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

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Current GAO Officials

Comptroller General of the United States
Charles A. Bowsher

Deputy Comptroller General of the United States
Vacant

Special Assistant to the Comptroller General
Milton J. Socolar

General Counsel
James F. Hinchman

Deputy General Counsel
Vacant

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Preface

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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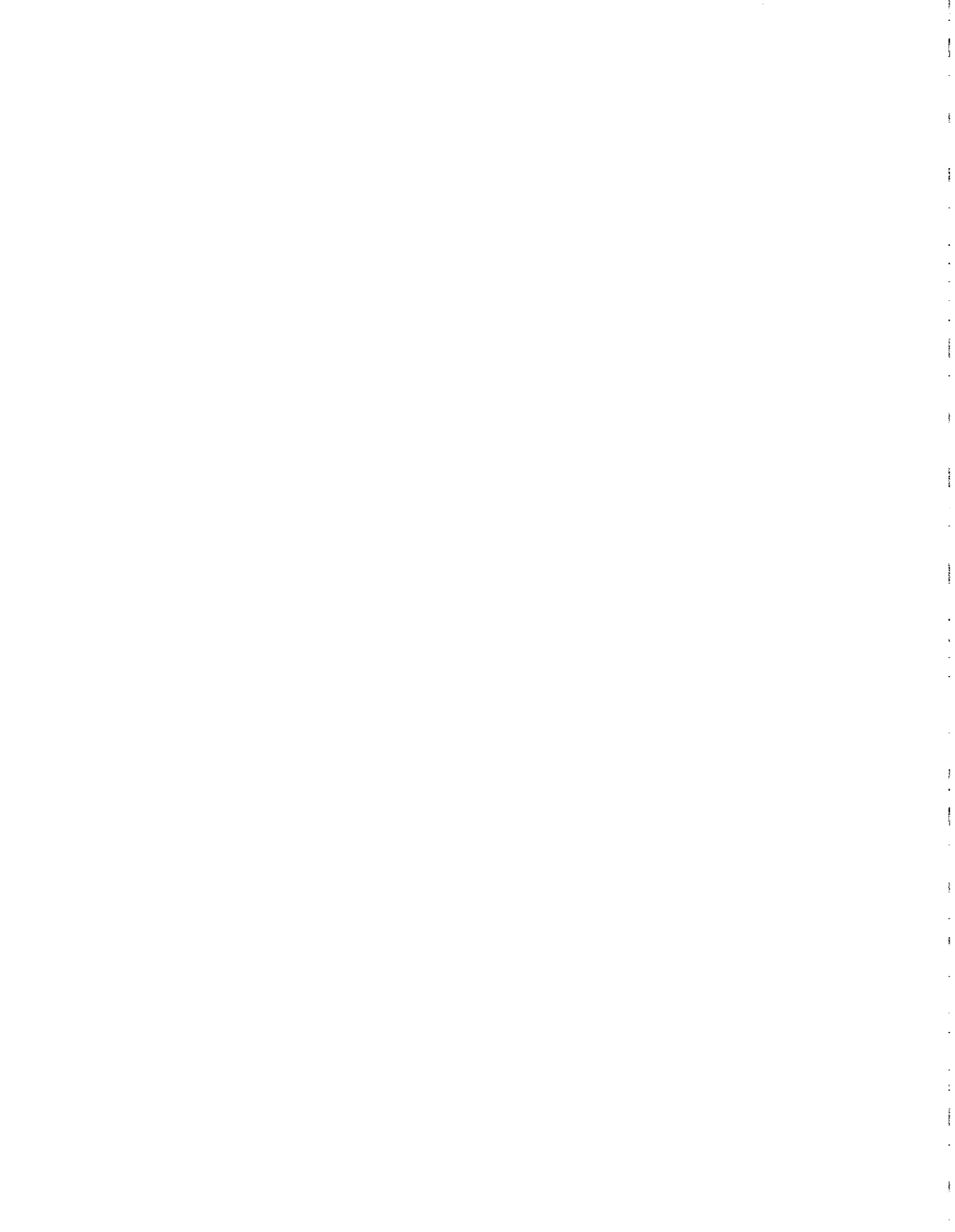
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Appropriations/Financial Management

B-238362, July 11, 1990***

Appropriations/Financial Management

Accountable Officers

- Relief
- ■ Physical losses
- ■ ■ Theft

An accountable officer's hotel room was burglarized while he was sleeping, after he had locked its door, and the cash and other items were out of sight. The hotel did not have a safe deposit box available, either in the hotel room or at the front desk, and locked containers were not otherwise available. We concur with the agency's administrative determinations that he was acting in the discharge of his official duties, and that he was not negligent. Thus, we grant relief from liability for the physical loss of funds under 31 U.S.C. § 3527 (1988).

B-234990, July 13, 1990***

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Mandatory use
- ■ ■ Grants

Appropriations/Financial Management

Federal Assistance

- Grants
- ■ State/local governments
- ■ ■ Funding levels

The Veterans Rehabilitation and Education Amendments of 1980, which established the Disabled Veterans Outreach Program (DVOP), required each state accepting DVOP funds to use those funds to hire the number of DVOP specialists as calculated in accordance with a statutory formula. 38 U.S.C. § 2003A. Department regulation, however, which instructed the states that their Employment Service grant funds would also have to finance DVOP, did not earmark any part of the grant funds for this program. Consequently, this Office sees no basis to question states' expenditures of grant funds on otherwise appropriate grant activities even though the DVOP did not operate at the level anticipated.

B-217114.6, July 24, 1990

Appropriations/Financial Management

Accountable Officers

- Liability
- ■ Debt collection

The joint liability of an accountable officer and an employee who obtained fraudulent travel reimbursements is not affected by the agency returning amounts improperly collected from the employee. As part of its efforts to recover the fraudulent reimbursements, the U.S. Army Corps of Engineers withheld a regular compensation check from the employee without complying with the requirements of 5 U.S.C. § 5514 (1988). Correcting the administrative error by releasing the withheld check does not affect the liabilities of either the employee or the accountable officer.

B-235678, July 30, 1990

Appropriations/Financial Management

Appropriation Availability

- Time availability
- ■ Bona fide needs doctrine
- ■ ■ Applicability
- ■ ■ ■ Multi-year appropriation

The bona fide need rule, 31 U.S.C. § 1502(a), which precludes an agency from obligating, without express statutory authority, an appropriation made for the needs of a limited period for the needs of subsequent periods, applies to multiyear appropriations as well as to single-year appropriations.

Appropriations/Financial Management

Appropriation Availability

- Time availability
- ■ Multi-year appropriation
- ■ ■ Level-of-effort contracts

Appropriations/Financial Management

Obligation

- Fiscal-year appropriation
- ■ Expiration
- ■ ■ Contracts

Payment for research work under a cost-plus-fixed-fee, level-of-effort contract that spans more than 1 fiscal year may be made from expired appropriations properly obligated during their period of availability if the contracting agency determines that the task is nonseverable. 65 Comp. Gen. 154 (1985), suggesting that level-of-effort work by definition is severable, is modified accordingly.

B-238112, July 30, 1990

Appropriations/Financial Management

Claims Against Government

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

The Department of Education may not pay a claim filed by a contractor who remained on the job for several months after its contract had expired. Where a contractor renders service on the mere hope that his proposal will materialize and a contract may be entered into, such services are voluntary and not reimbursable.

Civilian Personnel

B-237884, July 5, 1990***

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

An employee who transferred from Missouri to Germany for personal convenience and was subsequently transferred to Illinois in the interest of the government, is not entitled to reimbursement for real estate expenses in connection with the sale of his home in Missouri and the purchase of a house in Illinois. Only employees who were transferred to a foreign area in the interest of the government and who have completed a tour of duty in a foreign area as provided for in a service agreement are entitled to be reimbursed their real estate expenses.

B-238566, July 5, 1990***

Civilian Personnel

Relocation

- Household goods
- ■ Shipment
- ■ ■ Advances

The Panama Canal Commission may fund advance shipments of household goods for its eligible employees, who have completed their service agreements, under authority of 5 U.S.C. § 5729(a)(1) (1988).

B-233484, July 6, 1990***

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ New residence construction

A transferred employee constructed a residence at his new permanent station rather than purchase an existing residence. The real estate expenses authorized under paragraph 2-6.2 of the Federal Travel Regulations to be reimbursed are those which are comparable to expenses incurred in connection with the purchase of an existing residence. Since the expenses incurred as a result of permanent financing of the residence are most representative of the expenses incurred to purchase an existing residence, the employee's entitlement is to be primarily based on the expenses attendant to that settlement. *Ray F. Hunt*, B-226271, Nov. 5, 1987.

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ New residence construction

A transferred employee constructed a residence at his new permanent station. Although the expenses authorized by paragraph 2-6.2 of the Federal Travel Regulations (FTR) to be reimbursed are those usually incurred incident to the securing of permanent financing upon completion of the residence, other expenses incurred prior to permanent financing also may be reimbursed so long as they are not a duplication of an expense item already allowed incident to that permanent financing, an expense uniquely applicable to the construction process, or a nonreimbursable item listed under FTR, para. 2-6.2d(2).

Civilian Personnel

Relocation

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

A transferred employee constructed a residence at his new permanent station. Fee paid to public officials for tax certificates showing that the property was not encumbered by unpaid taxes may be allowed. Section 1605(d)(1) of title 15, United States Code, exempts such fees from computation of finance charge incident to the extension of credit under the Truth in Lending Act. *Wayne E. Holt*, B-189295, Aug. 16, 1977, and *John S. Derr*, B-215709, Oct. 24, 1984, are overruled in part.

B-238383, July 13, 1990

Civilian Personnel

Travel

- Temporary duty
- ■ Travel expenses
- ■ ■ Reimbursement

Civilian Personnel

Travel

- Travel expenses
- ■ Cancellation
- ■ ■ Penalties
- ■ ■ ■ Reimbursement

An employee was issued "reporting instructions" (travel orders) to attend a temporary duty training course, purchased a nonrefundable round-trip airline ticket for his voluntary return to his residence on nonworkdays (weekend), but did not use the ticket since the course was cancelled. Employee may not be reimbursed the cost of the ticket since he acted imprudently and in contravention of the Federal Travel Regulation, 41 C.F.R. § 301-2.2(d)(1)(ii)(A) (1989), in not utilizing the General Services Administration contract air carrier service for airline service between a city-pair (Salt Lake City, Utah, and Denver, Colorado) and purchasing a nonrefundable, rather than a refundable, round-trip airline ticket.

B-237729, July 20, 1990

Civilian Personnel

Compensation

- **Retroactive compensation**
- ■ **Overtime**
- ■ ■ **Amount determination**

An employee, who was improperly reassigned to a different office for a 4-month period, claims backpay for overtime he would have worked. The agency should award overtime based on what his co-workers worked or what the employee worked in the past.

B-238243, July 20, 1990

Civilian Personnel

Leaves Of Absence

- **Annual leave**
- ■ **Lump-sum payments**
- ■ ■ **Waiver**
- ■ ■ ■ **Reinstatement**

In computing an employee's backpay entitlement, the agency deducted his interim earnings and his lump-sum leave payment, resulting in a net indebtedness which was subject to waiver. The agency should also have deducted the erroneous lump-sum leave payment from the employee's interim employment, thereby increasing his net indebtedness. We hold that this second lump-sum leave payment is waived.

Civilian Personnel

Leaves Of Absence

- **Lump-sum payments**
- ■ **Eligibility**

An employee, who was removed from his position with the Yuma Proving Ground, was employed by the Corps of Engineers while his appeal of the separation action was pending. His appeal was successful, and he was reinstated retroactively to his position with the Yuma Proving Ground. The Corps of Engineers should not have paid him for his accrued annual leave since he was not separated from federal service under 5 U.S.C. § 5551 (1988).

B-238486, July 24, 1990***

Civilian Personnel

Travel

- **Temporary duty**
- ■ **Per diem**
- ■ ■ **Additional expenses**

An employee is not entitled to additional per diem for an extended tour of temporary duty in Ottawa, Canada, where an agency complied with the Federal Travel Regulations and reduced his per diem in writing, in advance. Employee has not shown that agency's action in reducing per diem rate for long-term temporary duty detail was arbitrary, capricious, or contrary to law. Moreover, employee is not entitled to any per diem for the period after his duty station was changed to Ottawa.

B-238614, July 26, 1990

Civilian Personnel

Travel

- Travel expenses
 - ■ Documentation procedures
 - ■ ■ Burden of proof
-

Civilian Personnel

Travel

- Travel expenses
- ■ Fraud
- ■ ■ Effects

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.

B-237693.2, July 27, 1990

Civilian Personnel

Compensation

- Overtime
 - ■ Eligibility
 - ■ ■ Travel time
-

Civilian Personnel

Travel

- Non-workday travel
- ■ Travel time
- ■ ■ Overtime

An agency required an employee to perform permanent change-of-station travel from Mississippi to the United Kingdom outside his regularly scheduled duty hours. In *Robert H. Ray, Sr.*, B-237693, Mar. 30, 1990, we sustained the agency's denial of the employee's claim for overtime compensation, since his circumstances were not covered by any of the specific grounds authorizing such compensation in 5 U.S.C. § 5542b(2)(B) and the agency's apparent failure to schedule his travel within his regular duty hours, in violation of 5 U.S.C. § 6101(b)(2), provides no basis for a compensatory remedy. We provide a further explanation of that decision by letter in response to a congressional inquiry.

Military Personnel

B-238153, July 3, 1990

Military Personnel

Leaves Of Absence

- Unused leave balances
- ■ Lump-sum payments

A former regular officer who is dropped from the rolls of the Air Force pursuant to 10 U.S.C. § 1161(b) may not be paid for accrued leave under 37 U.S.C. § 501 since that statute provides for payment of accrued leave only to officers who are discharged under honorable conditions.

B-239274, July 12, 1990

Military Personnel

Pay

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

A member who was erroneously overpaid for 12 days accrued leave when he separated from the United States Navy is not entitled to waiver of the erroneous payment where the record does not establish that he was sufficiently diligent in questioning what he should have known was a mistake.

B-234888, July 16, 1990

Military Personnel

Pay

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

A Marine Corps Colonel who retired but was immediately recalled to active duty for 1 year is not entitled to have his retired pay recomputed under 10 U.S.C. § 1402(a) to reflect a basic pay rate that became effective during that 1-year period, because the statute requires that a member in such circumstances receive the higher rate of basic pay for a continuous period of 2 years in order to have his retired pay recomputed to reflect the higher rate.

Military Personnel

Pay

- Survivor benefits
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A retired member of the Army named his second wife as his beneficiary on his Survivor Benefit Plan (SBP) form. When a Maryland court refused to recognize his Nevada divorce from his first wife the Army determined that the wife named on the SBP form was not his legal wife and then mistakenly discontinued withholding SBP premiums from the member's retired pay, resulting in a debt of \$8,214.04 accumulated over 11-1/2 years. That debt should be waived under 10 U.S.C. § 2774 (1982) because the member was not at fault for the mistake and could not reasonably have been expected to know that his first wife was covered under the Plan and that, therefore, his participation had not been discontinued.

Miscellaneous Topics

B-239045, July 5, 1990

Miscellaneous Topics

Federal Administrative/Legislative Matters

- Administrative agencies
- ■ Trademarks
- ■ ■ Infringement
- ■ ■ ■ Determination

Although the ultimate decision of infringement of a trademark lies with the courts, in the GAO's judgment, the Department of Health and Human Services has a reasonable basis for taking the position that Edu-Graphics' use of the Head Start name and logo on its products constitutes infringement of the Department's trademarks. Head Start grantees and/or the public are likely to be confused as to the source, sponsorship, or endorsement of Edu-Graphics' goods that bear the Head Start name and logo.

B-240027, July 30, 1990

Miscellaneous Topics

Federal Administrative/Legislative Matters

- Government corporations
- ■ Board members
- ■ ■ Authority

Miscellaneous Topics

Federal Administrative/Legislative Matters

- Government corporations
- ■ Federal procurement regulations/laws
- ■ ■ Applicability

In response to the Chairman, House Committee on Government Operations, we conclude that the Pennsylvania Avenue Development Commission (PADC) is subject to the Federal Property Act and the Federal Acquisition Regulation. In addition, we are unaware of any court decision holding that the role of the Mayor of the District of Columbia, as one of 15 members of the PADC, is unconstitutional since the Mayor is not appointed by the President pursuant to Article II, section 2, clause 2, of the Constitution.

Procurement

B-236260.2, July 2, 1990***

90-2 CPD 1

Procurement

Competitive Negotiation

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

Agency's failure to provide incumbent contractor required 30 days advance notice of solicitation for successor contract, to allow incumbent time to negotiate updated collective bargaining agreement to be incorporated in new solicitation, did not by itself warrant resolicitation to incorporate updated agreement where the agreement first was submitted to the contracting officer almost 2 months after bid opening.

B-237522.2, July 3, 1990

90-2 CPD 2

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision is denied where the protester essentially only restates its initial arguments and expresses disagreement with the decision.

B-238810, B-238810.2, July 3, 1990***

90-2 CPD 3

Procurement

Competitive Negotiation

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

Where solicitation provided for evaluation on comparative basis, elimination of protester's proposal from the competitive range and acceptance of another proposal for award, even though proposals may share a similar deficiency, is proper, so long as proposal selected for award properly was highest rated under solicitation's evaluation scheme.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Descriptive literature

Agency reliance during evaluation on preexisting descriptive literature (not submitted with offer), describing upgrade to software that permits offered model to meet solicitation requirement, is unobjectionable where literature was not inconsistent with literature submitted with offer and it showed conformance with requirement.

B-238860, July 3, 1990

90-2 CPD 4

Procurement

Special Procurement Methods/Categories

■ Federal supply schedule

■ ■ Contract awards

■ ■ ■ Propriety

Allegation that agency improperly awarded a purchase order to a federal supply schedule contractor at a price higher than the awardee's schedule price is denied where the record shows that the awardee's purchase order price to provide protective vests and extra carriers is the same as its schedule price, and that the difference between the awardee's purchase order price and schedule price is solely attributable to its price to stencil the agency's logo on each vest, an item not provided for in the federal supply schedule contract.

Procurement

Special Procurement Methods/Categories

■ Federal supply schedule

■ ■ Purchases

■ ■ ■ Cost/technical tradeoffs

■ ■ ■ ■ Technical superiority

Procuring agency properly awarded a purchase order for personal body armor (protective vests) to a higher priced, mandatory federal supply schedule contractor where the agency reasonably determined that the protester's low quote would not meet the agency's minimum needs.

B-238871, July 3, 1990

90-2 CPD 5

Procurement

Contractor Qualification

■ Responsibility

■ ■ Contracting officer findings

■ ■ ■ Negative determination

■ ■ ■ ■ Pre-award surveys

Contracting officer properly may base a nonresponsibility determination on a negative preaward survey, so long as it is based upon accurate information and conclusions.

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Prior contract performance

Contracting officer properly determined protester nonresponsible where he had a reasonable basis for concluding that, based upon protester's history of poor performance, there was a high risk that the protester might not be able to perform the contract in a timely manner in accordance with the required performance schedule.

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Distinctions
- ■ ■ De facto debarment

Nonresponsibility determination does not constitute a *de facto* debarment from government contracting where the record indicates that the determination was based upon the protester's current lack of capability, not a lack of integrity or honesty, and there is no indication that future determinations will not be based upon the protester's capability at the time of the procurement involved.

B-238892, July 3, 1990

90-2 CPD 6

Procurement

Small Purchase Method

- Quotations
- ■ Descriptive literature
- ■ ■ Adequacy

Agency may request technical data and information pertaining to the manufacture of a product from the firm listed as the product's manufacturer in the item description of a request for quotations.

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation
- ■ ■ Technical acceptability

Agency may, after the submission of the initial quotations, request and consider technical information from a firm offering an alternate product in its response to a request for quotations.

B-238964, July 3, 1990

90-2 CPD 7

Procurement

Bid Protests

- Bias allegation
- ■ Allegation substantiation
- ■ ■ Burden of proof

General Accounting Office will not attribute fraud or bad faith to contracting agency on the basis of unsupported allegation, inference or supposition.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Protester that cannot comply with solicitation requirements to supply word processing capability and antibiotic monitoring capability is not an interested party to challenge other solicitation provisions.

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Performance specifications
- ■ ■ ■ Justification

Solicitation for commercially available infection control software is not unduly restrictive of competition where record shows that challenged requirements for word processing capability and antibiotic sensitivities monitoring are reasonably related to contracting agency's minimum needs.

B-239064, July 3, 1990***

90-2 CPD 8

Procurement

Sealed Bidding

- Invitations for bids
- ■ Terms
- ■ ■ Progress payments

A request for progress payments is precatory in nature and does not render a bid nonresponsive in the absence of circumstances which indicate that the request is more than a mere wish or desire.

B-239680, July 3, 1990

90-2 CPD 9

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Where protester would not be eligible to participate under a set-aside pursuant to section 8(a) of the Small Business Act, protest challenging eligibility of proposed awardee and lack of competition is dismissed. The protester lacks the requisite direct economic interest to be considered an interested party since it would not be eligible to compete for the contract even if the protest were sustained.

B-239781, July 3, 1990

Procurement

Contract Management

- Federal procurement regulations/laws
- ■ Revision
- ■ ■ Contractors
- ■ ■ ■ Definition

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case No. 90-13, a proposal to revise the definition of "contractor" for purposes of debarment, suspension,

and ineligibility to make clear that the term includes entities that submit offers or receive contract indirectly (such as through affiliates) as well as directly.

B-238367.4, July 5, 1990**90-2 CPD 10**

Procurement**Bid Protests**

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

Protest that agency improperly determined to open negotiations, after an initial determination to award to protester, is untimely when filed more than 10 days after basis for protest was known.

B-238597.2, July 5, 1990*****90-2 CPD 11**

Procurement**Bid Protests**

- GAO authority

Rule that General Accounting Office (GAO) generally will not review protests of agency refusal to exercise a contract option is inapplicable where agency uses the exercise of contract options in parallel development contracts to select one contractor to continue the effort, because, under such circumstances, the agency's actions do not constitute contract administration but are, in fact, a form of limited competition properly subject to review by GAO.

Procurement**Bid Protests**

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

Agency challenge to timeliness of protest is denied where protester diligently pursues information that forms the basis of its protest, and files a timely protest upon receipt of such information.

Procurement**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest that agency abandoned evaluation criteria in solicitation and that contracting officer lacked a reasonable basis for selection decision is sustained where performance testing of protester's prototype equipment contributed significantly to selection decision under evaluation scheme, and such testing was conducted using test equipment that did not comply with the specification requirement; where the faulty operation of the test equipment was clearly related to operation of the prototype equipment; and where valid tests were never completed.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Negative determination
- ■ ■ ■ Effects

General Accounting Office sustains protest of low small business bidder which did not receive an award because the contracting agency did not think it "prudent" to contract with the firm whose prior contract for the same item had been terminated because of unsatisfactory performance. Although not denominated as such, the agency's action was a determination of nonresponsibility which by statute must be referred to the Small Business Administration for consideration under the certificate of competency procedure.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protest challenging agency's refusal to allow submission of protester's revised proposal is untimely where filed more than 10 days after protester was on notice of refusal.

Procurement

Bid Protests

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

Untimely protest is not converted to a timely protest where protester alleges that contracting agency gave it erroneous advice regarding General Accounting Office (GAO) bid protest procedures because protesters are assumed to have constructive knowledge of GAO's Bid Protest Regulations.

Procurement

Bid Protests

- Forum election
- ■ Finality

General Accounting Office will not consider a protest which sets forth the same issue raised by the protester in a claim before the contracting agency.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Point ratings

Agency's evaluation approach, which for many evaluation subfactors results in scores of 0, 5, or 10 points depending largely upon extent to which offers exceeded minimum requirements, is not ob-

jectionable where scores reflect agency's judgment of relative value of competing proposals and not the use of unstated evaluation factors.

B-238773, July 6, 1990

90-2 CPD 16

Procurement

Competitive Negotiation

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

Contracting agency may not award a contract on the basis of initial offers where agency engaged in discussions with one offeror by permitting the offeror to make a significant modification to its initial delivery terms.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Amendments
- ■ ■ Evaluation criteria
- ■ ■ ■ Modification

Contracting agency may not relax delivery terms contemporaneous with contract award; where the government relaxes a material solicitation requirement, it must permit all competitive range offerors an opportunity to respond to the revised requirements.

B-238890, July 6, 1990***

90-2 CPD 17

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Adequacy

Protest is denied where, although the Small Business Administration's denial of a certificate of competency (COC) references a basis for COC denial ultimately determined to be incorrect, it also references a correct, independent basis for denial.

B-239539.2, July 6, 1990

90-2 CPD 18

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

General Accounting Office will not award protest costs where the protest is properly dismissed after agency takes corrective action responsive to the protest.

Procurement

Bid Protests

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

Prior dismissal of protest as untimely is affirmed where protest to the General Accounting Office was filed more than 10 working days after protester was notified of agency's denial of protester's initial protest to the procuring agency.

Procurement

Bid Protests

- GAO authority

Protest concerning request for carriers' rate tenders falls outside of General Accounting Office's bid protest jurisdiction where transportation services will be obtained through the issuance of a government bill of lading pursuant to a tender for a one-time routing under relatively informal agency procedures.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Contracting agency properly canceled invitation for bids (IFB) for high security door lock cylinders to replace existing lock cylinders where: (1) use of "brand name or equal" instead of functional specification limited the agency's ability to clearly state its minimum needs; (2) IFB failed to provide precise information about existing cylinder spaces and doors into which the new locks were to fit; and (3) delivery schedule was unduly restrictive.

Procurement

Bid Protests

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

Protest against rejection of proposal and exclusion from competitive range is dismissed as untimely where protester waited 3 months after receiving letter detailing specific bases for rejection of the proposal to file protest.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Suspended/debarred contractors

Protester is not an interested party to maintain protest where it has been suspended from government contracting and would not be eligible to receive award even if its protest were sustained.

Procurement

Bid Protests

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

Protest that agency's specifications for equipment are unduly restrictive is untimely when not filed prior to the time for receipt of initial proposals, since the alleged improprieties were apparent from the face of the solicitation.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protester's offer was properly rejected as technically unacceptable where offer did not meet solicitation specifications.

Procurement

Bid Protests

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

Protest issues based on alleged improprieties in a solicitation that are apparent prior to bid opening must be filed prior to that date.

Procurement

Contractor Qualification

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

A bidder's ability to meet its contractual obligations at the price offered is a matter of the firm's responsibility for the contracting agency to determine before award, and the General Accounting Office will not review an affirmative determination in that respect except in limited circumstances.

Procurement

Sealed Bidding

- **Below-cost bids**
- ■ **Contract awards**
- ■ ■ **Propriety**

The submission of a below cost or low-profit offer is not illegal and provides no basis for challenging the award of a firm, fixed-priced contract to a responsible contractor.

Procurement

Sealed Bidding

- **Bids**
- ■ **Evaluation**
- ■ ■ **Prices**

Contracting agency may consider cost-related factors other than bid price to determine the low evaluated bid only where such factors are clearly delineated in the solicitation.

Procurement

Sealed Bidding

- **Contract award notification**
- ■ **Procedural defects**

Failure to promptly notify protester of award to another bidder does not affect the validity of an otherwise properly awarded contract.

B-239025, July 11, 1990***

90-2 CPD 25

Procurement

Sealed Bidding

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

Protest that low and second-low bids are nonresponsive for bidders' failure to complete certification regarding statutory limitation on use of appropriated funds for lobbying activities is denied where certification imposed no additional material obligation upon bidders beyond those imposed by the statute itself.

B-239038, July 11, 1990***

90-2 CPD 26

Procurement

Noncompetitive Negotiation

- **Use**
- ■ **Justification**
- ■ ■ **Urgent needs**

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not objectionable where the agency reasonably determined that only one source could supply the desired item within the urgent time constraints of the procurement.

Procurement

Competitive Negotiation

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

Where solicitation listed evaluation factors in descending order of importance, listing cost as the last factor should not have caused offerors to misinterpret the importance of cost since the solicitation disclosed the specific formula used by the agency to determine the tradeoff between cost and technical factors.

Procurement

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.

Procurement

Competitive Negotiation

- Offers
- ■ Exclusion
- ■ ■ Administrative discretion

Determination that offeror's proposal was no longer within the competitive range was proper where agency determined that offeror had no reasonable chance of being selected for award, and the record shows that the agency's relatively low technical rating of the offeror's proposal was reasonable, and that offeror's proposed cost was substantially higher than that of offerors in the competitive range.

Procurement

Bid Protests

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

Where protester challenges the agency's award of a contract to an approved source rather than the solicitation's omission of the protester as an approved source, the protest does not involve an allegation of a solicitation impropriety and, therefore, need not be filed before the closing date for receipt of proposals.

Procurement

Bid Protests

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **10-day rule**
- ■ ■ ■ **Effective dates**

Where the agency's and the protester's versions conflict concerning when the protester was notified that its proposal would not be considered for award, the General Accounting Office will resolve doubt over whether the protest was filed within 10 days of that notification in the protester's favor.

Procurement

Noncompetitive Negotiation

- **Use**
- ■ **Justification**
- ■ ■ **Urgent needs**

Contracting agency's decision to award contract to the only approved source that submitted a proposal is proper where, in view of unexpected deterioration of supply stock, the approved source is the only firm that can meet the agency's urgent need for the item.

B-239224, July 12, 1990

90-2 CPD 29

Procurement

Bid Protests

- **Allegation substantiation**
- ■ **Lacking**
- ■ ■ **GAO review**

Protest that after bid opening agency increased the amount of funding available so as to permit award for both the base and additive items, thereby displacing protester's low base bid, is denied where record shows that prior to bid opening, the agency budget officer certified in writing the availability of sufficient funds to permit award for the greater amount of work.

B-239231.4, July 12, 1990

90-2 CPD 30

Procurement

Bid Protests

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

Protest of agency's procedures in post award reevaluation of proposals is untimely when filed more than 10 working days after basis of protest was known or should have been known.

B-236336, July 13, 1990

Procurement

Payment/Discharge

- Shipment
 - ■ Tenders
 - ■ ■ Terms
 - ■ ■ ■ Interpretation
-

Procurement

Payment/Discharge

- Shipment costs
- ■ Rate schedules
- ■ ■ Applicability

Where a tender other than the one referenced on a Government Bill of Lading (GBL) could apply to the shipment, the referenced tender permits alternation with otherwise applicable charges whereas the other one does not, and the un referenced tender leads to a lower charge to the government, the un referenced tender should be applied.

Procurement

Payment/Discharge

- Shipment
- ■ Tenders
- ■ ■ Terms
- ■ ■ ■ Interpretation

The insertion of a tender number on a bill of lading is not conclusive as to the agreement and is not necessarily determinative of the government's legal obligations.

Procurement

Payment/Discharge

- Shipment costs
- ■ Additional costs
- ■ ■ Bills of lading
- ■ ■ ■ Ambiguity

The carrier, not the government as shipper, is responsible for the proper issuance of a Government Bill of Lading, free of conflicting provisions.

B-238893, July 13, 1990

90-2 CPD 31

Procurement

Bid Protests

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

New and independent grounds of protest based on information in the agency's report responding to the initial protest allegations are untimely where the protester first raises such issues more than 10 days after receiving the agency report.

Procurement

Special Procurement Methods/Categories

- Research/development contracts
 - ■ Contract durations
-

Procurement

Special Procurement Methods/Categories

- Research/development contracts
- ■ Contract extension
- ■ ■ Propriety

Protest alleging that the extension of a research and development (R&D) contract beyond 5 years is improper is denied since the Federal Acquisition Regulation (FAR) does not limit the duration of R&D contracts to 5 years; the extension of the performance period, standing alone, does not constitute a change in the scope of the procurement; and the contract is not a "multiyear contract" limited to a maximum duration of 5 years under FAR § 17.102-2(a).

B-239295, July 13, 1990

90-2 CPD 33

Procurement

Competitive Negotiation

- Contracts awards
 - ■ Propriety
-

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Award to offeror whose proposal in negotiated procurement failed to conform to material specification requirement for an "off-the-shelf," proven production system was improper.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Interpretation

In determining the actual meaning of a particular solicitation requirement, the solicitation must be read as a whole and in a manner that gives effect to all provisions of the solicitation; when solicitation is read as a whole, provision in statement of work that agency "desires" "off-the-shelf" proven production system clearly means that an "off-the-shelf" system is a mandatory requirement.

B-236173.4, B-236173.5, July 16, 1990

90-2 CPD 34

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest of change or relaxation of a solicitation requirement in accepting awardee's nonconforming proposal is denied where the protester was not prejudiced and the item meets the government's requirements.

Procurement

Competitive Negotiation

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

Notwithstanding greater importance of technical factors in overall evaluation scheme, agency may make award to lower-cost offeror where record establishes that contracting officer reasonably determined proposals to be technically equal.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Price negotiation

Since contracting agency did not consider protester's price to be too high for the technical approach proposed, agency was not required to conduct discussions on the price proposed by the protester.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest alleging awardee's noncompliance with mandatory technical requirements is denied, where the record shows that the awardee's proposal was reasonably evaluated by the agency as meeting the requirements.

Procurement

Competitive Negotiation

- Technical transfusion/leveling
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Improper technical leveling of proposals did not take place where the primary purpose of the contracting agency's discussions was to ascertain what the offeror was proposing to furnish rather than to raise offeror's technical proposal to level found in protester's proposal.

B-239035, July 16, 1990

90-2 CPD 35

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Performance bonds

Performance bond requirement in solicitation issued as part of a cost comparison pursuant to Office of Management and Budget Circular No. A-76, for facilities maintenance at academic institution housing over 1,000 personnel, is unobjectionable where substantial government-furnished property will be provided to the contractor for performance of the contract and the services to be performed are critical to the continuous operation of the facility.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Response times
- ■ ■ Adequacy

Protest that agency allowed unreasonably short time period for response to request for best and final offers is denied where agency allowed 6 days between mailing of request and due date for response, was not arbitrary in its treatment of offerors, and offeror in same city as protester responded the day before the due date.

Procurement

Competitive Negotiation

- Contracting officer duties
- ■ Contract award notification

Contracting agency is only obligated to notify unsuccessful firms of the agency's award decision after the award is made.

Procurement

Contractor Qualification

- Approved sources
- ■ Qualification
- ■ ■ Delays

Protest that agency unreasonably delayed qualification of protester's product is denied where the record shows that the protester's failure to complete a necessary test substantially contributed to the delay.

Procurement

Payment/Discharge

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

Where the government has made a *prima facie* case of carrier liability for the unexplained loss of a carton, the burden then shifts to the carrier to show that it was not negligent and that the loss was due to an excepted cause. The carrier has not rebutted the government's *prima facie* case merely by showing that it returned a similar carton found on a trailer that it says should have carried the missing item from the carrier's origin terminal to a second terminal, where the returned carton was marked for a different destination than was the lost one; involved a slightly different weight; showed a different Terminal Control Number; and was found on a different trailer than the one used to pick the missing item up at origin.

Procurement**Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Highest priced acceptable offeror under request for proposals providing for award to low cost acceptable offeror is not an interested party under General Accounting Office Bid Protest Regulations to protest award to low priced offeror; protester's unsupported and untimely assertion that all intervening offerors might be unacceptable is not sufficient to establish it as an interested party within the meaning of the Regulations.

B-237342.2, July 17, 1990**90-2 CPD 39****Procurement****Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reversal
- ■ ■ ■ Additional information

Decision sustaining protest on ground that reopening discussions with awardee to afford it an opportunity to make its proposal acceptable was improper is reversed where agency's reconsideration request shows that, as it originally asserted, it merely allowed awardee to substitute an acceptable item offered as alternate in best and final offer.

B-238216.2, July 17, 1990**90-2 CPD 40****Procurement****Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement**Socio-Economic Policies**

- Preferred products/services
- ■ American Indians

Denial of protest of Bureau of Indian Affairs' determination that joint venture did not qualify as a Buy Indian Act concern, as required by the solicitation, is affirmed where agency interpretation, which resulted from an agency-level protest following the commencement of negotiations with the protester, effected no actual change in agency policy, but instead was consistent with the agency's published draft regulations and was a reasonable implementation of the Act; in these circumstances, the agency was not required to afford protester an opportunity to reorganize or reimburse protester its negotiation costs.

B-238356.2, July 17, 1990*****90-2 CPD 41****Procurement****Bid Protests**

- Lobbying

Allegation that an offeror's failure to disclose expenditures for lobbying activities allegedly concerning the contract award requires rejection of its proposal is without basis where the alleged lobbying activities concern the awardee's grievance with respect to the government's termination

of the prior contract, not the reprocurement award, and do not fall within the scope of the disclosure requirement.

Procurement

Contract Management

- **Contract administration**
- ■ **Default termination**
- ■ ■ **Resolicitation**
- ■ ■ ■ **Procedures**

Agency properly conducted a reprocurement limited to the defaulted awardee and the second low offeror under the prior solicitation, rather than making a sole-source award to the second low offeror, where the agency had an urgent requirement but there was sufficient time to solicit offers from these two known potential sources.

B-238422.2, July 17, 1990

90-2 CPD 42

Procurement

Bid Protests

- **Agency-level protests**
- ■ **Protest timeliness**
- ■ ■ **GAO review**

Procurement

Socio-Economic Policies

- **Small business set-asides**
- ■ **Size status**
- ■ ■ **Administrative discretion**
- ■ ■ ■ **GAO review**

Agency is not required to terminate award to firm where, in response to untimely protest of Small Disadvantaged Business (SDB) status of the awardee under an SDB set-aside, the Small Business Administration finds awardee is not an SDB.

B-238555.2, July 17, 1990

90-2 CPD 43

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation errors**
- ■ ■ **Evaluation criteria**
- ■ ■ ■ **Application**

Protest alleging that contracting activity used undisclosed evaluation criteria is denied where the record is clear that proposals were evaluated in accordance with the criteria set forth in the solicitation.

Procurement

Competitive Negotiation

- Offers
- ■ Technical acceptability
- ■ ■ Deficiency
- ■ ■ ■ Blanket offers of compliance

Agency properly rejected protester's proposal as technically unacceptable where the proposal made a blanket offer to meet all required specifications but failed to provide sufficient detail regarding the solicitation's technical requirements.

B-238874, July 17, 1990***

90-2 CPD 44

Procurement

Bid Protests

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

The failure of an invitation for bids, which requested option prices, to state whether the evaluation of bids would include or exclude option prices is an apparent solicitation impropriety which should have been protested prior to bid opening; however, the General Accounting Office will consider the untimely protest under the significant issue exception to the timeliness rules where consideration of the protest is in the interest of the procurement system.

Procurement

Sealed Bidding

- Bids
- ■ Evaluation
- ■ ■ Prices
- ■ ■ ■ Options

Evaluation of bids under invitation for bids, which failed to state whether the evaluation of bids would include or exclude the evaluation of option prices, is improper.

B-238875, July 17, 1990

90-2 CPD 45

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Price negotiation

Cost discussions were meaningful where record establishes that the contracting agency indicated to the high-priced offeror that its costs should be reduced, and the offeror did, in fact, lower its price proposal. Agency reasonably did not discuss technical areas where the evaluators found no technical weaknesses or deficiencies in the proposals which were included in the competitive range.

Procurement

Competitive Negotiation

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

Protest that contracting agency should have performed in-depth cost realism and most probable cost analyses is denied where solicitation essentially requires awardee to provide a fixed number of full-time staffers to perform the work described, at firm, fixed-price, loaded hourly labor rates, and provides that for evaluation purposes these rates shall be multiplied by the number of hours in a year of full-time work.

B-238910, July 17, 1990

90-2 CPD 46

Procurement

Sealed Bidding

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

Protest that contracting agency improperly denied protester's request for upward correction of its low bid is sustained with respect to one line item of the completed bid schedule, where worksheets provide clear and convincing evidence of a mistake and of the intended bid for the item.

Procurement

Sealed Bidding

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

Protest that agency improperly denied requested correction of its bid price for a line item is denied, where protester prepared three different worksheets addressing the item, and it is not clear that the one worksheet indicating the allegedly intended item price in fact reflects protester's intended item price; agency therefore reasonably concluded that protester failed to show that the bid price was not intended.

B-239170, B-239921, July 17, 1990***

90-2 CPD 47

Procurement

Bid Protests

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

Protest challenging solicitation listing of competitor as an approved source, on the ground that approval was based on improper disclosure of protester's proprietary technical data, is untimely where protester had constructive notice of competitor's approval through announcement of prior award to competitor for same part in *Commerce Business Daily* more than 2 years before issuance of solicitation.

Procurement

Socio-Economic Policies

- Small business set-asides
 - ■ Size status
 - ■ ■ Administrative discretion
 - ■ ■ ■ GAO review

General Accounting Office does not review size status determinations made by the Small Business Administration (SBA) since SBA has conclusive authority to determine small business size status for federal procurements.

Procurement

Socio-Economic Policies

- Small businesses
 - ■ Contract awards
 - ■ ■ Pending protests
 - ■ ■ ■ Justification

A contracting officer is not required to delay contract award during the appeal period provided for challenges to initial Small Business Administration size status determinations.

B-203529.2, July 18, 1990

Procurement

Payment/Discharge

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

Carrier's allegation that a helicopter blade lost in transit to destination in fact had been delivered but later was returned by the agency to origin does not rebut the government's *prima facie* case against the carrier for loss of the blade where the agency has been unable to verify delivery or return; the carrier has furnished no documentation to support the allegation or otherwise establish delivery; and the record as developed in response to the allegation contains no evidence to suggest receipt at destination or return.

B-238680.2, July 18, 1990***

Procurement

Contractor Qualification

- Responsibility
 - ■ Contracting officer findings
 - ■ ■ Negative determination
 - ■ ■ ■ Criteria

Awardee did not meet definitive responsibility criterion in invitation for bids requiring bidders' possession of a \$100,000 working capital fund, where the contracting officer had no objective evidence that the awardee had working capital meeting the requirement.

Procurement

Bid Protests**■ GAO authority**

General Accounting Office does not consider bid protests of procurements by nonappropriated fund instrumentalities.

Procurement

Bid Protests**■ GAO procedures****■ ■ Preparation costs****■ ■ ■ Burden of proof**

Where a claimant, seeking the recovery of its proposal preparation and protest costs, fails to adequately document its claim to show that the hourly rates, upon which its claim is based, reflects the employee's actual rate of compensation plus reasonable overhead and fringe benefits, the claim for costs is denied.

Procurement

Competitive Negotiation**■ Offers****■ ■ Price reasonableness****■ ■ ■ Determination****■ ■ ■ ■ Administrative discretion**

Protest against dissolution of a small business set-aside and solicitation on an unrestricted basis is proper where the contracting officer had rational basis for determination that the prices submitted by eligible small businesses were unreasonably high.

Procurement

Competitive Negotiation**■ Offers****■ ■ Price reasonableness****■ ■ ■ Determination****■ ■ ■ ■ Administrative discretion**

In considering price reasonableness under a small business set-aside, contracting officer has discretion in deciding which factors to consider and a price submitted by an otherwise ineligible large business properly may be considered.

Procurement

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

Protest against dissolution of a small business set-aside and solicitation on an unrestricted basis is proper where the contracting officer had rational basis for determination that the prices submitted by eligible small businesses were unreasonably high.

Procurement

Competitive Negotiation

- Offers
- ■ Price reasonableness
- ■ ■ Determination
- ■ ■ ■ Administrative discretion

Contracting agency's determination that protester failed to establish the reasonableness of its offered price is upheld since the record shows that the cost and pricing data furnished by the protester was inadequate to support its claimed costs.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest is sustained where agency's determination that rates offered were not fair and reasonable is unsupported by record and where evaluation criteria concerning rates were applied to offerors inconsistently.

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Procurement

Special Procurement Methods/Categories

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

Dismissal of protest as academic following cancellation of invitation and agency's decision to perform in-house is affirmed since contrary to the protester's argument there is no requirement that a decision to perform a function in-house be supported by a cost study under OMB Circular A-76 and agency-wide guidelines for performance of support services supports agency's position that the decision to perform the services in-house was not made to avoid the consideration of the protest.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Auction prohibition

Despite disclosure by agency of competitors' prices, agency's decision to reopen discussions and request best and final offers after amending solicitation clarifying ambiguous manning requirement is not objectionable. Risk of possible auction is secondary to the need to preserve the integrity of the competitive procurement system.

Procurement

Competitive Negotiation

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

Agency properly determined that correction of omission of required manning levels from offeror's proposal as a result of ambiguous manning specifications in the solicitation requires reopening discussions with all offerors in the competitive range, since allowing correction effectively gives offeror an opportunity to make its proposal acceptable.

B-238942, July 20, 1990

90-2 CPD 55

Procurement

Socio-Economic Policies

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

Protest is sustained where agency improperly rejected protester's low bid for offering foreign end items on the basis that operation consisting of placing components in an envelope and sealing it performed abroad—which did not substantially transform the completely domestic components of a tracheal suction set—constituted "manufacturing" within the meaning of the Buy American Act and the Trade Agreements Act of 1979.

B-238965, July 20, 1990***

90-2 CPD 56

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety
- ■ ■ Evaluation errors
- ■ ■ ■ Materiality

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest alleging that agency improperly made award to firm whose product does not conform to specifications is sustained where record shows that agency in fact relaxed material requirements of specification for awardee and such action was prejudicial to the other competitive range offerors.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Pricing errors
- ■ ■ Correction
- ■ ■ ■ Propriety

Where, before award, but after receipt of best and final offers, an offeror claims a mistake in its proposal, agency may—but is not required to—reopen negotiations with offerors to allow the offeror claiming the mistake to revise its proposal, if the agency determines it is clearly in the government's best interest to do so.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency failed to properly notify it of possible errors where agency specifically cited only one item and failed to cite a second item is denied where both items were identical, except for shipping costs, and an error in one would have identified an error in the other.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety

Where, during discussions, agency requested the protester to review its proposed pricing on a specific item and protester verified its original price, agency determination not to reopen negotiations to allow protester to correct a subsequently discovered error is reasonable since protester was previously provided an opportunity to review its proposal and further negotiations would result in unacceptable delay of performance.

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Discussion

Where agency's proper removal of 49 pages from protester's proposal resulted in significant technical deficiencies, agency reasonably concluded that protester's proposal would require major revisions to become acceptable, and eliminated protester from the competitive range without conducting discussions.

Procurement

Competitive Negotiation

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

Where solicitation set forth line, type size, and page limitations on offerors' proposals and warned that pages exceeding these limits would not be evaluated, agency properly rejected 49 pages of protester's proposal which exceeded the limits set. In view of the number of pages involved and the plain requirements of the solicitation, protester's failure to comply with limits did not constitute minor irregularity and, thus, reasonably was not waived or corrected as clarification.

B-239023, July 20, 1990

90-2 CPD 59

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation errors**
- ■ ■ **Evaluation criteria**
- ■ ■ ■ **Application**

Protest challenging evaluation of protester's proposal is denied where solicitation's technical and cost criteria were of essentially equal importance; the contracting agency's cost realism and technical approach analysis were reasonably based; and the awardee offered the proposal with the highest technical rating and the lowest probable cost.

B-239662, July 20, 1990

90-2 CPD 60

Procurement

Sealed Bidding

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

Protest that agency improperly allowed correction of mistake in low bid after bid opening is denied where mistake was apparent clerical error and could be readily corrected by applying standard mathematical calculation.

B-240329, July 20, 1990

90-2 CPD 61

Procurement

Bid Protests

- **GAO procedures**
- ■ **Interested parties**
- ■ ■ **Direct interest standards**

A trade association which represents reforestation contractors is not an interested party to bring a protest against an allegedly improper award because it is not an actual or prospective bidder or offeror, if the requirement were resolicited.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest is sustained where agency's determination that rates offered by protester were not fair and reasonable is unsupported by record and where evaluation criteria was misapplied or applied to offerors inconsistently.

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Protest against the designation of an accounting system certification requirement in a negotiated procurement as relating to proposal "responsiveness" is academic where the agency states that it will consider the requirement as a matter of responsibility and in fact does so.

Procurement

Specifications

- Minimum needs standards
- ■ Determination
- ■ ■ Administrative discretion

Protest against the broad manner in which a requirement is written is denied where agency explains the need for the requirement and the protester does not show that the agency's position is unreasonable.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Terms
- ■ ■ Risks

Protest allegation that solicitation for requirements contract precludes bidders from reasonably calculating bid prices—because the solicitation does not guarantee a minimum payment to the contractor—is denied where the solicitation contains annual estimates of items needed and the contractor's expected hourly rate of work, and advises bidders of possibility that rate of work may double or triple in some instances. It is the bidder's responsibility in bidding a fixed-price contract to project costs and allow for risks— that, for example, the income derived from agency's orders may not encompass all costs—in computing its bid.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Invitations for bids
- ■ ■ ■ Identification

A bid bond which references an incorrect solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that a bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Invitations for bids
- ■ ■ ■ Identification

When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive; the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived.

Procurement

Contract Management

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

The General Accounting Office does not review agency decisions to terminate contracts for the convenience of the government—except when the termination results from an agency's determination that the agency improperly awarded the initial contract—since contract termination is a matter of contract administration not within its bid protest function.

Procurement

Bid Protests

- GAO procedures
 - ■ Administrative reports
 - ■ ■ Comments timeliness
-

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protester's late receipt of agency report is not a basis for reopening protest dismissed for failure to file comments or express continued interest in the protest within 10 working days after receipt of agency report, where protester failed to notify General Accounting Office (GAO) that it had not received report until after due date shown on GAO notice acknowledging receipt of protest.

Procurement

Bid Protests

- GAO procedures
 - ■ GAO decisions
 - ■ ■ Reconsideration
-

Procurement

Bid Protests

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

General Accounting Office (GAO) affirms its dismissal of a protest which was untimely because it was filed more than 10 working days after protester received a letter from the contracting agency which gave the precise reasons giving rise to the basis of the protest. Moreover, even assuming an earlier letter from the protester to GAO should be considered a protest, as argued by the protester, the protest is still untimely as the earlier letter was also received more than 10 working days after the date the basis of protest was known.

Procurement

Bid Protests

- GAO procedures
 - ■ Interested parties
 - ■ ■ Direct interest standards
-

Procurement

Competitive Negotiation

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

Protester whose proposal was reasonably found to be technically unacceptable is not an interested party to challenge the acceptability of the proposed awardee's proposal where other acceptable proposals would be in line for award if the protest were sustained.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest is denied where agency reasonably found that protester's proposal was technically unacceptable and not within the competitive range because, for example, it did not contain an explanation as to how the protester's proposed staff would meet unexpected surges in manpower requirements, and it did not explain how the proposed staff could accomplish multiple subtasks to be issued under a resulting contract.

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest that competition for requirements contract was unequal because allegedly erroneous advice was given to the protester with respect to an ordering clause, which provided for ordering by the most cost-effective method to the government, is denied where there is no indication in the record that any erroneous advice was given and, in any event, the ordering clause did not affect the agency's already existing ability to order in the most cost advantageous manner.

Procurement

Competitive Negotiation

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

Protest that proposal was improperly excluded from competitive range based on price is denied where record does not support protester's contention that in determining its price it relied on information not revealed to other offerors as to the true scope of work, and thus that protester effectively was the only offeror whose price accurately reflected the solicitation requirements.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Offers
- ■ ■ Rejection
- ■ ■ ■ Propriety

Where protester failed to provide test data showing that its offered product will meet a specification requirement, the contracting agency properly rejected protester's product as nonresponsive.

Procurement

Competitive Negotiation

- Offers
- ■ Price disclosure
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest is denied where protester's allegations that agency conducted improper negotiations with one offeror and disclosed protester's price are unsupported by any evidence in the record.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

General Accounting Office will not consider issues which are essentially made on behalf of other potential competitors who themselves may properly protest as interested parties.

Procurement

Competitive Negotiation

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

Contacting agency has discretion in the selection of evaluation factors for a solicitation so long as such factors reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Risks

There is no requirement that an agency eliminate all uncertainty or risk from a solicitation.

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Contention that agency improperly relaxed solicitation requirements by making award to low bidder is denied where the requirements, which allegedly were not relaxed for awardee, were not, in fact, included in the solicitation but were erroneously inferred by the protester based on an unreasonable interpretation of the solicitation.

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Technical equality
- ■ ■ ■ Cost savings

Where agency determined that protester's high-priced alternate proposal, first introduced in its best and final offer, and awardee's proposal were essentially technically equal, awardee's significantly lower price properly became the determining factor in the agency's selection of the awardee.

Procurement

Competitive Negotiation

- Discussion
- ■ Determination criteria

Subsequent to the submission of best and final offers and prior to award, agency's request that awardee verify and explain its lower hourly rates for particular labor categories did not constitute discussions because awardee was not given an opportunity to revise or modify its proposal, but information was obtained solely to determine responsibility of firm.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Wage rates

Where request for proposals required offerors to propose fixed labor rates, agency was not required to make award to protester where its proposal stated 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.

B-236389, July 25, 1990

Procurement

Payment/Discharge

- Shipment costs
 - ■ Additional costs
 - ■ ■ Evidence sufficiency
-

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation
- ■ ■ Technical acceptability

The Military Traffic Management Command's Freight Traffic Rules Publication No. 1A precludes a carrier from assessing an additional charge for exclusive use of vehicle service when "per mile per vehicle used" rates apply.

B-239345, B-239345.2, July 25, 1990

90-2 CPD 77

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation
- ■ ■ Technical acceptability

Contracting agency properly rejected offerors' quotations where the offerors did not provide sufficient information to demonstrate that their offered products were equivalent to the product specified in the solicitation.

B-237728.2, July 30, 1990

90-2 CPD 78

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Prior decision holding that agency properly elected to order a non-mandatory item from a federal supply schedule (FSS) contract when agency determined that burden and cost of new procurement outweighed protester's \$222 cost advantage is affirmed, where protester's argument that cost of placing an order with it are the same as for the FSS contractor, does not take into account the requirement that agency conduct a procurement under small purchase procedures.

B-238055.2, July 30, 1990

90-2 CPD 79

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Dismissal of protest as untimely is affirmed where on reconsideration protester contends that it was not read draft rejection letter as stated in the decision but does not deny that at the same time it was orally informed of the agency's rejection of its offer.

B-238112, July 30, 1990

Procurement

Payment/Discharge

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

The Department of Education may not pay a claim filed by a contractor who remained on the job for several months after its contract had expired. Where a contractor renders service on the mere hope that his proposal will materialize and a contract may be entered into, such services are voluntary and not reimbursable.

B-238223.2, B-238223.3, July 30, 1990

90-2 CPD 80

Procurement

Competitive Negotiation

- Contract awards
 - ■ Fixed-price contracts
 - ■ ■ Cost/technical tradeoffs
 - ■ ■ ■ Justification
-

Procurement

Competitive Negotiation

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

Award of contract at fixed price lower than that initially offered by protester, where certain items of protester's prices were criticized by evaluators as unrealistically low, does not establish that the agency applied a stricter price realism standard to the protester than to the awardee. Agency reasonably concluded that in certain areas the protester's low initial offer coupled with corresponding technical deficiencies indicated a lack of understanding and ability to perform the contract at the offered price, but reasonably did not have the same reservations about the awardee because of its technically superior offer.

Procurement

Competitive Negotiation

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

Protester was not prejudiced by reevaluation of all offerors' initial proposals by technical evaluation review panel, conducted in accordance with source selection plan, which lowered protester's "technically acceptable" score to a level considered "technically unacceptable but capable of being made acceptable," where protester was kept in the competitive range, advised of its deficiencies during discussions, and successfully corrected them in its best and final offer.

Procurement

Competitive Negotiation

- Offers
- ■ Price adjustments
- ■ ■ Allegation substantiation
- ■ ■ ■ Burden of proof

Agency did not mislead protester into raising its price where, based on the agency's reasonable concern that the protester had offered unrealistically low prices in certain areas of its proposal, during discussions the agency advised the protester that it must address the evaluators' price realism questions in its best and final offer, but did not state that the protester was required to raise its price.

Procurement

Contractor Qualification

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

Allegation that awardee was not properly found to be "corporately viable" and cannot perform the contract at the award price concerns the agency's affirmative determination of the awardee's responsibility which the General Accounting Office will not review absent evidence of possible fraud, bad faith, or misapplication of a definitive responsibility criterion.

B-238694.3, July 30, 1990

90-2 CPD 81

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

A contractor adversely affected by a prior General Accounting Office decision is not eligible to request reconsideration of the decision where the firm was aware of the original protest but did not participate in the protest proceedings.

B-239046.2, July 30, 1990

90-2 CPD 82

Procurement

Contractor Qualification

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

Allegation that awardee cannot perform in accordance with the solicitation's manning requirements concerns the contracting agency's affirmative responsibility determination which the General Accounting Office will review only where the protester makes a showing that the contracting officials acted fraudulently or in bad faith or misapplied definitive responsibility criteria.

Procurement

Contractor Qualification

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

Procurement

Sealed Bidding

- Below-cost bids
- ■ Contract awards
- ■ ■ Propriety

Protest that agency should not have accepted bid because it is too low is dismissed as there is no legal basis on which to object to the submission or acceptance of a below-cost bid. Protester's suggestion that awardee is unable to perform at its bid price concerns the contracting officer's affirmative determination of responsibility, a matter which General Accounting Office generally does not review.

B-239148, July 30, 1990

90-2 CPD 83

Procurement

Contract Management

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

Protest that contracting agency improperly terminated contract is dismissed since the termination involves a matter of contract administration not reviewed by the General Accounting Office.

B-239211, July 30, 1990

90-2 CPD 84

Procurement

Competitive Negotiation

- Best/final offers
 - ■ Contractors
 - ■ ■ Notification
-

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Amendments
- ■ ■ Submission time periods
- ■ ■ ■ Effects

Where an amendment relaxing the specifications for a national stock number item does not explicitly request competitive range offerors to submit their best and final offers (BAFOs), but contains language giving notice of a common cutoff date for receipt of revised offers, the amendment has the intent and effect of a request for BAFOs; under the circumstances in which the amendment was issued (after completion of preaward survey, where solicitation provided for award to lowest-priced, responsible offeror), protester had no reasonable basis for alleged expectation that BAFOs would not be requested until discussions were held.

Procurement

Sealed Bidding

- Bids
- ■ Modification
- ■ ■ Late submission
- ■ ■ ■ Determination

Where contracting officer, due to prison security arrangements, collected bids after announcing bid opening time, it was implicit that bid submission would continue until all bids were submitted; allowing one bidder to modify bid to incorporate envelope modification after bid initially had been presented to contracting officer merely delayed conclusion of bid submission process and did not render bid late when it finally was submitted after modification was completed.

B-239328, July 30, 1990

Procurement

Sealed Bidding

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

Procurement

Specifications

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

Where a brand name or equal solicitation required submission of descriptive literature sufficient to establish that the offered item conforms to the salient characteristics and bidders were advised that failure to do so would require rejection of their bids, the procuring agency properly rejected as nonresponsive a bid that included descriptive literature which failed to show compliance with several salient characteristics.

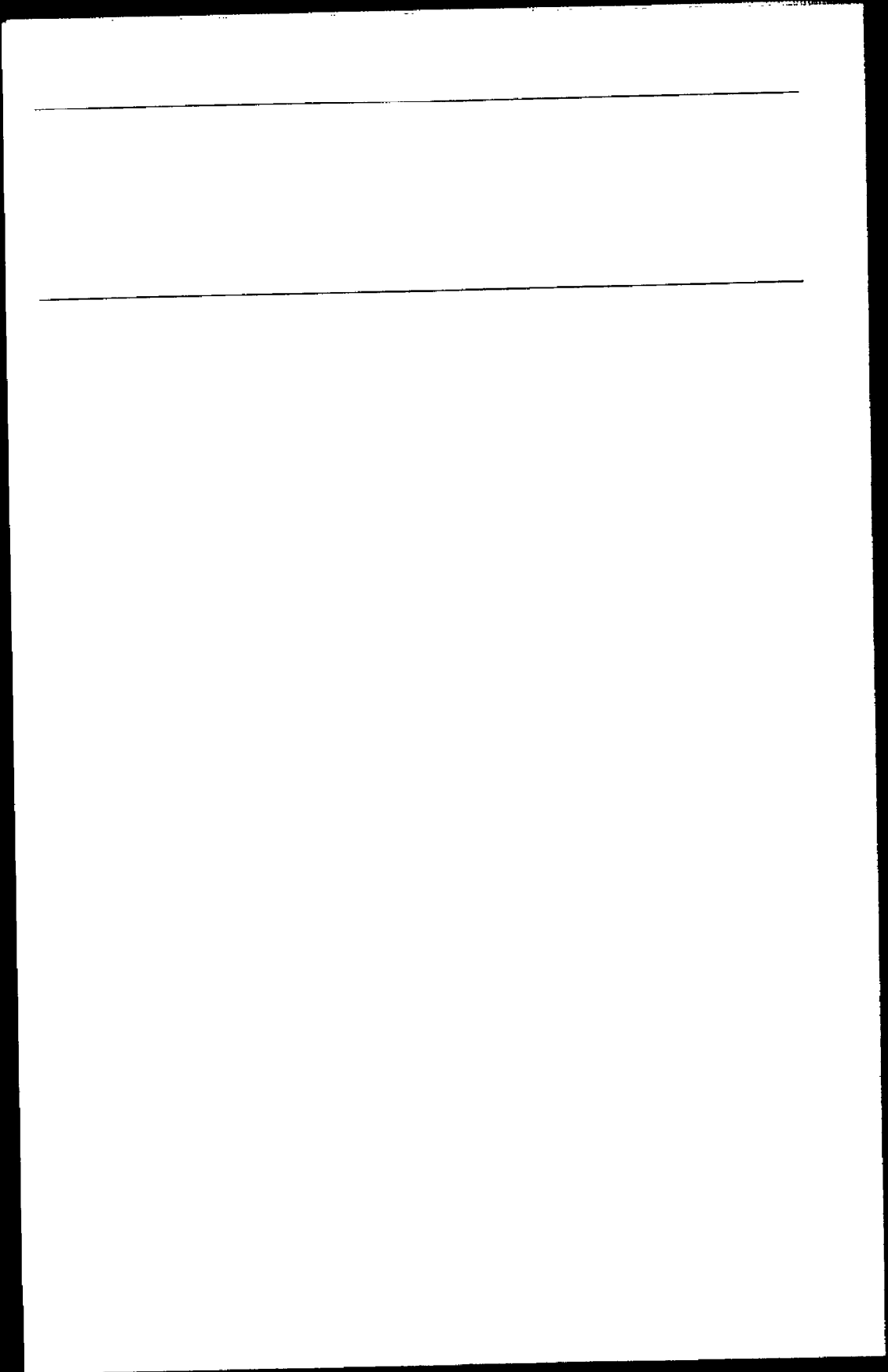
B-240064, July 30, 1990

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Price omission
- ■ ■ ■ Line items

Bid that omitted a separate price for a bid item that was subject to a statutory cost limitation was properly rejected as nonresponsive since this provision is a material term of the solicitation.



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