

GAO

United States General Accounting Office
Office of General Counsel

May 1991

Digests of Decisions of the Comptroller General of the United States

Vol. II, No. 8

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

Current GAO Officials

Comptroller General of the United States
Charles A. Bowsher

Deputy Comptroller General of the United States
Vacant

Special Assistant to the Comptroller General
Milton J. Socolar

General Counsel
James F. Hinchman

Deputy General Counsel
Vacant

Contents

Preface	iii
Table of Decision Numbers	iv
Digests	
Appropriations/Financial Management	1
Civilian Personnel	5
Military Personnel	10
Miscellaneous Topics	13
Procurement	14

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).

Table of Decision Numbers

	Page		Page
B-217114.7, May 6, 1991***	1	B-240762, May 13, 1991	6
B-217114.8, May 20, 1991	3	B-240908.2, May 28, 1991	9
B-217114.9, May 20, 1991	3	B-240979.2; B-240981.2, May 22, 1991	43
B-223799.2, May 13, 1991	5	B-241056.4, May 21, 1991	36
B-224854.2, May 16, 1991	8	B-241133.2, May 21, 1991	37
B-231660.2, May 24, 1991	8	B-241157.2, May 24, 1991	44
B-235145, May 7, 1991	10	B-241169.3, May 21, 1991	37
B-236008, May 7, 1991	10	B-241226, May 14, 1991	10
B-236399, B-238303, May 29, 1991	11	B-241287.2, May 6, 1991	17
B-236834.8, B-236834.9, May 15, 1991	29	B-241302.3, May 21, 1991	38
B-238004, B-242685, May 24, 1991***	44	B-241329.3, May 21, 1991	38
B-238004, B-242685, May 24, 1991***	4	B-241341.2, May 9, 1991	24
B-238110, May 7, 1991***	2	B-241391.3, May 20, 1991	34
B-238162.4, May 31, 1991	50	B-241476, May 20, 1991	11
B-238251.3, May 6, 1991	17	B-241510.2, May 21, 1991	38
B-238580, May 10, 1991	5	B-241569.2, B-241569.3, May 21, 1991***	38
B-239167.4, May 9, 1991	23	B-241594.2, May 21, 1991	39
B-239199, May 3, 1991	16	B-241639.2, B-241639.3, May 14, 1991	28
B-240089.2, May 14, 1991	7	B-241710, May 13, 1991***	6
B-240181.2, B-240181.3, May 21, 1991***	36	B-241916.2, May 10, 1991	24
B-240238, May 8, 1991***	2	B-241984, May 13, 1991	7
B-240280, May 22, 1991	4	B-242052.2, May 7, 1991***	21
B-240639.4, B-240820.3, May 15, 1991	30	B-242076, May 7, 1991	5
B-240726.3, May 2, 1991	15	B-242229.2, May 21, 1991	39
		B-242242.2, B-242243.2, May 31, 1991***	50

*** (notes published decisions) Cite published decisions as 70 Comp. Gen.—

Table of Decision Numbers

	Page		Page
B-242308, May 21, 1991	11	B-242648.2, May 21, 1991	40
B-242415, B-242415.3, May 1, 1991	14	B-242650, et al., May 20, 1991***	35
B-242436, May 3, 1991	16	B-242656, et al., May 8, 1991	23
B-242457, May 24, 1991	9	B-242663, May 6, 1991	19
B-242465, May 6, 1991	18	B-242664, May 17, 1991***	32
B-242474, May 6, 1991	18	B-242667, May 10, 1991	25
B-242484, May 2, 1991***	15	B-242673.3, May 14, 1991	28
B-242499, May 6, 1991	18	B-242678, B-242678.2, May 17, 1991	33
B-242503, May 28, 1991***	9	B-242686, May 20, 1991***	35
B-242506.3, May 20, 1991	34	B-242696, May 21, 1991	40
B-242527, May 13, 1991	26	B-242704, May 13, 1991	27
B-242529, May 8, 1991	21	B-242718, May 28, 1991***	46
B-242546, B-242547, May 16, 1991	31	B-242725, May 31, 1991	51
B-242552, May 10, 1991	25	B-242733, May 21, 1991	41
B-242559, May 6, 1991	19	B-242734, May 16, 1991	31
B-242567, May 17, 1991	32	B-242737, May 24, 1991	45
B-242568, May 13, 1991***	26	B-242754, May 31, 1991	51
B-242579, May 1, 1991	14	B-242769, May 10, 1991	25
B-242582.4, May 20, 1991	34	B-242800, B-242800.3, May 30, 1991	49
B-242592.2, B-242592.3, May 30, 1991	48	B-242903, May 8, 1991	23
B-242604, May 28, 1991	45	B-242909, May 10, 1991	26
B-242615, May 24, 1991	44	B-242973, May 21, 1991	41
B-242616, B-242616.2, May 28, 1991***	46	B-243025, May 2, 1991	1
B-242629, May 7, 1991	21	B-243040.2, May 9, 1991	24
B-242633, B-242633.2, May 30, 1991	49	B-243047, May 3, 1991	17
		B-243085, May 6, 1991	20

Table of Decision Numbers

	Page		Page
B-243100, May 22, 1991	42	B-243766, May 2, 1991	15
B-243196, May 13, 1991	27	B-243772, May 6, 1991	20
B-243212, May 21, 1991	41	B-243795, May 31, 1991	52
B-243358, May 20, 1991	35	B-243808, May 14, 1991	29
B-243358.2, May 20, 1991	36	B-243814, B-243815, May 13, 1991	27
B-243388, May 22, 1991	11	B-243868, May 10, 1991	26
B-243463.2, May 17, 1991	33	B-243934, May 22, 1991	43
B-243555, May 14, 1991	28	B-244096, May 22, 1991	43
B-243575, May 3, 1991	17	B-244142, May 29, 1991	47
B-243588.2, May 15, 1991	30	B-244149, May 29, 1991***	48
B-243677, B-243674, May 13, 1991	2	B-244162, May 29, 1991	48
B-243677, B-243674, May 13, 1991	13	B-244168, May 28, 1991	47
B-243720, May 6, 1991	20	B-244170, May 28, 1991	47
B-243741, May 22, 1991	42	B-244204, May 30, 1991	50

Overruled, Modified and Distinguished

	<u>Page</u>
41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are modified in part. 65 Comp. Gen. 858 (1986); B-217114.3, Feb. 10, 1987; B-217114, Mar. 26, 1987; B-217114, Feb. 29, 1988; B-217114, Aug. 12, 1988; B- 217114.5, June 8, 1990; B-217114.6, July 24, 1990, are modified.	1
41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are overruled in part.	2

Appropriations/Financial Management

B-243025, May 2, 1991

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Awards/honoraria

Federal Aviation Agency is advised, in response to its request to purchase jackets as part of its incentive awards program, that the purchase of the jackets for use as an honorary award is a proper expenditure of the agency's appropriated funds under the provisions of the Government Employees Incentive Awards Act, as implemented by Office of Personnel Management (OPM) regulations. OPM concurs in this request.

B-217114.7, May 6, 1991***

Appropriations/Financial Management

Accountable Officers

- Liability
- ■ Debt collection
- ■ ■ Amount determination

Accountable officers should have their liability for improperly paying fraudulent travel subsistence expense claims determined on the basis of the actual fraudulent overpayments made. Accountable officers are strictly liable for losses of government funds under their control. Under the False Claims Act and the Program Fraud Civil Remedies Act, the government's loss for paying fraudulent subsistence claims is the amount overpaid due to the fraud. Accountable officers' liabilities also should be limited to those overpayments. Prior cases which included in the officer's liability nonfraudulent expenses claimed for the same day as fraudulent expenses are modified.

Appropriations/Financial Management

Accountable Officers

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

Appropriations/Financial Management

Accountable Officers

- Liability
- ■ Debt collection
- ■ ■ Amount determination

The False Claims Act and the Program Fraud Civil Remedies Act specify the government's rights to collect damages and penalties from employees who submit fraudulent travel expense claims.

Agency actions to recoup fraudulent overpayments of subsistence expense claims from fraudulent payees should be taken in light of those Acts and other applicable statutes and regulations. Prior decisions advising agencies to recoup from fraudulent payees both the fraudulent overpayments and non-fraudulent subsistence expenses claimed for any day tainted by the fraudulent claim are overruled.

B-238110, May 7, 1991***

Appropriations/Financial Management

Appropriation Availability

- Time availability
- ■ Time restrictions
- ■ ■ Fiscal-year appropriation
- ■ ■ ■ Training

Travel and transportation expenses of temporary duty travel spanning more than one fiscal year should be charged against the appropriations current in the fiscal years in which the expenses are incurred rather than in the fiscal year in which the travel is ordered.

B-240238, May 8, 1991***

Appropriations/Financial Management

Obligation

- Recording
- ■ Advances
- ■ ■ Imprest funds

The Department of Veterans Affairs was not required to record Imprest Fund advances made in 1985 as obligations against its appropriations. Advances to cashiers made to finance unspecified future cash payments do not meet the statutory requirements for recording obligations. The obligations occur only as cashiers use the funds and obtain reimbursements from available appropriations.

Appropriations/Financial Management

Obligation

- Recording
- ■ Advances
- ■ ■ Imprest funds

Imprest Fund advances to cashiers represent potential obligations which agencies may be compelled to record against their appropriations. To prevent over-obligation of the appropriations, agencies should administratively record commitments or reservations of funds against their current appropriations which will have to be obligated to reimburse the Imprest Fund expenditures.

B-243677, B-243674, May 13, 1991

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Public transportation systems
- ■ ■ Commuting expenses
- ■ ■ ■ Discounts

Under section 629 of Public Law 101-509, 104 Stat. 1478 (1990), agencies are authorized to use appropriated funds to participate in state and local programs that encourage the use of public transportation, including programs that involve the sale of discounted transit passes.

B-217114.8, May 20, 1991

Appropriations/Financial Management

Accountable Officers

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

Appropriations/Financial Management

Accountable Officers

- Relief
- ■ Illegal/improper payments
- ■ ■ GAO decisions
- ■ ■ ■ Reconsideration

A congressional request asks GAO to address concerns raised by a constituent. The constituent, an accountable officer, is seeking information from an agency on a loss that occurred in his account so that he might be granted relief. The officer was previously denied relief and had also requested GAO to certify his liability to the Attorney General under 5 U.S.C. § 5512. Our certification resolved all of the issues concerning the liability which were within our jurisdiction, and we will not consider future relief requests.

B-217114.9, May 20, 1991

Appropriations/Financial Management

Accountable Officers

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

Appropriations/Financial Management

Accountable Officers

- Relief
- ■ Illegal/improper payments
- ■ ■ GAO decisions
- ■ ■ ■ Reconsideration

A congressional request asks GAO to address concerns raised by a constituent. The constituent, an accountable officer, is seeking information from an agency on a loss that occurred in his account so that he might be granted relief. The officer was previously denied relief and had also requested GAO to certify his liability to the Attorney General under 5 U.S.C. § 5512. Our certification resolved all of the issues concerning the liability which were within our jurisdiction, and we will not consider future relief requests.

B-240280, May 22, 1991

Appropriations/Financial Management

Accountable Officers

- Cashiers
 - ■ Relief
 - ■ ■ Illegal/improper payments
 - ■ ■ ■ Fraud
-

Appropriations/Financial Management

Accountable Officers

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

Relief is granted to finance officer who supervised an adequate system of procedures and controls to safeguard the funds in his care, and to the cashier who followed these procedures. The improper payments resulted from criminal activity that even an adequate and effectively supervised system cannot always prevent. *See, e.g., B-240654, Feb. 6, 1991.*

B-238004, B-242685, May 24, 1991***

Appropriations/Financial Management

Claims By Government

- Interest

The Forest Service is not required to discontinue the assessment of interest, late payment penalties, or administrative costs pursuant to the Federal Claims Collection Act, as amended, 31 U.S.C. § 3717, during the pendency of an appeal under the Contract Disputes Act.

Appropriations/Financial Management

Claims By Government

- Litigation expenses
- ■ General/administrative costs

The Forest Service may not include the costs of defending the agency's position in any appeals brought by a contractor or surety pursuant to the Contract Disputes Act as part of the administrative costs assessed under 31 U.S.C. § 3717 against contractors and sureties.

Civilian Personnel

B-242076, May 7, 1991

Civilian Personnel

Leaves Of Absence

- Annual leave
 - ■ Forfeiture
 - ■ ■ Restoration
-

Civilian Personnel

Leaves Of Absence

- Leave repurchase
- ■ Workmen compensation insurance

An employee, acting on incorrect advice received from her personnel office, bought back 97 hours of annual leave which had to be forfeited in a workers' compensation leave buy-back situation. The employee may utilize the administrative remedy which our Office has previously allowed in *Edmond Godfrey*, 62 Comp. Gen. 253 (1983), to ameliorate the situation.

B-238580, May 10, 1991

Civilian Personnel

Compensation

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

Where the record has not clearly established that an employee knew or should have known that her assignment to a higher step within grade GS-6 upon being returned from a temporary promotion at grade GS-7 to her former grade position was incorrect, and she could not reasonably be expected to know and understand the complexities of federal personnel regulations governing the establishment of pay rates and step advancements, we grant waiver of the overpayments due to the administrative errors involved.

B-223799.2, May 13, 1991

Civilian Personnel

Relocation

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

A Public Health Service commissioned officer requests reconsideration of a prior decision holding him liable for the costs of shipping household goods in excess of his weight allowance. The officer maintains that he should not be held liable for the extra costs because the moving company offered him a Guaranteed Price Pledge based on the company's estimate that the weight of his household goods would be within his prescribed limit. In fact, the guaranteed price equated to the

cost of moving goods weighing substantially more than his weight allowance and the total net weight of his goods was 4,454 pounds over his limit. While he may not have understood the basis for the guaranteed price and the company's agent misinformed him as to the weight, the law does not permit the government to bear the costs for shipping excess weight. Upon reconsideration, *Dr. John M. Dyer*, 67 Comp. Gen. 171 (1988), is affirmed.

B-240762, May 13, 1991

Civilian Personnel

Relocation**■ Taxes****■ ■ Allowances****■ ■ ■ Eligibility**

A transferred employee sold his residence at his old duty station and received reimbursement from the federal government for the loss on the sale of his home under the Homeowners Assistance Program. He claims a Relocation Income Tax (RIT) allowance under 5 U.S.C. § 5724b (1988) on the additional taxes withheld from his pay. The claim is denied since the taxable income received under the Homeowners Assistance Program is not included in the allowable items for which a RIT allowance is payable.

B-241710, May 13, 1991***

Civilian Personnel

Relocation**■ Miscellaneous expenses****■ ■ Reimbursement****■ ■ ■ Eligibility****■ ■ ■ ■ Litigation expenses**

A transferred employee attempted to cancel a residence purchase contract entered into prior to notice of transfer and retrieve his earnest money deposit. As a result of court action initiated by the seller, the court concluded that the earnest money deposit had been forfeited to the seller for breach of contract, and awarded the seller judgment for an additional amount as liquidated damages to cover expenses and lost rental income. The forfeited deposit as well as the liquidated damages and court costs may be included as miscellaneous expenses under section 302-3.1(c) of the Federal Travel Regulation, because the transfer to the new duty station was the proximate cause of those expenses. *Cf. Steven W. Hoffman*, B-184280, May 8, 1979.

Civilian Personnel

Relocation**■ Miscellaneous expenses****■ ■ Reimbursement****■ ■ ■ Eligibility****■ ■ ■ ■ Licenses**

A transferred employee claimed the cost of new driver's licenses for himself and his wife as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. The agency permitted the inclusion of only one license. The cost of both are to be included as allowable expenses. *George M. Lightner*, B-184908, May 26, 1976.

Civilian Personnel

Relocation

- Miscellaneous expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Post-office box

A transferred employee rented a post office box at his new duty station for a short period until he established a residence at that location and claimed the cost as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. Since the purpose for the allowance is to help defray the extra expenses incurred during the transitional period when a residence is discontinued at the old station and a residence is established at the new station, the short-term post office box rental qualifies as an allowable miscellaneous expense. B-163107, May 18, 1973, and *George M. Lightner*, B-184908, May 26, 1976, are overruled in part.

Civilian Personnel

Relocation

- Miscellaneous expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Telephone calls

A transferred employee's claim for telephone calls as allowable miscellaneous expenses under section 302-3.1(b) of the Federal Travel Regulation (FTR) was disallowed by the agency in its entirety. Such expenses may be allowed or disallowed depending on the purpose for the calls. Where telephone calls concern a matter which would itself be allowable elsewhere in the FTR, *e.g.*, real estate transactions, telephone calls regarding it are includable as a miscellaneous expense. *Timothy R. Glass*, 67 Comp. Gen. 174, 177 (1988).

B-241984, May 13, 1991

Civilian Personnel

Relocation

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

New employee from California was appointed to position in Virgin Islands. He disposed of a portion of his household goods and privately owned vehicles due to erroneous advice from agency personnel that new employees bear the expense of transporting household goods from place of residence at the time of his appointment to the Virgin Islands. The employee has filed a claim for the constructive cost of transporting the items which he had previously disposed of. There is no legal basis upon which the employee's claim for reimbursement may be authorized, nor is there a legal basis for reporting this claim to the Congress under the Meritorious Claims Act.

B-240089.2, May 14, 1991

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

An employee whose claim for reimbursement of real estate sales expenses was denied in a prior decision of this Office, *John F. Conlon*, B-240089, Nov. 19, 1990, requests that his claim be submit-

ted to Congress as a meritorious claim under the principles outlined in *John H. Teele*, 65 Comp. Gen. 679 (1986), which involved erroneous advice and detrimental loss. We decline to submit the claim to Congress for consideration as a meritorious claim under 31 U.S.C. § 3702(d) since the facts in this case show that the sale of the property was not related to the transfer and that the employee did not reasonably rely on the erroneous advice he received.

B-224854.2, May 16, 1991

Civilian Personnel

Compensation

- Overtime
- ■ Eligibility
- ■ ■ Actual work

Forty-seven wage board employees of the Corps of Engineers river bank protection parties, non-exempt from the Fair Labor Standards Act (FLSA), claim overtime compensation for allegedly scheduled hours of overtime not actually worked. Their claims for overtime pay are denied because the provisions of both the Fair Labor Standards Act and 5 U.S.C. § 5544(a), as they relate to the facts of the employment in this case, clearly contemplate that employees must actually work overtime hours in order to receive overtime pay. Further, the scheduling of overtime hours of work, even if "regularly scheduled" under 5 C.F.R. § 610.121(b), does not result in entitlement to premium pay unless the hours were actually worked. Accordingly, there exists no authority for payment of overtime compensation.

B-231660.2, May 24, 1991

Civilian Personnel

Relocation

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

Civilian Personnel

Relocation

- Temporary quarters
- ■ Determination
- ■ ■ Criteria

A transferred employee, with a wife and two teen-age children, executed a 1-year lease on a two-bedroom apartment at his new duty station. His claim for subsistence expense reimbursement incident to occupancy of those quarters was disallowed. While quarters under a 1-year lease are usually considered permanent, under the factors stated in paragraph 2-5.2c of the Federal Travel Regulations, the rented quarters are deemed to be temporary in nature since the employee leased the apartment to obtain a stable-type residence for his daughter and wife for medical reasons; lived in the apartment for only about 2-1/2 months and moved to a three-bedroom apartment after he was unable to sell his old residence; and stored the bulk of his household goods in a temporary storage facility during that period. Therefore, the employee is entitled to be reimbursed temporary quarters subsistence expenses.

B-242457, May 24, 1991

Civilian Personnel

Relocation

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

Civilian Personnel

Travel

- Travel regulations
- ■ Commuted rates
- ■ ■ Amount determination
- ■ ■ ■ Statutory restrictions

A transferred employee was authorized to move his household goods under the commuted rate method not to exceed the cost to the government under the actual expense government bill of lading method. The employee moved his household goods himself and claims the difference between the actual expense method that he was reimbursed and the higher commuted rate. He is entitled to the difference since there is no statutory or regulatory authority which provides for a limitation on the amount to be reimbursed in commuted rate schedules. Travel orders which purport to limit reimbursement without proper authority are not competent orders and have no legal effect.

B-240908.2, May 28, 1991

Civilian Personnel

Compensation

- Claim settlement
- ■ Forum election

The Chairman, Committee on Post Office and Civil Service, House of Representatives, requests our views concerning certain pay practices of the National Weather Service (NWS) in view of *Gahagan v. United States*, 19 Cl. Ct. 168 (1989), which allegedly held such practices to be illegal. The Chairman is advised that *Gahagan* was effectively overruled by *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), which held that matters which can be resolved through the negotiated grievance and arbitration procedures should not be heard in another forum unless there is a clear explicit exclusion in the collective bargaining agreement. There is no clear explicit exclusion of these pay claims in the parties' agreement. In view of *Carter v. Gibbs*, we believe these claims should be considered under the negotiated grievance procedure.

B-242503, May 28, 1991***

Civilian Personnel

Travel

- Overseas travel
- ■ Tour renewal travel
- ■ ■ Dependents

Under 41 C.F.R. § 302-1.4(e) (1990), an employee's daughter is a member of his household where he and his former spouse have joint legal and physical custody of their daughter and she resides with him more than 50 percent of the time. Therefore, the employee may be reimbursed for his daughter's travel costs incurred in connection with his overseas tour renewal agreement travel.

Military Personnel

B-235145, May 7, 1991

Military Personnel

Pay

- **Medical treatment**
- ■ **Expenses**
- ■ ■ **Reimbursement**

A former member of the Army Reserve may not be reimbursed for civilian medical bills incurred while not on active duty even though the treatment was for a disease contracted in the line of duty. Nor are they reimbursable due to any error or negligence of Army personnel in not properly referring him for expert military medical care.

B-236008, May 7, 1991

Military Personnel

Relocation

- **Rental allowances**
- ■ **Computation errors**
- ■ ■ **Reimbursement**

A member's housing entitlement (BAQ and rent plus) was miscalculated by Army Housing Referral Office and based on that calculation signed lease for an apartment. When properly computed the housing entitlement did not cover the cost of rent. The member cannot be reimbursed the difference because there is no statutory authority for payment of expenses in excess of housing entitlement and the government is not bound by erroneous acts of its agents. In addition, we decline to submit this claim to Congress under the Meritorious Claims Act, 31 U.S.C. § 3702(d) (1982).

B-241226, May 14, 1991

Military Personnel

Pay

- **Retirement pay**
- ■ **Overpayments**
- ■ ■ **Debt collection**
- ■ ■ ■ **Waiver**

Retired member of the Air Force began receiving retired pay and accepted a civilian position. When the expected deductions to his retired pay did not occur, he contacted the appropriate officials, however, deductions were never made. Since the member knew he was being overpaid, and did not take appropriate action, he is not without fault and the overpayments should not be waived. *Admiral James D. Watkins*, USN, (Retired), B-234401, June 24, 1989 is not applicable in this case and provides no basis for waiver.

B-241476, May 20, 1991

Military Personnel

Pay

- Training expenses
- ■ Eligibility
- ■ ■ Administrative discretion
- ■ ■ ■ Reserve officer candidates

GAO does not agree with the Army that the Secretary is precluded by statute from paying first-semester tuition for two Army Reserve Officer Training Corps (ROTC) cadets in the service's 4-year scholarship program, even though the cadets did not receive full medical qualification for the program until the second semester. Rather, the Secretary has the discretion to consider such payment based on factors he deems appropriate, consistent with the intent and objectives of the program.

B-242308, May 21, 1991

Military Personnel

Pay

- Death gratuities
- ■ Eligibility
- ■ ■ Guardians

When two guardians appointed by different courts present conflicting claims for a death gratuity on behalf of the children of a deceased service member, payment may not be made to either guardian until the legal dispute between them is finally settled.

B-243388, May 22, 1991

Military Personnel

Pay

- Dual compensation restrictions
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Member who knew his retired pay would be subject to dual compensation and pay cap restrictions when he accepted a civilian position should have known that he was being overpaid when no deductions were made from his retired pay. Since he did not take action in the matter he is not without fault and debt may not be waived.

B-236399, B-238303, May 29, 1991

Military Personnel

Pay

- Dual compensation restrictions
- ■ Exemptions

A retired Air Force Colonel employed by the Office of the Comptroller of the Currency (COC), whose compensation is derived from assessments on banks, holds a position in the executive branch and is not thereby exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532. The COC is a bureau within the Department of Treasury and the Comptroller performs his duties under the general direction of the Secretary of the Treasury. Because the COC is within an agency funded by appropriated funds it is not separated from general federal revenues so as to be a nonappropriated fund instrumentality as that term was used in *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986), in exempting employees of certain nonappropriated fund instrumentalities from dual compensation reductions.

Military Personnel

Pay

■ Dual compensation restrictions

■ ■ Exemptions

A retired Army Lieutenant Colonel employed by the Federal Deposit Insurance Corporation (FDIC), whose compensation is derived from assessments on banks, is not thereby exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532. The FDIC is a government corporation owned or controlled by the United States and thus is one of the entities specifically enumerated in the definition of positions subject to dual compensation reductions in subsection (b) of 5 U.S.C. § 5532. Because the Federal Deposit Insurance Corporation is authorized to borrow from the Treasury and pledge the full faith and credit of the United States to the payment of its obligations it is not separated from general federal revenues so as to be a nonappropriated fund instrumentality as that term was used in *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986).

Miscellaneous Topics

B-243677, B-243674, May 13, 1991

Miscellaneous Topics

Transportation

■ Public transportation systems

■ ■ Commuting expenses

■ ■ ■ Discounts

Under section 629 of Public Law 101-509, 104 Stat. 1478 (1990), agencies are authorized to use appropriated funds to participate in state and local programs that encourage the use of public transportation, including programs that involve the sale of discounted transit passes.

Procurement

B-242415, B-242415.3, May 1, 1991

91-1 CPD 424

Procurement

Competitive Negotiation

- Offers
 - ■ Evaluation
 - ■ ■ Technical acceptability
-

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest is sustained where record does not show that the awardee's offer is technically acceptable in areas alleged by protester. While agency argues that, by amendment, it effectively waived solicitation test data requirement to establish product acceptability until pre-production phase of the contract, record shows that the amendment did not address areas of noncompliance asserted by protester.

B-242579, May 1, 1991

91-1 CPD 425

Procurement

Competitive Negotiation

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

Exclusion of protester's proposal from the competitive range is proper where the agency reasonably determines that given the proposal's high price—which does not reflect a superior technical approach—it has no reasonable chance of being selected for award.

Procurement

Competitive Negotiation

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

An agency's evaluation must be based on the proposal submitted and an offeror that fails to submit its lowest price with its initial proposal runs the risk of being excluded from further competition for award, despite subsequent claims by the protester that it could have reduced its price in the areas of overhead, profit, and material costs.

Procurement

Bid Protests

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

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Subcontractors

Request for reconsideration on basis that initial decision did not address issues raised by a firm which submitted protest comments is dismissed where the comments indicated that the firm had participated in the procurement as a potential subcontractor to the protester and, thus, was not an interested party to protest. Firm's allegation on reconsideration that it also submitted an offer to the agency as a prime contractor does not convert the firm's earlier protest comments into a "constructive protest," where the comments expressly disavowed any intention to protest to our Office.

Procurement

Competitive Negotiation

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

Procurement

Noncompetitive Negotiation

- Offers
- ■ Sole sources
- ■ ■ Clarification
- ■ ■ ■ Propriety

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

Procurement

Sealed Bidding

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

Bidder's failure to submit solicitation's Certificate of Procurement Integrity renders its bid nonresponsive since completion of the certificate imposes material legal obligations upon the bidder to which it is not otherwise bound.

Procurement

Payment/Discharge**■ Shipment****■ ■ Carrier liability****■ ■ ■ Amount determination**

In shipments where the carrier handles all transportation, the general rule is that the carrier is liable for loss or damage unless the firm proves otherwise. However, where both the government and the carrier had transportation responsibility, the parties share equal liability for damage to a shipment if it is not readily apparent when the damage occurred, so long as the carrier accepts the government's settlement offer within 120 days and does not attempt to break out individual items; otherwise, the carrier waives the sharing arrangement, and the agency has the option of setting off full liability.

Procurement

Competitive Negotiation**■ Unsolicited offers****■ ■ Determination****■ ■ ■ Advertising****■ ■ ■ ■ Descriptive literature**

Agency is not required to evaluate as an unsolicited proposal protester's letters offering computer software for sale, where the agency reasonably determined that the letters, which announced the general availability of the software and contained product descriptions, were advertising material or an offer of a commercial product, and not an unsolicited proposal.

Procurement

Competitive Negotiation**■ Competitive advantage****■ ■ Privileged information****■ ■ ■ Disclosure**

Agency did not improperly disclose protester's ideas contained in letters offering computer software where the information in the letters was freely provided to the agency without restrictions on its use or disclosure, or any indication that the protester considered the information confidential or proprietary; restriction on the use of ideas in an unsolicited proposal do not apply since the letters were not unsolicited proposals but advertising material or an offer of a commercial product.

Procurement

Special Procurement Methods/Categories**■ Computer equipment/services****■ ■ Computer software****■ ■ ■ Research/development contracts****■ ■ ■ ■ Commercial products/services**

Agency need not comply with Federal Acquisition Regulation § 11.002 policy that commercial products be obtained by the government whenever practicable in placing an order to develop software under an existing contract.

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Procurement

Competitive Negotiation

- Alternate offers
- ■ Rejection
- ■ ■ Propriety

Allegation that agency improperly failed to evaluate protester's alternate price proposal is academic, and will not be considered, where solicitation provided for award to low, technically acceptable offeror, and subsequent evaluation by agency of protester's alternate price proposal shows that it would not have been low.

Procurement

Bid Protests

- Leases
- ■ Government property
- ■ ■ GAO review

*Protest against the proposed award of a lease of Navy-owned floating drydock is not for consideration under General Accounting Office's bid protest function since it does not concern a procurement by a federal agency of property or services within the scope of the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551, *et seq.* (1988).*

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

A party requesting reconsideration must show that prior decision contains either errors of fact or law or that the protester has information not previously considered that warrants reversal or modification of the decision. Repetition of arguments made during the original protest does not meet this standard.

Procurement

Socio-Economic Policies

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

Protest against denial of a certificate of competency by the Small Business Administration (SBA) is denied where the record does not support the protester's contention that SBA failed to consider vital information.

Procurement

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

Protest that awardee failed to meet solicitation requirement that offeror's corporate experience demonstrate ability to perform naval research support services, as set forth in solicitation's statement of work, is denied where record indicates that agency had reasonable basis for finding proposal technically acceptable in area of corporate experience.

Procurement

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

Protest is denied where protester's analysis of 17 line items out of 2,500 fails to establish that allegedly inaccurate estimated quantities contained in the solicitation served to misrepresent the agency's needs, made a difference to the relative competitive standing of offerors or resulted in an award to other than the low evaluated offeror.

Procurement

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

Procurement

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

Allegations that awardee submitted an unbalanced offer which was not otherwise in conformance with solicitation subcontracting restrictions are dismissed where protester would not be in line for award if they were sustained and is, thus, not an interested party to protest.

Procurement

Socio-Economic Policies**■ Small businesses****■ ■ Competency certification****■ ■ ■ Bad faith****■ ■ ■ ■ Allegation substantiation**

In view of the conclusive statutory authority of the Small Business Administration (SBA) to determine the responsibility of a small business concern, review by the General Accounting Office of a challenge to a contracting officer's determination that a small business concern is nonresponsible, and the subsequent denial of a certificate of competency by SBA, is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in denial of a mean-

ingful opportunity to seek SBA review, or whether SBA failed to consider vital information concerning the firm's responsibility.

Procurement

Contractor Qualification

■ De facto debarment

■ ■ Non-responsible contractors

Nonresponsibility determinations associated with contemporaneous procurements do not constitute *de facto* suspension or debarment where each determination was based on extensive current information documenting recent deficient performance under prior contracts for similar services.

Procurement

Contractor Qualification

■ De facto debarment

■ ■ Non-responsible contractors

Successive determinations of nonresponsibility of a small business concern do not constitute evidence of *de facto* suspension or debarment where each determination was subject to the Small Business Administration's authority to conclusively determine the responsibility of the small business concern.

B-242559, May 6, 1991

91-1 CPD 440

Procurement

Sealed Bidding

■ Bid guarantees

■ ■ Responsiveness

■ ■ ■ Letters of credit

■ ■ ■ ■ Adequacy

An irrevocable letter of credit is not an acceptable form of bid guarantee on Department of Defense construction solicitations that contain Department of Defense Federal Acquisition Regulation Supplement § 252.228-7007.

B-242663, May 6, 1991

91-1 CPD 441

Procurement

Socio-Economic Policies

■ Small businesses

■ ■ Contract awards

■ ■ ■ Pending protests

■ ■ ■ ■ Justification

Protest of award of contract prior to resolution of Small Disadvantaged Business status protest filed with the Small Business Administration is denied where record shows that the contracting officer's determination that award without delay was necessary to protect the public interest had a reasonable basis

Procurement

Socio-Economic Policies

- Small businesses
- ■ Preferred products/services
- ■ ■ Certification

Bidder's failure, under a partial small business set-aside, to certify that all end items to be furnished will be manufactured or produced by a small business located in the United States does not require rejection of its bid as nonresponsive where bidder is already obligated by Federal Acquisition Regulation provision incorporated in the solicitation to furnish only small business end items in its performance of the contract.

Procurement

Contractor Qualification

- Licenses
- ■ Determination time periods

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Additional information
- ■ ■ ■ Post-bid opening periods

Protester's allegation that bid which failed to include proof of possession of a specific permit, as required under invitation for bids, was nonresponsive is without merit since the requirement pertained to responsibility and therefore could be satisfied at any time prior to award.

Procurement

Sealed Bidding

- Unbalanced bids
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protest that awardee's bid is materially unbalanced and thus does not reflect overall lowest cost to the government is dismissed where allegation essentially constitutes challenge to solicitation evaluation scheme.

Procurement

Socio-Economic Policies

- Preferred products/services
 - ■ Domestic products
 - ■ ■ Compliance
-

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Foreign/domestic product distinctions

Agency improperly evaluated proposed digital facsimile system as a domestic end product for Buy American Act purposes, and protest on that ground is sustained, where the imported facsimile machine underwent some manufacturing operations in the United States but the essential nature of the machine was not altered, so that it remained a foreign component.

Procurement

Contract Management

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

Procurement

Contract Management

- Contract administration
- ■ Convenience termination
- ■ ■ Resolicitation
- ■ ■ ■ GAO review

Termination of contract for the convenience of the government and resolicitation of the requirement were not improper where shortly after award agency determined that proposals were improperly evaluated because the solicitation's evaluation criteria did not reveal the relative weights of the evaluation factors as applied in the evaluation process.

Procurement

Competitive Negotiation

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

Agency request for final submissions which does not include the term "best and final offers," but which reasonably communicates to offerors that discussions are closed and establishes a common cutoff date for the submission of final offers, meets the Federal Acquisition Regulation requirement for requesting best and final offers.

Procurement

Bid Protests

■ Non-prejudicial allegation

■ ■ GAO review

Allegation of agency bias which does not establish any specific and malicious intent by agency officials to harm the protester does not provide a basis to sustain a protest.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Agency's failure to retain notes and worksheets of individual evaluators does not render record inadequate for purposes of determining reasonableness of agency's evaluation where record contains detailed narrative description of the evaluation results, including a narrative description supporting the rating of each offer under each evaluation criterion and subcriterion.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Protest alleging improper evaluation of proposals is denied where record supports the reasonableness of the agency's determination that protester's proposal contained specific weaknesses.

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Terms

■ ■ ■ Interpretation

Issuance of task orders for "phase in" activities constitutes work within the scope of the requirements advertised.

Procurement

Contractor Qualification

- Responsibility
 - ■ Financial capacity
 - ■ ■ Corporate entities
-

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Financial capacity
- ■ ■ ■ Corporate entities

Agency reasonably found a Panamanian corporation nonresponsible based on a review of submitted information that indicated the firm was experiencing severe financial difficulties that may not allow it to complete the work.

Procurement

Bid Protests

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

Procurement

Specifications

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

Where protester initially alleges that awardee's "equal" product in a brand name or equal sealed bid solicitation does not meet solicitation salient characteristics without specifying the salient characteristics to which it *does not conform*, and then specifies for the first time in its comments on the agency report that the awardee's equal product does not meet solicitation requirement for transponder delay, the specific argument is untimely and will not be considered.

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 regulations in the conduct of a procurement.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where the principal basis for the request was available but not submitted or argued during consideration of the initial protest and where the balance of the reconsideration request merely expresses disagreement with prior decision.

Procurement

Competitive Negotiation

- Offers
- ■ Late submission
- ■ ■ Acceptance criteria
- ■ ■ ■ Government mishandling

Protest of agency's rejection of late proposal, sent by United States Postal Service Express Mail 1 day prior to the closing date for receipt of proposals, is dismissed; failure of Postal Service to deliver proposal to designated office by deadline did not constitute "mishandling by the government" that would excuse lateness.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest of agency's refusal to extend date for receipt of proposals is dismissed for failure to set forth a detailed statement of the legal and factual grounds of the protest as required by General Accounting Office Bid Protest Regulations.

Procurement

Bid Protests

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

Protest of alleged defects in solicitation is dismissed as untimely where not filed prior to time set for receipt of proposals.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Prior decision in which we sustained a protest and recommended termination of the contract and award to protester is affirmed where request does not establish any factual or legal errors in the prior decision which warrant its reversal.

Procurement

Contractor Qualification**■ Licenses**

Procurement

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

Contracting agency reasonably determined that offeror was not a responsible prospective contractor where contracting officer concluded that offeror may not be able to meet proposed delivery schedule since it had been denied import license necessary to perform in the manner which it proposed. It was incumbent upon the offeror to obtain the import license necessary to perform the contract in the manner proposed and the contracting agency was not obligated to obtain the import license for the firm or to inform the firm that it needed a license.

Procurement

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

Protest against award under invitation for bids on the basis that the product offered does not meet compatible/ interchangeable requirement and specified salient characteristics of product specified is denied where there is no evidence that the descriptive data accompanying the bid did not demonstrate that the offered product conforms to the requirements set forth in the solicitation.

Procurement

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

To the extent the protester is arguing that the agency should have evaluated the quality of the offered product, the protest filed after bid opening is an untimely protest against an apparent solicitation impropriety.

Procurement

Sealed Bidding**■ Bid guarantees****■ ■ Responsiveness****■ ■ ■ Invitations for bids****■ ■ ■ ■ Identification**

A bid bond that references an incorrect solicitation number and incorrect bid opening date is materially defective in the absence of other objective evidence to clearly establish at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that a bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive.

Procurement

Sealed Bidding

- Bids
- ■ Responsibility
- ■ ■ Certification
- ■ ■ ■ Omission

Requirement to complete a certificate of procurement integrity imposes substantial legal burdens on the contractor and is properly viewed as a matter of responsiveness which cannot be waived or satisfied after bid opening.

Procurement

Bid Protests

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

Protest that agency improperly applied evaluation preference to proposals is dismissed as untimely where allegation essentially constitutes challenge to solicitation evaluation scheme.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size status
- ■ ■ Pending protests
- ■ ■ ■ Government delays

Protest is sustained where the contracting officer failed to comply with the regulations by waiting 3 weeks before forwarding a firm's size status protest to the Small Business Administration (SBA), and the delay effectively deprived the firm of having its size protest considered by the SBA prior to award.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Procurement

Contract Management

- Contract administration
- ■ Contract terms
- ■ ■ Compliance
- ■ ■ ■ GAO review

Agency improperly awarded contract on basis of proposal which indicated that the offeror would not comply with a jewel-bearing clause contained in the solicitation, which was a material contract requirement.

Procurement

Special Procurement Methods/Categories

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

Because of the price reduction clause incorporated into every Federal Supply Schedule (FSS), an FSS supplier may issue a price reduction at any time and by any method; accordingly, an FSS contractor properly may issue a price reduction after learning of the agency's requirement for an FSS item, since all FSS contractors have the same opportunity to reduce their prices during the term of the FSS contract.

Procurement

Special Procurement Methods/Categories

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

Under Federal Supply Schedule (FSS) for surveying equipment, calculation of delivery costs for federal users located outside an FSS geographic coverage area may be calculated on a case-by-case basis and FSS suppliers are not obligated to accept orders from non-mandatory users; accordingly, an FSS supplier is not required to formally modify underlying FSS contract delivery cost provision in order to offer a non-mandatory user reduced price, which incorporates cost of delivery outside an FSS geographic coverage area.

Procurement

Bid Protests

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

Procurement

Bid Protests

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

Protest to the General Accounting Office that requirement for other than a dry-blended dishwashing compound is unduly restrictive of competition and that the requirement should have been set aside for small business concerns is dismissed as untimely since the initial agency-level protest was untimely filed after bid opening.

Procurement

Bid Protests

- **Dismissal**
- ■ **Definition**

Where protest of cancellation of solicitation after bid opening does not allege any reason why cancellation was improper, protest is dismissed for failure to state a legally sufficient basis.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Where protest is dismissed for failure to state a legally sufficient basis, protester is not entitled to recover bid preparation or protest costs.

B-241639.2, B-241639.3, May 14, 1991

91-1 CPD 466

Procurement

Bid Protests

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

Protests are dismissed as untimely when filed almost 2 months after protester received notice of award; protesters failed to fulfill requirement to diligently pursue grounds for protests.

B-242673.3, May 14, 1991

91-1 CPD 467

Procurement

Bid Protests

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

Protest against cancellation of solicitation is dismissed as untimely where protester filed its bid protest more than 10 working days after the date it knew the basis of protest.

B-243555, May 14, 1991

91-1 CPD 468

Procurement

Bid Protests

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

Protest alleging that contract modification constitutes improper sole-source award to incumbent contractor is dismissed as untimely where protester knew more than 10 days prior to filing its protest of agency's intent to modify existing contract instead of holding competition for new requirement, and elected to pursue the matter with agency's competition advocate instead of filing a protest.

Procurement

Bid Protests

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

Protest of cancellation of solicitation is dismissed as untimely where initial, agency-level protest against cancellation was filed more than 10 working days after protester received notice of cancellation.

B-236834.8, B-236834.9, May 15, 1991**91-1 CPD 470**

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Protest allegation that in determining reasonableness of transportation rates, solicitation failed to disclose all of the agency's intended evaluation criteria and otherwise contained improper evaluation factors is academic where record shows that only evaluation factors described in the RFP and not challenged by protester were bases for rate rejections.

Procurement

Bid Protests

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

Protest allegation that solicitation did not adequately describe the types of cargo to be transported is untimely where the allegation was not raised prior to the closing date for receipt of proposals.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Transportation contracts
- ■ ■ ■ Rates

Protest against agency's rejection of rates is denied where record shows that rejection of rates was made in accordance with the solicitation's stated evaluation criteria.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- **Discussion**
- ■ **Determination criteria**

Where solicitation advises offerors of the possibility that award may be made without discussions, the agency does not conduct discussions with any offeror, and acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government at a fair and reasonable price, there is no legal requirement that the agency conduct discussions with any offeror.

B-240639.4, B-240820.3, May 15, 1991

91-1 CPD 471

Procurement

Bid Protests

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

Procurement

Bid Protests

- **GAO procedures**
 - ■ **Preparation costs**
-

Procurement

Competitive Negotiation

- **Offers**
- ■ **Preparation costs**

Request for reconsideration and claim for protest costs are denied where awardee's protest against an alleged improper auction was properly dismissed as academic because the awardee's contracts were unaffected by the protest of another firm against the award to the awardee.

B-243588.2, May 15, 1991

91-1 CPD 472

Procurement

Bid Protests

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

Request for reconsideration of decision dismissing protest as untimely filed is denied; protester was on constructive notice of General Accounting Office filing requirements because they are published in the *Federal Register*.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Compliance

A domestic firm, assembling the components necessary to transform an imported "base" or "base frame" into a milling machine which meets the solicitation requirements, satisfies the domestic manufacturing requirement contained in solicitations.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Compliance

The domestic content restriction contained in solicitations for milling machines was met because the domestic component costs were more than 50 percent of the cost of all the components of the milling machine, even though arguably some items included in the calculation were not domestic components.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Compliance

Requirement that milling machine offered be a current model was met where machine is manufactured domestically from a foreign base and domestic components costing more than 50 percent of the cost of all components.

Procurement

Contractor Qualification

- Approved sources
- ■ Alternate sources
- ■ ■ Approval
- ■ ■ ■ Government delays

Agency process to approve alternate products for labyrinth ring assemblies is inconsistent with the statutory and regulatory provisions calling for "prompt" qualification procedures to obtain full and open competition, where protester was deprived of a reasonable opportunity to compete by the agency's failure to act on approval requests submitted and pursued by the protester for almost 2 years.

Procurement

Specifications

- **Brand name specifications**
- ■ **Equivalent products**
- ■ ■ **Acceptance criteria**

Protest of agency's evaluation of protester's alternate product as unacceptable under "Products Offered" clause is denied where agency reasonably determined that objective performance test results were required to establish acceptability of alternate product, and results of performance test submitted by protester did not establish acceptability of offered item.

Procurement

Contractor Qualification

- **Approved sources**
- ■ **Alternatives**
- ■ ■ **Pre-qualification**
- ■ ■ ■ **Testing**

Protest alleging that agency failed to afford protester a reasonable opportunity to qualify its alternate product is denied where protester delayed offering to pay for additional testing of its product for 3 months after it learned agency required such testing.

Procurement

Contractor Qualification

- **Approved sources**
- ■ **Alternatives**
- ■ ■ **Pre-qualification**
- ■ ■ ■ **Testing**

Protest alleging that agency should have accepted protester's offered alternate product under Department of Defense regulation requiring agencies to consider "qualifying country" sources of supplies is denied where agency considered test results from qualifying country and found the test to be both flawed and inconclusive, and protester does not dispute the reasonableness of agency's determination.

Procurement

Sealed Bidding

- **Invitations for bids**
- ■ **Terms**
- ■ ■ **Risks**

Protest alleging that firm, fixed-price solicitation for maintenance services subjects contractor to unreasonable risk of workload fluctuations is denied where the record shows that bidders can reasonably estimate the project cost given their expertise and the historical workload data provided in solicitation.

Procurement

Sealed Bidding

■ Invitations for bids

■ ■ Terms

■ ■ ■ Risks

Protest alleging that agency's omission from solicitation of Variation in Quantity clause, which limits circumstances under which government will accept variation in quantity, subjects contractor to unreasonable risk of workload fluctuations is denied; since clause is not intended to protect the contractor in the event of workload fluctuations, omission of clause does not impose additional risk on contractor.

Procurement

Contract Management

■ Contract administration

■ ■ Options

■ ■ ■ Use

■ ■ ■ ■ Notification

Procurement

Sealed Bidding

■ Invitations for bids

■ ■ Terms

■ ■ ■ Options

Protest of solicitation's renewal clause, which does not require agency to give contractor preliminary notice of its intent to exercise contract option by a specified time before contract expiration, is denied where applicable regulations do not require such a specific time period and the provision is otherwise reasonable.

B-242678, B-242678.2, May 17, 1991

91-1 CPD 477

Procurement

Specifications

■ Minimum needs standards

■ ■ Determination

■ ■ ■ Administrative discretion

Protest against specifications requiring a contractor-provided personal computer as part of electrocardiogram (EKG) monitoring services is denied where protester presents no substantive rebuttal to agency's explanation that the equipment is necessary to meet its minimum needs for reanalyzing EKG data in emergency cases.

B-243463.2, May 17, 1991

91-1 CPD 478

Procurement

Bid Protests

■ GAO procedures

■ ■ GAO decisions

■ ■ ■ Reconsideration

Request for reconsideration of decision dismissing protest is denied where new argument presented by protester is untimely raised.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where request contains no statement of fact or legal grounds warranting reversal but merely restates arguments made by the protester and previously considered by the General Accounting Office.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied when based on an argument that could have been but was not raised by protester in course of the original protest.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of protest, previously dismissed because it failed to state a valid basis for protest, is denied where the request merely repeats an argument made during the consideration of its original protest, and claims new grounds of protest which have no bearing on the propriety of the General Accounting Office's conclusion that the initial protest failed to state a valid basis.

Procurement

Bid Protests

- Agency-level protests
- ■ Oral protests

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Second request for reconsideration of prior General Accounting Office decision, affirming dismissal of protest as untimely, is denied where the protester's argument—that it orally protested the issue to the agency within the time required by our timeliness rules—could have and should have been raised in its earlier reconsideration request but was not. In any event, the Federal Acquisition Regulations do not permit oral protests.

Procurement

Bid Protests

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

Procurement

Bid Protests

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

Second reconsideration request that protester was an interested party to protest the agency's selection of another firm for award is denied where the protester would not be in line for award even if its protest of the award selection were sustained; the incurring of proposal preparation costs does not in itself provide the requisite economic interest to maintain a protest.

B-242650, et al., May 20, 1991***

91-1 CPD 482

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Justification
- ■ ■ ■ Procedural defects

Protest is sustained where agency's justification for proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not based on evidence that establishes the reasonableness of its determination that only one known source can meet the government's needs.

B-242686, May 20, 1991***

91-1 CPD 483

Procurement

Sealed Bidding

- Invitations for bids
- ■ Defects
- ■ ■ Signature lines
- ■ ■ ■ Omission

Protest is sustained where solicitation's Certificate of Procurement Integrity failed to provide a signature line, which reasonably misled bidders to believe a separate signature on the certificate was not required.

B-243358, May 20, 1991

91-1 CPD 484

Procurement

Bid Protests

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

Under the General Accounting Office Bid Protest Regulations, protests based upon alleged improprieties apparent on the face of the solicitation must be filed prior to the time set for the receipt of initial proposals; where, after solicitation's initial closing date, protester challenges solicitation's requirements as unduly restrictive on small business concerns, protest is untimely since requirements were clearly set forth in the solicitation.

Procurement

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

Under the General Accounting Office Bid Protest Regulations, protests based upon alleged improprieties apparent on the face of the solicitation must be filed prior to the time set for the receipt of initial proposals; where, after the solicitation's initial closing date, protester challenges solicitation's evaluation criteria, protest is untimely since evaluation criteria were clearly set forth in the solicitation.

Procurement

Socio-Economic Policies**■ Small businesses****■ ■ Size determination****■ ■ ■ GAO review**

The General Accounting Office (GAO) will not review a decision by the Small Business Administration (SBA) that a firm is, or is not, a small business since SBA, not GAO, has conclusive statutory authority to determine matters of small business size status for federal procurements.

Procurement

Competitive Negotiation**■ Discussion****■ ■ Adequacy****■ ■ ■ Criteria**

An agency may not reject protesters' low fixed-price proposals for proposing unrealistically low professional compensation packages, where the agency did not discuss the matter with those firms, the technical evaluation criteria specifically encompassed the adequacy of professional compensation packages, and the agency advised the protesters that their offers were technically acceptable.

Procurement

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

Request for reconsideration is denied where request contains no statement of facts or legal grounds warranting reversal but merely restates arguments made by the protester and previously considered by the General Accounting Office.

Procurement

Bid Protests

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

Protest against technical evaluation of protester's proposal was properly dismissed as untimely filed under Bid Protest Regulations because specific basis for protest was filed more than 10 working days after detailed debriefing. 4 C.F.R. § 21.2(a)(2) (1991). The protester had all the information it needed to include its specific arguments in its initial timely protest filed after the oral debriefing and the 10-day filing requirement is not extended to allow the protester to wait for written confirmation of the debriefing information.

B-241133.2, May 21, 1991

91-1 CPD 488

Procurement

Bid Protests

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

Request for reconsideration of prior decision denying protest alleging agency violation of contractor's proprietary rights in technical drawing is denied where protester repeats arguments previously made, disagrees with our conclusions, and attempts to supplement record with information it should have submitted during the course of the initial protest.

B-241169.3, May 21, 1991

91-1 CPD 489

Procurement

Bid Protests

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

Protester's assertion that agency allowed insufficient time for preparation of proposals is untimely when first raised after contract award, and does not fall within the significant issue exception to the General Accounting Office timeliness requirements.

Procurement

Bid Protests

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

Request for reconsideration is denied where protester fails to show error of fact or law or information not previously considered that would warrant reversal or modification of prior decision, and makes arguments that could have been, but were not, raised in the course of the initial protest.

B-241302.3, May 21, 1991

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest challenging agency's rejection of protester's bid as nonresponsive is denied where protester fails to specify in any detail the basis for its contention that the decision is in error and instead alludes to another issue not timely raised or considered in the initial protest.

B-241329.3, May 21, 1991

91-1 CPD 490**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior decision, in which the General Accounting Office found nonresponsive the requester's bid because unsolicited descriptive literature submitted with the bid showed that the offered product would not comply with a material invitation for bid (IFB) requirement, is denied where the requester does not dispute that the descriptive literature showed that the offered product did not comply with the IFB requirement.

B-241510.2, May 21, 1991

91-1 CPD 491**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester merely repeats arguments it made previously, expresses disagreement with our decision, and presents a new protest contention based upon information available during the course of the initial protest.

B-241569.2, B-241569.3, May 21, 1991***

91-1 CPD 492**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Competitive Negotiation

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

The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA)

and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

B-241594.2, May 21, 1991

91-1 CPD 493

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest of agency's improper evaluation of proposals and failure to conduct adequate discussions is denied where request does not establish that decision was based on error of fact or law.

B-242229.2, May 21, 1991

91-1 CPD 494

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protester's request for reconsideration of a decision denying its protest is denied, where request is filed more than 10 days after the 1 calendar week by which time the protester is presumed to have received the General Accounting Office's decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

The General Accounting Office denies request for reconsideration of a decision that denied a protest against agency's failure to set-aside the procurement under the section 8(a) program, where the reconsideration request is based solely on a letter from the Small Business Administration solicited by the protester after the initial decision, which does not establish that the original decision contained errors of law or failed to consider information that would warrant reversal of the initial decision.

B-242648.2, May 21, 1991

91-1 CPD 495

Procurement

Sealed Bidding

- Ambiguous bids
- ■ Determination criteria

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Price data
- ■ ■ ■ Information sufficiency

Bid under solicitation for lease with option to purchase motor vehicles was properly rejected as nonresponsive where agency reasonably concluded that the language the bidder inserted in its bid regarding percentage of lease price to be applied to purchase price limited the agency's right to exercise the purchase option during the first 12 months of the contract, and made the bid ambiguous regarding the actual price that the agency would be obligated to pay if it exercised the purchase option.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Protester is not an interested party to challenge agency's cancellation of solicitation where protester's bid was properly rejected as nonresponsive.

B-242696, May 21, 1991

91-1 CPD 496

Procurement

Bid Protests

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

Protest that agency improperly proceeded with bid opening without the applicable wage determinations in the solicitation is timely where the solicitation advised that the wage determinations would be provided when received and the protest is filed within 10 working days of the bid opening date.

Procurement

Socio-Economic Policies

- Labor standards
- ■ Service contracts
- ■ ■ Wage rates
- ■ ■ ■ Omission

Protest alleging that the agency's failure to incorporate applicable wage determinations in the solicitation deprived bidders of an opportunity to prepare bids based on the wages required to be paid under the resulting contract is denied where the agency could not delay bid opening to wait for a response from the Department of Labor to the agency's request for the applicable wage rates because of an urgent need to initiate contract performance for temporary services.

B-242733, May 21, 1991

91-1 CPD 497

Procurement

Contract Management

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

Generally, statutes and regulations governing regular federal procurements are not strictly applicable to repurchase after default; General Accounting Office will review repurchase only to determine if the contracting agency's actions were reasonable in the circumstances. Decision to limit repurchase of jet fuel to historical suppliers based upon an urgent need for such fuel was reasonable under the circumstances of this case.

B-242973, May 21, 1991

91-1 CPD 498

Procurement

Sealed Bidding

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

Agency properly canceled solicitation for harbor dredging where lowest bid was more than 25 percent above government estimate and government estimate was reasonably based on costs for similar work under prior contracts.

B-243212, May 21, 1991

91-1 CPD 499

Procurement

Bid Protests

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

Allegation that agency improperly applied a 10 percent preference to an offeror which certified that it qualified as a Minority Institution is dismissed as untimely where the solicitation included Department of Defense Federal Acquisition Regulation Supplement § 252.219-7007, which expressly provides for this preference and the protester did not protest this issue prior to the closing date for receipt of proposals.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Protest that contracting agency awarded contract based solely on price is denied where record demonstrates that award was made to the highest technically rated, lowest-priced offeror.

B-243100, May 22, 1991

91-1 CPD 500

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ Apparent solicitation improprieties

Protest against agency failure to require bid bond, where bid is below \$25,000, is untimely where filed after bid opening.

B-243741, May 22, 1991

91-1 CPD 501

Procurement

Bid Protests

■ Allegation substantiation

■ ■ Lacking

■ ■ ■ GAO review

Procurement

Contractor Qualification

■ Organizational conflicts of interest

■ ■ Corporate ownership

Protest alleging that an organizational conflict of interest existed during the procurement because an offeror that submitted an unsuccessful proposal acquired the successful offeror under the same solicitation is dismissed since there is no evidence that any offeror in the competition possessed proprietary information that was improperly obtained from the government; no evidence that any offeror had access to source selection information relevant to the contract that was not available to all competitors; and no evidence that the awardee will not be objective in performing the contract work or that it gained an unfair competitive advantage as a result of being acquired by another offeror.

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

Protest filed more than 10 working days after the protester learns basis for protest is untimely and will not be considered.

Procurement

Competitive Negotiation

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

Protest that cancellation of solicitation is improper is dismissed where the decision to cancel is based on the anticipated closure of the Air Force Base at which the services being solicited were to be provided, which involves a matter of executive policy that is not for resolution through the bid protest process.

Procurement

Competitive Negotiation

- Offers
- ■ Submission time periods
- ■ ■ Extension
- ■ ■ ■ Propriety

Protest of agency's refusal to extend date for receipt of proposals is dismissed where protester did not request a copy of solicitation until 9 days before proposals were due, even though solicitation was synopsized in the *Commerce usiness Daily* nearly 2 months before, and issued 1 month before, the closing date.

Procurement

Bid Protests

- GAO decisions
- ■ Recommendations
- ■ ■ Modification

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Procurement

Contract Management

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

Prior decision is modified to delete recommendation for corrective action which could have resulted in termination for convenience of two contracts in light of information showing termination is not practical; instead, General Accounting Office concurs in agency recommendation that options under contracts should not be exercised. Protester is entitled to recover its proposal preparation costs, in addition to its previously awarded protest costs.

B-238004, B-242685, May 24, 1991***

Procurement

Contract Disputes

- Appeals
- ■ Interest

The Forest Service is not required to discontinue the assessment of interest, late payment penalties, or administrative costs pursuant to the Federal Claims Collection Act, as amended, 31 U.S.C. § 3717, during the pendency of an appeal under the Contract Disputes Act.

Procurement

Contract Disputes

- Sureties
- ■ Liability
- ■ ■ Amount determination

Corporate sureties are liable, up to the penal sum of their bond, for the interest, late payment penalties, and administrative costs assessed against the contractor on whose behalf the surety provides its bond, plus any such assessments made against the surety for its own failure to pay in a timely fashion, even if the latter assessments exceed the penal sum of the bond.

B-241157.2, May 24, 1991

91-1 CPD 505

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Prior decision denying protest is affirmed where protester's request does not show that decision—holding that protester with relatively low-ranking technical proposal was not prejudiced by award at higher quantity than solicited—was in error.

B-242615, May 24, 1991

91-1 CPD 506

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency conducted adequate discussions with protester where written questions precisely conveyed the evaluators' principal concerns with the firm's proposal; concern regarding corporate experience, which was not subject to change, did not have to be the subject of discussions.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

Where protester had relatively little direct experience and failed to sufficiently identify a steel fabrication subcontractor after being asked to do so during discussions so that the subcontractor's experience and resources could be evaluated, agency acted reasonably in downgrading protester's proposal under relevant listed evaluation subfactors.

B-242737, May 24, 1991

91-1 CPD 507

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Leases
- ■ ■ ■ Office space

Contracting agency properly rejected protester's offer for leased space where the solicitation required offered space to have a potential for efficient layout but the protester's space contained inherent structural limitations, which, based upon the tenant agency's needs, precluded efficient layout.

B-242604, May 28, 1991

91-1 CPD 508

Procurement

Competitive Negotiation

- Contract awards
 - ■ Propriety
-

Procurement

Contractor Qualification

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

Agency properly awarded contract to low, responsible offeror where protester's offer did not take exception or deviate from specifications, and agency made requisite affirmative determination of responsibility.

Procurement

Bid Protests

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

Lower priced offeror timely filed protest of agency's cost evaluation and technical/cost tradeoff within 10 days of its receipt of information under a Freedom of Information Act request pertaining to the awardee's prices; however, protest is untimely to the extent that it touches on the protester's objections to the agency's technical evaluation and technical ranking of its proposal because it was not filed within 10 days of an agency debriefing disclosing the specific deficiencies in the protester's technical proposal.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Prices
- ■ ■ ■ Additional work/quantities

Agency price evaluation that only considered the total cost of a sample task, rather than the total contract cost, on a solicitation for an indefinite quantity of services under a delivery order contract was proper, where the sample task provided a common basis for cost evaluation under a solicitation that did not specify labor classifications or labor hours because of the uncertainty of the tasks that may be ordered during the contract and the agency's desire to use offerors' existing organizational structure and approaches, and where the task is typical of work under the contract.

Procurement

Competitive Negotiation

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

Agency properly exercised its discretion in determining awardee's technical superiority to be worth its higher cost under an evaluation scheme that accorded equal weight to costs and to technical factors.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Checks
- ■ ■ ■ Adequacy

Bid guarantee in the form of a cashier's check to the order of "Farmers Home Bureau, U.S. Government" on a construction services solicitation issued by the Farmers Home Administration is an acceptable firm commitment to the government since there is no doubt that the check can be negotiated by the agency in the event of a default by the bidder.

Procurement

Bid Protests

- Premature allegation
- ■ GAO review

Protest of agency's failure to award a contract to the apparent low bidder is dismissed as premature where agency has not yet made award and has not indicated to protester that protester is not in line for award.

Procurement

Contract Management

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

Agency's decision not to extend protester's current contract until performance is scheduled to begin under new contract is a matter of contract administration which General Accounting Office does not consider under its bid protest function.

Procurement

Competitive Negotiation

- Offers
- ■ Options
- ■ ■ Price disclosure

Protest of agency's disclosure of incumbent contractor's option unit prices under its current contract to prospective offerors at pre-proposal conference is dismissed; disclosure of nonproprietary option price information is proper where agency issues solicitation to determine whether exercise of option is to agency's advantage.

Procurement

Bid Protests

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

Protest against rejection of bid under custodial services solicitation, which was filed more than 10 working days after the protester received denial of its agency-level protest, is untimely filed under the General Accounting Office (GAO) Bid Protest Regulations; protester's initial filing of a protest with the General Services Board of Contract Appeals, which dismissed the protest for lack of subject matter jurisdiction, does not toll the time for filing a GAO protest.

Procurement

Bid Protests

- Premature allegation
 - ■ GAO review
 - ■ ■ Alternate sources
-

Procurement

Noncompetitive Negotiation

- Sole sources
- ■ Alternate sources
- ■ ■ Qualification

Where *Commerce Business Daily* (CBD) notice announcing agency's plans to make sole-source award contains footnote 22—giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements—a potential source must first timely respond to the CBD notice and receive a negative agency response before it can protest the agency's sole-source decision at the General Accounting Office (GAO). GAO will dismiss protest as premature where protest does not indicate that the protester submitted an expression of interest to the agency before filing the protest at GAO.

Procurement

Bid Protests

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

Protest to the General Accounting Office (GAO) filed more than 10 working days after the protester learned of the initial denial of its agency-level protest is untimely; the fact that protester sought further agency consideration after learning of the denial of the agency-level protest does not toll GAO timeliness requirements.

Procurement

Bid Protests

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

Prior decision dismissing protest as untimely is affirmed where protester failed to diligently pursue information reasonably expected to establish basis for protest.

Procurement

Contract Management

- Contract performance
- ■ GAO review

Protest based on protester's belief that awardee will not perform as contractually required concerns a matter of contract administration which is not for consideration under our Bid Protest Regulations.

Procurement

Competitive Negotiation

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

Award of a cost-reimbursement contract to a higher-rated, higher-cost offeror is not objectionable where award on that basis was consistent with the solicitation's stated evaluation methodology, and the agency reasonably determined that successful offeror's superior management and technical proposal justified award at the higher cost.

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where agency does not specifically conduct discussions with protester concerning an accounting deficiency in its initially proposed cost structure, but protester otherwise has knowledge of the deficiency and subsequently revises its cost structure in its best and final offer, which the agency accepts at face value as accurate, protester has not been competitively prejudiced.

Procurement

Competitive Negotiation

- Contract awards
- ■ Source selection boards
- ■ ■ Bias allegation
- ■ ■ ■ Allegation substantiation

Allegation that the source selection authority was biased and prejudged protester, the incumbent contractor, as incapable of performing the follow-on requirement, is denied where the record contains no evidence of bias and the evaluation and award decision were reasonable and in accordance with the solicitation's stated evaluation methodology.

B-242800, B-242800.3, May 30, 1991

Procurement

Sealed Bidding

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

Where brand name or equal solicitation requires submission of descriptive literature sufficient to establish that the offered item conforms to the salient characteristics and advises bidders that failure to submit adequate descriptive literature would require rejection of their bids, the procuring agency properly rejected as nonresponsive a bid that included descriptive literature which failed to show compliance with all of the listed salient characteristics.

B-244204, May 30, 1991

Procurement

Sealed Bidding**■ Contract awards****■ ■ Eligibility****■ ■ ■ Acceptance time periods**

A bidder that conditions an extension of its bid acceptance period upon an increase in price renders itself ineligible for award after its bid expires, since it has attempted to change a material term of the bid.

B-238162.4, May 31, 1991

Procurement

Bid Protests**■ GAO procedures****■ ■ Preparation costs****■ ■ ■ Attorney fees****■ ■ ■ ■ Amount determination**

Attorneys' fees claimed by prevailing protester are determined reasonable, and thus are allowable, where the hourly rates are within bounds of rates charged by similarly situated attorneys, and the hours claimed are properly documented and do not appear to be excessive.

B-242242.2, B-242243.2, May 31, 1991***

Procurement

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

Protest of agency nonresponsibility determination filed more than 10 working days after the Small Business Administration (SBA) Regional Office finds protester ineligible for consideration under certificate of competency program because the protester is not a small business will be considered timely under the General Accounting Office (GAO) Bid Protest Regulations when filed with GAO within 10 working days of the denial of protester's timely (within 5 working days) appeal by the SBA Office of Hearings and Appeals.

Procurement

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

Agency reasonably determined protester was nonresponsible where the protester's recent contract performance on similar work was inadequate, and protester does not specifically dispute agency position.

Procurement

Sealed Bidding

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

Contracting agency had a compelling reason to cancel invitation for bids after bid opening where it reasonably determined that specifications relating to messenger/driver functions were incomplete and did not reflect its minimum needs.

Procurement

Sealed Bidding

- Contract awards
- ■ Propriety
- ■ ■ Invitations for bids
- ■ ■ ■ Defects

Contracting agency could not award contract to low bidder and then change contract to include functions that were inadvertently omitted from invitation for bids since the value of the omitted functions was substantial and award of the contract based on less than the government's actual requirements would have prejudiced other offerors.

Procurement

Sealed Bidding

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

Procurement

Sealed Bidding

- Terms
- ■ Materiality
- ■ ■ Integrity certification

Assertion that bidder was not required to sign and complete a certificate of procurement integrity because the solicitation included the certificate for informational purposes only is denied where the solicitation specifically states that each bidder is required to submit a signed certificate with its bid and that the failure to do so will result in rejection of the bid as nonresponsive.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Terms
- ■ ■ Interpretation
- ■ ■ ■ Certification

Protester's argument that it was misled by a provision in an invitation for bids (IFB) stating that the Certificate of Procurement Integrity could be completed by successful "offerors" at any time prior to award to conclude that it was not required to provide a completed certificate with its bid

is denied because (1) it ignores the language of Federal Acquisition Regulation § 52.203-8(c)(1), set forth in full in the IFB, which states that bidders are required to submit a signed certificate with their bid submissions; (2) it confuses the requirements applicable to sealed bidding with those applicable to negotiated procurements; and (3) in any event, it concerns a patent ambiguity in the solicitation which should have been challenged prior to bid opening.

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Certification

■ ■ ■ ■ Omission

Contention that by signing its bid protester effectively satisfied the requirement to complete and sign the Certificate of Procurement Integrity is denied because the certification provision imposes additional and substantial legal obligations on the contractor, and failure to sign and complete the certificate calls into question the bidder's commitment to the certificate's stated requirements.

B-243795, May 31, 1991

91-1 CPD 520

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ Apparent solicitation improprieties

Protest based upon alleged solicitation impropriety is untimely when not filed until after quotations were due and award was made.

For:

Telephone research service regarding Comptroller General
decisions: (202) 275-5028

Information on pending decisions: (202) 275-5436

Copies of decisions: (202) 275-6241

Request to be placed on mailing lists for GAO Publications: (202) 275-4501

Questions regarding this publication: (202) 275-4501

**United States
General Accounting Office
Washington, D.C. 20548**

**Official Business
Penalty for Private Use \$300**

Address Correction Requested

<p>Special Fourth Class Rate Postage & Fees Paid GAO Permit No. G100</p>
