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General of the  
United States**

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# Contents

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Preface	iii
Table of Decision Numbers	iv
<hr/>	
Digests	
Appropriations/Financial Management	1
Civilian Personnel	5
Military Personnel	13
Miscellaneous Topics	17
Procurement	18

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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).

# Table of Decision Numbers

	Page		Page
B-220425.4, March 25, 1991***	58	B-238937, March 22, 1991	17
B-225873.2, March 28, 1991	16	B-238937, March 22, 1991	3
B-227285.8, March 13, 1991	36	B-239057, March 29, 1991***	11
B-227534.5, March 7, 1991	5	B-239073.2, March 15, 1991***	7
B-228790.2, March 1, 1991	13	B-239108, March 15, 1991	8
B-230158.2, March 1, 1991	18	B-239434.2, March 27, 1991	16
B-230370, March 18, 1991	15	B-239454, B-239450, March 26, 1991	4
B-231760.2, March 15, 1991	7	B-239480, B-238488, March 14, 1991	14
B-232666.4, March 5, 1991***	22	B-239565.2, B-239566.2, March 19, 1991	47
B-233058.5, March 18, 1991	44	B-239676.2, et al., March 8, 1991	32
B-233601.2, March 14, 1991	42	B-239770.2, March 6, 1991	29
B-233742.9, March 1, 1991***	18	B-240008.3, March 18, 1991	45
B-235558.4, March 19, 1991	47	B-240156.2, March 19, 1991***	47
B-235985.2, March 26, 1991	60	B-240289.2, March 15, 1991	43
B-236618, March 14, 1991	42	B-240316, March 15, 1991	2
B-237148, March 15, 1991	1	B-240333.2, March 28, 1991	63
B-237148, March 15, 1991	43	B-240342, March 1, 1991***	5
B-237623, March 15, 1991	14	B-240440, March 27, 1991	4
B-237623, March 15, 1991	2	B-240451, March 15, 1991	43
B-237765, March 26, 1991	16	B-240689.2, March 13, 1991	37
B-237819, March 11, 1991	6	B-240823, March 19, 1991	48
B-237973, March 22, 1991***	16	B-240942.2, March 21, 1991	15
B-238128, March 8, 1991	14	B-241007.2, March 13, 1991	37
B-238239, March 19, 1991	2	B-241032.3, March 21, 1991	54
B-238239, March 19, 1991	47	B-241153.2, March 8, 1991	33
B-238381, March 29, 1991***	11	B-241191, March 18, 1991	9
B-238761, March 1, 1991	13		
B-238877.4, March 20, 1991***	49		

\*\*\* (notes published decisions) Cite published decisions as 70 Comp. Gen.—

---

Table of Decision Numbers

---

	Page		Page
B-241218, March 7, 1991	5	B-241837.2, March 8, 1991	33
B-241281.2, March 22, 1991	54	B-241839, March 5, 1991	28
B-241292.3, March 22, 1991	55	B-241841, March 6, 1991	29
B-241367.3, March 13, 1991	38	B-241858, March 8, 1991	33
B-241413.2, March 1, 1991	19	B-241868, March 1, 1991	22
B-241418.2, March 21, 1991***	50	B-241912, March 5, 1991	28
B-241443, March 14, 1991	6	B-241916, March 1, 1991	22
B-241488, March 13, 1991	1	B-241924, March 8, 1991	34
B-241496.2, March 13, 1991	38	B-241942, March 12, 1991	35
B-241542.2, March 13, 1991	39	B-241945.2, March 28, 1991***	63
B-241591, March 1, 1991	17	B-241949, March 18, 1991	45
B-241592, March 13, 1991	1	B-241963, March 11, 1991	35
B-241703.2, March 11, 1991	34	B-241976, March 19, 1991	48
B-241719.2, March 11, 1991	35	B-241978, March 12, 1991	36
B-241733.2, March 5, 1991	23	B-241983.2, March 13, 1991	39
B-241748, March 1, 1991	19	B-241996, March 19, 1991	48
B-241759, et al., March 5, 1991	23	B-242009, March 21, 1991	51
B-241765, March 1, 1991	19	B-242020, March 21, 1991	51
B-241769.2, March 1, 1991	20	B-242023, B-242023.2, March 25, 1991	58
B-241770, March 25, 1991***	10	B-242029, March 15, 1991	44
B-241772, March 5, 1991	24	B-242058.2, March 20, 1991	49
B-241777, March 1, 1991	20	B-242060, March 25, 1991***	59
B-241805, March 1, 1991	20	B-242064, March 7, 1991	30
B-241808, B-241808.2, March 1, 1991	20	B-242070, March 21, 1991	52
B-241809, March 15, 1991	15	B-242077.3, March 22, 1991	55
B-241810, March 5, 1991	26	B-242079, March 27, 1991	62
B-241830, March 5, 1991	26	B-242080, March 8, 1991	34

---

Table of Decision Numbers

---

	Page		Page
B-242089, March 15, 1991	9	B-242359, March 22, 1991	57
B-242093, March 7, 1991	31	B-242361, et al., March 29, 1991	65
B-242102, March 13, 1991	39	B-242374, March 26, 1991	61
B-242104, March 18, 1991	46	B-242395, March 13, 1991	41
B-242107.2, March 13, 1991	40	B-242405, March 15, 1991	2
B-242134.4, March 20, 1991***	50	B-242405, March 15, 1991	44
B-242142, March 22, 1991	17	B-242435, March 29, 1991***	66
B-242142, March 22, 1991***	3	B-242449.4, March 22, 1991	58
B-242154, March 28, 1991	11	B-242496, March 13, 1991	41
B-242166, March 29, 1991	64	B-242515, March 27, 1991	62
B-242213.2, March 18, 1991	46	B-242517.2, March 6, 1991	30
B-242222, March 26, 1991	61	B-242598, March 26, 1991***	61
B-242229, March 22, 1991	56	B-242611, March 26, 1991	62
B-242236, March 7, 1991	31	B-242838.2, March 19, 1991	48
B-242244, March 13, 1991	40	B-242880, March 27, 1991	10
B-242254, March 13, 1991	40	B-242880, March 27, 1991	4
B-242261.2, March 21, 1991	52	B-242934.2, March 21, 1991	54
B-242270, March 13, 1991	41	B-242997, March 25, 1991	60
B-242303, March 21, 1991	53	B-243015, March 7, 1991	31
B-242307, March 8, 1991	6	B-243029, March 25, 1991	3
B-242309, March 21, 1991	10	B-243045, March 5, 1991	29
B-242311, March 29, 1991	64	B-243063, March 5, 1991	29
B-242316, B-242316.2, March 20, 1991	50	B-243070, March 7, 1991	31
B-242329.2, March 12, 1991	36	B-243099, March 8, 1991	34
B-242331, March 22, 1991***	56	B-243106, March 14, 1991	42
B-242331.3, March 22, 1991	56	B-243170, March 11, 1991	35
B-242357.2, March 22, 1991	57	B-243192, March 14, 1991	42
		B-243206, March 27, 1991	63

---

Table of Decision Numbers

	Page		Page
B-243224, March 19, 1991	49	B-243230, March 21, 1991	54
		B-243306, March 18, 1991	46

---

# Overruled, Modified and Distinguished

---

	Page
54 Comp. Gen. 87	11

---

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# Appropriations/Financial Management

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**B-241488, March 13, 1991**

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## Appropriations/Financial Management

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### Claims Against Government

- Customs duties
- ■ Proceeds
- ■ ■ Ownership

The Virgin Islands government claims that title to certain property, purchased with Virgin Islands duty collections by the federal government and utilized by the Customs Service, should be turned over to the Virgin Islands government. The claim is denied since 48 U.S.C. §§ 1406i and 1642a (1988) require the Customs Service to deduct the costs of collecting duties for the Virgin Islands from the duty proceeds and the Customs Service acquired the property in order to carry out its statutory duty to administer customs laws in the Virgin Islands. Since the property was properly acquired, a transfer of title would require specific congressional authority.

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**B-241592, March 13, 1991**

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## Appropriations/Financial Management

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### Claims Against Government

- Burden of proof

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## Appropriations/Financial Management

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### Claims Against Government

- Customs duties
- ■ Proceeds
- ■ ■ Ownership

The Virgin Islands government filed three claims for additional amounts from Customs Service funds derived from duty collected in the Virgin Islands. Two of the claims are based on government records which are known to be incomplete or unavailable. Where official records or other evidence which may prove or disprove the validity of a claim cannot be produced from government files or elsewhere, the claims must be denied. As to the third claim, claimant has not presented sufficient evidence to show it is entitled to the funds.

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**B-237148, March 15, 1991**

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## Appropriations/Financial Management

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### Claims Against Government

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

The Bureau of Indian Affairs may pay a contractor on a *quantum meruit* basis for services provided to the government under an improper contract extension since the government could properly have acquired the services, the government received and accepted the benefit of the services, and the contractor acted in good faith.

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**B-237623, March 15, 1991**

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**Appropriations/Financial Management**

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**Claims Against Government**

- Statutes of limitation
- ■ Effects
- ■ ■ Administrative appeals

The rule that a claim does not accrue for purposes of the statute of limitations pending a statutorily required determination as to the claimant's entitlement is not for application where a retired member of the military seeks to revoke a prior waiver of his military retired pay. A claim for retroactive retired pay following the revocation in 1986 of a prior waiver of such pay for amounts that accrued more than 6 years before the claim was received is barred by the 6-year limitations period.

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**B-240316, March 15, 1991**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Awards/honoraria
- ■ ■ Interagency program funding

Although the Federal Bureau of Prisons may not use appropriated funds to contribute, along with other federal agencies, a pro-rata share of costs incurred by the Dallas/Fort Worth Federal Executive Board for awards made by the Board, it may use its appropriations to pay costs of awards to its own employees for their services to the Board.

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**B-242405, March 15, 1991**

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**Appropriations/Financial Management**

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**Claims Against Government**

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Company that provided unauthorized track inspection services to the government in the belief that they were covered by an option clause of a term contract, when in fact the government had not exercised the option, may be paid on *quantum meruit* is because obtaining the services by contract would have been a permissible procurement, the government received and accepted their benefit, the company acted in good faith, and amount claimed represents the reasonable value of the benefit received.

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**B-238239, March 19, 1991**

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**Appropriations/Financial Management**

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**Claims Against Government**

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Denmark's claim for reimbursement for services furnished two Navy ships and for hospital services provided a Navy crew member may be paid despite absence of United States government records supporting the claim, since the United States Embassy and Navy Squadron Commander who apparently was initially responsible for handling the claim have recommended payment.

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**B-238937, March 22, 1991**

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**Appropriations/Financial Management**

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**Budget Process**

- Funding
- ■ Vending facilities
- ■ ■ Profits

Employee union may retain 50 percent of vending machine income so long as it pays other 50 percent to appropriate state agency for the blind.

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**B-242142, March 22, 1991\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Time availability
- ■ Permanent/indefinite appropriation
- ■ ■ Determination criteria

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

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**B-243029, March 25, 1991**

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**Appropriations/Financial Management**

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**Claims Against Government**

- Trust funds
- ■ Interest

Because the law regarding the investment of Individual Indian Monies (IIM) does not require the payment of interest on IIM accounts, the Bureau of Indian Affairs (Bureau) is not liable to IIM account owners for loss of interest, even that resulting from the Bureau's failure to manage IIM investments properly. The Bureau and tribal representatives should seek legislative settlement of any such claims.

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**B-239454, B-239450, March 26, 1991**

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**Appropriations/Financial Management**

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**Accountable Officers**

- Disbursing officers
- ■ Illegal/improper payments
- ■ ■ Liability restrictions
- ■ ■ ■ Statutes of limitation

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**Appropriations/Financial Management**

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**Accountable Officers**

- Liability
- ■ Statutes of limitation
- ■ ■ Effective dates
- ■ ■ ■ Illegal/improper payments

Upon the passing of the 3-year statute of limitations, 31 U.S.C. § 3526, an accountable officer's account is settled by operation of law and the officer is no longer liable for any deficiency in the account.

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**B-240440, March 27, 1991**

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**Appropriations/Financial Management**

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**Accountable Officers**

- Cashiers
- ■ Relief
- ■ ■ Illegal/improper payments
- ■ ■ ■ Forgeries

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**Appropriations/Financial Management**

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**Accountable Officers**

- Disbursing officers
- ■ Relief
- ■ ■ Illegal/improper payments
- ■ ■ ■ Forgeries

U.S. Navy disbursing officer is relieved of liability for the improper payment of checks on forged endorsements made by subordinate cashiers where the officer maintained and supervised an adequate system of procedures designed to prevent such improper payments. We cannot relieve cashiers of liability where supporting documents do not show whether the cashiers complied with existing procedures or whether they should have been suspicious of the fraudulent nature of the transactions. Since it appears that the 3-year period for settlement has almost expired, we are suspending the running of that period to allow the submission of additional information.

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**B-242880, March 27, 1991**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Federal executive boards
- ■ ■ Invitees/guests
- ■ ■ ■ Travel expenses

The Commission on Interstate Child Support may pay the lodging and meal costs of certain core invitees it determines are essential to assist the Commission in fulfilling its statutory duties and to ensure adequate representation at the statutorily mandated National Conference on Interstate Child Support.

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# Civilian Personnel

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**B-240342, March 1, 1991\*\*\***

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**Civilian Personnel**

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**Relocation**

- Temporary quarters
- ■ Interruption
- ■ ■ Actual expenses
- ■ ■ ■ Temporary duty

*Paul G. Thibault*, 69 Comp. Gen. 72 (1989), held that a transferred employee who, while occupying temporary quarters at his new duty station, was required to perform several days temporary duty away from that station, may be reimbursed the costs of retaining his temporary quarters during his absence in addition to per diem he received for his temporary duty if the agency determines that he acted reasonably in retaining those quarters. *Thibault* applies prospectively only since it represented a substantial departure from prior decisions. Therefore, an employee's claim which was settled prior to *Thibault* may not be overturned on appeal based on the new rules announced in *Thibault*.

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**B-227534.5, March 7, 1991**

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**Civilian Personnel**

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**Relocation**

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

An employee is not entitled to reimbursement for shipment of his automobile to his new duty station in Hawaii where shipment at government expense was not authorized at time of transfer and the employee shipped his automobile at personal expense. The employee has not shown that the agency abused its discretion in determining that it would not authorize overseas transportation of employees' automobiles to their duty station as being "in the best interest of the government," pursuant to 5 U.S.C. § 5727(b)(2) and the implementing provisions of the Federal Travel Regulations and Joint Travel Regulations. *Frayne W. Lehmann*, B-227534.4, Nov. 5, 1990, and B-227534.3, Feb. 21, 1990, affirmed.

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**B-241218, March 7, 1991**

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**Civilian Personnel**

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**Relocation**

- Foreign service personnel
- ■ Home service transfer allowances
- ■ ■ Amount determination

A foreign transfer allowance under 5 U.S.C. § 5924(2)(A) and its implementing regulations is allowed for civilians transferred to a foreign area for subsistence expenses incurred in the United States for up to 10 days before final departure to the foreign area. Neither the statute nor the regulations provide for any exceptions or extensions to the 10-day limit. Accordingly, there is no authority to reimburse an employee for expenses incurred for an additional 2-week period.

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**B-242307, March 8, 1991**

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**Civilian Personnel**

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**Compensation****■ Dual compensation restrictions****■■ Retired personnel**

United States Congressman is advised that a retired air traffic controller of the FAA who retired on December 29, 1987, and was reemployed by FAA as a controller on a part-time basis from February 17 until September 24, 1988, under 5 U.S.C. § 8344 (1988), as amended, never acquired any entitlement to the "no annuity offset." Therefore, FAA properly reduced or "offset" his salary by the amount of his annuity during the period he was reemployed by the agency.

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**B-237819, March 11, 1991**

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**Civilian Personnel**

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**Relocation****■ Household goods****■■ Temporary storage****■■■ Reimbursement****■■■■ Eligibility**

An Army officer transferred from Augusta, Georgia, to Washington, D.C., sold his house and put his household goods in temporary storage in Augusta. After later receiving orders transferring him to Fort Jackson, South Carolina, the officer chose to build a house in nearby Augusta and commute, and left his household goods in storage pending completion of the house. In the circumstances, the officer is entitled to the full storage costs available pursuant to the second set of orders.

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**B-241443, March 14, 1991**

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**Civilian Personnel**

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**Compensation****■ Claim settlement****■■ Property damages**

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**Civilian Personnel**

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**Travel****■ Privately-owned vehicles****■■ Property damages****■■■ Claims****■■■■ Payments**

We see no basis for legal objection to exercise by U.S. Customs Service of its discretionary authority to reimburse an employee for damage to her privately owned vehicle and loss of personal property under the provisions of the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. § 3721 (1988). The vehicle was parked in a lot provided by the government for federal employees and was broken into prior to construction of a secured parking area. Further, the employee's duties require her to use her personal vehicle for official business if a government vehicle is not available and therefore the parking of her vehicle was incident to service and not solely incident to commuting to and from work.

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**B-231760.2, March 15, 1991**

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**Civilian Personnel**

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**Leaves Of Absence****■ Military leave****■ ■ Eligibility**

Federal employees who were members of the California National Guard were called to military duty to provide logistical support to fire crews, but not to serve on fire crews themselves. Their requests for military leave under 5 U.S.C. § 6323(b) (1988) are denied since they were not called to provide military aid "to enforce the law," as that phrase is used in 5 U.S.C. § 6323(b) (1988).

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**B-239073.2, March 15, 1991\*\*\***

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**Civilian Personnel**

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**Relocation****■ Residence transaction expenses****■ ■ Reimbursement****■ ■ ■ Eligibility****■ ■ ■ ■ Lot sales**

A transferred employee's residence at his old duty station was situated on an undivided 11.2-acre parcel of land in an area which permitted 2-acre residence sites. However, some of his property was in a flood plain and other parts were sufficiently low lying that they remained wet much of the year. Under paragraph 2-6.1f of the Federal Travel Regulations, only that land which reasonably relates to the residence site may be included for real estate expense reimbursement purposes. Where a parcel of land has not been subdivided and it is questionable that it can be satisfactorily subdivided into additional residential sites under existing zoning requirements and health restrictions, none of that property will be deemed unrelated to the residence site and expense proration is not required.

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**Civilian Personnel**

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**Relocation****■ Residence transaction expenses****■ ■ Reimbursement****■ ■ ■ Eligibility**

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**Civilian Personnel**

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**Relocation****■ Residence transaction expenses****■ ■ Reimbursement****■ ■ ■ Eligibility****■ ■ ■ ■ Property titles**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B-168074, Oct. 29, 1969, and B-180986, Sept. 18, 1974.

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## **Civilian Personnel**

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### **Relocation**

- **Residence transaction expenses**
- ■ **Litigation expenses**
- ■ ■ **Attorney fees**
- ■ ■ ■ **Reimbursement**

A transferred employee, who jointly owned a residence with his former wife, was required to secure a modification of the court order associated with the divorce decree so that the employee could sell his interest in the residence to his former wife. While the modification itself was not contested, it was a continuation of a litigated matter. Under paragraph 2-6.2c of the Federal Travel Regulations the costs of litigation are not reimbursable. Hence, the legal fee incurred to secure the court order modification may not be reimbursed.

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## **Civilian Personnel**

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### **Relocation**

- **Residence transaction expenses**
- ■ **Reimbursement**
- ■ ■ ■ **Eligibility**

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## **Civilian Personnel**

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### **Relocation**

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

A transferred employee, who jointly owned a residence with his former wife, sold his entire interest in the property to his former wife. The rule requiring proration of expenses between the employee and his former wife is not applicable because the residence was not sold by both parties to a third party. Hence, the employee is entitled to full reimbursement of the allowable expenses he incurred in that transaction.

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## **B-239108, March 15, 1991**

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## **Civilian Personnel**

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### **Relocation**

- **Residence transaction expenses**
- ■ **Reimbursement**
- ■ ■ **Permanent duty stations**
- ■ ■ ■ **Distance determination**

Employee transferred from Cottonwood, Arizona, to Pierre, South Dakota, purchased a residence in Rapid City, South Dakota, 172 miles from Pierre. According to employee, decision to purchase in Rapid City was due to medical necessity in that employee's wife requires specialized medical care on an ongoing basis not available at a closer location than Rapid City. Employee may be reimbursed for real estate purchase expenses even though Rapid City is not within commuting distance from Pierre, if an agency determines that the circumstances are as described by him.

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**B-242089, March 15, 1991**

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**Civilian Personnel**

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**Travel**

- Actual subsistence expenses
- ■ Eligibility

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**Civilian Personnel**

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**Travel**

- Actual subsistence expenses
- ■ Reimbursement
- ■ ■ Amount determination

Actual expense reimbursement may be approved when an agency is unable to place an employee in a hotel whose costs are within the per diem rates and the employee would incur substantial costs if limited to per diem. An employee received travel orders authorizing reimbursement on an actual expense basis, but his hotel expense per day was less than agency guidelines for use of that basis. However, over his 6-week assignment the total extra expense was a substantial amount, and to after the fact limit reimbursement to the per diem basis would, in effect, be a retroactive change which is improper. Thus he should be reimbursed under the actual expense basis.

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**B-241191, March 18, 1991**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Additional expenses
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Rotating duty

An employee on "rotational" tour of duty for 36 months to a new duty station within the United States leased out his house at his former duty station. He was notified of his retransfer to his former duty station within the 3-year period allowed for reimbursement of transfer-related real estate expenses. Upon return to former duty station, employee reoccupied his former residence, sold it approximately 1 year later, and purchased a new residence in the same area. Since the 3-year period allowed had not expired prior to notification of retransfer, under the rules enunciated in *Warren L. Shipp*, 59 Comp. Gen. 502 (1980) and *Robert T. Celso*, 64 Comp. Gen. 476 (1985), the employee was under an obligation to avoid incurring unnecessary expenses and the government's obligation to reimburse real estate expenses is limited to the expenses already incurred and those which cannot be avoided. Therefore, the expenses incurred in connection with the employee's purchase of a new residence at his former duty station may not be paid.

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**B-242309, March 21, 1991**

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**Civilian Personnel**

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**Travel**

- Rental vehicles
- ■ Liability insurance
- ■ ■ Expenses
- ■ ■ ■ Reimbursement

Employees' claims for reimbursement of the fees they paid for collision damage waiver insurance incident to renting automobiles may be paid notwithstanding the general regulatory prohibition against paying for such insurance. In this case the rental agency would not release the automobiles without the insurance and the employees were engaged in emergency hurricane relief work. The regulations prohibition presumes an employee has a choice whether to elect the insurance, and these employees had no choice.

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**B-241770, March 25, 1991\*\*\***

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**Civilian Personnel**

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**Relocation**

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

A transferred employee sold his residence at the old duty station which he owned in his capacity as trustee of an *inter vivos* trust which he created in which he was sole beneficiary during his lifetime and in which he retained full powers of revocation. Since employee was both sole trustee and sole beneficiary, he retained all legal title and beneficial interest in the property and therefore, retained sufficient title for purposes of real estate expense reimbursement under the Federal Travel Regulations. Thus, he is entitled to receive reimbursement of real estate expenses associated with the sale of the residence.

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**Civilian Personnel**

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**Relocation**

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

In connection with the sale or purchase of a residence, a transferred employee is not entitled to reimbursement for a lawn service expense since that is a nonreimbursable routine maintenance cost. Also, where pest and home inspections were not required by law or as conditions of obtaining financing, they are not reimbursable. Costs of express mail are not reimbursable real estate expenses but may be reimbursed under the miscellaneous expense allowance.

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**B-242880, March 27, 1991**

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**Civilian Personnel**

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**Travel**

- Travel expenses
- ■ Reimbursement
- ■ ■ Invitees/guests

The Commission on Interstate Child Support may pay the lodging and meal costs of certain core invitees it determines are essential to assist the Commission in fulfilling its statutory duties and to ensure adequate representation at the statutorily mandated National Conference on Interstate Child Support.

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**B-242154, March 28, 1991**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
  - ■ Litigation expenses
  - ■ ■ Attorney fees
  - ■ ■ ■ Reimbursement
- 

**Civilian Personnel**

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**Relocation**

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

Employee seeks additional Temporary Quarters Subsistence Expense (TQSE) for unrefunded security deposit, unrefunded rent, legal fees and court travel, which was necessitated by his landlord's breach of contract and refusal to return his security deposit and unrefunded rent. The landlord subsequently declared bankruptcy. The employee may not be reimbursed. A "security deposit" is not an element of rent for TQSE purposes; the unrefunded rent occurred after the employee's entitlement had expired; and litigation costs are specifically prohibited by the Federal Travel Regulations. We are not aware of any statutory or regulatory authority for reimbursement under these circumstances.

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**B-238381, March 29, 1991\*\*\***

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**Civilian Personnel**

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**Relocation**

- Executive exchange programs
- 

**Civilian Personnel**

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**Travel**

- Executive exchange programs
- 

**Civilian Personnel**

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**Travel**

- Temporary duty
- ■ Determination

A federal employee who participates in the Executive Exchange Program is entitled either to relocation expenses or to travel expenses since the program is in the interest of the government and the participant remains an employee of his agency during the exchange period. However, the agency retains the discretionary authority to determine whether the employee's placement at the private sector location shall be as a permanent change of station or as a temporary duty assignment. 54 Comp. Gen. 87 (1974), modified.

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**B-239057, March 29, 1991\*\*\***

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**Civilian Personnel**

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**Compensation**

- Overtime
- ■ Eligibility
- ■ ■ Travel time

Thirteen employees, nonexempt from the Fair Labor Standards Act (FLSA), were found by the Office of Personnel Management (OPM) in its compliance order to be entitled to FLSA overtime for time spent as hours of work outside their normal duty hours for travel as passengers from

their temporary lodgings to their temporary duty worksites outside established official duty stations. The agency disagrees with such determination. The claims for FLSA overtime are allowed since we do not find OPM's determination to be clearly erroneous or contrary to law or regulation.

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# Military Personnel

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**B-228790.2, March 1, 1991**

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## Military Personnel

### Pay

- Retirement pay
- ■ Apportionment
- ■ ■ Exclusion
- ■ ■ ■ Disability pay

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## Military Personnel

### Pay

- Retirement pay
- ■ Apportionment
- ■ ■ Spouses

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## Military Personnel

### Pay

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

Uniformed Services Former Spouses' Protection Act excepts veterans disability compensation from the disposable retired pay the government may pay to a retired member's former spouse pursuant to court-ordered apportionment. Where veterans disability compensation is increased retroactively, and the retired member earlier waived retired pay equal to his entitlement to such compensation, the disposable retired pay subject to apportionment by court order should be adjusted downward retroactively to reflect the retroactive increase. Further, GAO would not object if the service decides that waiver of the former spouse's resulting debt, which is less than \$500, is appropriate under 10 U.S.C. § 2774.

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**B-238761, March 1, 1991**

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## Military Personnel

### Pay

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

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## Military Personnel

### Pay

- Dual compensation restrictions
- ■ Retired personnel

Former Army officer who accepted government civilian employment upon retirement from the Army received erroneous payments of retired pay because of administrative error by civilian offi-

cials in not reporting increases in his civilian pay to the Army for purposes of reducing his retired pay pursuant to the dual compensation laws. The resultant debt may be waived under 10 U.S.C. § 2774 since, under the circumstances, the retired officer could not reasonably be expected to have recognized that he was being overpaid.

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**B-238128, March 8, 1991**

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**Military Personnel**

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**Pay****■ Dual compensation restrictions****■ ■ Applicability**

A retired Marine Corps enlisted member who elected under 10 U.S.C. § 6323 to be retired in his temporary limited duty officer grade as captain rather than reverting to his enlisted grade is subject to the retired pay reduction provision of the Dual Compensation Act, 5 U.S.C. § 5532(b).

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**Military Personnel**

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**Pay****■ Dual compensation restrictions****■ ■ Overpayments****■ ■ ■ Debt collection****■ ■ ■ ■ Waiver**

Member was advised before retirement that he would be retired in his temporary duty officer status and that he should notify the Marine Corps if he obtained civilian employment with the government after retirement. Nonetheless, retired member took a civilian position just 3 months after retiring and failed to notify Marine Corps of his dual status, and, therefore, Marine Corps failed to reduce his retirement pay in accord with the Dual Compensation Act. Overpayment of retired pay is not appropriate in these circumstances since member was at fault for not notifying his military finance office of his dual status.

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**B-239480, B-238488, March 14, 1991**

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**Military Personnel**

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**Pay****■ Personnel death****■ ■ Balances****■ ■ ■ Lump-sum payments****■ ■ ■ ■ Reenlistment bonuses**

When a service member dies while receiving installments of a Selective Reenlistment Bonus (SRB), the unpaid balance of the SRB is payable as a lump sum for inclusion in his final military pay account. A determination which rules out misconduct of the member as to his own death is not required.

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**B-237623, March 15, 1991**

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**Military Personnel**

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**Pay****■ Retirement pay****■ ■ Claim accrual dates****■ ■ ■ Continuing claims****■ ■ ■ ■ Statutes of limitation**

The rule that a claim does not accrue for purposes of the statute of limitations pending a statutorily required determination as to the claimant's entitlement is not for application where a retired member of the military seeks to revoke a prior waiver of his military retired pay. A claim for

retroactive retired pay following the revocation in 1986 of a prior waiver of such pay for amounts that accrued more than 6 years before the claim was received is barred by the 6-year limitations period.

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**B-241809, March 15, 1991**

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**Military Personnel**

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**Travel**

- Per diem
- ■ Eligibility

**Military Personnel**

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**Travel**

- Temporary duty
- ■ Lodging
- ■ ■ Travel agencies

Members of the Army who used a rental company to procure lodging while at a temporary duty station acted in a reasonable and prudent manner when they used the company recommended by their superiors, who told them that adequate lodging would otherwise be unavailable or would require signing of long-term leases. Reliance on this information satisfied the requirement of the Joint Federal Travel Regulations that those on official travel exercise the same care and regard for expenses incurred as a prudent person would when traveling at personal expense.

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**B-230370, March 18, 1991**

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**Military Personnel**

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**Pay**

- Dual compensation restrictions
- ■ Retirement pay
- ■ ■ Reduction
- ■ ■ ■ Amount determination

A retired Army officer employed as a teacher under the Defense Department Overseas Teachers Pay and Personnel Practices Act is considered a full-time employee during the school year, and therefore, the period in which he receives salary due to his civilian position is the full calendar period of each pay period, not actual days worked. However, he is not subject to dual compensation reduction to his retired pay under 5 U.S.C. § 5532(b) during the summer recess merely due to employment during the school year.

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**B-240942.2, March 21, 1991**

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**Military Personnel**

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**Pay**

- Benefit election
- ■ Survivor benefits

**Military Personnel**

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**Pay**

- Retirement pay
- ■ Claims
- ■ ■ Evidence sufficiency

A retired member of the Army submitted a change of beneficiary request designating his wife rather than his daughter to receive any unpaid retired pay at his death. The request was not accepted because the member's signature was not witnessed. Since neither 10 U.S.C. § 2771 nor the applicable regulations require the member's signature to be witnessed, his request was a valid

change of beneficiary and on his death his wife was entitled to any unpaid retired pay due at his death.

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**B-237973, March 22, 1991\*\*\***

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**Military Personnel**

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**Pay**

- Reservists
- ■ Retirement pay
- ■ ■ Amount determination
- ■ ■ ■ Computation

A reservist's civil service retirement income is not "earned" income from nonmilitary employment" under the dual compensation restrictions of 37 U.S.C. § 204 which requires a reduction in the pay and allowances a member receives while incapacitated if he receives income from nonmilitary employment since civil service retirement income is unrelated to the member's current employment status. Accordingly, it may not be offset against his pay and allowances.

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**B-237765, March 26, 1991**

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**Military Personnel**

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**Pay**

- Personnel death
- ■ Estate
- ■ ■ Claims
- ■ ■ ■ Burden of proof

A claim for the estate of a deceased resident of the United States Soldiers' and Airmen's Home may not be allowed, since the claimants have not proved their relationship to the deceased.

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**B-239434.2, March 27, 1991**

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**Military Personnel**

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**Pay**

- Survivor benefits
- ■ Annuity payments
- ■ ■ Eligibility
- ■ ■ ■ Unborn children

A service member who was to be placed on the Temporary Disability Retired List with a terminal illness properly elected his unborn child to receive a Survivor Benefit Plan (SBP) annuity. For the purpose of cost of coverage, cost should be assessed from the date the member was transferred to the Temporary Disability Retired List.

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**B-225873.2, March 28, 1991**

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**Military Personnel**

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**Pay**

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

Allotments erroneously paid from the retired pay of retired service members may not be recouped or charged against the pay of the deceased members, except allotments for unearned insurance premiums.

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# Miscellaneous Topics

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**B-241591, March 1, 1991**

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## Miscellaneous Topics

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### Federal Administrative/Legislative Matters

- Government corporation
- ■ Administrative regulations
- ■ ■ Applicability

The Inspector General of the Legal Services Commission (LSC) is advised that the LSC, as an independent, nonprofit corporation outside the Executive Branch of the government, is not subject to the provisions of the OMB Circulars although they may be used for guidance. He is further advised that the identification of the LSC as a "designated Federal entity" and the resulting creation of an IG's office at LSC, does not change our opinion on the applicability of the OMB Circulars to LSC.

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**B-238937, March 22, 1991**

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## Miscellaneous Topics

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### Federal Administrative/Legislative Matters

- Vending facilities
- ■ Profits
- ■ ■ Distribution

Employee union may retain 50 percent of vending machine income so long as it pays other 50 percent to appropriate state agency for the blind.

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**B-242142, March 22, 1991**

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## Miscellaneous Topics

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### Transportation

- Railroads
- ■ Statutory restrictions

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

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# Procurement

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**B-230158.2, March 1, 1991**

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## Procurement

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### Contract Disputes

- Liquidated damages
- ■ Amount determination

Where the contract between a government agency and its contractor authorizes the agency to take administrative offset against amounts owed under the contract in order to recoup debts owed by the contractor for other reasons (e.g., debts arising from other contracts or from overpayments), but the contract does not specify the procedures to be followed in such instances, the offset will be governed by the procedures specified in section 10 of the Debt Collection Act of 1982, 31 U.S.C. § 3716.

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## Procurement

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### Bid Protests

- Administrative policies
- ■ Violation
- ■ ■ GAO review

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## Procurement

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### Payment/Discharge

- Administrative settlement
- ■ Set-off

GAO declines to overturn an administrative offset taken by the Defense Reutilization and Marketing Service (DRMS) against one of its contractors (Mid-South Metals, Inc.) in order to recoup a debt allegedly owed by another contractor (Southmet Recycling Corp.) because the contractors failed to adequately rebut evidence compiled by DRMS to justify "piercing the corporate veil."

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**B-233742.9, March 1, 1991\*\*\***

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**91-1 CPD 230**

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## Procurement

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### Specifications

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

Where protester argues awardee's proposal did not meet several solicitation requirements concerning required database management system, but protester likewise proposed a system that did not comply with several of the requirements, and agency has determined based upon its prior experience with awardee that the awardee's system satisfies its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

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## **Procurement**

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### **Competitive Negotiation**

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

Award to higher-priced offeror is unobjectionable where solicitation made technical considerations more important than cost and agency reasonably determined that the clear technical superiority and lesser risk associated with awardee's proven microcomputer workstation system was worth the additional cost.

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**B-241413.2, March 1, 1991**

**91-1 CPD 231**

## **Procurement**

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### **Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Resolicitation

Compelling reason existed for canceling invitation for bids after bid opening where original specification requirement overstated the government's minimum needs, and upon resolicitation this requirement will be deleted.

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**B-241748, March 1, 1991**

**91-1 CPD 232**

## **Procurement**

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### **Bid Protests**

- Non-prejudicial allegation
- ■ GAO review

## **Procurement**

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### **Competitive Negotiation**

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

Although agency did not evaluate proposals in accordance with the stated evaluation criteria because an unannounced evaluation factor was point scored, the protest is denied where the record shows that the protester was not prejudiced by the agency's improper evaluation, inasmuch as the protester's relatively lower technical score was attributable to its low scores for the identified evaluation factors, not the unannounced factor.

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**B-241765, March 1, 1991**

**91-1 CPD 233**

## **Procurement**

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

- Federal supply schedule
- ■ Purchases
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Agency reasonably rejected the low quote for furniture to be purchased from a Federal Supply Schedule contractor, where the agency reasonably determined, consistent with the request for quotations, that a higher-priced vendor's furniture offered features necessary for effective utilization of the limited space available.

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**B-241769.2, March 1, 1991****91-1 CPD 234**

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**Procurement**

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**Sealed Bidding**

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

Protest of rejection of bid as nonresponsive due to allegedly defective bid bond is denied where bond referenced standard bidding form number instead of solicitation number, incorrect bid opening date, and generic description of work, rendering uncertain the enforceability of the bond against the surety in case of default on subject contract.

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**B-241777, March 1, 1991****91-1 CPD 235**

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Additional work/quantities
- ■ ■ ■ Price omission

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Additional work/quantities
- ■ ■ ■ Acknowledgment

Mere acknowledgment of receipt of amendment that adds work, the price of which is to be evaluated for award, is not sufficient to bind the bidder to perform the additional work; therefore, bid on original bid schedule that does not include price for the additional work properly was rejected as nonresponsive.

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**B-241805, March 1, 1991****91-1 CPD 236**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Samples

Preaward samples of hand files were reasonably found unacceptable because they were not "double-cut" the length of the files as required by solicitation's commercial item description and also contained other defects of height, shape and form.

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**B-241808, B-241808.2, March 1, 1991****91-1 CPD 237**

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Size determination
- ■ ■ GAO review

General Accounting Office (GAO) will not consider allegation that awardee under a procurement set-aside for small business competition is other than a small business since Small Business Ad-

ministration, not GAO, has conclusive authority to determine matters of small business size status for federal procurements.

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Contractor personnel
- ■ ■ ■ Security clearances

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## **Procurement**

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### **Contractor Qualification**

- Responsibility criteria
- ■ Distinctions
- ■ ■ Performance specifications

Whether a contractor can obtain required personnel security clearances is a matter pertaining to its responsibility which General Accounting Office will not review.

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## **Procurement**

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### **Specifications**

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

Where solicitation contains definitive responsibility criterion that overstates the agency's requirements and agency's actual needs can be met through award to an offeror that has not met the requirement without prejudice to other offerors, agency may waive the definitive responsibility criterion.

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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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### **Contractor Qualification**

- Responsibility
- ■ Financial capacity
- ■ ■ Contractors

General Accounting Office will not consider allegations concerning an awardee's business record or financial capacity since these matters concern its responsibility.

**Procurement**

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**Contractor Qualification**

- Approved sources
- ■ Alternate sources
- ■ ■ Approval
- ■ ■ ■ Government delays

Protest is sustained where agency's failure to act in a timely manner on protester's request for source approval, as a supplier of an alternate product, denies protester a reasonable opportunity to qualify as a source and to compete for award.

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Prices

Protest is sustained where contracting officer in making his best value determination has no reasonable justification for award to an offeror on the Quality Vendor List at a price higher than the price offered by the low, non-listed offeror which was improperly found to have had a past performance deficiency.

**Procurement**

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**Competitive Negotiation**

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

Protester's nonreceipt of an amendment requesting a new round of best and final offers provides no legal basis to challenge the validity of the award where the record does not indicate that agency deliberately attempted to exclude offeror from the competition or otherwise violated applicable regulations governing the distribution of amendments.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Best/final offers
- ■ ■ Acceptance time periods

Award may not be made upon the basis of an offeror's unrevoked 13-month-old best and final offer (BAFO), even though the BAFO had no stated acceptance period, inasmuch as a reasonable time for accepting the offer had passed, the offeror did not respond to a new request for BAFOs, and the offer to accept award under the old BAFO was made after award under the latest BAFO to the offeror who submitted the lowest price on both BAFOs.

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**Procurement**

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**Sealed Bidding**

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

Where bid includes monthly charge for maintenance of equipment, omission of annual price and extended price is correctable as clerical error, since the error is apparent from the face of the bid.

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**Procurement**

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**Specifications**

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

Specification requiring facsimile machines to have the ability to "read" documents of a certain width is met by machine having an "effective scanning width" that meets the requirement, even though the "actual scanning width" may be slightly smaller, where industry guides define scanning width as effective scanning width.

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**Procurement**

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**Bid Protests**

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

Protests that solicitation should have included preference for small disadvantaged businesses and that solicitation included incorrect standard industrial classification code concern alleged improprieties apparent from the face of the solicitation and are untimely. Under the General Accounting Office Bid Protest Regulations, they were required to be filed prior to due date for receipt of proposals.

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**Procurement**

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**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest that agency failed to inform all offerors that proposals were required to be based on a level-of-effort of 146 man-years is denied where all offerors were informed of the requirement, and contrary to protester's contention, awardee's proposal was based on the required level-of-effort.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Evaluation errors**

#### **■ ■ ■ Evaluation criteria**

#### **■ ■ ■ ■ Application**

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Evaluation errors**

#### **■ ■ ■ Non-prejudicial allegation**

Alleged inconsistencies in an agency's application of its internal proposal evaluation plan do not themselves provide a basis for questioning the validity of an award selection since evaluation plans are solely for the guidance of agency officials. Where solicitation stated that agency would follow evaluation plan, the agency's failure to follow that plan resulted in no prejudice to protester since when it prepared its proposal, the protester was not aware of and could not have relied on the specifics of the plan.

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**B-241772, March 5, 1991**

**91-1 CPD 245**

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## **Procurement**

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### **Sealed Bidding**

#### **■ Invitations for bids**

#### **■ ■ Competition rights**

#### **■ ■ ■ Contractors**

#### **■ ■ ■ ■ Exclusion**

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## **Procurement**

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### **Sealed Bidding**

#### **■ Invitations for bids**

#### **■ ■ Contractors**

#### **■ ■ ■ Notification**

Firm that provided required maintenance services for 5 years for elevators it manufactured and installed as subcontractor to prime construction contractor pursuant to a maintenance provision in prime contract is not the "incumbent contractor" which the agency was required to solicit for elevator maintenance services at the expiration of the 5-year period covered by the prime contract, where subcontractor had no privity of contract with agency and has never had a prime contract with agency for the required services.

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## **Procurement**

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### **Sealed Bidding**

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

## **Procurement**

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### **Sealed Bidding**

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

Failure of agency to provide subcontractor with copy of solicitation for elevator maintenance services that subcontractor previously had supplied to agency pursuant to a maintenance provision in prime contract is not a basis for requiring agency to resolicit where agency did not deliberately exclude subcontractor from competition; the procurement was synopsisized in the *Commerce Business Daily*; the agency made reasonable efforts to distribute the solicitation to firms that had performed the services in the past or had expressed interest in the procurement; and the subcontractor did not avail itself of every reasonable opportunity to obtain the solicitation even though it knew or should have known that the 5-year maintenance period covered by the prime contract was about to expire.

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## **Procurement**

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### **Sealed Bidding**

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

Contention that agency cannot determine that the price of the only responsive bid received is reasonable is without merit where the agency properly determined that when compared to the government's estimate and to prior contract prices for similar services, the bid was reasonable, and the bid was submitted under threat of competition.

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## **Procurement**

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### **Contractor Qualification**

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

Protest that awardee of elevator maintenance services contract lacks experience with the equipment required to be maintained under the contract is a challenge to the contracting officer's affirmative determination of responsibility, which the General Accounting Office will not review absent a showing of possible bad faith or fraud on the part of procuring officials or that definitive responsibility criteria have not been met.

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## **Procurement**

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### **Contractor Management**

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

Whether awardee actually complies with its contractual obligations is a matter of contract administration which the General Accounting Office does not review under its bid protest function.

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**B-241810, March 5, 1991**

**91-1 CPD 246**

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## **Procurement**

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### **Sealed Bidding**

- **Bids**
- ■ **Responsiveness**
- ■ ■ **price date**
- ■ ■ ■ **Minor deviations**

Low bid, which contained unit prices of \$250 each for the two first article units and \$82 each for the 10,260 production units of survival vests, is responsive, even though the invitation for bids (IFB) did not request separate prices for first article units, since the bid unconditionally bound the bidder to provide all units in accordance with the terms of the IFB and the first article pricing is not grossly front-loaded.

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**B-241830, March 5, 1991**

**91-1 CPD 247**

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## **Procurement**

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### **Competitive Negotiation**

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

Contention that agency need not have a reasonable basis to cancel negotiations because it had not issued a formal solicitation is denied where agency was nonetheless conducting negotiations, based on a statement of work, that would have resulted in the award of a contract if the parties had reached agreement.

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## **Procurement**

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### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Cancellation**
- ■ ■ **Justification**
- ■ ■ ■ **Funding restrictions**

Protest asserting that agency's cancellation of negotiations lacked a reasonable basis because agency did not understand the costs involved in the project and failed to secure sufficient funding for the project is denied where agency action increasing its estimate by threefold in response to protester's complaints, followed by action to secure additional funding, indicates that the agency, albeit belatedly, understood the costs involved and did act to secure funding.

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## **Procurement**

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### **Competitive Negotiation**

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

Agency's cancellation of negotiations on the basis that the sole-source contractor's proposed costs exceeded the government estimate by a significant amount was proper where protester makes no showing that the government estimate was unreasonable.

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## **Procurement**

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### **Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protester's assertion that agency failed to engage in meaningful discussions is denied where record indicates that the agency negotiated in good faith with the protester, drawing its attention to every area where agency believed the proposal could be improved.

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## **Procurement**

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### **Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Allegation that agency negotiated in bad faith to use protester as a scapegoat for the agency's belated discovery that foreign assistance project would cost more than originally thought is denied where the record shows that the agency negotiated in good faith.

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## **Procurement**

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### **Bid Protests**

- Foreign policy
- ■ GAO review

General Accounting Office (GAO) will not consider protester's assertion that agency officials misled officials of the government of Chad and caused those officials to erroneously conclude that protester's proposal was too expensive because GAO will not insert itself in questions relating to the conduct of foreign policy.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Late submission
- ■ ■ ■ Rejection

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**Procurement**

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**Sealed Bidding**

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

Where telegraph company attempting to send telephone notice of telegraphic modification of protester's bid advised agency employee receiving the call that it had a "bid wire," employee reasonably assumed telephonic bid was being attempted and, after correctly advising that such bids were impermissible, terminated the call without asking whether modification, rather than bid, was being attempted; this phone call provided no basis for subsequently considering written modification received after bid opening.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Late submission
- ■ ■ ■ Rejection

Contracting agency properly refused to consider post-bid opening telegraphic modification that would have made protester's bid low where the only evidence of requisite pre-bid opening telephonic notice to agency is Western Union record of call, which shows initials of agency employee who allegedly accepted call, and agency denies ever receiving the call and states that there is no employee in the office with the initials in the Western Union record.

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**Procurement**

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**Competitive Negotiation**

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

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**Procurement**

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**Competitive Negotiation**

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

Where agency's evaluation of proposals was fair and reasonable and in accordance with the solicitation's stated evaluation criteria, and where protester's and awardee's proposals were reasonably determined to be essentially technically equal, price properly became the determining factor for award.

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**Procurement**

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**Special Procurement Methods/Categories**

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

General Accounting Office will not review agency decision to perform services in-house where no competitive solicitation has been issued for cost comparison purposes.

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**Procurement**

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**Bid Protests**

- Agency-level protests
- ■ Determination

Letter to contracting officer which expressed dissatisfaction with contract award and the belief that the contracting officer should reconsider the award selection was an agency-level protest even though it did not state that it was intended as a protest.

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**Procurement**

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**Bid Protests**

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

Protest filed with the General Accounting Office more than 10 days after agency denied agency-level protest is untimely. Protester's continued pursuit of the matter with the contracting agency did not alter its responsibility to conform to timeliness requirement of Bid Protest Regulations.

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**Procurement**

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**Bid Protests**

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

Protester does not have the direct economic interest to be considered an interested party to protest the acceptability of the awardee's proposal where the protester would not be next in line for award even if its protest were sustained.

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Allegation that discussions were inadequate because they did not inform protester that administrative contracting officer (ACO) had to approve an advance agreement relating to a change in computing corporate general and administrative cost rates is denied where record shows that protester applied to the ACO for such approval immediately prior to discussions and where the solicitation and the procurement regulations indicate that such approval is within the ACO's authority.

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## **Procurement**

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### **Competitive Negotiation**

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

Cost realism adjustment based on substituting certain proposed indirect cost rates predicated on an unapproved change to protester's existing method of accounting with audit-determined rates under the firm's established method of accounting was reasonable since contracting officer could not know which accounting system would be used in the event approval for the change was denied and since, at the time of award, deficiencies related to the proposed change had not been remedied.

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**B-242517.2, March 6, 1991**

**91-1 CPD 254**

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## **Procurement**

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### **Bid Protests**

- **Agency-level protests**
- ■ **Determination**

Letter to contracting agency expressing an intent to protest but which does not contain any specific basis for protest is not sufficient to constitute an agency-level protest, and a subsequent "formal protest" to the General Accounting Office filed more than 10 working days after the date the basis of protest was known, was properly dismissed as untimely.

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**B-242064, March 7, 1991**

**91-1 CPD 255**

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## **Procurement**

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### **Competitive Negotiation**

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

Protester's challenge to the evaluation of its proposal is denied where it is not shown that the agency's evaluation was unreasonable or inconsistent with the evaluation criteria listed in the solicitation.

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## **Procurement**

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### **Competitive Negotiation**

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

In a negotiated procurement the contracting agency has broad discretion in making cost/technical tradeoffs. Award to higher rated offeror with higher proposed costs is not objectionable where agency reasonably concluded that cost premium involved was justified considering the technical superiority of the selected offeror's proposal.

**Procurement**

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**Sealed Bidding**

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

Protest that agency lost and thus failed to consider the protester's bid is denied. It is not permissible to make award to a firm whose bid may have been lost by the government prior to the bid opening date; to do so would be inconsistent with preserving the integrity of the competitive bidding system.

**Procurement**

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**Bid Protests**

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

Protest is dismissed as untimely where the protester filed its initial agency-level protest more than 10 working days after the agency informed the protester that its offer was technically unacceptable, and the protester waited more than a year to receive the contracting agency's final response to its agency-level protest before filing its protest at the General Accounting Office.

**Procurement**

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**Bid Protests**

- Private disputes
- ■ GAO review

Protest of conduct of protester's former employee, who left protester's firm during competition to submit bid as president of awardee firm, is essentially a dispute between private parties and thus is outside the scope of General Accounting Office's bid protest function.

**Procurement**

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**Bid Protests**

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

**Procurement**

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**Specifications**

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

Protest against a restrictive geographic specification is untimely filed after the closing date for responses to the *Commerce Business Daily* (CBD) announcement for Architect/Engineer Services where the restriction was stated in the CBD announcement.

**Procurement**

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**Competitive Negotiation**

- **Discussion reopening**
  - ■ **Competitive system integrity**
  - ■ ■ **GAO decisions**
  - ■ ■ ■ **Recommendations**
- 

**Procurement**

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**Competitive Negotiation**

- **GAO decisions**
- ■ **Recommendations**
- ■ ■ **Implementation**

Contracting agency's implementation of General Accounting Office recommendation by issuing a request for best and final offers which incorporates a \$13.1 million penalty on any offeror's price, other than the incumbent contractor's under the improper award, has the effect of unreasonably excluding other offerors, and is an improper attempt by the agency to nullify any meaningful implementation of the prior decision.

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**Procurement**

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**Competitive Negotiation**

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

Where contract award was improper because of agency's failure to specifically identify the basis on which it would split award, the entire quantity awarded under the solicitation should be included in the second round of best and final offers. Prior recommendation sustaining protest is so modified.

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**Procurement**

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**Competitive Negotiation**

- **Discussion reopening**
  - ■ **Auction prohibition**
- 

**Procurement**

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**Competitive Negotiation**

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

Recommendation that a second round of best and final offers be solicited will not be modified on the ground that it will result in an impermissible auction since the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action.

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**Procurement**

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**Competitive Negotiation**

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

Where solicitation is found defective after award because the specifications were misleading and did not adequately reflect the government's needs, agency reasonably determined to terminate contract and resolicit for the requirements rather than make award to the protester.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Oral notification
- ■ ■ ■ Adverse agency actions

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**Procurement**

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**Bid Protests**

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

Protest filed more than 10 working days after the protester was orally informed of the basis of its protest is untimely. Oral information is sufficient to put the protester on notice of the basis of its protest—written notification is not required.

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**Procurement**

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**Competitive Negotiation**

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

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**Procurement**

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**Competitive Negotiation**

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

Agency's award to offeror for which it apparently relaxed certain specifications was improper where reasonable possibility of prejudice to the protester is evident in low price and technical score differences between the two offerors and the protester met the specifications that were relaxed for the awardee.

**Procurement****Specifications**

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

Where protester offered an alternate item, the protester's use of a different component in an approved source item was considered a major design change from the approved design for the item, and the contracting agency lacked the technical data necessary to evaluate the component, agency is not required to delay the award until protester's component could undergo operational testing to determine its acceptability.

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

- **Architect/engineering services**
- ■ **Contractors**
- ■ ■ **Evaluation**
- ■ ■ ■ **Personnel**

Agency decision to terminate negotiations with the protester for architect-engineer services was not arbitrary or unreasonable where the agency discovered inaccuracies in the information regarding the number of in-house professional employees listed in the protester's Standard Forms 254 and 255 and the requirement in the *Commerce Business Daily* that the project would be limited to firms with at least 75 percent of services performed in-house.

**Procurement****Sealed Bidding**

- **Bids**
- ■ **Responsiveness**
- ■ ■ **Bid guarantees**

Protest that bid bond is insufficient is dismissed where the bond itself shows it is sufficient to meet the invitation for bid's requirement for a bid bond that is 20 percent of the bid price.

**Procurement****Competitive Negotiation**

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

Under brand name or equal procurement for pipe severs and bevelers, award to firm offering modified "off-the-shelf" equal products is improper where agency determined equivalence to the brand name products based upon a blanket offer of compliance with salient characteristics and information in proposal does not otherwise show that item meets all of the salient characteristics.

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**B-241719.2, March 11, 1991****91-1 CPD 268**

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**Procurement**

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**Contractor Qualification**

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

Protest challenging proposed awardee's compliance with the certificate of independent price determination clause is dismissed as it challenges an issue of responsibility which the General Accounting Office does not generally review.

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**B-241963, March 11, 1991****91-1 CPD 269**

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Propriety

Protest is sustained where agency improperly awarded contract to offeror whose proposal failed to satisfy material terms and conditions of the solicitation.

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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

Where requirements under improperly awarded contract have been performed, protester is entitled to reimbursement of its protest and proposal preparation costs, but not to lost profits.

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**B-243170, March 11, 1991****91-1 CPD 270**

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**Procurement**

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**Bid Protests**

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

Protest of solicitation amendment received 1 day before proposals were due is untimely where not filed within 10 days of date protester received the amendment.

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**B-241942, March 12, 1991****91-1 CPD 271**

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**Procurement**

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**Competitive Negotiation**

- Competitive advantage
- ■ Incumbent contractors

In the absence of evidence indicating that the agency unfairly created an incumbent's advantage, a contracting agency is not required to equalize competition by including an evaluation factor in

the solicitation to account for the cost of milk trucks that the agency required the incumbent contractor to acquire under its contract, title to which was vested in the contractor.

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**B-241978, March 12, 1991**

**91-1 CPD 272**

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**Procurement**

**Socio-Economic Policies**

- Preferred products/services
- ■ Domestic products
- ■ ■ Compliance

Protest that solicitation failed to incorporate Department of Defense Federal Acquisition Regulation Supplement § 208.7801 *et seq.* requirement for domestic forgings is denied where contracting agency properly was granted a deviation from the regulation.

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**B-242329.2, March 12, 1991**

**91-1 CPD 273**

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Constructive notification

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**Procurement**

**Bid Protests**

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

Protester's lack of knowledge concerning jurisdiction of General Services Administration Board of Contract Appeals and the filing requirements of the General Accounting Office is not a basis for waiving timeliness requirements since protester, as a matter of law, was on constructive notice of these matters because they are set forth in regulations published in the Federal Register.

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**B-227285.8, March 13, 1991**

**91-1 CPD 274**

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Preparation costs

Claim for costs of filing and pursuing protest is denied where protester withdrew protest based on agency's corrective action remedying procurement defect alleged by protester, since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of the procurement.

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

General Accounting Office's Bid Protest Regulations providing for award of costs in some cases where contracting agency takes corrective action is inapplicable to protest filed before Regulations' effective date, April 1, 1991.

**Procurement**

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**Competitive Negotiation**

- Competitive advantage
  - ■ Non-prejudicial allegation
- 

**Procurement**

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**Competitive Negotiation**

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

Agency failure to amend solicitation to disclose plans to buy desktop publishing system for successful offeror as government-furnished equipment did not prejudice protester whose proposal offered to supply similar equipment, where the agency selected higher-priced, higher-rated proposal in accordance with solicitation's heavy emphasis on technical factors; in view of *de minimis* cost impact of equipment, there is no reason to believe that resultant reduction in protester's proposed price would have affected award decision.

**Procurement**

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**Competitive Negotiation**

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

Selection of awardee on the basis of its overall technical superiority, notwithstanding its 5 percent higher price, is unobjectionable where solicitation made technical considerations more important than cost and agency reasonably concluded that technical superiority of awardee's proposal was worth the cost premium.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Claim for protest costs on basis that agency took action remedying alleged evaluation defect is denied, since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement. General Accounting Office's (GAO) revised Bid Protest Regulations providing for award of protest costs in certain instances where contracting agency takes corrective action is inapplicable to protest filed before the effective date of the revised Regulations.

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**Procurement**

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**Bid Protests**

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

Untimely protest of a solicitation's failure to include a requirement for performance and payment bonds will not be considered under the significant issue exception to the timeliness rules of our Bid Protest Regulations, where resolution of that matter would not be of widespread interest to the general procurement community.

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**Procurement**

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**Competitive Negotiation**

- Competitive advantage
- ■ Non-prejudicial allegation

A potential competitive advantage accruing to one offeror by virtue of its prior experience need not be discounted or equalized in favor of the other offerors where the advantage does not result from preferential treatment or other unfair action by the government.

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**Procurement**

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**Competitive Negotiation**

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

A procuring agency's technical evaluation will not be questioned where the record shows that the evaluation had a reasonable basis and was consistent with the evaluation criteria listed in the RFP.

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**Procurement**

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**Bid Protests**

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

Bias or prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference or supposition.

**Procurement**

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**Bid Protests**

- Dismissal
  - ■ Definition
- 

**Procurement**

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**Contract Management**

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

Where agency terminated protester's contract for convenience and awarded new contract to lower bidder after determining that rejection of lower bid as nonresponsive was improper, general assertion that termination for convenience and subsequent award was improper is not a legally sufficient protest basis, and protest therefore is dismissed.

**Procurement**

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**Competitive Negotiation**

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

Protest that solicitation provisions specifying "desired" requirements for Lightweight Computer Unit are vague and ambiguous is denied where solicitation provides offerors sufficient detail to enable them to compete intelligently and on an equal basis.

**Procurement**

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**Socio-Economic Policies**

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

In view of the conclusive statutory authority of the Small Business Administration (SBA) to determine the responsibility of a small business concern, review by the General Accounting Office of a challenge to a contracting officer's determination that a small business concern is nonresponsible, and the subsequent denial of a certificate of competency by SBA, is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in denial of a meaningful opportunity to seek SBA review, or whether SBA failed to consider vital information concerning the firm's responsibility.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Dismissal of protest alleging that Small Business Administration's determination of awardee's size status was based on incorrect information provided by agency is affirmed where regulation protester claims was violated does not apply to solicitation.

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**Procurement**

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**Contractor Qualification**

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

Whether a contract awardee is capable of complying with a commercial product requirement in the specifications involves the agency's affirmative determination of the awardee's responsibility, which generally is not reviewable by the General Accounting Office.

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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 after award.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Agency acted reasonably in rejecting as technically unacceptable a proposal submitted in response to a solicitation for evasive driver training where the training facility proposed by protester failed to comply with solicitation requirements.

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## **Procurement**

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### **Bid Protests**

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

Protest that agency was biased in favor of the awardee in its evaluation of proposals for evasive driver training is denied where there is no credible evidence showing bias, and the record supports the agency's rejection of the protester's proposal as technically unacceptable and its selection of the awardee.

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## **Procurement**

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### **Bid Protests**

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

New grounds of protest raised for the first time in the protester's comments on the agency report are untimely where the protester could and should have raised these grounds when it filed its protest.

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**B-242270, March 13, 1991****91-1 CPD 284**

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## **Procurement**

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### **Sealed Bidding**

- **All-or-none bids**
- ■ **Responsiveness**

Where agency did not incorporate by reference a provision expressly permitting all-or-none bids, this omission does not constitute a prohibition on all-or-none bids, so as to render nonresponsive a bid containing an all-or-none qualification.

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**B-242395, March 13, 1991****91-1 CPD 285**

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## **Procurement**

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### **Bid Protests**

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

Protest to General Accounting Office filed more than 10 working days after oral notification of the basis of protest is dismissed as untimely.

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**B-242496, March 13, 1991****91-1 CPD 286**

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## **Procurement**

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### **Bid Protests**

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

Protest is dismissed as untimely where the protester filed its protest at the General Accounting Office more than 10 working days after the agency responded to the firm's agency-level protest informing the protester that its offer was technically unacceptable, which constituted initial adverse agency action regarding the protest.

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**B-233601.2, March 14, 1991**

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**Procurement**

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**Payment/Discharge**

- Shipment costs
- ■ Rate schedules
- ■ ■ Applicability

Prior decision is affirmed when a request for reconsideration essentially restates arguments in the original request for review, and presents no evidence demonstrating an error in fact or law.

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**B-236618, March 14, 1991**

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**91-1 CPD 287**

**Procurement**

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**Payment/Discharge**

- Shipment costs
- ■ Rate schedules
- ■ ■ Applicability

Alternation of rates, where the shipper treats a shipment as if it weighs more than it actually does in order to take advantage of a lower charge for the higher weight, is not proper where it is not provided for in terms of the parties' agreement, and there is no legal basis to read it into the agreement.

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**B-243106, March 14, 1991**

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**91-1 CPD 288**

**Procurement**

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**Bid Protests**

- Dismissal
- ■ Definition

Protest that agency improperly failed to list protester as a manufacturer of items required under request for quotations, based solely on agency's rejection of protester's product under a prior procurement of a different item, is dismissed since the protest as submitted fails to state a valid basis of protest.

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**B-243192, March 14, 1991**

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**91-1 CPD 289**

**Procurement**

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**Bid Protests**

- Premature allegation
- ■ GAO review

Protest that agency anticipates not exercising an option in the protester's contract and acquiring the services from the National Institute for the Severely Handicapped pursuant to the Javits-Wagner-O'Day Act will not be considered by the General Accounting Office, since it is premature.

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**Procurement**

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**Contract Management**

- Contract administration
- ■ Options
- ■ ■ Use
- ■ ■ ■ GAO review

Contracting agency has no obligation to exercise an option in an existing contract and need not justify such decision with a cost comparison.

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## **Procurement**

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### **Socio-Economic Policies**

#### **■ Preferred products/services**

#### **■ ■ Handicapped persons**

Since the Committee for the Purchase from the Blind and Other Severely Handicapped is vested with exclusive authority to determine whether particular services should be acquired from qualified workshops for the blind or other severely handicapped individuals under the Javits-Wagner-O'Day Act and since procuring agencies are required to obtain such services from workshops designated by the Committee, the General Accounting Office has no basis to object to the placement of particular services with a designated workshop in lieu of exercising an option in the protester's contract.

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## **B-237148, March 15, 1991**

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## **Procurement**

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### **Payment/Discharge**

#### **■ Unauthorized contracts**

#### **■ ■ Quantum meruit/valebant doctrine**

The Bureau of Indian Affairs may pay a contractor on a *quantum meruit* basis for services provided to the government under an improper contract extension since the government could properly have acquired the services, the government received and accepted the benefit of the services, and the contractor acted in good faith.

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## **B-240289.2, March 15, 1991**

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**91-1 CPD 290**

## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

#### **■ ■ GAO decisions**

#### **■ ■ ■ Reconsideration**

Awardee's mere assertion, in request for reconsideration of decision sustaining protest challenging award, that it completed one airfield paving project is not sufficient to establish that awardee satisfied definitive responsibility criterion in solicitation requiring that bidders have been "regularly engaged in airfield pavement work for the three years immediately preceding" their bid, especially where most of the only airfield project awardee completed was performed by a subcontractor in less than 1 year.

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## **B-240451, March 15, 1991**

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## **Procurement**

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### **Payment/Discharge**

#### **■ Shipment costs**

#### **■ ■ Overcharge**

#### **■ ■ ■ Payment deductions**

#### **■ ■ ■ ■ Propriety**

Under Item 41 of the Military Traffic Management Command's Freight Traffic Rules Publication No. 1A, a carrier that provides security escort vehicle service with only one escort vehicle for one shipment cannot charge twice for the escort vehicle merely because the shipment required the use of two trailers to transport the cargo.

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**Procurement**

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**Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Where agency awarded contract to a firm that agency erroneously believed to be the Federal Supply Schedule contractor for the item being purchased, agency in effect made an improper sole-source award.

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ Determination

Protest is not rendered academic merely because extent of contract performance renders corrective action not feasible.

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**B-242405, March 15, 1991**

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**Procurement**

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**Payment/Discharge**

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Company that provided unauthorized track inspection services to the government in the belief that they were covered by an option clause of a term contract, when in fact the government had not exercised the option, may be paid on *quantum meruit* basis because obtaining the services by contract would have been a permissible procurement, the government received and accepted their benefit, the company acted in good faith, and amount claimed represents the reasonable value of the benefit received.

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**B-233058.5, March 18, 1991**

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**Procurement**

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**Contracting Power/Authority**

- Communications systems/services
- ■ Authority delegation

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**Procurement**

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**Special Procurement Methods/Categories**

- Computer equipment/services
- ■ Contract awards
- ■ ■ Authority delegation

Protest that agency did not have the proper delegation of procurement authority to conduct procurement for a state-of-the-art, telecommunications system is denied where record shows that agency had delegation of authority from the General Services Administration.

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## **Procurement**

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### **Specifications**

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

Agency determination to procure a state-of-the-art, telecommunications system by means of a total package rather than by separate procurements for divisible portions of the total requirement was proper where the agency reasonably concluded that based on its need for a reliable and available system especially during emergencies, award of a single contract is necessary to ensure total system integration, installation and performance.

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**B-240008.3, March 18, 1991**

**91-1 CPD 293**

## **Procurement**

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### **Bid Protests**

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

Request for reconsideration of dismissal of protest due to protester's failure to file timely comments or expression of continued interest after receipt of agency report is denied; protester's alleged unawareness of comment filing requirements does not excuse failure to comment.

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**B-241949, March 18, 1991**

**91-1 CPD 294**

## **Procurement**

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### **Bid Protests**

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

Protest that all bids should be rejected because price entries in spaces which call for monthly rates per square foot of area to be cleaned indicate that they are not offering the required level of services is denied where the price entries in question are consistent with the solicitation instructions, and the bids do not take any exception to the solicitation requirements.

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## **Procurement**

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### **Sealed Bidding**

- **Bids**
- ■ **Error correction**
- ■ ■ **Low bid displacement**
- ■ ■ ■ **Propriety**

The submission of a below-cost bid is not, in itself, legally objectionable.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Error correction
- ■ ■ Low bid displacement
- ■ ■ ■ Propriety

Where bidder's prices for one base and one additive item increased cumulatively, contrary to solicitation instructions for additive pricing, agency's correction of the bid mistake was proper, although it resulted in the displacement of otherwise low bidder, since the mistake and bid prices actually intended are ascertainable from the bid when compared to other bid prices.

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**Procurement**

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**Bid Protests**

- Dismissal
- ■ Definition

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Summary dismissal of protest is affirmed where request for reconsideration is based on invalid procedural arguments— that dismissal is improper where agency does not request it or parties are not given advance notice—and on repetition of arguments considered when previous protest was dismissed.

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**Procurement**

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**Bid Protests**

- Administrative policies
- ■ GAO review

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**Procurement**

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**Special Procurement Methods/Categories**

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

Allegation that agency improperly failed to conduct cost comparison under Office of Management and Budget Circular A-76 is dismissed; the General Accounting Office does not consider such matters of executive branch policy except where a competitive solicitation has been issued for purposes of performing a cost comparison.

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**B-235558.4, March 19, 1991**

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**Procurement**

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**Payment/Discharge****■ Shipment****■ ■ Carrier liability****■ ■ ■ Burden of proof**

A carrier can be charged with the loss of an item not listed on the inventory, or on any other document, where the surrounding circumstances are sufficient to establish that the item was shipped and lost.

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**B-238239, March 19, 1991**

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**Procurement**

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**Payment/Discharge****■ Unauthorized contracts****■ ■ Quantum meruit/valebant doctrine**

Denmark's claim for reimbursement for services furnished two Navy ships and for hospital services provided a Navy crew member may be paid despite absence of United States government records supporting the claim, since the United States Embassy and Navy Squadron Commander who apparently was initially responsible for handling the claim have recommended payment.

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**B-239565.2, B-239566.2, March 19, 1991**

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**91-1 CPD 298****Procurement**

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**Bid Protests****■ GAO procedures****■ ■ GAO decisions****■ ■ ■ Reconsideration**

Decision sustaining protests challenging agency's failure to safeguard quotations which the protester submitted is affirmed where although the agency was not obligated to seek competitive quotations for the purchases, it did in fact issue requests for quotations (RFQ), and once it had made the RFQs publicly available, it had a duty to permit all eligible vendors expressing an interest a reasonable opportunity to compete and to fully and fairly consider their quotations.

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**B-240156.2, March 19, 1991\*\*\***

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**91-1 CPD 299****Procurement**

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**Contractor Qualification****■ Responsibility****■ ■ Financial capacity****■ ■ ■ Line of credit**

Protest challenging responsiveness of awardee's bid for failure to comply with bid deposit requirement is denied where the awardee's bid documents contained no irregularities or facial defects and bid deposit statement unequivocally bound bidder to furnish 20 percent of its bid price as a bid deposit as required by the solicitation. Fact that bidder pledged credit card account with insufficient line of credit is a matter of responsibility since it pertains solely to the adequacy of assets supporting the bid deposit; accordingly, this error did not render bid nonresponsive and agency properly allowed bidder to correct it prior to award.

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**B-240823, March 19, 1991**

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**Procurement**

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**Bid Protests****■ GAO authority**

This General Accounting Office does not have the authority to review a final decision by a Board of Contract Appeals rendered under a contract's "Disputes" clause.

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**B-241976, March 19, 1991**

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**91-1 CPD 300****Procurement**

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

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**Procurement**

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

Protest of agency decision to award two contracts instead of the three contracts mentioned in the solicitation, without first affording offerors an opportunity to submit revised proposals, is untimely under the Bid Protest Regulations when filed more than 10 working days after the protester received a letter naming the two awardees and providing their respective prices.

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**B-241996, March 19, 1991**

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**91-1 CPD 301****Procurement**

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**Sealed Bidding****■ Invitations for bids****■ ■ Terms****■ ■ ■ Risks**

Protest that solicitation for food services subjects bidders to unreasonable financial risks because it does not include separate line items to compensate the contractor when meal serving times are extended, headcounts are lower than estimated and for weekend ration pick-ups, and allegedly does not adequately describe government-furnished equipment and facilities, is without merit where the solicitation contains, or will be amended to contain, sufficient information for offerors to compete intelligently and on equal terms; there is no legal requirement that solicitations eliminate all risks for the contractor.

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**B-242838.2, March 19, 1991**

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**91-1 CPD 302****Procurement**

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

General Accounting Office properly dismissed as untimely a protest filed more than 3 months after the denial of an agency-level protest on the same basic matters; the protester's continued pursuit of the matter with the agency does not toll the timeliness requirements.

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**Procurement**

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**Bid Protests**

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

Protest contending that firm submitting low quotation was ineligible for award is dismissed where protester submitted the fifth-low quotation and is, therefore, not an interested party because it would not receive an award even if its protest were sustained.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration
- ■ ■ ■ Additional information

Request for reconsideration of decision dismissing protester's supplemental protest as untimely is denied where, by waiting until after its initial protest was dismissed without receiving an agency report and more than 5 weeks after notice of the award to file a Freedom of Information Act request, protester did not diligently pursue information which may have revealed additional ground of protest.

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**Procurement**

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**Bid Protests**

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

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Dismissal of protest because of protester's failure to file timely comments on agency report is affirmed since protester's claimed ignorance of filing deadlines does not excuse failure to file comments. Protester is charged with constructive notice of Bid Protest Regulations through their publication in *Federal Register* and *Code of Federal Regulations* and, in any event, protester had actual notice of requirements from General Accounting Office's letter acknowledging receipt of the protest.

**Procurement****Competitive Negotiation****■ Offers****■ ■ Preparation costs****Procurement****Socio-Economic Policies****■ Disadvantaged business set-asides****■ ■ Use****■ ■ ■ Administrative discretion**

Where agency erroneously relies on past procurement history and issues solicitation on unrestricted basis which results in a protest and subsequent agency determination, shortly before closing date for receipt of proposals, to set procurement aside for small disadvantaged businesses (SDB), claim for proposal preparation costs is denied since there is no evidence of bad faith on the agency's part; mere negligence or lack of due diligence by the agency, standing alone, does not provide a basis for the recovery of proposal preparation costs.

**Procurement****Competitive Negotiation****■ Offers****■ ■ Evaluation errors****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Application**

Protest that agency evaluated proposals on the basis of factors not explicitly stated in solicitation is denied where the factors used reasonably were related to the stated evaluation criteria.

**Procurement****Competitive Negotiation****■ Requests for proposals****■ ■ Cancellation****■ ■ ■ Resolicitation****■ ■ ■ ■ Propriety****Procurement****Specifications****■ Minimum needs standards****■ ■ Competitive restrictions****■ ■ ■ Design specifications****■ ■ ■ ■ Overstatement**

An agency had a reasonable basis to cancel and resolicit a request for proposals (RFP), under which award was to be made to the low-priced acceptable offeror, after the receipt of proposals and disclosure of prices, where the major required item was solicited in the RFP on a "brand name" rather than on a "brand name or equal" basis and an acceptable equal item was proposed, because the RFP overstated the agency's requirements, which caused a reasonable possibility of prejudice to the competitive system since actual and potential offerors did not have the opportunity to compete on the government's actual requirements.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Downgrading
- ■ ■ ■ Propriety

Downgrading of protester's proposal in evaluation was reasonable where proposal did not include significant information required by the solicitation and agency reasonably evaluated protester's performance under current contract as deficient.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Work schedules

Protester was reasonably on notice that its proposed use of extended work weeks for professional employees would be considered by the agency in evaluating its proposal.

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**Procurement**

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**Competitive Negotiation**

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

Agency reasonably concluded that protester's proposal based on employees working 2,600 hours per year created risk regarding the stability of protester's work force, and degraded the quality of the technical product.

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**Procurement**

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**Competitive Negotiation**

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

Agency reasonably determined that higher priced, technically superior proposal provided the best value to the government where contractor's performance will directly affect up to \$15 billion worth of resources in other government programs and procurements.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Approved sources
- ■ ■ ■ Evidence sufficiency

Award to only approved source for antenna switches to be supplied as government-furnished equipment in on-going government contract for conversion of F-106 aircraft to drone configurations is unobjectionable where agency reasonably determines that first article test of switch proposed by protester will be necessary before it can approve the firm as a source, and that testing of protester's switch cannot be completed to allow for timely delivery of antenna switches to conversion contractor.

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**Procurement**

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**Bid Protests**

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

Protest of apparent solicitation defect—agency's failure to set aside procurement for small disadvantaged business concerns—is dismissed as untimely where it is filed with the General Accounting Office more than 10 working days after the protester received notice of the denial of its agency-level protest.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Good cause exemptions
- ■ ■ ■ Applicability

Untimely protest will not be considered under the "good cause" exception to timeliness rules where no compelling reason beyond the protester's control prevented the protester from timely filing its protest with the General Accounting Office.

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**Procurement**

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**Bid Protests**

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

Untimely protest concerning agency's failure to set aside a procurement for small disadvantaged business concerns will not be considered under the "significant issue" exception to the General Accounting Office's timeliness rules where the issue previously has been considered and is not of widespread interest to the procurement community.

**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Evaluation****■ ■ ■ Prices****■ ■ ■ ■ Taxes**

Protest challenging failure of invitation for bids (IFB) to indicate that the state where contract is to be performed levies an excise tax on contractors is denied where the IFB states that the contract price is to include all applicable taxes, thereby giving notice to all bidders that it is their burden to ascertain whether and to what extent any taxes apply and to include the appropriate amount in their bids.

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**Procurement**

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**Bid Protests****■ Allegation substantiation****■ ■ Lacking****■ ■ ■ GAO review**

Protest alleging that solicitation is defective because it fails to notify bidders that storage space furnished by the government is insufficient and that the contractor will have to provide additional storage space is denied where the protester bases its contention merely on its prior need for extra storage space as the incumbent contractor and fails to show that the solicitation does, in fact, place undue risk on bidders, in view of their opportunity to make site visits and the specific language in the solicitation advising them that the government cannot guarantee that all of the storage space will be available throughout the period of the contract.

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**Procurement**

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**Specifications****■ Performance specifications****■ ■ Adequacy**

Protest that the deduction percentages listed on the Performance Requirements Summary (PRS) should total 100 percent of the contract price is denied where the PRS properly does not list all the contract requirements for which defective performance may cause a reduction in the contract price. While there may be uncertainty regarding what deductions may be taken for the unlisted requirements, this uncertainty is not unreasonable since the requirements are not easily susceptible to being quantified and all bidders are competing equally.

**Procurement**

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**Bid Protests**

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

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Effective dates
- ■ ■ ■ Facsimile

For purposes of establishing timeliness, a protest is filed when actually received by our Office. Protester relying on telefax equipment to file protest bears the risk of nonreceipt of transmission by GAO.

**Procurement**

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**Bid Protests**

- Private disputes
- ■ GAO review

Protest by construction subcontractor based solely on the alleged failure of defaulted general construction contractor to meet its contractual obligations to pay subcontractor is dismissed, since protest concerns only the settlement of obligations between private parties and thus does not invoke the General Accounting Office's bid protest jurisdiction.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision dismissing protest of agency's failure to consider the values of the awardee's and protester's warranties in cost evaluation is affirmed on reconsideration; since solicitation did not provide for evaluation of warranty, protest that agency did not evaluate warranties is essentially a post-closing date challenge to the evaluation method in the solicitation and, as such, is untimely.

**Procurement**

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**Bid Protests**

- Allegation
- ■ Abandonment

Where protest raised allegation that protester's offered equipment improperly was rejected as technically unacceptable based on inaccurate advice from a reference; agency refuted allegation in protest report; and protester then did not rebut the agency's response in its comments on the report, allegation is deemed abandoned and is dismissed.

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## **Procurement**

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### **Bid Protests**

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

Protester whose quote was reasonably found to be technically unacceptable is not an interested party to challenge the evaluation of the awardee and the firm next in line for award, since protester would not be in line for award even if protest were resolved in its favor.

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**B-241292.3, March 22, 1991**

**91-1 CPD 317**

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## **Procurement**

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### **Competitive Negotiation**

- First-article testing
- ■ Prior contractors
- ■ ■ Waiver
- ■ ■ ■ Propriety

Agency reasonably waived first article testing requirement for firm which successfully produced items under previous contracts with the agency, and whose specifications for the items were used by the agency as the basis for the solicitation specifications.

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## **Procurement**

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### **Competitive Negotiation**

- First-article testing
- ■ Prior contractors
- ■ ■ Waiver
- ■ ■ ■ Propriety

Allegation that protester was improperly denied an opportunity to compete on an equal basis with awardee because first article testing requirement was waived only for awardee is denied where waiver was properly allowed and any resulting competitive advantage accrued by awardee did not result from improper governmental action.

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## **Procurement**

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### **Competitive Negotiation**

- Competitive advantage
- ■ Non-prejudicial allegation

Allegation that protester was improperly denied an opportunity to compete on an equal basis with awardee because first article testing requirement was waived only for awardee is denied where waiver was properly allowed and any resulting competitive advantage accrued by awardee did not result from improper governmental action.

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**B-242077.3, March 22, 1991**

**91-1 CPD 318**

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## **Procurement**

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### **Sealed Bidding**

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

Where the bid opening officer receives a hand-carried bid after declaring the arrival of the bid opening time as shown on the bid opening room clock, the agency properly rejected the bid as late.

The bid opening officer's declaration is determinative of lateness unless shown to be unreasonable under the circumstances.

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**B-242229, March 22, 1991**

**91-1 CPD 319**

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**Procurement**

**Contract Management**

■ **Contract administration**

■ ■ **Options**

■ ■ ■ **Use**

■ ■ ■ ■ **GAO review**

Protest that agency improperly failed to exercise a contract option for a particular requirement and instead issued a new solicitation is dismissed since it involves a matter of contract administration and is not for consideration under the bid protest regulations.

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**Procurement**

**Socio-Economic Policies**

■ **Small business set-asides**

■ ■ **Use**

■ ■ ■ **Administrative discretion**

Agency properly issued solicitation as a small business set-aside rather than setting aside the requirement for small disadvantaged businesses or for award under the Small Business Administration's section 8(a) program where the requirement is not a new one and was previously acquired under a small business set-aside.

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**B-242331, March 22, 1991\*\*\***

**91-1 CPD 320**

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**Procurement**

**Competitive Negotiation**

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Wage rates**

Protest challenging agency's evaluation of awardee's proposal which allegedly proposed the use of tradesmen who would be paid hourly rates less than those required by the solicitation is denied where record shows that awardee's proposal did not take exception to solicitation requirement that it pay specified wage rates and thus the awardee is obligated under the contract to pay the required rates.

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**B-242331.3, March 22, 1991**

**91-1 CPD 321**

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**Procurement**

**Bid Protests**

■ **GAO procedures**

■ ■ **Pending litigation**

■ ■ ■ **GAO review**

General Accounting Office (GAO) will not consider a protest where there is a pending action in the United States District Court concerning the procurement and the court's decision could render any decision by GAO academic.

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**Procurement**

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**Bid Protests**

- Agency-level protest
  - ■ Protest timeliness
  - ■ ■ GAO review
- 

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of dismissal of protest as untimely is denied where protest was not filed with General Accounting Office (GAO) within 10 working days after decision denying agency-level protest, which constituted initial adverse agency action; although agency subsequently issued— after 10-day timeliness period had run—a decision denying agency-level request for reconsideration for a different reason, this did not become initial adverse action for purposes of determining timeliness of GAO protest.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Deadlines
- ■ ■ ■ Constructive notification

Protester's lack of knowledge of filing deadlines under General Accounting Office Bid Protest Regulations is not basis for waiving timeliness requirements; protesters are on constructive notice of the Regulations since they are published in the Federal Register and Code of Federal Regulations.

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**Procurement**

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**Bid Protests**

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

Significant issue exception to the General Accounting Office's timeliness requirements will not be invoked where protester is challenging rejection of its proposal as technically unacceptable; protest on this ground does not involve issue which has not previously been considered, and is not of widespread interest to the procurement community, the two conditions for applying the exception.

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**Procurement**

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**Sealed Bidding**

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

Solicitation is not defective for failure to specify precise quantity of equipment to be cleaned where it includes information concerning the projected level of equipment and bidders are thus able to prepare their bids on an intelligent and equal basis.

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**Procurement**

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**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 the report, despite protester's alleged failure to receive the acknowledgment notice specifically informing protester of the need to advise the General Accounting Office of the late receipt of a report, since protester is charged with constructive notice of the Bid Protest Regulations through their publication in the *Federal Register* and the *Code of Federal Regulations*.

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**B-220425.4, March 25, 1991\*\*\***

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

Claimant may not recover costs of filing and pursuing General Accounting Office protest which are not sufficiently documented or are unreasonable.

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**B-242023, B-242023.2, March 25, 1991**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

Procuring agency in a negotiated procurement for engine repair and overhaul services properly considered as strengths justifying a high technical rating the incumbent's specific experience under the solicitation's evaluation factors of "experience" and "management capabilities," and the incumbent's in-place specific tooling under the "facilities and equipment" factor, where specific experience and capabilities were encompassed within or reasonably related to the stated factors.

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**Procurement**

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**Competitive Negotiation**

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

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**Procurement**

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**Competitive Negotiation**

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

The agency's assessment of the awardee's overall performance risk, a general consideration under the solicitation, was reasonable, despite the agency's failure to consider the awardee's inclusion on the Defense Logistics Agency Contractor Alert List or the criminal investigation of the awardee, where the agency, in accordance with the stated evaluation scheme, documented the awardee's

successful past and present performance such that the agency concluded that the awardee could successfully perform the contract.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Contract awards**

#### **■ ■ Administrative discretion**

#### **■ ■ ■ Cost/technical tradeoffs**

#### **■ ■ ■ ■ Technical superiority**

Award was properly made to a higher-rated, higher-cost offeror where the source selection decision was consistent with the solicitation's evaluation factors and the selection official reasonably determined that the awardee's technical advantages outweighed the protester's lower-rated, lower-cost offer.

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**B-242060, March 25, 1991\*\*\***

**91-1 CPD 327**

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## **Procurement**

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### **Sealed Bidding**

#### **■ Invitations for bids**

#### **■ ■ Amendments**

#### **■ ■ ■ Acknowledgment**

#### **■ ■ ■ ■ Responsiveness**

Protest challenging rejection of bid as nonresponsive for failure to acknowledge an amendment to the solicitation is sustained where the amendment merely clarifies an existing requirement in the solicitation and thus is not material.

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## **Procurement**

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### **Sealed Bidding**

#### **■ Bids**

#### **■ ■ Responsiveness**

#### **■ ■ ■ Descriptive literature**

#### **■ ■ ■ ■ Absence**

Rejection of a bid for microcomputers as nonresponsive on basis that protester failed to submit descriptive literature to establish that the offered products conform to the specifications is improper where the solicitation does not require descriptive literature and there is no evidence in the protester's bid to indicate that protester took exception to the requirements.

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## **Procurement**

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### **Sealed Bidding**

#### **■ Bids**

#### **■ ■ Responsiveness**

#### **■ ■ ■ Descriptive literature**

#### **■ ■ ■ ■ Adequacy**

Rejection of bid as nonresponsive on the basis that protester's descriptive literature shows different models of an offered product—one which conforms to solicitation requirement for .31 dot pitch and one that does not—is improper where a reasonable interpretation of the bid's entire contents does not support conclusion that bidder was offering a nonconforming model.

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## **Procurement**

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### **Sealed Bidding**

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

## **Procurement**

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### **Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Descriptive literature
- ■ ■ ■ Ambiguous bids

Rejection of bid as nonresponsive on the basis that protester submitted descriptive literature, which showed four different configurations of a keyboard to establish conformance to the solicitation's "enhanced keyboard" requirement, is improper where all four configurations depict enhanced keyboards and thus conform to the requirement.

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## **Procurement**

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### **Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Descriptive literature
- ■ ■ ■ Ambiguous bids

Fact that bidder's descriptive literature merely refers to "full 1-year warranty" and does not also repeat solicitation requirement that warranty service be performed on-site does not render bid nonresponsive where there is no clear indication in bid that the bidder does not intend to conform with warranty requirement.

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## **B-242997, March 25, 1991**

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## **Procurement**

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

- Federal procurement regulations/laws
- ■ Revision
- ■ ■ Construction contracts

GAO has no objection to proposed changes in Federal Acquisition Regulation (FAR) case No. 90-62, which concerns construction contracting, to (1) provide for site visits by offerors or quoters, (2) provide for preconstruction conferences by awardees, and (3) prescribe requirements for "as built" drawings.

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## **B-235985.2, March 26, 1991**

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## **Procurement**

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### **Competitive Negotiation**

- Federal procurement regulations/laws
- ■ Amendments
- ■ ■ Price adjustments

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case No. 90-54, a proposal to amend FAR section 15.804-7 concerning factors to be considered in calculating price adjustments made as a result of defective cost or pricing data.

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**Procurement**

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**Competitive Negotiation**

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

Agency reasonably awarded contract to higher technically rated, higher-priced offeror for scanner maintenance services where awardee's ability to satisfy solicitation requirements for responding on-site within 2 hours of notification of equipment failure and for repairing scanner so that its downtime did not exceed 8 consecutive working hours was superior to protester's ability to do so.

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**Procurement**

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**Bid Protests**

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

Protest by firm not in line for award if the protest were sustained is dismissed since the protester does not have the requisite direct economic interest in the contract award to be considered an interested party under General Accounting Office's Bid Protest Regulations.

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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
- ■ ■ Effective date
- ■ ■ ■ Facsimile

Agency-level protest, and subsequent protest to the General Accounting Office, of an alleged solicitation impropriety are untimely where the agency-level protest was transmitted by facsimile machine to the procuring agency on the closing date at the exact time set for the receipt of proposals but was not received until after the time set for receipt of proposals.

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**Procurement**

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**Bid Protests**

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

Untimely protest that solicitation terms provide the contractor with unfair and early use of Federal Energy Guidelines in violation of public information dissemination laws and policy is not an

issue of widespread interest to the procurement community justifying invocation of the significant issue exception to the General Accounting Office timeliness requirements.

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**B-242611, March 26, 1991**

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**Procurement**

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**Contractor Qualification****■ Debarment****■ ■ Federal procurement regulations/laws****■ ■ ■ Revision**

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case No. 90-56, a proposal to revise FAR section 9.406-1 to provide examples of factors to be considered in deciding whether to debar a contractor.

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**B-242079, March 27, 1991**

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**91-1 CPD 331****Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Evaluation****■ ■ ■ Technical acceptability**

Agency's decision to reject protester's proposal as unacceptable and not consider it further for award was reasonable where the proposal contained significant technical and informational deficiencies which would have required major revisions to correct.

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**Procurement**

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**Competitive Negotiation****■ Discussion****■ ■ Determination criteria**

An award without discussions to the lowest-priced offeror whose proposal was evaluated as acceptable and the best value was proper where the solicitation provided that an award without discussions could be made.

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**B-242515, March 27, 1991**

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**91-1 CPD 332****Procurement**

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**Sealed Bidding****■ Bids****■ ■ Error correction****■ ■ ■ Pricing errors****■ ■ ■ ■ Line items**

Bid was properly rejected where its price was out of line with the others received and an alleged mistake in bid was not appropriate for correction because it would result in recalculation of the bid after bid opening to include an item not originally considered.

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**Procurement**

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**Socio-Economic Policies**

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

Where contracting officer determines that small business bidder is not responsible because the bidder will subcontract more than 50 percent of the cost of manufacturing the supplies requested by the solicitation, not including the cost of materials, and the bidder fails to apply to the Small Business Administration for a certificate of competency, the General Accounting Office will not consider a bidder's challenge to the agency's nonresponsibility finding.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties

Protester determined to be nonresponsible is not eligible to receive a contract award and thus is not an interested party to maintain protest that solicitation is defective.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision holding that agency conducting an urgent procurement under the authority of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(2) (1988), may make an award on the basis of initial proposals whether or not such award represents the lowest overall cost to the government is denied where protester fails to show that prior decision contained either errors of fact or law warranting reversal or modification.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ 10-day rule

Protest that apparent low bidder on a construction contract should be disqualified since it is an affiliate of the designer is timely filed under the Bid Protest Regulations, where the protest is filed within 10 days of when the protester first reasonably became aware of low bidder's affiliation.

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**Procurement**

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**Specifications**

- Design specifications
- ■ Competitive restrictions
- ■ ■ Waiver

Agency may only waive the proscription contained in Federal Acquisition Regulation § 36.209 against a design firm or its affiliates contracting to construct a project it designed where there is a

reasonable basis for concluding that an overriding governmental interest exists or that no purpose would be served by the application of the restriction in the procurement. Where a particular building design process minimized any potential competitive advantage, the contracting officer could determine a waiver is justified.

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**B-242166, March 29, 1991**

**91-1 CPD 336**

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**Procurement**

**Bid Protests**

■ **Allegation**

■ ■ **Abandonment**

Protest that solicitation specifications are defective is dismissed where protester disagrees with certain specifications, but does not allege that it cannot supply an item meeting them, or that it is economically affected by the specifications in any way.

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**Procurement**

**Bid Protests**

■ **Moot allegation**

■ ■ **GAO review**

Allegation that absence of adequate assembly and alignment information will preclude equal competition is without merit where agency plans to assure proper assembly and alignment through first article test, and protester makes no showing that agency's approach in fact will restrict competition.

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**B-242311, March 29, 1991**

**91-1 CPD 337**

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**Procurement**

**Specifications**

■ **Minimum needs standards**

■ ■ **Competitive restrictions**

■ ■ ■ **Geographic restrictions**

■ ■ ■ ■ **Justification**

Protest that solicitation for a modular elevated causeway system discriminates against West Coast offerors by designating Norfolk, Virginia, as the exclusive test site rather than allowing the use of San Diego, California, as an alternative test site, is denied where the agency reasonably concluded that the site chosen had the best test environment to demonstrate the required design parameters.

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**Procurement**

**Specifications**

■ **Minimum needs standards**

■ ■ **Determination**

■ ■ ■ **Administrative discretion**

Protest that agency showed favoritism toward a potential offeror by relaxing a requirement is denied where record shows that agency relaxed the requirement after determining that the use of a less expensive substitute would meet its minimum needs.

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## **Procurement**

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### **Contract Types**

- Fixed-price contracts
- ■ Incentive contracts
- ■ ■ Use
- ■ ■ ■ Administrative determination

Protest that solicitation should provide for a cost-reimbursement contract is denied where there is no evidence that the agency's choice of firm, fixed-price contract type is unreasonable.

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## **Procurement**

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### **Socio-Economic Policies**

- Preferred products/services
- ■ Domestic sources
- ■ ■ Construction contracts
- ■ ■ ■ Vessels

Agency properly excluded solicitation for a modulated elevated causeway system from domestic shipyard restriction of 10 U.S.C. § 7309 (1988), since restriction applies to procurement of any vessel by a military department, and agency reasonably concluded that required system was not a vessel.

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## **Procurement**

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### **Payment/Discharge**

- Payment procedures
- ■ Progress payments
- ■ ■ Rates
- ■ ■ ■ Applicability

Agency properly did not include, in a solicitation for a modular elevated causeway, the higher progress payment rates authorized by 10 U.S.C. § 7312 (1988), since that provision applies only to contracts involving the repair, maintenance, or overhaul of a naval vessel.

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**B-242361, et al., March 29, 1991**

**91-1 CPD 341**

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## **Procurement**

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### **Bid Protests**

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

Where a protest was initially filed with a contracting agency, any subsequent protest to the General Accounting Office filed more than 10 working days after actual or constructive knowledge of initial adverse agency action is untimely.

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## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

#### **■ ■ Protest timeliness**

#### **■ ■ ■ Apparent solicitation improprieties**

Where a protester supplements a timely protest with new, independent grounds of protest based upon alleged improprieties in a solicitation apparent prior to the closing date for receipt of initial proposals, such grounds are untimely if filed after the solicitation's closing date.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Alternate offers**

#### **■ ■ Rejection**

#### **■ ■ ■ Propriety**

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Evaluation**

#### **■ ■ ■ Technical acceptability**

Where an offeror proposes an alternate product, that offeror must provide sufficient documentation to reasonably demonstrate that its product will satisfy the government's requirements. An offer that contains a conflict in the drawings submitted to the agency for an alternate product may be rejected as technically unacceptable where the technical data package as submitted does not demonstrate the product's identity or its physical, mechanical, electrical, and functional interchangeability with the product cited in the procurement item description.

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## **Procurement**

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### **Noncompetitive Negotiation**

#### **■ Use**

Approval by a flag officer or GS-16 civilian of the Justification For Other Than Full And Open Competition is not required for contracts not exceeding \$100,000 since regulations provide that the contracting officer's certification that the justification is accurate and complete shall be sufficient unless agency procedures provide otherwise, which is not the case with respect to the Defense Industrial Supply Center.

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**B-242435, March 29, 1991 \*\*\***

**91-1 CPD 342**

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## **Procurement**

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### **Sealed Bidding**

#### **■ Invitations for bids**

#### **■ ■ Amendments**

#### **■ ■ ■ Materiality**

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## **Procurement**

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### **Sealed Bidding**

#### **■ Terms**

#### **■ ■ Materiality**

#### **■ ■ ■ Integrity certification**

Bidder's argument that amendment adding a requirement to complete a certificate of procurement integrity is not a material change to the solicitation is denied where the certification requirement

binds the contractor to detect and report violations of the procurement integrity provisions and thus imposes a substantial legal burden on the bidder.

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## **Procurement**

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### **Sealed Bidding**

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

Contention that acknowledgment of amendment adding requirement to complete certificate of procurement integrity was sufficient to commit bidder and that completion of certification should be permitted up to time of award is denied where completion of certificate imposes substantial legal burdens on contractor and is properly viewed as matter of responsiveness.

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## **Procurement**

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### **Sealed Bidding**

- **Terms**
- ■ **Materiality**
- ■ ■ **Integrity certification**

Contracting officer reasonably added requirement for certification of procurement integrity to invitation for bids prior to reinstatement of statutory requirement for such certification since bid opening and contract award would occur after the effective date of the statute requiring certification.



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