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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-238615, February 4, 1991***

Appropriations/Financial Management

Judgment Payments

■ Permanent/indefinite appropriation

■ ■ Availability

The Judgment Fund, 31 U.S.C. § 1304 (1988), is not legally available to cover the costs of compliance by the Department of Veterans Affairs with either judgments or proposed compromise settlements that are “injunctive” in nature (i.e., they direct the government to perform or not perform some act).

Appropriations/Financial Management

Appropriation Availability

■ Time availability

■ ■ Fiscal-year appropriation

■ ■ ■ Unobligated balances

The unobligated balance of an expired appropriation to implement extended educational assistance benefits mandated by 38 U.S.C. § 1662(a)(3) (1988) and 29 U.S.C. § 1721 note (1988) may be used by the Department of Veterans Affairs (VA) to satisfy a court order (or a proposed settlement agreement) which requires VA to entertain new applications and reconsider the eligibility of veterans improperly denied benefits under those acts. The unobligated balance of VA's appropriations may be used to provide the mandated benefits pursuant to 31 U.S.C. §§ 1502(b) and 1553(a), as amended by section 1405 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1675-80 (Nov. 5, 1990).

B-238548, February 5, 1991***

Appropriations/Financial Management

Appropriation Availability

■ Time availability

■ ■ Fiscal-year appropriation

■ ■ ■ Replacement contracts

When a contracting officer terminates a contract for the convenience of the government as a result of his or her determination that the award was clearly erroneous, the funds originally obligated for that contract remain available for a replacement contract awarded in a subsequent fiscal year, provided the conditions specified in 68 Comp. Gen. 158 are satisfied and the contracting officer's determination of improper award is supported by findings of fact and law. 68 Comp. Gen. 158, clarified.

B-231044.2, February 6, 1991***

Appropriations/Financial Management

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

Appropriations/Financial Management

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

The General Services Administration (GSA) is authorized by 40 U.S.C. § 757 (1988) to recover approximate costs of Federal Telecommunications System (FTS) services and facilities provided to Tennessee Valley Authority (TVA) as a result of TVA withdrawal from FTS. GSA is also authorized to recover termination costs that arose by virtue of GSA's authorized administrative practice regarding the Federal Telecommunications (FT) Fund, 40 U.S.C. § 757 (1982), but which were incurred subsequent to merger of FT Fund into the Information Technology (IT) Fund, 40 U.S.C. § 757 (1988).

B-231044.3, February 6, 1991***

Appropriations/Financial Management

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

Appropriations/Financial Management

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

The General Services Administration (GSA) is authorized by 40 U.S.C. § 757 (1988) to recover approximate costs of Federal Telecommunications System (FTS) services and facilities provided to Army and Air Force Exchange Service (AAFES) incurred as a result of AAFES withdrawal from FTS. Although AAFES undertook measures that might have resulted in reduced billings had it continued to participate in FTS, it withdrew from FTS before possible cost saving measures could be reflected in FTS billings. GSA is also authorized to recover termination costs that arose by virtue of GSA's authorized administrative practice regarding the Federal Telecommunications (FT) Fund, 40 U.S.C. § 757 (1982), but which were incurred subsequent to merger of FT Fund into the Information Technology (IT) Fund, 40 U.S.C. § 757 (1988).

B-240654, February 6, 1991

Appropriations/Financial Management

Accountable Officers**■ Cashiers****■ ■ Relief****■ ■ ■ Illegal/improper payments****■ ■ ■ ■ Fraud**

Relief is granted to finance officers who documented that they had in place at the time of the improper payments at issue adequate systems of procedures and controls to safeguard the funds in

their care, and to their subordinates who followed these procedures. The improper payments resulted from criminal activity that even as adequate and effectively supervised system cannot always prevent.

B-235606, February 7, 1991

Appropriations/Financial Management

Appropriation Availability**■ Purpose availability****■ ■ Adoption expenses**

Under section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, "qualifying adoption expenses" are payable if they are incurred for adoption proceedings initiated after September 30, 1987. A member who had custody as a guardian of his stepgrandchildren in 1984, could not adopt them at that time because he neither had the consent of the natural parents nor any other basis in law for doing so. Although the member continued to exercise custody as a legal guardian until he filed petitions for their adoption in October 1987 with the consent of the natural parents, the adoption proceedings were not initiated until the filing of the petitions.

Appropriations/Financial Management

Appropriation Availability**■ Purpose availability****■ ■ Adoption expenses**

Under section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, the Secretary of Defense was required to establish a test program under which a member of the Armed Forces may be reimbursed for "qualifying adoption expenses," which are defined as "reasonable and necessary expenses that are directly related to the legal adoption of a child." However, where the grandparents obtained initial custody of the children 3 years prior to the filing of a petition for adoption neither the custody proceedings nor other expenses incurred prior to the petition for adoption can be described as being "directly related to the legal adoption" of the minors.

B-240001, February 8, 1991***

Appropriations/Financial Management

Appropriation Availability**■ Purpose availability****■ ■ Necessary expenses rule****■ ■ ■ Awards/honoraria**

The Government Employees Incentive Awards Act, 5 U.S.C. §§ 4501-4514, provides no authority for the Internal Revenue Service (IRS) to purchase T-shirts for employees contributing certain amounts to the Combined Federal Campaign.

Appropriations/Financial Management

Appropriation Availability**■ Purpose availability****■ ■ Specific purpose restrictions****■ ■ ■ Personal expenses/furnishings**

The IRS may not use appropriated funds to purchase T-shirts for employees contributing certain amounts to the Combined Federal Campaign. The T-shirts are personal gifts and, as they are not essential to the accomplishment of an authorized purpose, the expenditure does not constitute a necessary and proper use of appropriated funds.

B-241730.2, February 14, 1991

Appropriations/Financial Management

Budget Process

- Revolving accounts
- ■ General/administrative costs
- ■ ■ Funding

In the absence of Congressional authorization, Government Printing Office revolving fund operations would be subject to a general funding lapse such as the one experienced on Columbus Day Weekend, 1990.

B-241668, February 19, 1991

Appropriations/Financial Management

Accountable Officers

- Liability
- ■ Illegal/improper payments

Appropriations/Financial Management

Obligation

- Funds
- ■ Authority

The Chairman of the White House Conference on Library and Information Services who obligated funds under an improper delegation of authority is not liable for improper payments because the government incurred no loss.

B-241725, February 19, 1991

Appropriations/Financial Management

Appropriation Availability

- Amount availability
- ■ Imprest funds
- ■ ■ Adjustments
- ■ ■ ■ GAO authority

The Department of Veterans Affairs requests that GAO adjust its accounts under 31 U.S.C. § 3530 for part of a loss resulting from the negligence of a cashier. For part of the loss, Section 3530 authorizes the affected agency to make adjustment without further action by GAO when the criteria for adjustment in that section have been met. For the other part of the loss, the Department may make adjustment under either 31 U.S.C. § 3530 or 31 U.S.C. § 1553, as amended by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510 (1990), depending on the Department's administrative finding.

B-242773, February 20, 1991

Appropriations/Financial Management

Accountable Officers

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

We relieve cashier of liability for loss resulting from burglary where sheriff's investigation did not implicate the cashier in the burglary.

B-237654, February 21, 1991

Appropriations/Financial Management

Appropriation Availability

■ **Purpose availability**

■ ■ **Liability insurance**

Insurance should not have been purchased by the Federal Highway Administration for a traveling highway technology exhibit because of the government's long-standing policy of self-insurance. However, the shipping company that obtained the insurance for the agency may be paid for the premiums because the insurance was obtained in good faith, the agency is taking steps to prevent future violations of the self-insurance rule, and payment has been allowed previously in similar circumstances. 55 Comp. Gen. 1196 (1976).

B-239122, February 21, 1991

Appropriations/Financial Management

Accountable Officers

■ **Liability**

■ ■ **Account deficiency**

■ ■ ■ **Statutes of limitation**

Upon the running of the 3-year statute of limitations of 31 U.S.C. § 3526, an accountable officer's account is settled by operation of law and the officer cannot be held liable for any deficiency in the account.

B-236414, February 22, 1991

Appropriations/Financial Management

Judgment Payments

■ **Attorney fees**

GAO will not issue advance decision requested by the Air Force on the propriety of paying a successful litigant against the government more than specified in the judgment because the Air Force, in advising the court, miscalculated the amount due, since after the request was filed the successful litigant and the Department of Justice were advised of the miscalculation and are pursuing resolution of the matter.

B-238940, February 25, 1991***

Appropriations/Financial Management

Appropriation Availability

■ **Time availability**

■ ■ **Time restrictions**

■ ■ ■ **Fiscal-year appropriation**

■ ■ ■ ■ **Training**

The Department of Agriculture, Food and Nutrition Service, may properly charge fiscal year 1989 appropriations for the cost of a training course scheduled to begin the first day of fiscal year 1990 since the course was intended to meet a *bona fide* need of fiscal year 1989, scheduling of the course was beyond the agency's control, and the time between procurement and performance was not excessive.

B-238123, February 27, 1991***

Appropriations/Financial Management

Accountable Officers

■ **Disbursing officers**

■ ■ **Relief**

■ ■ ■ **Illegal/improper payments**

■ ■ ■ ■ **Substitute checks**

Relief from liability for improper payment resulting from payee negotiating original and successor checks is granted Department of Navy disbursing officer under 31 U.S.C. § 3527(c) (1988). Disbursing officer's failure to obtain the required "Statement of the Claimant" from payee before issuing a successor check was not the proximate cause of the loss and provides us with no basis on which to deny relief.

Appropriations/Financial Management

Accountable Officers

■ **Disbursing officers**

■ ■ **Relief**

■ ■ ■ **Illegal/improper payments**

■ ■ ■ ■ **Substitute checks**

Relief from liability for improper payment resulting from payee negotiating original and successor checks is granted Department of Navy disbursing officer under 31 U.S.C. § 3527(c) (1988). Disbursing officer exercised reasonable care in issuing successor check to payee since Navy's regulations authorized her to do so under the circumstances and the record indicates that she neither knew nor had reason to know that payee had negotiated original check.

B-241269, February 28, 1991

Appropriations/Financial Management

Budget Process

■ **Funds**

■ ■ **Deposit**

■ ■ ■ **Miscellaneous revenues**

Fees received from federal agency participants in Financial Management Service seminars may be credited to Services' appropriation under the Training Act. Private sector participants may be admitted on a space available basis and fees received must be deposited into miscellaneous receipts. Under 42 U.S.C. § 4742 federal agencies have specific authority to train state and local employees and payments received are to be credited to the appropriation used to fund the training.

Civilian Personnel

B-240781, February 5, 1991

Civilian Personnel

Compensation

- Retroactive compensation
- ■ Quality step increase
- ■ ■ Eligibility

Agency is advised that it may not retroactively change the effective date of a quality-step increase to correspond with a within-grade increase so as to grant an employee a two-step increase where there is no evidence of administrative error which would fall within one of our exceptions to retroactive promotions. The agency complied with the request for an increase in accordance with its regulations.

B-242607, February 5, 1991

Civilian Personnel

Travel

- Bonuses
- ■ Acceptance
- ■ ■ Propriety

Chairman, Senate Committee on Rules and Administration, asks whether Senate may allow separating Senators or staff employees to retain for personal use frequent flyer mileage accrued on official travel, provided such person reimburse the Senate a reasonable sum of money in exchange therefor. Since Senate has authority to dispose of unneeded property and since frequent flyer mileage points are usually nontransferable and of no value to government after separation, Chairman is advised that we see no objection to amending Senate travel regulations to so provide.

B-240657, February 6, 1991

Civilian Personnel

Compensation

- Overtime
- ■ Eligibility
- ■ ■ Travel time

Employees who must travel within their official duty station after their scheduled tour of duty are entitled to overtime under 5 U.S.C. § 5542 (1988) if the travel is to complete an assigned task. Therefore, Panama Canal Commission employees whose duty station is the entire Canal, are entitled to overtime compensation for extra hours worked when they must travel from their usual work site at Balboa to Cristobal to perform work and then return to Balboa to record data before proceeding home.

B-239493, February 7, 1991

Civilian Personnel

Compensation**■ Compensation restrictions****■ ■ Rates****■ ■ ■ Amount determination**

Employee, a firefighter, who works regularly scheduled standby duty on Sundays, is not entitled to premium pay on an annual basis at the rate of 22-1/2 percent, even though he worked two work shifts on Sunday which transcended two pay periods, since he performed Sunday work for one 24-hour period, a calendar Sunday, which under 5 C.F.R. § 550.144(a)(4) constitutes one, not two calendar Sundays. Therefore, under the cited regulation, the employee has not worked the required 20 to 40 Sundays over a year's period so as to be entitled to premium pay at the 22-1/2 percent rate.

Civilian Personnel

Compensation**■ Compensation restrictions****■ ■ Rates****■ ■ ■ Amount determination**

Firefighters may not be paid a flat rate of 25 percent premium pay, irrespective of the number of Sundays worked during a year since the applicable regulation in 5 C.F.R. § 550.144(a)(4) clearly bases any increase in the basic rate of premium pay (20 percent) upon the average number of Sundays worked over a year's period.

B-241928, February 7, 1991

Civilian Personnel

Relocation**■ Household goods****■ ■ Commuted rates****■ ■ ■ Reimbursement****■ ■ ■ ■ Eligibility**

An agency authorized reimbursement under the commuted rate method for an employee's shipment of household goods. Subsequent to the employee's completion of the shipment of his household goods, the agency found that had a cost comparison been made it would have shown that the Government Bill of Lading method would have been more cost effective. Since the regulations do not contemplate that an agency should obtain a cost comparison after a household goods shipment has been completed merely for the purpose of limiting reimbursement to the employee, and the original travel order was not in error, the employee may be reimbursed under the commuted rate method.

B-240558, February 13, 1991***

Civilian Personnel

Relocation**■ Household goods****■ ■ Shipment****■ ■ ■ Reimbursement****■ ■ ■ ■ Senior executive service**

An individual, who was appointed to a Senior Executive Service position from the private sector, seeks reimbursement for the cost of shipping household goods to his residence near his new duty station prior to and in contemplation of his appointment. Reimbursement of such costs is author-

ized under 5 U.S.C. § 5723 (1988), but is limited to transportation costs from the appointee's residence at selection to his first duty station. Since the appointee's residence at selection was in the same locality as his first duty station, and the one from which he regularly commuted to that duty station, the cost of transporting household goods from elsewhere to that residence is an excess cost to be borne by the appointee. Paragraph 2-1.5f(5) of the Federal Travel Regulations.

Civilian Personnel

Relocation

- **Household goods**
- ■ **Shipment**
- ■ ■ **Reimbursement**
- ■ ■ ■ **Senior executive service**

An individual, who was appointed to a Senior Executive Service position (SES) from the private sector, made a short-distance change of residence 8 months after his appointment and seeks reimbursement for the cost of moving his household goods to his new residence. Because his commuting distance and time to his duty station were only reduced by 4 miles and 5 minutes, the agency doubts that the move qualified as being incident to his appointment. Agencies have broad discretion under paragraph 2-1.5b(2) of the Federal Travel Regulations to determine whether short-distance relocations of new SES appointees are incident to their appointment. Since the agency did not make the required determination that the appointee's short-distance move was incident to his appointment, we conclude that he may not be reimbursed those transportation costs.

B-240962, February 13, 1991

Civilian Personnel

Compensation

- **Compensation retention**
- ■ **Juror compensation**

Employee is not entitled to retain the amount he received for juror fees because of the requirement in 5 U.S.C. § 5515 (1988) that an employee is entitled to leave under 5 U.S.C. § 6322 (1988) must credit such amount against the employee's compensation payable by the United States. The state statute specifically refers to "compensation," and not to reimbursement of expenses. Where a statute provides compensation for jury service, a court official's statement that the amount paid includes parking and mileage does not overcome the requirement of 5 U.S.C. § 5515.

B-239895, February 14, 1991

Civilian Personnel

Compensation

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

In an advisory opinion, the Director, Administrative Office of the U.S. Courts, is advised that a former employee of the judicial branch must be considered partially at fault for failing to report an erroneous step increase after she received documents showing that an error had occurred. Moreover, the agency error and delay in processing waiver and collecting the debt would not be a sufficient basis upon which to grant waiver of the debt.

B-240492, February 15, 1991***

Civilian Personnel

Travel

- Travel expenses
- ■ Reimbursement
- ■ ■ Official business
- ■ ■ ■ Determination

Candidates for National Institutes of Health's (NIH) Intramural Research Training Award (IRTA) Program may be paid for travel expenses incurred in attending preselection interviews since NIH determines whether the candidates are qualified and the interviews are necessary to determine their qualifications and adaptability for the positions. Although the successful candidates are considered to be "Fellows" under the Program and are not appointed as federal employees, NIH treats the candidates in the same manner as applicants for positions in the excepted service. See *Office of Personnel Management*, 60 Comp. Gen. 235 (1981), and cases cited therein.

B-241249, February 15, 1991

Civilian Personnel

Leaves of Absence

- Annual leave
- ■ Cancellation
- ■ ■ Travel expenses
- ■ ■ ■ Reimbursement

Employee who purchased non-refundable low-fare, round-trip airline ticket and arranged to take annual leave in anticipation of a personal trip may not be reimbursed the cost of this ticket when the employee's official duties caused his leave to be cancelled and rendered him unable to use the ticket. There is no legal basis for the claim.

B-241272, February 15, 1991***

Civilian Personnel

Leaves Of Absences

- Military leave
- ■ Accrual
- ■ ■ Eligibility

In light of the 1980 amendment to the military leave statute, 5 U.S.C. § 6323(a), federal employees who are members of the Reserve or National Guard are now entitled to carry over up to 15 days of unused military leave into the next fiscal year. When the carried over leave is combined with the 15 days accrued in the new fiscal year, it produces a maximum military leave benefit of 30 days which may be used in one fiscal year. Employees may be continued in military leave status on leave they had to their credit in the fiscal year they entered active duty although the military duty to which the leave is applied extends into the next fiscal year. Decisions to the contrary, [10 Comp. Gen. 102 (1930), 10 Comp. Gen. 116 (1930), 11 Comp. Gen. 469 (1932), 12 Comp. Gen. 241 (1932), 17 Comp. Gen. 174 (1937), 29 Comp. Gen. 269 (1949), 35 Comp. Gen. 708 (1956), 40 Comp. Gen. 186 (1960), 41 Comp. Gen. 320 (1961), 51 Comp. Gen. 23 (1971)] are no longer applicable.

Civilian Personnel

Leaves Of Absences

■ Military leave

■ ■ Accrual

■ ■ ■ Eligibility

Federal employees who are members of the Reserve or National Guard serving on active military duty which extends into a second fiscal year now may accrue and use the 15 days of military leave which accrues at the beginning of the second year without return to civilian status. This is authorized under the 1980 amendment to section 6323(a), which provides additional flexibility in accrual and use of military leave. Comptroller General decisions to the contrary [10 Comp. Gen. 102 (1930), 10 Comp. Gen. 116 (1930), 11 Comp. Gen. 469 (1932), 12 Comp. Gen. 241 (1932), 17 Comp. Gen. 174 (1937), 29 Comp. Gen. 269 (1949), 35 Comp. Gen. 708 (1956), 40 Comp. Gen. 186 (1960), 41 Comp. Gen. 320 (1961), 51 Comp. Gen. 23 (1971)] are superseded.

B-238323, February 21, 1991***

Civilian Personnel

Compensation

■ Hazardous duty differentials

■ ■ Eligibility

■ ■ ■ Administrative determination

Employees' claims for hazard pay differential for handling a potentially hazardous substance may be paid retroactively for hazardous duty performed at Federal Aviation Administration (FAA) facility back to June 15, 1983, which is 6 years prior to the time these claims were constructively filed under 4 C.F.R. § 31.5. Retroactive payment may not be made for hazardous duty performed prior to that date. While the courts have recognized an equitable exception to the statute of limitations in cases where a plaintiff's cause of action was inherently unknowable, the exception is intended to apply where the plaintiff has suffered latent injury at the hands of the defendant. This exception is not applicable to these claims however since there is no evidence that FAA acted wrongly or concealed facts from its employees.

B-241337, February 21, 1991

Civilian Personnel

Leaves Of Absence

■ Annual leave

■ ■ Eligibility

■ ■ ■ Intermittent employment

Civilian Personnel

Leaves Of Absence

■ Sick leave

■ ■ Eligibility

■ ■ ■ Intermittent employment

Civilian motor vehicle operators, who were hired by the Army as intermittent employees to provide transport support for Ranger training classes, claim the leave benefits of part-time employees on the basis of work schedules that the Army provided to them in advance, contending that their work was thereby regularly scheduled. The claims may not be allowed since the claimants did not produce sufficient evidence to counter the agency's determinations that the work schedules were tentative only. Therefore, they did not work regularly scheduled tours of duty to qualify them as part-time employees. The disallowance of their claims is affirmed.

Civilian Personnel

Leaves Of Absence

- Annual leave
 - ■ Eligibility
 - ■ ■ Intermittent employment
-

Civilian Personnel

Leaves Of Absence

- Sick leave
- ■ Eligibility
- ■ ■ Intermittent employment

On appeal of the GAO disallowance of their claims, Army employees contend that their claims should be allowed because the Claims Group allowed a claim presented by an employee who performed work under similar circumstances. Their claims may not be allowed on that basis since the Claims Group's individual settlements have no effect as precedent for Comptroller General decisions, and their claims are not otherwise allowable under the applicable statutes and regulations.

B-241018, February 22, 1991

Civilian Personnel

Relocation

- Expenses
 - ■ Debt collection
 - ■ ■ Waiver
-

Civilian Personnel

Relocation

- House-hunting travel
- ■ Travel expenses
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

Employee who transferred from Anchorage, Alaska, to Denver, Colorado, was authorized to perform a househunting trip. Employee may not be reimbursed for expenses incurred during her househunting trip since her old official station was located outside the continental United States. See 5 U.S.C. §§ 5724a(a)(2) and 5721(3) (1988) and para. 2-4.1c(3), Federal Travel Regulations (Supp. 4, Oct. 1, 1982). However, collection of erroneous payments may be considered for waiver under 5 U.S.C. § 5584 (1988).

B-232438, February 24, 1991

Civilian Personnel

Leaves Of Absence

- Military leave
- ■ Accrual
- ■ ■ Eligibility

An employee, who served under two temporary appointments each of which was for a period of less than 1 year, claims entitlement to military leave. The claims is denied since the military leave statute limits military leave to employees serving under permanent or temporary indefinite appointments. 5 U.S.C. § 6323(a) (1982). Temporary indefinite appointments are those for periods of 1 year or more.

B-236241, February 25, 1991

Civilian Personnel

Compensation**■ Fringe benefits****■ ■ Retroactive adjustments****■ ■ ■ Intermittent employment**

Commissioners whose compensation was set by law at an amount equal to the daily rate paid a GS-18 under the General Schedule for each day or portion thereof during which they are engaged in the actual performance of Commission duties are in effect per diem employees whose scheme of compensation is different from regular employees. Commissioners' service must be considered as intermittent regardless of the number of hours worked and accordingly their only entitlement to compensation is their per diem payment for those days they were engaged in Commission business. As intermittent employees they are not entitled to annual and sick leave or health and life insurance benefits.

B-241483, February 28, 1991

Civilian Personnel

Relocation**■ Residence transaction expenses****■ ■ Downpayments****■ ■ ■ Reimbursement**

An employee's downpayment on the purchase price of a house may not be reimbursed in connection with residence transactions due to the employee's transfer.

Military Personnel

B-238125, February 1, 1991

Military Personnel

Pay

■ Reenlistment bonuses

■ ■ Computation

When a service member who has qualified for a Selective Reenlistment Bonus is selected to participate in a program leading to a commission, entitlement to additional unpaid bonus is suspended and terminates upon commissioning.

B-235606, February 7, 1991

Military Personnel

Pay

■ Adoption expenses

■ ■ Reimbursement

Under section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, "qualifying adoption expenses" are payable if they are incurred for adoption proceedings initiated after September 30, 1987. A member who had custody as a guardian of his stepgrandchildren in 1984, could not adopt them at that time because he neither had the consent of the natural parents nor any other basis in law for doing so. Although the member continued to exercise custody as a legal guardian until he filed petitions for their adoption in October 1987 with the consent of the natural parents, the adoption proceedings were not initiated until the filing of the petitions.

Military Personnel

Pay

■ Adoption expenses

■ ■ Reimbursement

Under section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, the Secretary of Defense was required to establish a test program under which a member of the Armed Forces may be reimbursed for "qualifying adoption expenses," which are defined as "reasonable and necessary expenses that are directly related to the legal adoption of a child." However, where the grandparents obtained initial custody of the children 3 years prior to the filing of a petition for adoption neither the custody proceedings nor other expenses incurred prior to the petition for adoption can be described as being "directly related to the legal adoption" of the minors.

B-239275, February 19, 1991

Military Personnel

Leaves Of Absence

- Annual leave
 - ■ Lump-sum payments
-

Military Personnel

Pay

- Retroactive pay
- ■ Deductions
- ■ ■ Lump-sum payments
- ■ ■ ■ Annual leave

When an Army Reserve officer is erroneously separated from active duty but then retroactively restored to active duty status through a correction of his military records, he must repay any readjustment pay and lump sum payments for annual leave he received incident to the voided separation. Later, if he is properly separated from active duty, he is entitled to pay and allowances for the additional period of active duty and readjustment pay and lump sum leave payment to which he may have become entitled in connection with the valid separation.

Military Personnel

Pay

- Insurance premiums
- ■ Debt collection

Collection of premiums for Servicemen's Group Life Insurance is required during a period of constructive active service between an erroneous separation from active duty and a proper separation. Any decision concerning whether collection of these premiums should be waived in these circumstances must be addressed to the Secretary of Veterans Affairs since this Office has no jurisdiction to decide such matters.

B-238613, February 21, 1991

Military Personnel

Relocation

- Household goods
 - ■ Shipment
 - ■ ■ Eligibility
-

Military Personnel

Relocation

- Relocation travel
- ■ Dependents
- ■ ■ Eligibility

An Air Force member who moved his dependents from Florida to Nevada in December, 1988 in contemplation of his separation in January, 1989, subsequent to revocation of prior separation orders, may not be reimbursed for the expense of such a move, since reimbursement under the applicable provisions of the Joint Federal Travel Regulations assumes the existence of valid orders at the time the travel occurs.

B-236414, February 22, 1991

Military Personnel

Pay

- Survivor benefits
 - ■ Annuities
 - ■ ■ Amount determination
-

Military Personnel

Pay

- Survivor benefits
- ■ Annuities
- ■ ■ Interest
- ■ ■ ■ Amount determination

The Military Retirement Fund that finances the self-sustaining Survivor Benefit Plan is intended by law to operate on an actuarially sound basis. Therefore, in calculating amounts due annuitants under the Plan as a result of court-ordered retroactive awards, interest on uncollected cost contributions, as well as the interest benefit that accrued to the Fund by virtue of not having paid benefits, should be considered.

Military Personnel

Pay

- Survivor benefits
- ■ Annuities
- ■ ■ Amount determination

The Department of Defense Military Retirement Fund is a special fund for paying, among other things, Survivor Benefit Plan (SBP) annuities. As the Fund is mandated to make such payments without reference to how benefit eligibility or amount is determined—by administrative or judicial action—judgments determining SBP benefits should be paid from the Fund and not from the permanent appropriation for judgments commonly known as the Judgment Fund.

Miscellaneous Topics

B-242179, February 4, 1991

Miscellaneous Topics

Housing/Community Development

■ Mortgages

■ ■ Escrow

■ ■ ■ Computation

■ ■ ■ ■ Statutory restrictions

Practice of single item analysis of escrow accounts held by mortgage lenders to pay taxes, insurance and other charges on federally related residential mortgages, does not violate section 10 of Real Estate Settlement Procedures Act of 1974, as amended (12 U.S.C. § 2609). Although single item accounts normally maintain a continuous positive balance throughout the year, they do not exceed either statutorily allowed monthly payment or maximum amount permitted to be collected as deposit at settlement. Statute allows for lender to hold a "cushion" equal to two months payment to the account, however, additional funds in a single item account do not constitute an excess cushion because the larger amount held is directly attributable to larger deposit properly collected at settlement, and retained because of permissible method of account computation. GAO makes no recommendation whether single item computation should be abolished by statute, however, HUD should clarify its position on the validity of single item analysis in pending regulations.

Procurement

B-240145.3, B-241988, February 1, 1991

91-1 CPD 100

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest that solicitation improperly prohibits relocation services contractor from receiving commission payments from household goods carrier is denied where agencies reasonably determined that commission payments are prohibited by the Anti-Kickback Act of 1986.

Procurement

Payment/Discharge

- Relocation service contracts
- ■ Contractors
- ■ ■ Bonuses
- ■ ■ ■ Propriety

Agency reasonably concluded that commission payments from household goods carrier to relocation services contractor are prohibited by Anti-Kickback Act of 1986 where contractor under solicitation will not be providing compensable services to carriers; commission payments therefore would serve only to improperly influence carrier selection.

B-240789.2, et al., February 1, 1991

91-1 CPD 101

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protests are dismissed where the same issues were considered and denied in recently decided protests involving the same parties.

Procurement

Bid Protests

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

Protest of apparent solicitation defect filed with the General Accounting Office (GAO) 2 months after protester's agency-level protest was denied, is untimely, even though the protest to the GAO was filed prior to closing date for receipt of initial proposals, since denial of agency-level protest constituted adverse agency action after which any protest to the GAO was required to be filed within 10 working days.

Procurement

Sealed Bidding

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

Procurement

Specifications

- Brand name/equal specifications
- ■ Equivalent products
- ■ ■ Salient characteristics
- ■ ■ ■ Minor deviations

Where bidder's descriptive literature, submitted to establish the compliance of its offered equal product with the salient characteristics for the brand name or equal procurement, takes exception to various salient characteristics, the bidder's bid was properly rejected as nonresponsive, and neither an alleged blanket promise of compliance nor any monetary savings that the bid offered can cure its nonresponsiveness.

Procurement

Sealed Bidding

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

Procurement

Specifications

- Brand name/equal specifications
- ■ Equivalent products
- ■ ■ Salient characteristics
- ■ ■ ■ Minor deviations

Where literature submitted by a bidder offering the brand name product indicates that product as offered does not comply with one of the salient characteristics for the product being purchased, the bid is nonresponsiveness and may not be cured after bid opening.

Procurement

Socio-Economic Policies

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

The General Accounting Office's review of a contracting officer's determination that a small business concern is nonresponsible, where the firm is eligible for certificate of competency (COC) consideration by the Small Business Administration (SBA) and SBA exercised its COC jurisdiction upon referral, is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of opportunity to seek SBA review.

Procurement

Socio-Economic Policies

- **Small businesses**
- ■ **Competency certification**
- ■ ■ **Adequacy**

Where the record shows that the Small Business Administration (SBA) considered all information provided to it by the contracting agency and the protester during the certificate of competency (COC) proceedings, mere disagreement with the result SBA reached after considering all the evidence does not show that SBA ignored vital information in declining to issue a COC.

Procurement

Contract Management

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

The General Accounting Office will not consider a challenge to the propriety of a contracting agency's decision to terminate a contract for default, since that is a matter to be resolved under the disputes clause of the terminated contract.

Procurement

Contract Management

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

Procurement

Socio-Economic Policies

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

Fact that termination for default under previous contract has been appealed does not eliminate such a termination as evidence of protester's nonresponsibility.

B-241180.2, February 1, 1991

91-1 CPD 104

Procurement

Bid Protests

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

Fourth ranked offeror, with highest evaluated cost, is not an interested party under the General Accounting Office Bid Protest Regulations to question awardee's conformance to specifications since protester would not be in line for award even if the issues raised were resolved in its favor; protester's unsupported assertion that all intervening offerors are unacceptable is not sufficient to establish it as an interested party within the meaning of the Regulations.

Procurement

Bid Protests

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

Protest that procurement was incorrectly set aside for small disadvantaged businesses is dismissed as untimely where solicitation clearly stated the set-aside restriction and protest was filed after bid opening.

Procurement

Bid Protests

- **GAO procedures**
- ■ **Interested parties**

Procurement

Competitive Negotiation

- **Offers**
- ■ **Competitive ranges**
- ■ ■ **Exclusion**
- ■ ■ ■ **Evaluation errors**

Protester whose proposal was excluded from the competitive range is an interested party to protest evaluation of its proposal since it might be entitled to inclusion within the competitive range and consideration for award if its arguments are found to have merit.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Competitive ranges**
- ■ ■ **Exclusion**
- ■ ■ ■ **Discussion**

Where agency reasonably determined that protester's proposal was deficient in several critical areas and that there was no reasonable expectation that it could be made acceptable through discussions, agency properly excluded the proposal from the competitive range.

Procurement

Bid Protests

- **Allegation substantiation**
- ■ **Lacking**
- ■ ■ **GAO review**

Allegation that award was improper because agency personnel provided awardee with early notification of the solicitation and gave awardee information about the procurement is denied where record establishes that agency reasonably determined that protester's proposal was technically unacceptable for reasons uniquely related to the protester's experience and that agency contacts with awardee concerned only the firm's interest in the project and disclosed no privileged information.

Procurement

Socio-Economic Policies**■ Preferred products/services****■ ■ Domestic products****■ ■ ■ Compliance**

General Accounting Office has no legal basis upon which to question the award where agency required verbal confirmation of awardee's Buy American Act certification that its facsimile machines were domestic end products in view of the fact that the protester's preaward allegations that these machines were foreign were not substantiated.

Procurement

Specifications**■ Brand name/equal specifications****■ ■ Equivalent products****■ ■ ■ Acceptance criteria**

Protest of rejection of bid offering carpet tiles as equal to specified tiles is denied where agency properly determined that sample submitted was not sufficiently similar to the specified pattern in terms of color and design.

Procurement

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

Allegations raised for the first time in protester's comments on agency report are untimely where based on information in letters received by protester more than 10 working days prior to filing of comments.

Procurement

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

Protest filed after award that agency should not have evaluated option prices in determining lowest overall priced proposal is untimely where the solicitation included a clause which stated that option prices would be evaluated and under the General Accounting Office Bid Protest Regulations protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that date.

Procurement

Competitive Negotiation

■ Unbalanced offers

■ ■ Materiality

■ ■ ■ Determination

■ ■ ■ ■ Criteria

Awardee's offer for basic and option quantities is not materially unbalanced where protester fails to show that the offer contained enhanced prices, that the evaluated option is not reasonably expected to be exercised, and that reasonable doubt exists that award to the firm will result in the lowest ultimate cost to the government.

Procurement

Contractor Qualification

■ Responsibility

■ ■ Contracting officer findings

■ ■ ■ Affirmative determination

■ ■ ■ ■ GAO review

Although protester contends that awardee's offer is unrealistically low and represents a buy-in, since in awarding the contract the agency necessarily determined that the firm was responsible, awardee's alleged below-cost offer is no basis to overturn award.

B-241426, February 4, 1991

91-1 CPD 114

Procurement

Contractor Qualification

■ Approved sources

■ ■ Qualification

■ ■ ■ Delays

Agency need not accept a proposal of a protester, who was not an approved source for a critical flight safety part, where the agency's needs became urgent and the agency reasonably determined that it could not delay the procurement until the protester received source approval.

Procurement

Noncompetitive Negotiation

■ Use

■ ■ Justification

■ ■ ■ Urgent needs

Agency need not accept a proposal of a protester, who was not an approved source for a critical flight safety part, where the agency's needs became urgent and the agency reasonably determined that it could not delay the procurement until the protester received source approval.

Procurement

Bid Protests

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

A protest to the General Accounting Office that was not filed within 10 working days after the protester knew of initial adverse agency action on agency-level protest is untimely.

B-237926, et al., February 5, 1991**91-1 CPD 116**

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ GAO review

General Accounting Office will not object to Small Business Administration's (SBA) denial of a certificate of competency (COC) where protester alleges that SBA failed to consider a report which found protester conditionally capable of performing contracts, since record shows that the report does not rebut or contradict information upon which the COC denial was based.

B-238803, February 5, 1991

Procurement

Payment/Discharge

- Shipment costs
- ■ Rate schedules
- ■ ■ Interpretation

When applicable rate publication specifically applies a minimum charge for shipments of less than 10,000 pounds that occupy a truck's full visible capacity but is silent with respect to similar shipments of 10,000 pounds or more, there is no basis to conclude that there is any special minimum charge on shipments of more than 10,000 pounds.

B-241176.2, February 5, 1991**91-1 CPD 118**

Procurement

Sealed Bidding

- Bids
- ■ Error correction
- ■ ■ Low bid displacement
- ■ ■ ■ Propriety

Protest of contracting agency's failure to permit the protester to correct a mistake in bid is denied where correction would have displaced the low bidder and the protester's intended bid price is not apparent from the bid itself.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Evaluation criteria
- ■ ■ Unit prices

Withdrawal of a bid containing a discrepancy between a unit price and an extended price is not required where the bid would remain low regardless of how the discrepancy is resolved.

Procurement

Sealed Bidding

- Bids
- ■ Error correction
- ■ ■ Low bid displacement
- ■ ■ ■ Propriety

Discrepancy between a unit price and an extended price in a bid may be corrected to reflect higher unit price where it is clear from the face of the bid that there is only one reasonable interpretation of the discrepancy in light of the government estimate, the range of the other bids, or the contracting officer's logic or experience.

Procurement

Specifications

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

Geographical restriction in requirement for lease of office space does not unduly restrict competition where the agency reasonably based the restriction upon its legitimate operational and security needs.

Procurement

Payment/Discharge

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

A carrier's claim that it should not be held responsible for the loss of a government shipment because another carrier received and transported the shipment is rejected where the Government Bill of Lading (GBL) was issued by the carrier without reference to any other carrier; the GBL, Public Voucher for Transportation Charges and other documents indicate that the carrier alone moved the shipment; and the carrier admits that it billed for the shipment.

Procurement

Payment/Discharge

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

Where an agency asserts that four of seven items in a shipment were not delivered, the carrier involved is liable for the loss if the carrier does not prove delivery of all of the items.

Procurement

Payment/Discharge

- **Shipment costs**
- ■ **Overcharge**
- ■ ■ **Payment deductions**
- ■ ■ ■ **Propriety**

The 3-year limit in 31 U.S.C. § 3726(b) on the government's right to deduct against a carrier's future bills to recover overcharges does not restrict the government's common law right to set off in order to recover for loss or damage.

B-241229.2, February 6, 1991

91-1 CPD 121

Procurement

Sealed Bidding

- **Invitations for bids**
- ■ **Interpretation**
- ■ ■ **Terms**

Post-bid-opening protest by low bidder whose bid was rejected and who verified bid price by alleging that the solicitation did not require asbestos removal in plaster ceilings but only in ceiling tiles is denied since protester's interpretation would not give effect to the solicitation's requirement, when read as a whole, for the removal of asbestos insulation in contaminated ceilings.

Procurement

Sealed Bidding

- **Bids**
- ■ **Responsiveness**
- ■ ■ **Determination criteria**

A contracting officer's statements do not constitute a waiver of a bidder's error or estop the government from rejecting a bid where it is ultimately properly rejected.

B-241302.2, February 6, 1991

91-1 CPD 122

Procurement

Sealed Bidding

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

Where handwritten notation on cover of technical manual submitted as part of protester's bid merely indicates protester's apparent intent to comply with solicitation's installation specification at a future date, bid was properly rejected as nonresponsive, even though the protester allegedly relied on oral assurances received from the contracting officer that the notation rendered the bid

acceptable since protester may not rely on oral advice inconsistent with the solicitation specifications.

B-241341, February 6, 1991

91-1 CPD 123

Procurement

Sealed Bidding

■ **Invitations for bids**

■ ■ **Amendments**

■ ■ ■ **Notification**

Prospective bidder's failure to receive solicitation amendment does not warrant disturbing the award where there is no allegation that the cause of the failure was the result of a deliberate attempt by the contracting agency to exclude the bidder or the result of deficiencies in the contracting agency's solicitation process.

B-241372, February 6, 1991

91-1 CPD 124

Procurement

Contractor Qualification

■ **Organizational conflicts of interest**

■ ■ **Allegation substantiation**

■ ■ ■ **Evidence sufficiency**

Agency properly excluded "response action contractors" (RACs) from competing for contract where contracting officer reasonably determined that the objectivity of such contractors could be impaired when performing specific tasks contemplated under the protested solicitation which could affect work being performed for agency by RACs

Procurement

Contractor Qualification

■ **Organizational conflicts of interest**

■ ■ **Allegation substantiation**

■ ■ ■ **Evidence sufficiency**

Agency properly excluded protester from competing on the basis of its corporate relationships with sister corporations which hold "response action" contracts.

Procurement

Competitive Negotiation

■ **Competitive restrictions**

■ ■ **Use**

■ ■ ■ **Propriety**

Agency may impose restrictions with respect to possible conflicts which are not explicitly provided for in applicable law or regulation where the needs of the agency or the nature of the procurement dictates the use of such restrictions.

Procurement

Bid Protests

■ **GAO procedures**

■ ■ **Interested parties**

Company that is properly excluded from competition on basis of an organizational conflict of interest is not an interested party to challenge solicitation requirements with which the successful offeror must comply.

Procurement

Sealed Bidding

- Low bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

Upward correction of bid was proper where evidence, including bidder's worksheets and price list, clearly demonstrated the existence of a mistake and the intended bid, which was below the next low bid by approximately 4 percent.

Procurement

Contract Management

- Contract administration
- ■ GAO review

Bid that takes no exception to solicitation requirement that offered equipment interface with equipment existing at the agency obligates bidder to provide such equipment and is therefore responsive; whether bidder actually performs contract with equipment that meets all specifications is a matter of contract administration, which is the responsibility of the contracting agency and not within the purview of bid protest function.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Prior contract performance

Contracting officer reasonably determined that awardee satisfied requirement for documentation of at least two examples of past performance showing successful installment of similar systems, where investigation of five projects listed by the prospective awardee showed such similar installations.

Procurement

Competitive Negotiation

- Quotations
- ■ Price reasonableness
- ■ ■ Determination
- ■ ■ ■ Administrative discretion

Procurement

Socio-Economic Policies

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

Protest against dissolution of an emerging small business set-aside and the award of the requirement to a large business is denied where the contracting officer had rational basis for determination that the price submitted by eligible emerging small business was unreasonably high.

Procurement

Competitive Negotiation

- Quotations
 - ■ Price reasonableness
 - ■ ■ Determination
 - ■ ■ ■ Administrative discretion
-

Procurement

Socio-Economic Policies

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

In considering price reasonableness under a small business set-aside, contracting officer has discretion in deciding which factors to consider and a price submitted by an otherwise ineligible large business properly may be considered.

B-241496, February 6, 1991

91-1 CPD 127

Procurement

Bid Protests

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

Protest against agency directive made before submission of best and final offers (BAFO) that all offerors' cost subtasks at a set amount for evaluation purposes filed after award is untimely because matter should have been protested before receipt of BAFOs.

Procurement

Competitive Negotiation

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

Allegation that agency conducted "Best Buy Analysis" not referred to in solicitation, which was actually cost/technical tradeoff, is denied since review shows that analysis conformed to solicitation evaluation factors.

B-241506, February 6, 1991

91-1 CPD 128

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

Bid properly was rejected for failure to acknowledge a material amendment where the bidder demonstrated receipt of the amendment only by presenting one of many plausible explanations for prices changed or unchanged in comparison to its earlier bid submitted to the agency before the issuance of the amendment, since an amendment is not considered to have been constructively acknowledged where the bid as submitted at bid opening does not include any evidence that the bidder had knowledge of the essential items appearing only in the amendment.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Competition sufficiency**

Establishment of a competitive range of one does not convert a competitive procurement into a sole-source one.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Inclusion****■ ■ ■ ■ Administrative discretion**

Procurement

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

Agency reasonably determined that protester's proposal was technically unacceptable and therefore not for inclusion in the competitive range where solicitation required the development of an electronic communications network using a specified information system and protester's proposal contained inadequate discussion of how it would go about establishing such a network using that system.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Inclusion****■ ■ ■ ■ Administrative discretion**

Procurement

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

Agency reasonably determined that protester's proposal was technically unacceptable and therefore not for inclusion in the competitive range where one of principal tasks to be accomplished under the solicitation was development of an electronic communications network and protester's proposed staff did not have sufficient experience to oversee such a task.

Procurement

Contractor Qualification**■ Responsibility/responsiveness distinctions****■ ■ Sureties****■ ■ ■ Financial capacity**

An affidavit of Individual Surety (Standard Form 28) is a document separate from the bid bond itself and serves solely as an aid in determining the responsibility of an individual surety. Deficiencies in an affidavit, including those necessitating a substitution of assets by the surety, may be corrected after bid opening and prior to award.

B-241696, February 6, 1991

Procurement

Sealed Bidding**■ Bids****■ ■ Responsiveness****■ ■ ■ Descriptive literature****■ ■ ■ ■ Adequacy**

Procurement

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

Bid was properly rejected as nonresponsive where descriptive literature submitted by the protester to establish conformance to the solicitation's specifications indicated that its product failed to conform to the specifications.

B-241727, February 6, 1991

Procurement

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

Protest that awardee's employment of a former agency employee as its technical advisor constituted a conflict of interest and gave awardee an unfair advantage is denied where the record does not show that any action by the former agency employee resulted in prejudice for, or on behalf of, the awardee.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Administrative discretion**

Agency reasonably found that an offeror demonstrated a limited understanding of agency requirements where offeror was determined to have provided insufficient man-hour effort to accomplish the requirements.

Procurement

Competitive Negotiation

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

Award to higher-rated offeror with higher proposed cost is not objectionable where agency reasonably concluded that the cost premium involved was justified considering the technical superiority of the selected offeror's proposal and the greater importance of technical considerations in proposal evaluation.

B-241729, February 6, 1991

91-1 CPD 133

Procurement

Sealed Bidding

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

Cancellation of invitation for bids for indefinite quantity contract was proper when agency determines it no longer has requirement for items.

B-241877.2, February 6, 1991

91-1 CPD 134

Procurement

Bid Protests

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

Request for reconsideration is denied where protester fails to demonstrate that an alleged factual error warrants reversal of our prior decision.

B-242794, February 6, 1991

Procurement

Bid Protests

- **GAO authority**

General Accounting Office is without jurisdiction to consider a protest of a procurement by the Clerk of the U.S. House of Representatives because the House of Representatives is not a federal agency for bid protest purposes.

B-239797.3, February 7, 1991

Procurement

Bid Protests

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

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Request for reconsideration of dismissal of protest against cancellation of timber sale as academic is denied where protester is not entitled to award under the initially canceled sale both because the scope of the requirement has materially changed and because the agency properly canceled sale after bid opening because erroneous agency advice and a deficient solicitation had impeded competition.

B-240769.3, February 7, 1991

91-1 CPD 135

Procurement

Sealed Bidding

- Competitive advantage
- ■ Non-prejudicial allegation

Request for reconsideration of dismissal of protest against cancellation of timber sale as academic is denied where protester is not entitled to award under the initially canceled sale both because the scope of the requirement has materially changed and because the agency properly canceled sale after bid opening because erroneous agency advice and a deficient solicitation had impeded competition.

Procurement

Contract Management

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

Propriety of an extension to a contract is a question of contract administration outside the scope of the General Accounting Office's protest review function.

Procurement

Bid Protests

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

Procurement

Bid Protests

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

Request for reconsideration of decision dismissing as untimely protest of agency's decision to request best and final offers from all offerors is denied where protest was not filed at General Accounting Office prior to the closing date for receipt of initial proposals.

Procurement

Bid Protests

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

Protest filed after closing date for receipt of best and final offers alleging that agency failed to furnish evaluation criteria for sealed bid procurement converted to negotiated procedures, is untimely where absence of criteria was apparent on the face of letter issued to effectuate the conversion; protests of alleged solicitation improprieties apparent prior to the next closing date for receipt of proposals must be filed prior to closing.

Procurement

Bid Protests

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

Protest that agency failed to advise that request for revised offers was a request for best and final offers (BAFO) is untimely where protester was on actual notice prior to closing of its alleged failure to receive letter advising of negotiation procedures for sealed bid procurement converted to negotiated procedures, including statement that BAFOs were being requested, but protester failed to protest within 10 working days of closing.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Contractors
- ■ ■ Notification

Notice to offerors that negotiations were to close with the submission of revised proposals by a common date was adequate notice that best and final offers were being requested.

Procurement

Specifications

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

Procurement

Specifications

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

Protest that in brand name or equal procurement the agency improperly made award to firm whose proposed “equal” product did not meet the stated salient characteristics is denied where the agency relied on offeror’s statements of compliance in conjunction with supporting descriptive literature after having verified the statements to maximum extent possible in light of the fact that the proposed product is new.

B-241502, et al., February 7, 1991

91-1 CPD 138

Procurement

Competitive Negotiation

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

Contracting officer’s decision to cancel a negotiated procurement because of doubt as to price reasonableness was not unreasonable where only one proposal is received, the items being procured are not commercially comparable and recent specification changes render government estimate unreliable and past procurements not comparable.

Procurement

Bid Protests

- Non-prejudicial allegation
 - ■ GAO review
-

Procurement

Noncompetitive Negotiation

- Use
- ■ Justification
- ■ ■ Urgent needs

Although protester’s allegation that agency’s justification for limiting competition to two sources was based upon an urgent need that was primarily the result of a lack of advance planning is correct, protest is denied where protester, as one of the sources solicited, was not prejudiced thereby.

Procurement

Competitive Negotiation

■ Offers

■ ■ Price competition

■ ■ ■ Adequacy

Awardee need not submit certified cost and pricing data where award is based on adequate price competition.

B-241513, B-241513.2, February 7, 1991***

91-1 CPD 139

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

■ ■ ■ ■ Effective dates

Procurement

Specifications

■ Brand name/equal specifications

■ ■ Equivalent products

■ ■ ■ Acceptance criteria

Protest alleging noncompliance of brand name product with specification requirements in a negotiated brand name or equal procurement need not be filed by the closing date for receipt of proposals; it may be timely filed within 10 working days of the date on which the protester learned of the procuring agency's determination that the brand name product was compliant with the specifications. Since an agency may properly specify specifications that go beyond those of the designated brand name and may reject the offer of a brand name product that does not comply, the protester need not file a "defensive" protest but properly may await an agency determination that is adverse to the protester's interest.

Procurement

Specifications

■ Brand name/equal specifications

■ ■ Equivalent products

■ ■ ■ Acceptance criteria

Protest alleging noncompliance of brand name product with certain solicitation specifications is denied where the record demonstrates compliance with each specification requirement.

Procurement

Sealed Bidding

- Ambiguous bids
- ■ Determination criteria

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

Even though protester acknowledged amendment shortening project completion schedule in its undated bid form, protester's bid was ambiguous and therefore properly rejected as nonresponsive as bid also included schedule showing completion in accordance with original, longer deadline, thereby creating doubt as to whether protester intended to bind itself to deliver in accordance with the completion schedule as amended.

B-241647, et al., February 7, 1991**91-1 CPD 141**

Procurement

Small Purchase Method

- Quotations
- ■ Terms
- ■ ■ Compliance

Since quotations from Federal Supply Schedule (FSS) vendors are informational responses and there is no requirement that the quotation comply precisely with the request for quotation requirements, where the awardee meets agency's minimum needs and the price impact of apparent omissions had no effect on competitive standing of vendors, protests of FSS vendor's failure to include certain items are denied.

Procurement

Bid Protests

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

Protest of unspecified "omissions of required provisions and ambiguous and indefinite evaluation factors" are dismissed as inadequately detailed and untimely when not raised prior to closing date for receipt of quotations.

B-242200, February 7, 1991

Procurement

Competitive Negotiation

- Federal procurement regulations/laws
- ■ Revision
- ■ ■ Evaluation criteria

General Accounting Office suggests deferring action on Federal Acquisition Regulation (FAR) case No. 90-52, a proposal to revise FAR section 15.605(b) concerning quality of services as an evaluation factor, pending consideration by the FAR councils of a change made by section 802(c) of Pub. L. No. 101-510.

Procurement

Competitive Negotiation

- Offers
 - ■ Evaluation errors
 - ■ ■ Allegation substantiation
-

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation errors
- ■ ■ Non-prejudicial allegation

Protest challenging contract award for stenographic reporting services as inconsistent with basis for award in request for quotations (RFQ) is sustained where record indicates that agency evaluated awardee's quotation based on its offer of a bonus payment to the government, a factor not stated in RFQ; agency verbally informed awardee that bonus payments would be accepted but did not so inform other quoters; and protester may have offered bonus payment had it known payments would be evaluated.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Propriety

Contracting agency's decision to cancel a request for proposals for laundry and dry cleaning services to be provided on a contractor owned-contractor operated basis is reasonable where troop reductions and base closures rendered the quantity estimates in the solicitation invalid and where agency decided its requirements would be best met by resoliciting on the basis of government owned-contractor operated facilities due to underutilization of such facilities.

Procurement

Noncompetitive Negotiation

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

Protest against award of an interim contract for laundry and dry cleaning services based on limited competition to only offeror proposing a reasonable price is denied where agency reasonably determined that an urgent need for the services existed.

Procurement

Competitive Negotiation

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

Protester's assertion that it should have received award because it offered a lower price than the awardee is dismissed where the solicitation provided that technical quality would be considered more important than price.

Procurement

Competitive Negotiation

- Contract award notification
- ■ Procedural defects

Protest that the agency failed to notify unsuccessful offerors on a small business set-aside of the name and location of apparent successful offeror is dismissed, because the notice was not required since the contracting officer determined in writing that the award was required to be made without delay.

B-241092.3, February 11, 1991

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest alleging that technical evaluation should have taken into account protester's satisfactory performance on prior contracts with same agency is without merit; firm is not entitled to presumptions based on prior performance but, rather, must demonstrate its capabilities in its proposal.

Procurement

Bid Protests

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

Protest of agency's decision to conduct procurement using negotiated procedures instead of sealed bidding is dismissed as untimely where not filed at General Accounting Office prior to time set for receipt of initial proposals.

Procurement

Specifications

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

In purchase of automatic data processing equipment using nonmandatory schedule contract, agency properly rejected response submitted by protester which failed to provide information sufficient to establish that equipment offered met agency's minimum requirements.

Procurement

Sealed Bidding

- Unbalanced bids
- ■ Materiality
- ■ ■ Responsiveness

A low bid is not unbalanced where there is no evidence that the bid contained enhanced prices for any items.

Procurement

Contract Management

- Contract administration
- ■ GAO review

Whether a bidder will comply with requirement that employees hold certificates of training and competence to perform certain maintenance services prior to their starting work is a matter of contract administration which is the responsibility of the agency and not within the purview of the General Accounting Office's bid protest function.

Procurement

Contractor Qualification

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

The necessity of a business license in a particular state or locality is generally a matter between the contractor and the issuing authority and will not be a bar to a contract award, absent a specific licensing requirement in the solicitation.

Procurement

Bid Protests

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

Allegations that agency improperly excluded protester from competitive range, denied protester opportunity for discussions, improperly allowed awardee to extend its offer, and did not promptly notify protester of ineligibility for award, are dismissed as untimely where raised more than 10

days after receipt of award notice, which should have made protester aware of any basis for allegations.

Procurement

Contract Management

- **Contract administration**
- ■ **GAO review**

Protest that award document included requirement impossible to perform is dismissed, since it concerns matters of responsibility or contract administration, which General Accounting Office does not review.

B-242645, February 11, 1991

91-1 CPD 148

Procurement

Contract Management

- **Contract modification**
- ■ **Leases**
- ■ ■ **Propriety**

Protest that agency, through contract modification, is improperly attempting to convert protester's firm, fixed-price leasing contract into a cost reimbursement supply contract is dismissed as a matter of contract administration within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the United States Claims Court.

B-240926.2, February 12, 1991

91-1 CPD 149

Procurement

Bid Protests

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

Request for reconsideration filed approximately 6 weeks after dismissal of protest is considered timely where there is no evidence in record to show when dismissal was received by protester.

Procurement

Bid Protests

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

Protester's late receipt of agency report is not a basis for reopening protest dismissed for failure to file comments or express continued interest in the protest within 10 working days after receipt of agency report, where protester failed to notify the General Accounting Office (GAO) that it had not received report until after the due date shown on the GAO notice acknowledging receipt of protest.

Procurement

Competitive Negotiation**■ Discussion reopening****■ ■ Auction prohibition**

Agency did not engage in improper auction techniques in the course of a negotiated procurement when, during discussions, it twice advised the protester that the labor element of the protester's proposal was unrealistically low and that the agency would reject the proposal if the protester did not increase the element's low price to a realistic level; the record does not support the protester's allegation that the agency mentioned a minimum acceptable price increase—at least \$10,000—for this element.

B-241446.2, February 12, 1991

Procurement

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

Allegation that agency improperly rejected sample based on incorrect interpretation of weight requirement is untimely where agency's interpretation was clear from face of the solicitation and record shows that protester in fact was aware of agency's interpretation prior to initial closing date; under these circumstances, protest of rejection is essentially a challenge to the requirement itself that should have been raised in protest prior to initial closing date.

Procurement

Bid Protests**■ GAO procedures****■ ■ Interested parties****■ ■ ■ Direct interest standards**

Where protester's proposal was rejected and the protester has not timely challenged the rejection, the protester would not be in line for award even if its protest against cancellation of solicitation were sustained; protester therefore is not interested party eligible to challenge cancellation.

B-241512, B-241512.2, February 12, 1991

Procurement

Bid Protests**■ Allegation****■ ■ Abandonment**

Protest issue is considered abandoned where agency's report specifically addresses argument raised in initial protest and protester fails to rebut the agency's position in its comments on the report.

Procurement

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

Protester's new and independent ground of protest first raised in comments on agency's report is dismissed as untimely where later-raised issue does not independently satisfy timeliness rules of

General Accounting Office's Bid Protest Regulations requiring protest to be filed within 10 working days after basis of protest is known or should have been known.

Procurement

Bid Protests

- **Allegation substantiation**
- ■ **Lacking**
- ■ ■ **GAO review**

Protest of unequal competition is denied where, contrary to protest allegation, there is no evidence that agency gave awardee advance notice of availability for hire of incumbent contractor's personnel.

Procurement

Bid Protests

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

Protest against evaluation of awardee's proposal is dismissed where protester would not be in line for award if allegations were resolved in its favor and, therefore, it is not an interested party.

B-241530, B-241530.2, February 12, 1991

91-1 CPD 153

Procurement

Competitive Negotiation

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

Contention that agency improperly excluded a proposal from the competitive range after finding only the proposal's response to the sample task unacceptable is denied where the solicitation expressly advised offerors that proposals must receive a rating of at least acceptable to be considered for award and where agency, in fact, reviewed the technical proposal in its entirety and reasonably concluded that the proposal was unacceptable in three of the four subfactors under the technical factor and where protester fails to challenge the results of the technical evaluation provided in response to the protest.

Procurement

Competitive Negotiation

- **Discussion**
- ■ **Offers**
- ■ ■ **Clarification**
- ■ ■ ■ **Propriety**

Protest against elimination from competitive range after consideration of offeror's proposal, including offeror's response to a request for clarification, is denied where the questions, regardless of their description as request for clarification, were sufficient to lead the protester into areas of perceived deficiency in its proposal and permitted protester to supplement its initial proposal, and where the proposal, as clarified, was reasonably evaluated unacceptable.

Procurement

Competitive Negotiation

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

Claim that protester's elimination from competitive range, leaving a competitive range of one offeror, was improper is denied where protester's proposal was reasonably found unacceptable.

Procurement

Competitive Negotiation

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

Protest that agency abandoned stated evaluation criteria because agency concluded protester's proposed approach was risky, even though the solicitation did not specifically enunciate risk as an evaluation factor or subfactor, is denied because consideration of risk is inherent in the evaluation of proposals.

Procurement

Competitive Negotiation

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

Contention that evaluation is biased is denied where protester fails to show that improper conduct occurred resulting in a conflict of interest on the part of evaluation panel members and the chairman of the evaluation panel, and the record contains no evidence of bias against the protester or in favor of the awardee.

Procurement

Competitive Negotiation

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

Protester's claim that tone of discussion questions indicates bias is denied because adversarial tone, standing alone, does not establish bias on the part of an agency or its contracting officials.

Procurement

Bid Protests

- **GAO procedures**
 - ■ **Protest timeliness**
 - ■ ■ **Deadlines**
 - ■ ■ ■ **Constructive notification**
-

Procurement

Competitive Negotiation

- **Contract awards**
- ■ **Award procedures**
- ■ ■ **Procedural defects**

Agency's failure to provide written notice to unsuccessful offerors of intent to award a small business set-aside contract, as required by Federal Acquisition Regulation § 15.1001, constitutes harmless procedural error since neither offeror sought to challenge the small business size status of the apparent successful awardee.

B-241544, February 12, 1991

91-1 CPD 154

Procurement

Bid Protests

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

Protest that experience requirement is unduly restrictive of competition is dismissed as untimely where the requirement is clearly set forth in the solicitation and the protest was not filed before the closing date for receipt of initial proposals.

Procurement

Bid Protests

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

Allegation that protester was given inadequate time to respond to request for additional information is dismissed as untimely where not raised within 10 days after the basis of protest was known.

Procurement

Competitive Negotiation

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

Agency determination to eliminate protester's proposal as technically unacceptable is reasonable, despite fact that only one offeror remains in competitive range, where the solicitation stressed the need for high quality workmanship, and after being advised by agency of deficiencies in its initial proposal, the protester's revised proposal does not demonstrate the required experience in related work, and the required references supplied by the protester provided unfavorable comments on the quality of the protester's work.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Administrative discretion**

General Accounting Office will not object to evaluation of technical and cost proposals where review of evaluation records shows that evaluation was fair and reasonable and consistent with the evaluation criteria in the solicitation.

Procurement

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

Although solicitation provided that technical factors were more important than cost, agency properly awarded contract to technically lower rated, lower cost offeror instead of higher cost, higher technically rated offeror, where solicitation provided for cost/technical tradeoff, and contracting officer reasonably determined that there was no significant technical difference between proposals and that award to lower cost offeror was most advantageous to the government.

B-241580, February 12, 1991**91-1 CPD 156**

Procurement

Bid Protests**■ Dismissal****■ ■ Definition**

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

B-241590.2, et al., February 12, 1991**91-1 CPD 157**

Procurement

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

Protest allegations filed more than 10 working days after protester learned of initial adverse agency action (notice of award to another firm) on protest to agency is untimely. Protester's continued pursuit of protest with contracting agency does not alter this result.

Procurement

Bid Protests

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

Protests filed more than 10 working days after the protester learned of the basis of its protests are untimely.

Procurement

Bid Protests

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

Protester alleging that awardee is ineligible for award does not have the direct economic interest in the contract award to be considered an interested party under General Accounting Office Bid Protest Regulations where there are other intermediate offerors that have a greater interest in the procurement than the protester.

B-241630, B-241630.2, February 12, 1991**91-1 CPD 158**

Procurement

Bid Protests

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

Protest challenging the rejection of an offer as technically unacceptable is untimely when filed more than 10 working days after the protester was orally informed of the agency's rejection of its offer.

Procurement

Bid Protests

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

Protest challenging an award is dismissed where the protester, who was eliminated from the competitive range and did not timely protest this elimination, would not be in line for award even if the allegation were resolved in its favor, and the protester therefore is not an interested party.

B-242601, February 12, 1991**91-1 CPD 159**

Procurement

Bid Protests

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

Protest is dismissed as untimely where, although protest would be timely based on date on first page of protest submission, date on second and subsequent pages indicate that protest was originally written nearly 1 month before it was filed at General Accounting Office; in absence of other evidence establishing timeliness, these dates show protest was filed more than 10 days after protester learned of basis for protest.

Procurement

Bid Protests

- Dismissal
- ■ Definition

Procurement

Socio-Economic Policies

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

Where protest allegations do not establish likelihood that agency's decision was contrary to applicable regulations, protest of decision to conduct procurement as small business set-aside instead of small disadvantaged business set-aside is dismissed for failure to set forth a legally sufficient basis of protest as required by General Accounting Office Bid Protest Regulations.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

- GAO procedures
- ■ Recommendations
- ■ ■ Modification

Prior decision is modified to delete recommendation that agency's requirements be resolicited without a clause placing a ceiling on option year price adjustments for increases in Service Contract Act wage rates, and that options under awardee's contract not be exercised, since the agency has obtained a deviation to the Federal Acquisition Regulation, which removed the single legal impediment to using the ceiling clause and has, thus, obviated the need for the recommended corrective action.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester's entitlement to the costs of filing a protest is unaffected by agency's good faith reliance on the validity of a solicitation clause which was found not to be authorized by the Federal Acquisition Regulation in earlier decision; the purpose of awarding costs is not to impose a penalty on the government but to reimburse the protester with valid claims for pursuing them.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Administrative discretion**

Proposal, which was found unacceptable and significantly inferior to those in the competitive range, was properly eliminated from the competitive range, where the agency has identified numerous deficiencies in the proposal consistent with the evaluation criteria and the protester did not rebut the alleged deficiencies.

Procurement

Competitive Negotiation**■ Alternate offers****■ ■ Acceptance****■ ■ ■ Propriety**

Procurement

Competitive Negotiation**■ Requests for proposals****■ ■ Amendments****■ ■ ■ Criteria**

Where agency, after receipt of offers, determines that an alternate approach not contemplated under the request for proposals (RFP) and involving a significant change to the RFP requirement is acceptable, the agency is required to either amend the RFP or engage in appropriate discussions with the offerors to allow all competitive range firms an opportunity to compete on a common basis.

Procurement

Special Procurement Methods/Categories**■ Service contracts****■ ■ Sewage services****■ ■ ■ Municipalities****■ ■ ■ ■ Mandatory use**

Agency reasonably found that provision of Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1988), requiring federal agencies to comply with local requirements respecting control and abatement of solid waste, does not require either the Alameda Naval Air Station and Annex, or the Naval Aviation Depot located on the air station to use Alameda, California's exclusive franchisee for refuse collection. Although the air station, annex and depot are within the corporate limits of the city of Alameda, the agency reasonably determined it is a major federal facility under the guidelines of the Environmental Protection Agency and should be treated as though it were a separate municipality entitled to contract for its own refuse collection services.

Procurement

Bid Protests**■ Non-prejudicial allegation****■ ■ GAO review**

Protest that agency improperly relaxed requirement regarding provision of commercial flight services is denied where there is no showing that the protester was prejudiced by the agency's actions.

Procurement

Bid Protests**■ Allegation substantiation****■ ■ Lacking****■ ■ ■ GAO review**

Procurement

Sealed Bidding**■ Invitations for bids****■ ■ Interpretation****■ ■ ■ Terms**

Protest that agency improperly rejected protester's bid for failure to agree to paint masonry surfaces with texture paint is denied where the schedule of services in the solicitation required that masonry surfaces be painted with texture paint. Fact that specifications appear to give contractor the option to use other than texture paint is not dispositive since under the order of precedence clause incorporated in the solicitation, the schedule of services—which clearly calls for use of texture paint—takes precedence over the specifications.

Procurement

Sealed Bidding**■ Bid guarantees****■ ■ Sureties****■ ■ ■ Acceptability**

Agency acted properly in rejecting a bid which proposed partnerships, rather than individuals, as individual sureties.

Procurement

Bid Protests**■ GAO procedures****■ ■ Agency notification****■ ■ ■ Deadlines****■ ■ ■ ■ Constructive notification**

Dismissal of protest is affirmed where protester failed to file a copy of the protest with the contracting agency within 1 day after filing with the General Accounting Office (GAO); protester's contention that it was unaware of the requirement to furnish a copy within 1 day does not waive the failure to do so, since protester is charged with constructive knowledge of GAO Bid Protest Regulations.

B-242185, February 13, 1991

Procurement

Payment/Discharge

- **Payment procedures**
- ■ **Invoices**
- ■ ■ **Facsimile**

Soil Conservation Service (Service) may make payments to a contractor based on facsimile invoices as long as the Service has adequate internal controls to guard against fraud and overpayments, and it determines that accepting facsimiles is beneficial to and cost-effective for the government.

B-241528, B-241528.2, February 14, 1991***

91-1 CPD 170

Procurement

Bid Protests

- **Allegation substantiation**
- ■ **Lacking**
- ■ ■ **GAO review**

Protest that contracting agency improperly removed best and final offers (BAFO) from room designated for receipt of BAFOs prior to the BAFO receipt deadline and may have tampered with BAFO prices is denied, where the record shows that proposals were properly safeguarded and the protester fails to provide evidence in support of its allegation in response to affidavits of agency personnel denying there was tampering.

Procurement

Special Procurement Methods/Categories

- **Computer equipment/services**
- ■ **Computer software**
- ■ ■ **Response times**
- ■ ■ ■ **Evaluation**

Agency reasonably accepted awardee's proposed use of a computer as meeting request for proposal response time requirements in the absence of credible evidence that the proposed system failed to meet these requirements.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Pre-award surveys**

Procurement

Competitive Negotiation

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

Protest that contracting agency inequitably subjected the protester to an arduous pre-award survey, while ordering only a short-form survey for the awardee, is denied where the record shows that the contracting agency ordered short-form surveys for both the offerors, and the protester, who was second low priced on a request for proposals awarded to the low acceptable offeror, was not prejudiced as a result of the survey since the protester was not in line for award in any case.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size determination
- ■ ■ GAO review

Protest that awardee is not a small business and is therefore ineligible for contract award is dismissed because challenges of the size status of particular firms are for review solely by the Small Business Administration, not the General Accounting Office.

Procurement

Competitive Negotiation

- Contract award notification
- ■ Procedural defects

Protest that contracting agency improperly failed to provide notice of contract award prior to award is denied where the agency properly waived the prior notice requirement of Federal Acquisition Regulation § 15.1001(b)(2) by determining, in writing, that the urgency of the requirement necessitated the award without delay.

B-241554, February 14, 1991

91-1 CPD 171

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Although contracting agency failed to hold meaningful discussions before rejecting proposed copy machine because of concerns about reliability, the protest is denied since the protester was ultimately given an opportunity, but failed, to respond to the agency's concerns about the reliability of its copy machine.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Contracting agency reasonably rejected protester's proposal of copy machine because, based on manufacturer recommended monthly copy volume listed in independent trade publications and the fact that very few of the copiers proposed are in use in the commercial market at the required monthly volume, agency officials had substantial doubts as to the ability of the proposed copiers to reliably produce 20,000 copies per month as required by the solicitation.

B-241594, February 14, 1991

91-1 CPD 172

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Where solicitation was clear as to elements of operational approach, including vehicle requirements, agency properly reduced protester's technical proposal score based on deficiency in operational approach as evidenced by inadequate number of vehicles.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where vehicle requirement was clearly stated in solicitation, agency was not required to remind protester of requirement in discussions; in any case, agency's request for more detailed explanation of operational approach adequately led protester into area of deficiency.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Procurement

Bid Protests

- Non-prejudicial allegation
- ■ GAO review

Protest of agency's alleged failure to apply evaluation preference to domestic contractor is denied where solicitation did not provide for evaluation preference; award based on evaluation preference not provided for in solicitation would have been improper.

B-241641, February 14, 1991

91-1 CPD 173

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Protester who did not submit a quotation under a solicitation is an interested party to protest allegedly defective specifications because of his interest as a potential competitor under a revised solicitation if the protest is sustained.

Procurement

Small Purchase Method

- Requests for quotations
- ■ Use
- ■ ■ Propriety

Issuance of request for quotations using small purchase procedures is proper where services will be obtained for less than \$25,000.

Procurement

Specifications

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

Requirement for face-to-face meetings between the agency and contractor is reasonable in procurement for editing services where several government personnel must be involved in discussions, the

text to be edited contains complex equations and formula, and the size of the documents precludes transmission of workable copy by telecopier.

Procurement

Special Procurement Methods/Categories

- Service contracts
- ■ Personal services
- ■ ■ Criteria

Award does not constitute impermissible personal services contract where the government does not supervise or control contractor's personnel.

B-241853, et al., February 14, 1991

91-1 CPD 174

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Protests that agency improperly awarded contracts for piston housing assemblies to second-low offeror after determining that the protester, the low offeror, was not a qualified source eligible for award, are dismissed as academic; agency's proposed action—suspension of performance of the contracts until they can be resolicited on a more competitive basis or until agency has approved protester's source approval request—is relief that would be appropriate if protest were sustained.

B-242367.2, February 14, 1991

91-1 CPD 175

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Dismissal of protest challenging award to other than the low offeror without discussions is affirmed where, shortly after filing of protest, agency corrected deficiency by opening discussions with all offerors in the competitive range and requesting best and final offers; although protester's requested relief was award of contract to itself, since such relief was not appropriate, dismissal of protest as academic based on agency's appropriate corrective action was proper.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Claim for proposal preparation and protest costs where agency took corrective action remedying alleged procurement defect in response to protest is denied since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

Procurement

Bid Protests

- Antitrust matters
- ■ GAO review

The proper forum for consideration of allegations of restraint of trade and possible violations of the antitrust laws is the Department of Justice, not the General Accounting Office.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protester's objection to agency refusal to announce cost estimate for government performance under cost comparison, without any claim to award or objection to solicitation, fails to state valid basis for protest under Bid Protest Regulations.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest that other firms' lower prices submitted in response to an oral solicitation for a short-term, urgent requirement were "suspect" because the agency did not provide those firms with the information necessary to compete intelligently and on an equal basis is denied where agency did provide those firms with copies of the specifications from the protester's prior contract and of its collective bargaining agreement.

Procurement

Sealed Bidding

- Below-cost bids
- ■ Contract awards
- ■ ■ Propriety

The submission of a below cost price is not illegal and provides no basis for challenging the award of a fixed-price contract to a responsible contractor.

Procurement

Contractor Qualification

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

Protest challenging affirmative determination of responsibility is denied where there were no definitive criteria to be applied and protester fails to show that affirmative responsibility determination by the contracting agency was the result of bad faith—notwithstanding protester's disagreement.

ment with contracting agency's conclusion-because record contains no evidence that government officials acted with specific and malicious intent to harm the protester.

B-241564, February 15, 1991***

91-1 CPD 179

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest is sustained where cost/technical tradeoff is based on flawed technical evaluation.

Procurement

Competitive Negotiation

- Discussion
- ■ Bad faith
- ■ ■ Allegation substantiation

Procurement

Competitive Negotiation

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Discussions were prejudicially unequal where, during discussions, agency advised awardee of availability of upgraded, higher performance computer which awardee subsequently offered to provide, and which was deemed a significant technical advantage in the selection of the awardee, but failed to advise other offerors, including the protester, of its desire for higher performance computer and solicitation gave no reasonable indication that agency wanted this higher level of performance.

B-241807, February 15, 1991

91-1 CPD 180

Procurement

Contractor Qualification

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

Protest challenging agency's determination that awardee will be able to perform the contract by supplying items conforming to the specification requirements involves an affirmative determination of the awardee's responsibility which the General Accounting Office will not review absent a showing of possible fraud or bad faith or misapplication of definitive responsibility criteria.

B-241529, February 19, 1991

91-1 CPD 181

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency conducted inadequate discussions is denied where one of the concerns identified by the agency but not discussed was relatively minor and the other related to an aspect of the

proposal the agency regarded as satisfactory and that could be improved significantly only through use of approaches contained in other proposals.

B-241565, February 19, 1991***

91-1 CPD 182

Procurement

Bid Protests

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

The General Accounting Office (GAO) considers untimely protest to raise a significant issue under the Bid Protest Regulations, where the issue of the protest, pertaining to the obligations of contracting officers under the newly promulgated regulations on individual sureties, has not been previously considered by GAO and may affect future procurements.

Procurement

Contractor Qualification

- Responsibility/responsiveness distinctions
- ■ Sureties
- ■ ■ Financial capacity

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Agency may not automatically reject a bidder for unacceptable individual sureties, where the bid bond is sufficient, even though the Standard Form 28, "Affidavit of Individual Surety," and supporting documents of the individual sureties submitted with the bid contain minor defects that might easily be remedied. Since these matters concern bidder responsibility, absent any evidence that the sureties lacked integrity or credibility or an unreasonable delay in the procurement, the agency should give the bidder the opportunity to have his sureties provide satisfactory explanations or pledge sufficient and acceptable assets.

B-241569, February 19, 1991***

91-1 CPD 183

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost reimbursement
- ■ ■ ■ Cost realism

In a negotiated procurement for the award of a cost reimbursement contract, the procuring agency's upward adjustment of the protester's proposed costs to reflect the agency's cost realism adjustment of the protester's proposed labor rates, which were based upon the offer of uncompensated overtime, to labor rates based on a 40-hour workweek was unreasonable, where offerors were not prohibited from offering uncompensated overtime, the protester's offer clearly provided for uncompensated overtime to satisfy the solicitation's requirements, and the protester's standard and disclosed accounting practices provided for the incurring and billing of uncompensated overtime.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost reimbursement
- ■ ■ ■ Cost realism

Where the agency reasonably concluded that labor costs would escalate during the option periods of a cost reimbursement contract, the procuring agency reasonably sought to normalize the offers of the awardee and the protester where the protester did not offer labor escalation, and the awardee did. It was not reasonable, however, for the agency to remove the labor escalation costs from the awardee's proposal to normalize the two firms' proposals, but rather these costs should have been added to the protester's lower labor cost proposal.

Procurement

Competitive Negotiation

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

Protest is sustained and award recommended to the protester, if otherwise appropriate, where the record shows that the protester's and awardee's proposals were technically equal, and the protester's evaluated costs should be considered lower than the awardee's.

B-241582, B-241582.2, February 19, 1991***

91-1 CPD 184

Procurement

Competitive Negotiation

- Requests for quotations
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Protest challenging proposed cancellation of request for quotations (RFQ) for systems furniture issued under requote procedures set out in the Federal Supply Schedule (FSS) on the grounds that RFQ is ambiguous with regard to inclusion of a panel-sharing discount and that RFQ does not call for component pricing necessary to calculate panel-sharing discount is sustained where (1) the only reasonable interpretation of the RFQ is that, consistent with the terms of the FSS, panel-sharing is not to be factored into vendors' price calculations; and (2) component pricing is an expected part of contract administration under the FSS requote procedures, and, in any event, vendor who is line for award under the RFQ submitted the detailed component pricing which the agency seeks.

Procurement

Sealed Bidding

- Low bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

Agency improperly permitted upward correction of alleged mistake in firm's low bid, and protest on that ground is sustained, where the firm has submitted no worksheets or other contemporaneous evidence in support of its explanation that the bid was based upon the firm's use of wrong Department of Labor wage determination for part of the bid.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency determination to reject protester's proposal as technically unacceptable was reasonable where proposal was prepared in an abbreviated format with numerous deficiencies, including a failure to provide a detailed technical approach for equipment installation as specifically required by the solicitation, such that the proposal would require major revisions in order to be made acceptable.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Where low offeror unequivocally offered to perform the contract and took no exception to the terms of the solicitation specifications, the firm's offer was acceptable.

Procurement

Payment/Discharge

- Shipment
- ■ Carrier liability
- ■ ■ Amount determination

Where some items in a Department of Defense-unique Freight All Kinds shipment are damaged, the carrier's liability is determined by applying the released value of \$2.50 per pound per commodity to the shipment's total weight, not just to the weight of the damaged items, pursuant to the carrier's tender and the Military Traffic Management Command's Freight Traffic Rules Publication No. 1A.

Procurement

Payment/Discharge

- Shipment costs
 - ■ Additional costs
 - ■ ■ Evidence sufficiency
-

Procurement

Payment/Discharge

- Shipment costs
- ■ Overcharge
- ■ ■ Payment deductions
- ■ ■ ■ Propriety

Carriers are required by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to collect only the applicable charges shown in tariffs or tenders filed with the Interstate Commerce Commission. Where a carrier has issued one tender that applies to shipments from Maryland to California and another to those from California to Maryland, actual shipment charges must be based on the appropriate tender.

Procurement

Competitive Negotiation

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

Protest that award must have been based on undisclosed evaluation factors is without merit where agency made award, consistent with stated evaluation factors, to offeror whose proposal was lower-priced and higher-rated than protester's offer.

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Prior contract performance

Agency reasonably determined protester was nonresponsible based upon contracting officer's conclusion that the protester's recent contract performance on similar work was inadequate, notwithstanding that the protester disputes the agency's interpretation of the facts, where the nonresponsibility determination is based on circumstances present at the time of award.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

Bid submitted on the original bid schedule instead of the amended bid schedule was properly rejected as *nonresponsive*, although the bid expressly acknowledged the amendments, because the requirements described on the original bid schedule do not encompass the additional requirements described on the amended bid schedule. At best, it is unclear if the bidder bound itself to perform all work as substantively changed in the amendments.

Procurement

Bid Protests

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

General Accounting Office (GAO) will not consider a protest where there are two pending appeals before the United States Court of Appeals for the Federal Circuit concerning the procurement and the Court's decision on either of the appeals could render any decision by GAO academic.

Procurement

Payment/Discharge

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Insurance should not have been purchased by the Federal Highway Administration for a traveling highway technology exhibit because of the government's long-standing policy of self-insurance. However, the shipping company that obtained the insurance for the agency may be paid for the premiums because the insurance was obtained in good faith, the agency is taking steps to prevent future violations of the self-insurance rule, and payment has been allowed previously in similar circumstances. 55 Comp. Gen. 1196 (1976).

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

- Private disputes
- ■ GAO review

Prior decision dismissing protest as essentially involving a dispute between private parties is affirmed on reconsideration where protester does not establish that decision contained errors of fact or law, or present information not previously considered that would warrant reversal or modification of decision.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Non-prejudicial allegation**

Procurement

Competitive Negotiation**■ Requests for proposals****■ ■ Terms****■ ■ ■ Compliance**

Protest that awardee's proposal of material handling system with an electric lift failed to comply with specification calling for hydraulic lift is denied where solicitation provided for consideration of proposed enhancements included in offered systems, the agency specifically determined that awardee's proposed electric lift would exceed the performance of a hydraulic lift, and protester was not prejudiced in any case since it argues only that the awardee's system should be rejected, not that it desires an opportunity to furnish an electric lift system.

Procurement

Competitive Negotiation**■ Discussion****■ ■ Determination criteria**

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Prior contract performance**

Protest that agency improperly considered protester's performance under prior contracts without first discussing contracts with protester is denied; agency reasonably considered problems in past performance to be weaknesses that could not be remedied through discussions and, moreover, protester does not present information that would have led agency to change its evaluation.

Procurement

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

Dismissal of protest alleging that procurement should have been set aside for exclusive small disadvantaged business participation as untimely is affirmed where it was not filed prior to the closing date for receipt of proposals.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Disadvantaged business set-asides
- ■ ■ Eligibility
- ■ ■ ■ Determination

Agency reasonably determined that joint venture comprised of a small disadvantaged business (SDB) and a non-SDB was eligible to receive contract set-aside for SDB concerns where the parties demonstrated the joint venture was not controlled by the non-SDB member.

Procurement

Bid Protests

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

Protester's receipt of solicitation amendment that clearly indicated agency's adverse position on protester's agency-level protest constituted initial adverse agency action. Protest to the General Accounting Office, filed more than 10 working days later, is untimely.

Procurement

Bid Protests

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

Decision dismissing as untimely protest against agency's failure to furnish protester with proper address for bid modification is affirmed where protest was not filed until more than 10 working days after the protest basis was known.

Procurement

Bid Protests

- GAO authority

General Accounting Office is without jurisdiction to consider a protest of a procurement by the Resolution Trust Corporation (RTC) because RTC is defined by statute as a mixed-ownership corporation and is therefore not a federal agency for bid protest purposes.

Procurement

Specifications

- Brand name/equal specifications
- ■ Equivalent products
- ■ ■ Salient characteristics
- ■ ■ ■ Minor deviations

Protest that awardee did not demonstrate in its proposal that its offered "equal" bone marrow transplant system met requirements in salient characteristics for maximum size, minimum capacity and automatic self-diagnostic capability is denied where agency determined that discrepancies were minor and immaterial and there was no evidence that protesting brand name manufacturer was prejudiced by agency's waiver of the requirements.

Procurement

Bid Protests

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

Conversations with agency personnel during which protester questioned bid specifications do not constitute a timely agency-level protest since oral protests are not permitted. Subsequent "clarification" of specifications submitted by protester with its bid, to the extent it can be regarded as a protest, is untimely since the contracting officer is not authorized to open a bid until the time set for bid opening.

Procurement

Bid Protests

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

Twelfth low bidder is not an interested party under General Accounting Office Bid Protest Regulations to protest that some bidders, including awardee, submitted unbalanced bids, where protester has not also protested against any possible award to all the intervening bidders.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester may not be awarded the costs of filing and pursuing its protest, including attorneys' fees, where protest was dismissed and thus no decision on the merits has been issued.

Procurement

Bid Protests

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

Protester does not have the direct economic interest to be considered an interested party to protest the reasonableness of the cost-technical tradeoff where the protester would not be next in line for award if the protest were sustained.

Procurement

Bid Protests

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

Protest alleging that RFP should have stated anticipated skill mix for RFP's level-of-effort is untimely when not filed prior to closing date for receipt of proposals.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Shipment schedules

Award of contract to offeror whose performance schedule indicated that it will not be able to meet the delivery date specified in the solicitation does not constitute unequal treatment of offerors and was not prejudicial to protester where the performance schedules submitted by all offerors indicated that they would not be able to meet the specified delivery date, and no offeror had been informed that the original earlier delivery date no longer reflected the agency's minimum needs.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Price data
- ■ ■ ■ Minor deviations

A bidder's failure to initial changes is no more than a matter of form and a contracting officer may waive that delinquency as a minor informality where there is no doubt as to an intended bid price.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Evaluation criteria
- ■ ■ Unit prices

A bid may not be rejected as nonresponsive on an invitation for bids because of a discrepancy between unit prices and total line item prices, even though the bidder did not properly price the

requested unit, where the ambiguity in pricing is subject to a single rational explanation that removes all doubt as to the intended bid price.

Procurement

Contractor Qualification

■ Responsibility/responsiveness distinctions

Agency's concern that the low bidder's pattern of pricing line items and options in its bid is inconsistent with the contract requirements does not relate to a matter of bid responsiveness, where the bidder has unequivocally committed to provide the exact thing called for in the invitation for bids by inserting prices for all line items and there is no doubt as to whether its bid will yield the lowest cost to the government, but rather these concerns relate to the bidder's understanding of and capability to perform the contract requirement, that is, its responsibility.

B-241734, February 25, 1991

91-1 CPD 208

Procurement

Competitive Negotiation

■ Contract awards

■ ■ Administrative discretion

■ ■ ■ Cost/technical tradeoffs

■ ■ ■ ■ Technical superiority

Contention that evaluation was improper because proposals were reviewed for compliance with requirements in the specification section of the solicitation, rather than in accordance with the guidance provided to offerors within the evaluation section, is denied, since evaluation factors, and explanations of those factors, are merely guidelines for determining the extent to which a proposal meets the requirements of the specification and other requirements included within the solicitation.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that agency improperly evaluated proposal is denied where record indicates that the agency evaluation was reasonable and consistent with the solicitation's evaluation criteria.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Protester's argument that it should receive award because it submitted the lowest-priced acceptable offer is denied where solicitation provided for award to the offeror whose proposal was most advantageous to the government, price and other factors considered, and the agency reasonably concluded that the awardee's substantially superior proposal warranted its slightly higher cost.

Procurement

Contractor Qualification

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

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Performance capabilities

Contracting officer reasonably concluded that definitive responsibility criteria requiring awardee to provide documentation showing it has 2 years of experience monitoring asbestos abatement projects, and that it has performed at least 3 contracts over \$100,000, was met by awardee's submission of a list showing the requisite experience and number of jobs, where nothing on the face of the information submitted called its correctness into question.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size determination
- ■ ■ Pending protests
- ■ ■ ■ Contract awards

Award made pending an appeal of an initial adverse determination concerning small business status was proper even though the contracting officer was notified of the appeal prior to making the award.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

The General Accounting Office will not consider new arguments raised by the agency in request for reconsideration where those arguments are derived from information available during initial consideration of protest but not argued, or from information available but not submitted during initial protest, since parties that withhold or fail to submit relevant evidence, information, or analysis for our initial consideration do so at their own peril.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ First-article testing
- ■ ■ Waiver
- ■ ■ ■ Administrative determination

Agency reasonably declined to waive first article testing on regulator valve and reservoir units to be used on artillery pieces for a firm that had furnished a similar valve that was found to be defective, notwithstanding that the agency granted a waiver of first article testing for the regulator valve and reservoir units on a previous procurement

Procurement

Sealed Bidding

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

Cancellation of an invitation for bids after bid opening is proper where solicitation does not reflect changed requirements in work and award under the solicitation would no longer meet the government's actual needs.

Procurement

Contracting Power/Authority

- Contracts
- ■ Ratification

Contract specialist's note to protester concerning protester's bid did not, by its language, contain indicia of binding agreement and, in any event, under Federal Acquisition Regulation § 4.101, only contracting officer possesses authority necessary to bind government to a contract.

Procurement

Contracting Power/Authority

- Implied contracts
- ■ Government liability

While, in the absence of an express contract, government may, in appropriate circumstances, be liable for a contract implied-in-fact, where record does not show facts supporting such a contract, no such contract or liability exists.

Procurement

Competitive Negotiation

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

Where agency's evaluation of offers was reasonable and in accordance with the solicitation's stated evaluation scheme, and protester's and awardee's offers were determined to be essentially techni-

cally equal, price properly became the determining factor in the agency's selection of the low-priced offer for award.

Procurement

Competitive Negotiation

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

Low-priced offer with higher unit prices for basic quantity than for option quantity is not materially unbalanced where it reasonably appears that the agency expects to purchase the option quantity so that award to the low-priced offeror will result in the lowest ultimate cost to the government.

B-241778, February 26, 1991

91-1 CPD 215

Procurement

Sealed Bidding

- Bids
- ■ Acceptance time periods
- ■ ■ Extension

Procurement

Sealed Bidding

- Bids
- ■ Modification
- ■ ■ Late submission
- ■ ■ ■ Rejection

A bidder may not revise its bid price when granting a bid acceptance period extension, since to do so would be tantamount to submitting a second bid after bid opening contrary to competitive bidding principles.

Procurement

Sealed Bidding

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

Procurement

Sealed Bidding

- Bids
- ■ Acceptance time periods
- ■ ■ Extension

An agency may allow a bidder to extend its bid acceptance period and revive its expired bid where the bidder initially offered the acceptance period required by the solicitation and has not expressly or impliedly declined a request to extend its bid; the other bidders had voluntarily taken their bids out of consideration for award; and revival of the bid would not compromise the integrity of the competitive bidding process.

Procurement

Sealed Bidding

- **Invitations for bids**
- ■ **Post-bid opening cancellation**
- ■ ■ **Justification**
- ■ ■ ■ **Price reasonableness**

Cancellation of invitation for bids after bid opening is not appropriate where a third low revived bid was determined to be reasonable by the contracting officer after the two low bidders conditioned their bid extensions on price increases, given that the bid price at issue was less than 10 percent above the original low bid, less than 3 percent above the low bidder's proposed revised bid and 35 percent below the government estimate.

B-241803, February 26, 1991

91-1 CPD 216

Procurement

Sealed Bidding

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

Contracting agency properly canceled invitation for bids for construction of a timber access road after bid opening because the work was encompassed by a district court injunction prohibiting agency action associated with the sale of timber until there was compliance with the National Environmental Policy Act requirement for an environmental impact statement.

B-241844, February 26, 1991

91-1 CPD 217

Procurement

Competitive Negotiation

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

Rejection of the protester's proposal for the performance of cardiology-related diagnostic tests in favor of an award to a higher-priced, technically acceptable offeror is proper where the agency reasonably concluded that the protester's lower-priced offer was technically unacceptable because the physician the protester proposed was not board certified in cardiology or board eligible in cardiology as required by the solicitation.

B-241849, et al., February 26, 1991

91-1 CPD 218

Procurement

Competitive Negotiation

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

Protest that agency conducted an improper cost realism analysis of protester's best and final offer for cost-type contract is denied where record shows that upward adjustment of protester's indirect costs was reasonably based on most recent actual cost rates of protester and where protester did not submit sufficiently convincing financial data to support substantially lower rates.

Procurement

Competitive Negotiation

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

Discussions were meaningful where agency imparted sufficient information to protester to afford it a fair and reasonable opportunity to identify and correct any deficiencies in its proposal and written discussion questions were designed to guide protester into those portions of its proposal that required amplification.

Procurement

Competitive Negotiation

- **Unbalanced offers**
- ■ **Cost allocation**
- ■ ■ **Labor costs**
- ■ ■ ■ **Justification**

Protest that awardee's offer is unbalanced is without merit since the concept of unbalanced bidding generally is not relevant in a negotiated procurement in which award is based upon evaluation of cost and technical factors with technical factors considered more important than cost, and where review of awardee's proposed prices for cost-plus-fixed-fee contract reveals *no evidence* that proposed prices are nominal for some requirements and enhanced for others, but rather that slightly lower prices in option years reasonably reflect the awardee's proposed labor mix, including the use of qualified lower cost personnel, as permitted under the solicitation's terms.

B-241946, February 26, 1991

91-1 CPD 219

Procurement

Sealed Bidding

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

Agency reasonably canceled invitation for bids (IFB) which had been set aside for small disadvantaged businesses (SDBs), and reissued IFB on an unrestricted basis where agency received three bids from SDBs which were significantly in excess of government estimate as well as funds available for acquisition.

B-241965, February 26, 1991

91-1 CPD 220

Procurement

Bid Protests

- **Allegation substantiation**
- ■ **Lacking**
- ■ ■ **GAO review**

Procurement

Sealed Bidding

- **Bids**
- ■ **Responsiveness**
- ■ ■ **Bid guarantees**

Protest is denied where protester alleges that agency was required to reject awardee's bid as non-responsive based on awardee's submission of a bid guarantee in the form of a cashier's check—as

permitted by Federal Acquisition Regulation (FAR) § 52.228-1, which was included in the solicitation's contract clauses section—rather than a bid bond—which was identified as the only acceptable form of bid guarantee in the notice to bidders section in the solicitation schedule—notwithstanding the fact that the language in the schedule takes precedence over the language in the contract clauses section since FAR § 28.204-2 explicitly permits persons required to furnish a bond to furnish a cashier's check instead.

B-242059, February 26, 1991

91-1 CPD 221

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Letters of credit
- ■ ■ ■ Adequacy

Irrevocable letter of credit is not an acceptable form of bid guarantee where solicitation limits types of bid guarantee that may be submitted to bid bonds or public debt obligations of the United States.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Post-bid opening modification
- ■ ■ Propriety

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Bid guarantees

Bid that does not contain a bid guarantee in the form required by the solicitation is properly rejected as nonresponsive; proper bid guarantee may not be substituted after bid opening since a nonresponsive bid generally may not be corrected after opening.

B-242494.2, February 26, 1991

91-1 CPD 222

Procurement

Bid Protests

- Agency-level protests
- ■ Protest timeliness
- ■ ■ GAO review

Continued pursuit of a protest at the procuring agency after that agency has taken initial adverse action following an agency-level protest does not toll General Accounting Office's timeliness requirements.

Procurement

Bid Protests

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

General Accounting Office's Bid Protest Regulations do not contemplate the piecemeal presentation of arguments or information relating to a protest, and it is incumbent upon a protester raising one basis of protest to diligently pursue information pertinent to the protest as well as information that reasonably would be expected to reveal additional bases for protest. Where record does not indicate that protester diligently pursued such information, allegation raised after initial protest is denied as untimely.

Procurement

Special Procurement Methods/Categories

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

Award of a contract for maintenance of automatic data processing equipment under a nonmandatory, General Services Administration schedule is proper where agency has determined that the scheduled items provide the lowest overall cost alternative.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Price adjustments
- ■ ■ Reduction

A contractor under a nonmandatory automatic data processing schedule contract may offer a price reduction at any time and by any method without approval by General Services Administration, and under the contract's terms the price reduction generally will remain in effect for the remainder of the contract.

Procurement

Special Procurement Methods/Categories

- Computer equipment/services
- ■ Federal supply schedule
- ■ ■ Off-schedule purchases
- ■ ■ ■ Advertising

An announcement in the *Commerce Business Daily* (CBD) of plans to procure an item under a nonmandatory ADP 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 product or service synopsis in the CBD.

Procurement

Small Purchase Method

- Requests for quotations
 - ■ Contractors
 - ■ ■ Notification
-

Procurement

Socio-Economic Policies

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

Protest challenging contracting agency's failure to solicit incumbent contractor in a small purchase, small business set-aside procurement is sustained where contracting officer deliberately decided not to send copy of solicitation to incumbent based solely on remarks purportedly made by incumbent to another contracting official during conversation concerning incumbent's performance under then-current contract.

B-242533.2, February 27, 1991**91-1 CPD 226**

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of dismissal of protest is denied where protester fails to specify any factual or legal basis warranting reversal or modification of initial decision.

B-242976, February 27, 1991

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest is dismissed for failure to state a basis of protest where the facts presented do not support protester's arguments that awardee's low offer was due to unbalancing or to misinterpretation of requirements.

B-240495.2, February 28, 1991

Procurement

Contractor Qualification

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

Invitation for bid's licensing provision, requiring the contractor to provide post-award evidence that it held a license, but not any specific state or local license, is a contract performance requirement, not a definitive responsibility criterion, which must be considered a prerequisite to award.

Procurement

Contractor Qualification

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

Contracting officer's affirmative determination that the awardee was responsible was not in bad faith, as alleged by the protester, where there is no evidence to support assertion that the contracting officer was apprised prior to award that the awardee did not have the necessary licenses to perform the contract.

B-241151.2, February 28, 1991

91-1 CPD 227

Procurement

Bid Protests

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

Request for reconsideration of dismissal of protest by firm not in line for award if protest were sustained is denied where all offerors included in the competitive range were considered technically equal and award was made to low, technically acceptable offeror. Since the protester was the third low acceptable offeror and did not challenge the acceptability of the second low offeror, protester does not have the direct economic interest in the contract award to be considered an interested party under General Accounting Office's Bid Protest Regulations.

B-241541.3, February 28, 1991

91-1 CPD 228

Procurement

Bid Protests

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

Request for reconsideration of prior dismissal due to protester's failure to file timely comments on agency's report or to express its continued interest in the protest is denied where the protester fails to show any error of fact or law that would warrant reversal or modification of prior decision. Protester's contention that its original filing constituted both its "protest" and its "comments" is not supported by the record; moreover, protester failed to timely express continued interest in the protest, as required by General Accounting Office's Bid Protest Regulations.

B-241652, February 28, 1991

91-1 CPD 229

Procurement

Contractor Qualification

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

Agency reasonably found the awardee of a contract for monitoring nuclear power plant compliance with safety and technical orders did not have an organizational conflict of interest where the unrelated consulting work the awardee performed for some of the plants would not affect the awardee's ability to provide objective advice under this contract.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Downgrading

■ ■ ■ ■ Propriety

Protester was reasonably downgraded in accordance with the evaluation criteria where it did not provide sufficient requested details despite being advised to do so during discussions.

Procurement

Bid Protests

■ Bias allegation

■ ■ Allegation substantiation

■ ■ ■ Burden of proof

Protest that evaluation was improperly biased is denied where the record shows the proposals were evaluated in accordance with the evaluation criteria and there is no convincing proof of bias.

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