

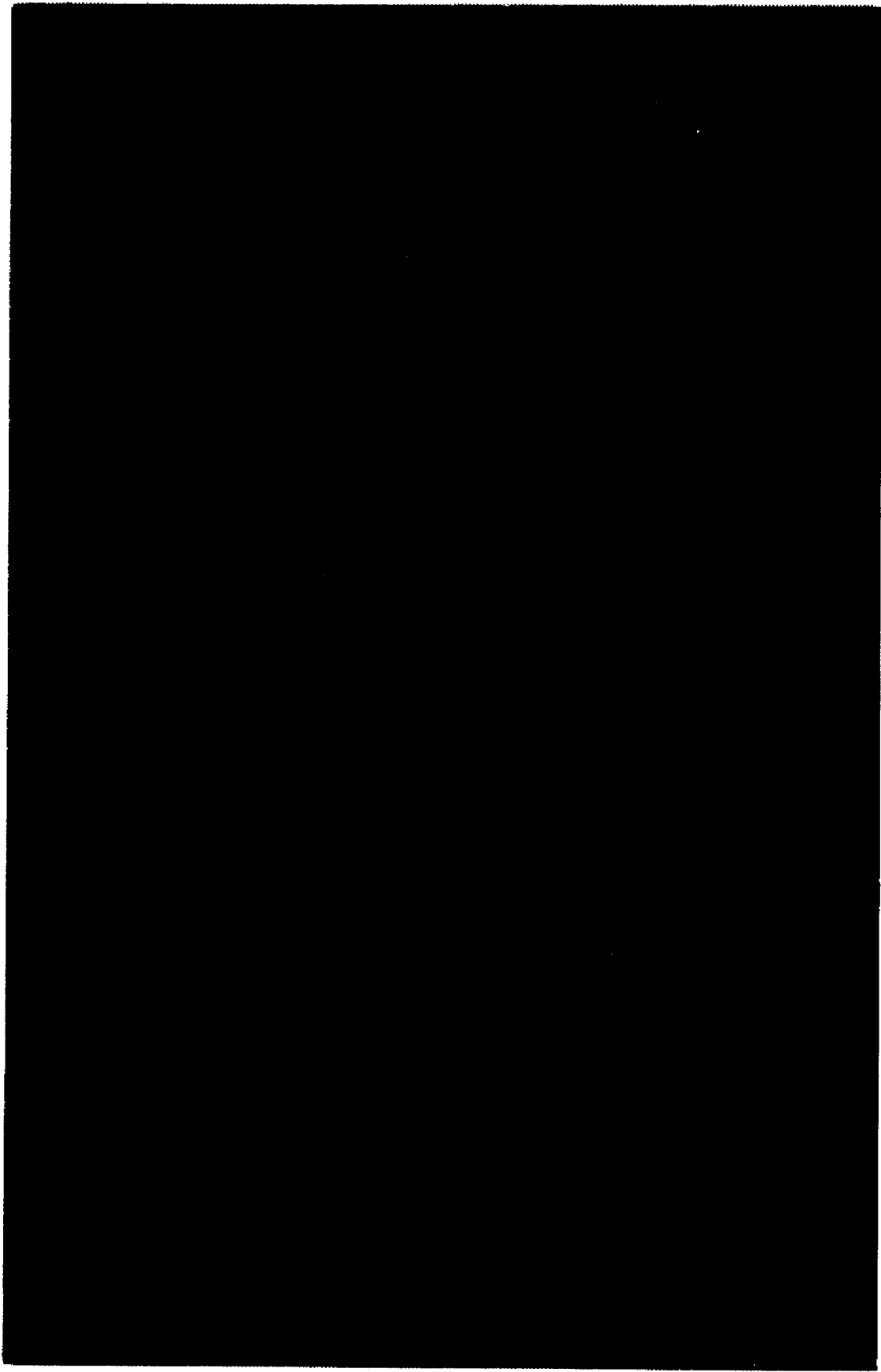
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UNITED STATES GENERAL ACCOUNTING OFFICE

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September 1985

Contents

	<u>Page</u>
Table of Decisions	I
Digests:	
General Government Matters:	
Appropriations and Miscellaneous	A-1
Personnel Law: Civilian Personnel	B-1
Personnel Law: Military Personnel	C-1
Procurement Law	D-1
Special Studies & Analysis	No Cases
Transportation	F-1
Index	i

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TABLE OF DECISIONS

September 1985

	<u>Sept.</u>	<u>Page</u>		<u>Sept.</u>	<u>Page</u>
B-193432	16...	F- 1	B-218441.2	25...	D-43
B-210659	30...	C- 3	B-218473.4	24...	D-37
B-212528	23...	A- 1	B-218476	5...	B- 2
B-212528.2	23...	A- 2	B-218491.2	23...	D-32
B-214233	24...	D-36	B-218619.2	17...	D-18
B-215287	12...	B- 3	B-218622.2)		
B-215554	26...	D-48	B-218622.3)	25...	D-44
B-216258)			B-218624.2)		
et al.)	19...	D-23	B-218880.2)	19...	D-24
B-216640	18...	B- 7	B-218643	4...	D- 3
B-216898	25...	D-41	B-218665	17...	C- 2
B-216935	17...	B- 4	B-218754	17...	B- 6
B-216945.2	24...	D-36	B-218834.2	11...	D-13
B-217088	3...	D- 1	B-218974	20...	D-29
B-217104	30...	B- 8	B-219154	12...	C- 1
B-217304	9...	D- 7	B-219174	23...	D-33
B-217334	9...	D- 8	B-219178.2	30...	D-58
B-217399	20...	D-28	B-219213	4...	D- 3
B-217421	30...	D-56	B-219221	6...	B- 3
B-217562	30...	A- 2	B-219223	16...	D-18
B-217574	18...	B- 7	B-219246	9...	A- 1
B-217603)			B-219292	17...	B- 6
B-217584)	4...	B- 1	B-219295	16...	D-18
B-217681	30...	B- 8	B-219298	18...	D-20
B-217784	3...	B- 1	B-219305.2	19...	D-25
B-217797	12...	B- 4	B-219317.4	9...	D-10
B-217852	30...	B- 9	B-219318.2	5...	D- 5
B-217856	18...	D-20	B-219330	20...	D-30
B-217858	10...	D-11	B-219342	24...	D-38
B-217922	6...	B- 2	B-219365)		
B-217939	25...	D-43	B-219368)	4...	D- 4
B-217940	19...	D-24	B-219370.2	17...	D-19
B-217948	17...	C- 1	B-219376	24...	D-39
B-217989	17...	B- 5	B-219387	3...	D- 2
B-218021.2	16...	D-17	B-219391	5...	D- 5
B-218077.3	3...	D- 2	B-219397	11...	D-14
B-218214.4	27...	D-51	B-219400	30...	D-59
B-218306.2	30...	D-57	B-219403	25...	D-45
B-218340.3	18...	D-20	B-219404	19...	D-25

TABLE OF DECISIONS - Con.

	<u>Sept.</u>	<u>Page</u>		<u>Sept.</u>	<u>Page</u>
B-219410	18...	D-21	B-219879.2	9...	D-10
B-219415.2	23...	D-34	B-219926	26...	D-51
B-219423	23...	D-35	B-219943	10...	D-12
B-219427	17...	D-19	B-219945	12...	D-15
B-219445	13...	D-16	B-219982	11...	D-14
B-219460	10...	D-12	B-219992.2	20...	D-31
B-219468	25...	D-46	B-219996	4...	D- 5
B-219495	13...	D-16	B-219997	25...	D-47
B-219555	27...	D-52	B-219999.2	6...	D- 6
B-219560.2	5...	D- 5	B-220006.2	9...	D-10
B-219580	27...	D-53	B-220026	30...	D-61
B-219590	18...	D-22	B-220057	18...	D-22
B-219629.3	24...	D-40	B-220164	6...	D- 6
B-219630	30...	D-60	B-220167.2	30...	D-61
B-219731	23...	D-36	B-220218	24...	D-41
B-219735	26...	D-50	B-220228	27...	D-54
B-219745	24...	D-40	B-220236	20...	D-31
B-219748	19...	D-27	B-220238	13...	D-16
B-219754	5...	D- 6	B-220273	30...	D-62
B-219809	17...	D-19	B-220274	25...	D-47
B-219814.2	27...	D-53	B-220277	20...	D-32
B-219838)			B-220282	27...	D-55
B-219853)	4...	D- 4	B-220316	30...	D-62
B-219853.2	27...	D-54	B-220557	27...	D-55
B-219866.2)			B-220575	27...	D-56
B-219867.2)	18...	D-22			
B-219875	25...	D-46			

**GENERAL GOVERNMENT MATTERS
APPROPRIATIONS AND MISCELLANEOUS**

ACCOUNTABLE OFFICERS B-219246 Sept. 9, 1985
Relief
Requirements for Granting

Where deceased HHS regional cashier stole imprest fund GAO cannot approve reimbursement of imprest fund under 31 U.S.C. § 3527 since this action is contingent upon a finding that cashier was not responsible for loss. Adjustments should be carried out under 31 U.S.C. § 3530.

FEDERAL CLAIMS COLLECTION B-212528 Sept. 23, 1985
ACT OF 1966
Debt Collection
Private Counsel for Government

GAO supports proposed legislation which would expand the Federal Claims Collection Act of 1966, as amended, by authorizing agencies to refer debts owed to the United States to private lawyers or law firms who could represent the Government in the negotiation, compromise, settlement, and litigation of those debts, subject to the supervision of the Department of Justice and the agency to whom the debt is owed. Specific perfecting amendments are suggested.

FEDERAL CLAIMS COLLECTION B-212528.2 Sept. 23, 1985
ACT OF 1966

Debt Collection

Private Counsel for Government

GAO supports proposed legislation which would expand the Federal Claims Collection Act of 1966, as amended, by authorizing agencies to refer debts owed to the United States to private lawyers or law firms who could represent the Government in the negotiation, compromise, settlement, and litigation of those debts, subject to the supervision of the Department of Justice and the agency to whom the debt is owed. Specific perfecting amendments are suggested.

CLAIMS

B-217562 Sept. 30, 1985

Evidence to Support

Sufficiency

Consistent with Air Force recommendation, claim of Commonwealth of Massachusetts for \$71,533.04 for rental of land to the United States Air Force for the period July 1, 1975 to June 30, 1976 may be paid. It is uncontroverted that the Air Force returned to Massachusetts unpaid the voucher covering rent for the period in question, and there is no proof that payment was subsequently made. Moreover, the Air Force books show that rent was paid for the period July 1, 1974 to June 30, 1975 but have no entry for the period in question.

**PERSONNEL LAW
CIVILIAN PERSONNEL**

OFFICERS AND EMPLOYEES B-217784 Sept. 3, 1985
Transfers
Real Estate Expenses
Broker's Fees

Transferred employee seeks reimbursement of 12 percent real estate broker's commission he paid in connection with sale of his residence at old duty station. Agency determined, based upon statement by HUD, that 7 percent was the prevailing rate customarily charged in locale of the old residence. FTR para. 2-6.2a requires that applicable rate is the rate generally charged by real estate brokers or agents in area of the old residence, not rate charged by particular agent used by employee. If employee, to expedite sale, pays a commission greater than that usually charged, he may not be reimbursed for the extra commission.

Transferred employee seeks payment of real estate commission to himself representing expenses he incurred in the purchase of a mobile home at his new duty station. FTR para. 2-6.2a expressly prohibits payment of such a commission in connection with the purchase, by the employee, of a home, including a mobile home, at his new official station.

OFFICERS AND EMPLOYEES B-217603; B-217584
Transfers Sept. 4, 1985
Real Estate Expenses
Loan Origination Fee

Transferred employees who purchased residences at their new duty stations were charged loan origination fees of 3 and 3.5 percent. The employees may be reimbursed these loan origination fees to the extent that local Department of Housing and Urban Development offices have determined them to be reasonable and customary in the area for the type of transaction involved.

OFFICERS AND EMPLOYEES**B-218476 Sept. 5, 1985****Transfers****Real Estate Expenses****Loan Discount Fees**

Where record shows that a portion of a 3 percent loan origination fee represented a mortgage discount, agency acted properly in limiting reimbursement to 1 percent. Employees are not entitled to reimbursement for mortgage discounts, even though the discount may be characterized by the lender as a loan origination fee.

OFFICERS AND EMPLOYEES**Transfers****Real Estate Expenses****Loan Origination Fee**

Employee may be reimbursed for only 1 percent of a 3 percent loan origination fee where HUD Area Office advised that 1 percent was customary in the area, and no evidence was offered to overcome that presumption.

OFFICERS AND EMPLOYEES**B-217922 Sept. 6, 1985****Transfers****Nonreimbursable Expenses****Operating and Maintenance Expenses****Residence**

Although the employee would not have undertaken plumbing repairs if they had not been needed to pass a housing inspection required to sell his residence, he is not entitled to real estate expenses for the repairs, since they were maintenance costs which may not be reimbursed under the Federal Travel Regulations.

OFFICERS AND EMPLOYEES**B-219221 Sept. 6, 1985****Promotions****Retroactive****Entitlement****Administrative Error**

Employee whose promotion was delayed for 4 weeks because paperwork was misplaced may not be given a retroactive promotion and backpay since the error occurred prior to approval of the promotion by a properly authorized official. Cases allowing payments to de facto employees are not applicable since an individual properly appointed as an officer or employee of the Government is only entitled to the salary of his appointed position.

SUBSISTENCE**B-215287 Sept. 12, 1985****Actual Expenses****Meals**

On a reclaim voucher, an employee requested reimbursement for nine meals prepared at his lodging which had been listed as no charge items on his original voucher. Where the inconsistent items are due to a lack of understanding of the standards governing reimbursement, rather than fraud or dishonesty, and there is no other basis for questioning the accuracy or validity of the reclaim items, those items may be paid.

SUBSISTENCE**B-217797 Sept. 12, 1985****Per Diem****Constructive Travel Costs****Weekend Travel**

An employee performed temporary duty (TDY) travel overseas at two locations that are subject to different per diem rates. He also performed personal travel on nonworkdays, between TDY assignments, and stayed at several locations subject to different per diem rates. Since the employee left his TDY location for personal reasons and performed indirect travel to his next TDY site, computation of his per diem should be made on a constructive basis over the usually traveled route as provided for by paragraph 1.2-5b of the Federal Travel Regulations.

TRAVEL EXPENSES**B-216935 Sept. 17, 1985****Overseas Employees****Home Leave****Minimum Service Requirement**

Employees who resign before completion of their second 24-month tour of duty abroad are not indebted to the Government for home leave granted based upon completion of their first 24-month tour of duty, but used during their second tour of duty. So long as they have completed the 24-month of duty upon which the grant of home leave is based, and return to service abroad after the period of home leave, no refund is required. Where the circumstances of a particular case give rise to a good faith doubt concerning the employee's intention to return to service abroad, the matter may be referred to this Office.

FRAUD**B-217989 Sept. 17, 1985****False Claims****Fraudulent Items as Vitiating Entire Voucher**

Federal agency determined that an employee had fraudulently claimed payment for lodging for 10 days during a temporary duty assignment. Based on evidence in the record indicating that the employee falsely claimed residence in a motel on those days, the agency has sustained its burden of proof on this issue, and the employee may not be allowed subsistence expenses for these days.

SUBSISTENCE**Per Diem****Headquarters****Prohibitions Against Payment**

An employee may not receive travel per diem or subsistence expenses in the area of his official duty station. Thus, an employee recalled to his permanent duty station for medical reasons while on a temporary duty assignment may not be reimbursed for his subsistence expenses there, notwithstanding his contention that it was unsafe for him to return to his permanent place of abode at his duty station because of threats of mob violence.

SUBSISTENCE**Per Diem****"Lodging-Plus" Basis****Staying With Friends, Relatives, etc.**

Where an employee occupies noncommercial lodgings while on temporary duty he may not be reimbursed for amounts paid his host based upon an amount calculated on the basis of charges for comparable lodgings. In the absence of evidence of the expenses incurred by the host, only the reasonable minimal daily amount established under agency regulation is reimbursable.

OFFICERS AND EMPLOYEES
Transfers
Real Estate Expenses
Finance Charges
Tax Fees

B-218754 Sept. 17, 1985

Transferred employee claimed a \$20 tax report fee and a \$37 tax service fee. Reimbursement for both fees is prohibited by para. 2-6.2d(2)(e) of the Federal Travel Regulations, since the fees constitute finance charges within the meaning of Regulation Z (12 C.F.R. § 226.4).

OFFICERS AND EMPLOYEES
Transfers
Real Estate Expenses
Loan Origination Fee

Transferred employee claimed 2 percent loan origination fee but agency limited reimbursement to 1 percent, based on HUD's advice that a 1 percent loan origination fee is customary in the locality of the employee's new residence. The information provided by HUD creates a rebuttable presumption as to the prevailing fee in the area, and the employee has not submitted evidence sufficient to rebut this presumption. Accordingly, the employee may not be reimbursed the additional 1 percent.

OFFICERS AND EMPLOYEES
Transfers
Real Estate Expenses
Time Limitation

B-219292 Sept. 17, 1985

A transferred employee may not be reimbursed for the cost of selling his residence at his former duty station after the expiration of the three-year period allowed by applicable statute and regulations, nor may the employee be reimbursed for the cost of selling that residence incident to a subsequent transfer, as it was not the residence from which he commuted to work at the time of that transfer.

COMPENSATION**B-216640 Sept. 18, 1985****Overtime****Firefighting****Fair Labor Standards Act****Entitlement**

Union of federal firefighters requests reconsideration of prior decision concerning reduction of overtime under Fair Labor Standards Act (FLSA) for periods of annual or sick leave. Regulations cited by union concerning overtime for periods of annual or sick leave apply to overtime under title 5, United States Code, not to overtime under the FLSA, a separate statutory authority.

COMPENSATION**Overtime****Firefighting****Two-Thirds Rule Application**

Union of federal firefighters requests reconsideration of prior decision holding they are entitled to basic pay for 80 hours biweekly plus premium pay for the remainder of their 144-hour tour of duty. Under the applicable statutes and regulations, firefighters are not entitled to basic pay for their entire 144-hour tour of duty.

OFFICERS AND EMPLOYEES**B-217574 Sept. 18, 1985****Transfers****Administrative Determination**

Employee transferred to Pompano Beach, Florida, may not be paid mileage for commuting on weekends between his Orlando residence and his permanent duty station. The fact that his superior indicated that the assignment to Pompano Beach was temporary, until a position could be found in Orlando, does not change the character of the assignment which otherwise was indefinite in duration and, thus, permanent in nature. Doubt as to its ultimate duration does not convert an indefinite assignment from permanent to temporary.

COMPENSATION**B-217104 Sept. 30, 1985****Prevailing Rate Employees****Conversion From Classified Positions****Rate Establishment****Comparability Adjustments**

Department of Navy questions payment of October 1982 annual pay comparability adjustment to printing and lithographic employee at the Charleston Naval Shipyard, whose position was converted from an agency-established special printing wage schedule to the Federal Wage System (FWS) in December 1980. Navy questions applicability of adjustment because previous wage schedule upon which employee's retained grade was based was abolished effective September 1982. Employee is entitled to full comparability adjustment which became due in October 1982, based on the rate of basic pay for his new FWS position pursuant to instructions issued by the Office of Personnel Management.

SUBSISTENCE**B-217681 Sept. 30, 1985****Per Diem****Headquarters****Prohibition Against Payment**

National Park Service employees stationed at Saint Croix National Scenic Riverway, Wisconsin, may not be paid per diem for travel within the park prior to the date the riverway was subdivided into three districts for the purpose of establishing official duty stations for park employees.

SUBSISTENCE**B-217852 Sept. 30, 1985****Per Diem****Rates****Increases****Retroactive Approval**

Employee of Department of Health and Human Services received travel orders which prescribed a per diem rate of \$41 per day, but indicated a "final rate" would be established after performance of a survey, which was required by an agreement established between employee's union and the agency. The survey was not completed until after the travel was performed. Under the circumstances of this case, the general rule prohibiting retroactive increase of benefits is not applicable, since the final per diem rate had not been established at the time of travel.

**PERSONNEL LAW
MILITARY PERSONNEL**

FRAUD

B-219154 Sept. 12, 1985

False Claims

Fraudulent Items as Vitiating Entire Voucher

An Army member on temporary duty for approximately 41 days submitted a fraudulent travel voucher. The member admitted the amounts claimed for meals were not accurate, and he also admitted that he and several other members had used the authorized rental car for other than official purposes. Since the subsistence expenses and car rental are tainted by fraud, the member may not be reimbursed for any of these expenses.

ORDERS

B-217948 Sept. 17, 1985

**Cancelled, Revoked or
Modified**

Travel expenses

Military personnel

It is a fundamental rule that provisions of travel orders which do not conform to the applicable statutes and regulations are ineffective and cannot create an otherwise unauthorized entitlement to travel allowances. Entries in a Marine Corps sergeant's travel orders are consequently ineffective to the extent they purport to authorize reimbursement of the expense of escorting his son for medical treatment from their residence in Cherry Point, North Carolina, to a hospital in Portsmouth, Virginia, since the governing provisions of statute and regulation do not allow such escort travel to be undertaken at public expense.

TRAVEL EXPENSES
Military Personnel
Escort Duty
Dependents
Medical Care

B-217948 Con't
Sept. 17, 1985

Authority for service members to travel at public expense to serve as escorts for their dependents who are undergoing medical treatment is limited by statute and regulation to the situation of a dependent of a service member stationed outside the United States when the dependent requires medical care not locally available in the overseas area. Hence, a Marine Corps sergeant stationed in the United States may not be allowed reimbursement of his traveling expenses incurred in escorting his son to a hospital for medical treatment.

TRANSPORTATION
Dependents
Military Personnel
Children

B-218665 Sept. 17, 1985

Member's Duty Station Change During Children's Visit

A Navy member who was stationed in Tunisia was returned to the United States under permanent change-of-station orders. Travel was authorized for his dependents. He may not be reimbursed for the travel of his stepson, residing and attending college in Tennessee, who was visiting the family in Tunisia and returned to Tennessee to resume his studies at the time the member received the change-of-station orders. The stepson's travel either to or from the duty station of the member is not authorized under these circumstances.

TRANSPORTATION**B-210659 Sept. 30, 1985****Household Effects****Military Personnel****Packing, Crating, Drayage, etc.****Packing Allowance****Regulations**

Air Force Regulation 75-25, establishing a 10 percent packing allowance for household goods shipped by the direct procurement method, is valid even though subparagraph M8002-3a, 1 JTR, prescribes a 20 percent packing allowance for household goods shipped by container. The 20 percent packing allowance applies when the weight of empty shipping boxes excludes packing materials. It does not apply when the weight of the shipping boxes or transporters includes the weight of materials necessary for preparing the goods for shipment. In that case the 10 percent allowance prescribed by the Air Force is appropriate. The 10 percent allowance is applicable in the present case because, in the absence of proof to the contrary, it is assumed that the tare weight prescribed by regulation to include packing materials was used.

PROCUREMENT LAW

BIDS **B-217088 Sept. 3, 1985**
Construction **85-2 CPD 259**
"Four Corners" of Bid
Bidder's Intent at Time of Bid Opening

A bidder's intention must be determined from bid itself at the time of bid opening, and contracting agency could not have considered any postopening explanations by protester in determining responsiveness of its bid.

BIDS
Qualified
Descriptive Literature
Unsolicited

Contracting agency properly considered unsolicited descriptive literature furnished with protester's bid where the literature described the same name and model number as equipment offered in the bid.

Statement, contained in successful bidder's unsolicited descriptive literature, which was merely descriptive of its standard equipment and not a limitation of the features otherwise described on that bidder's specification sheet, which included salient features, did not render bid ambiguous so as to require its rejection.

BIDS
Responsiveness
Descriptive Literature
Unsolicited
Describing Nonconforming Equipment
Bid Nonresponsive

Protester's bid was properly rejected as nonresponsive where unsolicited descriptive literature furnished with bid contained handwritten annotations indicating salient feature of brand name equipment to be procured was not included in bid.

B-217088 Con't

Sept. 3, 1985

Allegations

Erroneous Agency Advice

Not Prejudicial

Protest that contracting officer gave misleading advice as to protest procedures is denied where protester was correctly instructed to file its protest first with contracting agency and then, if necessary, with GAO.

B-218077.3 Sept. 3, 1985

85-2 CPD 260

General Accounting Office Procedures

Reconsideration Requests

Error of Fact or Law

Not Established

Prior decision upholding procuring activity's decision to exercise purchase option under existing contract is affirmed where: (1) protester repeats many arguments made in original protest, but merely disagrees with GAO's conclusions on those arguments; (2) alleged disagreement among government installations over evaluation of protester's product information has not been shown to be result of technical error by procuring activity; and (3) allegations that GAO showed a "lack of objectivity" in considering protest are without merit.

B-219387 Sept. 3, 1985

85-2 CPD 261

Davis-Bacon Act

Minimum Wage Determinations

Effect of New Determination

Ten-Day Notice Requirement

GAO will not object to procuring agency's failure to incorporate revised wage rates into an IFB where the revisions were issued by the Department of Labor less than 10 days prior to bid opening and there was not enough time left before bids were due to notify the bidders of them.

GENERAL ACCOUNTING OFFICE B-219387 Con't
Jurisdiction Sept. 3, 1985
Labor Stipulations
Davis-Bacon Act

Protest that a Department of Labor (DOL) wage determination does not include two classes of employees required to perform a contract, where those classes were included in the contracting agency's request to DOL for wage determinations, should be pursued through DOL's administrative process for reviewing such matters, not through a bid protest to GAO.

BIDS B-218643 Sept. 4, 1985
Responsiveness 85-2 CPD 265
Pricing Response Nonresponsive to IFB Requirements
Failure to Bid Firm, Fixed Price

Contracting agency properly rejected as nonresponsive a bid which omitted prices for several line items, because the solicitation clearly required bidders to price all line items and nothing in the bid indicated what the protester intended to bid for omitted items.

TRANSPORTATION B-219213 Sept. 4, 1985
Household Effects
Weight Limitation
Professional Books, etc.

The agency authorized, on the Government Bill of Lading, shipment of professional books, papers and equipment not to exceed 1,700 pounds. This authorization was based on an itemized inventory and a memorandum signed by the transferred employee indicating that these items had been separately packed and weighed. In view of the requirement that professional books, papers and equipment shipped in one lot with the employee's household goods be separately packed and weighed, the agency's determination that these items weighed 1,700 pounds will not be disturbed. The employee's after-the-fact estimate by the carrier that the inventoried items weighed 3,000 pounds does not reduce the amount of overweight shipped.

CONTRACTS	B-219365; B-219368
Protests	Sept. 4, 1985
General Accounting	85-2 CPD 266
Office Procedures	
Timeliness of Protest	
Significant Issue Exception	
Not for Application	

Two untimely protests, one contending that brand name or equal specifications were improperly used, and the second contending that specifications overstate the agency's minimum needs, do not present significant issues within meaning of Bid Protest Regulations since GAO has issued numerous decisions on these issues.

CONTRACTS	
Protests	
General Accounting Office Procedures	
Timeliness of Protest	
Solicitation Improprieties	
Apparent Prior to Bid Opening/Closing Date	
for Proposals	

Protests based on alleged solicitation defects which are apparent prior to the closing date for receipt of initial proposals must be filed prior to that date.

CONTRACTS	B-219838; B-219853
Protests	Sept. 4, 1985
General Accounting	85-2 CPD 267
Office Procedures	
Timeliness of Protest	
Solicitation Improprieties	
Apparent Prior to Bid Opening/Closing Date	
for Proposals	

Protests alleging that sole-source contract awards were improper are dismissed as untimely where filed approximately 6 months after date of publication in Commerce Business Daily (CBD) of notice that items were being purchased sole-source and of closing date for receipt of offerors since CBD announcement placed protester on notice of the bases for its protests prior to the closing date.

BONDS **B-219996 Sept. 4, 1985**
Bid **85-2 CPD 268**
Deficiencies
Power of Attorney Authority

An agency properly determined a bid bond defective and the bid nonresponsive where the bonding agent who signed the bond did not have a valid power of attorney to bind the surety. The protester's lack of negligence does not permit correction of the bond after bid opening to render the bid responsive.

CONTRACTS **B-219318.2 Sept. 5, 1985**
Protests **85-2 CPD 269**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior decision is affirmed on reconsideration where protester has not shown any error of law or fact which would warrant reversal of that decision.

CONTRACTS **B-219391 Sept. 5, 1985**
Protests **85-2 CPD 271**
Interested Party Requirement
Protester not in Line for Award

A protester, which did not submit a proposal and which is not a potential competitor if the protest is successful, is not an interested party to pursue a protest concerning allegedly ambiguous solicitation provisions.

CONTRACTS **B-219560.2 Sept. 5, 1985**
Protests **85-2 CPD 272**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protest is untimely where protester received amendment to IFB 2 working days before bid opening and did not file protest based on alleged improprieties apparent on the face of the solicitation until after bid opening.

CONTRACTS**B-219754 Sept. 5, 1985****Protests****85-2 CPD 274****Interested Party Requirement****Direct Interest Criterion**

To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A manufacturer which supplies equipment to potential bidders or offerors, but which is not a potential bidder or offeror in its own right, is not an interested party.

CONTRACTORS**B-219999.2 Sept. 6, 1985****Responsibility****85-2 CPD 276****Determination****Review by GAO****Affirmative Finding Accepted**

Prior dismissal of protest concerning low bidders' ability to perform satisfactorily under below-cost bids is affirmed since protest involves a challenge to affirmative determinations of responsibility which GAO generally will not review. Although GAO will review such protests where bidders' compliance with definitive responsibility criteria is challenged, there is no support for the protester's contention on reconsideration that the solicitation at issue contains definitive responsibility criteria.

BIDS**B-220164 Sept. 6, 1985****Prices****85-2 CPD 277****Below Cost****Effect on Bidder Responsibility**

Allegation that low bidder will be unable to perform because of below-cost bid is a matter of responsibility. GAO does not review agency's affirmative responsibility determination in absence of a showing of possible fraud or bad faith, or that solicitation's definitive responsibility criteria were not met.

BIDS **B-220164 Con't**
Responsiveness **Sept. 6, 1985**
Pricing Response
Minor Deviations From IFB Requirements

Submission of deduction schedule with bid where solicitation instructed that the schedule be submitted later does not make bid nonresponsive.

CONTRACTS

Small Business Concerns
Awards
Small Business Administration's Authority
Size Determination

Under the Small Business Act, the Small Business Administration has conclusive authority to determine matters of small business size status for federal procurements, and therefore GAO will not consider an allegation that the low bidder is not a small business concern.

CONTRACTS **B-217304 Sept. 9, 1985**
Negotiation **85-2 CPD 278**
Offers or Proposals
Evaluation
Technical Acceptability
Administrative Determination

Allegation that awardee's proposed equipment does not strictly conform to the RFP's technical requirements is denied since strict compliance was not required and agency's technical evaluation and determination that proposed equipment will satisfy agency's requirements is not found unreasonable.

Allegation that awardee's proposed commercial equipment will not comply with RFP's technical requirements is denied where agency evaluation of awardee's proposal indicates that equipment will satisfy contract requirements. Allegation that proposed equipment will be nonconforming to contract requirements is a matter of contract administration which is the responsibility of the procuring agency not our Office.

CONTRACTS

B-217334 Sept. 9, 1985

Negotiation

85-2 CPD 279

Offers or Proposals**Evaluation****Cost Realism****Function**

Protester's objections to agency's analysis of the cost realism of the offeror's price under a solicitation for a fixed-price contract are denied. Cost realism bears little relationship to a fixed-price contract where the prime concern is cost quantum.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Criteria****Application of Criteria**

The contracting agency and not GAO is in the best position to determine the amount of time necessary to conduct a satisfactory technical evaluation. Based on protester's best and final offer which consisted of a 3-1/2-page supplement to the initial proposal, GAO will not question agency's determination that a full and fair evaluation was made in about 45 minutes, especially in view of the fact that protester's proposal received highest technical evaluation.

CONTRACTS

B-217334 Con't

Negotiation

Sept. 9, 1985

Offers or Proposals**Evaluation****Technical Acceptability****Administrative Determination**

GAO does not view as unreasonable agency's determination that proposal which did not provide names of individual crew members proposed for survey of trees in National Forest, as was requested by the solicitation, was technically acceptable. Agency could reasonably view proposal as technically acceptable where proposal identified the crew members as senior undergraduate and graduate students in the biological sciences and stated that they would be trained by qualified employees of offeror. Moreover, agency properly downgraded proposal in its technical evaluation for lack of specificity in this regard.

CONTRACTS**Protests****Interested Party Requirement****Protester not in Line for Award**

Protester is not an interested party under GAO Bid Protest Procedures, where the protester was not in competitive range and, therefore, would not be in line for award even if its protest were sustained.

CONTRACTS**Subcontracts****What Constitutes**

Protest that awardee's employment of students contravenes government policy of subcontracting with small business concerns and small disadvantaged business concerns to the maximum extent consistent with efficient contract performance is denied where awardee's proposal shows employment relationship with students, not subcontract. Moreover, awardee's willingness to carry out policy is a matter of responsibility which GAO generally will not review.

CONTRACTS **B-219317.4** **Sept. 9, 1985**
Protests **85-2 CPD 280**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior decision dismissing protest against the rejection of a bid on a total small business set-aside due to the protester's representation in the bid that all supplies to be furnished would not be products of domestic small business is affirmed, since the protester has not shown that the decision is erroneous as a matter of fact or law.

CONTRACTS **B-219879.2** **Sept. 9, 1985**
Protests **85-2 CPD 281**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protest against a sole-source procurement properly was dismissed as untimely for failure to protest within 10 working days after receipt of a letter from the agency stating the reasons why the protester would not be considered an acceptable source. The basis of protest did not arise, as argued by the protester, when the agency later refused to reverse its position based on new circumstances affecting the protester, since the new circumstances involved only one of the reasons stated by the agency.

CONTRACTS **B-220006.2** **Sept. 9, 1985**
Protests **85-2 CPD 282**
Basis for Protest Requirement

Protest that apparent low bid should be rejected as unbalanced is dismissed for failure to state a valid basis for protest where the protester says only that the bidder's price for an item is too low, but does not allege that the bid contains enhanced prices for other items or that acceptance of the bid might not result in the lowest cost to the government. Such a protest is actually a challenge to the apparent low bidder's responsibility, a matter that GAO generally does not review.

BIDDERS**B-217858 Sept. 10, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor (DOL) recommended debarment of a contractor for violations of the Davis-Bacon Act because the contractor classified and paid 55 employees as laborers when in fact they were performing the work of roofers. In addition, some of these employees were not paid proper overtime. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Davis-Bacon Act (Act). There were substantial violations of the Act in that the underpayment of employees was grossly careless, if not intentional. The record shows that the contractor was previously investigated on two occasions, similar misclassification violations were disclosed, and DOL had advised the contractor at the conclusion of those investigations on how to properly classify employees.

CONTRACTS**Labor Stipulations****Davis-Bacon Act****Classification of Workmen****Erroneous****Debarment Propriety**

Classification disputes have often been considered by our Office to be "technical violations" of the Davis-Bacon Act which result from inadvertence or legitimate disagreement concerning classification, and do not warrant debarment. However, the evidence in this case shows that the classification violations were "substantial" in that they resulted from gross carelessness or bad faith. Here the contractor had been investigated on two prior occasions for the same violations and proper classification of workers had been explained on those earlier occasions.

CONTRACTS**B-217858 Con't****Labor Stipulations****Sept. 10, 1985****Davis-Bacon Act****Wage Underpayments****Employee Remedies**

Since no funds are available for the payment of the workers involved, the workers have a right to file an action in a United States District Court against the contractor and its sureties, if any, for payment of their wages under section 3(b) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(b) (1982).

CONTRACTS**B-219460 Sept. 10, 1985****Requests for Quotations****85-2 CPD 283****Evaluation****Technical Adaptability****Scope of GAO Review**

GAO will not disturb a procuring agency's technical evaluation of proposed equipment, or the agency's determination of its minimum requirements and the specifications necessary to fulfill them, absent a clear showing by the protester that the agency has acted unreasonably.

CONTRACTS**B-219943 Sept. 10, 1985****Protests****General Accounting Office Procedures****Timeliness of Protest****Adverse Agency Action Effect**

Protest filed with GAO more than 10 working days after protester receives notice of adverse agency action regarding protest filed with contracting agency is untimely, even if protest is filed by or referred to GAO by a Member of Congress.

BIDDERS
Responsibility v.
Bid Responsiveness
Information

B-218834.2 Sept. 11, 1985
85-2 CPD 284

When a solicitation provision requiring bidders to submit make and model numbers of all equipment offered is not intended to demonstrate bidders' conformance with specifications, the information does not relate to bid responsiveness. Rather, this information concerns how bidders will perform and as such, is a matter of responsibility. Thus, bidders may properly submit the information after bid opening.

CONTRACTS

Awards
Cancellation
Erroneous Awards
Cancellation not Required

Cancellation of a contract awarded under a solicitation containing an ambiguous experience requirement is not appropriate where the record indicates that the protester is not prejudiced by this ambiguity as it cannot comply with the intended meaning of the requirement.

CONTRACTS

Protests
General Accounting Office Procedures
Filing Protest With Agency

Under GAO Bid Protest Regulations, a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. Dismissal is not warranted, however, when the agency is otherwise aware of the basis of the protest and files its report in a timely manner.

CONTRACTS	B-219397	Sept. 11, 1985
Negotiation	85-2	CPD 285
Requests for Proposals		
Specifications		
Restrictive		
Undue Restriction not Established		

Agency's specifications are not unduly restrictive of competition where the agency presents a reasonable explanation why the specifications are necessary to meet its minimum needs, and the protester fails to show that the restrictions are clearly unreasonable under the circumstances.

CONTRACTS
Protests
Basis for Protest Requirement

GAO's Bid Protest Regulations require that a protest, as initially filed, contain a detailed statement of the basis for protest so that contracting agencies can comply with the statutorily imposed time limit for filing a report. Therefore, a protester may not subsequently augment its protest with an additional detailed statement in support of its protest since such practice could potentially delay protest proceedings.

CONTRACTS B-219982 Sept. 11, 1985
Protests 85-2 CPD 286
General Accounting Office Procedures
Timeliness of Protest
Adverse Agency Action Effect

When a protest alleging solicitation improprieties has been filed initially with the contracting agency, the agency's continued receipt of proposals as scheduled without taking the corrective action requested by the protester constitutes initial adverse agency action, and any subsequent protest to GAO must be filed within 10 working days after the proposal closing date in order to be timely.

B-219982 Con't
Sept. 11, 1985

CONTRACTS	B-219945	Sept. 12, 1985
Negotiation	85-2	CPD 287
Offers or Proposals		
Discussion With all Offerors Requirement		
Failure to Discuss		
Situations not Requiring Discussion		

CONTRACTS

- Protests
 - General Accounting Office Procedures
 - Timeliness of Protest
 - Solicitation Improprieties
 - Apparent Prior to Bid Opening/Closing Date for Proposals

D-15

BIDS
Mistakes
Correction
Low Bid Displacement

B-219445 Sept. 13, 1985
85-2 CPD 288

Protest that agency improperly allowed correction of a bid to displace a lower bid is denied where the agency reasonably concluded that the bid, which included a price for an item that had been deleted from the solicitation by an amendment that the bidder had acknowledged, was mistaken and that the intended bid was apparent from the bid as submitted.

FEDERAL ACQUISITION
REGULATION
Proposed Revision

B-219495 Sept. 13, 1985

GAO has no objection to the matters covered in Federal Acquisition Circular 84-10, which amends the following Federal Acquisition Regulation parts with respect to the issues indicated: (1) Part 7, planning for future competition; (2) Part 15, contracting by negotiation; (3) Part 19, Small Business and Small Disadvantaged Business Concerns; and (4) Part 34, Major System Acquisition. GAO does, however, suggest that a provision be added to FAR §§ 15.812 and 52.215-26 requiring offerors to identify commercial items they will supply which they will not manufacture or to which they will not contribute significant value and show the markup on those items.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest

B-220238 Sept. 13, 1985
85-2 CPD 289

Date Basis of Protest Made Known to Protester

Basis for protest may be learned of orally, and time for filing protest begins to run from the date oral advice is provided, notwithstanding that written confirmation is provided later.

CONTRACTS**Data, Rights, etc.****Disclosure****Unsolicited Proposals****B-218021.2 Sept. 16, 1985****85-2 CPD 290**

Allegation that agency misappropriated proprietary information and utilized the information in a subsequent RFP is denied since protester has not met its burden of showing proprietary nature of information allegedly misappropriated.

CONTRACTS**Negotiation****Offers or Proposals****Preparation****Costs****Denied**

Where no solicitation is issued, a claimant asserting that nonetheless an agency violated its duty to fairly and honestly consider a proposal submitted by claimant bears a significant burden to establish entitlement to proposal preparation costs. Where record supports agency's contention that it was merely engaged in soliciting information for planning purposes and had not sought proposals as part of a process that was to result in a contract award, payment of proposal preparation expenses is not warranted.

CONTRACTS**Protests****Preparation****Costs****Noncompensable**

A firm is not entitled to the costs of pursuing a protest including attorney's fees, where the matter is filed prior to the effective date of the Competition in Contracting Act of 1984.

BIDS **B-219223** **Sept. 16, 1985**
Invitation for Bids **85-2 CPD 291**
Specifications
Minimum Needs Requirement
Administrative Determination
Reasonableness

Requirement for power steering in specification for Air Force commissary order-pickers is not unduly restrictive of competition where the Air Force presents a reasonable explanation why the restriction is necessary to meet its minimum needs and protester, while disagreeing with the Air Force's technical analysis, does not show that the Air Force's position is unreasonable.

BIDS **B-219295** **Sept. 16, 1985**
Invitation for Bids **85-2 CPD 292**
Specifications
Samples

Complaint that procuring agency has failed to provide drawings or samples is without merit where protester fails to establish that adequate drawings were not available to it or that a sample was required.

CONTRACTS **B-218619.2** **Sept. 17, 1985**
Protests **85-2 CPD 293**
General Accounting Office Procedures
Reconsideration Requests
Error of Fact or Law
Not Established

Prior decision is affirmed on reconsideration where the protester has not shown any error of fact or law which would warrant reversal of the decision.

CONTRACTS**B-219370.2 Sept. 17, 1985****Protests****85-2 CPD 294****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Prior decision dismissing protest--based on finding that protester, as a potential subcontractor-supplier, is not an interested party within the meaning of the Competition in Contracting Act or GAO Bid Protest Regulations--is affirmed where protester fails to show that dismissal was in error.

BIDS**B-219427 Sept. 17, 1985****Invitation for Bids****85-2 CPD 295****Specifications****Defective****Allegation not Sustained**

IFB for fixed-price custodial services contract which includes requirement for snow removal is not defective merely because agency required contractor to perform all snow removal at price fixed in advance where snow removal, although unpredictable in amount, represented a minor portion of contract.

CONTRACTS**B-219809 Sept. 17, 1985****Disputes****Fraud Effect**

Where a government finance officer suspects that a contractor's claim is tainted by fraud, he should refuse to approve it pending resolution of the claim by the Claims Court, which has jurisdiction to determine this issue.

BIDDERS**B-217856 Sept. 18, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor (DOL) recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional. Therefore, the contractor is ordered debarred under the Act.

CONTRACTS**B-218340.3 Sept. 18, 1985****Protests****85-2 CPD 297****General Accounting Office Procedures****Timeliness of Comments on Agency's Report**

Prior dismissal is affirmed on reconsideration where comments addressed in manner other than that set forth in section 21.1(b) of GAO's Bid Protest Regulations were filed with the contracting agency instead of GAO. Such filing does not toll the timeliness requirements of GAO's Regulations.

CONTRACTS**B-219298 Sept. 18, 1985****Protests****85-2 CPD 298****Interested Party Requirement****Potential Contractors, etc. not Submitting Bids,
etc.**

Although GAO will consider protests of awards "by or for" the government, a protester which is not an actual or prospective offeror in the procurement is not an interested party to contest the restrictiveness of the specifications.

CONTRACTS

B-219410 Sept. 18, 1985

Negotiation

85-2 CPD 300

Awards**Initial Proposal Basis****Propriety**

Agency may award negotiated contract on the basis of initial proposals without discussions if adequate competition is obtained, to ensure a fair and reasonable price, and the RFP advises offerors of the possibility that award might be made without discussions.

CONTRACTS**Protests****Allegations****Bias****Unsubstantiated**

A protester fails to prove that the proposal evaluation process was biased or that the technical evaluations were unreasonable where no independent evidence of bias is provided and the record reasonably supports the contracting agency's technical judgment.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest alleging that RFP's evaluation factors were deficient filed after the closing date for receipt of proposals is untimely and will not be considered.

CONTRACTS	B-219590 Sept. 18, 1985
Prices	85-2 CPD 301
Taxes	
Inclusion or Exclusion	

Where solicitation requires that the contract price include all applicable taxes and contracting agency furnishes information needed to compute amount of state leasehold excise tax, offeror can prepare offer including an amount for state leasehold excise tax of doubtful applicability.

CONTRACTS	B-219866.2; B-219867.2
Protests	Sept. 18, 1985
General Accounting	85-2 CPD 302
Office Procedures	
Filing Protest With Agency	

Dismissal of original protests for failure to file a copy of protests with the contracting officer within 1 day after filing with GAO is affirmed since protester failed to comply with the Bid Protest Regulations.

CONTRACTS	B-220057 Sept. 18, 1985
Negotiation	85-2 CPD 303
Late Proposals and Quotations	
Hand Carried	

Proposal hand-delivered after time specified for receipt must be rejected as late, even though the cause of the delay, an automobile accident, was beyond the offeror's control.

CONTRACTS

B-216258 et al. Sept. 19, 1985

Two-Step Procurement 85-2 CPD 304

Step One

Offers or Proposals

Discussion With all Offerors Requirement

"Meaningful" Discussions

Discussions are adequate if, following a diligent effort by the agency to identify deficiencies in the proposals, each offeror is made aware of the agency's concerns about its proposal and is subsequently afforded an opportunity to revise its proposal to correct the deficiencies. An agency need not furnish information in any particular form, such as by furnishing calculations, provided the nature and gravity of its concerns are communicated to the offeror.

Whether discussions are meaningful must be determined by examining information available at the time discussions were held. An agency is not required to reopen discussions where a deficiency becomes apparent only after the agency has evaluated data an offeror submits to correct informational deficiencies that were addressed during discussions.

Protester is not prejudiced by an agency's failure to advise it during discussions that its design appears to be underpowered where the protester fails to convince the agency that other offered equipment would perform as claimed.

BIDDERS**B-217940 Sept. 19, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act. Based on our independent review of the record, we conclude that the contractor committed substantial violations of the Act in that the underpayments of employees were grossly negligent as demonstrated by the contractor's submission of certified payroll records which were inaccurate and incomplete. Furthermore, the contractor committed other substantial violations by inducing three employees to sign releases indicating that certain back wages had been paid when these back wages had not been paid. Therefore, we order debarment of the contractor and payment of the funds on deposit with our Office to the worker involved.

CONTRACTS**B-218624.2; B-218880.2 Sept. 19, 1985****Protests****85-2 CPD 306****General Accounting Office Procedures****Reconsideration Requests****Original Decision Rendered in Response to
Court Request****Court not Interested in GAO Reconsideration**

Where GAO decides protest in response to specific expression of interest from United States District Court, reconsideration request filed by contracting agency is dismissed--without consideration on the merits--because court had not expressed an interest in having GAO reconsider its decision.

CONTRACTS**B-219305.2 Sept. 19, 1985****Default****85-2 CPD 308****Reprocurement****Government Procurement Statutes****Applicability**

Contracting agency acted reasonably in obtaining requirements from next low offeror on original procurement where there was a relatively short time between the original competition and the default of the contract awarded to the low offeror and the agency had an urgent requirement for the computer systems procured which would not permit a new competition.

GENERAL ACCOUNTING OFFICE**Jurisdiction****Contracts****Disputes****Under Disputes Clause**

Protest of defaulted contractor that its exclusion from the reprocurement was contrary to the government's duty to mitigate damages resulting from the default will not be considered by GAO since whether the government met its duty to mitigate damages is a matter for resolution under the Disputes clause of the defaulted contract.

CONTRACTS**B-219404 Sept. 19, 1985****Negotiation****85-2 CPD 309****Awards****To Other Than Low Offeror**

In a negotiated procurement, award need not be made to the low offeror unless the solicitation so indicates. Where a solicitation clearly provides that technical capability is three times as important as proposed cost, GAO will not object to the award of a contract to the higher cost, but technically superior, offeror.

CONTRACTS

B-219404 Con't

Negotiation

Sept. 19, 1985

Competition

Equality of Competition

Incumbent Contractor's Advantage

An agency is not required to equalize competition for a particular procurement by considering the competitive advantage accruing to an offeror due to its incumbent status provided that such advantage is not the result of unfair government action or favoritism.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Cost Realism

Scope of GAO Review

GAO will not dispute an agency's determination as to the realism of proposed costs, unless the determination is shown to be unreasonable, because the agency is clearly in the best position to make such judgments.

CONTRACTS

Protests

General Accounting Office Procedures

Filing Protest With Agency

A protester's failure to submit copies of certain documents to the agency as provided to GAO contravenes the requirement of GAO's Bid Protest Regulations that a complete copy of the protest be furnished to the agency. Although GAO declines to dismiss the protest because the agency did not timely advise GAO that the documents had not been submitted and was able to adequately respond without them, the information contained in the documents will not be considered.

B-219404 Con't

Sept. 19, 1985

Timeliness of Protest

Solicitation Improprieties

Apparent Prior to Bid Opening/Closing Date
for Proposals

CONTRACTS

Small Business Concerns

Procurement not Restricted to Small Businesses

CONTRACTS

B-219748 Sept. 19, 1985

Protests

85-2 CPD 310

Allegations

Unsubstantiated

Where protester alleges awardee's equipment is deficient because it will not meet agency's future needs but where the equipment actually meets the requirements in the solicitation as written, protester has not shown awardee's equipment to be nonresponsive.

CONTRACTS **B-217399 Con't**
Small Business Concerns **Sept. 20, 1985**
Awards
Small Business Administration's Authority
Size Determination

Small business size status is for determination by
Small Business Administration and not by GAO.

CONTRACTS **B-218974 Sept. 20, 1985**
Negotiation **85-2 CPD 312**
Offers or Proposals
Evaluation
Competitive Range Exclusion
Reasonableness

Agency's decision to exclude an offeror from the
competitive range is proper where the offeror's
technical proposal is so deficient that it would
require major revisions before it could be made
acceptable.

CONTRACTS
Negotiation
Offers or Proposals
Evaluation
Criteria
Subcriteria—Reasonably Related to Criteria

Agency need not expressly identify, in an RFP, the
various aspects of stated evaluation criteria which may
be taken into account, if such aspects are reasonably
related to the stated evaluation criteria.

CONTRACTS**B-219330 Sept. 20, 1985****Negotiation****85-2 CPD 314****National Emergency Authority****Competition Consideration**

In procurements negotiated under authority of 10 U.S.C. § 2304(a)(16), the usual concern for obtaining maximum competition is secondary to the needs of industrial mobilization, and competition may be restricted to predetermined mobilization base producers in order to create or maintain their readiness to produce critical supplies in case of national emergency.

CONTRACTS**Negotiation****National Emergency Authority****Restrictions on Negotiations**

Protest of agency's refusal to accept the protester as an approved mobilization base producer so that it could compete in a procurement restricted to such producers is denied since the solicitation was issued to support the existing mobilization base, and there was no need to expand the existing base. There is no requirement that all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers.

CONTRACTS **B-219330 Con't**
Protests **Sept. 20, 1985**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester
What Constitutes Notice

Protest of agency's refusal to approve protester as a mobilization base producer eligible to compete for restricted procurement under 10 U.S.C. § 2304(a)(16) is timely even though it was not filed within 10 working days after the protester was told that it could not be approved due to a temporary freeze on adding new base producers, since the record is unclear as to what the protester may have been told about the possible duration of the freeze. Protest against restriction of procurement to mobilization base producers is also timely since it was filed prior to the extended date for receipt of initial proposals.

BIDS **B-219992.2 Sept. 20, 1985**
Invitation for Bids **85-2 CPD 315**
Cancellation
After Bid Opening
Administrative Determination

Agency decision to cancel brand name or equal solicitation and resolicit is not unreasonable merely because of exposure of protester's bid price where the brand name manufacturer did not receive the solicitation, the synopsis published in the Commerce Business Daily was misclassified, and only one responsive bid was received.

CONTRACTORS **B-220236 Sept. 20, 1985**
Responsibility **85-2 CPD 316**
Determination
Review by GAO
Affirmative Finding Accepted

Protest that bidder does not qualify as labor surplus area concern because less than 50 percent of the manufacturing costs are in a labor surplus area involves a determination of affirmative bidder responsibility not for consideration by GAO.

BIDDERS**B-220277 Sept. 20, 1985****Debarment****85-2 CPD 317****De Facto****Nonresponsibility Determinations v. De Facto****Debarment**

The fact that contracting agency has more than once relied on negative preaward survey by Defense Contract Administration Services Management Area (DCASMA) in making a negative determination of protester's responsibility does not constitute a de facto debarment by either the contracting agency or DCASMA because such determinations are subject to the Small Business Administration's independent and conclusive authority to determine small business responsibility.

BIDS**B-218491.2 Sept. 23, 1985****Invitation for Bids****85-2 CPD 318****Specifications****Samples**

Where there are no adequate specifications to determine whether address labels can be used with an address label printer, procuring activity properly may require bid samples.

CONTRACTS**Protests****General Accounting Office Procedures****Filing Protest With Agency**

Under 4 C.F.R. § 21.1(d) (1985) of our Bid Protest Regulations, a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer not later than 1 day after the protest is filed with GAO. However, dismissal of the protest is not required where the record shows that the protester timely furnished a copy of its protest to the address of the contracting officer, but that the letter was rejected and returned to the protester.

CONTRACTS**Award****Effective Date****Delayed****B-219174 Sept. 23, 1985****85-2 CPD 319**

A delay in meeting procurement milestones is a procedural deficiency which has no effect on the validity of the procurement.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest that agency should have made award on the basis of initial offers is untimely where not filed within 10 working days after protester learned of the agency's decision to request revised proposals.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest that price should have been a more significant proposal evaluation factor is untimely where filed after the closing date established by a solicitation amendment which clearly advised offerors that price would be given a weight equaling one-fifth the total weight assigned to technical factors.

CONTRACTS**B-219174 Con't****Two-Step Procurement****Sept. 23, 1985****Step One****Offers or Proposals****Discussion With all Offerors Requirement****Discussions not Required**

Protest that contracting agency improperly failed to conduct technical discussions with protester is denied where protester's proposal was found technically acceptable and contained no technical deficiencies or uncertainties that required discussion.

CONTRACTS**B-219415.2 Sept. 23, 1985****Negotiation****85-2 CPD 320****Offers or Proposals****Evaluation****Competitive Range Exclusion****Reasonableness**

Contracting agency reasonably excluded proposal from the competitive range because of informational deficiencies when the proposal omitted prices specifically required by the solicitation, the proposal would have to be rewritten in order to correct the deficiencies, several offerors were in the competitive range, and protester's price was clearly higher than other offerors.

CONTRACTS**Protests****Burden of Proof****On Protester**

Protester has not proved its case when the only evidence on an issue of fact is conflicting statements of the agency and the protester.

CONTRACTS

B-219423 Sept. 23, 1985

Negotiation

85-2 CPD 321

Offers or Proposals

Evaluation

Criteria

"Price and Other Factors"

Where the solicitation provided that the basis for award would be "price and other factors," and the agency later clarified this provision by informing all offerors that technical considerations, that is, "other factors" were of paramount importance, the protester cannot successfully argue that the agency improperly deviated from the evaluation scheme by awarding the contract to a higher priced, but technically superior, offeror.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Method

Not Prejudicial

Prejudice is not shown where the protester asserts that the contract award should have been made to the low offeror in accordance with the solicitation's evaluation scheme since, even if the protester is correct, the firm is not in fact the low offeror and therefore not entitled to receive the award.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

**Apparent Prior to Bid Opening/Closing Date
for Proposals**

Alleged solicitation improprieties apparent prior to the closing date for receipt of initial proposals must be protested prior to the closing date in order to be considered.

CONTRACTS **B-219731 Sept. 23, 1985**
Protests **85-2 CPD 322**
General Accounting Office Procedures
Timeliness of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date
for Proposals

Protest alleging that a solicitation requirement is unduly restrictive of competition is dismissed as untimely since GAO's Bid Protest Regulations provide that protests based upon alleged improprieties in a request for proposals apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date in order to be considered. The fact that the protester may have raised an objection to the requirement in its initial proposal does not alter this result because a protest filed with a proposal does not constitute a timely protest.

CONTRACTS **B-214233 Sept. 24, 1985**
Award **85-2 CPD 323**
Erroneous

Award of contract to offeror not possessing Top Secret facility security clearance required by solicitation was improper.

CONTRACTS **B-216945.2 Sept. 24, 1985**
Federal Supply Schedule **85-2 CPD 325**
Multi-Year Procurement

Protest against procuring agency's renewal of third year of 3-year agreement for subscription services under Federal Supply Schedule mandatory multiple-award contract by another firm with schedule contract is denied, where agency had need for single source of supply and protester could not furnish all of the agency's needs.

BIDDERS**Qualifications****Preaward Surveys****Discussion With Bidder**

B-218473.4 Sept. 24, 1985

85-2 CPD 327

Applicable regulations permit--but do not require--a contracting officer to discuss preaward survey results with a prospective contractor and prohibit discussions with other firms surveyed until after award. Thus, the regulations do not contemplate that preaward survey results will be available before award to permit contesting a nonresponsibility determination.

CONTRACTING OFFICERS**Determinations****Responsibility**

Contracting officer, not preaward survey team, ultimately must make responsibility determination. A protester seeking further review of a finding that it lacks financial capability therefore should promptly advise the contracting officer of specific changes in its financial position occurring after preaward survey.

Responsibility determination is administrative in nature and does not require the procedural due process otherwise necessary in a judicial proceeding.

CONTRACTORS**Responsibility****Determination****Time for Making Determination**

While responsibility determination should be as current as feasible, a procurement must proceed in an orderly and efficient manner, with award on the basis of facts at hand, rather than be delayed indefinitely so that a bidder found nonresponsible may cure deficiencies.

CONTRACTORS
Responsibility
Time for Determining

B-218473.4 Con't
Sept. 24, 1985

Contracting officer should reconsider a nonresponsibility determination when two conditions are present: ample time and a material change in a principal factor on which the determination is based. A second preaward survey is not mandated, however, whenever a nonresponsibility determination is challenged.

CONTRACTS

Protests

Information Evaluation

Sufficiency of Submitted Information

Protester's argument that it did not have to raise a particular basis of protest because it would have been apparent from documents submitted with the agency report is without merit, since Bid Protest Regulations require a detailed statement of factual and legal grounds for a protest and warn that failure to present such a statement may result in dismissal.

CONTRACTS

Negotiation

Offers or Proposals

Evaluation

Criteria

Application of Criteria

B-219342 Sept. 24, 1985
85-2 CPD 328

Allegation that a task to be performed under contract had already been performed "in-house" and should not have been a factor in the evaluation of proposals is denied where not supported by facts and where the failure to evaluate task would constitute an unauthorized deviation from the evaluation scheme.

CONTRACTS
Protests
Burden of Proof
On Protester

B-219342 Con't
Sept. 24, 1985

Protest alleging that contracting agency evaluator was not furnished complete copy of protester's proposal based solely on evaluator's written statements is denied where the agency denies the allegation and where those statements can also be read as indicating complete proposal was evaluated but that proposal contained deficiencies.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Where protester learned the facts essential to the bases of three of its protest allegations but failed to file its protest within 10 days of becoming so aware, the allegations are untimely and not subject for consideration under GAO Bid Protest Regulations.

BIDS
Invitation for Bids
Specifications
Brand Name or Equal
"Equal" Product Evaluation
Salient Characteristics not met

B-219376 Sept. 24, 1985
85-2 CPD 329

In brand name or equal procurement, a contracting agency may not award a contract to a bidder that offered an "equal" item identified by model number where the agency knows the offered model does not meet the brand name item's salient characteristics listed in the invitation for bids.

BIDS**Omissions****Acceptability of Bid****B-219629.3 Sept. 24, 1985****85-2 CPD 330**

Bidder's failure to insert the name of the manufacturer and the place of manufacture of offered supplies, required for purposes of government inspection and acceptance, does not render the bid nonresponsive, since the information is not needed to determine whether the bid meets the specifications.

CONTRACTS**Protests****General Accounting Office Procedures****Reconsideration Requests****Additional Evidence Submitted****Available but not Previously Provided to GAO**

GAO will not reconsider a decision where the protester admits that it failed to explain its position adequately in the initial protest, and tries to do so through a request for reconsideration.

CONTRACTS**Small Business Concerns****Awards****Responsibility Determination****Nonresponsibility Finding****Review by GAO****B-219745 Sept. 24, 1985****85-2 CPD 331**

Where a small business concern is determined to be nonresponsive by a contracting officer, GAO generally will not review that determination or the subsequent denial of a certificate of competency by the Small Business Administration absent a showing of possible fraud or bad faith on the part of the contracting officials or of SBA's failure to consider vital information bearing on the bidder's responsibility.

BIDS **B-220218 Sept. 24, 1985**
Acceptance Time Limitation 85-2 CPD 332
Bids Offering Different Acceptance Periods
Shorter Periods
Rejection of Bid

Bid which offered a bid acceptance period shorter than that required in a solicitation is nonresponsive and bidder may not modify bid after opening nor may the deficiency be waived.

CONTRACTS
Awards
Erroneous
Effect of Subsequent Actions

Prior improper award where the awardee shortened the bid acceptance period in the solicitation does not justify the error of accepting a nonresponsive bid for an award.

CONTRACTS **B-216898 Sept. 25, 1985**
In-House Performance v. 85-2 CPD 334
Contracting Out
Cost Comparison

In order to prevail on a protest against an agency decision to perform in-house, rather than contract out, the prospective contractor must demonstrate not only that the agency failed to follow proper cost comparison procedures, but also that this failure materially affected the outcome of the cost comparison.

B-216898 Con't
Sept. 25, 1985

GENERAL ACCOUNTING OFFICE

Contracts

**In-House Performance v. Contracting Out
Cost Comparison
Appeal of Agency's Analysis**

D-42

BIDDERS**B-217939 Sept. 25, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Evidence**

The Department of Labor (DOL) recommended debarment of a contractor for violations of the Davis-Bacon Act constituting a disregard of its obligations to employees under the Act, and an agreement was reached in an administrative law proceeding stipulating to the contractor's debarment. Accordingly, where a contractor specifically stipulates to debarment, after being granted due process by DOL in the form of an administrative law proceeding, we accept DOL's finding as evidence of a violation of the Davis-Bacon Act. The contractor is ordered debarred under the Act.

CONTRACTS**B-218441.2 Sept. 25, 1985****Protests****85-2 CPD 335****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Request for reconsideration of prior decision holding that the Competition in Contracting Act of 1984 extends GAO's bid protest authority to wholly owned government corporations, including the Tennessee Valley Authority, is denied where agency requesting reconsideration disagrees with decision but fails to show either errors of fact or of law in prior decision.

CONTRACTS

**Minority Businesses
Set-Asides
Authority**

B-218622.2; B-218622.3**Sept. 25, 1985****85-2 CPD 336**

Prior decision questioning authority of Agency for International Development (AID) to conduct its own minority set-aside is modified since it appears Congress has given AID authority to conduct such a program.

CONTRACTS

**Negotiation
Offers or Proposals
Evaluation
Criteria
Cost**

GAO affirms prior decision's conclusions that offeror's direct and indirect costs should be effectively evaluated in determining the contracting agency's best advantage in contract awards and that agency should consider use of hypothetical work model as a basis for soliciting future competition.

Knowledge of cost evaluation approach used on earlier procurement would not have benefited offeror under protested procurement because agency used varying cost evaluation approaches in these procurements and later procurement was otherwise deficient, and agency's failure to provide this information does not automatically entitle offeror to award under current procurement.

BIDS**B-219403 Sept. 25, 1985**

Opening
Postponement
Denied

When protester has actual knowledge of the need to inspect a construction site in the fall, before trail to be reconstructed under solicitation issued the following spring is covered with snow, neither the protester's failure to receive an agency letter suggesting that prospective bidders make an inspection nor the Commerce Business Daily's apparent failure to publish a presolicitation notice transmitted by the agency justifies postponing bid opening.

BIDS

Opening
Postponement
Propriety

The period allowed for a construction site visit is adequate when the trail to be rebuilt is only half snow-covered on date the agency issues the invitation for bids, the agency considers the snow-free portion representative of the entire trail, and bid opening delay would increase the time required to complete the project from two to three seasons.

When risk inherent in inability to view the snow-covered portion of trail affects all bidders equally, agency may properly refuse to postpone bid opening, since prospective bidders are expected to take risks into account when preparing their bids.

CONTRACTS

B-219468 Sept. 25, 1985

Negotiation

85-2 CPD 337

Requests for Proposals**Specifications****Minimum Needs****Administrative Determination**

Protest against specifications as exceeding procuring agency's reasonable needs is denied where agency has established prima facie support for specifications and protester has not shown that agency's specified needs are unreasonable.

CONTRACTS**Negotiation****Requests for Proposals****Specifications****Restrictive****Undue Restriction not Established**

Protest against alleged sole-source procurement is denied where record shows that more than one manufacturer offers conforming equipment, and the agency in fact has received two acceptable offers.

CONTRACTS

B-219875 Sept. 25, 1985

Protests

85-2 CPD 338

Interested Party Requirement**Protester not in Line for Award**

A firm challenging a contract award is not an interested party under GAO Bid Protest Regulations, and its protest is dismissed, where it would not be in line for award if its protest were upheld.

CONTRACTS**B-219997 Sept. 25, 1985****Negotiation****85-2 CPD 339****Sole-Source Basis****Justification****Timeliness of Determination**

When, at the time sole-source justification was made, contracting agency had every reason to expect that contract would be performed as anticipated, justification was valid and was not rendered invalid when events did not materialize under the contract as parties expected.

CONTRACTS**Protests****Contract Administration****Not for Resolution by GAO**

Compliance with contract performance obligation concerns a matter of contract administration which is the responsibility of the procuring activity, not GAO.

BIDS**B-220274 Sept. 25, 1985****Late****85-2 CPD 340****Acceptance****Delay due to Improper Government Action**

Contracting agency may accept a late bid based on its determination, which the protester does not challenge, that delay in receiving the bid was due to government mishandling.

CONTRACTS**B-215554 Sept. 26, 1985****Negotiation****85-2 CPD 341****Offers or Proposals****Evaluation****Technical Acceptability****Administrative Determination**

Where a source selection evaluation board (SSEB) determines that technical data contained in an offeror's proposal have not been supported in the proposal, the SSEB may, based on its collective experience, extrapolate from the data supplied by the offeror to produce reliable data needed to evaluate the proposal.

Where the protester proposes a payload weight of 54.54 (plus or minus 0.43) pounds, and three weight analyses by the agency show that the protester's payload would exceed the 55-pound limit stated in the solicitation, the agency's conclusion that the protester's payload carried a very high risk of being overweight cannot be said to be unreasonable, particularly when the agency has reason to question the accuracy of the protester's weight data.

An agency's use for evaluation purposes of its own sensitivity data, which were more conservative than the protester's data, is not objectionable when the protester failed to provide the agency with adequate backup material to support the use of the protester's data.

Agency evaluators cannot just accept blindly an offeror's conclusion that its design will be stable, but must make an independent judgment of the risks inherent in the proposed design.

CONTRACTS

B-215554 Con't

Negotiation

Sept. 26, 1985

Offers or Proposals**Evaluation****Technical Acceptability****Offeror's Responsibility to Demonstrate**

Where the protester and the agency disagree over whether the protester's design would meet the requirements of the solicitation and the protester has not shown that the agency's analyses of the protester's proposal were clearly in error, GAO will not question the agency's technical conclusion.

CONTRACTS**Protests****Burden of Proof****On Protester**

Protest is denied where the protester admits that the drift rate proposed in its design does not satisfy the requirement of the solicitation and the protester does not provide a basis for questioning the agency's judgment that the proposed rate would present serious operational problems.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Each new basis for protest first raised after the initial filing of a protest must satisfy independently GAO's timeliness requirements, and a protester's reservation of the right to raise new issues subsequent to the initial filing does not exempt the protester from these requirements.

Protester not in Line for Award

Sept. 26, 1985

Issues concerning the evaluation of a protester's cost proposal are academic when the agency properly has determined that the protester's technical proposal is unacceptable.

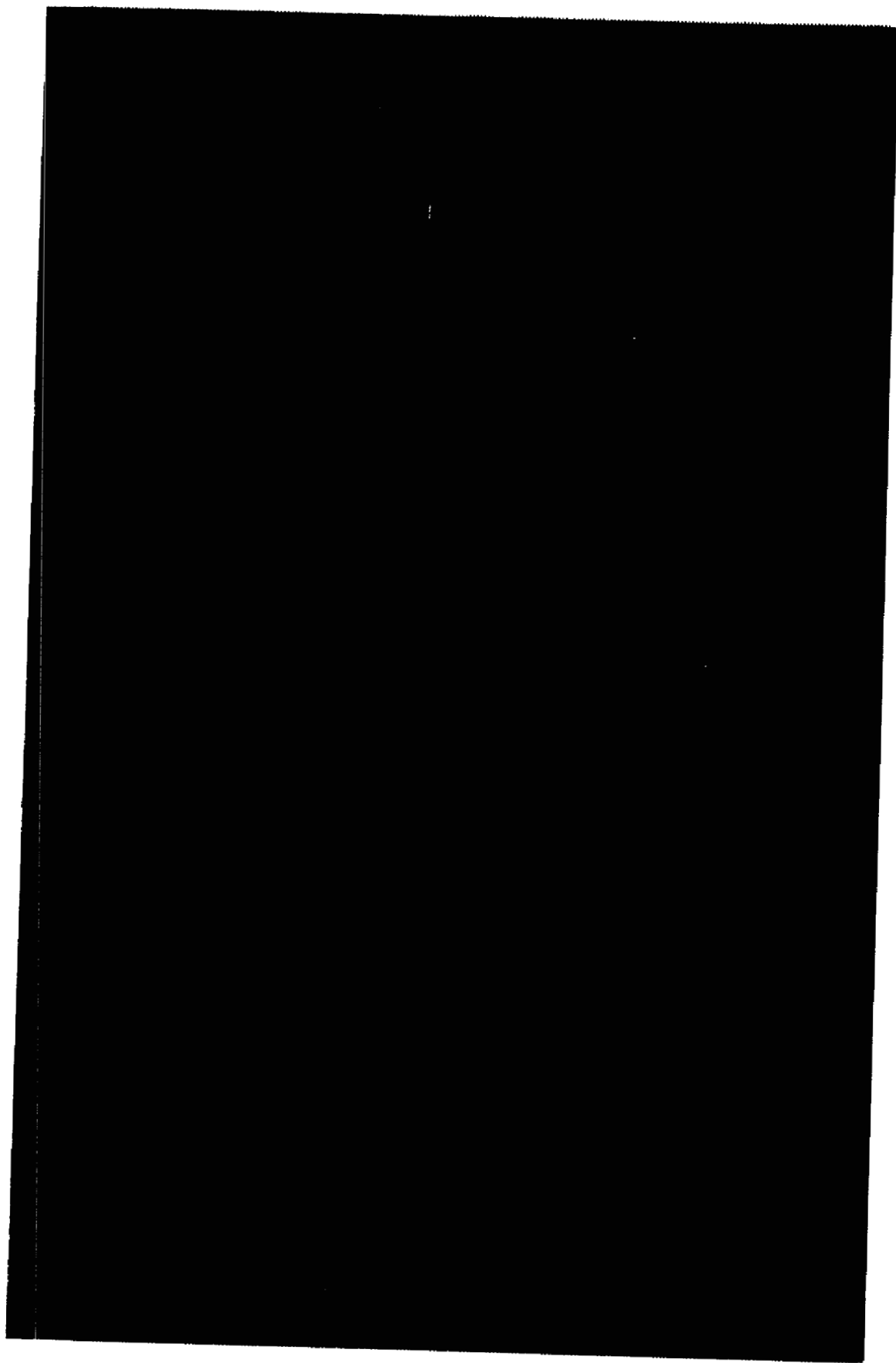
Competition Sufficiency

85-2 CPD 343

Award on the basis of initial proposals is permissible where the solicitation advised offerors that award might be made without discussions, and a sufficient number of proposals were received to assure that award would be at a fair and reasonable price.

Failure to Meet Solicitation Requirements

Where contracting agency decides to make award on initial proposal basis, an initial proposal taking exception to a material solicitation requirement is unacceptable and must be rejected.



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