

**GAO**

United States General Accounting Office

Office of General Counsel

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March 1994

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

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Vol. V, No. 6

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For sale by the Superintendent of Documents,  
U.S. Government Printing Office, Washington, D.C. 20402

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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.C. § 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. No. 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 file number and date, e.g., B-248928, Sept. 30, 1992. 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 and in annual volumes. Decisions in these volumes should be cited by volume, page number, and year issued, e.g., 71 Comp. Gen. 530 (1992).

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# Appropriations/Financial Management

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**B-253937, March 2, 1994\*\*\***

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## Appropriations/Financial Management

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### Claims By Government

- Overpayments
- ■ Waiver
- ■ ■ GAO authority

The U.S. Court of Veterans Appeals, established by Congress pursuant to Article I of the Constitution in the executive branch, is an "Executive agency" as that term is defined in 5 U.S.C. §§ 105 and 104(1), and therefore is an "agency" covered by the waiver statute, 5 U.S.C. § 5584. Accordingly, GAO has authority to consider for waiver a debt arising out of an erroneous payment of pay to an employee of that court.

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**B-255004, March 4, 1994**

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## Appropriations/Financial Management

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### Claims By Government

- Commercial carriers
- ■ Carrier liability
- ■ ■ Compromises

Where the carrier's share of liability for damage to a Code 5 shipment of household goods is, pursuant to a Military-Industry agreement directing a 50/50 split of liability, less than \$25, the government should not pursue the claim, since another Military-Industry agreement states that neither party will pursue claims that are under \$25.

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**B-254385, March 22, 1994**

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## Appropriations/Financial Management

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### Accountable Officers

- Certifying officers
- ■ Relief
- ■ ■ Illegal/improper payments

Relief is granted National Science Foundation (NSF) certifying officer under 31 U.S.C. § 3528(b)(1)(A) from liability for certification of a payment to the wrong contractor. The incorrect payee resulted from an error by an NSF program officer who entered the wrong institution code into NSF's automated payment system. The certifying officer did not know, and by reasonable diligence and inquiry could not have discovered, that the wrong institution code was used to identify the company receiving the payment.

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# Civilian Personnel

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**B-253937, March 2, 1994\*\*\***

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## Civilian Personnel

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### Compensation

- Debt collection
- ■ Waiver
- ■ ■ Authority
- ■ ■ ■ Applicability

The U.S. Court of Veterans Appeals, established by Congress pursuant to Article I of the Constitution in the executive branch, is an "Executive agency" as that term is defined in 5 U.S.C. §§ 105 and 104(1), and therefore is an "agency" covered by the waiver statute, 5 U.S.C. § 5584. Accordingly, GAO has authority to consider for waiver a debt arising out of an erroneous payment of pay to an employee of that court.

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## Civilian Personnel

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### Compensation

- Payroll deductions
- ■ Annuity deductions
- ■ ■ Underdeductions
- ■ ■ ■ Error detection

A reemployed annuitant upon entry on duty had her pay properly reduced as a result of her receipt of a civil service annuity. However, although she furnished appropriate notices to agency officials of cost-of-living increases in her annuity each January, due to administrative error additional reductions in her salary were not made for those increases, and this resulted in her receiving salary overpayments. She is found not to be at fault and her debt is waived since based on the documents she received the errors were not readily apparent and she was expecting general salary increases at the same time as the annuity increases each January.

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**B-251211.2, March 9, 1994**

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## Civilian Personnel

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### Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

An employee's claim was denied for the expenses of his purchase of a residence in Cary, North Carolina, approximately 160 miles from Richmond, Virginia, incident to his transfer to Richmond because Cary is not within ordinary commuting distance of Richmond. He requested reconsideration, alleging that he actually commuted between Cary and Richmond during the five workweeks he lived there before being transferred to Texas. The record shows he purchased the residence in Cary because he hoped to be transferred there, and that because of using leave and occasionally working at his residence in Cary, he worked at Richmond for only five days during the five workweeks. This does not constitute "regularly commuting" between residence and duty station, as required under the Federal Travel Regulations, and the purchase of the residence may not be considered incident to the transfer to Richmond. *Roger W. Montague*, B-251211, Feb. 4, 1993, affirmed.

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**B-254921, March 11, 1994**

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**Civilian Personnel**

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**Compensation**

- Balances
- ■ Personnel death
- ■ ■ Payees
- ■ ■ ■ Determination

An employee of the Department of Energy (DOE), filed a Standard Form (SF) 1152, Designation of Beneficiary, Unpaid Compensation of Deceased Civilian Employee, with DOE, but failed to sign it. He subsequently died. The unsigned SF 1152 is legally ineffective, and his case is remanded to DOE for a determination of the beneficiary or beneficiaries under 5 U.S.C. § 5582(b) (1988).

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**Civilian Personnel**

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**Compensation**

- Balances
- ■ Personnel death
- ■ ■ Payees
- ■ ■ ■ Determination

An employee of the Department of Energy (DOE), filed a signed Standard Form (SF) 1152, Designation of Beneficiary, Unpaid Compensation of Deceased Civilian Employee, with DOE, but failed to designate a beneficiary. She subsequently died. Her signed SF 1152 is legally ineffective, and DOE is instructed to distribute her unpaid compensation in accordance with 5 U.S.C. § 5582(b) (1988).

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**B-254001, March 14, 1994**

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**Civilian Personnel**

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**Compensation**

- Overtime
- ■ Eligibility
- ■ ■ Travel time

Attorneys who must travel with little or no notice in response to the Government National Mortgage Association determining an Issuer of government-guaranteed mortgage-backed securities to be in default may not receive compensatory overtime for travel performed outside of their normal duty hours. Although the agency cannot control an Issuer becoming at risk or insolvent, the decision whether and when to declare a default is within the control of the agency, and thus is not an administratively uncontrollable event travel to which would be compensable. See 5 U.S.C. § 5542(b)(2)(B)(iv) (1988).

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**B-254645, March 14, 1994**

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**Civilian Personnel**

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**Relocation**

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

Transferred employee claims reimbursement for 100 percent of expenses incurred in the sale of a residence at his old duty station. Employee is entitled to 100 percent reimbursement since he held title jointly with someone who was a member of his immediate family on the date he was first advised of his transfer in accordance with 5 U.S.C. § 5724(a)(4) (1988), and the Federal Travel Regulation, 41 C.F.R. § 302-6.1(c) (1993). His title was not diminished at a later date since he held sole

title to the property on the date he reported to his duty station, and at the time of settlement. Our Claims Group determination is overruled.

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**B-238725.2, March 17, 1994**

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**Civilian Personnel**

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**Compensation**

- Training expenses
- ■ Reimbursement
- ■ ■ Breach of service agreements

An employee asks whether an agency may include holidays, annual leave and sick leave in its computation of the employee's service obligation under 5 C.F.R. § 410.507 (1993), for agency paid training in a nonfederal facility. For employees assigned to full-time training, any time spent in pay status may counted as time spent in training. "Pay status" is defined generally to include any time for which an employee may be paid, including the holidays, annual leave and sick leave. However, time spent in training may not exceed 8 hours in a day or 40 hours in a week; therefore, where an agency appears to have included more than 40 hours in a week in computing an employee's debt for not completing her obligated service, the matter is referred to the agency for review and recomputation.

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**B-251120, March 17, 1994**

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**Civilian Personnel**

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**Compensation**

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

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**Civilian Personnel**

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**Compensation**

- Retroactive compensation
- ■ Eligibility
- ■ ■ Demotion

Legitimate measures, such as preventing supervisor-relatives from working in the same Air Route Traffic Control Center as other relatives, taken by agencies to anticipate and avert nepotistic problems are sanctioned in the law. Where a supervisor-relative took a voluntary downgrade so another relative could be assigned at the same Control Center, this downgrade did not become involuntary or an unwarranted or unjustified personnel action entailing backpay when the agency later changed its policy and allowed supervisor and other relatives to work at the same Control Center but used other measures to avert nepotistic problems.

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**B-246538.4, March 18, 1994**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

Two years after transferring from an intermittent schedule C position in California to a schedule C position in Washington, D.C., an employee filed a claim for relocation benefits. His agency denied the claim because there had been no authorization of such benefits and no record of a determination at the time he received the Washington appointment that it was a transfer in the interest of the government for which relocation benefits would be paid. The denial is sustained. The schedule C position to which the employee transferred was neither part of a merit promotion

plan nor competitively selected, and, thus, the transfer was not one which may be categorically considered to carry with it relocation benefits. Therefore, without clear evidence of such a specific determination in that regard by the agency, the claim is too doubtful to allow. *John C. Eastman*, B-246538.2, Jan. 27, 1993, affirmed.

---

**B-255037, March 18, 1994**

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**Civilian Personnel**

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**Compensation****■ Balances****■ ■ Personnel death****■ ■ ■ Payees****■ ■ ■ ■ Determination**

An employee apparently committed suicide by jumping off a ship in international waters without anyone seeing him. The designated beneficiary of the employee's unpaid compensation is his father who seeks to use a United States Coast Guard Report in lieu of a court-issued declaration of death to legally establish his son's death. Since the suicide occurred in international waters, we accept the Coast Guard Report and all the surrounding circumstances as sufficient evidence to establish the employee's death and grant the father's claim for the unpaid compensation due his son.

---

**Civilian Personnel**

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**Compensation****■ Personnel death****■ ■ Evidence sufficiency**

Where best evidence, i.e., death certificate, is not available, our Office may exercise discretion in establishing the quantum of evidence necessary to support a claim. See *Mary K. Heffernan*, B-184305, Dec. 22, 1976.

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**B-252815, March 24, 1994**

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**Civilian Personnel**

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**Relocation****■ Temporary quarters****■ ■ Determination****■ ■ ■ Criteria**

An agency questions whether quarters occupied by a transferring employee at his new duty station were temporary or permanent. Such a decision is a matter of agency discretion. In this case, we affirm the initial determination that the quarters were temporary because the employee signed a month-to-month lease, the house he rented was up for sale, he left over half of his household goods unpacked in the residence and he showed that he had made a reasonable effort to find suitable housing. Payment of other real estate expenses is also affirmed.

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**B-256771, March 24, 1994**

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**Civilian Personnel**

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**Relocation****■ Residence transaction expenses****■ ■ Loan origination fees****■ ■ ■ Reimbursement****■ ■ ■ ■ Amount determination**

An employee claiming reimbursement for a loan origination fee in excess of one percent submitted a letter from his lender asserting that the excess fee did not include finance charges and was the

rate customarily charged its customers. The claim is denied because a general, explanatory letter from a lender does not satisfy the requirement in the Federal Travel Regulations that a claim for a loan origination fee in excess of one percent must include an itemized list of the lender's charges and clear evidence that its rate is the rate customarily charged in the area of the residence. 41 C.F.R. § 302-6.2(d)(1) (1993).

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## **B-252774, March 29, 1994**

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### **Civilian Personnel**

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#### **Relocation**

- Mobile homes
- ■ Shipment
- ■ ■ Actual expenses
- ■ ■ ■ Reimbursement

A portable garage which is a separate building and not a part of an employee's mobile home may not be shipped at government expense incident to a relocation with her double-wide mobile home even though the employee considered garage to be a major part of her lifestyle in the mobile home and she had it wired for electricity and decorated to match the mobile home.

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## **B-254090, March 30, 1994**

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### **Civilian Personnel**

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#### **Relocation**

- Actual expenses
- ■ Eligibility
- ■ ■ Distance determination

An employee who was in a continuous travel status at his old duty station requested relocation benefits incident to his transfer and promotion to a position with little travel. The employee lived 74 miles from the old station and 81 miles from the new station. The agency applied the "short-distance" transfer rules, and denied his request because the commuting distance between his residence and the new station was only 7 miles further than to his old station. However, the distance between stations was 155 miles and when an employee is in continuous travel status, the respective distances between the residence and the duty stations are not a bar to relocation benefits if the employee relocates substantially closer to the new duty station.

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### **Civilian Personnel**

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#### **Relocation**

- Travel expenses
- ■ Reimbursement
- ■ ■ Eligibility

An agency asserted that an employee was not in a continuous travel status because he was receiving 8 percent locality pay based on the old duty station to which he was assigned, he was assigned a desk and a telephone there, and he acted in place of the supervisor in his absence. However, the proper test to determine whether an employee is in a continuous travel status is whether the employee is unable to commute on a daily basis to the employee's duty station. The employee here meets that test because he spent 80 to 90 percent of his time in travel status.

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# Military Personnel

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**B-254646, March 4, 1994**

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**Military Personnel**

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**Pay**

■ **Basic quarters allowances**

■ ■ **Eligibility**

An Air Force officer occupied quarters with his wife, who was also an Air Force officer, and their dependent daughter. Neither received a Basic Allowance for Quarters (BAQ). His claim for BAQ is denied because a member occupying government quarters without payment of rent is not entitled to BAQ.

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**B-254996, March 11, 1994**

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**Military Personnel**

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**Pay**

■ **Survivor benefits**

■ ■ **Eligibility**

The widow of a member of the Naval Reserve who had qualified for reserve retired pay was convicted of manslaughter in his death. Her claim for a Survivor Benefit Plan annuity is denied because the record does not establish a lack of felonious intent on her part.

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# Procurement

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**B-251969.4, March 1, 1994**

**94-1 CPD ¶ 160**

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## Procurement

### Competitive Negotiation

#### ■ Discussion

#### ■ ■ Misleading information

#### ■ ■ ■ Allegation substantiation

Protest that agency misled protester during discussions is denied where, although protester argues that agency told the firm to prepare its cost proposal on basis contrary to that set forth in the solicitation, in the absence of a written amendment changing the solicitation, protester unreasonably relied on alleged oral direction which contradicted the solicitation.

---

## Procurement

### Competitive Negotiation

#### ■ Offers

#### ■ ■ Evaluation

#### ■ ■ ■ Cost realism

#### ■ ■ ■ ■ Analysis

As part of cost realism evaluation, agency reasonably adjusted protester's prime labor costs to reflect full-time personnel to perform all maintenance where solicitation required this proposal approach and protester had erroneously included portion of prime labor costs under government furnished estimate of costs.

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**B-254436, March 1, 1994\*\*\***

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## Procurement

### Payment/Discharge

#### ■ Payment procedures

#### ■ ■ Invoices

#### ■ ■ ■ Amounts

IRS may certify an invoice that exceeds the amount estimated on a purchase order if the certifying activity can document that (1) the invoice accurately reflects services provided to the government consistent with the terms and conditions of the purchase order and (2) funds are available to adjust the obligation based on the purchase order.



**Procurement**

---

**Competitive Negotiation**

- Best/final offers
- ■ Evaluation errors
- ■ ■ Technical evaluation boards
- ■ ■ ■ Omission

Protest is sustained where record contains no evidence that agency considered protester's best and final offer, which offered a price reduction, in its selection decision.

---

**B-255347.2, March 2, 1994****Procurement**

---

**Bid Protests**

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

Post-award protest challenging the agency's proposed use of industrial mobilization exception to requirement for full and open competition is untimely where agency's use of the exception was explained in detail in four broad agency announcements published in the *Commerce Business Daily*, including ones to which the protester responded.

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**Procurement**

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**Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Protest alleging that agency's written justification for other than full and open competition did not comply with regulations specifying the required content of such justifications is denied where agency substantially complied with the requirements and agency's failure to list interested sources did not prejudice the protester.

---

**B-255478, March 2, 1994****Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Sureties
- ■ ■ ■ Adequacy

Agency's rejection of protester's bid bond was reasonable where the bidder's intended individual surety did not pledge sufficient assets to indemnify the government for the required bid bond amount.

**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Price reasonableness

Contracting agency properly canceled a request for proposals where: (1) agency's price estimate was reasonable, and (2) even after being advised that its proposed initial prices were too high, sole technically acceptable offeror submitted a best and final offer which exceeded the government estimate by approximately 20 percent, an amount which the agency is unwilling to expend for the required services.

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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

Absent evidence that a contracting agency has acted in violation of statute or regulation, a protester is not entitled to recover proposal preparation or protest costs.

**Procurement**

---

**Competitive Negotiation**

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

Agency had a reasonable basis for finding awardee's price proposal to be realistic and reasonable for award of travel agent contract.

---

**Procurement**

---

**Competitive Negotiation**

- Best/final offers
- ■ Propriety

Protester failed to show improper agency motives in adding requirement to solicitation and giving all offerors an opportunity to submit a new round of best and final offers.

---

## **Procurement**

---

### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Organizational experience

Record does not support protester's contention that it was entitled to extra years of experience considered in the technical evaluation because agency considered all experience of which it was made aware and evaluated experience of all offerors and their staff under same criteria.

---

## **Procurement**

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### **Bid Protests**

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

Protester is not an interested party under the General Accounting Office's Bid Protest Regulations to challenge the award to another offeror where the protester would not be in line for award even if its protest were sustained.

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**B-256259, March 3, 1994**

**94-1 CPD ¶ 172**

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## **Procurement**

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### **Bid Protests**

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

Where *Commerce Business Daily* notice announcing agency's intent to make a sole-source award gives other potential sources an opportunity to express their interest and capability to perform, and agency rejected the protester's expression of interest, protest filed at the General Accounting Office more than 10 days after protester received notice of rejection is untimely.

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**B-255023.3, B-255023.4, March 4, 1994**

**94-1 CPD ¶ 173**

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## **Procurement**

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### **Contractor Qualification**

- Approved sources
- ■ Qualification
- ■ ■ Delays

Protest that agency unduly delayed processing protester's source approval request (SAR) for flight critical item, thereby precluding protester from competing, is denied where the agency could not approve protester due to lack of technical data package necessary to develop competitive specifications or precise prequalification requirements, and in any case, even with prompt completion of initial technical review of SAR, time required for necessary first article test, engine test, flight testing, delivery of production units, and production lot test inspection precluded award to protester in time to meet agency delivery requirements.

**Procurement**

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**Contractor Qualification**

- Approved sources
- ■ Alternate sources
- ■ ■ Approval

Protest by an applicant for source approval against award of a sole-source contract requiring source approval is denied where, based on protester's calculations, protester could not have obtained approval in time to meet delivery schedule.

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**Procurement**

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**Small Purchase Method**

- Purchases
- ■ Propriety

Agency is not required to limit quantity of items purchased from an approved source on a sole-source basis to a level necessary to satisfy its needs awaiting protester's qualification as an approved source where record does not establish when, if ever, the protester will become an approved source.

**Procurement**

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**Sealed Bidding**

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

Where bid included descriptive literature specifically referencing solicitation number and literature contained legend that brings into question bidder's obligation to furnish product in exact accordance with specifications, bid was properly rejected as nonresponsive.

**Procurement**

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**Sealed Bidding**

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

Agency properly rejected bid as late under an invitation for bids where the bid, delivered by a commercial carrier, was received late by the agency because of adverse weather conditions.

**Procurement**

---

**Competitive Negotiation**

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

An agency properly justified its source selection decision, where it reasonably found that the protester's and the awardee's proposals were essentially equivalent from a technical standpoint and that the awardee's lower-priced proposal thereby represented the best value to the government.

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**Procurement**

---

**Competitive Negotiation**

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

An agency's price analysis was reasonable and adequate in a negotiated procurement for the award of a fixed-price contract, where the agency received adequate price competition, compared the offerors' proposed prices and estimated costs with each other and the government estimate, and reasonably determined that the awardee's price was realistic.

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**B-255500, March 7, 1994****Procurement**

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**Competitive Negotiation**

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

Protest that contracting agency improperly evaluated protester's offer is denied where protester, who did not submit the lowest-priced offer, failed to include information required by the solicitation to evaluate offerors' experience and equipment, leading agency to reasonably downgrade the offer under the technical evaluation factors.

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**B-255516, March 7, 1994****Procurement**

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**Competitive Negotiation**

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

Award to a technically more advantageous, higher-priced offeror was reasonable and represented the most advantageous offer to the government in accordance with the solicitation's stated evaluation methodology where the agency reasonably evaluated the protester's offer and determined that despite the awardee's higher price, the awardee's offer was technically more advantageous than the protester's offer and offset the protester's lower price.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

The General Accounting Office (GAO) denies request for reconsideration of a prior decision, which upheld the agency's determination not to conduct discussions and to award a contract to a firm that submitted a higher-rated, higher-priced proposal, where the request merely repeats the protester's interpretation of the evidence considered by GAO in reaching its prior decision.

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**Procurement**

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**Socio-Economic Policies**

- Small business set-asides
- ■ Use
- ■ ■ Administrative discretion

Agency decision not to set aside a procurement for small business concerns, although previously a set-aside, was reasonable where the agency concluded, after consideration of relevant factors, including the procurement history and the relatively complex and technical nature of the item to be procured, and with the concurrence of the agency's small business specialist and the representative from the Small Business Administration, that it could not reasonably expect to receive proposals from at least two responsible small business offerors.

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**Procurement**

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**Competitive Negotiation**

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

Where the solicitation provided that the agency's past quality performance rating, as determined under the agency's contractor evaluation system which rates firms based on past quality performance for specific commodities, is more important than price, but also stated that past quality performance would not be considered in evaluating firms which have no past quality performance rating because they are first-time offerors or have no current, up-to-date past quality performance, and that their offers would be evaluated solely on price, the agency properly awarded to the responsible firm with the lowest price which had no past quality performance rating.

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**Procurement**

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**Bid Protests**

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

Protest of amendment to solicitation which changed a mandatory location requirement to an evaluation factor is untimely when not filed by the next closing date for receipt of proposals following amendment. Protester's agency-level protest was not timely because it was filed as part of protester's proposal submission.

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## **Procurement**

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### **Competitive Negotiation**

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

Award to offeror with higher technical rating and lower cost than that proposed by the protester is unobjectionable where evaluation was conducted in accordance with amended solicitation and was reasonably based.

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**B-255918, B-255919, March 8, 1994**

**94-1 CPD ¶ 181**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

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

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## **Procurement**

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### **Contractor Qualification**

- De facto debarment
- ■ Non-responsible contractors

Multiple nonresponsibility determinations under contemporaneous procurements do not constitute *de facto* suspension or debarment where there is no evidence that the determinations were part of a long-term disqualification attempt by the agency.

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**B-255392.2, March 9, 1994**

**94-1 CPD ¶ 231**

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## **Procurement**

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### **Competitive Negotiation**

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

In making award to lower-priced technically equivalent offer, an agency properly credited protester's proposal for its prior experience as the incumbent contractor.

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## **Procurement**

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### **Contract Management**

- Contract administration
- ■ Contract extension
- ■ ■ GAO review

The protester's contention that the agency wrongfully induced it into a 1-month contract extension of its incumbent guard service contract is not for review by the General Accounting Office under its bid protest function as it concerns a matter of contract administration.

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**Procurement**

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

Protest that agency improperly determined proposal to be technically unacceptable is denied where record shows that the agency evaluators reasonably concluded that the protester failed to demonstrate that he could acceptably perform the requirement.

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Discussion**

Agency reasonably excluded protester's proposal from the competitive range where, due to the nature of the principal weakness in the proposal, *i.e.*, protester's lack of experience in performing contracts similar in scope, proposal could not have been improved enough through discussions to make it competitive with other higher-rated, lower-priced proposals.

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Technical acceptability****■ ■ ■ Negative determination****■ ■ ■ ■ Propriety**

Agency properly excluded protester's technically unacceptable proposal from the competitive range without considering its low price since a proposal which is technically unacceptable cannot be considered for award.

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**Procurement**

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

A procuring agency properly issued delivery orders under General Services Administration non-mandatory schedule contracts for interim computer hardware and software maintenance services after considering the schedule contracts of the only three known schedule contractors (including the protester's) and the orders resulted in the lowest overall cost to the government.



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**B-253452, March 10, 1994**

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**Procurement**

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**Payment/Discharge****■ Claims****■ ■ Submission time periods****■ ■ ■ Compliance****■ ■ ■ ■ Evidence sufficiency**

The burden is on the claimant to present evidence of receipt of a claim in the proper office within the statutory period of limitations; the claimant must establish the clear legal liability of the United States and the right to payment. An unsupported statement by a claimant carrier that it transmitted its claim by a commercial next day delivery service 1 day before the last day on which the claim might have been timely filed is not clear evidence of timely filing.

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**B-254323.3, March 10, 1994**

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**94-1 CPD ¶ 190****Procurement**

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**Bid Protests****■ GAO procedures****■ ■ Preparation costs****■ ■ ■ Administrative remedies****■ ■ ■ ■ Adequacy**

Protester is not entitled to reimbursement of the costs of filing and pursuing protest under section 21.6(e) of Bid Protest Regulations where the agency took prompt corrective action—23 working days after being notified that the protest was filed.

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**B-255553, March 10, 1994**

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**94-1 CPD ¶ 191****Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Technical acceptability****■ ■ ■ Negative determination****■ ■ ■ ■ Propriety**

Agency evaluation of protester's proposal as technically unacceptable was reasonable where: (1) protester failed to provide sufficient detail in its submitted resumes to demonstrate how its proposed key personnel were qualified to perform the required claims processing services; (2) protester failed to propose any key personnel with required computer database experience; and (3) protester provided only generalized assertions for the bulk of its technical discussions.

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**B-254674.2, March 14, 1994**

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**94-1 CPD ¶ 199****Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Evaluation****■ ■ ■ Downgrading****■ ■ ■ ■ Propriety**

Protest that agency improperly downgraded protester's proposal based on concerns about the protester's performance on another contract is denied. Although technical evaluation points were deducted from protester's proposal based on concerns about performance of the other contract, the record shows that, even had that contract not been considered by the evaluators, a contract would not have been awarded to the protester since, even without deduction of points based on concerns

about the previous contract, the protester's proposal still would have been lower rated technically and higher in price than the proposals submitted by the awardees.

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**B-254953.3, March 14, 1994   REDACTED VERSION   94-1 CPD ¶ 274**

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**Procurement**

**Competitive Negotiation**

■ **Offers**

■ ■ **Cost realism**

■ ■ ■ **Evaluation errors**

■ ■ ■ ■ **Allegation substantiation**

Agency conducted an unreasonable probable cost analysis when it upwardly adjusted the protester's overhead and general and administrative rates to reflect the protester's historical rates without properly considering that the protester's proposal contained a firm legal commitment to cap these rates.

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**B-255328.2, March 14, 1994**

**94-1 CPD ¶ 200**

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**Procurement**

**Competitive Negotiation**

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Personnel**

■ ■ ■ ■ **Adequacy**

Protest that awardee's proposal should have been rejected because it offered staffing levels below the government's estimate is denied where all three competitive range offerors, including protester, proposed similar staffing levels, confirmed during discussions that they could perform with their proposed staffing, and left their staffing at the same levels in their best and final offers; agency reasonably concluded that original estimate was too high.

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**B-255343.2, B-255343.4, March 14, 1994**

**94-1 CPD ¶ 325**

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**Procurement**

**REDACTED VERSION**

**Competitive Negotiation**

■ **Contract awards**

■ ■ **Initial-offer awards**

■ ■ ■ **Propriety**

Where solicitation warned offerors of the agency's intention to make award without discussions, protester could not presume that it would have opportunity to correct weaknesses through discussions, and the fact that it could have corrected the weaknesses and deficiencies in its proposal through discussions provides no basis for finding that the decision to award a contract without discussions was improper or unreasonable.

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**Procurement**

**Competitive Negotiation**

■ **Requests for proposals**

■ ■ **Terms**

■ ■ ■ **Compliance**

Proposal that took exception to material terms of the solicitation—i.e., agency's right to approve subcontractors and right to inspect data delivered under contract—was properly found unacceptable and was not considered for award based on initial proposals where the solicitation stated the agency's intent to make award without discussions.

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**Procurement**

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

An agency was not required to reject an offeror's low-priced proposal as technically unacceptable, even though the proposal lacked price lists for the solicited vehicle parts and the solicitation warned that such an omission would render the proposal "nonresponsive" because the solicitation, in fact, did not premise the evaluation of proposals or the offeror's promise to perform on the information contained in the price lists.

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**Procurement**

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**Bid Protests****■ GAO procedures****■ ■ Administrative appeals****■ ■ ■ GAO review**

The General Accounting Office (GAO) will not consider a protest of an awardee's mistake in proposal claim asserted after contract award, since such claims are for resolution under the Contract Disputes Act and are not encompassed by GAO's bid protest jurisdiction.

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**Procurement**

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

Although the agency determined the competitive range based solely on price, protest is denied because protester was not prejudiced by elimination from the competitive range, since protester would not have lowered its price sufficiently to become the low-priced offeror, and the contract was to be awarded to the firm submitting the low-priced, technically acceptable offer.

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**Procurement**

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**Competitive Negotiation****■ Suspended/debarred contractors****■ ■ Offers****■ ■ ■ Rejection****■ ■ ■ ■ Propriety**

Contracting officer reasonably excluded firm from competition where the firm had been suspended from federal procurements by another agency.

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**B-253916, March 16, 1994**

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**Procurement**

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**Payment/Discharge****■ Claims****■ ■ Submission time periods****■ ■ ■ Compliance****■ ■ ■ ■ Evidence sufficiency**

The burden is on the claimant to present evidence of receipt of a claim in the proper office within the statutory period of limitations. The government activity's time/date stamp is not dispositive of the time of a claim's receipt, but in the absence of a clear proof of earlier actual receipt, we will assume receipt at the time and date indicated on the stamp.

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**B-254941.2, March 16, 1994 REDACTED VERSION 94-1 CPD ¶ 244**

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**Procurement**

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**Competitive Negotiation****■ Requests for proposals****■ ■ Evaluation criteria****■ ■ ■ Cost/technical tradeoffs****■ ■ ■ ■ Weighting**

Where the RFP contains separate and independent technical evaluation factors encompassing separate subject areas, including staffing, technical plans, safety, key personnel, past experience, corporate support, and continuity of services, with each factor assigned separate numerical weights, an agency may not double count, triple count, or otherwise greatly exaggerate the importance of any one listed factor; stated differently, where an RFP lists a number of evaluation factors of stated importance, a single one cannot be accorded more than the weight prescribed in the RFP's evaluation methodology by the agency repeatedly considering the same factor in conjunction with the other major factors.

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**B-251902.4, B-251902.5, March 17, 1994****94-1 CPD ¶ 201**

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**Procurement**

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**Competitive Negotiation****■ Requests for proposals****■ ■ Competition rights****■ ■ ■ Contractors****■ ■ ■ ■ Exclusion**

Prior decision sustaining protester's challenge to its exclusion from a competition based on the competitive advantage received from information provided in response to a Freedom of Information Act (FOIA) request is affirmed where there is no showing that further dissemination of the FOIA response would be improper.

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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

Award of protest costs to prevailing protester is affirmed even though protest presented issue of first impression, since the award of costs is consistent with the intent of the Competition in Contracting Act of 1984 to relieve protesters of the burden of vindicating the public interest in full and open competition.

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**B-254011.4, March 17, 1994**

**94-1 CPD ¶ 232**

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## **Procurement**

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### **Sealed Bidding**

- Bids
- ■ Acceptance time periods
- ■ ■ Expiration
- ■ ■ ■ Reinstatement

Agency may properly request bidders to extend acceptance period, thus reviving expired bids, where such action does not compromise the integrity of the bidding system.

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**B-254635.3, March 17, 1994**

**94-1 CPD ¶ 233**

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## **Procurement**

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### **Bid Protests**

- Bad faith
- ■ Allegation substantiation
- ■ ■ Lacking

Decision dismissing protest of alleged bad faith actions by agency while negotiating the terms of a section 8(a) contract is affirmed on reconsideration where protester fails to show that dismissal was factually or legally erroneous, or to present information not previously considered that supports a different conclusion.

**Procurement**

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**Competitive Negotiation**

- Offers
  - ■ Evaluation
  - ■ ■ Cost data
  - ■ ■ ■ Certification
- 

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Cost estimates

Under a "public/private" competition for the repair of aircraft components, where Defense Contract Audit Agency (DCAA) audits depot's cost proposal and certifies it as reasonable and as having comparable estimates of direct and indirect costs, and where audit report identifies no understatement of costs by the depot, contracting agency properly may rely on the audit report in making its award determination without "going behind" the audit report to evaluate raw costs already audited by DCAA.

**Procurement**

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**Sealed Bidding**

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

Agency does not have a compelling reason to cancel a solicitation after bid opening based upon alleged ambiguous price evaluation provision, where the solicitation when read as a whole has only one reasonable interpretation of how the multiple unit prices will be evaluated for award to the lowest and second lowest bidders.

**Procurement**

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**Specifications**

- Performance specifications
- ■ Adequacy

Protest that solicitation for housing and grounds maintenance to be performed in part on a fixed-price basis is defective because it does not provide reliable information needed to bid is denied where the solicitation contains historical data or estimates of required services which, together with opportunities for site visits, should be sufficient to permit bidders to estimate the cost of performing the services and compete intelligently on an equal basis.

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**Procurement**

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**Bid Protests**

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

Allegation of bias is denied where the record contains no credible evidence that agency acted with specific intent to injure the protester.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Risks

Solicitation which provides for production of items in two phases, the second of which will not be initiated unless government testing validates government-furnished technical data package (TDP), is sufficient to advise prospective offerors of risk involved in use of TDP that is not yet proven.

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**Procurement**

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**Competitive Negotiation**

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

Request to modify remedy that agency reopen discussions and request another round of best and final offers because the recommendation is not practicable is denied where the agency has implemented the recommendation.

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Challenge to adequacy of discussions is denied where the agency pointed out technical deficiencies in the protester's proposal and provided offerors the opportunity to revise their offers. While agency did not point out weaknesses in offerors' management proposals, the protester was not prejudiced by the failure to hold discussions in this area, since it affected both offerors and even if the protester was given all possible points for management, the record shows that the selection decision would not have changed.

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## **Procurement**

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### **Competitive Negotiation**

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

Argument that agency improperly evaluated technical proposals is denied where the record shows that the evaluation was reasonable and in accordance with the stated evaluation criteria, and where the protester fails to show that the agency's conclusions were unreasonable or that offerors were treated disparately.

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## **Procurement**

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### **Competitive Negotiation**

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

Protest of decision to award to higher-priced, higher technically evaluated offeror is denied where the solicitation provided for award to offeror whose proposal was determined most advantageous to the government and where agency made a reasonable determination that the technical superiority and lower risk of the awardee's proposal outweighed the protester's lower price.

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**B-255604.3, March 22, 1994**

**94-1 CPD ¶ 208**

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## **Procurement**

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### **Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Justification
- ■ ■ ■ Urgent needs

Department of Defense reasonably justified sole-source award, pursuant to 10 U.S.C. § 2304(c)(2) (1988), for limited quantities of urgently required security container locks, to qualified firm where no other source, including protester, is or will become an approved source of locks in time to meet the urgent requirement, and agency intends later competitive purchase of remaining quantities by which time other firms may become qualified.

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## **Procurement**

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### **Noncompetitive Negotiation**

- Sole sources
- ■ Alternate sources
- ■ ■ Qualification

Agency determination that only currently qualified manufacturer of item is capable of timely meeting agency's urgent requirement is unobjectionable where one protester had not submitted sample for qualification testing at time of award and other protester cited only its limited prior experience and bare assertion of ability to meet agency's requirement.



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## **Procurement**

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### **Contracting Power/Authority**

- **Computer equipment/services**
- ■ **Authority delegation**
- ■ ■ **Federal procurement regulations/laws**
- ■ ■ ■ **Compliance**

Nature of product solicited, rather than product offered, determines whether product procured is a Federal Information Processing resource requiring delegation of procurement authority (DPA) from General Services Administration. Thus, where lock specification does not require computer components, sole-source purchase of lock merely incorporating microcomputer does not require DPA.

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**B-255684; B-255684.2, March 22, 1994**

**94-1 CPD ¶ 209**

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## **Procurement**

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### **Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Technical acceptability**

Protest that agency improperly evaluated firm's technical proposal is denied where the record shows that the evaluation was reasonable and consistent with the stated evaluation factors; protester's mere disagreement with the agency's conclusion does not render the evaluation unreasonable.

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## **Procurement**

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### **Competitive Negotiation**

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

Protest that agency improperly conducted discussions by failing to advise the protester of a weakness in its proposal and by holding face-to-face discussions with only one offeror is denied where the weakness at issue was a minor weakness in the protester's technically acceptable proposal and did not require discussions, and where there is no evidence that the protester was competitively prejudiced by not meeting with the agency since it received adequate written discussions, and since the only offeror that met with the agency was not selected for award.

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## **Procurement**

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### **Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Cost realism**
- ■ ■ ■ **Analysis**

Protest that agency improperly conducted its cost/price realism analysis by mechanically applying the government estimate to firm's cost proposal is denied where record does not support the allegation.

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## **Procurement**

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### **Contractor Qualification**

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

Protest that agency improperly rejected proposal based upon responsibility factors that should have been referred to the Small Business Administration is denied where protester's proposal was not rejected as technically unacceptable, and where traditional responsibility factors were used for the comparative evaluation of proposals.

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**B-255683, March 23, 1994**

**94-1 CPD ¶ 210**

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## **Procurement**

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### **Bid Protests**

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

Protester did not diligently pursue basis of protest where the protester waited until after it received notice of award to pursue the information under the Freedom of Information Act (FOIA) upon which it based its protest, inasmuch as that same information was publicly available from the time of bid opening; protest based upon information obtained in response to FOIA request filed more than 10 working days after award is dismissed as untimely.

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**B-255692, B-255693, March 23, 1994**

**94-1 CPD ¶ 211**

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## **Procurement**

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### **Socio-Economic Policies**

- Small businesses
- ■ Responsibility
- ■ ■ Negative determination
- ■ ■ ■ GAO review

Where record shows that new information relied upon by protester to challenge determination of nonresponsibility was not available until after Small Business Administration (SBA) declined to issue certificate of competency (COC), protest allegation that SBA failed to consider vital information is denied; there is no legal requirement that the SBA reconsider its determination or that the contracting officer ask the SBA to reconsider.

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## **Procurement**

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### **Socio-Economic Policies**

- Small businesses
- ■ Responsibility
- ■ ■ Negative determination
- ■ ■ ■ GAO review

Protest that the contracting officer improperly failed to reconsider nonresponsibility determination in light of new information submitted before award, but after Small Business Administration declined to issue a certificate of competency, is denied where record indicates that contracting officer did consider the evidence presented and reasonably determined that reversal of the nonresponsibility determination was not warranted.

**Procurement**

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**Specifications**

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

Where brand name or equal solicitation for infrared thermal imagers required offerors to submit descriptive literature in order to establish technical acceptability (conformance with all salient characteristics), contracting agency properly determined that protester's blanket statement that its proposed product would meet solicitation's vibration requirements was not sufficient to demonstrate technical acceptability, and thus contracting agency properly rejected the offer notwithstanding its lower price.

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**Procurement**

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**Specifications**

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

In a brand name or equal procurement, the contracting agency enjoys a degree of discretion in determining whether an offeror has provided sufficient information to show that the offeror's product is acceptable; the General Accounting Office will not disturb such a determination unless that determination is unreasonable.

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**B-255226, March 24, 1994**

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**Procurement**

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**Payment/Discharge**

- Shipment
- ■ Damages
- ■ ■ Evidence sufficiency

A shipper can establish a *prima facie* case of carrier liability for transit damage to his household goods when he shows that the condition of the item deteriorated between his tender of it to the carrier and delivery, even if pre-existing damage on the item was similar to the damage caused to it by the carrier. In this regard, the property owner's observations on how the carrier handled the property are relevant to the determination of additional transit damage.

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**B-255661.2, March 25, 1994**

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**Procurement**

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**Contractor Qualification**

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

Protester's assertion that the awardee will be unable to perform insulation services because, in the protester's view, the awardee lacks sufficient experience, a license to perform these services, and the capability to provide only materials manufactured in the United States, concern the agency's affirmative determination that the awardee is responsible. The General Accounting Office will not review a procuring agency's affirmative determination that an offeror is responsible absent a showing of possible fraud or bad faith on the part of the contracting agency or that definitive responsibility criteria in the solicitation were misapplied.

**Procurement**

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**Competitive Negotiation**

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

Agency's decision to award to a higher-priced, higher-rated offeror is reasonable and consistent with the stated evaluation criteria where the proposal of the awardee, whose price was only negligibly higher than the protester's price, was rated superior to the protester's on the most important evaluation criterion while the protester's proposal had similar superiority under the second most important criterion.

**Procurement**

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**Contractor Qualification**

- **Organizational conflicts of interest**
- ■ **Corporate ownership**

An individual hired and formally employed by the University of Colorado and working at an institute created by cooperative agreement between the University of Colorado and the Department of Commerce—who was not appointed to his position by an employee or officer of the federal government and who is not supervised by employees or officers of the federal government—is not a federal employee such that the award of a contract to a business allegedly owned or substantially controlled by the individual would be improper.

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**Procurement**

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**Competitive Negotiation**

- **Competitive advantage**
- ■ **Privileged information**
- ■ ■ **Disclosure**

Protest that the awardee gained an unfair competitive advantage and should have been excluded from the competition is denied where the agency reasonably concluded that proprietary or procurement sensitive information was not provided or inadvertently disclosed, or likely provided or inadvertently disclosed, to a former government employee currently associated with the awardee.

**Procurement**

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**Special Procurement Methods/Categories**

- **Federal supply schedule**
- ■ **Purchases**
- ■ ■ **Justification**
- ■ ■ ■ **Minimum needs standards**

Agency's decision to purchase immersible-type washers from a Federal Supply Schedule (FSS) because the agency believed that such a washer would better accomplish its cleaning needs than a spray-type washer, which was also on the FSS, is not objectionable where the agency explains its reason for choice and the protester has not persuasively established that the primary reason for the decision is unreasonable.

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**Procurement**

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**Noncompetitive Negotiation****■ Contract awards****■ ■ Sole sources****■ ■ ■ Justification**

Sole source award is unobjectionable where the agency reasonably determined through a market survey that only one source, the incumbent channel switch manufacturer, could supply the required commercial-off-the-shelf, replacement channel switches and the protester, despite being given the opportunity, failed to propose acceptable alternative solutions to satisfy the agency's requirements, in particular the agency's requirement that the replacement hardware be compatible with the existing system.

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**B-255749, March 28, 1994**

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**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Clerical errors****■ ■ ■ Error correction****■ ■ ■ ■ Propriety**

Generally, an asserted mistake in bid alleged prior to award may be corrected where there exists clear and convincing evidence that a mistake was made and of the intended bid price. Where the bidder supports its request for correction with conflicting explanations as to what price it actually intended, the contracting agency's decision to deny correction was reasonable.

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**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Pre-award withdrawal**

By contrast with the clear and convincing evidence required for bid correction, withdrawal of a bid for reason of mistake requires a lesser degree of proof and may be permitted if it reasonably appears that an error was made.

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**B-255758, March 28, 1994**

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**Procurement**

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

Protest against agency's determination not to set aside procurement for small business concerns is denied where agency concluded, prior to issuing the solicitation, that it could not reasonably expect to receive bids from at least two small business concerns at fair market prices and the agency's conclusion is supported by an extensive survey of the potential small business bidders conducted in response to the protest.

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## **Procurement**

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### **Sealed Bidding**

- Bonds
- ■ Jusification
- ■ ■ GAO review

Protest against payment and performance bond requirements in invitation for bids for landscape maintenance services is denied where the agency requires the bonding in light of its need for uninterrupted performance.

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**B-256506, March 28, 1994**

**94-1 CPD ¶ 234**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Contracts
- ■ ■ ■ Assignment

A protester that was not the named bidder, but was a different legal entity who assumed the bid after bid opening, is not eligible for award and does not qualify as an interested party under the Bid Protest Regulations to protest the rejection of the named bidder's bid for another reason.

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**B-254829, March 29, 1994**

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## **Procurement**

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### **Payment/Discharge**

- Shipment costs
- ■ Additional costs

A carrier is not entitled to a diversion charge in addition to the charge for a stop-off for partial unloading of a shipment when the government agency requested the stop-off before the carrier's receipt of the shipment.

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**B-255123.2 et al., March 29, 1994**

**94-1 CPD ¶ 220**

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## **Procurement**

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### **Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Testing
- ■ ■ ■ Information disclosure

Where bidder restricted disclosure of required test data submitted to establish responsiveness of the bid, the agency properly rejected the bid as nonresponsive.

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## **Procurement**

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### **Bid Protests**

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

Protests of previously awarded solicitations are dismissed as untimely where protester did not diligently pursue the information which forms the basis for the protests.

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**Procurement**

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**Competitive Negotiation**

- Competitive advantage
- ■ Incumbent contractors

Where the agency included in a solicitation a sample task, reflecting an actual contract requirement which had not previously been performed by the incumbent contractor, the agency did not afford the incumbent contractor any unfair competitive advantage by including this sample task in the solicitation.

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**Procurement**

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**Bid Protests**

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

Protest challenging propriety of method of award, which was apparent from the solicitation, is untimely when filed after bid opening.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Evaluation
- ■ ■ Prices
- ■ ■ ■ Unbalanced bids

Bid containing line item prices which may be below cost is not unbalanced where bid does not contain overstated prices for any line item.

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Prime contractors
- ■ ■ Affiliates

Protest that awardee fails to comply with solicitation's prime contractor definitive responsibility criterion is denied where: (1) prime contractor experience specification did not expressly prohibit bidders from relying on third party subcontractors or affiliates to meet the requirement; (2) awardee's affiliate holds the requisite prime contractor experience; and (3) the awardee has submitted evidence—in the form of a letter of commitment from the affiliate as well as a performance guaranty executed by the affiliate—which demonstrates that the affiliate will perform as promised by the awardee.

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## **Procurement**

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### **Contractor Qualification**

- **Responsibility**
- ■ **Prime contractors**
- ■ ■ **Affiliates**

Protest that awardee is nonresponsible based upon affiliate's alleged involvement in Brazilian government scandals is denied where contracting officer reviewed protester's submitted evidence of alleged nonresponsibility and reasonably concluded that the submissions amounted only to unsubstantiated speculation and innuendo—particularly since Brazilian government—after conducting an investigation into the alleged wrongdoings—concluded that affiliate was not guilty of any improprieties.

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**B-255868, March 29, 1994**

**94-1 CPD ¶ 218**

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## **Procurement**

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### **Bid Protests**

- **Interested parties**
- ■ **Agents**
- ■ ■ **Experts/consultants**

A consultant may represent an interested party in a protest before the General Accounting Office, where the consultant has been authorized to act for the interested party.

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## **Procurement**

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### **Sealed Bidding**

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

The awardee's bid was nonresponsive and could not properly be accepted by the procuring agency where the awardee's bid guarantee was executed 2 months after the date which the power of attorney identified as the expiration of the authority of the attorney-in-fact to bind the surety; the authority of the attorney-in-fact to bind the surety must be established from the face of the bid documents at bid opening.

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**B-254972.2, March 30, 1994**

**94-1 CPD ¶ 235**

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## **Procurement**

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

- **Service contracts**
- ■ **Merger**
- ■ ■ **Construction contracts**

Protest that solicitation combining landscaping services and guardrail construction should be divided in order to alleviate the bonding requirements for the nonconstruction work is denied where consolidating the requirements into one procurement was reasonably necessary to meet the agency's minimum needs.



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## **Procurement**

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### **Sealed Bidding**

- Bonds
- ■ Justification
- ■ ■ GAO review

Contracting agency was required by the Miller Act, 40 U.S.C. §§ 270a-270f, to include performance and payment bond requirements in a procurement involving construction work in excess of \$25,000.

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**B-255762 *et al.*, March 30, 1994**

**94-1 CPD ¶ 224**

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## **Procurement**

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### **Competitive Negotiation**

- Contracting officers
- ■ Agents
- ■ ■ Authority

Protest that contracting officer's representative (COR) acted beyond his authority is denied where solicitation advised offerors that COR would conduct negotiations on the contracting officer's behalf and contracting officer verifies COR's authority to issue amendments to the solicitation.

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## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Interpretation

Contention that agency acted unfairly in concluding (in a letter to the protester) that solicitation required only offerors of new construction to assume any costs of moving the government from its existing site to proposed interim sites and to the final site is denied where the agency advised all offerors that they would be required to pay for any moves, regardless of whether the offeror was proposing new construction or renovation of an existing building.

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## **Procurement**

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### **Bid Protests**

- Award pending appeals
- ■ Propriety

Where an agency determines that urgent and compelling circumstances require performance notwithstanding a protest, its only obligation is to inform the General Accounting Office (GAO), and the GAO does not review such a determination.

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**B-255764, March 30, 1994**

**94-1 CPD ¶ 225**

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## **Procurement**

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### **Competitive Negotiation**

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

Agency reasonably determined that the protester's lower-priced proposal did not represent the best value to the government in a procurement for a quantity of target missiles, where the agency, having considered all relevant and available data, evaluated the protester's proposal as unacceptable and high risk under the past performance and systemic improvement evaluation factor, as

compared to the awardee's highly satisfactory and low risk assessment under this factor, and reasonably concluded that the protester's unacceptable performance likely would ultimately cost the agency more than the awardee's price premium.

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**B-254907.4, March 31, 1994**

**94-1 CPD ¶ 236**

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**Procurement**

**Sealed Bidding**

**■ Bids**

**■ ■ Evaluation**

**■ ■ ■ Prices**

Where solicitation provided that bids would be evaluated on the basis of all bid items, including options, agency properly deducted the prices for certain bid items which merely duplicated work to be performed under the option provisions since the evaluation of bids must be based on the actual likely cost to the government.

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**B-255770, March 31, 1994**

**94-1 CPD ¶ 237**

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**Procurement**

**Competitive Negotiation**

**■ Offers**

**■ ■ Evaluation**

**■ ■ ■ Downgrading**

**■ ■ ■ ■ Propriety**

Agency reasonably downgraded the protester's proposal for instructional services where the protester's proposal evidenced a lack of certain instructor qualifications that were designated in solicitation as being preferred and proposed a less than optimum technical approach.

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