

September 1991

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

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# Preface

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This publication is one in a series of monthly pamphlets entitled "Digests of Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions concerning claims are issued in accordance with 31 U.S. Code § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, Pub. L. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by the file number and date, e.g., B-229329.2, Sept. 29, 1989. Approximately 10 percent of GAO's decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies, in monthly pamphlets and in annual volumes. Decisions in these volumes should be cited by volume, page number and year issued, e.g., 68 Comp. Gen. 644 (1989).

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# Appropriations/Financial Management

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**B-243004, September 5, 1991**

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Utility services
- ■ ■ ■ Use taxes

Special assessment imposed by City of Coulee Dam, Washington, to finance a new fire truck in support of municipal duty to provide fire protection within city limits is a tax and as such may not be paid by the Bureau of Reclamation with respect to Bureau property located within the city limits.

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## **Appropriations/Financial Management**

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### **Appropriation availability**

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Utility services
- ■ ■ ■ Use taxes

Bureau of Reclamation may not pay special assessment to finance fire truck purchase imposed by City of Coulee Dam, Washington, on Bureau property located outside the city limits. Fire truck assessment is based on 1980 sewer assessment and as such is not reasonably related to quantum of services provided.

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**B-237421, September 11, 1991**

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Purpose availability
- ■ Revolving accounts
- ■ ■ Deposit
- ■ ■ ■ Liquidated damages

The portion of delayed performance liquidated damages that is attributable to increased supervision and administration (S&A) expenses may be reimbursed to the Corps of Engineers' S&A revolving fund.

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**B-243074, September 11, 1991\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Time availability
- ■ Time restrictions
- ■ ■ Advance payments

Payments for McDonald's gift certificates and movie tickets, which will be redeemed at a later date for their full value, are not in violation of the advance payment prohibition in 31 U.S.C. § 3324, provided that adequate administrative safeguards for the control of the certificates and tickets are maintained, the purchase of the certificates and tickets is in the government's interest, and the certificates and tickets are readily redeemable for cash.

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**B-242277, September 12, 1991**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Fiscal-year appropriation
- ■ Interest
- ■ ■ Retroactive compensation

Under the Back Pay Act, the United States Information Agency must pay interest on amounts erroneously withheld from their employees' pay and contributed to the government's retirement fund. 5 U.S.C. § 5596(b)(2)(A) (1988). The interest is payable from the agency's appropriation covering the fiscal year or years in which the retirement contributions were withheld.

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**B-242891, September 13, 1991**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Attorney fees

Department of the Army appropriations may not be used to pay attorneys' fees incurred by three civilian employees as defendants in a federal criminal proceeding that was prosecuted by the Department of Justice. In these circumstances, it is not in the government's interest to provide representation at government expense since the attorneys' fees for which reimbursement is sought merely advanced the personal interest of the three employees rather than that of the government.

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**B-235945, September 16, 1991\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Specific purpose restrictions
- ■ Account balances
- ■ ■ Cancelled checks
- ■ ■ ■ Procedures

Treasury checks issued to pay benefits provided under the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, and expenses incurred by the Railroad Retirement Board in administering RUIA are subject to the check cancellation and disposition procedures in 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, by virtue of the comprehensive language "all Treasury checks" in section 3334(b).

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- **Specific purpose restrictions**
- ■ **Account balances**
- ■ ■ **Cancelled checks**
- ■ ■ ■ **Statutory interpretation**

The operative language of 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, and statutory provisions governing the use of funds in accounts established by the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, are not irreconcilable. The provisions of RUIA do not address the cancellation and disposition of uncashed Treasury checks issued against the RUIA accounts and hence, under applicable canons of statutory construction, the procedures specified in section 3334(b), the general law on the subject, apply.

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## **B-238181.2, September 17, 1991**

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### **Appropriations/Financial Management**

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#### **Obligation**

- **Payments**
- ■ **Estimates**
- ■ ■ **Communications systems/services**

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### **Appropriations/Financial Management**

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#### **Obligation**

- **Payments**
- ■ **Termination costs**
- ■ ■ **Communications systems/services**

Upon reconsideration, we reaffirm B-238181, Jan. 9, 1991, holding that the General Services Administration was authorized to assess the National Trust for Historic Preservation for (1) Federal Telecommunications Service (FTS) usage based on statistical sampling of data gathered two quarters prior to the quarter billed and (2) termination costs based upon a formula derived from experience gained in handling Postal Service's withdrawal from FTS.

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## **B-243300, September 17, 1991**

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### **Appropriations/Financial Management**

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#### **Appropriation Availability**

- **Purpose availability**
- ■ **Specific purpose restrictions**
- ■ ■ **Personal expenses/furnishings**
- ■ ■ ■ **Handicapped personnel**

Bonneville Power Administration may pay for a wheelchair van to transport a handicapped employee home on the rare occasions when her disability strikes her at work. The agency has an interest in avoiding disruption at the office and is required by law to make "reasonable accommodation" for handicapped employees.

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**B-242830, September 24, 1991**

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**Appropriations/Financial Management**

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**Accountable Officers**

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

Under 31 U.S.C. § 3527(a), Department of the Interior cashier and alternate cashier are relieved of liability for shortage of \$3,005.75 in imprest funds account resulting from an unexplained loss. Agency determined that loss was not due to fault or negligence of cashier or alternate cashier, and we concur since record reveals that employees had complied with applicable regulations regarding safeguarding the combination to the safe and the accountable officers made an affirmative showing of due care.

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**B-243857, September 26, 1991**

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**Appropriations/Financial Management**

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**Obligation**

- Contracts
- ■ Authority

Agency may not cite 10 U.S.C. § 2304(c)(5) to permit the use of a noncompetitive procurement when the applicable statutes contain no express authorization or requirement to acquire aircraft from a particular source.

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**B-242391, September 27, 1991\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Prizes

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Lotteries

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

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**B-236782, September 30, 1991\*\*\***

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**Appropriations/Financial Management**

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**Accountable Officers**

■ **Disbursing officers**

■ ■ **Relief**

■ ■ ■ **Illegal/improper payments**

■ ■ ■ ■ **Overpayments**

Bureau of Indian Affairs certifying official is relieved of liability pursuant to 31 U.S.C. § 3528(b)(1)(B) for certifying payments that were not proper under the appropriation. However, BIA should take appropriate action to resolve the amount owed the government as a result of the improper payments.

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# Civilian Personnel

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**B-243315, September 6, 1991\*\*\***

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## Civilian Personnel

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### Compensation

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

A reemployed annuitant's request for waiver must be denied when he was aware that the amount of the annuity was not being deducted from his salary and that he was being overpaid. Although the employee immediately notified the agency, we have consistently held that when an employee is aware of an error he cannot reasonably expect to retain the overpayment. Financial hardship cannot form the basis for waiver.

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**B-242277, September 12, 1991**

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## Civilian Personnel

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### Compensation

- Retroactive compensation
- ■ Interest

Under the Back Pay Act, the United States Information Agency must pay interest on amounts erroneously withheld from their employees' pay and contributed to the government's retirement fund. 5 U.S.C. § 5596(b)(2)(A) (1988). The interest is payable from the agency's appropriation covering the fiscal year or years in which the retirement contributions were withheld.

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**B-230807.2, September 13, 1991**

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## Civilian Personnel

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### Leaves Of Absence

- Annual leave
- ■ Accrual
- ■ ■ Statutory restrictions
- ■ ■ ■ Legislative/judicial personnel

## Civilian Personnel

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### Leaves Of Absence

- Sick leave
- ■ Accrual
- ■ ■ Statutory restrictions
- ■ ■ ■ Legislative/judicial personnel

Magistrate and bankruptcy judges and law clerks who are entitled to credit for annual and sick leave, which was initially not credited to them due to an erroneous agency position that they were not subject to the Annual and Sick Leave Act, cannot obtain credit for annual leave in excess of the statutory maximum carryover ceiling of 240 hours. Granting their claim for annual leave

credit beyond the statutory maximum would result in a windfall to them and run counter to a judicial decision addressing comparable circumstances.

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**B-242959, September 16, 1991**

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**Civilian Personnel**

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**Compensation**

- Classification
- ■ Appeals
- ■ ■ GAO review

Proper classification of positions is a matter for decision by the agency, with appeal to the Office of Personnel Management, whose decision is final.

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**Civilian Personnel**

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**Compensation**

- Retroactive compensation
- ■ Eligibility
- ■ ■ Adverse personnel actions
- ■ ■ ■ Classification

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**Civilian Personnel**

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**Compensation**

- Retroactive compensation
- ■ Eligibility
- ■ ■ Details

Backpay is not available as a remedy for misassignments to higher level duties or improper classifications.

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**Civilian Personnel**

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**Leaves Of Absence**

- Administrative leave
- ■ Use
- ■ ■ Administrative discretion

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**Civilian Personnel**

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**Leaves Of Absence**

- Court leave
- ■ Eligibility

Court leave under 5 U.S.C. § 6322 is limited to time spent on jury duty or as a witness. The granting of administrative leave is within the discretion of the agency and the GAO will not question the denial of such leave in the absence of a clear showing that such determination was arbitrary and capricious.

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**B-231659.4, September 23, 1991**

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**Civilian Personnel**

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**Travel**

- Travel regulations
- ■ Applicability

Under the airlines' deregulated pricing system the city-pair contract fare, if applicable, or the fare selected when a reservation is made or the ticket is issued is the applicable fare for government passenger transportation, and decisions that held that the government is entitled to the lowest

published tariff rate as a matter of law are not applicable in the deregulated environment. Also, the rule in *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253 (1957), which places the burden on the party in possession of the necessary documents, is applicable to place the burden on the airlines to show that a particular fare was not available only if the government shows that it requested a lower fare than was charged. Upon reconsideration, *Alaska Airlines, Inc., et al.*, B-231659, Sept. 10, 1990, 69 Comp. Gen. , is affirmed and clarified as to the time to be used in determining applicable fares.

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## Civilian Personnel

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### Travel

- Travel regulations
- ■ Applicability

The holding in *Alaska Airlines, Inc., et al.*, B-231659, Sept. 10, 1990, 69 Comp. Gen. , was not a changed interpretation of the law but an initial interpretation of the government's legal entitlement to airfares under the deregulated system. It is applicable to the claims for which the carriers requested the Comptroller General's review, and is not limited to prospective application only.

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## B-239138, September 25, 1991\*\*\*

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## Civilian Personnel

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### Compensation

- Retroactive compensation
- ■ Bonuses
- ■ ■ Interest

Federal agency and labor union have adopted provisions in collective bargaining agreement that specify criteria for granting cash incentive awards, impose deadlines for the agency's payment of such incentive awards, and require the agency to pay interest on late payments of awards. Under these circumstances incentive awards constitute "pay, allowances, or differentials" for purposes of the Back Pay Act, 5 U.S.C. § 5596, and the Act (including its interest provision) applies in the case of failure of an agency to comply with award payment deadlines it has agreed to in collective bargaining.

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## B-240956, September 25, 1991\*\*\*

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## Civilian Personnel

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### Travel

- Travel expenses
- ■ Air carriers
- ■ ■ Code-share
- ■ ■ ■ Use

Travel under a ticket issued by a U.S. certificated air carrier which leases space on the aircraft of a foreign air carrier under a "code-share" arrangement in international air transportation is considered to be "transportation provided by air carriers holding certificates" as required under 49 U.S.C. App. § 1517 (1988), the Fly America Act. Thus, passengers may properly use tickets paid for by the government under a "code-share" arrangement if the tickets were purchased from the U.S. air carrier.



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**B-239363, September 27, 1991\*\*\***

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**Civilian Personnel**

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**Relocation**

- Expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Manpower shortages

A new manpower shortage category appointee, while on temporary duty in Washington, D.C., for orientation/training en route to his undetermined first permanent duty station, was requested during that training to execute a 1-year service agreement designating Washington, D.C., as his permanent duty station, but the agency states no decision on his duty station had in fact been made. One week later he was issued a permanent change-of-station authorization and his wife shipped their household goods and travelled at government expense to Washington, D.C. Therefore, since the record does not establish notice to the employee of his duty station assignment until he received his permanent change-of-station authorization, his temporary duty allowances continued until that latter date.

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**B-241708, September 27, 1991**

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**Civilian Personnel**

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**Compensation**

- Actual subsistence expenses
- ■ Eligibility
- ■ ■ Fire fighting services
- ■ ■ ■ Emergencies

Bureau of Indian Affairs, Department of the Interior, practice of furnishing subsistence to emergency firefighters hired under special statutory authority and joint guidelines of the Interior Department and Agriculture Department is legally permissible. Although Agriculture has additional specific statutory authority to provide subsistence without charge to employees and Interior does not, both agencies have broad statutory authority to prescribe the pay and terms of employment of emergency firefighters. Further, firefighters of both agencies serve under the same conditions and it has been the longstanding practice to furnish them subsistence without charge. Interior's regular classified employees, however, are subject to charge under 5 U.S.C. § 5911 (1988) for subsistence furnished them.

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**B-243283.2, September 27, 1991**

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**Civilian Personnel**

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**Travel**

- Temporary duty
- ■ Travel expenses
- ■ ■ Reimbursement
- ■ ■ ■ Experts/consultants

Claim of State Department personal services contractor for both temporary lodging and living quarters allowances for the same period of time may not properly be paid, because the Standardized Regulations which govern such allowances and which were incorporated into the contract specifically prohibit payment of both allowances for the same period. Standardized Regulations have the force and effect of law and may not be waived by contracting officer through amendment to contract.

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## Civilian Personnel

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### Relocation

- Temporary quarters
  - ■ Actual expenses
  - ■ ■ Fraud
  - ■ ■ ■ Burden of proof
- 

## Civilian Personnel

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### Travel

- Travel expenses
- ■ Vouchers
- ■ ■ Fraud

Where agency proffers ample evidence that voucher claiming temporary quarters allowance is tainted by fraud, the claim may not properly be paid.

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## B-238962, September 30, 1991\*\*\*

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## Civilian Personnel

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### Travel

- Government vehicles
  - ■ Use
- 

## Civilian Personnel

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### Travel

- Temporary duty
- ■ Travel expenses
- ■ ■ Privately-owned vehicles
- ■ ■ ■ Mileage

Customs Inspectors are not entitled to mileage reimbursement where Customs Service determines that use of government-owned vehicles (GOVs) is advantageous to the government, a GOV is available, and Inspectors do not request or receive agency approval to use their privately owned vehicles (POVs) to travel from headquarters to nearby airports in order to perform inspections. *See* 41 C.F.R. § 301-4.4(c) (1990).

---

## Civilian Personnel

---

### Travel

- Temporary duty
- ■ Travel expenses
- ■ ■ Privately-owned vehicles
- ■ ■ ■ Mileage

Where a GOV is available for use but the Customs Service expressly authorizes an Inspector to use his POV for official travel, the Inspector is entitled to mileage at the rate of 9.5 cents per mile. *See* 41 C.F.R. § 301-4.4(c). The agency may deduct from this mileage allowance the distance the Inspector would normally travel between his residence and headquarters.

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## Civilian Personnel

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### Travel

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

Customs Inspectors may be entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1988) if Customs Service requires them to spend time in travel outside normal duty hours to return GOVs to headquarters following completion of inspections. Entitlement to overtime would depend upon the particular circumstances and cannot be determined in the abstract.

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**B-239870, September 30, 1991\*\*\***

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## Civilian Personnel

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### Relocation

- Overseas personnel
- ■ Return travel
- ■ ■ Eligibility

An employee, who had vested return travel rights under 5 U.S.C. § 5722 from Hawaii, received an inter-agency transfer to the continental United States. He is entitled to full relocation expense reimbursement under 5 U.S.C. § 5724 and § 5724a from the gaining agency. A losing agency pays vested return right expenses only when the return travel is performed before an inter-agency transfer occurs. *Thomas D. Mulder*, 65 Comp. Gen. 900 (1986).

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## Civilian Personnel

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### Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

An employee executed an agreement to sell his old residence after he received and accepted an intra-agency job offer involving transfer to a new duty station. He later accepted a job offer from another agency, also involving transfer to a new duty station, declined the first job offer and settled on the residence sale after receiving his travel authorization from the second agency. Declination of first job offer after accepting second job offer does not defeat his right to residence sale expense reimbursement so long as the conditions of entitlement under paragraph 2-6.1 of the Federal Travel Regulations (FTR) are met. *Paul W. Adamske*, B-239590, Jan. 29, 1991, 70 Comp. Gen. 205.

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## Civilian Personnel

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### Relocation

- Overseas personnel
- ■ Household goods
- ■ ■ Shipment
- ■ ■ ■ Privately-owned vehicles

An employee shipped a privately owned vehicle (POV) to Hawaii at government expense. Due to an accident and damage to the POV, he purchased a foreign manufactured vehicle as a replacement from a commercial automobile dealer in Hawaii. On subsequent transfer to another agency, he seeks reimbursement for shipment of that POV to the continental United States. While the FTRs are silent on the point, the gaining agency has discretionary authority to allow shipment at government expense of that foreign-made POV to the continental United States upon his return. Following the rule in *Thomas D. Mulder*, 65 Comp. Gen. 900 (1986), and under authority of paragraph 2-1.6 of the FTR, the cost of that shipment, if determined to be appropriate, is to be borne by the gaining agency.

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# Military Personnel

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**B-237791.2, September 6, 1991**

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## Military Personnel

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### Pay

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

As a general rule, laws are effective from the date of their enactment, unless another date is specifically provided. Absent provision for retroactive application, statute enacted December 24, 1974, authorizing credit for service as aviation midshipmen in computation of basic pay, does not entitle former aviation midshipman, retired August 1, 1973, to retroactive recomputation of basic pay and adjustment to retired pay.

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**B-240236, September 12, 1991\*\*\***

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## Military Personnel

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### Pay

- Basic quarters allowances
- ■ Rates
- ■ ■ Determination
- ■ ■ ■ Dependents

A member with dependents is entitled to a basic allowance for quarters at the "with-dependent" rate (BAQ-W) when adequate government quarters are not provided for him and his dependents. A divorced member may qualify for BAQ-W for a child living with the member's former spouse in private quarters if he pays child support in an amount at least equal to the difference between BAQ at the "with-" and "without-dependents" rates.

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## Military Personnel

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### Pay

- Basic quarters allowances
- ■ Rates
- ■ ■ Determination
- ■ ■ ■ Dependents

The cost of maintaining a separate residence for the times when the member has custody of the child may not be used instead of or in addition to support payments to qualify for BAQ-W.

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## Military Personnel

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### Pay

- Variable housing allowances
- ■ Amount determination

A divorced member who is entitled to a variable housing allowance (VHA) may receive the higher rate for a member with dependents (VHA-W) for continuous periods in excess of 3 months when

his child is living with him. The costs of maintaining a home for the child's visits does not entitle him to VHA-W when the child is living with the member's former spouse or visiting the member for shorter periods.

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**B-241214, September 12, 1991**

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**Military Personnel**

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**Travel**

- Per diem
- ■ Eligibility

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**Military Personnel**

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**Travel**

- Temporary duty
- ■ Orders
- ■ ■ Amendments
- ■ ■ ■ Permanent duty stations

When a member is ordered to attend training courses in excess of 20 weeks at an installation, such installation constitutes a permanent change of station and when such orders were fully executed, they may not be changed by subsequent orders.

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**B-241940, September 13, 1991**

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**Military Personnel**

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**Relocation**

- Household goods
- ■ Nontemporary storage
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

The Joint Federal Travel Regulations may be amended to allow military members separating or released from active duty nontemporary storage of their household goods.

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**B-243481, September 17, 1991**

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**Military Personnel**

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**Pay**

- Claims
- ■ Statutes of limitation

For claims that accrued on or after June 15, 1983, the requirement in 31 U.S.C. § 3702(b) that a claim against the government must be received by the Comptroller General within 6 years after the claim accrues is met if it was filed with either the General Accounting Office or the agency involved within that period.

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**Military Personnel**

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**Travel**

- Travel allowances
- ■ Eligibility

The right of military personnel to reimbursement for travel depends on the performance of official travel directed by competent orders, so that there is no legal basis for reimbursement without properly authorized written travel orders or verbal orders subsequently confirmed in writing.

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# Miscellaneous Topics

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**B-242762, September 12, 1991**

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## Miscellaneous Topics

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### **Federal Administration/Legislative Matters**

#### **■ Administrative agencies**

#### **■ ■ Audits**

#### **■ ■ ■ Financial information**

Memorandum to AFMD discusses criteria for determining materiality for financial statement audits and identifies laws and regulations material to financial statements of FSLIC Resolution Fund.

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# Procurement

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**B-245356, B-245386, September 4, 1991**

**91-2 CPD 214**

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## Procurement

### Bid Protests

- Contractors
- ■ Suspension
- ■ ■ Propriety

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## Procurement

### Sealed Bidding

- Suspended/debarred contractors
- ■ Bids
- ■ ■ Rejection
- ■ ■ ■ Propriety

Protests challenging suspension are dismissed where suspension was based on evidence of bribes by protester's former president to obtain contracts for protester, and agency complied with applicable procedural requirements; agency did not arbitrarily determine that protester was an affiliate subject to suspension, or otherwise act arbitrarily to avoid awarding protester contracts to which it was entitled.

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**B-244761.2, September 6, 1991**

**91-2 CPD 215**

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## Procurement

### Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Dismissal of protest on the ground that contractor had no right to compel an agency to exercise an option is affirmed where request for reconsideration is based on repetition of arguments concerning agency's motivation for issuing new solicitation that were considered in original protest.

**Procurement**

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**Sealed Bidding**

- Invitations for bids
  - ■ Certification
  - ■ ■ Signature lines
  - ■ ■ ■ Omission
- 

**Procurement**

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**Sealed Bidding**

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

Procuring agency properly canceled an invitation for bids after bid opening where the solicitation's Certificate of Procurement Integrity failed to provide a signature line or space, misleading the low bidder and others that failed to sign the certificate, and where the record indicates that the low bidder, apart from signing the certificate, was otherwise responsive and eligible for award.

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**Procurement**

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**Competitive Negotiation**

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

Contracting agency's determination to exclude protester's proposal from the competitive range was reasonable where protester offered level-of-effort amounting to only 70 percent of the government's estimate and the hours offered by the proposed awardee at a price less than 1 percent below proposed awardee's, and protester's proposal was so technically inferior that, notwithstanding possibility that some deficiencies might have been cured through discussions, it had no reasonable chance of award.

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**Procurement**

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**Competitive Negotiation**

- Competitive advantage
- ■ Incumbent contractors

Protest that the conduct of a limited procurement which resulted in the award of an interim contract provided an unfair advantage to the incumbent with respect to the subsequent award of a contract under full and open competition for the same services is denied where the record indicates that no inappropriate information had been disclosed, nor had any improper competitive advantage resulted from the interim award.

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency conducted meaningful discussions where it reasonably led the protester into areas of its proposal that required amplification or clarification. Agency is not required to request submission of information specifically requested in the RFP which should have been included in protester's initial proposal.

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**B-244106, September 9, 1991**

**91-2 CPD 229**

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## Procurement

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### Competitive Negotiation

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

Protest that agency failed to follow the stated evaluation criteria in evaluating protester's proposal by applying unstated criteria is denied where the allegedly unstated criteria were reasonably related to the stated criteria.

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## Procurement

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### Competitive Negotiation

- Technical evaluation boards
- ■ Bias allegation
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that agency failed to follow the stated evaluation criteria in evaluating protester's proposal by applying unstated criteria is denied where the allegedly unstated criteria were reasonably related to the stated criteria.

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Agency's evaluation of protester's proposal for aviation security research concerning "false alarm" data and luggage scanning is reasonable where the proposal does not contain supporting data for false alarms or indicate that the protester intends to scan actual luggage.

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## Procurement

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### Bid Protests

- Bias allegation
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protest that agency evaluators were biased is denied where there is no evidence in the record to support the allegation.

**Procurement**

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**Competitive Negotiation**

- Conflicts of interest
- ■ Competition rights
- ■ ■ Contractors
- ■ ■ ■ Exclusion

Agency's exclusion of protester from competition due to organizational conflict of interest was reasonable where protester prepared portions of statement of work without contracting officer's knowledge and thus had unfair competitive advantage; Federal Acquisition Regulation provides that a contractor that prepared a statement of work for services may not supply those services absent circumstances not applicable here.

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**Procurement**

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**Contractor Qualification**

- Organizational conflicts of interest
- ■ Allegation substantiation
- ■ ■ Procedural defects

Where protester properly was disqualified from competition based on organizational conflict of interest, agency's failure to afford protester opportunity to respond to organizational conflict of interest determination before disqualifying it was mere procedural defect that did not affect propriety of disqualification.

**Procurement**

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**Bid Protests**

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

Protest is dismissed as untimely where protester knew prior to bid opening of the alleged commercial unavailability of a warranty required by the solicitation, but waited until after award to protest the warranty requirement.

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**Procurement**

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**Sealed Bidding**

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

Where solicitation required bidders to submit prices for all items, agency properly rejected protester's bid as non-responsive where protester effectively took exception to a warranty requirement of the solicitation by inserting in its bid in the space provided for the item the notation "N/A" rather than a price.

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## **Procurement**

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### **Sealed Bidding**

- **Bids**
- ■ **Responsiveness**
- ■ ■ **Warranties**

Where solicitation required bidders to submit prices for all items, agency properly rejected protester's bid as non-responsive where protester effectively took exception to a warranty requirement of the solicitation by inserting in its bid in the space provided for the item the notation "N/A" rather than a price.

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## **Procurement**

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### **Sealed Bidding**

- **Bids**
- ■ **Errors**
- ■ ■ **Waiver**

Agency's decision not to waive protester's price omission for a warranty requirement of the solicitation was not unreasonable where the warranty was material and was not divisible from the other requirements of the solicitation.

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**B-244608, September 9, 1991**

**91-2 CPD 232**

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## **Procurement**

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### **Bid Protests**

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

Protest filed with the General Accounting Office more than 10 working days after the protester knew or should have known the basis of its protest is untimely.

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**B-245039, et al., September 9, 1991**

**91-2 CPD 233**

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## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **Purposes**
- ■ ■ **Competition enhancement**

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## **Procurement**

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### **Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Personnel**

Protest by incumbent contractor asserting that agency should require each offeror to demonstrate, in its proposal, that it has firm employment commitments from the personnel necessary for performance is dismissed as outside of the General Accounting Office's role in reviewing bid protests, which is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications.

**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion

Award of all lots to one firm, notwithstanding that protester submitted low price for one lot, is permissible where solicitation award methodology permitted award on the basis of such an offer.

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**Procurement**

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**Bid Protests**

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

Protest of solicitation award methodology filed after award is untimely.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
  - ■ Advertising
  - ■ ■ Omission
- 

**Procurement**

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**Competitive Negotiation**

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

Protest that agency deprived contractor of opportunity to submit an offer because agency did not advertise the procurement in the *Commerce Business Daily (CBD)* is denied where the contracting officer determined that a CBD synopsis was not required, pursuant to Federal Acquisition Regulation § 5.202(a)(12), since at the time the solicitation was issued the agency reasonably expected an overseas procurement for which competition was to be limited to local sources.

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**Procurement**

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**Bids Protests**

- Moot allegation
- ■ GAO review

Where agency corrects alleged impropriety in solicitation by amendment after initial protest is filed, matter is academic.

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## **Procurement**

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### **Bids Protests**

- **Premature allegation**
- ■ **Future procurement**
- ■ ■ **GAO review**

Problem envisioned by the protester, namely, that exorbitant prices will be charged on small purchases of ancillary tasks that may be performed during performance of contract work, is speculation about what will happen on future procurements and is not for consideration.

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**B-244755.2, B-244755.3, September 10, 1991**

**91-2 CPD 237**

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## **Procurement**

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### **Bid Protests**

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

General Accounting Office (GAO) will not consider protests of alleged solicitation improprieties filed more than 1 month following submission of initial, related protest, even though bids have not yet been opened, as consideration of such piecemeal submissions is inconsistent with GAO's mandate under the Competition in Contracting Act of 1984 to resolve protests quickly with only minimal disruption to the procurement process.

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**B-245376, September 10, 1991**

**91-2 CPD 238**

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## **Procurement**

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### **Competitive Negotiation**

- **Competitive restrictions**
- ■ **Use**
- ■ ■ **Propriety**

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## **Procurement**

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### **Contractor Qualification**

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

Protest alleging that solicitation's organizational conflict of interest provision unduly restricts competition is dismissed for failure to state a valid basis where the provision appears properly to address potential conflict, and protester does not explain why the restriction is not necessary to address the conflict.

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## **Procurement**

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### **Socio-Economic Policies**

- **Small businesses**
- ■ **Disadvantaged business set-asides**
- ■ ■ **Preferences**
- ■ ■ ■ **Applicability**

Protest of agency's failure to include evaluation preference for small disadvantaged business concerns in solicitation is dismissed; requirement for evaluation preference does not apply to procurements where award is not based solely on price or price related factors.

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**B-237421, September 11, 1991**

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**Procurement**

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**Payment/Discharge**

- Liquidated damages
- ■ Remission
- ■ ■ Deposit
- ■ ■ ■ Revolving accounts

The portion of delayed performance liquidated damages that is attributable to increased supervision and administration (S&A) expenses may be reimbursed to the Corps of Engineers' S&A revolving fund.

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**B-243875, September 11, 1991**

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**91-2 CPD 239****Procurement**

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**Competitive Negotiation**

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

Contention that evaluation was unreasonable is sustained where the protester's proposal was downgraded in areas where the two successful proposals are similarly deficient but the record contains no evidence that the similar deficiencies in the successful proposals were recognized, and, in fact, provides no discussion whatsoever of the strengths or weaknesses of the successful proposals.

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**Procurement**

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**Competitive Negotiation**

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

Protest is sustained where agency awards contracts on the basis of initial proposals without discussions and the record shows that the protester's acceptable proposal offered lower prices on 4 of 11 line items, since agency may not accept initial proposal without discussions where it will not result in the lowest overall cost to the government.

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**Procurement**

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**Bid Protests**

- Antitrust matters
- ■ GAO review

The General Accounting Office will not review protester's allegations of collusive bidding by awardees to determine if a violation of antitrust laws has occurred since jurisdiction over possible criminal violations is vested in the Attorney General and the federal courts.

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**Procurement**

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**Small Purchase Method**

- Quotations
- ■ Descriptive literature
- ■ ■ Adequacy

Agency had a reasonable basis not to list protester's product in a solicitation item description where, in response to an agency request for information, the protester refused to provide the agency with technical data indicating that it either manufactured or controlled the manufacture and design of the product in question.

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**Procurement**

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**Competitive Negotiation**

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

Agency is generally not required to consult protester's references listed in its technical proposal in order to obtain for evaluation purposes additional information not provided by protester in its technical proposal. Further, even if agency had consulted protester's references and given protester perfect scores for specifically challenged technical areas, protester would not be entitled to award since awardee still would be the highest technically rated offeror with the lowest price.

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**Procurement**

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**Competitive Negotiation**

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

Where solicitation advises offerors of the possibility that award may be made without discussions, agency does not conduct discussions with any offeror, and acceptance of the most favorable initial proposal without discussions will result in the lowest overall cost to the government at a fair and reasonable price, there is no legal requirement that agency conduct discussions with any offeror.

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**Procurement**

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**Bid Protests**

- Private disputes
- ■ GAO review

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**Procurement**

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**Payment/Discharge**

- Payment priority
- ■ Sureties/contractors

Where contractor and payment bond surety both claim entitlement to final contract payment, the payment should be held by the government pursuant to Federal Acquisition Regulation section 28.106-7(b) until there is an agreement between the parties or a judicial determination of their rights.

**Procurement**

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**Bid Protests**

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

Protest that solicitation improperly contained Buy American and Trade Agreement Acts provisions is untimely under Bid Protest Regulations when filed after bid opening.

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**Procurement**

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**Socio-Economic Policies**

- Preferred products/services
- ■ Domestic products
- ■ ■ Applicability

Where the Trade Agreements Act of 1979 properly applied to the procurement, protester was not entitled to any preference for offering a domestic end product where awardee offered to supply products from Japan, a "designated country" entitled to an equivalent preference.

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**Procurement**

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**Socio-Economic Policies**

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

There is no requirement that a procuring agency equalize whatever competitive advantage a foreign firm may have because the firm is not subject to certain solicitation provisions, such as socio-economic requirements, applicable to United States concerns.

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**Procurement**

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**Bid Protests**

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

Protest challenging cancellation of solicitation is untimely when filed more than 10 days after protester knew the basis for its protest.

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**Procurement**

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**Bid Protests**

- Premature allegation
- ■ GAO review

Allegation that agency is acquiring material with the intention of using it in conjunction with an improper modification of another existing contract does not state a valid basis for protest.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior decision sustaining protest is denied where party requesting reconsideration merely repeats arguments made and provides evidence that was available during the initial consideration of the protest, but which was not, though it could have been, presented at that time.

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**Procurement**

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**Bid Protests**

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

Where protester, the lowest technically rated, highest proposed cost offeror, abandons the issue concerning the agency's cost realism analysis of the second low offeror, which had a higher technical rating and a lower proposed cost than protester, protester lacks the requisite direct and substantial economic interest to be considered an interested party to protest the agency's cost realism analysis of the awardee, the highest technically rated, lowest evaluated cost offeror, as protester would not be next in line for award even if its protest were sustained.

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**Procurement**

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**Socio-Economic Policies**

- Small business 8(a) subcontracting
- ■ Incumbent contractors
- ■ ■ Adverse effects
- ■ ■ ■ Determination

Protest that Small Business Administration (SBA) improperly accepted into the 8(a) program a modified contract for custodial services previously performed under a non-8(a) small business set-aside contract is sustained where contracting agency failed to furnish SBA with adequate information regarding the proposed offering and, consequently, SBA lacked sufficient accurate information on which to determine whether the offering was appropriate for acceptance into the 8(a) program.

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**Procurement**

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**Bid Protests**

- Administrative policies
- ■ GAO review

General Accounting Office will not consider protest involving alleged violation of policy letter issued by the Office of Federal Procurement Policy which establishes executive branch policy regarding the definition of service contract requirements.

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## Procurement

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### Specifications

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

Solicitation statement of minimum manning levels does not restrict competition where solicitation permits offerors to deviate from the stated levels and explain the basis for the deviation.

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## Procurement

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### Specifications

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

Protest that solicitation's minimum manning levels exceed the agency's minimum needs is denied where agency estimate is reasonably based on agency's past contract experience.

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**B-244227, September 16, 1991**

**91-2 CPD 248**

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## Procurement

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### Sealed Bidding

- Unbalanced bids
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protester's low bid on requirements contract was properly rejected as materially unbalanced where protester offered mathematically unbalanced price and agency had a reasonable doubt that award to protester would result in the lowest overall cost to the government in light of the inherent unreliability of its estimates.

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**B-244334, September 16, 1991**

**91-2 CPD 249**

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## Procurement

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### Sealed Bidding

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

Procuring agency properly rejected bid on a sealed bid procurement as nonresponsive where a handwritten notation on the protester's bid reasonably may be interpreted as taking exception to the material solicitation requirement that hydrostatic steering be supplied.

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**Procurement**

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**Bid Protests**

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

**Procurement**

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**Bid Protests**

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

Protest of cancellation of purchase order is dismissed as untimely where the protest was initially filed with the contracting agency more than 10 working days after protester knew or should have known its basis of protest, and was subsequently filed with the General Accounting Office more than 10 days after the protester received oral notification that its agency-level protest was denied.

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**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ Preparation costs
- 

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action after the protest was filed, responding to 37 specific questions raised by the protester in two amendments totaling 39 pages.

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**Procurement**

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**Bid Protests**

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

Protest allegations that agency improperly solicited for basic and applied research using broad agency announcement (BAA) instead of request for proposals, that BAA was ambiguous because it appeared to require primarily applied research instead of the basic research actually required, and that project cannot be completed within agency's stated budget are untimely since they concern alleged solicitation improprieties and therefore should have been filed before proposals were due.

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## Procurement

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### Bid Protests

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

Untimely protest issues relating to apparent solicitation defects will not be considered under significant issue exception to General Accounting Office (GAO) timeliness requirements where issues either relate solely to instant procurement and thus are not of widespread interest to the procurement community, or previously have been considered by GAO.

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest alleging that agency improperly evaluated proposals based on unstated criterion—access to rights in offerors' proprietary data—is denied where evaluation record contains no evidence thereof.

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## Procurement

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### Competitive Negotiation

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

Agency's rejection of protester's research proposal was reasonable where record supports agency's conclusion that protester's proposal was weak in the area of basic research; protester's disagreement with agency's view that more basic research was required does not render agency's judgment unreasonable.

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**B-244554, September 16, 1991**

**91-2 CPD 253**

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## Procurement

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### Bid Protests

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

In procurement for farm management services, post-award protest that deficiencies in protester's proposal were attributable to failure of solicitation to state the actual number of properties to be managed is untimely; protester's argument that, under the circumstances, its initial and final proposals could not have been written differently, should have been raised not later than 10 days after agency advised protester in discussions that its initial proposal, so written, was deficient.

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## Procurement

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### Competitive Negotiation

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

## Procurement

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### Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Where request for proposals required offerors to propose a single, fixed unit price for each line item, protester's proposal properly could be excluded from consideration where protester offered several different unit prices that depended on how many tasks actually would be performed under the contract.

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## Procurement

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### Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Applicability

Agency was not required to refer decision not to make an award to protester, a small, disadvantaged business, to Small Business Administration for certificate of competency determination, where decision was based on stated evaluation criteria and agency did not reach the question of offeror's responsibility.

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**B-243974, et al., September 17, 1991**

**91-2 CPD 254**

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Cost realism
- ■ ■ Evaluation errors
- ■ ■ ■ Allegation substantiation

In a negotiated procurement for the award of a cost reimbursement contract for the operation and maintenance of aircraft, the procuring agency's cost realism determination was unreasonable where the agency failed to consider the awardee's likely considerable probable costs for required spare/repair parts for the contract's option years, even though the solicitation contemplated the evaluation of such costs.

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

The procuring agency improperly conducted prejudicially unequal discussions where it did not inform the protester, as it had the awardee, that spare/repair parts would be provided at government expense for the base year, and the protester thus proposed costs in excess of \$1 million for these parts while the awardee proposed \$0 costs; the provision of spare/repair parts for the base

year at government expense was a change in the solicitation requirements of which the agency improperly failed to inform offerors, other than the awardee.

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## Procurement

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### Competitive Negotiation

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

The selection of the awardee's higher rated, higher cost proposal was unreasonable where the source selection authority, in performing his cost/technical tradeoff, was unaware of the awardee's failure to price spare/repair parts for the option years or of the agency's failure to inform the protester of the agency's changed requirements concerning the provision of the parts at government expense for the base year, and where the protester's cost advantage could have been significantly greater had the offers been properly evaluated.

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**B-244302, September 17, 1991**

**91-2 CPD 255**

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## Procurement

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### Sealed Bidding

- Contingent fees

*Protest that agreement between selling agent and contractor constitutes improper contingent fee agreement is denied where under the terms of the agreement and in actual practice, the selling agent does not solicit or obtain contracts directly from the procuring agency.*

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**B-244340, September 17, 1991**

**91-2 CPD 256**

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## Procurement

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### Bid Protests

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

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## Procurement

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### Bid Protests

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

Even assuming that protester's decision to not file a protest following receipt of oral information that may have formed the basis of its protest was reasonable because the agency led protester to believe that there was only a slight possibility that its bid "may be" rejected as nonresponsive, and that agency had not reached a final decision concerning its bid, protest to the General Accounting Office is untimely where initial agency-level protest against rejection of bid was filed more than 10 working days after protester received written notice of the rejection.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where agency merely expresses disagreement with our finding that the awardee's proposal did not comply with the solicitation's required attorney services since, despite agency's claim that it did not intend to require such services, the agency has not shown that our decision was based on other than a clear and reasonable reading of the solicitation's terms or that an error of fact or law exists which warrants reconsideration of the decision.

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**Procurement**

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**Competitive Negotiation**

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

Protest that agency improperly canceled solicitation after receipt of best and final offers is denied where the decision to cancel was reasonably based on agency concerns that the integrity of the procurement process appeared to have been undermined by improper conduct of an agency procurement official.

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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

Protester is not entitled to the costs of filing and pursuing its protest where the agency took corrective action within 2 weeks of the day the protester first communicated its concerns about the procurement to the contracting officer, and within 1 day after the protest was filed.

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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

Protester is not entitled to award of the costs of filing and pursuing its protest where, in response to the protest, the agency terminated the awardee's contract, and canceled the underlying solicitation, within approximately 4 weeks after the protest was filed.

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**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Powers of attorney

Where corporate surety's power of attorney form attached to the bid bond designated a different individual as attorney-in-fact than the individual who signed the bond on behalf of the surety, the agency correctly determined the bond was defective and properly rejected bid as nonresponsive.

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**Procurement**

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**Bid Protests**

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

Where doubt exists as to the timeliness of a protest, such doubt will be resolved in favor of the protester.

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Risk allocation
- ■ ■ Performance specifications

Agency reasonably did not consider that the existence of an on-line automatic data processing equipment system would materially affect estimates for a system that accesses much the same data using Compact Disc Read Only Memory technology, where the systems serve different user requirements.



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**B-242980, September 20, 1991**

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**Procurement**

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**Payment/Discharge**

- Liquidated damages
- ■ Remission

Liquidated damages attributable to costs that were not foreseeable consequences of performance delay are remitted.

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**B-243446.2, B-243446.3, September 20, 1991**

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**91-2 CPD 262****Procurement**

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**Sealed Bidding**

- Contract awards
- ■ Propriety
- ■ ■ Evaluation criteria
- ■ ■ ■ Defects

Performance Incentive Contracting (PIC) provision contained in solicitation that provides for a preference to be given to offerors for quality and on-time delivery was ambiguous and did not provide the government an adequate basis for making a best value analysis. Since the agency in its resolicitation merely deleted the PIC provision, showing that award based on merely price and price-related factors would satisfy their needs, award to the low offeror under the original solicitation was proper since no offeror was prejudiced by the ambiguous provision and the awardee's product meets the agency's needs.

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**B-244803, September 20, 1991**

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**91-2 CPD 263****Procurement**

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**Bid Protests**

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

Protest based on other than an alleged solicitation impropriety is untimely when filed more than 10 working days after the protester learns basis for protest.

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**B-245646, September 20, 1991**

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**91-2 CPD 264****Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Acceptance time periods
- ■ ■ ■ Deviation

A bid was properly rejected as nonresponsive where it offered a 30-day acceptance period instead of the required 120 days.

**Procurement**

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**Bid Protests**

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

Protest allegations regarding matters that could have been raised prior to the closing dates for receipt of initial and final offers, but were not, are dismissed as untimely.

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**Procurement**

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**Bid Protests**

- Dismissal
- ■ Definition

General allegations without any detail regarding the conduct of a procurement are dismissed as failing to state a legally sufficient basis of protest.

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**B-231659.4, September 23, 1991**

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**Procurement**

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**Payment/Discharge**

- Payment deductions
- ■ Propriety

Under the airlines' deregulated pricing system the city-pair contract fare, if applicable, or the fare selected when a reservation is made or the ticket is issued is the applicable fare for government passenger transportation, and decisions that held that the government is entitled to the lowest published tariff rate as a matter of law are not applicable in the deregulated environment. Also, the rule in *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253 (1957), which places the burden on the party in possession of the necessary documents, is applicable to place the burden on the airlines to show that a particular fare was not available only if the government shows that it requested a lower fare than was charged. Upon reconsideration, *Alaska Airlines, Inc., et al.*, B-231659, Sept. 10, 1990, 69 Comp. Gen. , is affirmed and clarified as to the time to be used in determining applicable fares.

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**Procurement**

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**Payment/Discharge**

- Payment deductions
- ■ Propriety

The holding in *Alaska Airlines, Inc., et al.*, B-231659, Sept. 10, 1990, 69 Comp. Gen. , was not a changed interpretation of the law but an initial interpretation of the government's legal entitlement to airfares under the deregulated system. It is applicable to the claims for which the carriers requested the Comptroller General's review, and is not limited to prospective application only.

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**Procurement**

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**Specifications**

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

Protest against geographical restriction in proposed procurement for leased office space for the Drug Enforcement Administration, which eliminated the protester's building, is denied where the protester's building was properly excluded from the zone of consideration for security reasons.

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**Procurement**

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**Bid Protests**

- **Administrative policies**
- ■ **GAO review**

General Accounting Office will not consider protest involving alleged violation of policy letter issued by the Office of Federal Procurement Policy which establishes executive branch policy regarding the definition of contract requirements.

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**Procurement**

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**Specifications**

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

Solicitation statement of minimum manning levels does not restrict competition where solicitation permits offerors to deviate from the stated levels and explain the basis for the deviation.

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**Procurement**

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**Specifications**

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

Protest that solicitation's minimum manning levels exceed the agency's minimum needs is denied where agency estimate is reasonably based on agency's past contract experience.

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**Procurement**

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**Competitive Negotiation**

- **Requests for quotations**
- ■ **Cancellation**
- ■ ■ **Resolicitation**

Cancellation of request for quotations for commissary deli service and resolicitation of the requirement were not improper where shortly after award agency determined that proposals were improperly evaluated because the solicitation failed to list the evaluation criteria and was unclear as to what items had to be priced.

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**Procurement**

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**Bid Protests**

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

Where protester files an agency-level protest, subsequent agency receipt of best and final offers (BAFO) constitutes initial adverse agency action, and protest to the General Accounting Office filed more than 10 working days after receipt of BAFOs is untimely.

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**B-241440, September 24, 1991**

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**Procurement**

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**Contract Management**

- Federal procurement regulations/laws
- ■ Revision
- ■ ■ Cost accounting

General Accounting Office (GAO) suggests two changes to Federal Acquisition Regulation (FAR) case No. 90-17 concerning requirements in FAR Subpart 15.8 for the submission of cost or pricing data. The changes suggested by GAO involve (1) documenting the contract file when the contracting officer declines to adopt recommendations by government specialists, and (2) defining "significant" price changes for purposes of granting a cost or pricing data exemption based on a prior exemption granted within the past 3 years.

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**B-244954, September 24, 1991**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Preparation costs

In the absence of corrective action by an agency in response to a protest, a protester is entitled to protest costs only if the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation.

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**B-245244.2, September 24, 1991**

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**Procurement**

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**Sealed Bidding**

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

Bidder's failure to complete solicitation's Certificate of Procurement Integrity renders its bid non-responsive since completion of the certificate imposes material legal obligations upon the bidder to which it is not otherwise bound.

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**Procurement**

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**Bid Protests**

- Agency-level protests
- ■ Information adequacy

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**Procurement**

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**Bid Protests**

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

A letter to the contracting agency protesting the award of a contract that does not specify any basis for protest is not sufficient to constitute an agency-level protest; therefore, a protest subsequently filed with the General Accounting Office more than 10 working days after the basis for protest was known is untimely under our Bid Protest Regulations.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Signatures

Bid was properly rejected as nonresponsive where bidder submitted unsigned Certificate of Procurement Integrity with its bid, notwithstanding that the bidder had otherwise completed the certificate.

---

**Procurement**

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**Competitive Negotiation**

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

Agency reasonably excluded protester's proposal from the competitive range (leaving a competitive range of one), where proposal in competitive range was substantially superior to the protester's under each of the four technical evaluation factors and protester's proposed cost was 12 percent higher.

**Procurement**

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**Bid Protests**

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

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ Interest parties
- ■ ■ Subcontractors

Request for reconsideration of decision dismissing protest as untimely is denied where General Accounting Office (GAO) has learned that protester was a prospective subcontractor; GAO does not consider subcontractor protests except in circumstances that do not exist here.

---

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Descriptive literature

Under request for proposals which required offerors to provide detailed technical proposals describing their approach to meeting the agency's requirements and which stated that those proposals would be evaluated under various specified technical evaluation criteria, offerors were on notice that qualitative distinctions would be made among the proposals in the evaluation of offers.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Disparity in technical scoring among individual evaluators does not by itself cast doubt on the validity of evaluation panel's final conclusions with respect to technical merits of a proposal since it is not unusual for individual evaluators to reach disparate conclusions when judging proposals, as both objective and subjective judgments are involved.

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**Procurement**

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**Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Agency may not cite 10 U.S.C. § 2304(c)(5) to permit the use of a noncompetitive procurement when the applicable statutes contain no express authorization or requirement to acquire aircraft from a particular source.

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**Procurement**

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**Competitive Negotiation**

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

Where solicitation's proposal preparation instructions set forth type-size and page limitations on offerors' proposals, and required that proposals contain double-spaced print, agency did not act unreasonably in removing 59 pages of the protester's proposal prior to evaluating the proposal in response to the protester's submission of a single-spaced proposal, which exceeded the page limits; the agency's resultant determination that the proposal would require major revisions and thus was inappropriate for inclusion in the competitive range was reasonable.

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**Procurement**

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**Competitive Negotiation**

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

Agency reasonably eliminated as technically unacceptable a proposal from the competitive range where the record shows that the proposal was so deficient technically that substantial revisions would be necessary in order for it to become acceptable.

---

**Procurement**

---

**Bid Protests**

- Allegation substantiation
- ■ Burden of proof

Protest alleging that award was improper because it was not made at a fair market price is dismissed for failure to state a legally sufficient basis where protester does not furnish awardee's price, its own price, or any other information tending to show that award was not based on a fair market price.

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**Procurement**

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**Contractor Qualification**

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

Protest that awardee's price is unreasonably low is dismissed as essentially a challenge against contracting officer's affirmative determination of responsibility.

**Procurement**

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**Sealed Bidding**

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

Protester could not reasonably assume that agency would not evaluate options where a solicitation which erroneously included an award provision calling for evaluation of price on the basis of the base year plus alternates also contained provisions expressly providing that option year prices would be evaluated; the solicitation block calling for entries of the prices for the work required contained blanks for option year prices and required the entry of a total bid price including these option prices, and the protester's representatives had attended a pre-bid conference at which the agency stated that option prices would be evaluated to determine the low bid.

---

**Procurement**

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**Sealed Bidding**

- Non-responsive bids
- ■ Post-bid opening periods
- ■ ■ Clarification
- ■ ■ ■ Propriety

To the extent that the solicitation may have been unclear on its face as to the evaluation of options, the protester should have sought clarification from the agency, or filed a protest contesting the evaluation clauses before the bid opening date.

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**Procurement**

---

**Bid Protests**

- GAO procedures
  - ■ Preparation costs
- 

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Preparation costs

Where no determination has been made by the Comptroller General that a contract award violates law or regulation, protester is not entitled to an award of protest costs.

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**Procurement**

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**Socio-Economic Policies**

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

Protest of Small Business Administration's (SBA) denial of certificate of competency based on lack of evidence that protester's items for sale were produced in accordance with solicitation's quality control requirements is denied where record does not support allegation that SBA failed to consider vital information in that regard.

---



**Procurement**

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**Bid Protests**

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

Offeror whose proposal was ranked fourth, based on cost and technical evaluation, is not an interested party to question eligibility for award of highest ranked offeror where protester does not question eligibility of intervening offerors and would not be in line for award if the issues it raises were resolved in its favor.

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Prior contract performance

Evaluation that resulted in selection of incumbent to publish installation newspaper was proper where solicitation provided that evaluation would be based in part on past performance and experience in producing similar publications, protester did not timely object to that criterion, and agency properly applied the criterion in determining that awardee's experience was superior to protester's.

---

**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency was not required to hold discussions with offeror where proposal was acceptable as submitted and the only weaknesses—in prior experience—were relative in nature and not correctable through discussions.

---

**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Determination criteria

Discussions with offeror whose otherwise acceptable proposal took exception to certain solicitation requirements was proper where agency determined that proposal could be made acceptable through discussions; resulting decision to amend solicitation was unobjectionable since agency advised all offerors of changed requirements and all offerors responded to those requirements in revised proposals.

---

**Procurement**

---

**Sealed Bidding**

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

Cancellation of invitation for bids (IFB) was proper where the Certificate of Procurement Integrity clause included in the solicitation did not contain a signature line or block, misleading the two low bidders and six other bidders that failed to sign the certificate, and where agency also plans to substantially reduce the scope of work upon resolicitation to delete services that are no longer required which could materially affect competition.

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**Procurement**

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**Bid Protests**

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

Protest that agency should have rejected awardee's offer for lease of office space because it failed to meet solicitation requirement for "good access" to specified highways is dismissed as untimely due to protester's failure to diligently pursue the information on which its protest is based.

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**Procurement**

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**Bid Protests**

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

Protest that solicitation should have required successful offeror to perform off-site improvements benefitting property offered to be leased is untimely since alleged defect was apparent prior to submission of offers.

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**Procurement**

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**Contract Management**

- Contract administration
- ■ GAO review

Protest that agency waived the construction schedule after contract award raises matter of contract administration not for consideration by the General Accounting Office.

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**Procurement**

---

**Small Purchase Method**

- Requests for quotations
- ■ Lost quotations

Protest that agency lost and thus failed to consider quotation is dismissed where agency's isolated error is not alleged to have been the result of a conscious or deliberate effort to exclude the protester from award consideration.

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**Procurement**

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**Bid Protests**

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

**Procurement**

---

**Bid Protests**

- Moot allegation
- ■ GAO review

Protest concerning the evaluation of offers from firms which qualify for Status of Forces Agreement (SOFA) status and those which do not qualify is dismissed as it is either without merit as the solicitation provided for no evaluation factor concerning SOFA status or untimely as any protest to our Office that the solicitation should have included an evaluation factor for SOFA status should have been raised within 10 days of knowledge of initial adverse agency action on protester's agency-level protest.

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**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Powers of attorney

Where corporate surety's power of attorney form attached to bid bond failed to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety, the agency correctly determined the bond was defective and properly rejected bid as nonresponsive, since there was no evidence at the time of bid opening that surety would be bound.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest that awardee failed to meet solicitation experience requirement is denied where protester fails to demonstrate any errors of fact or law warranting reversal or modification of prior decision.

---

**Procurement**

---

**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency failed to conduct meaningful discussions with the protester where it did not fairly apprise the firm that its compensation package for guards was deficient and that this was the most significant consideration in the award decision.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Allegation that contracting officials should have accepted a nonconforming offer is denied where protester was specifically advised in the request for best and final offers (BAFO) that the timber it initially proposed was not in accordance with solicitation specifications and where the evaluators reasonably concluded that protester had not adequately justified the use of a lesser grade of timber in its BAFO.

---

**Procurement**

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**Competitive Negotiation**

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

Allegation that evaluators erred in concluding that protester lacked sufficient resources to perform within the prescribed time frame is denied where protester has not substantively rebutted detailed findings of the evaluators.

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**Procurement**

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**Competitive Negotiation**

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

Award to offeror with highest combined number of technical and cost points is unobjectionable since procuring agency may use the scores achieved under the technical/cost ratio specified in the solicitation as the basis of its technical cost tradeoff.

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**Procurement**

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

Protest seeking to overturn decision to set aside a procurement for exclusive small business participation because it was led to believe, in connection with settlement discussions on an earlier procurement, that subsequent procurements would be conducted on an unrestricted basis is denied since inherent in any such agreement is that agencies will act in accordance with the requirements of applicable statutes and the Federal Acquisition Regulation.

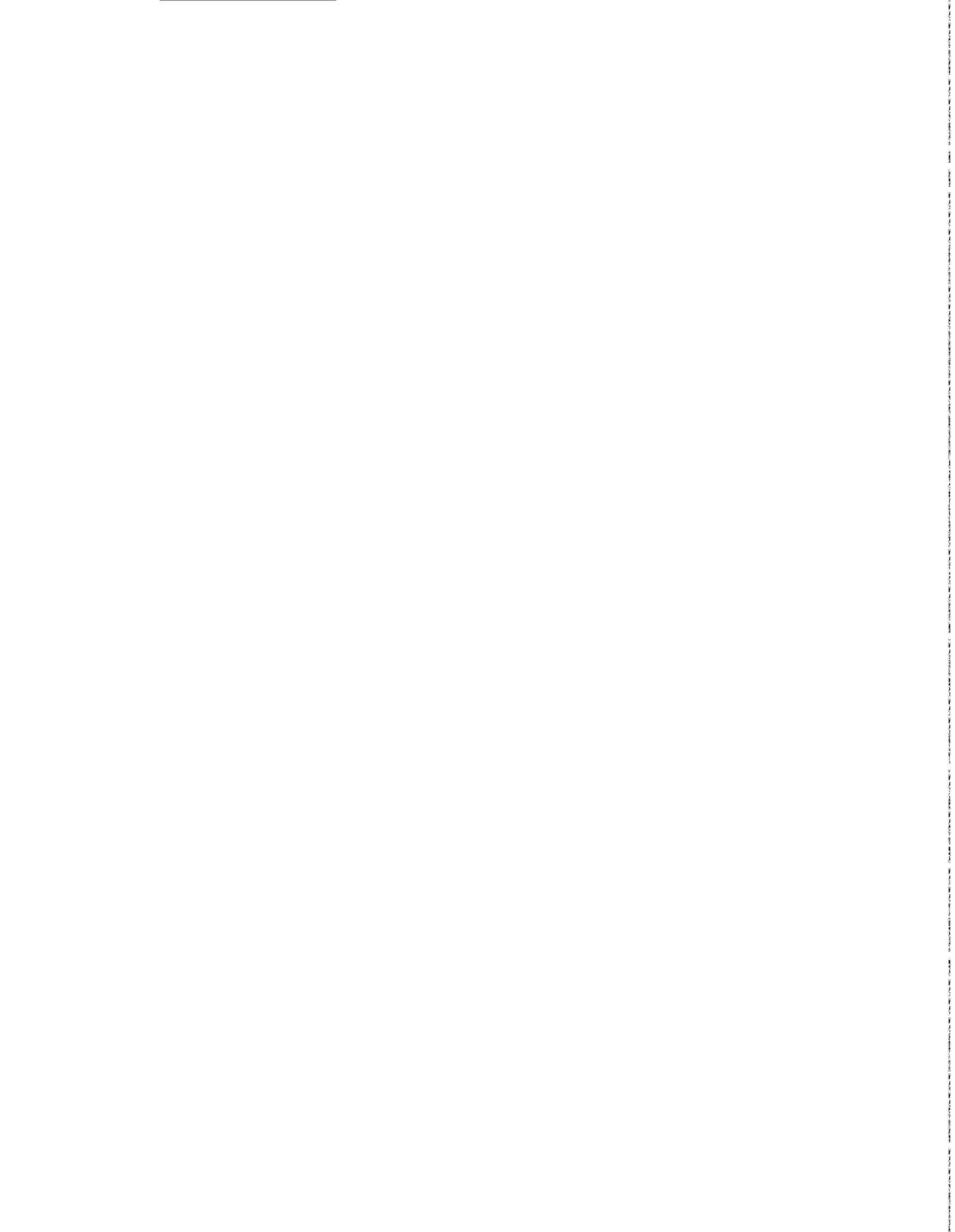
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**Procurement**

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**Socio-Economic Policies****■ Small business set-asides****■ ■ Use****■ ■ ■ Justification**

Contention that set-aside decision was improper is denied, even though the record fails to provide adequate support for the decision at the time it was made, since subsequent experience, including receipt of several proposals from small businesses, justifies the agency's decision to reserve the procurement for small business.



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