Decisions of The Comptroller General of the United States

VOLUME 50 Pages 767 to 826

MAY 1971

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-172069]

Compensation—Vessel Employees—Overtime—Twenty-Four Hour Port Watch Duty

A Corp of Engineers civilian wage board employee who performed a 24-hour port watch duty aboard a seagoing hopper dredge and received only 8 straight-time hours of compensation is entitled to payment for the additional 8 hours claimed, and properly documented, at overtime rates on the basis of the consolidated cases of *Detling et al.* v. *United States* and *France et al.* v. *United States*, 432 F. 2d 462 (1970), in which the court held the plaintiffs were in a standby duty for the time in excess of 8 hours and applied the two-thirds rule, allowing 8 hours for sleeping and eating time, and awarded the plaintiffs 8 hours of additional compensation at overtime rates pursuant to 5 U.S.C. 5544, a rule that has been followed in the decisions of the Comptroller General.

Compensation—Overtime—Standby, Etc., Time—Two-Thirds Rule—Aboard Vessels

Claims for 8 hours of additional compensation at overtime rates that are presented to the Corps of Engineers by civilian wage board employees who performed 24-hour tours of duty on dredges and other floating plants, receiving compensation for only 8 hours of work on a straight-time basis may be paid, if properly documented, by the Corps on the basis of the two-thirds rule in the *Detling* and *France* consolidated cases, 432 F. 2d 462 (1970). However, doubtful claims should be forwarded for settlement to the Claims Division of the United States General Accounting Office (GAO) pursuant to 4 GAO 5.1, and when the 10-year limitation act of October 9, 1940 is involved and the claims cannot be promptly approved and paid in the full amount claimed, they should be forwarded to the Claims Division for recording under 4 GAO 7.1, and after recording the claims will be returned to the Corps for payment, denial, or referral back to the GAO for adjudication.

Claims—Evidence to Support—Best Evidence Available—Acceptability

Where the claims of civilian wage board employees of the Corps of Engineers for 8 hours overtime compensation, which are presented on the basis of the consolidated cases of *Detling* and *France*, 193 Ct. Cl. 125, incident to a 24-hour port watch aboard hopper dredges or other floating plants and receipt of only 8 hours straight-time compensation, cannot be adequately documented, payment may be made by the Corps on the basis of the most accurate estimate after considering all available records. For example, if time and attendance records are missing for some part of the period claimed but available pay and leave records support reasonably accurate estimates of standby duty, the estimates will be considered sufficiently documented, or where no signed logs can be found for the standby duty claimed, the next best evidence—duty rosters—may be used to substantiate the payment of overtime.

To Doyle W. Hoffman, Department of the Army, May 10, 1971:

This will refer to your letter of February 26, 1971 (file reference SAJFF), with enclosures, in which you request an advance decision on the claim of Mr. Roy E. Boltin for compensation for standby time aboard dredges during port watch tours of duty. The claim is based upon the Court of Claims opinion rendered on the consolidated cases of *Detling et al.* v. *United States* and *France et al.* v. *United States*, 432 F. 2d 462 (1970), 193 Ct. Cl. 125. You state that this is the first of several claims which are anticipated as a result of the Court of

Claims decision and there is doubt as to the extent of additional adjudication, if any, which may be necessary before claims similar to those involved in the decision may be paid. Also, no criteria have been established in regard to substantiating documents.

Your letter recites the factual and legal basis for Mr. Boltin's claim as follows:

> Mr. Boltin was assigned to the Jacksonville District in October 1959 with duty aboard a seagoing hopper dredge. During the period of this assignment Mr. Boltin performed port watch duty aboard the dredge for periods of (24) hours for which he received compensation for (8) hours on a straight-time basis, the (8) hours being a part of his regular 40-hour tour of duty. Mr. Boltin basis his claim for an additional (8) hours at overtime rates on U.S. Court of Claims decision in the case of Chalmers O. Detling, et al vs. US and Joseph France, et al vs. US.

The documentation supporting this claim includes a certified computation schedule which you report was based upon data extracted from the following sources:

> (1) "Official Log Books" in which was entered the name(s) or the specific title(s) of the employees who were assigned port watch duties on specific dates.
> (2) "Unofficial Time and Attendance Records" maintained on the dredge and from which the official time and attendance records were posted in final form. The official Time and Attendance Records are retained for only two years; however, these records covering the last two years do not specifically identify port watch duty.
> (3) "Individual Pay Records."
> (4) "Operating Records" of the dredge which show port watch dates.

In addition to your request for a decision on Mr. Boltin's claim, you ask (1) whether payment may be made locally for employees who performed port watch on floating plant other than hopper dredges, under same or similar circumstances, and (2) whether it is necessary to obtain individual claims from current employees or can the records of these employees be reconstructed and payments made accordingly.

The Court of Claims held in the *Detling* and *France* cases that civilian wage board employees of the Corps of Engineers who perform port watch tours of duty requiring them to remain on board dredges and respond to any emergency calls during the remaining 16 hours of any day, after they have already maintained a port watch of 8 consecutive hours, are in a standby duty status and are entitled to overtime compensation under 5 U.S.C. 5544 except for sleeping and eating time. The court found that such eating and sleeping time totaled about 8 hours per day and accordingly applied the two-thirds rule. Our decisions have sustained certain regulatory schemes providing for overtime compensation of employees in a standby duty status so long as the two-thirds rule was followed. See 25 Comp. Gen. 161 (1945); 47 *id.* 438 (1968); and B–165646, February 18, 1969. We have also stated that the overtime rate of time and one-half applies to standby duty time within the purview of 5 U.S.C. 5544 as well as to actual work time. 42 Comp. Gen. 197, 201 (1962).

Mr. Boltin's claim is presented on a basis consistent with the Court of Claims decision, and decisions of our Office relating to standby time, and therefore is proper for allowance from a legal standpoint. Accordingly, and since the sources of data enumerated in your letter to substantiate the port duty performed by Mr. Boltin provide reliable evidence that such duty was performed, the claim which is returned herewith may be settled by your agency.

Other similar cases, upon receipt of a request in the nature of a claim from the individuals concerned, also may be settled without submission to our Office. This includes claims for service on other floating plants under situations similar to those involved in the *Detling* and *France* cases. However, claims involving a doubtful question of law or fact should be forwarded to our Claims Division pursuant to 4 GAO 5.1 for settlement. Those which have accrued so long ago (8 years or more) that the 10-year limitation of the act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a, may be involved, and which cannot promptly be approved and paid in the full amount claimed, should be forwarded to the Claims Division for recording under 4 GAO 7.1. After recording, such claims will be returned to you for payment, denial, or referral back to our Office for adjudication.

In further regard to evidence in support of the claims, where there is somewhat less documentation than that enumerated in your letter, we would not object to payments made on the basis of the most accurate estimates you are able to make after consideration of all available records. For example, if time and attendance records are missing for some part of the period covered by the claims but pay and leave records are available which contain information to support reasonably accurate estimates of standby duty, then such estimates are sufficient documentation for the claim; or where no signed logs can be found for the hours of standby duty in a given case, the next best evidence—duty rosters—can be used to substantiate the payment of overtime.

[B-172266]

Contracts—Performance—Geographical Area Restriction Breached—Price Reduction

A requirement in an invitation for bids that the contract be performed in a restricted geographical area is a reasonable limitation on competition when a contracting agency needs prompt service and plant accessibility, and the restriction relating to bidder responsibility, compliance with the requirement results in a valid contract. Therefore, although a contractor's unauthorized action subsequent to contract awards to effect performance of the printing of technical publications restricted to the Dallas-Fort Worth area in San Antonio constitutes a breach of contract and the Government has a vested right to insist on performance in the restricted area, since performance in the San Antonio area will not deprive the Government of contemplated rights, the contracts may be modified to delete the restriction with adequate price adjustment, however,

future procurements should broaden competition by enlarging the performance area.

To the Public Printer, United States Government Printing Office, May 10, 1971:

We refer to your letter of March 19, 1971, and enclosures, requesting the views of our Office as to the legality of permitting continued performance by Litho Press, Inc., San Antonio, Texas, of two multiple award, requirements type, contracts under the circumstances discussed below. The contracts in question are identified as Program 1712–M for technical publications for the Department of the Air Force covering the period July 1, 1970, through June 30, 1971, and Program 1711–M for Navy Technical Manuals covering the period October 1, 1970, through September 30, 1971.

Each of the contracts includes a clause, entitled "Restriction on Location of Production Facilities," which provides that all of the work produced by the contractor under the programs must be performed within the Dallas-Fort Worth, Texas, area because of the necessity of close liaison with the contractor. The clause in the Program 1712–M contract also cites a short production schedule as justification for the restriction on location of contractor production facilities.

The record indicates that subsequent to award of the contracts question arose as to the propriety of performance by the contractor of the work in question at its facilities in San Antonio, Texas, in lieu of its facilities in Dallas. The contractor, in a discussion of the matter with representatives of your office on December 4, 1970, urged that it interpreted the words "Dallas-Fort Worth, Texas area" in the above clauses as including San Antonio. The matter was therefore submitted to your Comptroller, who issued a decision to the effect that San Antonio, which is some 250 miles distant from Dallas and Fort Worth, may not be considered as being within the prescribed Dallas-Fort Worth area for the purpose of the contracts involved. By letter dated December 23, 1970, the contracting officer notified the contractor of the Comptroller's decision and stated that the manager of the Government Printing Office Regional Printing Procurement Office in Dallas had been advised to place orders with the contractor only after assurance that the work would be produced in the contractor's Dallas plant.

Attorneys for the contractor have protested enforcement of the performance location restriction on the basis that such a provision relates to the responsibility of the contractor and that in this case the contractor is meeting all of the contract requirements other than the requirement as to place of performance. In this connection, the attorneys advise that an earlier similar contract, Program 826–M,

was performed by the contractor out of Dallas and San Antonio with full knowledge on the part of your officials regarding the use of the San Antonio facilities. Further, the attorneys state that in a 1969 tour of the contractor's facility at Dallas your Director of Purchases approved the use by the contractor of the San Antonio plant "so long as the contractor met the short production delivery schedules and provided close liaison services and provided all of the other services required."

In addition, the contractor's attorneys urge that the geographic area limitation is for the benefit of the Government; that the interpretation of the limitation is within the discretion of the contracting officer; and that the contract awards which were made to Litho Press, Inc., pursuant to the exercise of administrative discretion should not be disturbed absent evidence of error, fraud, or favoritism.

In your letter of March 19 you state that the geographic limitations which were imposed by each procurement solicitation and contract were reported by the requiring agencies, the Departments of the Air Force and Navy, to be essential to their needs. You concur with the view of the contractor's attorneys that the limitations are for the benefit of the Government and that they relate to the responsibility of the contractor at the time of award, not to the responsiveness of its bid.

For the proposition that the bid solicitations were not ambiguous or that Litho Press, Inc., was not misled as to the meaning of the geographic restrictions in the solicitations, you refer to a letter dated July 6, 1970, in which Litho Press, Inc., assured your Dallas procurement office that it would produce the work in the Dallas-Fort Worth area and would otherwise comply with all contract specifications in the same manner as performance was then being made under the Program 826-M contract.

As to the effect of performance of the contract by Litho Press, Inc., in San Antonio in lieu of Dallas, you state that the necessary liaison has been maintained and that the contracts have been performed in accordance with the specified requirements without exception. Further, informal advice furnished to our Office by your Associate General Counsel is to the effect that neither the Department of the Air Force nor the Department of the Navy has made any complaint concerning performance of the contract at San Antonio and that there is no indication that any monetary saving has inured to the contractor incident thereto.

In presenting the matter to our Office for advice you state that you do not construe the decisions of our Office relating to the effect of geographic restrictions in procurement solicitations as authority for the view that once a contract is awarded on the basis of compli-

ance with such restrictions it may be performed without regard thereto. Accordingly, you solicit our views as to the legality of permitting continued performance of the contracts (presumably out of San Antonio) and making payments thereunder.

We have stated that the need of a contracting agency for prompt service and plant accessibility affords a reasonable basis for including in an invitation for bids a provision requiring bidders to have facilities located within a specified geographic area for performance of the contract. B–150703, February 15, 1963. We have also stated that since such a provision relates to the responsibility of a bidder rather than to the responsiveness of his bid, proof of compliance may be submitted by the bidder up to the time of award. B–147728, January 31, 1962; B–162250, September 21, 1967.

The geographic restriction clause in each of the invitations considered herein sets forth the basis for the requirement, and each of the ordering agencies has stated that the requirement is essential to its needs. In addition, before the awards were made your office had verified that Litho Press, Inc., had a plant in Dallas, and there was apparently no exception taken by Litho Press, Inc., in either of its bids to the clauses. In the circumstances, it is our view that the requirement in each invitation may be regarded as a reasonable limitation on competition and that Litho Press, Inc., was properly considered as evidencing compliance with such requirement. Accordingly, we see no legal basis to question the validity of either contract.

As to the contractor's action, subsequent to award, to effect performance of the contract work in San Antonio rather than in the Dallas-Fort Worth area, we believe that there can be no argument that without the consent of an authorized Government representative such action constituted a breach of the contract. The question to be answered, therefore, is whether such breach *per se* requires termination of the contract with resultant penalty against the contractor.

While the Supreme Court of the United States has observed that the party for whose protection a requirement is made may also waive it, *United States* v. *New York and Porto Rico Steamship Company*, 239 U.S. 88 (1915), in applying this rule to Government contracts our Office also applies the rule that agents and officers of the Government have no authority to modify existing contracts, or to surrender or waive contract rights which have vested in the Government, unless there is also a compensating benefit to the Government. 45 Comp. Gen. 224 (1965); 40 *id.* 684 (1961) and cases therein cited.

In the instant case, it is obvious that the requirement in each contract that the work be performed in the Dallas-Fort Worth area is for the sole benefit of the Government, and the Government therefore has a vested right to insist on such performance. The record, however, shows that the contractor, while accomplishing the work in San Antonio, has

maintained the close liaison required by the Departments of the Air Force and Navy, and has also complied with all other contract requirements. Noncompliance with the place of performance requirement therefore has not deprived the Government of the benefits contemplated by that requirement of the contracts. While it would therefore appear to be extremely questionable as to whether it was necessary to solicit bids and award contracts based upon performance in the Dallas-Fort Worth area, the fact remains that the Government is entitled to, and presumably is paying for, performance on that basis. Accordingly, if it is your opinion that enforcement of the restriction on place of performance of the contracts is no longer essential to the Government's needs, our Office will interpose no objection, upon issuance of a determination by you to such effect, to modification of the contracts to delete the restriction. Such modifications should, of course, provide for equitable adjustments of the contract prices to compensate the Government for any additional expense of administering the contracts, as well as any saving which may inure to the contractor by reason of permitting a change in the place of performance.

We suggest that, where similar circumstances exist in future procurements, consideration be given to broadening competition by enlarging the area of performance beyond the immediate area of a respective field procurement office and/or the site of the using agency if there is a reasonable expectation that bidders located outside such immediate area will be able to comply with the requirement for close liaison with the Government and other requirements of the particular procurement.

[B-171149]

Subsistence—Per Diem—Military Personnel—Temporary Duty—Firefighting

As members of the uniformed services ordered to proceed on temporary duty in Government vehicles to assist the Forest Service in firefighting, whether they sleep in Government or personal sleeping bags, in the vehicles, on the ground without sleeping bags, on the floors of warehouses and similar structures, or do not sleep on certain nights because of duty performance, are not performing the type duty identified as maneuvers, joint field exercises, Reserve training encampments, and similar activities, the payment of per diem to them is governed by paragraph M4205-6 of the Joint Travel Regulations, and the members who were not charged for meals or sleeping facilities provided by the Forest Service nor who did not occupy commercial facilities, are entitled for each day of temporary duty to a per diem of $2.50 and $3.10 for each meal not furnished, the rates prescribed by the regulation.

To Captain W. Paul Kearns III, Department of the Air Force, May 11, 1971:

We refer further to your letter dated September 21, 1970, with attachments, forwarded here by communication of January 25, 1971,

from the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 71–1), in which you request an advance decision as to the propriety of payment of claims for per diem by members stationed at Fairchild Air Force Base, Washington, while on temporary duty to assist in firefighting in the Wenatchee Forest, Wenatchee, Washington.

By orders issued on August 27, 1970, Headquarters 92d Strategic Aerospace Wing (SAC), Fairchild Air Force Base, Washington, certain members stationed at Fairchild Air Force Base were directed to proceed on temporary duty for the purpose of assisting in firefighting at the Wenatchee Forest, Wenatchee, Washington, for approximately 16 days, after which time they were to return to that base.

You say that approximately 63 members received such orders and that they drove Government vehicles which transported supplies and personnel to support the firefighting operation. You say further that because of emergency conditions members slept in Government sleeping bags, in vehicles, on the ground, on the floors of warehouses and other similar structures, and that because of duty requirements some members did not sleep on certain nights.

Of all vouchers received in connection with the temporary duty at Wenatchee, Washington, you have submitted three vouchers said to be representative of the others. In this connection, you ask the following questions:

a. If a member utilizes a government sleeping bag, does this constitute government quarters as contemplated by para M1150–5, JTR, and would this correspondingly require a reduction in the applicable per diem rate under para M4205–5 or para M4205–6, JTR, as applicable?

b. If a member slept on the floor of a warehouse building, private residence, or similar structure, for which no expense was incurred, does this constitute non-government quarters as contemplated by para M4205–6, JTR?

c. If a member slept in a government vehicle, would this be considered as quarters provided; or would quarters be considered as not furnished and would the higher per diem rate be applicable?

d. If a member slept on the ground under the stars with no sleeping bag or with his own personal sleeping bag, would quarters be considered as not furnished and would the higher per diem rate be applicable?

e. If a member did not sleep at all on certain nights, would he be entitled to full per diem less the applicable deduction for meals?

In forwarding your request through military channels, the Director of Accounting and Finance, Headquarters Fifteenth Air Force (SAC) and the Chief, Pay and Travel Division, Directorate of Accounting and Finance, Headquarters Strategic Air Command, expressed the belief that although the type of duty performed is not specifically identified in Section D (Maneuvers, Joint Field Exercises, Reserve Training Encampments, and Other Similar Activities) of Chapter 4, Part Two of Air Force Manual 177–103, it appears to fall within the concept of a "similar activity." Consequently, the view is expressed that reimbursement for occasional meals and quarters should be made

as prescribed by paragraph M4205–3 of the Joint Travel Regulations, but no per diem is authorized.

Section 404 of Title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel allowances for travel performed under orders when he is away from his designated post of duty.

Paragraph M4201 of the Joint Travel Regulations promulgated pursuant to that authority, provides that per diem allowances are not payable for the following periods:

6. while participating in maneuvers, field exercises, simulated war games, training encampments for the reserve components or Reserve Officers Training Corps students, and other similar activities (including duty as observer or umpire) where both rations in kind (including field rations) and quarters are available or furnished, whether or not such facilities are utilized. Members to whom this limitation otherwise applies may be reimbursed, in accordance with par. M4205–3, for occasional meals or quarters necessarily procured. * * *

Section D of Chapter 4, Part Two of Air Force Manual 177–103, implements paragraphs M4201–6 and M4250–3 of the Joint Travel Regulations. Paragraph 20433 of that section indicates that sleeping accommodations under field conditions consist of tentage, dugouts, lean-tos, or structures not suitable for regular occupancy, and subsistence under field conditions consists of rations prepared in a field kitchen or mess, or cold prepared rations common to the operation, and made available to participants.

Paragraph 20437 refers to Army Regulation 35–30 for definitive guidance with respect to per diem entitlement for duty within the contemplation of paragraph M4201–6 of the Joint Travel Regulations. Paragraph 5 of AR 35–30 provides:

Definitions. a. Other similar activities. For the purpose of these regulations the term "other similar activities" as used in the Joint Travel Regulations is defined as all activities performed in support of a maneuver, field exercise, training encampment, and simulated war games, including duties connected with the establishment or closeout of the operation.

An administrative determination that a particular assignment is or is not within the scope of paragraph M4201–6 of the regulations generally will not be questioned unless there is a clear showing that it is contrary to the facts surrounding the assignment. 31 Comp. Gen. 288 (1952); and 37 Comp. Gen. 126, 128 (1957) as modified in 37 Comp. Gen. 683 (1958). Consequently, we have recognized provisions in orders which designate a particular duty as of a type covered by paragraphs M4201–6 and M4250–3 of the Joint Travel Regulations, as valid administrative determinations. 37 Comp. Gen. 683 (1958).

Although the conditions encountered by members assisting in firefighting at Wenatchee Forest may be similar in some respects to those experienced under field training conditions, this, of itself, is not a sufficient basis to conclude that the activities in question are within

the scope of paragraph M4201–6 of the regulations. The orders contain no designation of the temporary duty as a type contemplated by paragraph M4201–6 of the Joint Travel Regulations and it clearly was not in support of a field training exercise so as to constitute "other similar activity" as defined above.

In decision B–140153, October 28, 1959, we held that an Air Force member whose orders authorized per diem while on temporary duty to operate Red Cross messes in a hurricane disaster area, and who was provided with tentage and meals, was not on field duty or engaged in "other similar activity" within the meaning of paragraph M4201–6.

Likewise, we are of the opinion that the temporary duty in question is not within the contemplation of paragraph M4201–6 of the regulations. Therefore, paragraph M4205–3 of the regulations is not for application and the payment of per diem is governed by paragraph M4205–6 of the regulations.

Paragraph M4205–6 of the regulations prescribes the rate of per diem authorized for travel and temporary duty in the United States when non-Government meals and/or quarters are furnished. It provides by table, in pertinent part, as follows:

> Rule 1. When meals and/or quarters are furnished with or without charge from non-Government sources (such as local or state governments, foreign governments), other United States Government agencies, United States Government Contractors, or by private organizations such as the National Red Cross during disasters, the member will be entitled to per diem for the day of arrival and the day of departure, in the amount of $2.50 per day plus $3.10 for each meal and $13.20 for each set of lodging procured while in a travel status from a commercial source * * *.
>
> Rule 2. For all other days the member will be entitled to per diem in the amount of $2.50 when both meals and quarters are furnished, $11.80 when only quarters are furnished, and $15.70 when only meals are furnished plus, in each case, the actual charges for the meals and/or quarters so furnished.

Footnotes to the Table provide that in no instance will the per diem payable exceed $25. And when less than three meals daily are furnished, it is provided that the per diem of $15.70 will be increased $3.10 for each meal not furnished from the Government or non-Government source involved.

The intent, generally, of paragraph M4205–6 covering duty such as here involved, where subsistence and sleeping bags or other sleeping facilities appropriate under the circumstances are furnished by a Government or non-Government agency and made available to those who can utilize them, thus relieving the member of the expense of obtaining quarters and meals commercially, is to limit the payment of per diem to the rate of $2.50 plus any charges paid by him for meals or quarters.

If, by reason of the member's duty assignment, he does not sleep at all on certain nights, or sleeps under the conditions enumerated in your letter, he is put to no expense for the facilities occupied. In these circumstances, in the absence of a showing that the member uti-

lized commercial sleeping facilities, we are of the opinion that the regulation does not authorize an increased per diem on the basis that quarters were not available. Under such conditions, the member has been put to no more expense for quarters by reason of his duty assignment than the members who utilized the sleeping facilities that were otherwise made available in connection with the operation. See 24 Comp. Gen. 473 (1944) and 44 Comp. Gen. 326 (1964).

As the members assisting in firefighting at Wenatchee, Washington, were not charged for meals or sleeping facilities provided by the Forest Service, and your letter indicates they did not occupy commercial lodgings, for each day of temporary duty they are entitled to per diem of $2.50 and, in addition, $3.10 for each meal not furnished, the rates provided in paragraph M4205–6 of the regulations.

Accordingly, the vouchers submitted are returned herewith, and if otherwise proper, per diem may be paid on the basis indicated.

[B–171177]

Contracts—Awards—Multiple—Lowest Overall Cost to Government

Although the multiple awards to the four offerors responding to a solicitation issued under the national emergency authority in 10 U.S.C. 2304(a)(16), three operating Government-owned contractor-operated facilities, for the purpose of satisfying current needs and retaining suppliers for accelerated future demands, did not result in the lowest individual offeror receiving an award for the maximum quantity, the multiple awards produced the lowest overall cost to the Government and will not be disturbed, even though the request for proposals (RFP) stated that it was expected one offeror would not be successful whereas awards were made to all offerors. Moreover, there was no quantity increase to require a formal amendment to the RFP, the evaluation of the proposals from offerors operating Government facilities was in accord with Bureau of the Budget Circular No. A–76, and failure to award all contracts simultaneously was justified, as was the evaluation transportation factor used.

To the Chamberlain Manufacturing Corporation, May 11, 1971:

This refers to the telegram of November 7, 1970, and letter of November 11, 1970, and your comments of January 15, 1971, on Army's report, protesting against the awards under request for proposals No. DAAA09–71–R–0018, issued August 26, 1970, by the Ammunition Procurement and Supply Agency (APSA), Department of the Army.

The procurement was conducted under 10 U.S.C. 2304(a)(16) which authorizes negotiation if it is determined to be in the interest of national defense to have a supplier available for furnishing property or services in case of a national emergency.

The request for proposals called for 2,742,610 units of metal parts for 155MM projectiles. Offerors were invited to submit proposals on the largest monthly delivery range they could meet plus all of the smaller monthly ranges. The ranges in the request for proposals were as follows:

Ranges	
Monthly Quantities	Total Quantities
50, 000	600, 000
55, 000	660, 000
60, 000	720, 000
65, 000	780, 000
70, 000	840, 000
75, 000	900, 000
80, 000	960, 000
85, 000	1, 020, 000

Offers were solicited from the following four current base producing contractors:

1. Donovan Construction Company, New Brighton, Minnesota (Donovan).
2. Sperry Rand Corporation, Shreveport, Louisiana (Sperry Rand).
3. Chamberlain Manufacturing Corporation, New Bedford, Massachusetts (Chamberlain-New Bedford).
4. Chamberlain Manufacturing Corporation, Scranton, Pennsylvania (Chamberlain-Scranton).

Except for Chamberlain-New Bedford, all of the above are Government-owned contractor-operated facilities.

A provision on page 46 of the request for proposals entitled "NOTICE TO OFFERORS" provided as follows:

NOTICE TO OFFERORS

This solicitation and the ranges of quantities proposed are for the purpose of allowing the Government to select a combination of multiple awards which will satisfy the current production requirements and at the same time retain more than one supplier in an active state with capability to accelerate production to a higher production rate at some future date, if required. The Government expects that one offeror participating in this competitive procurement action may be unsuccessful and may not receive an award as a result of this solicitation. *It is possible that not more than three awards may result from this solicitation and the quantities and delivery schedules awarded may vary between those offerors who are selected for awards* with some receiving larger quantities than others, based on the range quantities, and prices submitted in response to the solicitation. *The Government reserves the right to make that combination of awards determined to be in the best interest of the Government, price and other factors considered.* Principal among such other factors will be the potential quantitative mobilization production requirements for the supply item involved and the ability of firms selected for award to respond to such potential future demands by the Government for increased production beyond the quantities initially awarded as a result of this solicitation. [Italic supplied.]

The extended date for receipt of offers was September 10, 1970, and four offers were received on that date. The offerors were requested to confirm or submit revised offers by September 23, 1970, and they were advised that these revised offers might be used by the procuring activity as the basis for ceiling prices in awarding Letter Type contracts. Offerors were also advised that the total monthly requirement would be 250,000 units and that offers would be evaluated with the view of obtaining that monthly quantity.

A review of the abstract indicates that the following prices were quoted by offerors for the various ranges:

UNIT PRICES

Quantity (monthly schedule)	Chamberlain-New Bedford	Chamberlain-Scranton	Donovan	Sperry Rand
50, 000	$23. 27	$24. 9594	$23. 64	$25. 9213
55, 000	22. 94	24. 4691	23. 54	25. 9616
60, 000	22. 67	23. 922	23. 34	25. 6518
65, 000	23. 00	23. 3237	23. 20	25. 4819
70, 000	22. 82		23. 03	25. 6821
75, 000	22. 66		22. 99	25, 3822
80, 000	22. 68		22. 80	25. 3023
85, 000	22. 56		22. 54	24. 9724

In arriving at evaluated prices, factors for facilities and real property, facilities repair, and transportation were added. Additional factors for utilities and labor escalation were added to Donovan's prices. Provision No. 72 on page 82 of the request for proposals incorporated the price escalation clause at Armed Services Procurement Regulation (ASPR) 7-107(c). The utilities factor was added to Donovan's offer since services such as gas, water and sewerage were supplied to Donovan by another contractor. After the evaluation factors were added, the prices offered were as follows:

EVALUATED UNIT PRICES

Quantity (Monthly Schedule)	Chamberlain-New Bedford	Chamberlain-Scranton		Donovan		Sperry Rand
	*RAAP**	*LAAP***	*RAAP*	*LAAP*	*RAAP*	*LAAP*
50, 000	$25. 2636	$27. 98935	$26. 9399	$27. 92605	$27. 5666	$29. 2006
55, 000	24. 8836	27. 37775	26. 3283	27. 70205	27. 3426	29. 0600
60, 000	24. 6136	26. 77035	25. 7209	27. 39455	27. 0351	28. 5895
65, 000	24. 9536	26. 10075	25. 0513	27. 16455	26. 8051	28. 2790
70, 000	24. 7336			26. 91595	26. 5565	28. 3487
75, 000	24. 5536			26. 81085	26. 45140	27. 9384
80, 000	24. 5336			26. 55945	26. 200	27. 7681
85, 000	24. 3936			26. 24305	25. 8836	27. 3478

*RAAP—Ravenna Army Ammunition Plant.
**LAAP—Louisiana Army Ammunition Plant.

We are advised that the determinations regarding the selection of offerors and the quantity to be awarded to each offeror were based on maintaining four sources of supply furnishing a total of 250,000 units per month. Both of these considerations were deemed essential by APSA. It was determined, consistent with these purposes, that

the awards of the following combination of quantities would result in the lowest overall cost to the Government:

Contractor	Quantity	Dest	Unit Price	Amount
Donovan	85, 000	LAAP	$26. 24305	$2, 230, 659
Chamberlain-	65, 000	37, 500–RAAP	25. 0513	939, 424
Scranton		27, 500–LAAP	26. 10075	717, 771
Chamberlain-				
New Bedford	50, 000	RAAP	25. 263576	1, 263, 179
Sperry Rand	50, 000	LAAP	29. 2006	1, 460, 030
				$6, 611, 063

The above computation is based on the rate of 250,000 projectiles per month. Awards have been made to Chamberlain-New Bedford and to Donovan for a 12-month period; to Chamberlain-Scranton for an 11-month period and to Sperry Rand for an 8-month period.

Your protest centers around several issues. The first issue deals with the combination of quantities awarded to offerors. The thrust of your argument is that Army's actions resulted in the frustration of three basic policies:

(1) that the low offeror should receive the maximum quantity.
(2) that privately owned plants should be preferred over Government-owned facilities.
(3) that labor surplus areas such as New Bedford should receive preferential treatment in the award of Government contracts.

You also urge that the "NOTICE TO OFFERORS" provision quoted above was misleading in advising offerors that one of the offerors participating might be unsuccessful.

In B–153687, July 7, 1964, our Office considered a somewhat similar factual situation involving the procurement of a number of rounds of ammunition by formal advertising. The offeror who submitted a lower price on the item received an award for a basic quantity which was less than the quantity awarded to another higher-priced offeror since it was determined that a combination of awards on that basis resulted in the lowest overall cost to the Government. The solicitation provisions in that case did not prescribe multiple awards as here; the sole purpose was to satisfy the Government's needs at the lowest cost. Our Office denied the protest from the lower offeror.

The price comparison furnished in your letter of November 11, 1970, is not complete in that it does not consider the overall cost from the point of view of maintaining four sources of supply. Pursuant to our review we find that Army's combination of awards resulted in the lowest overall cost to the Government. In the circumstances, while the

lowest individual offeror did not receive the maximum quantity, we do not find this to be a basis for upsetting the awards made. However, we can appreciate your objections to such an award procedure and we are suggesting to the Secretary of the Army by letter of today that alternate procurement procedures should be considered for such situations.

Regarding the number of awards made, the request for proposals stated that it was expected that one offeror might not be successful. We do not think the awards should be invalidated for this reason. As already indicated, the lowest cost to the Government on three awards would have been higher than under the awards actually made and the terms of the request for proposals left open the possibility of awards to four sources. In addition, we can assume that the offerors to this solicitation were sufficiently familiar with the procurement procedures used by APSA to recognize the possibility that awards would be made to four sources.

Your contention that the actual quantity to be awarded is greater than the quantity specified in the request for proposals (2,742,650 units) is based on the premise that the Army will purchase 250,000 units per month for a 12-month period. In this regard the record indicates that under the contract awards the Army will purchase approximately the number of units specified in the request for proposals since, as previously noted, not all of the contracts will be for a 12-month period. Consequently, we do not find any basis to the contention that Army increased the quantity without a formal amendment to the request for proposals.

Further, we have found no basis to question Army's determination that the procurement plan was consistent with existing policy concerning the utilization of Government-owned plants. Bureau of the Budget Circular No. A–76 provides that a Government commercial or industrial activity may be authorized for the purpose of strengthening mobilization readiness. In the evaluation, factors were added to the proposals from the Government-owned contractor-operated facilities to equalize any competitive advantage. The contracting officer advises that even with respect to New Bedford it must be considered that only the land and buildings are privately owned and the manufacturing equipment is Government owned.

With respect to New Bedford receiving preferential treatment because it was located in a labor surplus area, page 11 of the request for proposals entitled "LABOR SURPLUS AREA CONCERNS" stated that the procurement was not set aside for labor surplus area concerns and labor surplus area concerns were eligible for a preference only in the event of tie offers, which did not occur.

The second issue concerns your objection to including an evaluation factor for anticipated repairs to Government property. You urge

that this factor was not included in the request for proposal's criteria for evaluation and that the costs of such repairs are conjectural.

Apparently you are referring to the clause in ASPR 7-702.14, dealing with maintenance, which was incorporated by reference into the facilities contract with Chamberlain-New Bedford. This clause provides that normal maintenance will be the responsibility of the contractor but that the Government will bear the expense of such repairs which are in excess of the contractor's defined liability.

With respect to the inclusion of a factor for repair of Government-owned facilities, page 24 of the request for proposals stated that the use of Government property was on an "As Is" and "Where Is" basis and page 82 of the request for proposals incorporated by reference ASPR 7-104.24(e) which is the clause for furnishing Government property on an "As Is" basis. The Chamberlain-Scranton proposal stated that the offer was based on having the "As Is" clause in the request for proposals deleted in its entirety. In response to an inquiry from the contracting officer, Chamberlain-Scranton representatives advised that there would be no repair cost to Government equipment at that plant since Government equipment at Scranton had been extensively modernized and rehabilitated. However, this apparently was not the case with respect to Government equipment in the Donovan or Sperry Rand plants.

Your proposal stated that:

> e. Prices are based upon the premise that maintenance repair parts costs incident to keeping the aging Government-owned equipment in operation will be shared on an 80%-20% basis, with the Government paying 80%. Chamberlain will pay for 20% of the repair parts costs as representing "normal wear and tear" and will pay for all of the in-house maintenance labor costs.
>
> f. In connection with (e) above, prices are based upon the premise that the "as-is, where-is" clause on Page 25, Para. 3(a) of the bid request will be deleted from any contract awarded as a result of this proposal.

In view of the above, a factor for repairs to Government-owned equipment was included in the evaluation of all of the offers. We find no basis to object to the evaluation of the repair factor. In any case, it is reported that even if this factor is excluded from the evaluation of proposals, the combination of awards as made still result in the lowest overall cost to the Government. Accordingly, we do not find that this contention constitutes a basis for upsetting the awards.

You next contend that making the award to Sperry Rand later than the other three awards is contrary to normal procurement practice which dictates simultaneous awards to prevent preaward pricing disclosures. With respect to whether you were prejudiced because a letter contract to Sperry Rand was not awarded simultaneously with

the awards to the other three offerors, the Supplemental Memorandum of Law dated February 11, 1971, from APSA, states as follows:

* * * Since Louisiana [Sperry Rand] did not run out of production until March 1971, a letter contract award to that plant could not be justified. Cost data necessary to definitize the three letter contracts awarded and the one firm contract award have been requested and received from all four participants. Negotiations have been conducted and are continuing utilizing cost data from each offeror. Under these circumstances, it is difficult to see in what way delay of Louisiana's award has had an effect upon the quantity which Chamberlain was entitled to receive pursuant to the solicitation terms. Nor is it evident what prejudice to Chamberlain's prices is established by revelation of its award prices after selection of awardees. And if it should be alleged that Louisiana attained an unnamed advantage in being aware of Chamberlain's award prices after the selection, how this "advantage" would have changed the results of the awards, the prices of Chamberlain, or the final price to be established for Louisiana, is not clear. It is submitted that the decision to make the awards nonsimultaneously was justified by the factual situation, was approved by appropriate authority, and was nonprejudicial to any of the competitors.

We do not find any basis to disagree with Army.

Finally, you question whether the factor for evaluation of transportation was properly included. The "Transportation Evaluation" provision provided as follows in paragraph (3) on page 40 of the request for proposals:

(3) For the purpose of evaluating offers and for no other purpose, the destination(s) and percentages of the total procurement quantity of supplies for each destination will be considered to be as follows:

TOTAL PERCENTAGE OF PROCUREMENT QUANTITY

Louisiana AAP—rail and motor: Doyline, Louisiana, 65%.
Ravenna AAP—rail: Atlas, Ohio, 35%.
Motor: Ravenna AAP, Ohio.

Evaluation will be based on distribution of supplies from all procurement source(s) to the destination(s) determined to be most advantageous to the Government. This evaluation may involve quantities of supplies from procurement sources not included in this solicitation but which are included in the total procurement quantity percentages which are designated above for each destination.

It has not been shown that the evaluation for transportation on the basis of shipping to alternate destinations was not in accordance with the specifications or that the specifications violated a statute or regulation. *Cf.* B–171306, March 24, 1971. Moreover, we have no basis for concluding that Army did not use the correct rates in evaluating for transportation.

For these reasons, your protest is denied.

[B–172125]

Military Personnel—Reserve Officers' Training Corps—Rifle and Pistol Team Competition—Status for Allowances

Since the participation of members of the Reserve Officers' Training Corps (ROTC) in rifle and pistol team competition matches is neither military training nor part of the ROTC curriculum, but the participation is performed on a voluntary extracurricular activity basis, to provide allowances to members

participating in National Matches, they may be considered to have the same status as civilians within the meaning of 10 U.S.C. 4313 so as to entitle them to a travel allowance of $0.05 a mile and a subsistence allowance of $1.50 a day, and the authority in 10 U.S.C. 4308(a)(8) may be invoked to provide allowances for participation in regional and international matches if the Secretary of the Army upon recommendation of the National Board for the Promotion of Rifle Practice approves the issuance of regulations to this effect.

To the Secretary of the Air Force, May 11, 1971:

Letter dated February 26, 1971, from the Deputy Assistant Secretary (Personnel Policy), with enclosures, requests a decision concerning the entitlement of members (cadets) of the Senior Reserve Officers' Training Corps who participate in rifle and pistol team competition matches to travel and transportation allowances for travel performed to and from the place where the competition matches are being held. The letter was forwarded here on March 2, 1971, by the Department of Defense Per Diem, Travel and Transportation Allowance Committee and the request was assigned PDTATAC Control No. 71–13.

In his letter the Deputy Assistant Secretary says that the question involves all ROTC members who are enrolled in advanced training under the provisions of 10 U.S.C. 2104 and 2107, and who are members of a rifle or pistol team eligible for participation in the competition matches. With the enclosures is correspondence relating to a comprehensive study made by the Department of the Army as to whether applicable sections of Title 10, U.S. Code, contain authority to pay cadets of the Senior Reserve Officers' Training Corps on a commuted rate basis when traveling to and from national rifle and pistol competition matches.

The record shows that in a letter to the Deputy Chief of Staff for Personnel, Department of the Army, dated June 29, 1970, Headquarters United States Continental Army Command advised that notwithstanding provisions in annual appropriation acts, such as section 629 of Public Law 91–171, approved December 29, 1969, 83 Stat. 485, which provide for travel expenses of members of the ROTC attending regional, national, and international matches, the Department of the Army has determined that only transportation and meal tickets may be furnished in connection with such attendance and that no reimbursement can be effected for the personal travel expenses incurred by such members. It was stated that this determination was premised on the view that basic ROTC legislation (10 U.S.C. 2101–2111) does not provide for expenses of ROTC students participating in rifle and pistol team competition.

The enclosures indicate that such administrative determination was based upon the view that rifle and drill competitions constitute

voluntary extracurricular activities of ROTC members and do not qualify as "field training" under 10 U.S.C. 2109(b)(1); that orders for travel incident thereto at Government expense may not be issued and, therefore, temporary duty allowances may not be paid cadets under paragraph M6005–4b of the Joint Travel Regulations authorizing travel expenses incident to temporary duty on official business of the United States; and that the furnishing of transportation to and from installations may be limited by the provisions of 10 U.S.C. 2110(c), authorizing transportation of ROTC members to and from installations when it is necessary for them to make "visits of observations."

It is further shown in the letter of June 29, 1970, that instructions to subordinate commands concerning travel allowance entitlements of ROTC members were based on the interpretation by the Comptroller of the Army and, in this connection, reference was made to letter dated April 23, 1970, of Headquarters United States Continental Army Command, subject "Payment of Per Diem and Fees—1970 National Rifle and Pistol Matches." Subparagraph 2a(4) of that letter reads as follows:

> No per diem is payable to ROTC personnel. Transportation requests and meal tickets will be furnished to and from campsite. Modified orders format TC 413 (AR 310–10) will be used.

In view of the specific authorization contained in section 629 of Public Law 91–171, Headquarters United States Continental Army Command in that letter requested that the Department of the Army provide a more definitive interpretation of that provision of law in order that revised guidance may be issued to subordinate commands.

The Deputy Assistant Comptroller (F&A), Fiscal Policy, Office of Comptroller of the Army, on July 14, 1970, stated that, although funds for travel of ROTC members to attend regional, national, and international rifle competition were made available by Public Law 91–171, as extended by Public Law 91–294, 84 Stat. 333, there was found no substantive authority for ROTC members as such to travel in order to participate therein unless the participation was to be designated "field training" under 10 U.S.C. 2109(b)(1). In view of the administrative determination that participation in rifle competition and matches by ROTC members is not "field training" under 10 U.S.C. 2109(b)(1), he concluded that such members may not be placed in a travel status or be paid a travel allowance under 10 U.S.C. 2109 unless and until that determination is changed.

In an opinion dated September 11, 1970, JAGA 1970/4650, however, The Judge Advocate General of the Army states that substantive authority for the payment of travel and transportation allowances to members of the Reserve Officers' Training Corps participat-

ing in the National Trophy Matches appears to be contained in 10 U.S.C. 4308(a)(8), which charges the Secretary of the Army with the responsibility of providing for " * * * the transportation and subsistence, or an allowance instead of subsistence, of members of teams authorized by the Secretary to participate in matches or competitions in the use of rifled arms." He also observed that 10 U.S.C. 4312(b), as implemented by subparagraph 15d, AR 920-30 dated June 30, 1967, specifically includes ROTC members as authorized participants in the annual National Trophy Matches sponsored by the National Board for the Promotion of Rifle Practice.

The Judge Advocate General concluded that, therefore, it is not necessary to find that such participation constitutes "field training" under 10 U.S.C. 2109, and that such separate statutory authority coupled with the appropriation authorizations would appear to permit payment of transportation and travel allowances on a commuted basis. However, doubt is expressed as to whether the full travel and subsistence allowances authorized by the current provisions of the Joint Travel Regulations may be paid or whether the payments must be limited to $1.50 per day subsistence and $0.05 per mile as provided by 10 U.S.C. 4313.

We find nothing in the Reserve Officers' Training Corps Vitalization Act of 1964, approved October 13, 1964, Public Law 88-647, 78 Stat. 1063, 10 U.S.C. 2101-2111, or in its legislative history, which would serve as authority for the payment of transportation, travel, subsistence or other allowances to ROTC members as such who participate in rifle matches, which activities are purely voluntary on the part of ROTC members and are not considered to come under the term "field training" as used in 10 U.S.C. 2109(b)(1).

It is our view, also, that participation in rifle matches is in no sense limited to observation and hence attendance at the rifle matches may not be construed as "visits of observation" to support transportation entitlements under 10 U.S.C. 2110(c).

We concur with the conclusion of The Judge Advocate General that 10 U.S.C. 4308(a)(8) grants authority for payment of travel and transportation allowances to members of the ROTC participating in National Trophy Match competitions. Also, as stated by the Judge Advocate General, funds have been made available for the authorized transportation of members of ROTC teams by provisions in annual appropriation acts. See, in this connection 38 Comp. Gen. 873, 875 (1959).

The current provision of law implementing 10 U.S.C. 4308(a)(8) insofar as members of ROTC rifle and pistol teams are concerned is section 829, title VIII, "General Provisions," Department of Defense

Appropriation Act, 1971, approved January 11, 1971, 84 Stat. 2035, which in pertinent part reads as follows:

> Such appropriations of the Department of Defense available for obligation during the current fiscal year as may be designated by the Secretary of Defense shall be available for the travel expenses of military and naval personnel, including the reserve components, and members of the Reserve Officers' Training Corps attending regional, national, or international rifle matches.

Since participation in rifle team activities by ROTC members has been administratively determined to be a voluntary extracurricular activity and not "field training," there is no legal basis to consider members of the ROTC as being military members in a temporary duty status while participating in rifle matches. Consequently, in our opinion they are not entitled to the temporary duty travel allowances prescribed in chapter 4 of the Joint Travel Regulations.

The provisions of 10 U.S.C. 4308 direct the Secretary of the Army, under regulations recommended by the National Board for the Promotion of Rifle Practice approved by him, to provide:

> (8) the transportation of employees, instructors, and civilians to give or receive instruction or to assist or engage in practice in the use of rifled arms, and the transportation and subsistence, or an allowance instead of subsistence, of members of teams authorized by the Secretary to participate in matches or competitions in the use of rifled arms.

Provision is made in 10 U.S.C. 4313 for traveling expenses and subsistence of competitors at National Matches, as follows:

> (a) Competitors at the National Matches under section 4312 of this title may draw not more than $1.50 a day as a subsistence allowance. If meals are furnished, a sum not to exceed $1.50 per man per day may be spent for that purpose while the contest is in progress.
> (b) A travel allowance of five cents a mile may be paid to a civilian competitor instead of traveling expenses and subsistence while traveling, and the allowance for the return trip may be paid in advance.

Since participation of ROTC rifle teams in National Matches is neither military training nor part of the ROTC curriculum, but is performed on a voluntary extracurricular activity basis, it is our opinion, and apparently that of The Judge Advocate General of the Army, that ROTC members of rifle teams participating in National Matches should be considered to have the same status as civilians within the meaning of 10 U.S.C. 4313 so as to be entitled to a travel allowance of $0.05 a mile instead of traveling expenses and subsistence while traveling, and an allowance of not more than $1.50 a day for subsistence or meals while participating in the National Matches, the cost of which may not exceed $1.50 a day. Your question is answered accordingly.

The above-cited opinion of The Judge Advocate General relates to travel incident to National Matches only, and not to regional or international matches, inasmuch as 10 U.S.C 4313 is restricted to National Matches. For the same reason this decision applies only to participa-

tion in National Matches. In this regard, also, the correspondence forwarded with the Deputy Assistant Secretary's letter indicates that the question involved relates solely to National Matches usually held at Camp Perry, Ohio. It may be noted, however, that provision is made in 10 U.S.C. 4308(a)(8) for like benefits with respect to other matches or competitions in the use of rifled arms under regulations approved by the Secretary of the Army upon recommendation of the National Board for the Promotion of Rifle Practice. We are not aware of any regulations providing therefor.

[B-171609]

Contracts—Negotiation—Request for Proposals—Minimum Needs Requirement—Same for All Offerors

In the procurement under a request for proposals of a ground simulator to be used to support the training of navigators where proposal deficiencies were identified, clarified, the Government work statement changed, and contractors allowed to determine the manner of correction, since the minimum requirements in several critical high cost areas established by oral clarification with one offeror were not reflected in any formal amendment, the possibility that all offerors were not committed to the same minimum requirements has been dispelled by the independent examination made by the National Bureau of Standards of the technical proposals, an examination conducted by the Bureau as the United States General Accounting Office was not equipped to evaluate the undertakings represented in the technical proposals submitted.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration

A provision in a solicitation for the negotiation of a fixed price, multi-year contract for a ground simulator which provides that in the evaluation of proposals the Government would assess the reasonableness, realism, and completeness of price proposals and that cost analysis and negotiation would be employed in the interest of establishing sound prices does not require rejection of an unrealistically low offer as the provision serves only as an aid in determining whether an offeror understands the scope of the work, and in uncovering mistakes and "buy-ins" in violation of paragraph 1-311 of the Armed Services Procurement Regulation. Although the multi-year procurement contains an option that minimizes "buy-in," the contract includes a special clause to protect against recoupment of losses through change orders, and the submission of different freeze dates that govern the financial responsibility for engineering change orders has no significant effect on source selection.

Contracts—Negotiation—Evaluation Factors—Criteria

Where all proposals are evaluated on the basis of the same performance criteria, the omission of the precise numerical weights to be used in the evaluation process does not reflect on the adequacy of the evaluation criteria stated in the request for proposals for a ground simulator. Moreover, any doubt as to the relative importance of the evaluation should have been discussed and resolved before the closing date set for receipt of proposals. Also, the use of the negotiating procedure authorized in 10 U.S.C. 2304(a) for the multi-year procurement was proper because the insufficiency of performance specifications did not permit advertising for bids or using the two-step procedure, and the "clean-up" sessions held after the prescribed cutoff date to clarify matters verbally agreed upon was not prejudicial to any offeror, and the sessions do not constitute a violation of paragraph 3-805.1(b) of the Armed Services Procurement Regulation.

To Gadsby and Hannah, May 12, 1971:

This is in reply to your letter dated January 14, 1971, and subsequent correspondence, protesting on behalf of the Link Division of Singer-General Precision, Inc. (Link), against the proposed award of a negotiated contract by the Air Force to Honeywell, Inc., for the ground simulator portion of the Undergraduate Navigational Training System (UNTS).

Essentially, it is your position that Honeywell's proposal is not responsive to the same minimum requirements on which the Government negotiated with Link, as evidenced by the fact that Honeywell is proposing a 15 to 20 million dollar system which is unrealistic and significantly lower priced than the Link proposal. In the alternative you state that Honeywell may be attempting to "buy-in," in violation of Armed Services Procurement Regulation (ASPR) 1–311 and despite the provision for realistic and sound pricing in the request for proposals. In addition, your protest also raises questions regarding the adequacy of the evaluation criteria stated in the request for proposals, and you contend the Air Force contravened significant governing procurement regulations and inappropriately applied or failed to apply certain other regulations. Your contentions will be considered in the order they are set out above.

Briefly stated, the ground simulator is to be used to support the training of navigators in the basic skills, knowledge and discipline required to operate present and future navigation equipment. The simulator must provide training for the operational use of all controls, displays and instruments associated with this training device. It is to be composed of 46 student stations, with provisions for two additional student stations, 12 instructor consoles, applicable operator consoles and associated simulator subsystems.

This procurement called for a fixed price, multi-year contract. Performance specifications were developed by the Air Force and issued to all offerors. It was recognized from the start by the Air Force and all offerors that there could be several design approaches to meet the requirements of the Air Force statement of work.

Proposal evaluation was accomplished substantially in accordance with the source selection procedures contained in Air Force Manual 70–10. As part of the evaluation, validation, and contract negotiation process, contractor's deficiencies were identified and each offeror was individually notified thereof. At times the Air Force requested clarifications from offerors regarding their proposals as well as modifications when a change in the Government's work statement was required. Each modification request was issued to all contractors. The decision to correct deficiencies and the manner in which the correction would be accomplished was the decision of each offeror,

One of your basic arguments is that in several critical high cost areas the Air Force work statement was open to several interpretations and that by oral clarification a clear minimum requirement was established between the Air Force and Link. It is contended that this minimum requirement never was reflected in any formal amendment to the Air Force work statement or, in all likelihood, in any of the specifications prepared by the other offerors. Link has requested that we independently examine these critical areas in all offerors' proposals, and particularly in the final Honeywell specification (which is the key contractual document) to determine if Honeywell and the other offerors have committed themselves to the same undertaking as Link.

Since this Office is not equipped to evaluate the undertakings represented in the various technical proposals we requested and obtained assistance from the National Bureau of Standards (NBS). With respect to your protest we requested NBS to perform an independent examination to determine whether or not Honeywell has based its proposal on the same requirements as Link in the contested critical areas stated in your protest. Since it is our opinion that consideration of the proposed contract with Honeywell is sufficient to determine whether you would be prejudiced by the proposed award, we did not request an examination of all proposals submitted.

NBS has submitted a report of its findings, a copy of which is attached and incorporated herein as part of our decision. We believe that the views expressed in that report clearly show that there is no substantial basis to this portion of your protest.

You also contend that Honeywell may be attempting to "buy-in" in violation of Armed Services Procurement Regulation 1–311 and despite the provision for realistic and sound pricing in the request for proposals.

The above-cited regulation defines "Buy-In" as follows:

(a) "Buying in" refers to the practice of attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of either (i) increasing the contract price or estimated cost during the period of performance through change orders or other means, or (ii) receiving future "follow-on" contracts at prices high enough to recover any losses on the original "buy-in" contract. Such a practice is not favored by the Department of Defense since its long-term effects may diminish competition and it may result in poor contract performance. Where there is reason to believe that "buying in" has occurred, contracting officers shall assure that amounts thereby excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on procurements subject to cost analysis.

It is your position that a "buy-in" is illegal because of the mandatory language in ASPR 1–311(a) stating that the contracting officer "shall assure" that there is no "get-well" or "bailing out" of the contractor.

With respect to the impact of this regulation, we have consistently held that it does not afford a basis for rejection of a bid, there being no specific provision therefor in the regulation, but only provisions for

other specific actions to be taken by the contracting officer in the event "buying in" is thought to be occurring, or has occurred. B–164951, September 30, 1968, and B–167312, September 19, 1969.

You also contend that to permit a "buy-in" would be illegal in this case since the terms of the Air Force solicitation *required* realistic and sound pricing. In this respect you have directed our attention to Attachment 3 to the solicitation entitled "Source Selection and Evaluation Criteria for Undergraduate Navigation Training System," paragraph IV(F). The provision referred to provides that in evaluating proposals the Government would assess the reasonableness, realism and completeness of the bidders' price proposals and that cost analysis and negotiation would be employed in the interest of establishing sound prices. Since there are various valid motivations which might influence an offeror to bid a lower price than he could support with cost or pricing data, we do not think the language of paragraph IV(F) can reasonably be construed as indicating an intention or requirement on the part of the Government to reject all offers which, upon cost or price analysis, appear to be lower than the offeror could justify. Rather, we feel that in evaluating such proposals the cost realism is more important to aid in determining whether the offeror understands the scope of the work required, uncovering evidence of a mistake, and alerting the Government to the possibility of an attempted "buy-in" in order to take precautions against its possible adverse effects.

The record shows that the Air Force believes Honeywell's price may be unrealistically low and, therefore, has attempted to insure that the low price is not the product of a mistake or misunderstanding. Also, a special clause has been developed for inclusion in the contract to protect against any endeavor to recoup losses through change orders and claims based upon mistake or impossibility of performance. While you argue that the guarantees in such an exculpatory clause are illusory, we believe the clause can reasonably be expected to protect the Government against the contingencies to which it is directed. Moreover, in accordance with the above-cited regulation the opportunity for "buying in" has been minimized since this is a multi-year procurement and it contains an option for all anticipated requirements. In this connection, you state that you have learned that there may be increased requirements over and above the present option quantity. However, the Air Force has advised that as late as March 30, 1971, there was no foreseeable requirement in addition to the option quantity in the request for proposals.

We have noted your request that we inquire into whether the proposals of Honeywell and Link contain different "freeze dates," since these dates govern which party has the financial responsibility for engineering change orders. While the record shows that Honeywell's data

design freeze date is in fact later than Link's and therefore more advantageous to the Government, we do not believe this would be a valid basis for objecting to the proposed award, since it is speculative and improbable that a contractor can recover amounts he underbid through engineering changes, and since contracting officers are charged under ASPR 1-311(a) with a duty to insure against the recovery of amounts for promised performance in the pricing of change orders. You also state that the existence of different freeze dates would be proof that offerors were asked to respond to materially different performance requirements. However, the Air Force has advised us that each contractor established its own freeze dates and, in any event, these dates were not considered to have a significant effect on source selection.

Under the circumstances, we find no basis for concluding that the Air Force was required to reject any firm fixed price offer solely because it may be below cost. Whether such an offer should be rejected is a matter of judgment, and we do not feel that we may take any legal objection to the exercise of such judgment where, as here, the risks to the Government have been carefully evaluated and reasonable measures have been taken to protect the Government's interests.

Your protest also questions the adequacy of the evaluation criteria stated in the request for proposals. The solicitation incorporated a comprehensive narrative description of the general and specific evaluation criteria. With respect to the order of importance of these criteria the following general explanation was provided in the solicitation.

1. The ability of the ground simulator to perform the Air Training Command's training support tasks.
2. Delivery of a fully operational and supportable system within the established acquisition schedule.
3. Total cost to the Government.

You have objected to the absence of any indication of the acceptable trade-offs among the factors listed, and to the lack of a precise indication of the relative weights attached to the factors. You state that in the absence of such information, offerors had no rational basis upon which to price competitive proposals, and the final choice between different equipment with substantial cost differentials was arbitrary and subjective.

While we have held that offerors should be informed of the relative weight or importance attached to evaluation criteria, we do not require the disclosure of the precise numerical weights used in the evaluation process. See 50 Comp. Gen. 390, December 16, 1970. Moreover, we believe any doubt you may have had as to the relative importance of the evaluation criteria should have been discussed and resolved before the closing date set for receipt of proposals. In any event, our

review of this procurement, particularly the evaluations and reports prepared by the Source Selection Evaluation Board (SSEB) and the Source Selection Advisory Counsel (SSAC), substantiates that the Air Force thoroughly reviewed and evaluated all proposals on the basis of the same performance criteria.

You also contend that the Air Force contravened significant governing procurement regulations and inappropriately applied or failed to apply certain other regulations. Particular emphasis is placed upon the failure of the Air Force to apply the provisions of Department of Defense (DOD) Directive 3200.9, as implemented by Air Force Regulation (AFR) 80–20, which establish and implement DOD policies governing Concept Formulation and Contract Definition in certain specified development projects. Inasmuch as this program is not financed with Research, Development, Testing and Engineering funds, application of the above-cited regulations was not required. See DOD Directive 3200.9, paragraph (VI) (B). Moreover, in this case the procuring activity was not directed to apply the referenced regulations as provided therein, and AFR 80–20 has been rescinded.

You also contend that even if these regulations did not technically govern this situation, as a practical matter a prior contract definition phase might have eliminated any prejudice to Link which resulted from the alleged failure of the Air Force to apply common specifications to all offerors. In this connection we note that the independent evaluation by NBS does not substantiate your allegations of prejudice resulting from the failure to provide common specifications.

You state that either purposely or inadvertently the Air Force conducted this solicitation as a Total Package Procurement, but that it failed to comply with the governing regulations in ASPR 1–330 through 1–330.6, thereby contributing to the lack of commonality in specifications. We note that you recognize that the above-cited regulations were canceled on September 30, 1970, but you contend, nevertheless, that the Air Force was bound by the regulation provisions. Since our investigation has not shown that, as between Link and Honeywell, different performance requirements or guidance was given which resulted in prejudice to Link, we see no substantial basis for objecting to the procurement plan employed in this case.

It is stated in your protest that insofar as this was a negotiated procurement it is inconsistent with the multi-year procurement sections of the ASPR which express a preference for the use of formal advertising. Moreover, you believe there is a further inconsistency here since the RFP, contrary to regulation, expressly de-emphasized the importance of price. Our review of the record of this case establishes that the use of negotiation procedures was authorized pursuant to 10 U.S.C. 2304(a) (10), as implemented by ASPR 3–210.1, because the

contracting officer determined that the performance specifications were insufficiently detailed to permit advertised bidding or two-step formal advertising procedures. With respect to the Air Force intention not to award solely on the basis of the lowest price as expressed in the RFP, the procuring activity requested and obtained a deviation from the inconsistent provision in ASPR 1-322.4(a).

Finally, it is argued that the Air Force violated ASPR 3-805.1(b) in failing to prescribe a cutoff date for negotiations. You state that a memorandum to all offerors from the Chairman of the SSEB stated that August 31, 1970, was a firm date for submission of specifications, and that this communication was the closest thing to the closing of negotiations in this procurement. We are unable to agree with your analysis in this regard. The record shows that all contractors met with the Air Force during the period from September 9 through November 6, 1970, and that approximately 7 working days were spent with each offeror. The contracting officer has stated that as these negotiations ended each offeror was aware of the system performance requirements and that specification negotiations were concluded. On November 12 the contracting officer issued a request for final and firm prices to be submitted by December 7, and by December 16, 1970, all contract documents were signed. The contracting officer states that there was a need for further clarifications because each offeror neglected to revise wording as previously agreed, and to this extent final specification "clean-up" took place with each offeror from December 16 through December 22. We note that you do not contend that the "clean-up" session with Link involved matters which had not been previously agreed to. Under these circumstances it is our opinion that negotiations were effectively closed with the submission of final prices on December 7, and that no offeror was prejudiced by the "clean-up" sessions since verbal agreement had already taken place.

We have noted that your protest raises the point that price negotiations were not conducted with Link. While such negotiations might have been advisable, our review of this matter does not indicate any attempt was made to negotiate a change of price with any offeror. Moreover, it does not appear that such negotiations would have changed your competitive position with respect to Honeywell.

For the reasons stated above, your protest is denied.

[B-172174]

Highways—Construction—Federal Aid Highway Programs—National Park System—Percentage of Participation

The authority in the Federal-Aid Highway Act of 1950, 23 U.S.C. 120(g), to pay 100 percent of the cost of highways located within national parks and monuments under the jurisdiction of the National Park Service (NPS) does not permit the

financing of the entire cost attendant to the construction of the Theodore Roosevelt Bridge over the Potomac River and Little River Crossing as these areas although within NPS jurisdiction are not part of the national park system for the purposes of 23 U.S.C. 120(g), which authorizes the Secretary of Transportation to construct roads through national parks and monuments and relates only incidentally to the administration and protection of parks and monuments as contemplated by the act of August 8, 1953, as amended. Therefore, the 90–10 Interstate project agreement with the District of Columbia may not be amended, nor may 100 percent participation funds be made available to construct other bridges over lands mentioned in the act of June 4, 1934.

To the Secretary of Transportation, May 12, 1971:

Your letter of March 10, 1971, requests our opinion as to whether Federal-aid highway funds may be used to finance 100 percent of the costs attendant to construction of the Theodore Roosevelt Bridge over the Potomac River and the Little River Crossing, both areas under the jurisdiction of the National Park Service, Department of the Interior, on the basis that the aforesaid areas are included within the term "national parks and monuments under the jurisdiction of the Department of the Interior" as that term is used in 23 U.S.C. 120(g). The request for 100 percent Federal financing comes from the District of Columbia which is currently obligated to pay 10 percent of the construction costs. You further ask, if we decide that the term "national parks and monuments" in 23 U.S.C. 120(g) is broad enough to include the area over which the Theodore Roosevelt Bridge is constructed, whether the Federal-aid Interstate project agreements for the bridge, which were originally authorized on a 90–10 participation basis, may now be amended to permit 100 percent participation with Federal-aid highway funds. We note from your letter that while the questions are raised in relationship to the Theodore Roosevelt Bridge, you anticipate that you may receive similar requests from the District of Columbia for 100 percent Federal participation in other bridges constructed or to be constructed across the Potomac and Anacostia Rivers.

The authority for the use of Federal-aid highway funds to pay the entire cost of the construction of Federal-aid highways located within "national parks and monuments under the jurisdiction of the Department of the Interior" was originally enacted into law in section 8 of the Federal-Aid Highway Act of 1950, 64 Stat. 785, and is now codified in 23 U.S.C. 120(g), which provides:

> The Secretary is authorized to cooperate with the State highway departments and with the Department of the Interior in the construction of Federal-aid highways within Indian reservations and national parks and monuments under the jurisdiction of the Department of the Interior and to pay the amount assumed therefor from the funds apportioned in accordance wtih section 104 of this title to the State wherein the reservations and national parks and monuments are located.

In your letter you discuss the act of June 4, 1934, 48 Stat. 836, which was enacted for the purpose of establishing and making clear the title of the United States in and to any part or parcel of land or

water in, under, and adjacent to the Potomac River, and other bodies of water, including submerged or adjacent lands; the opinion dated August 22, 1969, by the Associate Solicitor, Parks and Recreation, Department of the Interior that the National Park Service may issue permits involving the bed of the Potomac River; and conversations held between members of your staff and the Associate Solicitor, Parks and Recreation, Department of the Interior. We understand from this discussion and from conversations with a member of your staff that all parties concerned agree that the area crossed by the bridge is within the jurisdiction of the National Park Service.

It appears from your letter that it is the District's contention that since the area over which the bridge is constructed is within National Park Service jurisdiction, it is a national park within the meaning of 23 U.S.C. 120(g). For the reasons set forth below, we cannot agree.

As indicated above, the phrase "national parks and monuments under the jurisdiction of the Department of the Interior" was first enacted into the law as part of section 8 of the Federal-Aid Highway Act of 1950. In section 4(a) of the same act, appropriations are authorized for "the construction, reconstruction, improvement, and maintenance of roads and trails * * * in *national parks, monuments, and other areas administered by the National Park Service.*" It would appear that if the Congress had intended the provisions of section 8 to be construed broadly enough to encompass all areas under the jurisdiction of the National Park Service, it would have used language substantially similar to that used in section 4(a) of the same act. Compare also section 4(b) of the last cited act. [Italic supplied.]

Moreover, in connection with the matter, we have considered the applicability of section 2(b) of Public Law 91-383, 84 Stat. 826, which amended section 2 of the act of August 8, 1953, 67 Stat. 496, 16 U.S.C. 1c, in order to update, make uniform, and clarify the law with respect to the administration of the various units of the national park system. Section 2 of the 1953 act, as amended by Public Law 91-383, 16 U.S.C. 1c, reads, in pertinent part, as follows:

> The "national park system" shall include any area of land and water now or hereafter administered by the Secretary of the Interior, through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.
>
> (b) Each area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area. In addition, the provisions of this Act, and *the various authorities relating to the administration and protection of areas under the administration of the Secretary of the Interior* through the National Park Service, including but not limited to * * * shall, to the extent such provisions are not in conflict with any such specific provision, be applicable to all areas within the national parks, monuments, recreation areas, historic monuments, or parkways shall hereinafter not be construed as limiting such Acts to those areas. [Italic supplied.]

It is our view that the meaning of the term "national parks and monuments" in 23 U.S.C. 120(g) is not affected by the aforementioned provisions of Public Law 91-383, since 23 U.S.C. 120(g) is not an authority "relating to the administration and protection of areas under the administration of the" National Park Service. Rather, section 8 of the Federal-Aid Highway Act of 1950, now codified as 23 U.S.C. 120(g), was enacted primarily to give authority to the Secretary of Transportation to cooperate in the construction of Federal-aid highways through national parks and monuments and only incidentally relates to the administration of areas under the jurisdiction of the National Park Service. Consequently, we have concluded that the provisions of 23 U.S.C. 120(g) apply only to highways to be constructed within national parks and monuments, i.e., areas administered by the National Park Service for national park and monument purposes.

In regard to whether the area crossed by the bridge may be considered within a national park or monument, as indicated in your letters, the definitions in section 2 of the act of August 8, 1953, 67 Stat. 496, distinguished between lands in the "National Park System" and "miscellaneous areas" administered or supervised by the National Park Service and section 2(b) of Public Law 91-383, quoted above, simplified the definitions in the 1953 act by including as part of the "National Park System" not only land administered by the Secretary for park, monument, historic, parkway or recreational purposes but also land administered by the Secretary for "other purposes." You state in your letter that it is your understanding from informal discussions with the Associate Solicitor, Parks and Recreation, Department of the Interior that "the only lands identifiable as 'miscellaneous areas,' under the 1953 act, and as areas administered for 'other purposes,' within the definition in the 1970 act, are the areas identified in the act of June 4, 1934, referred to above." In other words, it appears that the Department of the Interior has never considered the area spanned by the Theodore Roosevelt Bridge as a national park or monument or a part thereof. Thus while the lands involved here may be part of the national park system such lands are not national parks or monuments.

In light of the foregoing, it is our view that Federal-aid highway funds may not participate, under the authority of 23 U.S.C. 120(g), in 100 percent of the costs attendant to the construction of the Theodore Roosevelt Bridge or other bridges constructed or to be constructed over the lands mentioned in the act of June 4, 1934, 48 Stat. 836. Consequently, your question as to whether the existing project agreements may be amended to permit 100 percent participation with Federal-aid funds in the costs attendant to construction of the bridge is moot and need not be answered.

[B-172508]

Contracts—Labor Stipulations—Davis-Bacon Act—Suspension—Revoked

The low bidder under an invitation for bids that was canceled upon issuance of Presidential Proclamation 4031, dated February 23, 1971, which suspended the provisions of the Davis-Bacon Act, 40 U.S.C. 276a, who is the second low bidder under the reissued invitation is not entitled to an award under the canceled invitation when Presidential Proclamation 4040 of March 29, 1971 revoked the suspension of the act. Presidential Proclamation 4040 effectively revoked the Davis-Bacon Act only as to construction contracts for which solicitations for bids or proposals were issued after March 29, 1971, and the implementing Defense Department regulation confirms that solicitations issued after February 23, 1971, but before March 30, 1971, shall not contain Davis-Bacon Act provisions and, therefore, an award to the lowest responsible, responsive bidder under the reissued invitation would be in accordance with the intent of the proclamation and regulation.

To the Secretary of the Army, May 12, 1971:

Reference is made to letter dated April 12, 1971, from the Deputy General Counsel, Office of the Chief of Engineers, requesting an advance decision on the protest made by the Gardner-Zemke Company against an award of any contract under invitation for bids (IFB) DACA63-71-B-0158, issued by the United States Army Engineer District, Fort Worth, Texas.

IFB-0158 is a resolicitation of IFB-0086, which was issued January 7, 1971, subject to the usual Davis-Bacon Act provisions. The Gardner-Zemke Company was low bidder on IFB-0086. However, that IFB was canceled on March 2, 1971, by the procuring activity and was reissued the same date, with a new bid opening date of March 17, 1971, as IFB-0158, without the provisions of the Davis-Bacon Act, 40 U.S.C. 276a. The low bidder under the reissued invitation is Delta Electric Construction Company, Inc., while Gardner-Zemke is second low. The cancellation and reissuance action was taken pursuant to administrative procedures promulgated following issuance of Presidential Proclamation 4031 dated February 23, 1971, which by its terms applied to all contracts entered into on and subsequent to February 23, 1971, and therefore included all procurements on which bids had been received but awards had not yet been made as of that date.

Before award was made under IFB-0158, however, Presidential Proclamation 4040 of March 29, 1971, revoked Proclamation 4031 as to all construction contracts for which solicitations for bids were issued after that date.

The basis for the protest is that, since the Davis-Bacon Act has been reinstated, award should be made under the original solicitation, IFB-0086, which was canceled solely because of the suspension, rather than under the current solicitation, IFB-0158.

Presidential Proclamation 4040 revoked Proclamation 4031 and effectively reinstated the Davis-Bacon Act but only as to construction contracts for which solicitations for bids or proposals are issued after March 29, 1971. A memorandum issued March 30, 1971, from the Assistant Secretary of Defense, Installations and Logistics, implemented the proclamation and set out procedures to be followed with respect to invitations which had been issued during the suspension of the Davis-Bacon Act. This confirms that solicitations issued after February 23, 1971, but before March 30, 1971, shall not contain Davis-Bacon Act provisions.

In view of the foregoing, it is our opinion that reissuance of the procurement under IFB–0158 and an award thereunder to the lowest responsible, responsive bidder would be in accordance with the intent of both the Presidential proclamation and the regulation issued in implementation thereof. We, therefore, see no valid basis on which it may be contended that an award must now be made to Gardner-Zemke Company as the low bidder on the original solicitation for bids.

Accordingly, an award to the low bidder under IFB–0158, if otherwise proper, would not be legally objectionable.

[B–171622]

Contracts—Requirements—Small Business Set-Asides—Certificate of Competency Procedure

Under a small business set-aside for the award of a requirements type contract, the evaluation of the low bid for the purpose of the Certificate of Competency (COC) procedures on the basis of the initial quantity to be purchased rather than the estimated quantity to be ordered during the contract period was inconsistent with the use of the estimated quantity to determine the low bidder and to perform the preaward survey, and resulted in the erroneous refusal of the contracting officer to refer the low bidder's unfavorable preaward survey to the Small Business Administration (SBA) as required by paragraph 1–705(c) of the Armed Services Procurement Regulation (ASPR). Therefore, the procedure in ASPR 1–705.4(c)(vi) should be implemented and if SBA determines that a COC would have been granted at the time of award and that such determination is still valid, the contract awarded should be canceled and an award made to the low bidder.

To the Secretary of the Army, May 13, 1971:

Reference is made to a letter dated February 3, 1971, from Headquarters, United States Army Materiel Command, reference AMCGC–P, furnishing our Office a report on the protest of Stamford Metal Specialty Company, Incorporated, against the award of a contract to another firm under invitation for bids No. DAAH01–71–B–0250, issued by the Redstone Arsenal, Alabama.

The subject solicitation, issued October 5, 1970, was a 100 percent small business set-aside for hydraulic system oil tanks. The invitation provided that a "requirements" type contract would be awarded

with an initial quantity of 14 purchased upon date of award; it further provided that an estimated quantity of 48 was expected to be ordered during the contract period.

Stamford Metal Specialty Company, Incorporated (Stamford), was determined to be the low bidder. However, based upon an unfavorable preaward survey, the contracting officer determined Stamford to be nonresponsible in accordance with Armed Services Procurement Regulation (ASPR) 1-903.1(ii) and 1-903.1(iii). The survey concluded that Stamford had an unsatisfactory quality assurance capability and an unsatisfactory performance record. The contracting officer's statement dated January 13, 1971, states in this regard, as follows:

3. The survey points out that the required item is relatively complex in nature and the Inspection System required is in accordance with Specification MIL-I-45208 to assure the receipt of a quality item. The records at DCASR, New York indicated that Stamford Metal Specialty quality performance record for 1970 has been unsatisfactory. Nine (9) customer complaints (complaint reports) have been investigated since 1 January 1970 and all complaints have been found justified and consistent. Quality deficiencies reported included dimensional defects, improper assemblies, non-conforming torque requirements, defective leather components, rubber molding defects, finishes, burnt spot welds, loose welds, general workmanship details and packaging. The company's inspection system and general control effort are attributable to the above noted defects. Areas considered out-of-control are receiving, inprocess and final inspection, records which do not reflect true product quality, measuring procedures, special processes and especially corrective action. The survey further states that the company's attention to the deficiencies of his inspection has been directed on a continuing basis. Although Stamford Metal has made some corrective actions, such as changes in suppliers who produce some of the defects and some reorganizing of their management structure, no significant change has been made that would influence or improve their Inspection System. The firm has made repeated promises to hire an experienced Quality Control Manager who would be given the final quality decision authority, and the responsibility for eliminating the repetition pattern of defectiveness being generated by his operation. As of 4 December 1970, the firm is still without inspection management despite past promises and no definitive plan has been presented for obtaining appropriate quality control personnel to assure compliance with applicable contractual quality requirements.

4. The survey also states that Stamford Metal's production record is unsatisfactory. The firm completed 33 contracts in the past year, of which 19 were delinquent. Of the 19 delinquencies, nine (9) were under 30 days late; six (6) were under 60 days late; three (3) were under 90 days late; and one (1) was 120 days late. The company is presently performing on 22 contracts, of which six (6) are delinquent. All these delinquencies are attributable to Stamford Metal Specialty Co., Inc.

Stamford contends that notwithstanding the unfavorable preaward survey, the matter should have been referred to the Small Business Administration (SBA) for Certificate of Competency Proceedings. This allegation apparently is based upon ASPR 1-705(c) which provides, in part, as follows:

If a bid or proposal of a small business concern is to be rejected solely because the contracting officer has determined the concern to be nonresponsible as to capacity or credit, the matter shall be referred to the appropriate SBA field office having authority to process the referral in the geographical

area involved. * * * This procedure applies only to proposed awards exceeding $2500. *For proposed awards exceeding $2500, but not exceeding $10,000, its use is within the discretion of the contracting officer.* * * * [Italic supplied.]

It is reported that Stamford's price was $9,996 for the guaranteed quantity of 14 units and $24,240 for the estimated quantity. The Army reports that the contracting officer interpreted the words "proposed awards" as used in the above-quoted regulation to apply only to the firm quantity award (14 units) and not to the estimated quantity (48 units) because the Government is under no obligation to order any additional units over and above the guaranteed minimum. Since the price for the guaranteed quantity to be purchased under the contract was below the ASPR $10,000 threshold, it is stated that the contracting officer exercised his discretion not to refer the question of Stamford's responsibility to SBA. It is reported that award was made to Flowdyne Corporation, the next low responsive, responsible bidder.

It is Stamford's contention that the dollar value of the subject procurement exceeds the $10,000 limit set forth in ASPR 1-705(c) and referral to SBA was therefore required prior to the contracting officer's determination of nonresponsibility. This argument apparently is based upon the conclusion that the $24,240 bid price for the estimated requirements under the contract should be determinative of the amount of the proposed award and not the bid price for the base guaranteed quantity.

ASPR 3-409.2(a) provides that in a requirements contract an estimated total quantity is stated for the information of prospective contractors and that such estimate should be as realistic as possible. As stated at 47 Comp. Gen. 272, 274 (1967) the information as to estimated total quantities of work is important for a proper evaluation of bids; if estimated quantities used for bid evaluation are different from actual anticipated needs, the possibility arises that a bidder may be found low on evaluation who is not the low bidder on the real requirements, or the best estimate thereof.

The contracting officer has stated that Stamford was the low evaluated bidder. This statement apparently is based upon the total evaluated unit price of $570.10 (as opposed to the next low of $584.50) as shown on the Abstract of Bids, DD Form 1501. Section D-4 on page 16 of the solicitation provides for price evaluation of bids as follows:

D-4. Price Evaluation Shall Be Made As Follows:
1. Production Quantity Evaluation:

The Unit Prices will be multiplied by the percentages of weight as set forth below.

The Weighted Unit Prices for all ranges will be totaled with the evaluated unit price for First Article (as evaluated in 2.b. below), to determine the low-

est bidder for award purposes only. Award will be made on the basis of the lowest evaluated total price.

	Range NR	Weight Factor	Times	Unit Price	Weighted Unit Price
1.		XX	X	$XX	$XX
2.		XX	X	$XX	$XX
3.		XX	X	$XX	$XX
4.		10%	X	$XX	$XX
5.		10%	X	$XX	$XX
6.		20%	X	$XX	$XX
7.		30%	X	$XX	$XX
8.		30%	X	$XX	$XX
Total Evaluated Unit Price					$XX

Stamford's evaluated unit price of $570.10 was arrived at through the above procedure. Obviously, the price evaluation procedure was based upon the Government's estimated requirements and not the guaranteed minimum purchase quantity. We note that preaward survey performed by DCASR, New York, was based upon Stamford's price of $24,240 for the estimated requirements of 48 units.

According to the terms of the invitation itself, bids were to be evaluated and the contract awarded on the basis of the estimated requirements of the Government. As already noted the preaward survey was performed on the basis of estimated requirements. ASPR and past decisions of this Office require that estimates of requirements be as realistic and accurate as possible. See 36 Comp. Gen. 380, 385 (1956). This assures a meaningful evaluation of bids which gives all persons an equal right to compete for Government contracts, and secures for the Government the benefits which flow from free and unrestricted competition. In the instant case the evaluation based upon estimated requirements met the stated standards. We believe that the contracting officer's position with respect to forwarding the matter of Stamford's responsibility to SBA is inconsistent with the method of soliciting and evaluating the bids on a requirements contract. The procedures followed in this procurement were all geared (as they should have been) to the estimated requirements and not the guaranteed minimum purchase. It appears that the contracting officer's refusal to forward the matter to SBA was inconsistent with the requirements of the invitation.

Further, we believe the contracting officer's position is inconsistent with the extent of the Government's obligation under the proposed contract. The solicitation called for a requirements type contract with a minimum purchase of 14 units. Under this type of contract the Government has a duty to order all its needs from the contractor during the contract period. If the Government's needs exceed 14 units during the contract period, these units must be ordered from the contractor; the Government may not purchase these units elsewhere. We believe it is appropriate to base the dollar value on the estimated requirements and not on the guaranteed minimum purchase amount.

We note, however, that Stamford was determined nonresponsible in accordance with ASPR 1-903.1(ii) and 1-903.1(iii). ASPR 1-705.4(c)(vi) states that nonresponsibility determinations pursuant to 1-903.1(iii) (past performance) and 1-903.1(iv) (integrity) are not covered by the Certificate of Competency procedure but must be supported by "substantial evidence documented in the contract files." We have held that a poor record of prior performance does not establish a lack of perseverance or integrity; rather the procuring activity has the burden of showing by substantial evidence that the bidder did not take diligent and aggressive steps to overcome its delivery problems. 49 Comp. Gen. 600 (1970); B-170224, October 8, 1970.

ASPR 1-705.4(c)(vi) further provides for the matter to be referred to SBA to give that agency the opportunity to appeal the negative determination to the head of the procuring agency. This procedure was not followed in the instant case. Therefore, steps should be taken to implement the procedure in ASPR 1-705.4(c)(vi) to determine whether a COC referral was required. In the event it is determined that a COC referral was required, such action should be implemented. If SBA then were to determine that a COC would have been granted at the time of award and that such determination is still valid, the contract with Flowdyne should be canceled and award made to Stamford.

[B-171827]

Subsistence—Per Diem—Military Personnel—Temporary Duty—En Route to New Duty Station

A chief warrant officer who is detached from his duty station at Hunter Army Airfield and assigned to duty overseas with temporary duty en route at Fort Stewart—both locations within a 40-mile radius and considered two different duty stations under the Joint Travel Regulations as they are established subdivisions with definite boundaries, even though administered as a single post with a single command and staff—is not entitled to a travel allowance for commuting daily by privately owned automobile from his residence to his temporary duty station since there was no official necessity for return to the old duty station and there is no evidence the warrant officer could not obtain lodgings at his temporary duty station, but he is entitled to per diem on the basis he entered a travel status the day he reported for temporary duty, notwithstanding he continued to occupy his old residence.

Travel Expenses—Military Personnel—Authorization—Retroactive

The treatment of Fort Stewart and Hunter Army Airfield, located 40 miles apart, as one installation with one staff which resulted in the movement of military and civilian personnel freely between both installations without competent orders directing a permanent change-of-station or performance of temporary duty may not be corrected by the issuance of retroactive orders to confirm the assignments and authorize travel allowances for temporary duty or permanent change-of-station allowances incident to the assignments, even though for the purposes of the Joint Travel Regulations, the installations are considered different stations since the retroactive orders would be without effect to change the vested rights of the personnel involved.

To Major Douglas C. Morrow, Department of the Army, May 13, 1971:

Further reference is made to your letter of October 19, 1970, requesting a decision of the Comptroller General concerning the entitlement of Chief Warrant Officer Joseph Moore to mileage allowance for a period of temporary duty at Fort Stewart en route to a new permanent station. The submission was assigned Control No. 71-4 by the Department of Defense Per Diem, Travel, and Transportation Allowance Committee.

By permanent change-of-station orders dated January 21, 1970, the member was detached from his duty station, Hunter Army Airfield, Georgia, and assigned to duty in Vietnam with temporary duty en route at Fort Stewart, Georgia, for approximately 8 weeks, reporting not later than January 25, 1970, with further temporary duty at Fort Rucker, Alabama. The member commuted daily from his place of lodging in Savannah, Georgia, to his temporary duty station at Fort Stewart and he has submitted a claim for this mileage, together with a statement of nonavailability of Government transportation.

The claim was denied by the administrative office for the reason that for command purposes Fort Stewart, Georgia, and Hunter Army Airfield, Georgia, are treated as one installation and administered by a common commander. The member's claim was processed through channels to the Per Diem, Travel, and Transportation Allowance Committee and the Deputy Chief of Staff for personnel. It is the view of both that Hunter Army Airfield and Fort Stewart should be considered as two different duty stations.

In your letter it is stated that Hunter Army Airfield is approximately a 40-mile distance from Fort Stewart, and that the two stations do not have a common border but they are administered as a single post with a single commander and staff. Also, it is stated that personnel have been transferred freely from Fort Stewart to Hunter Army Airfield and vice versa.

You ask whether the member is entitled to mileage or per diem while a student at Fort Stewart while on permanent change-of-station orders from Hunter Army Airfield to Vietnam. And, if the answer to this question is in the affirmative, you ask the following questions which you say relate to numerous claims which have or may be submitted.

a. Is a transfer between Hunter Army Airfield and Fort Stewart or between Fort Stewart and Hunter Army Airfield a PCS?

b. Personnel have been assigned to Hunter AAF and subsequently reassigned to Fort Stewart and vice versa. If the answer to 6a is affirmative, may a dislocation allowance be paid for this second PCS (JTR 1, paragraph M 9005) and what procedure will be necessary to secure retroactive approval by the Secretary of the Army for this second PCS?

c. Personnel have been transferred VOCO from Fort Stewart to Hunter Army Airfield and from Hunter Army Airfield to Fort Stewart. Will confirmatory orders be required in these instances?

7. As pertains to civilian employees. Employees have been transferred utilizing Standard Form 50. If the move between Hunter Army Airfield and Fort Stewart is a PCS move, will retroactive publishing of confirmation orders be required under the provisions of Chapter 2 JTR II, and will it be necessary to secure the service agreement as required by paragraph C 4103, 2a of JTR II.

With regard to military personnel, the pertinent statute, 37 U.S.C. 404(a), provides that under regulations prescribed by the Secretary concerned, a member of the uniformed services shall be entitled to receive travel and transportation allowances for travel performed under competent orders upon permanent change of station, or otherwise, or when away from a designated post of duty.

Paragraph M1150–10a of the Joint Travel Regulations defines a permanent duty station to be the post of duty or official station to which a member is assigned or attached for duty other than "temporary duty," or "temporary additional duty," the limits of which will be the corporate limits of the city or town in which the member is stationed, but if not stationed in an incorporated city or town, the official station is the reservation, station, or established area, or in the case of large reservations, the established subdivision thereunder having definite boundaries within which the designated post of duty is located. Since Hunter Army Airfield and Fort Stewart, Georgia, are established subdivisions with definite boundaries within which the designated post of duty is located, they should be considered under the Joint Travel Regulations as two different duty stations for travel allowance purposes.

In our decision of April 14, 1971, 50 Comp. Gen. 729, we considered the situation of a member who was detached from his old duty station and directed to perform temporary duty at a nearby location before reporting to his permanent duty station, and who did not change his residence during the period of temporary duty. We held that when he was detached from his duty station and proceeded to his temporary duty station outside the corporate limits of his old station, he entered a travel status and was entitled to the per diem prescribed in the regulations for ordered temporary duty en route to a new permanent station. And, in that decision we pointed out that under the present regulations, we are required to hold that, even though such mem-

ber continues to occupy the same quarters at his old station and to travel to and from his temporary duty station each weekday, his right to per diem will not be affected.

Therefore, when Moore was detached from duty at Hunter Army Airfield and reported for temporary duty at Fort Stewart, Georgia, on January 26, 1970, en route to his permanent duty station overseas, he was in a travel status entitling him to per diem commencing on that day notwithstanding that he continued to reside at his old residence.

He is not entitled to a travel allowance for the travel by private automobile from his residence to his place of temporary duty and return each day, however, since, after detachment from his old station, there was no official necessity for him to return to that station or to the quarters he occupied incident to that assignment, and there is no showing that he could not have obtained lodging at his temporary duty station. See Paragraph M4413, Joint Travel Regulations.

Accordingly, payment on the submitted voucher returned herewith is authorized on the basis indicated above if otherwise correct.

The remaining questions asked in your letter are not specifically involved in the voucher submitted and a definite answer does not appear to be required. 25 Comp. Dec. 653 (1919) and 22 Comp. Gen. 588 (1943). We point out, however, that a determination of the proper allowances payable to a member varies as to whether his assignment at his designated post of duty was for temporary or permanent duty. The question of what constitutes a member's designated post of duty and whether an assignment at such designated post of duty is temporary or permanent is to be determined basically from the orders under which the assignment is made. 24 Comp. Gen. 667, 670 (1945); 33 *id.* 98, 99 (1953).

Paragraph M3000 of the Joint Travel Regulations promulgated under the authority of 37 U.S.C. 404(a) provides that no reimbursement for travel is authorized unless orders by competent authority have been issued therefor. Paragraph M3002–1 of the regulations provides that written orders issued by competent authority are required for official travel or for reimbursement of expenses incident thereto and paragraph M3002–2 provides that a verbal order given in advance of travel and subsequently confirmed in writing giving date of the verbal order and approved by competent authority will meet the requirement for written orders. Written orders confirming verbal orders, together with evidence showing that an emergency prevented the issuance of written orders may be accepted only if the written confirmatory orders, fully substantiated, are issued within a reason-

able time thereafter. 43 Comp. Gen. 281 (1963). Also for consideration in this connection is the well settled rule that retroactive orders are without effect to either increase or decrease vested rights of Government personnel. 23 Comp. Gen. 713 (1944); 24 *id.* 439 (1944); 43 *id.* 281 (1963).

The record shows that Continental Army Command Message dated December 17, 1966, states that "Fort Stewart/Hunter AFB will be treated as one installation with one staff and designated Fort Stewart, Georgia (North Post/South Post)" and that personnel have been transferred freely from Fort Stewart to Hunter Army Airfield and vice versa as one installation. Since both installations were considered as one station, it is obvious that the personnel were moved in and around the station without competent written orders or verbal orders directing a permanent change of station or the performance of temporary duty which could be confirmed in writing.

In these circumstances we perceive no basis upon which orders may now be issued purporting to confirm verbal orders so as to authorize travel allowances for temporary duty or permanent change-of-station allowances incident to such assignments.

[B–172006]

Bids—Discarding All Bids—Specifications Defective—Federal Procurement Regulations Requirements

An invitation for the installation of heavy equipment replacements that omitted the Davis-Bacon Act on the basis the procurement did not contemplate construction, alteration, or repair of a public building, and incorporated the provisions of the Walsh-Healey Act, which requires a contractor to be a manufacturer of or a regular dealer in the equipment to be supplied, and a provision for bidders to attest to their experience and competency should be canceled and reissued by the contracting agency under the guidelines in section 1–12.402–2 of the Federal Procurement Regulations for determining whether substantial amounts of construction, alteration, or repair work would be involved, also taking into consideration the fact that no bidder qualified as a manufacturer or dealer to be eligible for award, and that the solicitation in requiring experience and competency attestation was unduly restrictive of competition.

To Sadur, Pelland and Braude, May 13, 1971:

Reference is made to your letter of March 16, 1971, to the United States Government Printing Office (GPO) protesting on behalf of the Kennedy Electric Company, Inc., against the award of any contract under Purchase Request No. 12770.

It is your contention that:

> Despite the fact that the procurement calls for revision to the existing protective relay system, revisions to the existing volt circuits, installation of a new volt circuit with protective relaying system, replacement of existing transformers, installation of a complete new substation, removal of existing rotary converter equipment and bus, and installation of solid state rectifiers (all of which require work to be performed directly on the site of the work), the invitation did not include the Davis-Bacon Act.

You question the omission of Davis-Bacon Act provisions, 40 U.S.C. 276a, which must be included in contracts for construction, alteration, or repair of a public building, and the incorporation of the provisions of the Walsh-Healey Act, 41 U.S.C. 35 note, in the solicitation, which require the contractor to be a manufacturer of, or a regular dealer in, the supplies or equipment to be manufactured or used in the performance of the contract. Further, you state that this procurement does not qualify under the Walsh-Healey Act, and that none of the bidders is a manufacturer of or a regular dealer of the equipment to be used.

It is GPO's position that the nature of the procurement is the installation of personal property (equipment) and that the procurement does not contemplate construction, alteration or repair of a public building. GPO states that the essence of this solicitation, as well as the proposed contracts being planned for the forthcoming air conditioning engineering work and installation, are all considered to be nonconstruction efforts, i.e., improvements to the existing systems by the installation of replacement equipment needed for the proper performance of its production machinery. Additionally, the electrical equipment installation is considered by GPO to be an essential part of the production equipment of that facility, and no different from the installation of the printing presses and other production equipment which require and will be served by the electrical installations. The solicitation provides that the equipment furnished must be capable of passing through a doorway which is six feet wide by nine feet high, and that building alterations may be made only with specific authorization. While GPO recognizes that all such large equipment installations may contain elements of construction, that agency contends that the contract, when considered as a whole, is not basically a construction contract and within the category of construction, alteration or repair to a public building.

This Office recognizes that the responsibility for determining whether a contract should be considered as one principally for construction, etc., or for supplies, and whether Davis-Bacon Act provisions should, or should not, be included therein, rests primarily with the contracting agencies which must award, administer and enforce the

contract. 44 Comp. Gen. 498 (1965). While we believe that certain aspects of the contract, such as the replacement of portions of the building's permanent wiring system, should be regarded as an alteration or repair to the building, we feel that the answer is not so clear regarding all electrical equipment installed for the main purpose of serving the production machinery as to justify this Office in overturning the good-faith determination of the agency that the contract is not essentially for the construction, alteration or repair of a public building. Since it appears, however, that substantial amounts of construction, alteration or repair work may be involved in the procurement we are calling to the attention of the Public Printer the provisions of section 1–12.402–2 of the Federal Procurement Regulations for use as guidelines in determining whether, and to what extent, if any, the Davis-Bacon Act provisions should be included in a resolicitation of the contract.

In regard to the Walsh-Healey Act, paragraph 6.01 of the purchase request incorporates the provisions of United States Government Printing Office Contract Terms No. 1. Article 30 of those terms states:

> Walsh-Healey Public Contracts Act—If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act as amended (41 U.S. Code 35–45), there are hereby incorporated by reference all representations and stipulations required by said act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

In conjunction with the above, paragraph 6.20 of the purchase request states:

> Any contract that may result from this invitation to bid will be subject to the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35–45). See Article 30, Government Printing Office Contract Terms, No. 1.

Thus, it is apparent that the provisions of the Walsh-Healey Public Contracts Act were specifically incorporated in the solicitation. However, there is no indication that any of the bidders are manufacturers or regular dealers, as required by the Walsh-Healey Act, so as to be eligible for the award. The question of whether the bidders qualify or do not qualify, as manufacturers or dealers is not one for determination by this Office. The Walsh-Healey Public Contracts Act Rulings and Interpretations No. 3, published by the Department of Labor, states at section 29:

> (a) The responsibility of determining whether or not a bidder is qualified as a manufacturer or as a regular dealer under the Public Contracts Act rests in the first instance with the contracting agency. However, any decision which the contracting officer might make is subject to review by the Department of Labor

which is charged with the administration of the Act. The Department of Labor may determine the qualifications of a bidder in the first instance in the absence of any decision by the contracting officer.

Our Office does not consider that it has authority to review determinations as to whether particular firms are regular dealers or manufacturers, and we have concluded that such determinations rest with the contracting officer, subject to the review by the Department of Labor which has the final authority. B–156085, February 17, 1965; B–151133, May 7, 1963. In this connection, we have been informally advised by a representative of the GPO that none of the bidders appears to be a manufacturer of or a regular dealer in the equipment and supplies to be furnished in the performance of the contract. If none of the bidders is a manufacturer of or regular dealer in the equipment to be supplied, no award may be made which complies with the Walsh-Healey requirements and the procurement must be readvertised.

However, even though the bidders do not qualify under the Walsh-Healey Act for the award, we also believe the solicitation to be unduly restrictive of competition in such respect. Subparagraph "e" of the Instructions to Bidders, paragraph 1–10, states that bids will be considered only from established contractors experienced in the performance of the work and installation of the equipment specified. Bidders are also required to submit with their bids a list of prior installations, and business references, which can attest to the bidder's experience and competence in the work to be performed. Such provisions seem to unnecessarily exclude from the bidding any manufacturers of or regular dealers in the equipment who would have the installation and other work performed by competent and experienced subcontractors.

Accordingly, we are advising the Public Printer that the project should be readvertised in accordance with the above conclusions. We are also pointing out to the Public Printer that 41 U.S.C. 40 authorizes the Secretary of Labor to make exceptions to the Walsh-Healey manufacturer or regular dealer stipulations in a solicitation and resulting contract upon a written finding by the head of the contracting agency that the inclusion of such stipulations will seriously impair the conduct of Government business.

[B–171379]

Witnesses—Courts-Martial Proceedings—Travel Expenses

The issuance of invitational travel orders and the payment of commuted travel allowances under 5 U.S.C. 5703 to civilian persons other than Federal Government employees who are requested to testify at pretrial investigations pursuant

to Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, which is implemented by the Manual for Courts-Martial prescribed by Executive Order No. 11476, June 19, 1969, may be authorized, even though the manual makes no provision for the subpoena of witnesses and the payment of witness fees, since the investigations are an integral part of the courts-martial proceedings. However, as the approval authority is discretionary, it should be exercised within the framework of the Military Code, which in Article 49 provides for depositions, and the Manual, which in paragraph 34d prescribes guidelines, and the Joint Travel Regulations revised accordingly.

To the Secretary of the Army, May 19, 1971:

Reference is made to letter dated November 6, 1970, from the Honorable William K. Brehm, Assistant Secretary of the Army, requesting our opinion on whether authority exists for the issuance of invitational travel orders and the payment of travel allowances to civilian persons (other than Federal Government employees) requested to testify in connection with investigations conducted under Article 32, Uniform Code of Military Justice, 10 U.S.C. 832. The question is submitted in contemplation of a revision of the Joint Travel Regulations. The request for decision, reviewed by the Per Diem, Travel and Transportation Allowances Committee, has been assigned PDTATAC Control No. 70–50.

The Uniform Code of Military Justice, now an integral part of Title 10 of the United States Code, entitled "Armed Forces," was originally enacted May 5, 1950 (64 Stat. 108), and became effective May 31, 1951. It unified, consolidated, revised and codified the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard. Article 32 of the Uniform Code, of primary concern herein, involves a statutory requirement of extensive and formalized pretrial investigation of charges and specifications before reference to trial by courts-martial, a statutory requirement first incorporated in a revision of the Articles of War in 1920 (41 Stat. 759, 802).

Article 32 provides that no charge may be referred to a general court-martial for trial "until a thorough and impartial investigation" thereof has been made. The investigation required by the Article calls for an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline." The accused, who must be advised of the charges against him, has the right to be represented by counsel at the investigation. At the investigation full opportunity is given the accused "to cross-examine witnesses against him if they are available" and to present anything he may desire in his own behalf, either in defense or

mitigation; and the investigating officer is to examine "available witnesses requested by the accused."

Implementing the Uniform Code of Military Justice is the Manual for Courts-Martial, United States, 1969 (Revised edition), which was prescribed by Executive Order No. 11476, June 19, 1969. Paragraph 34d of the Manual, on the subject of witnesses in an Article 32 investigation, states:

> All available witnesses, including those requested by the accused, who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused, and if counsel has been requested, in the presence of the accused and his counsel. Ordinarily, application for the attendance of any witness subject to military law will be made to the immediate commanding officer of the witness, who will determine the availability of the witness. There is no provision for paying compensation to any witness who gives evidence at the pretrial investigation. There is no provision for compelling the attendance of witnesses not subject to military jurisdiction.

As indicated in paragraph 34d of the Manual there is no provision for the subpoena of witnesses or the payment of witness fees and mileage for attendance at an Article 32 investigation. The absence of subpoena power and the incidental authority to tender witness fees has not been viewed as necessarily precluding the exercise of discretionary authority to invite travel at Government expenses of material witnesses before administrative hearings when the interests of the Government require their testimony. 40 Comp. Gen. 226 (1960), 48 *id.* 110 (1968). Moreover, in 48 Comp. Gen. 644 (1969), with reference to hearings involving adverse administrative actions against Federal employees or military members, we held:

> If in an agency administrative hearing of the type under discussion, the presiding hearing officer should determine that the testimony of a person not employed by the Government is necessary for a proper disposition of the case, and the witness is called by the presiding hearing officer, it is our view that the witness may be considered as an "individual serving without pay" within the scope of 5 U.S.C. 5703, even though the witness is, in effect, to testify on behalf of the employee or member involved.

We are concerned herein not with an administrative hearing on the merits of a case, but a pretrial investigation—required by statute—in the administration of military criminal justice. The Supreme Court in considering the 70th Article of War, a predecessor of the 32d Article of the Uniform Code, stated:

> * * * The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to the accused * * *.
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> * * * * * * *
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> * * * Its original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial * * *. *Humphrey* v. *Smith*, 336 U.S. 695 (1949).

Turning to the current Article 32 of the Uniform Code we find the United States Court of Military Appeals describing it as follows:

> An Article 32 investigation is not a mere formality, but is an integral part of the court-marital proceedings (United States v Allen, 5 USCMA 626, 18 CMR 250 (1955)), and judicial in character (United States v Eggers, 3 USCMA 191, 11 CMR 191 (1953)). It operates, moreover, as a discovery proceeding for the accused (United States v Samuels, supra). While the failure to comply with, or a substantial departure from, the requirements of Article 32 does not deprive the court-martial of jurisdiction (United States v Nichols, 8 USCMA 119, 23 CMR 343 (1959)), it can require appropriate relief, or even reversal of a conviction (United States v Parker, 6 USCMA 75, 19 CMR 201 (1955); United States v Schuller, 5 USCMA 101, 17 CMR 101 (1954)). * * * *United States* v. *Garner*, 40 CMR 778 (1969).

Article 32 being viewed as an important and substantial ingredient of court-martial proceedings, we perceive no significant basis for a categorical denial of the existence of discretional authority for the issuance of invitational travel orders, and the payment of commuted travel allowances under 5 U.S.C. 5703, if necessary for achieving any of the purposes of the Article. However, the discretionary authority to provide for the travel at Government expense of material witnesses on behalf of the accused or the prosecution so as to make them "available" for an Article 32 investigation must be exercised within the framework of the Uniform Code of Military Justice and the Manual for Courts-Martial. Reference is particularly made to the provision for depositions, Art. 49, 10 U.S.C. 849. A revision of paragraph 34d, setting forth guidelines for the exercise of such authority would appear to be prerequisite to the contemplated revision of the Joint Travel Regulations.

The question submitted is answered accordingly.

[B–125037]

Pay—Aviation Duty—Flight Performance Evidence—Reservists

The requirement for the submission of monthly flight certificates to support the payment of the aerial flight pay authorized in 37 U.S.C. 301(f) for members of the Reserve Forces performing inactive-duty training or active-duty training may be discontinued and the applicable regulations amended accordingly provided procedures are established which will insure that administrative records are maintained at the base level to support the payments of flight pay to reservists and will provide an adequate basis for subsequent review by the United States General Accounting Office in view of the fact that the regulations contained in paragraph 80231(a) of the Department of Defense Military Pay and Allowance Entitlements Manual provide that flight pay to reservists shall be governed by the provisions and conditions established for regular members and the certificates are no longer required for such members.

To the Secretary of Defense, May 24, 1971:

Further reference is made to letter dated February 13, 1971, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether monthly flight certificates are required in support of payment of aerial flight pay to members of the Reserve Forces performing inactive-duty training or active-duty training. The circumstances giving rise to the request are set forth and discussed in Department of Defense Military Pay and Allowances Committee Action No. 448.

The Committee refers to our decision of May 27, 1964, B–125037, in which we stated that no objection would be raised to discontinuing the requirement that monthly flight certificates be prepared and submitted to support aerial flight pay if sufficient records are maintained at base level to authorize such payments.

In its discussion the Committee states that it is recognized that the decision was rendered in response to a proposed amendment to Executive Order No. 10152, dated August 17, 1950. Also, it is stated that the content of the decision seems to address itself primarily to members on extended active duty, but that if the decision applies to Reserve members, it is deemed advisable to amend present Reserve pay procedures which require the monthly certificate.

Subsection (a) of section 301, Title 37, United States Code, authorizes the payment of incentive pay, including aerial flight pay, to members of the uniformed services who are "entitled to basic pay" under the circumstances there prescribed.

Subsection (f) provides that under regulations prescribed by the President and to the extent provided by appropriations, when a member of a Reserve component of a uniformed service, or of the National Guard, who is entitled to compensation under section 206 of Title 37, performs under orders, any duty described in subsection (a) (1)–(12) of section 301 for members entitled to basic pay, he is entitled to an increase in compensation equal to 1/30 of the monthly incentive pay authorized by subsection (b) or (c) of section 301, as the case may be, for the performance of that hazardous duty by a member of a corresponding grade who is entitled to basic pay.

It is further provided that such member is entitled to the increase for as long as he is qualified for it, for each regular period of instruction, or period of appropriate duty, at which he is engaged for at least 2 hours, including that performed on a Sunday or holiday, or for the performance of such other equivalent training, instruction,

duty, or appropriate duties, as the Secretary may prescribe under section 206(a).

Section 104 of Executive Order No. 11157, June 29, 1964, prescribes minimum flight requirements for qualification for incentive pay under 37 U.S.C. 301, subsection (b) of section 104 being applicable to members of the Reserve components of the uniformed services on inactive-duty training who are covered by 37 U.S.C. 301(f). Regulations contained in paragraph 80231(a) of the Department of Defense Military Pay and Allowance Entitlements Manual—issued under authority of section 113 of Executive Order No. 11157—provide that flight pay to reservists for periods of active duty or active duty for training shall be governed by the provisions and conditions established for members serving on extended active duty, with certain exceptions there prescribed.

No provision of law or regulations has been found which requires that the member concerned must prove that he has met the requirements entitling him to flight pay in different ways depending on whether he is a member of a Regular or Reserve component of the uniformed services.

The regulations governing present Reserve pay procedures which are said to require the submission of monthly flight certificates are not cited or otherwise identified in the Committee Action discussion and it is believed that regulations to that effect are not presently in effect in all of the military services.

In view of the conclusions reached in our decision of May 27, 1964, the question submitted is answered by saying that to the extent that applicable regulations (see in this connection paragraphs 2–11 and 2–13, Army Regulations 95–64) require the submission of monthly flight certificates as a prerequisite to the payment of flight pay to members of the Reserve Forces, such regulations may be amended in a manner which will permit the discontinuance of that practice, provided procedures are established which will insure that administrative records are maintained at the base level to support the payments of flight pay to such members and will provide an adequate basis for subsequent review by this Office.

[B–171727]

Real Property—Surplus Government Property—Sale—Price Sufficiency

The withdrawal of the opportunity afforded the high bidder to increase its bid for the purchase of Government real property which was submitted in an amount

less than the estimated value of the property and the rejection of the bid upon receipt of a late higher bid in excess of the appraised value of the property where the late delivery of the bid sent by special delivery certified airmail was due solely to a delay in the mails for which the bidder was not responsible was in accord with the procedure prescribed in section 101-47, 305-1 of Title 41, Code of Federal Regulations which governs the disposal of surplus real property, and the award made to the highest bidder will not be disturbed, and it is immaterial that the displaced high bidder had been advised to hand carry its bid to insure timely delivery and was not given advance notice of the sale.

To the General Dynamics Corporation, May 24, 1971:

Further reference is made to your letter of January 5, 1971, with enclosures, protesting the acceptance by the General Services Administration of a late bid under Sale No. GS-09-D(R)-71-11, issued by the Property Management and Disposal Service, General Services Administration (GSA), San Francisco, California.

The Notice of Sale invited bids for the purchase of Government real property described as a portion of the Marine Corps Recruit Depot, San Diego, California, consisting of one parcel containing approximately 1.22 acres, more or less, of which 0.73 acre is encumbered by road easements and the remainder is paved with asphalt. It is located on Washington Street at the south on-ramp to Pacific Coast Highway, San Diego, California. GSA began advertising the parcel for sale on November 16, 1970, by placing ads in the San Diego Union and San Diego Evening Tribune and announcing the time and place of bid opening as December 17, 1970. GSA also mailed 1,450 Notice of Sale announcements to prospective purchasers maintained on its mailing list. The announcements stated that all bids must be submitted on bid forms provided by GSA.

Ten bids were received prior to the bid opening, including your bid which, upon the suggestion of GSA in reply to your inquiry of how best to meet the bid opening hour, had been hand-carried to the bid opening. Your bid of $15,100 was the high bid opened at the bid opening. Inasmuch as no late bids were received by late afternoon of the bid opening date, GSA, in accordance with standard procedure when the high bid received is less than the estimated value of the property offered, prepared a letter affording you an opportunity to increase your offer.

After dispatching the above letter to you the contracting officer was advised that four late bids had been received, one of which was rejected as nonresponsive inasmuch as no money accompanied this bid. The four late bids were as follows:

Bidder	Date Received	Amount of bid
William Missler	12–18–70	$7, 100. 00
Mr. & Mrs. Jack F. Belfanz	12–18–70	$1, 000. 00
Chula Vista Electric Company	12–18–70	$23, 928. 00
W. C. Henry	12–20–70	Nonresponsive

The bid opening official, after determining that all late bids were mailed as certified or registered mail, contacted the Schedules Division, U.S. Post Office, Rincon Annex, San Francisco, to determine whether the late arrival was due solely to delay in the mails. The Post Office Department verified, from the date stamp placed on each bid envelope and from current mail schedules, that the late arrival of the bids was due solely to the heavy volume of Christmas mail and that under normal conditions the bids should have arrived on time. For this reason the three late bids were opened and abstracted on the afternoon of December 18, 1970. As shown, the bid of Chula Vista Electric Company (Chula Vista) was higher than your bid and was in excess of the appraised value of the property. You were immediately advised of this turn of events by letter of December 18, 1970, in which GSA rescinded its earlier letter of the same date which had afforded you an opportunity to increase your offer, and rejected your offer because a higher bid had been received. On December 28, 1970, Chula Vista was awarded the property by GSA.

By letter of December 23, 1970, you protested to GSA against the action taken, stating that you did not feel Chula Vista had filed a valid bid within the terms set forth for bid submittal. On January 5, 1971, you protested the award to Chula Vista to this Office alleging that GSA had not fairly informed you of the pending sale, that you were required to hand-carry your bid before it could be considered, whereas if GSA's contention is correct (apparently in reference to late bids) you could have had your bid postmarked before the bid opening and claimed that it was delayed by the mails, which you state normally involves a 1-day trip between San Diego and San Francisco. You state your belief that your bid, being the highest bid, should be accepted by GSA, and that you should be awarded the property.

Your protest that you were not given advance notice of the sale seems to be immaterial, inasmuch as you did submit a timely bid. Further, the record indicates that the suggestion to hand-carry your bid was made by GSA upon your request for information as to how you could insure submitting a timely bid. In view thereof, it would appear that both matters were without prejudice to you.

With regard to the propriety of your having been afforded an opportunity to increase your offer, which opportunity was withdrawn when the higher bid was received, we must advise that section 101–47, 305–1 of Title 41, Code of Federal Regulations, provides as follows:

(a) When the head of the disposal agency or his designee determines that bid prices (either as to all or some part of the property) received after advertising therefor or received in response to the action authorized in paragraph (b) of this § 101–47.305–1, are reasonable, i.e., commensurate with the fair market value of the property, and were independently arrived at in open competition, award shall be made with reasonable promptness by notice to the bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. Any or all offers may be rejected when the head of the disposal agency or his designee determines it is in the public interest to do so.

(b) Where the advertising does not result in the receipt of a bid at a price commensurate with the fair market value of the property, the highest bidder may, at the discretion of the head of the disposal agency or his designee and upon determination of responsiveness and bidder responsibility, be afforded an opportunity to increase his offered price. The bidder shall be given a reasonable period of time, not to exceed five working days, to respond. At the time the bidder is afforded an opportunity to increase his bid, all other bids shall be rejected and bid deposits returned. Any sale at a price so increased may be concluded without regard to the provisions of §§ 101–47.304–9 and 101–47.304–12.

(c) The disposal agency shall allow a reasonable period of time within which the successful bidder shall consummate the transaction and shall notify the successful bidder of the period allowed.

(d) It is within the discretion of the head of the disposal agency or his designee to determine whether the procedure authorized by paragraph (b) of this § 101–47.305–1 is followed or whether the bids shall be rejected and the property reoffered for sale on a publicly advertised competitive bid basis in accordance with the provisions of § 101–47.304–7, or disposed of by negotiation pursuant to § 101–47.306–1, or offered for disposal under other applicable provisions of this Subpart 101–47.3.

In view thereof, it would appear that it was within the discretion of the contracting officer as to whether opportunity should be afforded to increase bids following receipt of Chula Vista's higher bid.

The remaining issue raised by your protest is whether the late bid of Chula Vista should have been allowed to displace your bid and, if not, whether GSA may be required to ignore that bid and make an award to you on your present bid of $15,100.

Provisions governing the consideration of late bids are contained in paragraph 3 of GSA form 1741, which was made a part of the invitation and provides as follows:

3. Late Bids, Modifications, and Withdrawls.

a. Bids and modifications or withdrawals thereof received at the office designated in the Invitation for Bids after the exact time set for opening of bids will not be considered unless: (1) they are received before award is made; and either (2) they are sent by registered mail or by certified mail for which an

official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained, or by telegraph if authorized, and it is determined by the Government that the late receipt was due solely to delay in the mails or delay by the telegraph company, for which the bidder was not responsible; or (3) if submitted by mail (or by telegram if authorized), it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation: Provided, That timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification which makes the terms of the otherwise successful bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

b. Bidders using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late bid was timely mailed.

c. The time of mailing of late bids submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the bidder furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows:

(1) Where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the bidder which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or

(2) An entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the bid shall not be considered.

The record discloses that Chula Vista's bid was sent by special delivery certified airmail on December 16 and was received on December 18, 1970, the day after bids were opened, but before an award was made. Sales personnel failed to ask Chula Vista for the Receipt for Certified Mail in connection with consideration of the late bid until February 17, 1971, at which time the company indicated it no longer had the receipt in its possession. The Chula Vista, California, Postmaster has reported that the envelope in which the bid was received was deposited in his office prior to 5:00 p.m., the station's closing time, on December 16, 1970, and that under standard procedures the mailer would be given a Receipt for Certified Mail. In addition, the Assistant Director of Operations, San Francisco, Post Office, the delivering office, has reported that according to the current airmail

schedule, an airmail certified special delivery letter placed in the mails at Chula Vista, California, by 5:00 p.m. on December 16, addressed to General Services Administration, 49 Fourth Street, San Francisco, California, should have been delivered before 9:00 a.m. on December 17.

Since it is reported that the Chula Vista Post Office, where the bid was mailed, closes at 5:00 p.m., that is the hour to be considered as the time of mailing in accordance with the late mailed bid provisions above. Based thereon the Post Office advises, and it may be reasonably concluded, that the delay in the receipt of the bid of Chula Vista was due solely to a delay in the mails for which the bidder was not responsible.

The only remaining question is whether the inability of Chula Vista to produce a Receipt for Certified Mail showing the exact time of mailing requires rejection of its bid. While it is our opinion that the requirement for a receipt should be strictly construed when a bidder is unable to comply with a timely request therefor, the record in the present case indicates that the Government did not request the receipt from Chula Vista until 2 months after bid opening and almost 6 weeks after Chula Vista had been awarded the property. In view thereof, and since the other evidence of timely mailing is substantial, it is our opinion that the record does not require or justify disturbing the award made to Chula Vista.

In view of these considerations, your protest against the award made to Chula Vista Electric Company must be denied.

[B–172557]

Howard University—Employees—Transferred From Freedmen's Hospital—Leave Status

An employee who by reason of transfer from Freedmen's Hospital to the jurisdiction of Howard University under Public Law 87–262 is entitled to credit for retirement purposes for continuous employment with the University, upon reemployment with the Federal or District of Columbia Government may not have the service creditable for retirement credited as service toward the annual leave accrual provided in 5 U.S.C. 6303(a), as the University is not a Government instrumentality and, therefore, service with the University is not

considered Federal civilian service. Since the former Freedmen's Hospital employees received a lump-sum leave payment upon transfer to the Hospital, indicating separation, and Public Law 87-262 makes no provision for crediting service for leave accrual purposes, continuous service with Howard may not be considered as not having had a break in service.

To the Chairman, United States Civil Service Commission, May 24, 1971:

This refers to your letter of April 6, 1971, requesting a decision from our Office whether an employee who transferred with Freedmen's Hospital to Howard University under Public Law 87-262, and who consequently is entitled to credit for retirement purposes for his continuous employment with Howard University, would be entitled upon reemployment with the Federal or District of Columbia government to credit for the purpose of determining annual-leave category.

You ask the following questions:

1. May service with Howard University which is creditable for retirement under section 2(c) of Public Law 87-262 be credited as service toward annual-leave accrual category under 5 U.S.C. 6363 [5 U.S.C. 6303]?

2. May continuous service with Howard University of employees who were transferred to the University under Public Law 87-262 be considered as not a "break in service" for leave purposes with respect to such an employee who is reemployed in the Federal or District of Columbia government?

Section 2(c) of Public Law 87-262, 75 Stat. 543, provides in part as follows:

Each individual who is an employee of Freedmen's Hospital on the date of enactment of this Act and who transfers to Howard University shall, so long as he is continuously in the employ of Howard University, be regarded as continuing in the employ of the United States for the purposes of the Civil Service Retirement Act, the Federal Employees' Group Life Insurance Act of 1954. * * *

5 U.S.C. 6303(a) pertaining to annual leave accruals based on years of service also referred to in your letter is in part as follows:

* * * * * * *

In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title. * * *

Howard University was incorporated by act of Congress dated March 2, 1867, 14 Stat. 438. The University has been held to have been a private corporation as distinguished from a Government in-

strumentality. See *Maiatico Construction Company* v. *United States*, 79 F. 2d 418 (1935) and *Cobb* v. *Howard University*, 106 F. 2d 860 (1939). While the act of incorporation was amended on May 13, 1938, 52 Stat. 351, nothing in the amending statute changed the private character of the corporation (Howard University).

In our decision of January 11, 1961, 40 Comp. Gen. 412, we indicated that based upon the legislative history, the term "years of service" as used in 5 U.S.C. 6303(a), *supra*, was limited to military service and Federal civilian service. Thus, it follows that since service with Howard University is not generally regarded as Federal civilian service it would not be creditable for leave accrual purpose unless such a right can be viewed as having been granted by Public Law 87-262. As previously indicated the language of that statute specifically requires that services with Howard University of employees transferred from Freedmen's Hospital be regarded as service with the United States for retirement and certain other purposes. However, such statute is silent as to credit for leave accrual purposes when an employee returns to Federal employment. Moreover, we find nothing in the legislative history of the enactment to suggest an intent to that effect. Therefore, your first question is answered in the negative. In line with the foregoing your second question is likewise answered in the negative. In that connection we understand that the employees transferring from Freedmen's Hospital to the jurisdiction of Howard University received lump-sum payments for their annual leave which presumably were based on the transfers being separations for that purpose.

[B-172189]

Real Property—Acquisition—Owners, Etc., Moving Expenses—Statute of Limitation for Claiming

The requirement in Public Law 85-433, May 29, 1958, that a claim for the moving expenses incurred incident to conveying lands to the United States, supported by an itemized statement of expenses, losses, and damage, must be "submitted to the Secretary within one year from the date upon which the premises involved are vacated" is unambiguous and not subject to construction and, therefore, neither expenses incurred before the expiration of the year and not claimed, nor additional expenses incurred after the expiration of the statutory period may be reimbursed. However, persons displaced after January

2, 1971, by the acquisition of real property by the United States should be compensated for *moving* and related expenses under Public Law 91-646, which replaces the 1958 act and provides for the head of each Federal agency to establish regulations and procedures to implement the act.

General Accounting Office—Recommendations—Implementation

When a decision of the Comptroller General contains instructions for corrective action in regard to departmental policy, the Secretary concerned is required under section 236 of the Legislative Reorganization Act of 1970, 84 Stat. 1140, 1171, to submit written statements as to the action taken not later than 60 days after the date of the decision to the Committees of Government Operations of both houses and to the Committees on Appropriations in connection with a request for appropriations made more than 60 days after the date of the decision, action that the Department of Interior is required to take incident to the recommendation that the Bureau of Sport Fisheries and Wildlife correct its Realty Manual to reflect the proper application of the Statute of Limitation in Public Law 85-433 regarding the submission of expenses incurred in moving from lands acquired by the United States.

To the Secretary of the Interior, May 27, 1971:

By letter dated March 12, 1971, you request our decision as to whether the act of May 29, 1958, Public Law 85-433, 43 U.S.C. 1231-1234, permits "(1) the payment of moving expenses for which timely application was made but which were not incurred or claimed until after 1 year from the date the owner vacated lands that were acquired by the Department [of the Interior], and (2) in the foregoing circumstances, payment of moving expenses incurred but not claimed prior to the expiration of the year."

These questions have arisen following the disallowance by certifying officers of the Bureau of Sport Fisheries and Wildlife of parts of a moving expense claim submitted by a Mr. William E. Allen in connection with the purchase by the Bureau of a tract of land owned by him in Utah for the Flaming Gorge Project under section 8 of the Colorado River Storage Project Act, 43 U.S.C. 629g. You note that since these questions have a bearing on departmentwide procedures, they are presented to us under 31 U.S.C. 74 for a decision to the head of an agency, rather than as a decision to a certifying officer under 31 U.S.C. 82d.

The facts in the instant case are set out in your letter as follows:

* * * The lands were conveyed to the United States on August 28, 1964. Mr. Allen vacated the premises on April 1, 1965. He searched for and located replacement property and executed an agreement to purchase it on July 1, 1965; however, the agreement was cancelled through no fault of his own and he resumed

his search. On December 15, 1965, Mr. Allen filed an initial claim for moving expenses and gave notice his move was not complete. It was not until November 5, 1966, that Mr. Allen actually purchased replacement property. He filed a supplemental claim on February 20, 1968. Mr. Allen's claim for moving expenses amounts to $27,883.02. This included $11,903.81 in expenses that were incurred after March 31, 1966, or one year from the date of vacating the property, and $3,704.28 in additional expenses for searching for replacement property and moving incurred but not claimed prior to March 31, 1966. (While here not pertinent, there is an additional claim of $1,526.75 for attorney's fees.)

Section 1 of Public Law 85–433, 43 U.S.C. 1231, provides, in pertinent part:

* * * No payment under this Act shall be made *unless application therefor, supported by an itemized statement* of the expenses, losses, and damages incurred, *is submitted to the Secretary within one year from the date upon which the premises involved are vacated* * * *. [Italic supplied.]

You state that the claimant contends that his filing on December 15, 1965, of an initial claim, along with notice that his move was not complete, fully satisfied the statutory requirement and that he was not barred from incurring or claiming additional expenses after March 31, 1966, when the 1-year period expired. He further contends that he was not informed of any time limit for submitting additional claims.

In 32 Comp. Gen. 358 (1953) we considered the application of section 501(b) of the act of September 28, 1951, 65 Stat. 363. That section grants to the Secretaries of the Army, Navy, and Air Force the authority to reimburse owners and tenants for the expenses, losses, and damages incurred in moving themselves and their families and possessions because of acquisition of the land by one of the military departments. Section 501(b) further provides that "No payment in reimbursement shall be made unless application therefor, supported by an itemized statement of the expenses, losses, and damages so incurred, shall have been submitted to the Secretary of the military department concerned within one year following the date of such vacating." In construing that provision we held at page 360 that:

* * * Such provision is clear and unambiguous and is not subject to construction. Furthermore, it is self-executing in that the limitation period for filing applications for reimbursement is in nowise contingent upon the issuance of regulations * * *. Specifically, therefore, the Secretary of the Army is not authorized to reimburse any owners or tenants for expenses, losses, and damages in moving from the building under such provision if the said owner or tenant failed to file his claim for such expenses, losses, or damages within the period prescribed by the statute, namely, "within one year following the date of such vacating."

The above-quoted language of section 1 of Public Law 85-433 is just as clear and unambiguous as the above-quoted language of sec-

tion 501(b) of the act of September 28, 1951, and almost identical therewith. It prohibits, in effect, payment to owners and tenants in reimbursement of their expenses, losses, and damages unless application therefor together with a supporting itemized statement shall have been submitted to the Secretary of the Interior within 1 year from the date upon which the premises involved are vacated. In other words, unless an application or claim for payment of a sum certain, together with an itemized statement (of the expenses, losses, and damages incurred) supporting the amount claimed, is submitted to the Secretary within 1 year from the date the premises involved are vacated, payment on such application or claim would not be authorized. Therefore, since the statute requires that the application and supporting documents must be submitted within 1 year from the date of vacating, it is clear that neither those expenses, losses, and damages which are incurred but not claimed prior to the expiration of the year, nor those expenses, losses, and damages which are incurred after the expiration of that year may be reimbursed.

In summary, it is our view that section 1 of Public Law 85–433, 43 U.S.C. 1231, clearly and unambiguously prohibits the payment of claims by landowners and tenants for moving expenses and related losses and damages by reason of the acquisition of land by the Department of the Interior for public-works projects, unless the expenses, losses, and damages are incurred, and the application for reimbursement together with a supporting itemized statement is submitted to the Secretary of the Interior within 1 year from the date on which the premises involved are vacated. Accordingly, the answer to both of your questions is in the negative.

In your letter you state that the present policy of the Bureau of Sport Fisheries and Wildlife is reflected in section 771.8(9) of its *Realty Manual* which provides in pertinent part that "* * * Care should be exercised not to deny a claim on the basis of time limitation from the date of vacating where it can be reasonably shown that the claimant made an effort to comply * * *." The type of situation to which this policy is meant to apply is not entirely clear to us. If, however, it is applied to cases, such as that of Mr. Allen, wherein the person displaced by the Government does not, for one reason or another—

whether or not such reason is beyond his control—complete his move and submit his application within 1 year from the vacating of his premises, then it is in conflict with the clear and unambiguous statutory requirement of section 1 that all claims must be submitted within 1 year from vacating the property. Therefore, the policy contained in section 771.8(9) of the Bureau's *Realty Manual* should be revised to reflect the holding of this decision that Public Law 85–433, 43 U.S.C. 1231–1234, limits payment of expenses to those incurred and claimed within 1 year after vacating of the property involved. Of course, whether or not a claim will be considered to have been submitted to the Secretary within the time limitation would depend on the facts and circumstances in the particular case.

We wish to point out, however, that Public Law 85–433, 43 U.S.C. 1231–1234, was repealed by section 220(a)(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91–646, 84 Stat. 1894, 1903. Therefore, those persons displaced on or after January 2, 1971, the effective date of Public Law 91–646, by the acquisition of real property for a program or project undertaken by your Department should be compensated for moving and related expenses in accordance with the provisions of Public Law 91–646. Persons displaced prior to January 2, 1971, should continue to be reimbursed for moving and relocation expenses as provided by Public Law 85–433. In this regard we call your attention to section 213 of Public Law 91–646, 42 U.S.C. 4633, which authorizes the head of each Federal agency to establish such regulations and procedures as he deems necessary for implementing the provisions of the act.

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