

**GAO**

Office of General Counsel



142331

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



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# Preface

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This publication is one in a series of monthly pamphlets entitled "Digests of Decisions of the Comptroller General of the United States" which have 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 concerning 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, Pub. L. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by the file number and date, e.g., B-229329.2, Sept. 29, 1989. Approximately 10 percent of GAO's decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies, in monthly pamphlets and in annual volumes. Decisions in these volumes should be cited by volume, page number and year issued, e.g., 68 Comp. Gen. 644 (1989).

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# Appropriations/Financial Management

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**B-234242, February 6, 1990**

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**Appropriations/Financial Management**

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**Accountable Officers**

- Cashiers
  - ■ Relief
  - ■ ■ Physical losses
  - ■ ■ ■ Theft
- 

**Appropriations/Financial Management**

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**Accountable Officers**

- Determination criteria

Accountable officer is relieved of liability for physical loss resulting from criminal activity beyond her control. District Ranger is not an accountable officer; this Office is not the appropriate agency to address his liability.

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**B-236816, February 8, 1990\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Entertainment/recreation

U.S. Army School of the Americas may use official representation funds to pay for a change of command/incoming commander reception since the reception was an official function rather than a purely private social one and the use of official representation funds is consistent with Army regulations.

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**B-236330.2, February 14, 1990**

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**Appropriations/Financial Management**

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**Claims Against Government**

- Interest

An Army officer whose initial claim against the government was allowed is not entitled to interest on the amount paid in the absence of a statute authorizing such payment.

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**B-230250, February 16, 1990\*\*\***

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**Appropriations/Financial Management**

**Budget Process**

- Funds
- ■ Deposit
- ■ ■ Miscellaneous revenues

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**Appropriations/Financial Management**

**Claims By Government**

- False claims
- ■ Claim settlement
- ■ ■ Funds
- ■ ■ ■ Deposit

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**Appropriations/Financial Management**

**Claims By Government**

- False claims
- ■ Claim settlement
- ■ ■ Interest

The Federal Emergency Management Agency (FEMA) may deposit in the National Insurance Development Fund (Fund) that portion of a damage award or settlement obtained pursuant to the False Claims Act that would reimburse the Fund for losses suffered as a result of a policyholder's false claims. In addition to the principal amount of the false claims paid, the Fund may be reimbursed for interest on that amount plus any administrative expenses incurred in connection with the payment and recovery of these claims. However, FEMA must deposit any portion of an award or settlement that exceeds these amounts in the Treasury as miscellaneous receipts.

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**B-238222, February 21, 1990**

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**Appropriations/Financial Management**

**Accountable Officers**

- Agents
- ■ Relief
- ■ ■ Physical losses
- ■ ■ ■ Drug control

Where 'flashroll' funds are lost during attempted drug arrest, and DEA determines that agent acted (1) without negligence and (2) in the performance of his official duties, the expenditure can be recorded as an investigative expense. In such circumstances, there is no need to seek relief from our Office. 61 Comp. Gen. 313 (1982).

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**B-236141.1, February 23, 1990**

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**Appropriations/Financial Management**

**Judgment Payments**

- Approval
- ■ Certifying officers
- ■ ■ Elimination

GAO does not object to Treasury's elimination of its certifying officers from the process by which payments are made pursuant to 31 U.S.C. § 1304. Although, as codified, 31 U.S.C. § 3325(a)(1) (1982) directs executive branch disbursing officers to pay vouchers certified by the certifying officer or head of the "executive agency concerned", the original legislation did not so restrict a disbursing officer's authority. Rather, the original 1941 legislation permitted disbursing officers to disburse over vouchers certified by "the head of the department, establishment, or agency concerned" or

his or her designee. Thus, for purposes of Judgment Fund payments, GAO by statute is the "agency concerned" for purposes of 31 U.S.C. § 3325, and executive branch disbursing officers can pay any voucher duly certified by an authorized GAO official.

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**B-236141.2, February 23, 1990**

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**Appropriations/Financial Management**

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**Accountable Officers**

- Certifying officers
- ■ Liability
- ■ ■ Legislative/judicial personnel

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**Appropriations/Financial Management**

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**Accountable Officers**

- Disbursing officers
- ■ Liability
- ■ ■ Legislative/judicial personnel

The strict liability imposed by law upon a government disbursing officer for public funds entrusted to him may not be transferred in whole or in part to another person, unless such a transfer is specifically authorized by law. While partial transfers of financial liability were mandated with respect to certifying officers in the executive branch (by chapter 350 of the Act of Aug. 23, 1912, Pub. L. No. 62-299, 37 Stat. 360, 375, and the Act of Dec. 29, 1941, Pub. L. No. 77-389, Chap 641, 55 Stat. 875, codified in 31 U.S.C. § 3521 and §§ 3325, 3528 (1982), respectively), no similar authority or requirement exists with respect to certifying officers in the legislative or judicial branches.

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**Appropriations/Financial Management**

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**Accountable Officers**

- Certifying officers
- ■ Liability
- ■ ■ Legislative/judicial personnel

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**Appropriations/Financial Management**

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**Accountable Officers**

- Disbursing officers
- ■ Liability
- ■ ■ Legislative/judicial personnel

The duties and liabilities of executive branch disbursing and certifying officers were generally defined by the Act of Dec. 29, 1941, Pub. L. No. 77-389, Chap. 641, 55 Stat. 875, *codified in* 31 U.S.C. § 3325, 3528. However, that act does not apply to disbursing or certifying officers in the legislative or judicial branches.

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## **Appropriations/Financial Management**

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### **Accountable Officers**

- Certifying officers
- ■ Liability
- ■ ■ Legislative/judicial personnel

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## **Appropriations/Financial Management**

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### **Accountable Officers**

- Disbursing officers
- ■ Liability
- ■ ■ Legislative/judicial personnel

Agencies have discretionary authority to include in their regulations provisions which impose varying degrees of financial liability upon their employees for losses suffered by the government as the result of the employee's negligence or errors in judgment while carrying out his or her official duties. Such regulations become terms of the employees' employment contract.

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## **Appropriations/Financial Management**

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### **Accountable Officers**

- Certifying officers
- ■ Appointment
- ■ ■ GAO authority

The Directors of GAO's GGD/Claims Group and General Services & Controller were advised that: (1) GAO may have its own certifying officers (both for the preparation of internal administrative vouchers and for the preparation of settlement certificates used to certify payments from the Judgment Fund, 31 U.S.C. § 1304 (1982), as amended. (2) Unless GAO specifically provides otherwise in its administrative regulations, GAO's certifying officers are not financially liable for any losses the government may incur as the result of any erroneous certifications made by them. (3) If GAO decides to administratively impose some degree of financial liability upon its certifying officers, it may also provide a mechanism to relieve those employees from that liability when justified by the facts and circumstances.

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## **B-237146, February 23, 1990\*\*\***

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### **Appropriations/Financial Management**

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#### **Budget Process**

- Funding
- ■ Construction contracts

In overseeing construction of the Federal Triangle Development Project, The Pennsylvania Avenue Development Corporation may have its construction consultants' fees amortized as a cost of construction rather than as an expense of the Corporation because the funds transferred to the Corporation under the Federal Triangle Development Act were intended to cover start-up costs. The Corporation formally notified the required congressional committees of its plan to amortize these costs as a cost of construction and the committees did not object to this arrangement.

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## **B-237395, February 23, 1990**

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### **Appropriations/Financial Management**

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#### **Judgment Payments**

- Approval
- ■ Certifying officers
- ■ ■ Elimination

Letter advises the Treasury Department that its past practice of certifying judgment fund payments was not required by statute, and GAO would not object to its elimination. Since 31 U.S.C.

§ 1304 specifically conditions payment from the fund upon certification by GAO, there is ample authority for such payments to be disbursed upon GAO's certification alone.

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**B-235727, February 28, 1990**

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Specific purpose restrictions**

■ ■ ■ **Personal expenses/furnishings**

The National Park Service may not expend its appropriations to reimburse federal employees who paid a fee to obtain state pesticide application licenses, because such fees are a personal expense to the employees incident to a condition of employment.

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# Civilian Personnel

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**B-238121, February 1, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
  - ■ Inspection fees
  - ■ ■ Reimbursement
- 

**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Miscellaneous expenses
- ■ ■ Reimbursement

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-234695, February 2, 1990\*\*\***

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**Civilian Personnel**

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**Relocation**

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Spouses
- ■ ■ ■ Eligibility

An agency may pay a civilian employee's claim for temporary quarters subsistence expenses for her spouse incident to her transfer, even though the authorization is issued retroactively by amendment to the employee's order, and even though the spouse is a member of the uniformed services who is also being transferred, provided reimbursement would not result in the couple receiving a duplication of payments for the same purpose.

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**B-237640, February 6, 1990**

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**Civilian Personnel**

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**Relocation**

- Household goods
- ■ Temporary storage
- ■ ■ Expenses
- ■ ■ ■ Weight certification

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.



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**B-232489.2, February 8, 1990**

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**Civilian Personnel**

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**Relocation**

- Overseas personnel
- ■ Return travel
- ■ ■ Eligibility

On reconsideration, our prior decision limiting reimbursement of an employee's travel and transportation expenses to the constructive cost of returning to his residence, rather than reimbursing him for the actual costs he incurred in returning to another location, is affirmed.

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**B-234288, February 8, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Loan origination fees
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

Under a revision to the Federal Travel Regulations, para. 2-6.2d(1)(b) (Supp. 26, effective Oct. 1, 1987), an employee to be reimbursed for a loan origination fee in excess of 1 percent of the loan amount must show by clear and convincing evidence, including an itemization of the lender's administrative charges, that the fee does not include prepaid interest, points or a mortgage discount. In addition, the employee must show that the fee amount does not exceed the amount customary in the locality of the residence.

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**B-236769, February 8, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Property titles

A transferred employee who sold a residence at her old duty station which she owned jointly with her nondependent sister may be reimbursed only one-half of real estate expenses since nondependent sister does not qualify under the Federal Travel Regulations as member of the employee's "immediate family" for purposes of real estate expense reimbursement.

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**B-231927.2, February 12, 1990**

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**Civilian Personnel**

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**Compensation**

- Compensation retention
- ■ Eligibility

An employee, who exercised his reemployment rights under 10 U.S.C. § 1586 (1982), accepted a demotion and returned from overseas to his prior position in Hawaii. Upon reconsideration, he is entitled to additional compensation since the agency set his rate of "basic pay" at less than that to which he would have been entitled if he had not been assigned to duty outside the United States. The term "basic pay" includes the special rate of pay he received under 5 U.S.C. § 5303 before his overseas assignment. Decision *Yukio Fujikawa*, B-231927, Feb. 3, 1989, is *overruled*.

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**B-236651, February 12, 1990**

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**Civilian Personnel**

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**Relocation**

- Expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Personal convenience

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-237358, February 12, 1990**

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**Civilian Personnel**

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**Travel**

- Temporary duty
- ■ Travel expenses
- ■ ■ Return travel
- ■ ■ ■ Reimbursement

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-235846, February 14, 1990**

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**Civilian Personnel**

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**Travel**

- Overseas allowances
- ■ Educational travel
- ■ ■ Dependents
- ■ ■ ■ Alternate destinations

**Civilian Personnel**

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**Travel**

- Overseas allowances
- ■ Tour renewal travel
- ■ ■ Dependents
- ■ ■ ■ Alternate destinations

The Panama Canal Commission may fund educational and tour renewal travel to an alternate location for dependents of U.S. citizen employees of the Commission who are in the United States for undergraduate studies. These dependents need not return to Panama during a period in which U.S. citizens are warned not to travel to Panama.

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**B-236836, February 14, 1990**

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**Civilian Personnel**

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**Leaves Of Absence**

- Sick Leave
- ■ Charging
- ■ ■ Administrative discretion

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-231085, February 15, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Residency

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-229184, February 16, 1990\*\*\***

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**Civilian Personnel**

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**Relocation**

- Taxes
- ■ Allowances
- ■ ■ Eligibility

Due to the reimbursement of his relocation expenses, a transferred employee's adjusted gross income exceeded the maximum allowable for taking a deduction for a contribution to an Individual Retirement Account (IRA) on a jointly filed tax return. He indicates that the loss of the IRA deduction increased his tax liability by \$300, and he seeks an additional amount of relocation income tax (RIT) allowance to compensate him for this loss. Although a RIT allowance is intended to reimburse an employee for substantially all of the increased taxes he incurs due to the expenses of relocation that he is reimbursed, the applicable regulations provide that the allowance is not to be adjusted to accommodate an employee's unique circumstances. Payment of an additional RIT allowance in these circumstances is not authorized.

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**B-234619, February 16, 1990\*\*\***

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**Civilian Personnel**

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**Travel**

- Overseas travel
- ■ Travel modes
- ■ ■ Domestic sources
- ■ ■ ■ Air carriers

Under travel arrangements made by his agency, a U.S. Information Agency employee traveled from Costa Rica to Greece on foreign air carriers, although under an alternate routing he could have traveled part of the way on a U.S. carrier. The employee should not be assessed a penalty for violating the Fly America Act, 49 U.S.C. App. § 1517, because he is an employee of an agency covered by an exception to the act, 49 U.S.C. App. § 1518, for travel between points outside the United

States. Although it is within the agency's discretion to limit use of the exception, applicable agency regulations do not make the exception inapplicable to this travel.

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## **Civilian Personnel**

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### **Travel**

- Overseas travel
- ■ Travel modes
- ■ ■ Domestic sources
- ■ ■ ■ Air carriers

A U.S. Information Agency employee being transferred from California to Greece was required to stop in Washington, D.C., for 7 days of consultation. He was then routed by his agency on a U.S. air carrier from Washington, D.C., to Frankfurt, Germany, and by foreign carrier on to Greece, because U.S. carrier service for the entire distance was not available on the day he traveled, although it was available 5 days a week. The Comptroller General's Fly America Guidelines do not specifically require a delay in beginning travel in these circumstances. The Foreign Affairs Manual provides generally that scheduling the use of U.S. carriers is expected for transfer travel or when the traveler has flexibility. However, this general policy statement does not support a penalty against the employee in this case since the agency scheduled his travel and apparently concluded that the travel could not be delayed.

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## **B-234876.2, February 16, 1990**

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## **Civilian Personnel**

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### **Compensation**

- Retroactive compensation
- ■ Promotion
- ■ ■ Discretionary authority
- ■ ■ ■ Violation

Employee claims entitlement to a pay adjustment under 5 U.S.C. § 5333(b) and agency regulations, contending that applicable provision of those regulations (Civilian Manpower Management Instruction 531.53, para. S3-2c(1)), which uses the word "will" establishes a mandatory agency policy. The claim is denied. The word "will" used in the phrase "will be adjusted when justified," does not mandate a pay adjustment. The words "when justified" modify the word "will" and establish that the agency policy is discretionary. Since we find no error or abuse of discretion in agency's action, there is no basis to adjust the employee's pay rate.

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## **B-236321, February 16, 1990**

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## **Civilian Personnel**

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### **Relocation**

- Expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Personal convenience

Where an employee whose position was abolished declined transfer offer by her agency but instead transferred to another agency of her choice, agency's determination that the transfer was primarily for then convenience or benefit of the employee, thereby precluding reimbursement of relocation expenses, was not arbitrary or clearly erroneous.

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**B-227534.3, February 21, 1990**

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**Civilian Personnel**

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**Relocation**

- Household goods
- ■ Shipment
- ■ ■ Restrictions
- ■ ■ ■ Privately-owned vehicles

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-238023, February 22, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Loan origination fees
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-235328, February 23, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Taxes
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

Employee contends that his own alternative method of calculating the Relocation Income Tax allowance (RIT allowance) is better than the method prescribed by General Services Administration's (GSA's) regulations. His claim for additional reimbursement is denied since he has not demonstrated either that the regulations are inconsistent with the statutory authority or that these regulations are arbitrary or unreasonable on their face.

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**B-236516, February 23, 1990\*\*\***

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

An employee who is transferred back to his former duty station is entitled to only those real estate expenses which he incurred prior to notice of the retransfer and those which cannot be avoided. *Warren L. Shipp*, 59 Comp. Gen. 502 (1980), amplified.

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**B-238038, February 23, 1990**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Loan origination fees
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-238461, February 23, 1990**

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**Civilian Personnel**

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**Compensation**

- Retroactive compensation
- ■ Eligibility
- ■ ■ Court decisions
- ■ ■ ■ GAO review

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**B-229067.2, February 28, 1990**

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**Civilian Personnel**

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**Compensation**

- Overtime
- ■ Eligibility
- ■ ■ Travel time

Employee was required to perform temporary duty at various refineries 2 or 3 days in advance of ships' estimated arrivals. This need to perform duties at various times with advance notice was an administratively controllable event by either the agency or the employee, and therefore her travel outside of normal hours is not compensable as overtime under 5 U.S.C. § 5542(b)(2)(B)(iv).

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# Military Personnel

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**B-220860, February 2, 1990\*\*\***

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## Military Personnel

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### Pay

- Retirement pay
- ■ Suspension
- ■ ■ Foreign employment

In 65 Comp. Gen. 382 (1986), we held that a retired U.S. Marine Corps officer, ostensibly employed by a U.S. corporation which furnished services to the Royal Saudi Naval Forces (RSNF), was actually an employee of the Saudi Arabian government and, as such, was required to obtain consent under 37 U.S.C. § 908 before payments of his military retired pay could be resumed. Arguments submitted in support of a request for reconsideration of this decision do not change our conclusion that the RSNF had the right to control, supervise and direct the work of the retired officer, the key elements in our determination that he was employed by the foreign government. Accordingly, our previous decision is affirmed.

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**B-234695, February 2, 1990\*\*\***

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## Military Personnel

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### Relocation

- Temporary quarters
- ■ Actual expenses
- ■ ■ Spouses
- ■ ■ ■ Eligibility

An agency may pay a civilian employee's claim for temporary quarters subsistence expenses for her spouse incident to her transfer, even though the authorization is issued retroactively by amendment to the employee's order, and even though the spouse is a member of the uniformed services who is also being transferred, provided reimbursement would not result in the couple receiving a duplication of payments for the same purpose.

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**B-236756, February 5, 1990\*\*\***

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## Military Personnel

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### Pay

- Retirement pay
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A retired member of the Coast Guard was informed that he was being paid erroneously and he repaid the amounts due to the Coast Guard; however, the erroneous payments continued following the notification and repayment. The member is not without fault since he should have expected the monthly payments to change and he should have made inquiries of the proper officials when the payments were not reduced. In such circumstances waiver of his debt may not be granted under 10 U.S.C. § 2774.

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**Military Personnel**

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**Pay**

- Retirement pay
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Set-off

Collection of a debt under 37 U.S.C. § 1007(c), which provides that two thirds of monthly pay may be deducted from members of the uniformed service to repay a debt, rather than 5 U.S.C. § 5514 which limits collection to 15 percent, is appropriate where legislation amending 37 U.S.C. § 1007(c) was enacted subsequent to legislation amending 5 U.S.C. § 5514.

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**B-235158, February 6, 1990**

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**Military Personnel**

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**Pay**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A former Navy member's request for waiver of his debt to the United States arising out of an overpayment of pay for unused leave entitlement is granted. The member questioned the disbursing clerk and the disbursing clerk's supervisor and became convinced that the payment was correct. He therefore was without fault in accepting the erroneous payment.

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**B-235159, February 7, 1990**

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**Military Personnel**

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**Pay**

- Dual compensation restrictions
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

**Military Personnel**

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**Pay**

- Retirement pay
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A retired member who accepted employment with the Veterans Administration and then received overpayments of retired pay in violation of the Dual Compensation Act may not have the overpayments waived, since he had reason to know that the payments were erroneous, the basis of the error, and that the problem was in the process of being corrected.



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**B-233379, February 9, 1990**

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**Military Personnel**

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**Pay**

- Survivor benefits
- ■ Annuity payments
- ■ ■ Eligibility

When a member elects coverage under the Survivor Benefit Plan (SBP) for his spouse and child, the child may not receive the annuity unless the widow becomes ineligible to receive the annuity under 10 U.S.C. § 1450(b). Since a widow of two members cannot receive two SBP annuities but must choose one of them, she becomes ineligible to receive the other. Therefore, a dependent child may receive an annuity if the child is covered under the annuity not chosen by the widow.

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**B-234426, February 23, 1990**

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**Military Personnel**

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**Pay**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A debt arising from the unearned portion of a selective reenlistment bonus does not arise out of an "erroneous payment" and therefore is not subject to consideration for waiver by the Comptroller General under 10 U.S.C. § 2774.

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**B-235837, February 23, 1990**

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**Military Personnel**

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**Pay**

- Retirement pay
- ■ Amount determination
- ■ ■ Computation
- ■ ■ ■ Effective dates

A Navy member who was transferred to the Fleet Reserve in 1976, and subsequently retired in 1983 at grade E-6 with 30 years of service, is not entitled to advancement on the retired list to grade E-7, the highest grade at which he had served, since the statutory authority for such advancement applies only to retirements beginning in December 1987.

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# Miscellaneous Topics

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**B-221129.2, February 23, 1990**

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## Miscellaneous Topics

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### Environment/Energy/Natural Resources

- Environmental protection
- ■ Air quality
- ■ ■ Standards
- ■ ■ ■ Enforcement

While section 112 of the Clean Air Act, 42 U.S.C. § 7412, authorizes the Environmental Protection Agency to take certain specified actions to regulate emissions of hazardous air pollutants, it generally does not authorize the agency to implement the National Clean Air Coalition's recommendations (i.e., requiring hazard assessments and accident prevention standards) for regulating the accidental release of chemical air pollutants.

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**B-237146, February 23, 1990\*\*\***

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## Miscellaneous Topics

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### Federal Administrative/Legislative Matters

- Government corporations
- ■ Construction contracts
- ■ ■ Funding

In overseeing construction of the Federal Triangle Development Project, The Pennsylvania Avenue Development Corporation may have its construction consultants' fees amortized as a cost of construction rather than as an expense of the Corporation because the funds transferred to the Corporation under the Federal Triangle Development Act were intended to cover start-up costs. The Corporation formally notified the required congressional committees of its plan to amortize these costs as a cost of construction and the committees did not object to this arrangement.

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# Procurement

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**B-237029, February 1, 1990**

**90-1 CPD 134**

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## Procurement

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### Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Allegation that proposal was rejected as technically unacceptable due to certain radiological procedures contained in the solicitation which were unduly restrictive and overstated the contracting agency's minimum needs is untimely where the protester did not file its protest until after the award, since the alleged impropriety was apparent from the face of the solicitation.

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## Procurement

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### Competitive Negotiation

- Best/final offers
- ■ Technical acceptability
- ■ ■ Negative determination
- ■ ■ ■ Propriety

Contracting agency reasonably determined that protester's proposal was technically unacceptable where protester was twice advised of certain deficiencies in its proposal and failed to correct these deficiencies in its second best and final offer, since the protester's protest merely reflects its disagreement with the contracting agency's evaluation.

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**B-237164, February 1, 1990**

**90-1 CPD 135**

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## Procurement

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### Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Solicitation requirement for security clearance at time of contract award does not unduly restrict competition where contract performance will involve classified material, and successful completion of the contract would be risked if the successful contractor's personnel were not required to have clearance at that time.

**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Where request for proposals provided that the lowest priced offeror would not necessarily receive award, and that the award would be based on the specific combination of technical merit and cost which is most advantageous to the government, agency properly awarded to higher-rated, higher priced offeror where agency reasonably determined that the technical advantage associated with higher-rated proposal outweighed the price premium.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Cost realism
- ■ ■ Evaluation
- ■ ■ ■ Administrative discretion

Protest against failure to conduct cost analysis using certified cost or pricing data is denied where adequate price competition was obtained and agency did conduct price analysis which showed that proposed price is reasonable in comparison with current or recent prices for the same or substantially the same items.

**Procurement**

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**Sealed Bidding**

- Low Bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

Agency determination allowing a bidder to correct an alleged mistake in its apparent low bid prior to award was proper where the bidder presented clear and convincing evidence establishing both the existence of its mistake and its intended bid price, and the corrected bid would remain low by approximately 6 percent.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that descriptive literature requirement in solicitation was not sufficiently specific filed after protester's bid was rejected for failure to submit such literature is dismissed as untimely because General Accounting Office's Bid Protest Regulations require that protests of alleged solicitation improprieties be filed before bid opening.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Propriety
- ■ ■ Brand name/equal specifications
- ■ ■ ■ Equivalent products

General Accounting Office will not disturb the contracting agency's determination that the awardee's boring and milling machine complies with specification requirement, where the awardee's offer specifically stated that the offered equipment would comply with the specification in question, and commercial literature included with the awardee's offer indicated that the required feature meeting the specification was an optional item commercially available for the offered model.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ GAO review

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**Procurement**

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**Noncompetitive Negotiation**

- Use
- ■ Justification
- ■ ■ Urgent needs

Contracting agency's decision to cancel a request for proposals and to place a delivery order for part of the canceled requirement under an existing contract is reasonable where, in view of unexpected deterioration of supply stock, only one source can meet the agency's urgent need for the item.

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**Procurement**

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**Bid Protests**

- GAO authority

Protest against the award of concession permits for five cruiseship entries into national park is not for consideration under General Accounting Office's bid protest function since it does not concern a procurement by a federal agency of property or services within the scope of the bid protest provisions of the Competition in Contracting Act of 1984.

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**Procurement**

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**Payment/Discharge**

- Shipment
- ■ Carrier liability
- ■ ■ Burden of proof

Shipper's 6-day delay in signing delivery documents does not preclude a claim against the carrier for damage to household goods.

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## **Procurement**

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### **Payment/Discharge**

- **Shipment**
- ■ **Damages**
- ■ ■ **Evidence sufficiency**

Post-delivery movement of shipper's household goods within his residence is not sufficient to demonstrate that damage to the goods occurred after delivery.

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## **B-235118, February 2, 1990**

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## **Procurement**

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### **Payment/Discharge**

- **Shipment costs**
- ■ **Rate schedules**
- ■ ■ **Interpretation**

When applicable rate publication specifically applies a minimum charge to shipments of less than 10,000 pounds that occupy a truck's full visible capacity but is silent with respect to similar shipments of 10,000 pounds or more, there is no basis to conclude that there is any minimum charge on shipments of more than 10,000 pounds.

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## **B-237156, February 2, 1990**

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**90-1 CPD 145**

## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Apparent solicitation improprieties**

Protest allegations that agency improperly reopened discussions, and obtained new best and final offers (BAFOs) constituting an auction, are untimely when filed after award.

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## **Procurement**

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### **Competitive Negotiation**

- **Discussion reopening**
- ■ **Propriety**

Agency's verbal relaxation of requirement to submit resumes for awardee without advising protester of change does not require that negotiations be reopened where, due to awardee's higher technical score and lower price, award decision would remain the same.

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## **Procurement**

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### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Amendments**
- ■ ■ **Notification**
- ■ ■ ■ **Contractors**

Agency's verbal relaxation of requirement to submit resumes for awardee without advising protester of change does not require that negotiations be reopened where, due to awardee's higher technical score and lower price, award decision would remain the same.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Personnel experience
- ■ ■ ■ Point ratings

Where solicitation advises offerors of the total points available for each evaluation factor but also advises that subfactors would not be assigned points, agency reasonably evaluated each member of offerors' proposed staffs, consistent with stated evaluation criteria, by using a position functions matrix to produce a percentage of the total possible points for the staffing technical factor.

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**B-237160.2, February 2, 1990****90-1 CPD 146**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Late submission
- ■ ■ Acceptance criteria
- ■ ■ ■ Government mishandling

Where solicitation incorrectly indicated place for delivery of hand-carried proposals, and agency personnel then misdirected offeror when it attempted delivery of its proposal, government action was the paramount cause of a hand-carried proposal's being submitted several minutes after the time specified in the solicitation for receipt of proposals; lateness therefore properly may be waived and the proposal accepted for award.

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**B-237170, B-237173, February 2, 1990****90-1 CPD 147**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Competitive ranges
- ■ ■ Withdrawal

Where agency erroneously advised protester that its proposals were acceptable and within the competitive range in conducting discussions before the evaluation was completed, the protester was not prejudiced when the agency ultimately and reasonably determined that the proposals were unacceptable, even though the protester had not been apprised of all cited deficiencies during the discussions, since the portions of the proposals which the protester clarified during discussions showed its lack of understanding of the request for proposals (RFPs) requirements.

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**B-237202, February 2, 1990****90-1 CPD 148**

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**Procurement**

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**Contract Management**

- Contract administration
- ■ Default termination
- ■ ■ Propriety
- ■ ■ ■ GAO review

General Accounting Office will not consider the propriety of a contracting agency's decision to terminate a contract for default, since that is a matter for the contracting agency's board of contract appeals under the contract disputes clause.

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## **Procurement**

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### **Contract Management**

- **Contract administration**
- ■ **Default termination**
- ■ ■ **Resolicitation**
- ■ ■ ■ **GAO review**

Generally, statutes and regulations governing regular federal procurements are not strictly applicable to reprocurement after default; General Accounting Office will review reprocurement only to determine if the contracting agency's actions were reasonable in the circumstances.

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## **Procurement**

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### **Competitive Negotiation**

- **Contract awards**
- ■ **Propriety**

Award of replacement contract for repair and maintenance of meat wrapping machines used in commissaries to the second-low offeror under the original procurement after the agency terminated the original contract with the protester for default was reasonable, where: (1) urgent need for repairs to prevent spoilage required that replacement contract be awarded immediately; (2) it was unlikely that there would be any new offerors participating even if a new procurement were conducted because only a short period of time had elapsed between first procurement and award of replacement contract; (3) replacement contract was made at price that was approximately 9 percent lower than replacement contractor's original offer; and (4) agency reasonably concluded that protester was not a potential source for the reprocurement contract in view of its performance problems under the defaulted contract.

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**B-237248, February 2, 1990**

**90-1 CPD 149**

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## **Procurement**

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### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Terms**
- ■ ■ **Interpretation**

Protest that procuring agency improperly determined protester's proposal non-compliant with solicitation requirement is denied where protester's interpretation of requirement is not reasonable or consistent with solicitation as a whole.

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## **Procurement**

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### **Competitive Negotiation**

- **Discussion**
- ■ **Adequacy**
- ■ ■ **Criteria**

Agency conducted meaningful discussions where it directed protester to area in which its proposal was noncompliant with minimum solicitation requirement; procuring agency is not required to notify offerors of deficiencies remaining in their best and final offers or conduct successive rounds of discussions until such deficiencies are corrected.



**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest that awardee did not meet solicitation requirement that all houses should be built facing south is denied where protester has not shown that solicitation requirement that houses be oriented within 20 degrees of south, such that a major section of the roof faces within 20 degrees of south, could reasonably be read as requiring that the front of each house must face south.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Designs
- ■ ■ Evaluation
- ■ ■ ■ Technical acceptability

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest that awardee did not meet solicitation requirement that a major section of house roof face within 20 degrees of south is denied where agency reasonably found that awardee's proposal substantially complied with the requirement and the protester was not prejudiced by the agency's acceptance of the proposal.

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ GAO review

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Designs
- ■ ■ Evaluation
- ■ ■ ■ Technical acceptability

Protest that awardee's plans did not meet Uniform Federal Accessibility Standard concerning wheelchair turning space in its bathrooms for the handicapped is denied where agency architect concluded that awardee met the requirement and our review of the requirement does not provide us with any basis to question that determination.

**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Disadvantaged business set-asides
- ■ ■ Preferences
- ■ ■ ■ Computation

Protest against the application of the small disadvantaged business evaluation preference to only the cost adjustment factors in a procurement for natural gas is denied where the method employed constitutes a reasonable application by the Air Force of the 10 percent preference called for under its regulations, to a contract which incorporates index pricing, by limiting the preference to those portions of the contract which are actually priced by the offerors, and for which the amount paid does not fluctuate.

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Descriptive literature
- ■ ■ ■ Adequacy

Bid was properly rejected as nonresponsive where descriptive literature was required to establish conformance to the solicitation's specifications, and protester not only failed to submit all of the required descriptive literature, but also submitted literature which indicated that its offered product did not conform to the specifications.

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**Procurement**

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**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Evaluation
- ■ ■ Discussion
- ■ ■ ■ Propriety

Where protester alleges that a firm that evaluated bids for the contracting agency, under contract, engaged in discussions with other bidders in order to disqualify the protester's bid, but fails to provide any evidence in support of its allegation, there is no basis for concluding that the protester's bid was improperly evaluated.

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Ambiguity

Where a bidder certifies in a total small business set-aside both that it will furnish only end items manufactured or produced by domestic small business concerns, and, in its Buy American certificate, that it would supply non-domestic end products, its bid is nonresponsive since it is not clear from the bid documents whether the bidder will comply with the set-aside requirement to supply only items manufactured or produced in the United States.

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Competency certification
- ■ ■ Applicability

Certification concerning a bidder's obligation to furnish products manufactured or produced by a domestic small business is a matter of responsiveness and is not an issue to be referred to the Small Business Administration since it does not concern a bidder's representation that it is a small business.

**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Price reasonableness

Contracting officer's decision to cancel invitation for bids (IFB) based on unreasonableness of bid prices was proper where low bid exceeded the government estimate by 71 percent and there is no showing that the decision to cancel was unreasonable or based on bad faith on the part of contracting officials.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Propriety

Where cancellation of solicitation is in accord with governing legal requirements, the agency does not create an impermissible auction on resolicitation.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that an amendment to the solicitation should not have been issued and that discussions should have been conducted is untimely when not filed prior to the closing date for revised proposals.

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
- ■ Price disclosure
- ■ ■ Allegation substantiation

Protest that price disclosure was improper based solely on a price reduction in the awardee's best and final offer is denied.

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Pre-award surveys
- ■ ■ ■ Administrative discretion

Assertion that the agency did not conduct a proper preaward survey of the awardee is denied, since the decision to survey is within the discretion of the contracting officer.

**Procurement**

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**Contract Management**

- Contract administration
- ■ Convenience termination
- ■ ■ Administrative determination
- ■ ■ ■ GAO review

Termination of requirements contract for the convenience of the government was not improper where shortly after award agency discovered that solicitation was defective because it failed to provide estimates for any of the specific services to be performed such that the agency could not determine which bid represented the lowest cost to the government.

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
  - ■ Price disclosure
  - ■ ■ Allegation substantiation
- 

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
- ■ Price disclosure
- ■ ■ Contractors
- ■ ■ ■ Competitive restrictions

Agency may reject proposal of offeror who takes exception in its best and final offer to Certificate of Independent Price Determination and explains the circumstances of an exchange of pricing information with another offeror, where the agency determines the exchange had the effect of restricting competition.

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**B-237288, February 7, 1990**

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Submission methods
- ■ ■ ■ Procedural defects

Bid modification written on outside of bid envelope does not render bid nonresponsive where bid complied with all material requirements of the solicitation.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Interpretation
- ■ ■ ■ Intent

Contracting agency may consider a downward bid modification written on the bid envelope where agency's procedures for inspecting bid documents are sufficiently thorough that agency would have discovered the notation on the bid envelope regardless of whether the bidder called it to the agency's attention, and it was clear that the modification was not an internal note since it was signed by the individual responsible for preparing the bid.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Interpretation
- ■ ■ ■ Intent

Where bid modification is written on outside of bid envelope and is signed with the initials of the person who signed the bid, the contracting agency reasonably assumed that the person whose initials accompanied the modification signed the modification himself, not through an agent.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
  - ■ Terms
  - ■ ■ Service contracts
  - ■ ■ ■ Applicability
- 

**Procurement**

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**Special Procurement Methods/Categories**

- Service contracts
- ■ Terms

Contracting officer properly determined—consistent with the view of the Department of Labor, the agency charged with implementing the Walsh-Healey Act—that the Walsh-Healey Act does not apply to contract for rental of personal property since such a contract does not involve “furnishing” equipment within the meaning of the act. 19 Comp. Gen. 486 (1939), affirmed.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

Determination after bid opening that Walsh-Healey Act does not apply to contract for rental of personal property, despite inclusion of Walsh-Healey requirements in the invitation for bids (IFB), does not require cancellation of IFB, since there is no indication that competition was restricted due to inclusion of Walsh-Healey requirements and no bidders were prejudiced by agency’s subsequent determination to waive Walsh-Healey requirements.

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Disadvantaged business set-asides
- ■ ■ Preferences
- ■ ■ ■ Computation

General Accounting Office denies protest concerning the proper method of applying the small disadvantaged business preference to procurements of natural gas where the identical issue was resolved in a recent and previous protest involving the same agency and the same type of procurement.

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**Procurement**

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**Sealed Bidding**

- Bids
  - ■ Responsiveness
  - ■ ■ Determination criteria
- 

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Terms
- ■ ■ Interpretation
- ■ ■ ■ Alternate bids

Bidder's failure to bid on alternate item which was not selected for award by procuring activity does not render bid nonresponsive.

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**B-237892, February 7, 1990**

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**Procurement**

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**Payment/Discharge**

- Federal procurement regulations/laws
- ■ Amendments
- ■ ■ Personnel
- ■ ■ ■ Fringe benefits

General Accounting Office (GAO) is in favor of a change proposed in Federal Acquisition Regulation (FAR) case No. 89-70 that would amend FAR section 31.205-6(m) to provide that the costs of postretirement benefits other than pensions are allowable only if paid currently. GAO has no objection to other changes relating to fringe benefits proposed in FAR case 89-70.

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**Procurement**

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**Payment/Discharge**

- Federal procurement regulations/laws
- ■ Revision
- ■ ■ Payment procedures
- ■ ■ ■ Taxes

General Accounting Office has no objection to Federal Acquisition Regulations (FAR) case No. 89-73, a proposal to revise various provisions in FAR Parts 29 and 52 concerning dollar values relating to taxes.

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**B-237157.2, February 8, 1990**

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**Procurement**

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**Sealed Bidding**

- Low bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

Procuring agency properly denied protester's request for upward correction of its low bid because of an error in its subcontractor quote where the protester established that a mistake had been made but did not submit clear and convincing evidence of its intended bid.

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## Procurement

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### Sealed Bidding

- Low bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

Agency properly rejected the protester's bid—which may have been low because of a mistake—where the protester first alleges that it made a mistake and then seeks to abandon or waive the claim of mistake, and it is not clear that the bid would have been low regardless of any mistake.

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**B-237166, B-237166.2, February 8, 1990**

**90-1 CPD 163**

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## Procurement

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### Sealed Bidding

- Two-step sealed bidding
- ■ Offers
- ■ ■ Rejection
- ■ ■ ■ Propriety

Protester's proposal under modified two-step procurement was properly rejected as technically noncompliant where protester was given notice of potential areas where its proposal did not comply with essential requirements of the solicitation and failed to correct those areas.

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## Procurement

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### Sealed Bidding

- Two-step sealed bidding
- ■ Offers
- ■ ■ Competitive ranges
- ■ ■ ■ Exclusion

The General Accounting Office will not question the exclusion of the protester's proposal as non-compliant where the proposal was reasonably found deficient with respect to essential requirements of the solicitation.

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**B-237183, February 8, 1990**

**90-1 CPD 164**

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest is sustained where agency failed to discuss with offerors spare parts requirement contained in RFP for facsimile machines and related items in spite of evidence in the proposals that the offerors had widely divergent views as to what was required which was reflected in some offerors pricing requirement 40 times higher than awardee.



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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Unapparent solicitation improprieties

Even though contracting officials erroneously advised the protester that an evaluation preference for small disadvantaged business (SDB) concerns would be applicable to a forthcoming procurement, where the solicitation contained no SDB provision because the procurement was exempted from the requirement by regulation, a protest of the lack of an SDB preference is untimely when filed after the bid opening date.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest filed more than 10 days after protester was orally informed that its agency-level protest had been denied is untimely; protester may not delay filing its protest until it has received the agency decision in writing.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Price omission
- ■ ■ ■ Options

Bid that fails to include prices for option years is nonresponsive and must be rejected where the invitation requires such prices and provides that they will be evaluated for award.

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**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Agency may determine individual surety unacceptable, without discussions, where the agency reasonably determines that the surety's claimed equity in jointly-owned real estate, which the surety listed on his SF-28, Affidavit of Individual Surety, is not an asset that should be considered in determining the surety's net worth and, absent this asset or the protester's identification of any

other acceptable assets, the surety has insufficient net worth to cover the potential bond obligations.

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**B-237208, February 9, 1990**

**90-1 CPD 169**

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**Procurement**

**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Award to offeror having higher-cost, technically excellent proposal under request for proposals which gave greater weight to technical merit compared with cost advantage is justified where contracting agency reasonably determined that acceptance of proposal was worth the higher cost involved.

---

**Procurement**

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

It was not unreasonable for the contracting agency to consider personnel experience in evaluating proposals under "experience of the offeror" evaluation standard since: (1) the standard did not contain a statement limiting evaluation to institutional (offeror) experience; (2) the evaluation standard contained two substandards which could arguably be fulfilled by individual employees; and (3) only one aspect of one key employee was to be elsewhere evaluated under the request for proposals.

---

**Procurement**

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel

Since proposed Project Manager director of successful offeror provided unequivocal offer to be employed by successful offeror at a stated hourly labor hour cost figure, contracting agency properly evaluated proposed individual as being committed to offeror.

---

**Procurement**

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

Request for proposals clause which required proposed Project Manager for contract to have performed relevant projects "in the past year, on a full-time basis" reasonably conveyed contracting agency's intent that Project Manager has worked on a full-time basis on relevant projects for at least part of the year, but clause did not reasonably require full-time work for the entire year as protester argues.

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## Procurement

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### Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Allegation that contracting agency improperly disclosed names of incumbent contractor's personnel to competitor for recruitment purpose is denied where it is speculative, at best. Contracting agency denies disclosing incumbent's staff names; moreover, there are many ways for contracting companies to identify individuals for recruitment purposes.

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## Procurement

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### Competitive Negotiation

- Contracting officer duties
- ■ Contract award notification

Failure of contracting agency to give written, preaward notice of award is not significant where agency did give oral, pre-award notice of award.

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## Procurement

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### Contract Management

- Contract administration
- ■ GAO review

Successful offeror's difficulties in staffing contract after award relate to contract administration and are not for consideration under Bid Protest Regulations, 4 C.F.R. Part 21 (1989). *See* 4 C.F.R. § 21.3(m)(1).

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## B-237328, February 9, 1990\*\*\*

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## Procurement

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### Socio-Economic Policies

- Small businesses
- ■ Disadvantaged business set-asides
- ■ ■ Eligibility
- ■ ■ ■ Determination

Agency properly rejected joint venture under small disadvantaged business (SDB) set-aside where agency reasonably determined that SDB member of joint venture did not control at least 51 percent of venture as evidenced by the SDB member's lack of the financial capability to obtain necessary bonds, lack of funds to handle its financial commitments, lack of experience and technical resources to handle its portion of the contract, and the non-SDB member's maintenance of all record keeping for the venture.

**Procurement**

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**Bid Protests**

- Moot allegation
  - ■ GAO review
- 

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Late submission
- ■ ■ Rejection
- ■ ■ ■ Propriety

Protest that late bid should not have been rejected is dismissed as academic where record indicates that bid was not low and that protester thus would not be in line for award even if General Accounting Office found that bid should have been accepted.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Under solicitations that call for award on the basis of the best overall value to the government, with primary consideration given to technical merit, agency source selection officials have broad discretion to make cost/technical tradeoffs; such tradeoffs need only have a rational basis.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

In evaluating the corporate experience of a new business, an agency may, but is not obligated to, consider the prior related experience of a principal officer.

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Competency certification
- ■ ■ Applicability

Certificate of competency (COC) procedures do not apply where a small business firm's offer in a negotiated procurement is considered weak under technical evaluation factors relating to experience and past performance, since the COC program is for reviewing nonresponsibility, not the comparative evaluation of technical proposals.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Royalties
- ■ ■ ■ Cost evaluation

Protest is denied where record supports propriety of agency's use of alternate authorization and consent clause in solicitation (which does not include explicit royalty or patent indemnification requirements) where agency reasonably challenges process patent held by protester, due to rights obtained by the government in the patented process under protester's prior subcontract with prime government contractor.

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**Procurement**

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**Bid Protests**

- Patent infringement
- ■ GAO review

Exclusive remedy for patent infringement is to bring an action in United States Claims Court against government for money damages under 28 U.S.C. § 1498 (1982).

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Materiality

An amendment which incorporates into an invitation for bids (IFB) a Federal Acquisition Regulation provision detailing the order of precedence to be given in instances of conflicting contract interpretations is material since it gives the government the right to reconcile conflicts which otherwise would not be available to it and therefore changes the legal relationship between the parties.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Waiver

Bidder's failure to acknowledge a material amendment to a solicitation which also extended the bid opening date may not be waived where the bid contains only the previous bid opening date

since the mere submission of the bid on the amended bid opening date is not sufficient to show that bidder intended to be bound by the terms of the amendment.

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**B-237752, February 9, 1990**

**90-1 CPD 175**

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

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**Procurement**

**Sealed Bidding**

- Invitations for bids
- ■ Competition rights
- ■ ■ Contractors
- ■ ■ ■ Exclusion

Protest against nonreceipt of solicitation is dismissed as untimely where protest is filed more than 2 months after bid opening, and protester allowed 3 months to expire without inquiry concerning whereabouts of solicitation.

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**B-238074, February 9, 1990**

**90-1 CPD 176**

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**Procurement**

**Small Purchase Method**

- Contract awards
- ■ Propriety
- ■ ■ Contractors
- ■ ■ ■ Identification

General Accounting Office denies protest concerning the propriety of award to a firm under a name which includes a phrase in addition to its corporate name where the identical issue was resolved in a recent decision on a protest by the same protester and involving the same relevant set of factual circumstances.

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**B-236687.2, February 12, 1990**

**90-1 CPD 177**

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**Procurement**

**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

Protest challenging agency's determination that awardee will be able to perform the contract by supplying equipment conforming to the specifications involves the issue of the awardee's responsibility, the affirmative determination of which General Accounting Office will not review absent a showing of possible fraud or bad faith on the part of the procurement officials or that definitive responsibility criteria in the solicitation were misapplied.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest against apparent solicitation improprieties— agency inclusion of an allegedly unqualified producer as an approved source and alleged “flaw” in specifications—is untimely when filed after bid opening.

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

Protest concerning capability of bidder to manufacture product is dismissed as involving a matter of affirmative responsibility which is not for review except in circumstances not applicable here.

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**Procurement**

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**Contract Management**

- Contract administration
- ■ Contract terms
- ■ ■ Compliance
- ■ ■ ■ GAO review

Whether product delivered meets contract requirements involves a matter of contract administration which is not for review under the bid protest function.

**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Competitive ranges

Protest is sustained where agency discovered after award that awardee’s item was noncompliant with solicitation requirements, and proposes to modify contract by giving awardee opportunity to make its proposal acceptable; since agency’s intended action would constitute reopening of discussions with awardee, agency is obligated to conduct discussions with all offerors in the competitive range.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Contracting agency properly rejected protester's proposal from the competitive range as technically unacceptable where the proposal contained significant technical deficiencies under the solicitation's most heavily weighted technical evaluation factors and required major revisions in order to be made acceptable.

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**B-237359, February 12, 1990**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest alleging that provisions in request for proposals (RFP) are overly restrictive and favor a particular offeror is untimely where the alleged RFP defects were apparent prior to the closing date for receipt of initial proposals but the protest was not filed with either the contracting agency or the General Accounting Office until well after the closing date.

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**Procurement**

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**Competitive Negotiation**

- Hand-carried offers
- ■ Late submission
- ■ ■ Acceptance criteria

Agency properly rejected late hand-carried proposal where the record establishes that the protester delivered the proposal to the depository room after the closing time; shows no evidence of wrongful government action or advice that caused the proposal to be delivered late; and reflects that the protester's own actions were the cause of the late delivery.

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**B-237531, February 12, 1990**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Technical acceptability
- ■ ■ Evidence
- ■ ■ ■ Submission time periods

Offeror who initially took exception to a number of solicitation requirements was properly found technically acceptable where offeror explicitly withdrew all exceptions in its best and final offer, except for one exception with respect to which the agency had incorporated the offeror's proposed alternative into the solicitation by amendment.



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## **Procurement**

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### **Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

Contracting agency's affirmative determination of responsibility is not reviewed by the General Accounting Office absent a showing of possible fraud or bad faith, or misapplication of definitive responsibility criteria specified in the solicitation.

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## **B-237658, February 12, 1990**

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## **Procurement**

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### **Payment/Discharge**

- Shipment
- ■ Carrier liability
- ■ ■ Burden of proof

A carrier is not responsible for damage to a shipment caused solely by the operation of natural laws, under the exception to a carrier's liability for damage resulting from "the inherent vice or nature" of the item. The exception does not apply, however, simply because humidity may have contributed to the carrier's packing material sticking to an item of furniture's finish during the 2-day transit, where the carrier has not refuted the suggestion in the record that the damage was caused by the poor quality of the packing material and/or labor, or established that there was anything about the furniture finish that led to the problem.

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## **B-238399, February 12, 1990**

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**90-1 CPD 183**

## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Preparation costs

There is no basis for recovery of bid preparation costs claimed in connection with canceled timber sale where claimant has not protested the propriety of the cancellation, since costs will be awarded only in conjunction with decision on the merits of a protest finding improper agency action.

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## **B-234006.2, February 13, 1990**

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**90-1 CPD 184**

## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency properly awarded contract to low, technically acceptable offeror where protester's allegation that awardee's proposal fails to establish intent to comply with performance specifications is not supported by record.

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Inclusion
- ■ ■ ■ Administrative discretion

Agency reasonably retained higher-priced offeror in the competitive range where only two offerors remained and acceptability of lower-priced offeror was not assured.

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**B-236371.2, February 13, 1990**

**90-1 CPD 185**

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## Procurement

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### Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester simply reiterates arguments previously raised and considered and raises new arguments which fail to show any error of fact or law that would warrant reversal or modification of prior decision.

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**B-237254, February 13, 1990**

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

General Accounting Office will not disturb an agency's decision to exclude a protester from the competitive range on grounds that it had no reasonable chance for award when, considering the relative superiority of the other proposals, this determination was reasonable.

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**B-237276, B-237277, February 13, 1990**

**90-1 CPD 186**

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## Procurement

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### Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ GAO review

Whether evidence of offeror's employees' lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the administrative officers concerned; General Accounting Office will not question determination where protester fails to establish that there is no reasonable basis for it.

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## Procurement

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### Contractor Qualification

- De facto debarment
- ■ Non-responsible contractors

Agency's nonresponsibility determinations with respect to two prospective contracts does not amount to *de facto* suspension or debarment, where the findings of nonresponsibility involved

practically contemporaneous procurements and were based on current information concerning the protester's business integrity.

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**B-237335, February 13, 1990**

**90-1 CPD 187**

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**Procurement**

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Deviation

The award of a contract under a solicitation for sealed bids must be made on the same terms as were offered to all bidders by the solicitation. A bid which includes a provision requiring payment before delivery when the delivery is delayed and which was not included in the solicitation is non-responsive.

---

**Procurement**

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Determination time periods

A provision included in bid which renders the bid nonresponsive cannot be cured as a mistake, waived or deleted since a nonresponsive bid cannot be made responsive after bid opening.

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest filed after bid opening and award that the terms of the solicitation were vague and ambiguous is untimely since a protest concerning an alleged impropriety which is apparent on the face of a solicitation must be filed before bid opening.

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**B-237337, February 13, 1990**

**90-1 CPD 189**

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**Procurement**

**Competitive Negotiation**

- Offers
- ■ Technical acceptability
- ■ ■ Negative determination
- ■ ■ ■ Propriety

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**Procurement**

**Contractor Qualification**

- Licenses
- ■ Determination time periods

Where solicitation required that an offeror must be an institution accredited by an institutional accrediting body recognized by the Council on Postsecondary Education, proposal from a secondary school which did not have the required accreditation was properly rejected as unacceptable.

**Procurement**

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**Sealed Bidding**

- Invitations for bids
  - ■ Cancellation
  - ■ ■ Justification
  - ■ ■ ■ Price reasonableness
- 

**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Cancellation
- ■ ■ Reinstatement
- ■ ■ ■ Propriety

Protest challenging cancellation of invitation for bids set aside for small disadvantaged businesses on ground that low bid exceeded fair market prices of the items being acquired by more than 10 percent is sustained where the contracting agency failed to consider pricing information contained in a government-issued catalog of unit prices which indicated that the fair market prices of the items were significantly higher than the agency estimated.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Omission

Protest against proposed award of a contract to a bidder that failed to complete and sign the Procurement Integrity Certificate is denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for the Certificate has been suspended from December 1, 1989 to November 30, 1990 and current regulatory guidance requires agencies to ignore the Certificate in determining eligibility for award.

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Corrective actions

Protest against agency decision to reopen discussions is denied where agency determined that previous request for revised proposals did not provide effective notice to offerors that they were expected to submit best and final offers, and record supports agency's decision to take corrective action.

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## **Procurement**

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### **Competitive Negotiation**

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Corrective actions

Protest that proposed agency corrective action of reopening discussions is inadequate and that protester should receive award based on initial proposals is denied where record shows that initial proposals were neither technically acceptable nor most advantageous to the government from a price standpoint.

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## **B-237295, February 14, 1990\*\*\***

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Cost evaluation

Contracting agency's mechanical application of an undisclosed man-hour estimate to determine the acceptability of offers for a fixed-price contract is unreasonable where the agency rejected offers without discussing the discrepancy between the offerors' estimates and the government's estimate, and did not, in accordance with the requirements of the solicitation, assess the realism of the offerors' lower prices or otherwise evaluate the offerors' technical approaches.

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## **Procurement**

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### **Competitive Negotiation**

- Contract awards
- ■ Initial-offer awards
- ■ ■ Propriety

Where agency cannot reasonably conclude that awards represented the lowest overall costs to the government, agency cannot make award on the basis of initial proposals.

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## **B-237320, February 14, 1990**

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## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Amendments
- ■ ■ Propriety

Protest that amendment of solicitation improperly reopened the competition for a second round of best and final offers (BAFOs) is denied where contracting agency had a compelling reason to request second round of BAFOs.

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## Procurement

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### Competitive Negotiation

- Unbalanced offers
- ■ Materiality
- ■ ■ Determination
- ■ ■ ■ Criteria

Awardee's offer for minimum and indefinite quantity basic and option quantities is not materially unbalanced where the protester fails to show that the offer contained enhanced prices, that the total maximum quantities evaluated were not reasonably expected to be exercised, and that award to the firm will not result in the lowest ultimate cost to the government.

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**B-237327, February 14, 1990\*\*\***

**90-1 CPD 191**

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

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## Procurement

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### Special Procurement Methods/Categories

- Computer equipment/services
- ■ Contract terms
- ■ ■ Compliance
- ■ ■ ■ Computer software

Procuring agency failed to conduct meaningful discussions with the protester where the agency's technical concerns, which resulted in the elimination of the protester from the competitive range, were discovered during an on-site demonstration of the protester's software conducted after receipt of best and final offers and the agency failed to point out these concerns to allow the protester the opportunity to explain or retest the questioned aspects of the software.

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**B-237354, February 14, 1990**

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Agency reasonably found that an offeror did not demonstrate an understanding of agency requirements where offeror was determined to have provided insufficient manhour effort and time to accomplish the development, design, fabrication, and testing of military antenna assemblies.

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Discussions are meaningful where agency imparted sufficient information to protester to afford it a fair and reasonable opportunity in the context of the procurement to identify and correct deficiencies in its proposal.

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**B-237366, B-237366.2, February 14, 1990**

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

General Accounting Office will not review a protest of an affirmative determination of responsibility absent a showing that it was made fraudulently or that definitive responsibility criteria set out in the solicitation were not met.

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Discussions were meaningful where agency imparted sufficient information to protester to afford it a fair and reasonable opportunity to identify and correct any deficiencies in its proposal and written discussion questions were designed to guide protester into those portions of its proposal that required clarification, additional support or modification.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Cost realism
- ■ ■ Evaluation
- ■ ■ ■ Administrative discretion

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Non-prejudicial allegation

Protest that agency improperly raised protester's proposed costs in cost evaluation for cost-type contract without holding discussions with protester concerning alleged cost deficiencies is denied, where the contracting agency reasonably relied upon findings of Defense Contract Audit Agency that protester's costs were understated, and record shows that protester was not competitively prejudiced in any event.

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**B-238411, February 14, 1990**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest is untimely where not filed until 2 months after protester received information from contracting agency pursuant to Freedom of Information Act which put protester on notice of grounds of protest.

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**Procurement**

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**Specifications**

- Brand name/equal specifications
- ■ Equivalent products
- ■ ■ Salient characteristics
- ■ ■ ■ Descriptive literature

Where brand name or equal solicitation required descriptive material for equal offers in order to establish technical equivalency and two rounds of discussions were held, protester had ample opportunity to submit sufficient descriptive literature; agency was not required to remind offeror to furnish necessary information in its final proposal.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Propriety
- ■ ■ Brand name/equal specifications
- ■ ■ ■ Upgrades

Under brand name or equal procurement for ruggedized disk drive components, award to brand name manufacturer based on upgraded components (new, state-of-the-art technology, 96 percent greater disk storage capacity than specified brand name equipment, and a 23 percent greater price), was proper where no other technically acceptable offers were received and agency reasonably determined there would be no different competition for the upgraded components.

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**B-237991, February 15, 1990**

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ GAO review

General Accounting Office denies protest concerning an agency's rejection as technically unacceptable of an offered product where the identical issue was resolved in a recent decision on a protest by the same protester involving the same relevant set of factual circumstances.

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**B-238458, February 15, 1990**

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**Procurement**

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**Bid Protests**

- Private disputes
- ■ GAO review

The General Accounting Office will not consider a matter that is essentially a dispute between private parties.



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**B-238507, February 15, 1990**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Adverse agency actions

A protest to the General Accounting Office that was not filed within 10 days after protester should have known of initial adverse agency action on agency-level protest is untimely.

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**B-234619, February 16, 1990\*\*\***

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**Civilian Personnel**

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**Travel**

- Overseas travel
- ■ Travel modes
- ■ ■ Domestic sources
- ■ ■ ■ Air carriers

Under travel arrangements made by his agency, a U.S. Information Agency employee traveled from Costa Rica to Greece on foreign air carriers, although under an alternate routing he could have traveled part of the way on a U.S. carrier. The employee should not be assessed a penalty for violating the Fly America Act, 49 U.S.C. App. § 1517, because he is an employee of an agency covered by an exception to the act, 49 U.S.C. App. § 1518, for travel between points outside the United States. Although it is within the agency's discretion to limit use of the exception, applicable agency regulations do not make the exception inapplicable to this travel.

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**Civilian Personnel**

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**Travel**

- Overseas travel
- ■ Travel modes
- ■ ■ Domestic sources
- ■ ■ ■ Air carriers

A U.S. Information Agency employee being transferred from California to Greece was required to stop in Washington, D.C., for 7 days of consultation. He was then routed by his agency on a U.S. air carrier from Washington, D.C., to Frankfurt, Germany, and by foreign carrier on to Greece, because U.S. carrier service for the entire distance was not available on the day he traveled, although it was available 5 days a week. The Comptroller General's Fly America Guidelines do not specifically require a delay in beginning travel in these circumstances. The Foreign Affairs Manual provides generally that scheduling the use of U.S. carriers is expected for transfer travel or when the traveler has flexibility. However, this general policy statement does not support a penalty against the employee in this case since the agency scheduled his travel and apparently concluded that the travel could not be delayed.

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**B-235664.2, February 16, 1990**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior decision—holding that desire to obtain enhanced competition by relaxing delivery schedule and geographic restriction constitutes a compelling reason to cancel

solicitation and resolicit where only one responsive bid was received—is denied where protester essentially restates its prior arguments and does not show that the decision was based on error of fact or law.

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**B-237010.2, et al., February 16, 1990**

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Evaluation
- ■ ■ Price reasonableness
- ■ ■ ■ Administrative discretion

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Government estimates
- ■ ■ Defects
- ■ ■ ■ Allegation substantiation

Protest that government estimate is unreasonably low is denied where the contracting agency's explanation of the estimate demonstrates that it is reasonable.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Defects
- ■ ■ Evaluation criteria
- ■ ■ ■ Pricing

Protest that evaluation of bids is improper is sustained where there is no assurance that the award will be based on the lowest cost to the government.

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**B-237166.4, B-237166.5, February 16, 1990**

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**Procurement**

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**Sealed Bidding**

- Two-step sealed bidding
- ■ Offers
- ■ ■ Rejection
- ■ ■ ■ Propriety

Protester's proposal under modified two-step procurement was properly rejected as technically noncompliant where protester was given notice of potential areas where its proposal did not comply with essential requirements of the solicitation and failed to correct those areas.

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## **Procurement**

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### **Sealed Bidding**

- **Two-step sealed bidding**
- ■ **Offers**
- ■ ■ **Rejection**
- ■ ■ ■ **Propriety**

The General Accounting Office will not question the exclusion of the protester's proposal as non-compliant where the proposal was reasonably found deficient with respect to essential requirements of the solicitation.

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**B-237361, February 16, 1990**

**90-1 CPD 193**

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## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Apparent solicitation improprieties**

Protest against alleged apparent solicitation impropriety—inclusion of extended prices for line items for which allegedly inaccurate estimated quantities had been provided, as part of price for purpose of calculating low bid—is untimely when first raised by protester after bid opening.

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**B-237368, February 16, 1990**

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## **Procurement**

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### **Competitive Negotiation**

- **Offers**
- ■ **Competitive ranges**
- ■ ■ **Exclusion**
- ■ ■ ■ **Administrative discretion**

Where solicitation read as a whole advised offerors that a proposal complying with only one of the requirements concerning computer operating systems and host computers would be considered only if the agency received no proposal that complied with all of the requirements, and awardee submitted proposal complying with all requirements, agency properly rejected the awardee's proposal that met only one requirement.

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## **Procurement**

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### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Terms**
- ■ ■ **Compliance**

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## **Procurement**

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### **Special Procurement Methods/Categories**

- **Computer equipment/services**
- ■ **Contract terms**
- ■ ■ **Compliance**
- ■ ■ ■ **Computer software**

Protest that awardee's proposed computer software failed to comply with requirement for "formal" language is denied where protester fails to demonstrate that the agency acted unreasonably in determining that the offered software was compliant.

**Procurement**

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**Competitive Negotiation**

- Below-cost offers
- ■ Acceptability

Although protester contends that awardee cannot perform contract for the price it proposed, since in awarding contract the agency concluded that awardee could perform at the offered price and necessarily determined that the firm was responsible, awardee's alleged below cost offer is no basis to overturn award.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest filed after award that contract should not have been awarded based on fixed-price offers is untimely since it was clear from the face of the solicitation that a fixed-price contract would be awarded and under Bid Protest Regulations protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that date.

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**Procurement**

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**Bid Protests**

- GAO authority

General Accounting Office's authority to decide bid protests encompasses only protests relating to particular procurements; protest of agency's general procurement practices will therefore not be considered.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

In reviewing protests concerning the evaluation of proposals, the General Accounting Office will not substitute its judgment for that of the agency's evaluators but will examine the record to determine whether the evaluators' judgments were reasonable and in accordance with the listed criteria. Moreover, the protester must show that the evaluation was unreasonable and mere disagreement with the agency does not render the evaluation unreasonable.

**Procurement**

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**Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Sole-source award of a contract is proper where the contracting agency reasonably determined that only one source could supply the required item, a quantitative method for measuring aflatoxin levels in grain, and complied with the statutory procedural requirements for a sole-source award.

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**B-237532, February 16, 1990**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest challenging Buy American Act requirements in an invitation for bids as ambiguous is untimely when filed after bid opening.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Additional information
- ■ ■ ■ Post-bid opening periods

Agency properly rejected protester's apparent low bid as nonresponsive because of the firm's failure to submit a list of the quantity and price of each foreign item proposed, as required for a Buy American Act evaluation in a construction contract. Such information could not be submitted after bid opening since it would allow the protester the opportunity to manipulate its bid so it could either accept or decline award of the contract.

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**B-237537, February 16, 1990**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

In assessing the relative desirability of proposals and determining which offer should be accepted for award, the contracting agency enjoys a reasonable range of discretion, and the General Accounting Office has no basis to question the agency's selection of an offeror other than the protester, the incumbent, where the protester submitted a sketchy technical proposal which only summarily addressed the solicitation's evaluation criteria.

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**B-237558, February 16, 1990**

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**Procurement**

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**Special Procurement Methods/Categories**

- Federal supply schedule
- ■ Multiple/aggregate awards
- ■ ■ Mandatory use

Protest that requirements set forth in a request for quotations (RFQ), issued in conjunction with a mandatory, multiple award Federal Supply Schedule (FSS) contract, exceed the FSS specifications is denied where the RFQ merely particularized the issuing activity's minimum needs, and the stated requirements do not conflict with the FSS.

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## Procurement

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### Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that requirements set forth in a request for quotations (RFQ), issued in conjunction with a mandatory, multiple award Federal Supply Schedule (FSS) contract, exceed the FSS specifications is denied where the RFQ merely particularized the issuing activity's minimum needs, and the stated requirements do not conflict with the FSS.

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## Procurement

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### Small Purchase Method

- Requests for quotations
- ■ Evaluation criteria
- ■ ■ Sufficiency

Protest that agency failed to provide necessary evaluation factors is denied where the solicitation clearly sets forth the formula which will be used to determine the lowest weighted price.

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## B-237632, February 16, 1990\*\*\*

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## Procurement

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### Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Subcontracts
- ■ ■ ■ Small businesses

Agency properly included provision in request for proposals (RFP) requiring that the company awarded a supply contract under a small business set-aside perform at least 50 percent of the cost of manufacturing the supplies called for by RFP since provision implements the requirements of the Small Business Act.

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## B-237677, February 16, 1990

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## Procurement

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### Competitive Negotiation

- Requests for proposals
- ■ Competition rights
- ■ ■ Contractors
- ■ ■ ■ Exclusion

In an emerging small business set-aside, under small purchase procedures, agency's failure to solicit protester does not constitute an adequate reason to cancel and reissue the solicitation where the protester was not deliberately excluded from the competition, adequate competition was obtained, and the apparent low offer is reasonably priced.

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**B-237208.2, February 20, 1990\*\*\***

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Contract awarded for "on-site research animal colony support" to offeror submitting higher proposed cost proposal was reasonable where contracting agency found higher cost proposal to contain excellent merit compared with protester's lower cost, lower scored technical proposal and contracting agency further found that technical merit in higher cost proposal was worth the financial premium involved.

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**B-237306.2, February 20, 1990**

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency satisfied obligation to conduct meaningful discussions where it imparted sufficient information to protester with regard to various perceived weaknesses to afford it a fair and reasonable opportunity, in the context of the procurement, to identify and correct the deficiencies in its proposal.

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**B-237331, B-237331.2, February 20, 1990**

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**90-1 CPD 195**

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Point ratings

Where a solicitation lists construction experience and financial condition as technical evaluation factors to be scored up to a maximum of 300 points, there is no merit to the contention that the agency was required to award the full 300 points to all qualified, responsible offerors.

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**B-237363, February 20, 1990**

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**Procurement**

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**Contractor Qualification**

- Responsibility
  - ■ Contracting officer findings
  - ■ ■ Negative determination
  - ■ ■ ■ GAO review
- 

**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability
- ■ ■ ■ Information submission

Contracting agency reasonably determined bidder to be nonresponsible where bidder's individual sureties were found to be unacceptable based on information contained in their affidavits and an ongoing federal investigation which cast doubt on their credibility and integrity.

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**B-237454, B-237454.2, February 20, 1990**

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Responsiveness
- ■ ■ Descriptive literature

Agency properly rejected bids as nonresponsive where the bidders submitted with their bids unsolicited descriptive literature concerning the specific products offered, which raised questions as to whether the products complied with some of the material solicitation requirements and showed that the products did not comply with certain other material solicitation requirements.

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**B-237512, February 20, 1990**

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**90-1 CPD 196****Procurement**

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**Sealed Bidding**

- Bids
- ■ Error correction
- ■ ■ Pricing errors
- ■ ■ ■ Line items

Agency properly permitted bidder to correct omission of two option prices where the nature and existence of the error was clear and there was a consistent pricing pattern for the options of 2.5 percent more than the base price.

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**B-238283.2, February 20, 1990**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where supporting arguments are based upon information which was previously available to the protester, but not presented during consideration of the initial protest.



**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

Untimely protests, concerning procurement of all processed foods by the Department of Defense (DOD), presents a significant issue justifying consideration on the merits where protests concern the proper interpretation of a continuing statutory restriction on DOD's procurement of food which has not been previously considered by the General Accounting Office.

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**Procurement**

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**Socio-Economic Policies**

- Preferred products/services
- ■ Foreign/domestic product distinctions

Procuring agency properly applied the restriction contained in the annual Department of Defense Appropriations Act by requiring offerors to supply fish which had been caught by American fishing vessels, brought to American ports and processed in American plants. The restriction in the act does not permit the purchase of foreign-caught but American-processed fish.

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Cost realism
- ■ ■ Evaluation
- ■ ■ ■ Administrative discretion

Protest that awardee's low proposed labor rates amount to lack of cost realism is denied where agency's evaluation of cost realism was reasonable, and awardee confirmed its intent to comply with labor laws and was found to be otherwise responsible.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Where awardee's proposal was evaluated according to criteria in solicitation and found technically acceptable, contracting officer reasonably determined that awardee's understanding of the requirement and business judgment were sound despite low price.

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**B-238172, February 21, 1990\*\*\***

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Adverse agency actions

Where protest initially was filed with contracting agency, subsequent protest to General Accounting Office (GAO) which was not filed within 10 working days of actual knowledge of the initial adverse agency action is dismissed as untimely. Earlier receipt by GAO of information copy of letter which was addressed to the contracting agency and did not include a clear indication of a desire for a decision by GAO did not constitute timely protest to GAO.

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**B-237377, February 22, 1990****90-1 CPD 199**

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Information
- ■ ■ Submission time periods

**Procurement**

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**Contractor Qualification**

- Responsibility/responsiveness distinctions

**Procurement**

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**Government Property Sales**

- Timber sales
- ■ Bids
- ■ ■ Certification

The contracting officer acted improperly in rejecting a bid as nonresponsive on, and excluding the bidder from, a sealed bid/auction timber sale where the sealed bid included an executed form FS-2400-43, Certification of Nonsubstitution of Domestic Timber, but did not provide requested information regarding the bidder's timber exports, since this information relates to responsibility, rather than responsiveness, and can be supplied any time prior to award.

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**B-237495, February 22, 1990****90-1 CPD 200**

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**Procurement**

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**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest that agency failed to apply solicitation preference for historic buildings is denied since preference did not apply where agency reasonably concluded that the proposed awardee's offer was superior to protester's offer.

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**Procurement**

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**Bid Protests**

- Non-prejudicial allegation
- ■ GAO review

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Price disclosure
- ■ ■ Propriety

Contention that agency cannot award contract because disclosure of name of proposed awardee and estimate of the cost of the project in local newspapers after best and final offers precludes execution of Certificate of Procurement Integrity is denied where statutory requirement for submission of Certificate has been suspended and where record contains no evidence that release prejudiced the protester.

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**B-237517, February 22, 1990****90-1 CPD 201**

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**Procurement**

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**Specifications**

- Brand name/equal specifications
- ■ Equivalent products
- ■ ■ Acceptance criteria

Where brand name or equal solicitation required descriptive material for equal offers in order to establish technical equivalence to brand name item, agency properly determined that protester's blanket statement that proposed equal product is equivalent to the brand name was not sufficient to demonstrate equivalence, and thus properly rejected the proposal notwithstanding its lower price.

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**B-237638, February 22, 1990\*\*\*****90-1 CPD 202**

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Competency certification
- ■ ■ Reconsideration
- ■ ■ ■ Additional information

There is no legal requirement that the contracting agency again refer the question of an offeror's responsibility to the Small Business Administration (SBA) where, following agency determination that offeror was nonresponsible and SBA refusal to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by offeror and reasonably determined that reversal of the nonresponsibility determination is not warranted.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Protester was properly excluded from the competitive range where the agency reasonably concluded that the offeror had no reasonable chance of award because of deficiencies in proposed resumes and because of its otherwise low technical score and high price.

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**Procurement**

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**Specifications**

- Brand name specifications
- ■ Equivalent products
- ■ ■ Acceptance criteria

Issuance of purchase order in a small purchase procurement for a different brand item than that quoted by the low bidder is not objectionable where the contracting agency had already determined that the supplied item was technically acceptable based upon other contractor's descriptive literature and the low bidder in fact supplied the item at its original quoted price.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Cost savings

Award to firm which submits low, technically acceptable offer was proper since it was in accordance with solicitation award provision which called for award to low, technically acceptable offeror.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protester's contentions, not raised until after award, that the solicitation should have been set aside for labor surplus area concerns and that amendments to solicitation favored a particular offeror are untimely and will not be considered.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Delays
- ■ ■ ■ Agency-level protests

Protest is dismissed as untimely where initial agency-level protest against rejection of bid was filed 3 months after protester received notice of rejection.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

Contracting agency properly canceled solicitation where no offerors proposed compliant products and the agency determined that the specifications exceeded agency's needs and were overly restrictive, and that resoliciting the requirement under less restrictive specifications will increase competition and assure full and open competition.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior decision is denied where protester fails to show any error of fact or law that would warrant reversal or modification of prior decision.

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ GAO review

The Small Business Administration has the statutory authority to review a contracting officer's findings of nonresponsibility and to conclusively determine a small business concern's responsibility through the certificate of competency process.

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## Procurement

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### Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Bad faith
- ■ ■ ■ Allegation substantiation

Protest is denied where record does not support protester's contention that the Small Business Administration's (SBA) certificate of competency denial was based on one SBA official's predisposition to award the contract to another bidder.

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**B-236870.2, February 23, 1990**

**90-1 CPD 210**

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## Procurement

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### Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester fails to show error of fact or law or information not previously considered that would warrant reversal or modification of prior decision; mere restatement of arguments previously considered or disagreement with the initial decision is not sufficient to warrant reconsideration.

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**B-237408, February 23, 1990**

**90-1 CPD 211**

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## Procurement

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### Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Ambiguity allegation
- ■ ■ ■ Interpretation

Protester's interpretation of an amendment as deleting option requirements is unreasonable where a reading of the solicitation as a whole evidences no such intent and where the amendment did not specifically alter the section of the solicitation which required the pricing of options.

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Options
- ■ ■ ■ Prices

Where protester's prices for various line items were submitted sequentially in three separate documents and confirmed in its best and final offer, agency had no reason to question whether the option prices contained in the first of these documents, and unamended by the others that followed, were current. Thus, agency acted reasonably in using the protester's option prices as submitted in its initial proposal during the final evaluation of offers.

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**Procurement**

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**Contract Management**

- **Contract modification**
- ■ **Cardinal change doctrine**
- ■ ■ **Criteria**
- ■ ■ ■ **Determination**

Modification of existing contract to add court reporting services for an interim period pending completion of competitive procurement for new contract constitutes an improper sole-source award where new services are not within the scope of the contract as originally awarded, limited competition was not justified, and procuring agency was aware that the incumbent contractor was interested in competing.

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**Procurement**

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**Contract Types**

- **Time/materials contracts**
- ■ **Labor costs**

Where request for proposals required offerors to propose fixed labor rates, agency was not required to make award to protester where its proposal indicated that labor rates contained in the proposal were "average" rates rather than firm prices and that offeror intended to charge different rates after award depending upon skill levels of personnel assigned to perform each task order.

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**Procurement**

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**Noncompetitive Negotiation**

- **Use**
- ■ **Justification**
- ■ ■ **Industrial mobilization bases**

In a procurement conducted by a military agency under provisions of the Competition in Competition Act pertaining to mobilization base producers, the usual concern for obtaining full and open competition is secondary to the needs of industrial mobilization; the agency properly may restrict such a procurement to predetermined sources in order to create or maintain their readiness to produce critical supplies, and such restriction will be left to the discretion of the agency where there is no compelling evidence of abuse of that discretion.

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**Procurement**

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**Specifications**

- **Minimum needs standards**
- ■ **Total package procurement**
- ■ ■ **Propriety**

Allegation that procurement that is restricted to four firms could be expanded to include others is denied; agency did not abuse its discretion in restricting competition for mobilization base purposes and, in any event, agency had reasonable basis for the total package approach it adopted.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Omission

General Accounting Office will not review contracting agency's rejection of a bidder who failed to complete the solicitation's Certificate of Procurement Integrity or disturb the contract award since the requirement for the Certificate has been suspended.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Waiver

Where Certificate of Procurement Integrity clause requiring completion of Certificate is already incorporated in the solicitation, failure to acknowledge amendment that advises bidders to complete Certificate may be waived as a minor informality because amendment is immaterial since it imposes no new legal obligation.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Omission

General Accounting Office will not review contracting agency's rejection of a bidder who failed to complete the solicitation's Certificate of Procurement Integrity or disturb the contract award since the requirement for the Certificate has been suspended.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Evaluation criteria
- ■ ■ Approved sources

Contracting agency improperly rejected protester's bid on ground that the product offered did not appear on qualified products list (QPL) where solicitation failed to identify the procurement as subject to a QPL requirement, and agency did not provide bidders with a reasonable opportunity to demonstrate the acceptability of their products prior to bid opening.



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**Procurement**

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**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest contending that source listed on awardee's quotation is not the manufacturer and the item will not be produced domestically is denied where record contains evidence which supports the awardee's statements in its quotation and the protester has raised a basic allegation with no specifics.

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**Procurement**

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**Contractor Qualification**

- Organizational conflicts of interest
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Allegation that a firm is ineligible for award because its sole owner's husband is a government employee is denied; agency reasonably concluded there was sufficient separation of ownership and control of the firm, on the one hand, and the performance of unrelated duties by the government employee on the other hand, to preclude any actual or apparent conflict of interest.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Reconsideration

Request for reconsideration of prior dismissal of protest as untimely filed is denied where (1) protest challenged alleged solicitation impropriety but was not filed until after bid opening; (2) even assuming that protester's decision not to file a protest before bid opening was reasonable because contracting agency had led protester to believe that agency concurred in protester's interpretation of challenged solicitation provision, protest was not filed with General Accounting Office within 10 working days after the protester had actual or constructive knowledge of adverse action on initial protest filed with contracting agency; and (3) protest does not warrant invoking the significant issue exception to the timeliness rules.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Adverse agency actions

Where firm initially protests to agency the limitation of an acquisition to exclusively domestic firms prior to closing date for receipt of initial proposal, the agency's opening of proposals without taking requested corrective action constitutes initial adverse agency action. Consequently, a protest to the General Accounting Office (GAO) 8 weeks later, based upon agency's written denial of agency-level protest, is untimely under GAO's bid protest regulations.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest challenging the award of a contract based on initial proposals is dismissed as untimely where protest is based on information obtained pursuant to a Freedom of Information Act request filed 7 months after the protester first requested information pertaining to the award, since the protester failed to diligently pursue the information forming the basis of its protest.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Preparation costs

There is no basis for an award of proposal preparation costs where current protest is dismissed as untimely and prior protest under same solicitation by another protester— resulting in a settlement between the parties including in part the agency's reimbursement of the protester's proposal preparation costs—was withdrawn, since a prerequisite to the award of costs under the Competition in Contracting Act of 1984 is a decision on the merits of a protest.

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Procuring agency properly determined that the protester's initial proposal was unacceptable and not in the competitive range where the request for proposals sought the evaluation of specific selected state Job Opportunities and Basic Skills programs and the protester offered to perform a generalized nationally representative survey based upon a random sample.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Procuring agency need not include the protester's unacceptable initial proposal in the competitive range where major revisions would be required to make the proposal acceptable.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that agency did not invite the protester to a research workshop, which concerned the methods of evaluating the Family Support Act and Job Opportunities and Basic Skills programs, is untimely where the protester had known about the conference since the issuance of the solicitation and only protested this matter after the exclusion of its proposal from the competitive range.

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**B-237065.2, February 26, 1990**

**90-1 CPD 224**

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## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Propriety

Cancellation of solicitation and resolicitation is appropriate where procurement encompassing construction work was conducted, and award was made, under solicitation which did not include required Davis-Bacon wage determination.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Anticipated profits

Quoter has no legal entitlement to anticipated profits under canceled solicitation.

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**B-237073.2, February 26, 1990\*\*\***

**90-1 CPD 225**

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## **Procurement**

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### **Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Agents
- ■ ■ ■ Identification

Protest that bid bond was defective due to corporate surety's failure to name federal process agents is denied because such failure is a procedural omission that does not bear directly on the authority of the surety to issue the bond or affect the underlying obligation of the surety.

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**B-237465, February 26, 1990**

**90-1 CPD 226**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protester's objections to various alleged deficiencies in a solicitation which were apparent from the face of the solicitation prior to the time for receipt of initial proposals are dismissed as untimely since protest was not filed until after subsequent request for best and final offers was made.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Amendments
- ■ ■ Propriety

Fact that solicitation amendment transmitting wage determinations and certain changes to solicitation provisions was received immediately after, and not before, telephonic discussions were conducted provides no basis for disturbing procurement where contents of amendment would not have been the subject of discussions in any event and where amendment was received 1 week before best and final offers were due.

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**B-237486, February 26, 1990****90-1 CPD 227**

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Propriety

Where an agency reopens negotiations by advising one offeror to lower its prices, it must also conduct discussions with the other offeror in the competitive range.

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**B-237545, February 26, 1990****90-1 CPD 228**

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**Procurement**

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**Contract Management**

- Contract administration
- ■ GAO review

Protest of agency's actions in authorizing second year of multiyear contract and canceling second year of protester's multiyear contract for the same item, is dismissed since the agency's actions involved matters of contract administration not reviewed by the General Accounting Office.

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**B-237598, B-237599, February 26, 1990\*\*\*****90-1 CPD 229**

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Propriety

Offer complies with Commercial Operations clause requesting a list of sites where equipment of the same model, type and class as the proposed system has operated successfully, where the information submitted is verified by the agency, and the equipment is found to be successfully operating at those sites.

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**B-237629, February 26, 1990\*\*\*****90-1 CPD 230**

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Pre-award surveys

Agency reasonably found low bidder nonresponsible on solicitation for an automotive maintenance/repair contract, where the bidder has no current automotive maintenance contract, a pre-award survey team received unsatisfactory reports on the bidder's only prior contract for

this work, the bidder's other contract work is not readily transferable, and the agency was reasonably concerned about the bidder's personnel staffing.

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**B-237826, February 26, 1990**

**90-1 CPD 231**

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that agency overstated its minimum needs is dismissed as untimely when not filed before the closing date for proposals following the incorporation of the allegedly restrictive specification in the solicitation.

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**Procurement**

**Competitive Negotiation**

- Best/final offers
- ■ Multiple offers
- ■ ■ Justification

Protest that agency should have requested that protester submit a best and final offer is denied where the protester took explicit exception to the RFP's stated requirements after being notified of a proposal deficiency, since an agency is not required to hold successive rounds of discussions so that an unacceptable offeror might become acceptable.

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that awardee's product failed to meet the specifications is dismissed as untimely where the protester did not diligently pursue the information concerning the awardee's product which forms the basis of protest.

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**Procurement**

**Competitive Negotiation**

- Contract awards
- ■ Propriety
- ■ ■ Offers
- ■ ■ ■ Minor deviations

Where awardee's x-ray scanning equipment is 1 inch larger than size specified in solicitation, agency properly waived deviation as inconsequential since the equipment would meet its minimum needs and other bidder was not prejudiced by the waiver.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

Untimely protest against specifications, content of discussions and technical evaluation is not for consideration under the significant issue exception to the General Accounting Office Bid Protest Regulations.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that an approved source listed in the procurement documents is not a manufacturer is untimely since it was filed more than 10 working days after a contracting agency letter advised the protester that only manufacturers could be listed as approved sources.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest alleging specification impropriety apparent on the face of the solicitation that minimum wastepaper content requirement for paper products being purchased restricts competition is untimely when not filed prior to bid opening.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Determination criteria

Protester's bid was properly rejected as nonresponsive where protester took exception in its bid to a material solicitation requirement that paper products to be furnished contain a minimum of 50 percent wastepaper.

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**Procurement**

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**Bid Protests**

- Definition

Protest consisting of a copy of a letter to a contracting officer, without any further explanation, is dismissed where the submission fails to set forth a detailed statement of the legal and factual grounds of the protest as required by General Accounting Office's Bid Protest Regulations.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Information relating to whether there is a sufficient reason to cancel can be considered no matter when the information justifying the cancellation first surfaced or should have been known.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Price reasonableness

Where record shows that agency believed that services could be performed more cheaply in-house and that some of the estimates contained in IFB were inaccurate, General Accounting Office will not object to cancellation even though agency's initial justification for cancellation of invitation for bids was questionable.

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**Procurement**

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**Special Procurement Methods/Categories**

- In-house performance
- ■ Administrative discretion
- ■ ■ GAO review

Where record shows that agency believed that services could be performed more cheaply in-house and that some of the estimates contained in IFB were inaccurate, General Accounting Office will not object to cancellation even though agency's initial justification for cancellation of invitation for bids was questionable.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Errors
- ■ ■ Corrective actions
- ■ ■ ■ Moot allegation

Dismissal of protest that proposal was improperly evaluated is affirmed; agency determined that evaluation factors were defective, terminated awardee's contract, and stated its intention to re-compete the requirement on the basis of revised evaluation criteria, thus rendering the protest academic.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Preparation costs

Where a protest is dismissed as academic, there is no decision on the merits and therefore no basis for recovery of protest costs.

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## **B-237448, February 27, 1990**

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## **Procurement**

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### **Contracting Power/Authority**

- Unauthorized contracts
- ■ Ratification

The Navy may ratify a commitment for a newspaper advertisement for which prior formal approval was not obtained.

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## **B-237503, February 27, 1990**

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**90-1 CPD 238**

## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Weighting

Where solicitation contains technical evaluation factors and provides that award will be based on both price and technical factors and does not state that evaluation will be conducted on a "acceptable/unacceptable" basis, technical proposals should be evaluated on a relative basis and selection based on a price/technical tradeoff.

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## **Procurement**

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### **Competitive Negotiation**

- Competitive advantage
- ■ Non-prejudicial allegation

The fact that an offeror proposed to use an aircraft donated to it by a government agency, other than the contracting agency in its offer under a solicitation for pilot training does not constitute an unfair competitive advantage which the contracting agency was required to equalize.

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## **B-237555, February 27, 1990**

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**90-1 CPD 239**

## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Prior contracts
- ■ ■ ■ Contract performance

Where technical evaluation scheme in request for proposals sets forth prior experience and performance as an evaluation factor and protester referenced in its proposal its performance under prior contracts, the agency properly investigated the protester's performance under these and other prior contracts of which it was aware in making its technical acceptability determination.



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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Risks
- ■ ■ Pricing

Agency properly considered unexplained reductions in protester's final price as an indication that its proposal presented performance risks.

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## **Procurement**

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### **Competitive Negotiation**

- Discussion reopening
- ■ Propriety

An agency has no obligation to reopen negotiations so that an offeror may remedy defects introduced into a previously acceptable proposal by a best and final offer since the offeror assumes the risk that changes in its final offer might raise questions about its ability to meet the requirements of the solicitation.

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Risks
- ■ ■ Evaluation
- ■ ■ ■ Technical acceptability

Decision not to award to lowest-priced offeror was reasonable where source selection authority determined that the proposal represented a performance risk and that the technical superiority of another offeror's proposal outweighed its cost premium.

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## **B-237595, February 27, 1990**

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## **Procurement**

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### **Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that requirement for 5-year warranty for roofing services unduly restricts competition is denied where protester does not show that requirement exceeds agency's minimum needs and argues only that the 5-year warranty is difficult for bidders to provide.

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## **B-237619, February 27, 1990**

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**90-1 CPD 241**

## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that solicitation for high speed blade tip grinders should have been limited to grinders manufactured in the United States or Canada involves an alleged impropriety apparent from the face of the solicitation and is untimely when not filed until after award.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

Untimely protest will be considered as raising a significant issue where the protest allegation involves the proper interpretation of a congressional restriction on the use of appropriated funds which allegedly has been violated by the procuring agency.

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## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Commercial products/services
- ■ ■ Federal supply schedule
- ■ ■ ■ Classification

Determination as to proper Federal Supply Classification (FSC) code for item being purchased is for the buying agency, and that determination will stand unless it is clearly without a reasonable basis; where an agency might have classified an item under either of two FSC codes, its determination that one of the codes is the more appropriate one will not be disturbed where the record reflects a reasonable basis for the determination.

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**B-238031, et al., February 27, 1990**

**90-1 CPD 242**

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## **Procurement**

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### **Sealed Bidding**

- Bonds
- ■ Justification
- ■ ■ GAO review

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## **Procurement**

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### **Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ GAO review

Protests that bonding requirements in solicitations are unduly restrictive of competition are without merit where agency required bonds to assure continuous provision of mechanical and operating services in buildings occupied by federal agencies, and protester does not establish that the determinations to require bonds were unreasonable or made in bad faith.

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**B-238039.2, February 27, 1990**

**90-1 CPD 243**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest challenging alleged solicitation impropriety in request for quotations (RFQ) is untimely when received in General Accounting Office after 5:30 p.m. on the RFQ's closing date.

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

An agency may cancel a negotiated procurement based on the potential for increased competition or cost savings.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ GAO review

Solicitation for the lease of 366,700 square feet of office space may be canceled where the agency's need for space has significantly changed, even if this reason was not the original reason for canceling the procurement.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Preparation costs

Claim for costs for preparing a revised offer and protest costs is denied where cancellation of solicitation was proper, and there is no indication that agency acted improperly.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision affirming prior dismissal on timeliness grounds and dismissing subsequent protest on grounds that protester was not an interested party is denied because significant issue exception raised in reconsideration applies only to timeliness requirements and is not an exception to the requirement that the protester be an interested party within the meaning of the General Accounting Office's Bid Protest Regulations.

**Procurement**

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**Sealed Bidding**

- Contract awards
  - ■ Multiple/aggregate awards
- 

**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Defects
- ■ ■ Evaluation criteria
- ■ ■ ■ Pricing

Where an invitation for bids permits multiple awards and states that award will be based on the lowest overall cost to the government, a single award at a price more than the total of two awards plus the administrative costs for two contracts is improper. The Competition in Contracting Act of 1984 requires agencies to evaluate sealed bids based solely on the factors stated in the solicitation and to make award considering only price and price-related factors included in the solicitation.

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**B-237466, February 28, 1990\*\*\***

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**Procurement**

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**Socio-Economic Policies**

- Preferred products/services
  - ■ Domestic products
  - ■ ■ Interpretation
- 

**Procurement**

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**Socio-Economic Policies**

- Preferred products/services
- ■ Foreign/domestic product distinctions

Domestically performed processing operations on imported horsehair do not constitute "manufacturing" for purposes of the Buy American Act, 41 U.S.C. § 10a *et seq.* (Supp. IV 1986), since they do not result in a fundamental change to the foreign component.

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**Procurement**

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**Socio-Economic Policies**

- Preferred products/services
- ■ Domestic sources
- ■ ■ Foreign products
- ■ ■ ■ Price differentials

Since overhead and profit are not a part of the test to determine whether the cost of domestic components exceeds 50 percent of the cost of all components for purposes of the Buy American Act, 41 U.S.C. § 10a *et seq.* (Supp. IV 1986), protester, whose foreign component costs are greater than its domestic component costs, is not entitled to a preference under the act.

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**Procurement**

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**Specifications**

- Brand name/equal specifications
- ■ Equivalent products
- ■ ■ Salient characteristics
- ■ ■ ■ Descriptive literature

Where request for proposals specified an acceptable brand name product and permitted offers of alternate products identical to or completely interchangeable with the specified product, agency properly rejected alternate product offered by protester which did not have certain physical characteristics of the specified item and was not the functional equivalent of it.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that item description should have incorporated American National Standards Institute standard rather than specifying an acceptable brand name product and permitting offers of alternate products interchangeable with the specified one is dismissed as untimely where not filed prior to the closing date for receipt of proposals.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Government delays
- ■ ■ Procedural defects

Allegation of unreasonable delay in awarding contract pertains to a procedural matter which does not provide a basis of protest.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that contracting officer misused price reasonableness as a negotiation basis is untimely where raised more than 10 working days after protester became aware of protest basis.

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**Procurement**

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**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Where protester effectively withdraws a particular line item from consideration during negotiations and agrees to a reduced maximum order limitation (MOL) on other line items, allegation that agency "refused" to accept its offer for first line item and "forced" it to accept the MOL for the latter items, fails to state a valid basis for protest.

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**Procurement**

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**Bid Protests**

■ Allegation substantiation

■ ■ Burden of proof

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**Procurement**

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**Bid Protests**

■ Definition

Protest consisting of a copy of a letter to a contracting officer, without any further explanation, is dismissed where the submission fails to set forth a detailed statement of the legal and factual grounds of the protest as required by General Accounting Office Bid Protest Regulations.

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