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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

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Preface

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

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Appropriations/Financial Management

B-245282, April 8, 1992

Appropriations/Financial Management

Claims Against Government

■ Burden of proof

In a case involving a claim against the federal government for payment, the burden is on the claimant to provide evidence of his entitlement to be paid. Since the claimant has made material statements of fact in support of his claim for subsistence expenses that conflict with evidence provided by other witnesses, the claim is too doubtful to be approved for payment. However, transportation expenses the agency paid, which were not shown to be doubtful, should not be recouped.

B-245482, April 8, 1992

Appropriations/Financial Management

Claims Against Government

■ Interest

Appropriations/Financial Management

Judgment Payments

■ Certification

Claims Group is advised to certify payment from the Judgment Fund, 31 U.S.C. § 1304 (1988), of Colorado's claim for interest under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9607, 9620 (1988), since the language of that act appears to have waived the government's sovereign immunity and the Justice Department has informally advised GAO that it will no longer defend the contrary position in the courts. B-235986, June 28, 1989, is overruled.

B-247687, April 10, 1992***

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Necessary expenses rule

■ ■ ■ Awards/honoraria

Under 10 U.S.C. § 1125 (1988) and the Department of Defense's implementing regulation, the Air Force may purchase belt buckles to distribute to Major Command level winners of the annual "Peacekeeper Challenge" competition.

B-247871, April 10, 1992

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Bottled drinking water

The Office of Inspector General for the Agency for International Development may use appropriated funds to purchase bottled drinking water for its employees when the water otherwise available to its employees is unwholesome.

B-241201.2, April 15, 1992

Appropriations/Financial Management

Accountable Officers

- Relief
- ■ Physical losses
- ■ ■ GAO decisions
- ■ ■ ■ Reconsideration

We reverse our decision in B-241221, Aug. 23, 1991, and grant relief to four accountable officers. New evidence submitted indicates that more than one person had access to the funds when the shortages occurred, and it is therefore impossible to place responsibility for the loss on any one individual.

B-246517, April 17, 1992***

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Utility services
- ■ ■ ■ Use taxes

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone service fee imposed by the Commonwealth of Kentucky because the fee is a tax, the legal burden of which falls directly on the federal government as a telephone service consumer.

B-248363, April 17, 1992

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Utility services
- ■ ■ ■ Use taxes

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone system fee imposed in the State of Indiana because the fee is a tax, the legal burden of which falls directly on the federal government.

Appropriations/Financial Management

Budget Process

- Authorizing legislation
 - ■ Termination dates
 - ■ ■ Federal executive boards
 - ■ ■ ■ Civil rights
-

Appropriations/Financial Management

Process

- Funding gaps
- ■ Continuing resolutions
- ■ ■ Federal executive boards
- ■ ■ ■ Civil rights

Appropriations acts providing fiscal year 1992 funds to the United States Commission on Civil Rights had the effect of suspending the operation of section 8 of the United States Commission on Civil Rights Act of 1983, as amended, which would have terminated the Commission on September 30, 1991. The Commission therefore was authorized to operate during the period between October 1, 1991, and November 26, 1991, when a reauthorization bill was enacted extending the Commission's termination date to September 30, 1994.

Civilian Personnel

B-244300, April 3, 1992***

Civilian Personnel

Compensation

- Overtime
 - ■ Eligibility
 - ■ ■ Burden of proof
-

Civilian Personnel

Compensation

- Overtime
- ■ Eligibility
- ■ ■ Customs inspectors
- ■ ■ ■ Monitoring

Payment of overtime compensation to Customs inspectors under 19 U.S.C. § 267 is not warranted after suspected "internal" drug carriers have been subject to a strip search and an x-ray search that reveal reasonable suspicion that the individual is concealing drugs. The time spent monitoring the suspect at a hospital or other facility after a reasonable suspicion has been established is not part of the inspectional process for which overtime compensation is authorized under 19 U.S.C. § 267.

B-217666.2, April 7, 1992

Civilian Personnel

Relocation

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

A transferred employee who rented temporary quarters on a monthly basis should have the total monthly rent prorated to include all days which are counted as part of the temporary quarters period, including days away on personal business since they are part of the consecutive days of occupancy under 41 C.F.R. § 302-5.2(a) (1991). The days that the employee performed temporary duty away from his new duty station interrupted the temporary quarters period and are not to be counted for purposes of computing daily lodging cost.

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Miscellaneous expenses
- ■ ■ Reimbursement

A courier fee paid to the closing attorney in connection with a real estate transaction may not be reimbursed unless the courier service was required by the lender. However, copying costs paid to

the closing attorney may be reimbursed if those costs were related to recording the property transfer and are customarily paid by the purchaser in the locality.

B-245282, April 8, 1992

Civilian Personnel

Travel

- Travel expenses
- ■ Documentation procedures
- ■ ■ Burden of proof

Civilian Personnel

Travel

- Travel expenses
- ■ Vouchers
- ■ ■ ■ Fraud

In a case involving a claim against the federal government for payment, the burden is on the claimant to provide evidence of his entitlement to be paid. Since the claimant has made material statements of fact in support of his claim for subsistence expenses that conflict with evidence provided by other witnesses, the claim is too doubtful to be approved for payment. However, transportation expenses the agency paid, which were not shown to be doubtful, should not be recouped.

B-246581, April 9, 1992

Civilian Personnel

Relocation

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

An employee hired to fill a manpower shortage position was authorized to move his household goods to his new duty station under a government bill of lading (GBL), and he chose to move himself. He is entitled to be reimbursed only for his actual expenses not to exceed what the government would have paid to move the goods by the contract carrier. Any expenses incurred to move his two cars may not be included in his actual expenses since cars are not included in the regulatory definition of household goods that may be moved at government expense.

Civilian Personnel

Relocation

- Household goods
- ■ Shipment
- ■ ■ Restrictions
- ■ ■ ■ Privately-owned vehicles

Civilian Personnel

Relocation

- Household goods
- ■ Shipment costs
- ■ ■ Waiver

An employee hired to fill a manpower shortage position who moved his household goods to his new duty station at government expense under a GBL erroneously included his car in the shipment. Since cars are not included in the definition of household goods that may be moved at government expense, the agency charged the employee for the amount the mover charged to transport the car.

Generally, a government payment for a household goods shipment which includes unauthorized items such as a car is not an "erroneous payment" as that term is used under 5 U.S.C. § 5584 (1988) and thus is not subject to waiver. Since there are no circumstances in this case which would amount to agency authorization of the erroneous inclusion of the car in the shipment rendering the GBL payment erroneous, there is no basis to waive the employee's debt.

B-247196, April 13, 1992

Civilian Personnel

Leaves Of Absence

- Annual leave
- ■ Forfeiture
- ■ ■ Restoration

An employee failed to use restored forfeited leave within the required 2-year period and the leave again was forfeited. Although the employee alleges that the agency erred in advising him regarding the rules for using restored leave, the leave may not be restored again. The 2-year requirement, which is contained in a regulation issued by OPM, has the force and effect of law and may not be waived or modified by this Office. 5 C.F.R. § 630.306 (1991).

B-246364, April 14, 1992

Civilian Personnel

Compensation

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

Agency has determined that employee, whose duties as a Security Guard expose him to hazardous materials and high noise levels, has been effectively safeguarded by the agency. Therefore, the criteria for payment of a hazard duty pay differential has not been met. The entitlement to hazard duty pay differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency unless that judgment was clearly wrong, arbitrary, or capricious. Further, since the hazardous duties performed by the employee have been taken into account in the classification of the position, payment of the differential is prohibited by 5 U.S.C. § 5545(d)(1) and 5 C.F.R. § 550.904(a) (1991). The claim is denied.

B-245061, April 15, 1992

Civilian Personnel

Travel

- Temporary duty
- ■ Per diem
- ■ ■ Eligibility

Agency regulation that prohibits payment of per diem for travel of more than one calendar day when the travel performed by the employee is within a 35-mile radius of his official station is in accord with FTR, § 301-7.5(a) (1991). The agency regulation also permits exceptions to be made for unique agency program requirements. Under the circumstances of this case, since the employee's attendance was needed at a training site at night as well as during the regular workday, we would not object to payment of per diem based on unique program requirements.

B-246639, April 15, 1992

Civilian Personnel

Relocation

■ **House-hunting travel**

■ ■ **Travel expenses**

■ ■ ■ **Reimbursement**

■ ■ ■ ■ **Eligibility**

Employee who was permanently transferred from Columbus to Crawford, Nebraska seeks reimbursement for two househunting trips. The claim is denied since an employee may be reimbursed travel and transportation expenses for only one round trip of an employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. § 5724a(a)(2) (1988). The fact that the employee had to abort one househunting trip after only one day because of severe flood conditions does not create a right to additional reimbursement where the expenses claimed are precluded by law.

B-222926.3, April 23, 1992***

Civilian Personnel

Compensation

■ **Arbitration decisions**

■ ■ **GAO review**

Applying the exclusivity provision of the Civil Service Reform Act, 5 U.S.C. § 7121(a), as construed in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), GAO will no longer take jurisdiction of federal employee claims on matters which are subject to negotiated grievance procedures under collective bargaining agreements. *Carter* and related judicial decisions interpret § 7121(a), which provides that such procedures shall be the exclusive means of resolving grievances falling within the agreement's coverage, as precluding judicial remedies for matters that have not been excluded from the negotiated grievance procedure. This interpretation applies equally to our general claims settlement jurisdiction under 31 U.S.C. § 3702 and our jurisdiction under 31 U.S.C. § 3529 to issue decisions to federal agency officials on proposed payments involving employee claims. Our decisions *AFGE Local 2413*, 67 Comp. Gen. 489 (1988), and *Samuel R. Jones*, 61 Comp. Gen. 20 (1981), are hereby overruled.

B-246718, April 29, 1992

Civilian Personnel

Relocation

■ **Residence transaction expenses**

■ ■ **Reimbursement**

■ ■ ■ **Eligibility**

■ ■ ■ ■ **Residency**

A transferred employee, who maintained a leased apartment near his old permanent duty station, may not be reimbursed real estate sales expenses for a family residence distantly removed from his duty station based on claim that he commuted to and from the family residence to his permanent duty station on weekends, paid state taxes, and voted there. Under 41 C.F.R. 302-1.4(j) and 302-6.1 (1991), and our decisions, a family residence from which an employee travels to and from work only on weekends does not qualify that residence as a regularly commuting residence.

B-245649, April 30, 1992

Civilian Personnel

Relocation

- Overseas personnel
- ■ Return travel
- ■ ■ Eligibility

A retired employee who, because of health reasons, decides to return to the continental United States 10 months after her retirement from federal service in Alaska may not be paid travel expenses since her return is not incidental to her retirement.

B-245710, April 30, 1992

Civilian Personnel

Travel

- Overseas personnel
- ■ Quarters allowances
- ■ ■ Reimbursement
- ■ ■ ■ Government quarters

Customs Service employees occupying government quarters on a Navy base in the Philippines received a living quarters allowance (LQA), pursuant to 5 U.S.C. § 5923 and the Standardized Regulations, from Customs that they used to pay rent to Navy. Navy raised the rent above the LQA, but due to political unrest prohibited the employees from taking non-government quarters. The employees paid the difference and claimed reimbursement for the few months until Customs could arrange an agreement to pay Navy directly pursuant to 5 U.S.C. § 5912, under which an agency may furnish government quarters without charge to an employee. Since the agency intended that the employees be provided quarters without cost the arrangement may be given retroactive effect and the claims may be paid.

B-246613, April 30, 1992

Civilian Personnel

Compensation

- Retroactive compensation
- ■ Promotion
- ■ ■ Eligibility

Administrative and clerical errors in the effective dates of two promotion approvals occurred prior to the time when the properly authorized official exercised her discretion to grant the promotions. Thus, the promotions in question cannot be made retroactively effective. *Douglas C. Butler*, 58 Comp. Gen. 51 (1978).

B-246646, April 30, 1992

Civilian Personnel

Relocation

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

An employee, notified that he would be separated from his position in a reduction-in-force (RIF), was offered and accepted a comparable position in his agency at another location. As authorized he took a househunting trip to the new location at government expense. After his return, the RIF notice was canceled and he chose to remain in his position rather than transfer. Under the circumstances of the RIF cancellation, the declined transfer and retention of position was tanta-

mount to a cancellation of the transfer in the interest of the government, and the employee is not obligated to repay the househunting trip expenses.

Military Personnel

B-239275.3, April 1, 1992

Military Personnel

Pay

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

Military Personnel

Pay

- Overpayments
- ■ Waiver
- ■ ■ Statutes of limitation

Indebtedness resulting from erroneous payments of accrued leave caused by improper separation may be waived pursuant to 10 U.S.C. § 2774 to the extent payments may not be set off against later accrued leave. Request for waiver must be received within 3 years of discovery of overpayment.

B-244825, April 3, 1992

Military Personnel

Pay

- Retroactive pay
- ■ Claim accrual dates
- ■ ■ Statutes of limitation

Claim for pay due black soldier during the Civil War is denied because portion of claim based on letter sent to President Lincoln in 1864 may have been settled by soldier accepting pay after date of letter and remainder of claim is barred by act of December 22, 1911, 37 Stat. 47, 49 which precludes consideration of any claims in connection with Civil War service not received by December 31, 1912.

B-245956, April 3, 1992

Military Personnel

Pay

- Medical treatment
- ■ Expenses
- ■ ■ Reimbursement

A former Army member's military records were corrected to extend his term of active duty. In the interim between his earlier discharge and later discharge he was injured in an accident caused by another party. His claim for reimbursement of his medical expenses due to the accident is denied since he received an insurance settlement which was intended in part to pay his medical expenses.

Military Personnel

Travel**■ Temporary duty****■ ■ Travel expenses****■ ■ ■ Privately-owned vehicles****■ ■ ■ ■ Mileage**

Navy employees claim mileage at their temporary duty station in order to obtain meals. The employees' claims are denied since the record supports the agency's determination that the claims are not allowable as a necessary expense of travel since adequate restaurant facilities were available in the immediate vicinity of the temporary duty station. Although the employees' travel orders authorized such mileage, this authorization was of no effect because it is contrary to a specific provision in the governing Federal Travel Regulation.

Procurement

B-244383.7, April 1, 1992

92-1 CPD 328

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where requesting party bases its reconsideration request on arguments that it could have made during the initial protest or on arguments that were previously considered, and where requesting party does not demonstrate that prior decision was legally or factually incorrect.

B-244680.2, B-244680.3, April 1, 1992

92-1 CPD 329

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Contracting agency provides no basis for reconsidering prior decision since repetition of arguments made during consideration of the original protest and mere disagreement with General Accounting Office decision do not meet the standard for reconsideration requests.

Procurement

Competitive Negotiation

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

Procurement

Contractor Qualification

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

Since there is no evidence in the record to indicate that the awardee prepared or assisted in preparation of the solicitation's statement of work, there was no basis to exclude the firm from competition due to an organizational conflict of interest.

Procurement

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

Protest allegation was properly dismissed as abandoned where the agency responded in detail to the protest allegation and the protester failed to reply to the agency's response.

Procurement

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

Procurement

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

The protester may not raise new grounds of protest concerning the responsiveness of the award-ee's bid in its comments after being provided with the awardee's bid in the agency's report on the initial protest, where the protester had reviewed the awardee's bid at bid opening and only protested the bid was nonresponsive for certain other reasons.

Procurement

Bid Protests**■ GAO procedures****■ ■ Preparation costs****■ ■ ■ Administrative remedies**

Where agency reinstated protester to competitive range 4 days after receiving notification of protest, thus granting the relief requested, protester is not entitled to costs of filing and pursuing the protest. The fact that corrective action is taken as result of a protest does not entitle protester to reimbursement for such costs where, as in this case, the agency acts without undue delay.

Procurement

Competitive Negotiation**■ Contract awards****■ ■ Administrative discretion****■ ■ ■ Technical equality****■ ■ ■ ■ Cost savings**

Where selection officials reasonably regard proposals as essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations.

Procurement

Competitive Negotiation

■ Contracting officer findings

■ ■ Offers

■ ■ ■ Technical equality

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical equality

In making a determination that two proposals are essentially equal from a technical standpoint, a finding by the agency of strict equality is not required; the General Accounting Office has upheld such determinations with technical differentials between proposals of more than 15 percent.

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Terms

■ ■ ■ Ambiguity allegation

■ ■ ■ ■ Interpretation

Protest that agency failed to provide the protester with interpretation of alleged ambiguity in the solicitation is denied where solicitation clearly and unambiguously stated the requirement, and the agency merely confirmed another offeror's interpretation of the requirements.

B-246740, April 1, 1992

92-1 CPD 333

Procurement

Specifications

■ Minimum needs standards

■ ■ Competitive restrictions

■ ■ ■ Design specifications

■ ■ ■ ■ Justification

Procurement

Specifications

■ Minimum needs standards

■ ■ Competitive restrictions

■ ■ ■ Design specifications

■ ■ ■ ■ Overstatement

Protest that specifications are overly restrictive because they require the replacement of a portion of an underground steam distribution system with a shallow concrete trench underground system to the exclusion of, or without permitting as an option, the use of a direct burial underground system, is denied where the agency demonstrated reasonable bases for this requirement based on the shallow concrete trench underground system's advantages in ease of maintenance and modification, and because it can also serve as a sidewalk

Procurement

Bid Protests

- Allegation
- ■ Abandonment

Where agency responds in detail to the protester's contention, made in its initial protest, that its proposal was wrongfully found technically unacceptable and the protester, in its comments on the agency report, fails to address in any way the agency's detailed response, the issue is deemed abandoned and will not be considered by the General Accounting Office.

Procurement

Bid Protests

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

Protester, which does not contest that it was properly found technically unacceptable, is not an interested party under the Bid Protest Regulations eligible to protest the award without discussions to the low-priced, technically acceptable offeror in accordance with solicitation evaluation criteria.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Procurement

Competitive Negotiation

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

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

Procurement

Competitive Negotiation

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

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

Procurement

Competitive Negotiation

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

Protest of exclusion of firm's proposal from the competitive range is denied where the agency reasonably concluded in accordance with the evaluation criteria in the solicitation that the protester did not have the qualifications and relevant experience necessary to perform the contract, did not demonstrate its understanding of the purpose and subject matter of the procurement, and did not propose a level-of-effort which reflected its understanding of the scope of work.

Procurement

Bid Protests

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

Protester properly found technically unacceptable is not an interested party to challenge the agency's evaluation of the awardee's proposal and the award to that firm since the protester would not be in line for award if its protest were sustained.

Procurement

Bid Protests

- GAO authority

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision asserting jurisdiction over protest of award under tender of service for transportation of motor vehicles is denied, since the Competition in Contracting Act's broad authority extends to protests of "procurements" and encompasses acquisition of transportation services.

Procurement

Specifications

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

Protest is denied where under a brand name or equal solicitation the agency reasonably rejected the protester's "equal" product since it did not comply with salient characteristics listed in the solicitation and thus did not satisfy the agency's minimum needs.

Procurement

Special Procurement Methods/Categories

- **Federal supply schedule**
 - ■ **Off-schedule purchases**
 - ■ ■ **Justification**
-

Procurement

Specifications

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

In a brand name or equal procurement where the protester is not eligible for award because its “equal” product, listed on a mandatory Federal Supply Schedule, does not comply with salient characteristics listed in the solicitation and does not satisfy the agency’s minimum needs, the protester is not prejudiced by the agency’s decision to obtain a waiver from the General Services Administration to purchase a nonschedule brand name product which does satisfy the agency’s minimum needs.

B-246764, et al., April 2, 1992

92-1 CPD 341

Procurement

Bid Protests

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

Where agency letter of rejection cited 15 bases for rejecting the protester’s equipment as noncompliant with the specifications, and protest to General Accounting Office (GAO) contends that protester’s equipment is functionally equivalent to that specified, challenging the agency’s determination in only 10 of the 15 areas, later protest of additional areas of alleged noncompliance is untimely as the protest should have been filed, under GAO Bid Protest Regulations, at the latest within 10 working days of receipt of agency report.

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

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

Contention that agency should have conducted a life cycle cost evaluation for offers to replace existing equipment is without merit where solicitation failed to provide for such evaluation and is untimely to the extent that solicitation should have included such a preference.

Procurement

Sealed Bidding

- Invitations for bids
 - ■ Risks
-

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Extension
- ■ ■ ■ Administrative discretion

The contracting agency's agreement to the granting of an additional extension of time for a bidder to apply for a certificate of competency is a matter within the discretion of the contracting agency, with the government's interest in proceeding with the acquisition, not the offeror's interest in obtaining an extension, controlling. The bidder's alleged reliance on oral advice from other than a contracting agency representative that an extension of time would be requested from the Small Business Administration was at the bidder's risk.

Procurement

Special Procurement Methods/Categories

- In-house performance
- ■ Cost estimates
- ■ ■ GAO review

Where statute directing agencies to study the costs, benefits, and feasibility of performing their motor vehicle operations through General Services Administration or by contract does not direct agency to follow any particular study methodology, agency reasonably estimated costs of in-house repair and maintenance, where all records were not available, by extrapolating costs in available records representing repairs on 60 percent of the vehicle fleet to estimate costs of maintaining and repairing entire fleet.

Procurement

Special Procurement Methods/Categories

- In-house performance
- ■ Cost evaluation
- ■ ■ Personnel

Agency was not required to charge personnel costs against in-house estimate where most efficient organization study indicated that conversion to contractor effort and elimination of one position would be offset by creation of position to monitor contractor effort.

Procurement

Small Purchase Method

- Contract awards
- ■ Propriety

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest that agency improperly made small purchase award to firm whose product was not "equal" is denied where agency reasonably found that awardee's product was functionally equivalent for the intended application.

Procurement

Bid Protests

- GAO authority

Protest jurisdiction of the General Accounting Office (GAO) extends to protests filed by interested parties challenging procurements conducted by federal agencies and does not turn on whether appropriated funds are involved. GAO will consider a protest against Department of the Army solicitation for relocation services to military personnel at "no-cost" to the agency where the agency's selection of firms will result in service to government employees and will benefit government, and, thus, it is a procurement of services by a federal agency.

Procurement

Competitive Negotiation

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

Protest that agency improperly evaluated protester's proposal is denied where record shows that the agency's evaluation of the proposal was reasonable and in accordance with the solicitation's evaluation factors.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Bid Protest Regulations require party requesting reconsideration of prior decision to show prior decision was based on either errors of fact or law or to present information not previously considered which warrants reversal or modification of decision; repetition of untimely arguments made during consideration of the original protest does not meet this standard.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Requests for reconsideration of decision sustaining protest that solicitation should be issued as a small business set-aside are denied where agency and interested party do not show that the decision improperly concluded that the agency lacked a reasonable basis to issue the solicitation as unrestricted rather than as a set-aside.

Procurement

Bid Protests

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

Where agency promptly investigated allegation that award was improperly made on the basis of initial proposals, and took appropriate corrective action 7 working days after being notified of the protest, thus promptly granting the relief requested, protester is not entitled to costs of filing and pursuing the protest.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

Request for reconsideration of dismissal of one ground of protest as untimely is denied where request identifies no legal or factual error in the determination that a solicitation requirement providing the particular basis for protest was apparent on the face of the solicitation, and the protester elected not to challenge that provision until after its proposal had been rejected.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest that agency improperly evaluated protester's proposal is denied where protester merely reiterates its disagreement with the agency's evaluation of its proposal.

Procurement

Bid Protests

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

Protester diligently pursued the information providing the basis for its protest where it filed a Freedom of Information Act request approximately 3 weeks after it was orally notified of the award to another offeror.

Procurement

Competitive Negotiation

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

Protest is sustained where record shows that cost realism analysis was flawed because, but for its error in computing the protester's general and administrative costs, agency would have determined that protester's proposal represented the lowest realistic cost.

Procurement

Contractor Qualification

- Responsibility
- ■ Corporate entities
- ■ ■ Affiliates
- ■ ■ ■ Preferences

Procurement

Socio-Economic Policies

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

Agency improperly failed to apply 10 percent small disadvantaged business (SDB) preference to an SDB regular dealer of jet fuel, who claims the preference based upon furnishing the product of a small business refiner, which the agency asserts is an affiliate of a suspended contractor; applicable regulations provide no basis for not applying the SDB preference in such circumstances. Since the agency's concerns actually relate to the responsibility of the SDB regular dealer, the agency must make a responsibility determination; a negative determination is subject to referral to the Small Business Administration under certificate of competency procedures.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
 - ■ Mandatory use
-

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Purchases
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Justification

Award by a mandatory user agency of the Federal Supply Schedule to other than the lowest priced schedule vendor is improper where all of the reasons cited the agency for ordering from the higher priced vendor are unreasonable.

Procurement

Competitive Negotiation

- Contractors
- ■ Exclusion
- ■ ■ Justification

Agency properly rejected proposal under solicitation for air transportation services where agency verification of proposed flight schedule through commercial reservation system established that protester's proposed flight schedule was not *bona fide*, thus warranting the protester's exclusion in accordance with the solicitation.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest challenging adequacy of discussions is without merit where discrepancy between protester's proposed flights and actual available flights did not become apparent until after negotiations had closed; agency was not required to reopen discussions with all offerors in order to resolve discrepancy.

Procurement

Competitive Negotiation

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

Agency properly declined to apply solicitation provision allowing it to waive minimum service requirements in favor of lower price in order to make award to protester where decision was consistent with solicitation's emphasis on minimally acceptable service levels over price.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to award of the costs of filing and pursuing its protest where the agency took corrective action approximately 2 weeks after the issuance of the General Accounting Office's decision with respect to Federal Supply Schedule requote procedures which provided the first interpretation establishing the necessity for the corrective action taken by the agency.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

Dismissal of protest for failure to diligently pursue information forming basis for protest is affirmed where delay in protester's receipt of the information was caused by its failure to file a timely supplemental document request pursuant to the Bid Protest Regulations and where the basis for protest was the same as that in previously-dismissed untimely protest.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

Protest challenging resolicitation and subsequent cancellation of that resolicitation is dismissed where protest is based on underlying untimely argument that protester was entitled to award under canceled original solicitation.

B-246668.2, April 9, 1992

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to award of costs of filing and pursuing its protest where, in response to a protest challenging the issuance of certain solicitations, the agency canceled the solicitations and agreed to place delivery orders under the protester's existing contract less than 1 month after the protest was filed.

B-247783.2 , April 9, 1992

92-1 CPD 355**Procurement**

Bid Protests

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

Protest by third-low offeror is dismissed where firm is not an interested party under General Accounting Office's Bid Protest Regulations because it would not be in line for award if its protest against the selection of the low offeror were sustained; mere fact that agency has not yet performed preaward survey on second-low offeror and found firm to be responsible is insufficient to establish requisite direct economic interest on the part of the protester.

B-245050.2, B-245051.4, April 10, 1992

92-1 CPD 357**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

Protest grounds, first raised by protester more than 10 days after it knew or should have known of the grounds, were properly considered untimely by General Accounting Office, and do not form the basis for reconsideration.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester fails to show any error of law or fact warranting reversal of finding that agency had compelling reason to cancel solicitation and reissue it using proprietary specifications based upon agency's minimum need for compatibility of fire alarm receiver and existing transmitters.

Procurement

Sealed Bidding

- Bonds
 - ■ Justification
 - ■ ■ GAO review
-

Procurement

Sealed Bidding

- Performance bonds
- ■ Justification

Protest against bond requirements in invitation for bids (IFB) for mess attendant services set aside for small disadvantaged businesses is denied where the agency requires bonding in light of its need for uninterrupted performance.

Procurement

Sealed Bidding

- Bids
 - ■ Responsiveness
 - ■ ■ Brand name/equal specifications
 - ■ ■ ■ Equivalent products
-

Procurement

Specifications

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

Bid offering an "equal" product under brand name or equal procurement for waste compactors was properly rejected where the bidder did not submit descriptive literature with the bid on the offered "equal" model, but rather submitted descriptive literature on another model.

Procurement

Competitive Negotiation

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

Protest that agency improperly evaluated proposal for employee assistance program counseling services is denied where record indicates the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria.

Procurement

Competitive Negotiation

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

Protest that agency improperly relied on undisclosed criteria in technical evaluation of proposals is denied where matters considered in evaluation were reasonably related to the stated evaluation factors.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Discussions were meaningful where record shows that areas of weakness were called to protester's attention, and protester had an opportunity to identify and correct specific deficiencies within those areas.

B-248109, April 13, 1992

92-1 CPD 361

Procurement

Bid Protests

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

Procurement

Noncompetitive Negotiation

- Sole sources
- ■ Alternate sources
- ■ ■ Qualification

Where *Commerce Business Daily* (CBD) notice announcing procuring agency's intent to make a sole-source award offers other potential source's an opportunity to compete by requiring potential sources to identify their interest and capabilities within 15 days of the CBD notice, a potential source must first properly respond to the CBD notice and receive a negative agency response before filing a protest challenging the sole-source decision; protest of the sole-source announced in CBD is dismissed as untimely where the protester did not properly respond to the CBD notice.

B-245388.2, April 14, 1992

92-1 CPD 362

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to the costs of filing and pursuing its protest, where the protest elicited corrective action on the part of the agency 1 month after it was filed with the General Accounting Office, even though the protester filed an agency-level protest of the same matter.

Procurement

Contractor Qualification

- Responsibility criteria
 - ■ Organizational experience
-

Procurement

Contractor Qualification

- Responsibility/responsiveness distinctions

A bidder's failure to submit a statement of experience with its bid as required by the invitation for bids does not render the bid nonresponsive because this information only relates to bidder responsibility not bid responsiveness; the requested statement of experience is not a definitive responsibility criterion because it does not establish specific quantitative and qualitative standards by which a bidder's responsibility is measured.

Procurement

Competitive Negotiation

- Best/final offers
 - ■ Evaluation
 - ■ ■ Point ratings
 - ■ ■ ■ Propriety
-

Procurement

Competitive Negotiation

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

Agency's evaluation of best and final offers (BAFO) and its subsequent award selection cannot be found reasonable where the evaluation record contains no rationale for agency's conclusion that proposal revisions in the protester's BAFO did not warrant a change to the scoring that was based on the initial proposal.

Procurement

Competitive Negotiation

- Technical evaluation boards
- ■ Qualification
- ■ ■ GAO review

The composition of a technical evaluation panel is within the discretion of the contracting agency, and we will not object to the constitution of the panel absent a showing of fraud, bad faith, conflict of interest, or actual bias.

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Conflicts of interest
- ■ ■ Post-employment restrictions
- ■ ■ ■ GAO review

The interpretation and enforcement of post-employment conflict-of-interest restrictions are primarily matters for the procuring agency and for the Department of Justice. The General Accounting Office's interest, in the context of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. The offeror's subcontractor's employment of a former government employee who participated in the initial development of the performance work statement and source selection plan (which was essentially disclosed in the solicitation), whose participation ended before the request for proposals was issued and who was neither involved in the preparation of the offeror's proposal nor would be involved in performing the contract, does not confer any unfair competitive advantage.

Procurement

Contractor Qualification

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

Although the contracting officer is permitted to directly determine a prospective subcontractor's responsibility when it is in the government's interest to do so, the Federal Acquisition Regulation does not require such determination; and where the agency has made an affirmative determination of an offeror's responsibility, General Accounting Office will not review that determination absent a showing of possible bad faith or fraud or misapplication of definitive responsibility criteria specified in the solicitation.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest that agency unreasonably evaluated the protester's technical proposal and excluded it from the competitive range, after discussions, is denied where the agency reasonably determined that the protester's proposal no longer had a reasonable chance of being selected for award because the protester's proposal was higher in cost and contained numerous deficiencies and the awardee's low cost proposal was rated technically superior.

Procurement

Competitive Negotiation

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

Agency is not required to make an award to an offeror that submitted the low cost technically acceptable offer where the solicitation provided that cost was the least important evaluation factor and expressly established that the award would be based on the greatest value to the government, with technical merit being significantly more important than cost.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Protest that agency failed to conduct meaningful discussions because it refused to identify the specific resumes determined to be unacceptable is denied where solicitation contained specific descriptions of the qualifications that would be required for key and non-key personnel, and agency reasonably was evaluating offerors' understanding of personnel requirements by their ability to decide how they would satisfy the personnel requirements without further guidance.

Procurement

Bid Protests

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

Protest alleging organizational conflict of interest on the part of awardee is dismissed as untimely filed where protester was informed of agency's decision to allow the challenged firm to compete and protester failed to protest this decision within 10 days.

Procurement

Contractor Qualification

- Responsibility criteria
 - ■ Distinctions
 - ■ ■ Performance specifications
-

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Negative determination
- ■ ■ ■ Effects

Although an agency may use traditional responsibility criteria, such as the availability of necessary production, technical equipment and 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 without referral to the Small Business Administration was improper where the agency's decision did not reflect a relative assessment of offers but instead effectively constituted a finding of nonresponsibility.

Procurement

Competitive Negotiation

- Offers
 - ■ Evaluation
 - ■ ■ Technical acceptability
-

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ Negative determination

Agency was not required to refer rejection of protester's offer as technically unacceptable to Small Business Administration for certificate of competency determination where rejection encompassed the firm's failure to propose an offer in compliance with material and mandatory solicitation requirements and was not based solely on pass/fail evaluation of traditional responsibility-type criteria; under these circumstances, the rejection was not a responsibility determination.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protester's proposal was properly rejected as technically unacceptable and excluded from the competitive range where the protester failed in its proposal to submit information sufficient to demonstrate compliance with material and mandatory solicitation requirements.

B-244989.2, April 20, 1992

92-1 CPD 371

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Prior decision dismissing a protest challenging the rejection of an offer for failure to include information regarding price realism is affirmed where, notwithstanding agency's express request for explanation as to price realism figures, protester's best and final offer did not provide adequate information to permit an effective realism analysis.

B-246120.3, B-246120.4, April 20, 1992

92-1 CPD 372

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration
- ■ ■ ■ Comments timeliness

Under Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(j)), comments must be related to the protest issues addressed in the agency's report; submission that only raises new protest grounds based on the information in the report, but that does not refer to original protest issues or report on those issues, does not constitute comments, and there thus is no basis for reconsidering dismissal of original protest for failure to file comments.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Agency properly included awardee in competitive range where technical factors were more important than cost, awardee's initial proposal was highest rated technically, and awardee's initial proposal price, although the highest received, was not unreasonably high compared to other offers.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Protest that agency improperly failed to advise protester of initial evaluation finding that proposal was too detailed is without merit where, subsequent to that evaluation finding, discussions were reopened, new best and final offers were requested, and new evaluations were conducted, and it is clear that other specified deficiencies, not the inclusion of too much detail, was the ultimate basis for the downgrading of the protester's proposal.

Procurement

Competitive Negotiation

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

Agency properly evaluated awardee's cost proposal where it obtained views of Defense Contract Audit Agency as to reasonableness and realism of awardee's cost elements, discrepancies were discussed and resolved with awardee, and award was made on a fixed-price basis.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Purchases
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Where military agency issues a delivery order to Federal Prison Industries, Inc. (FPI) for FPI's purchase from the Federal Supply Schedule (FSS) under circumstances where FPI essentially acts as a purchasing agent for the agency, the agency is required to justify the purchase of other than the lowest priced product available on the FSS.

Procurement

Bid Protests

- Non-prejudicial allegation
- ■ GAO review

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Purchases
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Protester is not prejudiced by agency's failure to follow requirement to justify Federal Supply Schedule purchase of other than the lowest priced product where the agency subsequently reviews protester's lower priced fabric and concludes that purchase of the awardee's fabric is justified because of differences in fabric. Determinations as to aesthetics and suitability involve the subjective judgment of the agency.

Procurement

Competitive Negotiation

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

A management and operations contractor of the Department of Energy violated the terms of its own procurement provisions and the "federal norm" in failing to amend a solicitation for a telecommunications system, despite significant changes in its requirements occurring after the award selection decision in the 2 1/2-year delay before award caused by various protests.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest that technical proposals were improperly evaluated, reflecting an unstated agency predisposition for one of the two permitted technical approaches, is denied where, contrary to protester's

arguments, record does not demonstrate that the agency waived specification performance requirements in favor of awardee's technical approach or gave undue weight to perceived disadvantage in the other technical approach adopted by the protester.

Procurement

Competitive Negotiation

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

Protest that agency misevaluated price proposals does not provide a basis for overturning the award where even if agency had evaluated prices in manner protester claims solicitation required, awardee's price would have remained \$1.5 million less than protester's and awardee's technical proposal was rated higher.

B-247011, April 21, 1992***

92-1 CPD 376

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

- Offers
- ■ Price disclosure
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that inordinate number of solicitation amendments and delays in procurement process created likelihood that protester's price improperly was disclosed to low and second-low offerors is dismissed where (1) protest based on the delays was not raised at the time they occurred, and thus is untimely; (2) there is no evidence that amendments and delays were not necessary, or that agency otherwise proceeded improperly; and (3) there is no evidence, other than mere speculation, that protester's prices were disclosed.

B-246136.2, April 22, 1992***

92-1 CPD 377

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety

Agency's decision to reopen competition after making award to protester based on initial proposals was improper where record does not establish that any offeror was prejudiced by perceived solicitation defect, and record does not support agency's further assertion that proposals were not evaluated properly; reopening of competition thus did not provide any benefit to the procurement system that would justify competitive harm to protester from reopening competition after exposure of protester's price.

Procurement

Competitive Negotiation**■ Contract awards****■ ■ Propriety****■ ■ ■ Evaluation errors**

Agency improperly accepted for award a proposal for an x-ray system that failed to meet a variety of stated solicitation requirements, without issuing a written amendment to the solicitation; a protester who submitted a totally compliant system was prejudiced by this relaxation since it could reasonably have redesigned its offered product to less stringent standards, which could result, as alleged, in a significant price reduction in systems that it could offer.

Procurement

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

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Application**

In a negotiated procurement in which the solicitation provided that the qualifications of key personnel was the most important of four listed technical evaluation factors and that the combined weight of technical factors was more important than cost, the agency's interpretation that key personnel qualifications would only be evaluated on a go/no-go basis, but the remaining three factors evaluated qualitatively, is not reasonable, inasmuch as the agency's interpretation, reading the solicitation as a whole, does not give effect to all of the solicitation provisions.

Procurement

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

Award was properly made to higher priced, higher rated offeror where the source selection decision is consistent within evaluation factors and the agency reasonably determines that the technical superiority of the higher priced offer outweighs the price difference.

B-247004, April 22, 1992**92-1 CPD 380**

Procurement

Specifications

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

Protest against geographical restriction in solicitation for printing services limiting bids to firms whose production facilities are within a 125-mile radius of agency is reasonable where, in order to ensure print quality of final publications, agency requires that a government representative conduct press inspections at the contractor's facility.

B-247014, April 22, 1992**92-1 CPD 381**

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Ambiguous prices

A bid price is not ambiguous where one line item price is enclosed in parenthesis and not computed in the total price since the only reasonable interpretation of the bid price, from the face of the bid documents and considered in light of the other bids, is that the line item is not specifically priced but is included in the prices of other related line items.

B-247081, April 22, 1992**92-1 CPD 382**

Procurement

Noncompetitive Negotiation

- Use
- ■ Justification
- ■ ■ Urgent needs

Protest against noncompetitive award of contract for refrigerant recycling units is sustained where record indicates that the "urgency" which was used to justify the noncompetitive approach resulted from the contracting agencies' lack of advance planning.

B-244862.3, B-247422, April 23, 1992**92-1 CPD 383**

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Personnel experience

Personnel qualification requirement in a solicitation—requiring engineering candidate to have 2 years of technical experience with a particular computer system—constitutes a technical evaluation factor where solicitation's award provision informed offerors that personnel qualifications were more important than cost and thereby placed offerors on notice that required resume submissions would be evaluated qualitatively.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

Procurement

Contract Management

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

Since the record demonstrates that the awardee's proposed candidate resume failed to indicate compliance with technical experience requirement and was, therefore, properly judged technically unacceptable by the technical evaluation team, agency's proposed termination of protester's contract—on basis that protester had improperly received contract award—is proper since offeror's non-compliance with a mandatory technical evaluation factor cannot be waived.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Protest against terms of solicitation is dismissed where protester generally challenges terms but provides no detailed statement of legal and factual grounds in support of protest.

B-247043, April 23, 1992

92-1 CPD 384

Procurement

Contractor Qualification

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

Nonresponsibility determination based primarily on information that protester had experienced serious performance problems on four recent government contracts, leading contracting officer to conclude that the offeror lacked the necessary technical and production capabilities to satisfy the current requirement on a timely basis, was reasonable where the delinquencies in fact existed and were not shown to be excusable.

B-247073, B-247073.2, April 23, 1992

92-1 CPD 385

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Prior contract performance

Protest that proposed awardee's past performance should have been evaluated as less than acceptable, and that protester's should have been rated outstanding, is denied where, on basis of generally favorable reports of prior performance, agency had reasonable basis for finding both offerors acceptable in this area.

Procurement

Bid Protests

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

Protester's argument that proposed awardee should not have been found acceptable in the category "personnel experience" is untimely, and will not be considered, where protester knew that agency had found the offeror acceptable in that category 2 months earlier and therefore had a basis for protesting the alleged misevaluation at that time.

B-247096, April 23, 1992

92-1 CPD 386

Procurement

Competitive Negotiation

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

Agency reasonably made a determination to exclude the protester's proposal from the competitive range where solicitation placed heavy emphasis on technical factors, protester's proposal ranked eighth in technical merit of 19 proposals, and protester's initial price was higher than three other proposals with significantly higher technical scores, and the evaluation record supports the agency's determination that, based on initial proposals received, the protester had no reasonable chance for award.

B-247450, April 23, 1992

92-1 CPD 387

Procurement

Bid Protests

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

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Absence of a protester's corporate surety from Department of the Treasury Circular 570 rendered the bid nonresponsive; protester thus was not an interested party to protest award to another bidder since it did not question the finding of nonresponsiveness and since at least one other bidder could be awarded the contract if the awardee were found ineligible.

B-247518, April 23, 1992

92-1 CPD 388

Procurement

Sealed Bidding

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

Government mishandling was not the paramount cause for late receipt of a bid which was sent by U.S. Postal Service Express Mail 1 working day before bid opening and delivered to the govern-

ment installation's central mail facility approximately 2-1/2 hours prior to the scheduled bid opening where the outer, Express Mail envelope was not marked with any information identifying it as containing a bid and, as a result, the bid was delivered to the bid opening room after bid opening by the agency's regular internal mail delivery, rather than by expedited mail delivery; accordingly, the bid was properly rejected as late.

B-242379.4, April 24, 1992**92-1 CPD 389**

Procurement

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

Prior decision is affirmed where protester fails to establish that dismissal of one element of one argument as untimely was incorrect.

Procurement

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

Protester's claim that prior decision reached the wrong conclusion on the issue of whether the solicitation's requirement for submitting test data was impermissibly restrictive is denied where the issue was considered in great detail, and protester, while urging a different conclusion, fails to show that prior decision was incorrect.

Procurement

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

Prior decision dismissing protester's challenge to specifications is affirmed where protester, while claiming that agency tailored specifications to competitor's product, failed to make any showing that the specifications prejudice the protester or exceed the agency's minimum needs.

B-244471.5, April 24, 1992**92-1 CPD 390**

Procurement

Bid Protests**■ GAO procedures****■ ■ Preparation costs****■ ■ ■ Administrative remedies**

Protester is not entitled to costs of filing and pursuing protests under section 21.6(e) of the General Accounting Office (GAO) Bid Protest Regulations based on agency corrective actions; where protests were filed prior to agency's award decision, they were premature, and when agency finally determined—as protester had argued—that protester, not one of the lower bidders, was entitled to award, determination was merely culmination of award process, not corrective action.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action within 7 working days of when the protest was filed.

Procurement

Competitive Negotiation

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

Notwithstanding technical deficiencies in the evaluation process and a lack of meaningful discussions in some areas, protest against the award of a guard services contract is denied since the record supports the reasonableness of the agency's cost/technical tradeoff decision to award to a higher rated offeror even when the protester is awarded the maximum number of points for the technical subfactors affected by the deficiencies.

Procurement

Bid Protests

- Dismissal
- ■ Definition

Protest that does not provide a detailed factual and legal basis is dismissed.

Procurement

Contractor Qualification

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

Protest that the awardees did not accurately disclose information concerning their ability to perform contract concerns the agency's affirmative determination of the awardees' responsibility which the General Accounting Office will not review absent a showing of possible fraud or bad faith, or misapplication of definitive responsibility criteria in the solicitation.

B-245855, April 27, 1992

Procurement

Payment/Discharge

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

Department of Defense Guaranteed Traffic agreement provides that a participating carrier or forwarder will not be released from its obligation to furnish service until the expiration date of the agreement unless the Military Traffic Management Command assigns a replacement carrier with a definite start-up date. If such an agreement is extended by mutual agreement, the expiration date becomes the expiration date of the extension.

B-246451.2, April 27, 1992

92-1 CPD 395**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration
- ■ ■ ■ Comments timeliness

Prior dismissal of a protest is affirmed where the protester failed to file with the General Accounting Office within 10 working days after receipt of the agency report its comments on the report or an expression of its continued interest in the protest.

B-247036, April 27, 1992

92-1 CPD 396**Procurement**

Competitive Negotiation

- Offers
- ■ Cost realism
- ■ ■ Rates
- ■ ■ ■ Cost reimbursement contracts

In a negotiated procurement for the award of a cost reimbursement contract, the procuring agency's cost realism determination of the awardee's proposed subcontractor costs was unreasonable where the agency normalized the amount of subcontractor hours proposed upward to the level of the government's independent estimate but used the awardee's estimated subcontractors' labor rates, which the agency had previously and properly determined to be unrealistically low, in calculating the awardee's total adjusted subcontractors' cost.

B-247141, April 27, 1992

92-1 CPD 397**Procurement**

Contract Management

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

Contract modification resulting from deficiencies in an engineering change proposal which was incorporated into the solicitation requirements was not outside the scope of the contract where the nature and purpose of the original contract remains unchanged.

Procurement

Contractor Qualification

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

Where record contains no evidence of an intent to harm the protester or any other offeror, and where contract specialist based her affirmative determination of awardee's responsibility on current evidence of the contractor's responsibility and successful performance, protest that contracting agency disregarded results of prior negative post-award audit in bad faith is denied.

Procurement

Bid Protests

- Non-prejudicial allegation
- ■ GAO review

Procurement

Socio-Economic Policies

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

Although contracting officials should not have relied on awardee's Buy American Act certification without inquiring into results of agency audits indicating noncompliance with domestic content requirements under prior contracts, protester was not prejudiced as a result of agency's action where post-award audit indicates that awardee's product qualifies as a domestic end item.

Procurement

Competitive Negotiation

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

Agency properly excluded proposal from the competitive range where the agency reasonably concluded that the offeror had no reasonable chance of award because of deficiencies in personnel experience and corporate experience.

Procurement

Bid Protests

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

Allegations of improper disclosure of protester's proposal information and of improper contact between agency and competitor are dismissed as untimely where raised more than 10 working days after protester knew or should have known of protest basis.

Procurement

Competitive Negotiation

- **Competitive advantage**
- ■ **Non-prejudicial allegation**

Where awardee was temporarily provided access to agency's electronic mail system in conjunction with contract performance, but gained no demonstrable advantage prior to or during protested procurement, protest that awardee had unfair advantage is denied.

B-247047, April 28, 1992

92-1 CPD 399

Procurement

Contractor Qualification

- **Responsibility criteria**
- ■ **Performance capabilities**

A requirement that a company be "regularly engaged" in the manufacture of seismic isolation bearings may be met by a company that has installed bearings in only one building, where there are only a limited number of buildings worldwide in which the bearings have been installed and the company was identified in the solicitation as an acceptable manufacturer of the bearings.

Procurement

Competitive Negotiation

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

Where solicitation requires offeror to have at least 3 years of experience, agency may reasonably consider both the limited 3-year experience of an offeror as well as the offeror's more recent applicable experience.

Procurement

Competitive Negotiation

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

Where solicitation imposes a 3-year experience requirement but imposes no particular education requirement, individual with considerable practical experience in the field may reasonably be found to meet requirements.

Procurement

Bid Protests

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

Procurement

Specifications

- **Performance specifications**
- ■ **Waiver**
- ■ ■ **Propriety**

Although the procuring agency waived a mandatory solicitation requirement for the awardee's proposal with regard to the experience of the awardee's proposed material supplier and improperly overrated the proposal under the related evaluation subfactor, the protest of this waiver is not

sustained because the procuring agency determined that the supplier was acceptable and there is no evidence that the protester or any other potential offeror was prejudiced by the agency's action, given the substantial price advantage of the awardee, whose proposal was rated approximately technically equal to the protester's, and the lack of any indication that the protester would materially lower its price or change its technical approach in response to the waiver of this requirement.

B-247052, April 28, 1992

92-1 CPD 400

Procurement

Socio-Economic Policies

■ **Small businesses**

■ ■ **Size determination**

■ ■ ■ **GAO review**

Challenge to awardee's small business size status is dismissed since it is a matter exclusively for review by the Small Business Administration.

Procurement

Bid Protests

■ **GAO procedures**

■ ■ **Protest timeliness**

■ ■ ■ **10-day rule**

Protest allegations based on information obtained in the notice of award and at a debriefing are dismissed as untimely since they were not filed within 10 working days after the debriefing; protester is not entitled to wait an additional 10 days to file its protest from the time it receives written materials which confirm matters earlier disclosed at the debriefing.

Procurement

Competitive Negotiation

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Personnel**

■ ■ ■ ■ **Cost evaluation**

The awardee's failure to provide letters of commitment identifying current salary levels which were to be used for cost realism purposes did not affect the validity of the agency's cost realism analysis where the agency had an adequate basis to, and did, confirm the realism of proposed salary rates for the key personnel involved.

Procurement

Bid Protests

■ **Allegation substantiation**

■ ■ **Lacking**

■ ■ ■ **GAO review**

Procurement

Competitive Negotiation

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Personnel**

Protest alleging that awardee did not have permission of an individual to use his resume in an initial proposal is denied where the record shows that the individual had discussed employment with a proposed subcontractor and had signed a letter of acceptance as a result of that discussion.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Personnel**
- ■ ■ ■ **Availability**

Protest alleging that awardee knew or should have known that a key individual proposed in its initial and best and final offer (BAFO) became unavailable for employment prior to submission of the BAFO is denied where the record supports a conclusion that the awardee and its subcontractor reasonably believed the individual was still available on the basis of a prior commitment to the awardee's subcontractor.

Procurement

Bid Protests

- **Dismissal**
- ■ **Definition**

Procurement

Contractor Qualification

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

Argument that agency failed to consider the bankruptcy of awardee's subcontractor is dismissed since it involves an affirmative determination of responsibility and the record does not show that the determination was the product of fraud or bad faith.

B-247063, April 28, 1992**92-1 CPD 401**

Procurement

Competitive Negotiation

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

Proposal was properly downgraded under a procurement for technical support in the development and implementation of project management systems conducted by a Department of Energy management and operation contractor where the proposal primarily referenced, without substantive explanation, the protester's experience as the incumbent contractor; there is no legal basis for favoring a firm with presumptions on the basis of an offeror's prior performance.

B-247142, April 28, 1992**92-1 CPD 402**

Procurement

Competitive Negotiation

- **Hand-carried offers**
- ■ **Late submission**
- ■ ■ **Acceptance criteria**

Hand-carried proposal was properly rejected as late where paramount cause of late delivery was that offeror's agent left less than 2 minutes to accomplish delivery of proposal once the agent left her vehicle in the parking lot of the office building containing the proposal depository. Minimal delay resulting from interaction between contracting agency employee stationed at building's re-

ception desk and protester's agent who sought confirmation of procurement office location, is not improper government action which warrants acceptance of the late proposal.

B-245999.2, April 29, 1992

92-1 CPD 403

Procurement

Competitive Negotiation

■ **Offers**

■ ■ **Competitive ranges**

■ ■ ■ **Exclusion**

■ ■ ■ ■ **Discussion**

Procurement

Competitive Negotiation

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Technical acceptability**

The contracting agency properly evaluated the protester's proposal as technically unacceptable and eliminated it from the revised competitive range, following discussions, where protester offered an unnecessary housing organization—which manifested to the agency the protester's lack of understanding of the solicitation requirements—and proposed unjustified and unacceptable staffing cuts; the evaluated deficiencies rendered unacceptable the protester's organizational structure, which was the primary technical evaluation criterion under the solicitation.

B-247331, April 29, 1992

92-1 CPD 404

Procurement

Competitive Negotiation

■ **Contract awards**

■ ■ **Initial-offer awards**

■ ■ ■ **Discussion**

■ ■ ■ ■ **Propriety**

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

Procurement

Competitive Negotiation

■ **Discussion**

■ ■ **Determination criteria**

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

Procurement

Competitive Negotiation

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Personnel**

■ ■ ■ ■ **Availability**

Protester's allegation that the awardee acted improperly with regard to the key personnel it proposed, based on the fact that the awardee replaced the individuals initially proposed as key per-

sonnel after award, is denied where there is no indication in the record that it was unreasonable for the awardee, when it submitted its initial proposal, to expect the proposed employees to be available for performance.

Procurement

Contractor Qualification

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

The General Accounting Office will not review an affirmative determination of responsibility by the contracting officer absent a showing of fraud or bad faith on the part of procuring officials or that definitive responsibility criteria in the solicitation were not met.

Procurement

Competitive Negotiation

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

Protest that agency improperly evaluated protester's and awardee's proposals is denied where record shows that the agency's evaluation of the proposals was reasonable and in accordance with the solicitation's evaluation criteria.

B-247669, April 29, 1992

92-1 CPD 405

Procurement

Bid Protests

- GAO authority

Protest grounds challenging the size status of a potential offeror and the handling of a Freedom of Information Act request are dismissed as not within the bid protest jurisdiction of the General Accounting Office.

Procurement

Competitive Negotiation

- All-or-none offers
- ■ Acceptance

Protest challenging agency's decision to require submission of proposals on an all-or-nothing basis is denied where agency conducted a market survey and reasonably based its decision to require all-or-nothing proposals on the results of that survey.

Procurement

Bid Protests

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

Procurement

Bid Protests

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

Protest contending that agency should have procured services in the framework of the Small Business Administration's section 8(a) program is dismissed where no allegation of regulatory violation, fraud, or bad faith was raised in the initial protest, and the allegation made in a later filing is untimely.

B-247077, April 30, 1992

92-1 CPD 406

Procurement

Competitive Negotiation

- Offers
- ■ Submission methods
- ■ ■ Facsimile

Where solicitation permits the submission of offers by telefacsimile machine only "if authorized" and does not elsewhere provide authorization, agency properly rejected facsimile offer submitted based upon alleged oral authorization of contract specialist; authorization for submission of facsimile proposals concerns the submission of proposals and therefore must be furnished by amendment to all offerors.

B-247146, April 30, 1992

92-1 CPD 414

Procurement

Contractor Qualification

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

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Reconsideration
- ■ ■ ■ Additional information

Protest that agency improperly failed to reconsider nonresponsibility determination based on new information after Small Business Administration's denial of a certificate of competency is denied where, although protester asserts that agency must have been aware of the information before award to another firm, the agency denies such knowledge and the record contains no persuasive evidence to the contrary.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where, during discussions, agency asked offeror to explain a termination for default under a prior contract, and offeror declined to provide specific information, agency properly obtained information from the activity which issued the termination without giving offeror an additional opportunity to explain the termination.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Where solicitation evaluation scheme provided that performance risk would be considered equally important as technical considerations, both of which were more important than price, agency properly made award to offeror with higher priced, higher technically rated proposal with low performance risk, because the agency reasonably concluded that the technical superiority of the awardee's proposal outweighed the protester's lower proposed price.

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