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GAO 837

Digests of Unpublished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

GAO 837

United States General Accounting Office

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PREFACE

This publication is one in a series of monthly pamphlets entitled "Digests of Unpublished Decisions of the Comptroller General of the United States" which has been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S. Code 3702 (formerly 31 U.S.C. 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, 98 Pub. L. 369, July 18, 1984.

Decisions in this pamphlet are presented in digest form and represent approximately 90 percent of the total number of decisions rendered annually. Full text of these decisions are available through the circulation of individual copies and should be cited by the appropriate file number and date, e.g. B-219654, Sept. 30, 1986.

The remaining 10 percent of decisions rendered are published in full text. Copies of these decisions are available through the circulation of individual copies, the issuance of monthly pamphlets and annual volumes. Decisions appearing in these volumes should be cited by volume, page number and year issued, e.g., 65 Comp. Gen. 624 (1986).

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NOTICE

Effective October 1, 1986, a new controlled vocabulary was used to index the documents of GAO's Office of General Counsel, reflecting changes in the chapter titles and the index entries (headings). Copies of this vocabulary with introductory material explaining how to use the vocabulary to retrieve documents was mailed the latter part of October to individuals currently on GAO's distribution list for this publication.

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APPROPRIATIONS/FINANCIAL MANAGEMENT

Appropriation Availability B-227033; B-227034

Purpose availability Aug. 4, 1987

Lump-sum appropriation

Administrative discretion

A contracting agency is not required as a matter of law to spend funds provided in a lump-sum appropriation act in a certain manner when the appropriations act itself does not so require, notwithstanding language cited by the protester in a congressional committee report about how Congress desired the funds to be spent.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Appropriation Availability B-224702 Aug. 5, 1987

Time availability

Time restrictions

Fiscal-year appropriation

An executive agency may not obligate its expired fiscal year funds on a contract for litigation support services, where the obligation is not authorized by law and the services extend beyond the fiscal year whose appropriation has been charged.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-227209 Aug. 5, 1987

Cashiers

Relief

Illegal/improper payments

Fraud

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers

Disbursing officers

Relief

Illegal/improper payments

Fraud

U.S. Army Finance and Accounting Officer is relieved of liability for improper payment made by subordinate cashier where he maintained and supervised adequate system of procedures designed to prevent improper payment. Cashier is not relieved of liability for making improper payment where she did not carry out existing procedures with due care which would have detected the fraudulent nature of the payment.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-227632 Aug. 5, 1987

Disbursing officers

Relief

Illegal/improper payments

Substitute checks

Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for an improper payment resulting from payee's negotiation of both original and recertified military checks. Proper procedures were followed in the issuance of the part of the disbursing official and subsequent collection attempts are being pursued. However, for cases involving notices of loss received after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if finance officer delays more than 3 months in forwarding the debt to your Collection Division.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-227662 Aug. 5, 1987

Cashiers

Relief

Illegal/improper payments

Forgeries

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers

Disbursing officers

Relief

Illegal/improper payments

Forgeries

U.S. Army finance officer is relieved of liability for the improper payment of a check on a forged endorsement made by a subordinate cashier where he maintained and supervised an adequate system of procedures designed to prevent such improper payment. The cashier is also relieved of liability for making the improper payment where she complied with existing procedures and the loss resulted from criminal activity over which the officer and the cashier had no control.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Budget Process B-227658 Aug. 7, 1987

Continuing resolutions

Statutory interpretation

Congressional intent

APPROPRIATIONS/FINANCIAL MANAGEMENT

Budget Process

Funds transfer

Unobligated balances

Authority

Unobligated balance in the Fisheries Loan Fund (Fund) was effectively transferred to National Oceanic and Atmospheric Administration (NOAA) by 1987 continuing resolution. Office of Management and Budget's (OMB) position that statutory authorization for the Fund expired "at the close of September 30, 1986" before the transfer took place is incorrect. Although the final continuing resolution took effect on October 18, 1986, (Pub. L. No. 99-500, republished October 30 as Pub. L. No. 99-591, 100 Stat. 3341), the transfer was in fact effected on October 1 by the first continuing resolution for fiscal year 1987 and carried forward uninterrupted in subsequent resolutions including the final permanent resolution, Pub. L. No. 99-591. The transfer was effective within a few hours after the close of September 30, 1986, and there is no reason to frustrate obvious congressional intent over such a short interval.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Obligation B-227658 Con't
Fiscal-year appropriation Aug. 7, 1987
Expiration
Continuing resolutions

The Fisheries Loan Fund, 16 U.S.C. 742c(c) has a 30 year history of late renewals. Recent late renewals have not been made retroactive, leading to the conclusion that the balance in the Fund has in fact been continued beyond its expiration date. Apparently attempting to resolve the conflict over the supposedly defective transfer of the Fund's obligated balance to NOAA, Congress renewed the Fund authority within the same time frame as it has done in the past by deleting the Fund's sunset provision.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Federal Assistance B-220527 Aug. 11, 1987
Grants
Acceptance
Authority

The First Selectman of the Town of Franklin, Connecticut (Town), accepted a fiscal year 1983 Economic Development Administration (EDA) grant for the Town. However, unknown to EDA, the First Selectman did not have the authority to accept the grant, so that there was no valid grant from EDA in fiscal year 1983. See B-220527, December 16, 1985. The Town expended funds for the project in fiscal year 1984 after the receipt of an EDA letter extending the period for project construction. By use of the doctrine of equitable estoppel the Town seeks to prevent EDA from denying that there was a valid grant. Since the Town knew that its official lacked the authority to accept the grant, its actions, and not any affirmative misconduct on the part of EDA, were responsible for the expenditure of funds for the project. Therefore, the doctrine of equitable estoppel is not applicable to this case. Also, there was no new grant offer, renewal, or ratification of the prior year's offer, in fiscal year 1984. Accordingly, the Town may not recover its expense from EDA.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-227410 Aug. 18, 1987

Certifying officers

Relief

Illegal/improper payments

Overpayments

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers

Disbursing officers

Relief

Illegal/improper payments

Overpayments

Relief granted to finance and accounting officers for loss due to overpayment on contract. Deputy finance officer acted reasonably in relying on information given to her which though erroneous, could not have been detected by her. Finance and Accounting officer maintained an adequate system of controls to safeguard funds.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-221950 Aug. 19, 1987

Certifying officers

Illegal/improper payments

Liability restrictions

Statutes of limitation

It is unnecessary to grant relief to a certifying officer in a case where the 3-year statute of limitation period has expired. Under these circumstances, the account in question must be considered settled and the accountable officer involved cannot be held liable for any erroneous payment. 31 U.S.C. 3526(c).

APPROPRIATIONS/FINANCIAL MANAGEMENT

Appropriation Availability B-226718.2 Aug. 19, 1987

Amount availability

Antideficiency prohibition

Violation

A provisions in Pub. L. No. 100-71 which provides that if funds in the Guaranteed Reserve Fund used to pay claims under the Foreign Military Sales (FMS) guaranteed loan program are inadequate for that purpose, appropriated funds available to Department of Defense (DOD) under two other specified authorities "may" be used to pay such claims is mandatory to the extent that sufficient unobligated funds are available in the other appropriations. In light of DOD's irrevocable and unconditional guarantee to FFB, DOD must use the new funding authority if needed to honor its obligation as guarantor.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Appropriation Availability B-224596 Aug. 21, 1987

Amount availability

Augmentation

User fees

Federal Energy Regulatory Commission is authorized to charge fees established by regulation for its review of administrative appeals of remedial orders issued by the Department of Energy's Office of Hearings and Appeals. Authority is found in Title V of the Independent Offices Appropriation Act, 1952, Chapter 376, Public Law 137, 65 Stat. 268, 290, August 31, 1951, codified at 31 U.S.C. 9701.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-227757; B-227759

Disbursing officers Aug. 25, 1987

Relief

Illegal/improper payments

Substitute checks

Relief is granted Army disbursing officials and a deputy under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified checks, there was no indication of bad faith on the part of the disbursing officials and their deputies, and collection is being pursued. However, for cases involving notices of loss received after June 1, 1986, where the payee has left the Army or its employ, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-228712 Aug. 25, 1987

Disbursing officers

Relief

Illegal/improper payments

Substitute checks

Relief is granted Army disbursing official and his deputy under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official and his deputy, and subsequent collection attempts are being pursued. However, for cases involving notices of loss received after June 1, 1986, where the payee has left the Army or its employ, we will deny relief if Army delays more than 3 months in forwarding the debt to its Collection Division.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Federal Assistance B-228675 Aug. 31, 1987

Grants

Renewal

Administrative determination

Decision by ACTION to deny grantee continued assistance under the VISTA Program was within the authority of the Director of VISTA and is not one that can be questioned by this office.

CIVILIAN PERSONNEL

CIVILIAN PERSONNEL

B-226637 Aug. 3, 1987

Relocation

Expenses

Reimbursement

Eligibility

Personal convenience

Where employee requested transfer to the Philadelphia area, agency properly determined that transfer was not in the interest of the government and denied his claim for relocation expenses. Fact that employee may have been well qualified for the vacancy to which he was transferred does not provide a basis for payment of relocation expenses. Moreover, the employee's initial impression that the government would pay his moving costs does not nullify the statutory prohibition against reimbursement in the case of a transfer primarily for the benefit or convenience of the employee.

CIVILIAN PERSONNEL

B-226705 Aug. 3, 1987

Travel

Temporary duty

Travel expenses

Reimbursement

Amount determination

Employee of the Army claims she should have been reimbursed a higher amount for travel on temporary duty, alleging that the Army improperly determined rates to reimburse her travel. Army officials state that employee was properly paid the amount that it would have cost the government if a transportation request had been used, pursuant to 2 JTR para. C4704(c). It appears the Army used appropriate method of determining reimbursement rate, and the claimant has not provided evidence to the contrary. Accordingly, the claim is denied.

CIVILIAN PERSONNEL **B-224619 Aug. 17, 1987**

Compensation
Additional compensation
Eligibility
Weekends/holidays
Furloughs

CIVILIAN PERSONNEL
Leaves of Absence
Furloughs
Additional compensation
Eligibility
Weekends/holidays

Employees placed on furlough for a period including both the workday preceding and the workday succeeding a holiday are not entitled to holiday pay. They have been removed from duty without expectation of pay and there is no longer a presumption that, but for the holiday, they would have worked on that day. However, agencies are cautioned not to indiscriminately furlough employees for periods when holidays occur.

CIVILIAN PERSONNEL **B-224765 Aug. 17, 1987**

Relocation
Residence transaction expenses
Inspection fees
Reimbursement

An employee is not entitled to relocation expense reimbursement for a building inspection fee he paid as a result of his mother's insistence on the inspection as a condition for her loan to him of a downpayment on his purchase of a residence at his new duty station. Since she had no loan security interest in the home, she did not benefit from the inspection as a lender and such lenders do not customarily require purchasers to obtain building inspections.

CIVILIAN PERSONNEL

B-226322 Aug. 17, 1987

Relocation**Residence transaction expenses****Miscellaneous expenses****Reimbursement**

A transferred employee seeks reimbursement of property tax increase resulting from the loss of the homestead exemption on his residence at his old station during the period he and his family no longer occupied the residence and had moved to his new duty station. Federal Travel Regulations para. 2-6.2d(2)(c) provides that property taxes are nonreimbursable items of miscellaneous expense. The tax in question is, in fact, a property tax, and employee may not be reimbursed for property tax increase.

CIVILIAN PERSONNEL

B-225838 Aug. 20, 1987

Travel**Rental vehicles****Expenses****Reimbursement****Eligibility**

An employee on official travel may be reimbursed for towing and repair charges to a rental vehicle when unusual circumstances prevent his receiving prior approval from the rental company to have towing and repair services performed at the company's expense. The expenses incurred were essential to the transaction of official business. See Louis G. Fiorelli, B-221698, August 18, 1986, 65 Comp. Gen. 799.

CIVILIAN PERSONNEL

B-226173 Aug. 20, 1987

Compensation

Compensation restrictions

Compensatory time

Unused leave balances

Exempted positions

A former employee of a United States District Court claims reimbursement for unused compensatory time upon separation on the basis of an agreement between herself and the Clerk of the Court. Her claim is denied. The employee was appointed by the Clerk of the Court under provisions of 28 U.S.C. 751(b), to a position outside the competitive service, so that compensatory time and overtime provisions in title 5, United States Code, do not apply. Her compensation is fixed pursuant to statutory authority in 28 U.S.C. 604(a)(5), and there is no provision for payment for overtime or accrued compensatory time in the statute or implementing regulations. Federal employment relationship is statutory, not contractual, and Government is not bound by the unauthorized acts of its agents.

CIVILIAN PERSONNEL

B-226328 Aug. 20, 1987

Relocation

Residence transaction expenses

Loan discount fees/points

Reimbursement

Incident to the sale of a residence at the time of transfer, an employee paid mortgage discount points to enable a buyer to obtain a mortgage loan. The employee may not be reimbursed for the points as such reimbursement is expressly prohibited by paragraph 2-6.2d(2) of the Federal Travel Regulations.

CIVILIAN PERSONNEL

B-226795 Aug. 20, 1987

Compensation

Arbitration decisions

GAO review

The General Accounting Office will not inquire into matters relating to a grievance. Such matters are within the jurisdiction of the employing agency and the Office of Personnel Management.

CIVILIAN PERSONNEL

Relocation

Permanent duty stations

Determination

Criteria

Whether a particular duty station is permanent or temporary is a question of fact to be determined from the orders, and where necessary, from the character of the assignment, particularly the duration and nature of the duty. Where the employee was given permanent duty, change-of-station travel orders, advanced relocation expenses and assigned the same type of field engineering work at the new duty station, the assignment is a permanent duty assignment. The permanent character of the assignment is not affected by the employee's retransfer after 3 years to a prior duty station.

CIVILIAN PERSONNEL

Travel

Commuting expenses

Liability

Claim for mileage for commuting between Mitchell, Indiana, and Tell City, Indiana, over a 3-year period is denied since an employee must bear the cost of commuting between his residence and his official duty station.

Claim for overtime compensation for time spent commuting between Mitchell, Indiana, and Tell City, Indiana, outside of the normal duty hours is denied. The general rule is that time spent traveling between an employee's residence and his permanent duty station is not compensable traveltime.

CIVILIAN PERSONNEL**B-227503 Aug. 20, 1987****Relocation****Residence transaction expenses****Mortgage insurance****Reimbursement**

A transferred employee claims reimbursement for a mortgage insurance premium required by the lender and 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). In addition, mortgage insurance to protect the lender against default is a finance charge which may not be reimbursed under the FTR.

CIVILIAN PERSONNEL**B-223356 Aug. 21, 1987****Compensation****Discrimination allegation****GAO review**

Employee contends that local Air Force base supplementary regulation regarding use of the highest previous rate rule discriminates against persons not married to military or federal civilian employees. Our Office does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in the agencies of the government.

CIVILIAN PERSONNEL**B-223356 Con't****Compensation****Aug. 21, 1987****Rates****Determination****Highest previous rate rule**

Civilian employee of the Air Force at the Pentagon in a grade GS-7, step 5, position was selected for a position in California that she had previously held at the same grade and step level as when she previously occupied the position, grade GS-6, step 6. The employee claims that since she was contacted by the chairman of the medical department regarding her availability for employment, her acceptance does not constitute a demotion at the employee's request and the Air Force should have applied the highest previous rate rule or pay retention rule to appoint her at a level commensurate with her highest level. Absent a mandatory policy or administrative regulation, the use of the highest previous rate is discretionary on the agency's part. We conclude that the authorized appointing official did not abuse his discretion in setting her pay at the grade GS-6, step 6, level.

CIVILIAN PERSONNEL**B-224662 Aug. 21, 1987****Compensation****Prevailing rate personnel****Wage rates****Determination**

The National Federation of Federal Employees (NFFE) requests our decision as to whether certain U.S. Army Corps of Engineers prevailing rate employees who work aboard a floating plant and are paid under a special schedule with rates set according to the New Orleans, Louisiana wage area may be placed under the Lake Charles-Alexandria wage area schedule or, in the alternative, under a special schedule with rates comparable to that wage schedule. The NFFE's request may not be granted since it appears that the employees are being paid in accord with longstanding Corps practices. Any change in those practices must be authorized by the Office of Personnel Management after consideration and recommendation by the Prevailing Rate Committee.

CIVILIAN PERSONNEL**B-227484 Aug. 26, 1987****Travel****Temporary duty****Per diem rates****Amount determination**

An employee authorized a special rate of per diem due to availability of meals and lodging at his temporary duty site may not be reimbursed for the cost of meals he obtained during the period of his temporary duty without a showing that his orders were in error regarding the availability of meals.

CIVILIAN PERSONNEL**B-223250 Aug. 27, 1987****Leaves of Absence****Annual leave****Forfeiture****Restoration**

During 1984, a Department of Energy employee was detailed to perform work for a Congressional Subcommittee. He was unable to take annual leave, a vacation to Europe, due to the work he was performing for the Subcommittee, and he forfeited 77 hours of annual leave. While the regulation, 5 C.F.R. 630.308 (1984), states that the use of annual leave must be scheduled in advance in writing, the statutory provision, 5 U.S.C. 6304(d)(1)(B) (1982), does not specifically require that a written request be made by the employee. Here, the claimant was detailed to work for a Subcommittee of the Congress for an extended period of time. He scheduled the use of his annual leave, in advance, in a timely manner and such use was approved by Subcommittee officials. In these circumstances, the intent of the statutory requirement of "advance scheduling" of annual leave has been adequately met. The 77 hours of annual leave which was forfeited may be restored.

PROCUREMENT

PROCUREMENT

B-223311 Aug. 3, 1987

Contract Management

Shipment costs

Rates

Overcharge

Set-off

A Navy supplier described plastic containers on a Government Bill of Lading (GBL) under a general National Motor Freight Classification (NMFC) item as plastic articles, NOI, density of 6 but less than 12 pounds per cubic foot. The description required application of a class 100 rating and rate. The carrier collected freight charges on a specific NMFC description, air cargo containers, set up, which required application of a class 400 rating and rate. The producer's description is a factor weighing heavily in the determination of an article's description, and the carrier has not rebutted the prima facie validity of the GBL description. Therefore, GSA's deduction of the difference between charges collected and charges derived from the classification description and item shown on the GBL is sustained.

PROCUREMENT

B-225722.4 Aug. 3, 1987

Bid Protests

GAO procedures

GAO decisions

Reconsideration

Additional information

Bid Protest Regulations do not permit a firm to protest an issue and later, after the protest has been denied, to bring forth further legal arguments and analyses to support its position that could have been raised earlier.

PROCUREMENT

B-226762.2 Aug. 4, 1987

**Competitive Negotiation
Contract awards
Initial-offer awards
Propriety
Price reasonableness**

Award without discussions is unobjectionable where there is adequate price competition and agency determines award will result in lowest overall cost to government.

PROCUREMENT

**Competitive Negotiation
Offers
Modification
Late submission**

Proposal modification cannot be considered where received after the closing date for receipt of proposals.

PROCUREMENT

**Competitive Negotiation
Requests for proposals
First-article testing
Waiver
Administrative determination**

Agency refusal to waive first article test requirement was reasonable where specification change was adopted due to unsatisfactory quality and no items produced under that specification had been delivered at time of procurement.

PROCUREMENT
Contract Formation
Principles
Contract extension
Authority

B-224702 Aug. 5, 1987
87-2 CPD 128

PROCUREMENT
Payment/Discharge
Unauthorized contracts
Quantum meruit/valebant doctrine

Where an agency has no legal authority to extend a contract and the contractor does not sign the contract extension, no binding contract extension came into effect and the agency is without legal authority to continue to obtain the services under the contract extension. However, the contractor is entitled to be paid for the services it performed on a quantum meruit basis.

PROCUREMENT
Noncompetitive Negotiation
Contract extension
Sole sources
Propriety

Sole-source extension of litigation support services contract consisting mainly of clerical tasks is not justified where the agency has not established that these services are unavailable from other responsible sources. In any case, since the agency did not comply with mandatory justification and publication procedures, the extension was not authorized.

PROCUREMENT

B-224702 Con't

Noncompetitive Negotiation Aug. 5, 1987

Use

Procedures

Congressional notification

Compliance

Noncompetitive award pursuant to provision in Competition in Contracting Act, 41 U.S.C. 253(c)(7) (Supp. III 1985), which permits such awards where the secretary of an executive agency determines that it is necessary in the public interest, is only authorized if the secretary has complied with statutory "report and wait" provision 41 U.S.C. 253(c)(7)(b), under which the secretary must give 30 days notice to Congress prior to contract award.

PROCUREMENT

Socio-Economic Policies

Small business 8(a) subcontracting

Contract extension

Propriety

An 8(a) services contract with no options may not be extended by a procuring agency after the contractor loses its eligibility to participate in the 8(a) program from the Small Business Administration.

PROCUREMENT

Special Procurement Methods/Categories

Service contracts

Legal services

Support services

Severability

Litigation support services to support particular litigation, which are primarily clerical in nature and which require no final report or product to be delivered, are continuing and recurring in nature and thus severable into the various pertinent time periods encompassing the service.

PROCUREMENT
Sealed Bidding
Ambiguous bids
Determination criteria

B-227027 Aug. 5, 1987
87-2 CPD 129

PROCUREMENT
Sealed Bidding
Bids
Ambiguous prices
Rejection
Propriety

Where bid contains unexplained discrepancy between total bid price and sum of line item prices, and is low under only one interpretation, the bid is ambiguous and must be rejected, notwithstanding bidder verification of intended price.

PROCUREMENT
Bid Protests
GAO procedures
Interested/parties
Suspended/debarred contractors

B-227686 Aug. 5, 1987
87-2 CPD 130

General Accounting Office will not consider a protest from a suspended firm since the firm is ineligible for a contract award and, therefore, is not an interested party to protest.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule
Adverse agency actions

B-227750 Aug. 5, 1987
87-2 CPD 131

Protest filed more than 10 working days after the protester should have received agency's notification of rejection is untimely and not for consideration.

PROCUREMENT

B-227762 Aug. 5, 1987

Bid Protests

87-2 CPD 132

GAO procedures

Protest timeliness

10-day rule

Adverse agency actions

A protest against cancellation of a solicitation filed more than a month after protester received denial of protest to agency is untimely.

PROCUREMENT

B-227918.2 Aug. 5, 1987

Bid Protests

GAO procedures

GAO decisions

Reconsideration

PROCUREMENT

Bid Protests

GAO procedures

Interested parties

Direct interest standards

Prior dismissal is affirmed, where protester acknowledges that it is third-low offeror and thus would not be in line for award even if its protest were sustained.

PROCUREMENT

B-224213.2 Aug. 6, 1987

Bid Protests

87-2 CPD 133

GAO procedures

Preparation costs

Protester may recover the costs it incurred in filing and pursuing its protest where the agency unreasonably excluded the protester from competition.

PROCUREMENT **B-224213.2 Con't**
Competitive Negotiation **Aug. 6, 1987**
Offers
Preparation costs

Protester may recover its proposal preparation costs where the contracting agency wrongfully excluded it from the competition and no other remedy is available because the procurement was canceled after available funding lapsed during the pendency of the protest.

PROCUREMENT **B-224782.5 Aug. 6, 1987**
Contract Management
Federal procurement regulations/laws
Revision
Cost accounting

General Accounting Office comments on a proposal to revise paragraph (c) of Federal Acquisition Regulation 31.205-43 concerning the allowability of costs incurred in connection with business meetings by suggesting that the revised cost principle provide examples of the classes of individuals intended to be encompassed by the term "noncontractor personnel."

General Accounting Office has no objection to a proposal to (1) amend Federal Acquisition Regulation (FAR) 31.205-6, by adding paragraph (1) to make unallowable the costs of so-called "golden parachutes" and "golden handcuffs" and (2) revise FAR 31.205-27(a) to make unallowable the costs of resisting a corporate takeover.

PROCUREMENT
Sealed Bidding
Bids
Responsiveness
Warranties

B-227028, et al.
Aug. 6, 1987
87-2 CPD 134

Where a bid is accompanied by the bidder's standard limited warranty with a letter stating that it is extending that warranty on the equipment offered and that warranty provides less coverage than required by the solicitation the bid is nonresponsive.

PROCUREMENT **B-227314 Aug. 6, 1987**
Special Procurement Methods/Categories
Research/development contracts
Federal procurement regulations/laws
Revision

General Accounting Office has no objection to a proposal to amend the Federal Acquisition Regulation (FAR) to revise sections 5.202(a), 6.003, and 6.302-1(a) concerning awards based on acceptance of unsolicited research proposals and to add a new section 35.016 concerning contracting for basic and applied research using broad agency announcements.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-227340 Aug. 6, 1987
87-2 CPD 135

PROCUREMENT
Special Procurement Methods/Categories
Computer equipment/services
Federal supply schedule
Non-mandatory purchases

Protest is sustained where agency ordered equipment that did not meet the specifications set forth in the agency's published notice. Since specifications overstated agency's needs and equipment, which has been installed and is functioning, in fact satisfies its needs, General Accounting Office will not require cancellation of the order and resolicitation of the requirement. Protester is instead entitled to the costs of preparing its response and pursuing its protest.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-225630.3 Aug. 7, 1987
87-2 CPD 136

Request for reconsideration is dismissed where argument raised by protester is one which it could and should have advanced in its original protest, as GAO's Bid Protest Regulations do not contemplate the unwarranted piecemeal development of protest issues.

PROCUREMENT
Bid Protests
Information request
Procedures

B-227065 Aug. 7, 1987
87-2 CPD 137

To the extent that protester complains about contracting agency's response to protester's request for documents under Freedom of Information Act (FOIA), protester's recourse is to pursue disclosure remedies under FOIA.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Prices
Additional work/quantities

In procurement for automatic data processing equipment, contracting agency properly may calculate the cost of additional software required by offerors proposing certain type of equipment based on the assumption that the software will be required for a 5-year period, and need not prorate the software costs based on protester's unsupported assurance that due to future developments in protester's product line, the additional software will not be needed for the entire 5-year period.

PROCUREMENT
Specifications
Minimum needs standards
Competitive restrictions
Performance specifications
Justification

In procurement for automatic data processing equipment, contracting agency reasonably may require offerors to demonstrate that offered equipment has current capacity sufficient to meet the agency's projected increased future demand in order to ensure that sufficient capacity will be available when needed.

PROCUREMENT

B-227240.4 Aug. 7, 1987

Bid Protests

GAO procedures

Administrative reports

Comments timeliness

PROCUREMENT

Bid Protests

GAO procedures

Protest timeliness

Deadlines

Constructive notification

Dismissal of protest for failure to comment on agency report or to inform General Accounting Office (GAO) of continuing interest in protest within 7 working days after agency report due date is affirmed despite protester's assertion that it did not receive GAO acknowledgment notice stating 7-day deadline; requirement for timely communication to GAO after report receipt is set forth in Bid Protest Regulations, 4 C.F.R. part 21 (1987), which are published in Federal Register, and protesters are charged with notice of their contents.

PROCUREMENT

B-227267 Aug. 7, 1987

Bid Protests

87-2 CPD 138

Allegation substantiation

Lacking

GAO review

Protest that agency improperly evaluated proposals is denied where protester indicates its disagreement with the agency's evaluation but does not demonstrate that the evaluation was unreasonable.

PROCUREMENT
Sealed Bidding
Bids

B-227975 Aug. 7, 1987
87-2 CPD 139

Responsiveness
Brand name/equal specifications
Salient characteristics

A bid offering an "equal" product under a brand name or equal solicitation must contain sufficient descriptive information to permit the contracting officer to determine that the product possesses the salient characteristics specified in the solicitation. A bid which does not identify any specific alternate product and which merely represents generally that all salient characteristics will be met or exceeded may be properly rejected as nonresponsive.

PROCUREMENT
Contractor Qualification
Responsibility

B-228653 Aug. 7, 1987
87-2 CPD 140

Contracting officer findings
Affirmative determination
GAO review

Protester's allegations regarding the awardee's technical and financial capability to perform a contract concern the awardee's responsibility as a prospective contractor. This Office will not review an agency's affirmative determination of responsibility absent a showing of possible bad faith or fraud on the part of procurement officials or that definitive responsibility criteria stated in the solicitation have not been met.

**PROCUREMENT
Bid Protests**

**B-228656 Aug. 7, 1987
87-2 CPD 141**

**GAO procedures
Protest timeliness
Good cause exemptions
Applicability**

PROCUREMENT

**Bid Protests
GAO procedures
Protest timeliness
Significant issue exemptions
Applicability**

Untimely protest against the correction of a mistake in bid based on the bidder's worksheets is dismissed where the protester requests consideration for good cause, but does not state any basis for the General Accounting Office to invoke the good cause exception to our timeliness rules, and the protest does not present a significant issue.

PROCUREMENT

B-222263 Aug. 10, 1987

**Contract Management
Shipment costs
Rates
Overcharge
Set-off**

The General Services Administration deducted as overcharges the difference between the charges billed by the carrier on a combination of rates and a through rate applicable from the Storage-In-Transit location to destination. In view of the tender's plain language, there is no merit in the carrier's contention that for delivery of household goods shipments more than 50 miles from the Storage-In-Transit point, two rates are applicable: a drayage rate for the first 50 miles and a linehaul rate applicable for the miles beyond. Clearly, only one rate, whichever is higher, is applicable. GSA's action is sustained.

PROCUREMENT **B-225500.3 Con't**
Contractor Qualification **Aug. 10, 1987**
Responsibility
Contracting officer findings
Negative determination
Prior contract performance

Fact that termination for default under other contract has been appealed to the Armed Services Board of Contract Appeals does not eliminate such a termination as evidence of protester's nonresponsibility.

PROCUREMENT **B-227074, et al.**
Bid Protests **Aug. 10, 1987**
GAO procedures **87-2 CPD 144**
Protest timeliness
10-day rule

Protest that the agency improperly scheduled a site survey after the closing dates set for receipt of proposals in three solicitations is untimely where the protester waited more than 10 working days after receiving notification that a site survey would be scheduled after closings to file a protest with the contracting agency. Subsequent protest to the General Accounting Office therefore also is untimely.

Protest that the agency improperly canceled three solicitations for telecommunications services is untimely where the protester first raised the issue more than 3 months after being notified of cancellation by the agency.

Allegation that the agency improperly conducted a second site survey is untimely where the protest was filed more than 10 working days after the protester was aware of the second site survey.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Shipment schedules

B-227074, et al. Con't
Aug. 10, 1987

Where the RFP stated that award would be made on the basis of price and other factors and also indicated that award might be made to an offeror whose proposal did not meet the beginning date for services, the contracting officer properly awarded a contract to the lowest-priced offeror even though that offeror's proposal indicated that the service date would not be met, as the awardee's proposed prices were significantly below the prices offered by the protester, and the specified date for beginning services already had passed.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-227091 Aug. 10, 1987
87-2 CPD 145

PROCUREMENT
Competitive Negotiation
Offers
Preparation costs

Where protest concerning subcontract award by government prime contractor is sustained, Competition in Contracting Act and Bid Protest Regulations authorize recovery by protester of proposal preparation and protest costs.

PROCUREMENT
Sealed Bidding
Bids

B-227164 Con't
Aug. 10, 1987

Responsiveness
Pre-award samples
Acceptability

Where the IFB requires that coal analysis reports published by the Department of Energy show that the characteristics of the coal produced by the bidder's mine satisfy the specification, a bid that fails to demonstrate compliance with the specification is properly rejected as nonresponsive.

Contracting agency did not violate IFB's evaluation clause by failing to request a special report from the Department of Energy after bid opening to determine whether bidder's coal met specifications where clause required offerors to insure that coal had been sampled prior to submitting a bid.

IFB requirement that coal analysis reports published by the Department of Energy show that the coal offered meets the specifications, is a matter of responsiveness, not responsibility.

PROCUREMENT
Bid Protests

B-227983.2 Aug. 10, 1987
87-2 CPD 147

GAO procedures
Protest timeliness
Good cause exemptions
Applicability

Protest challenging experience requirement added to solicitation by amendment properly was dismissed as untimely where it was not filed with General Accounting Office (GAO) until day after proposals were due. Invoking good cause exception to timeliness rules is not warranted where delay in filing is due to the fact that the protester and its counsel were unaware of GAO Bid Protest Regulations, and there is no indication that protester had insufficient time between receipt of amendment and proposal due date to file a timely protest since protester was able to prepare both its proposal and a letter objecting to the experience requirement by the proposal due date.

PROCUREMENT **B-225827.2 Aug. 11, 1987**
Bid Protests **87-2 CPD 148**
GAO procedures
Protest timeliness
Apparent solicitation improprieties

Protest of apparent solicitation impropriety must be filed before the closing dates for receipt of proposals.

PROCUREMENT **B-227003.2 Aug. 11, 1987**
Competitive Negotiation **87-2 CPD 149**
Requests for proposals
Amendments
Competitive restrictions
Domestic sources

Protest that the Navy after submission of initial offers unreasonably restricted competition to United States firms for construction of Navy housing in the Philippines is denied. The Secretary of the Navy made the requisite determination under the Competition in Contracting Act that the restriction was in the public interest because hiring of foreign firms could jeopardize vital United States bases in the Philippines.

PROCUREMENT **B-227839.4 Aug. 11, 1987**
Bid Protests **87-2 CPD 150**
GAO procedures
Protest timeliness
Significant issue exemptions
Applicability

Original decision dismissing as untimely protest challenging contracting agency's decision to exclude protester from procurement because it failed to meet agency's technical requirements is affirmed where protester fails to show that protest, which was filed approximately 6 months after protester knew or should have known it would be excluded from the competition, was timely or raised a significant issue warranting waiver of the timeliness rules.

PROCUREMENT

B-227866 Aug. 11, 1987

**Sealed Bidding
Unbalanced bids
Materiality
Responsiveness**

87-2 CPD 151

Where the protester, the incumbent contractor, took advantage of the evaluation method to submit a materially unbalanced bid, its bid properly was rejected and awards made to other firms whose bids were not unbalanced.

PROCUREMENT

B-227079 Aug. 12, 1987

**Socio-Economic Policies
Small business set-asides
Use
Administrative discretion**

87-2 CPD 152

Protest that solicitation for construction should be set aside for small business is denied where the record does not show that the contracting agency abused its discretion in determining that there was no reasonable expectation of receiving acceptable proposals from at least two responsible small business concerns.

PROCUREMENT

B-227323 Aug. 12, 1987

Socio-Economic Policies

87-2 CPD 153

Small business set-asides

Use

Administrative discretion

The Air Force Academy's issuance of a solicitation for an indefinite quantity construction contract, under which a prime contractor will be responsible for minor projects that traditionally have been performed by small businesses, does not illegally remove these jobs from small business participation. The solicitation implements the Simplified Acquisition of Base Engineering Requirements concept, a procurement approach that reasonably relates to the Academy's minimum needs, which an agency is not required to compromise to ensure maximum small business participation. Moreover, the solicitation itself is set aside for small business; the protester does not establish that the projects will not continue to be performed by small businesses; and the remaining major part of the Academy's construction budget will continue to go to small business set-asides.

PROCUREMENT

B-227648 Aug. 12, 1987

Contract Management

Contract administration

Contract terms

Modification

GAO authority

General Accounting Office has no authority under Public Law No. 85-804 to alter the terms of a contract to provide the contractor with monetary relief; that authority rests solely with specified executive agencies.

PROCUREMENT

B-228608 Aug. 12, 1987

Bid Protests

87-2 CPD 154

GAO procedures

Interested parties

Direct interest standards

Protester, third low bidder, is not an interested party to challenge responsiveness of low bidder's bid since, even if protest were sustained, protester would not be in line for award.

PROCUREMENT

Contractor Qualification

Responsibility/responsiveness distinctions

Manuals/guidelines

Quality control

Protester's allegation that other bidders who failed to submit quality control plan with their bids as required by the invitation for bids are nonresponsive is without merit, since quality control plan relates to responsibility and therefore may be furnished any time before award of the contract.

PROCUREMENT

B-227968.2 Aug. 13, 1987

Bid Protests

87-2 CPD 155

GAO procedures

Protest timeliness

Deadlines

Constructive notification

Protester's lack of knowledge concerning GAO's filing deadlines is not a basis for waiving timeliness requirements, since prospective contractors are on constructive notice of Bid Protest Regulations.

PROCUREMENT

B-228644 Aug. 13, 1987

Noncompetitive Negotiation

Use

**Federal procurement regulations/laws
Amendments**

PROCUREMENT

Small Purchase Method

**Federal procurement regulations/laws
Amendments**

PROCUREMENT

Socio-Economic Policies

Small businesses

Size standards

**Federal procurement regulations/laws
Revision**

General Accounting Office comments on Federal Acquisition Circular 84-28, which (1) amends Federal Acquisition Regulation (FAR) 5.101, 5.201(a), 5.201(b), 5.205(c), 13.104(g), 13.105, 19.501(f)(1), 19.507, and 52.219-4 concerning thresholds for requirements relating to small purchases, (2) amends FAR 6.302-1 concerning the use of other than competitive procedures, (3) amends FAR 15.605(b) concerning evaluating factors, (4) amends FAR 15.812 and the clause at FAR 52.215-26 concerning unit prices, and (5) incorporates revised small business size standards previously issued by the Small Business Administration.

PROCUREMENT
Sealed Bidding
Bids

B-227078 Aug. 14, 1987
87-2 CPD 156

Responsiveness
Price omission
Line items

A bidder's failure in step two of a two-step sealed bid procurement to submit a price under a subitem that the agency included on the bidding schedule by mistake, and which consists of supplies already included on the schedule and priced by the bidder, does not render the bid nonresponsive.

PROCUREMENT

Sealed Bidding
Contract awards
Propriety
Invitations for bids
Defects

Award may be made under a defective solicitation where award would satisfy the government's needs and no bidder would be prejudiced.

PROCUREMENT
Competitive Negotiation
Offers

B-227089; B-227105
Aug. 14, 1987

Evaluation
Technical acceptability

Protest that agency improperly rejected proposal for failure to comply with solicitation requirement for honing machine column design is denied where protester fails to show that its offer complied with specification or that specification was ambiguous.

PROCUREMENT

Specifications

Minimum needs standards

Competitive restrictions

Design specifications

Burden of proof

B-227089; B-227105 Con't

Aug. 14, 1987

Protest that design specification was unduly restrictive of competition is denied where performance specification which justifies design specification is stated in solicitation and protester fails to show that the requirement is unreasonable or that its own nonconforming product meets the performance specification.

PROCUREMENT

Sealed Bidding

Invitations for bids

Pre-qualification

Contractor personnel

Certification

B-227357 Aug. 14, 1987

87-2 CPD 158

Protest against solicitation requirement that supervising field service engineer be accredited as a certified electrical test technician is denied where the protester has not demonstrated that the requirement exceeds the procuring agency's minimum needs or is clearly unreasonable.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-225420.2 Aug. 17, 1987
87-2 CPD 162

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs
Attorney fees
Amount determination

Award of costs of filing and pursuing protest, including attorney's fees is granted for issues on which protester prevailed in initial decision, where protester has been excluded unreasonably from competition and our original recommendation, as reasonably implemented by agency, does not in fact result in protester having opportunity to compete for award.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-226997.8, et al.
Aug. 17, 1987
87-2 CPD 163

Original decision denying protesters' challenge to additional repair work provisions in solicitation for ship repair services is affirmed where protesters in request for reconsideration do not show that original decision was based on error of fact or law.

PROCUREMENT
Bid Protests
Antitrust matters
GAO review

B-227034.2 Aug. 17, 1987
87-2 CPD 164

General Accounting Office does not consider allegations of possible antitrust violations, since these matters are properly for consideration by the Department of Justice.

PROCUREMENT
Bid Protests
Bias allegation
Allegation substantiation
Burden of proof

Unfair or prejudicial motives will not be attributed to an agency's procurement officials simply on the basis of inference or supposition.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
Apparent solicitation improprieties

Protest of alleged solicitation defects is untimely since it was not filed before the closing date for receipt of proposals.

PROCUREMENT
Competitive Negotiation
Competitive advantage
Non-prejudicial allegation

A competitive advantage accruing to an offeror because of its own position need not be discounted or equalized in favor of the other offerors where the advantage does not result from preferential treatment or other unfair action by the government.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-227055 Aug. 17, 1987
87-2 CPD 165

When protester successfully challenges the use of competitive negotiations versus sealed bids, it is entitled to the costs of filing and pursuing the protest.

PROCUREMENT
Competitive Negotiation
Use
Criteria

Agency decision to negotiate, requesting competitive proposals instead of sealed bids, is not justified solely by the agency's alleged need for price discussions to assure a fair and reasonable price, where the record does not show such discussions were necessary.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-227110.2; B-227111.2
Aug. 17, 1987
87-2 CPD 166

Prior decision holding that a protest against a solicitation cancellation, initially filed with the procuring agency 1 day before the closing date for receipt of quotations, was untimely where the agency received quotations on the scheduled closing date without taking corrective action and the subsequent protest to our Office was filed more than 10 working days later is affirmed, since the protester has not presented any factual or legal basis for us to overrule our decision.

PROCUREMENT B-227133 Aug. 17, 1987
 Sealed Bidding 87-2 CPD 167
 Invitations for bids
 Cancellation
 Justification
 Competition enhancement

PROCUREMENT
 Sealed Bidding
 Invitations for bids
 Cancellation
 Justification
 Minimum needs standards

Compelling reason exists for canceling a brand name or equal invitation for bids after opening where the invitation fails to include certain requirements the agency deems material and necessary to meet its needs and also overstates certain of the agency's minimum needs so that it may have restricted competition.

PROCUREMENT B-227157 Aug. 17, 1987
 Competitive Negotiation 87-2 CPD 168
 Best/final offers
 Modification
 Late submission
 Acceptance criteria

Where a protester offers in writing for the first time in an agency-level protest to change place of performance in a negotiated procurement 6 months after the submission of best and final offers, the agency properly could decline to consider the late modification. Acceptance of such a modification would require the agency to reopen discussions with all offerors, and the decision not to reopen discussions will not be disturbed by the General Accounting Office (GAO) so long as the agency reasonably exercises its discretion in making that decision.

PROCUREMENT **B-227157 Con't**
Competitive Negotiation **Aug. 17, 1987**
Discussion reopening
Propriety
Best/final offers
Pre-award surveys

An agency properly may factor in the time and expense of preaward surveys, either already conducted or which would be required as a result of reopening discussions, in determining whether it is in the government's best interest to reopen discussions after best and final offers.

PROCUREMENT
Socio-Economic Policies
Preferred products/services
Domestic products
Waiver
Administrative discretion

General Accounting Office will not review an agency determination not to waive Buy American Act requirements since Buy American Act vests discretion as to waiver in the head of the concerned agency.

PROCUREMENT **B-227929.2 Aug. 17, 1987**
Bid Protests **87-2 CPD 169**
GAO procedures
Constructive notification

Protesters are charged with constructive notice of General Accounting Office Bid Protest Regulations, since the Regulations are published in the Federal Register (and are codified in the Code of Federal Regulations).

PROCUREMENT	B-227929.2	Con't
Bid Protests		Aug. 17, 1987
GAO procedures		
GAO decisions		
Reconsideration		

Reconsideration request that merely reiterates prior arguments is denied.

PROCUREMENT	B-228685	Aug. 17, 1987
Socio-Economic Policies	87-2	CPD 170
Small business 8(a) subcontracting		
Contract awards		
Administrative discretion		

In view of the broad statutory discretion granted a contracting agency in determining whether to award a section 8(a) program contract, the General Accounting Office will not review a contracting agency's decision not to award such a contract under that program absent some reasonable showing that the agency's decision was made fraudulently or in bad faith or that regulations were violated in making the decision.

PROCUREMENT	B-225057.3	Aug. 18, 1987
Bid Protests	87-2	CPD 171
GAO procedures		
GAO decisions		
Reconsideration		

Information available to but not submitted by the protester during the pendency of its protest was properly not considered by General Accounting Office (GAO) in reconsideration of a decision denying a protest.

PROCUREMENT B-227059 Aug. 18, 1987
Competitive Negotiation 87-2 CPD 172
Offers
Evaluation
Technical acceptability

Protest of agency's determination that awardee's offered system was technically acceptable is denied where the record indicates that the agency's position was correct.

PROCUREMENT B-227160 Aug. 18, 1987
Bid Protests 87-2 CPD 173
Constitutional rights
GAO review

General Accounting Office will not consider protester's contention that requirement for birth control services in request for proposals for operation of primary care medical facilities infringes protester's right to free exercise of religion since issues involving alleged constitutional violations are for resolution by the courts.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
Apparent solicitation improprieties

Protester's contention that request for proposals calling for birth control services for eligible beneficiaries under contracting agency's health care program is defective because agency's statutory authority to provide medical services does not include birth control services is untimely when first raised in protester's comments on agency report, filed well after due date for initial proposals. Contention will not be considered under significant issue exception to timeliness rules because it does not directly concern the interpretation or application of a procurement statute or regulation on a matter of widespread interest to the procurement community.

PROCUREMENT **B-227160 Con't**
Specifications **Aug. 18, 1987**
 Minimum needs standards
 Competitive restrictions
 Performance specifications
 Justification

Requirement for birth control services under request for proposals calling for operation of primary care medical facilities does not unduly restrict competition by precluding participation by Catholic health care providers where contracting agency shows that including birth control services is reasonable in order to meet its minimum needs under program intended to provide consolidated medical services to eligible beneficiaries in a more efficient, less costly manner than under agency's current health care system.

PROCUREMENT **B-227163 Aug. 18, 1987**
Sealed Bidding **87-2 CPD 174**
Bids
 Responsiveness
 Price omission
 Line items

A bid in which a line item price is omitted is non-responsive and must be rejected except in limited circumstances where other prices in the bid establish a consistent pattern which evidences both the existence of an error and the intended bid.

Bidder's consistent entry of "NSP" (not separately priced) for data items on bid does not constitute a pattern sufficient to establish that the bidder intended to bid NSP for a data item requirement added by an amendment which the bidder acknowledged but failed to price. The added item is not substantially similar to other data items, the government estimate for the added item is three times as great as the highest estimate for any of the other data items, and other bidders had widely divergent pricing patterns including one bidder which entered NSP for 23 of the data items, but which priced the remaining two data items.

PROCUREMENT
Sealed Bidding
Bids
Responsiveness
Price omission
Line items

B-227163 Con't
Aug. 18, 1987

Omission of a price entry for a material requirement which is not divisible from the remainder of the solicitation requirements may not be waived as a minor informality.

PROCUREMENT
Bid Protests
GAO procedures
Agency notification

B-227739.2 Aug. 18, 1987
87-2 CPD 175

Dismissal of protest for failure to furnish a copy to the contracting officer within 1 working day of filing at the General Accounting Office (GAO) is affirmed where protester admits that a copy was mailed to the wrong office and protester does not refute the agency's position that the contracting officer was not served within 1 working day as required by GAO Bid Protest Regulations.

PROCUREMENT
Bid Protests
GAO procedures
Agency notification

B-227885.2 Aug. 18, 1987
87-2 CPD 176

Dismissal of protest for failure to file a copy with the contracting officer within 1 working day after filing with General Accounting Office (GAO) is affirmed where agency did not receive copy until 16 working days after the protest was filed at GAO and otherwise did not have timely knowledge of protest basis; the fact that the protester may have forwarded a copy within the necessary time period is not relevant, since the requirement is for receipt by the agency.

PROCUREMENT B-227069 Aug. 19, 1987
Bid Protests 87-2 CPD 177
Non-prejudicial allegation
GAO review

Alleged change in basis for evaluation does not warrant questioning contract award where protester was not in line for award under the original basis and therefore was not prejudiced.

PROCUREMENT
Competitive Negotiation
Discussion
Adequacy
Criteria

Challenge to conduct of discussions provides no basis for questioning contract award where: (1) protester was advised of areas where its initial proposal was deficient, except for one area where weakness was inherent in the proposed approach; (2) discussions with awardee show no signs of improper coaching; and (3) protester's technical score after discussions improved by more than twice as many points as the awardee's, suggesting that protester was not evaluated unfairly in relation to awardee.

PROCUREMENT B-227115 Aug. 19, 1987
Competitive Negotiation 87-2 CPD 178
Contract awards
Administrative discretion
Cost/technical tradeoffs
Technical superiority

In negotiated procurements, the agency has broad discretion in determining the manner and extent to which it will make use of the technical and cost evaluation results and award need not be made to the offeror who proposes the lowest cost. Award to higher priced, higher technically ranked offeror is not objectionable where the solicitation award criteria made technical considerations more important than cost and agency reasonably concluded that protester's lower proposed cost did not outweigh the technical advantages demonstrated in competitor's higher cost proposal.

PROCUREMENT **B-227115 Con't**
Competitive Negotiation **Aug. 19, 1987**
Offers
Evaluation
Cost estimates

Protest that agency improperly failed to inform offeror that it "questioned the realism" of some of protester's proposed costs is denied where the record shows that the agency raised these concerns in discussions conducted with the protester.

PROCUREMENT
Competitive Negotiation
Offers
Organizational experience
Evaluation
Propriety

Protest by incumbent contractor that agency improperly evaluated incumbent and competing firm as having essentially equal relevant past performance experience is denied. Although incumbent has several years experience performing under related contracts, the agency's current requirements involve efforts significantly different than those previously performed by the incumbent. Competing firm, although a relatively new company, has specific experience performing the functions currently required.

PROCUREMENT **B-227132 Aug. 19, 1987**
Contractor Qualification **87-2 CPD 179**
Responsibility
Contracting officer findings
Negative determination
Pre-award surveys

Protest against negative responsibility determination is denied where the determination was based on a negative preaward survey report that found protester had an unsatisfactory record of prior performance, and the record contains documentation that provides a reasonable basis for the preaward survey finding and the contracting officer's determination.

PROCUREMENT
Sealed Bidding
Bids

B-227420 Aug. 19, 1987
87-2 CPD 180

Clerical errors
Error correction
Propriety

PROCUREMENT
Sealed Bidding
Bids

Error correction
Low bid displacement
Propriety

Bid of annual rather than the requested monthly prices for janitorial services is obvious clerical mistake subject to correction, even where it results in misplacement of otherwise low bidder, where magnitude of one statement of bid is on the order of 12 times, based on other bids received and normal cost of the work, and there is no more than theoretical possibility that error was random in nature.

PROCUREMENT
Contractor Qualification
Citizenship

B-227834 Aug. 19, 1987
87-2 CPD 181

Under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C.A. 4852 (West Supp. 1987), a firm is required to be incorporated in the United States for 5 years, in order to bid on the procurement of an embassy office building in a foreign country. Given the 5-year incorporation requirement, the Department of State's refusal to consider affiliates' citizenship history to meet this requirement is not an abuse of discretion.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-225784.4 Aug. 20, 1987
87-2 CPD 182

PROCUREMENT
Competitive Negotiation
Offers
Preparation costs

Prior decision denying protester's claim for costs is affirmed where protest was dismissed since a prerequisite to the award of costs under the Competition in Contracting Act is a decision on the merits of the protest.

PROCUREMENT
Sealed Bidding
Invitations for bids
Defects
Evaluation criteria

B-225947.3 Aug. 20, 1987
87-2 CPD 183

PROCUREMENT
Socio-Economic Policies
Preferred products/services
Domestic sources
Construction contracts

Where the solicitation fails to reference an American Preference Policy (APP) which requires that a 20 percent factor be added to the bids of foreign contractors competing for military construction projects, and the contracting officer advises potential bidders that the APP is not applicable to the procurement, it would be unfair to apply the APP after bid opening to the prejudice of a foreign contractor. Instead, the solicitation should be canceled and the requirement resolicited based on proper and consistent ground rules.

PROCUREMENT

B-226408.2 Aug. 20, 1987

Competitive Negotiation

87-2 CPD 184

Bonds

Justification

Protest challenging proposal guarantee and performance bond requirements in solicitation for audiovisual services is sustained where contracting agency fails to show that the bond amounts are reasonable, in view of the fact that the value of the government-furnished equipment, on which the performance bond requirement is based, is significantly lower than the required bond amount, and agency offers no explanation for amount of the proposal guarantee.

PROCUREMENT

Special Procurement Methods/Categories

In-house performance

Cost evaluation

Government estimates

Bonds

Cost comparison to determine whether to contract out for audiovisual services or continue to perform them in-house is not defective even though the government, as a self-insurer, does not include bonding costs in its own cost estimate.

PROCUREMENT B-227050 Aug. 20, 1987
Competitive Negotiation 87-2 CPD 185
Offers
Evaluation
Time/materials contracts
Wage rates

PROCUREMENT
Competitive Negotiation
Unbalanced offers
Cost allocation
Labor costs
Justification

Protest by incumbent that awardee proposed materially unbalanced fixed hourly labor rates, in response to solicitation for indefinite quantity, time-and-materials contract, will not be considered where the incumbent's challenge to the solicitation's workload estimates, that they bore no relation to the historical workload, was not made until after award.

Protester does not demonstrate that awardee proposed materially unbalanced fixed hourly labor rates, in response to solicitation for indefinite quantity, time-and-materials contract, where it does not appear that examples of mathematical unbalancing in proposal cited by protester would affect the outcome of the competition.

PROCUREMENT B-227253 Aug. 20, 1987
Payment/Discharge 87-2 CPD 186
Liquidated damages
Remission

Request for remission of liquidated damages assessed by Department of the Air Force must be denied in the absence of a favorable recommendation by the head of the agency.

PROCUREMENT
Bid Protests
Moot allegation
GAO review

B-227369.4 Aug. 20, 1987

GAO will not consider protest where a small business protester's initial objection that its bid improperly was rejected as nonresponsive has been rendered academic by contracting agency's redetermination of responsiveness.

PROCUREMENT
Socio-Economic Policies
Small businesses
Responsibility
Negative determination
GAO review

GAO will not review a contracting officer's finding that a small business concern is nonresponsible since the Small Business Administration has conclusive authority to determine the responsibility of small business concerns under its certificate of competency procedures.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-227439 Aug. 20, 1987
87-2 CPD 187

PROCUREMENT
Competitive Negotiation
Offers
Preparation costs

Where the General Accounting Office (GAO) has no basis to question contracting agency's finding that it is not feasible to terminate an existing contract for the convenience of the government and make award to the protester, protester that was unreasonably excluded from the competition is entitled to its costs of filing and pursuing the protest and its proposal preparation costs.

PROCUREMENT **B-227439 Con't**
Competitive Negotiation **Aug. 20, 1987**
Offers
Evaluation
Technical acceptability
Equivalent products

Protest is sustained against award under request for proposal calling for a specific brand name part or acceptable alternate where agency admittedly incorrectly concluded that protester's alternate offer was technically unacceptable and record supports agency's reversal of its initial determination that alternate offer was unacceptable.

PROCUREMENT **B-227893 Aug. 20, 1987**
Competitive Negotiation **87-2 CPD 188**
Offers
Evaluation
Options
Prices

Agency properly included option period in the solicitation where agency reasonably determined there is an anticipated need for the service beyond the first contract period, and, in accordance with the solicitation evaluation method, awarded to the low offeror for the base and option periods.

PROCUREMENT B-227927.2 Aug. 20, 1987
Bid Protests 87-2 CPD 189
GAO procedures
Protest timeliness
Apparent solicitation improprieties

PROCUREMENT
Bid Protests
Non-prejudicial allegation
GAO review

Decision to dismiss protest against solicitation provisions is affirmed because, to the extent protest is against the solicitation's alleged lack of clarity, it was untimely filed after bid opening and to the extent it is against the acceptance of a bid from a non-union firm it is without merit as the inclusion in a solicitation of the current contractor's collective bargaining agreement is only for the purpose of setting the wage rates which must be paid, not to bind bidders to all the terms of the agreement.

PROCUREMENT B-227965.2; B-227965.4
Bid Protests Aug. 20, 1987
GAO procedures 87-2 CPD 190
Interested parties
Direct interest standards

Protesters are not interested parties to protest an agency's estimate of the cost of in-house performance, for comparison with the costs of contracting out, where they would not be in line for award if the protest was sustained.

PROCUREMENT
Bid Protests
GAO procedures
Interested parties
Subcontractors

B-228677.2 Aug. 20, 1987
87-2 CPD 191

To be considered an interested party to protest under the Competition in Contracting Act of 1984 and GAO's Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award a contract. A subcontractor to a potential government contractor, which is not an actual bidder or offeror itself, is not an interested party.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-225646.2 Aug. 21, 1987

Prior decision is affirmed on reconsideration where protester has not shown any error of fact or law which would warrant reversal of the decision. The protester's disagreement with the conclusion of this Office with respect to the materiality of exceptions taken by it to standard solicitation provisions does not provide a basis for reversal.

PROCUREMENT

B-227270 Aug. 21, 1987

Specifications

87-2 CPD 192

Minimum needs standards

Competitive restrictions

Geographic restrictions

Justification

Geographical restriction in an IFB for a contract to provide meals and lodging for applicants for military duty requiring bidders to be located within a 12-driving-mile radius of the agency's processing center does not unduly restrict competition where the agency reasonably determined, 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 12-mile area.

PROCUREMENT

B-227481 Aug. 21, 1987

Sealed Bidding

Invitations for bids

Amendments

Acknowledgment

Responsiveness

Bidder's failure to acknowledge an amendment that applied only to an additive item did not affect the bid's acceptability since evaluation and award did not include the additive item, so that the amendment was irrelevant to the work awarded.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule

B-227600.2 Aug. 21, 1987
87-2 CPD 193

Dismissal of protest as untimely is affirmed. Protester's position that award of contract and not the opening of bids constitutes initial "adverse agency action" in response to an agency-level protest of solicitation improprieties is contrary to express language of General Accounting Office Bid Protest Regulations and decisions.

PROCUREMENT
Bid Protests
Bias allegation
Allegation substantiation
Burden of proof

B-227846 Aug. 21, 1987
87-2 CPD 194

Protester's inference and supposition of bias in favor of awardee, allegedly exemplified by one reviewer scoring awardee higher on technical evaluation than others, does not meet burden necessary to show bias.

PROCUREMENT
Contract Management
Contract administration
Contract terms
Compliance
GAO review

Requirement that 25 percent of the work on a contract be performed by the contractor relates to performance, an issue of contract administration, and is not a precondition of performance. The General Accounting Office does not review matters of contract administration.

PROCUREMENT **B-227846 Con't**
Contractor Qualification **Aug. 21, 1987**
Responsibility
Contracting officer findings
Affirmative determination
GAO review

Where requirements that offerors submit resume detailing previous experience with similar work and provide information regarding experience of key personnel are not sufficiently specific and objective to constitute definitive responsibility criteria, affirmative determination of responsibility will not be questioned.

PROCUREMENT **B-227907 Aug. 21, 1987**
Contract Management **87-2 CPD 195**
Contract administration
Contract terms
Compliance
GAO review

Whether firm awarded contract is not meeting its performance obligations is a matter of contract administration that the General Accounting Office (GAO) will not consider.

PROCUREMENT
Contractor Qualification
Responsibility
Contracting officer findings
Affirmative determination
GAO review

The GAO will not review a contracting agency's affirmative responsibility determination where there is no allegation or showing that the contracting officials acted fraudulently or in bad faith, or misapplied definitive responsibility criteria.

PROCUREMENT

B-228743 Aug. 21, 1987

Bid Protests

87-2 CPD 196

GAO procedures

Protest timeliness

Apparent solicitation improprieties

Protest against requirement in solicitation that offerors document ability to receive cooperation from state officials is dismissed as untimely where protest, which concerns impropriety apparent from solicitation, was not filed until well after the closing date for receipt of initial proposals.

PROCUREMENT

Competitive Negotiation

Contract awards

Propriety

Corporate entities

Award to an organization of state and local officials does not violate Federal Acquisition Regulation, 48 C.F.R. 3.601, which provides that a contracting officer shall not knowingly award a contract to an organization substantially owned or controlled by "Government employees" since the FAR provision applies only to federal government employees.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule

B-223355.2 Aug. 24, 1987
87-2 CPD 197

Protest is untimely because not diligently pursued where the protester waited 3 weeks from notice of cancellation of the solicitation to orally request information concerning the solicitation's cancellation and then waited an additional 4 weeks before filing a Freedom of Information Act request.

PROCUREMENT
Contractor Qualification
Pre-qualification
Allegation substantiation

B-227113 Aug. 24, 1987
87-2 CPD 198

Contracting agency's consideration of protester's data to determine whether competition is available for supply of item being procured on a sole-source basis does not involve the application of a prequalification requirement under 10 U.S.C. 2319, where the agency has no testing or qualification standards because of a lack of technical data for the item.

PROCUREMENT
Noncompetitive Negotiation
Sole sources
Justification
Intellectual property

Contracting agency reasonably conducted a sole-source procurement for a critical aircraft part with the original equipment manufacturer (OEM) where it lacked detailed technical data necessary to evaluate or test alternates, and the protester failed to submit sufficient data to show it manufacturers an equivalent part or previously manufactured the part for the OEM.

PROCUREMENT
Bid Protests
GAO procedures
Interested parties
Subcontractors

B-227787.2 Aug. 24, 1987
87-2 CPD 199

Request for reconsideration of dismissal of protest by nonbidding prospective subcontractor is denied because protester is not an interested party under GAO's Bid Protest Regulations.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
Apparent solicitation improprieties

B-227974 Aug. 24, 1987
87-2 CPD 200

Protest that the agency did not conduct adequate discussions prior to requiring the submission of revised proposals is dismissed as untimely where the protest was not filed prior to the closing date for receipt of revised proposals.

PROCUREMENT
Bid Protests
GAO procedures
Anticipated profits

B-228065 Aug. 24, 1987
87-2 CPD 201

Where protester seeks anticipated profits in connection with contracting agency's determination that, although protester's low offer was not received late as the agency had previously stated, termination of substantially performed contract was impracticable, the request is dismissed since anticipated profits may not be recovered even in the presence of error in government action.

PROCUREMENT

Bid Protests

Antitrust matters

GAO review

B-225419.3; B-228095

Aug. 25, 1987

87-2 CPD 202

General Accounting Office does not consider allegations of antitrust violations.

PROCUREMENT

Contract Management

Contract administration

Contract terms

Compliance

GAO review

Whether or not a firm actually performs in compliance with contract requirements is a matter of contract administration, which the General Accounting Office does not review as part of its bid protest function.

PROCUREMENT

Contractor Qualification

Responsibility

Contracting officer findings

Affirmative determination

GAO review

General Accounting Office will not review a contracting agency's decision that a firm is responsible except in limited circumstances.

PROCUREMENT **B-227102 Aug. 26, 1987**
Competitive Negotiation 87-2 CPD 203
Contract awards
Administrative discretion
Cost/technical tradeoffs
Technical superiority

There is no merit to the protester's contention that the agency was required to select its low-cost proposal for base operations services for comparison with the estimate of the cost of government performance where the solicitation for a cost-type contract provided that technical factors would be significantly more important than cost in selecting the proposal most advantageous to the government and the protester's proposal was at best minimally acceptable and its proposed costs were substantially understated.

PROCUREMENT **B-226885 Aug. 27, 1987**
Sealed Bidding 87-2 CPD 204
Bids
Modification
Submission methods
Procedural defects

Agency's determination not to consider changes written on bid envelope is legally unobjectionable where bidder did not adhere to prescribed procedural requirements for modifying bid; modification was signed by other than individual who signed standard bid form; and there was nothing in bid package indicating that signatory of modification was authorized to modify bid.

PROCUREMENT

B-227779.2 Aug. 27, 1987

Bid Protests

87-2 CPD 205

GAO procedures

Protest timeliness

Good cause exemptions

Applicability

The fact that a firm is new to government contracting does not warrant considering an untimely protest.

PROCUREMENT

Bid Protests

GAO procedures

Protest timeliness

10-day rule

Protest of cancellation of a solicitation must be filed within 10 working days after the basis for protest was or should have been known.

PROCUREMENT

B-227338 Aug. 28, 1987

Competitive Negotiation

87-2 CPD 206

Offers

Equivalent products

Rejection

Government delays

Agency delay in advising protester of rejection of alternate product for, in part, inadequate tolerances on critical dimensions, was not prejudicial where agency could not disclose required tolerances and protester has provided no evidence it could have independently developed adequate tolerances and sustained them during production.

PROCUREMENT

Bid Protests

GAO procedures

Administrative reports

Comments timeliness

B-227899.2 Aug. 28, 1987

87-2 CPD 207

Dismissal of protest for failure to submit timely comments on the agency report is affirmed, where the protester did not fulfill its obligation to notify the General Accounting Office, within the required timeframe, that it received the report late.

PROCUREMENT

Special Procurement Methods/Categories

Construction contracts

Fixed-price contracts

Profit restrictions

B-224357.2 Aug. 31, 1987

In response to allegation of Associated General Contractors of America and former protester that corrective action taken by Veterans Administration (VA) in response to Comptroller General decision, Lecher Construction Co., B-224357, Sept. 30, 1986, 86-2 CPD 369, did not comply with the applicable requirements of the Federal Acquisition Regulation (FAR) for deviation from the FAR, General Accounting Office (GAO) determines that agency actions in processing the class deviation appear to be in compliance with the FAR because (1) in accordance with the FAR exemption from consultation with the Civilian Agency Acquisition Council prior to authorization of the deviation, the agency properly determined that urgent circumstances precluded such consultation, and (2) the FAR does not require publication of Class deviations unless they are adopted as FAR revisions, which was not the case here.

PROCUREMENT
Competitive Negotiation
Offers

B-226939, et al. Con't
Aug. 31, 1987

Evaluation
Technical acceptability

Although manual for self-installation of label affixing machines initially submitted by successful offeror may have been "hard to follow" without formal training in the machine's use, in view of fact that this circumstance did not exclude the possibility of self-installation of a machine which the contracting agency describes as "extremely simple to assemble," agency's acceptance of awardee's proposal as technically acceptable does not appear unreasonable.

PROCUREMENT
Competitive Negotiation
Offers

Evaluation
Technical acceptability
Equivalent products

Contracting officer's decision that item which protester proposed to supply did not meet request for proposals "commercial product" requirement was not unreasonable where record supports contracting officer's conclusion that proposed model, which had no commercial history, was not a "successor" to a product having an admitted commercial history since original product was made by third party, and not protester, and there is no indication that original manufacturer has authorized protester to represent proposed model as successor to original model.

PROCUREMENT **B-227070 Aug. 31, 1987**
Noncompetitive Negotiation 87-2 CPD 209
Use
Justification
Urgent needs

Protest against sole-source award based on unusual and compelling urgency is sustained because agency failed to explain the procurement's urgency despite the fact that the award was not made until 8 months after the justification and approval was executed and, under the contract, the first unit is not to be delivered until 16 months after the contract award and the final units are not to be delivered until more than 4 years after award.

PROCUREMENT **B-227124 Aug. 31, 1987**
Competitive Negotiation 87-2 CPD 210
Offers
Evaluation
Options
Prices

Allegation that award was improper since awardee's price including option quantities was higher than protester's price with option quantities is without merit where, under solicitation, options were not included in the evaluation, award was made for only the basic quantity and the contract included no options and expressly stated that the terms of the solicitation relating to options were deleted.

PROCUREMENT
Competitive Negotiation
Offers
Price disclosure
Allegation substantiation
Evidence sufficiency

Where a protester fails to offer any evidence that the agency disclosed the firm's proposed price to another offeror and the agency denies the allegation, the protester's contention is mere conjecture and thus provides no basis to sustain the protest.

PROCUREMENT **B-227124 Con't**
Competitive Negotiation **Aug. 31, 1987**
Requests for proposals
First-article testing
Waiver
Administrative determination

Waiver of first article testing requirement was reasonable where firm had passed first article test for the same item under an earlier contract. The fact that firm's test under the prior contract was delayed does not detract from the fact that firm passed test for same item.

PROCUREMENT **B-227170 Aug. 31, 1987**
Bid Protests **87-2 CPD 211**
GAO procedures
Protest timeliness
Apparent solicitation improprieties

Protest concerning removal of small business set-aside and closing date extensions is dismissed because it was filed after the closing date for receipt of initial proposals. Alleged improprieties which are apparent from the face of the solicitation must be protested no later than the closing date for receipt of initial proposals.

PROCUREMENT
Bid Protests
Information disclosure
Administrative determination
GAO review

GAO Bid Protest Regulations require the contracting agency to provide protest submissions to interested parties except for material that is privileged and is so identified by the protester.

PROCUREMENT **B-227170 Con't**
Competitive Negotiation **Aug. 31, 1987**
Offers
Competitive ranges
Inclusion
Administrative discretion

General Accounting Office (GAO) will question a selection official's determination of whether an offeror is in the competitive range only upon a clear showing that it was unreasonable, arbitrary or in violation of procurement laws or regulations.

PROCUREMENT **B-227807 Aug. 31, 1987**
Bid Protests **87-2 CPD 212**
GAO procedures
Preparation costs

PROCUREMENT
Competitive Negotiation
Offers
Evaluation errors
Evaluation criteria
Application

PROCUREMENT
Competitive Negotiation
Offers
Preparation costs

While procuring agencies have broad discretion in determining the evaluation plan they will use in a negotiated procurement, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. General Accounting Office finds that the procuring agency terminated negotiations with an offeror and, in effect, rejected its proposal on the basis of criteria not specified by the solicitation, and, under the circumstances, finds the protester entitled to proposal preparation costs and the costs of protesting.

PROCUREMENT

Bid Protests

GAO procedures

GAO decisions

Reconsideration

B-227891 Aug. 31, 1987

87-2 CPD 213

Protest raising same issues as those resolved in a recent decision on a protest by the same protester and involving the same agency is dismissed as no useful purpose would be served by further consideration of the protest.

PROCUREMENT

Bid Protests

GAO procedures

GAO decisions

Reconsideration

B-228849 Aug. 31, 1987

87-2 CPD 214

A protest filed with the General Accounting Office following adverse agency action on a protest that was untimely filed with the contracting agency is untimely and will not be considered because the initial agency protest was not timely filed. The fact that the contracting agency considered the protest on the merits does not change this result.

MISCELLANEOUS TOPICS

MISCELLANEOUS TOPICS **B-228641 Aug. 18, 1987**
Federal Administrative/Legislative Matters
Administrative policies
Records destruction
Time restrictions

This Office recommends that the Small Business Administration review (in the portions of the schedule where it has not already done so) its proposed electronic records retention schedule to identify the event triggering the running of the time period for retaining information either on line or on tape and to specify this in its disposition schedule for those records necessary to protect the legal and financial interests of the United States.

Finance Industry**Financial institutions****Government corporations****Government-insured loans****Payment terms**

When the Federal Financing Bank (FFB) makes Foreign Military Sales (FMS) loans to foreign countries, the Department of Defense (DOD) is legally obligated to make payment to FFB, using funds in the Guaranteed Reserve Fund, if the borrower fails to make payment when due because of default or rescheduling of the debt, and such failure continues for a least 10 days. Since DOD's guarantee is unconditional and irrevocable and FFB can only make loans backed by such a guarantee, FFB does not have the authority to delay for an unreasonable period of time in demanding payment from DOD once the borrower's failure to make payment when due has continued for 10 days. Any arrangement between FFB and DOD that provided for such an unreasonable delay would alter DOD's statutory and contractual obligation as guarantor.

If default by the borrower on a Foreign Military Sales (FMS) loan guaranteed by the Department of Defense (DOD) is imminent, the Antideficiency Act would not prohibit DOD from agreeing to reschedule the debt even if there were insufficient funds in the Guaranteed Reserve Fund to pay the claims that could result under DOD's guarantee. In such circumstances, where DOD's only alternatives were to insist that the borrower comply with the original payment schedule, knowing it could not do so and would default, or to allow the debt to be rescheduled, debt rescheduling would not constitute a discretionary act subject to the limitations of the Antideficiency Act.

MISCELLANEOUS TOPICS **B-224596 Aug. 21, 1987**
Environment/Energy/Natural Resources
Administrative agencies
Administrative appeals
Hearings
User fees

Federal Energy Regulatory Commission is authorized to charge fees established by regulation for its review of administrative appeals of remedial orders issued by the Department of Energy's Office of Hearings and Appeals. Authority is found in Title V of the Independent Offices Appropriation Act, 1952, Chapter 376, Public Law 137, 65 Stat. 268, 290, August 31, 1951, codified at 31 U.S.C. 9701.

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