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

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Notice

To provide a comprehensive overview of Comptroller General decisions, the Office of General Counsel has expanded its monthly pamphlet of *Digests of Unpublished Decisions of the Comptroller General of the United States* to include the digests of all decisions printed in the annual volume of *Decisions of the Comptroller General of the United States*. Effective immediately, the digests of all substantive legal decisions rendered by the Comptroller General will be presented in one publication retitled *Digests of Decisions of the Comptroller General of the United States*. We hope you find this unified pamphlet a useful means for researching Comptroller General decisions.

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Preface

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

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Appropriations/Financial Management

B-223372, December 4, 1989

Appropriations/Financial Management

Accountable Officers

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

Account is settled by operation of law since 3-year statute of limitations begins to run when an agency's account is "substantially complete" and ready for audit.

B-231044, December 4, 1989***

Appropriations/Financial Management

Obligation

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

Under 40 U.S.C. § 757 (1982), General Services Administration billings to the Navy only are required to approximate the cost of Federal Telecommunications System (FTS) service provided. The information provided this Office does not support a conclusion that GSA's billings were unreasonable approximations.

Appropriations/Financial Management

Obligation

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

The General Services Administration (GSA) is authorized to assess Navy with direct costs associated with Navy's withdrawal from FTS. Nothing in 40 U.S.C. § 757 (1982) requires GSA to recover such costs only through rates imposed on remaining FTS users.

B-237419, December 5, 1989

Appropriations/Financial Management

Accountable Officers

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

Relief is granted Forest Service Certifying Officer under 31 U.S.C. § 3528(b)(1)(A) from liability for certification of a performance bond refund after a refund had previously been issued from an imprest fund. The Officer did not know and by reasonable diligence and inquiry could not have discovered that the payee had actually received the refund already. Proper procedures were followed by the Officer in the certification of the refund.

B-235401, December 6, 1989

Appropriations/Financial Management

Accountable Officers

- Relief
- ■ Physical losses
- ■ ■ Embezzlement

Since request for relief of Internal Revenue Service accountable officer was received more than 3 years after IRS had knowledge of the loss, this Office is unable to grant relief. The accountable officer has no personal liability. 31 U.S.C. § 3526(c).

B-237420, December 8, 1989

Appropriations/Financial Management

Accountable Officers

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

Cashier is relieved of liability for loss by theft of funds in the amount of \$760. Presumption of negligence on the part of the accountable officer is rebutted since the evidence shows that a theft took place and an investigation reveals no connection between the accountable officer and the theft.

B-198713.4, December 11, 1989

Appropriations/Financial Management

Claims Against Government

- Statutes of limitation
- ■ Administrative regulations
- ■ ■ Modification

A final rule is issued for publication in the Federal Register amending 4 CFR part 31 to provide that claims against the government which are within GAO's jurisdiction may be filed with the federal agency concerned for purposes of tolling the 6-year limitations period is 31 U.S.C. § 3702(b) (1982). The final rule follows earlier publication of an interim rule on this subject and is effective as of June 15, 1989, the publication date of the interim rule (54 FR 25437).

B-237236, December 11, 1989***

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Necessary expenses rule**
- ■ ■ **Identification tags**

An agency may use appropriated funds to purchase employee identification tags which, unlike calling or business cards, are not personal in nature and are reasonably necessary to the operations of the agency.

B-237135, December 21, 1989

Appropriations/Financial Management

Appropriation Availability

- **Amount availability**
- ■ **Antideficiency prohibition**
- ■ ■ **Violation**

The United States Customs Service violated the Antideficiency Act, 31 U.S.C. § 1341(c) (1982), when it recorded an obligation against anticipated reimbursements if it did not have sufficient funds available for obligation from other sources. Absent statutory authority, anticipated reimbursements from the sale of property are not available for obligation.

B-230382, December 22, 1989

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Specific purpose restrictions**
- ■ ■ **Meals**

The Department of the Army may not use appropriated funds for payment of "entertainment" expenses such as meals, coffee breaks or buffets for employees attending an Army Audio-Visual Conference at their official duty stations. The Army, however, may use appropriated funds to pay costs resulting from an attendance guarantee of 300 persons for luncheon. Meal expenses of personnel attending the Army conference while on travel duty should be charged to their travel allowances.

Civilian Personnel

B-235624.2, December 4, 1989

Civilian Personnel

Compensation

- Arbitration decisions
- ■ GAO review

Claim which was the subject of a final and binding arbitration proceeding will not be reviewed by our Office even where the result of that proceeding was to dismiss the grievance as untimely. 4 C.F.R. § 22.7(a) (1989).

B-229447.2, December 6, 1989

Civilian Personnel

Compensation

- Retroactive compensation
- ■ Eligibility
- ■ ■ Discretionary authority

Upon reconsideration we affirm our decision that an employee who was appointed to a grade and step lower than that for which he was eligible is not entitled to have his appointment retroactively changed to a higher level with appropriate backpay because the appointment at a higher level would have been discretionary rather than mandatory.

B-235100, December 7, 1989

Civilian Personnel

Relocation

- Household goods
- ■ Commuted rates
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

An employee who is authorized to be reimbursed under the Commuted Rate System for arranging with a common carrier to move his household goods during the applicable period of time is entitled to reimbursement of an additional 10 percent seasonal adjustment without providing evidence that he was actually charged the adjusted rate by the carrier since the General Services Administration regulation in effect does not limit the adjustment to cases where the higher rate has been charged by the carrier.

B-233946.2, December 14, 1989

Civilian Personnel

Compensation**■ Rates****■ ■ Determination****■ ■ ■ Highest previous rate rule**

Upon reemployment following a RIF, an employee is entitled to have his salary computed in accord with the highest previous rate rule. In determining employee's highest previous rate, an agency uses scheduled salary for grade and step of the position held by the employee regardless of whether he was paid a special rate of pay under 5 U.S.C. § 5303. See 5 C.F.R. § 531.203.

B-230407, December 15, 1989

Civilian Personnel

Relocation**■ Household goods****■ ■ Vessels****■ ■ ■ Restrictions****■ ■ ■ ■ Liability**

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

B-231838.2, December 15, 1989***

Civilian Personnel

Compensation**■ Discrimination allegation****■ ■ Attorney fees****■ ■ ■ GAO review**

In view of the statutory authority vested in the Equal Employment Opportunity Commission (EEOC) to order final corrective action in discrimination cases, this Office declines to question the propriety of EEOC's award of attorney fees in this case.

B-231992, December 15, 1989***

Civilian Personnel

Relocation**■ Relocation service contracts****■ ■ Reimbursement****■ ■ ■ Direct costs**

Employee accepted use of relocation services contractor, but rejected contractor's offer to purchase his former home. Employee does not have to reimburse the agency for direct costs agency paid to contractor when the employee rejects the contractor's purchase offer. *Gerald F. Stangel, Larry D. King*, 68 Comp. Gen. 321 (1989).

Civilian Personnel

Relocation

- **Residence transaction expenses**
- ■ **Appraisal fees**
- ■ ■ **Reimbursement**

Civilian Personnel

Relocation

- **Residence transaction expenses**
- ■ **Relocation service contracts**
- ■ ■ **Offers**
- ■ ■ ■ **Rejection**

Agency paid relocation services contractor its direct costs for appraisals and title work. After employee rejected contractor's purchase offer, he also incurred expense for appraisal and title services. He may not be reimbursed for those expenses since they duplicate expenses agency paid to relocation services contractor. The Federal Travel Regulations in para. 2-12.5 (Supp. 11, Aug. 27, 1984) prohibit a dual benefit once an election is made to use a contractor.

Civilian Personnel

Relocation

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

In the absence of any statutory or regulatory restriction, the amounts paid by an agency to a relocation services contractor on behalf of an employee under the provisions of 5 U.S.C. § 5724c are not considered in determining the maximum allowable reimbursement to the employee for his own expenses in selling his residence on the open market under § 5724a(a)(4).

Civilian Personnel

Relocation

- **Residence transaction expenses**
- ■ **Relocation service contracts**
- ■ ■ **Use**
- ■ ■ ■ **Taxes**

The FTR provides that the expenses paid by a relocation company providing relocation services on behalf of a transferred employee may be subject to a relocation income tax allowance to the extent such payments constitute income to the employee. Specific questions pertaining to the income tax consequences of such payments or to the applicability of the allowance should be addressed to the Internal Revenue Service.

Civilian Personnel

Travel

- **Temporary duty**
- ■ **Return travel**
- ■ ■ **Amount determination**

Agency is correct in its contention that employee was erroneously reimbursed for mileage for weekend return travel to any place other than his new headquarters. Such overpayments may be considered for waiver if they occurred after December 28, 1985, the effective date of the amendment to 5 U.S.C. § 5584 allowing waiver of travel expense overpayments.

B-232695, December 15, 1989***

Civilian Personnel

Compensation

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

Where employees performed duties of a position classified at a higher grade than the position they occupied, no right to increased pay exists. A federal employee is entitled only to the salary of his/her appointed position even though higher level duties were performed. Moreover, collective bargaining agreement provision that provided higher pay where an employee is detailed to a higher-graded position for more than 30 days is not applicable, since there was no detail but merely an accretion or misassignment of some higher-graded duties. Therefore, the employees are not entitled to backpay for performing the higher-graded duties.

B-236856, December 15, 1989

Civilian Personnel

Travel

- Advances
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A transferred employee was erroneously advanced temporary quarters subsistence expense (TQSE) for her 23-year-old son. Consequently, the agency sought to have the employee pay back \$3,250 that had been advanced to her and used for her son's TQSE. Waiver is granted under 5 U.S.C. § 5584, as amended, because the record shows that the employee relied in good faith on the erroneous authorization for TQSE.

B-234886, December 19, 1989

Civilian Personnel

Relocation

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Eligibility
- ■ ■ ■ Annual leave

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

B-235461, December 19, 1989

Civilian Personnel

Compensation

- Hazardous duty differentials
- ■ Eligibility
- ■ ■ Administrative determination

We sustain the agency's determination not to authorize environmental differential pay for future exposure to asbestos. The union has not demonstrated by clear and convincing evidence that the agency was arbitrary or capricious in determining that safety equipment and procedures eliminate any hazardous conditions.

Civilian Personnel

Compensation

- Hazardous duty differentials
- ■ Eligibility
- ■ ■ Administrative discretion

Claims for retroactive environmental differential pay for prior exposure to asbestos are being reviewed by the agency and will not be considered by our Office at this time.

B-237436, December 20, 1989

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Finance charges

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Mortgage insurance
- ■ ■ Reimbursement

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

B-219076.2, December 22, 1989

Civilian Personnel

Relocation

- Household goods
- ■ Actual expenses
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

B-236228, December 22, 1989

Civilian Personnel

Leaves Of Absence

- Annual leave
- ■ Eligibility
- ■ ■ Intermittent employment

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

B-236247, December 22, 1989

Civilian Personnel

Relocation

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

Civilian Personnel

Relocation

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

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

Military Personnel

B-234729, December 15, 1989

Military Personnel

Pay

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

Request for waiver of a debt arising out of overpayments of a basic allowance for quarters and housing after a service member returned home from overseas assignment properly was denied, since the member knew he was being overpaid and that the agency was trying to correct the situation, and he therefore had a duty to set the repayments aside for eventual refund.

B-236552, December 18, 1989

Military Personnel

Pay

- Retirement pay
- ■ Amount determination
- ■ ■ Post-retirement active duty

The retired pay of a service member who was immediately recalled to active duty without a break in service for less than 2 years is computed according to 10 U.S.C. § 1402 to reflect the additional service, and is based on the pay rate as prescribed in that statute.

B-229248, December 19, 1989

Military Personnel

Pay

- Survivor benefits
- ■ Annuity payments
- ■ ■ Eligibility

A military reservist who irrevocably elects to participate in the Survivor Benefit Plan following completion of the requisite years of service for retirement purposes is considered to have been eligible at that time for retired pay for Survivor Benefit Plan annuity computation purposes in the event of his death before age 60. Survivor Benefit Plan eligibility attaches at that time. Statutory exemption providing an immediate Survivor Benefit Plan annuity for a widow married to a member for less than 1 year at the time he became eligible for retired pay therefore does not apply where a second spouse was married to a member when he began receiving retired pay but was not married to him when he completed the years of service required for retired pay and Survivor Benefit Plan eligibility.

B-231724, December 19, 1989

Military Personnel

Travel

- Travel expenses
- ■ Voluntary expenditure
- ■ ■ Reimbursement

A member purchased an airline ticket from personal funds even though his travel orders directed the use of transportation request (TR). He may be reimbursed notwithstanding provisions of the pertinent regulations that would otherwise preclude payment since the record shows that attempts to modify his orders were made by the proper authorities and that the member believed the orders would be modified to authorize reimbursement.

B-234009, December 19, 1989

Military Personnel

Relocation

- Relocation travel
- ■ Dependents
- ■ ■ Eligibility

The dependent daughter of a service member stationed overseas returned to the United States shortly before the member's permanent change of station (PCS) back to the United States, in connection with which he had been authorized dependent travel, and lost her dependent status through marriage before the PCS. The member may be reimbursed for the cost of her travel since the daughter had traveled to the overseas post at government expense as the member's dependent.

B-234751, December 19, 1989

Military Personnel

Travel

- Advances
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A service member was ordered to contact the billeting office while he was on temporary duty (TDY) to determine the availability of housing. Upon assuring the Accounting and Finance Office at the TDY station that he would obtain a non-availability statement, the member was paid per diem at \$50, the rate appropriate when government housing is not available. He never furnished a certificate of nonavailability, however, and when he completed his TDY his per diem allowance was recomputed at \$25. Waiver of the resulting overpayment is not appropriate, since the overpayment did not result from erroneously authorized allowances in his travel orders.

B-235375, December 20, 1989

Military Personnel

Relocation

- Household goods
- ■ Weight restrictions
- ■ ■ Liability
- ■ ■ ■ Computation

Invalidation of weight certificates on a permanent change of station move does not prevent assessment of excess cost against the member. Weight can be determined by other reasonable means, including the estimated weight per article shipped, and the agency's determination of weight under such circumstances will be upheld by this Office, absent fraud or clear error.

B-237198, December 20, 1989

Military Personnel

Relocation

- Mobile homes
- ■ Shipment costs
- ■ ■ Reimbursement

Government's claim against service member for the cost of 15 tires replaced by the carrier while moving the member's mobile home incident to a permanent change of station may not be waived, since only claims arising from erroneous payments are eligible for waiver and, pursuant to applicable regulations, the member had agreed to reimburse the government for tire replacement costs when he elected to have his mobile home transported.

B-237071, December 21, 1989

Military Personnel

Pay

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

Claim for repayment by service member of erroneous payments caused by an incorrect calculation of his Variable Housing Allowance that resulted from an error in the service's computer entry of his zip code may be waived, even though the error and reason for it were reflected on the member's Leave and Earnings Statement. The reference to the error in the Statement was obscure, and there was no reasonable basis for the member to have detected it through a normal review of the document.

Miscellaneous Topics

B-236256, December 15, 1989

Miscellaneous Topics

Environment/Energy/Natural Resources

■ Hazardous substances

■ ■ Evidence

■ ■ ■ Investigation

■ ■ ■ ■ Funding

The Nuclear Regulatory Commission's (NRC's) use of federal funds to obtain evidence contained in tape recordings of conversations is authorized when the evidence sought is to be used in an investigation related to possible safety problems at a power plant licensee of the Commission. The expenditure directly facilitates a specifically authorized agency activity for which general appropriations are available.

Miscellaneous Topics

Environment/Energy/Natural Resources

■ Hazardous substances

■ ■ Evidence

■ ■ ■ Investigation

■ ■ ■ ■ Telephone calls

Recording a conversation, with the consent of one of the parties to the conversation, is permissible under federal law, regardless of whether the recording is made in violation of state law, unless the recording is made for the purpose of committing a criminal or tortious act.

Miscellaneous Topics

Environment/Energy/Natural Resources

■ Hazardous substances

■ ■ Evidence

■ ■ ■ Investigation

■ ■ ■ ■ Funding

The NRC may purchase and use evidence contained in lawfully recorded tapes, in an ongoing administrative proceeding.

Miscellaneous Topics

Environment/Energy/Natural Resources

■ Hazardous substances

■ ■ Evidence

■ ■ ■ Investigation

■ ■ ■ ■ Telephone calls

Contract between the NRC and a private party containing a provision that bars the private party from discussing with law enforcement officials or members of Congress information concerning

possible criminal violations involving failure of NRC officials to deal with dangers to public health and safety at a nuclear power plant is unenforceable as contrary to public policy.

B-236148, December 28, 1989

Miscellaneous Topics

Environment/Energy/Natural Resources**■ Environmental protection****■ ■ Air quality****■ ■ ■ Standards****■ ■ ■ ■ Enforcement**

EPA pamphlet, describing defect warranty under Clean Air Act, correctly states that such warranty covers all defective emission control related parts for the first 5 years or 50,000 miles of vehicle use. Performance warranty, discussed in a separate pamphlet, limits coverage after 2 years and 24,000 miles. Clean Air Act, § 207, 42 U.S.C. § 7541.

Miscellaneous Topics

Environment/Energy/Natural Resources**■ Environmental protection****■ ■ Air quality****■ ■ ■ Standards****■ ■ ■ ■ Enforcement**

Under Clean Air Act, § 209(b), 42 U.S.C. § 7543(b), EPA may waive federal preemption of California's emissions control standards. Under this authority, EPA may waive federal preemption for California's warranties and useful life regulations. See *Motor and Equipment Manufacturers Association v. EPA*, 627 F.2d 1095, 1107 (D.C. Cir. 1979).

Procurement

B-235761.3, B-235761.4, December 1, 1989

89-2 CPD 507

Procurement

Bid Protests

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

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

Procurement

Bid Protests

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

Dismissal on timeliness grounds is affirmed where agency-level protest was filed more than 10 days after basis of protest was known since protest filed with General Accounting Office subsequent to agency-level protest is untimely where the original protest was untimely filed with agency.

B-236686.2, December 1, 1989

89-2 CPD 508

Procurement

Bid Protests

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

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Prior dismissal of protest is affirmed where dismissal was due to protester's failure to file timely comments on agency report; protester's alleged unawareness of comment filing requirements is not an excuse because protester is charged with constructive notice of Bid Protest Regulations through their publication in the Federal Register and Code of Federal Regulations.

Procurement

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

Regulations prohibiting small disadvantaged business set-aside where the contracting agency had previously contracted for services under a small business set-aside does not apply to first-time acquisition by a separate agency for part of the same services previously acquired.

Procurement

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

Where solicitation provides for award to lowest priced technically acceptable offeror, agency properly awarded to low priced offeror whose proposal explicitly stated that the equipment offered satisfied all material technical requirements under the solicitation, and included required supporting literature which substantiated that the equipment was compliant. Neither commercial literature which is not directly applicable to the equipment in question, nor tests conducted by a competitor and which are self serving, establish that the agency's determination of technical acceptability was unreasonable.

Procurement

Bid Protests**■ GAO procedures****■ ■ Protest timeliness****■ ■ ■ Apparent solicitation improprieties**

Allegation that cost improperly was evaluated on life cycle basis is untimely, and will not be considered, where cost evaluation method was detailed in request for proposals, and allegation was not raised until after closing date for receipt of proposals.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Allegation substantiation**

Allegation that contracting agency performed portion of life cycle cost evaluation improperly is denied where calculations provided by agency to General Accounting Office provide no basis for objection.

Procurement

Competitive Negotiation

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

Where solicitation states that proposed price is most important evaluation factor for source selection purposes, but clearly provides that technical, management and logistics, although of less importance, also will be evaluated, there is nothing improper in the selection of a higher priced offeror when the agency reasonably determines that the selected firm's evidenced technical/management/logistics superiority offsets the price premium associated with its offer.

B-236476, December 4, 1989

89-2 CPD 513

Procurement

Bid Protests

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

A challenge to the determination that the awardee was the lowest priced offeror, not raised until 2 months after the award was made, is untimely where the protester has not shown why it earlier did not know, or should not have known, of the issue; General Accounting Office Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues.

Procurement

Competitive Negotiation

- Contract awards
- ■ Personnel
- ■ ■ Substitution
- ■ ■ ■ Propriety

Agency is not required to conduct a second round of best and final offers (BAFOs) where a substitution is made for one key employee who resigned from the awardee's firm after BAFOs but before award, and where the contracting activity reviewed the resume of the substituted employee and determined it to be technically acceptable.

Procurement

Competitive Negotiation

- Discussion
- ■ Determination criteria

Procuring agency's communications with offeror concerning required small and disadvantaged business subcontracting plan relate to offeror's responsibility and do not constitute discussions or require that revised proposals be solicited from all offerors.

Procurement

Contractor Qualification

- Contract personnel
- ■ GAO review

It is not inherently improper for an awardee to recruit and hire personnel employed by the prior incumbent contractor.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester is not entitled to recover protest costs where agency takes corrective action in response to protest.

Procurement

Bid Protests

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

Protest filed after closing date challenging application of a 10 percent evaluation preference for small disadvantaged businesses is untimely since agency's intent to apply the preference was evident from the face of the solicitation and apparent solicitation improprieties must be protested before the initial closing date.

Procurement

Bid Protests

- Non-prejudicial allegation
- ■ GAO review

Procurement

Competitive Negotiation

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

Award was proper despite agency's failure to apply transportation evaluation factor to proposed prices as required by solicitation, since corrected evaluation did not change the offerors' relative standing and protester thus was not prejudiced by agency's initial error.

Procurement

Noncompetitive Negotiation

- Industrial mobilization bases
- ■ Contract awards
- ■ ■ Propriety

Protest of contracting agency's proposed award of a contract for apparel to particular source to serve industrial mobilization purposes is denied where awardee's position would thereby be strengthened and protester was reasonably considered by contracting agency to be ineligible for award given its delinquent production status on current contracts.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Contracting agency has a reasonable basis for limiting the competition in a reprocurement action to the only known source capable of producing the items to meet its operational requirements and in excluding the protester where the agency reasonably finds that the protester, whose contracts for these items were terminated for default, is not technically capable of meeting the requirements of the reprocurement solicitation.

Procurement

Specifications

- Design specifications
- ■ Intellectual property
- ■ ■ Unauthorized use
- ■ ■ ■ Evidence sufficiency

Protest that agency violated protester's proprietary rights in technical data is denied since protester does not present clear and convincing evidence that the solicitation's technical drawing, developed through reverse engineering by the agency, was otherwise derived from proprietary technical data and drawings.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

Requests for reconsideration which are essentially new piecemeal protests are dismissed as untimely since protests were filed more than 10 working days after protester's basis of protest was known or should have been known.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Improper action will not be attributed to an agency's procurement officials on the basis of unsupported allegations, inference or supposition.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Reconsideration request is denied where the protester has presented no evidence that prior decision was based on factual or legal errors.

Procurement

Bid Protests

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

Protester is not an interested party eligible to protest award to another offeror under General Accounting Office Bid Protest Regulations where protester's proposal was properly rejected as late and protester thus would not be in line for contract award even if its protest were sustained.

B-236606, December 6, 1989

89-2 CPD 520

Procurement

Noncompetitive Negotiation

- Use
- ■ Justification
- ■ ■ Urgent needs

Agency properly restricted competition to two offerors where it reasonably believed those offerors were the only ones who could perform the work promptly and properly in view of an unusual and compelling urgency for fresh water at an island military installation.

B-236612, December 6, 1989

89-2 CPD 521

Procurement

Special Procurement Methods/Categories

- Computer equipment/services
- ■ Federal supply schedule
- ■ ■ Non-mandatory purchases

An announcement in the *Commerce Business Daily* (CBD) of plans to procure an item under a nonmandatory automatic data processing schedule contract is a device to test the market to determine whether the government's needs will be met at the lowest overall cost by procuring from the schedule. The agency is not "locked into" all the specific features of the advertised product but may generally purchase functionally equivalent products that do not contain features of the product synopsized in the CBD.

Procurement

Competitive Negotiation

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

Where agency determines after award that awardee's descriptive literature submitted with its best and final offer (BAFO) was nonconforming, agency is not required to eliminate awardee from competition but may afford awardee an opportunity to correct its proposal by reopening negotiations with all offerors within the competitive range, advising awardee during discussions that its descriptive literature is nonconforming, and then allowing all offerors an opportunity to submit a second round of BAFOs.

B-234773.2, December 7, 1989

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration that does not show errors of fact or law in the prior decision and which essentially restates arguments that were previously made and considered in the original bid protest provides no basis for reconsideration.

Procurement

Bid Protests

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

New and independent grounds of protest first raised in protester's comments on the agency's report responding to initial protest allegations were properly dismissed as untimely, where the later-raised issues were filed more than 10 working days after protester was aware of the new grounds of protest.

B-235956.2, December 7, 1989

Procurement

Sealed Bidding

- Unbalanced bids
- ■ Materiality
- ■ ■ Responsiveness

Low bid is not materially unbalanced, and thus not subject to rejection as being nonresponsive, where the agency expects to exercise the option quantities, and the record contains no basis for concluding that low bidder would not offer the lowest ultimate cost to the government.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Second request for reconsideration of decision dismissing protest as untimely is denied where protester fails to show any error of fact or law in prior decisions.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Price reasonableness

Contracting agency's decision to cancel invitation for bids based on unreasonableness of price of the only bid submitted was proper where the bid price exceeded the government estimate by 43 percent, and exceeded prices paid for similar services under bidder's own recent contract by an amount the agency determined was not justified by market conditions.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Protester, third low offeror, is not an interested party to challenge award of a contract to the lowest acceptable offeror where it has not challenged award to the second lowest offeror.

Procurement

Competitive Negotiation

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

An award based on initial proposals, without holding discussions, is proper where the solicitation advises offerors of that possibility, no discussions are held, and the competition demonstrates that the acceptance of initial proposals will result in lowest overall cost to the government.

Procurement

Competitive Negotiation

- Discussion
- ■ Determination criteria

Where award is to be made on an initial proposal basis, agency acted reasonably in deciding not to open discussions after highest offeror submitted a late price reduction since price reduction did not change the relative standing of the offerors, and was submitted 2 months after the initial closing date and pre-award survey had begun.

Procurement

Competitive Negotiation

- Discussion
- ■ Propriety
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that agency held discussions with the awardee but improperly failed to do so with the protester is denied where the agency's communication with the awardee did not give the firm the opportunity to revise its proposal or to furnish information necessary to evaluate the proposal.

B-237498.2, December 7, 1989

89-2 CPD 528

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

Untimely protest that agency rejection of proposal is inconsistent with Indian Self-Determination Act, 25 U.S.C. § 450 *et al.* (1982), does not fall under significant issue exception to Bid Protest Regulations.

B-237717, December 7, 1989

89-2 CPD 529

Procurement

Bid Protests

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

Protest that agency did not solicit offer from protester or notify protester that it was soliciting offers from others is dismissed as untimely where record shows protester knew more than 2 months prior to the filing of its protest that General Services Administration had issued the solicitation and it was not on the mailing list for the solicitation.

B-232651.2, December 8, 1989

89-2 CPD 530

Procurement

Bid Protests

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

Protest alleging improprieties in conduct of procurement is dismissed as untimely where filed more than 10 working days after basis of protest is known or should have been known through receipt of information released pursuant to initial Freedom of Information Act (FOIA) request; filing of a second FOIA request does not toll General Accounting Office's timeliness requirements.

Procurement

Contract Management

■ Contract administration

■ ■ GAO review

Protest allegations concerning contract performance are matters of contract administration which are not within bid protest jurisdiction of General Accounting Office, and therefore will not be considered.

B-236723, December 8, 1989

89-2 CPD 531

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

■ ■ ■ ■ Equivalent products

Rejection of alternate product as unacceptable under alternate products clause because of lack of sufficient information to establish equivalence was unobjectionable where protester was unable to supply specifically requested information the agency reasonably determined was necessary to establish acceptability of the alternate product.

B-236819, December 8, 1989

89-2 CPD 532

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Blanket offers of compliance

Bid properly found to be nonresponsive as submitted may not be changed after bid opening so as to make it responsive.

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Determination time periods

Bid offering an alternate product was properly rejected as nonresponsive where the agency determined the alternate product did not meet two requirements of the specifications; a mere assertion by the protester that its offered product does meet the characteristics in question does not show that the agency's determination is erroneous.

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Shipment schedules

■ ■ ■ ■ Deviation

Where a bid does not unconditionally commit the bidder to comply with the required date for contract completion, the bid is nonresponsive; the fact that the bidder signed the bid does not correct the ambiguity.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees claimed by prevailing protester are allowable where hours are adequately documented and the rates and hours claimed are shown to be reasonable.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees need not be allocated between sustained and denied protest issues where all of the issues raised by the protester were related to the same core protest allegation which was sustained, and there were no distinct and severable grounds of protest on which the protester did not prevail.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Successful protester is entitled to recover company costs incurred in pursuing protest to the extent that such costs are sufficiently documented and are reasonable.

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Claim for proposal preparation costs is disallowed where claimant was not awarded proposal preparation costs in the protest decision and did not timely request reconsideration of the costs awarded.

B-234877, December 11, 1989

Procurement

Payment/Discharge

- Shipment
- ■ Carrier liability
- ■ ■ Amount determination

Carrier is not entitled to possession of damaged articles as if carrier had purchased salvage value because the carrier's argument that they are still "useful" is not evidence that the Navy's determination of no value and consequent failure to retain damaged items for the carrier was unreasonable.

Procurement

Payment/Discharge

- Shipment
- ■ Carrier liability
- ■ ■ Amount determination

In absence of competent evidence from the carrier concerning the unreasonableness of the cost of repairs or the market value of the damaged property, this Office will not reverse an administrative determination on such issues.

B-235651.2, December 11, 1989

89-2 CPD 533**Procurement**

Sealed Bidding

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

Where an invitation for bids (IFB) requires descriptive literature to establish that offered products conform to the IFB specifications, the contracting agency properly rejected as nonresponsive a bid that included a brochure which contained conflicting information as to whether the item offered was compliant and a "technical proposal" which consisted of the bidder's listing of IFB specifications. Such a list is no better than a blanket offer of compliance for purpose of permitting agency to determine whether offered product meets specifications and does not cure the ambiguous brochure.

B-236227.2, December 11, 1989

89-2 CPD 534**Procurement**

Contractor Qualification

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

Agency properly found protester nonresponsible and rejected its bid where protester failed to provide sufficient information to permit a finding that the individual sureties on its bid bond were acceptable.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Replacement of an unacceptable surety after bid opening is not allowable since the liability of the sureties is an element of responsiveness which must be established at the time of bid opening.

B-236452, December 11, 1989

89-2 CPD 535

Procurement

Competitive Negotiation

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

Protest that disagreement with agency concerning solicitation's data disclosure provision caused the agency to be biased in its technical evaluation of the protester's proposal is denied where there is no evidence of bias in the record.

B-236455.2, December 11, 1989

89-2 CPD 536

Procurement

Socio-Economic Policies

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

Protest against award to the only firm offering domestic commodity is denied where the contracting agency properly applied the mandatory preference for domestic commodity clause contained in the solicitation.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Availability
- ■ ■ ■ Criteria

Protester's allegation that the exception to the preference for domestic commodity clause is applicable to the instant procurement is without merit since the record shows that the domestic commodity is available as and when needed at United States market prices.

Procurement

Sealed Bidding

- Contract awards
 - ■ Propriety
-

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgement
- ■ ■ ■ Responsiveness

Protest against proposed award of a contract to a bidder that acknowledges an amendment containing a Procurement Integrity Certificate clause but fails to complete and sign the Certificate itself is denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for the Certificate, which implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988, has been suspended from December 1, 1989 to November 30, 1990, by section 507 of the Ethics Reform Act of 1989.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Brand name/equal specifications
- ■ ■ ■ Salient characteristics

Bid submitted in response to a solicitation requiring a brand name or equal product properly was rejected as nonresponsive where descriptive literature submitted with bid established that offered "equal" product failed to meet three salient characteristics set forth in the solicitation.

Procurement

Competitive Negotiation

- Offers
- ■ Late submission
- ■ ■ Acceptance criteria

Proposals delivered late by Federal Express properly were rejected where, although the government may have contributed to the late delivery by restricting access to the proposal depository, the paramount cause of the late delivery was, initially, the failure of the Federal Express courier to wait for a reasonable amount of time to make delivery to agency personnel, and, subsequently, the failure of the same courier to return prior to the time designated for receipt of proposals, specified on one of the proposal envelopes, to make another attempt at delivery.

Procurement

Bid Protests

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

Protest that solicitation provisions which require the submission of certain information are unfair because they provide the incumbent contractor with an advantage is untimely where not raised prior to closing time for receipt of proposals.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Where request for proposals provided that, in evaluating proposals, technical quality and price would be considered to be of equal importance, agency properly made award based on the higher rated, higher priced proposal since it reasonably determined that the technical advantage associated with higher rated proposal was worth the difference in price.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Procuring officials enjoy a reasonable degree of discretion in evaluating proposals, and the General Accounting Office will not disturb an evaluation where the record supports the conclusions reached and the evaluation is consistent with the criteria set forth in the solicitation.

Procurement

Competitive Negotiation

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

General Accounting Office will not recommend that an agency cancel a solicitation where the protester does not present clear and convincing evidence that the solicitation's specifications and drawings package are derived from proprietary drawings.

Procurement

Specifications

- Design specifications
- ■ Intellectual property
- ■ ■ Unauthorized use
- ■ ■ ■ Evidence sufficiency

Protest that agency did not justify the use of reverse engineering in order to obtain additional competition for requirement is dismissed since General Accounting Office will not review a protest that has the purpose of reducing competition.

B-236575, December 12, 1989

89-2 CPD 543

Procurement

Competitive Negotiation

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

Cancellation of a request for proposals after receipt and evaluation of initial proposals was proper where the agency reasonably determined that alternatives were available to better satisfy its requirements, and determined to reevaluate its needs in order to broaden the stated requirements and reissue the solicitation on a more competitive basis. Agency may properly cancel a solicitation regardless of when the information justifying the cancellation arises.

B-236633, December 12, 1989

89-2 CPD 544

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Price competition

Although solicitation provided that technical factors would be weighted more than price, agency may award to technically lower rated, lower cost offeror instead of higher cost, higher technically rated offeror, where the contracting officer reasonably determines that there is no significant technical difference between proposals and that award to lower cost offeror is most advantageous to government.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Administrative discretion

General Accounting Office will not substitute its judgment for that of agency evaluators concerning technical evaluation of proposals where review of source selection documents shows that evaluation was fair and reasonable and consistent with evaluation criteria in the solicitation.

B-236965.2, December 12, 1989

89-2 CPD 545

Procurement

Sealed Bidding

■ Invitations for bids

■ ■ Evaluation criteria

■ ■ ■ Prices

■ ■ ■ ■ Options

Since invitation for bids properly provided for evaluation of both base year and option years to determine the low bidder, award on that basis was proper.

B-237196, December 12, 1989

89-2 CPD 546

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ Apparent solicitation improprieties

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

Protest based on agency actions prior to bid opening; on information available at time of award; and on information provided in response to a Freedom of Information Act (FOIA) request submitted 2 months after award, is dismissed as untimely when initially filed with the contracting agency 4 weeks after receipt of FOIA response, and more than 3 months after contract award.

B-233269.3, December 13, 1989

89-2 CPD 547

Procurement

Bid Protests

■ Allegation

■ ■ Abandonment

Procurement

Bid Protests

■ GAO procedures

■ ■ Administrative reports

■ ■ ■ Comments timeliness

Protest was properly dismissed pursuant to General Accounting Office Bid Protest Regulations where the protester failed to file comments in response to the agency report or provide notice of

continued interest in the protest within 10 working days following receipt of the report by the General Accounting Office.

B-236504, December 13, 1989

89-2 CPD 548

Procurement

Competitive Negotiation

■ **Discussion**

■ ■ **Adequacy**

■ ■ ■ **Criteria**

Protest that agency failed to engage in meaningful discussions in the area of "level of effort" for a cost-plus-a-fixed-fee type contract is denied where record shows that agency posed sufficient discussion questions to protester in issue area to allow protester to adequately respond to agency's requirements.

Procurement

Competitive Negotiation

■ **Technical transfusion/leveling**

■ ■ **Allegation substantiation**

■ ■ ■ **Evidence sufficiency**

Protest that agency engaged in "technical leveling" by providing all firms with certain normalized costs elements is denied since the concept of technical leveling is inapplicable to cost discussions and, in any event, protester has shown no prejudice in connection with agency's actions.

B-236573, December 13, 1989***

89-2 CPD 549

Procurement

Contractor Qualification

■ **Approved sources**

■ ■ **Alternatives**

■ ■ ■ **Pre-qualification**

■ ■ ■ ■ **Testing**

Procuring agency properly rejected the protester's alternate item in a procurement involving a "Products Offered" clause where the protester refused to bear the costs of properly required qualification testing.

B-236718, B-236718.2, December 13, 1989

89-2 CPD 550

Procurement

Bid Protests

■ **Allegation substantiation**

■ ■ **Burden of proof**

Protest that awardee's lodging establishment is not within a 15-mile radius of the contracting activity as required by the solicitation is denied where the record indicates that agency conducted a pre-award survey of the incumbent low bidder for previous identical solicitation requirement and firm was found to meet the requirement.

Procurement

Bid Protests

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

Protest challenging the use of a military specification in an invitation for bids is untimely when filed after bid opening.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification

Protest requesting cancellation of an invitation for bids (IFB) after bid opening because of omission of the Certificate of Procurement Integrity clause is denied where no bidders would be prejudiced by an award under the deficient solicitation; the bidder supplied the Certificate before award; the agency's actual needs will be served by award under the IFB; and the statutory requirement for the Certificate has been suspended for 1 year as of December 1, 1989.

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Conflicts of interest
- ■ ■ Allegation substantiation
- ■ ■ ■ Lacking

Protest of alleged conflict of interest due to relationship between high level official of the contracting agency and proposed awardee is denied where record does not show that any improper influence was exerted in procurement on behalf of proposed awardee.

Procurement

Socio-Economic Policies

- Small business 8(a) subcontracting
- ■ Use
- ■ ■ Administrative discretion

Protest against the proposed award of a contract under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), is denied where the protester, which alleged that the procuring agency improperly favored a particular 8(a) contractor, has failed to show that the procurement officials acted fraudulently or in bad faith.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Conflicting terms
- ■ ■ ■ Ambiguity

Where bid is submitted under name "Sigma Electronics" and bond is submitted under name "Sigma General Corporation" contracting officer properly rejected bid as nonresponsive because of uncertainty as to identity of the actual bidder and was not required to investigate further whether the named entities referred to same legal entity, since bidder bears primary responsibility for unambiguously identifying itself as the party to be bound by the bid and there was insufficient evidence in the bid documents to alert contracting officer that named entities might be the same legal entity.

Procurement

Competitive Negotiation

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

Contracting agency acted reasonably in selecting offeror submitting superior technical proposal over a lower priced offeror where the solicitation provided that technical factors would be worth 70 percent in the evaluation and price would be worth 30 percent.

Procurement

Competitive Negotiation

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

Protest that contracting agency deviated from the evaluation criteria set forth in the solicitation is denied where the record demonstrates that the agency consistently applied enumerated criteria.

Procurement

Bid Protests

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

Protest of rejection of proposal is untimely when filed more than 10 working days after basis of protest is known.

Procurement

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

Protest that contractor is not complying with subcontracting limitations in its contract is dismissed because the allegation involves a contract administration matter which is not for consideration by General Accounting Office under its bid protest function.

Procurement

Socio-Economic Policies**■ Small businesses****■ ■ Competency certification****■ ■ ■ Information disclosure**

Protest is sustained where the Small Business Administration's denial of a certificate of competency to a small business concern is based upon substantially incorrect information concerning the monetary value of the proposed award and the difference between the government's estimate and the offeror's bid.

Procurement

Socio-Economic Policies**■ Small businesses****■ ■ Contract award notification****■ ■ ■ Notification procedures****■ ■ ■ ■ Pre-award periods**

Procurement

Socio-Economic Policies**■ Small businesses****■ ■ Contract awards****■ ■ ■ Size status****■ ■ ■ ■ Misrepresentation**

Protest is sustained where, contrary to Federal Acquisition Regulation, agency awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, without executing a determination of urgency prior to award or giving prior notice of the proposed award to unsuccessful offerors which prevented protester from challenging awardee's size status prior to award.

Procurement

Bid Protests**■ GAO procedures****■ ■ Purposes****■ ■ ■ Competition enhancement**

Protest that agency should not have amended solicitation to extend bid opening date to allow greater competition is dismissed since complaint about action taken to increase competition does not constitute a proper basis for protest.

Procurement

Contractor Qualification**■ Responsibility****■ ■ Contracting officer findings****■ ■ ■ Affirmative determination****■ ■ ■ ■ GAO review**

Protest contention that, contrary to representations in its bid, awardee does not have on file compliance reports required by equal opportunity laws and regulations and has not developed affirmative action plans is dismissed since such affirmative action requirements are matters of responsibility and the General Accounting Office generally will not review a contracting officer's affirmative responsibility determination.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Personnel**

Protester's disagreement with source selection authority's evaluation conclusions that awardee had met all solicitation requirements with regard to personnel experience, availability, and security clearance, does not establish that selection authority's evaluation was unreasonable.

Procurement

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

Decision to award on the basis of the lower-cost, lower-rated technical proposal was reasonable where source selection authority made a detailed evaluation of the relative strengths and weaknesses of the proposals, setting forth his reasons for disagreeing with the technical evaluation team, which reasonably supports his conclusion that protester's superior technical proposal did not justify award at its significantly higher cost.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Price competition

Agency's decision to award contract to offeror whose proposal includes items rated marginally acceptable does not constitute waiver of solicitation requirements where agency made a reasonable cost/technical tradeoff determination that protester's higher-rated items did not justify its significantly higher cost.

B-236121.2; B-236899, December 18, 1989

89-2 CPD 561

Procurement

Contractor Qualification

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

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability
- ■ ■ ■ Information submission

Agency reasonably found bidder nonresponsive where bidder failed to provide sufficient information to permit a finding that the individual sureties on its bid bond were acceptable.

B-236598, December 18, 1989

89-2 CPD 562

Procurement

Sealed Bidding

- Bid opening
- ■ Extension
- ■ ■ Refusal
- ■ ■ ■ Competition sufficiency

Procurement

Sealed Bidding

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

Protest that contracting agency did not obtain full and open competition because protester did not receive its copy of solicitation until 1 day before bid opening and agency refused to extend bid opening date or to accept a "FAX" bid, is denied where agency made diligent, good-faith efforts to publicize and distribute the solicitation, which contained classified material, consistent with security clearance requirements, and obtained two bids at prices which have not been shown to be unreasonable.

Procurement

Sealed Bidding

- **Qualified bids**
- ■ **Responsiveness**

Bid was properly rejected as nonresponsive where the bid contained a provision requiring the government to order a minimum option quantity, if it ordered any quantity under an option clause which gave the government the unilateral right to increase the quantity up to 300 percent of the basic contract quantity.

Procurement

Payment/Discharge

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

A carrier does not overcome the government's *prima facie* case of liability against it for damaged property by asserting that the property owner, who did not allege the damage until after delivery, denied the firm the right to inspect in the stipulated time period, where the owner denies the carrier's assertion and the carrier did not meet its obligation to pursue its inspection right vigorously once it perceived that the owner would not cooperate.

Procurement

Sealed Bidding

- **Invitations for bids**
- ■ **Cancellation**
- ■ ■ **Justification**

Solicitation for refuse collection and disposal services should be canceled where federal facility, located within city limits, is by statute subject to local requirement to use city's exclusive franchise for refuse collection and transportation, and does not constitute a "major federal facility" exempt from statutory requirement to use local franchisee.

Procurement

Government Property Sales

- **Timber sales**
- ■ **Resolicitation**

Protest that agency violated regulatory prohibition against consideration of bid on timber resale from bidder who failed to complete the original contract is denied where agency determined allowing firm to compete was in the public interest, the exception provided for in the regulation.

Procurement

Bid Protests

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

Third low bidder is not an interested party to question awardee's responsibility or responsiveness since it would not be in line for award even if the issue were resolved in its favor.

Procurement

Bid Protests

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

Protest against alleged solicitation defects which are apparent prior to bid opening must be filed prior to bid opening.

Procurement

Bid Protests

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

Protest to General Accounting Office against alleged solicitation defects must be filed within 10 working days following initial adverse agency action on agency-level protest.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Subcontractors

Previous dismissal is affirmed on reconsideration because the General Accounting Office does not consider protests from potential subcontractors since they are not interested parties under Competition in Contracting Act of 1984.

Procurement

Bid Protests

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

Firm that did not submit bid is not interested party to challenge propriety of award to the low bidder, since it would not be in line for the award if its protest were sustained.

Procurement

Bid Protests

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

Dismissal of protest as untimely is affirmed on reconsideration where protester initially filed agency-level protest of alleged solicitation defects, and did not then file its subsequent protest with General Accounting Office within 10 working days after agency proceeded with bid opening, the initial adverse agency action on the protest.

Procurement

Competitive Negotiation

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

Award on the basis of initial proposals to the firm judged to be most advantageous under the evaluation factors listed in the solicitation but proposing second lowest cost was proper where the only lower-priced proposal was technically unacceptable.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

The determination of the merits of an offeror's technical proposal is primarily the responsibility of the procuring agency and will be questioned only upon a showing of unreasonableness.

Procurement

Bid Protests

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

New and independent grounds of protest filed more than 10 working days after notification of the bases of protest are dismissed as untimely.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Options
- ■ ■ ■ Prices

Price evaluation was not improper where the solicitation included two conflicting clauses concerning the evaluation of options, but the awardee was the low offeror under either clause.

Procurement

Competitive Negotiation

- Unbalanced offers
- ■ Materiality
- ■ ■ Determination
- ■ ■ ■ Criteria

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

An offer is not materially unbalanced where the offeror's cost structure is consistent with a design approach permitted under the solicitation, and the offer represents the lowest cost to the government.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Information submission
- ■ ■ ■ Contractor duties

Where offeror identifies itself as an independent cost center within a greater corporate structure and does not clearly commit the resources of the "parent" corporation in its proposal, contracting

agency may restrict its evaluation to the independent resources it reasonably finds committed by the offer.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Information submission
- ■ ■ ■ Contractor duties

Failure to specify the government/contractor share ratio in cost proposal for fixed-price incentive contract renders the offer ambiguous as to a material term. Where such material term is first omitted from the best and final offer, procuring agency is not required to reopen discussions.

B-236813.2, December 20, 1989

89-2 CPD 573

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Protester may not be awarded the costs of filing and pursuing protest where General Accounting Office properly dismissed protest as academic, since no decision on the merits of the protest was issued.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Sufficiency

Where agency reasonably determined that stated evaluation scheme was defective because it did not reflect the agency's actual needs, agency is not required to make award to protester whose price was evaluated as low under defective evaluation scheme.

Procurement

Competitive Negotiation

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

Protest objecting to amendment of solicitation's evaluation factors prior to the date for receipt of proposals is denied, since contracting agencies have broad discretion to amend the terms of a solicitation, including the relative weights of evaluation criteria.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability
- ■ ■ ■ Information submission

In determining the acceptability of an individual bid bond surety, an agency may consider the surety's failure to disclose other bond obligations on the affidavit of individual surety, Standard Form 28, and where the record indicates a continuing pattern by the surety of not disclosing outstanding bond obligations, a contracting officer has a reasonable basis to reject the surety as unacceptable.

Procurement

Competitive Negotiation

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

General Accounting Office will not disturb an agency's determination to exclude a proposal from the competitive range where the proposal: (1) did not meet the minimum requirements of the solicitation; (2) was so technically deficient that only major revision would render it technically acceptable; and (3) when compared to other submitted proposals, had no reasonable chance for award.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Adequate discussions were conducted where agency perceived deficiencies in the protester's proposal relating to a lack of technical information required by the solicitation to detail changes to be made to off-the-shelf equipment to meet specifications; this concern was communicated to the protester; and the protester submitted an amended offer which contained additional, albeit insufficient, technical data in response.

Procurement

Competitive Negotiation

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

Proposal to modify off-the-shelf electronic components to meet solicitation's salient characteristics was reasonably determined to be technically unacceptable where technical drawings accompanying the proposal contained insufficient information regarding the dimensions of the equipment offered and the configuration and operation of the electronic circuitry to be provided.

Procurement

Socio-Economic Policies

- **Small businesses**
- ■ **Competency certification**
- ■ ■ **Applicability**

Agency was not required to refer the rejection of protester's offer based on grounds of technical unacceptability to the Small Business Administration for certificate of competency proceedings.

B-236829, December 21, 1989

89-2 CPD 578

Procurement

Contract Management

- **Contract administration**
- ■ **Contract terms**
- ■ ■ **Modification**
- ■ ■ ■ **Level-of-effort contracts**

Procurement

Noncompetitive Negotiation

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

Execution of contract modification for additional level-of-effort hours necessary for incumbent to complete ongoing research projects is not objectionable where agency has reasonably determined that a competitive procurement for the requirement is not feasible since only incumbent can perform in required timeframe.

B-236950, December 21, 1989

89-2 CPD 579

Procurement

Sealed Bidding

- **Unbalanced bids**
- ■ **Materiality**
- ■ ■ **Responsiveness**

A bid which incorporates a high price for preventative maintenance, for which substantial payment may be received early during contract performance, and a substantially lower price for corrective maintenance is not mathematically unbalanced, nor would such payment be tantamount to advance payment, where the government intended the contractor to perform a substantial amount of preventative maintenance in order to minimize the time that facilities are nonoperational, and the awardee's pricing is consistent with the government estimate.

Procurement

Bid Protests

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

Procurement

Bid Protests

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

"Good cause" and "significant issue" exceptions to General Accounting Office's Bid Protest Regulations' timeliness requirements do not apply to request by Panamanian concern for reconsideration of protest dismissed as untimely filed because: (1) good cause exception does not apply to facts surrounding protester's method of transmitting protest or to date protester chose to transmit protest; and (2) significant issue exception does not apply to consideration of nonresponsibility determination involving protester's prior performance since issue is not a novel one of widespread interest to the procurement community.

Procurement

Contractor Qualification

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

Procurement

Scaled Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Contracting officer's finding of bidder nonresponsibility was properly based upon the unacceptability of individual sureties who are the subjects of an ongoing government investigation in connection with their furnishing of bid guarantees pledging overvalued stock.

Procurement

Payment/Discharge

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

The Army may not reimburse the Hyatt Regency Hotel for food and refreshments served. Payment may not be made on a *quantum meruit* basis where the Army could not have procured the goods or services had formal procedures been followed.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency's failure to identify the awardee's ineligibility for award and to afford the awardee an opportunity to correct this alleged deficiency constitutes a lack of adequate discussions is denied since protester had constructive notice that its nonprofit status rendered it ineligible for award of a small business set-aside.

Procurement

Contract Management

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

Protest against termination of contract based on determination that awardee was ineligible to receive the award under a small business set-aside is denied where the awardee certified that it is a nonprofit organization and the applicable Small Business Administration regulations define a small business in terms of a business entity organized "for profit."

Procurement

Contract Management

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

Allegation that decision to terminate contract resulted from improper congressional influence is denied where the record does not support the allegation.

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Use
- ■ ■ Justification

Where record shows that maintenance services were previously acquired through a small business set-aside and the contracting officer reasonably expected offers from at least two qualified small business concerns, there is no basis to conclude that the decision to set aside the current procurement was improper.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Price reasonableness

Decision holding that cancellation of invitation for bids after bid opening was proper is affirmed where agency implicitly determined that protester's bid was unreasonably high and that cancellation would be in the government's best interest since on resolicitation in subsequent fiscal year agency could expect to receive lower prices and thus to acquire the required work at lower cost to the government.

Procurement

Contract Management

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

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Criteria

Agency properly used a new solicitation to test the reasonableness of option prices where, because bids had been close and a new requirement under the prior solicitation had caused some bidders to overprice one item, the agency was unable to determine that exercise of the option was the most advantageous method of satisfying its needs.

Procurement

Bid Protests

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

Protest that agency improperly solicited competitive bids for life rafts based on data allegedly proprietary to protester, and that procurement should have been from qualified products list, is dismissed as untimely where same allegations initially were raised in agency-level protest, and subsequent protest to General Accounting Office was not filed within 10 working days after agency proceeded to accept bids, which was initial adverse agency action.

Procurement

Bid Protests

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

Procurement

Sealed Bidding

- Bid guarantees
- ■ Validity
- ■ ■ State/local laws
- ■ ■ ■ Applicability

Allegation that Treasury Department Circular 570 improperly permits acceptance of corporate sureties not licensed in state of contract performance involves challenge to alleged solicitation impropriety and therefore is untimely when not filed prior to bid opening, and in any event, presents issue for the Treasury Department or the courts, not this Office, to decide.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Validity
- ■ ■ State/local laws
- ■ ■ ■ Applicability

Contention that bid bond was defective because it was executed by corporate surety not licensed to do business in state where contract is to be performed is denied since there is no requirement in Treasury Department Circular 570, which prescribes qualifications for corporate sureties, that surety be licensed in state of performance, and prospective awardee's surety in fact was licensed in the state where the bond was executed, as required by the Treasury Circular.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Low bids were properly rejected on the basis that individual bid bond sureties were unacceptable where their Affidavits of Individual Surety contained gross inconsistencies, misstatements and omissions of essential information, and where the contracting officers had a reasonable basis to question the accuracy and sufficiency of the surety's evidence of financial acceptability and net worth.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Eligibility
- ■ ■ ■ Criteria

Nonresponsibility determination based on unacceptability of required individual bid bond sureties need not be referred to the Small Business Administration for review under the Certificate of

Competency procedures, since such determinations are based solely on the qualifications of the surety, not the small business offeror.

B-237129, December 22, 1989

89-2 CPD 588

Procurement

Contractor Qualification

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

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability
- ■ ■ ■ Information submission

Agency reasonably found bidder nonresponsive where bidder failed to provide sufficient information to permit a finding that the individual sureties on its bid bond were acceptable.

B-237213, December 22, 1989

89-2 CPD 589

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Agency's cancellation of a brand name or equal request for proposals (RFP) after receipt of best and final offers was proper where the contracting officer reasonably determined that the RFP overstated the agency's minimum needs and discovered similar equipment meeting the agency's minimum needs at lower cost on a mandatory Federal Supply Schedule.

B-237278.3, December 22, 1989

89-2 CPD 590

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Procurement

Small Purchase Method

- Quotations
- ■ Preparation costs

There is no basis for an award of quote preparation and protest costs where the protest was dismissed as academic, since a prerequisite to the award of costs is a decision on the merits of a protest.

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

- Best/final offers
- ■ Multiple offers
- ■ ■ Justification

Protest that solicitation amendment that called for revised proposals and agency's subsequent request for a second round of best and final offers (BAFOs) resulted in an auction is untimely where protest was not filed until after the dates the revised proposals and BAFOs were due.

Procurement

Competitive Negotiation

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

Fact that protester received higher score in the evaluation of its proposal under the solicitation before an amendment calling for revised proposals was issued and a lower score when its revised proposal was evaluated does not necessarily mean that the later evaluation was not in accordance with the evaluation criteria since the amendment was issued to correct deficiencies in the evaluation plan, the instructions to offerors and the evaluation factors. General Accounting Office finds no improprieties in the evaluation record.

Procurement

Competitive Negotiation

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

Even though the protester received a higher point score under solicitation evaluation formula incorporating cost and technical factors, the contracting officer reasonably selected a significantly lower-priced offeror for award, where both offerors proposed substantially the same technical approach and the protester's high price was caused by its substantial overstatement of one element of cost in its fixed price, a matter that was brought to its attention during discussions, such that the agency could not find the protester's price was reasonable.

Procurement

Competitive Negotiation

- Discussion
 - ■ Adequacy
 - ■ ■ Criteria
-

Procurement

Competitive Negotiation

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

Agency properly conducted more extensive technical discussions with an offeror who submitted incomplete proposal than with the protester who submitted substantially complete proposal with no notable deficiencies.

B-236614, December 26, 1989

89-2 CPD 593

Procurement

Bid Protests

- Allegation substantiation
- ■ Burden of proof

A protester's allegation that a competitor had special access to "inside" procurement information, based upon an article in a trade journal, does not provide a basis to question a procurement, where the protester produces no concrete evidence to support contentions, even after being given the opportunity to question cognizant agency officials at the General Accounting Office bid protest conference.

Procurement

Specifications

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

Agency has established a reasonable basis for its allegedly restrictive specification for a semi-automatic handgun that it be double-action first shot and singleaction subsequent shots, where the specification is based upon legitimate safety concerns and where the protester's attack on the specification primarily concerns the agency's training policy in use of handguns, a matter the General Accounting Office will not question under its bid protest function.

B-236631, December 26, 1989

89-2 CPD 594

Procurement

Bid Protests

- Contract performance
- ■ Work suspension

Where an agency makes the determination that award must be made notwithstanding pending protest because of urgent and compelling circumstances significantly affecting the United States, submission by protester filed within 10 days of agency's determination which essentially reiterates initial protest will not be considered a new post-award protest requiring agency to direct contractor to cease performance or make another determination.

Procurement

Bid Protests

■ Contract performance

■ ■ Work suspension

Where an agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for a decision by the General Accounting Office (GAO) on a bid protest, and notifies GAO prior to making award, the agency has complied with the Competition in Contracting Act of 1984 (CICA). Further, GAO does not review the agency's determination.

Procurement

Bid Protests

■ GAO procedures

■ ■ Interested parties

A protester has no standing to claim an error in a competitor's bid, since it is the responsibility of the contracting parties—the government and low bidder—to assert rights and bring forth the necessary evidence to resolve mistake questions.

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Determination criteria

Bid is responsive where as submitted it is an offer to perform without exception the exact thing called for in the solicitation and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions of the solicitation.

Procurement

Sealed Bidding

■ Contracting officer duties

■ ■ Responsibility criteria

■ ■ ■ Pre-award surveys

Procurement

Specifications

■ Brand name/equal specifications

■ ■ Equivalent products

■ ■ ■ Salient characteristics

■ ■ ■ ■ Minor deviations

Conversation between bidder and agency project director concerning solicitation specifications, where bidder was told by project director that he was without authority to grant bidder permission to deviate from solicitation specifications but that bidder could attempt to get specifications changed after award was not an improper "secret" grant of permission to deviate from specifications.

Procurement

Competitive Negotiation

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

Selection of the awardee on the basis of its overall technical superiority and low risk, notwithstanding its higher price is not objectionable where selection is adequately explained in the evaluation documents and has not been shown to be inconsistent with the established evaluation factors.

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Bad faith
- ■ ■ ■ Allegation substantiation

Where bidder, under several previous contracts, had satisfactorily supplied the government with engine components similar to the component being solicited, the contracting officer did not act in bad faith in making an affirmative determination that the bidder was responsible.

Procurement

Sealed Bidding

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

Protest against award of a contract to a bidder that failed to complete and sign Certificate of Procurement Integrity is denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for a Certificate, which implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988, has been suspended from December 1, 1989 to November 30, 1990, by section 507 of the Ethics Reform Act of 1989.

Procurement

Competitive Negotiation

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

Contracting officer properly decided to award a firm, fixed-price contract to the offeror of the higher-rated, higher-priced proposal, where: (1) the solicitation stated that technical factors would be considered significantly more important than price; (2) the awardee's proposal was rated higher than the protester's in every technical evaluation factor; and (3) the awardee's proposal received a higher overall evaluation score when the weighted technical and price evaluation scores were combined.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Point ratings

Protest that Navy evaluators were required to quantify their evaluation of proposals under Navy regulations that allow paying premiums for "measured increments of quality" is denied, where the record shows that evaluators made independent determinations of the strengths and weaknesses of proposals in a number of subfactors within each technical factor set forth in the request for proposals, and the evaluations were supported by both qualitative statements and point scores representing as accurately as possible the quality of each proposal in each evaluation subfactor.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Protest based upon minor discrepancies found in evaluation documents related to evaluation of protester's initial proposal is denied, where alleged discrepancies either are adequately explained by the contracting agency or discrepancies had no effect on the ultimate selection.

B-235831.3, B-236695, December 27, 1989

89-2 CPD 599

Procurement

Sealed Bidding

■ Bid guarantees

■ ■ Sureties

■ ■ ■ Acceptability

■ ■ ■ ■ Information submission

Bid properly rejected where bidder found nonresponsive for its failure to provide sufficient information that individual bid bond sureties were acceptable.

B-236732, December 27, 1989

89-2 CPD 600

Procurement

Specifications

■ Brand name/equal specifications

■ ■ Equivalent products

■ ■ ■ Acceptance criteria

Where protester argues that awardee's proposed "equal" data storage system under brand name or equal procurement does not meet salient characteristics for mean-time-between-failure (MTBF), but protester's own proposed "equal" system would likewise fail to comply under the protester's calculation of MTBF, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protest is dismissed where the issue was considered and denied in an earlier protest involving the same parties.

Procurement

Bid Protests

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

Protest which is not filed within 10 working days of when protester knew of the basis of its protest (allegedly improper cancellation of solicitation) is dismissed as untimely.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Proposed sole-source award is unobjectionable where the agency complied with statutory requirements for written justification and publication of notice in the *Commerce Business Daily* (CBD), and agency reasonably determined that only one source is available to supply the desired item. Protester, who submitted a statement of interest in response to CBD notice and solicitation, failed to submit any technical data showing how it would meet detailed requirements of the solicitation, even though it was specifically requested to do so, and thus did not establish that it is an available supplier.

Procurement

Bid Protests

- Subcontracts
- ■ GAO review

The General Accounting Office will not consider a bid protest by a subcontractor concerning a subcontract award by a prime construction contractor where the government's involvement is not so pervasive that the prime contractor should be considered a mere conduit for the government.

Procurement

Contractor Qualification

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

The General Accounting Office will not review a protest against challenging agency's affirmative determination of awardee's responsibility where there is no showing that the contracting officials may have acted fraudulently or in bad faith.

Procurement

Competitive Negotiation

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

When, in its comments on the agency report, the protester does not rebut the agency's explanation for its elimination of the protester from the competitive range, which appears to be reasonable, the General Accounting Office has no basis to overturn the agency's decision.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Modification
- ■ ■ Acceptance criteria

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Options
- ■ ■ ■ Prices

Award to bidder which submitted step-ladder pricing for option items instead of single unit price called for by solicitation will not be disturbed despite the fact that for one quantity of option items (35 units) awardee's bid is slightly higher than protester's, since, given awardee's pricing scheme—under which price for 35 option items is significantly higher than price for 36 items—there is no reasonable likelihood that agency will order the smaller quantity.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

To be considered, a request for reconsideration must indicate error of fact or law or information not previously considered that would warrant reversal or modification of a prior dismissal. The

mere restatement of arguments previously considered, or mere disagreement with the dismissal does not meet this standard.

B-236728, December 29, 1989

89-2 CPD 608

Procurement

Competitive Negotiation

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

Protest that agency should make award on the basis of initial proposals since protester's initial proposal was lower in price than the awardee's best and final offer (BAFO) price submitted after discussions were held is denied. Federal Acquisition Regulation provides that where discussions have been held award should be made on the basis of BAFOs.

Procurement

Competitive Negotiation

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Protest is denied where record fails to support protester's contention that it was misled during discussions into increasing its price. Record shows that price increase was due to protester's more than doubling its overhead rate after discussions during which agency specifically accepted lower overhead rate initially proposed.

B-236846, December 29, 1989

90-1 CPD 6

Procurement

Contractor Qualification

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

Protester was properly found nonresponsible where it failed to provide sufficient information to permit a finding that the individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonably based.

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