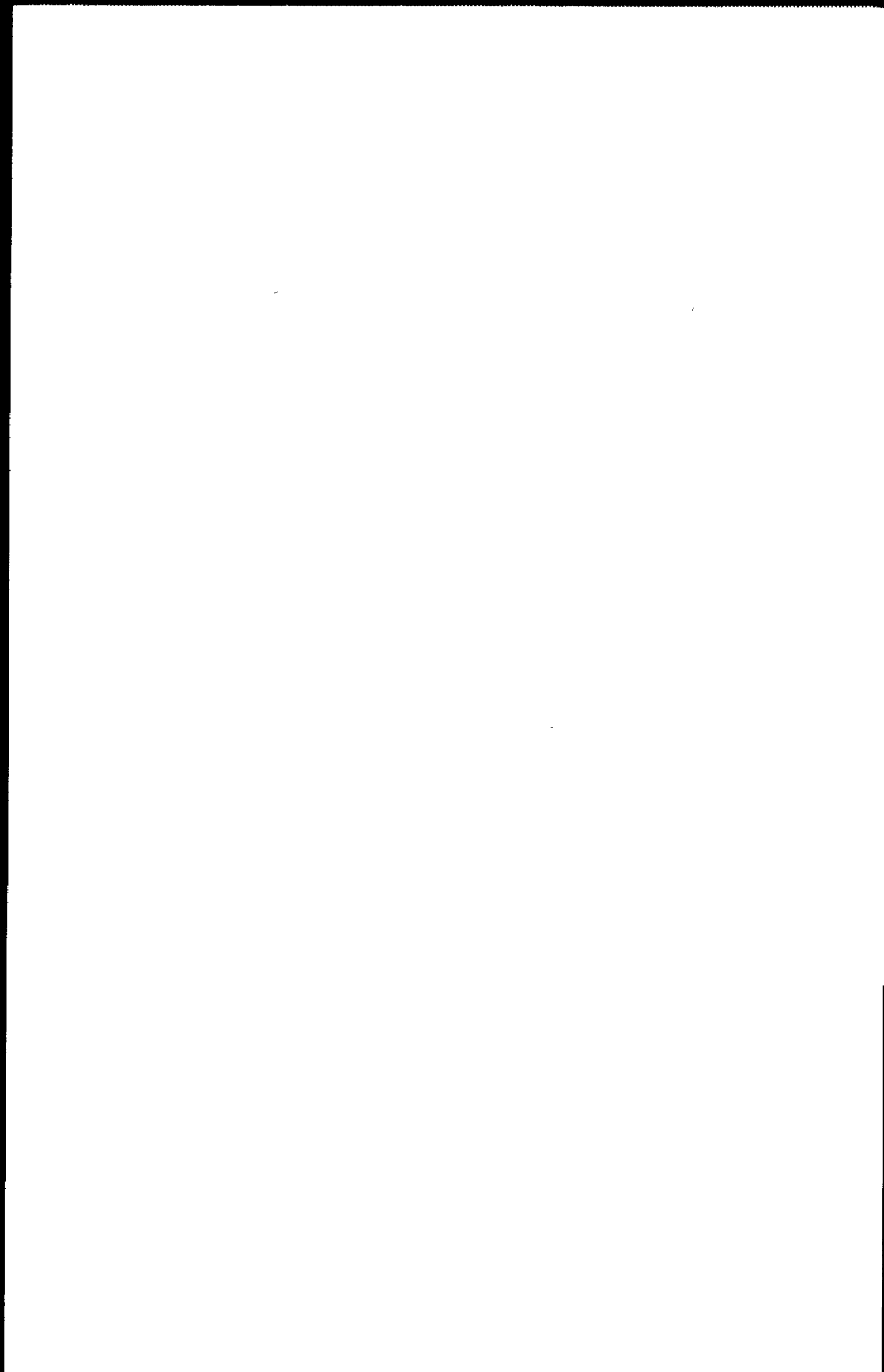


March 1986
Vol. II, No. 6

Digests of Unpublished
Decisions of the
Comptroller General
of the United States



UNITED STATES GENERAL ACCOUNTING OFFICE

CHARLES A. BOWSER

Comptroller General of the United States

MILTON J. SOCOLAR

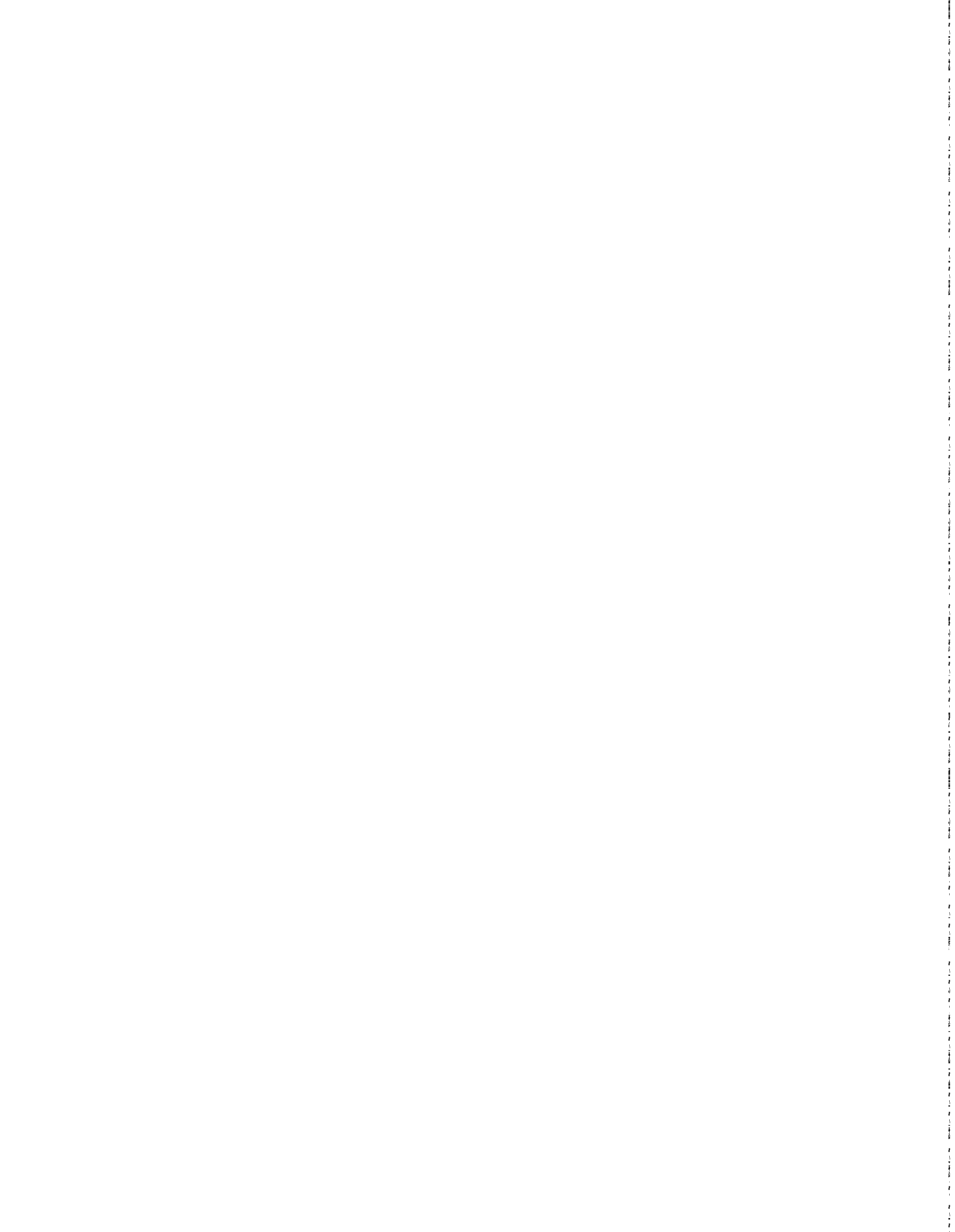
Special Assistant
to the Comptroller General

HARRY R. VAN CLEVE

General Counsel

JAMES F. HINCHMAN

Deputy General Counsel



March 1986

Contents

	<u>Page</u>
Table of Decisions	I
Digests:	
General Government Matters:	
Appropriations and Miscellaneous	A-1
Personnel Law: Civilian Personnel	B-1
Personnel Law: Military Personnel	C-1
Procurement Law	D-1
Special Studies & Analysis	E-1
Transportation Law	No Cases
Index	i

Compiled in the
Index-Digest Section
Office of the General Counsel

Telephone research service regarding Comptroller
General decisions: (202) 275-5028

For Copies of cases: (202) 275-6241



TABLE OF DECISIONS
March 1986

	<u>Mar.</u>	<u>Page</u>		<u>Mar.</u>	<u>Page</u>
B-131935	17...	A- 2	B-220526.2	17...	D-27
B-199838	24...	A- 3	B-220540	31...	B- 8
B-213346	3...	B- 1	B-220582.3	21...	D-40
B-214080	25...	A- 3	B-220646.2	24...	D-44
B-217215	20...	A- 2	B-220668.2	12...	D-18
B-217501	12...	B- 3	B-220701	31...	B- 9
B-218610.2	17...	D-25	B-220752.2	28...	D-49
B-218886	24...	B- 5	B-220786	3...	B- 1
B-218981	24...	B- 6	B-220852.5	3...	D- 1
B-219023	12...	B- 3	B-220856.2	7...	D-10
B-219059	24...	C- 1	B-220859.2	4...	D- 2
B-219312.7	13...	D-21	B-220868	5...	D- 5
B-219473	12...	B- 4	B-220910	5...	D- 6
B-219676.4	24...	D-42	B-220925	3...	D- 1
B-219733.2	18...	D-32	B-220965	12...	D-18
B-219812	25...	B- 7	B-220982	6...	D- 8
B-219854	12...	B- 4	B-221012	18...	D-34
B-219929.2	31...	D-50	B-221054	6...	D- 9
B-219934.2	12...	D-16	B-221058	20...	D-39
B-220133	13...	B- 5	B-221068	17...	D-29
B-220192.3	4...	D- 2	B-221089	31...	D-50
B-220287	11...	B- 2	B-221113.2	6...	D- 9
B-220331.2, et al.)	10...	D-12	B-221170.6	17...	D-30
B-220390.3	6...	D- 8	B-221276	7...	D-10
B-220392, et al.)	7...	D- 9	B-221277	27...	D-47
B-220412)			B-221286	12...	D-20
B-220412.2)	10...	D-12	B-221287	10...	D-13
B-220421.2	21...	D-39	B-221296	21...	D-40
B-220423)			B-221298	13...	D-23
B-220423.2)	18...	D-32	B-221314	12...	D-21
B-220425	11...	D-15	B-221316	18...	D-34
B-220431	13...	D-22	B-221325)		
B-220449	24...	D-43	B-221326)	21...	D-41
B-220451	18...	D-33	B-221334	13...	D-24
B-220459	17...	D-26	B-221337	19...	D-36
B-220479	10...	B- 2	B-221358	17...	D-30
			B-221380	18...	D-35

TABLE OF DECISIONS - Con.

	<u>Mar.</u>	<u>Page</u>		<u>Mar.</u>	<u>Page</u>
B-221390	31...	D-51	B-221826	19...	D-38
B-221395	26...	A- 4	B-221858	7...	D-11
B-221415	26...	A- 4	B-221860	27...	D-48
B-221416	12...	C- 1	B-221878	21...	D-42
B-221430)			B-221930	27...	D-49
B-221430.2)	14...	D-25	B-221985	21...	D-42
B-221452	27...	A- 5	B-221992.3	12...	D-21
B-221502.3	24...	D-44	B-222012	11...	D-15
B-221550	31...	D-52	B-222016.2	10...	D-14
B-221559	10...	D-14	B-222041	6...	A- 1
B-221563.2	27...	D-48	B-222091	26...	D-46
B-221584.2	13...	D-24	B-222104	4...	A- 1
B-221623	24...	B- 7	B-222115	13...	A- 2
B-221657	25...	B- 8	B-222154	13...	D-24
B-221668	19...	D-36	B-222213	19...	D-38
B-221687	13...	E- 1	B-222259,		
B-221725	24...	D-45	et al.)	27...	A- 5
B-221726.2	7...	D-11	B-222266	26...	A- 4
B-221730	31...	D-52	B-222318	24...	D-45
B-221776	26...	D-46	B-222344	28...	D-49

OVERRULED, MODIFIED, AND DISTINGUISHED

B-213346, Mar. 3, 1986 reverses B-213346, Dec. 8, 1983.

B-220582.3, Mar. 21, 1986 distinguishes B-193541, Mar. 27, 1979.

**GENERAL GOVERNMENT MATTERS
APPROPRIATIONS AND MISCELLANEOUS**

ACCOUNTABLE OFFICERS **B-222104 Mar. 4, 1986**

**Relief
Illegal or Erroneous Payments
Without Fault 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.

ACCOUNTABLE OFFICERS **B-222041 Mar. 6, 1986**

**Relief
Duplicate Checks Issued
Improper Payment**

Relief is granted Army Finance and Accounting official under 31 U.S.C. § 3528 from liability for certification of improper payment resulting from payee's negotiation of both original issued Army instrument and substitute Treasury check. The officer did not know and by reasonable diligence and inquiry could not have discovered that the payee had actually received both checks and intended to cash both payment instruments. Proper procedures were followed in the certification of the substitute check.

DISBURSING OFFICERS**B-222115 Mar. 13, 1986****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.

APPROPRIATIONS**B-131935 Mar. 17, 1986****Authorization****Expiration****Expenditures Beyond**

Subsection 393(c) of title 47, U.S.C. which provides that: "of funds appropriated pursuant to section 391 of this title for any fiscal year, not less than 75 percent shall be available to extend delivery of public telecommunications services to areas not receiving such services" requires that, in the absence of anything in the appropriation act to the contrary, 75 percent of the appropriations for planning and construction of public telecommunications facilities must be used for extending delivery of public telecommunications services to areas not received by such services. However, since appropriation authorization set forth in 47 U.S.C. § 391 expired on September 30, 1984, funds appropriated for planning and construction of telecommunications facilities since that time are not made pursuant to 47 U.S.C. § 391. Since the 75 percent availability requirement set forth in 47 U.S.C. § 391(c) is tied necessarily to the authorization in section 391, the expiration of the authorization means that the section 393(c) requirement has also expired. Therefore, any subsequent appropriations for the program are not subject to the set-aside, unless it is reinstated by a new enactment.

INTEREST**B-217215 Mar. 20, 1986****Debts Owed United States
State, etc. Debts
Authority**

The State of Oklahoma is liable for interest on debts owed under the Elementary and Secondary Education Act where the United States Department of Education made written demand upon the State for payment of the debt and advised State that interest would be charged. The State argued that it was not liable for interest because the Department failed to give adequate notice of its intent to assess interest and had not issued final regulations governing the collection of interest. The Department substantially complied with then-existing notice provisions of the Federal Claims Collection Standards. In addition, the Department's failure to publish final regulations on its policy for assessing interest does not relieve Oklahoma of its interest liability because the State had actual notice of the interest policy.

STATES**B-199838 Mar. 24, 1986****Federal-State Conflicts
License, Permits, etc. Fees**

An addition to the Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, is to be constructed by a contractor selected by the Federal Aviation Administration (FAA) of the Department of Commerce, pursuant to 49 U.S.C. App. § 1348(b). Under the State of Minnesota Building Code, the City of Farmington has enforcement duty for state building standards, including building permit issuance and inspection, for new construction within the City. It also collects a building permit fee. Under the Property Clause (Article IV, § 3, cl. 2) and the Supremacy Clause (Article VI, cl. 2) of the U.S. Constitution, neither the FAA nor the contractor is required to obtain a building permit, pay the fee for its issuance, or otherwise comply with state regulation of the construction in view of the overriding authority granted under the Federal statute.

ACCOUNTABLE OFFICERS **B-214080 Mar. 25, 1986**
Physical Losses, etc. of Funds, Vouchers, etc.
Cashiers, etc.
Imprest Fund
Relief Granted

Imprest fund cashier is relieved of liability for unexplained loss of funds. Cashier gave sworn testimony that she locked the safe before leaving the office, and her unrefuted statement is sufficient to relieve the presumption of negligence which is raised by the unexplained loss. Moreover, two other employees also had access to the combination providing an independent basis for relief.

DISBURSING OFFICERS **B-221395 Mar. 26, 1986**
Relief
Erroneous Payments
Not Result of Bad Faith or Negligence

U.S. Army Finance and Accounting officer is relieved of liability for improper payments made by his subordinate cashiers because he maintained and supervised an adequate system of procedures to prevent improper payments. Each of the cashiers is also relieved because she followed all prescribed procedures for cashing travel vouchers notwithstanding that the payee circumvented those procedures with criminal activity.

ACCOUNTABLE OFFICERS **B-221415 Mar. 26, 1986**
Relief
Illegal or Erroneous Payments
Without Fault or Negligence

Army finance officer and subordinate cashiers are granted relief under 31 U.S.C. § 3527(c) for improper payments totalling \$2950. Improper payments resulted from criminal activity over which the finance officer and cashiers had no control. The offender was able to cash forged checks with five different cashiers each of whom checked his ID and none of whom noted any discrepancy between the offender and the ID picture or between the ID signature and that on the check.

CERTIFYING OFFICERS

B-222266 Mar. 26, 1986

Relief**Erroneous Payments****Duplicate Payments**

Relief is granted Army Finance and Accounting official under 31 U.S.C. § 3528 from liability for certification of improper payment resulting from payee's negotiation of both original issued Army instrument and substitute Treasury check. The officer did not know and by reasonable diligence and inquiry could not have discovered that the payee had actually received both checks and intended to cash both payment instruments. Proper procedures were followed in the certification of the substitute check.

DISBURSING OFFICERS

B-221452 Mar. 27, 1986

Relief**Erroneous Payments****Not Result of Bad Faith or Negligence**

Army disbursing officers are relieved of liability for the improper payment of \$1,302.49 pursuant to 31 U.S.C. § 3527(c) (1982). The deficiency resulted from the payment of a fraudulently endorsed check. Relief is proper since the cashier followed all prescribed procedures, his supervisor established and maintained an adequate system of controls and the loss resulted from criminal activity over which the disbursing officers had no control.

DISBURSING OFFICERS

B-222259, et al. Mar. 27, 1986

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 checks, there was no indication of bad faith on the part of the disbursing officials and subsequent collection attempts are being pursued.

The status of B-219122, January 22, 1986 was changed from an unpublished decision in Civilian Personnel Law, to a Published decision.

**PERSONNEL LAW
CIVILIAN PERSONNEL**

COMPENSATION

B-213346 Mar. 3, 1986

Severance Pay

Eligibility

Involuntary Separation

Resignation to Take Temporary Position

An employee's voluntary transfer from career service to a temporary appointment may not be considered conclusive proof that the employee's ultimate separation at the expiration of the temporary appointment was voluntary so as to deny him severance pay. Rather, the issue of voluntariness is a question of fact to be resolved on a case-by-case basis. Here, the employee is entitled to severance pay where the record shows his separation after his temporary appointment was involuntary. Sullivan v. United States, 4 Cl. Ct. 70 (1983), affirmed 742 F.2d 628 (Fed. Cir. 1984), followed.

COMPENSATION

B-220786 Mar. 3, 1986

Backpay

Retroactive Promotions

Claim Denied

An employee was serving in a position classified at grade GS-11. That position was eventually reclassified as grade GS-12. The employee claims entitlement to backpay for period prior to the date of reclassification, asserting that since the duties performed at the lower grade were the same as those required to be performed at the higher grade, the position should always have been at grade GS-12. The claim is denied. Neither the Classification Act, 5 U.S.C. §§ 5101 et seq., nor the Back Pay Act, 5 U.S.C. § 5596, creates a substantive right to backpay for a period of alleged improper classification. United States v. Testan, 424 U.S. 392 (1976).

STATUTES OF LIMITATION**B-220786 Con't****Claims****Mar. 3, 1986****Compensation**

An employee was serving in a position classified as grade GS-11. That position was eventually reclassified as grade GS-12. The employee claims entitlement to backpay for period prior to the date of reclassification. The claim was first received in this Office on October 10, 1984. Since the period of the claim spanned 12 years, that portion of the claim which arose before October 10, 1978, is barred from consideration because 31 U.S.C. § 3702(b)(2) (1982) limits consideration of such claims on their merits to the 6-year period prior to the date of receipt here.

OFFICERS AND EMPLOYEES**B-220479 Mar. 10, 1986****Transfers****Transportation for House Hunting
Disallowance**

Employee who was permanently transferred from Cincinnati to Cleveland, Ohio, seeks reimbursement for costs of second househunting trip. The claim is denied since an employee may be reimbursed travel and transportation expenses for only one round trip between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. § 5724a(a)(2) (1982); Federal Travel Regulations para. 2-4.1a (Supp. 4, August 23, 1982).

OFFICERS AND EMPLOYEES**B-220287 Mar. 11, 1986****Transfers****Real Estate Expenses
Insurance**

A transferred civilian employee of the Air Force claims reimbursement for a mortgage insurance premium he paid at settlement on purchase of a residence at his new duty station. Reimbursement for mortgage insurance, as distinguished from mortgage title insurance, is specifically precluded by the Federal Travel Regulations (FTR) and Joint Travel Regulations (JTR). In addition, mortgage insurance to protect the lender against default is a finance charge which may not be reimbursed under the FTR and JTR.

COMPENSATION**B-217501 Mar. 12, 1986****Backpay****Retroactive Promotions
Computation**

An employee received a quality step increase in her GS-5 promotion subsequent to actions denying her a promotion to GS-6 for which she successfully brought a discrimination complaint. In determining her backpay entitlement incident to retroactive promotion to GS-6, the quality step increase she earned in the lower grade position may not be treated as if it had been awarded in the higher grade position to which she was retroactively promoted.

OFFICERS AND EMPLOYEES**B-219023 Mar. 12, 1986****Transfer****Service Agreements
Failure to Fulfill**

A federal employee was selected for transfer to Indianapolis by the Department of the Army and traveled there on a house-hunting trip under a travel authorization issued by the Army. The employee instead accepted and transferred to a position with the Internal Revenue Service in Indianapolis. Since the employee breached his service agreement with the Army by failing to effect the transfer to which he agreed, the Army correctly undertook to collect amounts it had advanced for the house-hunting trip. However, since the expenses were incurred at a time when there was an intent to transfer the employee to Indianapolis, we would not object to the Internal Revenue Service's reimbursement of those expenses even though incurred prior to its determination to transfer the employee.

OFFICERS AND EMPLOYEES**B-219473 Mar. 12, 1986****Transfers****Service Agreements****Failure to Fulfill****Retirement**

Employee of Department of Housing and Urban Development (HUD) who was transferred from Dallas to Fort Worth, Texas, failed to complete 12-month service agreement when he voluntarily retired, and HUD refused to reimburse his relocation expenses. Determination whether separation is beyond employee's control and for reasons acceptable to the agency is primarily for the agency to decide. Our Office will not overturn the agency's determination, unless it is arbitrary or capricious. Here agency promulgated regulation which provided that voluntary separation of an employee upon satisfying age and service requirements for optional retirement is an acceptable reason for release from a service agreement. Accordingly, agency action in refusing to accept voluntary retirement as an acceptable reason for not fulfilling obligation under service agreement is contrary to agency's own regulation and arbitrary. Therefore, agency action is improper and employee may be paid claimed expenses to extent otherwise proper.

OFFICERS AND EMPLOYEES**B-219854 Mar. 12, 1986****Transfers****Real Estate Expenses****Actual Residence at Time of Official Transfer****Requirement**

Employee of the National Park Service in Lowell, Massachusetts, sold his residence after being selected to participate in a developmental management training program in Washington, D.C. At the completion of the program he had not been reassigned and his temporary duty in Washington was extended. Several months later he was reassigned to Boston, Massachusetts. Employee may not be reimbursed for real estate sale expenses since there was not a clear administrative intent, but rather a possibility that he might be transferred at the time he sold his residence.

OFFICERS AND EMPLOYEES**B-220133 Mar. 13, 1986****Transfers****Real Estate Expenses****Loan Origination Fee**

In connection with his purchase of a house at his new duty station, a transferred employee was advised that he would have to pay a 3 percent loan origination fee. However, at the closing the fee was stated and collected as a 1 percent loan origination fee and a 2 percent discount fee. The agency permitted reimbursement of only the 1 percent fee. Since HUD states that the customary and reasonable rate for a loan origination fee is 3 percent; since there is no indication that the interest rate on the employee's mortgage was adjusted downward upon payment of the 2 percent fee; and since both the lending institution and the settlement agent state that the percentage split is solely a function of the lender's accounting method, we find that the 2 percent fee is not a finance charge. Therefore, the employee is entitled to recover the additional 2 percent fee to the extent his total recovery will not exceed the statutory limit.

OFFICERS AND EMPLOYEES**B-218886 Mar. 24, 1986****Transfers****Temporary Quarters****Rental of Former Residence After Sale**

Transferred federal employees are normally ineligible for reimbursement of temporary quarters subsistence expenses incurred while renting their permanent residence following its sale at their old duty station, but they may qualify for reimbursement if they establish that an intent to vacate the home existed prior to rental. Hence, a transferred employee who provided information showing that he planned to move on the day before the sale of his home, but was delayed by the government's inability to locate a mover, established sufficient intent to vacate to qualify for reimbursement of subsistence expenses incurred during the temporary rental of his old residence after its sale.

OFFICERS AND EMPLOYEES
Transfers
Temporary Quarters
Time Limitation

B-218886 Con't
Mar. 24, 1986

The relocation entitlements of transferred federal employees are governed by the regulations in effect at the time the relocation transactions occur. An authorization specifying 30 days' temporary quarters subsistence expenses for a transferred employee may therefore be extended up to 60 days due to the issuance of new regulations effective prior to the employee's transfer date.

DEBT COLLECTIONS

B-218981 Mar. 24, 1986

Waiver
Civilian Employees
Compensation Overpayments
Collection not Against Equity and Good
Conscience, etc.

Employee of the Department of the Interior received erroneous payments for a cost-of-living allowance in Alaska after he had been converted to a wage grade employee. The employee was on notice from his Notification of Personnel Action Form and should have otherwise known that wage grade employees were not eligible for the allowance. Since his leave and earnings statements for the period reflected that he was being paid the allowance, he is not without fault in the matter and the debt may not be waived.

OFFICERS AND EMPLOYEES**B-221623 Mar. 24, 1986****Resignation****Voluntary v. Involuntary**

Employee contends that she was forced to resign for fear of retaliation against her because she assisted Air Force investigators with investigation of overtime fraud. After obtaining another position with Air Force at a lower grade employee claims backpay for period of unemployment and time at reduced grade, and relocation expenses. Appropriate authority for consideration of voluntariness of resignation is Merit Systems Protection Board, and without finding of unwarranted or unjustified personnel action by that appropriate authority, there is no basis for backpay award. Even if backpay could be awarded, Back Pay Act does not authorize payment of relocation expenses.

MILEAGE**B-219812 Mar. 25, 1986****Travel by Privately Owned Automobile****Personal Convenience**

The fact that an employee with back problems needs a multiple adjustable driver's seat does not render a regularly equipped Government-furnished vehicle unavailable. The cost of special equipment of this nature is a personal expense. Thus, an employee who requests to use his own specially equipped vehicle instead of a regularly equipped Government-furnished vehicle is limited to reimbursement at the 9.5 cent mileage rate applicable when a Government-furnished vehicle is authorized and available and the employee elects to use his own vehicle.

AGENTS**B-221657 Mar. 25, 1986****Government****Government Liability for Acts Beyond Authority
Erroneous Information**

Even if employee was advised incorrectly by agency financial management officials that he was entitled to reimbursement for expenses incurred for breaking a lease and purchasing a home at his new duty station, there is still no basis for reimbursement where no statutory authority exists, since the Government may not be bound by the erroneous acts or advice of its employees.

OFFICERS AND EMPLOYEES**Transfers****Real Estate Expenses****Duty Stations Within United States Requirement**

Employee relocating to St. Louis, Missouri, from a foreign post of duty may not be reimbursed for cost of breaking lease at prior duty station and cost of purchasing new home at new duty station. Both the old and new duty stations of a transferred employee must be located within the United States, and its territories and possessions to entitle him to reimbursement for real estate expenses under 5 U.S.C. § 5724a(a)(4).

SUBSISTENCE**B-220540 Mar. 31, 1986****Per Diem****Illness, etc.****While on Temporary Duty**

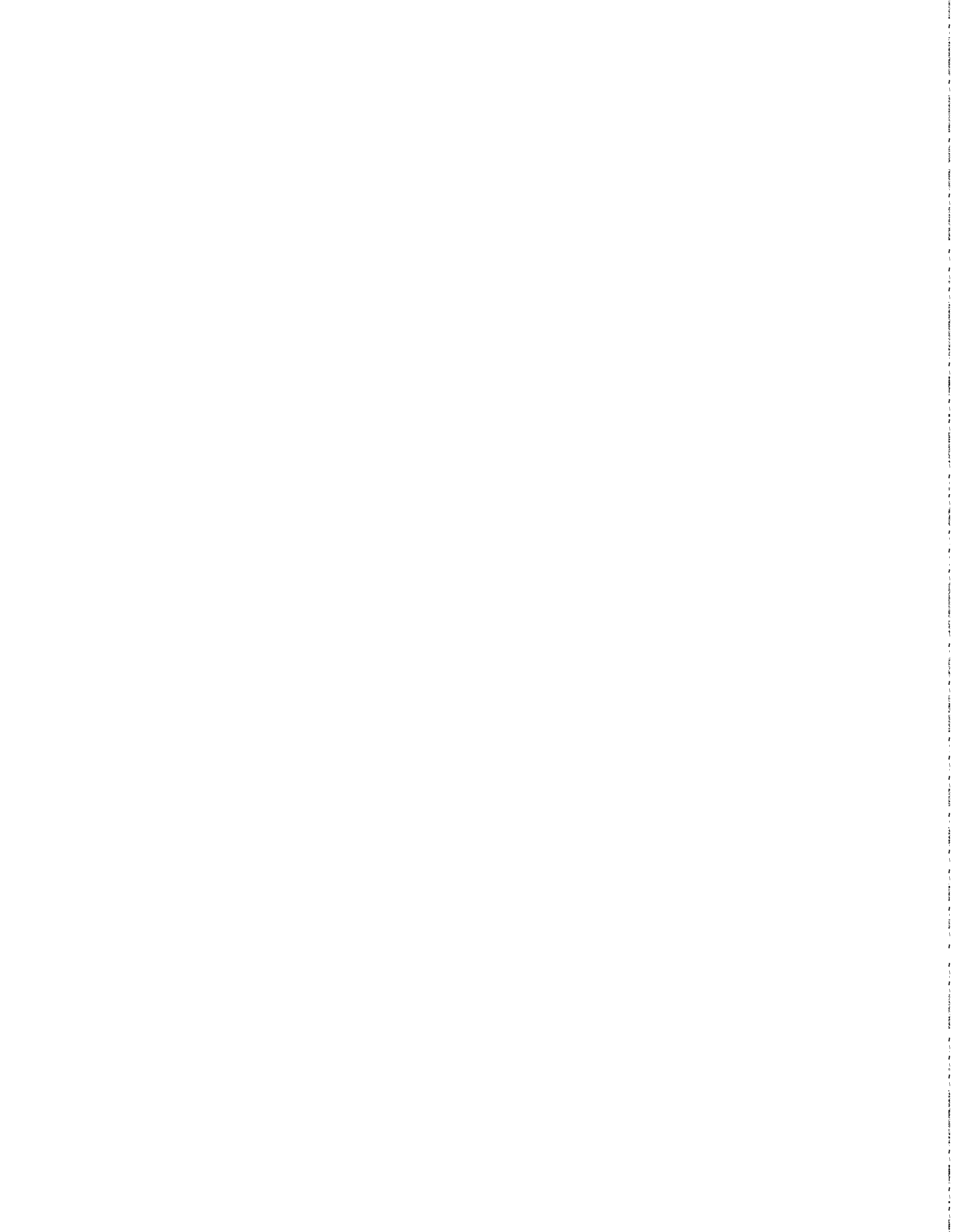
Employee became seriously ill and was hospitalized while on temporary duty. Under 5 U.S.C. § 5702(b) and paragraphs 1-7.5b(1) and 1-8.4b of the Federal Travel Regulations per diem or actual subsistence expenses shall be continued for a period not to exceed 14 calendar days unless a longer period is approved. The employee's own actual subsistence expenses in a high rate geographical area are allowed for the entire period of his hospitalization. However, the employee's claims for the cost of his wife's motel room and the rental expenses of the car, which was not authorized on his travel orders and was rented and used solely by his wife, are denied.

COMPENSATION

B-220701 Mar. 31, 1986

Rates**Highest Previous Rate****Administrative Discretion**

An employee (grade GS-9, step 1), an intern in an agency's training program, was authorized to go on leave without pay. While in that status, he was employed by another agency in a higher grade. He voluntarily resigned that position and resumed his training with the first agency. Following training, he was reassigned, but remained in grade GS-9, step 1. He requested a salary adjustment to step 8 of his grade, contending that the agency's regulations mandated that rate of pay by application of the highest previous rate rule. The highest previous rate rule allows agencies discretion to set pay at less than the highest previous rate. Therefore, unless an agency affirmatively relinquishes that discretion in its own regulations, it is not obligated to pay the highest allowable rate. The agency in this case has not relinquished discretion to set pay at less than the highest allowable rate. Therefore, the agency denial of the claim is sustained.



**PERSONNEL LAW
MILITARY PERSONNEL**

COMPENSATION

B-221416 Mar. 12, 1986

Double

Concurrent Military Reservist and Civilian Service

A provision of the Department of Defense Appropriation Act, 1982, limited the combined military and civilian compensation of National Guard technicians to the rate payable for level V of the Executive Schedule. The full amount of a National Guard officer's combined civilian technician salary and military basic pay was subject to this limitation, even though the officer was on a detail to a state government under an arrangement providing for partial state reimbursement of his technician's salary, since during the detail he retained his federal civil service and military status, and his civilian salary and military basic pay remained obligations of appropriated federal funds.

MILITARY PERSONNEL

B-219059 Mar. 24, 1986

Educational Assistance

A member of the Marine Corps who enlisted for 4 years under the Educational Assistance Program and reenlisted 10 months prior to the end of the first enlistment may receive his educational assistance benefits in a lump sum as provided in 10 U.S.C. § 2146 and implementing regulations. Language in the statute which indicates that a member should make the election of lump-sum benefits upon reenlistment at the end of the enlistment during which the benefits were earned does not limit the election only to those who reenlist at the end of the first enlistment. However, payment may not be made until he completes the initial 4 years of service.

**MILITARY PERSONNEL
Educational Assistance**

**B-219059 Con't
Mar. 24, 1986**

A member of the Marine Corps who enlisted under the Educational Assistance Program is not limited to either the student loan repayment benefit or the educational assistance benefit, but may receive both types of benefits if he enlisted under both segments of the program and was otherwise eligible. The law does not restrict a member to one type of benefit, and the legislative history indicates that both types of benefits are available to the member for the same period of service, as does the implementing Department of Defense guidance.

PROCUREMENT LAW

CONTRACTS B-220852.5 Mar. 3, 1986
Protests 86-1 CPD 213
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Request for reconsideration is dismissed where protester merely reiterates previously denied argument that regulations requiring the timely filing of requests for reconsideration should be waived.

BIDS B-220925 Mar. 3, 1986
Invitation for Bids 86-1 CPD 214
Specifications
Defective

When invitation for bids (IFB) inaccurately stated requirements, the contracting agency should have canceled the IFB and resolicited rather than awarding a contract to the bidder that complied with the actual requirements, but was not low.

BIDS
Rejection
Propriety

Although it was improper to reject bid which satisfied one reasonable interpretation of ambiguous specification on basis it did not comply with agency's interpretation, record provides no basis to conclude that agency's interpretation was not also reasonable. Therefore, GAO cannot find that agency unreasonably excluded protester from competition to award bid preparation costs and costs of pursuing protest.

BIDS **B-220925 Con't**
Responsiveness **Mar. 3, 1986**
Brand Name or Equal Procurement

Offer of version 3.1 of microcomputer operating system is responsive to requirement for version 3.0 or equal when version 3.1 is an upgraded version of the 3.0.

CONTRACTS **B-220192.3 Mar. 4, 1986**
Protests **86-1 CPD 217**
General Accounting Office Procedures
Reconsideration Requests
Original Decision Rendered in Response to Court
Request
Court not Interested in GAO Reconsideration

Request for reconsideration of prior decision is dismissed where prior decision was issued in response to a request from a court and the court has not requested reconsideration of the decision.

CONTRACTS **B-220859.2 Mar. 4, 1986**
Negotiation **86-1 CPD 218**
Requests for Proposals
Ambiguous

Protester's contention that solicitation clause providing for price adjustments in the event of significant workload variations is not sufficiently detailed is without merit since clause need not specify exact formula for calculating price adjustment and any disagreement can be resolved under the standard Disputes clause.

CONTRACTS

B-220859.2 Con't

Negotiation

Mar. 4, 1986

Requests for Proposals

Specifications

Quantity Estimates

Best Available Information Requirement

Protest that workload estimates in solicitation are defective is denied where protester fails to show that the estimates are not based on the best information available or otherwise are deficient.

CONTRACTS

Negotiation

Requests for Proposals

Statement of Work

Protest that RFP section did not clearly state the services for which a contractor would be responsible, and should be revised to show a detailed workload, is denied where the RFP, when read as whole, defines the services. There is no requirement that a solicitation be so detailed as to eliminate completely all performance uncertainties or address every possible eventuality.

CONTRACTS

Options

Exercisable at Sole Discretion of Government

Review by GAO

GAO will not consider protester's contention that agency cannot demonstrate that recompeting its contract is cost effective. Where an option is exercisable at the sole discretion of the government, the decision not to exercise the option is a matter of contract administration which GAO will not review under its bid protest function.

CONTRACTS
Protests
Abandoned

B-220859.2 Con't
Mar. 4, 1986

Where agency rebuts an issue raised in the initial protest and the protester fails to respond to the agency's rebuttal in its comments to the agency report, the issue is deemed abandoned.

CONTRACTS
Protests
Allegations
Bias
Unsubstantiated

Where a protester alleges that procurement officials acted intentionally to preclude the protester from receiving the award, the protester must submit virtually irrefutable proof that the officials had specific and malicious intent to harm the protester, since contracting officials otherwise are presumed to act in good faith.

CONTRACTS
Protests
Moot, Academic, etc. Questions

Protest that solicitation should not require that a specific number of personnel operate a photo laboratory is academic where solicitation amendment deletes requirement.

CONTRACTS

B-220868 Mar. 5, 1986

Negotiation

86-1 CPD 220

Offers or Proposals

Best and Final

Additional Rounds

Revisions in Level of Effort

There is no impropriety in requesting a second round of best and final offers where a valid reason, such as a change in the work requirements, exists for such action.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Evaluators

Bias Alleged

Unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition and even where bias is shown, if there is no indication that the protester's competitive position was adversely affected, the protest will be denied.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Technically Equal Proposals

Price Determinative Factor

Where an agency regards proposals as essentially equal, cost or price may become the determinative factor in making an award notwithstanding that in the evaluation criteria cost was of less importance than technical considerations. A protester's mere disagreement with the determination that proposals are essentially equal does not render the evaluation objectionable.

CONTRACTS

B-220868 Con't

Negotiation

Mar. 5, 1986

Technical Evaluation Panel

Evaluation Propriety

Source selection officials are not bound by the recommendations and conclusions of evaluators and, as a general rule, we will defer to such officials' judgment even when they disagree with assessments made by working level evaluators or individuals who normally would be expected to have technical expertise.

CONTRACTS

B-220910 Mar. 5, 1986

Negotiation

86-1 CPD 221

Offers or Proposals

Discussion With all Offerors Requirement

Initial Proposal Basis—Solicitation Provision

Contracting agency properly awarded contract on the basis of initial proposals, without discussions, where the solicitation advised offerors of that possibility and award was at the lowest overall cost to the government.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Brand Name or Equal

Salient Characteristics - Satisfaction of

Requirement

Where specifications for a brand name or equal battery-operated item require battery chargers "(if applicable)" and salient characteristics list battery chargers, the only reasonable interpretation of the solicitation is that battery chargers are required and are a salient characteristic where the item uses rechargeable batteries. Thus, offered item that used disposable batteries and did not include battery chargers was acceptable.

CONTRACTS

B-220910 Con't

Negotiation

Mar. 5, 1986

Offers or Proposals

Evaluation

Brand Name or Equal

**Salient Characteristics - Satisfaction of
Requirement**

In brand name or equal procurements, items offered as equal need not meet generally stated salient characteristics exactly like the brand name item, but the equal items' features must be substantially equivalent in function to the brand name items.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Propriety

Protest that agency failed to evaluate offers for a battery-operated item on an equal basis--because offers of items with rechargeable batteries had to include battery chargers in their prices while the costs of replacement batteries for items with disposable batteries were not evaluated--lacks merit where the record indicates that the disposable batteries will last for the useful life of the item and the protester has not shown otherwise.

CONTRACTS

Negotiation

Requests for Proposals

Ambiguous

Fact that solicitation is unclear regarding the number of battery chargers required with purchased systems does not provide basis for challenging award where the protester admits its price including only one charger still would not be low.

CONTRACTS
Negotiation
Justification

B-221054 Mar. 6, 1986
86-1 CPD 225

Agency decision to negotiate, requesting competitive proposals in lieu of sealed bids, is justified where the agency foresees a need for discussions and the basis for award reasonably includes technical considerations in addition to price and price-related factors.

BIDS
Mistakes
Correction
Low Bid Displacement

B-221113.2 Mar. 6, 1986
86-1 CPD 226

Agency acted reasonably in permitting bidder to correct error in monthly bid price even though corrected bid displaced low bid, since mistake and intended monthly bid price were ascertainable from bid itself.

BIDS
Invitation for Bids
Specifications
Restrictive
Burden of Proving Undue Restriction

B-220392, et al. Mar. 7, 1986
86-1 CPD 227

Protests that design specifications for welding machines can be met by only one producer and, therefore, unduly restrict competition are without legal merit where the agency establishes that design specifications are necessary to standardize military welding machines and the protesters do not show that the agency's justification for standardization is clearly unreasonable or that a different standard design would increase the likelihood of competition.

CONTRACTS

B-220856.2 Mar. 7, 1986

Protests

86-1 CPD 229

General Accounting Office Procedures**Reconsideration Requests****Original Decision Rendered in Response to
Court Request****Court not Interested in GAO Reconsideration**

Where GAO decides protest in response to specific expression of interest from United States District Court, reconsideration request filed by the protester is dismissed--without consideration on the merits--because court has not expressed an interest in having GAO reconsider its decision.

CONTRACTS

B-221276 Mar. 7, 1986

Modification

86-1 CPD 230

Change Orders**Propriety**

Contracting agency's plan to acquire aircraft maintenance training equipment under an existing contract for development and production of the aircraft is proper where the contract provides for issuance of change orders for production of the training equipment by the contractor. Since acquisition of the equipment directly from the contractor was authorized, it also was proper for the agency to allow the contractor to select a subcontractor to produce the equipment.

CONTRACTS**Modification****Scope of Contract Requirement**

Contracting agency is not required to conduct a separate procurement for aircraft maintenance training equipment where production of the equipment is within the scope of the existing contract for development and production of the aircraft.

CONTRACTS
Subcontracts
Propriety

B-221276 Con't
Mar. 7, 1986

Subcontracting Practices of Contractor

Contracting agency had a reasonable basis for its decision to allow the contractor under an existing contract for aircraft production to select a subcontractor to produce the maintenance training equipment for the aircraft, where agency reasonably concluded that high degree of coordination necessary to ensure system compatibility was best achieved through a prime contractor/subcontractor arrangement.

CONTRACTS

B-221726.2 Mar. 7, 1986

Protests

86-1 CPD 276

General Accounting Office Procedures

Reconsideration Requests

Error of Fact or Law

Not Established

Prior dismissal is affirmed where protester did not offer any new evidence and waiver of our timeliness rule for good cause is not warranted.

CONTRACTS

B-221858 Mar. 7, 1986

Protests

86-1 CPD 231

Moot, Academic, etc. Questions

Future Procurements

Protest which merely anticipates possible future agency action is speculative and will not be considered.

BIDS B-220331.2, et al. Mar. 10, 1986
Invitation for Bids 86-1 CPD 232
Defective
Evaluation Procedure

Where the evaluation scheme in an invitation for bids provides no reasonable assurance that award will result in the lowest cost to the government in terms of actual work performed, the invitation is defective per se and no bid can be evaluated properly.

BIDS B-220412; B-220412.2
Invitation for Bids Mar. 10, 1986
Amendments 86-1 CPD 233
Failure to Acknowledge
Bid Nonresponsive

Amendment to IFB which added entire specification for one item was material, and bidder's failure to acknowledge the amendment rendered its bid nonresponsive as to that item.

BIDS
Invitation for Bids
Amendments
Failure to Acknowledge
Waiver
Significance of Amendment

Agency properly waived bidder's failure to acknowledge receipt of IFB amendment because amendment--which relaxed a portion of the agency's requirements by providing alternative specifications and clarified the original solicitation by providing information that was incorporated by reference in the solicitation as issued--was not material.

CONTRACTS B-220412; B-220412.2 Con't
Protests Mar. 10, 1986
Moot, Academic, etc. Questions
Corrective Action Proposed, Taken, etc., by
Agency

Protest of agency's rejection of bid for failure to acknowledge receipt of IFB amendment is dismissed as academic where agency determines that amendment was not material and waives protester's failure to acknowledge receipt of it.

CONTRACTORS B-221287 Mar. 10, 1986
Conflict of Interest 86-1 CPD 234
Consultant Services to Government and Prime
Contractor

Agency has not acted unreasonably in deciding not to exclude potential editing contractor from competition even though the potential contractor's spouse and former associate serve, respectively, as a consulting adviser and managing editor of the journal to be edited, where both individuals are excluded from evaluating proposals and are not in positions to influence the procurement.

CONTRACTS
Requests for Quotations
Competition
Equality of Competition

Contracting agencies are not required to use evaluation criteria and specifications that compensate for the experience, resources or skills that a potential offeror obtained as a former government employee, except where any advantage is the result of a preference or unfair action by the agency.

CONTRACTS **B-221287 Con't**
Requests for Quotations **Mar. 10, 1986**
Evaluation Factors
Experience

Evaluation scheme for proposals for schizophrenia journal editing services that heavily weights offeror's specific experience editing schizophrenia articles rather than psychological/psychiatric articles generally is reasonable where agency has shown that such experience directly relates to the offeror's ability to perform the services.

BIDS **B-221559 Mar. 10, 1986**
Invitation for Bids **86-1 CPD 236**
Specifications
Minimum Needs Requirement
Administrative Determination
Reasonableness

Geographical restriction in IFB requiring bidders for a contract to provide meals and lodging for applicants for military duty to be located within 5 driving miles from the agency's processing center does not unduly restrict competition since the agency reasonably believed, based on its experience with the protester's more remote facility, that the restriction would improve efficiency and that adequate competition was available within the restricted area.

CONTRACTS **B-222016.2 Mar. 10, 1986**
Protests **86-1 CPD 237**
General Accounting Office Procedures
Timeliness of Protest
Adverse Agency Action Effect

Protest filed with GAO more than 10 working days after the contracting agency denied the firm's agency-level protest is untimely and will not be considered. Protester's continued pursuit of the matter with the contracting agency before filing with GAO does not alter this result.

CONTRACTS

B-220425 Mar. 11, 1986

Negotiation

86-1 CPD 238

Awards**Initial Proposal Basis****Propriety**

Agency improperly awarded a contract on the basis of initial proposals where it is not clear the contract was awarded at the lowest overall cost to the government.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Criteria****Application of Criteria**

Agency unreasonably found protester's proposal technically unacceptable where the technical evaluation panel failed to evaluate the proposal in accordance with the solicitation provisions.

CONTRACTS

B-222012 Mar. 11, 1986

Protests

86-1 CPD 241

Moot, Academic, etc. Questions**Protester not in Line for Award**

Protest against rejection of bid for failure to acknowledge an amendment will not be considered since the firm's bid otherwise is nonresponsive, so that it is not eligible for award in the procurement irrespective of the protest's merits.

CONTRACTS

B-219934.2 Mar. 12, 1986

Negotiation

86-1 CPD 242

Offers or Proposals**Evaluation****Cost Realism Analysis****Reasonableness**

Challenge to agency's conduct of cost realism evaluation, which raised protester's costs, is denied where cost was the least important evaluation factor and protester has not responded to specific contention that it would not have been selected even if its proposed costs were realistic or provided evidence that it could have reduced its costs sufficiently to overcome awardee's substantial technical advantage.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Technical Acceptability****Administrative Determination**

Contention that evaluation of technical proposals in procurement of marine engineering and design services was improper is without merit where record demonstrates that awardee, including subcontractor, may reasonably be judged to have offered superior personnel and corporate experience to that proposed by protester. Absent prohibition in RFP, proposed subcontractor's experience and personnel may be considered in evaluation.

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

Dismissal for failure to furnish agency copy of protest within 1 day of filing at GAO, as required by GAO Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1985), is not warranted where agency is already on notice of bases for protest, through prior letter from protester to agency, and agency is able to submit protest report within time limit prescribed under Competition in Contracting Act, 31 U.S.C.A. 3553(b)(2)(A) (West Supp. 1985).

CONTRACTS

B-219934.2 Con't

Protests

Mar. 12, 1986

General Accounting Office Procedures

Timeliness of Protest

Date Basis of Protest Made Known to Protester

Contention that protester was misled in negotiations about the adequacy of its proposal, first raised in protester's comments on agency report, is untimely where protester knew of content of negotiations when it filed initial protest and that its proposal had not received highest rating. GAO Bid Protest Regulations require that protests be filed within 10 days of when protester knew or should have known of basis for protest. 4 C.F.R. § 21.2(a)(2).

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

**Apparent Prior to Bid Opening/Closing Date
for Proposals**

Where transition costs were not included among the evaluation criteria, they could not be considered. Consequently, protest against agency's failure to consider transition costs, not raised until protester learned of impending award to another offeror, is untimely because not raised prior to closing date for receipt of proposals. GAO Bid Protest Regulations require that an impropriety apparent on the face of a solicitation be filed prior to the next closing date of solicitation. 4 C.F.R. § 21.2(a)(2).

CONTRACTS

Protests

Information Evaluation

Sufficiency of Submitted Information

It would not be appropriate to dismiss protest for failure to cite any legal authority or request specific relief where protest provides all information essential to protest.

CONTRACTS

B-220668.2 Mar. 12, 1986

Protests

86-1 CPD 243

General Accounting Office Procedures**Reconsideration Requests****Timeliness**

In initial decision, GAO held that protester's bid correctly was found nonresponsive because it did not comply with the IFB's required minimum bid acceptance period. Protester's argument in requesting reconsideration, that the solicitation should not have specified a minimum bid acceptance period, not only is untimely since it was not filed before bid opening, but it does not show that the initial decision was factually or legally wrong, which is necessary to prevail on reconsideration.

CONTRACTS

B-220965 Mar. 12, 1986

Negotiation

86-1 CPD 244

Offers or Proposals**Discussion With all Offerors Requirement****"Meaningful" Discussions**

The requirement for meaningful discussions does not obligate agencies to advise an offeror of what is, comparatively, a minor weakness that is not considered significant, but subsequently becomes the determinative factor when two closely-ranked proposals are compared.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Criteria**

Agency's in-house staffing estimate may properly be utilized as a tool for evaluating offerors' proposed staffing levels.

CONTRACTS

B-220965 Con't

Negotiation

Mar. 12, 1986

Offers or Proposals

Evaluation

Evaluators

Qualifications

The General Accounting Office will not appraise the qualifications of contracting agency personnel evaluating technical proposals in the absence of a showing of possible fraud, conflict of interest, or bias on the part of those evaluators.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Personnel

Offerors are not bound by recommended or minimum staffing levels set forth in agency handbooks incorporated by reference into a solicitation. Offerors should consider such levels as guidelines, and they may assign additional staff for a particular function where deemed necessary or advisable.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Technical Superiority

Significant

An agency may select one of two offerors with a slightly higher technical point score and a slightly higher cost where the selecting official finds, consistent with the evaluation criteria established in the solicitation, that the technical superiority outweighs minimal savings.

CONTRACTS **B-220965 Con't**
Negotiation **Mar. 12, 1986**
Source Selection
Board, Commission, etc.
Overruled by Source Selection Official

Where a selecting official determines that the technical scoring of proposals by an evaluation panel does not accurately reflect significant differences between the proposals, the selection official properly may consider this difference in making an award decision.

BIDS **B-221286 Mar. 12, 1986**
Responsiveness **86-1 CPD 245**
Exceptions Taken to Invitation Terms
Delivery Provisions

Bid which takes exception to the IFB delivery schedule by allowing 112 rather than 90 days for delivery after receipt of order is nonresponsive because the bid is not an unequivocal offer to meet the material requirements set out in the solicitation.

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

Protest concerning alleged impropriety apparent on the face of the solicitation filed after bid opening is untimely since GAO Bid Protest Regulations require that protest be filed before bid opening. Exception permitting the filing of such a protest after bid opening where a protester receives the amendment too late to protest does not apply since the record indicates there was sufficient time for a protest to have been filed.

BIDS
Rejection
Propriety

B-221314 Mar. 12, 1986
86-1 CPD 246

Bid submitted in corporate name was properly rejected where corporation's charter had been revoked for nonpayment of franchise taxes.

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

B-221992.3 Mar. 12, 1986
86-1 CPD 248

Dismissal of protest as untimely is affirmed on reconsideration where neither "good cause" nor "significant issue" exception applies.

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

B-219312.7 Mar. 13, 1986
86-1 CPD 249

Prior decisions affirming the dismissal of an untimely request for reconsideration are affirmed where protester has not shown that the prior decisions (or the dismissal) were based upon any errors of fact or law.

CONTRACTS
Negotiation
Awards

B-220431 Mar. 13, 1986
86-1 CPD 250

To Other Than Low Offeror

Contracting agency may award to offeror submitting higher cost proposal where cost is of lesser importance than noncost considerations, if the superiority in the higher cost proposal is reasonably considered by the agency to be worth the price premium involved. Therefore, contracting agency may reasonably decide to pay price premium for proposal it regards as superior because lower-priced, acceptable proposal has weaknesses in two key technical areas.

CONTRACTS

Protests

Basis for Protest Requirement

Where protester, which submitted lower-priced, acceptable offer, argues that contracting agency has not justified payment of price premium to successful offeror even where noncost factors are more important than cost, protest states a valid basis of protest and will not be dismissed.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

New Issues

Unrelated to Original Protest Basis

Protest against alleged lack of meaningful discussions is untimely when filed--as new ground of protest--more than 10 working days after protester should reasonably have been aware of this basis of protest.

CONTRACTORS **B-221298 Mar. 13, 1986**
Responsibility **86-1 CPD 252**
Administrative Determination
Nonresponsibility Finding
Based on Negative Pre-Award Survey Report

Contracting officer may base nonresponsibility determination on pre-award survey showing contractor's delinquent past performance and inadequate production facilities, and his own familiarity with contractor's delinquent performance under a contract for the same item, without affording the contractor an opportunity to explain or discuss the evidence.

Opinion by Defense Contract Administration Services Management Area (DCASMA), which conducted pre-award survey, based on events occurring and information provided by the contractor after award, that reevaluation was appropriate if the pre-award survey was the only basis for the contracting officer's negative determination is without effect. The contracting officer is empowered to make this determination and considered information besides the pre-award survey, and the information sent to DCASMA by the protester was not provided until after the award was made.

CONTRACTORS
Responsibility
Determination
Review by GAO
Nonresponsibility Finding

Contracting officer has broad discretion in determining bidder's responsibility and GAO will not question a negative determination absent a showing of bad faith or lack of any reasonable basis for the determination.

CONTRACTS **B-221334 Mar. 13, 1986**
Negotiation **86-1 CPD 253**
Requests for Proposals
Specifications
Restrictive
Undue Restriction not Established

Protest that specification requiring electrocardiograph test results to be printed in 8-1/2- by 11-inch format unduly restricts competition is denied. The agency believes that it would be necessary to cut and paste 4-1/2-inch-wide printouts produced by the protester's equipment in order to fit them securely into standard 8-1/2- by 11-inch files, and that this would be inefficient and increase the risk of loss. The protester has not shown that the agency's position is clearly unreasonable.

CONTRACTS **B-221584.2 Mar. 13, 1986**
Small Business Concerns **86-1 CPD 254**
Awards
Responsibility Determination
Nonresponsibility Finding
Certificate of Competency Requirement

GAO dismisses a protest against a contracting officer's nonresponsibility determination with respect to a small business concern where the matter has been referred to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC) and SBA has not yet determined whether to issue a COC.

BIDS **B-222154 Mar. 13, 1986**
Responsiveness **86-1 CPD 255**
Failure to Furnish Something Required
First Article Prices

Bid is properly rejected where bidder failed to submit price for first article production and there was no showing by some notation that production would be at no cost to government.

CONTRACTS	B-221430; B-221430.2
Negotiation	Mar. 14, 1986
Offers or Proposals	86-1 CPD 256
Preparation	
Costs	
Denied	

There is no legal basis for recovery of proposal preparation costs where the General Accounting Office finds the cancellation of a solicitation proper.

CONTRACTS
Negotiation
Requests for Proposals
Cancellation
Administrative Discretion
Reasonable Exercise

In a negotiated procurement, a contracting officer need only establish a reasonable basis to support a decision to cancel a solicitation. A reasonable basis exists where the agency determines that sufficient funds are not available to allow contracting for the maximum quantities stated in the request for proposals and that additional competition is likely for reduced quantities.

BIDS	B-218610.2 Mar. 17, 1986
Mistakes	86-1 CPD 257
Correction	
Propriety	

Bidder's reliance on subcontractor's firm quotation that omitted an item is a mistake that must be corrected where there was no dispute about the nature of the error and the alleged intended bid fell within a narrow range of uncertainty, the upper end of which was still significantly below the next low bid.

BIDS**Mistakes****Evidence of Error
Sufficiency****B-218610.2 Con't****Mar. 17, 1986**

Sworn statements from potential subcontractors corroborating claimant's alleged intended bid price are not required.

CONTRACTS**Negotiation****Disclosure of Price, etc.
Inadvertent****B-220459 Mar. 17, 1986****86-1 CPD 258**

Where an agency inadvertently discloses a protester's proposal to the only other offeror, but not until after award, the protester is not prejudiced by the error in the present procurement.

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

Improper technical leveling does not occur merely because an agency, during discussions, advises an offeror whose proposal is susceptible to being made acceptable that it does not meet certain specifications and requests it to address further particular aspects of its proposed system. Pointing out deficiencies is part of the agency's responsibility to conduct meaningful discussions.

CONTRACTS **B-220459 Con't**
Negotiation **Mar. 17, 1986**
Offers or Proposals
Evaluation
Technical Transfusion Prohibition

Improper technical transfusion has not occurred where the record reveals no evidence that during discussions, the agency conveyed to an offeror, either directly or indirectly, a better technical approach that allegedly has been proposed by a protester.

CONTRACTS
Performance
Suspension
Pending Final Resolution of Protest

Competition in Contracting Act of 1984 provision generally requiring agencies to stay contract performance if the General Accounting Office (GAO) notifies them of a protest filed with it within 10 days of award does not apply to agency-level protests, so there is no legal basis for GAO to object to continued performance.

CONTRACTS **B-220526.2 Mar. 17, 1986**
Negotiation **86-1 CPD 259**
Offers or Proposals
Best and Final
One Technically Acceptable Offer

Final negotiations with one offeror to obtain a small reduction in price were not improper where only that firm remained within the agency's revised competitive range.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Errors****Not Prejudicial****B-220526.2 Con't****Mar. 17, 1986**

Protest against the successful offeror's failure in its cost proposal to price separately annual rent and maintenance, under a solicitation for the construction and lease of military family housing units, is denied where the deviation did not operate to deprive the protester of an award to which it was otherwise entitled and had no significant adverse impact on the government's interest.

CONTRACTS**Negotiation****Offers or Proposals****Qualification of Offerors****Adequacy of Finances, Personnel, Facilities, etc.**

Whether the successful offeror under a negotiated procurement has sufficient financial backing to perform the contemplated effort directly relates to the firm's responsibility as a prospective contractor. By awarding the contract, the agency has in fact determined the firm to be responsible, and GAO does not review affirmative determinations of responsibility except in limited circumstances not present here.

CONTRACTS**Negotiation****Offers or Proposals****Unbalanced****Not Automatically Precluded**

The concept of bid unbalancing generally is not relevant to a negotiated procurement in which cost or price is not the primary basis for source selection. Thus, the fact that the successful offeror under a solicitation for the construction and lease of military family housing units may have loaded an unknown amount for maintenance into its annual rent is immaterial where the basis for award was not the lowest total annual rent, but rather the most favorable cost/quality ratio between total annual rent and technical merit.

CONTRACTS

B-221068 Mar. 17, 1986

Negotiation

86-1 CPD 260

Offers or Proposals

Discussion With all Offerors Requirement

"Meaningful" Discussions

Agency did not violate requirement for conducting meaningful discussions by not informing offeror that its key personnel lacked recent working-level experience since agency is not required to point out weaknesses inherent in offeror's proposed approach and proposal was based on these particular individuals who could not be replaced without redoing the proposal.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Experience Rating

Where RFP required that successful offeror update agency's security procedures and manuals and stated that offeror's experience in implementing policy would be evaluated, it was reasonable for agency to consider offeror's current working-level experience in evaluating proposals.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Technically Unacceptable Proposals

Cost, etc. not a Factor

Fact that protester's cost proposal was lower than awardee's is irrelevant when protester's proposal was technically unacceptable and thus ineligible for award.

CONTRACTS B-221068 Con't
Protests Mar. 17, 1986
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

Contention regarding contract requirements concerning employee and facility security clearances raised after award is untimely since a protest based upon alleged improprieties in a solicitation must be filed prior to the closing date for receipt of initial proposals.

CONTRACTS B-221170.6 Mar. 17, 1986
Protests 86-1 CPD 261
Contract Administration
Not for Resolution by GAO

Whether contracting agency properly permitted contractor to substitute equipment under contract relates to contract administration not encompassed by GAO bid protest function.

CONTRACTS B-221358 Mar. 17, 1986
Negotiation 86-1 CPD 262
Awards
Price Determinative Factor

Award based on cost savings represented by the awardee's proposal is proper where contracting agency reasonably found technical proposals of awardee and protester to be essentially equal.

CONTRACTS

B-221358 Con't

Negotiation

Mar. 17, 1986

Competition

Equality of Competition

Incumbent Contractor's Advantage

Agency is not required to equalize competition by considering competitive advantages/disadvantages resulting from particular firm's own incumbency or circumstances so long as they do not result from preferential or unfair government action.

CONTRACTS

Negotiation

Offers or Proposals

Discussion With all Offerors Requirement

"Meaningful" Discussions

Protest that the agency improperly failed to advise the protester during discussions of the competitive nature of the procurement and the importance of cost is denied where protester, in fact, was advised during discussions that the procurement was competitive and that proposed costs could be changed in best and final offer. Agency is not obligated in discussions to advise one offeror of its standing in relation to other offeror or to disclose price/cost necessary to win competition.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

Apparent Prior to Bid Opening/Closing Date
for Proposals

Protests based upon alleged improprieties in an RFP which are apparent prior to the closing date for receipt of initial proposals must be filed prior to that time.

CONTRACTS **B-219733.2 Mar. 18, 1986**
Protests **86-1 CPD 263**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact of Law
Not Established

Prior decision is affirmed on reconsideration where requester does not demonstrate that the decision was legally or factually incorrect.

CONTRACTS **B-220423; B-220423.2**
Protests **Mar. 18, 1986**
Allegations **86-1 CPD 264**
Unsubstantiated

Allegation that proposal for a telemetry antenna system complied with a reasonable interpretation of the solicitation's requirement for automatic tracking and that agency advised protester that such an approach would be acceptable is denied where the record fails to show that either the specification or the agency misleads the protester concerning the requirements imposed.

Allegation that agency should have disclosed additional information concerning the intended use of the solicited telemetry antenna is denied where there is no showing that specification was insufficient to apprise protester of what was required and where full compliance with the specification would have satisfied the agency's requirements.

CONTRACTS
Two-Step Procurement
Step One
Offers or Proposals
Discussion With all Offerors Requirement
"Meaningful" Discussions

Protest alleging that agency failed to conduct meaningful discussions because deficiency, for which proposal was rejected, was not raised by agency in clarification requests or deficiency notices is denied where clarification requests and deficiency notices were intended only to be part of the ongoing evaluation process to determine which proposals were acceptable.

CONTRACTS

B-220423; B-220423.2 Con't

Two-Step Procurement

Mar. 18, 1986

Step One**Offers or Proposals****Evaluation****Technical Acceptability**

Although an agency should make reasonable efforts under step one of a two-step procurement to qualify proposals for participation in the second round, technically unacceptable proposals may, nonetheless, be rejected in step one.

Allegation that proposal should not have been found technically unacceptable nor reasonably susceptible of being made acceptable is denied where, despite protester's disagreement, agency reasonably concluded that a major redesign of protester's proposed system would be required to correct the deficiency.

BIDS

B-220451 Mar. 18, 1986

Invitation for Bids

86-1 CPD 265

Specifications**Minimum Needs Requirement****Administrative Determination****Reasonableness**

Requirement that "Compano only" typeset be used to print certain casebound books is not unduly restrictive where agency's minimum needs require typeset consistency with previous volumes published and agency's determination that only one typeset will meet this requirement is not unreasonable.

CONTRACTS**B-221012 Mar. 18, 1986****Requests for Quotations
Competition
Adequacy****86-1 CPD 266**

In a small business, small purchase set-aside, an agency's failure to solicit an incumbent contractor does not constitute an adequate reason to cancel the successor contract and resolicit where the incumbent was not deliberately excluded from the competition, adequate competition was obtained, and the awarded contract was reasonably priced.

BIDS**B-221316 Mar. 18, 1986****Invitation for Bids
Clauses
Liquidated Damages
Legality****86-1 CPD 268**

Provision in a solicitation which authorizes deduction for value of unsatisfactorily performed tasks, monitored by random sampling, in proportion to the defective performance imposes a reasonable measure of damages.

Protest against provision in a solicitation that permits the government to deduct from the contractor's payment an amount representing the total contract value of the tasks monitored by customer complaint, when the number of defects exceeds the acceptable quality level, is denied when protester does not demonstrate how the value of these tasks would vary depending on the extent of the unsatisfactory performance beyond the acceptable quality level.

BIDS
Invitation for Bids
Interpretation
As a Whole

B-221316 Con't
Mar. 18, 1986

Based on reasonable reading of solicitation as a whole, it is clear that the unit of inspection for purposes of determining unsatisfactory performance and assessing liquidated damages is each particular task performed in a building and not the building itself.

ESTOPPEL

Against Government
Not Established

Prior Erroneous Advice, Contract Actions, etc.

Bidder relies on oral statement from contracting officer deemed to be in conflict with the terms of the solicitation at its own risk and such a statement cannot be considered in determining a solicitation to be ambiguous.

BIDS
Invitation for Bids
Cancellation
After Bid Opening
Defective Solicitation

B-221380 Mar. 18, 1986
86-1 CPD 269

Cancellation of a solicitation for ship repair services after bid opening due to omission of information concerning the availability of the ship, that is, the dates the ship was scheduled to be at sea, was proper where the correction of the omission was reasonably deemed to be a significant change requiring revision of the specifications.

BIDS **B-221380 Con't**
Invitation for Bids **Mar. 18, 1986**
Cancellation
Resolicitation
Auction Atmosphere not Created

An impermissible auction situation is not created where a sealed bidding solicitation is canceled because the specifications needed to be revised and the agency then uses a negotiated solicitation upon resolicitation.

CONTRACTS **B-221337 Mar. 19, 1986**
Negotiation **86-1 CPD 271**
Late Proposals and Quotations
Best and Final Offers

Protester's late offer that was submitted in response to an agency's second request for best and final offers for design and construction of housing is not a late modification of an otherwise successful proposal where significant deficiencies existed in previous proposal submission and offeror therefore was not already in line for award. Therefore, the agency's decision not to consider the late proposals was proper.

BIDS **B-221668 Mar. 19, 1986**
Invitation for Bids **86-1 CPD 272**
Amendments
Failure to Acknowledge
Materiality Determination

An amendment that creates a legal right for the government and imposes a different legal obligation on the contractor than was contained in the original solicitation is material; thus, rejection of a bid as nonresponsive for failure to include acknowledgment of the amendment is proper.

BIDS**B-221668 Con't****Mistakes****Mar. 19, 1986****Correction****Nonresponsive Bids**

A nonresponsive bid may not be corrected pursuant to the mistake provisions of the Federal Acquisition Regulation and a late modification of a bid (acknowledging an amendment to the solicitation) may not be accepted where the bid as originally submitted is nonresponsive.

BIDS**Responsiveness****Low Price of Bid not a Factor**

A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the competitive bidding system.

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

Protest against the need for a solicitation amendment is untimely and not for consideration when it is filed with GAO after bid opening.

BIDS **B-221826 Mar. 19, 1986**
Invitation for Bids **86-1 CPD 273**
Amendments
Failure to Acknowledge
Wage Determination
Defect of Substance v. Merely Form

Failure to acknowledge a material amendment which contains a Service Contract Act wage rate determination generally renders a bid nonresponsive.

CONTRACTS
Protests
Interested Party Requirement
Nonresponsive Bidder

A nonresponsive bidder is not an interested party under GAO Bid Protest Regulations to protest the responsiveness of the next low bid where there is another bid that could be accepted, so that the protester does not have a direct economic stake in the outcome of the matter.

BIDS **B-222213 Mar. 19, 1986**
Invitation for Bids **86-1 CPD 274**
Specifications
Conformability of Equipment, etc. Offered

Bid may not be rejected because equipment offered is prototype rather than commercial product where invitation for bids does not require that equipment be commercially available.

CONTRACTS B-222213 Con't
Options Mar. 19, 1986
Exercisable at Sole Discretion of Government
Review by GAO

General Accounting Office (GAO) will not consider incumbent contractor's contention that contracting agency should exercise option under existing contract instead of conducting a new procurement, since decision whether to exercise option is a matter of contract administration outside the scope of GAO bid protest function.

CONTRACTS B-221058 Mar. 20, 1986
Negotiation 86-1 CPD 278
Offers or Proposals
Discussion With all Offerors Requirement
Varying Degrees of Discussions
Propriety

Where contracting agency advised one offeror of specific weaknesses in its proposal but gave the protester "clarifying questions" which did not reasonably advise protester of specific weakness in its initial offer, discussions were unequal and not meaningful.

CONTRACTS B-220421.2 Mar. 21, 1986
Protests 86-1 CPD 280
General Accounting Office Proedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior decision denying protest is affirmed on reconsideration where the protester cites a regulation applicable only to construction contracts in connection with a personal computer procurement and does not show any other error of law or fact that would warrant reversal of the prior decision.

PURCHASES **B-220582.3 Mar. 21, 1986**
Purchase Orders **86-1 CPD 281**
Federal Supply Schedule
Purchase Propriety

Prior decision is affirmed where the protester has not shown in its request for reconsideration that GAO erred in concluding that an agency's award of a purchase order for six microfilm reader/printers to other than the low priced supplier under a Federal Supply Schedule contract on the basis of greater maintenance availability was a legally sufficient justification for the award and did not constitute an improper "fracturing" of the agency's real needs.

CONTRACTS **B-221296 Mar. 21, 1986**
Negotiation **86-1 CPD 282**
Offers or Proposals
Time Limitation for Submission
Sufficiency of Time for Response

Protest that agency allowed insufficient time for the preparation of proposals is denied where the time exceeded the statutorily mandated minimum time.

CONTRACTS
Negotiation
Requests for Proposals
Specifications
Minimum Needs
Administrative Determination

The contract for purchase of high temperature water from contractor-owned, contractor-operated facility, which also permitted production of electricity and required sale to local utility rather than to procuring activity as urged by protester, reasonably was determined to meet minimum needs since government purchase from utility would be more reliable and cost effective.

CONTRACTS B-221325; B-221326
Protests Mar. 21, 1986
General Accounting 86-1 CPD 283
Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protests against alleged improper disclosure of pricing information are untimely when filed more than 10 days after the protester learns of the disclosure and after bid opening and contract award of later similar solicitations.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Significant Issue Exception
Not for Application

Untimely protest will not be considered under the significant issue exception to GAO's timeliness rules where the procurement format giving rise to the protest occurs infrequently and the issue raised--alleged improper price disclosure--has been considered previously. The good cause exception is not for application where there is no allegation or showing that some compelling reason beyond the protester's control prevented the timely filing of the protest.

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Subcontractors' Claims

GAO will review subcontractor protests where the subcontracts are awarded by general agents operating government facilities under government direction, thus making the contracts fall within the category of awards made by or for the government.

BIDDERS **B-221878 Mar. 21, 1986**
Responsibility v. Bid **86-1 CPD 284**
Responsiveness
Place of Performance

Low bidder's failure to complete standard place of performance clause constitutes a minor informality which can be waived because it involves the bidder's responsibility, not responsiveness, and therefore can be completed any time up to the time of award.

CONTRACTS **B-221985 Mar. 21, 1986**
Protests **86-1 CPD 285**
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

Protest that it was improper to compete procurement and that award should have been made to protester on a sole-source basis is dismissed as untimely where the protest against the alleged solicitation impropriety was not filed until after the closing date for receipt of proposals.

CONTRACTS **B-219676.4 Mar. 24, 1986**
Protests **86-1 CPD 287**
Authority to Consider
Contract Administration Matters

Request for reconsideration is dismissed where contention raised on reconsideration, that firm awarded contract cannot meet performance obligations, is a matter of contract administration which GAO will not consider.

CONTRACTS
Negotiation
Awards
Propriety
Upheld

B-220449 Mar. 24, 1986
86-1 CPD 288

There is no basis to question agency's selection of contractor for the design and construction of a commissary, where the awardee's proposal offered the best cost to quality point ratio and the initial protest filed by the fourth-ranked offeror does not state how evaluation was inconsistent with criteria set forth in solicitation.

CONTRACTS
Protests
Allegations
Unsubstantiated

Allegation that agency violated Competition in Contracting Act of 1984 by not conducting discussions with "all" offerors is without merit where record shows that agency did conduct discussions with both offerors in the competitive range, from which the protester was excluded.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Debriefing Conferences
Issues Providing Protest Basis

Specific challenges to agency's point scoring of protester's and awardee's proposals, first raised orally at bid protest conference 6 weeks after protester had been debriefed by agency and first submitted in writing in post-conference comments, are untimely. Allegations should have been filed within 10 working days of the debriefing.

CONTRACTS

B-220646.2 Mar. 24, 1986

Protests

86-1 CPD 289

Interested Party Requirement

Protester not in Line for Award

The General Accounting Office affirms its dismissal of a protest on grounds that the protester was not an interested party where the protester, the third-low offeror, has not shown that it would be next in line for award if its protest against award to the low offeror were sustained.

A third-low offeror's economic interest in a contract award that is based solely on the supposition that the second-low offeror may be found nonresponsible is too tenuous to support a finding that the offeror is an interested party to protest an award to the low offeror.

CONTRACTS

B-221502.3 Mar. 24, 1986

Negotiation

86-1 CPD 290

Requests for Proposals

Cancellation

Administrative Discretion

Reasonable Exercise

Lack of funding provides a reasonable basis for cancellation of a solicitation.

CONTRACTS

Protests

Burden of Proof

On Protester

Where protester alleges that agency canceled a solicitation in order to avoid responding to his protest against solicitation improprieties but presents no evidence in support of these allegations, protester has not proved his case.

CONTRACTS **B-221502.3 Con't**
Protests **Mar. 24, 1986**
Preparation
Costs
Noncompensable

Protester is not entitled to reimbursement of costs of pursuing his protest where protest is not sustained.

CONTRACTS **B-221725 Mar. 24, 1986**
Protests **86-1 CPD 291**
Moot, Academic, etc. Questions
Future Procurements

Protest against agency's decision to delay consideration of protester's request to become an approved source for item being procured is dismissed as premature since agency has not yet decided whether to make a sole-source award to another firm, pending agency's legal review of that firm's proprietary rights in the applicable specifications.

CONTRACTS **B-222318 Mar. 24, 1986**
Negotiation **86-1 CPD 292**
Sole-Source Basis
Determination not to Use
Scope of GAO Review

General Accounting Office will not review protest that contracting agency should procure item from the protester on a sole-source basis.

BIDDERS

B-221776 Mar. 26, 1986

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, had misclassified some employees, and had not paid overtime to some employees, and had falsified certified payroll records. Based on an independent review of the record in this matter, it is concluded that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the falsification of the records appears intentional. Therefore, the contractor is debarred under the Act.

BIDS

B-222091 Mar. 26, 1986

Acceptance Time

86-1 CPD 293

Limitation**Bids Offering Different Acceptance Periods****Shorter Periods****Rejection of Bid**

A bidder may not correct a bid containing a nonconforming acceptance period after bid opening, since a nonresponsive bid may not be cured through the mistake-in-bid procedures.

BIDS**Ambiguous****Two Possible Interpretations****Clarification Prejudicial to Other Bidders****Rejection of Bid**

The presence, in two otherwise identical copies of a single bid, of two conflicting acceptance periods, one conforming to the period specified by the government and the other nonconforming, renders the bid ambiguous, since the two copies are to be read together as a single document for the purpose of determining responsiveness. Where a bid is subject to two reasonable interpretations, under one of which it is nonresponsive, it must be rejected.

BIDS

B-221277 Mar. 27, 1986

Invitation for Bids

86-1 CPD 294

Cancellation**After Bid Opening****Administrative Determination**

An invitation for bids may be canceled after bid opening where the agency reasonably determines that, due to changed requirements, it does not reflect the agency's actual needs and, in addition, the price of the only responsible bidder is in excess of available funds.

Assuming that an original basis for cancellation of an invitation for bids was erroneous or inadequate, the cancellation is not legally objectionable if a subsequently enunciated basis supports the action.

CONTRACTS**Awards****Separable or Aggregate****Best Interests of Government**

Where a solicitation provides for an aggregate award or separate awards for three line items, and the only responsible bidder's price exceeds, in the aggregate and for one of the three, the funds available for all items, the agency is not required to award a contract for one or two items since it has no assurance that sufficient funds would remain to procure the remaining item(s) upon resolicitation.

CONTRACTS

B-221563.2 Mar. 27, 1986

Protests

86-1 CPD 295

**General Accounting Office Procedures
Constructive Notice**

GAO Bid Protest Regulations are published in the Federal Register and therefore protesters are charged with constructive notice of their contents.

CONTRACTS**Protests****General Accounting Office Procedures
Timeliness of Comments on Agency's Report**

Dismissal of original protest for failure to comment on the agency report in a timely manner is affirmed despite protester's assertion that it did not receive GAO's acknowledgment of protest notice which states that the protest file will be closed without action if the protester fails to comment within the prescribed time since the protester failed to comply with our Bid Protest Regulations, which contain the comment requirement.

CONTRACTS

B-221860 Mar. 27, 1986

Modification

86-1 CPD 296

**Additional Work or Quantities
Sole-Source Procurement Result**

Although a protested modification extending a contract by 6 months exceeded the scope of the original contract, the award of the extension on a sole-source basis was justified where ongoing, necessary services would otherwise be interrupted, only the incumbent could meet the government's needs within the required time, and the noncompetitive award did not result from the lack of advance planning.

CONTRACTS B-221930 Mar. 27, 1986
Protests 86-1 CPD 297
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protest that apparent successful offeror is technically unacceptable is dismissed as untimely when filed more than 10 days after the basis for the protest is known or should be known by the protester whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1985).

CONTRACTS B-220752.2 Mar. 28, 1986
Protests 86-1 CPD 298
Interested Party Requirement
Potential Contractors, etc. not Submitting
Bids, etc.

Where an agency properly determined that in order to establish a second source for cable television services it was necessary to exclude the incumbent cable operator from the competition, the incumbent is not an interested party to protest alleged defects in the solicitation.

GENERAL ACCOUNTING OFFICE B-222344 Mar. 28, 1986
Jurisdiction 86-1 CPD 299
Cooperative Agreements
Awards

Protest against the procedures being used to award a cooperative agreement, not significantly controlled by procurement statutes and regulations, will not be considered where company has neither alleged nor shown that contract rather than cooperative agreement should have been used and where alleged conflict of interest is not material to selection of intended awardee.

BIDS **B-219929.2 Mar. 31, 1986**
Responsiveness **86-1 CPD 301**
Pricing Response Nonresponsive to IFB Requirements
Failure to Bid Firm, Fixed Price

Bid, based on subcontractor's quotation that omitted items, properly was rejected where the use of another available quotation would have rendered the bid other than low.

CONTRACTS **B-221089 Mar. 31, 1986**
In-House Performance v. Contracting Out **86-1 CPD 302**
Agency In-House Estimate
Basis

Protest that agency supervisory staffing level cost is understated for purposes of comparison with contract cost is sustained where the agency's staffing level is unsupported by the management study it prepared as required by cost comparison rules, and the agency otherwise has failed to document the basis for these staffing levels.

CONTRACTS
In-House Performance v. Contracting Out
Guidelines

When an agency engages in a cost comparison under Office of Management and Budget Circular No. A-76, General Accounting Office will review an allegation that the agency did not comply with established ground rules. Moreover, since the Circular requires the agency to prepare a management study, which defines what must be done under the solicitation and the best way of doing it and which ultimately serves as the basis for the government's estimate in the cost comparison, the review includes ensuring consistency between study and in-house costs.

CONTRACTS

B-221390 Mar. 31, 1986

Negotiation

86-1 CPD 303

Late Proposals and Quotations**Best and Final Offers**

Protester's best and final offer, received 1 day after the date specified for receipt of best and final offers, was properly rejected where none of the exceptions outlined in the solicitation permitting consideration of a late offer applies.

Best and final offer received 1 day late cannot be considered on the basis that it may offer the government certain advantages over offers which have been timely received.

Where a firm is not prejudiced by an agency's failure to notify it promptly that its best and final offer will not be considered because it was received late, the failure is a procedural deficiency that does not affect the validity of the contract award.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent in Request for Best and Final Offers**

Protest based upon an alleged solicitation impropriety which does not exist in initial solicitation, but which is subsequently incorporated therein, must be protested not later than the next closing date for receipt of proposals. Accordingly, protester's contention that agency should have extended the deadline for receipt of best and final offers is untimely because this contention was not raised until well after the closing date for receipt of best and final offers.

CONTRACTS

B-221550 Mar. 31, 1986

**Negotiation
Sole-Source Basis
Competition Availability**

Noncompetitive award is not justifiable based on the existence of only one responsible source, an exception to the competition requirements under the Competition in Contracting Act, where the agency determined only that the awardee was qualified, not that the awardee was the only responsible source.

CONTRACTS**Negotiation
Sole-Source Basis
Justification
Inadequate**

The costs associated with the possible loss of a possible lawsuit against the government do not constitute "serious injury" to the government justifying a noncompetitive contract award under the "unusual and compelling urgency" exception to the Competition in Contracting Act, at least where no lawsuit had been threatened; the contracting agency never performed a legal analysis showing that conducting a competitive procurement could render the government liable for negligent or arbitrary action; and the contracting agency made no judgment as to the merits or likelihood of such a lawsuit.

PURCHASES**Small
Sole-Source Basis
One Known Source**

Noncompetitive small purchase is not justifiable on basis that only one source was reasonably available, an exception to small purchase competition requirements under Federal Acquisition Regulation, where contracting agency, although aware of requirement for nearly 3 months, took no steps to identify other potential sources.

CONTRACTS

B-221730 Mar. 31, 1986

Negotiation

86-1 CPD 305

Requests for Proposals

Amendment

After Evaluation of Initial Proposals

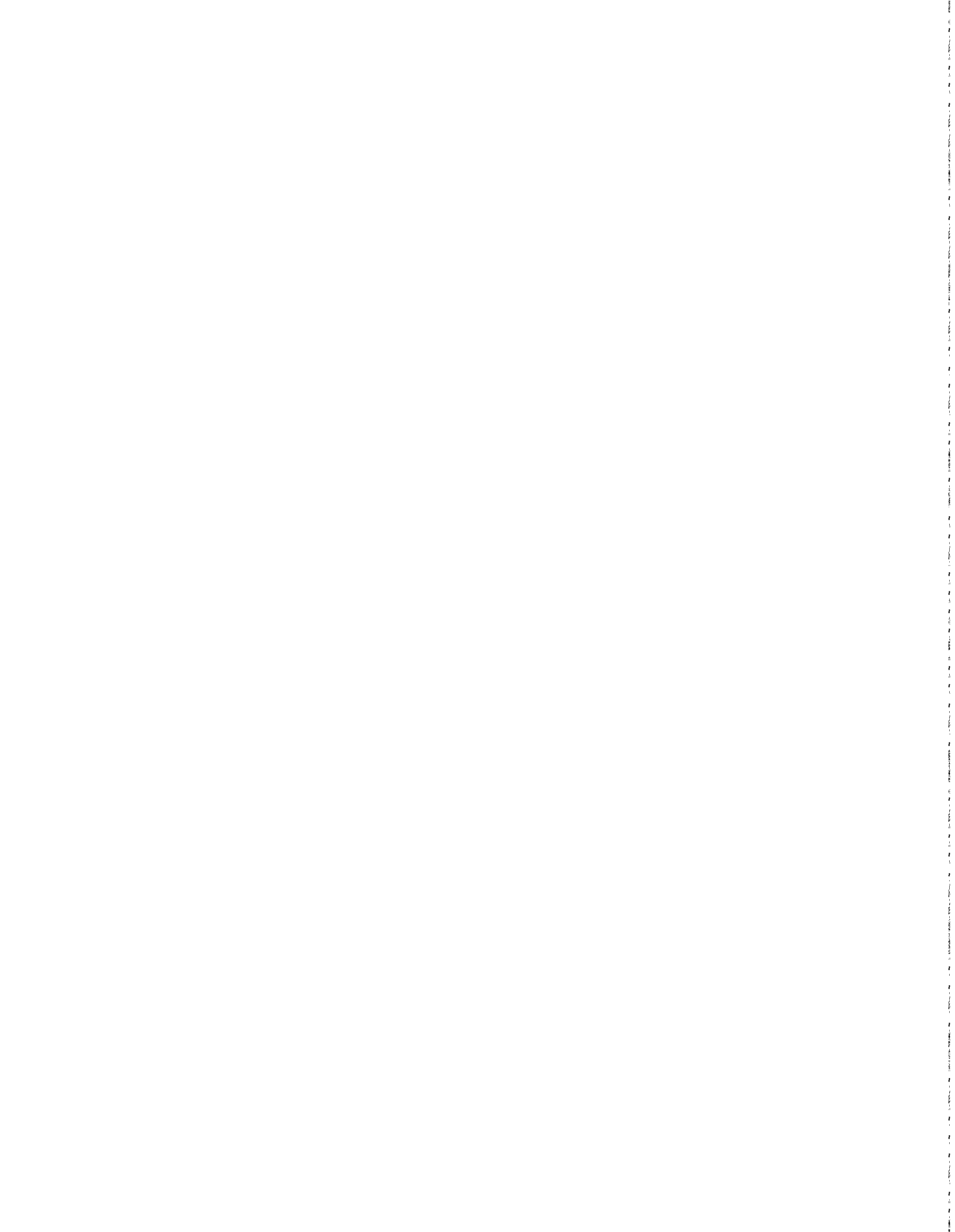
Where request for best and final offers sent to offerors, including protester, deleted an item added by an amendment to the solicitation, protest that awardee did not include offer for deleted item is denied.

CONTRACTS

Protests

Moot, Academic, etc. Questions

Allegation that awardee's product was not listed in the Federal Supply Schedule is irrelevant since the item being procured was not listed under a mandatory schedule.



SPECIAL STUDIES & ANALYSIS

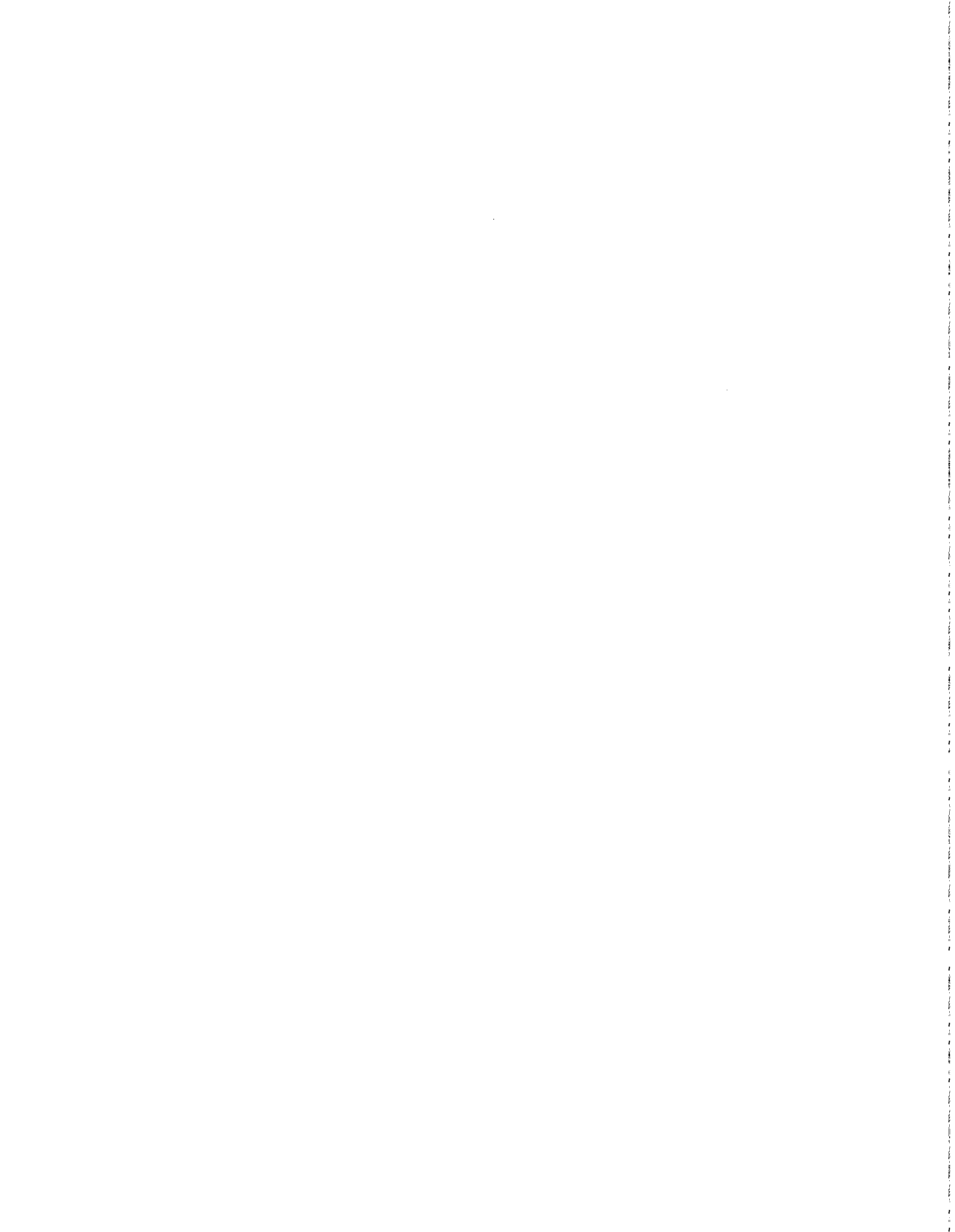
APPROPRIATIONS

B-221687 Mar. 13, 1986

Impounding

**Executive Branch's Failure to Expend Appropriated
Funds**

When what we consider to be mandatory, hence unimpoundable, spending authority is reported by the President as an impoundment, our authority under the Impoundment Control Act is limited to reporting that fact to the Congress. We cannot take action to compel release of the funds unless the Congress disapproves the proposed impoundment. Even if we had reported as unauthorized the deferral of funds for the Special facility for Sub-Saharan Africa on January 1, 1986 when the funds were withheld, and the Congress had immediately disapproved it (The Congress was then in recess), the impoundment would have been terminated before we could have first filed suit to compel release of the funds (the funds were released on January 17).



INDEX

MARCH 1986

	<u>Mar.</u>	<u>Page</u>
ACCOUNTABLE OFFICERS		
Physical Losses, etc. of Funds, Vouchers, etc.		
Cashiers, etc.		
Imprest Fund		
Relief Granted	B-214080	25... A- 3
Relief		
Duplicate Checks Issued		
Improper Payment	B-222041	6... A- 1
Illegal or Erroneous Payments		
Without Fault or Negligence	B-221415	26... A- 4
	B-222104	4... A- 1
AGENTS		
Government		
Government Liability for Acts Beyond Authority		
Erroneous Information	B-221657	25... B- 8
APPROPRIATIONS		
Authorization		
Expiration		
Expenditures Beyond	B-131935	17... A- 2
Impounding		
Executive Branch's Failure to Expend Appropriated Funds	B-221687	13... E- 1
BIDDERS		
Debarment		
Labor Stipulation Violations		
Davis-Bacon Act		
Wage Underpayments		
Debarment Required	B-221776	26... D-46
Responsibility <u>v.</u> Bid		
Responsiveness		
Place of Performance	B-221878	21... D-42

INDEX - Con.

	<u>Mar.</u>	<u>Page</u>
BIDS		
Acceptance Time Limitation		
Bids Offering Different		
Acceptance Periods		
Shorter Periods		
Rejection of Bid	B-222091	26... D-46
Ambiguous		
Two Possible Interpretations		
Clarification Prejudicial to		
Other Bidders		
Rejection of Bid	B-222091	26... D-46
Invitation for Bids		
Amendments		
Failure to Acknowledge		
Bid Nonresponsive	B-220412;) B-220412.2)	10... D-12
Materiality Determination	B-221668	19... D-36
Wage Determination		
Defect of Substance <u>v.</u>		
Merely Form	B-221826	19... D-38
Waiver		
Significance of		
Amendment	B-220412;) B-220412.2)	10... D-12
Cancellation		
After Bid Opening		
Administrative		
Determination	B-221277	27... D-47
Defective Solicitation	B-221380	18... D-35
Resolicitation		
Auction Atmosphere not		
Created	B-221380	18... D-36

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
BIDS - Con.			
Invitation for Bids - Con.			
Clauses			
Liquidated Damages			
Legality	B-221316	18...	D-34
Defective			
Evaluation Procedure	B-220331.2, et al.)	10...	D-12
Interpretation			
As a Whole	B-221316	18...	D-35
Specifications			
Conformability of Equipment, etc. Offered	B-222213	19...	D-38
Defective	B-220925	3...	D- 1
Minimum Needs Requirement			
Administrative Determination			
Reasonableness	B-220451	18...	D-33
	B-221559	10...	D-14
Restrictive			
Burden of Proving Undue Restriction	B-220392, et al.)	7...	D- 9
Mistakes			
Correction			
Low Bid Displacement	B-221113.2	6...	D- 9
Nonresponsive Bids	B-221668	19...	D-37
Propriety	B-218610.2	17...	D-25
	B-220982	6...	D- 8
Evidence of Error			
Sufficiency	B-218610.2	17...	D-25

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
BIDS - Con.			
Rejection			
Propriety	B-220925	3...	D- 1
	B-221314	12...	D-21
Responsiveness			
Brand Name or Equal Procurement	B-220925	3...	D- 2
Exceptions Taken to Invitation Terms			
Delivery Provisions	B-221286	12...	D-20
Failure to Furnish Something Required			
First Article Prices	B-222154	13...	D-24
Low Price of Bid not a Factor			
	B-221668	19...	D-37
Pricing Response Nonresponsive to IFB Requirements			
Failure to Bid Firm, Fixed Price	B-219929.2	31...	D-50
CERTIFYING OFFICERS			
Relief			
Erroneous Payments			
Duplicate Payments	B-222266	26...	A- 4
COMPENSATION			
Backpay			
Retroactive Promotions			
Claim Denied	B-220786	3...	B- 1
Computation	B-217501	12...	B- 3
Double			
Concurrent Military Reservist and Civilian Service	B-221416	12...	C- 1

INDEX - Con.

	<u>Mar.</u>	<u>Page</u>
COMPENSATION - Con.		
Rates		
Highest Previous Rate		
Administrative Discretion	B-220701	31... B- 9
Severance Pay		
Eligibility		
Involuntary Separation		
Resignation to Take		
Temporary Position	B-213346	3... B- 1
CONTRACTORS		
Conflict of Interest		
Consultant Services to		
Government and Prime		
Contractor	B-221287	10... D-13
Responsibility		
Administrative Determination		
Nonresponsibility Finding		
Based on Negative Pre-Award		
Survey Report	B-221298	13... D-23
Determination		
Review by GAO		
Nonresponsibility Finding	B-221298	13... D-23
CONTRACTS		
Awards		
Separable or Aggregate		
Best Interests of		
Government	B-221277	27... D-47
In-House Performance <u>v.</u>		
Contracting out		
Agency In-House Estimate		
Basis	B-221089	31... D-50
Guidelines	B-221089	31... D-50

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Modification			
Additional Work or Quantities			
Sole-Source Procurement			
Result	B-221860	27...	D-48
Change Orders			
Propriety	B-221276	7...	D-10
Scope of Contract			
Requirement	B-221276	7...	D-10
Negotiation			
Awards			
Initial Proposal Basis			
Propriety	B-220425	11...	D-15
Price Determinative			
Factor	B-221358	17...	D-30
Propriety			
Upheld	B-220449	24...	D-43
To Other Than Low Offeror	B-220431	13...	D-22
Competition			
Equality of Competition			
Incumbent Contractor's			
Advantage	B-221358	17...	D-31
Disclosure of Price, etc.			
Inadvertent	B-220459	17...	D-26
Justification	B-221054	6...	D- 9
Late Proposals and Quotations			
Best and Final Offers	B-221337	19...	D-36
	B-221390	31...	D-51

INDEX - Con.

	<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.		
Negotiation - Con.		
Offers or Proposals		
Best and Final		
Additional Rounds		
Revisions in Level of Effort	B-220868	5... D- 5
One Technically Acceptable Offer		
	B-220526.2	17... D-27
Discussion With all Offerors Requirement		
Initial Proposal Basis-- Solicitation Provision		
	B-220910	5... D- 6
"Meaningful" Discussions		
	B-220459	17... D-26
	B-220965	12... D-18
	B-221068	17... D-29
	B-221358	17... D-31
Varying Degrees of Discussions Propriety		
	B-221058	20... D-39
Evaluation		
Brand Name or Equal Salient Characteristics - Satisfaction of Requirement		
	B-220910	5... D- 6
Cost Realism Analysis Reasonableness		
	B-219934.2	12... D-16
Criteria		
	B-220965	12... D-18
Application of Criteria		
	B-220425	11... D-15
Errors		
Not Prejudicial	B-220526.2	17... D-28

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Negotiation - Con.			
Offers or Proposals -Con.			
Evaluation - Con.			
Evaluators			
Bias Alleged	B-220868	5...	D- 5
Qualifications	B-220965	12...	D-19
Experience Rating	B-221068	17...	D-29
Personnel	B-220965	12...	D-19
Propriety	B-220910	5...	D- 7
Technical Acceptability			
Administrative			
Determination	B-219934.2	12...	D-16
Technical Superiority			
Significant	B-220965	12...	D-19
Technical Transfusion			
Prohibition	B-220459	17...	D-27
Technically Equal Proposals			
Price Determinative			
Factor	B-220868	5...	D- 5
Technically Unacceptable			
Proposals			
Cost, etc. not a			
Factor	B-221068	17...	D-29
Preparation			
Costs			
Denied	B-221430;) B-221430.2)	14...	D-25

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Negotiation - Con.			
Offers or Proposals - Con.			
Qualification of Offerors			
Adequacy of Finances, Personnel, Facilities, etc.	B-220526.2	17...	D-28
Time Limitation for Submission			
Sufficiency of Time for Response	B-221296	21...	D-40
Unbalanced			
Not Automatically Precluded	B-220526.2	17...	D-28
Requests for Proposals			
Ambiguous	B-220859.2	4...	D- 2
	B-220910	5...	D- 7
Amendment			
After Evaluation of Initial Proposals	B-221730	31...	D-52
Cancellation			
Administrative Discretion			
Reasonable Exercise	B-221430;)		
	B-221430.2)	14...	D-25
	B-221502.3	24...	D-44
Specifications			
Minimum Needs			
Administrative Determination	B-221296	21...	D-40
Quantity Estimates			
Best Available Information Requirement	B-220859.2	4...	D- 3
Restrictive			
Undue Restriction not Established	B-221334	13...	D-24
Statement of Work	B-220859.2	4...	D- 3

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Negotiation - Con.			
Sole-Source Basis			
Competition Availability	B-221550	31...	D-52
Determination not to use Scope of GAO Review	B-222318	24...	D-45
Justification Inadequate	B-221550	31...	D-52
Source Selection			
Board, Commission, etc. Overruled by Source Selection Official	B-220965	12...	D-20
Technical Evaluation Panel Evaluation Propriety	B-220868	5...	D- 6
Options			
Exercisable at Sole Discretion of Government			
Review by GAO	B-220859.2	4...	D- 3
	B-222213	19...	D-39
Performance			
Suspension			
Pending Final Resolution of Protest	B-220459	17...	D-27
Protests			
Abandoned	B-220859.2	4...	D- 4
Allegations			
Bias			
Unsubstantiated	B-220859.2	4...	D- 4
Unsubstantiated	B-220423;) B-220423.2)	18...	D-32
	B-220449	24...	D-43

INDEX - Con.

	<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.		
Protests - Con.		
Authority to Consider		
Contract Administration		
Matters	B-219676.4	24... D-42
Basis for Protest		
Requirement	B-220431	13... D-22
Burden of Proof		
On Protester	B-221502.3	24... D-44
Contract Administration		
Not for Resolution by GAO	B-221170.6	17... D-30
General Accounting Office Procedures		
Constructive Notice	B-221563.2	27... D-48
Filing Protest With Agency	B-219934.2	12... D-16
Reconsideration Requests		
Error of Fact or Law		
Not Established	B-219312.7	13... D-21
	B-219733.2	18... D-32
	B-220421.2	21... D-39
	B-220852.5	3... D- 1
	B-221726.2	7... D-11
	B-221992.3	12... D-21
Original Decision Rendered		
in Response to Court Request		
Court not Interested in		
GAO Reconsideration	B-221092.3	4... D- 2
	B-220856.2	7... D-10
Timeliness	B-220668.2	12... D-18

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Protests - Con.			
General Accounting Office Procedures - Con.			
Timeliness of Comments on Agency's Report	B-221563.2	27...	D-48
Timeliness of Protest			
Adverse Agency Action Effect	B-222016.2	10...	D-14
Date Basis of Protest Made			
Known to Protester	B-219934.2	12...	D-17
	B-220390.3	6...	D- 8
	B-221325;)		
	B-221326)	21...	D-41
	B-221930	27...	D-49
Debriefing Conferences			
Issues Providing Protest Basis	B-220449	24...	D-43
New Issues			
Unrelated to Original Protest Bases	B-220431	13...	D-22
Significant Issue Exception			
Not for Application	B-221325;)		
	B-221326)	21...	D-41
Solicitation Improprieties			
Apparent in Request for Best and Final Offers	B-221390	31...	D-51
Apparent Prior to Bid Opening/ Closing Date for Proposals			
	B-219934.2	12...	D-17
	B-221068	17...	D-30
	B-221286	12...	D-20
	B-221358	17...	D-31
	B-221668	19...	D-37
	B-221985	21...	D-42

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Protests - Con.			
Information Evaluation			
Sufficiency of Submitted			
Information	B-219934.2	12...	D-17
	B-220982	6...	D- 8
Interested Party Requirement			
Nonresponsive Bidder	B-221826	19...	D-38
Potential Contractors, etc.			
not Submitting Bids, etc.	B-220752.2	28...	D-49
Protester not in Line for			
Award	B-220646.2	24...	D-44
Moot, Academic, etc.			
Questions	B-220859.2	4...	D- 4
	B-221730	31...	D-52
Corrective Action Proposed,			
Taken, etc. by Agency	B-220412;)		
	B-220412.2)	10...	D-13
Future Procurements	B-221725	24...	D-45
	B-221858	7...	D-11
Protester not in Line for			
Award	B-222012	11...	D-15
Preparation			
Costs			
Noncompensable	B-221502.3	24...	D-45
Requests for Quotations			
Competition			
Adequacy	B-221012	18...	D-34
Equality of Competition	B-221287	10...	D-13

INDEX - Con.

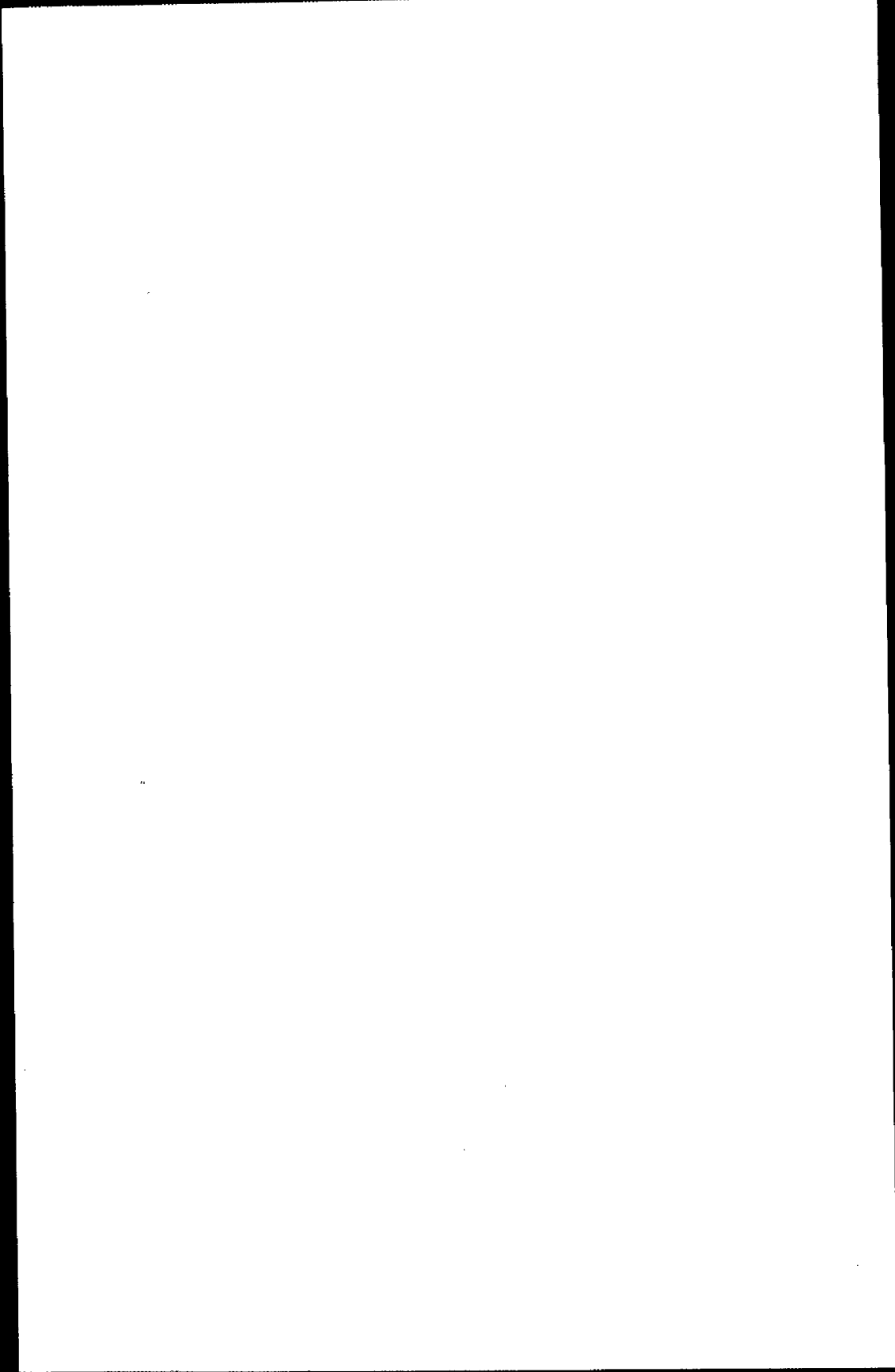
		<u>Mar.</u>	<u>Page</u>
CONTRACTS - Con.			
Requests for Quotations - Con.			
Evaluation Factors			
Experience	B-221287	10...	D-14
Small Business Concerns			
Awards			
Responsibility Determination			
Nonresponsibility Finding			
Certificate of Competency			
Requirement	B-221584.2	13...	D-24
Subcontracts			
Propriety			
Subcontracting Practices of			
Contractor	B-221276	7...	D-11
Two-Step Procurement			
Step One			
Offers or Proposals			
Discussion With all			
Offerors Requirement			
"Meaningful"			
Discussions	B-220423;) B-220423.2)	18...	D-32
Evaluation			
Technical Acceptability	B-220423;) B-220423.2)	18...	D-33
DEBT COLLECTIONS			
Waiver			
Civilian Employees			
Compensation Overpayments			
Collection not Against Equity			
and Good Conscience, etc.	B-218981	24...	B- 6
DISBURSING OFFICERS			
Relief			
Erroneous Payments			
Not Result of Bad Faith			
or Negligence	B-221395 B-221452 B-222115 B-222259, et al.)	26... 27... 13... 27...	A- 4 A- 5 A- 2 A- 5

INDEX - Con.

		<u>Mar.</u>	<u>Page</u>
ESTOPPEL			
Against Government			
Not Established			
Prior Erroneous Advice,			
Contract Actions, etc.	B-221316	18...	D-35
GENERAL ACCOUNTING OFFICE			
Jurisdiction			
Contracts			
Subcontractors' Claims	B-221325;) B-221326)	21...	D-41
Cooperative Agreements			
Awards	B-222344	28...	D-49
INTEREST			
Debts Owed United States			
State, etc. Debts			
Authority	B-217215	20...	A- 2
MILEAGE			
Travel by Privately Owned			
Automobile			
Personal Convenience	B-219812	25...	B- 7
MILITARY PERSONNEL			
Educational Assistance	B-219059	24...	C- 1
OFFICERS AND EMPLOYEES			
Resignation			
Voluntary <u>v.</u> Involuntary	B-221623	24...	B- 7
Transfers			
Real Estate Expenses			
Actual Residence at Time of Official			
Transfer Requirement	B-219854	12...	B- 4
Duty Stations Within United			
States Requirement	B-221657	25...	B- 8
Insurance	B-220287	11...	B- 2

INDEX- Con.

	<u>Mar.</u>	<u>Page</u>
OFFICERS AND EMPLOYEES - Con.		
Transfers - Con.		
Real Estate Expenses - Con.		
Loan Origination Fee	B-220133	13... B- 5
Service Agreements		
Failure to Fulfill	B-219023	12... B- 3
Retirement	B-219473	12... B- 4
Temporary Quarters		
Rental of Former Residence		
After Sale	B-218886	24... B- 5
Time Limitation	B-218886	24... B- 6
Transportation for House Hunting		
Disallowance	B-220479	10... B- 2
PURCHASES		
Purchase Orders		
Federal Supply Schedule		
Purchase Propriety	B-220582.3	21... D-40
Small		
Sole-Source Basis		
One Known Source	B-221550	31... D-52
STATES		
Federal-State Conflicts		
License, Permits, etc. Fees	B-199838	24... A- 3
STATUTES OF LIMITATION		
Claims		
Compensation	B-220786	3... B- 2
SUBSISTENCE		
Per Diem		
Illness, etc.		
While on Temporary Duty	B-220540	31... B- 8



United States
General Accounting Office
Washington, D.C. 20548

Special Fourth Class Rate
Postage & Fees Paid
GAO
Permit No. G100

Official Business
Penalty for Private Use \$300

Address Correction Requested
