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[B-175516]

Attorneys—Fees—Bar Membership Dues—Government Attorneys

The membership dues assessed by the unified bar for the District of Columbia on Government attorneys who are members of the District of Columbia bar are personal expenses that are not payable from appropriated funds. Therefore, since only those attorneys of the U.S. Patent Office who are members of the District of Columbia bar are subject to the dues of the unified bar to be permitted to appear in the U.S. District Court for the District of Columbia, the Court of Appeals for that circuit, and the U.S. Court of Customs and Patent Appeals, those attorneys who are not members of the District of Columbia bar, may without the payment of dues to the unified bar appear before the U.S. District Court for the District of Columbia in those cases in which the United States is a party, and if admitted to practice before the highest court of any State, may be admitted to practice before the U.S. Court of Appeals, the U.S. Court of Claims, and the U.S. Court of Customs and Patent Appeals.

General Accounting Office—Decisions—Advance—Disbursing and Certifying Officers—Questions Not on Voucher

Since the authority of the U.S. General Accounting Office to issue advance decisions to certifying officers is limited to questions involved in specific vouchers presented to them for certification, the question of whether appropriated funds may be used to pay membership dues to the unified bar of the District of Columbia presented by a certifying officer must be treated as a request for a decision from the head of the agency under 31 U.S.C. 74, and the reply directed to him.

To the Secretary of Commerce, May 1, 1972:

Reference is made to letter of March 17, 1972, from L. L. Nahme, authorized certifying officer, Office of Finance, U.S. Patent Office, as follows:

As a result of court reform legislation in the District of Columbia, the District of Columbia Court of Appeals will, on April 1, 1972, assume jurisdiction over the practice of law in the District of Columbia. By Rules of Court, the said Court has instituted a unified bar for the District of Columbia, the pertinent rules being set forth in the attached photocopies. You will note that under Rule XIII (a) no one can practice law in the District of Columbia unless he is an active member of the District of Columbia Bar. You will also note that under Rule II. Section (4), the payment of membership dues will be required in an amount not exceeding $50 per year. The memorandum from Albert E. Brault, Chairman of the Organization Committee, shown in the attached photocopy, would seem to eliminate any possibility the government-employed lawyers who practice in the courts are immune from the active membership requirements.

All of the lawyers in the Office of the Solicitor, U.S. Patent Office, (9 in number) are required as a regular part of their duties to appear in the U.S. District Court for the District of Columbia, the Court of Appeals for that circuit, and the U. S. Court of Customs and Patent Appeals. The payment of the Bar dues will be mandatory if they are to perform their duties.

Under the recited circumstances, is there any possibility that all or a part of the dues could be paid out of Patent Office appropriations?

The authority of this Office to issue advance decisions to certifying officers is limited to questions involved in specific vouchers presented to them for certification. 31 U.S.C. 82d; see e.g., 26 Comp. Gen. 797,

799–800 (1947). For this reason, we treat the instant submission as a request for decision from you under 31 U.S.C. 74 and our reply is made to you as head of the Department involved. See 47 Comp. Gen. 70, 71 (1967); *cf.* 41 *id.* 767 (1962).

The statement in Mr. Nahme's letter that under the "Rules Governing the Bar of the District of Columbia" no one can practice law in the District of Columbia unless he is a member of the District of Columbia bar is not correct insofar as Federal agencies and Federal courts are concerned. A member of the bar of any State, the District of Columbia, or Puerto Rico, is eligible for employment as a Government attorney, i.e., for employment in an attorney position in a Federal agency. Also, insofar as the U.S. District Court for the District of Columbia is concerned, attorneys who are members in good standing of that court on April 1, 1972, continue to be members without formal application; and attorneys employed or retained by the United States who are not members of the bar of such court may upon leave of court enter their appearance and sign pleadings and papers in cases in which the United States or one of its agencies is a party. See revised rule 93 (sec. (2)) dated March 14, 1972, Rules of the U.S. District Court for the District of Columbia. Thus, it would seem that Government attorneys who are not members of the District of Columbia bar may appear before the U.S. District Court for the District of Columbia in cases in which the United States is a party.

Further, attorneys who have been admitted to practice before the highest court of any State are eligible for admission to the bar of the U.S. Court of Appeals for the District of Columbia, the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals. See in this connection, 28 U.S.C. Appendix, Rule 46, Federal Rules of Appellate Procedure; 28 U.S.C. Appendix, Rule 201, Rules of Court of Claims; and 35 U.S.C. Rule II, Rules of the U.S. Court of Customs and Patent Appeals. Hence, attorneys employed or retained by the Federal Government who are not members of the District of Columbia bar but who have been admitted to practice before the highest court of any State may be admitted to practice before the U.S. Court of Appeals for the District of Columbia, the U.S. Court of Claims, and the U.S. Court of Customs and Patent Appeals, if otherwise qualified.

In any event it has been repeatedly held that fees incident to obtaining permits or licenses necessary to qualify a Federal employee to perform the duties of a position are personal expenses for which appropriated funds are not available. See 23 Comp. Dec. 386 (1917); 3 Comp. Gen. 663 (1924); 6 Comp. Gen. 432 (1926); 21 Comp. Gen. 769 (1942); and 31 Comp. Gen. 81 (1951).

We have applied the foregoing principles in several decisions concerning fees and expenses incident to the practice of law. In 22 Comp. Gen. 460 (1942), we held that an attorney could not receive reimbursement for the payment of a court admission fee which was necessary to qualify him to represent the Government in a particular case. This decision was reaffirmed under similar facts in 47 Comp. Gen. 116 (1967). Finally, in our decision of March 2, 1971, B-171677, which appears to be indistinguishable from the instant context, we held that appropriated funds could not be applied to the expense incurred by a Federal attorney incident to maintaining his status as an attorney in good standing of the State Bar of California, which is a "unified" or "integrated" bar jurisdiction. We noted therein that the principle is the same whether applied to an isolated fee or to dues or fees chargeable on a recurrent basis.

In light of the foregoing it must be held that Patent Office appropriations may not be used to pay all or any part of the fee or dues in question, absent statutory authority specifically so providing.

[B-175193]

Bidders—Debarment—Contract Award Eligibility—Rejection of Bidder in Best Interest of Government

The rejection, both as prime contractor or subcontractor, of the low bidder under an invitation for bids to overhaul the topside of a Navy vessel as being in the best interest of the Government without issuing the written determination of responsibility required by paragraph 1-904.1 of the Armed Services Procurement Regulation (ASPR), and referral to the Small Business Administration under ASPR 1-705.4(vi), because the bidder had been placed in a suspended status on the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors, pursuant to ASPR 1-605, for lack of business integrity, was a proper action that was not in violation of due process since a written determination is not required if it is not in the best interest of the Government to award a contract to a suspended bidder whose placement on the consolidated list was not for the purpose of punishment but in the best interest of the Government.

Bidders—Debarment—Procedure—Due Process Status

Since the procedures under paragraph 1-605 of the Armed Services Procurement Regulation, which prescribes temporary or limited suspension for a reasonable time in the interest of the Government of a contractor suspected of the commission of specific crimes, including bribery, or any other offense indicating a lack of business integrity or business honesty, although lacking certain elements which may be considered by a court in order to afford due process in a more severe debarment action, do not result in a denial of due process, as the regulation includes safeguards and provides for modification of a suspension and a contract award when in the best interest of the Government, and because the bidder's status is before the courts, the U.S. General Accounting Office will not question the validity of the regulation.

Bidders—Qualifications—Administrative Determinations—Notice of Bid Rejection

The signing of a contract by a contracting officer on the basis of a favorable preaward survey constitutes the affirmative determination of bidder responsi-

bility that is required by paragraph 1-904.1 of the Armed Services Procurement Regulation, and, therefore, the fact that a written determination respecting responsibility was not issued to the low rejected bidder does not invalidate the contract. Moreover, since responsibility is a question of fact to be determined by the contracting officer and necessarily involves the exercise of a considerable range of discretion, the U.S. General Accounting Office will not substitute its judgment for that of the contracting officer where there is no convincing evidence that a responsibility determination was arbitrary, capricious, or not based upon substantial evidence.

To Vom Baur, Coburn, Simmons & Turtle, May 2, 1972:

Further reference is made to your protest on behalf of Horne Brothers, Incorporated, against the award of a contract to another firm under invitation for bids No. N62678-72-B-0048, issued by the Supervisor of Shipbuilding, Conversion and Repair, U.S. Navy, Portsmouth, Va.

The subject invitation was issued on December 13, 1971, for the regular overhaul of the U.S.S. *Francis Marion* and was divided into three lots, with work on Lot II to commence on February 11, 1972, and be completed on May 22, 1972. Bids on Lot II (topside overhaul only) of $1,643,725 and $1,759,000 were submitted on January 5, 1972, by Horne and Metro Machine Corp., respectively. However, Horne was advised by the contracting officer in a letter dated January 7, 1972, that its bid was rejected because on December 14, 1971, it had been placed on the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors, in a suspended status, and "it has not been determined to be in the best interest of the Government to consider your bid."

Therefore, on January 11, 1972, a preaward survey of Metro, as the next lowest responsive bidder, was commenced pursuant to section I, part 9, of the Armed Services Procurement Regulation to determine Metro's status as a responsible prospective contractor. Based upon an affirmative report and recommendation of award dated January 19, 1972, by the survey team, the contracting officer determined Metro responsible within the meaning of the applicable regulations and awarded it a contract on January 24, 1972.

It is reported that on January 12, 1972, prior to the award, representatives of both Horne and the Secretary of the Navy, met to discuss Horne's request for removal from the suspended list and award of the subject contract. There were subsequent telephone conferences between Horne and Navy representatives; however, since it was considered inappropriate and contrary to ASPR 1-605.3(iv) to discuss the reasons for suspension beyond what was stated in the notice, no further meetings were held. Finally, on February 14, 1972, the Navy declined to grant Horne a hearing on the suspension action and refused to reverse its determination that Horne would not be allowed to participate in the procurement either as a prime or subcontractor.

Your protest on behalf of Horne was filed with our Office on February 11, 1972. On February 15, 1972, suit on behalf of Horne was instituted in the U.S. District Court of the District of Columbia (Civil Action No. 289–72) for injunctive relief and a declaratory judgment. A motion for a temporary restraining order (TRO) was also filed and subsequently denied as was Horne's motion for an injunction pending appeal of that order. On February 18, 1972, Notice of Appeal from those orders and a motion for an injunction pending appeal from the order denying the TRO were filed in the U.S. Court of Appeals for the District of Columbia (Case No. 72–1146). On February 23, 1972, Horne filed a motion for an immediate hearing on the motion for an injunction. By order dated March 3, 1972, the Court of Appeals denied both motions. However, on April 13, 1972, the District Court granted Horne's motion for a preliminary injunction, ordering cessation of performance of the work pending a decision by our Office on the protest. We understand that on April 14, 1972, the District Court granted the Government's motion for a 10-day stay of the injunction.

Your attack on the Navy's rejection of Horne's bid is basically twofold; first, you contend that the Navy's rejection of Horne's bid without a written determination respecting responsibility pursuant to section 1–904.1(iv) of ASPR, including referral to the Small Business Administration for review of a negative determination pursuant to ASPR 1–705.4(vi), was invalid; second, you contend that Horne's suspension pursuant to ASPR 1–605 was invalid because it was not based upon "adequate evidence" as required therein, there was no allegation of an offense which is grounds for suspension thereunder, and the regulation is in excess of any statutory authority and violates the due process requirements of the Constitution.

With regard to the last point, you contend that the regulation is invalid because it fails to establish adequate standards for placement on the list and fails to establish adequate procedures, including notice of specific charges, opportunity to present evidence and cross-examine adverse witnesses, and does not culminate in administrative findings and conclusions based upon the record so made. Also, you argue that the Secretary of the Navy has no specific statutory authority to place bidders on such a list, and any such inherent power he may possess was not validly exercised in the instant case as it was based upon regulations which are null and void, citing *Gonzalez* v. *Freeman*, 334 F. 2d 570 (1964), and *Overseas Media Corporation* v. *McNamara*, 385 F. 2d 308 (1967).

Furthermore, it is your contention that the statement in the notice of suspension that the Navy has "substantial reason to believe" that Horne had given gratuities and favors to naval personnel does not

comport with the requirement of ASPR 1-605 that such determination be based upon "adequate evidence," and that the "giving of gratuities and favors" does not by itself support suspension under the regulation.

Finally, you contend that award to Metro without a written determination of responsibility pursuant to ASPR 1-904.1 is invalid. Furthermore, it is your position that since the Navy has also barred Horne from performing as a subcontractor for Metro the latter does not have the required resources, facilities, and expertise to be considered a responsible contractor. Also, you argue that barring Horne as a subcontractor is invalid under ASPR 1-906(b) in the absence of a negative determination of responsibility.

It is the Navy's position that when a prospective contractor is suspended pursuant to ASPR 1-605, he is by the terms of the suspension "ineligible" to receive an award unless the Secretary determines that award to the suspended firm would be in the best interest of the Government and a determination respecting responsibility is not required. However, the Navy contends that if a determination concerning responsibility is required a suspended firm would not "be otherwise qualified and eligible to receive an award under applicable laws and regulations" as provided by ASPR 1-903.1(v), in which case referral to SBA for review of a negative determination is not required. Therefore, it is the Navy's position that the failure to make a specific determination of nonresponsibility is not alone sufficient to invalidate the award to Metro.

With regard to the matter of Horne acting as a subcontractor for Metro, the Navy reports that prior to the award it advised Metro in response to its question that subcontracting with Horne would not be permitted because Horne was on the suspended list. The Navy points out that under ASPR 1-906(b) it is authorized to make such a determination and that the same rationale discussed above concerning Horne's responsibility as a prime contractor applies.

Concerning your argument that Metro is not responsible unless it subcontracts with Horne, the Navy reports that in connection with its preaward survey Metro furnished a list of proposed subcontractors which excluded Horne. Nevertheless, the survey team made an affirmative determination after considering such factors as technical, production, and financial capability, purchasing and subcontracting and ability to meet schedule.

The Navy reports that the suspension action was taken only after several months of investigation by both the Navy and Department of Justice into allegations that, among other things, Horne had given gratuities to Navy employees in the form of liquor, gasoline for private

cars, and home improvements for private residences in return for favorable actions in the performance of such employee's official duties. Further, it is reported that as a result of the investigation a Special Grand Jury was convened in November 1971 for the purpose of receiving testimony and exhibits to determine whether criminal charges should be brought against Horne. We understand that on April 24, 1972, the Special Grand Jury returned a 21-count criminal indictment against Horne Brothers, Incorporated, two of its wholly owned subsidiaries, and 16 officers and employees of Horne Brothers and a civilian inspector of the Navy.

Section 1–605.1 of ASPR provides that an agency may, in the interest of the Government, suspend a firm or individual suspected, upon adequate evidence, of commission of specified crimes, including bribery, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor. With regard to the period of suspension, ASPR 1–605.2(a) provides that all suspensions are for a temporary period pending completion of investigation and such legal proceedings as may ensue. It also provides for a limit on the period of suspension in the event prosecutive action is not commenced within a maximum of 18 months.

While it is true, as you contend, that the procedures lack certain elements which may be considered necessary by a court in order to afford due process in the more severe debarment action, which was involved in the *Gonzalez* case, *supra*, as a general rule, temporary or limited suspension for a reasonable time by way of such summary action as provided for in this regulation does not of itself result in a denial of due process. See *Gonzalez* v. *Freeman*, 334 F. 2d 570, 579 (1964); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152–153 (1941); and *R. A. Holiman & Co.* v. *Securities and Exchange Commission*, 299 F. 2d 127, 131–133, cert. denied, 370 U.S. 911 (1962). We note that certain safeguards are included in the regulation. For example, suspension must be based upon adequate evidence, not mere accusation; in assessing the adequacy of the evidence, consideration must be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof, and inferences which may be drawn from the existence or absence of affirmative facts; and the assessment of the evidence includes an examination of basic documents, such as contracts, inspection reports, and correspondence. Moreover, the regulation provides that the suspension may be modified and contracts may be awarded if it is determined to be in the best interest of the Government. In view of the foregoing, and since the matter is presently before the courts, we do not

believe it proper for our Office to question the validity of the regulation.

Although the notice of suspension did not allege commission of one of the specific criminal acts named in the regulation, it stated that the suspected gratuities and favors were considered inducements or irregularities indicating a "lack of business integrity." In this regard, the regulation provides for suspension not only where commission of a specific crime is suspected, but of "any other offense indicating a lack of business integrity or business honesty." We do not believe it is necessary to decide at this time whether the word "offense" should be read to mean "criminal offense." Suffice it to say that the evidence upon which the suspension was based was also the basis for convening the Special Grand Jury to continue the investigation resulting on April 24, 1972, in a 21-count criminal indictment. Included in the indictment are charges that Navy inspectors were bribed with "tanks of gasoline, liquor and other things of value." The indictment appears sufficient to establish that there was adequate evidence of criminal offenses to satisfy the standards of the regulation.

Furthermore, it is our view that rejection of Horne's bid without making a determination of nonresponsibility pursuant to ASPR section I, part 9, was a proper action. ASPR 1–605 provides that placing an individual or firm on the consolidated list is for the purpose of protecting the interest of the Government and not for the purpose of punishment. To protect the interest of the Government, ASPR 1-603 (a) provides:

> *Type D* includes concerns which have been suspended under the conditions set forth in 1–605. Concerns under Type D listings shall not be awarded contracts or solicited for bids or proposals, except where the Secretary concerned or his authorized representative determines it to be in the best interest of the Government to make an exception for a particular procurement or where the listing indicates that the suspension does not apply to sales contracts or to procurement contracts.

Also, section 1–605.3 (iii) provides for the notice of suspension to contain language to the same effect. By clear terms the regulation prohibits the award of a contract to a suspended individual or firm except in the one situation where the Secretary concerned or his designee determines it to be in the best interest of the Government to make an exception for a particular procurement. In these circumstances, to require a written determination of nonresponsibility pursuant to applicable regulations would serve no useful purpose.

With regard to the matter of Metro's responsibility, ASPR 1–904.1 provides that no contract shall be awarded to any firm unless the contracting officer has made an affirmative determination. As noted above, such determination was made on the basis of the favorable preaward survey. Furthermore, the applicable regulation provides that the sign-

ing of the contract by the contracting officer constitutes such a determination. Responsibility is a question of fact to be determined by the contracting officer and necessarily involves the exercise of a considerable range of discretion. Where, as here, there is not convincing evidence that the determination was arbitrary, capricious, or not based upon substantial evidence, we will not substitute our judgment for that of the contracting officer. 45 Comp. Gen. 4 (1968).

Accordingly, there is no proper basis for our Office to disturb the award to Metro and your protest is denied.

[B-173976]

Bankruptcy—Referees—Compensation—Limitation on Salary Changes

Acceptance by full-time referees in bankruptcy of the comparability adjustment in rates of pay authorized for Government employees would in view of the 2-year limitation on salary changes in section 40(b) of the Bankruptcy Act, 11 U.S.C. 68(b), preclude any further adjustments in referee salaries by the Judicial Conference until the expiration of the 2-year limitation since the salaries of referees are administratively fixed and, therefore, are not within the purview of section 3 of the Economic Stabilization Act Amendments of 1971 requiring adjustments in the pay of employees subject to a statutory pay system, which as defined in the Federal Pay Comparability Act of 1970 excludes administratively fixed salaries. Therefore, since administrative action is prerequisite to salary adjustments similar to those granted by section 3 of the 1971 act, approval by the Judicial Conference of salary adjustment is subject to the section 40(b) limitation.

To the Director, Administrative Office of the United States Courts, May 5, 1972:

We refer to letter of February 25, 1972, from your General Counsel by which he has requested our opinion on whether acceptance by full-time referees in bankruptcy of the comparability adjustment in rates of pay recently authorized for all Government employees would, in view of the proviso contained in subsection 40(b) of the Bankruptcy Act, 11 U.S.C. 68(b), preclude any further adjustment in their salaries by the Judicial Conference until the expiration of 2 years.

The salaries of referees in bankruptcy are established, within statutorily prescribed maxima, by the Judicial Conference of the United States pursuant to section 40 of the Bankruptcy Act, 11 U.S.C. 68, based on the volume and types of business that the individual referee handles, amounts involved and other cognate considerations assessed in connection with periodic surveys and recommendations made by your office and recommendations of the judicial councils after consulting with the district judges. Subsection b of section 40 of the Bankruptcy Act includes the following proviso:

* * * *And provided further,* That no salary fixed under the provisions of this section for a full-time referee shall be changed more often than once in any two years or in an amount of less than $250.

The argument has been made that a pay increase to the referee which is derived from section 3 of the Economic Stabilization Act Amendments of 1971, Public Law 92-210, approved December 22, 1971, 5 U.S.C. 5305 note, does not operate to fix the salary of referees under the provisions of section 40 of the Bankruptcy Act, but is a salary adjustment derived from another statutory source and thus would not preclude another salary increase predicated on the authority in the Bankruptcy Act irrespective of the 2-year limitation also contained therein.

It has been suggested also that subsection 255(j) of the Federal Salary Act of 1967, Public Law 90-206, 91 Stat. 613, 2 U.S.C. 360, may be viewed as, in effect, repealing or rendering inapplicable the proviso of subsection 40(b) limiting salary adjustments to a frequency of every 2 years.

The Economic Stabilization Act Amendments of 1971 provide at section 3 as follows:

> Sec. 3. Notwithstanding any provision of section 3(c) of the Federal Pay Comparability Act of 1970 (Public Law 91-656), or of section 5305 of title 5, United States Code, as added by section 3(a) of Public Law 91-656, and the provisions of the alternative plan submitted by the President to the Congress pursuant thereto on August 31, 1971, such comparability adjustments in the rates of pay of each Federal statutory pay system as may be required under such sections 5305 and 3(c), based on the 1971 Bureau of Labor Statistics survey—
>
> (1) shall not be greater than the guidelines established for the wage and salary adjustments for the private sector that may be authorized under authority of any statute of the United States, including the Economic Stabilization Act of 1970 (Public Law 91-379; 84 Stat. 799), as amended, and that may be in effect on December 31, 1971; and
>
> (2) shall be placed into effect on the first day of the first pay period that begins on or after January 1, 1972.
>
> Nothing in this section shall be construed to provide any adjustments in rates of pay of any Federal statutory pay system which are greater than the adjustments based on the 1971 Bureau of Labor Statistics survey.

It has been suggested further that the effect of this provision is to prescribe an "across the board" adjustment in the pay system for referees established by section 40 of the Bankruptcy Act. In support thereof your General Counsel quotes from page 22 of the House Conference Report, No. 92-745, 92d Congress, 1st Session, wherein the following is stated:

> The Senate bill contained a provision which authorizes comparability adjustments in the rates of pay of each Federal pay system covered by the Federal Pay Comparability Act of 1970, to be placed into effect on the first day of the first pay period that begins on or after January 1, 1972, notwithstanding the provisions of the alternative pay plan submitted by the President to the Congress on August 31, 1971. The amount of such increases may not exceed the 5.5 percent ceiling established as a guideline by the Pay Board. The House bill contained no such provision. The conferees adopted the Senate provision with a clarifying amendment.
>
> It is intended that the comparability adjustments be made not only in the "statutory pay system," as that term is defined under 5 U.S.C. 5301(c), to include the General Schedule, the Foreign Service, and the Department of Medicine and Surgery, Veterans Administration, but also in all other Federal pay systems covered by the Federal Pay Comparability Act of 1970.

The other pay systems are those under which rates of pay are fixed by administrative action under 5 U.S.C. 5307, which includes all such employees in the Executive, Legislative, and Judicial Branches (except employees whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) and employees of the government of the District of Columbia. In addition, it includes certain employees of the Architect of the Capitol, and employees of County Committees established under 16 U.S.C. 590h(b).

Comparability adjustments also are authorized under sections 4 and 5 of the Federal Pay Comparability Act of 1970 for employees whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives. The January, 1972, adjustment authorized by the provisions of this section will apply also to these employees.

In addition to comparability adjustments in rates of pay, the Federal Pay Comparability Act of 1970 also authorizes comparable adjustments in minimum and maximum rates of pay, and in monetary limitations on, or monetary allowances for, pay applicable to certain classes of employees. It is intended that such limitations and allowances also be adjusted under the authority of this section.

The provision in the Conference Report requires that the comparability adjustments in pay, and the adjustments in monetary limitations or allowances, be placed into effect on the first day of the first pay period that begins on or after January 1, 1972. It is intended that this effective date will apply to all employees who are entitled to receive comparability adjustments under this legislation, including legislative employees covered by sections 4 and 5 of the Federal Pay Comparability Act of 1970.

We point out that the above language represented an attempt by the conferees on the part of the House to adopt a clarifying amendment to the provision of the Senate bill. The Senate bill provided substantially as does section 3 of the Economic Stabilization Act Amendments as enacted. In response to a point of order raised by Congressman Gross, the Speaker of the House ruled at page H12455 of the Congressional Record, December 14, 1971, as follows:

The gentleman from Iowa (Mr. Gross) makes a point of order against the conference report on the bill S. 2891 on the ground that the conferees on the part of the House have exceeded their authority as defined in clause 3 of rule XXVIII by including matter not submitted to conference by either House.

Specifically, the gentleman from Iowa asserts that the conferees have broadened that provision of the Senate bill which authorizes comparability adjustments in the rates of pay of each Federal statutory pay system covered by the Federal Pay Comparability Act of 1970 at a rate not in excess of 5.5 percent, effective after January 1, 1972.

The House amendment contained no comparable provision. As stated in the joint statement of the managers on page 22, the conferees have adopted the Senate provision with a "clarifying amendment" to assure that the comparability adjustments be made not only in the "statutory pay systems" as that term is defined in 5 U.S.C. 5301(c), but also in "all other Federal pay systems" covered by the Federal Pay Comparability Act of 1970; namely, those under which rates of pay are fixed by administrative action under 5 U.S.C. 5307. This would include employees in the executive, legislative, and judicial branches and employees of the District of Columbia whose pay is disbursed by administrative action. It would also include employees whose pay is disbursed by the Secretary of the Senate or the Clerk of the House.

The Chair is compelled to hold that the conferees, by deleting the word "statutory" in the Senate bill, have broadened the coverage of the comparability adjustments beyond the scope of the Senate bill or the House amendment. The Chair therefore sustains the point of order.

Thus, section 3 was enacted without any change in the language as proposed by House Conference Report 92–745. The language in

section 3 as enacted required adjustments in the pay of employees subject to a Federal statutory pay system which is defined in the Federal Pay Comparability Act of 1970, Public Law 91-656, 5 U.S.C. 5301, as relating to the General Schedule pay system, the Foreign Service pay system and the pay system of the Department of Medicine and Surgery, Veterans Administration. Moreover, we point out that the Federal Pay Comparability Act of 1970 does not provide for mandatory adjustments in the rates of compensation of employees whose pay is fixed by administrative action, but provides that their rates of pay may be adjusted as indicated below:

§ 5307. Pay fixed by administrative action

(a) Notwithstanding section 665 of title 31—

(1) the rates of pay of—

(A) employees in the legislative, executive, and judicial branches of the Government of the United States (except employees whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) and of the government of the District of Columbia, whose rates of pay are fixed by administrative action under law and are not otherwise adjusted under this subchapter;

* * * * * * *

(2) any minimum or maximum rate of pay (other than a maximum rate equal to or greater than the maximum rate then currently being paid under the General Schedule as a result of the pay adjustment by the President), and any monetary limitation on or monetary allowance for pay, applicable to employees described in subparagraphs (A), (B), and (C) of paragraph (1) of this subsection;

may be adjusted, by the appropriate authority concerned, effective at the beginning of the first applicable pay period commencing on or after the day on which a pay adjustment becomes effective under section 5305 of this title, by whichever of the following methods the appropriate authority concerned considers appropriate—

(i) by an amount or amounts not in excess of the pay adjustment provided under section 5305 of this title for corresponding rates of pay in the appropriate schedule or scale of pay;

(ii) if there are no corresponding rates of pay, by an amount or amounts equal or equivalent, insofar as practicable and with such exceptions and modifications as may be necessary to provide for appropriate pay relationships between positions, to the amount of the pay adjustment provided under section 5305 of this title; or

(iii) in the case of minimum or maximum rates of pay, or monetary limitations or allowances with respect to pay, by an amount rounded to the nearest $100 and computed on the basis of a percentage equal or equivalent, insofar as practicable and with such variations as may be appropriate, to the percentage of the pay adjustment provided under section 5305 of this title.

(b) An adjustment under subsection (a) of this section in rates of pay, minimum or maximum rates of pay, and monetary limitations or allowances with respect to pay, shall be made in such manner as the appropriate authority concerned considers appropriate.

(c) This section does not authorize any adjustment in the rates of pay of employees whose rates of pay are fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates or practices.

(d) This section does not impair any authority under which rates of pay may be fixed by administrative action.

At page 19 of the House Conference Report, No. 91–1685, to accompany H.R. 13000, which became the Federal Pay Comparability Act of 1970, referees in bankruptcy are specifically stated to be included in the category of those employees whose pay is fixed by administrative action.

Section 5307 of 5 U.S.C., as added by the Federal Pay Comparability Act of 1970, clearly reflects that administrative action is prerequisite to adjustments in the pay of employees such as referees in bankruptcy, the primary purpose of such addition being to provide authority to grant salary increases retroactive to the same date as might be authorized for employees subject to statutory pay systems. It follows that under section 40 of the Bankruptcy Act any increases similar to those granted by section 3 of the act of December 22, 1971, would have to be approved by the Judicial Conference and would be subject to the proviso of section 40 of the Bankruptcy Act limiting salary fixing thereunder to intervals of 2 years. We do not regard the 2-year proviso in section 40 of the Bankruptcy Act as having been repealed or rendered inapplicable by the action of the President in transmitting his recommendation to the Congress in January 1969 as provided in section 225(j) of the Federal Salary Act of 1967, Public Law 90–206, 81 Stat. 613, for the reason hereinafter indicated.

The Commission on Executive, Legislative, and Judicial Salaries was created by section 225 of the Federal Salary Act of 1967, 2 U.S.C. 351, for the purpose of reviewing the rates of various top ranking positions in the executive, legislative, and judicial branches to determine and provide the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and their appropriate relationship to pay rates in the General Schedule. The act provides further that the Commission shall submit to the President a report of the results of each review, which shall be included by the President in the budget transmitted to Congress. In that regard subsection (j) provides as follows:

> (j) EFFECT OF RECOMMENDATIONS OF THE PRESIDENT ON EXISTING LAW AND PRIOR PRESIDENTIAL RECOMMENDATIONS.—The recommendations of the President transmitted to the Congress immediately following a review conducted by the Commission in one of the fiscal years referred to in subsection (b) (2) and (3) of this section shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith—
>
> (A) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of such recommendations (other than any provision of law enacted in the period specified in paragraph (1) of subsection (i) of this section with respect to such recommendations) * * *.

In the budget for 1970, the President included a recommendation for salaries of various officials of the United States, among which was a maximum salary of $36,000 for full-time referees in bank-

ruptcy which became effective on February 14, 1972. See notes under 11 U.S.C. 68 and 2 U.S.C. 358.

Since the recommendation of the President affected only the maximum salary limitation contained in subsection (a) of section 40 of the Bankruptcy Act, 11 U.S.C. 68(a), our view is that no basis exists for concluding that the 2-year proviso contained in subsection 40(b) has been modified, superseded or otherwise rendered inapplicable. The questions presented are answered accordingly.

[B-174236]

Transportation—Rates—Increases—Ex-Parte—Effective Date

The intrastate shipments of several carloads of aviation fuel that had been originally shipped in interstate commerce under Government bills of lading to storage areas other than the points involved in the reshipments and commingled with other fuel shipments are independent shipments and are not a continuity of the original interstate transportation, which ended when the fuel was stored and, in addition, since the intrastate reshipments moved within the 30-day notice period of an Ex-Parte rate increases, the reshipments are not subject to the rate increase and the claim for additional freight charges based on the Ex-Parte rate increase is not applicable and may not be allowed.

To the Cape Fear Railways, Inc., May 5, 1972:

Further reference is made to your letter dated September 27, 1971, in which you request review of the settlement (TK-908952) by which our Office disallowed the $112.08 in additional freight charges claimed on the rail shipments which moved under Government bills of lading F-0703603 through F-0703606. Those shipments consisted of several carloads each of JP-4 aviation fuel transported from River Terminal at Fayetteville, N.C., to Pope Air Force Base, Fort Bragg, N.C., during November 1969.

It is agreed that Southern Freight Association Section 22 Quotation A-3941 has application on the freight movements, but there is disagreement as to whether the increase provided in Ex-Parte 262 is applicable.

Our Office is advised by the Department of the Air Force that the shipments from River Terminal to Pope Air Force Base were not a part of through transportation from Texas. The shipments from Texas were consigned to Beaufort, N.C., and to Charleston, S.C., and at the time of departure from Texas, no other destinations were known. Upon arrival at the two named eastern seaboard points, the contents of the ocean tankers were pumped into storage tanks and commingled with other JP-4 fuel which was contained therein. The transportation service ended at those points and the fuel came to rest.

As requisition orders were received from Government consuming installations and other bulk storage stations, new shipments were

made under separate bills of lading via either pipeline, motor, rail or barge conveyances in the specified quantities requested by each installation.

As the supplies of JP–4 fuel at River Terminal became depleted or low, additional quantities of the fuel were requested from either or both of the installations located at Beaufort, N.C., and/or Charleston, S.C. We understand that the shipments to River Terminal generally were transported by barge and that the fuel was pumped from the barges into storage tanks. The storage facility was operated by Chemphalt of Carolina, Inc., for the Government. At the time of arrival at River Terminal, the ultimate destination of the JP–4 fuel was still not known, since both Pope Air Force Base and Simmons Army Airfield requisitioned JP–4 fuel as needed from River Terminal. On reshipment from River Terminal, new transportation documents were again issued and the shipments were treated as separate freight movements rather than as a continuation of the previous transportation by ocean tanker and barge.

The Government's whole plan was to arrange storage points on the eastern seaboard from which distribution might be effected as required, without any unnecessary delays in the supply. Under the plan there is neither necessity nor purpose in having continuity of transportation. The storage depots are the natural places for a change from interstate to intrastate transportation. There is nothing of record here that establishes an intent by the Government for continuous transportation from Texas to Pope Air Force Base, North Carolina.

The reshipment of an interstate shipment does not necessarily establish a continuity of movement or present the shipment to a point within the same State from having an independent or intrastate character. *Chicago, M. & St. P. Ry. Co.* v. *Iowa*, 233 U.S. 334 (1914); *Atlantic Coast Line R.* v. *Standard Oil Co.*, 275 U.S. 257 (1927). Ownership of the property or the point of passage of title also is not determinative of whether the shipment is an interstate or intrastate movement. *Pennsylvania R.* v. *Clark Bros.*, 238 U.S. 456, 466 (1915); *B. & O. S. W. R.* v. *Settle*, 260 U.S. 166 (1922). When the JP–4 fuel was unloaded from the ocean tankers, mixed with other fuel in the storage tanks, and therein stored, the interstate commerce ended for all purposes. *General Oil* v. *Crain*, 209 U.S. 211 (1908); *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506 (1923); *Petroleum Products Transported within a Single State*, 71 I.C.C. 17, 26–32 (1957). Thus, we conclude that the freight movements from River Terminal to Pope Air Force Base are intrastate in character.

But whether the particular shipments from River Terminal to Pope Air Force Base are interstate or intrastate in character is not in our

view controlling as to the validity of your claim for additional charges as to the instant shipments. By amendment 5 to Quotation SFA-3941, issued on November 11, 1969, the railroads parties to the quotation purport to make the rates named therein subject to the increase in Ex-Parte 262 effective November 18, 1969. But Appendix "A" to Quotation A-3941 in a paragraph headed "Termination or Modification of Quotation" authorizes cancellation or modification of the quotation by either party on 30 days written notice to the other. It also provides that modification of the quotation may be accomplished by the railroad parties to the quotation upon shorter notice subject to the mutual agreement of the parties. There is nothing of record, however, to establish that the Military Traffic Management and Terminal Service (MTMTS) concurred in the increase on any shorter notice than 30 days. Therefore, the increase was not effective until 30 days after notice of the increase was furnished MTMTS by the carriers.

Since the notice was not given earlier than November 11, 1969, it was not effective as to shipments moving within 30 days of such date. The increase thus is not applicable on the shipments involved which as indicated above moved during November 1969.

The disallowance of your claim for $112.08 therefore was proper and is sustained.

[B-175552]

Transportation—Dependents—Military Personnel—Children—Member's Duty Station Change During Children's Visit

A divorced naval officer whose former wife was given legal custody, care, and control of their children under a court order permitting them to visit with him during their summer vacation is considered to be a member without dependents within the meaning of paragraph M9001-2 of the Joint Travel Regulations and, therefore, the fact that the children accompanied the officer when his permanent duty station was changed during their visit does not entitle him to reimbursement for their transportation or to a dislocation allowance for the children under M9004-2-1, since the travel of the children was not to establish a residence and neither their visiting status nor their residence was changed. However, since the officer was not assigned public quarters he is entitled pursuant to 37 U.S.C. 407 to a dislocation allowance as a member without dependents equal to his quarters allowance for 1 month.

To Lieutenant (jg) J. Glass, Department of the Navy, May 9, 1972:

This refers to your letter dated December 10, 1971, which was forwarded here by 4th endorsement, dated March 23, 1972, of the Per Diem, Travel and Transportation Allowance Committee, requesting an advance decision as to the legality of payment of dependent travel and dislocation allowance to Commander Lloyd W. Stetzer, MC, USN, under the described circumstances. Your request has been assigned PDTATAC Control No. 72-12.

BUPERS Order 125897, dated April 12, 1971, ordered Commander Stetzer when directed in July 1971 to proceed from Naval Air Station, Memphis, Tenn., and report to Naval Station, Key West, Fla., for duty. Second endorsement, dated July 2, 1971, directed him to detach July 30, 1971, and carry out his basic orders. Third endorsement, dated August 9, 1971, shows that he reported at the Naval Station, Key West, Fla., August 7, 1971, for duty.

You say that on August 9, 1971, payment of dependent travel and dislocation allowance was made to Commander Stetzer on behalf of three sons, Michael, Eric and Scott and that his present wife, Commander Grace Stetzer, received mileage and dislocation allowance (single) in her own right. Also you say that a permanent change of station was effected from Naval Air Station, Memphis, Tenn., to Naval Hospital, Key West, Fla., and that a permanent residence was established in Key West. Payment of dependents' travel and dislocation allowance for Commander Stetzer's three sons was subsequently disallowed, apparently his pay record has been checked the amounts paid, and he has resubmitted a claim for payment.

You also say that dependency certificate (NAVCOMPT 1040) filed October 1, 1971, shows that Commander Stetzer was divorced in Craighead County, Arkansas, on July 2, 1963, and that his former wife, Mrs. Marie Jo Stetzer, was given legal custody, care and control of the children. A copy of a court order filed April 6, 1970, in the case of *Marie Jo Stetzer* v. *Lloyd W. Stetzer*, No. 13087, decreed, among other things, that Commander Stetzer is to have the custody and the right to have the children visit him for the first 2 months of their summer vacation, rather than for their entire summer vacation, as originally ordered and decreed.

Since Commander Stetzer does not have custody of his children for a major portion of the year, you expressed doubt as to whether the 2-month period of custody can be considered in establishing entitlement for dependents' travel and dislocation allowance.

Section 406, Title 37 U.S. Code, provides, in part, that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation in kind for his dependents, to reimbursement thereof, or to a monetary allowance in place of transportation in kind, subject to such conditions and limitations as are prescribed by the Secretaries concerned. Pursuant to 37 U.S.C. 407, under regulations prescribed by the Secretary concerned, a member of a uniformed service whose dependents make an authorized move in connection with his change of permanent station is entitled to a dislocation allowance equal to his basic allowance for quarters for 1 month as

provided for a member of his pay grade and dependency status in 37 U.S.C. 403.

A member without dependents who is transferred to a permanent station where he is not assigned Government quarters is entitled to a dislocation allowance equal to his quarters allowance for 1 month. For the purposes of section 407, it provides that a member whose dependents may not make an authorized move in connection with his change of permanent station is considered a member without dependents.

The regulations authorized to be prescribed are contained in the Joint Travel Regulations, Volume 1. Paragraph M7000 of those regulations provides that, other than for specifically enumerated exceptions, members of the uniformed services are entitled to transportation of dependents at Government expense upon a permanent change of station for travel performed from the old station to the new permanent station or between points otherwise authorized in the regulations. Among the exceptions, item 12 provides that members of the uniformed services are not entitled to reimbursement for any travel of dependents between points otherwise authorized in the regulations to a place at which they do not intend to establish a residence and that travel expenses of dependents for a pleasure trip or for purposes other than with the intent to change the dependents' residence, as authorized in the regulations, may not be considered an obligation of the Government.

Paragraph M9001–2 provides that the term "member without dependents" means a member, regardless of pay grade, who has no dependents or who is not entitled to transportation of dependents under the provisions of paragraph M7000 in connection with a change of permanent station. Paragraph M9004–2–1 specifically provides that the dislocation allowance is not payable to a "member with dependents" in connection with permanent change-of-station travel performed under conditions under which Commander Stetzer's children performed travel to his new permanent station, namely, for a purpose other than to establish their permanent residence.

Under the terms of the court order Commander Stetzer's children were only visiting him in July 1971 at his old station, Naval Air Station, Memphis, Tenn. Such visit was not required but was merely permitted. His former wife, Marie Jo Stetzer, retained legal custody, care and control of the children except for a short visit with their father each summer. While it may be that Commander Stetzer is obligated under the divorce decree to pay child support and while the children actually accompanied him on his change of permanent station, the travel involved had no effect to change their visiting status to a dependency status within the meaning of 37 U.S.C. 406 and 407, nor

did they travel to Key West, Florida, for the purpose of changing their residence from that of their mother. The travel involved was only a part of the permitted visit for which travel reimbursement is not authorized under the regulations. Likewise, there is no authority for payment of dislocation allowance as a member with dependents pursuant to paragraph M9004–2–1, Joint Travel Regulations.

However, it does not appear that Commander Stetzer was assigned public quarters in Key West, Fla. Since he comes within the definition of a member without dependents contained in paragraph M9001–2 he is entitled to dislocation allowance as a member without dependents provided he was not assigned public quarters. See B–164258, October 25, 1968, copy herewith.

Accordingly, the travel voucher is returned and may be paid on the basis above indicated if otherwise correct.

[B–174680]

Contracts—Awards—Labor Surplus Areas—Certificate of Eligibility—Submission With Bid Requirement

A small business concern that failed to submit a current certification of first preference eligibility status with its bid under the labor surplus area set-aside portion of a procurement for air conditioners to evidence commitment to employing disadvantaged individuals as required by the invitation for bids (IFB) in accordance with paragraph 1–804.2(d) of the Armed Services Procurement Regulation, properly was evaluated as a Group 7 priority bidder—a small business concern that is not located in a labor surplus area—and, therefore, not entitled to priority in negotiations since the submission with a bid of a certificate of eligibility for first preference is a matter of responsiveness and is required for determination of bidder eligibility for an award of a labor surplus area set-aside. Therefore, an award to the only other Group 7 bidder on the basis of being the low bidder on the same item in the unrestricted portion of the IFB is appropriate.

Contracts—Awards—Labor Surplus Areas—Certificate of Eligibility—Validity Determination

Where the contracting officer knew a first preference eligibility certificate submitted under a labor surplus area set-aside was invalid, the precedent established in 50 Comp. Gen. 559 is not for application, for although in that decision the award was made on the basis of an invalid labor surplus area certificate, the certificate was accepted in good faith by the contracting officer and, therefore, the contract awarded was not void *ab initio* but only voidable at the option of the Government and the cancellation of the award was not necessary.

To the Therm-Air Manufacturing Company, Inc., May 10, 1972:

We refer to your letter of December 22, 1971, protesting against award of a contract under invitation for bids (IFB) No. DSA400–72–B–1003, issued August 20, 1971, by the Directorate of Procurement and Production, Defense General Supply Center (DGSC), Richmond, Virginia, for 13 line items of mechanically refrigerated air condi-

tioners. The protest pertains to line item 10 which was set aside for award to labor surplus area concerns.

Award of the labor surplus area set-aside portion of the procurement was governed by the priorities established in Clause C8–3 of the IFB, in part, as follows:

> Negotiations for award of the set-aside portion will be conducted only with labor surplus area concerns (and small business concerns to the extent indicated below) who have submitted responsive bids * * * on the non-set-aside portion at a unit price no greater than 130 percent of the highest unit price at which an award is made on the non-set-aside portion. * * * Negotations for the set-aside portion will be conducted with such bidders in the following order of priority:
> Group 1. Certified-eligible concerns with a first preference which are also small business concerns.
> Group 2. Other certified-eligible concerns with a first preference.
> Group 3. Certified-eligible concerns with a second preference which are also small business concerns.
> Group 4. Other certified-eligible concerns with a second preference.
> Group 5. Persistent or substantial labor surplus area concerns which are also small business concerns.
> Group 6. Other persistent or substantial labor surplus area concerns.
> Group 7. Small business concerns which are not labor surplus area concerns.

Bidders were also required to submit DGSC form 350, Production Facilities and Transportation Data, in which the following statement was included in section B:

> Labor Surplus Area or Partial Small Business Set-Asides.
> 1. If a portion of the procurement has been set aside for labor surplus area or small business concerns and if the offeror desires to be considered for award of such set-aside portion as a labor surplus area concern, the offeror must:
> a. Furnish with his offer evidence that he or his first-tier subcontractor is a certified concern in accordance with 29 CFR 8.7(b) (ASPR 1-801.1(i)) and identify below the address in or near a "section of concentrated unemployment or underemployment," as classified by the Secretary of Labor, at which the costs he will incur on account of manufacturing or production (by himself if a certified concern or by certified concerns acting as first-tier subcontractors) amount to more than 25 percent of the contract price.

Under the section entitled "Prime Manufacturer Costs," Therm-Air identified its plant in Newark, N.J., and indicated that 26 percent of the manufacturing or production costs for the items set aside for labor surplus area concerns would be incurred at that plant. The following requirement was also made in section B of the form:

> 2. Failure to identify the locations as specified above will preclude consideration of the offeror as a labor surplus area concern. In addition, if eligibility is based on status as a certified-eligible concern, failure to furnish evidence of eligibility will preclude consideration of the offeror as a certified-eligible concern. * * *.

Heat Exchangers, Inc. (Heat Exchangers), a small business concern, qualified for Group 7 priority for the set-aside portion. However, Therm-Air stated in the cover letter submitted with its bid that, as a small business firm in a labor surplus area, it was entitled to Group 1 priority for negotiations. During evaluation of the bids, procurement officials noted that the certificate of eligibility furnished by Therm-Air

in support of its claim to Group 1 priority expired on August 10, 1971, more than a month before opening of bids. In an informal conversation in November 1971, the contracting officer mentioned to a representative of Therm-Air that its certificate of eligibility expired before opening of bids and that Therm-Air could not be considered for Group 1 preference for negotiations. Subsequently, in a letter of November 16, 1971, Therm-Air submitted a "current" certificate of eligibility, effective November 12, 1971, through May 12, 1972. In a second letter of November 24, 1971, Therm-Air submitted a "corrected copy" of the certificate of eligibility, effective August 11, 1971, through February 11, 1972. The accompanying letter stated that the "correction was initiated by the New Jersey State Employment Service to correct an error they made on their previous issuance of this certificate." The contracting officer concluded that Therm-Air remained ineligible for Group 1 preference because it did not submit evidence of its eligibility at the time of bid opening. Further, it was determined that Therm-Air did not qualify for Group 5 preference as a firm in a persistent or substantial labor surplus area because it did not indicate that it would perform 50 percent of the contract in an area of persistent or substantial labor surplus as required by Armed Services Procurement Regulation (ASPR) 1-804.2. Therefore, the contracting officer concluded that Therm-Air was in Group 7 priority as a small business concern not located in a labor surplus area.

Because only Heat Exchangers and Therm-Air submitted unit bids on item 0010 which were no greater than 130 percent of the highest unit price at which an award was made on the unrestricted portion of the IFB, only these firms were eligible for the set-aside portion. Negotiations were subsequently initiated with both firms according to their rank as low bidders under Group 7 priority for small business concerns not in labor surplus areas. Therefore, the set-aside portion of item 0010 was offered to Heat Exchangers as low bidder on the same item in the unrestricted portion of the IFB.

Therm-Air protests against the proposed award to Heat Exchangers of item 0010, offered under Group 7 priority, because it alleges that the item should have been offered to it under Group 1 priority as a properly certified small business concern in a labor surplus area. As part of its protest, Therm-Air also contends that the provisions of the IFB and their interpretation by DGSC are not consistent with congressional policy and directives of the Department of Labor for procurements set aside for labor surplus areas.

Portions of procurements are set aside for labor surplus areas under the broad language of the Defense Production Act of 1950 (50 U.S.C.A. App. 2062, as amended) in which Congress directed that

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departments and agencies shall apply, "when practicable and consistent with existing law and the desirability for maintaining a sound economy, the principle of the geographical dispersal of such facilities in the interest of national defense." In Defense Manpower Policy No. 4 (DMP–4), 32A CFR ch. 1, the policy of encouraging the awarding of contracts in sections of concentrated unemployment or underemployment and in areas of persistent or substantial labor surplus was implemented by assigning to the Secretary of Labor specific duties, including classifying areas of unemployment and establishing regulations for the order of preference under which contracts should be awarded to bidders. The following duty is also assigned to the Secretary of Labor:

> Certify employing establishments which have agreed to perform contracts in or near sections of concentrated unemployment or underemployment and which have agreed to comply with regulations of the Secretary of Labor with respect to the employment of disadvantaged applicants.

The policy is further implemented in 29 CFR Part 8, in which definitions and specific criteria are established. In section 8.9 procedures for certifying a firm's plan to employ disadvantaged individuals are provided, including the following:

> (b) Certificates of eligibility shall be valid for a period of 6 months * * *.
>
> * * * * * * *
>
> (c) No certificate which would afford an employing establishment first preference under § 8.8 shall be issued to any establishment whose plans for the employment of disadvantaged individuals do not provide that at least 25 percent of the total number of new hires each month beginning with the date of certification and continuing until the expiration of the validity period or completion of an awarded contract or subcontract whichever is later shall be disadvantaged individuals identified and referred to the employing establishment pursuant to § 8.7(b).

Finally, in TRAINING AND EMPLOYMENT SERVICE PROGRAM LETTER No. 2558, February 27, 1970, guidelines for certifying firms for preference under DMP–4 were explained, including the following requirements for certification:

> To be eligible for first or second preference, an employer must submit with his bid a copy of certificate of preference issued by the Department of Labor or its authorized representative to the bidding employer * * *. To be certified in the first or second preference group, an employer must meet the conditions outlined below:
>
> A. First Preference Group Certificate
>
> * * * * * * *
>
> 2. Irrespective of whether a contract is awarded as a result of the certification, the employer must agree, in writing, to comply with the following provisions:
>
> a. The employer will hire, in the certified establishment, a proportion of disadvantaged residents from the classified labor surplus area equaling at least 25 percent of the total new hires each month, beginning with the first full month following the date of certification and continuing until the expiration of the validity period of the certificate or

> the completion of an awarded contract or subbcontract, whichever is later. * * *.
>
> * * * * * * *
>
> c. The employer will furnish the certifying ES office, by the tenth of each month, a report of new hire activity for the previous calendar month. * * *.

Our Office has held consistently that submission with the bid of a bidder's certificate of eligibility for first preference is a matter of responsiveness and required for evaluation of a bidder's eligibility for award of that portion of a procurement set aside for labor surplus area concerns. See 47 Comp. Gen. 543. (1968), 51 Comp. Gen. 344 (1971). The requirement stated in the IFB that the certificate must be submitted with the bid is in accordance with ASPR 1–804.2(d) which is similar to the language, quoted above, in the regulations of the Department of Labor. We consider the ASPR regulation consistent both with congressional policy and regulations of the Department of Labor. In this regard, when acquiring a privileged negotiating position, the certified-eligible bidder with first preference, whether or not he is performing a contract, commits himself to hiring disadvantaged individuals for 25 percent of all positions for which he hires during each month he is certified and to identify these individuals in a report to the Department of Labor. If, as Therm-Air contends, a bidder should be required only to show by an outdated certificate that at some time past he was actually certified, the purpose of the labor surplus area provisions would be defeated because there would be no commitment by the bidder at the time the bid is submitted that disadvantaged individuals in the area of the bidder's facility would be hired. For the same reason, the contention made by Therm-Air that submission of an outdated certificate was merely a mistake by the bidder which could be corrected by submitting a "corrected" or even backdated certificate is invalid. In the present case, Therm-Air was not bound to hire disadvantaged persons during the period from August 10, 1971, when Therm-Air's certificate expired, to September 20, 1971, when a valid certificate should have been submitted with the bid, and therefore the purpose for which the Government grants certified-eligible status to firms was defeated. Furthermore, an official of the Manpower Administration in the Department of Labor has notified us informally that, in any event, backdating of your certificate was improper because backdating is considered to be appropriate only in circumstances in which an agency of the Government has previously placed the employer in the wrong preference category. Backdating should not, however, be used to cover the employer's failure to keep his certification current.

In support of its protest Therm-Air cites our decision in 50 Comp. Gen. 559 (1971) that although an award was made on the basis of an invalid labor surplus area certificate, it was not necessary that the contract be canceled because, as the certificate was accepted in good faith by the contracting officer, the contract was not void *ab initio* but only voidable at the option of the Government. We do not accept that precedent as binding in the present case. That decision should be distinguished from the present case in which the contracting officer knew before award that the certificate was invalid.

In its letter of February 4, 1972, responding to the administrative report, Therm-Air asserts that at the time of bid opening it was currently performing under a labor surplus area set-aside contract awarded to it as a firm entitled to first-preference status. On this basis, Therm-Air was required, at the time the present bid was submitted, to hire disadvantaged individuals for 25 percent of employment openings under 29 CFR 8.9, quoted above. Therm-Air argues from this fact that no other proof of first-preference certification was necessary for it to receive priority for negotiation of the award set aside for labor surplus areas. However, we find no indication in Therm-Air's bid that it was currently performing under the requirements of a first-preference certificate at its Newark facility and the contracting officer could not reasonably be expected to be aware of that fact. Furthermore, in recent decisions our Office has again upheld the requirement that current certification of first-preference status must be actually submitted with the bid in order to support a bidder's right to priority in negotiation. See 51 Comp. Gen. 335 (1971); and 51 *id.* 344 (1971).

Because Therm-Air did not submit a valid certification with its bid, the contracting officer properly refused to consider it a certified-eligible concern, entitled to priority in negotiations. Accordingly, we consider the proposed award to Heat Exchangers for that portion of item 0010 set aside for labor surplus areas to be appropriate.

[B–174738]

Transportation—Rates—Section 22 Quotations—Shipping Point Not Tender Listing

A claim for the freight overcharges deducted pursuant to 49 U.S.C. 66 in payment of a shipment of pallets of empty projectiles from Twin Cities Army Ammunition Plant, Minnesota, under a Government bill of lading that made reference to a section 22 I.C.C. (49 U.S.C. 22) special tariff rate—I.C.C. 185—for shipments originating from New Brighton, Minnesota, located 2½ miles from the plant, was properly disallowed. Interpreting the tender—a continuous unilateral offer—as any other contract document to determine the intent of the parties, evidences the plant and New Brighton are not different locations since it is common knowledge ammunition plants are not located within municipalities,

the Government agent believed the special tariff rate applied or other carriers would have been tendered the shipment, and the carrier's agent did not object to the bill of lading reference to the I.C.C. 185 tender, issued to secure the ammunition traffic.

To the Red Ball Motor Freight, Inc., May 10, 1972:

We refer again to your letter of December 3, 1971, in which you request review of our settlement certificate of October 18, 1971, our claim No. TK–927192. The settlement disallowed your claim for $318.06, the balance of freight charges allegedly due your company for transporting a truckload of 62 pallets of empty projectiles from Twin Cities Army Ammunition Plant, Minnesota, to the Louisiana Army Ammunition Plant, Doyline, La. The projectiles weighed 39,990 pounds, the pallets, 1,860 pounds, and the dunnage, 300 pounds. The transportation services were performed in September 1968 and were authorized by Government bill of lading No. E–9994453 which, in addition to the usual entries, refers in the tariff or special rate authorities space to "United Buckingham Tender ICC85 eff 3/10/67."

For these transportation services you collected freight charges of $1,205.49, based on a rate of $2.86 per 100 pounds applied to the total weight of the shipment. When reached in the audit (see section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66), our Transportation Division found that lower charges of $878.85 were applicable to the shipment. The lower charges are based on United Buckingham Freight Lines Section 22 Quotation I.C.C. 185 (Tender I.C.C. 185) (the reference on the bill of lading is an obvious typographical error) which, effective March 10, 1967, names a rate of $2.10 per 100 pounds, truckload minimum weight, 40,000 pounds, on shipments of projectiles, or rocket heads, empty or sand loaded or solid, moving from New Brighton, Minn., to Doyline, La., via United Buckingham Freight Lines to Kansas City, Mo., Red Ball Motor Freight, Inc., beyond. A dunnage allowance of 300 pounds is applicable and was taken.

You were notified of the overcharge of $326.64; after your protests were duly considered, the amount of the overcharge was collected by deduction (49 U.S.C. 66) and your claim for part of the amount deducted was disallowed in the settlement here under review.

You contend that since the bill of lading indicates that the shipment did not originate at New Brighton, Minn., the rate in Tender I.C.C. 185 is not applicable to the shipment. You enclose a copy of a map which you say indicates that Twin Cities Ammunition Plant and New Brighton are two distinctly different locations and you allege that "* * * rates cannot be made on an intent," a reference to the Division's reliance on a letter dated April 7, 1970, from United Buck-

ingham to the Military Traffic Management and Terminal Service (MTMTS) in which that carrier says that Tender I.C.C. 185 "* * * was issued with the intent that it was to apply on shipments originating at the Twin Cities Army Ammunition Plant, Minneapolis, Minn., as well as from New Brighton, Minn."

Tenders like Tender I.C.C. 185 are rate quotations made to the United States by carriers under section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22, and are continuing unilateral offers to perform transportation services at named ratings or rates subject to the terms and conditions named therein. *C & H Transportation Co.* v. *United States*, 193 Ct. Cl. 872, 436 F. 2d 480 (1971). The principles followed in interpreting them are no different from those presented in the interpretation of any other document. 44 Comp. Gen. 419, 420 (1965).

A fundamental principle used in the interpretation of contracts generally is the ascertainment of the parties' intention. *Crown Iron Works Co.* v. *Commissioner of Internal Revenue*, 245 F. 2d 357, 359 (1957). This may be done by looking to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, and the situation in which the parties were at the time of contracting. *Pekar* v. *Local U. No. 181, Int. U. of United Brewery, Etc. Wkrs.*, 311 F. 2d 628, 636 (1962). The terms of the contract must receive the construction which is most probable and natural under the circumstances so as to attain the object which the parties to it had in contemplation in making it. *Decatur Bank* v. *St. Louis Bank*, 88 U.S. 294, 298 (1874); *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. U. Local 584*, 222 F. Supp. 125 (1963).

Applying these principles here, it is clear that the $2.10 rate in Tender I.C.C. 185 is applicable to this shipment.

We note first that the Twin Cities Army Ammunition Plant was reactivated in 1966, that it is located about 2½ highway miles north of New Brighton, Minn., and that it is common knowledge that ammunition plants usually are not located within municipalities. See *O.K. Transfer & Storage Co., Inc., Com. Car Application*, 32 M.C.C. 107, 113 (1942), where the Interstate Commerce Commission in authorizing territory for transportation of explosives recognized that "* * * points of origin * * * are not entirely exact because municipalities usually require powder magazines or mills to be located beyond the city limits."

More importantly, however, is the fact that the Government agent responsible for the shipment believed that the rate offered in Tender I.C.C. 185 applied from the Army Ammunition Plant. (We note that

at least seven other similar shipments were made.) If the Government agent believed otherwise, this shipment as well as the others most likely would have been tendered to other carriers ready, willing, and able to transport them at the $2.10 rate.

Bill of lading No. E–9994453 itself shows that the parties agreed at the time of shipment that Tender No. 185 was applicable to the shipment.

When the bill of lading was tendered to United Buckingham's agent for his acceptance, he was on notice by reason of the pertinent reference to Tender No. 185 in the bill of lading that the Government's agent contemplated the transportation of the shipment under the terms of the tender. And United Buckingham's agent raised no objection to the reference to the tender.

The competitive nature of this traffic, the fact that no Government facilities for receipt and shipment of ammunition so far as we know are located at New Brighton and the other circumstances involved clearly negate the idea that United Buckingham with the concurrence of W. P. Furrh, Assistant General Traffic Manager of Red Ball, performed a useless act in issuing Tender I.C.C. 185; indeed, the record shows that it was issued with the intent to secure ammunition traffic from the Twin Cities Ammunition Plant. This conclusion is supported by United Buckingham's letter of April 7, 1970, to MTMTS which serves to clarify the carrier's intent in making the offer. See *C & H Transportation Co., Inc.* v. *United States*, *supra; Pennsylvania Railroad Company* v. *United States*, 165 Ct. Cl. 1, 10 (1964); and *Union Pacific Railroad Company* v. *United States*, 152 Ct. Cl. 523, 287 F. 2d 593 (1961).

In these circumstances and because the settlement of October 18, 1971, is not otherwise shown to have been erroneous, it is sustained.

[B–172671]

Compensation—Overtime—Traveltime—Assignment Not Primary Function of Employee

An attorney whose travel away from his permanent duty station to obtain the affidavit of a witness involved returning to headquarters after the end of his normal tour of duty may not be paid overtime compensation or allowed compensatory time under 5 U.S.C. 5542(b)(2)(B) for the return trip home, even though the initial travel qualified as hours of employment, since his duties as an attorney are primarily to perform legal functions and not to transport documents, and the fact that the transportation of the affidavit was necessary to the performance of his duties did not convert the return trip to hours of employment within the meaning of 5 U.S.C. 5542(b)(2)(B)(i), which authorizes the payment of overtime compensation for time spent in a travel status only when the travel involves the performance of work while traveling.

Compensation—Overtime—Traveltime—Administratively Controllable

In applying 5 U.S.C. 5542(b)(2)(B)(iv), which authorizes the payment of overtime when travel after the end of a normal tour of duty "results from an event which could not be scheduled or controlled administratively," the term "event" although including anything which necessitates an employee's travel, requires the existence of an immediate official necessity in connection with the event requiring the travel, and if the necessity is not so immediate as to preclude the proper scheduling of the travel, the time in travel does not qualify as hours of employment, and the phrase "could not be scheduled" contemplates more than the fact that administrative pressures make scheduling in accordance with 5 U.S.C. 6101(b)(2) difficult or impractical, or emergency situations. Events considered beyond administrative control are discussed in Federal Personnel Manual Supplement 990-2.

Compensation—Overtime—Traveltime—Administratively Controllable

In view of the policy expressed in 5 U.S.C. 6101(b)(2) that to the maximum extent practicable travel should be scheduled within the regularly scheduled workweek of an employee, per diem costs which might be necessary to comply with the policy are not considered unreasonable. However, should an uncontrollable event necessitate an employee's travel, notwithstanding there is sufficient notice to permit the scheduling of the travel during his regularly scheduled duty hours, where such scheduling would result in the payment of at least 2 days additional per diem, the travel may be required during off duty hours and compensated for at overtime rates.

Officers and Employees—Traveltime—Administrative Determination—Employee Compliance Requirement

Although pursuant to 5 U.S.C. 6101(b)(2) travel should not be scheduled at times outside of an employee's regularly scheduled workweek as the section does not require or permit the payment of compensation for such travel, at the same time an employing agency has the discretionary authority to determine when it is impracticable to schedule official travel within the employee's workweek and to order travel that is noncompensable as overtime. However, the official requiring the noncompensable travel is required to comply with 5 CFR 610.123 and record his reasons for ordering the travel and furnish a copy of his statement to the employee, who in turn would not be justified in refusing to perform the properly ordered travel.

To the Chairman, National Labor Relations Board, May 11, 1972:

We refer to your letter of March 3, 1972, requesting our determination as to the legality of payment of overtime compensation and/or allowance of compensatory time for travel performed by Mr. Amedeo Greco, an attorney with your Regional Office in Milwaukee, Wis. With your letter you forwarded Mr. Greco's memorandum of December 23, 1971, which sets forth his own interpretation of 5 U.S.C. 5542(b)(2)(B) upon which he bases his request for compensatory time.

Section 5542 of Title 5 of the United States Code, governing overtime compensation, provides in pertinent part as follows:

§ 5542. Overtime rates; computation.

(a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by

an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

* * * * * * *

(b) For the purpose of this subchapter—

* * * * * * *

(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

* * * * * * *

(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

In the course of investigating a case which he was assigned, Mr. Greco determined that it was necessary to interview a witness and to take an affidavit of that witness. He, therefore, scheduled an appointment with the witness as their schedules mutually permitted. He drove from Milwaukee, Wis., his permanent duty station, to Appleton, Wis., the only site where the witness was available. The drive to Appleton of approximately 2 hours and the taking of the sworn statement of the witness were completed during Mr. Greco's normal duty hours. After completing his business in Appleton, Mr. Greco returned to Milwaukee, arriving about 1½ hours after the end of his normal tour of duty. He subsequently requested and was denied compensatory time off for that amount of time. He has appealed from that denial.

Mr. Greco's request for compensatory time is predicated upon the thesis, set forth in his memorandum, that the travel which he performed may be viewed as coming within either the provision of subparagraph 5542(b)(2)(B)(i) or of subparagraph 5542(b)(2)(B)(ii), quoted above. In addition to requesting our determination as to the compensability at overtime rates for the traveltime involved, you ask to be advised regarding the interpretation of the language of subparagraph 5542(b)(2)(B)(iv), quoted above.

We have given careful consideration to Mr. Greco's view. However, we note that subparagraph 5542(b)(2)(B)(ii) provides that traveltime is hours of employment if it is "incident to travel that involves the performance of work while traveling." Mr. Greco is contending that such provision was intended to include all travel which is incident to work. He makes this argument by drawing an analogy between his travel and that of a truckdriver in an example given in Federal Personnel Manual Letter 550–36 (superseded and incorporated in FPM Supplement 990–2). In pertinent part he states the following:

Rather, more on point to the case herein is the very language * * * in *Federal Personnel Manual Letter No. 550–36* which states, *inter alia* that "an employee shall be paid for time in travel status outside of his regular work schedule if the travel involves the preformance of work while traveling * * * (or) is in-

cident to travel that involves performance of work when traveling (such as a truckdriver riding in a truck to a destination to pick up another truck and drive it back to his original duty station. * * *"

It is clear that the driver's traveltime spent in reaching the truck would be compensated for. Why? Because the purpose of his trip was to get the truck * * * and then bring it back. Inasmuch as the object of his trip—the bringing back of the truck—could not have been accomplished unless he was transported to the truck—his travel to the location of the truck involved work which was "incident" to work. And, because the driving of the truck to the original duty point was also an integral part of his duties, he would obviously be paid for such time as that, too, involved work which was "incident" to travel, i.e., bringing the truck back to the duty station * * *.

How does this bear on the case herein? Simply put a lawyer * * * who takes affidavits for the investigation of a case is performing duties analogous to those of a truckdriver. * * * Thus, when I traveled to the Appleton area, my primary aim, like the truckdriver, was to obtain an object—the affidavits which, in my professional judgment, I thought it necessary for the Regional Director to possibly use in order that he could thereafter make an initial determination of the case in Milwaukee. * * *.

* * * Similarly, in my case, affidavits could not have been taken in the Appleton area unless I drove there and then returned to my permanent duty station in Milwaukee, where these affidavits were subsequently used.

Regarding the above we note that the traveltime of the truckdriver to pick up the truck meets the conditions set forth in subparagraph 5542(b) (2) (B) (ii) not because it is solely incident to his delivering the truck to his duty station but because it is incident to his driving the truck on the return journey, namely, for performing the work for which a truckdriver is employed.

In connection with the above we point out that time spent in travel which is an inherent part of and inseparable from the work itself qualifies as work and may be compensated at overtime rates. See 43 Comp. Gen. 273 (1963) wherein we stated that the time spent in travel by detention officers of the Immigration and Naturalization Service in returning a specially equipped vehicle (in which alien detainees had been transported as a part of each of the employee's assigned duties) to the garage for refueling, etc., may be viewed as time spent in a work status since such travel was not merely incidental to the personal transportation of the employee back to the original duty station, but an essential part of his assigned duties, as in the case of a chauffeur, bus operator or truckdriver. See also the discussion of this point in *Delano* v. *United States*, 183 Ct. Cl. 379 (1968), B–163042, May 22, 1968, and B–146389, February 1, 1966, copies of which decisions are enclosed. In the present case Mr. Greco had completed his work at Appleton and was returning to his official duty station. The question to be decided is whether the transportation of the affidavit, which was incident to Mr. Greco's personal transportation to his headquarters, changed the character of his travel to such an extent that the traveltime was compensable.

Federal Personnel Manual Supplement 990–2, Book 550, subchapter S1–3(b) (2) (c) (iv), states in part as follows:

Travel which involves the performance of work while traveling generally means, within the statute and the Commission's regulations, work which can only be performed while traveling (such as monitoring communications or signal devices used in air or rail traffic or escorting a prisoner to a distant prison). On the other hand, when an agency requires an employee to perform work while traveling, the time spent performing the work is work even though it is the kind of work that would ordinarily be performed at the employee's place of business. In this latter situation, the criteria used in determining whether or not the work was required to be performed while traveling will be that which is used in determining whether or not overtime work is officially ordered or approved. Pay, if warranted, will be limited to time actually spent working.

Under the predecessor statute to 5 U.S.C. 5542(b)(2)(B), which similarly provided that time spent in a travel status away from the official duty station is considered hours of employment if the travel involves the performance of work while traveling, we expressly held that the fact that, incidental to the purpose of the travel, files, documents, etc., are transported does not change the character of travel. See 38 Comp. Gen. 142 (1958); 40 *id.* 439 (1961); and B-163211, July 31, 1968, copy enclosed.

We note that Mr. Greco is an attorney. His duties are primarily to perform legal functions, not to transport documents. We recognize that in the course of performing duties, he will obtain documents, such as the affidavit herein involved. However, we believe that the transportation of such documents, while necessary to the performance of his duties, does not convert travel in returning to headquarters to hours of employment within the meaning of 5 U.S.C. 5542(b)(2)(B)(i). Therefore, Mr. Greco is not entitled to compensatory time.

You make the following additional inquiries:

In this area the General Counsel would like to explore another of the 1967 amendments to 5 U.S.C. 5542(b)(2)(B). The recently added criterion for premium pay for time spent while traveling raises questions concerning when travel is the result of "an event which could not be scheduled or controlled administratively." Both the term "event" and the scope of the phrase "could not be scheduled" create some problems in construction. I tend to construe "event" to mean anything at all that might cause a government employee to travel. I would think it would not have to be some positive occurrence or participation in some program—am I correct? As I have already mentioned, I also have difficulty with the phrase "could not be scheduled"—I assume that there is some latitude in the construction of this phrase even though it is written in the absolute. I assume that "could not" is relative to office work load and the practical realities of any given situation. Again, am I correct?

In Volume 50 of The Comptroller General's decisions, decision no. B-163654 dated January 26, 1971, you held that a determination that initial travel might be the result of an event which could not be scheduled or controlled administratively would not of itself qualify the return trip for premium pay. This holding could conceivably induce employees to stay in a hotel overnight, charge per diem and then travel back to duty station the following day during the normal tour of duty or perhaps could induce employees to simply put off work to be done at the permanent duty station to allow travel to be done during the normal tour of duty. Neither of these situations would be in the Government's interest and neither could be completely controlled by Agency monitoring or administration. Is it still the position of the Comptroller General that initial and return travel are to be justified separately when related to an administratively uncontrollable event?

The term "event" has been construed by this Office to include anything which necessitates an employee's travel. However, there must exist an immediate official necessity in connection with that event requiring the travel to be performed. Thus we have held, notwithstanding an official necessity for an employee's travel, that where the necessity is not so immediate as to preclude proper scheduling of travel the time in travel does not qualify as hours of employment. 50 Comp. Gen. 674 (1971). See also B–169078, April 22, 1970, and B–170683, November 16, 1970, copies enclosed.

The term "could not be scheduled" contemplates more than the fact that administrative pressures make scheduling in accordance with 5 U.S.C. 6101(b)(2) difficult or impractical. It does not however contemplate only emergency situations. For example, we have recognized that certain inspection and contract testing requirements may be beyond administrative control. 50 Comp. Gen. 519 (1971). The Federal Personnel Manual Supplement 990–2, Book 550, subchapter S–1 provides a discussion and illustrations of the nature of the events that may be considered to be beyond administrative ability to schedule or control. However, in 49 Comp. Gen. 209 (1969) we held that the necessity for performing repairs on ship equipment which had been gradually deteriorated by the sun was not an uncontrollable event and, notwithstanding the administrative considerations involved, that the time for scheduling the repair was completely within the agency's control.

In regard to your question concerning return travel, we have held and our opinion now is that although initial travel may fall within one of the conditions of subparagraph 5542(b)(2)(B) to qualify as hours of employment, the return travel must itself fall within one of those conditions in order to qualify the time involved as hours of employment. 50 Comp. Gen. 519 (1971); 50 *id.* 674 (1971). In light of the policy expressed in 5 U.S.C. 6101(b)(2) that to the maximum extent practicable travel should be scheduled within the regularly scheduled workweek of an employee we have also held that the per diem costs which might be necessary to comply with that policy are not considered unreasonable. B–169078, April 22, 1970. Assuming an uncontrollable event necessitates an employee's travel, notwithstanding that there is sufficient notice to permit scheduling of the travel during his regularly scheduled duty hours where such scheduling would result in the payment of at least 2 days additional per diem, travel may be required during those off duty hours and compensated for at overtime rates. 50 Comp. Gen. 674 (1971).

Mr. Greco has requested to be advised whether Federal employees can refuse assignments involving travel outside of their regular duty

hours which is not compensable at overtime rates. In enacting 5 U.S.C. 6101(b)(2) it is clear that the Congress intended that as a general practice travel should not be scheduled at times outside of an employee's regularly scheduled workweek, but at the same time it left to the discretion of the employing agency authority to determine when it is impracticable to schedule official travel within the scheduled workweek of an employee. Moreover, Congress failed to provide a remedy in the case where an agency fails to adhere to the policy enunciated in 5 U.S.C. 6101(b)(2), there being nothing in that section requiring or permitting the payment of compensation for travel outside an employee's regularly scheduled workweek.

When an employee is required to perform noncompensable travel outside of his regularly scheduled workweek the provision of section 610.123 of Title 5 of the Code of Federal Regulations should be complied with. That section provides:

> Insofar as practicable travel during nonduty hours shall not be required of an employee. When it is essential that this be required and the employee may not be paid overtime under § 550.112(e) of this chapter the official concerned shall record his reasons for ordering travel at those hours and shall, upon request, furnish a copy of his statement to the employee concerned.

In view of the above, the inability of an agency to schedule an employee's travel within his regular duty hours, regardless of the fact that the time in travel is not compensable as overtime, would not justify the employee's refusal to perform travel which is properly ordered.

[B-172937]

Bonds—Performance—Reduction—Consideration

The failure of the low offeror to submit a performance bond equal to 100 percent of the contract price by the time of contract award under a request for proposals to construct a mail facility that made the furnishing of the bond a condition of the contract and not a condition precedent to award does not affect the validity of the contract since the acceptance of the late performance bond reflects the longstanding practice that permits the furnishing of Miller Act bonds up to time of contract performance, and the general bond condition was met albeit in a lesser percentage amount with the valuable consideration of a price reduction moving to the Government. However, the procurement should have been resolicited to reflect the lesser penal amount, and future procurements should consider all statutory and regulatory bonding requirements, as well as the proposed guarantee provisions in paragraphs 18-801 and 10-102.4 of the Armed Services Procurement Regulation.

To the Secretary of the Army, May 11, 1972:

Reference is made to letter ENGGC-M dated September 17, 1971, and prior correspondence, from the General Counsel, Office of the Chief of Engineers, reporting on the Kidde-Briscoe joint venture protest against the award of contract No. DACW51-71-C-9005 to Terminal Construction Corporation and Associates, under request for

proposals (RFP) No. DACW51-71-R-0001 issued by the New York District, Corps of Engineers.

The RFP, as amended, requested proposals for the construction of the New York Metropolitan Bulk and Foreign Mail Facility at Jersey City, N.J. The closing date for receipt of proposals was April 28, 1971. With respect to the furnishing of bonds by offerors, the RFP provided:

> i. Payment and Performance Bonds: Within five days after the prescribed forms are presented to the offeror to whom award is made for signature, a written contract on the form prescribed by the specifications shall be executed and two bonds, each with good and sufficient surety or sureties acceptable to the Government, furnished; namely a performance bond (Standard Form 25) and a payment bond (Standard Form 25A). The penal sums of such bonds will be as follows:
>
> (1) Performance Bond. The penal sum of the performance bond shall equal 100 percent (100%) of the contract price. * * *.
>
> * * * * * * *
>
> (3) Any bonds furnished will be furnished by the contractor to the Government prior to commencement of contract performance.

However, the RFP did not require offerors to furnish a bid [proposal] guarantee as required by Armed Services Procurement Regulation (ASPR) 18-801.

Three proposals were received on schedule IX, the schedule on which the contract in question was awarded. The lowest proposal in the amount of $84,844,000 was submitted by the Terminal Construction Corporation and Associates. The next lowest proposal in the amount of $95,613,000 was submitted by Kidde-Briscoe. The third proposal in the amount of $102,896,000 was submitted by Grove, Shepard, Wilson & Kruge, Inc. The Government's estimate was in the amount of $77,084,000. A contract for the work covered by schedule IX was awarded, without discussions, to Terminal Construction Corporation and Associates on May 7, 1971. Terminal received its letter of award, including the prescribed forms of required performance and payment bonds and contract document on May 10, 1971. Terminal executed and returned the contract document which was then signed by the contracting officer; however, Terminal did not at that time furnish the required performance and payment bonds. On May 13, 1971, the contracting officer received a telegram from the attorney for Kidde-Briscoe protesting the making of an award to Terminal on the ground that it had not furnished a performance bond in the amount of 100 percent of the contract price as required by the RFP.

Thereafter, by letter dated May 27, 1971, Terminal submitted a request to the contracting officer to reduce the penal amount of the performance bond from 100 percent to 55 percent of the contract price and offered to reduce the contract price by $300,000 in return for the reduction. On May 28, 1971, the contracting officer forwarded the request of Terminal to higher authority for decision. Terminal's offer

of a $300,000 price reduction for lowering of the bond requirement was accepted and a notice to proceed was issued on June 16, 1971.

The question presented is whether the award made under these circumstances resulted in a valid contract notwithstanding Terminal's inability to furnish the required 100-percent performance bond. Upon review of the record as supplemented by argument of counsel, we conclude that the award is not subject to legal objection by our Office since, by the terms of the RFP, the 100-percent bond was not a condition precedent to the award but, rather, was a condition of the contract. Compare 47 Comp. Gen. 1, 2 (1967). The general bond condition was met by Terminal albeit in a lesser percentage amount than that solicited but with valuable consideration ($300,000) moving to the Government to support the penal sum reduction to 55 percent.

Although ASPR 18-802 and the Miller Act (40 U.S.C. 270a(a)) are inconsistent as to the time when the bond must be furnished, we need not resolve that inconsistency since the late furnishing of a performance bond by a contractor need not be regarded by the procurement agency as a default. *Cf.* 47 Comp. Gen. 1, 3 (1967). Also, ASPR 18-802 reflects the longstanding practice of the procurement agencies to permit the furnishing of Miller Act bonds up to a time when performance of the contract is to commence. While the concept of fairness inherent in competitive procurement would ordinarily dictate a termination of the contract upon default on the obligation to furnish a performance bond in the penal amount of $84,844,000, we cannot conclude that the award was a nullity. The post-award actions taken were not beyond the scope of normal contract management responsibilities nor did they represent patently illegal acts under the military procurement statute and implementing regulations.

Since, as appears to be the case, a performance bond in a penal amount less than that solicited adequately protects the Government's interest, we believe that under the principles of competitive negotiated procurement it would have been better procedure to provide for a resolicitation of the procurement to reflect a reduction in bond penal sum. This, we feel, is the import of ASPR 3-805.1(e) whereunder all interested firms, including those who participated initially, would be invited to submit offers on the construction requirements as modified insofar as Miller Act bonds are concerned. In the instant case, however, it appears unlikely that any competing offeror was prejudiced by the post-award events in view of the more than $10 million difference between the two low offers. Thus, further negotiation efforts under amended bond requirements could not reasonably be expected to have affected the competitive standing of the offerors.

Furthermore, we note that the procurement activity failed to comply with the bid [proposal] guarantee provisions of ASPR 18-801 and 10-102.4. Had proposal guarantees been required and furnished in all probability this protest would not have resulted.

While we conclude that no corrective action need be taken with respect to the Terminal award, we strongly recommend that responsible procurement officials be apprised of the circumstances giving rise to this protest and of the necessity to comply with all statutory and regulatory bonding requirements in future construction solicitations.

[B-174387]

Orders—Amendment—Retroactive—Travel Completed

The retroactive amendment of orders authorizing travel by privately owned vehicle and directing group travel pursuant to paragraphs M4100 and M4104 of the Joint Travel Regulations after the performance of temporary duty at an ROTC summer camp to delete the group travel requirement entitles members traveling by privately owned vehicles to the allowance prescribed by paragraph M4104 of the regulations since the general rule that travel orders may not be revoked or modified retroactively to increase or decrease accrued or fixed rights after the performance of travel does not apply when orders are modified within a reasonable time to correct an administrative error or complete orders to show original intent, and the deletion of the group travel requirement reflects the intent that members who were permitted to travel by privately owned conveyandces were exempt from group travel.

To Lieutenant Colonel W. J. Duffy, Department of the Army, May 15, 1972:

Further reference is made to your recent undated letter, reference AJDFO, with attachments, requesting an advance decision as to the propriety of payment on a voucher in favor of Private First Class Neil R. Sand, 272-44-1974, covering travel by privately owned vehicle from Fort Bragg, N.C., to Indiantown Gap, Pa., to support First U.S. Army Advanced ROTC Summer Camp. Your request has been assigned Control No. 72-3 by the Per Diem, Travel and Transportation Allowance Committee.

Elements of the 82d Airborne Division, Fort Bragg, N.C., were required to perform temporary duty at Indiantown Gap Military Reservation, Pa., during the period from June 1 to August 6, 1971. Under the provisions of Directive LOI No. 1, Support of First U.S. Army Advanced ROTC Summer Camp at Indiantown Gap Military Reservation (IGMR) CY 71, dated April 5, 1971, members were authorized to travel by privately owned vehicles subject to the discretion of the Commanding Officer, First Brigade.

Letter dated April 28, 1971, of Headquarters First Brigade, 82d Airborne Division, authorized personnel deploying to Indiantown

Gap Military Reservation to take privately owned vehicles provided they met the criteria set out in that letter and secured the approval of their unit commander. You say that such provisions were met and verbal approval of unit commanders was received.

However, paragraph 1 TC 405 of Letter Order 06–0954, dated June 2, 1971, directing Private Sand and three others to proceed on temporary duty to Indiantown Gap Military Reservation, Pa., on or about June 3, 1971, for approximately 119 days, authorized but did not direct travel by privately owned vehicle and directed group travel under the provisions of paragraphs 4100 and 4104, Joint Travel Regulations. By paragraph 1 TC 469 of Letter Order 09–1857 dated September 24, 1971, paragraph 1 of Letter Order 06–0954 was amended to delete that portion of the orders directing group travel.

It is apparent that a large number of the members involved in the support program traveled separately from the convoy in their privately owned vehicles. You intimate that orders were not issued to indicate those members authorized to travel separately and those directed to perform group travel. Accordingly, you raise the following questions:

a. Does the directed group travel instructions take precedence over travel by POV authorized?

b. If above is affirmative, is the amended order considered of doubtful validity in view of commanders' intentions to permit travel by POV as noted in inclosures 1 and 2, published prior to commencement of travel.

c. If above is negative, may this voucher and all other vouchers submitted by personnel under like circumstances involving TDY to IGMR be paid administratively by this office.

d. If above is negative may claims be submitted on DD Form 1351–6 (Multiple Travel Payment List) in lieu of individual claims in view of the fact that over 400 personnel are involved.

Paragraph M4100 of the Joint Travel Regulations defines "group travel" as a movement of three or more members traveling in a group for which transportation will be furnished by Government conveyance or Government transportation request from the same point of origin to the same destination under one order which is specifically designated by the order-issuing authority as a "group travel order."

Paragraph M4101, setting out guidelines in prescribing group travel, provides that the guidelines should not be imposed merely for economy as being in the best interests of the Government but consideration should also be given the needs of the individual. Paragraph M4104 provides that orders covering group travel should not ordinarily include members authorized or permitted to travel separately from the group but that when a member who is specifically authorized by the order-issuing authority to travel separately from the group is included in the group travel orders he shall be entitled to proper travel allowances for that travel.

Paragraph M4203-3 of the regulations provides that when authorized travel is performed at personal expense, the member will be reimbursed a monetary allowance in lieu of transportation at the rate of $0.05 per mile for the official distance. Paragraph M4204-5 provides that when travel orders do not state that travel by privately owned conveyance is more advantageous to the Government, per diem is payable for travel by privately owned conveyance for the time actually consumed not to exceed that payable for constructive travel over a usually traveled route by air or surface common carrier whichever more nearly meets the requirements of the orders and is more economical to the Government.

In this case it appears that the majority of the men involved in the support program were required to move by convoy. However, members whose privately owned vehicles met the criteria established by the brigade commander were permitted to take them to the Indiantown Gap Military Reservation. While it has not been shown that those members whose privately owned vehicles passed the inspection were issued individual travel authorizations as in the case of Private Sand and the three others covered by Letter Order 06-0954, it seems clear that the members whose vehicles were registered and tagged with IMGR temporary stickers were permitted to travel separately from the group at their own expense.

It is the general rule that travel orders may not be revoked or modified retroactively so as to increase or decrease the rights which have accrued or become fixed under the laws and regulations when travel has already been performed. Exceptions to that rule have been recognized where such modifications are made within a reasonable time after the issuance of the basic orders in order to correct an administrative error or complete orders to show the original intent. 23 Comp. Gen. 713 (1944); 24 *id.* 439 (1944); 34 *id.* 355 (1954). The deletion effected by Letter Order 09-1857, merely corrected the travel order to reflect the original intention that members permitted to travel by personally owned conveyance were not required to travel with the rest of the group. Consequently, under the provisions of paragraph M4104 of the regulations, those members would be entitled to travel allowances as appropriate to such travel on an individual basis. Accordingly, question a is answered in the negative and question b requires no answer. Question c is answered in the affirmative and hence question d requires no answer.

In view of the above, the voucher, which is returned, may be paid, if otherwise correct.

[B-174907]

Contracts—Awards—Small Business Concerns—Set-Asides—Withdrawal—Bid Prices Excessive

The withdrawal of a small business set-aside pursuant to paragraph 1-706.3 of the Armed Services Procurement Regulation (ASPR), cancellation of the request for quotations, and resolicitation of the procurement to overhaul and modify aircraft propeller components from both large and small firms were not arbitrary actions where on the basis of a quote—not a "courtesy offer"—from a small business concern prior to the correction of the standard industrial classification which changed its status to large business, the contracting officer determined limiting quotations to small business would be detrimental to the public interest, a reasonable determination notwithstanding the withdrawal notice did not literally comply with ASPR 1-706.3(a), or that before the withdrawal, discussions were not held with all small business firms within a competitive range (ASPR 3-805.1(a)), or that a late price reduction by a small firm was not considered.

To Earl P. Dolven, May 15, 1972:

Reference is made to your letter dated April 12, 1972, with enclosures, and prior correspondence, on behalf of The Golden Propeller Corp., protesting the action taken by the contracting officer in withdrawing the small business set-aside, canceling request for quotations (RFQ) No. F09603-72-Q-0216, and resoliciting the requirement from large and small business firms. You state that Golden Propeller is a small business concern for the purposes of this procurement and is the incumbent contractor.

The subject RFQ, issued on August 6, 1971, invited quotations for the furnishing of services and supplies required to accomplish overhaul and modification of propeller components applicable to the O-2A, U-10 and QU-22B aircraft. The procurement was totally set aside for participation by small business under standard industrial classification (SIC) code 3723 under which a small business concern is one which employs not more than 1,000 employees. Prior to the November 8, 1971, date for receipt of offers, Golden Propeller appealed the use of SIC code 3723 to the Size Appeals Board in Washington, D.C. On September 2, 1971, the Size Appeals Board ruled that the correct SIC code is 4582 under which a small business concern is one with average annual receipts not exceeding $1 million for the previous 3 fiscal years. The contracting officer appealed this ruling but the Chairman of the Size Appeals Board in a letter dated October 15, 1971, advised the contracting officer that the Board found no basis for changing its decision. Therefore, the contracting officer amended the solicitation on October 28, 1971, to comply with the Board's ruling.

Prior to amendment of the RFQ establishing the new SIC code, a quotation was received from Propeller Service of Miami, Inc., which is classified as a large business under SIC code 4582. After the receipt

of offers, it was determined that the quote from Propeller Service of Miami was substantially less than the offer received from any other source. Also, offers from other sources were far in excess of the Government's estimate for the procurement. For these reasons, the contracting officer determined that the prices offered by small business offerors were unreasonable.

On January 4, 1972, all offerors were advised that the subject RFQ was being canceled in order that a resolicitation may be issued to firms both "large" and "small." Offerors were advised that the set-aside for small business "is withdrawn in accordance with ASPR 1-706.3." The procurement was resolicited with a closing date for receipt of proposals set for January 24, 1972. The proposals received are being held unopened pending a decision on the protest by our Office.

You contend that the contracting officer has totally ignored the Small Business Administration (SBA) notice requirements of Armed Services Procurement Regulation 1-706.3(d) governing the withdrawal of a small business set-aside. SBA also protests the decision of the contracting officer to withdraw the set-aside prior to SBA's ruling on the size status of three of the offerors.

The contracting officer reports that on November 15, 1971, the attorney for Golden Propeller was furnished the names of the offerors submitting quotations and protested to the contracting officer the consideration of any offer submitted by Propeller Service of Miami on the ground that the firm was large business. Golden Propellor also protested any award to either Aircraftsmen, Inc., or Propellers Inc., on the same basis and pursuant to ASPR 1-703.

The contracting officer, prior to submitting your protest to the SBA for a ruling on size determination, reviewed and evaluated the quotations of Golden Propeller, Propellers Inc., Aircraftsmen, Inc., and Propeller Service of Miami, Inc., and concluded that the only reasonable quote was submitted by Propeller Service of Miami. This firm submitted a quotation on August 23, 1971, as a small business under SIC code 3723 under which the RFQ was first issued.

Propeller Service of Miami advised that the new SIC code resulted in its firm being considered large business. The contracting officer reports that Aircraftsmen, Inc., failed to acknowledge receipt of the RFQ amendment effecting the change in the SIC code. Upon inquiry, Aircraftsmen acknowledged that under the new SIC code it was eliminated since it would then be considered "large" business. This left the size status of Propellers Inc. undetermined by any means. The contracting officer, at that point in time, did not consider it necessary for him to refer the matter to SBA for determination of the size

status of either Aircraftsmen or Propeller Service of Miami since both admitted to "large" business status under the new SIC code. He also considered it useless to do so with regard to Propellers Inc. since his decision to withdraw the set-aside would not be affected regardless of the size status of Propellers Inc.

On December 20, 1971, subsequent to the contracting officer's decision to withdraw the set-aside and at the SBA's recommendation, the contracting officer requested SBA to determine the size of the three protested offerors. In a report from SBA, we are advised that on December 29, 1971, the SBA District Office, Oklahoma City, Okla., determined that Aircraftsmen was not a small business concern. On January 10, 1972, the SBA Regional Director, Seattle, Wash., determined that Propellers Inc. was a small business concern.

The question for our consideration is whether the contracting officer acted properly in canceling the solicitation and withdrawing the set-aside for exclusive small business offerors. You state that the contracting officer did not furnish the SBA with the written notice of intent to withdraw the set-aside as required by ASPR 1–706.3. ASPR 1–706.3(a) provides in pertinent part as follows:

> * * * If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (*e.g.*, because of unreasonable price), he may withdraw a unilateral or joint set-aside determination by giving written notice to the small business specialist, and the SBA representative if available, stating the reasons for the withdrawal. * * *.

By letter dated December 15, 1971, the contracting officer advised the SBA Atlanta Regional Office of his intent to withdraw the small business set-aside since a reasonable price had not resulted when the solicitation was limited to small business firms. Although this notice was not sent to either of the individuals designated in the regulation, it is our understanding that it was sent to the regional office at the request of the small business representative at Robins Air Force Base. Thus, while the regulation was not literally complied with, the fact remains that the SBA was provided with an opportunity to appeal the contracting officer's determination and did not do so within 2 working days as required by ASPR 1–706.3(d). Further, the contracting officer, by letter of January 3, 1972, provided SBA with a second opportunity to appeal by the close of business that day and again no appeal was taken. In the circumstances, we conclude that the SBA was furnished with an adequate opportunity to appeal the contracting officer's determination despite the fact that the notice requirement did not meet the literal requirement of ASPR 1–706.3(a).

We agree, as a general proposition, that, in keeping with the provisions of ASPR 3–805.1(a), discussion should be conducted with all

small business offerors within a competitive range in a total small business set-aside prior to deciding whether to withdraw the set-aside because of the receipt of unreasonable prices on initial proposals from all offerors. In the present case, the contracting officer would have been required to obtain a size ruling from SBA prior to conducting discussions in view of Golden Propeller's protest that certain other offerors were large business concerns. However, the contracting officer was of the opinion that this would have been a useless delay since, regardless of the size ruling, within all probability meaningful discussions leading to reasonable prices from small businesses could not have been conducted. Since the initial prices received from sources other than Propeller Service of Miami were grossly excessive when compared to the Propeller Service of Miami proposal and the Government estimate for the procurement, the contracting officer's decision not to refer the small business size protest to SBA and not to conduct negotiations appears reasonable in the circumstances.

Further, Golden Propeller's telegraphic modification of December 7, 1971, reducing its prices by approximately 30 percent was a late modification which the contracting officer was not required to consider. The record indicates that this reduction in price was submitted after telephonic advice on December 6, 1971, that it was the intention of the office of the Director of Procurement at Robins Air Force Base to cancel the solicitation on December 8, 1971. The contracting officer states that in deciding not to conduct negotiations with any of the "small" businesses involved, he considered Golden Propeller's reduced price proposal and he realized that negotiations might have resulted in some reductions, but he could not find a reasonable expectation that such reductions could produce prices as reasonable as those expected through resolicitation in open competition. Known large business sources which had been originally excluded from the procurement due to its set-aside nature included the original manufacturer of the equipment. The record indicates that Golden Propeller's reduced price proposal exceeded the Government estimate and was substantially higher than that of Propeller Service of Miami. This revised quote did not offer any substantive basis for a change in the contracting officer's previous decision. Under these circumstances, we believe the contracting officer's decision not to conduct negotiations was justified. Further, we find no legal basis to question the contracting officer's decision that limiting quotations to small business firms is detrimental to the public interest.

The SBA in a report to our Office contends that the offer of Propeller Service of Miami was a "courtesy" offer and is nonresponsive.

The SBA refers to decisions of our Office where we have held that the receipt of lower prices from firms which are ineligible for award is insufficient standing alone to require a conclusion that the prices submitted by eligible bidders are unreasonable. 46 Comp. Gen. 102, 106 (1966); B–168534(1) and (2), January 16, 1970; 50 Comp. Gen. 759 (1971). The record indicates that the contracting officer's decision to withdraw the set-aside was based on proposal information resulting from initial quotations received under the original small business definition as well as an independent estimate by the Government. At that time the proposal submitted by Propeller Service of Miami was not a courtesy proposal and the contracting officer was justified in considering its price and the Government estimate in arriving at his decision to withdraw the set-aside. We do not consider that the withdrawal of the small business set-aside was arbitrary in any respect. B–151741, July 30, 1963.

Accordingly, we believe that the cancellation of the RFQ and resolicitation constituted a reasonable exercise of administrative discretion vested in the contracting officer and the protest is therefore denied.

[B–175525]

Contracts—Subcontracts—Make-or-Buy Proposals of Prime Contractors—Government Participation in Subcontracting

Under a make-or-buy proposal by a prime contractor pursuant to a request for proposals to furnish launch vehicles, the participation of the National Aeronautics and Space Administration (NASA) in the negotiation of the second step engine with subcontractors does not make the prime contractor an agent of NASA so as to subject the subcontracting to the Government's procurement statutes and regulations, for in a make-or-buy program as defined in NASA PR 3.901–1, the Government buys management, including placing and administering subcontracts, from the prime contractor along with goods and services to assure performance at the lowest overall cost, with the right of review reserved in the Government. Therefore, the essential point is not the selection of the subcontractor but the make-or-buy decision, and the record shows NASA thoroughly analyzed the various technical aspects involved in the prime contractor's proposal, including the relative merits of two different subcontractor design configurations.

To Vom Baur, Coburn, Simmons & Turtle, May 16, 1972:

We refer to your letter dated March 23, 1972, and subsequent correspondence protesting on behalf of Aerojet Liquid Rocket Co., a division of Aerojet-General Corp. (Aerojet), against the proposed award of a subcontract under McDonnell Douglas Astronautics Co. (McDonnell), request for proposals (RFP) No. A3–152–72–DSM–121, issued on February 7, 1971. McDonnell is currently negotiating with the National Aeronautics and Space Administration (NASA)

under RFP No. NP–71–2 issued on April 30, 1971, for the procurement, on a sole source basis, of 15 Delta launch vehicles. The subject McDonnell RFP, which was issued to Aerojet, contemplated a "follow on" subcontract for 15 stage II rocket engine systems. We are informed that stage II of the Delta launch vehicle has been designed and developed by Aerojet under a research and development contract, and for the past 11 years Aerojet has been the sole source supplier of stage II systems to the prime contractor, McDonnell.

In response to the subject McDonnell request, Aerojet provided a rough price estimate of $912,000 per second stage, which McDonnell appears to have considered too high. Both NASA and McDonnell then decided to consider and actively seek an alternative approach to the second stage engine. After considering a number of other sources for the engine, all of which were determined to be unacceptable either from a cost or performance standpoint, McDonnell discussed with TRW, Incorporated (TRW), the possibility of utilizing TRW's Lunar Module Descent Engine (LMDE) in the Delta second stage. The record indicates that the Apollo Service Module Engine manufactured by Aerojet was included among the sources considered by McDonnell. We are informed that it was rejected by McDonnell based on considerations of weight and thrust.

On May 28, 1971, Aerojet provided McDonnell with two price proposals, one at $847,000 per stage and the other at $771,000 per stage. Initial negotiations reduced the Aerojet proposal to $750,000 per stage. Negotiations continued until August 11 when Aerojet submitted a firm price of $709,000. At this point McDonnell, apparently feeling that the price could not be negotiated downward, advised NASA that it had reached an impasse in the negotiations with Aerojet. NASA personnel, with the consent of McDonnell, then discussed the negotiation problems with Aerojet. Subsequently, NASA informally authorized a feasibility study by McDonnell on the use of the TRW LMDE engine. On September 15, Aerojet submitted a revised proposal to McDonnell lowering its price to $575,000 per unit based on certain changes in scope and technical requirements. Aerojet states that it was encouraged by McDonnell to propose these changes; however, it is clear from the record that McDonnell was not satisfied with Aerojet's revised proposal.

On September 21 TRW submitted its formal proposal to McDonnell for the delivery of 15 LMDE engines, the first 8 of which were to be Government-furnished property. This approach was then incorporated in McDonnell's "make or buy" proposal submitted to NASA. The make-or-buy proposal contemplated a change from the arrangement used in its prior contract (under which the propulsion unit consist-

ing of tanks, piping, and airframe needed for the Delta second stage, as well as the second stage engine, were subcontracted to Aerojet, to which McDonnell then added the guidance and control systems and provided the required integration, checkout, and launch services) to an arrangement under which McDonnell would subcontract the engine to TRW and assemble the entire second stage itself, as well as provide associated support effort. We are advised that under the prior arrangement McDonnell did one-third of the work while Aerojet did two-thirds, whereas under the new proposed arrangement McDonnell would do two-thirds and TRW would do one-third.

NASA then established a board to evaluate McDonnell's make-or-buy proposal. This board determined that the McDonnell/TRW proposal was technically feasible.

At the urging of NASA personnel and concurrent with NASA's evaluation of McDonnell's make-or-buy proposal, negotiations were resumed in late January 1972 between McDonnell and Aerojet. Finally, on February 11, 1972, McDonnell and Aerojet negotiated a "not to exceed" unit price of $682,000; however, neither party accepted the other's proposed agreement. Meanwhile, McDonnell had submitted its make-or-buy plan which NASA is proposing to approve as part of the award of the prime contract to McDonnell. You urge that Aerojet should be given further opportunity to negotiate with NASA on stage II.

In this regard you contend that NASA has so involved itself in this procurement that McDonnell in effect acted as a mere agent of NASA, rather than an independent contractor and therefore in accordance with B–170324, April 19, 1971, this procurement is subject to the Government procurement statutes and the implementing regulations. You submit that even if the procurement statutes do not literally apply to this procurement, it should nevertheless be judged by the Federal standards. You urge that the matter should be viewed in the framework of a competition between Aerojet and McDonnell for the second stage.

Based on the above-cited premise, you assert that McDonnell's actions in obtaining Aerojet's technical and cost proposals and utilizing them as a base upon which to develop its make-or-buy proposal constitute a violation of the prohibition against the use of an auction technique contained in NASA PR 3–805.1(c) and a violation of the NASA policy against "transfusion" of information between competitors as evidenced by NASA Procurement Regulation Directive No. 70–15, dated December 1, 1970. In addition you allege that McDonnell's position as judge of the Aerojet proposal and advocate of its own make-or-buy proposal evidences an irremediable conflict of interest.

NASA, on the other hand, is of the view that since a make-or-buy proposal is the focal point of this controversy the situation is to be evaluated within the framework of the regulations applicable to such proposals. A make-or-buy program is defined by NASA PR 3.901–2(a) as that part of a contractor's written plan for the development of an end item which identifies the major subsystems, assemblies, subassemblies, and components to be manufactured, developed, or assembled in his own facilities, and those which will be obtained elsewhere by subcontract.

The general policy in regard to these programs is set forth as follows in NASA PR 3.901–1:

General. The Government buys management from the prime contractor along with goods and services, and places responsibility on him to manage programs to the best of his ability, including placing and administering subcontracts as necessary to assure performance at the lowest overall cost to the Government. Although the Government does not expect to participate in every management decision, it may reserve the right to review the contractor's management efforts, including the proposed make-or-buy program. In reviewing the content of the proposed make-or-buy program effort should be made to have the prime contractor establish any new facility in or near sections of concentrated unemployment or underemployment and in areas of persistent or substantial labor surplus.

The evaluation of these programs is to be conducted in accordance with the standards promulgated by NASA PR 3.901–3(b):

(b) In reviewing and evaluating a proposed make-or-buy program, the contracting officer shall assure that all appropriate items are included and shall delete items which should not be included. In conducting his review, the contracting officer shall obtain the advice of appropriate personnel including technical, small business and labor surplus area specialists, whose knowledge would contribute to the adequacy of the review. During such review primary consideration shall be given to the effect of the contractor's proposed make-or-buy program on price, quality, delivery, and performance. The contractor has the basic responsibility for make-or-buy decisions. The contractor's recommendations shall therefore be accepted unless they adversely affect the Government's interest or are inconsistent with Government policy. The evaluation of "must make" and "must buy" items should normally be confined to that necessary to assure that the items are properly categorized. The effect of the following factors on the interests of the Government shall also be considered:

(i) whether the contractor has justified the performance of work in plant which differs significantly from his operations;

(ii) the consequence of the contractor's projected plant work loading with respect to overhead costs;

(iii) the contractor's consideration of the competence, ability, experience, and capacity available in other firms, especially small business and labor surplus area concerns (this is particularly significant if the contractor proposes to request additional Government facilities in order to perform in-plant work);

(iv) the contractor's make-or-buy history as to the type of item concerned;

(v) whether small business and labor surplus area concerns will be able to compete for subcontracts; and

(vi) other elements, such as the nature of the items, experience with similar items, future requirements, engineering, tooling, starting load costs, market conditions, and the availability of personnel and materials.

The extent to which the statutes and regulations governing procurements by the Government apply to the award of subcontracts depends

on the particular facts and circumstances of the case. See 49 Comp. Gen. 668 (1970). In this case, we do not agree that the selection of a subcontractor is primarily at issue; rather, we believe with NASA that the essential point is the make-or-buy decision.

As NASA PR 3–900(b) states, although there is a relationship between the review and approval of a prime contractor's make-or-buy program and the review and approval of his subcontracting program, each is a separate and distinct action and the factors to be considered in each vary. Therefore, we think the propriety of a contracting agency's approval of a contractor's make-or-buy program should be judged in the context of the rules and regulations applicable to such actions, and not in the context of a subcontract award or of a direct Government contract award.

In the context of the regulations governing the submission and evaluation of make-or-buy proposals it is clear that the prime contractor has the basic responsibility for make-or-buy decisions (see NASA PR 3.901–3(b)). It is the contractor's responsibility to develop and present to the Government all of the relevant information in regard to the impact of the make-or-buy decision upon the price, quality, delivery and performance of the prime contract. Where the proposal involves the replacement of an incumbent subcontractor, the prime contractor must evaluate the cost and technical factors implicit in such a change. To facilitate this evaluation the prime contractor reasonably would attempt to obtain the latest cost and technical information from the incumbent subcontractor. It is, of course, clear that the incumbent subcontractor is under no obligation to supply this information. We know of no limitation on the prime contractor's right to use such information in arriving at a make-or-buy decision. Any limitation which did exist would be a matter between the prime contractor and the subcontractor over which the Government agency would have no proper jurisdiction. *Cf.* B–158125, June 30, 1966.

Next you attack the adequacy and validity of NASA's evaluation of McDonnell's make-or-buy proposal. In regard to the NASA cost evaluation you allege that no accurate price comparison could have been made because the most recent McDonnell RFP merely specified a "not to exceed" price subject only to downward negotiations. In addition, you allege that Aerojet is willing at this time, and has always been willing, to negotiate a price directly with NASA.

The record indicates that price has been the subject of negotiations between Aerojet and McDonnell since May 1971. In addition, both McDonnell and NASA have the benefit of a cost history of the Delta second stage reaching back 11 years. Although Aerojet maintains that their lowest price has been withheld from McDonnell lest that informa-

tion be used to McDonnell's advantage, we are not prepared to conclude in the circumstances that NASA did not possess sufficient information to conduct an accurate cost analysis.

Any offer by Aerojet to negotiate directly with NASA is not subject to our review. The course of action is open to NASA and its good faith decision in regard to Aerojet's offer will not be questioned by us from a legal standpoint.

Next you assert that McDonnell has received an unfair cost advantage because of NASA's approval of the use of eight excess LMDE engines as no-cost Government furnished property (GFP). You allege that McDonnell's should-cost figure for the Aerojet engine is actually less than the cost of the TRW engine if the GFP engines are not made available to McDonnell. You state that McDonnell's should-cost figure cannot be accurate because neither McDonnell nor NASA obtained a quote from Aerojet based on the engine alone.

We have been informed by NASA that, based on the latest price negotiated between McDonnell and TRW (lower than the price indicated in NASA's initial report), the cost of the TRW engine without the benefit of the GFP is lower than the "should cost" figure of $287,000 for the Aerojet engine. In addition, a thorough analysis showed that the McDonnell proposal enjoyed a cost advantage regardless of the GFP. Concerning the alleged inaccuracy of McDonnell's "in-house study" of the cost of the Aerojet engine, this is essentially a management judgment and we cannot conclude that either McDonnell or NASA should have obtained a proposal from Aerojet as part of this "in-house study," particularly in view of the circumstances at the time.

Next you assert that since Aerojet's design is flight proven and has a record of extremely high reliability, NASA's selection of the McDonnell/TRW design is erroneous because its system has never been developed, much less flown. In this connection, attention has been called to our report to the Congress, B–163058, dated November 19, 1970, entitled "Adverse Effects of Large-Scale Production of Major Weapons Before Completion of Development and Testing," where we were critical of contracting decisions to go into production before completion of full scale testing. We concluded in this report that since the consequences of concurrency could seriously affect cost and readiness, it was prudent to limit its use to those cases where the risk was necessary and there was a good chance of success. It is suggested that in this case prudence dictates continued use of the "flight proven" Aerojet design thereby avoiding the problems of concurrency inherent in the alternate approach.

Our report to the Congress primarily dealt with the problem of concurrency in the development and large-scale production of new major weapon systems. In the instant case we are concerned with a relatively small number of production units (15) based on components which have been in production and use for a number of years. We do not think the criticisms and recommendations contained in our report are particularly applicable to this procurement action.

It is basically your contention that the flight proven Aerojet design should be preferred by NASA over the unproven McDonnell/TRW design. You support this contention by a point-by-point rebuttal of NASA's technical evaluation of the McDonnell/TRW design, and you refute McDonnell's and NASA's technical criticisms of your system.

In regard to the technical evaluation of the subject make-or-buy proposal it has long been the policy of this Office, even in reviewing procurements subject to the full force of the procurement statutes and regulations, that the agency has broad discretion in evaluating technical proposals. Where, as here, a reasonable difference of opinion exists in regard to the relative technical merits of two design configurations, we will not substitute our judgment for that of the agency unless it is clear from the record that the agency is in error. See 51 Comp. Gen. 621 (1972).

The record shows that NASA conducted a thorough and complete analysis of the various technical aspects involved in the approval of McDonnell's proposal. Although you offer arguments purporting to refute NASA's evaluation we cannot conclude that the agency's approval of the McDonnell proposal was arbitrary.

Based on a thorough consideration of the record before us we find no legal basis upon which we may object to the agency's approval of McDonnell's make-or-buy proposal.

[B–174529]

Contracts—Negotiation—National Emergency—"One or More" Awards—Maintenance of Supply Sources

Notwithstanding a request for proposals (RFP) for fuze grenades provided for two contract awards in order to retain two sources of supply in the event of unforeseeable contingencies, a single award, pursuant to an amendment to the RFP, in view of changed circumstances to the offeror who submitted both the proposal solicited and an unsolicited proposal on the basis of a savings to the Government is not prohibited, even though 10 U.S.C. 2304(a)(16), under which the procurement was negotiated, indicates price need not control when the national defense is involved, since neither the determination and findings nor the RFP states the maintenance of production capacity requires current production by more than one contractor where the Government is assured of support for the immediate and long range logistics associated with the required item. Furthermore, in determining the low offer, the use of Government facilities was evaluated.

Contracts—Awards—Labor Surplus Areas—Set-Aside—One Concern Only Qualified

In view of paragraph 1-804.1(a)(1)(ii) of the Armed Services Procurement Regulation, which provides that a partial labor surplus area set-aside shall not be made if there is a reasonable expectation that bids or proposals will be received from no more than two concerns with technical competency and productive capacity and only one of the concerns will qualify as a labor surplus area concern, a labor surplus area set-aside was properly not provided for the procurement of fuze grenades under the authority of 10 U.S.C. 2304(a)(16) since only one of two qualified concerns was a labor surplus area concern. Furthermore, whether the criteria to set aside a portion of a procurement for labor surplus area concerns has been satisfied in a given case is largely within the discretion of the contracting authority.

To Scovill Local 1604, May 18, 1972:

Reference is made to your telefax dated November 11 and your letter dated November 19, 1971, protesting the award of a contract to Honeywell, Inc., under request for proposals (RFP) DAAA09-71-R-0156, issued by the U.S. Army Munitions Command (MUCOM), Joliet, Ill.

The RFP was issued on June 15, 1971, for the procurement of 17,988,700 Fuze Grenade, M219E1. Proposals were requested on several alternate quantities and monthly delivery rates, which would result in a total monthly delivery rate of 3.4 million units. The following clause appeared with reference to the number of awards contemplated:

> Since this requirement is critical to the support of Southeast Asia, the Government must make two awards to avoid discontinuity of supply in the event of strikes, acts of God or other unforeseeable contingencies. This solicitation and the range of quantities and delivery rates proposed are for the purpose of selecting two awards which will satisfy current production with two suppliers * * *.

This clause was based on the direction included in a telegram from the Project Manager for Selected Ammunition, U.S. Army Materiel Command, to MUCOM, dated June 7, 1971, that the solicitation specify a minimum of two awards. The rationale for this position was expressed as follows:

> It is considered imperative at this time to retain two sources of supply not only to assure support of SEA [Southeast Asia] operations in the face of contingencies but also to permit satisfaction of fluctuating requirements which may exceed the capacity of only one producer.

The companies responding to the RFP by the opening date of July 30, 1971, were Honeywell, Incorporated (Honeywell), Scovill Manufacturing Company (Scovill), and Pace Company (Pace). A price evaluation was conducted only on the offers submitted by Honeywell and Scovill because of the comparatively high price offered by Pace.

The total low evaluated price for two suppliers to furnish 17,988,780 units in accordance with the RFP was $4,337,570.11. Awards at this total price would have obligated Honeywell to furnish a quantity of 13,100,000 units at a monthly rate of 2,500,000 units and would have obligated Scovill to furnish a quantity of 4,888,780 units at a monthly rate of 900,000 units. In addition to its proposal pursuant to the RFP,

Honeywell submitted an unsolicited proposal for the total procurement quantity of 17,988,780 units at a total evaluated price of $3,919,683.21. The savings to the Government in awarding the entire procurement to Honeywell would have been $417,886.90. As a result of this price analysis, a request was made by MUCOM to the Project Manager for Selected Ammunition for reaffirmation of the requirement for two awards.

By telegram dated September 24, 1971, the Project Manager advised that:

> In light of potential savings, this office has examined current end item production schedules and reviewed future requirements with AF HQ. This office concurs that only one award should be made at this time for the total quantity of 17,988,780 provided the following steps are taken to minimize risk:
>
> A. Expedite necessary resolicitation and subsequent procurement actions to reduce loss of lead time.
>
> B. During resolicitation, conduct an engineering evaluation to establish whether contractor proposing to deliver 3.4 million fuzes per month can attain and maintain this rate without jeopardizing quality.

On September 27, 1971, Amendment 0004 to the subject RFP was issued. In light of an additional funded requirement for M219E1 fuzes, the amendment increased the total quantity by 22,275,000 units to 40,263,780 units, but it did not change the total monthly delivery rate of 3.4 million units. In addition, it deleted the requirement for awarding a minimum of two contracts and advised that the Government reserves the right to make one or more awards on the total quantity or any portion thereof, price and other factors considered.

The three original offerors under the RFP resubmitted proposals pursuant to Amendment 0004. Because of the price spread between the proposal of Pace and that of Honeywell and Scovill, an evaluation was again conducted only on the proposals of the two low offerors. The following is the result of that evaluation and the potential award combinations:

Contractor	Quantity	Unit Price	Total Contract Amount
Honeywell	29, 700, 000	$. 25498	$7, 572, 906
Scovill	10, 563, 780	. 31980	3, 378, 297
Total evaluated price			10, 951, 203
Honeywell	26, 100, 000	. 26579	6, 937, 119
Scovill	14, 163, 780	. 30057	4, 257, 207
Total evaluated price			11, 194, 326
Honeywell	20, 131, 890	. 27803	5, 597, 269
Scovill	20, 131, 890	. 28037	5, 644, 378
Total evaluated price			11, 241, 647
Honeywell	40, 263, 780	. 245	9, 864, 626

Based upon Honeywell's evaluated proposal for the entire procurement quantity, and a determination that Honeywell can manufacture 3.4 million units per month, a single award was made to Honeywell. The award to Honeywell resulted in a savings to the Government of $1,086,577 over the lowest cost of a combination of two awards to Honeywell and Scovill for the total procurement quantity.

In your protest to this Office you inquire as to the rationale of the Government in making a single award to Honeywell without a back-up supplier. We feel this inquiry is especially pertinent in light of the position evidenced by the Government prior to its issuing of Amendment 0004 to the effect that "the Government must make two awards to avoid discontinuity of supply in the event of * * * unforeseeable contingencies."

Further, we note that this procurement was negotiated under the authority of 10 U.S.C. 2304(a)(16) as implemented by the Armed Services Procurement Regulation (ASPR) 3-216. Pursuant to 10 U.S.C. 2304(a)(16), contracts may be negotiated as an exception to the rules of formal advertising in those instances where the Secretary (or his designee) determines the following:

> * * * (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved.

The legislative history of this authority clearly indicates that the price to the Government need not be controlling, since it was expected that the Government would be required to pay more for contracts awarded in furtherance of those interests.

However, we have held that where neither the Determination and Findings justifying negotiation under 10 U.S.C. 2304(a)(16) nor the RFP itself states that the maintenance of needed production capacity necessarily requires current production by more than one contractor, and where the Government is assured that awards made to one or more offerors would support the immediate and long range logistics associated with the required item, we are aware of no justifiable basis for prohibiting a single award at a lower cost to the Government. See 49 Comp. Gen. 772 (1970).

In the instant case, we have been advised by Headquarters, U.S. Army Materiel Command that because of the unsolicited proposal of Honeywell, the Project Manager for Selected Ammunition reassessed the requirements for the subject fuze, and concluded that as a result of the changed circumstances existing at the time of the reassessment, the need for two awards had been vitiated. In particular, the Project Manager indicated that the requirement for two suppliers had been based

upon an Air Force forecast in June 1971 that certain programs requiring the M-219E1 fuze would be accelerated and that a requirement for an increase in the rate of production of these fuzes was a likely possibility. However, in September 1971, the Air Force determined that expansion of such programs was unlikely due to the winding down of operations in Southeast Asia and because of funding limitations. Further, there was a deletion of another Air Force program using production equipment which could be employed in manufacturing M-219E1 fuzes, and provide additional capacity to support a single award if required. In addition, the Project Manager's study in September 1971 of production deliveries from M-219E1 fuze contracts current at that time, and of end item loading schedules, projected an inventory build-up which was considered adequate protection for unforeseen contingencies. The Project Manager also advised that the Army's mobilization base requirements were not directly related to the decision as to whether one or more awards of the subject procurement should be made, since the tooling of both Honeywell and Scovill are Government-owned and upon making one award the tooling of the unsuccessful offeror would be retained in layaway for future use.

The record before this Office evidences that a Class Determination and Findings, dated April 13, 1971, and signed by the Assistant Secretary of the Army (Installations and Logistics), authorizes the procurement of goods and services pursuant to 10 U.S.C. 2304(a)(16). This authorization was cited by the contracting officer as his authority to negotiate the subject procurement. The Class Determination and Findings states that:

> 4. A procurement action for items of ammunition critical to the support of operations in Southeast Asia *may be for more than one award* * * *. [Italic supplied.]

Thus, the pertinent Class Determination and Findings was permissive with respect to the number of awards that could be made and did not require more than one award.

In view of the changed circumstances concerning the requirements to be satisfied by the instant procurement, as well as the permissive wording of the Class Determination and Findings concerning the number of awards that may be made thereunder, we are of the opinion that the elimination of the provision for a minimum of two awards by Amendment 0004 to the RFP was proper.

You contend that the fact that Scovill was not awarded a portion of the subject procurement indicates that the procurement agency did not give sufficient consideration to the labor surplus situation in the Waterbury, Conn., area. Further, you note that the Government has made partial labor surplus area set-aside awards to Scovill in the past, not-

withstanding the fact that its price was higher than the non-set-aside contractor, and that a labor surplus area set-aside award to Scovill would have been appropriate under this procurement.

The contracting officer reports that only three firms were known to have the technical competency and productive capacity to submit a proposal in response to the subject RFP. The three firms were Scovill, Honeywell and Bell and Howell Co. However, Scovill was the only firm considered a labor surplus area concern. Further, in response to a presolicitation notice relative to this procurement Bell and Howell indicated that they would not submit a proposal. Based on this information, the contracting officer expected to receive offers from only Scovill and Honeywell, although a third proposal was received from Pace.

ASPR 1-804.1(a)(1)(ii) provides that a partial set-aside shall not be made if there is a reasonable expectation that bids or proposals will be received from no more than two concerns with technical competency and productive capacity and only one of the concerns will qualify as a labor surplus area concern. Therefore, in view of the fact that it was reasonable to expect that only one labor surplus area concern would submit a proposal, a labor surplus area set-aside was not considered to be authorized for this procurement. Whether the criteria to set aside a portion of a procurement for labor surplus area concerns has been satisfied in a given case is largely within the discretion of the contracting activity, and we see no basis for objecting to the decision reached in this case. See B-174443, February 8, 1972.

With regard to whether the Government-owned facilities used by Honeywell were evaluated by the procurement agency prior to making the award to Honeywell, the contracting officer reports the following:

> Section C of the solicitation provided for use of Government Owned Facilities in the offeror's possession in accordance with ASPR 13-308. Section D of the RFP included the clause entitled EVALUATION PROCEDURE TO ELIMINATE COMPETITIVE ADVANTAGE FROM RENT-FREE USE OF GOVERNMENT PRODUCTION AND RESEARCH PROPERTY which includes a formula for computation of evaluation factors to be applied against the offeror to eliminate competitive advantage as required by ASPR 13-503 and 13-506. These clauses were applicable to the original proposals and proposals submitted under Amendment 0004. Facility evaluations were conducted on all proposals in conjunction with other evaluation factors included in the proposal, to compute the total evaluated prices which were used as a basis for award.

Pursuant to our review of the record as set forth above, we find no evidence of impropriety on the part of the procurement agency in making a single award of this procurement to Honeywell.

Therefore, your protest must be denied.

[B-174915]

Contracts—Negotiation—Basic Ordering Agreements—Propriety

Because a request for quotations to procure aircraft engine idler pulleys issued pursuant to 10 U.S.C. 2304(a)(10) allowing negotiations when formal competitive procedures are impracticable on the basis of a determination and findings that fully adequate data and quality assurance procedures were not available contained the requirement that a proposal should incorporate the current basic ordering agreement does not make the contract awarded illegal because the terms and conditions of agreements may vary with each firm since paragraph 3-410.2 of the Armed Services Procurement Regulation provides the general terms of each agreement, and the specific terms of the contract are defined by the contract requirements. However, of importance is the fact that the offeror whose final price was 60 percent lower than the successful contractor was not given an equal opportunity to compete as required by 10 U.S.C. 2304(g), a situation to be avoided in future procurements.

To the Secretary of the Air Force, May 18, 1972:

We refer to letter LGPM, February 29, 1972, from the Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems & Logistics, reporting on the protest of Artko Corporation (Artko) against award of a contract under request for quotations (RFQ) PR 72-03259, issued by the Oklahoma City Air Materiel Area (OCAMA), Tinker Air Force Base, Oklahoma, for purchase of a quantity of aircraft engine idler pulleys designated as Honeywell part No. 944136-1.

Because fully adequate data and quality assurance procedures were not available, a determination and findings was made to procure the pulleys under 10 U.S.C. 2304(a)(10), allowing the negotiation of a purchase when formal competitive procedures are impractical. Although the pulley had been categorized "3y," "Item already direct purchase manufacturer," under Air Force Regulations (AFR) 57-6 (also Defense Supply Agency (DSAM) 4105.2), the agency hoped to realize savings in the purchase by placing the pulley in category "2y," "Item coded competitive," if other sources could qualify equivalent items. On September 17, 1971, TWX solicitations for offers to supply on an urgent basis 2,838 pulleys described as Honeywell part No. 944136 were sent to several sources, including Artko and U.S. Dynamics Corporation (Dynamics). The solicitation provided that the proposal, to be submitted no later than September 30, 1971, should incorporate the terms and conditions of the current basic ordering agreement (BOA). Other requirements in the solicitation were a firm unit price, discount terms, a specific delivery schedule, and packaging standards.

After receiving offers under the solicitation, procurement officials discovered that Honeywell part No. 944136 had been superseded by Honeywell part No. 944136-1. In a TWX solicitation of October 19, 1971, OCAMA requested the offerors to submit quotations based upon the substitute part with all other requirements remaining the same as those in the first solicitation.

On November 1, 1971, Artko was notified by TWX that negotiations were being conducted with it as one of the responsible offerors who submitted a quotation under the solicitation and that it was requested to submit its best and final offer by November 5, 1971. The TWX stated that delivery as well as price would be a factor for consideration since the procurement was urgent. On November 2, 1971, a TWX was sent to all the offerors advising that the quantity had been increased by 951 units and requesting that the best and final offers be based upon the new quantity.

In its quotation of October 29, 1971, submitted in response to the solicitation of October 19, 1971, Artko offered the pulleys at $17.96 each. On November 5, 1971, Artko submitted its best and final offer at $14.41 each with delivery of first article 5 weeks after receipt of the order and delivery of 1,500 units per week beginning 3 weeks after approval of the first article. In a TWX of November 8, 1971, OCAMA requested that by November 12, 1971, Artko furnish a copy of its drawings of the pulley for evaluation of its offer. On November 15, 1971, Artko's drawings were referred to the OCAMA Procurement Engineering Branch. The reference stated that Artko quoted a lower price and better delivery schedule than Honeywell and requested approval or disapproval of Artko as a supplier who had not previously been approved on the item. On the following day, the drawings were returned to the Air Force buyer without action because "no heat treat or hardness" was specified. The engineering branch suggested to the buyer that Artko should be requested to supply more complete data and attempt to be qualified for a subsequent purchase of the same item in order to avoid delay of the current purchase. After Artko provided additional information, including revised drawings and specifications for heat treatment, the engineering branch on November 17, 1971, again rejected Artko's proposal as "inadequate." In response to Artko's protest, the engineering branch issued the following statement on January 14, 1972, in support of its rejection on the basis of the technical inadequacy of Artko's proposal:

1. PPLE disapproved the data ARTKO furnished in support of furnishing Honeywell P/N 944136-1 because the data furnished was incomplete, inaccurate, and there was no assurance the Government would receive a satisfactory item if the part was manufactured to the data furnished.
2. Because the requirement was urgent we suggested ARTKO furnish complete data and attempt to get approved for next procurement.

3. The following are *some* of the deficiencies in data submitted:

a. The material specified in AMS5349 which is steel casting, Investment Corrosion Resistant (SAE60416) which would require a casting drawing, and none was furnished.

b. Section A–A which is a cross-section of an important feature of this item is incorrect as shown on furnished drawing.

c. NOTE 3 specifies "Passivate per Spec 4834." This specification was not furnished.

d. A tolerance change was made on drawing by obliterating an existing figure and writing in another figure. This is not an acceptable engineering practice on engineering changes as no authenticity is evident.

e. After ARTKO was informed in our letter of 16 November 1971, there was no heat treat or hardness shown on drawing, someone printed by hand a heat treat specification on second copy of drawing furnished, and again no data or signature to show authenticity was evident.

f. Flag Note 2 states "Before cutoff to .42(2) Ref Dim" and Flag Note 2 refers to .500R and .0930 diameter, yet there is no material to be cut off. This is confusing as to just what is meant or intended.

g. The drawing and heat treat specifications does not show Company address, nor signature of draftsman, and engineer. There is no proof these documents are official Company documents.

Meanwhile, on November 3, 1971, Dynamics submitted its best and final offer of $19.75 per unit with delivery of five items immediately and deliveries of 1,000 units 30 days after award, 1,000, 60 days after award, and 1,789 units 90 days after award. Copies of drawings submitted by Dynamics were sent for technical evaluation on November 8, 1971, also with the comments that its price was lower and its delivery schedule better than that of Honeywell. In an evaluation of November 15, 1971, it was stated that "the contractor has not supplied all of the data that is needed for an engineering evaluation; Material Specification USD No. 17739 is needed." In a memo of November 30, 1971, another request was submitted for technical evaluation of Dynamics as a new supplier of the pulley. Savings in both time and cost were cited as reasons for qualifying Dynamics. In a response of December 2, 1971, to the latter request, the OCAMA Technical Operations Section stated that the evaluation was "expected to take several months" and suggested that the item be purchased immediately from the original manufacturer. In a memorandum of December 8, 1971, with respect to the sample parts and drawings previously submitted by Dynamics, the Technical Operations Section stated:

The following items are needed to complete the evaluation:

a. Heat treat specification—14662
b. Passivate specification—14834
c. Material specification—17739
d. A Material certification
e. A heat treat certification
f. Explain the meanings of references B1, B2, C1, C2 and E1 on U.S. Dynamics Corporation Drawing 1944135.

In a letter of December 9, 1971, Dynamics submitted the information and drawings requested. The technical evaluation of Dynamics was returned in a memorandum of January 4, 1972, stating that the sample

parts had been inspected and that Dynamics has been approved as a supplier of the pulleys. The memorandum stated further:

> The parts are acceptable except for insufficient passivation finish. * * *
> If U.S. Dynamics Corporation is awarded a contract for a quantity of subject parts, government inspectors should be requested to assure compliance with the specification for passivated surface finish along with other acceptance inspections.

An award to Dynamics for manufacture of the part was signed by both the contracting officer and a representative of Dynamics on January 7, 1972, and award became effective on that day when the contract was hand-delivered to the representative of Dynamics. Although the file copy of the contract was not mailed until January 10, 1972, it is attested in a memorandum signed by the contracting officer and a clerk who made a copy of the contract for the representative of Dynamics that the award was actually made on January 7 in order to expedite performance of the urgent requirements of the contract. On the basis of the above evidence concerning the circumstances of the award, we are unable to agree with Artko's allegation that the contract was awarded after its protest was submitted on January 10, 1972.

Nor do we consider valid Artko's contention that an award made under a BOA is illegal because the terms and conditions of such agreements may vary with each firm. The parties agreed to basic ordering agreements under Armed Services Procurement Regulation (ASPR) 3–410.2 which provides the general terms of each agreement. Furthermore, the specific terms of a contract awarded under a BOA are defined by the requirements of the contract. Finally, there is no evidence that procurement regulations governing the BOA were violated nor that any bidder was prejudiced by use of the BOA.

However, we are in full agreement with Artko that Air Force procurement officials failed to provide Artko an equal opportunity to compete for the award. Under 10 U.S.C. 2304(g), procurement officials are required to conduct written or oral discussions with all responsible offerors submitting competitive proposals. Our Office has ruled repeatedly that competitive offerors should be given equal opportunity for discussions. See 46 Comp. Gen. 191 (1966); B–170181, February 22, 1971.

The final price offered by Dynamics was nearly 60 percent higher than Artko's. Furthermore, the delivery schedule proposed by Artko was not significantly different from that of Dynamics. In any case, it did not act as a deterrent against inviting Artko to furnish technical data and was not relied upon as one of the bases for rejection until after the offeror's technical data was considered to be deficient. Nevertheless, in the memorandum of January 14, 1972, submitted by OCAMA in support of its determination that Artko's proposal was

not responsive, the material deficiencies in Artko's drawings were listed, although these deficiencies were never disclosed to Artko. A cursory review of OCAMA's own evaluations of the data from Artko and Dynamics, quoted above, indicates that some of the same deficiencies existed in the original data furnished by both offerors. Yet Dynamics was provided with an additional opportunity and additional time not provided to Artko to establish itself as a source for the item. The only reasonable conclusion which may be drawn from these findings is that procurement officials failed to conduct negotiations in a manner giving all competitors an equal opportunity to compete for the award.

In view of the fact that performance by Dynamics has now been completed, no recommendation for corrective action is being made in the present case. However, based on the findings above, we recommend that appropriate steps be taken to preclude a recurrence of the same situation.

[B-175336]

Pay—Missing, Interned, Etc., Persons—Promotions—"Effective for All Purposes"

Any amounts due a member of the Marine Corps who when he entered a missing status, as defined by 37 U.S.C. 551(2), on April 30, 1967, was a private first class E-2, and who by September 10, 1971, the date his death was established as April 30, 1967, had been promoted successively to sergeant E-5, are payable at the rates in effect on September 10, 1971, for pursuant to Public Law 92-169, the promotion of a member while in a missing status is "fully effective for all purposes," notwithstanding 10 U.S.C. 1523 or any other provision of law and even though the Secretary concerned or his designee under 37 U.S.C. 556(b) determines the member died before the promotion was made, and the member's spouse who was his widow on the day of his death is entitled to the payment of the arrears of pay and the 6 months' death gratuity due notwithstanding she had remarried before he was officially determined to be dead.

Military Personnel—Missing, Interned, Etc., Persons—Leaves of Absence—Accrual

Although a member of the uniformed services continues to be credited pursuant to 37 U.S.C. 552(a) with pay and allowances until his death is determined and such credits are not disturbed if death is determined to have occurred prior to the date of determination, for the purposes of leave accural the actual date of death remains the date of discharge under 37 U.S.C. 501(a), so that no leave accrues after that date. Therefore, a member of the Marine Corps who was determined on September 10, 1971, to have died on April 30, 1967, did not continue to accrue leave after April 30, 1967. However, pursuant to Public Law 92-169, his widow is entitled to payment for the leave that had accrued to the member before his death, as well as the arrears of pay and the 6 months' death gratuity due, on the basis of the member's posthumous promotions from grade E-2 to grade E-5, at the rates in effect on September 10, 1971, the date the member was determined to have died on April 30, 1967.

To Major F. D. Brady, United States Marine Corps, May 19, 1972:

Further reference is made to your letter dated February 15, 1972, which was forwarded here by letter dated February 28, 1972, of Headquarters United States Marine Corps, requesting a decision concerning the computation of various amounts due in the case of Sergeant Milton E. Prescott, Jr., 318 34 8835, United States Marine Corps., deceased, and the person entitled to receive such payment. Your request has been assigned Control No. DO-MC-1148 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Prescott entered a missing status as defined by 37 U.S.C. 551(2) on April 30, 1967. On that date he had less than 2 years of service and held the grade of private first class (E-2). He was married, had no children, and was receiving basic allowance for quarters on behalf of his wife. Sergeant Prescott's wife (Sandra Jean), married one Elmer E. Olson, Jr., October 4, 1969. So far as is known, the marriage of Sergeant and Sandra Jean Prescott was not dissolved by judicial action. Credit for basic allowance for quarters was terminated effective October 3, 1969.

While in a missing status, Sergeant Prescott was promoted successively to the grades of lance corporal, corporal and sergeant (E-5). The last promotion was effective June 1, 1968.

On September 10, 1971, a determination was made under 37 U.S.C. 556(b) by the Secretary of the Navy's designee that competent evidence conclusively established Sergeant Prescott's date of death as April 30, 1967. On the date of such determination he was being credited with pay and allowances of a sergeant (E-5) with over 4 years of service. On April 30, 1967, he had 4 days of unused leave to his credit.

The act of July 28, 1942, ch. 528, 57 Stat. 722, authorized the posthumous promotion of military and naval personnel, but provided that no person should be entitled to any bonus, gratuity, pay, or allowance by virtue of any provision of that act. That act was amended by the act of July 17, 1953, ch. 220, 67 Stat. 176, to provide that, for the purposes of that act in any case where the date of death is established or determined under the Missing Persons Act, the date of death is the date of receipt by the head of the department concerned of evidence that the person is dead, or the date the finding of death is made. Such provisions of law are now codified in 10 U.S.C. 1521-1524, the provision that no person is entitled to any gratuity, pay, or allowance by virtue of a posthumous promotion being codified in 10 U.S.C. 1523.

Section 4 of the 1942 law, now codified in 10 U.S.C. 1522, provides that the Secretary concerned may issue, or have issued, an appropriate warrant in the name of a member of the Armed Forces who was officially recommended for appointment or promotion to a grade other

than a commissioned grade but was unable to accept the appointment or promotion because of death in line of duty. The term "a grade other than a commissioned grade" includes an enlisted grade.

Section 552(a), Title 37, U.S. Code, as amended by the act of November 24, 1971, Public Law 92–169, 85 Stat. 489, provides in pertinent part as follows, the last sentence having been added by the 1971 act:

(a) A member of a uniformed service who is on active duty * * * and who is in a missing status, is, for the period he is in that status, entitled to receive or have credited to his account the same pay and allowances, as defined in this chapter, to which he was entitled at the beginning of that period or may thereafter become entitled. * * * Notwithstanding section 1523 of title 10 or any other provision of law, the promotion of a member while he is in a missing status is fully effective for all purposes, even though the Secretary concerned determines under section 556(b) of this title that the member died before the promotion was made.

In view of the language added by the act of November 24, 1971, that a promotion of a missing person is "fully effective for all purposes" you presented for consideration various questions as to the grade and rate of pay to be used in the computation of the leave payment and the death gratuity. You also requested a decision as to the entitlement of Mrs. Sandra J. Prescott Olson to payment of the amount due.

On August 16, 1966, Sergeant Prescott executed a record of emergency data designating Sandra Jean Prescott, wife, and Ida Prescott, mother, as beneficiaries for gratuity pay. He also named Sandra Jean Prescott for 100 percent of his unpaid pay and allowances. Sandra J. Prescott Olson has presented claims for unpaid pay and allowances and death gratuity. No claim has been submitted by any other person. However, Mr. Joseph C. Fanelli, stating that he is the attorney for Mr. and Mrs. Milton E. Prescott, Sr., parents, notified the Marine Corps on November 1, 1971, that a claim may be filed on their behalf and requested that no disbursement be made to any claimant until they have the necessary time to complete their investigation and research.

Under 10 U.S.C. 1524, prior to the enactment of Public Law 92–169, a posthumous promotion was allowed to stand but by virtue of 10 U.S.C. 1523, no effect was given thereto for pay purposes except that pay credited under the Missing Persons Act subsequent to the actual date of death was not recovered by virtue of the provisions of that act.

By the plain terms of Public Law 92–169, the promotion of a member while he is in a missing status is "fully effective for all purposes," notwithstanding 10 U.S.C. 1523 or any other provision of law, even though the Secretary concerned or his designee determines that the member died before the promotion was made. Hence, in view of the provisions of 10 U.S.C. 1524 for the purposes of the posthumous promotions granted to Sergeant Prescott, the date of death is September 10,

1971, and any "bonus, gratuity, pay, or allowance" payable upon such determination of death, including payment for accrued leave, is payable at the rates in effect on September 10, 1971.

A member in a missing status under 37 U.S.C. 552(a) is entitled to continuance of credit of pay and allowances until his death is determined and such credits are not disturbed if death is determined to have occurred prior to the determination, which credits, under 37 U.S.C. 557, are for determination by the Secretary concerned or his designee. However, the right of survivors to be paid the arrears of pay, including payment for unused leave and to receive the 6 months' death gratuity is for determination as of the actual date of death under the provisions of 10 U.S.C. 1477 and 2771, but to receive the death gratuity the survivor must be living at the time of payment. See 10 U.S.C. 1477(d).

Public Law 92–169 did not make the date of receipt of evidence of death or the date of making a finding of death the date of death for all purposes, but only for posthumous promotion purposes and the consequent rate of pay for purposes of computation of death benefits based thereon, since the posthumous promotion is effective for all purposes under that law. Leave is not "pay and allowances" (see 37 U.S.C. 551(3)), but is "vacation or absence from duty with pay" (10 U.S.C. 704); hence for the purposes of accrual of leave the actual date of death remains the date of discharge under 37 U.S.C. 501(a), so that no leave accrues after that date. 51 Comp. Gen. 391 (1972).

For purposes of the lump-sum leave payment, therefore, the member did not accrue any leave after April 30, 1967, the date he in fact died, even though the lump-sum leave payment is for computation on the basis of the posthumous promotion to the grade of sergeant (E–5) and the rate of pay and allowances in effect on September 10, 1971, the date the designee of the Secretary of the Navy determined that competent evidence established his date of death as April 30, 1967.

The record indicates that Sandra Jean Prescott Olson was the widow of Sergeant Prescott on April 30, 1967, the actual date of his death. Nothing in the provisions of 10 U.S.C. 1524 or Public Law 92–169 makes the eligibility of a surviving wife as such or as a designated beneficiary to receive the arrears of pay of a deceased member of the Armed Forces or the 6 months' death gratuity dependent upon her being his unremarried widow as of the date of receipt by the Secretary concerned of evidence of death of the member, as of the date a finding of death is made, or as of the time payment thereof is effected. Consequently, the fact that Sergeant Prescott's wife remarried in 1969 prior to the date the Secretary of the Navy or his designee received evidence that Sergeant Prescott in fact died on April 30, 1967, does not affect her eligibility to receive the arrears of pay or the 6 months' death gratuity.

Sergeant Prescott's widow is the living survivor highest on the list provided in 10 U.S.C. 1477 entitled to be paid the death gratuity, and the designated beneficiary is the person highest on the list contained in 10 U.S.C. 2771 entitled to be paid the arrears of pay. Since, on April 30, 1967, Sandra J. Prescott Olson was the wife and designated beneficiary of Sergeant Prescott, she is entitled to receive the accrued pay and allowances credited to his account and determined to be due in the case, and to payment for the 4 days' unused leave and the 6 months' death gratuity computed on the rates effective on September 10, 1971, the date of determination of death. Your questions are answered accordingly.

While we held in our decision of January 5, 1972, 51 Comp. Gen. 391, that the payment for accrued leave in the case of a member who died while in a missing status should be computed at the rate applicable on the date of his death rather than the rate of pay on the date of receipt of evidence of the member's death, that decision did not involve posthumous promotions, the rule set forth above being for application in such cases.

[B–170531]

Military Personnel—Missing, Interned, Etc., Persons—House Trailer Transportation

The wife of an Army warrant officer missing in action who moved her household effects in her mobile home and was denied reimbursement for the expenses incurred in the movement of the trailer, as 37 U.S.C. 554 in providing for the travel and transportation of dependents and household and personal effects of members of the uniformed services in a missing status does not specifically include a house trailer, nevertheless may be reimbursed the expense of the trailer movement since the amount involved is less than it would cost the Government to comply with paragraph M8353 of the Joint Travel Regulations authorizing the shipment of household goods when a member is in a missing status for more than 29 days, either to his official home of record or the residence of his next of kin.

To Lieutenant Colonel H. C. Williams, Department of the Army, May 22, 1972:

Your letter of November 5, 1971, with enclosures, requests a decision whether Mrs. Jacqueline S. Sparks, the wife of Warrant Officer Jon M. Sparks, U.S. Army, who is presently in a missing-in-action status, may be reimbursed for the movement of her household goods in her mobile home from Ocean Springs, Miss., to Plano, Tex., in May 1971, as evidenced in the voucher submitted for payment. The request has been assigned PDTATAC Control No. 71–61 by the Per Diem, Travel and Transportation Allowance Committee.

The enclosures include a letter from Headquarters, 5th U.S. Army, Fort Sam Houston, Tex., dated August 13, 1971, which states that Mrs. Sparks was denied movement of her trailer at Government expense in view of the decision of our Office, October 23, 1971, 50 Comp.

Gen. 317, which held that there was no authority under 37 U.S.C. 554, for a dependent of a member of the uniformed services who is in a missing status, to transport a housetrailer at Government expense. However, the letter suggests that Mrs. Sparks is entitled to reimbursement for the items of personal property that were transported in the housetrailer as for a shipment of household goods under the provisions of paragraph M8353, Joint Travel Regulations, and is filing claim under the provisions of paragraph M8500 of the regulations.

The claim is supported by an inventory of household goods showing that a total of 711 cubic feet of such goods was contained in the housetrailer. Also, there is a statement from the Chief, Traffic Management Branch at Keesler Air Force Base, Biloxi, Mississippi, that the cost of shipping 5,000 pounds (711 x 7) by motorvan at Government expense for the distance transported would have been $597.50. The actual cost for the movement of the housetrailer amounted to $495.36, plus additional charges for $42.50, for blocking and leveling the trailer and connecting utilities at Plano, Tex.

You indicate that, while the Government would have paid the transportation charges if shipment of the household goods had actually been made by motorvan, there is doubt that the Government is liable for reimbursement on a constructive cost basis for moving the household goods in conjunction with the movement of a mobile home. You therefore request a decision whether any reimbursement of personal expense is proper in this case.

Section 554 of Title 37, United States Code, provides for the travel and transportation of dependents and household and personal effects of members in a missing status. Transportation may be provided for the dependents and household effects of a member of a uniformed service on active duty (without regard to pay grade) who is officially reported as dead, injured, or absent for a period of more than 29 days in a missing status, to various locations as specified therein.

Section 409 of Title 37 provides in pertinent part that under regulations prescribed by the Secretaries concerned, and in place of the transportation of baggage and household effects or payment of a dislocation allowance, a member, or in the case of his death, his dependent, who would otherwise be entitled to transportation of baggage and household effects under section 406 of that title, may transport a housetrailer or mobile dwelling within the continental United States, within Alaska, or between the continental United States and Alaska, for use as a residence. The housetrailer may be transported by one of the enumerated ways, the cost of which or reimbursement therefor being limited, as there prescribed.

Paragraph M10002, Joint Travel Regulations, provides generally that except for a member who is officially reported as dead, injured

or absent for a period of more than 29 days in a missing status, any member of the uniformed services who would otherwise be entitled to have his household effects transported at Government expense is entitled to a trailer allowance as set forth in that chapter.

Paragraph M8353–1, item 3 of the regulations, provides in pertinent part that transportation of the household goods of a member is authorized to his official home of record or to the residence of his dependents, next of kin, or other person entitled to receive custody of the household goods when official notice is received that the member is absent for a period of more than 29 days in a missing status.

Paragraph M8500 of the regulations provides that a shipment of household goods as otherwise authorized, ordinarily will be made through a shipping or transportation officer. However, when a shipping or transportation officer is not available or the member was instructed to make shipment at personal expense, reimbursement of the actual cost of the shipment is authorized, exclusive of unauthorized services. In all other cases, the regulation provides that a member who arranges for the shipment of the household goods at personal expense is entitled to reimbursement of such costs not to exceed the cost which would have been incurred had the shipment been made by a shipping or transportation officer.

In 50 Comp. Gen. 317 (1971), we held that section 554 of Title 37, United States Code, limits entitlement to those specific travel and transportation items there mentioned and authority to transport housetrailers or mobile homes is not one of the allowances included. We said that the words "household and personal effects" as used in that section may not be construed as including a housetrailer for the purpose of transporting it when a member is in a missing-in-action status.

While under the provisions of section 554 of Title 37, United States Code, Mrs. Sparks is not entitled to reimbursement for the movement of her mobile home from Ocean Springs, Miss., to Plano, Tex., the household effects that were contained in the housetrailer would have been shipped separately by the Government under arrangements by a shipping or transportation officer if Mrs. Sparks had requested such a shipment. Furthermore, under the provisions of paragraph M8500 of the regulations, Mrs. Sparks could have personally arranged for the shipment of these effects by any means, including the direct hire or rental of a conveyance (with or without operator). In view thereof, and since Mrs. Sparks did move her household goods in her housetrailer at her own expense, it is concluded that she is entitled to reimbursement of the transportation cost she incurred ($495.36) since that amount is less than it would have cost the Government had the shipment been made by a shipping or transportation officer.

Accordingly, the voucher and other enclosures are returned herewith, the voucher being approved for payment in the amount shown to be due Mrs. Sparks, if otherwise correct.

[B-175783]

Departments and Establishments—Services Between—Appropriation Obligation—Funds Transferred for Training Personnel

The agreement of June 4, 1971, by which funds were transferred by the Department of Health, Education, and Welfare to the Federal Aviation Administration (FAA) to provide training from June 7, 1971, to June 7, 1972, for air traffic control trainees pursuant to section 303(a) of the Manpower Development and Training Act of 1962, as amended, 42 U.S.C. 2613(a), which authority terminates June 30, 1972, is an agreement that was authorized independently of section 601 of the Economy Act since section 306(a) of the Manpower Act provides for the making of contracts and agreements, and the training agreement having been entered into prior to June 30, 1971, meets the obligation requirement of section 1311 of the Supplemental Appropriation Act, 31 U.S.C. 200, and, therefore, the transferred funds remain available for further obligation by FAA in accordance with the agreement within the time limits of the Manpower Development and Training Act.

To the Secretary of Transportation, May 22, 1972:

Reference is made to letter of April 18, 1972, from the General Counsel, Federal Aviation Administration (FAA), concerning the continued availability to FAA of certain funds transferred to it by the Department of Health, Education, and Welfare (HEW) to provide training for air traffic control trainees pursuant to the Manpower Development and Training Act of 1962, as amended, 42 U.S.C. 2571, *et seq.*

The funds involved are those provided by the Department of Labor Appropriation Act, 1970, Public Law 91-204, 84 Stat. 23, under the heading "Manpower Development and Training Activities." It is specifically stated therein that the funds are to remain available until June 30, 1971. Pursuant to section 310 of the Manpower Development and Training Act of 1962, 42 U.S.C. 2620, the authority conferred under title II of the act will terminate on June 30, 1972, except that disbursements under contracts entered into prior to such date may continue through December 30, 1972.

It is explained that an agreement was entered into on June 4, 1971, between the Office of Education, HEW, and FAA whereby funds in the amount of $500,000 that had been transferred to HEW would be advanced to FAA to cover the cost of training in an air traffic control

program. The agreement covers the period June 7, 1971, to June 7, 1972, and calls for FAA to contract with educational institutions to provide the necessary training. Except for such agreement no further obligation action has been taken and the question is presented as to whether such agreement effectively obligated the funds for purposes of section 1311 of the Supplemental Appropriation Act, 1955, approved August 26, 1954, 68 Stat. 830, 31 U.S.C. 200.

Section 1311 provides in pertinent part as follows:

(a) After August 26, 1954, no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed * * *.

Ordinarily, authority for one Federal agency to perform services for another agency is provided by section 601 of the Economy Act of 1932, 47 Stat. 417, as amended, 31 U.S.C. 686. Concerning agreements entered into under such authority it was stated in 34 Comp. Gen. 418, 421 (1955) that—

* * * While there may be recorded obligations based upon agreements entered into under that provision of law if the agreements comply with section 1311(a)(1), 68 Stat. 830, such obligations against fiscal year appropriations are required by section 1210 of the General Appropriation Act, 1951, Public Law 759, approved September 6, 1950, 64 Stat. 765, to be deobligated at the end of each fiscal year to the extent that the performing or procuring agency has not incurred valid obligations under the agreement. * * *.

It is urged, however, that the agreement in question is not subject to the limitations of the Economy Act as set forth in section 1210 of the General Appropriation Act, 1951, 31 U.S.C. 686–1, in that the agreement in question was authorized by title II of the Manpower Development and Training Act of 1962. Although reference is not made to any particular provisions of that act it is noted that section 303(a) thereof, 42 U.S.C. 2613(a) provides that (quoting from the Code)—

(a) In the performance of their functions under this chapter, the Secretary of Labor and the Secretary of Health, Education, and Welfare, in order to avoid unnecessary expense and duplication of functions among Government agencies, shall use the available services or facilities of other agencies and instrumentalities of the Federal Government, under conditions specified in section 2616(a) [306(a)] of this title. Each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary of Labor and the Secretary of Health, Education, and Welfare and, to the extent permitted by law, to provide such services and facilities as either may request for his assistance in the performance of his functions under this chapter.

Inasmuch as the last sentence of section 303(a) above authorizes Federal agencies to cooperate with the Secretaries named therein and, to the extent permitted by law, to provide services as they may request, there would appear a reasonable basis for the view that section 303(a) of itself provides no new authority to enter into intragovernmental agreements. However, section 306(a), as amended, 42 U.S.C. 2616(a) referred to in the first sentence of section 303(a) states that (quoting from the Code):

> The Secretary of Labor and the Secretary of Health, Education, and Welfare may make such contracts or agreements, establish such procedures, including (subject to such policies, rules, and regulations as they may prescribe) the approval of any program under section 2582 [202] of this title, the cost of which does not exceed $75,000, and make such payments, either in advance or by way of reimbursement, or otherwise allocate or expend funds made available under this chapter, as they deem necessary to carry out the provisions of this chapter.

Also, section 309(a) of the act, as amended, 42 U.S.C. 2619(a) states that—

> (a) In carrying out the responsibilities under this chapter, the Secretary of Labor and the Secretary of Health, Education, and Welfare shall provide, *directly or through grants, contracts, or other arrangements*, training for specialized or other personnel and technical assistance which is needed in connection with the programs established under this chapter or which otherwise pertains to the purposes of this chapter. * * *. [Italic supplied.]

Consequently, while the matter is not entirely free of doubt, since section 306(a) specifically provides for the making of contracts or agreements and is referred to in section 303(a) which concerns only Federal agencies, we are inclined to concur with the General Counsel of FAA that the agreement in question is authorized by the Manpower Development and Training Act of 1962, and independently of section 601 of the Economy Act.

Under somewhat similar circumstances we advised the Administrator of the Housing and Home Finance Agency, in decision dated April 10, 1951, B-102040, that—

> * * * where such contracting authority has been granted by specific statute, as in the instances cited in your letter, the departments and agencies are, of course, authorized to enter into contracts with each other under the terms, conditions and limitations, including the period of availability of appropriations, as set forth in the particular statute.

Accordingly, it is our view that the agreement in question having been entered into prior to June 30, 1971, meets the obligation requirements of 31 U.S.C. 200 and that the funds remain available for further obligations by FAA in accordance with such agreement within the time limits of the Manpower Development and Training Act of 1962.

[B-175429]

Courts—District of Columbia—Superior Court—Criminal Justice Act Application

In the prosecution of cases brought in the District of Columbia (D.C.) Superior Court established by the D.C. Court Reform and Criminal Procedure Act of 1970 (Public Law 91-358) by merging the Court of General Sessions, the Juvenile Court, and the D.C. Tax Court, which new court was given exclusive jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia," the funds appropriated to the Federal Judiciary for the implementation of the Criminal Justice Act (CJA), 18 U.S.C. 3006A, are available to pay attorneys and experts appointed by the Superior Court since Public Law 91-447 amended the CJA by adding subsection (1) to make the CJA applicable to the District and, therefore, the CJA applies when a prosecution is brought in the name of the United States in the Superior Court and the D.C. Court of Appeals and when counsel is appointed in juvenile proceedings pursuant to 18 U.S.C. 3006A(a).

Courts—Criminal Justice Act of 1964—Proceedings in the District of Columbia Courts—Administration and Budgeting for Programs

Notwithstanding the reorganization of the local courts in the District of Columbia (D.C.) pursuant to the D.C. Court Reform and Criminal Procedure Act of 1970 (Public Law 91-358), the Administrative Office of the United States Courts should continue to handle the administration of, and budgeting for the Criminal Justice Act (CJA) program in the D.C. courts in the same manner as in the past and to the extent possible as it administers and budgets for the programs of the Federal district courts, except for the D.C. Public Defender Service which is covered by sections 306 and 307 of the Reform Act, and the responsibilities of the Judicial Conference of the United States or the Administrative Office of the United States Courts under 28 U.S.C. 604, 605, and 610 remain unchanged with respect to the D.C. Superior Court and the D.C. Court of Appeals.

To the Director, Administrative Office of the United States Courts, May 26, 1972:

Your letter of March 7, 1972, requests our opinion as to whether, in light of the reorganization of the local courts in the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91-358, 84 Stat. 473, the funds appropriated to the Federal Judiciary for the implementation of the Criminal Justice Act (CJA), 18 U.S.C. 3006A, are available to pay attorneys and experts appointed in the District of Columbia Superior Court as well as pay for other services, in cases where exclusive jurisdiction over the criminal offense charged is vested in that court; and if it is our decision that such funds may be so applied, in what categories of cases could such attorneys and experts be compensated. You also ask what responsibilities the Judicial Conference of the United States and your office would have over the administration of, and budgeting for, the CJA program in the District of Columbia (D.C.) Superior Court and the District of Columbia (D.C.) Court of Appeals if we determine

that CJA applies to cases peculiar to the local jurisdiction of those courts. We wrote to the Executive Officer of the D.C. Courts for his views on these matters, and in response thereto The Honorable Harold Greene, Chief Judge of the Superior Court of the District of Columbia furnished us the views of the District of Columbia courts.

In 45 Comp. Gen. 785 (1966)—referred to in your letter—we stated that the Criminal Justice Act is intended to provide adequate representation at all stages for persons charged with the commission of felonies or misdemeanors, other than petty offenses as defined in section 1 of Title 18, United States Code, who are financially unable to obtain an adequate defense. We noted that in making such provision, the act was framed in terms of the Federal Court System of which the District of Columbia Court of General Sessions has traditionally not been considered a part. However, we pointed out that with respect to the purposes of the Criminal Justice Act of 1964, the United States District Court for the District of Columbia had concurrent jurisdiction over all criminal cases which could properly be heard in the "United States Branch" of the D.C. Court of General Sessions, and that all criminal cases heard in the Court of General Sessions—other than those involving violations of police or municipal ordinances or regulations—were prosecuted by a United States attorney in the name of the United States. We stated that since the United States determined whether a defendant in a criminal case was to be tried in the U.S. District Court or in the Court of General Sessions, it was difficult to reach the conclusion that the Congress intended a defendant's entitlement under the Criminal Justice Act to be dependent upon whether the United States should choose to prosecute him in one court rather than another. Thus, we concluded that the Criminal Justice Act of 1964 should be construed as covering the U.S. Branch of the D.C. Court of General Sessions and that any plan covering application of the act in the District of Columbia should include that Branch. See also our decisions of September 24, 1970, 50 Comp. Gen. 205 and 48 Comp. Gen. 569 (1969).

On July 29, 1970, the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91-358, 84 Stat. 473 (henceforth referred to as the D.C. Court Reform Act) was enacted into law. Among other things, that act merged the three local courts – the Court of General Sessions, the Juvenile Court, and the D.C. Tax Court—into a new Superior Court. The Superior Court is given exclusive jurisdiction "of any criminal case under any law applicable

exclusively to the District of Columbia "except for those already commenced in the United States District Court or those filed there during an 18-month transition period. The D.C. Court Reform Act also established the District of Columbia Public Defender Service and phased out over a 30-month period the former pro rata contributions made from District of Columbia appropriations for the maintenance of the U.S. District Court and the U.S. Court of Appeals.

You state that the D.C. Superior Court, having been invested with both misdemeanor and felony criminal jurisdiction of local application, has assumed much of the character of a State court. You further state that it appears that two of the major premises of our original opinions finding the Criminal Justice Act of 1964 applicable to the D.C. General Sessions Court are now eliminated: first, there is no longer concurrent jurisdiction shared by the local court and the United States Court and second, the trial jurisdiction is no longer dependent upon whether the United States should choose to prosecute a defendant in one court rather than another.

On October 14, 1970, shortly after the enactment of the D.C. Court Reform Act, there was enacted Public Law 91–447, 84 Stat. 916, amending 18 U.S.C. 3006A (the CJA), which amendment you describe as a "virtual rewriting of the Criminal Justice Act." While in this act the Congress did not disturb the section (18 U.S.C. 3006A(k)) defining the United States "District Courts" to which CJA is applicable, it added a new subsection (1) to the CJA, which subsection provides:

> (1) *Applicability in the District of Columbia.* The provisions of this Act, other than subsection (h) of section 1, shall be applicable in the District of Columbia. The plan of the District of Columbia shall be approved jointly by the Judicial Council of the District of Columbia Circuit and the District of Columbia Court of Appeals.

This language (except for the phrase "other than subsection (h) of section 1") was initially introduced on April 30, 1970, on the floor of the Senate, by Senator Hruska as an amendment to the bill which amended the CJA. At the time the amendment was introduced, Senator Hruska made the following statement:

> Mr. President, the amendment that I have offered would make the provisions of the Criminal Justice Act, as amended by S. 1461, fully applicable to the District of Columbia.
>
> This amendment is needed to clarify the application of the act to appointed counsel appearing before the court of general sessions or any other courts of general jurisdiction, now or in the future, in the District of Columbia. The Criminal Justice Act of 1964, as originally enacted, omitted any reference to the District of Columbia Court of General Sessions, although the Comptroller General ruled in 1966 that the act does extend to certain classes of cases prosecuted in that court. As I recall, that was also the intent of the 1964 act.

Since the Constitutional Rights Subcommittee began consideration of S. 1461, and other proposed amendments to the 1964 act, legislation has been proceeding through the Senate and House District Committees that would significantly reorganize the Federal courts of the District. That legislation is now before a conference committee.

The concurrent jurisdiction of the District of Columbia District Court and the District of Columbia Court of General Sessions over certain offenses against the United States would end under that legislation, and the court systems would be greatly changed. It is the concurrent jurisdiction, however, upon which the Comptroller General based his opinion of coverage under the 1964 act.

Therefore, to insure coverage of the Criminal Justice Act in the District, whether or not the court reorganization bill is enacted, for those classes specified in the 1964 act as amended by S. 1461 as reported by the full Judicial Committee, this amendment is offered. (Congressional Record—Senate, April 30, 1970, S6500, Temp. Ed.)

Senator Hruska's amendment making the CJA applicable in the local courts of the District of Columbia was agreed to by the Senate. It was subsequently accepted by the House, with additional amendments after the Department of Justice noted that the language of the Senate amendment left unclear the applicability of the public defender organization provisions of the act within the District of Columbia and the question of compensation of counsel appointed to represent juveniles. (See the Hearings before Subcommittee No. 3 of the House Judiciary Committee, June 18 and 25, 1970, pages 96 to 99.) While the Department of Justice proposed specific language to deal with these problems, the House Committee merely amended the bill to exempt the District of Columbia from the public defender organization provisions of the CJA within the District of Columbia courts. Thus, House Report No. 91–1546, 91st Congress, explains:

Amendment No. 11 provides that except for subsection (h) involving defender organizations, the provisions of the Criminal Justice Act apply in the District of Columbia. The District already [sic] a Public Defender Service (title III, Public Law 91–358).

The House and the Senate both accepted this further amendment of Senator Hruska's amendment.

Further, we note that section 210(a) of the D.C. Court Reform Act revises, codifies, and enacts the general and permanent laws of the District of Columbia relating to criminal procedure. That section revises Title 23, D.C. Code, and provides, in effect, that all criminal prosecutions—except (in most cases) for prosecutions for violations of all police or municipal ordinances or regulations and for violation of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding 1 year, or prosecutions for violations of section 6 of the act of July 29, 1892 (D.C. Code, section 22–1107), relating to disorderly

conduct, and for violations of section 9 of that act (D.C. Code, section 22–1112), relating to lewd, indecent, or obscene acts—shall be conducted in the name of the United States by the U.S. attorney for the District of Columbia, or his assistants. In other words, most, if not all, criminal prosecutions formerly brought by the United States attorney in the name of the United States in the "United States Branch" of the Court of General Sessions or in the United States District Court for the District of Columbia will now be brought by the United States attorney in the name of the United States in the D.C. Superior Court. Application of the CJA to these cases in the Superior Court would accomplish the stated purpose of the sponsor of subsection (1) of the CJA that CJA coverage in the District under the 1970 amendments should include those classes of cases which were covered by the 1964 act prior to the reorganization of the D.C. Court System.

Moreover, the intent to make applicable the CJA to the District of Columbia courts is obvious from the wording of subsection (1) of the CJA. As noted above, the last sentence of that subsection provides:

> The plan of the District of Columbia shall be approved jointly by the Judicial Council of the District of Columbia Circuit and the District of Columbia Court of Appeals.

We agree with Judge Greene's interpretation of this sentence that:

> * * * Had it not been the clear congressional intent for the Criminal Justice Act to apply to the D.C. Court system, there would, of course, have been no reason whatever for requiring that the Criminal Justice Act plan for the District of Columbia be approved by the District of Columbia Court of Appeals, a local court without strictly "federal" responsibilities.

We agree that the rationale of our former decisions making the CJA—prior to the 1970 amendments thereto—applicable to the D.C. Court of General Sessions (i.e., the concurrent jurisdiction shared by the local court and the United States District Court for the District of Columbia and the fact that the choice of forum was up to the United States) no longer applies to the D.C. courts as reorganized by the D.C. Court Reform Act. However, it is our opinion that except as to subsection (h) of the CJA relating to public defender systems, subsection (1) of the CJA, as added by Public Law 91–447, clearly and unequivocally makes the CJA applicable to prosecutions brought in the D.C. Superior Court and the D.C. Court of Appeals with regard to those prosecutions brought in the name of the United States, and we so hold.

As to the application of the CJA to juvenile proceedings, section 3006A(a) of Title 18, United States Code, provides, in effect, that the CJA will cover:

> * * * any person financially unable to obtain adequate representation (1) who is charged with * * * juvenile delinquency by the commission of an act, which if committed by an adult, would be such a felony or misdemeanor * * * or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. * * *

House Report 91-1546, dated September 30, 1970, states on page 3 that the purpose of 18 U.S.C. 3006A is to:

> * * * render explicit the coverage [under section 3006A(a)(1)] of persons charged with juvenile delinquency. Within the District of Columbia, children would also be covered by section [3006A(a)(4)], insofar as the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Public Law 91-358, approved July 29, 1970) requires the appointment of counsel for them in cases in which they face loss of liberty * * *

In other words, the provisions of 18 U.S.C. 3006A(a)(1) are applicable in the District of Columbia, as in all the other CJA covered jurisdictions, to persons charged with juvenile delinquency by the commission of an act which, if it had been committed by an adult, would be a felony or misdemeanor (other than a petty offense as defined by 18 U.S.C. 1) or with violation of probation covered by the provisions of the CJA, and the provisions of 18 U.S.C. 3006A(a)(4) cover persons charged in juvenile proceedings in the District of Columbia for whom the Sixth Amendment of the Constitution requires the appointment of counsel, or for whom, in a case in which the juvenile faces loss of liberty, any Federal law—including, in particular, the D.C. Court Reform Act—requires the appointment of counsel.

As to your final question, the Administrative Office of the United States Courts should handle the administration of, and budgeting for, the CJA program in the District of Columbia's local courts generally in the same manner as it has in the past and to the extent possible as it administers and budgets for programs of the Federal district courts, except, of course, that the administration of, budgeting for, and financing of, the District of Columbia Public Defender Service should be in accordance with sections 306 and 307 of the D.C. Court Reform Act. Except for the aforementioned, this decision should not be construed to increase or decrease the responsibilities of the Judicial Conference of the United States or the Administrative Office of the United States Courts under sections 604, 605, and 610 of Title 28, United States Code, with respect to the D.C. Superior Court and the D.C. Court of Appeals.

Copies of this decision are being sent to the Executive Director of the District of Columbia Courts and to the Chief Judge of the Superior Court of the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE : 1973 O - 497-490