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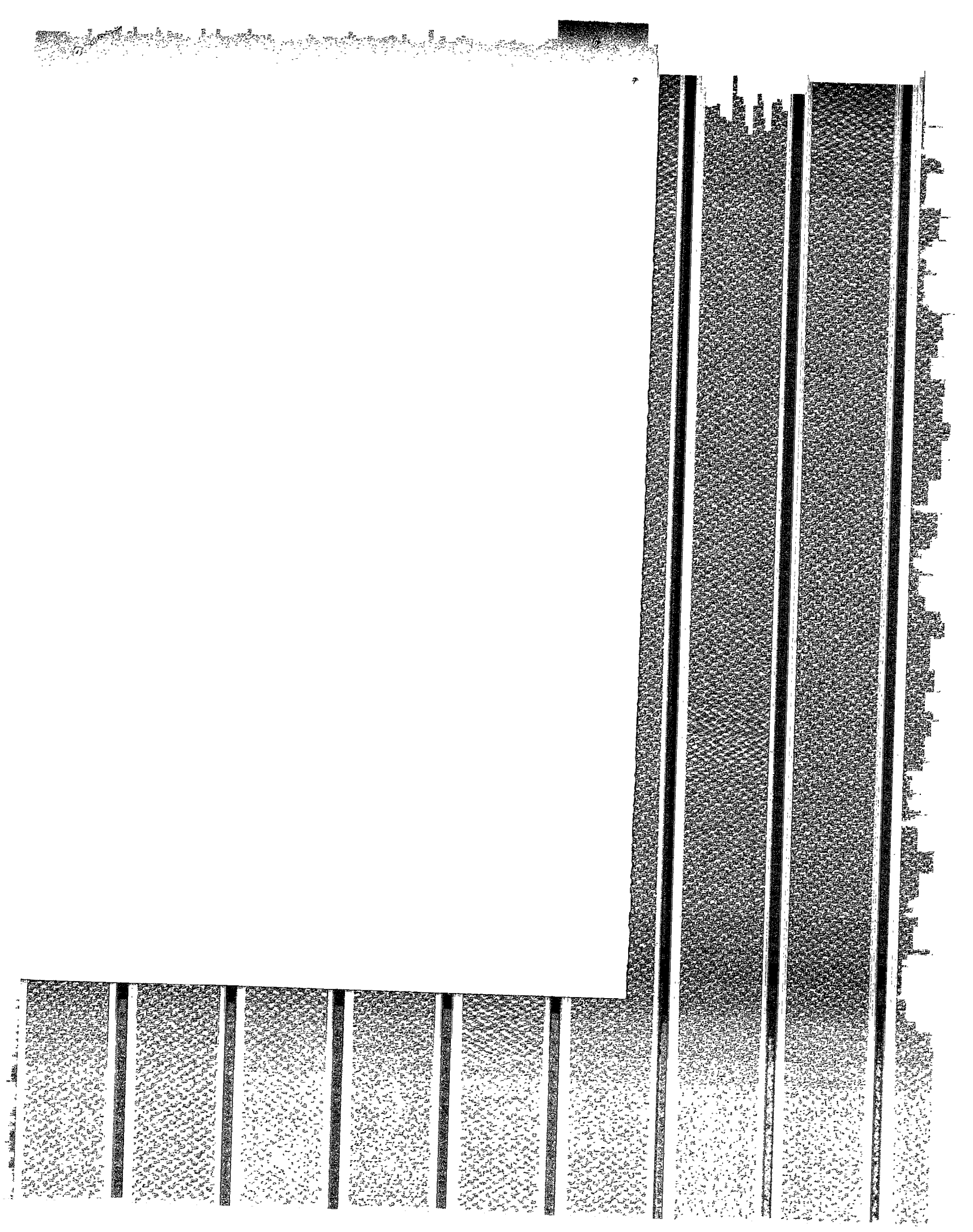
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Digests of Decisions of the Comptroller General of the United States

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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-237915, May 4, 1990

Appropriations/Financial Management

Amount Availability

- Augmentation
- ■ Gifts/donations
- ■ ■ Advertising

The Chairman, Committee on Government Operations, House of Representatives, is advised that we have no legal objection to a memorandum of understanding entered into by the National Archives and Records Administration (NARA) with Philip Morris Companies Inc., in connection with the bicentennial of the United States Constitution during the period of 1989-91, in view of the broad statutory authority granted NARA to solicit and accept gifts. 44 U.S.C. §§ 2112(g)(1), 2305 (Supp. V 1987).

B-237082, et al., May 8, 1990

Appropriations/Financial Management

Accountable Officers

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

Relief is granted Department of the Treasury disbursing official under 31 U.S.C. § 3527 for duplicate check overpayments. The overpayments were not the result of bad faith or lack of reasonable care, an adequate system of procedures and controls was maintained, and diligent collection actions were taken.

B-236057, May 9, 1990

Appropriations/Financial Management

Claims Against Government

- Past due accounts
- ■ Royalties
- ■ ■ Interest

Section 111(b) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(b), imposes an interest charge on any payment of oil or gas royalties made by the Secretary of the Interior which is "not paid on the [monthly] date required under section 35" of the Mineral Leasing Act (MLA). 30 U.S.C. § 191. We believe this interest charge provision applies only to payments that are subject to the monthly payment date specified in section 35. Oil or gas royalty payments from National Forest acquired lands, which the Forest Service is effectively responsible for disbursing, are required to be distributed annually, in accordance with 16 U.S.C. § 500, and are not subject to the monthly payment requirement of section 35 of the MLA. In our view, nothing in FOGRMA changes this annual distribution date requirement for the Forest Service. Accordingly,

these payments are not required to be made monthly as specified in section 35 of the MLA and are not subject to the interest charge provision of section 111(b) of FOGRMA.

B-227353, May 23, 1990***

Appropriations/Financial Management

Budget Process

- Funds transfer
- ■ General/administrative costs
- ■ ■ Cost allocation

Section 7(c)(2) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231f(c)(2) (1982), provides for transferring funds between the Social Security trust funds and the Railroad Retirement Account. When computing costs for this purpose, either full costing or incremental costing may be used since administrative cost determinations are left to the discretion of Railroad Retirement Board and Secretary of Health and Human Services.

B-230434.3, May 24, 1990

Appropriations/Financial Management

Claims Against Government

- Claim settlement
- ■ GAO authority

Appropriations/Financial Management

Claims Against Government

- Claim settlement
- ■ Pending litigation
- ■ ■ GAO review

Claimant is advised that this Office will take no further action on his claim since the claims are currently the subject matter of his appeal before a court of competent jurisdiction, and if his appeal is unsuccessful, the doctrine of *res judicata* would apply. There is no mandatory requirement that the Comptroller General must settle all claims for and against the United States since the statutory language in 31 U.S.C. § 3702(a) (1988), states "except as provided in this chapter or another law."

B-238487, May 25, 1990

Appropriations/Financial Management

Claims Against Government

- Burden of proof

When there is an irreconcilable dispute of fact between a government agency and a claimant, the burden is on the claimant to prove his claim. See 4 C.F.R. § 31.7. Therefore a service member's claim for a \$150 withdrawal from an automatic teller machine which he says he never received must be denied when the Air Force record shows that the \$150 was paid to him.

Civilian Personnel

B-237836, May 2, 1990

Civilian Personnel

Relocation

- Purposes
- ■ Determination
- ■ ■ Administrative discretion

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-236861, May 3, 1990

Civilian Personnel

Leaves Of Absence

- Annual leave
- ■ Forfeiture
- ■ ■ Restoration

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-238640, May 3, 1990

Civilian Personnel

Travel

- Bonuses
- ■ Acceptance
- ■ ■ Propriety

Under GSA's regulations and decisions of the Comptroller General, denied boarding compensation payments made by air carriers for failing to furnish seats to travelers who had tickets because of overbooking are due the government, not the travelers, when the payments result from travel on official business. The difference in treatment between these payments and payments made by air carriers to travelers *voluntarily* giving up their seats on overbooked airplanes (which the travelers would be allowed to keep) is explained in *Elizabeth Duplantier*, 67 Comp. Gen. 328 (1988).

B-232173, May 4, 1990

Civilian Personnel

Relocation

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

Husband and wife employees, who had dependent children, were separately transferred to Washington, D.C., 7 months apart. Both claimed a miscellaneous expense allowance under chapter 2, part 3, of the Federal Travel Regulations, at the \$700 rate for an employee with immediate family. They are both entitled to the allowance because they were transferred at different times and each transferred with a dependent child.

Civilian Personnel

Relocation

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

Husband and wife employees were separately transferred to Washington, D.C., 7 months apart. The husband, who was transferred first, was authorized and received temporary quarters subsistence expenses (TQSE) for 120 days. Upon the wife's later transfer she was authorized and received 60 days TQSE for herself and a dependent child, but her claim for her husband's expenses as a family member was disallowed. Since the husband and wife employees were transferred to the same location but at different times, each is separately entitled to relocation expenses as an employee. Although the husband received full TQSE benefits in his own right, the wife may include him as a family member under her TQSE entitlement.

B-236219, May 4, 1990

Civilian Personnel

Travel

- Bonuses
- ■ Rebates
- ■ ■ Acceptance
- ■ ■ ■ Propriety

A federal employee who charges official travel expenses on a personal charge card and who receives a cash or credit rebate for purchases made on that card during the calendar year, is entitled to keep the entire rebate. The rebate is not directly related to official travel and, therefore, is not the property of the federal government.

B-237660, May 4, 1990

Civilian Personnel

Travel

- Temporary duty
- ■ Travel expenses
- ■ ■ Reimbursement

A member of the U.S. Army Reserve serving a 138 day Temporary Tour of Active Duty in the Washington, D.C. area, after responding to a request by Army Personnel for a legal officer residing in that area, is not entitled to travel expenses and mileage when he declared Columbia, Mary-

land, as his residence rather than his actual home in Fayetteville, North Carolina, in order to qualify for the selection.

B-195374.3, May 15, 1990

Civilian Personnel

Relocation

■ Expenses

■ ■ Reimbursement

■ ■ ■ Eligibility

■ ■ ■ ■ Service breaks

An employee, separated from an agency by reduction-in-force action, is not entitled to reimbursement of relocation expenses since, under 5 U.S.C. § 5724a(c) (1970), he was not reemployed within 1 year from the date of separation. Upon further review of the circumstances in *Robert Garcia*, B-195374, Sept. 14, 1979, we still decline to recommend this claim to the Congress as a meritorious claim under 31 U.S.C. § 3702(d)(1988).

B-216640.8, May 16, 1990***

Civilian Personnel

Compensation

■ Overtime

■ ■ Claims

■ ■ ■ Statutes of limitation

On reconsideration, our prior decision denying additional overtime compensation to individual members of the International Association of Firefighters, Local F-100, is affirmed. An initial request for a decision was not accompanied by a signed representation authorization or claim over the signature of the individual claimants so as to toll the 6-year Barring Act, 31 U.S.C. § 3702(b) (1982). The 6-year period of limitation in 31 U.S.C. § 3702(b) is a condition precedent to the right to have a claim considered by our Office, and our Office has no authority to waive or modify its application.

B-237607, May 21, 1990

Civilian Personnel

Relocation

■ Residence transaction expenses

■ ■ Reimbursement

■ ■ ■ Eligibility

An employee who transferred from England to a position in the United States was issued travel orders authorizing expenses for the sale of his residence in England. The employee is not entitled to such expenses because his international transfer was not of the type for which real estate expenses are authorized under , and in any event the expenses allowed under that statute are limited to those incurred within the United States. In addition, we decline to submit the claim to Congress for consideration as a meritorious claim under 31 U.S.C. § 3702(d).

B-235902, May 22, 1990***

Civilian Personnel

Compensation

- **Retroactive compensation**
- ■ **Adverse personnel actions**
- ■ ■ **Attorney fees**
- ■ ■ ■ **Eligibility**

Although there is no authority to pay attorney fees in connection with an administrative settlement of a complaint of age discrimination, a federal agency may pay the full claim for attorney fees related to settlement of an employee's age and sex discrimination complaints where the agency concedes that the employee would have prevailed in the same manner on just the sex discrimination complaint.

B-237972, May 22, 1990

Civilian Personnel

Relocation

- **Residence transaction expenses**
- ■ **Refinancing**
- ■ ■ **Fees**
- ■ ■ ■ **Reimbursement**

A transferred employee refinanced the mortgage on his residence at his old duty station to obtain assumable financing to make it more saleable. The agency disallowed the percentage fee paid the lender for refinancing as either a loan discount or prepayment of interest, neither of which may be reimbursed under the Joint Travel Regulations (JTR). The charge made by the lender, however, is in the nature of a mortgage prepayment penalty which is an allowable expense under paragraph 2-6.2d(1)(g) of the Federal Travel Regulations and paragraph C14002d(1), item 7, of the JTR. Therefore, payment may be made to the extent reasonable and customary and otherwise reimbursable under those provisions. See *Marshall L. Dantzler*, 64 Comp. Gen. 568 (1985).

Military Personnel

B-237796, May 9, 1990

Military Personnel

Pay

■ Pay retention

■ ■ Amounts

■ ■ ■ Computation

While 10 U.S.C. § 6330(d) in effect in 1981, authorized the crediting of part of a year that was 6 months or more as a full year for eligibility for transfer to the Fleet Reserve and for multiplier purposes in computing retainer pay, there is no authority to credit 6 months or more service as a full year for the basic pay portion of the retainer pay formula.

Military Personnel

Pay

■ Retirement pay

■ ■ Amount determination

■ ■ ■ Computation

■ ■ ■ ■ Effective dates

The retired pay of an enlisted member of the Navy transferred to the temporary disability retired list prior to September 30, 1983, should not be recomputed on his transfer to the permanent disability retired list to reflect changes in the law for crediting of service for retirement purposes when no intervening active duty occurs.

B-238487, May 25, 1990

Military Personnel

Pay

■ Deposit accounts

■ ■ Automatic teller machines

When there is an irreconcilable dispute of fact between a government agency and a claimant, the burden is on the claimant to prove his claim. *See* 4 C.F.R. § 31.7. Therefore a service member's claim for a \$150 withdrawal from an automatic teller machine which he says he never received must be denied when the Air Force record shows that the \$150 was paid to him.

Miscellaneous Topics

B-238959, May 2, 1990

Miscellaneous Topics

National Security/International Affairs

■ National defense interests

■ ■ Set-off

■ ■ ■ Reports

In order to prepare the annual offset report in compliance with section 309 of the Defense Production Act of 1950, the Office of Management and Budget (OMB) must use inter-agency studies covering the information identified in Section 309(b)(1)(A) and (B) of the Act. 50 U.S.C. App. § 2099(b) (Supp. V 1987). Because the Act does not specify the method by which such studies are to be conducted, a survey of subcontractors and nondefense industry sectors is not required, so long as the studies otherwise satisfy the requirements of the Act.

B-234243.1, May 8, 1990

Miscellaneous Topics

Federal Administrative/Legislative Matters

■ Administrative agencies

■ ■ Financial management

■ ■ ■ Statutes

■ ■ ■ ■ Reformation

Section 111(b) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(b), imposes an interest charge on any payment of oil or gas royalties made by the Secretary of the Interior which is "not paid on the [monthly] date required under section 35" of the Mineral Leasing Act (MLA). 30 U.S.C. § 191. We believe this interest charge provision applies only to payments that are subject to the monthly payment date specified in section 35. Oil or gas royalty payments from National Forest acquired lands, which the Forest Service is effectively responsible for disbursing, are required to be distributed annually, in accordance with 16 U.S.C. § 500, and are not subject to the monthly payment requirement of section 35 of the MLA. In our view, nothing in FOGRMA changes this annual distribution date requirement for the Forest Service. Accordingly, these payments are not required to be made monthly as specified in section 35 of the MLA and are not subject to the interest charge provision of section 111(b) of FOGRMA.

B-239201.1, May 8, 1990

Miscellaneous Topics

Federal Administrative/Legislative Matters

■ Government corporations

■ ■ Audits

■ ■ ■ GAO authority

■ ■ ■ ■ Statutes

Informal memorandum to AFMD staff summarizes the research on whether statutes require GAO to conduct financial audits of government corporations.

B-236057, May 9, 1990

Miscellaneous Topics

Environment/Energy/Natural Resources

■ **Mineral issues**

■ ■ **Royalties**

■ ■ ■ **Interest**

Section 111(b) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(b), imposes an interest charge on any payment of oil or gas royalties made by the Secretary of the Interior which is "not paid on the [monthly] date required under section 35" of the Mineral Leasing Act (MLA), 30 U.S.C. § 191. We believe this interest charge provision applies only to payments that are subject to the monthly payment date specified in section 35. Oil or gas royalty payments from National Forest acquired lands, which the Forest Service is effectively responsible for disbursing, are required to be distributed annually, in accordance with 16 U.S.C. § 500, and are not subject to the monthly payment requirement of section 35 of the MLA. In our view, nothing in FOGRMA changes this annual distribution date requirement for the Forest Service. Accordingly, these payments are not required to be made monthly as specified in section 35 of the MLA and are not subject to the interest charge provision of section 111(b) of FOGRMA.

B-239598, May 17, 1990

Miscellaneous Topics

Human Resources

■ **Health care**

■ ■ **Communicable diseases**

■ ■ ■ **Administrative determination**

Provision in supplemental appropriations act directing the President to exclude HIV-infected aliens from admission to the United States was not permanent legislation in view of the absence of words of futurity, the fact that its purpose could be and was achieved during the effective period of the act, and the legislative history of the section. Section 518, Pub. L. No. 100-71.

Miscellaneous Topics

Human Resources

■ **Health care**

■ ■ **Communicable diseases**

■ ■ ■ **Administrative determination**

Miscellaneous Topics

National Security/International Affairs

■ **Immigration/naturalization**

■ ■ **Restrictions**

■ ■ ■ **Communicable diseases**

Because the President retains discretion to continue to exclude HIV-infected aliens from the United States, if Congress now believes that HIV infection should not constitute a basis for inadmissibility of aliens, legislation may be required to effect that change.

Procurement

B-233372.4, May 1, 1990***

90-1 CPD 436

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

Claim for bid protest costs incurred for working on a companion protest and in pursuit of a cost claim, and for contacting a congressional representative, are disallowed since they are unrelated to the pursuit of the protest.

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

Claim for a general and administrative expense factor to be applied to protester's direct expenses is disallowed in the absence of a sufficient explanation of the basis for that factor.

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

■ ■ ■ Attorney fees

■ ■ ■ ■ Amount determination

Agency's general objections to the allegedly "excessive" number of hours claimed by the protester as spent by its attorneys and employees in pursuit of its protest provide an insufficient basis for concluding that the attendant costs are not reasonable where the hours are properly documented and certified.

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

■ ■ ■ Profits

Claim for profits on protester's labor costs is disallowed since there is no statutory basis to award profits as part of the costs for pursuing a bid protest.

B-236450, May 1, 1990

Procurement

Payment/Discharge

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Where contracting agency reproduced in its own solicitation specifications drafted by the claimant without that firm's prior approval, claimant is entitled, on a *quantum valebant* basis, to the reasonable value of those services to the government.

B-238194, May 1, 1990

90-1 CPD 437

Procurement

Sealed Bidding

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

Bid for printing services is nonresponsive to invitation for bids requirement that bidder certify intent to supply paper containing waste paper content (WPC) of at least 50 percent. Bidder inserted ".50" under column entitled "Offeror's Percentage" of WPC; therefore, bid must be interpreted as one-half of 1 percent for WPC or 49.5 percent less than that required.

B-238207, B-238207.2, May 1, 1990

90-1 CPD 438

Procurement

Competitive Negotiation

- Best/final offers
- ■ Submission
- ■ ■ Timeliness

Where awardee's best and final offer (BAFO) is sent by facsimile transmission (FAX) 4 days prior to the closing date for BAFOs, but FAX is not time/date stamped by the contracting agency upon receipt, protest that agency failed to provide evidence of timely receipt is denied where protester does not contest that FAX was sent 4 days prior to the BAFO deadline, as indicated on the FAX copy, and the agency's receiving employee attests that the FAX was timely received.

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety

Where, after submission of best and final offers, contracting agency reduces its need for an item by one-half and awards a contract based on an evaluation of only one rather than two lots of the item as specified in the solicitation, agency did not improperly award the contract without amending the solicitation to reflect the reduced requirement because offerors were on notice that they were competing for only one contract for one-half of the requirement if a split award were made, and therefore were not prejudiced by the change.

Procurement

Contractor Qualification

- Licenses
- ■ State/local laws
- ■ ■ GAO review

The necessity for a business license in a particular state or locality is generally a matter between the contractor and the issuing authority (although it can be considered in making a determination of responsibility) and will not be a bar to a contract award, absent a specific licensing requirement in the procurement solicitation.

Procurement

Small Purchase Method

- Quotations
- ■ Submission time periods

Under the simplified procedures for small purchases, quotations beyond these initially received may generally be solicited and accepted by the government at any time prior to acceptance of any quote.

Procurement

Competitive Negotiation

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

Protest that agency failed to evaluate offers consistently with solicitation's evaluation scheme is denied where protester's interpretation of applicable solicitation language is unreasonable.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not objectionable where the agency reasonably determined that only one source could supply the desired non-developmental item within the time constraints of the procurement, and the protester's offered product reasonably was not found compliant with the agency's requirements.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration based on a protest allegation not considered in prior decision is denied where the allegation was untimely because the protester knew or should have known of this basis of protest no later than the time it filed its original protest, but failed to raise the matter until it filed its comments to the agency report, more than 10 working days after the date the basis of protest was known or should have been known.

Procurement

Competitive Negotiation

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

Award to the highest rated and highest priced offeror, instead of to the low-priced offeror, is unobjectionable where the awardee had the best price/quality point ratio.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Although contracting agency did not point out all identified deficiencies in the protester's proposal during discussions, the protester was not materially prejudiced so as to justify sustaining its protest, where, even assuming the protester's proposal received the maximum total score in the affected technical areas, it still would not be competitive with the awardee's proposal.

Procurement

Competitive Negotiation

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Agency did not mislead protester during discussions in stressing the importance of price where price accounts for 50 percent of the specified evaluation weight.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest is denied where the protester was given a complete debriefing by the agency and additional evaluation documentation by the General Accounting Office (GAO) pursuant to its request for documents under section 21.3(f) of GAO Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1989), and only

specifically contests the evaluation of certain subcriteria, the total value of which would not make the protester competitive with the awardee even if it received a perfect score for these items.

B-238631, May 2, 1990

90-1 CPD 444

Procurement

Sealed Bidding

- Bids
- ■ Expiration
- ■ ■ Reinstatement
- ■ ■ ■ Propriety

Bidder may be allowed to revive its bid and extend its bid acceptance period after the bid has expired where the bidder originally offered the minimum acceptance period requested by the agency and where revival of the bid would not compromise the integrity of the bidding system.

B-238645, May 3, 1990

90-1 CPD 445

Procurement

Bid Protests

- Fraud
- ■ Investigation
- ■ ■ Administrative proceedings

Protest is dismissed where contracting agency has referred the matter of the disclosure of the protester's proposal to a competitor to the Army Criminal Investigation Division (CID) for investigation. The protester may reinstate its protest with the General Accounting Office after receipt of the results of the CID's report.

B-239378, May 3, 1990

90-1 CPD 446

Procurement

Bid Protests

- Private disputes
- ■ GAO review

The General Accounting Office will not consider a protest that is based on what is essentially a dispute between private parties.

B-237415.2, May 4, 1990

90-1 CPD 447

Procurement

Bid Protests

- GAO authority

Determinations of law in decisions issued by the General Accounting Office in resolving bid protests will generally be followed unless overruled by a subsequent decision, statute or regulation.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Arguments considered and rejected by the General Accounting Office in denying original protest will not support request for reconsideration.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Terms
- ■ ■ Purchase orders
- ■ ■ ■ Quantity restrictions

Only reasonable reading of a Federal Supply Schedule contract is that an overall maximum order limitation (MOL) on any order is to apply to all the items listed on that contract, including those which do not have specific MOLs. Since the order for the lease of equipment exceeded the overall MOL, the General Accounting Office recommends that it be terminated.

Procurement

Competitive Negotiation

- Oral solicitation
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Propriety

Procurement

Competitive Negotiation

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

Evaluation method which subordinates price to technical considerations is not *per se* defective because price is not weighted or scored with other factors.

Procurement

Competitive Negotiation

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

Where initial oral solicitation was properly canceled because among other things it provided no common basis for evaluating offers, agency is not later precluded from conducting a separate competitively negotiated procurement in which price is subordinated to technical considerations, even though price may have been a more significant evaluation factor during the initial competition.

Procurement

Competitive Negotiation

- Use
- ■ Criteria

Agency seeking to obtain creative contractor-provided advertising services to publicly market real property acted reasonably in subordinating price to technical merit by using competitive negotiation format in lieu of sealed bidding procedures.

Procurement

Bid Protests

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

Protest to the General Accounting Office of a December 1987 award to another offeror on the basis that the firm was not qualified is dismissed as untimely because the protest was filed more than 10 working days after basis of protest was known or should have been known, and is not for consideration under the "good cause" or "significant issue" exceptions to the timeliness rules.

Procurement

Contract Management

- Contract administration
- ■ Contract terms
- ■ ■ Modification
- ■ ■ ■ Propriety

Protest of modification to another offeror's contract made 9 months after award which deleted a requirement that had been in the solicitation will not be considered by the General Accounting Office because modification involves matter of contract administration and it does not appear that the contract was awarded with the intent to modify it or that the modification is beyond the scope of the original contract.

Procurement

Competitive Negotiation

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

Agency may properly select for award a more highly rated, higher-priced proposal despite the fact that solicitation provides for price to be the most important evaluation factor, where it determines that technical superiority of higher-priced proposal is worth the additional cost.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where solicitation asks offerors to respond to several sample tasks for the purpose of testing their understanding of the technical requirements of the contemplated contract, agency is not required to spell out for the protester during discussions all weaknesses in its responses to the tasks since the purpose of the sample tasks is to see if the offeror can identify and resolve technical issues itself.

Procurement

Contract Types

- **Fixed-price contracts**
- ■ **Price determination**
- ■ ■ **Cost increase**
- ■ ■ ■ **Risk allocation**

Where a fixed-price contract is to be awarded, adjustment of proposals for price realism during evaluation for purposes other than to assess the risk in an offeror's approach is inappropriate since a fixed-price contract is not subject to adjustment based on the contractor's cost experience during performance.

B-238384, May 4, 1990

90-1 CPD 452

Procurement

Bid Protests

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

General Accounting Office does not consider protest issues which are essentially made on behalf of other potential competitors who themselves may properly protest as interested parties.

Procurement

Specifications

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

Solicitation's specifications are not unduly restrictive of competition where the procuring agency establishes that requirements for certain film and automatic processing features represent agency's minimum needs and protester, though disagreeing with agency's analysis, fails to show that the restriction is clearly unreasonable.

B-238496, May 4, 1990

90-1 CPD 453

Procurement

Sealed Bidding

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

Agency properly refused to permit protester to correct an alleged mistake in its bid where the correction would be a recalculation of the bid after bid opening to include an item not originally considered.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Funding restrictions

Contracting agency has a compelling reason to cancel a solicitation after bid opening where it determines that sufficient funds are not available to make award.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where the protester fails to show any error of fact or law that would warrant reversal or modification of prior decision, but essentially reiterates arguments considered in the initial decision.

Procurement

Bid Protests

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

General Accounting Office will not consider a request for reconsideration on the basis of the protester's subsequent provision of facts and information which were available to the protester, but which it failed to present at the time the protest was considered by our Office, particularly since the new information indicates that the protest was untimely when originally filed.

Procurement

Bid Protests

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

While timeliness of protest issue concerning evaluation of electric rates is unclear, it will be considered as a significant issue because it is one not previously decided and which may arise in future procurements for electric service.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Prices

Cost evaluation of proposal for electric service for 10-year period did not result in a reasonably accurate prediction of the actual cost of the service where the agency's calculations were based on

a January start date rather than the August start date listed in the solicitation and under the offered rate scheme, annualized results based on a January start date differ from those based on an August start date.

Procurement

Competitive Negotiation

- Offers
- ■ Prices
- ■ ■ Rate schedules
- ■ ■ ■ Utility services

Where offeror's proposal for electric service contains two rate schedules, one of which is unacceptable, but the unacceptable rate was not considered by agency in its cost evaluation and award selection and its inclusion in the resulting contract would have no impact on the services offered under the acceptable rate, the proposal may be accepted.

B-234089.3, May 8, 1990

90-1 CPD 457

Procurement

Bid Protests

- GAO decisions
- ■ Recommendations
- ■ ■ Modification

Agency request that General Accounting Office modify corrective action recommended in original decision is denied where request does not include any support for assertion that recommended re-solicitation would result in a delay of 300 days and significant cost to agency and firms that submitted proposals under original solicitation.

B-238095.2, May 8, 1990

90-1 CPD 458

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where based on information that could have been but was not presented during consideration of original protest.

B-238447, May 8, 1990

90-1 CPD 459

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Procurement

Competitive Negotiation

- Contract awards
- ■ Errors
- ■ ■ Corrective actions
- ■ ■ ■ Moot allegation

Protest that an award was made under a request for proposals to an offeror whose proposal did not meet the specifications of the solicitation is dismissed as academic when the agency deter-

mines that the solicitation was defective and the award improper and takes the appropriate corrective action.

B-238305, May 9, 1990

90-1 CPD 460

Procurement

Competitive Negotiation

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

Agency reasonably awarded a negotiated contract for travel services on the basis of initial proposals to the highest technically rated offeror, proposing the most advantageous combination of rebates, discounts, and price initiatives, where the solicitation informed offerors of that possibility and no discussions were conducted with any offeror.

Procurement

Competitive Negotiation

- Discussion
- ■ Determination criteria

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

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency reasonably found protester's offer to contain deficiencies with regard to aspects of its organizational, staffing, quality control, and automation plans, as well as personnel qualifications.

Procurement

Competitive Negotiation

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

Protest alleging bias must present convincing evidence to support its claims, since procurement officials are presumed to act in good faith.

Procurement

Government Property Sales

- Timber sales
- ■ Bids
- ■ ■ Certification

Procurement

Sealed Bidding

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

The agency properly rejected the high bid in a sealed-bid timber sale, where the high bidder failed to include with its sealed bid a Certificate of Small Business Status, which contained a contract performance requirement that certain contract work be accomplished with the bidder's own employees.

Procurement

Contractor Qualification

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

Protest that agency's nonresponsibility determination and subsequent refusal of the Small Business Administration to issue a certificate of competency was erroneous in light of new information submitted by the protester is denied where record does not show that any new information was presented.

Procurement

Socio-Economic Policies

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

Protest that Small Business Administration's (SBA) denial of certificate of competency was based on incorrect information provided by agency is denied where record indicates that information considered by the contracting officer and forwarded to SBA was accurate.

Procurement

Sealed Bidding

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

The protester's deletion of one subline item in its low bid on a sealed-bid procurement should be waived as a minor informality where the deleted bid requirement was not material or an essential

or integral part of the overall contract work and where the waiver of the requirement would not affect the relative competitive standing of the bidders.

B-238236, May 11, 1990

90-1 CPD 464

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Omission

A bidder's failure to sign its bid may be waived as a minor informality when the bid is accompanied by a document bearing the bidder's signature, since the signature demonstrates the bidder's intent to be bound by its bid.

B-238359, May 11, 1990

90-1 CPD 465

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest against determination by agency not to make inspection equipment located in mobilization base contractor's facility available to other offerors but instead to apply rental evaluation factor is denied as application of rental evaluation factor is proper to equalize competitive advantage and retention of equipment to support other mobilization based contracts was reasonable.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Industrial mobilization bases
- ■ ■ ■ Equipment

Allegation by protester who did not submit a proposal that awardee's price is unreasonable is dismissed because protester is not an interested party to raise that allegation.

B-238366, May 11, 1990

90-1 CPD 466

Procurement

Noncompetitive Negotiation

- Sole sources
- ■ Justification
- ■ ■ Foreign/international tribunals
- ■ ■ ■ Cooperative agreements

Where an international organization, comprised of 11 nations including the United States, specifies that supplies and services be purchased from a particular firm, the Navy may properly specify that firm when purchasing the supplies and services on behalf of the international organization.

Procurement

Noncompetitive Negotiation

- **Sole sources**
- ■ **Justification**
- ■ ■ **International organizations**
- ■ ■ ■ **Cooperative agreements**

A justification and approval for a noncompetitive award that states that a market survey was not conducted because a “directed source” was designated pursuant to an international agreement adequately states why the market survey was not conducted.

B-238492, May 11, 1990

90-1 CPD 467

Procurement

Competitive Negotiation

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

Notwithstanding the validity of the government estimate or the contracting agency’s determination that all bid prices were unreasonably high, agency’s cancellation of solicitation after bid opening is proper where sufficient funds are not available to make award to the low responsive bidder.

Procurement

Socio-Economic Policies

- **Small business 8(a) subcontracting**
- ■ **Contract awards**
- ■ ■ **Propriety**

Small Business Administration (SBA) regulations prohibiting acceptance of contract into section 8(a) program where competitive solicitation for the requirement has already been issued as a small business set-aside, or where SBA finds that doing so would adversely affect other small businesses, do not prohibit setting aside contract under the 8(a) program where: (1) solicitation originally was issued as a small disadvantaged business set-aside, not a regular small business set-aside, and later was converted to an unrestricted procurement; and (2) SBA has made no finding that acceptance of the contract into the 8(a) program would adversely affect other small businesses.

B-238783, May 11, 1990

90-1 CPD 468

Procurement

Bid Protests

- **GAO procedures**
- ■ **Interested parties**
- ■ ■ **Suspended/debarred contractors**

Suspended offeror is not an “interested party” under General Accounting Office’s Bid Protest Regulations because a suspended offeror is not eligible for award.

Procurement

Bid Protests**■ GAO decisions****■ ■ Recommendation affirmation**

Recommendation to reopen negotiations under revised specifications is affirmed notwithstanding potential for additional cost to the government where any such cost would be due in large measure to the agency having placed a substantial order under the contract after the protest conference, at which the awardee's compliance with the specifications was in issue, and only 1 month prior to the due date for the General Accounting Office's decision.

Procurement

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

Decision finding that awardee's proposal was noncompliant with solicitation requirements, and recommending that negotiations be reopened under revised specifications, is affirmed where reconsideration request is based on mere disagreement with prior decision or arguments that could have been, but were not, raised during consideration of protest, and record does not otherwise show error of fact or law warranting reversal or modification of decision.

Procurement

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

Decision to award to higher-priced, higher technically rated offeror was proper where the solicitation award criteria made technical considerations more important than price and the agency reasonably concluded that the awardee's higher total point score resulting from its technical superiority established that its proposal was worth the price premium.

Procurement

Special Procurement Methods/Categories**■ Federal supply schedule****■ ■ Offers****■ ■ ■ Rejection****■ ■ ■ ■ Propriety**

Under multiple-award Federal Supply Schedule (FSS) solicitation, where agency determined that protester offered required most favored customer pricing—prices equal to or lower than offeror's lowest commercial prices—for certain percentage of large number of items and solicitation provided for possible award on a product-by-product basis, outright rejection of proposal for unreasonable pricing was improper; agency should have given protester opportunity through discussions to establish which items were priced acceptably, requested best and final offer, and included protester on FSS for all properly priced items.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision sustaining protest that agency's failure to provide preaward notice of proposed award under small business set-aside resulted in improper circumvention of size status protest procedures, to the prejudice of the protester, is affirmed, where requests for reconsideration fail to specify errors of fact or law in original decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Arguments that agency could have presented, but did not present, during consideration of protest are not basis for reconsidering decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Where interested party was aware of protest but did not actively participate in process by presenting or responding to arguments, party is not eligible to request reconsideration of decision on protest.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

Corporate experience requirement in solicitation was an evaluation factor, not a definitive responsibility criterion, because consideration for award was not contingent upon offeror's showing of 5 years of experience, rather, the quality of such experience was to be evaluated as to its acceptability.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

Agency's consideration of a subcontractor's experience under the relevant evaluation factor was proper where solicitation did not prohibit use of subcontractors to perform the contract, or use of subcontractor to satisfy experience requirement.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Subcontractors

Solicitation provision barring subcontracting without written permission of contracting officer by its terms applies only to additional subcontracting proposed after award and therefore did not prohibit offerors from proposing the use of subcontractors in initial proposals.

B-238169.2, May 16, 1990

90-1 CPD 474

Procurement

Sealed Bidding

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

Protest that agency acted in bad faith in canceling solicitation is denied where protester asserts, but there is no evidence showing, that the agency only canceled the solicitation to render original protest challenging rejection of bid academic and, thus, to prevent General Accounting Office from issuing a decision.

Procurement

Sealed Bidding

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

Contracting officer properly canceled invitation for bids after bid opening and resolicited on the basis of revised specifications where original specifications overstated the government's minimum needs in some respects and, in others, failed to include certain requirements the agency deems material and necessary to meet its needs.

B-238251, May 16, 1990

90-1 CPD 475

Procurement

Contractor Qualification

- Licenses

Protest that at time of award, awardee did not have Nuclear Regulatory Commission licenses required by solicitation is sustained where record indicates that contracting agency did not review whether awardee had the appropriate licenses but simply relied on agency responsible for qualified parts list (QPL) to verify possession of licenses and the record does not indicate that QPL authority reviewed whether awardee had licenses called for by solicitation.

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety

Award to offeror whose proposal in negotiated procurement failed to conform to material specification requirement concerning computer source code was improper where waiver of requirement resulted in competitive prejudice.

B-238551, May 16, 1990

Procurement

Bid Protests

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

Objection to agency's use of small purchase procedures and allegations that agency may have misdescribed its minimum needs and provided inadequate packaging instructions are dismissed as untimely where not raised until protester's comments on the agency report, well after the due date for receipt of quotations.

Procurement

Small Purchase Method

- Requests for quotations
- ■ Terms
- ■ ■ Design specifications

Agency is not required to use federal specifications included in General Services Administration Index of Federal Specifications, Standards and Commercial Item Descriptions where procurement is conducted under Federal Acquisition Regulation small purchase procedures, which is specifically excepted from this requirement.

B-238560, May 16, 1990

Procurement

Special Procurement Methods/Categories

- Off-schedule purchases
- ■ Propriety

Where contracting agency is not a mandatory user of General Services Administration Federal Supply Schedules, the agency may properly purchase items on the "open market" when the contracting agency determines that it would be in the government's best interest in terms of quality, responsiveness, or costs.

Procurement

Specifications

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

Protest that awardee's high-density movable shelving system fails to meet certain characteristics of brand name product in a "brand name or equal" procurement is denied where the protested characteristics were not included in the specifications and contracting agency determined that the awardee's product was equal to the brand name product.

Procurement

Sealed Bidding

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

Protester's bid was properly rejected as nonresponsive where protester took exception in its bid to a material solicitation requirement that paper products to be furnished contain a minimum of 50 percent waste paper.

Procurement

Bid Protests

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

Protest alleging specification impropriety apparent on the face of the solicitation, that minimum waste paper content requirement for paper product being purchased is ambiguous, is untimely when not filed prior to bid opening.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Use
- ■ ■ Propriety

Contracting agency may acquire items under a Federal Supply Schedule (FSS) contract where incidental, non-FSS items are also being acquired in the same procurement so long as the acquisition is made at the lowest aggregate price and the cost of the non-FSS items is insignificant compared to the total cost of the procurement. Where agency solicits a fully integrated system, a significant portion of which is not available under FSS, agency cannot reasonably conclude that items to be acquired are FSS items and, therefore, agency is required to procure entire system on open market.

Procurement

Competitive Negotiation

- Discussion
- ■ Determination criteria

Agency engaged in discussions with offeror where correspondence between the parties resulted in significant revisions to firm's initially offered price. Fact that agency was motivated initially to correspond with firm because of suspected mistake was immaterial where ultimately the communications resulted in price revisions which were not based on errors in calculations, but rather an error in judgment.

Procurement

Competitive Negotiation

■ Discussion reopening

■ ■ Propriety

■ ■ ■ Best/final offers

■ ■ ■ ■ Corrective actions

Despite disclosure of competitors' prices, agency decision to hold discussions and request best and final offers to remedy improper discussions held after initial offers were submitted is not objectionable. Risk of possible auction is secondary to the need to preserve the integrity of the competitive procurement system, and agency has significantly changed requirements which lessens potential for auction.

B-237486.2, May 17, 1990

90-1 CPD 482

Procurement

Competitive Negotiation

■ Discussion

■ ■ Offers

■ ■ ■ Clarification

■ ■ ■ ■ Propriety

Prior decision sustaining protest on basis that the agency improperly reopened negotiations with one offeror without providing the same opportunity to the other offeror in the competitive range is affirmed where the agency request for reconsideration misconstrues our decision rationale, and does not establish any factual or legal errors in the prior decision.

Procurement

Bid Protests

■ GAO procedures

■ ■ GAO decisions

■ ■ ■ Reconsideration

Prior decision sustaining protest on basis that the agency improperly reopened negotiations with one offeror without providing the same opportunity to the other offeror in the competitive range is affirmed where the agency request for reconsideration misconstrues our decision rationale, and does not establish any factual or legal errors in the prior decision.

B-238178.3, May 17, 1990

90-1 CPD 483

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ Significant issue exemptions

■ ■ ■ ■ Applicability

Significant issue exception to the General Accounting Office's timeliness requirements will be invoked only where the protest involves a matter which has not been considered on the merits in previous decisions and which is of widespread interest to the procurement community

Procurement

Bid Protests

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

Protester's lack of actual knowledge of General Accounting Office's Bid Protest Regulations is not a defense to dismissal of its protest as untimely since protesters are on constructive notice of the Regulations, as they are published in the Federal Register and Code of Federal Regulations.

B-238403, May 17, 1990***

90-1 CPD 484

Procurement

Competitive Negotiation

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

Agency may rely on the recommendations of the Defense Contract Audit Agency concerning direct labor and indirect cost rates in analyzing cost proposals.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel

Agency does not have a duty to verify the availability of prospective employees proposed by an offeror for whom offeror has submitted letters of commitment.

B-239016, May 17, 1990

90-1 CPD 485

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification

Contracting agency properly canceled solicitation where the solicitation failed to state that the item being procured was subject to a qualification requirement and the agency did not provide bidders with a reasonable opportunity to demonstrate the acceptability of their products prior to bid opening.

B-237408.2, May 18, 1990

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Letter responding to reconsideration request explains that request does not include statement of factual or legal grounds warranting reversal or modification of decision as required by Bid Protest Regulations but only raises a number of procedural matters which did not prejudice the protester.

Letter also explains that General Accounting Office nonetheless carefully reexamined the record and concluded that decision was correct.

B-238371, May 18, 1990***

90-1 CPD 486

Procurement

Competitive Negotiation

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

Protest that awardee is ineligible for a contract because of a conflict of interest arising from its relationship with a company which could possibly be subject to audit services required under present contract is denied where agency reasonably determines that no actual conflict exists and where agency's proper administration of task orders issued under contract would provide adequate safeguards to prevent the contractor from possibly conducting a biased audit.

Procurement

Competitive Negotiation

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

Protest that awardee's proposed labor mix does not meet solicitation personnel education and experience requirements, and therefore agency's evaluation of awardee's proposal was unreasonable, is denied where record shows that proposed labor mix met the solicitation staff requirements.

B-238595, May 18, 1990

90-1 CPD 487

Procurement

Bid Protests

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

Protest is dismissed as untimely where protest was filed almost 7 months after protester received notice of award; protester has not met its obligation of diligently pursuing the basis of its protest.

B-238621.2, B-238622.2, May 18, 1990

90-1 CPD 488

Procurement

Bid Protests

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

Dismissal of bid protest will not be reconsidered where protester does not specify any error of fact or law that would warrant reversal or modification.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of dismissal of protest challenging acceptability of competitor's bid is denied where the competitor's failure to complete representation concerning its number of employees did not eliminate or reduce its obligation to perform services in conformity with all material terms and conditions of the solicitation.

Procurement

Bid Protests

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

Where *Commerce Business Daily* (CBD) notice announcing agency's plan to make a sole-source award gives other potential sources an opportunity to submit expressions of interest showing their capability to perform, potential offeror must, as a prerequisite to filing a protest challenging the sole-source decision, submit a timely expression of interest in response to the CBD notice.

Procurement

Bid Protests

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

General Accounting Office (GAO) will not consider the merits of an untimely protest by invoking the significant issue exception in GAO's Bid Protest Regulations, where the protest does not raise an issue of first impression that would be of widespread interest to the procurement community.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision finding that procuring court reporting services for interim period under an existing contract constituted improper sole-source award—because new services were not within the scope of the contract as originally awarded and agency was aware incumbent contractor for services was interested in competing—is affirmed where reconsideration is based on arguments that could have been, but were not raised during consideration of protest, and record does not otherwise show error of fact or law warranting reversal or modification of decision.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Personnel experience****■ ■ ■ ■ Point ratings**

Agency's use of a rating plan that resulted in the assignment of zero points for a labor category in the evaluation of protester's best and final offer, on the ground that 3 of 11 resumes submitted for the category were unacceptable, was an improper material departure from the evaluation plan set forth in the solicitation; the plan stated there, and used by the agency in evaluating initial proposals provided for a composite score based on the scores of all resumes submitted, regardless of whether any particular resume was found unacceptable.

Procurement

Bid Protests**■ GAO procedures****■ ■ Interested parties**

Protester who did not submit an offer under a solicitation and argues that it could not do so is not an interested party to complain about an awardee's price submitted in response to the solicitation.

Procurement

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

Protest that contracts awarded under the terms contained in a solicitation will unfairly deprive protester of orders under its own Federal Supply Schedule contract is untimely where it was not filed prior to the time set for the receipt of offers under the solicitation.

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 agency, without notice to unsuccessful offerors, awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, based on agency's desire to make immediate award in order to

avoid the administrative inconvenience of applying for an exception from a rumored funding freeze.

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Contract awards
- ■ ■ Price reasonableness

Contracting officer may not ignore prior procurement history, government estimate, and other relevant evidence in determining whether small business price received was in fact fair and reasonable.

B-238402, May 23, 1990

90-1 CPD 495

Procurement

Competitive Negotiation

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

Award to lower-cost offeror receiving lower technical score was proper where agency reasonably concluded that point scores overstated protester's technical advantage and any actual advantage did not justify the cost premium involved.

Procurement

Competitive Negotiation

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

Where solicitation indicates that cost will be evaluated but does not indicate its specific weight relative to technical factors, it is presumed that cost and technical factors will be considered to be approximately equal in importance.

B-236603.2, May 24, 1990

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reversal
- ■ ■ ■ Factual errors

Decision denying protest of source selection is reversed and the protest sustained where the factual basis upon which earlier decision was based—that protester's excessive electrical work man-hours component made up virtually the entire amount of the difference in price between it and awardee—was erroneous and where agency had no reasonable basis to select lower rated offeror for award under the solicitation's evaluation criteria in which technical was worth 75 percent and cost only 25 percent.

Procurement

Competitive Negotiation

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

Decision denying protest of source selection is reversed and the protest sustained where the factual basis upon which earlier decision was based—that protester's excessive electrical work man-hours component made up virtually the entire amount of the difference in price between it and awardee—was erroneous and where agency had no reasonable basis to select lower rated offeror for award under the solicitation's evaluation criteria in which technical was worth 75 percent and cost only 25 percent.

B-238420, B-238420.2, May 24, 1990

90-1 CPD 497

Procurement

Competitive Negotiation

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

Award to higher-priced offeror is unobjectionable where technical considerations were more important than cost under the solicitation and agency reasonably concluded that technical superiority of awardee's proposal was worth the additional cost.

Procurement

Competitive Negotiation

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

Consideration of technical risk in evaluating proposals is unobjectionable since, although not specified as an evaluation criterion in the solicitation, technical risk is reasonably related to the specified technical evaluation criteria.

B-239262, May 24, 1990

90-1 CPD 498

Procurement

Bid Protests

- **GAO procedures**
- ■ **Pending litigation**
- ■ ■ **GAO review**

Procurement

Contract Management

- **Contract administration**
- ■ **Default termination**
- ■ ■ **Resolicitation**
- ■ ■ ■ **GAO review**

The General Accounting Office has no authority to consider, let alone issue, stay of reprourement solicitation pending outcome of protester's appeal of default termination of original contract with the Armed Services Board of Contract Appeals.

Procurement

Sealed Bidding

- Bid guarantees
 - ■ Responsiveness
 - ■ ■ Sureties
 - ■ ■ ■ Liability restrictions
-

Procurement

Sealed Bidding

- Bids
- ■ Bid guarantees
- ■ ■ Omission
- ■ ■ ■ Responsiveness

Bid properly may be rejected as nonresponsive where bidder fails to indicate penal sum of bid bond either as a percentage of the bid amount or as a fixed sum.

Procurement

Competitive Negotiation

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

Protest that agency was required to issue a new solicitation to test market before exercising an option is denied where agency reasonably determined that option was the most advantageous offer based upon informal price analysis, considering product availability and other factors.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration that is based on arguments previously considered and rejected is denied since the requester has not furnished a legal or factual basis for reversing the earlier decision.

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest alleging awardee was provided an undue competitive advantage because it had submitted unsolicited proposals which in part formed the basis for a competitive procurement is dismissed where the protester was fifth in line for award and is, therefore, not an interested party to protest.

Procurement

Bid Protests

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

Letter to contracting agency's purchasing agent stating intent to protest but which does not state any specific basis for protest is not sufficient to constitute agency-level protest and a subsequent protest to the General Accounting Office 6 weeks after basis of protest was known is dismissed as untimely.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Requests for reconsideration which merely disagree with the General Accounting Office's initial decision without showing that the decision was based on error of fact or law do not provide any basis for modification or reversal.

Procurement

Competitive Negotiation

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

Agency reasonably provided offerors whose best and final offers (BAFO) had been found technically acceptable an opportunity to submit new BAFOs in response to the General Accounting Office's (GAO) remedial recommendation to reopen discussions and obtain another round of BAFOs under a protest sustained because the agency conducted improper post-award discussions with the award-ee only. The agency was not required to conduct additional detailed discussions with offerors whose proposals were technically acceptable in order to comply with GAO's recommendation, which did not require that the agency entirely reconduct the procurement.

Procurement

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

Request for reconsideration is denied where it is based upon information that was available, but not submitted, during consideration of original protest and it otherwise does not establish the existence of error in prior decision.

Procurement

Sealed Bidding**■ Bids****■ ■ Responsiveness****■ ■ ■ Terms****■ ■ ■ ■ Deviation**

Insertion of unsolicited part number in a bid, even if included merely for a bidder's internal control purposes, qualifies bid, creating doubt whether the bidder is offering to comply with the solicitation specifications. The contracting officer properly rejected such a qualified bid where it did not contain an express statement that the designated part conforms to all solicitation requirements, and there was no data available to the contracting officer before bid opening which demonstrated that the part specified was compliant.

Procurement

Sealed Bidding**■ Qualified bids****■ ■ Responsiveness**

Insertion of unsolicited part number in a bid, even if included merely for a bidder's internal control purposes, qualifies bid, creating doubt whether the bidder is offering to comply with the solicitation specifications. The contracting officer properly rejected such a qualified bid where it did not contain an express statement that the designated part conforms to all solicitation requirements, and there was no data available to the contracting officer before bid opening which demonstrated that the part specified was compliant.

Procurement

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

Protest that evaluation factors in solicitation for loan servicing should have included prior experience as a separate factor is denied where prior experience was included under several evaluation factors and the record shows that the agency did consider the protester's prior experience in its evaluation.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Protest that agency did not give credit for an alleged reduction in cost in protester's proposal is denied where the solicitation basically required the protester to factor this reduction into the fixed-unit rate it submitted as its cost and the protester failed to do this. Furthermore, where the alleged reduction would not render the protester's cost lower than the awardee's cost, where cost was in any case less important than technical considerations and the awardee's offer was technically superior, failure to consider this reduction did not prejudice the award decision.

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Amendments

■ ■ ■ Notification

■ ■ ■ ■ Contractors

Protest that agency improperly extended the period contractors would be responsible for delinquent accounts without providing notice to offerors and affording firms an opportunity to revise offers is denied where the requirement was modified in writing, the written modification was given to offerors during discussions, and the evaluation of best and final offers was consistent with the revised terms.

B-238276.2, May 30, 1990

90-1 CPD 508

Procurement

Bid Protests

■ GAO procedures

■ ■ GAO decisions

■ ■ ■ Reconsideration

Request for reconsideration is denied where protester merely reiterates prior arguments and does not present factual or legal grounds warranting reversal or modification of an earlier dismissal of protest of agency's affirmative responsibility determination.

B-238505, May 30, 1990

90-1 CPD 509

Procurement

Competitive Negotiation

■ Offers

■ ■ Cost realism

■ ■ ■ Evaluation

■ ■ ■ ■ Administrative discretion

Where agency request for second best and final offer (BAFO) states that it is concerned about the realism of offerors' prices and states that any changes to a proposal must be explained in detail by the offeror, agency properly considered unacceptable an unexplained price reduction and change in proposal's pricing format in protester's second BAFO.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Where a protest is dismissed as academic because procured item is no longer required, there is no decision on the merits of the protest and therefore no basis for recovery of protest costs.

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Protest was properly dismissed as academic where protested contract was terminated because unmanned air vehicles solicited were no longer required; underlying protest became academic when no award would be made under the solicitation.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety

General Accounting Office denies request for reconsideration of previous decision which upheld award to low evaluated offeror, in absence of evidence that low evaluated offer would result in other than the lowest ultimate cost to the government.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decision :
- ■ ■ Reconsideration

A protester who offers the same part as the awardee on a small purchase procurement, but at a higher price, is not prejudiced where its protest is that the awardee misidentified the part in its quote and the awardee's quote appeared acceptable on its face and offered a product that met the government's requirements.

B-237864.2, May 31, 1990

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision denying a protest because the protester failed to present any support or specifics to substantiate its allegation that the firm represented by an offeror as the manufacturer of the items to be supplied would not be the manufacturer and the items may be of foreign origin is affirmed where the protester in its request for reconsideration still offers no support for its allegations.

B-238411.2, May 31, 1990

90-1 CPD 513**Procurement**

Bid Protests

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

Procurement

Bid Protests

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

When a protester has sufficient information upon which to base a protest, it must file a protest within 10 working days and not wait until it obtains all of the information to which it believes it is entitled under the Freedom of Information Act; therefore, the agency's failure to promptly provide the information sought does not constitute good cause under the Bid Protest Regulations to warrant consideration of an untimely protest.

B-238670, May 31, 1990

90-1 CPD 514**Procurement**

Sealed Bidding

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

Bid that modified requirements of an invitation for bids by adding an additional sub-line item is nonresponsive since it contained a material deviation from the terms of the invitation for bids which imposed conditions resulting in a competitive advantage to that bidder.

Procurement

Sealed Bidding

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

Agency's cancellation of solicitation after bid opening on the basis that all otherwise acceptable bids are unreasonable in price is proper where the low responsive bid exceeds the government estimate by a significant amount.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Requests for proposals

Conversion of invitation for bids to a negotiated procurement after rejection of all otherwise acceptable bids for price unreasonableness is proper where the contracting officer follows the procedures set forth in the Federal Acquisition Regulation at section 15.103, and preserves the integrity of the competitive process.

Procurement

Contract Management

- Contract administration
- ■ GAO review

Question relating to fulfillment of payment and performance bond requirements, which are implemented after contract award, is a matter of contract administration not cognizable by the General Accounting Office under its Bid Protest Regulations.

Procurement

Sealed Bidding

- Bids
- ■ Responsivness
- ■ ■ Signatures
- ■ ■ ■ Omission

Agency's determination that bid was nonresponsive is proper where bid was signed with a rubber-stamp signature but was not accompanied by any evidence showing that, before bid opening, bidder had authorized the use of a rubber-stamp signature.

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