

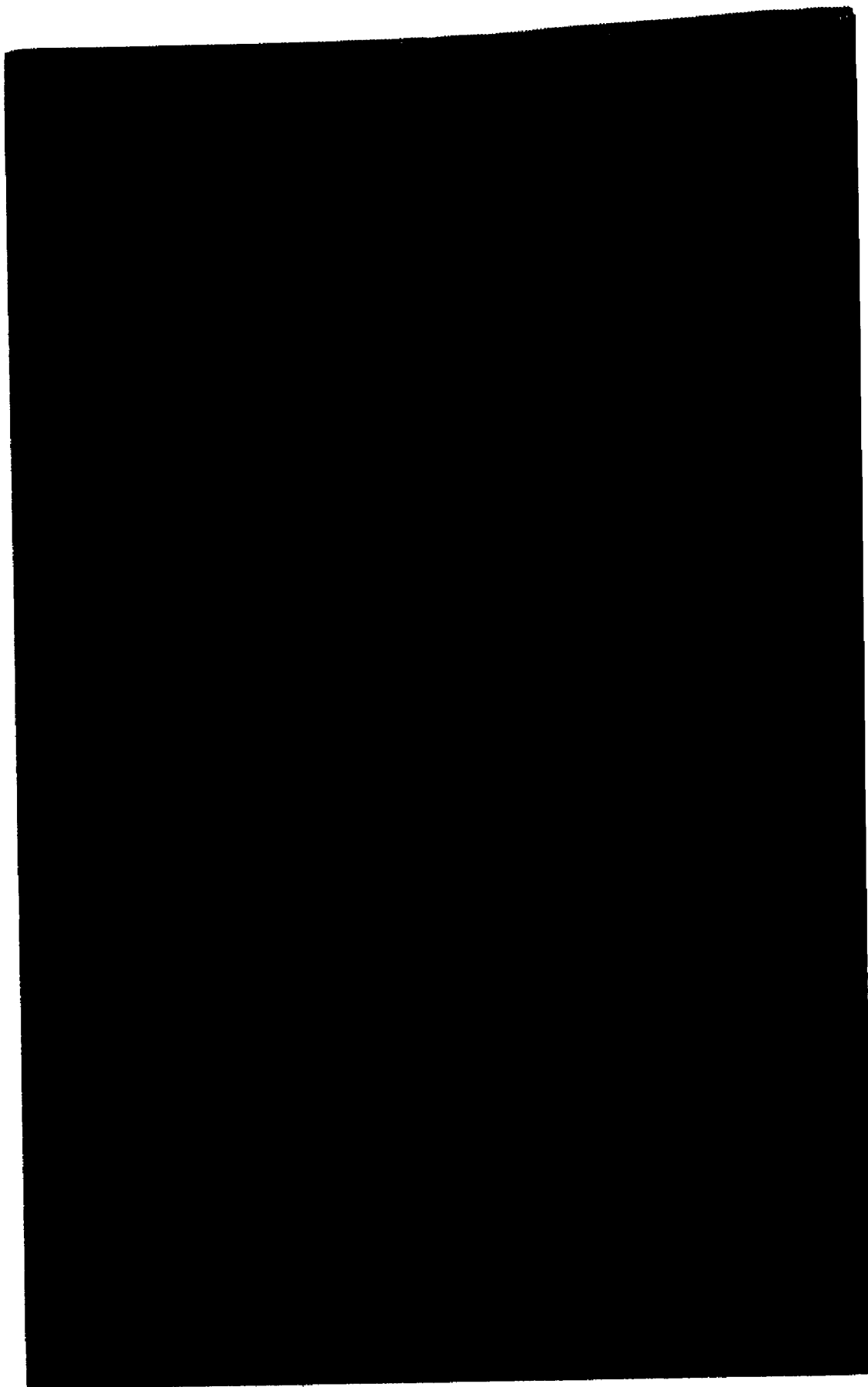
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UNITED STATES GENERAL ACCOUNTING OFFICE

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General Counsel

December 1985

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**GENERAL GOVERNMENT MATTERS
APPROPRIATIONS AND MISCELLANEOUS**

ACCOUNTABLE OFFICERS B-211962 Dec. 10, 1985
Relief
Illegal or Erroneous Payments
Without Fault or Negligence

Upon a request for reconsideration, relief from liability for a loss of \$8,202 granted former Department of Labor imprest fund cashier under 31 U.S.C. § 3527(a). A number of persons had access to the safe where the fund was kept in violation of Treasury standards. GAO agrees with conclusion that the loss was the result of pervasive laxity in office procedures beyond control of the cashier.

ACCOUNTABLE OFFICERS B-220156 Dec. 10, 1985
Physical Losses, etc. of Funds, Vouchers, etc.
Cashiers, etc.
Imprest Fund
Relief Granted

U.S. Army and Accounting Officer is relieved of liability for improper payment made by subordinate cashier since he maintained and supervised adequate system of procedures to prevent improper payments. Cashier is also relieved since he followed all existing procedures although such procedures were circumvented by payee who perpetrated a criminal scheme to obtain funds by cashing checks on a totally withdrawn account.

ACCOUNTABLE OFFICERS B-220737; B-220981 Dec. 10, 1985

Relief

Illegal or Erroneous Payments

Without Fault or Negligence

U.S. Army Finance and Accounting Officers are relieved of liability for improper payments made by their respective subordinate cashiers because they each maintained and supervised an adequate system of procedures to prevent improper payments. All of the cashiers are also relieved because they followed all prescribed procedures for cashing checks notwithstanding that the payee circumvented those procedures with a criminal scheme.

TREASURY DEPARTMENT

B-221127.3 Dec. 13, 1985

Secretary of Treasury

Authority

Railroad Retirement Account

During the debt-ceiling crisis of November, 1985, the Department of the Treasury redeemed approximately \$445 million of Railroad Retirement Account securities in excess of that determined by the Railroad Retirement Board to be necessary for payment to beneficiaries. Treasury's actions were inconsistent with its investment authority under section 15(e) of the Railroad Retirement Act. (45 U.S.C. § 231n(e)), although later corrected with no loss of principal or interest to the Account.

Ordinarily, the Department of the Treasury provides the Railroad Retirement Account interest on the "float" for benefit checks mailed on the 1st of the month, but not cashed until the 7th and 8th. During the November, 1985 debt-ceiling crisis, and because of the danger of an imminent default, the Department accelerated redemptions of RRA securities (among other trust accounts) thereby decreasing the period which would otherwise be available to the Account to earn interest on its investments. GAO concludes that Treasury's actions were inconsistent with the Railroad Retirement Act's requirement that Railroad Retirement Account funds be invested except as immediately required for payment. The amount of interest lost should be restored to the account as an administrative error.

DISBURSING OFFICERS**B-220308 Dec. 16, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-220500 Dec. 16, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

APPROPRIATIONS

B-220527 Dec. 16, 1985

Fiscal Year**Availability Beyond****Federal Aid, Grants, etc.**

Economic Development Administration offer of a public works grant to Town of Franklin, Connecticut and State of Connecticut jointly, was conditioned on acceptance of the offer by both parties before September 30, 1983, the end of the fiscal year. An unauthorized agent for the applicant Town purported to accept the offer on the last day of the fiscal year and her action was, in effect, ratified 6 months later by the Town Council which would have been authorized to accept the grant offer. However, at the time of the attempted ratification, the grant offer was no longer available for acceptance, having expired on the same date that the appropriation to fund the grant lapsed.

Ratification of an unauthorized action taken in a prior fiscal year may serve to authorize a charge to the prior year's funds only if the Government received and accepted the benefit of property or services provided by a contractor, or if, in a grant situation like this, the agency had actually awarded the grant and the grantee had expended its own funds for grant purposes in reliance on the erroneous award.

DISBURSING OFFICERS**B-220831 Dec. 16, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-220846 Dec. 16, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-221158 Dec. 16, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-221197 Dec. 16, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-220193 Dec. 17, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-221185 Dec. 17, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-221258 Dec. 17, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-220830 Dec. 18, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

DISBURSING OFFICERS**B-221213 Dec. 18, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

ACCOUNTABLE OFFICERS**B-216279.2 Dec. 30, 1985****Relief****Lack of Due Care, etc.****Relief Denied**

Upon reconsideration, decision to deny relief pursuant to 31 U.S.C. § 3527 to Customs Service cashier for \$1,000 deficiency in her account is affirmed. Agency failed to make the determinations required by the statute that the deficiency was not the result of negligence on the part of the accountable officer. Further, agency could not have made necessary determinations because record clearly indicates that cashier was negligent. Any adverse personnel action taken by the agency against the accountable officer is not relevant to the granting of relief by this Office.

CLAIMS

B-219337 Dec. 30, 1985

**Reporting to Congress
Legal Liability or Equity
Contract Matters**

The Department of the Interior may carry out its agreement to resolve claims by former licensees of the American Revolution Bicentennial Administration consistent with its earlier resolution of a test case, notwithstanding the fact that the remainder of claims were not formally filed with the agency until 7 years after the termination of applicable license agreements. The agreement in the test case did not constitute a "settlement", as that term is ordinarily used by this Office to refer to the determination of legal liability on the part of the Government. Instead, the Department's actions apparently involved a determination that equitable factors favored payment, and an agreement to award compensation to the claimant only as specifically provided by Congress. Similar action in the present case would not be barred by limitations otherwise applicable to determination of legal liability.

STATUTES OF LIMITATION**Claims
Date of Accrual
Contract Matters
Breach of Contract**

Administrative adjudication of breach of contract claims by six former licensees of the American Revolution Bicentennial Administration, asserted against the Department of the Interior as successor agency, may not be time-barred, even when filed 7 years after contract termination, if cognizable under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. Under the Act, the period of limitation of judicial review commences only upon final agency adjudication. No determination was ever made whether contracts in question are procurements under the Act.

DISBURSING OFFICERS**B-221398 Dec. 30, 1985****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

**PERSONNEL LAW
CIVILIAN PERSONNEL**

PROPERTY

B-219094 Dec. 5, 1985

Private

Damage, Loss, etc.

Personal Property

Claims Act of 1964

This Office does not have jurisdiction to consider the claim of an employee of the Internal Revenue Service for loss and damage to personal property while on official business. Such a claim is for consideration by the head of the employing agency or his designee under the Military Personnel and Civilian Employees Claim Act of 1964, 31 U.S.C. § 3721 (1982), and any settlement of the claim approved by the agency would be final and conclusive.

TRAVEL EXPENSES

"Pet" Care

Prohibition

Pet care expenses incurred by federal employee while on temporary duty are not reimbursable since neither the statute nor the applicable regulations governing the reimbursement of travel expenses authorize payment for such expenses. John A. Maxim, Jr., B-212032, July 6, 1983.

LEAVES OF ABSENCE**B-219211 Dec. 9, 1985****Administrative Leave****Official Business Requirement****Brief, Partial Shutdown of Agency, etc.****Funding Gap Possibility**

Incident to a forced agency furlough plan, an employee took 3 furlough days off without pay during a scheduled furlough period. The furlough plan was later cancelled and the employee was allowed to substitute annual leave for the 3 days. However, the employee now requests restoration of the annual leave on the basis that the agency should have excused the furlough days without charge to leave. We uphold his agency's denial of his request for restoration of annual leave. Each agency has the discretionary authority to determine the situations in which an employee may be excused from duty without loss of pay or charge to leave; there is no indication that the agency abused its discretion in this case.

APPOINTMENTS**B-219973 Dec. 9, 1985****Above Minimum Step in Grade****Grade GS-11 and Above****Office of Personnel Management Approval
Requirement**

An employee of the Equal Opportunity Commission was hired with the understanding she would be appointed at step 4 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Upon subsequent, but prospective approval of higher step placement by OPM, a claim for retroactive increase in that pay is made here. The claim is denied. Under 5 U.S.C. § 5333, 5 C.F.R. § 531.203(b), and General Accounting Office decisions, appointments to grades GS-11 and above may be made at a rate above the minimum rate of the grade, but only with prior approval of OPM. Since such appointment is discretionary and not a right, the employee may not receive a retroactive increase. See Susan E. Murphy, 63 Comp. Gen. 417 (1984).

GENERAL ACCOUNTING OFFICE B-220119 Dec. 9, 1985

Jurisdiction

Labor-Management Relations

Requests for Decisions

Declined

It is the policy of the Comptroller General to decline jurisdiction in matters pending resolution in grievance proceedings initiated under the laws governing Federal labor-management relations, if one of the parties indicates a preference to have the dispute settled through arbitration and objects to a review of the matter in the General Accounting Office. Hence, jurisdiction is declined on an agency's request for a decision concerning allegedly fraudulent travel and transportation allowance claims submitted by an employee, where it appears the matter is pending arbitration and the employee's union objects to the agency's referral of the case to the General Accounting Office for review.

LEAVES OF ABSENCE

B-218728 Dec. 10, 1985

Annual

Restored

An employee sustained a compensable on-the-job injury resulting in a prolonged recuperation period which extended beyond the end of the leave year. Following his injury and with the knowledge that he probably would be unable to use 44 hours of annual leave subject to forfeiture, the employee timely scheduled its use in compliance with 5 C.F.R. § 630.308. The agency denied restoration of the annual leave on the basis that scheduling must be done before an injury occurs in order to have it restored. We have ruled in prolonged recuperation cases that if there was no opportunity to schedule leave because of illness, such leave may be presumed to have been timely scheduled for the purposes of restoration. The fact that the employee scheduled the annual leave after the injury would not alter that result since Congress rejected the view that an employee should be required to use annual leave while he is sick in order to avoid its loss.

COMPENSATION**B-217044 Dec. 11, 1985****Removals, Suspensions, etc.****Back Pay Act of 1966****Backpay Award****Scope of Entitlement**

An employee of the U.S. Navy in the Philippines who held a position available only to Philippine nationals was separated in 1974 when he acquired U.S. citizenship which was conditional on his emigration to the United States. The Merit Systems Protection Board later found that he should have been given a 60-day notice prior to separation under reduction-in-force procedures. He is not entitled to additional backpay beyond that given by the Navy for the 60-day notice period, particularly since the record shows he was unavailable for work in the Philippines upon his emigration to the United States less than 3 months after the time of his separation. Payments under the Back Pay Act are designed to compensate employees for the pay they would have received but for a wrongful separation, and the employee cannot be considered to have lost any pay in excess of the 60 days' backpay already allowed in those circumstances.

OFFICERS AND EMPLOYEES**B-218692 Dec. 17, 1985****Transfers****Temporary Quarters****Evidence of Expense**

Where transferred employee and his family occupied temporary quarters in the home of the employee's brother, agency properly limited reimbursement for lodging costs to \$4 a day. Although the employee claims to have paid brother \$30 a day for lodgings and for use of garage to store household goods, documentation submitted by employee shows brother's increased costs for providing lodgings proximated only \$4 a day. Amount paid for use of garage is not a lodging cost, but should be treated as a cost of temporary storage of household goods.

DEBT COLLECTIONS**B-218722 Dec. 17, 1985****Waiver****Civilian Employees****Collection****Not Against Equity and Good Conscience, etc.**

An Air Force employee who had been receiving post allowance and living quarters allowance while stationed in England was erroneously paid the same allowances after his transfer from England to Germany. The employee should have expected a decrease in the amount of his pay based on the termination of these allowances but he failed to examine his record of bank deposits, which would have indicated that his pay did not decrease after his transfer to Germany. Therefore, the employee is not without fault, and under applicable regulations, waiver is precluded. Financial hardship cannot form the basis for waiver.

COURTS**B-220881, et al. Dec. 17, 1985****Suits Against United States****Proper Parties**

United States, not employees or specific Government agencies, is proper defendant for court actions brought under the Tucker Act, 28 U.S.C. § 1346, seeking monetary recovery. Therefore, if General Accounting Office is a named defendant, a motion to dismiss action against GAO would be appropriate.

STATUTES OF LIMITATION**Claims****Military Matters and Personnel****Pay and Allowances****Philippine Scouts**

District court actions by Philippine nationals for pay and allowances arising from military service with the United States Armed Forces in the Far East and subsequently as recognized guerillas in the Philippines are subject to six-year statute of limitations in 28 U.S.C. § 2401.

VETERANS ADMINISTRATION **B-220881, et al., Con't**
Finality of Findings, **Dec. 17, 1985**
etc.

Conclusiveness of Administrator's Determination
Veterans Benefits

Generally, decisions of Veterans Agency Administration regarding claimants entitlement to VA benefits are not reviewable by other Government agencies or courts.

TRAVEL EXPENSES **B-218984 Dec. 18, 1985**
Temporary Duty
Lodgings and/or Meals Travel

Employee on temporary duty claims taxicab fares to travel to restaurants away from general area of her lodgings. Employee's claim is denied since record supports agency's determination that employee traveled to restaurant for reasons of personal preference and not because adequate facilities were unavailable in area of lodgings.

OFFICERS AND EMPLOYEES **B-219228; B-220318**
Transfers **Dec. 18, 1985**
Expenses
Relocation, etc.
Income Tax Treatment

Employees of Internal Revenue Service seek payment of relocation income tax allowance for their transfers which were effective prior to November 14, 1983. Claims are denied since the tax allowance authorized by section 118 of Public Law 98-151 is available only to employees whose effective date of transfer is on or after November 14, 1983. Contrary statement made by congressional sponsors after enactment of the legislation is not sufficient to show that implementing regulations establishing the effective date are improper.

OFFICERS AND EMPLOYEES**B-219222 Dec. 20, 1985****Transfers****Real Estate Expenses****Time Limitation****Mandatory**

Employee reported for duty at his new official station on September 20, 1980. Due to delay caused by litigation and occupancy of his residence at his old duty station under purchase agreement, he did not go to settlement on that residence until March 1, 1984. Federal Travel Regulations, para. 2-6.1e, (Supp. 4, October 1, 1982) (FTR), allows a maximum of 3 years for a federal civilian employee to complete transfer-related real estate transactions for entitlement to reimbursement. Claimant's entitlement expired on September 20, 1983, over 5 months prior to sale of residence. Reimbursement of the claimed real estate expenses is not authorized by FTR para. 2-6.1e. The regulation has the force and effect of law and may not be waived or modified.

COMPENSATION**B-219273 Dec. 26, 1985****Severance Pay****Eligibility****Involuntary Separation**

Agency announced a transfer of functions and advised employee that, if he declined to move with his function, he could resign and receive severance pay. After the employee submitted his resignation but before its effective date, the agency canceled the transfer of functions and advised the employee that he could withdraw his resignation and retain his position. We hold that the employee is not entitled to receive severance pay because his resignation was voluntary, having been effected after the transfer of functions was canceled and after he was afforded the option of retaining his position. Furthermore, although the employee may have acted in reliance on the transfer-of-function notice, the doctrine of equitable estoppel does not apply here.

TRANSPORTATION**B-199296 Dec. 27, 1985****Automobiles****Overseas Employees****Authority****Lacking**

Employee questions determination that he will not be authorized to ship his privately-owned vehicle at government expense from his overseas duty post to the United States unless that vehicle (or the vehicle it replaced) was shipped at government expense to the overseas duty station. That determination is consistent with the applicable regulations and our decisions. Although the employee may have been misinformed concerning his entitlements, the government is not bound by the erroneous acts of its agents or employees.

COMPENSATION**B-220793 Dec. 27, 1985****Downgrading****Saved Compensation****Entitlement**

Employee of the Forest Service voluntarily transferred from his position in one national forest to a position with the same title, series and grade in another national forest. Because the new position was in a lower wage rate area, the employee suffered a reduction in pay. The employee is not entitled to retained pay since the transfer is considered to be at his request. The fact that he was informed by a forest service official that the position was being advertised and that his application would be welcomed does not establish that his reduction in pay was other than at his own request.

**PERSONNEL LAW
MILITARY PERSONNEL**

DEBT COLLECTIONS

B-219004 Dec. 17, 1985

Waiver

Military Personnel

Pay, etc.

Overpayment

Administrative Error

A retired Coast Guard officer's application for waiver of his debt to the United States arising out of overpayments of military retired pay is denied, where it appeared that he was furnished with written notice that his normal net monthly pay entitlement was \$1,440, but he was actually paid \$1,600 per month and failed to report the discrepancy. Under the governing provisions of statutory law, a grant of waiver of a debt arising out of overpayments of military pay may not be allowed if there is an indication that the concerned service member either knew or should have known that an error existed, and failed to take appropriate corrective action.

STATUTES OF LIMITATION

B-221033 Dec. 17, 1985

Claims

Claims Settlement by GAO

Six Years After Date of Accrual

A former member of the Marine Corps claims payment of a military Basic Allowance for Quarters for the period from January 1, 1974, to March 4, 1975, the date of his separation from active duty. His claim was first received in the General Accounting Office on November 7, 1985. His claim may not be considered, since his claim accrued no later than the date of his separation from service and the Barring Act, 31 U.S.C. § 3702(b), bars consideration of claims received in the General Accounting Office more than 6 years after they have accrued.

AIRCRAFT

B-218921 Dec. 26, 1985

Carriers

Fly America Act

Applicability

Freight Transportation

The Fly America Act, requiring use of available U.S. air carriers, is not applicable where the funds paying for the air transportation are later reimbursed by a foreign government, international agency, or other organization.

PROCUREMENT LAW

CONTRACTS

Negotiation

Awards

Propriety

Technical Superiority-Paramount Consideration

B-219650 Dec. 2, 1985

85-2 CPD 618

Decision of source selection official to award cost-reimbursement contract to a higher cost, technically superior offeror is not objectionable where award on that basis is consistent with the RFP's evaluation criteria and the source selection official determined that the higher cost was justified because awardee proposed more senior staff time and found that the awardee's proposed staff, specifically the project director, was more technically qualified and experienced than the staff offered by competing offeror.

CONTRACTS

Negotiation

Evaluation

Evaluators

Bias Alleged

Where record shows that award decision was made by source selection official who disregarded technical evaluation panel point scores, GAO has no basis to conclude that allegedly biased technical evaluator had any affect on the award decision.

CONTRACTS

Negotiation

Source Selection

Board, Commission, etc.

Overruled by Source Selection Official

Source selection official has the ultimate responsibility for determining what, if any, significance to attach to the technical scores given offers by the technical evaluation panel. Source selection official properly could decide to disregard scores and base award selection on review of record.

Where basis for protest arose on receipt of materials requested under the Freedom of Information Act, protester's assertion that it received so much information that it needed more than 10 working days to review the material before protesting does not warrant consideration of the untimely protest under the timeliness exception for good cause, which is limited to circumstances where some compelling reason beyond a protester's control prevented a timely filing.

GAO will not consider an untimely protest under the timeliness exception for significant issues where the matter raised is not of widespread interest or importance to the procurement community.

In determining the responsibility of the low offeror, the contracting officer is not bound by the recommendation in the preaward survey conducted by the Defense Contract Administration Services Management Area. Rather, he must himself make the final determination based not only upon the preaward survey but also on other information available to him.

CONTRACTORS**B-219657; B-219657.2 Con't****Responsibility****Dec. 3, 1985****Determination****Review by GAO****Nonresponsibility Finding**

GAO will not question the contracting officer's determination that the low offeror is nonresponsible where the offeror fails to demonstrate bad faith on the part of contracting officials or the lack of a reasonable basis for the contracting officer's conclusion that the offeror lacks adequate financial resources to successfully perform a contract at the offered price.

GAO will not object to the contracting officer's decision, in determining whether the low offeror is a responsible offeror with sufficient financial resources to successfully perform the contract, to disregard the financial resources of the separately incorporated offeror's parent company and of its proposed subcontractors, except to the extent that the parent company and proposed subcontractors have entered into a written commitment to make available such resources. The stockholders of a corporation are generally not liable on a contract made by the corporation, while subcontractors normally are not in privity with the government.

CONTRACTS**Negotiation****Offers or Proposals****Best and Final****Acceptability**

Protest against rejection of second best and final offer (BAFO) for failure to include one of the required bills of material setting forth the list price to the government of various required material is denied. Omission was not a minor informality. Moreover, GAO will not question agency determination that correction by reference to the bill of material included in protester's first BAFO would have required reopening discussions and that reopening discussions and calling for a third round of BAFO's was inappropriate.

Where a protest has been filed initially with the contracting agency, any subsequent protest to GAO must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action in order to be timely.

Protesters have a duty to diligently pursue information which forms the basis of their protests within a reasonable time. Where the protester waits more than 3 months after the initial agency denial of its protest to file a Freedom of Information Act request for more detailed information, a subsequent protest to GAO allegedly based upon such information is untimely.

Untimely protest will not be considered under the significant issue exception to GAO's timeliness rules where the issue raised--exclusion from the competitive range--has been previously considered. Nor will the protest be considered under the good cause exception to the timeliness rules where there is no showing that some compelling reason beyond the protester's control prevented the protester from filing the protest.

CONTRACTS **B-219657; B-219657.2 Con't**
Protests **Dec. 3, 1985**
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that closing date in order to be timely.

CONTRACTS
Protests
Procedures
Information Disclosure

Contracting agency has primary responsibility for determining which documents are subject to release to protester under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), and GAO will not question the agency determination in the absence of a showing of fraud or bad faith on the part of contracting officials.

CONTRACTS **B-220048 Dec. 3, 1985**
Protests **85-2 CPD 622**
Allegations
Unsubstantiated

Protester's statements and actions during the procurement process are inconsistent with its contentions that RFP did not permit services offered by awardee or was misleading in that regard.

CONTRACTS
Protests
Contract Administration
Not for Resolution by GAO

Whether contractor performs in a manner consistent with the contract involves a matter of contract administration for the contracting agency that GAO does not review.

BONDS**B-220556 Dec. 3, 1985****Bid****85-2 CPD 623****Surety****Obligation to Government****Absence of Authorized Signature on Bond**

Where surety's power of attorney form attached to bid bond fails to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety, the agency properly determined the bond to be defective and the bid nonresponsive because it is not clear whether the surety would be bound.

FEDERAL ACQUISITION REGULATION B-221098 Dec. 3, 1985**Proposed Revision**

GAO has no objection to proposed changes to Federal Acquisition Regulation §§ 31.109(h) and 31.205-44 concerning advance agreements on, and the allowability of, training and education costs.

CONTRACTS**B-219327.7 Dec. 4, 1985****Protests****85-2 CPD 624****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest filed more than 10 working days after protester was aware or should have been aware of its basis of protest is untimely.

CONTRACTORS**B-219804 Dec. 4, 1985****Responsibility****85-2 CPD 625****Determination****Review by GAO****Affirmative Finding Accepted**

Whether the awardee's price is below cost involves the awardee's responsibility--a matter that GAO generally does not review.

CONTRACTS

B-219804 Con't

Negotiation

Dec. 4, 1985

Offers or Proposals**Discussion With all Offerors Requirement****Exceptions****Offers not Within Competitive Range**

Protest that agency violated regulatory requirements concerning the conduct of discussions is denied since these requirements apply only with respect to proposals in the competitive range and the protester's proposal was not included in the competitive range.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Propriety**

Protest concerning evaluation of protester's proposal is denied where there is no showing that agency's evaluation was unreasonable or was inconsistent with law or the solicitation's evaluation criteria.

CONTRACTS**Protests****General Accounting Office Function****Independent Investigation and Conclusions****Speculative Allegations**

GAO will not conduct an independent investigation in connection with a bid protest in order to substantiate a protester's speculative allegations.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest that agency did not allow sufficient time for the preparation of proposals is dismissed as untimely because it was not filed prior to the closing date for receipt of proposals.

CONTRACTS**B-220025 Dec. 4, 1985****Negotiation****85-2 CPD 626****Sole-Source Basis****Administrative Determination****Reasonable Basis**

Contracting agency substantially complied with procedures in the Competition in Contracting Act of 1984 for the award of a sole source contract when agency published the required notices and prepared an adequate justification which was approved by the appropriate agency official.

Sole source procurement was justified where the contracting agency reasonably determined that only one source could satisfy the agency's needs by the required time.

BIDS**B-221087 Dec. 4, 1985****Responsiveness****85-2 CPD 627****Failure to Furnish Something Required
Information****Small Business Concerns****End Product Contributor**

Bid on a total small business set-aside solicitation which fails to indicate that bidder intends to furnish supplies manufactured by a small business is nonresponsive and the fact that the bidder represented itself as a small business and a manufacturer for Walsh-Healey purposes and indicated its plant as the place of manufacture does not cure the deficiency.

CONTRACTS**B-219420.2 Dec. 5, 1985****Protests****85-2 CPD 628****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Request for reconsideration is denied where the protester makes the same basic assertion that was made in the initial protest and does not show that the contracting agency eliminated its proposals from the competitive range without evaluating them in accord with the solicitation's evaluation scheme.

BIDDERS**B-219694 Dec. 5, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor failed to pay the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in the case, we find that there was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional and we conclude that the contractor disregarded its obligations under the Act. Therefore, the contractor will be debarred under the Act.

BIDS**B-219828 Dec. 5, 1985****Unbalanced****85-2 CPD 630****Propriety of Unbalance****"Mathematically Unbalanced Bids"****Materiality of Unbalance**

Where first articles are separately priced, a bid that is mathematically unbalanced in the extreme because it grossly overprices first articles should be rejected, even if low, since the bid suffers from the same defect as an advance payment. Award would provide funds to the contractor early in contract performance to which it is not entitled if payment is to be measured on the basis of value received.

CONTRACTS**B-219828 Con't****Negotiation****Dec. 5, 1985****Offers or Proposals****Discussion With all Offerors Requirement****What Constitutes Discussion****Questions Posed During Preaward Survey**

In a negotiated procurement, conversations that take place during a preaward survey that relate to the capability of a prospective contractor are distinct from discussions conducted prior to best and final offers since the latter are concerned with the acceptability of a proposal and thus serve a different purpose from those held during a preaward survey.

CONTRACTS**B-220399 Dec. 5, 1985****Negotiation****85-2 CPD 631****Competition****Adequacy**

Where as result of Commerce Business Daily synopsis agency distributed copies of solicitation to 24 firms of which four have submitted offers, thus obtaining full and open competition, GAO will not sustain protest of firm which did not compete because apparently through oversight it was not added to solicitation mailing list which agency did not use in any event. GAO recommends, however, that in future agency take measures to insure that interested firms are added to solicitation mailing lists and that such lists are used.

CONTRACTS**B-220878 Dec. 5, 1985****Protests****85-2 CPD 632****Moot, Academic, etc. Questions****Contract Terminated for Convenience**

Protest against award to another firm is academic when the contract in question has been terminated for the convenience of the government because the contracting agency discovered after award that the specifications did not adequately describe its needs.

CONTRACTS **B-220967.2; B-220968.2** **Dec. 5, 1985**
Protests **85-2** **CPD 633**
General Accounting Office Procedures
Filing Protest With Agency

GAO generally will not review a contracting officer's finding that a small business is not responsible where the Small Business Administration, which has conclusive jurisdiction in the area, denied the firm a COC.

CONTRACTS
Small Business Concerns
Awards
Responsibility Determination
Nonresponsibility Finding
Review by GAO

Dismissal of protest because protester did not furnish a copy of it to the contracting agency within 1 day after filing with GAO is affirmed where the agency states it received its copy more than 1 week after the filing, and the protester has furnished no evidence to show otherwise. The fact that the protester may have sent the copy within the necessary period is not relevant, since the requirement is for receipt by the agency.

CONTRACTS **B-219676** **Dec. 6, 1985**
Negotiation **85-2** **CPD 635**
National Emergency Authority
Expansion of Mobilization Base

GAO will not object to contracting officer's determination to consider new planned producers for industrial mobilization item rather than limit competition to existing planned producers. Determination of how best to meet its industrial mobilization needs is primarily the responsibility of the procuring agency and that determination will not be disturbed in the absence of convincing evidence--not shown by protester--that contracting agency abused its discretion in determining how to meet its needs.

CONTRACTS**B-219676 Con't****Negotiation****Dec. 6, 1985****National Emergency Authority****Expansion of Mobilization Base**

Given that GAO cannot conclude that contracting agency abused its discretion in allowing new planned producers to qualify for mobilization needs involving military food rations, and since protester's planned producer agreement states that contracting agency is not obligated to convert protester's planning schedule to contract, it was not improper for contracting agency to qualify new producers even though protester, an existing planned producer, is small, minority firm. Further, fact that other established planned producers may have competitive advantage over protester because of other contracts awarded to concerns is an advantage which contracting agency is not required to equalize.

Contracting agency's statement that new planned producer had timely qualified is sufficient evidence of producer's qualified status for industrial mobilization program in the absence of evidence to the contrary; moreover, contracting officer's determination justifying defense mobilization contract for rations supports DLA's official position that new planned producer had timely qualified as planned producer.

BIDS**B-220033 Dec. 6, 1985****Invitation for Bids****85-2 CPD 636****Amendment****Acknowledgement****Bidder Bound by Amended IFB**

Where bidder crosses out line item under bid schedule with notation indicating item was deleted because of a specific amendment, but bidder acknowledges subsequent amendment reinstating item, only reasonable interpretation of bid is that bidder is bound by the subsequent amendment to supply item.

BIDS

B-220033 Con't

Invitation for Bids

Dec. 6, 1985

Cancellation

After Bid Opening

Administrative Determination

Invitation for bids (IFB) for Navy mines may be canceled after bid opening where agency learns that manufacturer of specific battery power unit component required under IFB is having production difficulties and that the battery may not perform properly.

BIDS

Responsiveness

Pricing Response

Minor Deviations From IFB Requirements

Bid which offered prices for option quantities for Fiscal Year (FY) 1987 conditioned on the exercise of quantities in the FY 1986 option year was responsive since the only reasonable interpretation of the solicitation was that the agency intended to exercise FY 1986 option quantities as a prerequisite to the exercise of FY 1987 option quantities.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

GAO will not consider protest by interested party where protest was untimely submitted as part of comments on agency report concerning protest of another bidder.

CONTRACTORS**B-219632 Dec. 9, 1985****Responsibility****85-2 CPD 637****Determination****Review by GAO****Affirmative Finding Accepted**

Solicitation provision that bidder may be required to demonstrate previous experience in performing comparable work involves bidder responsibility that GAO does not review absent a showing of possible fraud on the part of contracting officials or that definitive responsibility criteria were not applied.

Solicitation provision that bidder must have performed similar construction services within the United States for 3 prior years must be met as a condition of award; the similarity of prior work, however, is essentially within the discretion of the contracting agency.

Allegation that agency's affirmative determination of responsibility was based on fraud or bad faith is without merit where record indicates a reasonable basis for agency's determination.

GENERAL ACCOUNTING OFFICE**Jurisdiction****Contracts****Performance****Contract Administration Matter**

Protest that subcontractor of awardee does not comply with nationality provisions included in the contract is dismissed since compliance with the provisions is a matter of contract performance not for GAO consideration.

BIDS**B-220163 Dec. 9, 1985****Guarantees****85-2 CPD 639****Bid Guarantees****Deficiencies****Bid Rejection**

Agency official's admittedly erroneous oral advice to a bidder regarding the amount on which a required 20 percent bid guarantee should be based does not prejudice the bidder when the guarantee furnished is defective in other ways in addition to the insufficient amount.

BIDS**Guarantees****Bid Guarantees****Irrevocable Letter of Credit****Acceptability**

Protester's bid is properly rejected as nonresponsive where an irrevocable letter of credit submitted as a bid guarantee does not identify the solicitation or the work to be performed and does not contain an expiration date. Enforceability of the letter of credit is therefore questionable, and the government would not receive the full and complete protection contemplated by the IFB.

BIDS**B-219453.2 Dec. 10, 1985****Invitation for Bids****85-2 CPD 641****Cancellation****After Bid Opening****Defective Solicitation**

An invitation for bids may be canceled after bid opening and the exposure of bid prices when a compelling reason exists for doing so. A specification that overstates the agency's needs and results in a wide disparity of prices indicating that one or more bidders may have been misled by ambiguities in the specification constitutes a compelling reason for cancellation and resolicitation.

CONTRACTS**B-219652 Dec. 10, 1985****Negotiation****85-2 CPD 642****Offers or Proposals****Discussion With all Offerors Requirement****Failure to Discuss****Elimination From Competitive Range****Unjustified**

GAO does not accept agency's argument that protester could not have improved its evaluation scores in the experience, equipment and management categories since protester's deficient prior performance, which was fixed, could not have been improved. The equipment and management categories are susceptible to improvement through discussions.

CONTRACTS**B-219728.2 Dec. 10, 1985****Negotiation****85-2 CPD 643****Offers or Proposals****Discussion With all Offerors Requirement****Failure to Discuss****Situations not Requiring Discussion**

Discussions need not be held with the two offerors within a competitive range on a no-cost, no-fee travel management services contract, even though the technical point scores of the offerors' proposals are very close, where the agency has a reasonable basis for award selection.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Technical Superiority****Significant****B-219728.2 Con't****Dec. 10, 1985**

Agency may select a contractor, which received a slightly higher technical point score than the protester, for award of a no-cost, no-fee travel management contract, where the source selection official and the evaluators found that the contractor's proposal was technically superior to the protester's because the protester's proposal demonstrated a lack of understanding of the requirements, which was the heaviest weighted evaluation criterion. Since point scores are only a guide to intelligent decisionmaking, the source selection official can reasonably find that proposals are not technically equal in this case.

CONTRACTS**Negotiation****Offers or Proposals****Qualifications of Offerors**

Offeror submitted a proposal containing a letter of accreditation, which the contractor altered by substituting its name for and erasing the name of the predecessor corporation for which the accreditation was issued. This accreditation was necessary to be found a responsible contractor and the agency relied on the altered accreditation to find the offeror responsible. However, a protest on this basis of an award to the offeror is denied, where the offeror had received the proper accreditation prior to contract performance and the agency found that the offeror therefore would be responsible and where there was no requirement that proof of accreditation be submitted with the proposal.

CONTRACTS **B-220396 Dec. 10, 1985**
Grant-Funded Procurements 85-2 CPD 644
General Accounting Office Review

GAO does not review complaints concerning the award of contracts under federal grants.

CONTRACTS **B-220406.2 Dec. 10, 1985**
Protests 85-2 CPD 645
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Contention that awardee had not met definitive responsibility criterion, first raised in request for reconsideration but without any identification of such criterion does not provide a basis for reconsideration. Moreover, this contention based on same allegations made in original protest, is untimely and will not be considered since the request was not filed within 10 days of filing the original protest, the date on which, at the latest, the protester knew or should have known the basis of protest.

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Performance
Contract Administration Matter

Whether awardee will actually perform in accordance with terms of contract is a matter of contract administration which is not for GAO consideration.

CONTRACTS

B-220616 Dec. 10, 1985

Protests

85-2 CPD 646

General Accounting Office Procedures**Timeliness of Protest****Adverse Agency Action Effect**

Protest is untimely and will not be considered where initially filed with the contracting agency and then not filed with GAO within 10 working days after protester's receipt of agency's denial of the protest. Protest is not rendered timely by assertion that the denial letter misled the protester into believing that it had no basis for protest where GAO finds that the letter in fact contained nothing that should have misled the protester in that regard.

CONTRACTS

B-221178 Dec. 10, 1985

Protests

85-2 CPD 647

General Accounting Office Procedures**Timeliness of Protest****Adverse Agency Action Effect**

When a protest has been filed initially with the contracting agency, any subsequent protest to GAO, to be timely, must be filed within 10 working days of notification of or actual or constructive knowledge of initial adverse action on the agency-level protest. The fact that protester continues to pursue the matter with the agency does not toll the running of the 10-day requirement.

CONTRACTS**B-219658 Dec. 11, 1985****Negotiation****85-2 CPD 648****Offers or Proposals****Evaluation****Criteria****Application of Criteria**

In solicitation for fixed-price requirements contract under which payment will be based on productive labor hours, evaluation can only be on the basis of the total number of labor hours specified in the solicitation. Although offerors are required to include salaries, general and administrative expenses, and profit in their proposed labor rates, an evaluation based on the number of productive hours independently developed by an offeror, rather than on total labor hours, would lead to offerors improperly being evaluated on different bases.

CONTRACTS**B-219668 Dec. 12, 1985****Negotiation****85-2 CPD 649****Offers or Proposals****Preparation****Costs****Denied**

There is no legal basis for recovery of proposal preparation costs where GAO does not find the cancellation of a solicitation improper.

CONTRACTS**Negotiation****Requests for Proposals****Cancellation****In-House Government Performance**

GAO does not object to cancellation of a solicitation where the contracting agency needs to modify the scope of work and has decided to perform some of the work in-house.

Date Basis of Protest Made Known to Protester

Prejudicial to Other Bidders

D-21

CONTRACTS **B-220069 Dec. 12, 1985**
Negotiation **85-2 CPD 651**
Offers or Proposals
Best and Final
Ambiguous
Clarification Propriety

An agency was not obligated to seek verification or clarification of a best and final offer where the record shows that the agency, while aware of a discrepancy in the offer, reasonably assumed that its interpretation of the offer was correct.

LABOR DEPARTMENT **B-221203 Dec. 12, 1985**
Jurisdiction **85-2 CPD 652**
Service Contract Act Violations

The Department of Labor, not GAO, is the proper forum to determine whether a solicitation is subject to the provisions of the Service Contract Act.

PURCHASES **B-221211 Dec. 12, 1985**
Purchase Orders **85-2 CPD 653**
Federal Supply Schedule
Prices
Buy American Act Differential
Applicability

The Buy American Act and the Department of Defense Balance of Payments Program do not apply to the purchase of supplies that are for use outside the United States where the cost is not estimated to exceed \$25,000.

CONTRACTS **B-219323.2 Dec. 13, 1985**
Protests **85-2 CPD 654**
Authority to Consider
Contract Administration Matters

Whether a contractor is performing in compliance with contract requirements is a matter of contract administration to be decided by the procuring agency, not GAO.

B-219323.2 Con't
Dec. 13, 1985

CONTRACTS
Protests
 General Accounting Office Procedures
 Reconsideration Requests
 Error of Fact or Law
 Not Established

CONTRACTS	B-219654.2 Dec. 13, 1985
Protests	85-2 CPD 655
General Accounting Office Procedures	
Reconsideration Requests	
Error of Fact or Law	
Not Established	

CONTRACTS B-219956.2 Dec. 13, 1985
Protests 85-2 CPD 656
General Accounting Office Procedures
Filing Protest With Agency

D-23

CONTRACTS**B-220002 Dec. 13, 1985**

**Negotiation
Awards
Propriety
Upheld**

Contracting agency properly selected for award the proposal that received the highest evaluated score for technical factors and price where the evaluation was reasonable and consistent with the solicitation's evaluation scheme.

CONTRACTS

**Negotiation
Prices
Below Cost
Effect on Responsibility**

No statute or regulation precludes an award of a fixed-price contract simply because the offeror may have proposed wage rates below the applicable Department of Labor minimum wage determinations. While the risk that the offeror may have to pay higher rates than indicated in its proposal may be a factor in determining the offeror's responsibility, GAO does not review a determination that an offeror is responsible except in limited circumstances.

CONTRACTS**B-220045 Dec. 13, 1985**

**Negotiation
Awards
Initial Proposal Basis
Propriety**

85-2 CPD 657

Award on an initial proposal basis, without discussions, is proper where the solicitation advises offerors of this possibility and the competition clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government.

CONTRACTS**B-220045 Con't****Negotiation****Dec. 13, 1985****Offers or Proposals****Rejection****Failure to Meet Solicitation Requirements**

Agency decision to reject an offer is proper where the technical proposal is so deficient that it would require major revisions to be made acceptable.

CONTRACTS**Protests****General Accounting Office Procedures****Filing Protest With Agency**

Protest will not be dismissed for failure to furnish the contracting officer a copy of the protest within a day after filing with GAO as required by GAO's Bid Protest Regulations where the delay did not hamper the protest proceedings.

CONTRACTS**Protests****Interested Party Requirement****Protester Not in Line for Award**

Since the protester's offer was properly eliminated from the competition and the protester is therefore ineligible for the award, it is not an interested party to protest the acceptability of one of the remaining eligible offers.

BIDS**B-220064; B-220182.2****Invitation for Bids****Dec. 13, 1985****Amendment****85-2 CPD 658****Failure to Acknowledge****Bid Responsive**

Amendment requiring performance of significant work by certain date is not material, and bidder's failure to acknowledge the amendment thus does not render its bid nonresponsive, since the amendment did not increase the bidder's obligations under the original invitation for bids.

CONTRACTS**B-220299.2 Dec. 13, 1985****Protests****85-2 CPD 659****General Accounting Office Procedures****Timeliness of Comments on Agency's Report**

Dismissal of original protest on the basis that the protester had failed to pursue the matter after agency report was filed is affirmed since GAO has no record of protester's alleged telephonic advice that it wished to have the protest decided on the existing record. GAO's Bid Protest Regulations contemplate the submission of a written statement and a protester who fails to submit one does so at its own risk.

BIDDERS**B-220450 Dec. 13, 1985****Qualifications****85-2 CPD 660****License Requirement****Administrative Determination**

Contracting officers are not required to question the validity of a required license or permit that is submitted by a bidder before award and that is valid on its face in the absence of some appropriate indication that the license may not be valid.

CONTRACTS**B-220511.2 Dec. 13, 1985****Protests****85-2 CPD 661****Abeyance Pending****Contract Appeals Board Action**

Protest involving the procurement of personal computers, which is also the subject of a protest pending before the General Service Administration Board of Contract Appeals (GSBCA), is dismissed in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit.

CONTRACTS **B-220512.3 Dec. 13, 1985**
Protests **85-2 CPD 662**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protest not filed within 10 working days after the protester knew or should have known the basis for protest is untimely and will not be considered.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

Protest against alleged defective specifications in step one of two-step, sealed bidding procurement filed after closing date for receipt of step-one technical proposals is untimely.

CONTRACTS **B-220625 Dec. 13, 1985**
Negotiation **85-2 CPD 663**
Late Proposals/Quotations
Lost
Acceptance of Duplicate Copy
Propriety

Where the contracting activity never received the protester's offer, and there is no evidence even to establish that an offer actually was sent, a copy submitted after the proposal due date cannot be considered for award.

CONTRACTS
Negotiation
Requests for Proposals
Cancellation
Not Justified

Solicitation listing incorrect offer submission address need not be canceled where adequate competition results, reasonable prices are received, and there is no evidence of a deliberate attempt to exclude protester from the competition.

CONTRACTS **B-220935.4 Dec. 13, 1985**
Negotiation **85-2 CPD 664**
Offers or Proposals
Discussion With all Offerors Requirement
Exceptions
Offers not Within Competitive Range

Agencies are not required to hold discussions to correct deficiencies in a proposal that is not within the competitive range.

CONTRACTS
Protests
General Accounting Office Procedures
Reconsideration Requests
Error of Fact of Law
Not Established

Prior dismissal is affirmed where no new facts or legal arguments are raised on reconsideration which show that dismissal was erroneous.

CONTRACTS **B-221177.2 Dec. 13, 1985**
Protests **85-2 CPD 665**
General Accounting Office Procedures
Constructive Notice

GAO's Bid Protest Regulations provide clear instructions for the proper preparation and submission of protests, and all protesters are on constructive notice of their contents since those regulations were published in the Federal Register and appear in the Code of Federal Regulations.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Adverse Agency Action Effect
Interim Appeals to Agency--Effect on 10
Working Day GAO Filing Period

Where a protest to GAO following initial adverse agency action is not received within 10 working days of that action because it was misaddressed to the procuring activity rather than to GAO, the protest was properly dismissed as untimely.

CONTRACTS

B-219985 Dec. 16, 1985

Negotiation

85-2 CPD 666

Offers or Proposals

Evaluation

Administrative Discretion

Cost/Technical Tradeoffs

Procurement officials have broad discretion in determining the tradeoff between cost and technical advantages in competing proposals, and GAO will only review such determinations for rationality and consistency with the established evaluation factors.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Criteria

Order of Importance

When a request for proposals is silent as to the relative importance of cost and technical factors, they must be considered approximately equal in weight.

CONTRACTS

Protests

Allegations

Bias

Unsubstantiated

Protest that alleged conflict of interest by agency procurement personnel tainted the evaluation of proposals is denied where it is based only on inference and supposition.

B-219988.3 Dec. 16, 1985

85-2 CPD 667

Future Procurements

CONTRACTS

Convenience of Government

Agency's decision to terminate a contract for the convenience of the government is reasonable in light of agency's need to revise solicitation specifications to reflect its actual needs.

Contracts

Review of Procedures Leading to Award

CONTRACTS

B-219989; B-219989.2

Dec. 16, 1985

85-2 CPD 668

Offeror's Superior Advantages

A procuring agency has no obligation to equalize a firm's competitive advantage because of cost savings that would result from the firm's simultaneous performance of another government contract unless such an advantage results from a preference or unfair action by the contracting agency.

Conflict of Interest Prohibitions

Organizational

B-219989; B-219989.2 Con't
Dec. 16, 1985

Reviewing abstracts of scientific literature for obvious errors incident to converting them to magnetic tape, where contractor prepared abstracts and submitted them to procuring agency under another contract, does not rise to the level of substantive review that would impair a contractor's objectivity and thus constitute an organizational conflict of interest.

CONTRACTS

Protests

Allegations

Unsubstantiated

Protest alleging that an answer to a request for clarification was used by the procuring agency to improve another offeror's proposal is denied where the procurement record does not show that the answer was used as the basis of questions posed to the other offeror or in discussions with that offeror.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Cost Realism Analysis

Reasonableness

B-220066 Dec. 16, 1985

85-2 CPD 669

There is no merit to a contention that the contracting agency improperly adjusted the protester's proposed indirect costs for cost realism based on Defense Contract Audit Agency (DCAA) recommended rates where the protester was given a copy of the DCAA audit report and had an opportunity either to change or justify its proposed rates in its best and final offer, but did not do so, and the agency reasonably concluded that the proposed rates remained unrealistic.

CONTRACTS**B-220066 Con't****Negotiation****Dec. 16, 1985****Offers or Proposals****Evaluation****Cost Realism Analysis****Reasonableness**

Where a contracting officer recommends that a technical score given to an offeror be increased and also determines that the protester's cost proposal should be upwardly adjusted to reflect cost realism, the source selection authority's concurrence in those recommended changes to form the basis for his award decision is not subject to challenge where the decision is both reasonable and consistent with the solicitation's established evaluation scheme.

CONTRACTS**Negotiation****Offers or Proposals****Qualification of Offerors**

Generally, it is within a contracting officer's discretion not to conduct a preaward survey, and such a decision will not be reviewed absent a showing of possible fraud or bad faith.

CONTRACTS**B-220199.3 Dec. 16, 1985****Protests****85-2 CPD 671****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

A prior decision dismissing a protest is affirmed where the protester did not show the existence of the limited circumstances under which the protester's failure to acknowledge a solicitation amendment, incorporating minimum wage rates determinations under the Services Contract Act, may be corrected.

CONTRACTS**B-220326.2 Dec. 16, 1985****Protests****85-2 CPD 672****General Accounting Office Procedures****Timeliness of Comments on Agency's Report**

GAO will not reopen a protest file that was closed because the protester's comments on the agency report were not received at GAO within 7 working days after the protester received the report as required by Bid Protest Regulations.

CONTRACTS**B-220565 Dec. 16, 1985****Negotiation****85-2 CPD 673****Awards****Price Determinative Factor**

Contracting officer properly may decide in favor of a technically lower rated proposal in order to take advantage of its lower cost, even though cost was the least important evaluation criterion, where he reasonably determines that the cost premium involved in making an award to the higher rated, higher priced offeror is not justified in light of the acceptable level of technical competence available at the lower cost.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Cost Realism****Scope of GAO Review**

Agency determinations resulting from a cost realism analysis will not be disturbed unless they clearly lack a reasonable basis, and the protester has not shown that the agency's determinations were unreasonable in this case.

Abeyance Pending Contract Appeals Board Action

85-2 CPD 674

General Accounting Office Procedures

85-2 CPD 675

Error of Fact or Law

Prior dismissal of a protest for failure to state a valid basis for protest is affirmed where protester merely alleged that it should have been awarded the contract but failed to take any exception to the agency's evaluation of proposals. Request for reconsideration, which offers additional details, will not be opened as a separate protest where request does not independently constitute a timely protest.

General Accounting Office Procedures

85-2 CPD 676

Reconsideration Requests

Additional Evidence Submitted

Available but not Previously Provided to GAO

Information available to show a protest is timely must be submitted at the time of the initial protest and not with a request for reconsideration of the dismissal of the initial protest.

BIDDERS**B-219703 Dec. 17, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay its employees the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that nonpayment of employees and subsequent falsification of records was intentional. In addition, the record shows that the contractor failed to pay its employees the required prevailing wage rates. Therefore, the contractor will be debarred under the Act.

CONTRACTS**B-219665; B-219665.2****Labor Stipulations****Dec. 17, 1985****Service Contract Act
of 1965****85-2 CPD 677****Applicability of Act**

Agency was not required to amend RFP and solicit a second round of best and final offers based on an increase in the applicability of the Service Contract Act where there was uncertainty whether the additional coverage would be required and agency's analysis of protester's and eventual awardee's proposals indicated competitive standing would not be affected by proposed change.

B-219665; B-219665.2 Con't

Dec. 17, 1985

Discussion With all Offerors Requirement

Submission, after best and final offers, of additional evidence of an offeror's financial resources does not constitute improper discussions or require an agency to request revised proposals from all offerors when the information does not affect the acceptability of the proposal but relates to the offeror's responsibility.

B-219953 Dec. 17, 1985

85-2 CPD 678

Low bid in which F.O.B. origin and destination prices obviously are reversed must be rejected, even though the bidder confirmed its prices, where the bid would not be low if corrected.

B-219968.2 Dec. 17, 1985

85-2 CPD 679

Contractors Work Force

Agency acted improperly in failing to refer its rejection of a small business low bidder to the Small Business Administration because it erroneously concluded that a solicitation provision requiring the contractor to perform 33-1/3 percent of the project with its own work force concerned the responsiveness of the bid rather than the bidder's responsibility.

CONTRACTS**B-220224 Dec. 17, 1985****Clauses****85-2 CPD 680****Economic Price Adjustment**

Contention that agency should have included an economic price adjustment clause in solicitation is denied because use of such a clause is discretionary with agency and no abuse of discretion has been shown.

CONTRACTS**Negotiation****Requests for Proposals****Minimum Needs Requirement****Reasonableness**

Contention that agency improperly decided to use multiyear contracting and to solicit option quantities under solicitation is denied. Where agency has established reasonable basis for using multiyear contracting and soliciting option quantities, the protester's disagreement with the agency's conclusions does not establish that the determination was improper.

CONTRACTS**B-220531 Dec. 17, 1985****Negotiation****85-2 CPD 681****Offers or Proposals****Evaluation****Technical Acceptability****Administrative Determination**

Agency determination that alternate product is technically unacceptable is reasonable where the alternate product did not comply with a material specification provision.

CONTRACTS**B-220531 Con't****Negotiation****Dec. 17, 1985****Offers or Proposals****Rejection****Propriety**

Where the initial reason advanced by the agency for rejection of an offer is not substantiated, but the record establishes that a sufficient basis for the agency action existed at the time the agency made its decision, the rejection is not legally objectionable.

CONTRACTS**Negotiation****Offers or Proposals****Technical Acceptability****Offeror's Responsibility to Demonstrate**

Where the solicitation listed an approved source item and provided that offerors of alternate products were required to submit sufficient information to permit agency evaluation, but did not call for product testing, the agency is not required to accept offer of product samples and either test items or submit them to outside testing laboratory.

BONDS**B-220606 Dec. 17, 1985****Requirement****85-2 CPD 682****Bid, Performance, etc.****Administrative Determination**

Protest that bid guarantee, performance and payment bond requirements unfairly and unreasonably restrict competition is denied where the contracting officer reasonably determined that bonding requirements were necessary to protect the government's interest.

CONTRACTS

B-219994 Dec. 18, 1985

Requests for Quotations

85-2 CPD 683

Evaluation**Technical Acceptability****Scope of GAO Review**

Agency's refusal to approve protester as a source for critical helicopter spare parts is not unreasonable where the protester's offer of an alternate product is rejected as technically unacceptable because of failure to furnish all requested data and where the protester has not shown that the requirement for this data in the solicitation was unreasonable. The fact that another agency has previously approved the alternate product does not, by itself, indicate that the procuring agency's rejection of it was improper.

CONTRACTS**Requests for Quotations****Purchases on Basis of Quotations****Evaluation Propriety**

Failure of agency immediately to apprise protester of informational deficiencies in its offer is not unreasonable where procurement was conducted under small purchase procedures, since these procedures do not contemplate the type of discussions and the opportunity to submit revised proposals that otherwise may occur in a negotiated procurement.

CONTRACTS**Requests for Quotations****Specifications****Restrictive****"Approved Source" Requirement****Qualification of Offerors**

When a nonapproved source for helicopter spare parts has an opportunity to submit a quote and its offer is the subject of a complete technical evaluation, rejection does not constitute de facto debarment.

CONTRACTORS

B-220075; B-220075.2

Responsibility

Dec. 18, 1985

Determination

85-2 CPD 684

Review by GAO**Affirmative Finding Accepted**

Whether a joint venture is a legal entity eligible for a contract award is a matter of the joint venture's responsibility, the affirmative determination of which GAO generally will not review.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Administrative Discretion**

Procuring officials enjoy a reasonable degree of discretion in evaluating proposals and GAO will not disturb an evaluation where the record indicates that the conclusions reached in the evaluation were supported by information in the proposals and were consistent with the evaluation criteria set forth in the solicitation.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Cost Realism****Scope of GAO Review**

Agency's determination that awardee's proposed costs were realistic was proper where based on complete cost data and consideration of all proposed costs. Fact that protester believes different approach in considering cost realism would have led to more accurate analysis is not sufficient to impugn the agency's determination since the extent to which costs will be examined generally is a matter within the agency's discretion.

CONTRACTS

B-220075; B-220075.2 Con't

Negotiation

Dec. 18, 1985

Offers or Proposals

Evaluation

Criteria

Subcriteria-Reasonably Related to Criteria

Contracting agency's failure to indicate in evaluation scheme all of the training programs that would be considered under a corporate experience evaluation factor is unobjectionable where the solicitation clearly indicated that such related experience would be considered; while a contracting agency must identify major evaluation areas in the solicitation, the agency need not identify the various aspects of each factor which may be taken into account.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Technical Acceptability

Administrative Determination

Agency's determination that awardee's technical proposal was substantially equal to the protester's despite a 0.35 point (on scale of 10) difference is reasonable where the awardee's proposal was scored higher under the two most important evaluation factors comprising 60 percent of the evaluation; whether a given point spread between proposals indicates that the higher rated proposal is significantly superior is a matter largely within the contracting agency's discretion.

B-220075; B-220075.2 Con't

Dec. 18, 1985

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

Apparent in Request for Best and Final Offers

Allegation that agency should have made multiple awards is untimely and will not be considered where protester was advised in request for best and final offers that single award would be made and did not raise the allegation before the due date for best and final offers.

JOINT VENTURES

Qualifications

Imputed From One Venturer to the Joint Venture

Certain qualifications of individual members of a joint venture--including past compliance with equal employment opportunity requirements and security clearances--properly may be considered by a contracting agency in evaluating the qualifications of the joint venture, where the individual members will perform all contract work.

CONTRACTS

B-220640 Dec. 18, 1985

Negotiation

85-2 CPD 685

Competition

Adequacy

Limited to Two Offerors

Agency's use of limited competitive procedures (provided for under the Competition in Contracting Act) on a procurement for the completion of a terminated contract at a medical center is unobjectionable where the agency reasonably determined that conditions at the worksite were dangerous and threatened the well-being of the patients, so that there was no time to conduct a full competition.

CONTRACTS
Protests
Allegations
Bias
Unsubstantiated

B-220640 Con't
Dec. 18, 1985

A protester's inference that certain agency actions were motivated by the agency's desire to discriminate against the protester is not sufficient to establish agency bad faith; to prove bad faith, the protester must establish that agency officials acted with the specific and malicious intent to injure the protester.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

B-221284.2 Dec. 18, 1985
85-2 CPD 688

Protest is dismissed as untimely where protester delayed more than 2 months after agency's opening of bids in face of oral protest to agency to file with GAO.

BIDS
Responsiveness
Descriptive Literature
Adequacy

B-220036 Dec. 19, 1985
85-2 CPD 689

The inadequacy of submitted descriptive literature may not be cured by explanations offered after bid opening under the fundamental principle of sealed bidding that responsiveness must be determined on the basis of the bid as submitted.

BIDS**B-220036 Con't****Responsiveness****Dec. 19, 1985****Descriptive Literature****Indication That Item Offered Failed to Meet
Specifications**

Where an invitation for bids requires the submission of descriptive literature to establish conformance with the material specifications of the solicitation, a bid must be rejected as nonresponsive if the literature submitted evidences nonconformity with the specifications or is otherwise ambiguous.

CONTRACTORS**B-219675 Dec. 20, 1985****Responsibility****85-2 CPD 690****Determination****Factors for Consideration****Collusive Bidding**

Pressure to withdraw a protest exerted by a company related to a proposed subcontractor of another offeror does not constitute a violation of the other offeror's Certificate of Independent Price Determination, and in the absence of evidence of possible collusion, the procuring agency is not required to consider allegations of such pressure in determining the other offeror's responsibility.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Competitive Range Exclusion****Reasonableness**

Agency's failure to include protester's proposal in the competitive range, based on agency's evaluation of the proposal regarding mission suitability, cost, company experience and past performance, is not arbitrary or in violation of applicable statutes and regulations when, compared with another offeror, the protester was reasonably found deficient in these areas.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Not for SBA Review****B-219675 Con't****Dec. 20, 1985**

Certificate of Competency (COC) procedures do not apply when a small business firm's offer in a negotiated procurement pertaining to scientific research is found deficient under technical evaluation criteria relating to experience and past performance, since the COC program is reserved for reviewing nonresponsibility matters, not the comparative evaluation of technical proposals.

CONTRACTS**Protests****Allegations****Unsubstantiated**

Allegation that agency harassed protester to withdraw its protest does not affect the merits of the protest or the validity of the agency's protested procurement action.

BIDS**Mistakes****Correction****Intended Bid Price****Establishment Required****B-219929 Dec. 20, 1985****85-2 CPD 691**

Where a low bidder establishes 2 mistakes in its bid but only establishes the intended amount for 1 mistake and the second mistake raises doubt that the intended bid would have remained the low bid, the bid may not be corrected nor the second mistake waived. The agency may only permit withdrawal of the bid.

BIDDERS
Identity
Sufficiency

B-219938 Dec. 20, 1985
85-2 CPD 692

Bid submitted in the name of an unincorporated entity, signed by an individual as "owner," is responsive and sufficient to obligate the entity as a sole proprietorship, notwithstanding the bidder's submission after bid opening of an erroneous certification of incorporation.

BIDS

Responsiveness

Failure to Furnish Something Required

Standard Representations and Certifications

Waiver

As Minor Informality

The failure to include completed standard representations and certifications does not affect the bidder's material obligation and, therefore, may be waived as a minor informality.

GENERAL ACCOUNTING OFFICE

Recommendations

Contracts

Prior Recommendation

Withdrawn

Changed Requirements

B-220031 Dec. 20, 1985

85-2 CPD 693

GAO withdraws its prior recommendation that the contracting agency not renew the remaining 2 option years of the awarded contract and instead resolicit for those years, since the agency states that because of its anticipated future needs, it will not be exercising the final option year of the contract. Further, the agency has established that a competition for its needs for the 1 remaining option year would not be in the government's best interest.

BIDS

B-220078 Dec. 20, 1985

"Buying In"

85-2 CPD 694

Not Basis for Precluding Award

Protest alleging that solicitation resulted in a "buy-in" by awardee is dismissed, since the possibility of a "buy-in" is not illegal and does not provide a basis upon which an award may be challenged.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****New Issues****Unrelated to Original Protest Basis**

New grounds of protest initially presented subsequent to GAO's receipt of agency report on the protest are dismissed as untimely. Where a protester initially files a timely protest and later supplements it with new and independent grounds for protest, the later-raised allegations must independently satisfy GAO's timeliness requirements. GAO Bid Protest Regulations do not contemplate the piecemeal presentation of arguments or grounds for protests.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest of alleged improprieties in solicitation for two-step sealed bidding is untimely where alleged improprieties were apparent prior to bid opening but the protest was filed subsequent to bid opening. Untimely filed protest will not be considered under the significant issues exception to GAO's timeliness rules where issues have been previously considered by GAO.

CONTRACTS	B-220078 Con't
Protests	Dec. 20, 1985
Information Evaluation	
Sufficiency of Submitted Information	

Grounds of protest which were not accompanied by any factual details when protest was initially presented are dismissed. GAO Bid Protest Regulations provide in part that protest filed with GAO must set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents.

CONTRACTS	B-220237.2 Dec. 20, 1985
Negotiation	85-2 CPD 695
Offers or Proposals	
Evaluation	
Approved Sources	
Alternatives	

GAO denies protest where the protester offered an alternate product in lieu of the approved source item specified in the solicitation and, as a result, was not considered for the award because the alternate could not be analyzed and approved in time. The solicitation notified all offerors that the length of time needed to approve an alternate product could prevent consideration for the current contract award.

Fact that an agency's procedure for approving alternative products takes more time than protester believes is necessary does not indicate that the procedure lacks a reasonable basis.

CONTRACTS**B-220237.2 Con't****Negotiation****Dec. 20, 1985****Offers or Proposals****Rejection****Propriety**

Where protester's offered alternate product was previously approved under another company's name, but protester failed to point this out in its offer, agency properly rejected protester's offer.

BIDS**B-220591 Dec. 20, 1985****Ambiguous****85-2 CPD 696****Nonresponsive Bid**

Where specifications require that duct be cleaned, bid that states price is based on the ducts being cleared is ambiguous and should be rejected as nonresponsive.

CONTRACTS**B-220923 Dec. 20, 1985****Negotiation****85-2 CPD 697****Requests for Proposals****Cancellation****Reasonable Basis****Changed Conditions, Needs, etc.**

Cancellation of interdepartmental procurement of disk drives was proper where requiring agency anticipated improved reliability and cost effectiveness with procurement of solid state storage devices.

CONTRACTS**B-218914.4 Dec. 23, 1985****Protests****85-2 CPD 698****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Request for reconsideration on grounds that GAO allegedly failed to address one basis of protest is denied when protester does not show that initial decision, holding that two bases of protest are essentially the same and that neither has legal merit, was erroneous.

BIDDERS**B-219270 Dec. 23, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional. Therefore, the contractor will be debarred under the Act.

CONTRACTS

B-219397.4 Dec. 23, 1985

Negotiation

85-2 CPD 699

Prices**Reasonableness****Administrative Determination**

Where the range of prices received by the agency under a solicitation clearly indicates that the successful offeror's price was reasonable, protest by firm, relying on its own cost experience for similar work, that successful offeror's price was unreasonably low and was improperly evaluated by the agency at face value, is denied.

CONTRACTS**Protests****Interested Party Requirement****Protester not in Line for Award**

GAO will not consider the merits of a case where the protester is not in line for award even if its protest is sustained because protester is not an "interested party" under GAO Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985).

CONTRACTS

B-219886 Dec. 23, 1985

Negotiation

85-2 CPD 701

Requests for Proposals**Specifications****Restrictive****Inability to Meet**

Geographic restriction that contractor issuing credit cards and operating a automated ordering system for such cards must be located in the Washington, D.C. metropolitan area, unduly restricts competition where there is only one known firm within the area and the contracting agency does not show that an award to the protester, located within an additional hour of driving, is not practicable.

CONTRACTS
Protests
Preparation
Costs
Compensable

B-219886 Con't
Dec. 23, 1985

Recovery of the costs of filing and pursuing a protest is allowed where the protester unreasonably lost the opportunity to compete because of an improper geographic restriction. Where it is clear that protester's proposal would not be considered because of the geographic restriction but the protester nevertheless submitted a proposal, the recovery of proposal preparation costs is not allowed.

CONTRACTS
Protests
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

B-220000.4 Dec. 23, 1985
85-2 CPD 702

Prior decision dismissing a protest is affirmed where question raised in the protester's original submission did not state a valid basis for protest and was untimely raised.

CONTRACTS
Federal Supply Schedule
Generally

B-220058 Dec. 23, 1985
85-2 CPD 703

Purchase from a Federal Supply Schedule does not require common cutoff date for receipt of best and final offers.

CONTRACTS

B-220058 Con't

Federal Supply Schedule

Dec. 23, 1985

Prices**Reductions****After Award**

A Federal Supply Schedule contractor may institute a general price reduction in its schedule contract during the contract period, provided the reduction is applied to all federal agencies for the duration of the contract.

CONTRACTS**Protests****Allegations****Unsubstantiated**

Protest that the agency improperly included an installation fee in the evaluation of the protester's price quotation, even though the protester's Federal Supply Schedule contract contained no such fee, and that the agency failed to include an installation fee in the evaluation of the awardee's price quotation, even though such a fee is contained in the awardee's Federal Supply Schedule contract, is denied where the record shows that the protester expressly included an installation fee in its price quotation and the awardee omitted the installation fee in its price quotation.

CONTRACTS**Protests****Burden of Proof****On Protester**

The protester has the responsibility to present sufficient evidence to prove its case. Where an agency denies a protester's contention that the agency engaged in an improper price auction by obtaining a price from the protester and using the protester's price to secure a lower price from another contractor, and the protester fails to furnish probative evidence to the contrary, the contention is speculative and the protester has not met its burden of proof.

BIDS

B-220364 Dec. 23, 1985

Responsiveness

85-2 CPD 705

Solicitation Requirements not Satisfied**Conformability of Equipment, etc. Offered**

Bid is properly found nonresponsive where bidder concedes that its equipment deviates from numerous technical specifications in IFB. Fact that bidder did not explicitly take exception to the specifications and now contends that it will modify its equipment to fully comply, does not cure deviations from the specifications evident from technical information included in the bid.

CONTRACTS**Performance****Suspension****Pending Final Resolution of Protest**

Agency's failure to make the required CICA determination for continued contract performance during pendency of protest does not provide a basis to upset an otherwise proper award.

CONTRACTS**Protests****Authority to Consider****Tennessee Valley Authority Procurements**

Tennessee Valley Authority (TVA) is subject to GAO bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA) since TVA comes within the statutory definition of a federal agency subject to CICA and TVA procurements are funded with appropriated funds.

CONTRACTS **B-220364** **Con't**
Protests **Dec. 23, 1985**

Dec. 23, 1985

Dec. 23, 1985

Dec. 23, 1985

Dec. 23, 1985

Dec. 23, 1985

Dec. 23, 1985

CONTRACTS B-219680, et al. Dec. 24, 1985
Damages 85-2 CPD 706

B-219680, et al. Dec. 24, 1985

B-219680, et al. Dec. 24, 1985

B-219680, et al. Dec. 24, 1985

B-219680, et al. Dec. 24, 1985

B-219680, et al. Dec. 24, 1985

B-219680, et al. Dec. 24, 1985

B-219680, et al. Dec. 24, 1985

CONTRACTS
Damages
Liquidated
Failure to Perform Obligated Service

Liquidated
Failure to Perform Obligated Service

Liquidated
Failure to Perform Obligated Service

Liquidated
Failure to Perform Obligated Service

Liquidated
Failure to Perform Obligated Service

BIDS **B-219993.2 Dec. 24, 1985**
Invitation for Bids **85-2 CPD 707**
Amendments
Failure to Acknowledge
Bid Nonresponsive

Bid is nonresponsive when it fails to acknowledge amendment that changed payment clause from one providing for monthly payment based on quantities in the contract subject to an adjustment in price if quantities varied by plus or minus 5 percent to one providing for payment based on the actual workload quantity.

CONTRACTS **B-220072 Dec. 24, 1985**
Negotiation **85-2 CPD 708**
Offers or Proposals
Evaluation
Competitive Range Exclusion
Reasonableness

Protest that agency improperly excluded proposal from the competitive range is denied where GAO's in camera review of the evaluation documents shows that the agency's finding that offeror's technical proposal was unacceptable was reasonable and the record further indicates that offeror's proposed cost was significantly higher than costs proposed by offerors included in the competitive range.

CONTRACTS
Protests
Allegations
Bias
Unsubstantiated

When a protester alleges bias, it has the burden of affirmatively proving its case and unsupported allegations of bias do not satisfy this burden.

CONTRACTS

B-220136 Dec. 24, 1985

Requests for Quotations 85-2 CPD 709**Purchases on Basis of Quotations**

Failure to complete in quotation sections on equal opportunity, affirmative action, and price representation is not significant because quotation price is below dollar amount that makes equal opportunity section applicable and affirmative action section and price representation section are only informational.

Issues as to contractor's rapid performance under contract, agency's delay in informing protester of contract award and alleged factual errors by agency in reporting dates and times of phone calls to protester will not be considered, since issues do not affect the validity of the award.

CONTRACTS**Requests for Quotations****Purchases on Basis of Quotations****Evaluation Propriety**

Contracting agency's determination to reject protester's quotation was not unreasonable where request for quotations required polypropylene fabric, but protester's offer of olefin fabric and subsequent clarification left doubt that polypropylene fabric would be furnished.

BIDS

B-220139 Dec. 24, 1985

Invitation for Bids

85-2 CPD 710

Clauses**Incorporation by Reference****Propriety**

Omission of mandatory insurance clause from solicitation may not be cured under "Christian Doctrine" since that doctrine does not permit preaward incorporation of a mandatory provision when it has been inadvertently omitted.

BIDS**Invitation for Bids****Clauses****Indemnity Clause**

Solicitation's inclusion of a clause that the contractor will save the government harmless from liability for damages caused by the contractor's fault in providing asbestos monitoring services is not a deviation from the Federal Acquisition Regulation and thus does not require prior authorization.

Solicitation requirement that the contractor save the government harmless from liability for damages caused by the contractor's fault in providing asbestos monitoring services is not unduly restrictive of competition where the protester complains that the clause allocates overly burdensome risks to the contractor. The contracting agency has discretion to offer for competition a proposed contract that imposes maximum risks on the the contractor and minimum burdens on the agency.

BIDS**B-220139 Con't****Invitation for Bids****Dec. 24, 1985****Clauses****Mandatory****Omission Effect**

Where mandatory clause is inadvertently omitted from IFB, award still may be made if it will meet government's actual needs, and no other bidder was prejudiced by the omission.

CONTRACTS**Protests****Interested Party Requirement****Nonresponsive Bidder**

Nonresponsive bidder is interested party to file a protest where it seeks resolicitation of procurement allegedly conducted on basis of defective specifications and would have the opportunity to rebid if requirement is resolicited.

BIDS**B-220141.2 Dec. 24, 1985****Evaluation****85-2 CPD 711****Government Equipment, etc.****Propriety of Evaluation**

Evaluation factors added to the bids of bidders for a government-owned, contractor-operated (GOCO) laundry facility are not shown to be prejudicial to GOCO bidders where the record shows that both the awardee and the second low bidder were GOCO bidders.

SMALL BUSINESS ADMINISTRATION**B-220141.2 Con't****Contracts****Dec. 24, 1985****Contracting With Other Government Agencies****Procurement Under 8(a) Program****Review by GAO**

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the contracting officer "in his discretion" to enter into contracts with the Small Business Administration for subcontracting to 8(a) firms. Accordingly, GAO will not review the agency's decision not to contract under the 8(a) program when there has been no showing of possible fraud or bad faith by government officials or that applicable regulations have been violated.

BIDS**B-220567 Dec. 24, 1985****Invitation for Bids****85-2 CPD 712****Cancellation****Reinstatement****Not Required****Protester not Entitled to Award**

Where agency's requirement for solicited items is substantially reduced from that on which bids were submitted, reinstatement of solicitation canceled after bid opening because of price unreasonableness is not appropriate.

BIDS**Preparation****Costs****Noncompensable****Invitation Properly Canceled**

Claim for bid preparation costs and costs of pursuing protest are denied where there is no showing that the government acted arbitrarily or capriciously with respect to the claimant's bid.

CONTRACTS**B-221308 Con't****Protests****Dec. 24, 1985****Basis for Protest Requirement**

Protest that awardee's substitution of key personnel during contract performance requires a change in the technical ranking of proposals and award to the protester is dismissed for failure to state a valid basis for protest since the propriety of an agency's evaluation of proposals is not affected by events occurring during contract performance.

CONTRACTS**Protests****Information Evaluation**

Protest stating only that an agency provided protester with "false information" regarding various stages of a procurement is dismissed for failure to set forth a detailed statement of the legal and factual grounds of the protest.

CONTRACTS**B-220028 Dec. 26, 1985****Labor Stipulations****85-2 CPD 717****Service Contract Act of 1965****Minimum Wage, etc. Determinations****Union Agreement Effect**

Contracting officer acted properly when he forwarded a copy of the protester's collective bargaining agreement to the Department of Labor, but did not change the Service Contract Act wage rate determination in the solicitation because he reasonably determined that the collective bargaining agreement would not affect the contract to be awarded under the solicitation as the collective bargaining agreement did not come into effect until after the proposed start date of the new contract.

GENERAL ACCOUNTING OFFICE B-220028 Con't
Jurisdiction Dec. 26 1985
Labor Stipulations
Service Contract Act of 1965

GAO does not review the wage rate determinations issued by the Department of Labor in connection with solicitations subject to the Service Contract Act.

BIDS B-220574 Dec. 26, 1985
Invitation for Bids 85-2 CPD 718
Amendment
Failure to Acknowledge
Bid Nonresponsive

Bidder's failure to acknowledge a material IFB amendment renders bid nonresponsive.

BIDS
Invitation for Bids
Cancellation
After Bid Opening
Defective Solicitation

Overstatement of government's needs is a material solicitation deficiency requiring cancellation of the solicitation and resolicitation.

CONTRACTS
Protests
General Accounting Office Procedures
Filing Protest With Agency

Although protester filed a copy of the protest with the contracting officer 1 day late, GAO will consider the merits of the protest since the contracting agency had prior knowledge of the basis of the protest and completed the report before the report was due and was not prejudiced in the preparation of the report by the protester's delay.

Bid bond is not defective even though the individual sureties did not sign the same bond form, since both sureties signed separate bid bonds and executed the required affidavits.

A contracting agency reasonably may determine that the sureties on a bid bond are unacceptable and, consequently, find the bidder nonresponsive, based on a continuing pattern of nondisclosure by the sureties of their outstanding bond obligations.

Alleged lack of background of protester's representative to make knowledgeable decision about release of information is protester's responsibility and not contracting agency's.

D-64

CONTRACTS
Data, Rights, etc.
Disclosure

B-220920 Con't
Dec. 26, 1985

Protester has not shown that its proprietary rights have been violated where alleged proprietary information disclosed by contracting agency to all prospective bidders was not disclosed by protester's representative in confidence to contracting agency.

BIDS
Prices
Level Pricing Clause
Bid Responsiveness

B-219961 Dec. 27, 1985
85-2 CPD 722

An unlevel low bid, submitted despite a solicitation requirement for level pricing, is responsive unless it can be shown that the second-low bidder conceivably could become low if it were permitted to unlevel its bid in the same manner as the low bidder.

CONTRACTS
Negotiation
Offers or Proposals
Discussions With all Offerors Requirement
"Meaningful" Discussions

B-219967.2 Dec. 27, 1985
85-2 CPD 723

While competitive range discussions must be meaningful, the agency need not discuss weaknesses inherent in an offeror's judgment or approach which, in order to correct, would require substantial proposal revision and possibly lead to technical leveling. The content and extent of meaningful discussions in a given procurement are matters primarily for determination by the agency, and GAO will not question such a determination unless it is clearly without a reasonable basis.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Cost Realism Analysis****Reasonableness****B-219967.2 Con't****Dec. 27, 1985**

Agency's evaluation of cost proposals by scoring and comparing estimated total contract costs, including estimated material and travel costs that were provided to all offerors for purposes of preparing cost proposals, is not unreasonable where the method used is consistent with the evaluation scheme in the solicitation and provides a sound basis for weighing the relative merits of the proposals.

CONTRACTS**Protests****Allegations****Unsubstantiated**

Allegation that contract negotiator's subsequent statements show that he gave greater weight to experience and responsibility than the solicitation contemplated is denied where that individual did not evaluate technical proposals and the agency made no adverse responsibility determination.

CONTRACTORS**Responsibility****Determination****Review by GAO****Affirmative Finding Accepted****B-220657 Dec. 27, 1985****85-2 CPD 724**

Whether awardee can actually provide the services required under the contract is a matter of responsibility which GAO does not generally review.

CONTRACTS**B-220657 Con't****Negotiation****Dec. 27, 1985****Offers or Proposals****Prices****Unprofitable**

Acceptance of below-cost offer for a fixed-price contract is not improper where contracting officer determines that awardee is responsible.

CONTRACTS**Protests****Allegations****Unsubstantiated**

Allegation that awardee will be unable to provide adequately trained instructors within one month after award lacks merit where record shows that qualifications of offered personnel conformed to the agency's stated requirements.

CONTRACTS**Requirements****Estimated Amounts Basis**

Protest that agency improperly accepted fewer services than was originally solicited is denied where solicitation indicated that stated quantities were merely estimates with no guarantee as to the amount which would actually be required.

BIDS**B-220730 Dec. 27, 1985****Responsiveness****85-2 CPD 725****Solicitation Requirements not Satisfied****Conformability of Equipment, etc. Offered**

Protest that bid was improperly rejected is denied where bid did not offer item required by specification. If protester wished to challenge allegedly restrictive specifications, it should have protested prior to bid opening.

CONTRACTS **B-221180.2 Dec. 27, 1985**
Protests **85-2 CPD 726**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior decision is affirmed on reconsideration where the protester has not shown any error of law or fact which would warrant reversal of that decision.

CONTRACTS **B-220991.2 Dec. 30, 1985**
Protests **85-2 CPD 728**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

GAO will not reconsider a decision sustaining a protest against an agency's determination to perform services in-house instead of contracting out for the services where agency's unsupported argument presented for first time in request for reconsideration does not show that decision, based principally on agency's own administrative appeal decision, was in error.

BIDS **B-220082.2 Dec. 31, 1985**
Prices **85-2 CPD 729**
Reasonableness
Administrative Determination

A contracting officer's determination concerning price reasonableness is a matter of administrative discretion which GAO will not question unless the determination is clearly unreasonable or there is a showing of possible fraud or bad faith.

CONTRACTS	B-220082.2 Con't
Protests	Dec. 31, 1985

Dec. 31, 1985

General Accounting Office Procedures

Timeliness of Protest

Date Basis of Protest Made Known to Protester

Protest alleging that bid was submitted on an "all or none" basis and that agency improperly made only a partial award to the protester is untimely when filed more than 10 working days after the partial award to the protester since agency's actions are inconsistent with protester's alleged "all or none" qualification.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

Freedom of Information Act Request Involvement

Protest challenging procuring agency's determination that bid price for one line item is unreasonable is timely where filed within 10 working days of the protester's receipt, under the Freedom of Information Act, of agency's price analysis.

AGENTS

Of Private Parties

B-220594 Dec. 31, 1985

85-2 CPD 730

Authority

Contracts

Signatures

Time for Submitting Evidence

Authority of agent to submit bid modification may be established after bid opening.

BIDS

Ambiguous

Two Conflicting Prices for Same Item

A bid that is ambiguous as to price need not be rejected if it is low under all reasonable interpretations.

BIDS
Modification
Before Bid Opening
Ambiguity Allegation

B-220594 Con't
Dec. 31, 1985

A modification increasing the low bid, but not to more than the second low bid written on the envelope that contained the bid, should not be considered where circumstances indicate that the bidder obtained a possible advantage thereby, unless the bidder can establish that the higher bid was intended; otherwise, the contract amount should be at the lower price.

BIDDERS
Suspension
Upheld

B-221202 Dec. 31, 1985

GAO will review agency suspension of bidder after bid opening to ensure that agency has not acted arbitrarily to avoid awarding a contract to that apparent low bidder. In view of criminal investigation, including allegations of wrongdoing made by former employees of the suspended concern, agency suspension action was not without a reasonable basis.

CONTRACTS
Protests
Authority to Consider
Contract Administration Matters

Protest of government's delay under contract and the temporary suspension of progress payments under contracts are matters of contract administration and are not for consideration by GAO under its Bid Protest Regulations, 4 C.F.R. Part 21 (1985).

CONTRACTS

B-221202 Con't

Small Business Concerns

Dec. 31, 1985

Awards

Delayed

Certificate of Competency Processing Time

Agency's action refraining from issuing an award to small business was not improper during pendency of an appeal by the agency of Small Business Administration's determination to issue a certificate of competency.

CONTRACTS

Small Business Concerns

Awards

Responsibility Determination

Nonresponsibility Finding

Review by GAO

GAO will not review an agency's rejection of a small business as nonresponsible where the bidder did not file an application with the Small Business Administration for a certificate of competency.

TRANSPORTATION LAW

TRANSPORTATION

B-217640 Dec. 9, 1985

Demurrage

Detention Charges

A motor carrier was notified in advance that a naval shipyard would be closed from 3:30 p.m., December 23, to 8 a.m., January 4. The carrier's driver arrived at the shipyard with a loaded trailer in the afternoon of December 23. The carrier states that its driver was told that the unloading facility was occupied and he would not be able to unload. The agency states, however, that the driver was told that he could be unloaded that afternoon if he waited until the vehicle then occupying the facility was unloaded, but the driver chose not to do so and, instead, left the loaded trailer, which consequently was not unloaded until January 4. In these circumstances the facts stated by the agency are accepted, the delay in unloading is attributed to the carrier, not the agency, and the carrier is not entitled to vehicle detention charges for the period of December 23 to January 4.

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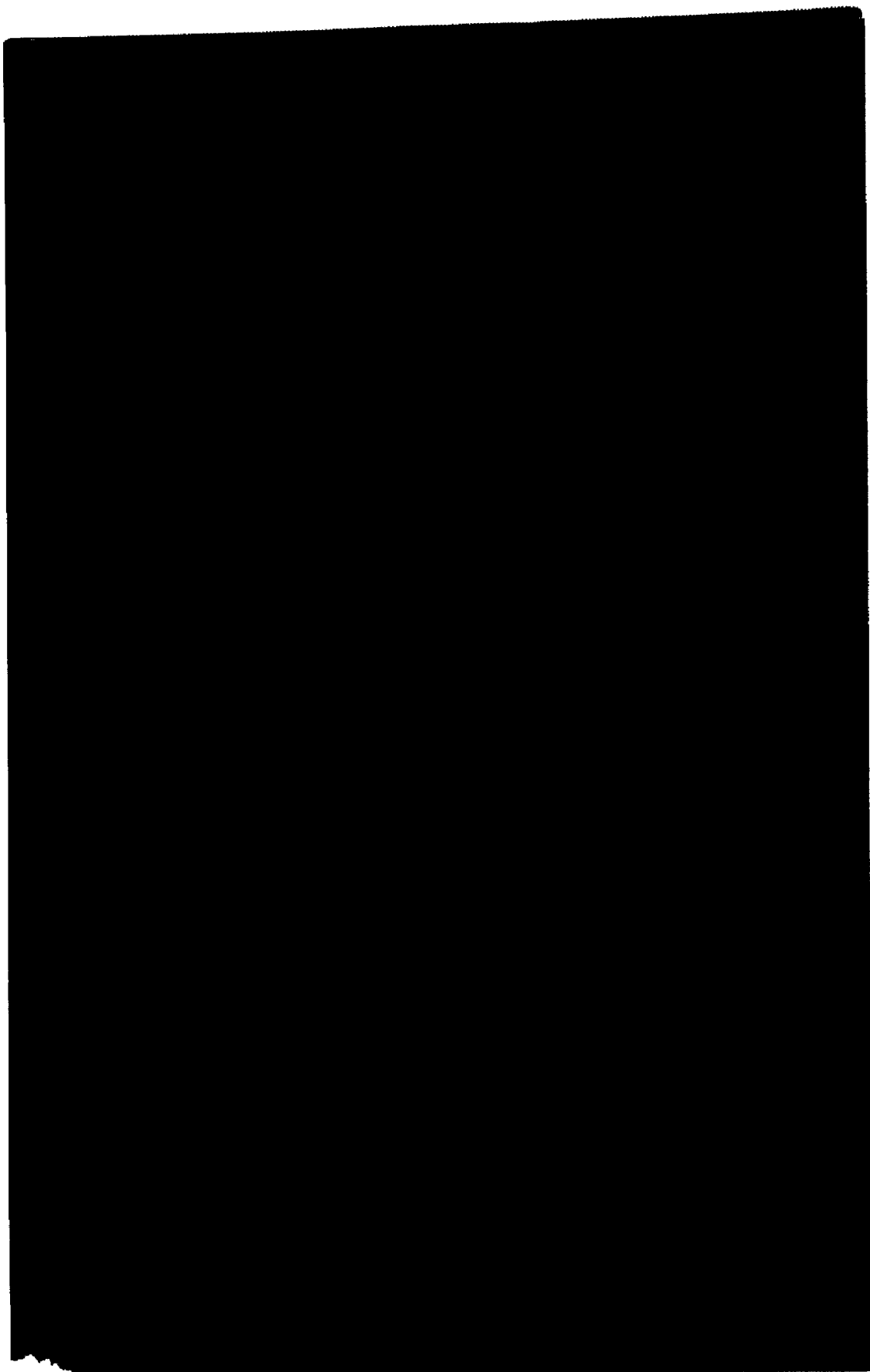
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