

**GAO**

United States General Accounting Office  
**Office of General Counsel**

---

December 1991

---

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

---

Vol. III, No. 3

---

---

---

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	4
Military Personnel	8
Miscellaneous Topics	11
Procurement	12

---

---

# 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-229363.2, December 23, 1991***	7	B-244217, December 19, 1991	10
B-233167.3, December 9, 1991	19	B-244240.5, December 6, 1991	17
B-234326.15, December 24, 1991	42	B-244271.2, December 9, 1991	21
B-234326.15, December 24, 1991	2	B-244383.4, et al., December 6, 1991	17
B-236224, December 23, 1991***	8	B-244500, December 5, 1991	4
B-237868.8, December 20, 1991	35	B-244513, December 10, 1991	9
B-238520.5, B-238520.6, December 31, 1991	49	B-244575, December 11, 1991	4
B-240391.5, December 12, 1991	24	B-244617, December 24, 1991	11
B-240697.2, December 16, 1991	9	B-244617, December 24, 1991	2
B-241418.3, December 27, 1991	43	B-244653.2, December 23, 1991	38
B-241441.4, B-241441.6, December 27, 1991	44	B-244682.3, December 12, 1991	24
B-241498.2, December 5, 1991	16	B-244721, December 17, 1991	6
B-241592.3, December 13, 1991	1	B-244760.2, December 27, 1991	44
B-241996.5, December 9, 1991	19	B-244826, December 12, 1991	5
B-242394.7, December 20, 1991	36	B-244831.2, December 27, 1991	45
B-242558.2, December 18, 1991	6	B-244918, B-244918.2, December 3, 1991***	13
B-242632.2, December 13, 1991	25	B-244935, December 4, 1991	14
B-242957.3, December 9, 1991	19	B-244956, B-244956.2, December 4, 1991	14
B-243387.2, B-243387.3, December 23, 1991	37	B-244958, B-244958.2, December 5, 1991	16
B-243647.4, B-246327, December 20, 1991	36	B-244965.2, December 18, 1991	32
B-243718.2, December 3, 1991***	12	B-244974, December 4, 1991	15
B-243769.2, December 12, 1991	24	B-244989, December 4, 1991	16
B-243829, December 13, 1991***	9	B-244991, December 6, 1991	18
B-243855.3, December 9, 1991	20	B-244997, December 6, 1991	18
B-244082, December 16, 1991***	5	B-245006.2, December 13, 1991	25

\*\*\* (notes published decisions) Cite published decisions as 71 Comp. Gen.—

Table of Decision Numbers

	Page		Page
B-245044, B-246011, December 9, 1991	21	B-245366, December 30, 1991	47
B-245103, December 12, 1991	5	B-245381, December 30, 1991	48
B-245106, December 17, 1991	29	B-245400, December 30, 1991	48
B-245128, December 18, 1991	32	B-245433, December 26, 1991	3
B-245132, December 17, 1991	29	B-245434, December 30, 1991	48
B-245137, December 18, 1991	32	B-245446, December 17, 1991	31
B-245146, December 18, 1991	33	B-245453, December 30, 1991	49
B-245149, December 16, 1991***	27	B-245470, December 27, 1991	45
B-245158, et al., December 17, 1991	29	B-245481, December 26, 1991	43
B-245164, December 18, 1991	33	B-245516, December 16, 1991	27
B-245223, December 23, 1991	39	B-245539, December 9, 1991	22
B-245235, December 26, 1991	43	B-245549.5, December 9, 1991	22
B-245250, December 18, 1991	33	B-245569, December 11, 1991	23
B-245260, December 13, 1991	26	B-245599, December 27, 1991	46
B-245287, December 23, 1991	39	B-245619, December 16, 1991	27
B-245289, B-245289.2, December 23, 1991***	40	B-245644, December 12, 1991	25
B-245293, December 23, 1991	40	B-245678, December 16, 1991	28
B-245296, December 23, 1991	41	B-245714, December 13, 1991	26
B-245299, December 23, 1991	41	B-245714, December 13, 1991***	11
B-245328, December 17, 1991	30	B-245783.2, December 23, 1991	42
B-245329, December 27, 1991	45	B-245798, December 27, 1991	46
B-245330, December 17, 1991***	1	B-245849, December 11, 1991	23
B-245330, December 17, 1991***	6	B-245911, December 27, 1991	47
B-245333, December 20, 1991	36	B-245944, December 20, 1991	37
B-245353, December 17, 1991	30	B-245952, December 6, 1991	18
B-245363, December 20, 1991	36	B-245969, December 9, 1991	22
		B-246048, December 27, 1991	47
		B-246194, December 17, 1991	31

---

Table of Decision Numbers

---

	Page		Page
B-246272, December 2, 1991	12	B-246725, December 3, 1991***	13
B-246333, December 18, 1991	34	B-246766, December 11, 1991	23
B-246337, December 18, 1991	34	B-246785.2, December 30, 1991	49
B-246408, December 12, 1991	25	B-246836, December 17, 1991	32
B-246425, December 19, 1991	35	B-246925, December 11, 1991	23
B-246526, December 17, 1991	31	B-246937, December 20, 1991	37
B-246721, December 2, 1991	12	B-246963, December 13, 1991	27



---

# Overruled, Modified and Distinguished

---

	<u>Page</u>
43 Comp. Gen. 503	9
58 Comp. Gen. 131	9



---

# Appropriations/Financial Management

---

---

**B-241592.3, December 13, 1991**

---

## **Appropriations/Financial Management**

---

### **Budget Process**

#### **■ Funds transfer**

#### **■ ■ Authority**

---

## **Appropriations/Financial Management**

---

### **Claims Against Government**

#### **■ Interest**

In response to various claims of the Virgin Islands, the Advisory Services of the Virgin Islands is advised that there is no authority to pay interest on funds held by Customs on behalf of the Virgin Islands absent an agreement or statute, nor is there any legal authority to cover over to the Virgin Islands customs duties collected through preclearance operations on goods entering the mainland from the Virgin Islands. *Virgin Islands v. Blumenthal*, 642 F.2d 641 (Ct. App. D.C. Cir. 1980), reh'g denied, Dec. 18, 1980, cert. denied, 451 U.S. 983 (1981). Virgin Islands account is a deposit fund and various provisions in title 31 U.S.C. which refer to trust funds do not apply. Attorney General of the Virgin Islands is also advised that the transfer of funds on behalf of the Virgin Islands is within the jurisdiction of Customs and not GAO.

---

**B-245330, December 17, 1991\*\*\***

---

## **Appropriations/Financial Management**

---

### **Appropriation Availability**

#### **■ Purpose availability**

#### **■ ■ Specific purpose restrictions**

#### **■ ■ ■ Training**

#### **■ ■ ■ ■ Federal executive boards**

The United States Equal Employment Opportunity Commission (EEOC) may pay registration fees for its employees to attend a Federal Executive Board training seminar. The payment of a reasonable registration fee for a training seminar sponsored by a Federal Executive Board does not constitute interagency financing of a board or commission, and is therefore permissible.

---

**B-234326.15, December 24, 1991**

---

**Appropriations/Financial Management**

---

**Appropriation Availability**

- Amount availability
  - ■ Appropriation restrictions
  - ■ ■ Construction contracts
- 

**Appropriations/Financial Management**

---

**Budget Process**

- Budget restrictions
- ■ Constrs

The Air Force acknowledges that the two contracts to produce the Investment Casting Facility at Hill AFB, Ogden, Utah, constituted a single minor military construction project. Because the project cost over \$200,000, the Air Force acknowledges that it was not authorized to finance the project out of the Air Force Industrial Fund.

---

**Appropriations/Financial Management**

---

**Appropriation Availability**

- Amount availability
  - ■ Appropriation restrictions
  - ■ ■ Constrs
- 

**Appropriations/Financial Management**

---

**Budget Process**

- Budget restrictions
- ■ Construction contracts

Two Air Force contracts to replace a total of 12 trailers constitute a single military construction project costing over \$200,000. As such, it was improper to finance the contracts out of the Air Force Industrial Fund. The Air Force's argument that each trailer represents a separate project costing less than \$200,000 is rejected because it is inconsistent with the applicable Air Force regulation and the Air Force had previously treated the replacement of all 12 trailers as a single project.

---

**B-244617, December 24, 1991**

---

**Appropriations/Financial Management**

---

**Appropriation Availability**

- Time availability
- ■ Time restrictions
- ■ ■ Advances
- ■ ■ ■ Social security

The Social Security Administration's determination that New York State's draw down against a federal letter of credit to pay employee retirement contributions incurred in operating Disability Determination Program on behalf of Social Security Administration approximately 15 months in advance of liquidation of obligation is excessive is not unreasonable. Department of Treasury regulations require that the timing of cash advances be "as close as is administratively feasible to the actual disbursements." 31 C.F.R. § 205.4(a).

---

**B-245433, December 26, 1991**

---

**Appropriations/Financial Management**

---

**Claims Against Government**

■ **Unauthorized contracts**

■ ■ **Quantum meruit/valebant doctrine**

Drug Enforcement Administration (DEA) may pay for, on a *quantum valebant* basis, a computer software package that it acquired without entering into a contract. However, DEA may not pay for three software packages that were developed for the agency but never accepted.

---

# Civilian Personnel

---

---

**B-244500, December 5, 1991**

---

## Civilian Personnel

---

### Relocation

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

Where a transferred employee and his family remained in their residence at the old duty station after packing their household goods (HHG) for shipping, and did not initiate their travel or shipment of their HHG to the new duty station, the employee is not deemed to have vacated the residence. The inconvenience caused the employee and his family while occupying the residence under these conditions is an insufficient basis for reimbursement of subsistence expenses.

---

## Civilian Personnel

---

### Relocation

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Reimbursement
- ■ ■ ■ Amount determination

A transferred employee and his family, who arrived at the new duty station at about 2 p.m., and moved into a motel are entitled to reimbursement of the expenses of their dinner meal and lodging for that date as part of their temporary quarters subsistence expense reimbursement. 41 C.F.R. § 302-5.2(g)(1)(i). However, his temporary quarters eligibility period ends at midnight on the date the employee moved into his new residence. 41 C.F.R. §§ 302-5.2(f) and 302-5.2(g)(3). Any subsistence expense payment made subsequent to that date should be recouped.

---

**B-244575, December 11, 1991**

---

## Civilian Personnel

---

### Compensation

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

---

## Civilian Personnel

---

### Compensation

- Payroll deductions
- ■ Health insurance
- ■ ■ Insurance premiums
- ■ ■ ■ Underdeductions

Employee appealed Claims Group's denial of his request to waive repayment of debt of \$780.82 which arose from his nonpayment of health insurance premiums during a period of leave without

pay under 5 C.F.R. § 890.502(b) (1991). Claims Group correctly held that waiver could not be considered because there had been no erroneous payment. The matter is returned to the agency with recommendation that it be referred to OPM for retroactive correction of administrative error under 5 C.F.R. § 890.103(b) (1991).

---

**B-244826, December 12, 1991**

---

**Civilian Personnel**

---

**Compensation****■ Personnel death****■ ■ Balances****■ ■ ■ Payees****■ ■ ■ ■ Designated beneficiaries**

A federal employee designated 5 beneficiaries, including his spouse, to receive any unpaid compensation due him at the time of his death under 5 U.S.C. § 5582 (1988). His spouse's claim for an alternate distribution based on California community property and probate law is denied since the disposition of the unpaid compensation of a federal employee is governed exclusively by federal statute and regulation. Entitlement to such unpaid compensation vests in the beneficiaries designated by the employee, notwithstanding any competing claims by those who claim entitlement on the basis of local laws or court orders. Hence, the employee's unpaid compensation is to be divided equally among the five named beneficiaries.

---

**B-245103, December 12, 1991**

---

**Civilian Personnel**

---

**Travel****■ Temporary duty****■ ■ Miscellaneous expenses****■ ■ ■ Reimbursement****■ ■ ■ ■ Telephone calls**

An employee on temporary duty travel away from his official duty station in Harrisburg, Pennsylvania, may not be reimbursed for five phone calls made to his wife while she was visiting her family in Morgantown, Indiana. The agency's policy limits traveling employees to one call each day to the employee's "home or other location within the local commuting area." While no statute or regulation entitles an employee to make personal calls home, or elsewhere, while on temporary duty travel, such calls may be reimbursed if the agency decides they constitute official business under regulations issued by the General Services Administration (GSA). 41 C.F.R. § 201-38.007-1(a). In this case, the agency's policy is within the scope of discretion contemplated by the regulations.

---

**B-244082, December 16, 1991\*\*\***

---

**Civilian Personnel**

---

**Compensation****■ Retroactive compensation****■ ■ Computation****■ ■ ■ Taxes**

In making deductions from an employee's backpay award, pursuant to the Office of Personnel Management regulations and instructions, "net backpay" for the purpose of calculating federal, state, and Medicare taxes is the balance of gross backpay less only interim net outside earnings. Interim net earnings are gross earnings less losses and certain expenses incurred in connection with the interim employment or business, but before income tax withholdings.

---

## **Civilian Personnel**

---

### **Compensation**

- Debt collection
- ■ Waiver
- ■ ■ Authority
- ■ ■ ■ Applicability

Where a backpay computation results in a net indebtedness of the employee, the debt may be considered for waiver. While amounts due for taxes and health benefits premiums are not subject to waiver under 5 U.S.C. § 5584, repayment of a lump-sum leave payment is subject to waiver under that authority. Therefore, it is waived to the extent of the employee's net indebtedness in this case.

---

## **B-244721, December 17, 1991**

---

### **Civilian Personnel**

---

#### **Relocation**

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

An employee seeks reimbursement of telephone and cable television installation charges incurred while occupying temporary quarters in connection with a permanent change of station. We have consistently held that telephone installation charges, as opposed to telephone user fees, are not allowable as subsistence expenses since such charges are one-time fees and not ordinarily included in the price of a room. Similarly, while cable television rental charges may be reimbursed if ordinarily included in the price of a hotel or motel room in the area, the one-time charge for installation would not be a reimbursable temporary quarters subsistence expense.

---

## **B-245330, December 17, 1991\*\*\***

---

### **Civilian Personnel**

---

#### **Compensation**

- Training expenses
- ■ Federal executive boards

The United States Equal Employment Opportunity Commission (EEOC) may pay registration fees for its employees to attend a Federal Executive Board training seminar. The payment of a reasonable registration fee for a training seminar sponsored by a Federal Executive Board does not constitute interagency financing of a board or commission, and is therefore permissible.

---

## **B-242558.2, December 18, 1991**

---

### **Civilian Personnel**

---

#### **Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Overseas personnel

Claimant request reconsideration of our prior decision, Donald E. Clay, B-242558, June 19, 1991, which held that an employee who transferred overseas and returned to his former duty station in the United States upon completion of the overseas assignment, is not entitled to reimbursement of expenses incurred in the sale of his former residence since both the old and new official stations are not located within the United States or other specified areas. The language of the statutory and regulatory provisions, 5 U.S.C. § 5724(a)(4)(A) (1988) and 41 C.F.R. § 302-6.1(a) (1989), are clear



and unambiguous and make no provision for reimbursing such relocation costs because the employee's position was abolished and he was involuntarily transferred to his overseas post of duty. The request for reconsideration is denied.

---

**B-229363.2, December 23, 1991\*\*\***

---

**Civilian Personnel**

---

**Compensation**

**■ Overtime**

**■ ■ Eligibility**

**■ ■ ■ Travel time**

National Labor Relations Board (NLRB) employees are not entitled to overtime pay or compensatory time off for time spent in travel outside normal work hours to or from union representation elections since the NLRB still retains a degree of control over the event. In addition to attempting to meet the parties' request for scheduling of the event, the NLRB conducts and supervises the actual polling, and counts and tabulates the ballots. In order for such travel to be compensable under the statutory exception in 5 U.S.C. § 5542(b)(2)(B)(iv), there must be a complete lack of government control. *Daniel L. Hubbel, et al.*, 68 Comp. Gen. 29 (1988), *affirmed*.

---

# Military Personnel

---

---

**B-236224, December 23, 1991\*\*\***

---

## Military Personnel

---

### Pay

- Allowances
- ■ Eligibility
- ■ ■ Dependents
- ■ ■ ■ Determination

The Survivor Benefit Plan annuity created by 10 U.S.C. § 1448(d)(2) may be paid to the dependent child of a deceased retirement-eligible member of the uniformed services living with the surviving parent who is the deceased member's former spouse. The annuity may be paid for periods commencing on or after March 1, 1986.

---

## Military Personnel

---

### Pay

- Allowances
- ■ Eligibility
- ■ ■ Dependents
- ■ ■ ■ Determination

Law providing Survivor Benefit Plan annuity to dependent child of retirement-eligible deceased service member, where child lives with surviving parent who is not deceased's surviving spouse, states that it applies to "claims arising on or after March 1, 1986." The referenced date only limits the time period for which a qualified dependent may make a claim, not the underlying entitlement, so that it is not relevant to the dependent's entitlement that the member died before March 1, 1986.

---

## Military Personnel

---

### Pay

- Retirement pay
- ■ Claim accrual dates
- ■ ■ Continuing claims
- ■ ■ ■ Statutes of limitation

---

## Military Personnel

---

### Pay

- Survivor benefits
- ■ Annuity payments
- ■ ■ Eligibility

Under law providing Survivor Benefit Plan annuity to dependent child of retirement-eligible deceased member under prescribed circumstances, claim must be filed before October 1, 1988, only if death occurred between September 21, 1972, and October 1, 1985. Filing deadline is not relevant where member died after such period.

---

**B-244513, December 10, 1991**

---

**Military Personnel**

---

**Pay**

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

Member of the uniformed services received his regular active duty pay for the month after he had retired from the service. He claims that since the amount was directly deposited he was unaware of the overpayment. Since members have an obligation to verify their bond statements and since the member did not do so, nor did he take any action to have the matter corrected, waiver is denied.

---

**B-243829, December 13, 1991\*\*\***

---

**Military Personnel**

---

**Pay**

- Retirement pay
- ■ Personnel death
- ■ ■ Claim accrual dates
- ■ ■ ■ Administrative determination

Where there is no evidence that a military member died before a state court decree presumptively declaring his date of death to be 7 years from the date of his unexplained disappearance, claim of surviving spouse for undisbursed retired pay up to the court determined date of death is allowed. 43 Comp. Gen. 503 (1964) and 58 Comp. Gen. 131 (1978) are modified accordingly.

---

**Military Personnel**

---

**Pay**

- Survivor benefits
- ■ Benefit election
- ■ ■ Notification

Spouses of military members who retired before 1972, when the Survivor Benefit Plan went into effect, were not entitled to notice that member-spouses had elected not to participate in the plan.

---

**B-240697.2, December 16, 1991**

---

**Military Personnel**

---

**Pay**

- Allowances
- ■ Eligibility
- ■ ■ Dependents
- ■ ■ ■ Determination

A Navy member adopted children who receive \$2,147 per month in social security and Veterans' Administration benefits which are deposited in trust funds for them. Since that amount is sufficient to support them, they are not "in fact dependent" on him under 37 U.S.C. § 401(2). We will not disturb the Navy Family Allowance Activity's determination to that effect.

---

**B-244217, December 19, 1991**

---

**Military Personnel**

---

**Pay**

■ **Overpayments**

■ ■ **Waiver**

■ ■ ■ **Statutes of limitation**

Member was erroneously overpaid due to incorrect Pay Entry Basic Date. He was notified in 1984 of the debt but did not file request for waiver until 1988, when collection action began. Since member did not file his request for waiver within the 3 years time limit under 10 U.S.C. § 2774, the Claims Group's denial of the waiver was proper.

---

# Miscellaneous Topics

---

---

**B-245714, December 13, 1991\*\*\***

---

## Miscellaneous Topics

---

### Science/Technology

#### ■ Electronic data interchange

##### ■ ■ Use

##### ■ ■ ■ Contracts

Contracts formed using Electronic Data Interchange technologies may constitute valid obligations of the government for purposes of 31 U.S.C. § 1501, so long as the technology used provides the same degree of assurance and certainty as traditional "paper and ink" methods of contract formation.

---

**B-244617, December 24, 1991**

---

## Miscellaneous Topics

---

### Human Resources

#### ■ Social security

##### ■ ■ Advances

##### ■ ■ ■ Time restrictions

The Social Security Administration's determination that New York State's draw down against a federal letter of credit to pay employee retirement contributions incurred in operating Disability Determination Program on behalf of Social Security Administration approximately 15 months in advance of liquidation of obligation is excessive is not unreasonable. Department of Treasury regulations require that the timing of cash advances be "as close as is administratively feasible to the actual disbursements." 31 C.F.R. § 205.4(a).

# Procurement

---

**B-246272, December 2, 1991**

**91-2 CPD 497**

---

## Procurement

### Socio-Economic Policies

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

Protest of nonresponsibility determination is dismissed where, after protest was filed, agency referred the matter to the Small Business Administration, which has conclusive jurisdiction over the matter.

---

**B-246721, December 2, 1991**

**91-2 CPD 498**

---

## Procurement

### Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest that agency improperly extended the closing date for receipt of proposals does not state a valid basis for protest where contracting officer has the discretion to determine if a closing date needs to be changed and the original closing date would have occurred on a federal holiday when the federal building where offers were to be delivered would be closed to the public.

---

## Procurement

### Bid Protests

- Premature allegation
- ■ GAO review

Protest filed prior to evaluation of offers that anticipates that agency will not award in accordance with the solicitation evaluation criteria will not be considered by the General Accounting Office, since it is premature.

---

**B-243718.2, December 3, 1991\*\*\***

**91-2 CPD 499**

---

## Procurement

### Bid Protests

- Moot allegation
- ■ GAO review

Dismissal of protest as academic is affirmed where the corrective action promised by the procuring agency in response to the protest—to amend the solicitation and reopen the competition—is the precise relief that the General Accounting Office would have recommended, notwithstanding that the protester requested as relief the award of the contract, where the solicitation's award criteria are prejudicially ambiguous and the record shows that the protester is not otherwise entitled to award.

---

## **Procurement**

---

### **Bid Protests**

- GAO procedures
  - ■ Preparation costs
- 

## **Procurement**

---

### **Competitive Negotiation**

- Offers
- ■ Preparation costs

Protester is entitled to the award of its costs of filing and pursuing the protest, notwithstanding the agency's promise on the agency report due date of corrective action in response to the protest and the dismissal of the protest as academic, where the agency has, without explanation, taken nearly 5 months to perform the promised corrective action while allowing continued performance of an admitted improperly awarded contract.

---

**B-244918, B-244918.2, December 3, 1991\*\*\***

**91-2 CPD 500**

## **Procurement**

---

### **Contractor Qualification**

- Responsibility criteria
  - ■ Distinctions
  - ■ ■ Evaluation criteria
- 

## **Procurement**

---

### **Socio-Economic Policies**

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

Although an agency may use traditional responsibility criteria, such as the availability of necessary facilities, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business offer as unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of offers but instead effectively constituted a finding of nonresponsibility.

---

**B-246725, December 3, 1991\*\*\***

**91-2 CPD 504**

## **Procurement**

---

### **Bid Protests**

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

## **Procurement**

---

### **Bid Protests**

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

Protest is dismissed as untimely under the Bid Protest Regulations when filed more than 10 working days after receipt of a denial of an agency-level protest on the same issue, even where the

protest to the General Accounting Office (GAO) was sent by certified mail 2 weeks before it was received by GAO; a protester makes use of the mails to file a protest at its own risk.

---

**B-244935, December 4, 1991**

**91-2 CPD 511**

---

**Procurement**

**Contract Management**

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

Protest that agency improperly terminated for convenience a contract awarded to the protester and awarded contract to the next low bidder is denied where record shows that the protester's bid should have been rejected because the protester, in verifying its bid price, indicated that it had not bid on the basis required by the solicitation.

---

**B-244956, B-244956.2, December 4, 1991**

**91-2 CPD 512**

---

**Procurement**

**Bid Protests**

- Moot allegation
- ■ GAO review

Protest that specification restricts competition is dismissed as academic where protester meets the protested specification.

---

**Procurement**

**Bid Protests**

- Moot allegation
- ■ GAO review

---

**Procurement**

**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ GAO review

Allegation that solicitation is restrictive because it does not include certain data is without merit where the government does not possess or have rights in the data, and thus is unable to release it; all offerors therefore are in the same position of having to obtain the data from its owner; and protester actually obtained the data, albeit not in the preferred format.

---

**Procurement**

**Competitive Negotiation**

- Offers
- ■ Samples
- ■ ■ Submission time periods
- ■ ■ ■ Adequacy

Protest that 5-day notice for proof-of-concept demonstration is insufficient to ensure full competition is denied where agency reasonably determined that offerors would need to develop a model in preparing their proposals, and that such a model would be available for the demonstration within the 5-day period.



---

**Procurement**

---

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

Protest that agency improperly failed to consider cost realism of awardee's proposal when it accepted awardee's capped indirect cost rates, which were substantially lower than its actual rates, is denied where the contract limits reimbursability of indirect costs to the capped rates, and there is no indication that awardee will attempt to recover unreimbursable indirect costs through increases in reimbursable direct costs.

---

**Procurement**

---

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

Whether awardee will be able to perform contract at below-cost rates is a matter of its responsibility; General Accounting Office will not review agency's affirmative determination of responsibility absent showing of possible agency fraud or bad faith or misapplication of definitive responsibility criteria.

---

**Procurement**

---

**Competitive Negotiation****■ Offers****■ ■ Personnel experience****■ ■ ■ Contractor misrepresentation**

Protest allegation that awardee intentionally misrepresented experience of awardee's proposed project manager and availability of key personnel is denied where record does not support claim of misrepresentation.

---

**Procurement**

---

**Contractor Qualification****■ Contractor personnel****■ ■ GAO review**

Protest allegation that agency improperly evaluated experience of awardee's proposed project manager and availability of awardee's key personnel is denied where the record indicates that agency's evaluation of candidate's experience was reasonable, and agency had no reason to believe that proposed key personnel would not be available to perform contract.

---

**Procurement**

---

**Competitive Negotiation**

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

Where an offeror fails to furnish pricing information specifically requested by the agency in a written request for best and final offers, the agency properly rejected the proposal on the ground that it could not find the proposed price realistic.

---

**Procurement**

---

**Bid Protests**

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

Protest of award of a contract is dismissed as untimely where not filed within 10 working days of when protester became aware of agency's award decision.

---

**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Commercial products/services
- ■ ■ ■ Definition

Solicitation provision requiring that equipment be commercially available is not satisfied where the components of the equipment are commercially available but the equipment end item itself is not.

---

**Procurement**

---

**Contract Management**

- Contract administration
- ■ Commercial products/services
- ■ ■ Compliance
- ■ ■ ■ GAO review

---

**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Commercial products/services
- ■ ■ ■ Waiver

While agency improperly waived material requirement in request for proposals for a commercially available system in accepting awardee's product, General Accounting Office will not disturb the award because the equipment satisfies the agency's needs and there is nothing in the record that suggests that the protester was prejudiced.

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

General Accounting Office (GAO) affirms dismissal of protest as untimely where protester filed protest more than 10 working days after learning the reasons why the agency believed contract was improperly awarded and that its contract had been terminated; in such a case, GAO will review the propriety of the termination, even where agency has not yet announced its intention to resolicit.

**Procurement**

---

**Competitive Negotiation**

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

Protest is sustained where the procuring agency failed to amend solicitation despite significant changes in its requirements; it is unclear what the outcome of the competition would have been if an amendment detailing the changed requirements had been issued and offerors had been given the chance to submit revised proposals responding to the changed requirements.

---

**Procurement**

---

**Competitive Negotiation**

- Best/final offers
- ■ Procedural defects

Where solicitation did not require offerors to bring a certain project director to the discussion sessions and the procuring agency did not tell one offeror to bring the project director but told other firms to do so, protest is sustained where the record indicates that the one offeror's best and final offer may have been adversely affected because it did not bring its project director to the sessions.

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest that agency should have disclosed three evaluation subfactors because they were significant subfactors is denied where each subfactor was reasonably related to the evaluation factor under which it was considered and no subfactor was worth more than any other subfactor so that offerors could have reasonably anticipated the evaluation scheme.

---

**Procurement**

---

**Competitive Negotiation**

- Competitive advantage
  - ■ Privileged information
  - ■ ■ Disclosure
- 

**Procurement**

---

**Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

A sole-source award is not an appropriate remedy to erase a competitive advantage allegedly given other offerors by an agency's disclosure of proprietary information where: (1) the agency only inadvertently disclosed the data and did not use it to define its requirements, and (2) a sole-source award would require the agency to procure services it had already found to be technically unacceptable.

---

**Procurement**

---

**Competitive Negotiation**

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

Use of competitive negotiation in procurement for tent frames is appropriate where contracting agency has reasonably determined that technical factors related to timely delivery and high quality are more important than price, since award decision will not be based primarily on price, agency is not required to use sealed bidding.

---

**Procurement**

---

**Contractor Qualification**

- Responsibility criteria
- ■ Distinctions
- ■ ■ Evaluation criteria

Technical evaluation scheme that incorporates responsibility-type evaluation criteria does not improperly circumvent Small Business Administration's role of ultimately determining a small business firm's responsibility where use of such criteria is warranted by agency's need for a comparative evaluation of offerors' technical ability to make timely delivery of a fully satisfactory product.

---

**Procurement**

---

**Bid Protests**

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

Protest is dismissed as untimely where initial agency-level protest of award was filed more than 10 working days after protester learned of basis for protest.

---

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Reconsideration request of denial of a claim for the costs for filing and pursuing the protest and other protest expenses is denied, where the claimant disagrees with the prior decision, which found that the claimed hourly rate was not based upon actual rates of compensation, but does not provide any information to show that the hourly rate was based upon actual costs or compensation.

---

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ Preparation costs

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where the agency took corrective action approximately 1 month after the issuance of General Accounting Office's decision with respect to a recently imposed certification requirement, and the decision provided the first interpretation establishing the necessity for the corrective action taken by the agency.

---

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of dismissal of allegation that agency violated its internal regulations is denied where regulations were not intended to confer legal rights on outside parties, and protester has not demonstrated that the alleged violations prevented it from submitting a proposal or otherwise affected its ability to compete.

---

## **Procurement**

---

### **Bid Protests**

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

## **Procurement**

---

### **Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ GAO review

Request for reconsideration of decision denying protest allegation that solicitation specifications were overly restrictive is denied where protester does not show that prior decision was based on errors of fact or law.

---

## **Procurement**

---

### **Bid Protests**

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

## **Procurement**

---

### **Bid Protests**

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

Request for reconsideration of dismissal of allegation that agency used improper evaluation criteria and intended to acquire a particular product is denied where protester failed to submit a proposal and, therefore, is not an interested party after denial of its protest alleging defective specifications.

---

---

**B-243855.3, December 9, 1991**

**91-2 CPD 525**

---

## **Procurement**

---

### **Bid Protests**

- Non-prejudicial allegation
  - ■ GAO review
- 

## **Procurement**

---

### **Competitive Negotiation**

- Contract awards
- ■ Propriety
- ■ ■ Requests for proposals
- ■ ■ ■ Deviation

To set aside award because of an alleged violation of solicitation provision that requires an offeror's unit prices be in proportion to item's actual cost, protester must establish it was prejudiced by awardee's alleged deviation from requirement. Where offers of both protester and awardee deviated from requirement, protester has not shown it was prejudiced by acceptance of awardee's lower-priced offer.

---

## **Procurement**

---

### **Competitive Negotiation**

#### **■ Unbalanced offers**

#### **■ ■ Allegation substantiation**

Allegation that awardee's offer is unbalanced is denied where record fails to show that the awardee's offer contained enhanced prices and that reasonable doubt exists that award will result in the lowest overall cost to the government.

---

**B-244271.2, December 9, 1991**

**91-2 CPD 526**

---

## **Procurement**

---

### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Competitive ranges**

#### **■ ■ ■ Exclusion**

#### **■ ■ ■ ■ Justification**

Protest alleging that offeror's proposal was improperly excluded from the competitive range because its cost proposal, which included the cost of a major project component omitted by its competitors, was higher than the cost proposals of its competitors is denied where: (1) protester's proposal was excluded from the competitive range based on its low technical and cost scores, and not simply based on its high cost; (2) there is no evidence that the protester included in its cost proposal the costs that it claims its competitors omitted; and (3) the protester has furnished no evidence as to the magnitude of the costs allegedly omitted by its competitors.

---

## **Procurement**

---

### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Evaluation**

#### **■ ■ ■ Cost estimates**

Protest of cost evaluation is denied where protester fails to demonstrate that agency lacked a reasonable basis for awarding it low scores on cost evaluation factors.

---

## **Procurement**

---

### **Competitive Negotiation**

#### **■ Contract awards**

#### **■ ■ Award procedures**

#### **■ ■ ■ Procedural defects**

Failure to notify offeror promptly of its exclusion from the competitive range is a procedural defect which does not affect the validity of an award.

---

**B-245044, B-246011, December 9, 1991**

**91-2 CPD 527**

---

## **Procurement**

---

### **Competitive Negotiation**

#### **■ Requests for proposals**

#### **■ ■ Cancellation**

#### **■ ■ ■ Justification**

#### **■ ■ ■ ■ Competition enhancement**

Contracting agency properly canceled solicitation for computer equipment where the agency reasonably determined that original solicitation's new equipment clause unnecessarily discouraged qualified offerors from proposing used equipment.

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Samples
- ■ ■ Late submission

Exclusion of an initial offer from consideration for award was reasonable where the required Product Demonstration Model (PDM) was not submitted before the closing time for receipt of offers and where that the PDM itself was the most important evaluation factor under the request for proposals; to allow the omission to be cured after the time set for receipt of proposals would be inconsistent with the clause governing late proposals.

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Modification
- ■ ■ Late submission

Late modification of a proposal may only be made to an "otherwise successful proposal"; a proposal is not an "otherwise successful proposal" if it would not result in the award of the contract to the offeror regardless of the late modification.

---

**Procurement**

---

**Bid Protests**

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

Protest is dismissed as untimely where not filed within 10 working days after protester should have learned of its basis for protest.

---

**Procurement**

---

**Sealed Bidding**

- Invitations for bids
- ■ Defects
- ■ ■ Signatures
- ■ ■ ■ Omission

Cancellation of invitation for bids (IFB) was proper where the Certificate of Procurement Integrity clause included in the solicitation did not contain a signature line or block, reasonably misleading the low bidder and five other bidders that a separate signature on the certificate was not required.



---

**Procurement**

---

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Signatures

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

---

**Procurement**

---

**Bid Protests**

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

Protest of solicitation specifications as defective is dismissed as untimely where not filed with the General Accounting Office until 2 weeks after bid opening.

---

**Procurement**

---

**Bid Protests**

- Definition

Consultant's pre-bid opening telephone conversations with contracting agency's employees cannot be considered a timely agency-level protest by the bidder now protesting to the General Accounting Office where: (1) the protester has not shown that the consultant was acting on the protester's behalf; and (2) the communications were oral.

---

**Procurement**

---

**Bid Protests**

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

Where protester does not allege that agency improperly concluded that its offered product did not meet a salient characteristic of the specifications, that color screen be operator selectable, protest alleging that requirement for operator selectable color screen exceeds agency's minimum needs is dismissed as untimely where filed after time set for receipt of quotations.

---

**Procurement**

---

**Bid Protests**

- Sales
- ■ Government property
- ■ ■ GAO review

General Accounting Office (GAO) will not review protest concerning sale of property by the Department of Agriculture's Farmers Home Administration because under Bid Protest Regulations

GAO considers protests involving sales only if the agency involved agrees and the agency has not done so here.

---

**B-240391.5, December 12, 1991**

**91-2 CPD 535**

---

**Procurement**

**Bid Protests**

■ **GAO procedures**

■ ■ **Preparation costs**

Protester is not entitled to the costs of filing and pursuing its protest where, in response to a protest which challenged the conduct of discussions and the lack of a common cutoff date for best and final offers, the agency promptly initiated an investigation into the 10-month course of the procurement and, in conjunction with preparation for a lawsuit filed during the investigation by another offeror, discovered potential regulatory and statutory violations which led to the cancellation of the solicitation 2 days after the agency report on the protest was due to be filed.

---

**B-243769.2, December 12, 1991**

**91-2 CPD 536**

---

**Procurement**

**Bid Protests**

■ **GAO procedures**

■ ■ **GAO decisions**

■ ■ ■ **Reconsideration**

---

**Procurement**

**Specifications**

■ **Ambiguity allegation**

■ ■ **Specification interpretation**

Decision, which found solicitation specification for circuit card assemblies that contained an erroneous reference to unneeded circuit connections was nevertheless unambiguous when the solicitation was read as a whole, is affirmed on reconsideration, where the reconsideration request only references an erroneous statement of fact in the decision that did not change the ultimate conclusion that the solicitation, when read as a whole, was unambiguous.

---

**B-244682.3, December 12, 1991**

**91-2 CPD 537**

---

**Procurement**

**Sealed Bidding**

■ **Bids**

■ ■ **Post-bid opening modification**

■ ■ ■ **Low bid displacement**

■ ■ ■ ■ **Propriety**

Contracting officer's post-bid opening acceptance of second low bidder's price reduction, which displaced protester's apparent low bid, was proper where record establishes that price reduction letter was present in bid package before bids were opened but was overlooked by bid opening official.

---

**Procurement**

---

**Bid Protests**

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

Protest against solicitation's sample testing requirements is dismissed as untimely where the requirements were apparent from the face of the solicitation but the protest was not filed until after the initial closing date.

---

**Procurement**

---

**Bid Protests**

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

Under the General Accounting Office Bid Protest Regulations, a protester which is a non-8(a) firm is not an interested party to protest the agency's failure to provide it with a copy of an amendment to an 8(a) solicitation since it would not be eligible to compete for award even if the protest were sustained.

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Technical acceptability
- ■ ■ Deficiency
- ■ ■ ■ Blanket offers of compliance

Award to offeror based on blanket assertion in proposal that its product would comply with a particular specification is improper where solicitation required that each offeror explain how its proposal complies with each requirement and where, in response to agency request for additional information verifying compliance, awardee provided data indicating that its product would not comply with solicitation requirements.

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest that agency improperly evaluated awardee's technical proposal as superior to protester's technical proposal is denied where record provides no indication that the agency's technical evaluation was unreasonable.

---

## **Procurement**

---

### **Competitive Negotiation**

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

Protest that two of six technical evaluators were biased against protester is denied where record contains no evidence of specific intent to harm protester and scores awarded by the two allegedly biased evaluators did not vary unreasonably from the scores awarded by the other evaluators.

---

## **Procurement**

---

### **Competitive Negotiation**

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

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

---

**B-245260, December 13, 1991**

**91-2 CPD 542**

---

## **Procurement**

---

### **Contractor Qualification**

- **Responsibility**
- ■ **Information**
- ■ ■ **Submission time periods**

Protest alleging that a bid on a timber sale should have been rejected because it did not contain required information concerning the bidder's affiliates is denied where the information did not relate to the bidder's performance obligation and therefore could be furnished at any time prior to award.

---

**B-245714, December 13, 1991**

---

## **Procurement**

---

### **Contract Formation Principles**

- **Contracts**
- ■ **Electronic data interchange**
- ■ ■ **Use**

Contracts formed using Electronic Data Interchange technologies may constitute valid obligations of the government for purposes of 31 U.S.C. § 1501, so long as the technology used provides the same degree of assurance and certainty as traditional "paper and ink" methods of contract formation.

---

**Procurement**

---

**Sealed Bidding****■ Low Bids****■ ■ Rejection****■ ■ ■ Propriety**

Protester's low bid properly was rejected as nonresponsive for failure to offer firm, fixed price where bid contained letter stating that any difference between actual cost and bid price for certain equipment would be charged to the government.

---

**Procurement**

---

**Socio-Economic Policies****■ Small business set-asides****■ ■ Use****■ ■ ■ Procedural defects**

Agency decision not to set aside procurement for small business concerns is improper where record establishes that the contracting officer should reasonably have expected that offers would be obtained from at least two small business concerns and that award could be made at a fair market price.

---

**Procurement**

---

**Sealed Bidding****■ Invitations for bids****■ ■ Amendments****■ ■ ■ Acknowledgment****■ ■ ■ ■ Responsiveness**

---

**Procurement**

---

**Sealed Bidding****■ Invitations for bids****■ ■ Amendments****■ ■ ■ Materiality**

Protest challenging a competitor's lower bid as nonresponsive for failure to acknowledge an amendment to the solicitation is denied where the amendment merely corrected a typographical error to clarify a requirement already contained elsewhere in the solicitation, and thus is not material.

---

**Procurement**

---

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

Protest alleging that specifications favor local contractors is denied since the alleged advantage is not the result of preference or unfair action by the United States Government.

---

## **Procurement**

---

### **Specifications**

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

Protest alleging that solicitation's performance schedule is unduly restrictive is denied where agency's determination of its needs are reasonable.

---

## **Procurement**

---

### **Bid Protests**

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

Protest alleging that the solicitation's performance schedule conflicts with certain technical specifications is denied where the record shows that no such conflict exists.

---

**B-245678, December 16, 1991**

**91-2 CPD 547**

---

## **Procurement**

---

### **Bid Protests**

- **Moot allegation**
- ■ **GAO review**

Protest against alleged defect in solicitation that is corrected by agency after protest is academic.

---

## **Procurement**

---

### **Bid Protests**

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

GAO will not consider contention raised in final comments that requirement for list of parts suppliers would not provide evidence of parts availability, since it should have been raised in initial protest.

---

## **Procurement**

---

### **Noncompetitive Negotiation**

- **Sole sources**
- ■ **Justification**
- ■ ■ **Intellectual property**

Air Force reasonably determined that it required a single maintenance contractor for CT scanner, a complex piece of medical diagnostic equipment, who would have access to and be able to support the scanner software as well as the hardware, including upgrades.

---

**Procurement**

---

**Contractor Qualification**

- Approved sources
- ■ Pre-qualification
- ■ ■ Justification

The decision of the federal agency committee which administers the Federal Agency Prequalification Procedure for underground heat distribution (UHD) systems to require protester to pass a longer boiling test than the one required by the Procedure is reasonable where protester's polyester resin UHD system has twice previously failed.

---

**Procurement**

---

**Competitive Negotiation**

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

Where solicitation provided that cost was the least important evaluation factor and that multiple awards would be made to the responsible offerors whose offers were most advantageous to the government based on an integrated assessment of each proposal, agency was not required to make an award to an offeror which submitted the lowest cost technically acceptable offer where the agency reasonably determined that the cost advantage was outweighed by the technical and management risks associated with the proposal.

---

**Procurement**

---

**Competitive Negotiation**

- Discussion
- ■ Determination criteria

Agency is not required to conduct discussions with respect to inherent weaknesses in an offeror's approach that would require major revisions to resolve or with respect to a lack of specific experience required by the solicitation which could not be ameliorated as a result of discussions.

---

**Procurement**

---

**Competitive Negotiation**

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

Protester's proposals for hospital aseptic management services were properly downgraded in the area of proposed staffing where agency had compared protester's staffing levels with government estimates, determined that protester's levels were too low, advised protester during discussions that its staffing levels were considered inadequate, and protester nonetheless failed to increase staffing in its final proposals.

---

## **Procurement**

---

### **Bid Protests**

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

Objection that agency's estimates of required staffing levels were too high, and that lower levels proposed by protester were adequate, is without merit where protester fails to show that agency's estimates clearly were unreasonable; protester's mere assertion that its own calculations are superior to agency's is not sufficient.

---

## **Procurement**

---

### **Competitive Negotiation**

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

Contracting agency held meaningful discussions concerning staffing where detailed deficiency letter provided to protester specifically mentioned inadequate staffing, and protester's subsequent arguments indicate it was advised of staffing weaknesses but simply chose not to increase its staffing levels because it disagreed with agency's assessment that the levels it proposed were too low.

---

**B-245328, December 17, 1991**

**91-2 CPD 551**

---

## **Procurement**

---

### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Competition rights**
- ■ ■ **Contractors**
- ■ ■ ■ **Exclusion**

Agency's failure to solicit offer from protester for supplies in an urgent procurement violated statutory requirement to maximize competition to the extent practicable where agency admits that it should have been aware of protester as possible source.

---

**B-245353, December 17, 1991**

**91-2 CPD 552**

---

## **Procurement**

---

### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Cancellation**
- ■ ■ **Price reasonableness**

Agency determination to cancel solicitation for failure to obtain reasonable prices was properly based on comparison of protester's prices with government estimate and other similar contract prices.



---

**Procurement**

---

**Contractor Qualification**

- Responsibility
- ■ Financial capacity
- ■ ■ Contractors

The General Accounting Office will not consider allegations concerning an awardee's financial capacity or an awardee's failure to submit information during the pre-award survey since these matters concern its responsibility.

---

**Procurement**

---

**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Where solicitation provides for award to low, technically acceptable offeror without discussions, allegations that agency did not conduct discussions or perform a cost-technical tradeoff do not state a valid basis for protest.

---

**Procurement**

---

**Bid Protests**

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

Protester's contention, not raised until after award, that the solicitation should have been set aside for small business concerns is untimely and will not be considered.

---

**Procurement**

---

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Contractor liability
- ■ ■ ■ Liability restrictions

A bid that limits the bidder's liability to obtain permits and pay fees, which are responsibilities assigned the bidder under an invitation for bids (IFB) for a construction project, materially modifies the terms of the IFB and must be rejected as nonresponsive.

---

**Procurement**

---

**Sealed Bidding**

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

Agency properly rejected the protester's bid as nonresponsive where the protester failed to furnish a bid guarantee with its bid as required by the terms of the solicitation.

---

**Procurement**

---

**Competitive Negotiation**

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

Contracting agency's decision to make award to the lowest-priced offeror is proper where the record indicates that the agency had a reasonable basis for viewing the competing proposals as essentially equal so that price became the determining factor.

---

**Procurement**

---

**Competitive Negotiation**

- Discussion
- ■ Offers
- ■ ■ Error correction

Where an agency permits one offeror to submit revised pricing information after receipt of best and final offers, it must conduct discussions with all offerors whose proposals are in the competitive range and permit all offerors to submit similarly revised proposals.

---

**Procurement**

---

**Competitive Negotiation**

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

Unsuccessful offeror's protest based on ground that it should have been selected for award of firm, fixed-price requirements contract because it proposed the lowest price is denied where the solicitation made technical considerations more important than cost and agency, which found awardee's proposed price reasonable and consistent with its technical proposal, reasonably concluded that the technical superiority of the awardee's proposal was worth the additional cost.

---

**Procurement**

---

**Competitive Negotiation**

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

Protest that agency improperly made award on the basis of initial proposals under a negotiated brand-name-or-equal procurement to a firm whose proposal was allegedly "nonresponsive" because its "equal" product, at the time of proposal submission, did not conform to a listed salient characteristic—approval by an international organization—is denied where the "equal" awardee's initial proposal clearly promised the required approval and shortly after proposal submission furnished the agency with confirmation of its product's approval.

---

**Procurement**

---

**Competitive Negotiation**

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

Protest that agency improperly determined that technical proposals were substantially equal, instead of finding that protester's proposal was superior, is denied where record establishes agency reasonably determined that protester's proposal was not technically superior; agency therefore properly made award on basis of awardee's lower price.

---

**Procurement**

---

**Competitive Negotiation**

- **Contract awards**
- ■ **Propriety**

---

**Procurement**

---

**Competitive Negotiation**

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

Contract award is not improper because agency inadvertently failed to test and approve awardee's product demonstration models (PDMs) prior to award where solicitation does not require any specific testing, and the awardee is otherwise obligated to supply a product that meets the solicitation specifications.

---

**Procurement**

---

**Contractor Qualification**

- **Standards**
- ■ **Compliance**
- ■ ■ **GAO review**

Allegation that awardee's product does not comply with Food and Drug Administration's (FDA) standard for identity of chocolate is a matter within the jurisdiction of the FDA which is not for review by the General Accounting Office.

---

**Procurement**

---

**Bid Protests**

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

---

**Procurement**

---

**Bid Protests**

- Subcontracts
- ■ GAO review

The General Accounting Office (GAO) will not consider the protest of a subcontract award by a Department of Energy management and operations contractor that was not filed within 10 working days of the subcontract award decision, even though the award decision was the subject of an earlier decision by the General Services Administration Board of Contract Appeals (GSBCA) granting the protest and directing an award to the protester, which decision was vacated for want of jurisdiction by the U.S. Court of Appeals of the Federal Circuit; the GSBCA filing does not toll GAO's timeliness requirements. Also, contrary to the protester's argument, GAO generally measures the timeliness of a subcontract award protest from the time of the subcontract award decision, not the government approval of such decision.

---

**Procurement**

---

**Bid Protests**

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

Untimely protest of a subcontract award by a Department of Energy management and operations contractor that alleges conflict of interest violations and improper post best and final offer discussions does not warrant consideration under the significant issue exception to the General Accounting Office (GAO) Bid Protest Regulations timeliness rules, even where a vacated decision of the General Services Administration Board of Contract Appeals (GSBCA) found these violations and the government effectively conceded these violations in a brief filed on an appeal of the GSBCA decision, since these issues are not of widespread interest to the procurement community and have been considered on the merits in previous GAO decisions.

---

**Procurement**

---

**Bid Protests**

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

Where original protest basis for challenging agency's rejection of proposal is rendered academic by agency agreement with protester, and protester raises new challenge to rejection in comments on agency report, new protest ground is untimely because not filed within 10 days after basis of protest was known.

---

**Procurement**

---

**Bid Protests**

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

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

---

**B-237868.8, December 20, 1991**

---

---

**Procurement**

---

**Bid Protests**

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

A protester is not entitled to be reimbursed attorneys' fees for pursuit of a protest, which is related to an earlier sustained protest that awarded protest costs, where the later filed protest was ultimately dismissed as academic because of agency corrective action.

---

**Procurement**

---

**Bid Protests**

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

Protester is entitled to recover, as costs of filing and pursuing a protest, attorneys' fees for the analysis of the final decision and some explanation and consultation with the client.

---

**Procurement**

---

**Bid Protests**

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

Attorneys' fees associated with the preparation of a claim for protest costs are not allowable.

---

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ Preparation costs

Protester's claim for in-house costs incurred is disallowed where outside attorneys' bills do not corroborate alleged activities of in-house personnel and the costs were not shown to be reasonably incurred in pursuit of the protest.

---

## **Procurement**

---

### **Bid Protests**

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

Where protester has aggregated allowable and unallowable costs associated with pursuing a protest into a single lump-sum claim, the entire amount is disallowed.

---

**B-242394.7, December 20, 1991**

**91-2 CPD 566**

---

## **Procurement**

---

### **Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior decision denying protest is denied where ground of protest not addressed in original decision does not provide basis for reversing or modifying that decision.

---

**B-243647.4, B-246327, December 20, 1991**

**91-2 CPD 567**

---

## **Procurement**

---

### **Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior dismissal of protest as untimely is denied where protester waited more than 6 months after he knew that solicitation was canceled to file protest during which time he did not pursue information which allegedly provides basis to protest the cancellation.

---

**B-245333, December 20, 1991**

**91-2 CPD 568**

---

## **Procurement**

---

### **Bid Protests**

- Moot allegation
- ■ GAO review

Protest raising same issue that was resolved in a recent decision on a protest by the same protester is dismissed as no useful purpose would be served by further consideration of the matter.

---

**B-245363, December 20, 1991**

**91-2 CPD 569**

---

## **Procurement**

---

### **Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Ambiguous specifications

Cancellation of solicitation after bid opening is proper where solicitation was defective because evaluation did not ensure that the award would be based on the lowest cost to the government.

---

**Procurement**

---

**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Waiver

Agency acted reasonably in waiving a bidder's failure to acknowledge an amendment that had no material effect on price, quality, quantity or delivery.

---

**Procurement**

---

**Competitive Negotiation**

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

In a negotiated procurement for a fixed-price, combined indefinite quantity and requirements, contract, a procuring agency is not required to conduct a cost realism analysis simply because the solicitation required cost and pricing data, where adequate price competition was obtained and the solicitation does not provide for a cost realism analysis.

---

**Procurement**

---

**Competitive Negotiation**

- Below-cost offers
- ■ Acceptability

The submission of a below-cost offer in a fixed-price procurement is not in itself objectionable.

---

**Procurement**

---

**Bid Protests**

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

Post-award protest allegation that solicitation failed to provide sufficient information to allow offerors to compete on an equal basis is an untimely protest of an apparent solicitation impropriety, since it was not protested prior to the closing date for receipt of proposals.

---

**Procurement**

---

**Bid Protests**

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

Under the Bid Protest Regulations, General Accounting Office (GAO) will reverse a prior decision on reconsideration only where the requester shows that it contains errors of fact or law or that GAO failed to consider relevant information.

---

## **Procurement**

---

### **Competitive Negotiation**

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

Protest that awardee engaged in "bait-and-switch" tactics is denied since although most of the personnel which the awardee originally proposed were not available to perform the contract, nothing in the record indicates that the awardee submitted personnel commitment forms in bad faith or without the consent of the individuals proposed and record provides plausible reason for the use of substitute personnel.

---

## **B-244653.2, December 23, 1991**

---

## **Procurement**

---

### **Contract Management**

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

Protest that agency improperly failed to exercise a contract option is dismissed since it involves a matter of contract administration not for consideration under our Bid Protest Regulations.

---

## **Procurement**

---

### **Sealed Bidding**

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

Allegation that solicitation is defective for failing to notify potential offerors of liability for employee health care benefits which are required by local law is denied where solicitation informs offerors of their general liability for all taxes and employee benefit requirements imposed by foreign government; agency need not structure a solicitation to eliminate all risks for a contractor.

---

## **Procurement**

---

### **Sealed Bidding**

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

Solicitation provisions are not ambiguous where, read as a whole, solicitation clearly requires contractor to provide all vehicles it deems necessary to complete performance and to include all associated costs in the monthly rate bid for standard services.



---

## **Procurement**

---

### **Sealed Bidding**

- Invitations for bids
  - ■ Defects
  - ■ ■ Preferences
- 

## **Procurement**

---

### **Socio-Economic Policies**

- Preferred products/services
- ■ Domestic sources

Protest is sustained where agency fails to include a preference in solicitation for qualified domestic firms in accordance with 22 U.S.C.A. § 4864 (West Supp. 1991).

---

**B-245223, December 23, 1991**

**91-2 CPD 573**

## **Procurement**

---

### **Specifications**

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

*Allegation that specified physical characteristics for foam sleeping pads are restrictive because they do not reflect the actual minimum needs of the agency is denied where the record shows that the agency reasonably determined that the characteristics were related to its need for durable pads and where the protesters have provided no substantive response to the agency's position in this regard.*

---

## **Procurement**

---

### **Bid Protests**

- Non-prejudicial allegation
- ■ GAO review

Allegation that a portion of a specification that requires sleeping pads made by a particular means of production is restrictive is denied since protesters admit that their products cannot meet other specification requirements which were not restrictive of competition and, thus, could not have been accepted for award whether or not the solicitation had been amended to delete the requirement for the particular method of manufacture.

---

**B-245287, December 23, 1991**

**91-2 CPD 574**

## **Procurement**

---

### **Competitive Negotiation**

- Requests for proposals
- ■ Competition rights
- ■ ■ Contractors
- ■ ■ ■ Exclusion

Protest concerning agency's failure to solicit protester for appraisal services is sustained where record shows that agency deliberately denied the protester the opportunity to submit a proposal based on an unexplained requirement that appraisers belong to a particular association.

**Procurement**

---

**Competitive Negotiation**

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

Award to a lower rated, lower priced offeror in a negotiated, best value procurement for aircraft operation and maintenance services, in which technical considerations were stated to be more important than cost, was not reasonable where the protester's admitted technical superiority was based upon its offer of greater manpower and where the source selection authority, in performing a cost/technical tradeoff, did not consider where the differences in the offerors' manpower arose to determine that the protester's technical superiority was not worth the associated cost premium.

---

**Procurement**

---

**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that protester did not receive meaningful discussions concerning its offer of greater manpower relative to the awardee's offered manpower is denied where the protester's proposal, which was rated technically superior, was found to contain no deficiencies or uncertainties.

---

**Procurement**

---

**Contract Types**

- Fixed-price contracts
- ■ Incentive contracts
- ■ ■ Use
- ■ ■ ■ Administrative determination

Protest that awardee, in a procurement for a fixed-price incentive with award fee contract, offered less than the stated minimum target and award fees since the awardee removed general and administrative (G&A) costs from its proposed target cost before calculating its target and award fees is denied where the solicitation indicates that offerors' target costs need not necessarily include G&A costs for the purpose of calculating target and award fees.

**Procurement**

---

**Contract Management**

- Contract modification
- ■ Cardinal change doctrine
- ■ ■ Criteria
- ■ ■ ■ Determination

Contract modification resulting from an engineering change proposal to provide a significantly less expensive and more powerful UNIX operating system was not outside the scope of the contract where the original solicitation requested offerors to propose a UNIX operating system which was evaluated and included as part of the original contract.

**Procurement**

---

**Competitive Negotiation**

- Contract awards
- ■ Multiple/aggregate awards
- ■ ■ Propriety

Agency decision to procure marine corrosion control support services as a integrated package is legally unobjectionable where agency reasonably determines that this approach is necessary to obtain the required comprehensive and integrated analysis of life-cycle marine corrosion control.

---

**Procurement**

---

**Specifications**

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

Allegation that requirement for licensed engineers is unduly restrictive of competition is denied where agency demonstrates that requirement is necessary to satisfy the agency's minimum needs and that adequate competition exists; the fact that protester may have difficulty in assembling a sufficient number of experts to compete for the contract does not itself establish that the agency's justification is unreasonable.

---

**Procurement**

---

**Competitive Negotiation**

- Competitive advantage
- ■ Non-prejudicial allegation

Agency is not required to neutralize the competitive advantage which an incumbent firm may have by virtue of its particular circumstances as long as the advantage does not result from favoritism or preferential treatment by the agency.

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

---

**Procurement**

---

**Competitive Negotiation**

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

Protest that proposal evaluation was unreasonable is denied where protester's technical proposal was properly downgraded in two areas found deficient by the technical evaluation panel, and the record contains no evidence that the agency deviated from the evaluation criteria announced in the solicitation or that the evaluation panel inconsistently rated technical factors for the awardee and the protester.

---

## **Procurement**

---

### **Competitive Negotiation**

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

Selection on the basis of awardee's exceptional technical superiority, notwithstanding its higher cost, is unobjectionable where agency reasonably determined that awardee's higher-cost proposal for technical resource services was worth the additional cost, and cost/technical tradeoff was consistent with the evaluation scheme.

---

**B-245783.2, December 23, 1991**

**91-2 CPD 579**

---

## **Procurement**

---

### **Contractor Qualification**

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

Protest by a terminated contractor challenging the contract termination taken by the agency as corrective action in response to an earlier protest by another firm, which had been found nonresponsible, is dismissed, since the protest of the corrective action, in effect, challenges an affirmative determination of responsibility, and does not allege fraud, bad faith, or a misapplication of definitive responsibility criteria.

---

**B-234326.15, December 24, 1991**

---

## **Procurement**

---

### **Special Procurement Methods/Categories**

- **Construction contracts**
- ■ **Determination**

The Air Force acknowledges that the two contracts to produce the Investment Casting Facility at Hill AFB, Ogden, Utah, constituted a single minor military construction project. Because the project cost over \$200,000, the Air Force acknowledges that it was not authorized to finance the project out of the Air Force Industrial Fund.

---

## **Procurement**

---

### **Special Procurement Methods/Categories**

- **Construction contracts**
- ■ **Determination**

Two Air Force contracts to replace a total of 12 trailers constitute a single military construction project costing over \$200,000. As such, it was improper to finance the contracts out of the Air Force Industrial Fund. The Air Force's argument that each trailer represents a separate project costing less than \$200,000 is rejected because it is inconsistent with the applicable Air Force regulation and the Air Force had previously treated the replacement of all 12 trailers as a single project.

**Procurement**

---

**Competitive Negotiation**

- Contract awards
- ■ Initial-offer awards
- ■ ■ Propriety
- ■ ■ ■ Price reasonableness

The contracting officer, in a negotiated procurement for a source approved product, reasonably determined that award to the low-priced offeror on the basis of initial proposals would result in the actual lowest overall cost to the government where the majority of the prices received in the procurement were less than the award price for the item in the prior procurement and where the agency was not aware, nor did the higher-priced protester make the agency aware, that certain changes to the protester's offered product, made to obtain source approval after submission of initial proposals, might result in a lower cost to the government.

**Procurement**

---

**Sealed Bidding**

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

**Procurement**

---

**Specifications**

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

Where a "brand name or equal" solicitation required submission of descriptive literature sufficient to establish that the offered product conforms to the salient characteristics, the procuring agency properly rejected as nonresponsive a bid that included descriptive literature which failed to show compliance with several salient characteristics.

**Procurement**

---

**Bid Protests**

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

Protest that one of brand name or equal solicitation's salient characteristics is immaterial, and thus should not be a basis for rejecting proposal, is untimely where allegation is not raised until after time for submission of proposals.

---

## **Procurement**

---

### **Bid Protests**

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

Protester properly found to have submitted technically unacceptable offer is not an interested party eligible to challenge another firm's technical acceptability under different specification provision.

---

**B-241441.4, B-241441.6, December 27, 1991**

**91-2 CPD 583**

## **Procurement**

---

### **Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Information disclosure

## **Procurement**

---

### **Contract Management**

- Contract administration
- ■ Convenience termination
- ■ ■ Competitive system integrity

Termination of protester's contract and cancellation of solicitation was proper where, due to agency's inadvertent disclosure of low offeror's price prior to submission of best and final offers, agency reasonably determined that the procurement had been conducted in a manner prejudicial to the integrity of the competitive procurement system.

---

**B-244760.2, December 27, 1991**

**91-2 CPD 584**

## **Procurement**

---

### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Samples

## **Procurement**

---

### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability
- ■ ■ ■ Tests

Absent a showing that the contracting agency's tests on product samples were defective or improperly conducted, the General Accounting Office has no legal basis to object to the agency's finding that certain of the protester's samples did not conform to the required characteristics set forth in the solicitation.

---

**Procurement**

---

**Bid Protests**

- Dismissal
- ■ Definition

Protest alleging that agency's cancellation of solicitation before bid opening due to changed requirements was improper is dismissed for failure to state a legally sufficient basis where protest does not establish likelihood that agency's decision to cancel amounted to abuse of discretion.

---

**Procurement**

---

**Competitive Negotiation**

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

Where the agency's evaluation of the protester's proposal as unacceptable was reasonable and in accordance with the solicitation's evaluation criteria, and where the agency reserved the right to make an award to other than the lowest offeror on the basis of initial proposals without conducting discussions, the award to a technically superior, slightly higher evaluated cost offeror was proper.

---

**Procurement**

---

**Bid Protests**

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

With regard to both an original sealed bid solicitation and subsequent negotiation, a firm's inclusion in its offers of protests of the specifications concern alleged improprieties apparent from the solicitation and are untimely since filing protests in this manner does not bring them to the contracting officer's attention prior to the time set for bid opening, or for receipt of proposals.

---

**Procurement**

---

**Sealed Bidding**

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

Contracting officer properly rejected protester's bid as nonresponsive and its subsequent negotiated offer as unacceptable where on their face they took exception to several material specification requirements.

---

## **Procurement**

---

### **Bid Protests**

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

An offeror who is ineligible for award because its offer is unacceptable is not an "interested party" under the bid protest provisions of the Competition in Contracting Act of 1984 to maintain a protest of an award to another offeror.

---

**B-245599, December 27, 1991**

**91-2 CPD 588**

---

## **Procurement**

---

### **Competitive Negotiation**

- Use
- ■ Criteria

---

## **Procurement**

---

### **Sealed Bidding**

- Use
- ■ Criteria

Agency decision to use negotiation procedures, in lieu of sealed bidding procedures, for the repair and installation of a complex fire alarm reporting system is justified where the award will be primarily based on technical, non-price factors and where discussions may be needed.

---

## **Procurement**

---

### **Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

When protesting the inadequacy of specifications, the protest must set forth a detailed statement of the specifications which are inadequate.

---

**B-245798, December 27, 1991**

**91-2 CPD 589**

---

## **Procurement**

---

### **Sealed Bidding**

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

---

## **Procurement**

---

### **Sealed Bidding**

- Line items
- ■ Costs
- ■ ■ Waiver
- ■ ■ ■ Administrative discretion

Procuring agency properly waived bidder's failure to include price of one item in its bid where the work covered is divisible from the solicitation and the cost is de minimis relative to the total bid and would not affect the competitive standing of the bidders.



**Procurement**

---

**Bid Protests**

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

Protest filed with General Accounting Office is untimely where filed more than 10 working days after protester became aware of initial adverse agency action on agency-level protest.

**Procurement**

---

**Bid Protests**

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest is denied where record does not support protester's allegation that awardee's proposal failed to satisfy certain solicitation specifications.

**Procurement**

---

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Descriptive literature
- ■ ■ ■ Ambiguous bids

Protest that bid was improperly rejected as nonresponsive because the protester failed to bid on a contract line item under a brand name or equal solicitation is denied where the protester's explanation that it inserted "N/A" under this line item to indicate that it was offering the brand name at best suggests an ambiguity, and is inconsistent with its pattern of bidding when it elsewhere offered brand name items.

---

**Procurement**

---

**Bid Protests**

- Non-prejudicial allegation
- ■ GAO review

While agency waived a specified salient feature for the brand name bidder where the solicitation contained an incorrect, overly stringent requirement due to a typographical error, protester was not prejudiced since the accepted product satisfies the agency's actual needs and the protester's product was otherwise properly rejected as nonresponsive.

---

**Procurement**

---

**Sealed Bidding**

- Low bids
- ■ Rejection
- ■ ■ Propriety

In a procurement for copier services where the schedule in the invitation for bids required bidders to submit single unit prices for estimated subline item quantities of copies to be made and where the protester's bid did not conform to the schedule because the protester split the agency's estimated subline item quantities of copies at what it considered quantities most economically advantageous to the firm and separately priced these quantities, the protester's apparent low bid was properly rejected as nonresponsive because the protester's pricing scheme permits it to structure its bid to obtain maximum profits and to limit its economic risks in the event the agency does not make its estimated subline item quantities of copies, thus affording the protester an unfair pricing advantage over the other bidders.

---

**Procurement**

---

**Sealed Bidding**

- Unbalanced bids
- ■ Materiality
- ■ ■ Responsiveness

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

---

**Procurement**

---

**Bid Protests**

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

Protest of alleged ambiguity in functional specifications is untimely where it is not raised prior to the closing date for receipt of initial proposals.

---

**Procurement**

---

**Competitive Negotiation**

- Contract award notification
- ■ Procedural defects

Failure to notify protester that its proposal was eliminated from the competitive range until after award is a procedural matter which does not affect the validity of the award.

---

**Procurement**

---

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

Protest that solicitation's pricing format is ambiguous is denied where protester's interpretation is not reasonable given the plain language of the request to quote monthly service prices as opposed to daily service prices. The fact that quoting prices on a monthly basis will create some risk for offerors does not render it inappropriate since offerors are expected to consider the degree of risk in calculating their prices.

---

**Procurement**

---

**Specifications****■ Minimum needs standards****■ ■ Competitive restrictions****■ ■ ■ Allegation substantiation****■ ■ ■ ■ Evidence sufficiency**

Protest that agency should state a daily method of computing prices rather than the monthly method in the solicitation is denied since an agency is responsible for determining its needs and for drafting its requirements and the protester has not shown that the agency's method is unreasonable.

---

**Procurement**

---

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

Reconsideration of a protest, which was dismissed as untimely because the protest indicated that it was filed more than 10 working days after the protester was verbally apprised of its bases for protest, is denied; the protester may not, on reconsideration, introduce for the first time information upon which the protester's assertion of its protest's timeliness relies, where the initial protest was untimely on its face.

---

**Procurement**

---

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

Where General Accounting Office sustained protest on basis that protester should have received award due to low price of alternate proposal, GAO will not consider awardee's subsequent protest that it also had submitted an alternate proposal that was not properly evaluated by the agency; protesters and other parties to a protest may not present information in a piecemeal fashion, either over the course of a single protest, or through the filing of a separate protest after resolution of the first protest.

---

## **Procurement**

---

### **Bid Protests**

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

## **Procurement**

---

### **Bid Protests**

- GAO procedures
- ■ Interested parties

Where General Accounting Office (GAO) determined that agency failed to evaluate protester's proposal and recommended award to protester, subsequent protest by initial awardee that resulting award to protester was improper because protester's alternate proposal was technically unacceptable will not be considered; GAO will not consider new arguments raised by interested party that could have been raised during consideration of initial protest.

---

## **Procurement**

---

### **Competitive Negotiation**

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

Where solicitation schedule included stepladder option quantities and solicitation provided for evaluation based upon the total price for all options, agency reasonably evaluated option prices based upon extending the unit price for the maximum stepladder quantity (rather than upon adding the extended price for the first stepladder quantity to the extended price for the second stepladder quantity).

---

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