordingly.

To the Secretary of the Air Force, March 30, 1970:

Further reference is made to letter of November 17, 1969, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs), requesting reconsideration in part of decision of July 8, 1969, B-152420, which denied per diem to members of the Reserve components ordered to duty for periods of less than 20 weeks when quarters and mess are available.

Also, our decision is requested as to whether the regulations may be amended to authorize per diem for more than 20 weeks under certain circumstances. The request was assigned Control No. 69-44 by the Department of Defense Per Diem, Travel and Transportation Allowance Committee.

With his request for review, the Assistant Secretary forwarded a letter dated August 15, 1969, from the Chief, National Guard Bureau, with attachments, in which it is contended that the purpose and intent of section 3 of Public Law 90-168, 81 Stat. 525, which added clause 4 to 37 U.S.C. 404(a), was to make members of the National Guard entitled to per diem under the same conditions as the Regular member when the Guardsman leaves his home for short periods for which he is entitled to, or has waived, pay under Title 37, United States Code, and, therefore, that such members are entitled to per diem (so-called residual per diem) when on active duty for periods of less than 20 weeks to attend a course of instruction when quarters and mess are available.

The decision of July 8, 1969, was an amplification of the holding in decision of February 7, 1969, 48 Comp. Gen. 517, that under the provisions of clause (4) of 37 U.S.C. 404(a), a reservist may not be paid per diem when mess and quarters are provided for him. This conclusion was based upon our understanding of the purpose and intent of clause (4) as explained in its legislative history. The decision applied to all types of duty including periods of attendance at courses of instruction.

As indicated above, however, the request for reconsideration relates only to that part of the decision denying per diem while attending courses of instruction. In the letter of August 15, 1969, from the Chief, National Guard Bureau, it is urged that the background and legislative history of the law show that it was the intent of the Congress to permit payment of per diem to Reserves in such cases so that Regulars and Reserves attending school would be treated equally.

In support of this view the Chief, National Guard Bureau, refers to bills introduced in the 85th, 86th, 87th, 88th, and 89th Congresses

for the purpose of authorizing the payment of per diem to Reserves while on training duty. None of these bills, however, was enacted and with the exception of H.R. 17195, 89th Congress, they were stated in language substantially different from that contained in 37 U.S.C. 404(a)(4). The per diem payment provisions of H.R. 17195 and the explanation of their purpose in its legislative history are identical with the language of section 404(a)(4) and the explanation of its purpose in its legislative history.

The differently worded bills were not enacted by Congress, in fact, some of them do not appear to have been considered by the legislative committees. Their language and the explanation of their purpose by the military departments, however, support the views of the Chief, National Guard Bureau.

As the Chief, National Guard Bureau, says, the matter of per diem payments to National Guard members attending service schools is discussed (page 57) in H. Rept. No. 13 dated February 13, 1967, to accompany H.R. 2 which became Public Law 90–168 (10 U.S.C. 136 note). It appears to be his view that such discussion reflects a purpose to authorize per diem payments to Reserves attending service schools on the basis that a member of the Regular component attending the school in a temporary duty status is entitled to per diem.

It is stated in the Committee report that section 404(a)(4) is designed to provide the same entitlement to all military personnel in the matter of per diem eligibility when the circumstances are essentially the same. The report states, however, that no per diem is to be payable during annual active duty for training when quarters and mess are available.

In the decision of February 7, 1969, we expressed the view that the legislative history reflected an intent that the right to per diem should be denied generally to reservists on short tours of duty at military installations where both Government quarters and mess are provided for them, the comment therein as to equalizing entitlement to travel per diem with that of members of the Regular services apparently having had reference only to cases where a mess or quarters are not provided. Viewed generally, the Committee report lends support to that view. However, considered in the light of the material submitted by the Chief, National Guard Bureau, the Committee report does not necessarily conflict with his views in those cases where the circumstances of the Regular member and the Reserve member are essentially the same.

The law is broadly stated. Therefore, while the matter is not free from doubt, in view of the representations made by the Chief, National Guard Bureau, and the absence of any clear showing in the legislative history of Public Law 90–168 to the contrary, we will not object to the

promulgation of regulations authorizing payment of per diem (residual) to members of Reserve components ordered to attend service schools for periods of less than 20 weeks when quarters and mess are available and the circumstances are the same as those of members of Regular components attending the school in a temporary duty status.

We see no basis, however, for the view that Congress intended to authorize the payment of per diem only to members attending schools in such cases. Consequently, if the equality of treatment intended by the law is to be accomplished, it is our view that the regulations should authorize payment of per diem to members of Reserve components on active duty for less than 20 weeks in all cases where members of Regular components performing like duty in a temporary duty status would be entitled to per diem, subject, of course, to the exception expressed in the legislative reports that no member of a Reserve component "should receive [any] per diem for performance of * * * 2 weeks of annual active duty for training at a military installation where quarters and messing are, in fact, available." The conclusion reached in the decisions of February 7 and July 8, 1969, is modified accordingly.

In his letter of August 15, 1969, the Chief, National Guard Bureau, requests that action to authorize per diem in school attendance cases be made retroactively effective to February 7, 1969, in the Army and July 8, 1969, in the Air Force. Under the initial regulations promulgated pursuant to 37 U.S.C. 404(a)(4) per diem had been authorized in the school attendance cases and these are the respective dates upon which payment of the per diem apparently was discontinued by the Army and the Air Force in accordance with the decisions of February 7 and July 8, 1969.

As a general rule regulations may not be made retroactively effective when the law has been previously construed or proposed regulations amend regulations previously issued. See 45 Comp. Gen. 451 (1966). In this case, however, what is proposed is a reinstatement of the initial regulations promulgated under the law and we now conclude that the initial regulations were proper and that termination of the per diem payments was not required by the law.

In such circumstances and since the National Guard Bureau, immediately upon receipt of the decisions of February 7 and July 8, 1969, initiated action to have them reconsidered, we will not object to per diem payments heretofore or hereafter made for any period on or after January 1, 1968, and prior to the effective date of the new regulations issued to give effect to this decision, if such payments are in accordance with paragraph M6001 of the Joint Travel Regulations originally issued (April 1, 1968) to implement section 3 of Public Law 90–168, and are otherwise correct.

Concerning the question whether the regulations may be amended to authorize per diem for more than 20 weeks in these cases (the payment of per diem being authorized for Reserves under present regulations only in cases where they are ordered to duty for less than 20 weeks) we would have no objection to the promulgation of regulations providing for continuation of per diem for short additional periods where due to unforeseen circumstances it is impossible to complete the ordered duty within the scheduled 20-week period.

[B-167307]

Contracts—Negotiation—Two-Step Procurement—Letter Requests for Proposals

The award made of multi-year contracts for the operation and maintenance of three warning systems—DEWLine, WACS, and BMEWS—under letter requests contemplating two steps to accomplish the procurement—technical and price proposals—was not improper because the manning level for the DEWLine was revised, a factual question for technical evaluation by the contracting agency, or because of the failure to discuss the phase-over costs to be added to the price proposed by a nonincumbent offeror, a reasonable administrative determination on the basis of the noncompetitive nature of the procurement. Furthermore, discussions with the protestant satisfied the requirements of Armed Services Procurement Regulation (ASPR) 3-804 and 3-805, and even though permitting the successful offeror only to revise prices after the close of negotiations violated ASPR 3-805.1(b)—a procedure to be corrected--no significant detriment having resulted to the competitive system, objection to the award is not warranted.

To the Secretary of the Air Force, March 30, 1970:

We make reference to a letter (with attachment) dated August 26, 1969, from the Chief of the Procurement Operations Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, and to a letter (with attachment) dated October 9, 1969, from the Chief of the Contractor Relations Branch, Procurement Operations Division, reporting on the protest by the Radio Corporation of America (RCA) against the award of multi-year contracts to Federal Electric Corporation (FEC) for the operation and maintenance during fiscal years 1970, 1971, and 1972 of the Distant Early Warning Line (DEWLine), the White Alice Communications System (WACS), and the Ballistic Missile Early Warning System (BMEWS).

The procurement was instituted by the issuance on November 4, 1968, of three letter requests for technical proposals (LRTP's), denominated F04606-69-R-0130 (BMEWS), F04606-69-R-0131 (DEWLine), and F04606-69-R-0134 (WACS). Due to the importance and complexity of the procurement, a separate contracting officer was assigned to each system. The LRTP's advised prospective offerors that the contemplated procurement would be accomplished in two steps: (1) submission and evaluation of technical proposals, without pricing

information, to determine acceptability of the services offered; and (2) issuance of requests for price proposals (RPP's) only to those firms having submitted acceptable technical proposals. This two-step procedure is authorized under paragraph 3–805.1(c) of the Armed Services Procurement Regulation (ASPR).

One of the grounds of RCA's protest concerns the manning level for DEWLine. In its first technical proposal for that system, RCA offered to provide the required services utilizing 757 persons. This proposal and several revisions thereof were deemed unacceptable by the Air Force. The RCA proposal for DEWLine which was finally approved by the Air Force called for a manning level of 1,234, exclusive of trainees.

RCA asserts that:

> * * * the method by which the manning requirements were established forced RCA to conclude that the figure of 1,267 [this figure includes trainees] was not a guideline but a firm requirement as to the number of persons who must in fact be used in running the system. Thus, RCA was forced to increase its manning requirements to a level imposed on it by the Air Force in spite of the fact that in its experienced judgment such a manning level was excessively high, a judgment which it was prepared to back with a firm fixed price. * * *

RCA has also stated:

> It was improper procedure to force RCA to accept a manning level in its technical proposal for DEWLine which was substantially higher than that which RCA in its experienced judgment felt would have been adequate. It can only be assumed (since the details of the proposal of Federal Electric Corporation have quite properly not been made available to RCA) that RCA was in effect required to submit a price proposal based on manning levels approximating those being maintained currently or being proposed by Federal Electric Corporation. Bearing in mind that a firm fixed-price contract was contemplated, the effect of forcing upon RCA a higher manning level than it felt was required to do the job was to limit improperly the competition between the companies. * * * One of RCA's strongest assets in past competition has been its ability to economize the manning requirements without impairing performance. This asset was arbitrarily ruled out of the competitive procurement in question by the manner in which the two-step negotiation of RCA's technical proposal for DEWLine was handled. We believe this was an improper restriction of competition under the circumstances.

RCA further asserts: "RCA's judgment was and remains that it could adequately man DEWLine to meet Air Force requirements with 100 fewer persons."

The contracting officer's 27 page statement of facts dated August 1, 1969, is liberally interspersed with lengthy responses to the RCA allegations concerning manning levels which we do not restate here. However, the question is essentially one of administrative judgment: RCA avers that it could have performed the required DEWLine services with a personnel level of 100 less than the number that was determined acceptable by the Air Force, while the agency procurement officials contend that approval of an offer proposing to utilize less than the number of personnel finally approved would have been inadequate to assure satisfactory mission performance.

This dispute presents a factual question requiring a technically experienced evaluation. We are not disposed to question the administrative judgment as to such matters except on a clear showing of arbitrariness. Our review of all the relevant facts of record discloses no basis for concluding that the Air Force negotiated the manning levels in an arbitrary or otherwise improper manner. See B–164552(1), February 24, 1969, and B–166705, July 30, 1969. See, also, B–167374, October 6, 1969, where we declined to question the award of a service contract to the second low offeror because the low offeror proposed a manning level said to be "insufficient to meet the needs of the activity." We were advised by the procurement activity in that case that award to the low offeror "would result in inadequate performance and compromise the high standards of food service." For a similar result, see B–167983, March 11, 1970.

A second issue raised by the RCA protest concerns an evaluation factor. This factor, separately computed for each of the three systems, was to be added to the price proposal of each offeror other than the incumbent contractor on the individual system to which the proposal related. It should be noted at this juncture that offerors were permitted to submit alternate price proposals for each system, the alternate offers being on the basis of combined award for the particular system together with either or both of the other two systems. RCA, at the time this procurement was being conducted, was the operating contractor for BMEWS and WACS, while FEC was the DEWLine incumbent contractor.

The evaluation factor appears to have had a twofold purpose. An award to an offeror for the operation of a system on which that offeror was not the incumbent contractor would involve performance for a period less than the full 36 months—July 1, 1969, through June 30, 1972—because the displaced contractor would be required to operate the system during a "phase-over" interval. By way of illustration, award to a nonincumbent on BMEWS would require the new contractor to perform for 33 months out of the 3-year period; similarly, a nonincumbent on WACS would have to perform for 34 months, and an nonincumbent on DEWLine for 32 months. The factor, therefore, was designed to compensate for these discrepancies, thereby assuring that incumbents would be compared to nonincumbents on an equal basis. Secondly, the factor was intended to permit the Air Force to assess the full costs to the Government of the effect of an award to a given offeror, thus allowing the Air Force to determine with accuracy the offer most advantageous to the Government.

Accordingly, a complex formula was devised for computing the evaluation factor; the formula was set forth in the LRTP's and RPP's. It took into account, for example, any discount offered for prompt pay-

ment and also the rental charges for use by an incumbent contractor of Government-owned facilities. However, the most significant portion of the evaluation factor was the "phase-over" costs to be added to the proposed price of a nonincumbent offeror. The phase-over costs were derived from three elements: administrative costs, nonproductive costs, and productive costs. Each of these costs was defined in the LRTP's and RPP's. The definitions are as follows:

1. Administrative costs are those costs which the Government estimates it will incur as a result of a new contractor being phased-in and the Government being required to move personnel and property to a new location.
2. Non-productive costs are those costs which the Government estimates the incumbent contractor may reasonably be expected to incur as a result of being phased-out. Such non-productive costs shall consist of, but not be limited to: severance pay, termination of leased facilities/equipment, transportation of phased-out personnel.
3. Productive costs are those costs which the Government estimates an incumbent contractor will incur for the operation and maintenance effort during the phase-out period.

Administrative costs and nonproductive costs were stated in the RPP's as follows:

	BMEWS	WACS	DEWLine
Administrative	$31, 700	15, 100	102, 420*
Nonproductive	452, 671	513, 600	355, 481

*Plus $165 per mile times the number of miles a nonincumbent contractor established its project headquarters from Paramus, New Jersey.

Productive costs were to be computed by application of a stated percentage to the incumbent contractor's independent price proposal for the first year effort for that system. For BMEWS, WACS and DEWLine, the percentages were 25 percent, 18.83 percent, and 32.6 percent, respectively. We have review detailed memoranda prepared by each contracting officer setting forth the manner in which these percentages were derived. We find no basis for any comment on these percentages, except that the percentages appear to be realistic and sound.

The resulting evaluation of the respective offers on the basis of award of all three systems to one offeror has been summarized by the contracting officers in this manner:

	RCA	FEC
BMEWS		
1. offered price	$47, 364, 300	$42, 350, 517
2. phase-over		4, 531, 926
3. rental charges	76, 975	
	$47, 441, 275	$46, 882, 443

WACS		
1. offered price	$33, 148, 032	$31, 016, 054
2. phase-over		2, 420, 844
3. rental charges	39, 690	
	33, 187, 722	33, 436, 898
DEWLine		
1. offered price	59, 349, 164	67, 155, 354
2. phase-over	7, 947, 418	
3. rental charges		62, 969
	67, 296, 582	67, 218, 323
Total	$147, 925, 579	$147, 537, 664

With regard to the adequacy of the formula devised for computing productive costs incurred during the phase-over period, RCA has stated the following:

> The ground rules set forth in the RFP as employed by the Air Force for evaluating the price proposals also were inherently defective. The competitors could not in this situation have submitted proposals on a comparable basis due to the different operating time periods involved as between the incumbent and the non-incumbent for each system. In order for a firm fixed-price contract to be feasible, therefore, it was considered necessary to add certain costs to the prices of each non-incumbent to offset this disparity in time periods. We realize that this situation presented a difficult technical procurement problem, one with which the Air Force and your office has wrestled in the past. This difficulty was, of course, aggravated by the decision to employ a firm fixed-price contract. However, in the computation of the productive cost portion of the phase-over costs, the decision to apply a fixed percentage established by the Air Force against the incumbent's price submitted on a single-system basis and to add the resulting amount to the non-incumbent's price contained an inherent flaw. This procedure invited the submission of unrealistically high prices by an incumbent in his single-system proposal since it was all but certain that this bid would not be considered in making the award. Perhaps more significantly, in the case of DEWLine, it imposed an additional penalty on RCA as a result of the higher price of Federal Electric Corporation's DEWLine proposal stemming from the higher manning level reflected therein in contrast to that with which RCA was prepared to operate the system. Finally, this procedure injected for evaluation purposes figures for phase-over costs which bore no real relationship to what the actual costs would be in the event of award to a non-incumbent, since the incumbent would be under no obligation to perform phase-over services at the evaluation figures.

RCA also has pointed out that at the same time that productive phase-over costs of $5.94 million had been "artificially" computed under the evaluation formula for BMEWS and WACS, the Air Force had received RCA's initial proposal for phase-out of BMEWS and WACS in the approximate amount of $11 million. RCA concludes that this substantial disparity should have induced the Air Force to conduct discussions concerning the realism of the figure computed under the stated formula.

The contracting officers have responded with these remarks:

The protest suggests that the computation of the productive cost based upon the price quoted by an incumbent contractor in its single system proposal was incorrect, and should have been based on its proposal for operating all three systems. This suggestion is invalid and such procedure would have been improper for the following reasons:

a. At the time of formulating the solicitations, it was unknown if in fact there would be any offers for combined operation. Therefore, it was necessary to specify that the percentages would be applied to a proposal that was certain to be submitted since there could be no combination offers unless there had been a basic single system offer.

b. Of more importance is the fact that if an incumbent contractor was unsuccessful in receiving an award of a new procurement and thus required to phase out, he would be performing on the basis of each system operation. Thus, the productive cost for such an operation would be more appropriately determined from his single system offer than from an offer encompassing more than one system. It is correct that RCA's proposals for phase out had been requested by the Air Force and did show a large variance with the amount produced by the evaluation process. However, RCA was on notice that phase out proposals submitted under sole source conditions, would not be used by the Air Force for proposal evaluation purposes. In addition, at the time of evaluation of the competitive proposals, there had been no audit examination or technical evaluation of the RCA phase out proposals. The Air Force did recognize significant differences but was unable to attach importance to the phase out proposal having knowledge of the type of proposal usually submitted by RCA under sole source conditions. * * *

The contracting officers have also submitted some figures for prior sole-source contracts awarded to RCA on BMEWS and WACS. These were included:

* * * to show that RCA sole source proposals are traditionally inflated and cannot be accepted at face value. Therefore, the fact that RCA's phase out proposals were in the possession of the Air Force did not rule out the validity of the amounts used in the evaluation process. In spite of the disparity of the RCA phase out proposal, the Air Force was at a loss to understand how RCA could defend the need for such exorbitant costs when the Air Force also possessed the competitive proposal by RCA in which their cost of operation was vastly smaller. Both offers were for the performance of the same work; the only difference being that under phase out, the work would be performed for a shorter period of time. The foregoing relates to the productive cost only since the nonproductive costs were not a factor in the RCA competitive proposal. * * *

Later on in their report, the contracting officers observed:

* * * It must be pointed out that RCA was on notice that their phase out proposals would not be used in evaluating the proposals and had entered no objections thereto. * * * The credibility of the RCA phase out proposals remains questionable. Our initial doubts as to their validity are supported by actions that have occurred since receipt of the RCA phase out proposals. Independent field analysis by audit and technical personnel of the phase out proposals, conducted without knowledge of our estimates of phase out costs, have supported the accuracy of the evaluation estimates extremely well. * * *

In addition, the report contains the following:

* * * the computation of the productive cost as a factor of the incumbent's single system offer is the only valid way to determine this cost. It is not agreed that this procedure would invite the submission of unrealistically high prices by an incumbent in his single system proposal, since there was no certainty that the single system proposal would *not* be considered in making an award. The solicitations required single system offers and provided for submission of combination offers (two or more systems), if an offeror wished to do so. An incumbent who might be tempted to submit an unrealistically high single system offer in order

to gain a competitive advantage as suggested by RCA would have to weigh this against the unknown possibility that combination proposals might not be submitted by a competitor. By bidding high, it is true that an incumbent could force higher evaluation costs on his competitor's proposal, but in doing so he could price himself out of the competition. If a non-incumbent submitted only a single system offer, the action suggested by RCA would work to the incumbent's disadvantage and cause such a proposal to be higher than necessary, resulting in the possible loss of the award on a single system evaluation.

In addition, the submission of unrealistically high prices in an incumbent's single system offer was unlikely since he was required to show in detail the manner in which the manpower was reflected in the prices offered. This was a requirement in the case of a single system offer and also in the case of any combination offer. * * *

Upon full consideration of the matter, we are unable to conclude that the Air Force procurement officials were in error in failing to conduct discussions as to the appropriateness of the $5.94 million figure representing productive phase-over costs for BMEWS and WACS. Recognition must here be given to the fundamental principle that the hallmark of negotiated procurement is the flexibility and informality which properly permits actions which would not be legally proper in a formally advertised procurement. 47 Comp. Gen. 279 at 284 (1967). By the same token, the freedom of the contracting officer in the setting of a negotiated procurement has its limits:

Government procurement by negotiation, like procurement by formal advertising, requires that contracting officers observe elemental impartiality toward all offerors. While negotiated procedures are more flexible than advertised procedures, such flexibility demands a greater degree of care on the part of the contracting officer to insure that all competitive offerors are treated equally. * * *

48 Comp. Gen. 583, at 592 (1969).

This basic approach was recently applied in B–167389, February 12, 1970. In that case the allegation was made that the protestant had been provided too short a time for the submission of a "best and final" offer. See ASPR 3–805.1(b). We responded in this manner:

* * * We do not believe that sound procurement policy dictates the establishment of a minimum time for the submission of price revisions. Rather, it would appear to be clearly preferable to leave it to the sound discretion of the procurement officials to afford whatever period is considered necessary, in view of the pertinent factors, including time, involved in the individual case. Such a view is in accord with the general principle that negotiated procurements are to be characterized by "flexible and informal" procedures which "properly permit the contracting officer to do things in the awarding of a negotiated contract that would be a radical violation of the law if the procurement were being accomplished by formal advertising." 47 Comp. Gen. 279, at 284 (1967). * * *

We then elaborated as follows:

We do not mean to imply that there is no standard for review of such matters by our Office, nor do we believe that there can be no circumstances in which we would object to a negotiated award where a protest is based on an inadequate opportunity to submit a revised proposal. The applicable standard for review is one of reasonableness under the circumstances, and our inquiry necessarily would be whether, as a matter of law, the period of time afforded was unreasonable and prejudicial to a competitively situated offeror. * * *

Our decision B–167389 involved a question of time, i.e., the duration of negotiations. The present situation concerns the scope of the subject matter to be discussed.

We do not reach in the present circumstances the question of prejudice to a competitively situated offeror (see the second quotation from B–167389 above) since our above-stated conclusion rests upon our determination that failure to conduct discussions on the subject of the productive phase-over costs for BMEWS and WACS was reasonable under the circumstances. In this regard, there is one consideration of principal importance. It is the distinction that must be made between submitting an offer in competition with other offerors and submitting an offer in a noncompetitive atmosphere. This point has been amply detailed in the quoted portions of the administrative report.

In addition to the comments contained therein, we think emphasis must be given to the fact that the $5.94 million figure was extrapolated at the end of a lengthy process of negotiation, conducted in connection with a highly desirable multi-year procurement which had been for many months the subject of continuous scrutiny by the Air Force. The contracting officers were able to assess the RCA phase-out offer of $11 million in the light of their accumulated knowledge of the operations and maintenance of BMEWS and WACS. This $11 million offer by RCA was an initial proposal, submitted at the commencement of a negotiation process which was yet to take place. Obviously there could be no competition regarding actual phase-out proposals. Yet the phase-out services to be performed by RCA were the same as those represented by the figure of $5.94 million. We believe that the difference may be adequately explained on the basis of the noncompetitive nature of the $11 million proposal and that, in any event, this consideration, in conjunction with the others mentioned by the contracting officers, supports the decision not to conduct discussions on this subject. In this connection, contrast 49 Comp. Gen. 98, August 12, 1969, where prior to the date set for receipt of revised proposals, an offeror expressed the opinion that a stated evaluation factor was grossly overestimated and indicated willingness to discuss the matter during negotiations. We recognized that the determination of the evaluation factor was a matter of administrative responsibility. Nonetheless, we held:

> * * * However, in our opinion, the presence or absence of an evaluation factor and the amount thereof can have an impact upon the prices offered and in that sense can affect one of the essential terms (price) of the contract. We believe that any prospective offeror or bidder who requests an opportunity to discuss the basis for a particular evaluation factor ordinarily should be accorded such an opportunity. Therefore, we conclude that the new source who requested an opportunity to discuss the $40,000 evaluation factor before

submitting its revised proposal should have been granted that opportunity at that time. * * *

On the facts of record as discussed above, the above-cited decision is clearly distinguishable.

A further contention has been made by RCA, namely, that no written or oral discussion was conducted with RCA as to its price proposals, whereas several aspects of FEC's price offers were the subject of discussions. Reliance is placed on 10 U.S.C. 2304(g) and its implementation in ASPR, both of which require, with certain specified exceptions, that in a negotiated procurement, after the receipt of initial proposals, written or oral discussions must be conducted with all offerors within a competitive range, price, and other factors considered. RCA has suggested that two matters as to which fruitful discussions could have been undertaken are the manning level for DEWLine, and the disparity between the Air Force phase-over costs for BMEWS and WACS and RCA's separate price proposal for phase-over of these latter two systems.

We have previously adverted to the extensive negotiation of the DEWLine manning question during the first step of this procurement. In light of these prior discussions between the Air Force and RCA, we believe that little benefit could have been achieved by reopening the manning requirements during the price proposal phase of the procurement. We have also indicated that the difference in productive cost figures for the phase-over of BMEWS and WACS was, under the circumstances, a subject which the contracting officers, in their discretion, properly decided was not necessary to discuss.

However, the records of negotiations (which are set out below) demonstrate that during the price proposal stage, substantial discussions as to several matters were conducted with FEC. On the other hand, only one matter was discussed with RCA at this stage of the procurement. The negotiation memorandum for DEWLine discloses, in part, as follows:

RCA's proposal was responsive to the RFP, however, due to the wide variance in prices for Item 13 manday rate for Camp Support—RCA @ $45.42 vs. $5.00 for FEC, it was felt there was a misunderstanding of the requirement. A telephone call was made to the ACO Det 1 First Air Force for a clarification of the requirement. It was determined that Camp Support was for food and lodging only in support of third parties and not "Camp Support except food and lodging to third parties" as stated in the RFP. The word "except" was therefore deleted and each contractor was requested to take another look at the requirement and advise if there would be a change in their proposal. As a result RCA reduced their price to $2.00* per manday and FEC to $3.00 per manday. There was no other change to RCA's proposal. *$2,299,098 total decrease [The underscored portion was handwritten.]

The negotiation memoranda for BMEWS and WACS are virtually identical to DEWLine on this point.

In addition, in a memorandum executed at 11 a.m., May 27, 1969, concerning the closing of negotiations on BMEWS, WACS, and DEWLine it was stated:

A meeting was held with the representatives of RCAS to discuss their proposal. RCAS was informed that their proposal, as amended, now fulfilled the requirements of the solicitation. They were also notified that the Air Force felt that further negotiations were not required. However, they were advised that if they desired to make any further revisions to their proposal, such revision would be accepted up to the close of business (1615 hours) this date; otherwise, negotiations would be considered officially closed at the close of business today and any change submitted subsequent to that hour would be treated pursuant to the clause of the solicitations titled "Late Offers and Modifications or Withdrawals."

This document was signed by Mr. C. Fred Brown, Chief of the Operation & Maintenance Section, Commodities Procurement Division, Directorate of Procurement & Production. An identical memorandum, executed at 9:50 a.m. the same day, relates to the closing of negotiations with FEC. Both memoranda disclose that all three contracting officers attended meetings with RCA and FEC.

An affidavit, submitted by the RCA negotiator primarily involved in these procurements, relates in part as follows:

The discussions held from May 21–27, 1969 with respect to the most recent procurements for BMEWS, White Alice and DEWLine dealt primarily with assuring the Air Force that the number of personnel in the qualified technical proposal had been accounted for in the price proposal. Corrections of obvious errors were made. In addition, RCA reduced its DEWLine price proposal when an element of cost (camp support) was changed by the Air Force by the deletion of the word "except" from the item description in the Request for Cost Proposal.

At no time did the Air Force enter into or invite discussions of the various elements of RCA's price proposals or the other cost elements used in evaluating the proposals. Previous negotiations of the BMEWS and White Alice contracts with the same Air Force representatives involved lengthy and detailed discussions of each element of cost. Accordingly, these procurements did not involve at all the type of price negotiations or discussions I have been accustomed to and have experienced in the past.

We are unable to agree with RCA's assertion that there were no price discussions with RCA within the meaning of the statute and regulations. The statute itself does no more than impose a requirement that, in the circumstances described, "written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered." The regulatory framework within which this statutory mandate is carried out is ASPR 3–804 and 3–805. Section 3–804 provides, in part:

* * * Complete agreement of the parties on all basic issues shall be the objective of the contract negotiations. Oral discussions or written communications shall be conducted with offerors *to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid.* * * * [Italic supplied.]

It is evident that the Government officers responsible for these procurements did not discuss the RCA price proposals as extensively as the price proposals of FEC. In fact, with the exception of the Camp

Support item in the DEWLine RPP, it seems that no specific matter was discussed with RCA during the second stage of this two-step negotiated procurement. But the obligation of the procurement officials is to "resolve uncertainties," and it is clear that in the opinion of these officials there was uncertainty in RCA's offer only as to DEWLine Camp Support. Repeating our earlier observation, the questions concerning the appropriate DEWLine manning level and the disparity between the offered and the Air Force productive phase-over costs need not have been the subject of discussions. Therefore, we believe that the applicable legal requirements were met by the discussion of Camp Support, followed by the extension to RCA of an opportunity to submit price revisions as to any or all of the three systems. *Cf.* 48 Comp. Gen. 449 (1968).

The final issue involved in this protest was not raised as one of the original grounds for the protest. By letter of October 23, 1969, RCA noted that the record of negotiations (submitted to our Office with the October 9 letter referenced above) indicated that FEC had been permitted to submit revisions subsequent to the May 27 deadline in violation of ASPR 3-805.1(b), which provides in part:

> * * * Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see (a) above) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals must be submitted by that date. All such offerors shall be informed that any revision received after such date shall be treated as a late proposal in accordance with the "Late Proposals" provisions of the request for proposals. (In the exceptional circumstances where the Secretary concerned authorizes consideration of such a late proposal, resolicitation shall be limited to the selected offerors with whom negotiations have been conducted.) In addition, all such offerors shall also be informed that after the specified date for the closing of negotiation no information other than notice of unacceptability of proposal, if applicable (see 3-508), will be furnished to any offeror until award has been made.

The August 1, 1969, statement by the contracting officers includes these relevant comments:

> * * * Negotiations necessary to insure complete responsiveness were conducted with both RCA and FEC. These discussions occurred *during the period 21 May through 27 May* and resulted in pricing changes by both firms. * * *
>
> * * * * * * *
>
> * * * If either FEC or RCA had offered revised pricing when the Air Force offered them the ***final opportunity to do so on 27 May 1969*** * * * [Italic supplied.]

The two memoranda of May 27, 1969, signed by Mr. Brown, which purported to effect a closing of negotiations, were attached as part of the initial administrative report.

In response to a specific request by our Office, the price negotiation

memoranda, required by ASPR 3-811(a) to be included in the contract file "for the use of any reviewing authorities," were made available to us with the letter of October 9, 1969.

The memorandum relating to BMEWS and signed on June 5, 1969, by the contracting officer individually responsible for that system, contains the following pertinent comments:

> Dates and Place of Fact Finding, Pre-Negotiation Review and Negotiation: 19 through 27 May 1969. * * *
>
> * * * * * * *
>
> There being no other areas that required further negotiations and because of the closeness of their proposals it was determined that further negotiations were not necessary. Therefore, both firms were verbally notified that negotiations were closed as of 27 May 1969.

The contracting officer for DEWLine signed a memorandum of negotiations on June 4, 1969. That document includes these observations:

> Date of Negotiations: 21 May—29 May 1969.
>
> * * * * * * *
>
> There being no other areas that required further negotiations and because of the closeness of their proposals, it was determined that further negotiations were not necessary. Therefore, both firms were verbally notified that negotiations were closed as of 29 May 1969.

The WACS negotiation memorandum was signed by the individual contracting officer on June 6, 1969; relevant portions are as follows:

> Discussions took place with both proposers during the period 19 through 29 May 1969 to clarify their proposals. * * *
>
> * * * * * * *
>
> There being no other areas that required further negotiations and because of the closeness of their proposals it was determined that further negotiations were not necessary. Therefore, RCA was verbally notified on 27 May 1969 and FEC on 29 May 1969 that negotiations were closed.

It is worthy of note that each memorandum states that the Government was represented during negotiations by the three contracting officers and by Mr. C. Fred Brown and Mr. Earl Lavine, Chief of the Electronics Branch, Commodities Procurement Division, Directorate of Procurement & Production. Mr. Lavine also approved and signed the negotiation memoranda for DEWLine and WACS.

Attached to a November 18, 1969, letter to Air Force Headquarters from the Director of Procurement Management, Aero Space Defense Command, is a memorandum from the DEWLine contracting officer. It states in part:

> * * * Negotiations with RCA and FEC for the operation and maintenance of the DEW Line, BMEWS and WHITE ALICE were actually concluded on 27 May 1969. * * *

The record further shows that a letter dated May 26, 1969, from FEC to the contracting activity, to the attention of Mr. Lavine, effected

certain modifications in FEC's price proposals. The letter reads as follows, except for the specific price changes:

FEC would like to take this opportunity to clarify our combination proposals which reflect personnel reductions. Please delete the second paragraph of the Supporting Price Information and those attachments which reflect proposed reductions in personnel complements for the combinations of DEWLine, BMEWS and White Alice in each of our alternate proposals.

Reductions in revised combination prices have taken into account profit and general and administrative areas where price reductions can be afforded the government by combining these programs.

In clarification of the above which represents our individual technical proposals and a savings is reflected to the government from the separate and individual bids in the G & A and profit areas resulting from the combination of the programs.

Price summaries have been included which show the applicable G & A and Profit.

The price herein reflects the reduction in pricing applicable to the DEWLine portion of all combinations resulting from inadvertently using Revision 3, Service Contract Act determination, instead of Revision 2 determination. This equates to $371,000 as explained in our previous letter dated 1969 May 23.

In addition to the above please delete paragraph five of the Supporting Price Information with respect to right of assignment to any subsidiary.

The price for the combination bids is therefore changed by Item Numbers under each combination as follows:

* * * * * * *

Price summaries reflecting the G & A and Profit for the above are as follows:

* * * * * * *

With regard to our Basic BMEWS proposal please change item No. 1 to read $1,318,130 and item No. 2 to read $500.

This letter is date stamped "28 May 1969." It is not clear by whom this letter was stamped.

The file includes a letter dated May 28, 1969, from FEC to the contracting activity, to the attention of the WACS contracting officer. The letter states:

In accordance with agreements reached during the recent discussions with our representatives, FEC is pleased to submit the attached clarifications to our White Alice Cost Proposal dated 16 May 1969 in response to RFP Nr. F04606–69–R–0134. The revised pages correct inadvertent errors in the rate associated with the Project Manager and the rate proposed for the Field Engineers of the Technical Assistance Team.

In addition, we have prepared a revised schedule to cover the full extent of the period of performance associated with the Aleutian extension stations.

Also, in accordance with our discussions, we have re-examined the expected costs of purchased services for the White Alice Communications System and we confirm that our proposed estimate is adequate.

We trust that you will find our submission complete and satisfactory. Should you have any questions regarding the revisions, please contact us.

A second letter of the same date, to the attention of the DEWLine contracting officer, reads as follows:

In accordance with recent discussions between yourself and representatives of FEC, attached are four revised summary pages and four revised schedule pages applicable to the one year proposal and the multi-year proposal submitted by FEC on 19 May 1969 in response to RFP Nr. F04606–69–R–0131.

These revisions cover Alaskan non-exempt labor and they reflect the rates set forth in the Service Contract Act Wage Determination dated 1 March 1969, 67–28 (Revision 2). As revised, the schedules reflect the adjustment set forth in our May 23, 1969 letter.

In addition, we also wish to advise you that the foreign exchange rate set forth in FEC's submission of 19 May 1969 should be 7.5% in lieu of the rate of 7.15% indicated. The credit reflected for foreign exchange is correct as the typographical error is restricted to the rate.

We trust you will find this submission satisfactory. Should you have any questions regarding it, please contact us.

A similar letter, dated May 29, 1969, amended the FEC letter of May 26. It stated:

Federal Electric Corporation wishes to further clarify the above Price Proposals in the area of reimbursables. Please replace page 2 and page 3 of the subject letter, with the attached pages, dated 69 May 29 (Revised). These revised pages reflect the pricing for all combinations involving the DEWLine. Item No. 1 of our basic "3 year" DEWLine Price Proposal is $1,745,722. Item No. 1 of the "1 year" DEWLine Price Proposal is $1,709,495. Revised supporting price backup pages for DEWLine are attached.

Included herein are the deletions to DEWLine RFP's, pages 6 and 7 of *Supporting Price Information*, paragraph *Miscellaneous:*

b. Recreation and Morale Supplies, including movies
d. Commercial Equipment Maintenance
e. Commercial Calibration Services
f. Subscriptions
g. Stationery and Office Supplies
h. Streator and Winnipeg Hangar Leases
i. Laundry and Dry Cleaning

Also, attached are page 2 of Summary Contract Item 1, and page 2 of Contract Item 1—Other Costs for the DEWLine RFP's for "1 year" and "3 years."

RFP F04606-69-R-0134, Supporting Price Information, Attachment D, page 21 of 27, Rent, Housing and Furniture, delete words: ". . . with the exception of Photograph equipment and Reproduction equipment," and Materials and Supplies Costs, delete words: ". . . movies and recreational supplies."

The letters of May 28 and 29 are not date stamped.

RCA's position is that the actual date for the closing of negotiations was May 27 and that the revisions to FEC's price proposals received after that date should have been disregarded pursuant to the terms of the "Late Offers and Modifications or Withdrawals" clause.

The inconsistency between the memoranda of Mr. Brown and the memoranda of the respective contracting officers presents a critical factual uncertainty: what were the date or dates when negotiations were closed? While we generally refrain from resolving such questions, we believe that May 27 was the closing date for negotiations on all three procurements. A different conclusion would be contrary to the clear preponderance of the record, and would require us to hold that there was a patent failure to set a common cutoff date, at least with respect to WACS.

Accordingly, the revisions to FEC's prices received after May 27 should have been rejected under ASPR 3-805.1(b) and the applicable RPP clauses concerning late modifications. Although the most recent memorandum of the DEWLine contracting officer indicates that certain revisions were "confirming" information verbally given to the Air Force on or before May 27, it is admitted by him that not all the revisions were merely confirmatory.

The memorandum affirmatively states that "there was no further discussion with either contractor after 27 May 1969." The record appears to support this statement, for all the revisions by FEC seem to have been made in response to points raised during discussions prior to the close of business on May 27. The revisions, moreover, did not result in a change in the relative standing of the two offerors as evaluated on the basis of a combination award of all three systems to one of them. Nor was any new matter discussed with FEC after May 27. Contrast, on this point, 49 Comp. Gen. 402, December 22, 1969, which also implicitly suggests that there may be changes to a proposal after closing of discussions that may not be "substantial" enough to constitute a reopening of negotiations.

While from RCA's viewpoint there could have been no greater prejudice to it than the failure to exclude its sole competitor from the procurement, the detriment to the integrity of the system of competitive procurement is not substantial enough to warrant our Office to object to the awards at this time. Phase-over has been completed and FEC is in full operation of all three systems. In this context, the deficiency in procedure (receipt of revisions after closing date) is not sufficiently significant to require the Government to take any action adverse to the awards as made. However, we by no means condone the violation of ASPR 3-805.1(b) and we urge that effective action be taken to assure that such violations do not recur.

[B-168278]

Bids—Evaluation—Delivery Provisions—First Article Approval or Waiver

Under an invitation soliciting bids on the basis of first article approval and/or waiver, when the need for the procurement became urgent, an award of a contract to the second low bidder who had submitted bids on both first article approval and waiver, on the basis the first article waiver bid offered earlier delivery, and the withdrawal of the request for a Certificate of Competency, which had been informally approved on the low responsive bidder who had submitted a bid on a first article approval basis only, overlooked the eligibility of the low bidder for a contract award. Although the award on the basis of urgency should not have been accomplished under the invitation and the proper action would have been to cancel the invitation and negotiate the contract pursuant to the public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in the Government's interest; however, procedures should be reviewed.

Contracts—Awards—Small Business Concerns—Certifications—Withdrawal of Application by Government

The withdrawal of a Certificate of Competency referral to the Small Business Administration after advice the certificate would issue was not legally effective to remove the low bidder from consideration for award, even though its bid was submitted on a first article approval basis only, as the invitation solicited bids on both a first article approval and/or waiver basis. Therefore,

when an urgency for the procurement developed, the contracting officer in awarding a contract to the second low bidder on the basis of first article waiver to obtain a shorter delivery schedule, overlooked the restriction in Armed Services Procurement Regulation 1-1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not an evaluation factor, and that the alternative to an award to the low bidder would have been cancellation of the invitation and negotiation of a contract pursuant to the public exigency procedures of 10 U.S.C. 2304(a)(2).

Bids—Alternative—Failure to Bid on Alternate

Where bidders under an invitation soliciting bids on the basis of first article approval and/or waiver of the article are advised to submit bids on the basis of first article approval even if entitled to waiver of the first article in order to make them eligible for consideration should the contracting agency determine to make an award on the basis of first article approval, the fact that the low bidder did not submit a bid on the first article waiver alternative did not effect bid responsiveness or the bidder's eligibility for the award of a contract on the basis of first article approval, as the bidder having complied with the terms of the invitation did not run the risk that its bid on the basis of first article approval could not be considered because the Government elected to accept the alternative it did not bid upon, the waiver of first article approval.

To the Secretary of the Army, March 30, 1970:

Reference is made to letters dated December 5 and 23, 1969, and March 5, 1970, from the Deputy Director for Procurement, Directorate of Requirements and Procurement, and the Assistant General Counsel, Headquarters United States Army Materiel Command, furnishing a report on the protest of the Chausse Manufacturing Company, Inc., against the award of a contract to the Hi-Jenny Division of Homestead Industries under invitation for bids (IFB) No. DAAF01-69-B-0767, issued by the Rock Island Arsenal, Rock Island, Illinois.

The IFB was issued to 12 prospective bidders on May 27, 1969, and solicited bids on a proposed procurement of 192 cleaners, steam, pressure jet, wheel-mounted, in accordance with Rock Island Arsenal Tool & Equipment Division purchase description T&E PD-22A dated July 21, 1965, and referenced specifications. The IFB requested bids, f.o.b. origin and/or destination, on the basis of first article approval or waiver of first article approval. Section I of the invitation provided in part:

* * * offerors who are eligible to have first article approval tests waived, and have so offered, are hereby requested to submit prices on all requirements set forth below so that they will not be precluded from consideration for award in the event that the Government determines that an award requiring first article approval is in the best interests of the Government. If such determination is made, award will be made with First Article Approval, notwithstanding the existence of offers Without First Article Approval. Award will be made as follows: With First Article OR Without First Article (NOT BOTH)—(F.O.B. Destination OR F.O.B. ORIGIN)

In evaluation of offers with First Article Approval, the cost to the Government of first article testing will be included. The evaluated price of offers with First Article Approval, will be arrived at by subtracting from the total offer (unit price multiplied by quantity) the applicable discount, if any, and adding thereto the evaluation factor set out in the schedule; plus the transportation

costs if applicable. Offers will be evaluated on the basis of the lowest overall cost to the Government.

Award will be made to that responsible offeror whose offer conforming to the Solicitation, will be most advantageous to the Government, price and other factors considered.

Amendment 0001 extended bid opening time from June 16 to June 23, 1969. The invitation contained a notice of total small business set-aside and offers were solicited from small business concerns only.

In response to the invitation, Rock Island Arsenal received nine unit price bids which are summarized as follows:

CONTRACTOR	WITH FIRST ARTICLE APPROVAL	DEST.	ORIGIN
Chausse Mfg. Co., Inc.	X	$1,460.00	$1,398.00
Sioux Steam Cleaner Corp.	X	$1,585.00	$1,497.13
Hi-Jenny Div., Homestead, Ind.	X	$1,649.36	$1,547.00
Aeroil Prods., Co., Inc.	X	$1,865.00	$1,798.00
Little Giant Prods., Inc.	X	$2,613.00	$2,563.00
Henry Spen & Co., Inc.	X	No Bid	$1,745.00
Malsbary Mfg., Co.	X	No Bid	$1,901.87
L&A Products, Inc.	X	No Bid	$1,997.38
DRP Prods., Co., Inc.		No Bid	No Bid

CONTRACTOR	WITHOUT FIRST ARTICLE APPROVAL	DEST.	ORIGIN
Chausse Mfg. Co., Inc.		No Bid	No Bid
Sioux Steam Cleaner Corp.	X	$1,585.62	$1,497.13
Hi-Jenny Div., Homestead, Ind.	X	$1,629.36	$1,527.00
Aeroil Prods., Co., Inc.		No Bid	No Bid
Little Giant Prods., Inc.		No Bid	No Bid
Henry Spen & Co., Inc.		No Bid	No Bid
Malsbary Mfg., Co.	X	No Bid	$1,880.00
L&A Products, Inc.		No Bid	No Bid
DRP Prods., Co., Inc.	X	$1,975.00	$1,875.00

In view of the low bids submitted by Chausse on a first article approval basis, the Arsenal requested the Defense Contract Administration Services Region (DCASR), Detroit, Michigan, to conduct a preaward survey of Chausse. A preaward survey was performed of Chausse and DCASR furnished a "no award" recommendation on August 8, 1969.

Thereafter, by letter dated August 21, 1969, Headquarters, United States Army Weapons Command, authorized the Arsenal to forward the Chausse bid to the Small Business Administration (SBA) for consideration under the Certificate of Competency (COC) procedures. On September 8, SBA requested an extension until September 24, 1969, in which "to process" a COC pertaining to Chausse. A second request from SBA for further extension until September 30, 1969, to process the COC was granted by the Arsenal. Subsequently, by telephone call on September 30, 1969, the Army Weapons Command Small Business Office was notified that "SBA had notified DOD of their

intention to issue a COC on subject referral." We are advised that no written notification of this intention was furnished to the Arsenal.

The proposed procurement of steam cleaners originally was not considered an urgent procurement; in fact, it carried only an issue priority designator 10. However, by letter dated October 10, 1969, from Headquarters, United States Army Weapons Command, the Arsenal was notified that:

* * * expedited procurement action be taken on ESN 4940-865-4738, Steam Cleaner, Portable.

2. The NICP of the S&M Directorate has been experiencing procurement problems on this cleaner, and it is in a critical supply position. The history of open procurements is known to your office and as a result of a meeting held by Mr. Scheibler, SWERI-PR, on 8 Oct 69, it was determined to expedite a quantity which would cover the known requirements, issue priority 06.

3. There are 178 cleaners which are in the above position. Attached is a list of open requisitions covering 159 cleaners. Listed below are an additional 18 cleaners required for modernization of RVN which also fall into this category. Also, there is a tool set requisition requiring a cleaner which carries an 05 priority. These requirements total 178 each. It is recommended that a quantity of 180 each be expedited with delivery not to exceed 60 days.

Based on the foregoing, the contracting officer issued the following determination regarding "Waiver of First Article" on October 10, 1969:

1. IFB DAAFO1-69-B-0767 for 192 Steam Cleaners, FSN: 4940-865-4738 opened on 16 Jun 69.

2. This IFB provided for bids on the basis of a First Article item and for bids on the basis of waiving the First Article item to bidders who could qualify.

3. The apparent low bidder with First Article Testing is the Chausse Mfg. Co., Inc. This bidder, based on a Pre-award Survey, was rejected as a responsible bidder. This matter has been processed through to Small Business Administration for COC consideration.

4. By letter dated 10 October 1969, the NICP informed the Contracting Officer that there existed urgent requirements for 178 of these steam cleaners. The requirement for these steam cleaners carry IPD's of from 1 through 6 under U M M P S. Delivery is required as soon as possible and the steam cleaners will be issued on a first-in-first-out basis against these urgent requirements.

5. The delay involved in First Article Testing cannot be permitted as these urgent requirements are to be met.

6. The low, responsive, responsible bidder on the basis of waiving First Article testing is Hi-Jenny Division, Homestead Industries, Coraopolis, Pennsylvania. The Sioux Steam Cleaner Corporation has submitted a lower bid on the basis of waiving First Article requirements but cannot receive a waiver because at this time it does not have any contract on which it has ever had a First Article accepted by the Government for this or a similar item.

7. Although the urgent requirement is for 178 Steam Cleaners the balance of the 192 steam cleaners or 14 is considered so small a production run that it is not feasible to acquire them on a separate contract because of price consideration.

8. Based on the above, I hereby determine that it is in the best interest of the Government to waive the requirements for First Article Testing and have

production for these urgently required steam cleaners commence without delay.

It is significant to observe that no mention was made in the determination that SBA was processing a COC to Chausse on September 8. In this context, we feel that the Arsenal was on notice that a COC would be forthcoming which would conclusively establish Chausse's capacity and credit. Armed Services Procurement Regulation (ASPR) 1–705.4(a).

It is reported that in preparing and issuing the above-quoted determination particular attention was given to the first article approval clause and the delivery schedule contained in the invitation. If first article approval was required, deliveries could extend for a period of 315 days (90 days for first article submission plus 75-day approval time plus 150-day delivery requirement), whereas final shipment would be effected within 150 days if the contract did not require first article approval.

With the determination of urgency now in effect, a technical evaluation was requested from the Arsenal's Tool & Equipment Division relative to a waiver of first article approval for Hi-Jenny Division of Homestead Industries and such waiver was approved. Additionally, a favorable performance record on the prospective contractor was reported by the Defense Contract Administration Services District (DCASD), Pittsburgh, Pennsylvania.

It is reported that after a thorough review of all bids, with due regard for the current urgent requirements, contract DAAFO1–70–C–0268 was awarded to Hi-Jenny as the lowest responsive, responsible bidder. The contract, awarded on the basis of waiver of first article approval, f.o.b. origin, was executed on October 22, 1969, at a unit price of $1,527, or for a total price of $293,184, with delivery to be made within 150 days after date of award. In view of the award to Hi-Jenny, the COC referral to SBA was withdrawn on October 23, 1969.

Chausse's protest is primarily directed to the propriety of the procurement office's withdrawal of the COC referral, since SBA had given the Army Weapons Command Small Business Office notice on September 30, 1969, of SBA's intention to issue a COC on the Chausse referral.

Under ASPR 1–705.4, a small business bidder, administratively found to be nonresponsible, may be denied SBA review of its capacity and credit when award must be made without delay.

ASPR 1-705.4(c) provides that award shall be withheld pending either SBA action concerning issuance of a Certificate of Competency or the expiration of 15 working days after SBA is so notified, whichever is earlier. However, this procedure is not mandatory where the contracting officer certifies in writing that an award must be made without delay. The certification of urgency issued here related not to delay in making an award of a contract under the invitation but to a performance delay that would result if an award were made on an alternative basis, that is, on a first article approval basis. We have held that the fact that a contracting officer had referred a matter of responsibility to the SBA would not thereafter preclude application of the nonreferral authority on the basis of competent advice of urgency. B-157090, September 30, 1965. We stated further in that decision that "the waiver of SBA referral may be invoked at any time *prior to the SBA determination when it appears that a bona fide procurement urgency requires accelerated contractual action.*" [Italic supplied.]

The record shows that from a practical standpoint, your agency had been advised of the SBA's determination prior to the withdrawal action. We therefore believe that the withdrawal of the referral to SBA—after that agency had advised of its intention to issue a COC to Chausse—was not legally effective to remove that low bidder from consideration for award. The solicitation required award to the lowest evaluated bidder—irrespective of the delivery difference between first article waiver and first article approval—whether it was on the basis of origin or destination delivery or first article required or first article waived.

The public advertising statutes require that award be made to the lowest responsive, responsible bidder. Also, the rules of competitive advertised bidding require that bids be evaluated on a common basis which is prescribed in the invitation. 40 Comp. Gen. 160, 161 (1960). Otherwise, bidders could not compete on an equal basis as required by law, since they would not know in advance the basis on which their bids would be evaluated. 36 Comp. Gen. 380, 385 (1956). Therefore, the invitation itself must be considered as controlling the bases upon which bids will be evaluated. The delivery terms and conditions of the IFB were subject to the provisions of ASPR 1-1903(a) which provide in part:

(a) * * * To permit proper evaluation of bids or offers where one or more bidders or offerors may be eligible to have first article approval tests waived, the solicitation shall permit the submission of alternative bids or

offers—one including first article approval tests and the other excluding such tests; shall state clearly the relationship of the first article to the contract quantity * * * and shall provide for:

(i) Delivery schedules for the production quantity in accordance with 1-305; as appropriate, the delivery schedules—

* * * * * * *

(B) may provide for a shorter delivery schedule where the first article approval is waived and earlier delivery is in the interest of the Government, *provided that in the latter case any difference in delivery schedules resulting from a waiver of first article approval shall not be a factor in evaluation for award.* * * * [Italic supplied.]

The legal analysis accompanying the report reads as follows:

The awarding of Contract DAAF01-70-C-0268 did not impair the integrity of the Government bidding system. The contract was awarded to the low, responsive, responsible bidder submitting bids on the basis of without first article approval. The paramount consideration in awarding the contract on the basis of without first article approval was the determination that the best interest of the Government would be served in obtaining the steam cleaners in as short a time as possible due to subsequently imposed urgent requirements. Equal consideration was given to those contractors submitting bids on the basis of without first article approval. Those bidders, including Chausse, who did not and/or could not submit bids on this basis were nonresponsive to that specific bid item. *45 Comp. Gen. 682.* The foregoing discloses that procurement regulations were adhered to in awarding the subject contract. * * *

We agree that Chausse was technically nonresponsive to the alternative bid item covering "first article" waiver. While there is no requirement that a bidder respond to all alternative items of an invitation to render his bid responsive, a bidder by failing to respond to an alternative item runs the risk that should the Government elect to accept an alternative not bid upon, his bid could not be considered for the alternative bid item. This is the import of 45 Comp. Gen. 682 (1966), cited in the legal analysis, where alternate bids were requested as to different types of pipes to give bidders an opportunity to bid upon any type of pipe which would result in the lowest cost to the Government. In the instant case, bidders had no such opportunity if they were not entitled to first article waiver. Here, bidders were advised to submit bids on the basis of first article approval even if they were entitled to waiver so that bids on that basis might be considered in the event it is determined to make award with first article approval. Hence, aside from the matter of "urgency," Chausse was fully responsive to the solicitation and was eligible for award with first article approval as the lowest bidder under the solicitation.

The award as actually made to Hi-Jenny was based on the determination that that bidder was the lowest responsive bidder on the basis of first article waiver. It was rationalized that by such an

award delivery could be accomplished 165 days earlier as against the 315 days that would be required if award were made to a bidder not entitled to waiver. However, in making the award, there was overlooked the restriction in ASPR 1–1903(a), *supra*, that *any difference* in delivery schedules resulting from waiver of first article approval *shall not be a factor in evaluation for award. Cf.* 47 Comp. Gen. 448 (1968).

Since the determination of October 10 reasonably supported the urgency of the procurement, and since an award on the basis of "urgency" should not have been accomplished under the solicitation we feel that the only proper alternative to an award to Chausse would have been a cancellation of the solicitation and negotiation of a contract pursuant to the public exigency procedures of 10 U.S.C. 2304(a)(2).

Corrective action at this date would be impracticable and inconsistent with the Government's interests. We strongly recommend that the the procurement procedures at the buying activity be reviewed in the light of the circumstances of this protest and decision.

[B–168669]

Bids—Tie—Procedure for Resolving

Although three tie bids stamped received within a 5-minute period under a Request for Quotations issued pursuant to 41 U.S.C. 252(c)(3) should not have been resolved by awarding a contract to the firm whose quotation had the earliest time stamp, the record evidences no favoritism or improper motive for the award and, therefore, the executed procurement will not be disturbed, even though as a matter of sound judgment the matter should have been resolved by giving preference to small business concerns in accordance with the policy stated in sections 1–2.407–6 and 1–3.601 of the Federal Procurement Regulations. While procedures for breaking ties in advertised procurements (FPR 1–2.407–6) do not apply to small purchases, they will be applied by the contracting agency in the future when identical price quotations are submitted in order to avoid even the appearance of partiality.

To Video Engineering Co., Inc., March 30, 1970:

Further reference is made to your letter of December 17, 1969, with enclosures, protesting the award of a contract to Multi-Media Engineering, Inc., pursuant to Request for Quotations (RFQ) No. 6–J, issued by the United States Information Agency, Washington, D.C.

A written Request for Quotations No. 6–J, issued on October 22, 1969, to your firm, Multi-Media Engineering Co., Inc., Rockville, Maryland, and Ampex Corporation, Arlington, Virginia, requested

quotations on one "Ampex Model VR-5100 Videotape Recorder with Ampex Model TR-820 Monitor Receiver * * *." Subsequently, the same firms were orally requested to provide quotations on an alternate list including the above and some items of Ampex equipment.

The Multi-Media, Ampex and Video Engineering Quotations were time stamped as "Received" by the procuring activity on October 27, 1969, at 12:15 P.M., 12:16 P.M., and 12:20 P.M., respectively. Your original quotation did not include a price on the alternate list, but a quotation thereon was received on October 29, 1969. All three firms submitted identical price quotations, including prompt payment discounts, on both requests. This is ascribed by the procuring activity "to the fact that the quotes submitted are based upon a common price list submitted by the manufacturer—Ampex—to its dealers * * *."

Since the prices quoted were identical, the procuring activity determined that award would be made to the firm whose quotation bore the earliest time stamp. A purchase order was issued to Multi-Media on October 30, 1969, and the goods have since been delivered and payment therefor has been made.

You have objected to the use of the time of receipt as a basis for the issuance of a purchase order to Multi-Media, contending that this procedure violates section 1-2.407-6 of the Federal Procurement Regulations (FPR), which requires a drawing of lots when equal bids are received and there is no difference between bidders as to small business status or classification as certified eligible or labor surplus area concerns.

The above mentioned section is specifically applicable only to awards under formally advertised procurements. The instant procurement was not formally advertised but was negotiated under the authority of 41 U.S.C. 252(c)(3)„ which permits negotiation when "the aggregate amount involved does not exceed $2,500." The procedures for such small purchases are prescribed by FPR Subpart 1-3.6, but that subpart contains no provision for determination of awards on tie bids. However, since it is stated in FPR 1-3.601 that one of the objectives of the small purchase procedure is to improve opportunities for small business concerns to obtain Government contracts, and FPR 1-2.407-6 does provide a preference for small business concerns, we believe that, in the absence of any other prescribed procedure or clear

reason to the contrary, the provisions of that section should have been followed as a matter of sound judgment.

While the record in the instant case does not reveal any indication of favoritism or other improper motive in the award to Multi-Media, and you have not alleged any such impropriety, the use of the time of receipt of proposals is so fraught with the possibility of abuse that we could not approve it as a regular procedure. In this connection, we have been advised by the procuring agency that to avoid even the appearance of partiality in future small purchase procurements wherein identical price quotations are submitted, the procedures of FPR 1-2.407-6 will be followed to determine to whom a purchase order will be issued. Since the provisions of FPR 1-2.407-6 were not clearly applicable in this instance, and there appears no indication of any lack of good faith in the award made, and the supplies have been delivered, we find no proper basis for now disturbing the procurement, and your protest must therefore be denied. However, we appreciate your bringing the matter to our attention.

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Leaves of absence (*See* Leaves of Absence)

CACOUNTABLE OFFICERS

Accounts

Credit for waived erroneous payments

In accordance with Pub. L. 90–616, an accountable officer is entitled to full credits in his accounts for erroneous payments that are waived under authority of act, as payments are deemed valid for all purposes. Therefore, refund to employee of overpayment which he had repaid prior to waiver of erroneous payment by authorized official is regarded as valid payment that may not be questioned in accounts of responsible certifying officer regardless of fact that he may not regard erroneous payment as having been appropriately waived---------- 571

Certification of confidential expenditures

Propriety

Vouchers covering expenses of investigations under 14 U.S.C. 93(e), which were incurred on official business of confidential nature and approved by Coast Guard officer, but nature of expenses are unknown to certifying officer, may not be certified for payment without holding certifying officer accountable for legality of payment. 14 U.S.C. 93(e) contains no provision for certification of vouchers by Commandant of Coast Guard who is authorized to make investigations and, therefore, responsibility for certifying vouchers for payment is governed by act of Dec. 29, 1941, which fixes responsibilities of certifying and disbursing officers, and payment for costs of investigations may only be made in accordance with 1941 act---------- 486

AGENTS

Of private parties

Authority

Ministerial duties

Immediate reply to receipt of material amendment to invitation by TWX operator of low bidder, who is not responsible for preparation and submission of bids, and which was only intended as signal that transmission of amendment had been received, is not equivalent to an acceptance of terms of amendment by individual responsible for binding bidder, and under rule of agency that information furnished to clerk or anyone acting in ministerial capacity is not imputed to another, rejection of low bid was proper---------- 459

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Of private parties—Continued

Evidence

Time for submitting

Low bid signed by president of company in receivership, where power of attorney from receiver authorizing president to sign bid was submitted after bid opening, is nevertheless responsive bid. Rule that evidence of agency must be submitted before bids are opened is too restrictive in view of fact that should principal establish bid was submitted on his behalf by unauthorized individual, Govt. not only would have possible cause of action against that individual, who no doubt would challenge false disavowal of his authority, but in addition has ample means to protect itself against fraudulent practices by bidders. However, evidence of agency submitted before bid opening would avoid challenges of proof of agency. 48 Comp. Gen. 369, modified..... 527

AGRICULTURE DEPARTMENT

Inspectional services

Reimbursement

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541–5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work..... 510

The longstanding interpretation by Dept. of Agriculture that reference in Meat Inspection Act (7 U.S.C. 394), to reimbursement by meat industry for overtime costs incurred by Govt., includes cost of furnishing holiday services, is entitled to great weight in construction of act and, therefore, meat establishments that were rendered inspection services on Friday, Dec. 26, 1969, day declared a holiday by Executive order, may not be relieved of liability to reimburse Dept. for holiday premium pay that was made to inspectors..... 510

Surplus commodities

Procurements based on barter

In evaluation of proposals submitted to construct submarine cable subsystem linking Okinawa to Taiwan, proposals that were solicited on both nonbarter basis and barter basis under Pub. L. 80–806, which authorizes disposal by barter and exchange of surplus agricultural commodities for use outside U.S., addition of 50 percent Balance of Payments Program factor to cost of foreign source items offered in proposals received on both barter and nonbarter basis was proper and was not precluded by barter procedures prescribed in sec. 4, part 5, of Armed Services Procurement Reg. Therefore, it was reasonable to use 50 percent balance of payments factor in evaluating lowest priced barter proposal, even though when added to cost of foreign items the price became the highest offered..... 562

AGRICULTURE DEPARTMENT—Continued Page

Surplus commodities—Continued

Procurements based on barter—Continued

Foreign source items purchased in United Kingdom for use overseas that are offered in proposal submitted on barter basis pursuant to Pub. L. 80–806, which authorizes disposal of surplus agricultural commodities overseas, properly were subject to 50 percent Balance of Payments Program evaluation factor upon determination offset credits provided under barter agreements between U.S. and United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of balance of payments penalty, and that balance of payments impact would be adverse. Application of offset credits is not mandatory, nor is application of balance of payments procedure automatically waived when offsets are available---------- 562

Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L. 80–806, which authorizes disposal, by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal. If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors---------- 562

ALLOWANCES

Station. (*See* **Station Allowances**)

APPROPRIATIONS

Augmentation

Gifts, etc.

Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at meeting. However, pursuant to 5 U.S.C. 4111(b), and Bur. of the Budget Cir. No. A–48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose---------- 572

Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status, which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations---------- 572

APPROPRIATIONS—Continued Page

Augmentation—Continued

Gifts, etc.—Continued

Where physician employed by Veterans Admin. hospital that is affiliated with medical school of university is authorized travel and per diem to undertake Govt. business for specified period, performs duties for university when in nonpay or annual leave status while traveling, reimbursement by university of expenses incurred by physician during nonduty days should not be construed as supplementing Veterans Admin. appropriations 572

Availability

Parking space

To reimburse General Services Administration for parking facilities leased in commercial building pursuant to par. 10c, GSA Order PBS 7030.2B, Apr. 18, 1968, for accommodation of employees of agency assigned to building, agency may use appropriations use to reimburse GSA for rental of building 476

Restrictions

Buy American requirement

Notwithstanding cotton from which pads are to be manufactured in Japan for delivery in the U.S. is of domestic origin, pads offered by low bidder are considered of foreign origin and subject to expenditure restriction appearing in Dept. of Defense acts since first introduced in 1953, and as restriction was not waived on basis item cannot be procured in U.S., and as item is not for use overseas, low bid was properly rejected. Fact that invitation refers to cotton "grown *or* produced in the United States" does not denote alternative and make place of production irrelevant, in view of legislative history of 1953 act, evidencing congressional intent that any article of cotton may be considered "American" only when origin of fiber as well as each successive stage of manufacturing is domestic 606

BALANCE OF PAYMENTS PROGRAM

(*See* **Funds, Balance of Payments Program**)

BIDDERS

Qualifications

Delivery capabilities

Evidence requirements

Assumption in absence of information indicating otherwise, that past delivery delinquencies of low bidder—small business concern—were his fault is not adequate basis for concluding that delinquent deliveries established lack of perseverance or tenacity, and matter of concern's responsibility is for further consideration. If it is found upon review that low bidder on basis of substantial evidence does not possess necessary tenacity or perseverance to do an acceptable job, additional documentation or explanation should be furnished to support conclusion, otherwise nonresponsibility determination should be referred on basis of capacity and credit to Small Business Admin. under Certificate of Competency procedure 600

BIDDERS—Continued Page
Qualifications—Continued
Financial responsibility
Reconsideration

Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for nonresponsible bidder to improve its position after contracting officer's determination of nonresponsibility has been confirmed by Small Business Admin., where low bidder held financially nonresponsible on basis of preaward survey and SBA's adverse findings, has concluded negotiations for technical data rights and patent license contract that involves millions of dollars and provides for immediate substantial advance payment, bidder's responsibility should be reconsidered and if necessary, time permitting, reviewed by SBA, because of mandate in Armed Services Procurement Reg. 1–905.2, that financial resources should be obtained on as current basis as feasible with relation to date of contract award---------- 619

Tenacity and perseverance
Capacity to perform

Finding by contracting officer that small business concern lacks tenacity and perseverance because insufficiently prepared to accept award relates to concern's capacity and cannot support determination of nonresponsibility under par. 1–705.4(a) of Armed Services Procurement Reg., which defines capacity as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know how,' technical equipment and facilities or the ability to obtain them," factors that are covered by Certificate of Competency procedure---------- 600

Determination review

Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1–903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1–705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600

Responsibility *v.* bid responsiveness

To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could

BIDDERS—Continued Page

Responsibility *v.* bid responsiveness—Continued

not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid---------- 553

Noncompliance at time of bid submission with provision of invitation for steel pipe requirements that stated "when pipe is furnished" from supplier's warehouse, whether supplier is manufacturer or jobber, evidence should be shown that pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to testing standard contractor is obligated to meet required procedure "when pipe is furnished," and failure to do so would be breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by contractor would be absolutely and unquestionably impossible, any rejection of bid for that reason would rest upon determination of nonresponsibility rather than nonresponsiveness of bid---------- 553

Whether low bidder offering Japanese steel can meet its delivery obligation under requirements contract for steel pipe is question of responsibility and, therefore, fact that bidder did not furnish firm written commitment from Japanese manufacturer did not require rejection of bid. Bidder with full knowledge of circumstances concerning its ability to meet delivery schedule agreed to be bound by specified delivery schedule, and Govt. is entitled to rely on this promise---------- 553

In matters of responsibility, questions concerning qualifications of prospective contractor are primarily for resolution by administrative officers concerned, and in absence of showing of bad faith or lack of any reasonable basis for determination that prospective contractor is responsible, U.S. GAO is not justified in objecting to determination made on question of bidder responsibility by administrative agency---------- 553

Small business concerns. (*See* **Contracts, awards, small business concerns**)

BIDS

Aggregate *v.* separable items, prices, etc.

Partial award

Unbalanced bid

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error------- 588

BIDS—Continued Page

All or none

Qualified. (*See* Bids, qualified, all or none)

Alternative

Deduction

Base bid error

Where base bid is corrected to reflect intended price for materials and contract is awarded with deduction of alternative item, amount deducted for item should reflect correction in base bid---------- 480

Delivery

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed---------- 639

Failure to bid on alternate

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1–1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---------- 639

Where bidders under invitation soliciting bids on basis of first article approval and/or waiver of article are advised to submit bids on basis of first article approval even if entitled to waiver of first article in order to make them eligible for consideration should contracting agency determine to make award on basis of first article approval, fact that low bidder did not submit bid on first article waiver alternative did not effect bid responsiveness or bidder's eligibility for award of contract on basis of first article approval, as bidder having complied with terms of invitation did not run risk that its bid on basis of first article approval could not be considered because Govt. elected to accept alternative it did not bid upon, waiver of first article approval---------- 639

BIDS—Continued Page

Awards. (*See* **Contracts, awards**)

Bonds. (*See* **Bonds**)

Buy American Act

Evaluation

Balance of Payments Program restrictions

Surplus agricultural products effect

In evaluation of proposals submitted to construct submarine cable subsystem linking Okinawa to Taiwan, proposals that were solicited on both nonbarter basis and barter basis under Pub. L. 80–806, which authorizes disposal by barter and exchange of surplus agricultural commodities for use outside U.S., addition of 50 percent Balance of Payments Program factor to cost of foreign source items offered in proposals received on both barter and nonbarter basis was proper and was not precluded by barter procedures prescribed in sec. 4, part 5, of Armed Services Procurement Reg. Therefore, it was reasonable to use 50 percent balance of payments factor in evaluating lowest priced barter proposal, even though when added to cost of foreign items the price became the highest offered 562

Foreign source items purchased in United Kingdom for use overseas that are offered in proposal submitted on barter basis pursuant to Pub. L. 80–806, which authorizes disposal of surplus agricultural commodities overseas, properly were subject to 50 percent Balance of Payments Program evaluation factor upon determination offset credits provided under barter agreements between U.S. and United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of balance of payments penalty, and that balance of payments impact would be adverse. Application of offset credits is not mandatory, nor is application of balance of payments procedure automatically waived when offsets are available 562

Competitive system

Delivery provisions

Failure to meet not prejudicial

When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive, and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b. origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated "Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system 517

Equal bidding basis for all bidders

Oral statements

Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L.

BIDS—Continued Page

Competitive system—Continued

Equal bidding basis for all bidders—Continued

Oral statements—Continued

80–806, which authorizes disposal by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal. If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors---------- 562

Preservation of system's integrity

Interest of Govt. and integrity of competitive bidding system require that, after bids are opened and bidders' prices disclosed, invitations should be canceled only for most cogent and compelling reasons, and fact that one bidder made mistake in bid does not represent cogent or compelling reason for rejecting all bids and readvertising procurement-- 417

Restrictions on competition legitimacy

Procedure for issuing solicitation packages in number determined by contracting officer, which after obtaining competition by means of automated bidders source file, by publicizing procurement in Commerce Business Daily, and by notice in contractors information center results in insufficient copies to satisfy all mail requests does not achieve maximum competition sought and, therefore, fairness of policy of filling requests on first-come, first-served basis, regardless of whether request is made via mail or in person should be reviewed. Firm should be able to obtain copy of solicitation without being left with belief it must resort to engaging local representative to do business with Govt. agency---- 550

Contracts, generally. (*See* **Contracts**)

Correction

Initialing requirement

Failure to initial erasure and correction of unit price in low bid submitted under invitation for indefinite quantity of rods, where there was no doubt of intended bid price and no need to question whether person signing bid effected changes as abstract of bids evidenced price had been corrected prior to bid opening, was minor informality of form that should have been waived pursuant to par. 2–405 of Armed Services Procurement Reg. in interest of Govt. as low bidder responsible for contents of bid submitted would be required to perform at corrected bid price-------- 541

Delivery provisions

Failure to meet

Deviation minor

When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive, and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b. origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated

BIDS—Continued Page

Delivery provisions—Continued

Failure to meet—Continued

Deviation minor—Continued

"Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system 517

Mistakes

Verification

Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2–406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it 558

Proof of ability to meet

Whether low bidder offering Japanese steel can meet its delivery obligations under requirements contract for steel pipe is question of responsibility and, therefore, fact that bidder did not furnish firm written commitment from Japanese manufacturer did not require rejection of bid. Bidder with full knowledge of circumstances concerning its ability to meet delivery schedule agreed to be bound by specified delivery schedule, and Govt. is entitled to rely on this promise 553

Deviations from advertised specifications. (*See* **Contracts, specifications, deviations**)

Discarding all bids

Changed conditions, etc.

Affecting price, quantity, or quality

Cancellation of invitation for bids based on determination changes in scope of work and equipment to be furnished constituted substantial deviation from original specifications that affected price, quantity, or quality of procurement, and readvertisement of procurement with award to second low bidder under first invitation was in best interest of Govt. and is proper action under sec. 1–2.404–1(b) of Federal Procurement Regs., even though revision of specifications is not one of examples cited in section for canceling invitation. Examples cited are not intended to be all inclusive, but to be indicative of type of circumstance that justifies cancellation and, therefore, contracting officer's determination to cancel invitation prevails in absence of showing of abuse of administrative discretion 584

BIDS—Continued Page

Discarding all bids—Continued

Compelling reasons only

Interest of Govt. and integrity of competitive bidding system require that, after bids are opened and bidders' prices disclosed, invitations should be canceled only for most cogent and compelling reasons, and fact that one bidder made mistake in bid does not represent cogent or compelling reason for rejecting all bids and readvertising procurement-- 417

Evaluation

Alternate bases

Failure to bid on all bases

Where bidders under invitation soliciting bids on basis of first article approval and/or waiver of article are advised to submit bids on basis of first article approval even if entitled to waiver of first article in order to make them eligible for consideration should contracting agency determine to make award on basis of first article approval, fact that low bidder did not submit bid on first article waiver alternative did not effect bid responsiveness or bidder's eligibility for award of contract on basis of first article approval, as bidder having complied with terms of invitation did not run risk that its bid on basis of first article approval could not be considered because Govt. elected to accept alternative it did not bid upon, waiver of first article approval---------- 639

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

Delivery provisions

First article approval or waiver

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed---------- 639

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1-1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---------- 639

BIDS—Continued Page

Evaluation—Continued

Delivery provisions—Continued

Guaranteed shipping weight

Award to low bidder who failed to furnish guaranteed shipping weight (GSW) under invitation stating that "Bidder must state weights in his bid or it will be rejected." is not precluded because weight applied was one submitted by second low bidder, where invitation in providing for evaluation of bids on f.o.b. origin basis, plus transportation, and for reduction of contract prices should transportation costs exceed those used for bid evaluation, furnishes packing specifications that permit computing highest possible weight, which multiplied by applicable freight rate produces transportation cost that when added to bid price does not displace low bid. Even though failure to state GSW is not minor deviation, one of exceptions to rule is situation such as onc involved where there is no real likelihood low bid will exceed second high bid---------- 496

Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2-406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it---------- 558

Failure to furnish something required. (*See* **Contracts, specifications, failure to furnish something required**)

Mistakes

Allegation after award. (*See* **Contracts, mistakes**)

Correction

Base bid and alternative items

Where base bid is corrected to reflect intended price for materials and contract is awarded with deduction of alternative item, amount deducted for item should reflect correction in base bid---------- 480

Contract executed prior to correction

Where record establishes mistake had been made in low bid and that intended bid exceeded bid submitted, and Govt. was on constructive notice of error from time of bid opening and on actual notice within 24 hours of opening, and documentation of mistake established existence, nature, and amount of mistake, which amount when added to bid price does not displace low bidder, fact that contractor signed contract before correction of mistake does not preclude its right to relief. Both Govt. and contractor expected that price would be amended at later date to reflect bid price intended by bidder, price actually known to contracting officer and, therefore, reformation of contract by increasing price by amount of documented mistake is authorized---------- 446

BIDS—Continued Page
Mistakes—Continued
Correction—Continued
Evidence of error
Omission of price

Bidder who submitted clear and convincing evidence of error in bid due to failure to show extended amount for listed quantity of one item and its unit price, manner in which error occurred, and intended total bid price, established existence of mistake alleged, and satisfied requirements of sec. 1–2.406–3(a)(2) of Federal Procurement Regs. to permit bid correction, even though profit and overhead figure was not increased. Bid may be corrected to reflect omission of direct costs without increase for profit and overhead if so requested by bidder where bid would still remain low bid even if amended to reflect increase for profit and overhead as correction would not be prejudicial to other bidders---------- 480

Low bid displacement

Telegram received prior to bid opening increasing bid price for janitorial services, which is alleged to have been intended as decrease, and if so considered three lower bids would be displaced to make corrected price lowest submitted, may not be treated as price decrease on basis mistake occurred in transmission of bid amendment, absent showing message delivered originally by telegraph company was not message telephoned by bidder, or certification by telegraph company that would support allegation of error in bid price modification. Therefore, exception to prohibition in sec. 1–2.406–3(a)(2) of Federal Procurement Regs. that permits bid correction that displaces lower bids when error is established through information provided by telegraph company rather than by interested bidder does not apply---------- 417

Evidence of error
Unbalanced bid

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error---------- 588

Verification
Government responsibility

Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2–406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be

BIDS—Continued Page

Mistakes—Continued

Verification—Continued

Government responsibility—Continued

erroneous on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it 558

Multi-year

Same unit price for "like" items

Fact that low bidder on multi-year procurement for receiver-transmitters to be furnished at four different levels of preservation, packaging, and packing under invitation containing provision "The unit price for each *like* item of total multi-year requirements shall be same for all program years," bid different unit price on each level of packaging does not violate requirement for same unit price on each "like" item. Same unit price was offered for all *like* packaged items and, therefore, pricing requirements of invitation, which did not preclude separate prices for same items requiring different packaging, and of par. 1–322.2(c)(iv) of Armed Services Procurement Reg. were met, notwithstanding more expensive packaging was used for some of same packaged items without increase in unit price 489

Negotiated contracts. (*See* **Contracts, negotiation**)

Omissions

Invitation attachments

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed 538

Options

Cancellation. (*See* **Contracts, options, cancellation**)

Prices

Correction

Initialing requirement

Failure to initial erasure and correction of unit price in low bid submitted under invitation for indefinite quantity of rods, where there was no doubt of intended bid price and no need to question whether person signing bid effected changes as abstract of bids evidenced price had been corrected prior to bid opening, was minor informality of form that should have been waived pursuant to par. 2–405 of Armed Services Procurement Reg. in interest of Govt. as low bidder responsible for contents of bid submitted would be required to perform at corrected bid price 541

BIDS—Continued Page

Qualified

Acceptance of bid erroneous

Under invitation for bids that contained provisions for submission of bid samples as part of bid, and for inspection of production samples by Govt. prior to delivery and by contractor to insure that delivered product was "manufactured and processed in careful and workmanlike manner, in accordance with good practice," bid that submitted acceptable samples but took exception to production sample inspection due to lack of standard test equipment in industry to assure finished product would meet Govt.'s test, and offered to measure performance on basis of specifications and to meet workmanship standards inspection was intended to insure, was qualified bid as it eliminated that Govt.'s test results would control and imposed different standard of product acceptability ---------- 534

Telegram by unsuccessful bidder stating intent to protest to U.S. GAO should contract award be made to low bidder alleged to have qualified its bid, and advising supporting letter would follow, should have been treated as protest and award made to low bidder day before receipt of promised letter withheld until dispute was resolved, particularly in view of fact protestant's declaration of intent to file protest with GAO in event of contract award, was sufficient standing alone to require conclusion that telegram constituted protest. However, contract having been substantially performed, it would not be in best interests of Govt. to require cancellation of contract---------- 534

All or none

Partial award legality

While combination of awards for maximum quantity offered by low bidder and bidder that had submitted "all or none" bid would be in Govt.'s interest pricewise for entire quantity solicited, partial award under qualified bid is precluded, and word "all" in minimum quantity column may not be explained by bidder to mean "all" of any indefinite quantity to be procured under invitation. Eligibility of bid for award is determinable from bid itself without reference to subsequent offers and interpretations by bidder, as formal advertising contemplates receipt of firm offers which can be accepted by Govt.'s unilateral action and, therefore, partial acceptance of qualified bid would not result in legal award, notwithstanding bidder's willingness to accept partial award---- 499

Rejection

Propriety

Although rejection of low bid under invitation for indefinite quantity of rods was improper and award of contract to second low bidder was unauthorized, in view of expenses incurred by contractor, minimum quantity ordered under contract may stand and payment made at contract price. However, no additional orders may be placed under contract, even though bid price was computed in anticipation of obtaining orders for maximum quantity stated in contract, and contractor purchased more material than needed to fill minimum quantity ordered, as extent of contractor performance is not for consideration in deciding whether to preclude further performance where Govt. has right not to exercise option to purchase---------- 541

BIDS—Continued Page

Responsiveness *v.* bidder responsibility

To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid 553

Noncompliance at time of bid submission with provision of invitation for steel pipe requirements that stated "when pipe is furnished" from supplier's warehouse, whether supplier is manufacturer or jobber, evidence should be shown that pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to testing standard contractor is obligated to meet required procedure "when pipe is furnished," and failure to do so would be breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by contractor would be absolutely and unquestionably impossible, any rejection of bid for that reason would rest upon determination of nonresponsibility rather than nonresponsiveness of bid 553

Samples. (*See* **Contracts, specifications, samples**)

Small business concerns. (*See* **Contracts, awards, small business concerns**)

Solicitation packages

Availability

Procedure for issuing solicitation packages in number determined by contracting officer, which after obtaining competition by means of automated bidders source file, by publicizing procurement in Commerce Business Daily, and by notice in contractors information center results in insufficient copies to satisfy all mail requests does not achieve maximum competition sought and, therefore, fairness of policy of filling requests on first-come, first-served basis, regardless of whether request is made via mail or in person should be reviewed. Firm should be able to obtain copy of solicitation without being left with belief it must resort to engaging local representative to do business with Govt. agency 550

Specifications. (*See* **Contracts, specifications**)

Telegraphic submissions

Error in transmission

Establishment

Telegram received prior to bid opening increasing bid price for janitorial services, which is alleged to have been intended as decrease, and if so considered three lower bids would be displaced to make corrected price lowest submitted, may not be treated as price decrease on basis mistake occurred in transmission of bid amendment, absent showing message delivered originally by telegraph company was not message

BIDS—Continued Page

Telegraphic submissions—Continued

Error in transmission—Continued

Establishment—Continued

telephoned by bidder, or certification by telegraph company that would support allegation of error in bid price modification. Therefore, exception to prohibition in sec. 1–2.406–3(a)(2) of Federal Procurement Regs. that permits bid correction that displaces lower bids when error is established through information provided by telegraph company rather than by interested bidder does not apply 417

Tie

Procedure for resolving

Although three tie bids stamped received within 5-minute period under Request for Quotations issued pursuant to 41 U.S.C. 252(c)(3) should not have been resolved by awarding contract to firm whose quotation had earliest time stamp, record evidences no favoritism or improper motive for award and, therefore, executed procurement will not be disturbed, even though as matter of sound judgment matter should have been resolved by giving preference to small business concerns in accordance with policy stated in secs. 1–2.407–6 and 1–3.601 of Federal Procurement Regs. While procedures for breaking ties in advertised procurements (FPR 1–2.407–6) do not apply to small purchases, they will be applied by contracting agency in future when identical price quotations are submitted in order to avoid even appearance of partiality 646

"Two bites at the apple." (*See* **Contracts, specifications, failure to furnish something required, information**)

Two-step procurement

Negotiation. (*See* **Contracts, negotiation, two-step procurement**)

Unbalanced

Mistake-in-bid relief

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error 588

BONDS

Bid

Individual sureties *v.* corporation

Fact that individual sureties are on bond rather than corporation does not make bond submitted with low bid unacceptable. Individual sureties are permitted pursuant to par. 10–201.2 of Armed Services Procurement Reg., provided they are financially responsible persons, and, therefore,

BONDS—Continued Page
Bid—Continued
Individual sureties *v.* corporation—Continued
where individual sureties on bid bond furnished by low bidder are solvent and have undertaken to guarantee that principal named in bond will execute contract identified in bond if accepted by Govt., bid bond is considered sufficient on strength of individual sureties 527

Performance
Failure to furnish
Upon failure of bidder awarded timber sales contract to timely furnish performance bond, offer to sell timber to second high bidder and bidder's response by signing bid form and contract, and furnishing bid deposit and performance bond, did not consummate contract, as approval and signature of required contracting authority had not been secured, and acceptance of bidder's documents was subject to outcome of appeal by successful bidder, with whom binding contractual relationship had been created by acceptance of bid and notification of acceptance, even though performance bond had not been furnished, in view of fact invitation provided for execution of formal contract documents and furnishing of performance bond at later date, and prescribed penalty for failure to do so 431

BUY AMERICAN ACT
Bids. (*See* Bids, Buy American Act)
Buy American appropriation restriction
Domestic origin requirement
Notwithstanding cotton from which pads are to be manufactured in Japan for delivery in the U.S. is of domestic origin, pads offered by low bidder are considered of foreign origin and subject to expenditure restriction appearing in Dept. of Defense acts since first introduced in 1953, and as restriction was not waived on basis item cannot be procured in U.S., and as item is not for use overseas, low bid was properly rejected. Fact that invitation refers to cotton "grown *or* produced in the United States" does not denote alternative and make place of production irrelevant, in view of legislative history of 1953 act, evidencing congressional intent that any article of cotton may be considered "American" only when origin of fiber as well as each successive stage of manufacturing is domestic 606

CERTIFYING OFFICERS
Accounts
Credit for waived erroneous payments
In accordance with Pub. L. 90–616, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under authority of act, as payments are deemed valid for all purposes. Therefore, refund to employee of overpayment which he had repaid prior to waiver of erroneous payment by authorized official is regarded as valid payment that may not be questioned in accounts of responsible certifying officer regardless of fact that he may not regard erroneous payment as having been appropriately waived 571

CERTIFYING OFFICERS—Continued Page

Liability

Certification of vouchers without knowledge of expenditures

Vouchers covering expenses of investigations under 14 U.S.C. 93(e), which were incurred on official business of confidential nature and approved by Coast Guard officer, but nature of expenses are unknown to certifying officer, may not be certified for payment without holding certifying officer accountable for legality of payment. 14 U.S.C. 93(e) contains no provision for certification of vouchers by Commandant of Coast Guard who is authorized to make investigations and, therefore, responsibility for certifying vouchers for payment is governed by act of Dec. 29, 1941, which fixes responsibilities of certifying and disbursing officers, and payment for costs of investigations may only be made in accordance with 1941 act 486

CITIES, CORPORATE LIMITS

Per diem for military personnel

Escorts for deceased personnel

Members of uniformed services while performing temporary duty as escorts for deceased members within corporate limits of their permanent duty station may not be paid per diem, even though distance traveled to funeral site is over 55 miles. Allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and sec. 408, regarding entitlement generally for travel performed on public business under competent orders. Under sec. 404, per diem for temporary duty is payable only when member is away from designated duty station, and for travel within limits of permanent duty station, member under sec. 408 may only be paid transportation costs. Therefore, Joint Travel Regs. may not be amended to provide per diem for escort duty at permanent duty station 453

COMPENSATION

Military personnel. (*See* Pay)

Overtime

Inspectional service employees

Holidays

Executive order, etc.

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541–5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work 510

Part-time WAE employees

Part-time immigration inspectors employed on intermittent basis at hourly rates regardless of day or time of day they are required to perform service, and who are paid overtime compensation for work per-

COMPENSATION—Continued Page
Overtime—Continued
Inspectional service employees—Continued
Part-time WAE employees—Continued
formed in excess of 8 hours in day under 5 U.S.C. 5542(a), having no regular hours of duty are not eligible for extra compensation prescribed by act of Mar. 2, 1931 (8 U.S.C. 1353a) for work between 5 p.m. and 8 a.m. However, inspectors are entitled to 2 days extra pay for Sunday and holiday duty pursuant to 1931 act, but since they have no regular tour of duty, they may not receive their regular pay in addition to extra pay---- 577

Travel time
Ship as temporary duty station
Employee who traveled to overseas port to join ship for underway vibration survey that was completed en route to U.S. was not in work status while deadheading back aboard ship to entitle him to overtime compensation, notwithstanding he was not permitted to leave ship upon completion of assignment. Ship was employee's temporary duty station despite fact that it was moving during survey, and employee's actual travel ended when he reported for duty aboard ship and resumed only when duty was completed, and as there was no performance of work while traveling, or travel incident to travel that involved performance of work while traveling within contemplation of 5 U.S.C. 5542(b)(2), employee's travel time may not be regarded as "hours of employment."_ 503

CONTRACTORS
Conflicts of interest
Developmental or prototype items
Under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), award of development contract for experimental engines to contractor proposing to use services of foreign firm who had performed feasibility studies for Govt. to determine practicality of developing engines, does not violate Rule 1 of Dept. of Defense Directive 5500.10, which is intended to prevent organizational conflicts of interest and subsequent unfair competition from hardware producer that provides system engineering and technical direction (SE/TD) without at same time assuming overall contractual responsibility for production of system. Directive is not self-executing but its application must be negotiated, and neither feasability studies contract nor development contract provided for its application---- 463

CONTRACTS
Awards
Cancellation
Erroneous awards
Cancellation not required
Telegram by unsuccessful bidder stating intent to protest to U.S. GAO should contract award be made to low bidder alleged to have qualified its bid, and advising supporting letter would follow, should have been treated as protest and award made to low bidder day before receipt of promised letter withheld until dispute was resolved, particularly in view of fact protestant's declaration of intent to file protest with GAO in event of contract award, was sufficient standing alone to

CONTRACTS—Continued Page
Awards—Continued
Cancellation—Continued
Erroneous awards—Continued
Cancellation not required—Continued
require conclusion that telegram constituted protest. However, contract having been substantially performed, it would not be in best interests of Govt. to require cancellation of contract---------- 534

Erroneous
Performance
Although rejection of low bid under invitation for indefinite quantity of rods was improper and award of contract to second low bidder was unauthorized, in view of expenses incurred by contractor, minimum quantity ordered under contract may stand and payment made at contract price. However, no additional orders may be placed under contract, even though bid price was computed in anticipation of obtaining orders for maximum quantity stated in contract, and contractor purchased more material than needed to fill minimum quantity ordered, as extent of contractor performance is not for consideration in deciding whether to preclude further performance where Govt. has right not to exercise option to purchase---------- 541

Separable or aggregate
Propriety of single award
While combination of awards for maximum quantity offered by low bidder and bidder that had submitted "all or none" bid would be in Govt.'s interest pricewise for entire quantity solicited, partial award under qualified bid is precluded, and word "all" in minimum quantity column may not be explained by bidder to mean "all" of any indefinite quantity to be procured under invitation. Eligibility of bid for award is determinable from bid itself without reference to subsequent offers and interpretations by bidder, as formal advertising contemplates receipt of firm offers which can be accepted by Govt.'s unilateral action and, therefore, partial acceptance of qualified bid would not result in legal award, notwithstanding bidder's willingness to accept partial award---- 499

Small business concerns
Certifications
Competency
Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1–903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1–705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600

Finding by contracting officer that small business concern lacks tenacity and perseverance because insufficiently prepared to accept

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Certifications—Continued
Competency—Continued
award relates to concern's capacity and cannot support determination of nonresponsibility under par. 1–705.4(a) of Armed Services Procurement Reg., which defines capacity as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know how,' technical equipment and facilities or the ability to obtain them," factors that are covered by Certificate of Competency procedure---------- 600

Assumption in absence of information indicating otherwise, that past delivery delinquencies of low bidder—small business concern— were his fault is not adequate basis for concluding that delinquent deliveries established lack of perseverance or tenacity, and matter of concern's responsibility is for further consideration. If it is found upon review that low bidder on basis of substantial evidence does not possess necessary tenacity or perseverance to do an acceptable job, additional documentation or explanation should be furnished to support conclusion, otherwise nonresponsibility determination should be referred on basis of capacity and credit to Small Business Admin. under Certificate of Competency procedure---------- 600

Withdrawal of application by Government

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed---------- 639

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1–1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---------- 639

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Eligibility
Reconsideration

Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for nonresponsible bidder to improve its position after contracting officer's determination of nonresponsibility has been confirmed by Small Business Admin., where low bidder held financially nonresponsible on basis of preaward survey and SBA's adverse findings, has concluded negotiations for technical data rights and patent license contract that involves millions of dollars and provides for immediate substantial advance payment, bidder's responsibility should be reconsidered, and if necessary, time permitting, reviewed by SBA, because of mandate in Armed Services Procurement Reg. 1–905.2, that financial resources should be obtained on as current basis as feasible with relation to date of contract award 619

Bids. (*See* Bids)

Data, rights, etc.
Use by Government
Internal use

Data submitted under requests for proposals having been obtained properly, lost its proprietary nature and Govt., therefore, may accept data and use proprietary data previously purchased to verify accuracy of data. Restrictive legend on proprietary specification is intended to prohibit Govt. from using data for in-house manufacture or disclosure outside Govt., and fact that legend does not restrict use of data for internal purposes is evidenced by clarification of restrictive data clause in par. 9–203(b) of Armed Services Procurement Reg. to limit restriction to procurements entailing disclosure outside Govt., and by right reserved to Govt. to use similar or identical data, which implies use of restricted data for comparison purposes 471

Incorporation of terms by reference

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed 538

Leases (*See* Leases)

Mistakes

Acceptance of contract with knowledge of mistake

Where record establishes mistake had been made in low bid and that intended bid exceeded bid submitted, and Govt. was on constructive notice of error from time of bid opening and on actual notice within 24

CONTRACTS—Continued Page

Mistakes—Continued

Acceptance of contracts with knowledge of mistake—Continued

hours of opening, and documentation of mistake established existence, nature, and amount of mistake, which amount when added to bid price does not displace low bidder, fact that contractor signed contract before correction of mistake does not preclude its right to relief. Both Govt. and contractor expected that price would be amended at later date to reflect bid price intended by bidder, price actually known to contracting officer and, therefore, reformation of contract by increasing price by amount of documented mistake is authorized 446

Allegation before award. (*See* **Bids, mistakes**)

Contracting officer's error detection duty

Notice of error

Unbalanced bid

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error 588

Government's fault

Correction

Error made in slope percentage factor used in computing redetermined stumpage rates under timber sale contract may be corrected retroactively and contractor credited with overpayment that resulted from Govt.'s unilateral error, as no disagreement exists concerning correct slope percentage to subject correction to limitations of disputes clause of contract, nor is retroactive modification of contract subject to regulation that timber sale contracts may be modified only when modification applies to unexecuted portions of contract and will not be injurious to U.S., as exception to rule that contract may not be modified except in Govt.'s interest may be made to correct unilateral error by Govt 530

Negotiation

Conflicts of interest prohibition

Under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), award of development contract for experimental engines to contractor proposing to use services of foreign firm who had performed feasibility studies for Govt. to determine practicality of developing engines, does not violate Rule 1 of Dept. of Defense Directive 5500.10, which is intended to prevent organizational conflicts of interest and subsequent unfair competition from hardware producer that provides system engineering and technical direction (SE/TD) without at same time assuming overall contractual responsibility for production of system. Directive is

CONTRACTS—Continued Page

Negotiation—Continued

Conflicts of interest prohibition—Continued

not self-executing but its application must be negotiated, and neither feasibility studies contract nor development contract provided for its application 463

National emergency authority

Conclusiveness

Determination whether it would be in interests of Govt. to negotiate contract to assure availability of particular mobilization base is vested in head of military department involved, and par. 3–216 of Armed Services Procurement Reg., which implements 10 U.S.C. 2304(a)(10), provides for Secretary to determine when it is in interests of national defense to negotiate with particular manufacturer to assure availability of property or services during national emergency. Therefore, in absence of convincing evidence of abuse of discretion by procuring agency, its determination of needs of Govt., and method of accommodating such needs is conclusive, especially where procurement is for equipment of highly specialized nature that must be based on expert technical opinion. 463

Public exigency

Advertised procurement initially

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed 639

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1–1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2) 639

CONTRACTS—Continued Page

Negotiation—Continued

Two-step procurement

Letter requests for proposals

Award made of multi-year contracts for operation and maintenance of three warning systems—DEWLine, WACS, and BMEWS—under letter requests contemplating two steps to accomplish procurement—technical and price proposals—was not improper because manning level for DEWLine was revised, a factual question for technical evaluation by contracting agency, or because of failure to discuss phase-over costs to be added to price proposed by nonincumbent offeror, reasonable administrative determination on basis of noncompetitive nature of procurement. Furthermore, discussions with protestant satisfied requirements of Armed Services Procurement Reg. 3–804 and 3–805, and even though permitting successful offeror only to revise prices after close of negotiations violated ASPR 3–805.1(b)—procedure to be corrected—no significant detriment having resulted to competitive system, objection to award is not warranted 625

Offer and acceptance

Contract execution

What constitutes

Upon failure of bidder awarded timber sales contract to timely furnish performance bond, offer to sell timber to second high bidder and bidder's response by signing bid form and contract, and furnishing bid deposit and performance bond, did not consummate contract, as approval and signature of required contracting authority had not been secured, and acceptance of bidder's documents was subject to outcome of appeal by successful bidder, with whom binding contractual relationship had been created by acceptance of bid and notification of acceptance, even though performance bond had not been furnished, in view of fact invitation provided for execution of formal contract documents and furnishing of performance bond at later date, and prescribed penalty for failure to do so 431

Firm offer for unilateral acceptance

While combination of awards for maximum quantity offered by low bidder and bidder that had submitted "all or none" bid would be in Govt.'s interest pricewise for entire quantity solicited, partial award under qualified bid is precluded, and word "all" in minimum quantity column may not be explained by bidder to mean "all" of any indefinite quantity to be procured under invitation. Eligibility of bid for award is determinable from bid itself without reference to subsequent offers and interpretations by bidder, as formal advertising contemplates receipt of firm offers which can be accepted by Govt.'s unilateral action and, therefore, partial acceptance of qualified bid would not result in legal award, notwithstanding bidder's willingness to accept partial award 499

Options

Cancellations

Erroneous award

Although rejection of low bid under invitation for indefinite quantity of rods was improper and award of contract to second low bidder was unauthorized, in view of expenses incurred by contractor, minimum

CONTRACTS—Continued Page
Options—Continued
Cancellations—Continued
Erroneous award—Continued
quantity ordered under contract may stand and payment made at contract price. However, no additional orders may be placed under contract, even though bid price was computed in anticipation of obtaining orders for maximum quantity stated in contract, and contractor purchased more material than needed to fill minimum quantity ordered, as extent of contractor performance is not for consideration in deciding whether to preclude further performance where Govt. has right not to exercise option to purchase---------- 541

Proprietary, etc., items. (*See* Contracts, data, rights, etc.)

Protests
Consideration mandatory
Telegram by unsuccessful bidder stating intent to protest to U.S. GAO should contract award be made to low bidder alleged to have qualified its bid, and advising supporting letter would follow, should have been treated as protest and award made to low bidder day before receipt of promised letter withheld until dispute was resolved, particularly in view of fact protestant's declaration of intent to file protest with GAO in event of contract award, was sufficient standing alone to require conclusion that telegram constituted protest. However, contract having been substantially performed, it would not be in best interests of Govt. to require cancellation of contract---------- 534

General Accounting Office authority
Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1-903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1-705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600

Notice
To contractors
Failure of contracting officer to notify low bidder, whose bid was rejected for failure to acknowledge material amendment to invitation, of protest prior to contract award to lowest responsive bidder, was neither prejudicial to bidder nor in derogation of sec. 1-2.407-8 of Federal Procurement Regs. The section is not specific that bidder affected by protest is to be notified in every case, but speaks only of "appropriate cases," and states example that contemplates situations where award might not be consummated within acceptance period provided by offer, and not situations where bid is not eligible for award. 459

CONTRACTS—Continued Page

Protests—Continued

Valid

Delay of contact awards

Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for nonresponsible bidder to improve its position after contracting officer's determination of nonresponsibility has been confirmed by Small Business Admin., where low bidder held financially nonresponsible on basis of preaward survey and SBA's adverse findings, has concluded negotiations for technical data rights and patent license contract that involves millions of dollars and provides for immediate substantial advance payment, bidder's responsibility should be reconsidered and if necessary, time permitting, reviewed by SBA, because of mandate in Armed Services Procurement Reg. 1-905.2, that financial resources should be obtained on as current basis as feasible with relation to date of contract award 619

Requirements

Maximum limitations

What constitutes

Under General Services Administration requirements contract for carbonless transfer paper that contained $7,500 maximum order limitation, combination of requisitions received from different supply depots within same zone for same item that exceeds limitation and issuance of new procurement, does not violate terms of requirements contract. Each requisition received by ordering activity from depot is internal document and ordering office has right to combine two or more requisitions, and should combination exceed dollar limitation, procuring activity is obliged to obtain supplies under separate procurement to enable Govt. to explore possibility of securing lower prices for larger quantities, but future procurements should state what will constitute order within maximum limitation clause of contract 437

Research and development

Conflicts of interest prohibitions

Under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), award of development contract for experimental engines to contractor proposing to use services of foreign firm who had performed feasibility studies for Govt. to determine practicality of developing engines, does not violate Rule 1 of Dept. of Defense Directive 5500.10, which is intended to prevent organizational conflicts of interest and subsequent unfair competition from hardware producer that provides system engineering and technical direction (SE/TD) without at same time assuming overall contractual responsibility for production of system. Directive is not self-executing but its application must be negotiated, and neither feasibility studies contract nor development contract provided for its application 463

Sales, generally. (*See* Sales)

Samples. (*See* Contracts, specifications, samples)

Small business concerns. (*See* Contracts, awards, small business concerns)

CONTRACTS—Continued Page

Specifications

Addenda acknowledgment

By other than authorized personnel

Immediate reply to receipt of material amendment to invitation by TWX operator of low bidder, who is not responsible for preparation and submission of bids, and which was only intended as signal that transmission of amendment had been received, is not equivalent to an acceptance of terms of amendment by individual responsible for binding bidder, and under rule of agency that information furnished to clerk or anyone acting in ministerial capacity is not imputed to another, rejection of low bid was proper 459

Changes, revisions, etc.

Affecting price, quantity, or quality

Cancellation of invitation for bids based on determination changes in scope of work and equipment to be furnished constituted substantial deviation from original specifications that affected price, quantity, or quality of procurement, and readvertisement of procurement with award to second low bidder under first invitation was in best interest of Govt. and is proper action under sec. 1–2.404–1(b) of Federal Procurement Regs., even though revision of specifications is not one of examples cited in section for canceling invitation. Examples cited are not intended to be all inclusive, but to be indicative of type of circumstance that justifies cancellation and, therefore, contracting officer's determination to cancel invitation prevails in absence of showing of abuse of administrative discretion 584

Delivery provisions

Proof of ability to meet

Whether low bidder offering Japanese steel can meet its delivery obligations under requirements contract for steel pipe is question of responsibility and, therefore, fact that bidder did not furnish firm written commitment from Japanese manufacturer did not require rejection of bid. Bidder with full knowledge of circumstances concerning its ability to meet delivery schedule agreed to be bound by specified delivery schedule, and Govt. is entitled to rely on this promise 553

Deviations

Delivery provisions

Waiver

When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive, and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b. origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated "Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system 517

CONTRACTS—Continued Page

Specifications—Continued

Deviations—Continued

Informal *v.* substantive

Guaranteed shipping weight

Award to low bidder who failed to furnish guaranteed shipping weight (GSW) under invitation stating that "Bidder must state weights in his bid or it will be rejected." is not precluded because weight applied was one submitted by second low bidder, where invitation in providing for evaluation of bids on f.o.b. origin basis, plus transportation, and for reduction of contract prices should transportation costs exceed those used for bid evaluation, furnishes packing specifications that permit computing highest possible weight, which multiplied by applicable freight rate produces transportation cost that when added to bid price does not displace low bid. Even though failure to state GSW is not minor deviation, one of exceptions to rule is situation such as one involved where there is no real likelihood low bid will exceed second high bid---- 496

Failure to furnish something required

Freight classification description

Low bid that describes receiver-transmitters to be furnished as "Electronic equipment. Freight classification not previously established by this facility" in response to Freight Classification Description clause of invitation, which states description is to be "same one bidder uses for commercial shipment," is responsive bid. Clause does not invite freight classification *if* bidder has not had any previous commercial shipment, and in providing for use of other information to determine classification description most appropriate and advantageous to Govt., clause neither binds bidder nor Govt. Therefore, failure of bidder to submit classification data may be waived as minor deviation, notwithstanding imperative language to contrary---------- 489

Information

Choice to furnish

Failure to furnish cost differentials for different modes of transportation, types of vehicle, or places of delivery Govt. may specify at time of shipment, does not require rejection of low bid under invitation for procurement of receiver-transmitters which provides that "differentials *if* specified below will be considered in evaluation of bids." Bidder had choice to offer differentials and failure to do so evidences none were intended to be offered---------- 489

Delivery, etc., information

Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2–406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it---------- 558

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

Information—Continued

Invitation to bid attachments

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed..... 538

Points of production and inspection

To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid..... 553

Submission time specified

Noncompliance at time of bid submission with provision of invitation for steel pipe requirements that stated "when pipe is furnished" from supplier's warehouse, whether supplier is manufacturer or jobber, evidence should be shown that pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to testing standard contractor is obligated to meet required procedure "when pipe is furnished," and failure to do so would be breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by contractor would be absolutely and unquestionably impossible, any rejection of bid for that reason would rest upon determination of nonresponsibility rather than nonresponsiveness of bid.... 553

Minimum needs requirement

Administrative determination

Determination whether it would be in interests of Govt. to negotiate contract to assure availability of particular mobilization base is vested in head of military department involved, and par. 3–216 of Armed Services Procurement Reg., which implements 10 U.S.C. 2304(a)(10), provides for Secretary to determine when it is in interests of national defense to negotiate with particular manufacturer to assure availability of property or services during national emergency. Therefore, in absence

CONTRACTS—Continued Page

Specifications—Continued

Minimum needs requirement—Continued

Administrative determination—Continued

of convincing evidence of abuse of discretion by procuring agency, its determination of needs of Govt., and method of accommodating such needs is conclusive, especially where procurement is for equipment of highly specialized nature that must be based on expert technical opinion---- 463

Revisions. (*See* **Contracts, specifications, changes, revisions, etc.**)

Samples

Preproduction sample requirement

Delivery date

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed- 639

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submi tted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1-1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---- 639

Where bidders under invitation soliciting bids on basis of first article approval and/or waiver of article are advised to submit bids on basis of first article approval even if entitled to waiver of first article in order to make them eligible for consideration should contracting agency determine to make award on basis of first article approval, fact that low bidder did not submit bid on first article waiver alternative did not effect bid responsiveness or bidder's eligibility for award of contract on basis of first article approval, as bidder having complied with terms of invitation did not run risk that its bid on basis of first article approval could not be considered because Govt. elected to accept alternative it did not bid upon, waiver of first article approval---- 639

CONTRACTS—Continued Page
Specifications—Continued
Samples—Continued
Tests to determine product acceptability

Under invitation for bids that contained provisions for submission of bid samples as part of bid, and for inspection of production samples by Govt. prior to delivery and by contractor to insure that delivered product was "manufactured and processed in careful and workmanlike manner, in accordance with good practice," bid that submitted acceptable samples but took exception to production sample inspection due to lack of standard test equipment in industry to assure finished product would meet Govt.'s test, and offered to measure performance on basis of specifications and to meet workmanship standards inspection was intended to insure, was qualified bid as it eliminated that Govt.'s test results would control and imposed different standard of product acceptability ---------- 534

COURTS
Court of Claims
Decisions
Effect given by General Accounting Office

Payment of retired pay computed at pay of higher grade in which member or former member of Armed Forces had served satisfactorily, without regard to whether higher grade was of temporary or permanent status, may be authorized, or credit passed in accounts of disbursing officers for payments made, in view of judicial rulings so holding, even though Armed Force in which individual held higher grade is not service from which he retired, subject of course to statute of limitation contained in act of Oct. 9, 1940, 31 U.S.C. 71a, and administrative approval that service at higher grade was satisfactorily performed, if such determination is required by statute. 47 Comp. Gen. 722, modified ---------- 618

Judges
Leaves of absence
Earned in executive branch of Government

Judges of Tax Court who were removed from executive branch of Govt. by virtue of enactment of sec. 951, Pub. L. 91–172, approved Dec. 30, 1969, which established Court as constitutional court, may not be regarded as separated from service within contemplation of 5 U.S.C. 5551, in absence of such indication in legislative history of act, so as to permit lump-sum payments for accrued annual leave pursuant to act of Dec. 21, 1944, as amended, for Pub. L. 83–102, under which judges were credited with leave when appointed to court from classified civil service position authorizes payment for credited leave only upon separation from service or upon return to position subject to Annual and Sick Leave Act of 1951, as amended. However, entitlement of judges to payment for accrued annual leave to their credit remains undisturbed ------ 545

Retirement
Termination prior to eligibility

Upon termination of services of judge of U.S. Tax Court prior to eligibility for retirement under 26 U.S.C. 7447, judge who had prior service subject to civil service retirement laws may again acquire coverage under civil service retirement system if upon reemployment in

COURTS—Continued Page
Judges—Continued
Retirement—Continued
Termination prior to eligibility—Continued
position subject to system, he redeposits to Civil Service Retirement and Disability Fund any refunds received from fund and under sec. 7448, with interest from date of refunds to date of redeposit, and service involved may be recredited for civil service retirement purposes, but in no case may deposit exceed that normally required under Civil Service Retirement System. In absence of reemployment, question of reinstating coverage under system is for submission to Civil Service Commission..... 521

Survivorship benefits
Deposits in Civil Service Retirement and Disability Fund
Judge of U.S. Tax Court with prior Govt. service who elects to receive retired pay under 26 U.S.C. 7447(d), may not have payments he made into Civil Service Retirement and Disability Fund form basis for survivor's annuity under sec. 7448(h) of Internal Revenue Code should he not apply for refund of deposits to fund that is authorized in sec. 7447(g)(2)(C), in view of his statutory entitlement to refund upon election of retired pay under Internal Revenue Code and provisions in statute, Pub. L. 91–172, which amends 26 U.S.C. 7447(g), that exclude him from entitlement to civil service retirement annuity, including survivor's annuity, and from requirement to contribute to Civil Service Retirement and Disability Fund..... 521

Procedure to obtain
Judge of U.S. Tax Court with prior Govt. service who elects retired pay under 26 U.S.C. 7447(e), may obtain immediate survivor's protection under sec. 7448 of Internal Revenue Code upon making at time of his election applicable deposits in Tax Court survivor's annuity fund for 5-year period immediately preceding date of election—period to include all service he performed as judge plus so much of prior service subject to civil service retirement system that is necessary to complete 5-year period. However, to obtain maximum survivor protection, judge must make deposit to fund for all service for which he claims credit, and any service in excess of 5 years for which he does not make deposit, survivor's annuity must be reduced in accordance with sec. 7448(d)..... 521

DEBT COLLECTIONS
Waiver
Civilian employees
Compensation overpayments
Accountable officers accounts
In accordance with Pub. L. 90–616, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under authority of act, as payments are deemed valid for all purposes. Therefore, refund to employee of overpayment which he had repaid prior to waiver of erroneous payment by authorized official is regarded as valid payment that may not be questioned in accounts of responsible certifying officer regardless of fact that he may not regard erroneous payment as having been appropriately waived..... 571

DISCHARGES AND DISMISSALS Page

Military personnel

Discharge effect

Reenlistment bonus

Payment of variable reenlistment bonus authorized in 37 U.S.C. 308(g) to Navy petty officer discharged pursuant to 10 U.S.C. 6295 on Nov. 4, 1968, 3 months prior to expiration of enlistment, who on Nov. 5, 1968, reenlisted in rating of hospital corpsman, is not precluded by removal of rating from list of critical military skills effective Jan. 1, 1969, and prohibition effective Sept. 1, 1968, against payment of bonus incident to an early discharge for purpose of immediate reenlistment. Sec. 6295 discharge is considered to be same as discharge issued at expiration of term of service, except for nonentitlement to pay and allowances for period not served, and reenlistment, whether immediate or otherwise, is, therefore, separate contract and obligation, and discharge and reenlistment of member occurring prior to Jan. 1, 1969, is entitled to variable reenlistment bonus 434

DOCUMENTS

Incorporation by reference. (*See* Contracts, incorporation of terms by reference)

DONATIONS

Legality

Authority requirement

Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status, which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations 572

EVIDENCE

Substantial new evidence rule

Military matters

Late receipt of retirement orders

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued 429

FEES Page

Parking

Equalization of fees charged in two buildings

Plan to equalize parking fees of agency employees located in two buildings, one a Federal building, the other a leased building, under management of commercial parking firm ignores that in proposed "single facility" concept, space is principal ingredient of plan and not management services, and that parking fees to be collected go beyond realistic charge for management services. Contemplated agreement would confer interest in Federal property in contravention of 40 U.S.C. 303b, which requires that leasing of Federal property shall be for money consideration only, and monies so derived deposited into Treasury as miscellaneous receipts, and overlooks that in absence of statutory authority use of Federal property to help finance procurement of private services is unauthorized. Therefore, parking equalization plan may not be approved 476

Physicians

State license fees

Reimbursement

Air Force medical officer, licensed in Texas, who while in residency at military hospital in Mississippi is assigned for 6 months to New Orleans civilian hospital, may not be reimbursed cost of fees paid in connection with reciprocity licensure in State of Louisiana. Statute prescribing fees, exempts physicians and surgeons in military service practicing in discharge of official duties, and officer while assigned to special medical training is considered to have been performing military duties, and in absence of statutory authority for payment of State fees, appropriated funds may not be used to impose burden on Govt. in conduct of its official business 450

FUNDS

Balance of Payments Program

Offset credits under barter agreements

Foreign source items purchased in United Kingdom for use overseas that are offered in proposal submitted on barter basis pursuant to Pub. L. 80–806, which authorizes disposal of surplus agricultural commodities overseas, properly were subject to 50 percent Balance of Payments Program evaluation factor upon determination offset credits provided under barter agreements between U.S. and United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of balance of payments penalty, and that balance of payments impact would be adverse. Application of offset credits is not mandatory, nor is application of balance of payments procedure automatically waived when offsets are available 562

Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L. 80–806, which authorizes disposal by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal.

FUNDS—Continued Page
Balance of Payments Program—Continued
Offset credits under barter agreements—Continued
If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors 562

Nonappropriated
Civilian employee activities
Transportation request use
Use of Govt. transportation requests, Standard Form 1169, by Army and Air Force Exchange Service—nonappropriated fund activity, even though considered Govt. instrumentality for some purposes, as appropriated funds are not made available for its operations—in order to procure air transportation for civilian employees and avoid payment of 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. Travel of Exchange employees concerned with recreation, welfare, and moral of members of uniformed services is not travel for account of U.S., nor on official business, two prerequisites in GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, sec. 2000, for use of Govt. Transportation Requests to procure passenger transportation 578

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Bidders' qualifications
Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1-903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and reparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1-705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected 600

Statutory construction. (*See* Statutory Construction)
GRANTS
To States. (*See* States, Federal aid, grants, etc.)
GRATUITIES
Reenlistment bonus
Critical military skills
Early discharge from enlistment
Payment of variable reenlistment bonus authorized in 37 U.S.C. 308(g) to Navy petty officer discharged pursuant to 10 U.S.C. 6295 on Nov. 4, 1968, 3 months prior to expiration of enlistment, who on Nov. 5, 1968, reenlisted in rating of hospital corpsman, is not precluded by removal of rating from list of critical military skills effective Jan. 1, 1969, and prohibition effective Sept. 1, 1968, against payment of bonus incident to an early discharge for purpose of immediate re-

GRATUITIES—Continued Page
Reenlistment bonus—Continued
Critical military skills—Continued
Early discharge from enlistment—Continued
enlistment. Sec. 6295 discharge is considered to be same as discharge issued at expiration of term of service, except for nonentitlement to pay and allowances for period not served, and reenlistment, whether immediate or otherwise, is, therefore, separate contract and obligation, and discharge and reenlistment of member occurring prior to Jan. 1, 1969, is entitled to variable reenlistment bonus 434

Training leading to a commission
Reenlistment prior to approval of training
Eligibility criteria established in par. 7d(2) of Bur. of Naval Personnel Instruction 1133.18B, dated Dec. 1968, to effect that petty naval officers who reenlist to meet minimum service requirements for Navy Enlisted Scientific Education Program (NESEP) or for other programs leading to commissioned status are not eligible for variable reenlistment bonus authorized pursuant to 37 U.S.C. 308(g), does not preclude additional eligibility requirement in par. 7d(2), deferring payment of bonus to members who reenlist subsequent to applying for NESEP training, pending results of their application, and providing for payment only to members not selected for training, as subsection is in accord with par. V.A. 6 of Dept. of Defense Instruction No. 1304.13, which implements 37 U.S.C. 308(g) 611

GUAM
Employees of the Federal Government
Registration to vote effect
Registering to vote in Guam does not deprive civilian employee of benefits prescribed for overseas service where neither acts involved nor their legislative histories indicate intent that employee be denied entitled benefits because of registration. Therefore, termination of employee's entitlement to non-foreign post differential authorized in 5 U.S.C. 5941(a)(2) and E.O. No. 10,000 as recruitment incentive; to home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside U.S.; to up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); to travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to "place of actual residence" established at time of employee's appointment or travel overseas, is not required 596

HOLIDAYS
Created by Executive order
Inspectional services
Reimbursement
Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541–5549, as there

HOLIDAYS—Continued Page
Created by Executive order—Continued
Inspectional services—Continued
Reimbursement—Continued
is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work---------- 510

JUDGES
(*See* **Courts, judges**)

JUSTICE DEPARTMENT
Law enforcement
Discretionary grants-in-aid
Reservation in sec. 306 of title I of Omnibus Crime Control and Safe Streets Act of 1968 of 15 percent of funds appropriated to Law Enforcement Admin., Dept. of Justice, for purpose of making discretionary grants in aid of law enforcement programs is interpreted to permit grants to units of general local government as well as State planning agencies on basis that language of section is not precise and that reference to only detailed legislative history of section contained in Senate floor debates evidences intent to authorize direct grants to units of local government, and this fact is more relevant factor of persuasiveness in interpretation of sec. 306 than fact that legislation originated in House-- 411

LEASES
Parking space
Appropriations. (*See* **Appropriations, availability, parking space**)
Status
Plan to equalize parking fees of agency employees located in two buildings, one a Federal building, the other a leased building, under management of commerical parking firm ignores that in proposed "single facility" concept, space is principal ingredient of plan and not management services, and that parking fees to be collected go beyond realistic charge for management services. Contemplated agreement would confer interest in Federal property in contravention of 40 U.S.C. 303b, which requires that leasing of Federal property shall be for money consideration only, and monies so derived deposited into Treasury as miscellaneous receipts, and overlooks that in absence of statutory authority use of Federal property to help finance procurement of private services is unauthorized. Therefore, parking equalization plan may not be approved- 476

Post Office Department. (*See* **Post Office Department, leases**)
Repairs and improvements
Government's obligation
The repair of window breakage by vandals and otherwise in building occupied as post office under 30-year lease that exempted lessee, Govt., from liability to repair damages caused by "acts of a stranger" is responsibility of lessor, even if lease does not provide affirmatively that lessor shall be liable for such repairs. On basis of absence of "Federal law" on issue, conflict in State court decisions as to legal liability of lessee, length of lease term, purpose for which premises were leased and lease

LEASES—Continued Page
Repairs and improvements—Continued
Government's obligation—Continued
provisions relating to repairs, exceptions to Govt.'s liability for repairs should be strictly applied and Govt. as lessee exempted from liability to make repairs, except for breakage not caused by vandalism---------- 532

LEAVES OF ABSENCE
Civilians on military duty
Retired military personnel
Retired Regular naval officers serving in civilian position subject to retired pay reduction under 5 U.S.C. 5532, and ineligible for military leave granted reservists and National Guard members pursuant to 5 U.S.C. 6323(a), when ordered to 2 weeks of active naval duty is entitled to receive lump-sum payment for annual leave or to elect to have leave remain to his credit until return from active duty in accordance with 5 U.S.C. 5552, which authorizes active duty in Armed Forces for civilian employees without separation. If retired officer elects lump-sum leave payment, should he return to civilian position prior to expiration of period covered by payment, he will be subject to same adjustment required in case of reemployment following separation—refund of amount equal to unexpired period---------- 444

Home leave travel of overseas employees
Minimum service requirement
What constitutes
To be eligible for home leave travel allowances prescribed for employee who satisfactorily completes agreed upon period of service as provided in sec. 1.3c of Bur. of Budget Cir. No. A–56, Revised, Oct. 12, 1966, employee must have completed minimum of 12 months of service following date on which he arrives at or returns to his overseas post of duty, and, therefore, agency may not regard agreed upon period of overseas service as commencing on date employee is assigned to training or temporary duty in U.S. immediately following completion of home leave and credit employee with time spent in training toward fulfillment of agreed upon period of service---------- 425

Lump-sum payments
Transfers
Executive to judicial branch of Government
Judges of Tax Court who were removed from executive branch of Govt. by virtue of enactment of sec. 951, Pub. L. 91–172, approved Dec. 30, 1969, which established Court as constitutional court, may not be regarded as separated from service within contemplation of 5 U.S.C. 5551, in absence of such indication in legislative history of act, so as to permit lump-sum payments for accrued annual leave pursuant to act of Dec. 21, 1944, as amended, for Pub. L. 83–102, under which judges were credited with leave when appointed to court from classified civil service position authorizes payment for credited leave only upon separation from service or upon return to position subject to Annual and Sick Leave Act of 1951, as amended. However, entitlement of judges to payment for accrued annual leave to their credit remains undisturbed-- 545

LEAVES OF ABSENCE—Continued Page

Military personnel

Convalescent

Travel from convalescent leave site

Member of uniformed services who travels from convalescent leave site to medical treatment facility other than one that granted convalescent leave incident to illness or injury incurred while receiving hostile fire pay under 37 U.S.C. 310, may be authorized return transportation at Govt. expense pursuant to sec. 9(1) of Pub. L. 90–207, approved Dec. 16, 1967 (37 U.S.C. 411a). To restrict member's return to facility from which he departed is not required in view of apparent beneficial intent of 1967 act to relieve member of travel expenses incurred incident to convalescent leave, and governing regulations may be amended accordingly 427

MILITARY PERSONNEL

Escort duty

Per diem. (*See* **Subsistence, per diem, military personnel, escort duty**)

Gratuities

Reenlistment bonus. (*See* **Gratuities, reenlistment bonus**)

Hostile fire pay. (*See* **Pay, additional, hostile fire**)

Leaves of absence. (*See* **Leaves of Absence, military personnel**)

Medical officers

License fees

Air Force medical officer, licensed in Texas, who while in residency at military hospital in Mississippi is assigned for 6 months to New Orleans civilian hospital, may not be reimbursed cost of fees paid in connection with reciprocity licensure in State of Louisiana. Statute prescribing fees, exempts physicians and surgeons in military service practicing in discharge of official duties, and officer while assigned to special medical training is considered to have been performing military duties, and in absence of statutory authority for payment of State fees, appropriated funds may not be used to impose burden on Govt. in conduct of its official business 450

Pay, generally. (*See* **Pay**)

Per diem. (*See* **Subsistence, per diem, military personnel**)

Proficiency pay. (*See* **Pay, additional, proficiency**)

Record correction

Discharge change as entitlement to pay, etc.

Retirement and advancement on retired list

Upon correction of military records on Apr. 17, 1969, pursuant to 10 U.S.C. 1552, to show retirement under 10 U.S.C. 3914 of private E–1 on Dec. 1, 1945, with over 20 years of service, in lieu of discharge from Regular Army, and advancement on retired list effective Feb. 2, 1955, to 1st. lieutenant based on 30 years of active duty and inactive time on retired list as provided in 10 U.S.C. 3964, retired pay of member for period Feb. 2, 1955, to Apr. 16, 1969, is not subject to recomputation under 10 U.S.C. 3992 at rate "applicable on date of retirement," but in accordance with act of May 20, 1958, at rates prescribed in sec. 511 of Career Compensation Act of 1949. Although on Oct. 1, 1949, member's retired pay was greater under sec. 511(a), recomputation is permitted

MILITARY PERSONNEL—Continued Page
Record correction—Continued
Discharge change as entitlement to pay, etc.—Continued
Retirement and advancement on retired list—Continued
under sec. 511(b) to provide greater amount of retired pay prescribed by section, on basis advancement on retired list constituted changed condition 440

Reenlistment bonus. (*See* **Gratuities, reenlistment bonus**)

Reservists
Training duty
Per diem

To equalize entitlement of members of National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in temporary duty status are entitled to per diem, subject to exception in legislative reports with respect to sec. 3 of Pub. L. 90–168 (37 U.S.C. 404(a)), that no member of Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at military installation where quarters and mess are available. 48 Comp. Gen. 517, and B–152420, July 8, 1969, modified 621

Retired
Civilian service
Concurrent military duty

Retired Regular naval officer serving in civilian position subject to retired pay reduction under 5 U.S.C. 5532, and ineligible for military leave granted reservists and National Guard members pursuant to 5 U.S.C. 6323(a), when ordered to 2 weeks of active naval duty is entitled to receive lump-sum payment for annual leave or elect to have leave remain to his credit until return from active duty in accordance with 5 U.S.C. 5552, which authorizes active duty in Armed Forces for civilian employees without separation. If retired officer elects lump-sum leave payment, should he return to civilian position prior to expiration of period covered by payment, he will be subject to same adjustment required in case of reemployment following separation—refund of amount equal to unexpired period 444

Retirement
Effective date
Late receipt of orders

Late receipt by enlisted members of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969,

MILITARY PERSONNEL—Continued Page

Retirement—Continued

Effective date—Continued

Late receipt of orders—Continued

date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued 429

Station allowances. (*See* Station Allowances, military personnel)

Travel expenses. (*See* Travel Expenses, military personnel)

OFFICERS AND EMPLOYEES

Compensation. (*See* Compensation)

Contributions from sources other than United States

Acceptance

Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at meeting. However, pursuant to 5 U.S.C. 4111(b) and Bur. of the Budget Cir. No. A–48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose 572

When Veterans Admin. physician employed by hospital affiliated with medical college of university is authorized both travel to attend medical meeting to conduct Govt. business for portion of meeting, and to be absent without charge to leave to attend remainder of meeting, and he is reimbursed by Govt. for travel costs and per diem incurred on Govt. business and by university for balance of his expenses, contribution by university pursuant to its tax exempt status under 26 U.S.C. 501(c)(3), and authority under 5 U.S.C. 4111, may be retained by employee 572

Where physician employed by Veterans Admin. hospital that is affiliated with medical school of university is authorized travel and per diem to undertake Govt. business for specified period, performs duties for university when in nonpay or annual leave status while traveling, reimbursement by university of expenses incurred by physician during nonduty days should not be construed as supplementing Veterans Admin. appropriations 572

Debt collections

Waiver. (*See* Debt Collections, waiver, civilian employees)

Dependents

Transportation. (*See* Transportation, dependents)

Leaves of absence. (*See* Leaves of Absence)

OFFICERS AND EMPLOYEES—Continued Page

Overseas

Home leave

Minimum service requirement. (*See* **Leaves of Absence, home leave travel of overseas employees, minimum service requirement**)

Travel expenses. (*See* **Travel Expenses, overseas employees, home leave**)

Registration to vote

Effect on benefits

Registering to vote in Guam does not deprive civilian employee of benefits prescribed for overseas service where neither acts involved nor their legislative histories indicate intent that employee be denied entitled benefits because of registration. Therefore, termination of employee's entitlement to non-foreign post differential authorized in 5 U.S.C. 5941(a)(2) and E. O. No. 10,000 as recruitment incentive; to home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside U.S.; to up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); to travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to "place of actual residence" established at time of employee's appointment or travel overseas, is not required 596

Per diem. (*See* **Subsistence, per diem**)

Retirement. (*See* **Retirement, civilian**)

Transfers

Relocation expenses

Truth in Lending Act effect

What constitutes a finance charge

Prohibition in sec. 4.2d of Bur. of Budget Cir. No. A–56 against reimbursement of any fee, cost, charge, or expense determined to be finance charge under Truth in Lending Act, as implemented by Regulation Z issued by Board of Governors of Federal Reserve System, precludes reimbursing employee who purchased residence incident to permanent change of station not only for loan charge that is finance charge within meaning of act, but also for VA funding fee paid as condition precedent to securing VA loan guarantee, and for tax service paid incident to extension of credit. However, recording fee, and costs of obtaining credit report and lender's title policy are not finance charges and these items of cost are reimbursable 483

Travel expenses. (*See* **Travel Expenses**)

ORDERS

Canceled, revoked or modified

Effective date

New evidence

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is

ORDERS—Continued Page
Canceled, revoked or modified—Continued
Effective date—Continued
New evidence—Continued
entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued ---- 429

PAY
Active duty
Period between date of retirement and receipt of orders
Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued ---- 429

Additional
Hostile fire pay
Hospitalization for treatment of injuries, etc.
Entitlement to special pay determinations
The terms "hostile fire," "explosion of a hostile mine," or "other hostile action" as used in 37 U.S.C. 310(a)(3) authorizing 3 additional months of hostile fire pay for member of uniformed services hospitalized for treatment of injury or wound, have reference to "battle casualties," which is defined in casualty regulations as including persons wounded or injured "in action," even if wounded mistakenly or accidentally by friendly fire, and excluding one who is ill from illness or medical cause or receives injuries resulting from noncombatant accident, felonious assault, attempted suicide, or self-inflicted wounds. Therefore, only when member is classified as casualty as result of hostile action may be paid hostile fire pay for period not to exceed 3 months while hospitalized. 507

Proficiency
Award retroactively prohibited
Award of proficiency pay to members of uniformed services from date of eligibility, which was administratively overlooked, may not be retroactively approved. Entitlement to proficiency pay prescribed in 37 U.S.C. 307 is subject to par. 10811 of Dept. of Defense Military Pay and Allowances Entitlements Manual, which provides that award of proficiency pay for members meeting requirements in Table 1–8–1 may be awarded proficiency pay and that such pay "starts on date award is made unless later date is specified. Awards may not be made retroactively." -- 505

PAY—Continued Page

Civilian employees. (*See* Compensation)

Retired

Advancement on retired list

Evidence of satisfactory service in another service

Payment of retired pay computed at pay of higher grade in which member or former member of Armed Forces had served satisfactorily, without regard to whether higher grade was of temporary or permanent status, may be authorized, or credit passed in accounts of disbursing officers for payments made, in view of judicial rulings so holding, even though Armed Force in which individual held higher grade is not service from which he retired, subject of course to statute of limitation contained in act of Oct. 9, 1940, 31 U.S.C. 71a, and administrative approval that service at higher grade was satisfactorily performed, if such determination is required by statute. 47 Comp. Gen. 722, modified 618

Highest pay benefits

Upon correction of military records on Apr. 17, 1969, pursuant to 10 U.S.C. 1552, to show retirement under 10 U.S.C. 3914 of private E-1 on Dec. 1, 1945, with over 20 years of service, in lieu of discharge from Regular Army, and advancement on retired list effective Feb. 2, 1955, to 1st lieutenant based on 30 years of active duty and inactive time on retired list as provided in 10 U.S.C. 3964, retired pay of member for period Feb. 2, 1955, to Apr. 16, 1969, is not subject to recomputation under 10 U.S.C. 3992 at rate "applicable on date of retirement," but in accordance with act of May 20, 1958, at rates prescribed in sec. 511 of Career Compensation Act of 1949. Although on Oct. 1, 1949, member's retired pay was greater under sec. 511(a) recomputation is permitted under sec. 511(b) to provide greater amount of retired pay prescribed by section, on basis advancement on retired list constituted changed condition 440

Effective date

Late receipt of retirement orders

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued 429

PAY—Continued Page
Retired—Continued
Grade, rank, etc., at retirement
Service in higher rank than at retirement

Payment of retired pay computed at pay of higher grade in which member or former member of Armed Forces had served satisfactorily, without regard to whether higher grade was of temporary or permanent status, may be authorized, or credit passed in accounts of disbursing officers for payments made, in view of judicial rulings so holding, even though Armed Force in which individual held higher grade is not service from which he retired, subject of course to statute of limitation contained in act of Oct. 9, 1940, 31 U.S.C. 71a, and administrative approval that service at higher grade was satisfactorily performed, if such determination is required by statute. 47 Comp. Gen. 722, modified---------- 618

Waiver for civilian retirement benefits
Revocation

Regular enlisted member of uniformed services who subsequent to retirement was employed as civilian in Federal Govt. and waived his retired pay to have his military service credited for civilian retirement purposes may not if reemployed in civil service revoke waiver of retired pay. Revocation of waiver would not terminate former member's status as an annuitant or terminate his eligibility to receive an annuity, which pursuant to 5 U.S.C. 8344(a) would be deducted from civilian compensation payable to annuitant while reemployed in order to avoid double benefit based upon same period of military service. Therefore, reemployed annuitant is entitled to continue to receive his annuity and to be paid by employing agency only difference between annuity due and salary payable to him---------- 581

POST EXCHANGES, SHIP STORES, ETC.
Employees
Government transportation request use

Use of Govt. transportation requests, Standard Form 1169, by Army and Air Force Exchange Service—nonappropriated fund activity, even though considered Govt. instrumentality for some purposes, as appropriated funds are not made available for its operations—in order to procure air transportation for civilian employees and avoid payment of 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. Travel of Exchange employees concerned with recreation, welfare, and morale of members of uniformed services is not travel for account of U.S., nor on official business, two prerequisites in GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, sec. 2000, for use of Govt. Transportation Requests to procure passenger transportation---- 578

POST OFFICE DEPARTMENT
Leases
Damages
Government's liability

The repair of window breakage by vandals and otherwise in building occupied as post office under 30-year lease that exempted lessee, Govt., from liability to repair damages caused by "acts of a stranger" is responsibility of lessor, even if lease does not provide affirmatively that lessor

POST OFFICE DEPARTMENT—Continued Page

Leases—Continued

Damages—Continued

Government's liability—Continued

shall be liable for such repairs. On basis of absence of "Federal law" on issue, conflict in State court decisions as to legal liability of lessee, length of lease term, purpose for which premises were leased and lease provisions relating to repairs, exceptions to Govt.'s liability for repairs should be strictly applied and Govt. as lessee exempted from liability to make repairs, except for breakage not caused by vandalism 532

PROPERTY

Public

Private use

Authority

Plan to equalize parking fees of agency employees located in two buildings, one a Federal building, the other a leased building, under management of commercial parking firm ignores that in proposed "single facility" concept, space is principal ingredient of plan and not management services, and that parking fees to be collected go beyond realistic charge for management services. Contemplated agreement would confer interest in Federal property in contravention of 40 U.S.C. 303b, which requires that leasing of Federal property shall be for money consideration only, and monies so derived deposited into Treasury as miscellaneous receipts, and overlooks that in absence of statutory authority use of Federal property to help finance procurement of private services is unauthorized. Therefore, parking equalization plan may not be approved 476

Surplus

Disposition

Sale. (*See* **Sales**)

PURCHASES

Tie bids

Resolution

Although three tie bids stamped received within 5 minute period under Request for Quotations issued pursuant to 41 U.S.C. 252(c)(3) should not have been resolved by awarding contract to firm whose quotation had earliest time stamp, record evidences no favoritism or improper motive for award and, therefore, executed procurement will not be disturbed, even though as matter of sound judgment matter should have been resolved by giving preference to small business concerns in accordance with policy stated in secs. 1–2.407–6 and 1–3.601 of Federal Procurement Regs. While procedures for breaking ties in advertised procurements (FPR 1–2.407–6) do not apply to small purchases, they will be applied by contracting agency in future when identical price quotations are submitted in order to avoid even appearance of partiality 646

REGULATIONS
Page
Implementing procedures
Propriety

Instructions by Defense Contract Audit Agency authorizing per diem rate of $20, and up to $25 maximum where employee incurs actual expenses in excess of $20, that were issued to put into effect Pub. L. 91–114, approved Nov. 10, 1969, and implementing Joint Travel Regs., increasing per diem from $16 to $25 for travel within continental U.S., may not be basis for retroactive approval of additional per diem for employees issued orders prior to statutory increase, or for reducing rate prescribed by statute. There is no authority when taking required administrative action to effect statutory increase to apply increase retroactively, and per diem may only be reduced in special circumstances prescribed by JTR establishing mandatory rate increase. Also combination of per diem and actual expenses provided in instructions is improper. 493

Retroactive
Administrative error correction

The general rule that regulations may not be made retroactively effective when law has been previously construed or proposed regulations amend regulations previously issued, does not apply to reinstatement of properly issued regulations. Therefore, upon reinstatement of regulations that authorized per diem to reservists ordered to active duty for less than 20 weeks where quarters and mess are available, no objection will be raised to per diem payments heretofore or hereafter made for any period on or after Jan. 1, 1968, and prior to effective date of new regulations to give effect to per diem entitlement, if such payments are in accordance with par. M6001 of Joint Travel Regs., issued Apr. 1, 1968, to implement sec. 3 of Pub. L. 90–168 ---------- 621

RETIREMENT
Civilian
Contributions
Former employees serving as judges

Judge of U.S. Tax Court with prior Govt. service who elects to receive retired pay under 26 U.S.C. 7447(d), may not have payments he made into Civil Service Retirement and Disability Fund form basis for survivor's annuity under sec. 7448(h) of Internal Revenue Code should he not apply for refund of deposits to fund that is authorized in sec. 7447 (g)(2)(C), in view of his statutory entitlement to refund upon election of retired pay under Internal Revenue Code and provisions in statute, Pub. L. 91–172, which amends 26 U.S.C. 7447(g), that exclude him from entitlement to civil service retirement annuity, including survivor's annuity, and from requirement to contribute to Civil Service Retirement and Disability Fund ---------- 521

Judge reemployed upon termination of judicial services

Upon termination of services of judge of U.S. Tax Court prior to eligibility for retirement under 26 U.S.C. 7447, judge who had prior service subject to civil service retirement laws may again acquire coverage under civil service retirement system if upon reemployment in position subject to system, he redeposits to Civil Service Retirement and Disability Fund any refunds received from fund and under sec. 7448, with interest from date of refunds to date of redeposit, and service involved

RETIREMENT—Continued Page
Civilian—Continued
Contributions—Continued
Judge reemployed upon termination of judicial services—Continued
may be recredited for civil service retirement purposes, but in no case may deposit exceed that normally required under Civil Service Retirement System. In absence of reemployment, question of reinstating coverage under system is for submission to Civil Service Commission--- 521

Reemployment
Annuity deduction
Federal employment requirement

Regular enlisted member of uniformed services who subsequent to retirement was employed as civilian in Federal Govt. and waived his retired pay to have his military service credited for civilian retirement purposes may not if reemployed in civil service revoke waiver of retired pay. Revocation of waiver would not terminate former member's status as an annuitant or terminate his eligibility to receive an annuity, which pursuant to 5 U.S.C. 8344(a) would be deducted from civilian compensation payable to annuitant while reemployed in order to avoid double benefit based upon same period of military service. Therefore, reemployed annuitant is entitled to continue to receive his annuity and to be paid by employing agency only difference between annuity due and salary payable to him---------- 581

SALES
Disclaimer of warranty
Removal difficulties

High bidder under sales contract disposing of cranes who inspected surplus property to check size, location, condition, and circumstances affecting removal is not entitled to rescission of contract because cranes, with or without dismantling, can only be removed at prohibitive cost. Sales record evidences actions of Govt. were taken in good faith, and sale having been made on "as is" and "where is" basis without recourse against Govt. and without guaranty, warranty, or representation as to quantity, kind, character, quality, weight, or size, contractor assumed risk of conditions which impaired removal, and fact that it was economically unfeasible, or even too dangerous, to remove cranes does not relieve contractor from his contractual obligations---------- 613

Timber. (*See* **Timber Sales**)

STATES
Federal aid, grants, etc.
Discretionary authority

Reservation in sec. 306 of title I of Omnibus Crime Control and Safe Streets Act of 1968 of 15 percent of funds appropriated to Law Enforcement Admin., Dept. of Justice, for purpose of making discretionary grants in aid of law enforcement programs is interpreted to permit grants to units of general local government as well as State planning agencies on basis that language of section is not precise and that reference to only detailed legislative history of section contained in Senate floor debates evidences intent to authorize direct grants to units of local government, and this fact is more relevant factor of persuasiveness in interpretation of sec. 306 than fact that legislation originated in House_ 411

STATION ALLOWANCES Page

Military personnel

Excess living costs outside United States, etc.

Dependents military dependent status

Member of uniformed services who incident to permanent change of station to restricted area overseas to which dependents are not authorized to accompany him, elects to move dependents from old duty station in United States (U.S.) to designated place in Alaska, Hawaii, Puerto Rico, or any territory or possession of U.S.—in fact to any place outside U.S.—may not be paid station allowances—temporary lodging, housing, and cost-of-living allowances—as dependents move overseas would be personal choice, separate and apart from member's overseas duty. Dependents while residing overseas would not be in military dependent status and, therefore, increased living costs incurred by member would not be within contemplation of 37 U.S.C. 405 for reimbursement purposes. 548

STATUTORY CONSTRUCTION

Administrative construction weight

The longstanding interpretation by Dept. of Agriculture that reference in Meat Inspection Act (7 U.S.C. 394), to reimbursement by meat industry for overtime costs incurred by Govt., includes cost of furnishing holiday services, is entitled to great weight in construction of act and, therefore, meat establishments that were rendered inspection services on Friday, Dec. 26, 1969, day declared a holiday by Executive order, may not be relieved of liability to reimburse Dept. for holiday premium pay that was made to inspectors---------- 510

Legislative history, title, etc.

Examination

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541–5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work---------- 510

History and origin of legislation in different houses

Reservation in sec. 306 of title I of Omnibus Crime Control and Safe Streets Act of 1968 of 15 percent of funds appropriated to Law Enforcement Admin., Dept. of Justice, for purpose of making discretionary grants in aid of law enforcement programs is interpreted to permit grants to units of general local government as well as State planning agencies on basis that language of section is not precise and that reference to only detailed legislative history of section contained in Senate floor debates evidences intent to authorize direct grants to units of local government, and this fact is more relevant factor of persuasiveness in interpretation of sec. 306 than fact that legislation originated in House---------- 411

STATUTORY CONSTRUCTION—Continued Page

Legislative intent

Buy American requirement

Notwithstanding cotton from which pads are to be manufactured in Japan for delivery in the U.S. is of domestic origin, pads offered by low bidder are considered of foreign origin and subject to expenditure restriction appearing in Dept. of Defense acts since first introduced in 1953, and as restriction was not waived on basis item cannot be procured in U.S., and as item is not for use overseas, low bid was properly rejected. Fact that invitation refers to cotton "grown *or* produced in the United States" does not denote alternative and make place of production irrelevant, in view of legislative history of 1953 act, evidencing congressional intent that any article of cotton may be considered "American" only when origin of fiber as well as each successive stage of manufacturing is domestic 606

SUBSISTENCE

Per diem

Actual expenses

Combination with per diem

Improper

Instructions by Defense Contract Audit Agency authorizing per diem rate of $20, and up to $25 maximum where employee incurs actual expenses in excess of $20, that were issued to put into effect Pub. L. 91–114, approved Nov. 10, 1969, and implementing Joint Travel Regs., increasing per diem from $16 to $25 for travel within continental U.S., may not be basis for retroactive approval of additional per diem for employees issued orders prior to statutory increase, or for reducing rate prescribed by statute. There is no authority when taking required administrative action to effect statutory increase to apply increase retroactively, and per diem may only be reduced in special circumstances prescribed by JTR establishing mandatory rate increase. Also combination of per diem and actual expenses provided in instructions is improper 493

Hours of departure, etc.

Rendezvous location

Employee who drove his privately owned automobile to rendezvous location from where he traveled in privately owned automobile of another employee to their temporary duty station may be paid per diem computed on basis of travel from time of departure from home to his return pursuant to sec. 6.9c(2) of Standardized Govt. Travel Regs., even though section does not precisely apply to situation, for had employee driven his automobile entire distance to temporary duty station or been picked up at his residence, per diem would have begun to run from time of departure from his residence. Per diem payable is for computation under par. C8101–2c of Joint Travel Regs. at $11.80 rate prescribed for travel for period of less than 24 hours but more than 10 hours where use of lodgings was not required 525

SUBSISTENCE—Continued Page

Per diem—Continued

Increases. (See Subsistence, per diem, rates, increases)

Military personnel

Escort duty

At permanent duty station

Members of uniformed services while performing temporary duty as escorts for deceased members within corporate limits of their permanent duty station may not be paid per diem, even though distance traveled to funeral site is over 55 miles. Allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and sec. 408, regarding entitlement generally for travel performed on public business under competent orders. Under sec. 404, per diem for temporary duty is payable only when member is away from designated duty station, and for travel within limits of permanent duty station, member under sec. 408 may only be paid transportation costs. Therefore, Joint Travel Regs. may not be amended to provide per diem for escort duty at permanent duty station 453

Reservists

Where due to unforeseen circumstances, it is impossible for reservist to complete ordered duty within scheduled 20-week period, per diem payments may be continued for short additional periods and regulations amended accordingly 621

Station per diem allowance. (*See* Station Allowances, military personnel)

Training duty periods

Reservists

To equalize entitlement of members of National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in temporary duty status are entitled to per diem, subject to exception in legislative reports with respect to sec. 3 of Pub. L. 90–168 (37 U.S.C. 404(a)), that no member of Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at military installation where quarters and mess are available. 48 Comp. Gen. 517, and B–152420, July 8, 1969, modified 621

The general rule that regulations may not be made retroactively effective when law has been previously construed or proposed regulations amend regulations previously issued, does not apply to reinstatement of properly issued regulations. Therefore, upon reinstatement of regulations that authorized per diem to reservists ordered to active duty for less than 20 weeks where quarters and mess are available, no objection will be raised to per diem payments heretofore or hereafter made for any period on or after Jan. 1, 1968, and prior to effective date of new regulations to give effect to per diem entitlement, if such payments are in accordance with par. M6001 of Joint Travel Regs., issued Apr. 1, 1968, to implement sec. 3 of Pub. L. 90–168 621

SUBSISTENCE—Continued Page

Per diem—Continued

Rates

Increases

Administrative implementation

Instructions by Defense Contract Audit Agency authorizing per diem rate of $20, and up to $25 maximum where employee incurs actual expenses in excess of $20, that were issued to put into effect Pub. L. 91–114, approved Nov. 10, 1969, and implementing Joint Travel Regs., increasing per diem from $16 to $25 for travel within continental U.S., may not be basis for retroactive approval of additional per diem for employees issued orders prior to statutory increase, or for reducing rate prescribed by statute. There is no authority when taking required administrative action to effect statutory increase to apply increase retroactively, and per diem may only be reduced in special circumstances prescribed by JTR establishing mandatory rate increase. Also combination of per diem and actual expenses provided in instructions is improper 493

Increase in maximum per diem rate for travel within limits of continental U.S. from $16 to $25 that is authorized by Pub. L. 91–114, approved Nov. 10, 1969, and prescribed by pars. 8101–1 and 8101–2 of Joint Travel Regs. is mandatory increase and $25 rate may only be reduced by administrative action under special circumstances provided in par C8051 of regulations, and, therefore, agency rates of per diem that are in contravention of those prescribed by regulations are ineffective 525

Temporary duty

Computation

Employee who drove his privately owned automobile to rendezvous location from where he traveled in privately owned automobile of another employee to their temporary duty station may be paid per diem computed on basis of travel from time of departure from home to his return pursuant to sec. 6.9c(2) of Standardized Govt. Travel Regs., even though section does not precisely apply to situation, for had employee driven his automobile entire distance to temporary duty station or been picked up at his residence, per diem would have begun to run from time of departure from his residence. Per diem payable is for computation under par. C8101–2c of Joint Travel Regs. at $11.80 rate prescribed for travel for period of less than 24 hours but more than 10 hours where use of lodgings was not required 525

TAXES

State

Government immunity

Governmental function, etc.

Air Force medical officer, licensed in Texas, who while in residency at military hospital in Mississippi is assigned for 6 months to New Orleans civilian hospital, may not be reimbursed cost of fees paid in connection with reciprocity licensure in State of Louisiana. Statute prescribing fees, exempts physicians and surgeons in military service practicing in discharge of official duties, and officer while assigned to special medical training is considered to have been performing military

TAXES—Continued Page

State—Continued

Government immunity—Continued

Governmental functions, etc.—Continued

duties, and in absence of statutory authority for payment of State fees, appropriated funds may not be used to impose burden on Govt. in conduct of its official business 450

TERRITORIES AND POSSESSIONS

Registration to vote

Effect on civilian employee benefits

Registering to vote in Guam does not deprive civilian employee of benefits prescribed for overseas service where neither acts involved nor their legislative histories indicate intent that employee be denied entitled benefits because of registration. Therefore, termination of employee's entitlement to non-foreign post differential authorized in 5 U.S.C. 5941(a)(2) and E. O. No. 10,000 as recruitment incentive; to home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside U.S.; to up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); to travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to "place of actual residence" established at time of employee's appointment or travel overseas, is not required 596

TIMBER SALES

Bids

Contract consummation

Upon failure of bidder awarded timber sales contract to timely furnish performance bond, offer to sell timber to second high bidder and bidder's response by signing bid form and contract, and furnishing bid deposit and performance bond, did not consummate contract, as approval and signature of required contracting authority had not been secured, and acceptance of bidder's documents was subject to outcome of appeal by successful bidder, with whom binding contractual relationship had been created by acceptance of bid and notification of acceptance, even though performance bond had not been furnished, in view of fact invitation provided for execution of formal contract documents and furnishing of performance bond at later date, and prescribed penalty for failure to do so 431

Rate redetermination

Erroneous

Error made in slope percentage factor used in computing redetermined stumpage rates under timber sale contract may be corrected retroactively and contractor credited with overpayment that resulted from Govt.'s unilateral error, as no disagreement exists concerning correct slope percentage to subject correction to limitations of disputes clause of contract, nor is retroactive modification of contract subject to regulation that timber sale contracts may be modified only when modification applies to unexecuted portions of contract and will not be injurious to U.S., as exception to rule that contract may not be modified except in Govt.'s interest may be made to correct unilateral error by Govt 530

TRANSPORTATION Page

Automobiles

Ferry fares

English channel

Where charges for crossing English channel via hovercraft are imposed for transportation of motor vehicle and not for transportation of driver and passengers, officer of uniformed services who drove his privately owned vehicle incident to permanent change of station, accompanied by his dependents, and incurred ferry expense to cross channel may not be reimbursed on basis of applying percentage of vehicle fare assessed for transportation across English channel to transportation of driver and passengers in vehicle, officer having paid no fare for his or his dependents transportation via hovercraft---------- 416

Dependents

Parents

Financial support requirement

Employee who incident to permanent change of duty station has mother-in-law moved by ambulance from nursing home located at his old station to one in vicinity of his new station so wife could continue to handle affairs of her mother, who although not dependent for income tax purposes depends on daughter to handle financial and other affairs, may not be reimbursed cost of ambulance service. Even though mother-in-law could be regarded as member of employee's household notwithstanding she receives domiciliary care elsewhere, she is not "dependent" within meaning of sec. 1.2d of Bur. of Budget Cir. No. A-56, as employee does not contribute to her support, and fact that parent relies on daughter for other than financial support does not constitute her dependent---------- 544

Requests

Issuance, use, etc.

Official business requirement

Use of Govt. transportation requests, Standard Form 1169, by Army and Air Force Exchange Service—nonappropriated fund activity, even though considered Govt. instrumentality for some purposes, as appropriated funds are not made available for its operations—in order to procure air transportation for civilian employees and avoid payment of 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. Travel of Exchange employees concerned with recreation, welfare, and morale of members of uniformed services is not travel for account of U.S., nor on official business, two prerequisities in GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, sec. 2000, for use of Govt. transportation requests to procure passenger transportation------ 578

TRAVEL EXPENSES

Contributions from private sources

Acceptance by agency

Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status, which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may

TRAVEL EXPENSES—Continued Page
Contributions from private sources—Continued
Acceptance by agency—Continued
not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations---------- 572

Acceptance by employee

Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at testing. However, pursuant to 5 U.S.C. 4111(b), and Bur. of the Budget Cir. No. A–48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose---------- 572

When Veterans Admin. physician employed by hospital affiliated with medical college of university is authorized both travel to attend medical meeting to conduct Govt. business for portion of meeting, and to be absent without charge to leave to attend remainder of meeting, and he is reimbursed by Govt. for travel costs and per diem incurred on Govt. business and by university for balance of his expenses, contribution by university pursuant to its tax exempt status under 26 U.S.C. 501(c)(3), and authority under 5 U.S.C. 4111, may be retained by employee------ 572

Military personnel
Ferry fares
Charges assessed for motor vehicle transportation

Where charges for crossing English channel via hovercraft are imposed for transportation of motor vehicle and not for transportation of driver and passengers, officer of uniformed services who drove his privately owned vehicle incident to permanent change of station, accompanied by his dependents, and incurred ferry expense to cross channel may not be reimbursed on basis of applying percentage of vehicle fare assessed for transportation across English channel to transportation of driver and passengers in vehicle, officer having paid no fare for his or his dependents transportation via hovercraft---------- 416

Leaves of absence
Convalescent
Travel from convalescent leave site

Member of uniformed services who travels from convalescent leave site to medical treatment facility other than one that granted convalescent leave incident to illness or injury incurred while receiving hostile fire pay under 37 U.S.C. 310, may be authorized return transportation at Govt. expense pursuant to sec. 9(1) of Pub. L. 90–207, approved Dec. 16, 1967 (37 U.S.C. 411a). To restrict member's return

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
Leaves of absence—Continued
Convalescent—Continued
Travel from convalescent leave site—Continued
to facility from which he departed is not required in view of apparent beneficial intent of 1967 act to relieve member of travel expenses incurred incident to convalescent leave, and governing regulations may be amended accordingly---------- 427

Official business
Participation in private conventions, etc.
Where physician employed by Veterans Admin. hospital that is affiliated with medical school of university is authorized travel and per diem to undertake Govt. business for specified period, performs duties for university when in nonpay or annual leave status while traveling, reimbursement by university of expenses incurred by physician during nonduty days should not be construed as supplementing Veterans Admin. appropriations---------- 572

Overseas employees
Home leave
Minimum service requirement
Training or temporary duty in United States
To be eligible for home leave travel allowances prescribed for employee who satisfactorily completes agreed upon period of service as provided in sec. 1.3c of Bur. of Budget Cir. No. A–56, Revised, Oct. 12, 1966, employee must have completed minimum of 12 months of service following date on which he arrives at or returns to his overseas post of duty, and, therefore, agency may not regard agreed upon period of overseas service as commencing on date employee is assigned to training or temporary duty in U.S. immediately following completion of home leave and credit employee with time spent in training toward fulfillment of agreed upon period of service---------- 425

VEHICLES
Parking. (*See* **Fees, parking**)
VOUCHERS AND INVOICES
Certifications
Confidential expenditures
Vouchers covering expenses of investigations under 14 U.S.C. 93(e), which were incurred on official business of confidential nature and approved by Coast Guard officer, but nature of expenses are unknown to certifying officer, may not be certified for payment without holding certifying officer accountable for legality of payment. 14 U.S.C. 93(e) contains no provision for certification of vouchers by Commandant of Coast Guard who is authorized to make investigations and, therefore, responsibility for certifying vouchers for payments is governed by act of Dec. 29, 1941, which fixes responsibilities of certifying and disbursing officers, and payment for costs of investigations may only be made in accordance with 1941 act---------- 486

WORDS AND PHRASES Page

"In compliance with the above"

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed---------- 538

"Two bites at the apple"

To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid---------- 553