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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.C. § 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. No. 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 file number and date, e.g., B-248928, Sept. 30, 1992. 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 and in annual volumes. Decisions in these volumes should be cited by volume, page number, and year issued, e.g., 71 Comp. Gen. 530 (1992).

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Appropriations/Financial Management

B-250411, March 1, 1993***

Appropriations/Financial Management

Budget Process

- Advances
- ■ Repayment
- ■ ■ Interagency agreements

Appropriations advanced by an ordering agency under an Economy Act agreement, 31 U.S.C. § 1535, should be returned to the ordering agency by the agency filling the order to the extent that the amount advanced is in excess of actual costs incurred by the performing agency.

Appropriations/Financial Management

Bid Protests

- Funds transfer
- ■ Authority
- ■ ■ Interagency agreements

An Economy Act agreement, which terminated over 10 years ago, may not be treated as a reimbursable agreement by the performing agency, and the balance of funds transferred under the agreement may not be used to provide the agency with reimbursable authority.

Appropriations/Financial Management

Appropriation Availability

- Amount availability
- ■ Augmentation
- ■ ■ Interagency agreements

The retention by the performing agency of amounts in excess of actual costs incurred under an Economy Act agreement would result in an improper augmentation of the performing agency's appropriations.

B-251179, March 3, 1993***

Appropriations/Financial Management

Federal Assistance

- Grants
- ■ State/local governments
- ■ ■ Funding levels
- ■ ■ ■ Amount determination

Sections 3034(b)(3) and 3034(b)(5)(C) of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), respectively direct the Secretary of Transportation to grant to the Los Angeles County Transportation Commission \$695 million for fiscal years 1993

through 1997 and \$535 million for fiscal years 1998 through 2000. The two grant amounts are additive rather than inclusive.

Appropriations/Financial Management

Federal Assistance

■ Grants

■ ■ Cost allocation

Section 3034(b)(5)(C) of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), directs the Secretary of Transportation to grant funds to the Los Angeles County Transportation Commission in fiscal years 1998 to 2000. This directive does not establish a current grant which must be charged against the statutory limits on grants awarded through fiscal year 1997.

Appropriations/Financial Management

Federal Assistance

■ Grants

■ ■ State/local governments

■ ■ ■ Contingency funds

■ ■ ■ ■ Statutory restrictions

Sections 3034(b)(5)(C) and 3034(c) of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), direct the Secretary of Transportation to sign an agreement, by October 15, 1996, to grant funds to the Los Angeles County Transportation Commission in fiscal years 1998 to 2000. When entered into, the agreement will constitute a contingent commitment of future budget authority under section 3(a)(4)(C) of the Federal Transit Act, and will become subject to the statutory limits on such commitments.

B-246959.2, March 9, 1993

Appropriations/Financial Management

Judgment Payments

■ Interest

■ ■ Appeals

GAO declines to reverse Claims Group denial of interest on judgment in *Ulmet v. United States*, Cl. Ct. No. 470-85C. Contrary to claimant's view, 28 U.S.C. § 1961(c)(2)(1988) only waives sovereign immunity for interest where, under 31 U.S.C. 1304(b) (1988), the government has unsuccessfully appealed to the Supreme Court, which did not happen in this case.

B-248247, March 15, 1993***

Appropriations/Financial Management

Budget Process

■ Invoices

■ ■ Parking fees

■ ■ ■ Reimbursement

■ ■ ■ ■ Authority

The Bureau of the Mint has authority to reimburse the General Services Administration for a line item charge for parking included in an invoice for the rental of office space.

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Leases**
- ■ ■ **Parking fees**

The Bureau of the Mint, authorized by the General Services Administration (GSA) to acquire, by lease, employee parking at a commercial facility, may use appropriated funds to pay for the parking. GSA, however, is encouraged to scrutinize more closely agencies' requests for parking to ensure the parking is necessary to maintain efficient agency operations.

B-250884, March 18, 1993

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Specific purpose restrictions**
- ■ ■ **Meals**

Appropriations/Financial Management

Accountable Officers

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

Relief is granted to certifying official under 31 U.S.C. § 3528(b)(1)(B), who improperly charged against official reception and representation funds, the cost of meals provided to government employees during interagency working meetings. Charges were not specifically prohibited by statute and the government received value for the payments. Charges also were made in good faith because although payments were not in accord with prior decision of this Office, the certifying official was unaware of the decision, relied on agency guidance, and discontinued practice once it became clear that agency guidance conflicted with our decision.

B-248967, March 22, 1993***

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Invitees/guests**
- ■ ■ **Travel expenses**

Since the Farm Credit Administration's expenses are paid with funds that are not to be construed to be appropriated funds, 12 U.S.C. § 1250(b)(2), and since the Farm Credit Administration has specific statutory authority to pay the costs of nongovernment personnel to attend FCA meeting, 12 U.S.C. § 1249, the prohibition on the use of appropriated funds for such expenditures contained in 31 U.S.C. § 1345 does not apply to FCA.

Appropriations/Financial Management

Appropriation Availability

- **Purpose availability**
- ■ **Business cards**

The Farm Credit Administration may use its official reception and representation funds to purchase business cards for its employees whose jobs include official representation.

Appropriations/Financial Management

Accountable Officers

■ **Liability**

■ ■ **Debt collection**

■ ■ ■ **Amount determination**

Comptroller General decision, 70 Comp. Gen. 463 (1991), which modified prior cases instructing agencies to apply the "tainted day" rule in deciding the liability of fraudulent payees and the accountable officers who made the erroneous payments, applies prospectively to determinations of liability made after May 6, 1991. *Cf.* 63 Comp. Gen. 281 (1984). Any suggestion to the contrary in 70 Comp. Gen. 463 is modified accordingly.

Civilian Personnel

B-250203, March 1, 1993

Civilian Personnel

Relocation

- Household goods
- ■ Weight restrictions
- ■ ■ Liability
- ■ ■ ■ Waiver

An employee may not be relieved of his debt for excess weight of his household goods shipped incident to a permanent change of station. The weight limitation is statutory, and there is no authority to exceed it notwithstanding that the carrier may have underestimated the weight. The agency correctly determined the employee's indebtedness in accordance with the Federal Travel Regulation, 41 C.F.R. § 302-8.3(b)(5) (1991), based on a ratio of the excess weight to the total weight of the shipment applied to the total charges for the shipment.

B-250433, March 1, 1993

Civilian Personnel

Travel

- Travel expenses
- ■ Eligibility
- ■ ■ Annual leave
- ■ ■ ■ Return travel

While on annual leave, an Internal Revenue Service employee incurred extra expenses to return to his official duty station in San Jose, California, because his motor home broke down and he had to testify at a trial in his official capacity in Fresno, California, on the following day. His claim for the extra expenses is denied since he had the responsibility to place himself at his regular place of employment at his own expense, absent statutory or regulatory authority to the contrary.

B-248991, March 3, 1993

Civilian Personnel

Travel

- Travel expenses
- ■ Apportionment
- ■ ■ Official business
- ■ ■ ■ Presidential appointment

Two Interior Department employees who performed travel to Idaho and attended both official and political events allocated their expenses based on guidelines issued by the Counsel to the President. The travel expenses were apportioned based on the percentage of time spent engaged in official versus political events, and we have no reason to question the determination that certain events were official and should be reimbursed as allowable agency expenditures.

Civilian Personnel

Compensation

■ Eligibility

■ ■ Presidential appointment

Two Interior Department employees who performed travel to Idaho and attended both official and political events may be paid their salaries for the time spent on political events. The pay for these two positions is set by statute, and these officials are not subject to the Annual and Sick Leave Act. Since these officials are entitled to their salaries by virtue of their office rather than the performance of official duties, we have no basis to question the payment of their salaries during their travel, even while engaged in political activity.

B-250432, March 3, 1993

Civilian Personnel

Relocation

■ Residence transaction expenses

■ ■ Loan origination fees

■ ■ ■ Reimbursement

■ ■ ■ ■ Amount determination

A transferred employee may not be reimbursed a loan origination fee in excess of 1 percent of the loan amount unless the lender's administrative charges are itemized and are shown by clear and convincing evidence not to include prepaid interest, points, or a mortgage discount. 41 C.F.R. § 302-6.2(d)(1)(ii) (1991). Where a lender's letter merely provides a listing of the categories of expenses, and fails to specify the cost attributable to each, it does not meet the requirements of the Federal Travel Regulation and the employee may not be reimbursed in excess of 1 percent of the loan amount.

B-249184, March 5, 1993***

Civilian Personnel

Relocation

■ Residence transaction expenses

■ ■ Reimbursement

■ ■ ■ Eligibility

■ ■ ■ ■ Overseas personnel

Employee transferred from Alaska to a foreign post of duty, Singapore, in the interest of the government. He sold his Alaska residence after being notified by agency officials that he would not return to Alaska and that his return rights would be to his prior position in Savannah, Georgia. Upon completion of his tour of duty in Singapore, he was transferred back to his prior position which had been relocated to Charleston, South Carolina. Upon his transfer to Charleston, an official station other than the one from which he was transferred to the foreign post of duty, the employee became entitled to the allowable expenses incurred in the sale of his residence in Alaska since he sold it after he had been officially notified that he would not return to Alaska but to a different duty station in the United States. 5 U.S.C. § 5724a(a)(4)(A) (1988).

B-249816, March 8, 1993

Civilian Personnel

Leaves Of Absence

- Lump-sum payments
- ■ Computation
- ■ ■ Retention allowances

Employee who was receiving a 25 percent retention allowance under 5 U.S.C. § 5754 (Supp. II 1990), has retired from federal service and requested that the retention allowance be included in his lump-sum leave payment under 5 U.S.C. § 5551 as pay he would have received had he remained in the service until expiration of the period of the annual leave. The claim is denied. A retention allowance is an addition to basic pay in the nature of a bonus for remaining with the agency, payment is discretionary with the head of the agency and may be reduced or discontinued at any time, and a reduction or elimination may not be appealed. Payment as lump-sum leave would be inconsistent with the intent of the statute to retain an employee who would otherwise leave government service.

B-251143, March 8, 1993

Civilian Personnel

Relocation

- Miscellaneous expenses
- ■ Reimbursement
- ■ ■ Forfeiture

A transferred employee's claim may not be paid for an additional miscellaneous expense allowance based on the additional cost of orthodontic treatment his daughter received at his new duty station as a continuation of treatment begun at his old duty station. While an employee may be reimbursed the cost of orthodontic services paid for and forfeited upon a transfer of duty stations, the record in this case does not show that the employee, in fact, paid for treatment at his old duty station which his daughter did not receive due to his transfer.

B-250070, March 11, 1993

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Contract cancellation

A transferred employee may not be reimbursed the costs he incurred incident to a canceled contract to purchase a residence at his new duty station. Only expenses incurred in connection with a completed sale or purchase may be reimbursed. Although the employee later was transferred, the second transfer had nothing to do with the canceled contract. Rather, the contract was canceled because it was contingent on the sale of the employee's old residence and that contract fell through when the buyer was laid off causing the bank to withdraw his loan application.

B-250376, March 15, 1993

Civilian Personnel

Travel

- **Advances**
- ■ **Overpayments**
- ■ ■ **Debt collection**
- ■ ■ ■ **Waiver**

An employee assigned to duty at an overseas location was evacuated from there to a safe haven in Washington, D.C., because of civil unrest. Following completion of 180 days in an evacuation status, he was issued a travel order for an additional 180 days authorizing reduced per diem and automobile rental at his safe haven, and given a travel advance. He is not entitled to either a reduced per diem or automobile rental expenses since the orders issued were erroneous. Under 5 U.S.C. § 5523 (1988) the maximum period for which expenses incident to evacuation may be paid is 180 days following evacuation. However, since he incurred expenses in excess of the travel advance in detrimental reliance on the erroneous travel orders, repayment of the travel advance is waived under 5 U.S.C. § 5584 (1988).

B-252215, March 24, 1993

Civilian Personnel

Compensation

- **Increase**
- ■ **Approval**
- ■ ■ **Procedures**
- ■ ■ ■ **Effective dates**

Civilian Personnel

Compensation

- **Retroactive compensation**
- ■ **Increase**
- ■ ■ **Effective dates**

The Chairman, Joint Committee on Printing, asks whether a pay increase, may be effected retroactive to January 10, 1993, the date the outgoing Public Printer's pay plan for nonbargaining employees would have been effective had it not been stayed by direction of the Joint Committee on Printing. Because both the Public Printer and the JCP agreed prior to January 10, that the pay raise, once determined, should be effective on January 10, the increase may be made retroactive to that date.

B-249457, March 31, 1993

Civilian Personnel

Relocation

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

Husband and wife, who are federal employees working for different agencies, were transferred to the same duty station by their respective agencies on June 13 and August 12, 1991, respectively. Since they were transferred at distinctly different times, approximately 2 months apart, each employee is entitled to their own separate relocation allowances. 41 C.F.R. § 302-1.8 (1991), then in effect, limiting reimbursement to only one member of the immediate family when two or more family members are transferred to the same duty station, does not bar reimbursement since the transfers occurred at distinctly different times. Here, each agency may authorize and reimburse

relocation benefits to its employee, provided duplicate reimbursement is not made. *See Roberta J. Shoaf*, 57 Comp. Gen. 389 (1978).

B-250892, March 31, 1993

Civilian Personnel

Relocation**■ Meritorious claims**

Incident to a transfer, an agency erroneously authorized payment for annual leave, a bonus and severance pay to a foreign service employee. The Claims Group waived collection of the erroneous payments that had been made and the agency requested that the unpaid portion of the employee's claim be referred to Congress as meritorious claim. Here, the employee's position had been abolished and, therefore, it appears to have been in the employee's interest to accept the transfer, regardless of whether the agency authorized the benefits that it did. Since he did not relocate solely or substantially because of the erroneous advice and because he was allowed to retain a substantial sum in erroneously authorized benefits, we do not consider his claim appropriate for submission as a meritorious claim.

B-251556, March 31, 1993

Civilian Personnel

Relocation**■ Residence transaction expenses****■ ■ Loan origination fees****■ ■ ■ Reimbursement****■ ■ ■ ■ Amount determination**

Claim for reimbursement of a loan origination fee in excess of 1 percent of the loan amount is denied because the lender's administrative charges are not itemized as required by section 302-6.2(d)(1)(ii) of the Federal Travel Regulation. General, explanatory letters from the lender indicating that the fee does not include interest, points, or a mortgage discount and is customary in the area do not satisfy the itemization requirement.

B-251559, March 31, 1993

Civilian Personnel

Relocation**■ Residence transaction expenses****■ ■ Reimbursement****■ ■ ■ Eligibility****■ ■ ■ ■ Permanent residences**

Transferred employee purchased a residence in Mobile, Alabama, approximately 263 miles from his new duty station in Birmingham, Alabama. The employee's position requires considerable travel and he works a compressed work schedule of 4 days each week, with each Monday off. He maintains an apartment in Birmingham and when at headquarters, commutes to and from work from the apartment. The employee is not entitled to reimbursement of expenses incurred in the purchase of the Mobile residence. The requirement under the FTR, 41 C.F.R. § 302-1.4(k) (1992), that the employee "regularly commutes" from the residence in question, contemplates commuting on a daily basis, not just on weekends or occasionally during the week.

Military Personnel

B-250903, March 9, 1993

Military Personnel

Pay

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

Military Personnel

Pay

- Reenlistment bonuses
- ■ Debt collection

A member of the uniformed services who did not complete his term of enlistment was required to repay the unearned portion of a reenlistment bonus which he had been paid when he reenlisted. At the time he was discharged, part of the debt was offset against amounts due him for active duty pay and allowances and unused accumulated leave. The balance owed, due to recoupment of the unearned portion of the bonus, is not appropriate for waiver consideration, since it was a valid payment when made and therefore is not an erroneous payment for purposes of waiver.

Military Personnel

Pay

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

Due to administrative error a member was overpaid when he received active duty pay and allowances after he was discharged from the uniformed service. The member, who was told at the time of his discharge that the pay and allowances due him up to the date of discharge were being offset against his debt, should have known he was not entitled to active duty pay and allowances after discharge. Thus he is not without "fault" in the matter and waiver may not be granted.

B-251159, March 16, 1993

Military Personnel

Relocation

- Household goods
- ■ Commuted rates
- ■ ■ Weight certification

The General Accounting Office will not disturb an agency's determination of the net weight of a service member's household goods shipment in the absence of clear error or fraud. The burden of establishing fraud rests on the party alleging it.

B-251041, March 18, 1993

Military Personnel

Relocation**■ Dislocation allowances****■ ■ Eligibility**

A member received Permanent Change of Station (PCS) orders to Saudi Arabia with concurrent travel for his dependents. After they vacated their permanent quarters, his orders were amended to allow only the member to travel. His dependents were considered to have been evacuated to a safe haven. The member received a Dislocation Allowance (DLA) when his dependents' safe haven became their designated place. The member's claim for an additional DLA for a PCS is denied because his dependents did not complete a move to a new location before his orders were amended. He is not entitled to a DLA as a member without dependents because he occupied government quarters following both his PCSs.

B-251519, March 18, 1993

Military Personnel

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

Retired member of the Air Force elected participation in Reserve Component Survivor Benefit Plan but deductions from his retired pay were erroneously discontinued after 3 months. Member should have made inquiries about the unexplained rise in retired pay which occurred as a result and since the member is not without "fault," waiver may not be granted.

B-252057, March 18, 1993

Military Personnel

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

The debt of a Navy member who erroneously was paid both a basic allowance for subsistence and separate rations may be waived under 10 U.S.C. § 2774, where the record showed that the member was without fault, and there was no indication of fraud, misrepresentation, or lack of good faith on her part.

B-251046, March 26, 1993

Military Personnel

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

Where retired officer was advised, following a break in service, that exemption contained in 5 U.S.C. § 5532(e) to dual compensation statutes was lost, overpayment of retired pay from date of such advice is not for waiver under 10 U.S.C. § 2774, even though officer had been advised that new waiver would be forthcoming because officer was partially at fault in not realizing waiver might not be granted and that he would have to repay the money.

B-249916, March 30, 1993

Military Personnel

Pay

■ **Basic quarters allowances**

■ ■ **Rates**

■ ■ ■ **Determination**

■ ■ ■ ■ **Dependents**

Two married members were issued competent orders to different duty stations. Their common class of dependents were split due to those orders. Female member was assigned family-type government quarters for one child and herself. Male member with remaining children residing in nongovernment housing, was receiving basic allowance for quarters (BAQ) at with-dependent rate. Notwithstanding that quarters were available at female member's duty station for the entire class of dependents, under these circumstances since the class of dependents was split by competent orders the male member may continue to receive BAQ at with-dependent rate until the remaining dependents occupy government quarters.

Miscellaneous Topics

B-247155.2, March 1, 1993

Miscellaneous Topics

Environment/Energy/Natural Resources

- Environmental protection
- ■ Air pollution
- ■ ■ Administrative settlement
- ■ ■ ■ Authority

GAO's Office of General Counsel did consider EPA's February 12, 1991, Policy on the Use of Supplemental Environmental Projects in EPA Settlements in developing our opinion in B-247155, and we continue to believe that certain projects allowed under that policy are not authorized by section 205 of the Clean Air Act, as amended.

B-250888, March 1, 1993

Miscellaneous Topics

Housing/Community Development

- Housing
- ■ Bids
- ■ ■ Submission time periods
- ■ ■ ■ Extension

Pursuant to section 21A(c)(2)(B) of the Federal Home Loan Bank Act, 12 U.S.C. § 1441a(c)(2)(B), the Resolution Trust Corporation is not authorized to extend the exclusive bidding period for single-family residential properties in its affordable housing program beyond 97 days, but may remarket property if significant defects occurred in the initial marketing effort. Further, RTC is authorized to remarket single-family properties under the affordable housing program where a sales contract with a qualifying purchaser falls through with 97 days being the total number of days the property is offered for sale under the program.

B-249350, March 3, 1993***

Miscellaneous Topics

Environment/Energy/Natural Resources

- Natural resources
- ■ Leases
- ■ ■ Interest
- ■ ■ ■ Computation

Where section 506 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(2), charged the Secretary of the Interior to promulgate regulations specifying the interest rates to be used in calculating compensation due canceled lessees, the Secretary may establish any interest rate that is not arbitrary or inconsistent with the statute.

Procurement

Late cases

B-249939, December 21, 1992 REDACTED VERSION

Procurement

Competitive Negotiation

■ Discussion

■ ■ Adequacy

■ ■ ■ Criteria

Agency did not conduct meaningful and equal discussions with the protester since the protester, the low priced offeror, was not advised during discussions of significant perceived weaknesses in its initial proposal while in contrast the awardee received discussion questions which encompassed the perceived weaknesses in its initial proposal.

B-245571.5, January 26, 1993 REDACTED VERSION 93-1 CPD 273

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that technical evaluation panel failed to adhere to solicitation's technical evaluation factors which required comparative assessments of technical proposals is denied where record shows that panel carefully determined strengths and weaknesses of each technical proposal and provided source selection official with thorough evaluation and relative ranking of each proposal.

Procurement

Competitive Negotiation

■ Contracting officer findings

■ ■ Offers

■ ■ ■ Technical equality

Protest challenging source selection official's determination that protester's and awardee's proposals are essentially technically equal is denied where contracting officer reasonably determined that technical evaluation panel's conclusions did not reflect a significant difference in the technical proposals.

Procurement

Competitive Negotiation

- Contracting officer findings
- ■ Offers
- ■ ■ Technical equality

Agency properly awarded contract for medical evacuation services to the low-priced offeror where the contracting officer reasonably found that the awardee's and the protester's technical proposals are essentially equal.

B-250323, January 26, 1993 REDACTED VERSION

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Although an agency could consider information obtained from an offeror during a pre-award survey in evaluating the offeror's technical acceptability, the agency could not, in the absence of urgency, reject an offer that was otherwise in line for award without inquiring of the offeror as to the intent and meaning of the information, where the import and the meaning of the information is not clear.

B-250822, B-250822.2, February 19, 1993 REDACTED VERSION

Procurement

Bid Protests

- GAO authority
- ■ Protective orders
- ■ ■ Information disclosure

One of two outside counsel for awardee—a subsidiary of a parent corporation—is denied admission to a General Accounting Office protective order where the attorney's role as a competitive decisionmaker presents too great a risk of inadvertent disclosure of protected information given that the attorney serves as a corporate officer for two other subsidiaries and has represented at least nine subsidiaries in the last 3 years, suggesting that the attorney has a management relationship with the companies that cuts across corporate boundaries.

Procurement

Competitive Negotiation

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

Protester's contention that agency unreasonably selected a higher rated, lower-risk proposal priced \$18.8 million above the protester's proposal is denied where: (1) since the solicitation called for award of a fixed-price incentive contract (under which the government would absorb 70 percent of the incurred costs between the target and ceiling prices), the agency performed a limited price

realism analysis to consider the impact of costs in excess of the target price, and as a result of this analysis, reasonably concluded that the protester's actual price would be approximately \$2.6 million higher than its proposed price; and (2) the agency made its price/technical tradeoff after reasonably quantifying and considering the possible additional costs associated with selection of the protester's higher risk proposal.

Procurement

Competitive Negotiation

■ Discussion

■ ■ Adequacy

■ ■ ■ Criteria

Challenge to adequacy of discussions is denied where the agency pointed out all deficiencies in the protester's proposal, but did not point out areas where the protester's technically acceptable approach was relatively less desirable than other offerors' approaches.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Argument that agency improperly evaluated technical proposals is denied where the record indicates that the evaluation was reasonable and in accordance with the stated evaluation criteria, and where the protester fails to show that the agency's conclusions were irrational or that offerors were treated disparately.

B-250834, February 22, 1993 REDACTED VERSION

Procurement

Competitive Negotiation

■ Offers

■ ■ Competitive ranges

■ ■ ■ Exclusion

■ ■ ■ ■ Administrative discretion

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

Contracting agency reasonably excluded protester's proposal from the competitive range as technically unacceptable where the record shows that the technical evaluators properly downgraded protester's proposal in areas found deficient in accordance with solicitation evaluation criteria.

Procurement

Competitive Negotiation

- Offers
 - ■ Evaluation
 - ■ ■ Personnel experience
-

Procurement

Competitive Negotiation

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

Protest that proposal evaluation was irrational and inconsistent with solicitation criteria requiring experience and expertise with one brand of computer equipment to be supplied and serviced by the successful offeror is denied where a reasonable reading of the solicitation as a whole indicates that such specific experience and expertise was not a requirement and the record shows that the evaluation was otherwise reasonably based.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency was not required to conduct discussions regarding the relationship of the protester's past contracts to the current solicitation because discussions would not provide an opportunity to change that relationship.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost realism
- ■ ■ ■ Analysis

Protest that price analysis was inaccurate and might not reflect actual difference between higher-priced protester and lower-priced awardee is denied where the consequence of any alleged defects in the analysis are immaterial in comparison to the large disparity in the prices submitted by the competing offerors.

B-249513.4, March 1, 1993***

93-1 CPD 182

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

The protester has the duty to set forth a detailed statement of all legal and factual grounds in its initial protest; issues not reasonably identified as protest grounds will not be considered as such by the General Accounting Office in response to protester's request for reconsideration of dismissal of its protest as untimely.

B-249840, March 1, 1993

Procurement

Payment/Discharge

- Shipment
- ■ Damages
- ■ ■ Notification

Military-Industry Memorandum of Understanding (MOU) governing claims for loss or damage to household goods provides that a carrier will accept written notice of loss/damage discovered after delivery as overcoming the delivery receipt's presumed correctness if the agency dispatches the notice within 75 days after delivery. Dispatch from the claims office controls, even though the notice may not actually leave the installation until the 76th day as evidenced by the installation's postage meter stamp. Air Force regulation directing the claims officer to ensure the notice is post-marked by the 75th day creates no right for the carrier independent of the MOU.

B-250936, March 1, 1993

93-1 CPD 183

Procurement

Bid Protests

- Definition

Note sent to agency prior to bid opening complaining that specifications in solicitation were "written around" one particular supplier so that only that supplier could comply and asking to be "advised" constitutes a protest because it conveys an expression of dissatisfaction and requests corrective action.

Procurement

Bid Protests

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

Protest to GAO not filed within 10 working days of bid opening was timely, even though the bid opening was adverse action to the protester's agency protest, when protester initially was notified that it was the successful bidder, and its protest was filed within 10 working days of being subsequently notified by the agency of its determination to award the contract to another bidder.

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest alleging that specifications are unduly restrictive is sustained because agency failed to show that the requirements in the solicitation were necessary to meet its minimum needs.

Procurement

Sealed Bidding

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

Where an invitation for bids for truck forklifts required bidders to furnish descriptive literature establishing their offered product's compliance with the specifications, the agency properly rejected as nonresponsive a bid that included descriptive literature showing that the offered product operated on an 80-volt system, while the specifications required that the forklifts be designed for 36 volts, since this conflict rendered the offered product incompatible with the agency's current maintenance and repair system.

Procurement

Bid Protests

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

Protest that solicitation specifications are unnecessarily restrictive is untimely, when the alleged improprieties were apparent from the face of the solicitation, but were not protested until after bid opening.

Procurement

Competitive Negotiation

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

Agency reasonably made award based on cost where the technical proposals were found to be substantially equal.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency conducted meaningful, and not misleading, discussions, where protester with highly rated, higher cost technical proposal was advised of the specific technical weaknesses in its proposal and that the agency was interested in a cost effective approach.

Procurement

Competitive Negotiation

- **Technical evaluation boards**
- ■ **Conflicts of interest**
- ■ ■ **Allegation substantiation**

There is no evidence that the Chairman of the technical review team, who had some official business contacts with a subcontractor of the awardee, had an improper conflict of interest that improperly influenced the award.

B-251138, March 1, 1993

93-1 CPD 186

Procurement

Sealed Bidding

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

Where workpapers contain clear and convincing evidence that the low bidder mistakenly omitted an element of cost from its bid, the contracting agency properly permitted upward correction of the bid; even though the intended bid could not be determined exactly, it would fall within a narrow range of uncertainty and would remain low after correction.

B-251355, March 1, 1993

93-1 CPD 187

Procurement

Sealed Bidding

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

Where bid contains a discrepancy between the unit and extended prices for an item, the bid may be corrected downward to reflect a unit price that is consistent with the extended price if the unit price clearly is out of line with both the government estimate and the prices offered by the other bidders, and only the extended price reasonably can be regarded as having been the intended bid.

B-250983, March 2, 1993

93-1 CPD 190

Procurement

Competitive Negotiation

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

Downscoring of protester's proposal for offering a drug testing plan based on reasonable suspicion rather than no cause (*i.e.*, random testing) was unobjectionable; agency reasonably determined that this plan did not ensure the efficiency of the testing to the same degree as the random testing proposed by the awardee.

Procurement

Specifications

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

Awardee's proposed property satisfied requirement in solicitation for offers for a 10-year lease that the property be "at" the airport, where the proposed property is located immediately adjacent to the airport; geographic restrictions are inherently restrictive of competition and should not be read in a way that unnecessarily further restricts competition.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Weighting

In a negotiated procurement for the lease of office space, where the solicitation for offers set forth the price and technical evaluation factors without stating their relative importance, the procuring agency properly evaluated all the factors as being of approximately equal weight, and determined that award should be based upon the lowest evaluated price because the offerors were essentially equal considering all the technical factors.

Procurement

Competitive Negotiation

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

Where the solicitation for offers for rental office space allows offerors to offer varying amounts of square footage and provides that the evaluation of price would be dependent upon actual amount of square footage offered, the agency reasonably did not normalize the protester's and awardee's offers of different amounts of square feet of space.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Protest allegation that the agency used the wrong total square footage figure to calculate the protester's net present value price per square foot is denied, where, although the agency did use the wrong square footage figure, the protester was not prejudiced thereby because application of the correct figure would not result in the protester being lower priced than the awardee.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost estimates
- ■ ■ ■ Service charges

Protest allegation that the agency in its price evaluation should not have escalated the protester's future service charges per annum because the protester, as the incumbent lessor, assertedly had rarely increased service charges, is denied, where the solicitation informed offerors that price escalations would be evaluated using a net present value analysis and the protester proposed an escalation that effectively assigned the risk of increased service charges to the government.

B-250991, March 2, 1993

93-1 CPD 192

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Conflicting evidence
- ■ ■ ■ Burden of proof

Where there are conflicting statements regarding the timeliness of a protest, the General Accounting Office will resolve any reasonable doubt in favor of the protester and find the protest timely under the Bid Protest Regulations, unless the agency provides proof sufficient to support its allegations.

Procurement

Bid Protests

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

Bidder, who is not eligible for award under an invitation for bids for refuse collection services because the bidder would not be considered a responsible contractor to perform at its bid price in view of the substantial increase in landfill/dumping fees in the 5 month period from bid opening,

for which the bid price cannot properly be increased, is not an interested party under the Bid Protest Regulations eligible to protest the cancellation of the solicitation.

B-251019, March 2, 1993**93-1 CPD 193**

Procurement

Sealed Bidding**■ Bids****■ ■ Evaluation****■ ■ ■ Approved sources**

Protest that agency improperly approved awardee's product for inclusion on qualified products list despite lack of detail concerning certain test results is denied where test results in fact were sufficient to show that awardee met most qualification requirements, and any relaxed requirements as to testing details had been similarly relaxed for protester.

B-251068, B-251068.2, March 2, 1993**93-1 CPD 199**

Procurement

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

Protest that agency improperly conducted cost-realism analysis is denied where record shows that no cost-realism analysis was performed during price evaluation.

Procurement

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

Protest that agency improperly revised independent government estimate (IGE) after reviewing initial offers is denied where IGE was not disclosed in solicitation such that protester could have been misled, and there is no argument or evidence that the IGE as revised did not reflect statement of work in solicitation.

Procurement

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

Protest that agency failed to conduct meaningful discussions is denied where record shows that agency brought to protester's attention all significant areas of weakness identified by evaluators.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that agency evaluated proposals using undisclosed evaluation criteria is denied where record shows that all matters taken into consideration during evaluation were encompassed by or reasonably related to stated evaluation criteria.

B-249700.2, March 3, 1993

93-1 CPD 194

Procurement

Bid Protests

■ GAO procedures

■ ■ GAO decisions

■ ■ ■ Reconsideration

Decision dismissing protest as untimely is affirmed where record supports General Accounting Office's conclusion as to the date protester learned of protest basis.

B-250603.2, March 3, 1993

93-1 CPD 195

Procurement

Noncompetitive Negotiation

■ Use

■ ■ Justification

■ ■ ■ Urgent needs

Agency's award of a non-competitive sole-source contract based on urgency, in lieu of exercising option under protester's contract, was unobjectionable where agency reasonably determined that the protester's poor financial condition rendered the firm unable to perform satisfactorily; referral to the Small Business Administration for a certificate of competency review was not required under these circumstances.

B-250699.2, March 3, 1993 REDACTED VERSION

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that offeror should have been given credit in technical evaluation for proposing all desired or preferred features listed in the solicitation for intercom system, in addition to all mandatory requirements, is denied where the solicitation provided that proposed desired features would be evaluated in the context of the entire proposed system and in relation to the system's proposed use and the record does not show that the offered desired features were viewed by the agency as unusually advantageous.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Construction contracts

On a construction contract incorporating the Buy American Act provisions, which require the supply of domestic construction materials, a contracting officer may rely on an offeror's representation that it will furnish domestic construction material, without further investigation, unless the contracting officer has reason to doubt the representation.

B-251001, March 3, 1993

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Government estimates
- ■ ■ Wage rates

Protest challenging agency's use of undisclosed labor hours estimate for janitorial services is denied where the solicitation places offerors on notice that their proposed labor hours will be evaluated, and the protester does not challenge the accuracy of the agency's estimate.

Procurement

Competitive Negotiation

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

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

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency did not conduct meaningful discussions is denied where the agency advised offeror about the perceived deficiencies in its proposal, including the offeror's failure to submit its proposed minimum labor hour estimates for services required under the contract; an agency is not required to reopen discussions where a deficiency becomes apparent only after the agency has evaluated data an offeror submits to correct informational deficiencies raised during discussions.

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 outside the competitive range where agency reasonably found that the proposal, which did not follow the format specified in the solicitation's instructions, failed to address the essential tasks to be performed under the contract and would require major revisions to become technically acceptable.

Procurement

Bid Protests

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

Protester whose proposal was properly eliminated from the competitive range is not an interested party to challenge award of the contract where there was at least one other proposal besides the awardee's determined to be within the competitive range.

B-251465, B-251465.2, March 3, 1993

Procurement

Special Procurement Methods/Categories

- In-house performance
- ■ Administrative discretion
- ■ ■ GAO review

Decision to cancel solicitation and to perform the services in-house is a matter of executive policy which the General Accounting Office does not review under its bid protest function except when the agency issues a competitive solicitation for cost comparison purposes under Office of Management and Budget Circular No. A-76.

B-252241.2, March 3, 1993

Procurement

Bid Protests

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

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Determination criteria
- ■ ■ ■ Time/date notations

For the purposes of establishing timeliness, a protest is filed when actually received by the General Accounting Office.

B-249966, March 4, 1993

Procurement

Payment/Discharge

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

Tender of an item to a carrier is established as an element of a *prima facie* case of carrier liability where the item allegedly lost or damaged is reasonably related to items shown on the inventory of a carton's contents, particularly where it would not have been unusual to pack the item in that carton, and the carrier did the packing and prepared the inventory list.

B-250188, March 4, 1993

Procurement

Payment/Discharge

- Shipment
- ■ Damages
- ■ ■ Amount determination

The General Accounting Office will not question an agency's calculation of the value of damages to items in a shipment of household goods unless the carrier presents clear and convincing evidence that the agency's calculation was unreasonable.

B-250302.2, March 4, 1993

93-1 CPD 202

Procurement

Sealed Bidding

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

Agency's cancellation of solicitation after bid opening on the basis that all acceptable bids are unreasonable in price is proper where the current low bids exceed the prior contract prices by more than 45 percent and the protester has not shown that the agency's comparison of these prices was flawed.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Determination criteria

Where an agency's determination of nonresponsibility is based on inaccurate or incomplete information or upon a misinterpretation of available information, the determination is unreasonable.

Procurement

Competitive Negotiation

- Unbalanced offers
- ■ Rejection
- ■ ■ Propriety

Protest that offer must be rejected as unbalanced and front-loaded is denied where offer does not include any significantly enhanced pricing and price for mobilization and demobilization did not constitute an advance payment.

Procurement

Contractor Qualification

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

Procurement

Contractor Qualification

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

Allegation that more than 50 percent of awardee's cost of contract performance incurred for personnel will be expended for subcontractor employees is dismissed, since it concerns a matter of responsibility; General Accounting Office will not review a contracting agency's affirmative responsibility determination absent a showing of fraud or bad faith or that definitive responsibility criteria in the solicitation were not met.

Procurement

Competitive Negotiation

- Offers
 - ■ Evaluation
 - ■ ■ Personnel experience
-

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Where solicitation required offerors to document relevant experience of proposed personnel, as well as corporate experience, and to discuss potential problems in planned study involving screening of 3.5 million people, and to identify solutions to potential problems, evaluators reasonably found protester's proposal unacceptable where proposal contained no evidence of experience with studies involving more than 5,000 subjects and failed to address or propose solutions to problems associated with mass mailing and follow-up of persons who did not respond.

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Withdrawal
- ■ ■ Propriety

Contracting officer properly withdrew a small business set-aside where all small business proposals received were technically unacceptable.

Procurement

Sealed Bidding

- Bids
 - ■ Interpretation
 - ■ ■ Intent
 - ■ ■ ■ Evidence
-

Procurement

Sealed Bidding

- Bids
- ■ Prices
- ■ ■ Lodging

In procurement for lodging and conference services, agency acted properly in not evaluating an \$800 hotel account credit added by protester at the end of its pricing schedule, where contracting officials reasonably interpreted the credit as intended for miscellaneous expenses and not as a reduction in contract price.

Procurement

Socio-Economic Policies

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

The General Accounting Office's review of a Small Business Administration (SBA) certificate of competency (COC) determination based on the SBA's failure to consider vital information is limited to circumstances where a procuring agency's actions prevent SBA from making a reasonable judgment on the basis of the relevant facts. The SBA did not fail to consider vital information in denying a small business concern's application for a COC where SBA reached a conclusion based on appropriate information furnished by the agency and the protester.

Procurement

Sealed Bidding

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

Agency properly rejected bid as nonresponsive where bid's descriptive literature demonstrated its offered product's noncompliance with an invitation for bid specification requirement.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

The requirement for meaningful discussions did not obligate agency to advise protester of proposal weakness, which impacted performance risk assessment of otherwise acceptable proposal, that was not deemed significant during evaluation, even though it ultimately became a determinative factor in selecting awardee's closely-ranked proposal.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Adjectival ratings

Where solicitation provided that technical and management proposals would be rated on a color/adjectival and a risk basis and both technical and management were of more importance

than cost, selection of a higher priced, lower risk proposal over lower priced, higher risk proposal was proper since the agency reasonably found the protester's otherwise acceptable proposal involved greater risk of accomplishing the solicitation's requirements.

B-250699.4, March 5, 1993 REDACTED VERSION 93-1 CPD 251

Procurement

Competitive Negotiation

- Discussion reopening
 - ■ Propriety
 - ■ ■ Best/final offers
 - ■ ■ ■ Alternate offers
-

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Performance capabilities

Where a solicitation allows for alternative approaches to meeting performance requirements, the manner in which offerors are to fulfill the requirements need not be specified in the solicitation. Nor must the agency advise a technically acceptable offeror during discussions that it considers another approach to be superior.

Procurement

Competitive Negotiation

- Offers
 - ■ Evaluation
 - ■ ■ Technical acceptability
-

Procurement

Competitive Negotiation

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

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Thus, the General Accounting Office (GAO) will not make an independent determination of the merits of technical proposals; rather, GAO will examine the agency evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. Mere disagreement with the agency does not render the evaluation unreasonable particularly where as here, the procurement concerns sophisticated technical hardware.

B-251055, March 5, 1993 93-1 CPD 210

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Weighting
- ■ ■ ■ Bias allegation

Protest that technical evaluation scheme in request for proposals for a "prime vendor" to purchase and distribute pharmaceuticals to member hospitals and clinics improperly favors large

pharmaceutical wholesalers is denied where protester has not shown the evaluation scheme to be unreasonable, and where two most important technical evaluation factors, alleged by protester particularly to favor large businesses, are integrally related to the fundamental purpose of the contract, as set forth in the statement of work—to quickly deliver medically necessary drugs to hospitals and clinics.

Procurement

Competitive Negotiation

■ Competitive advantage

■ ■ Subcontractors

■ ■ ■ Prior contracts

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Evaluation criteria

■ ■ ■ Prior contracts

■ ■ ■ ■ Contract performance

Evaluation of offerors' proposed small and small disadvantaged business subcontracting plans rather than on the basis of prior history of subcontracting with small and small disadvantaged business is reasonable, because under the Federal Acquisition Regulation there is no legal requirement for a company to subcontract with small and small disadvantaged firms until it has been awarded a government contract incorporating the subcontracting plan set forth in its proposal.

Procurement

Competitive Negotiation

■ Use

■ ■ Criteria

Procurement

Socio-Economic Policies

■ Small business set-asides

■ ■ Use

■ ■ ■ Administrative discretion

Contracting officer's decision to solicit offers on an unrestricted basis, rather than through a small business set-aside, is not an abuse of discretion where: (1) the contracting officer made reasonable efforts to ascertain whether offers would be submitted from two or more responsible small business concerns capable of performing the work at fair market prices before determining that there was no reasonable expectation of receiving such offers; and (2) the agency's small business specialist and a small business representative both concurred with the decision.

Procurement

Socio-Economic Policies

■ Small business set-asides

■ ■ Use

■ ■ ■ Administrative discretion

Protest that 20 percent of agency's requirements for pharmaceutical "prime vendors" for the entire country should be set aside for award under the Small Business Administration's 8(a) program is dismissed, where the protester has not made a showing of possible fraud or bad faith on the part of government officials or that regulations have been violated.

Procurement

Bid Protests

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

New and independent grounds of protest first raised in protester's comments on agency report must independently satisfy the timeliness requirements of Bid Protest Regulations, since Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues.

B-248904.3, March 8, 1993

93-1 CPD 211

Procurement

Bid Protests

- **Information disclosure**
- ■ **Administrative determination**
- ■ ■ **GAO review**

Protest that agency improperly failed to disclose vital information concerning condition of rocket motor selected by protester from list of available government furnished property is denied where protester was on actual or constructive notice of problems with condition and storage of motors, and the downgrading of protester's proposal for selection of motor was based, not on factors related to the undisclosed information, but on factors known to the protester—i.e., its assumption of a 90 percent yield rate for motors that were 20 to 30 years old and had not flown for 7 years.

B-250992.2, March 8, 1993

93-1 CPD 212

Procurement

Competitive Negotiation

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

Agency decision to eliminate offeror's proposal from award consideration was reasonable where the offeror's proposal did not provide much of the information specifically requested in the solicitation and during discussions.

B-251105, March 8, 1993

93-1 CPD 213

Procurement

Bid Protests

- **Bias allegation**
- ■ **Allegation substantiation**
- ■ ■ **Burden of proof**

Procurement

Competitive Negotiation

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

Where agency includes in the evaluation scheme a requirement that items offered be available to commercial or government markets, the General Accounting Office will consider a protest claiming that awardee's items do not meet the availability requirement.

Procurement

Bid Protests

- Moot allegation
 - ■ GAO review
-

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Contention that agency could not reasonably conclude that awardee's hardware and software met the availability requirements of the solicitation is denied where the record shows that the items had been sold in both the commercial and government markets and limited deliveries of the items had been made at the time of award.

B-250695.2, March 9, 1993

93-1 CPD 214

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior dismissal is denied where protester does not show that decision contains errors of fact or law or that information not previously considered warrants reversal of decision, but basically repeats arguments made during consideration of the original protest.

B-251073, March 9, 1993

93-1 CPD 215

Procurement

Socio-Economic Policies

- Small business 8(a) subcontracting
 - ■ Cancellation
 - ■ ■ Resolicitation
 - ■ ■ ■ Small business set-asides
-

Procurement

Socio-Economic Policies

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

Protest is denied where record does not demonstrate that Small Business Administration (SBA) officials violated applicable regulations or engaged in fraud or bad faith in determining not to award contract offered under section 8(a) of the Small Business Act on the basis of a competition; record indicates that SBA reasonably determined on the basis of the information available to it prior to issuance of the solicitation that there was no reasonable expectation that at least two 8(a) firms would submit offers for any particular 8(a) quantity offered under a national bulk fuels procurement.

Procurement

Competitive Negotiation

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

Proposal was properly eliminated from the competitive range where the agency reasonably concluded that deficiencies in technical approach, personnel qualifications, facilities, and project management rendered the proposal technically unacceptable.

Procurement

Bid Protests

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

Procurement

Bid Protests

- Intellectual property
- ■ Disclosure
- ■ ■ Allegation substantiation
- ■ ■ ■ Lacking

The General Accounting Office will not consider a protest based on an allegation of improper government disclosure of proprietary information 11 years ago, since the protest does not involve the disclosure of information in the present solicitation.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision dismissing protest on procedural grounds is affirmed; protester's argument that General Accounting Office waived its right to dismiss the protest by stating in an earlier, related decision that the remaining protest issues would be addressed "on the merits" in a future decision is without merit and provides no basis for reconsideration.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where request primarily repeats the protester's interpretation of a solicitation provision that allegedly entitled it to a waiver of a bid sample requirement, and the initial decision denying the protest considered and rejected the protester's interpretation.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

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

Procurement

Bid Protests

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

Generally, in determining whether comments on the agency report were timely filed within 10 working days of the protester's receipt of the agency report, the General Accounting Office (GAO) will rely upon its time/date stamp, unless there is other evidence to show actual earlier receipt by GAO.

Procurement

Contract Management

- Contract administration
- ■ Options
- ■ ■ Use
- ■ ■ ■ Size status

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size status
- ■ ■ Self-certification

Where contractor properly self-certified as a small business in its offer, was awarded a contract and later was acquired by a large business, agency is not required to re-examine contractor's size status in order to exercise option under the contract, since the size status at time of self-certification controls.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Requirement for meaningful discussions is satisfied when all offerors in the competitive range are advised of the weaknesses, deficiencies, and excesses in their proposals and are given the opportunity to revise their proposals through the submission of best and final offers. Agencies are not

obligated to afford offerors all-encompassing discussions or to discuss every element of a proposal that did not receive the maximum possible score.

Procurement

Competitive Negotiation

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

Contracting agency properly decided to award an indefinite-quantity contract to the offeror with the higher rated, higher priced proposal where the solicitation stated that technical factors would be considered significantly more important than price and the awardee's proposal was rated significantly higher than the protester's in nearly every technical evaluation factor.

B-251436, March 10, 1993

93-1 CPD 223

Procurement

Competitive Negotiation

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

Cancellation and resolicitation of procurement was proper where agency misclassified advertisement in the *Commerce Business Daily* and so failed to effectively notify firms most likely to respond.

B-251575.2, March 10, 1993

93-1 CPD 224

Procurement

Bid Protests

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

Agency took prompt corrective action in response to protest challenging solicitation requirements, and protester therefore is not entitled to reimbursement of its costs of filing and pursuing its protest, where agency initiated an investigation of protest allegations, determined that an in-depth review of the specifications was necessary, and canceled solicitation by the agency report due date.

Procurement

Bid Protests

- **Administrative remedies**
- ■ **Implementation**
- ■ ■ **Timeliness**

In determining whether agency took prompt corrective action in response to protest, General Accounting Office (GAO) measures promptness from the time the protest was filed at GAO, not from the time the protester first raised the matter at the agency level.

Procurement

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

Protest that agency should have evaluated alleged "operating cost advantages" of selecting protester's building as opposed to awardee's building is denied where solicitation did not state that the agency intended to conduct such an evaluation.

Procurement

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

Protester's allegation that contracting agency improperly evaluated both its own and awardee's technical proposals under solicitation which sought offers for the design and construction of building is denied where record shows that the agency reasonably evaluated the proposals under each of the solicitation evaluation criteria.

Procurement

Competitive Negotiation**■ Offers****■ ■ Interpretation****■ ■ ■ Office space**

Procurement

Specifications**■ Minimum needs standards****■ ■ Design specifications****■ ■ ■ Office space**

Agency reasonably found that awardee's proposal offered the required office space based upon an "errata sheet" submitted with its drawings which specifically stated that the areas on the drawings were, in some cases, incorrect, and which listed the correct dimensions showing that the proposed facility would comply with the office space requirement.

Procurement

Specifications**■ Minimum needs standards****■ ■ Competitive restrictions****■ ■ ■ GAO review**

Solicitation requirement that both hardware and software maintenance services be provided by the same contractor unduly restricts competition where the record does not provide a reasonable basis for the determination that the combined requirement reflects the agency's minimum needs.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where requesting party fails to show any legal or factual basis warranting reconsideration of prior decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Dismissal of protest by firm not in line for award if protest were sustained is affirmed where record does not support protester's contention that the contracting agency treated awardee and protester unequally with regard to evaluation of alternate proposals.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Evaluation
- ■ ■ Subcontractors

Agency did not preclude protester from proposing two key subcontractors in its best and final offer (BAFO) where Inspector General's preliminary audit report indicated that the subcontractors were a financial risk and, as a result of this report, the agency reasonably required that the protester in its BAFO either rebut the preliminary findings or substitute new subcontractors.

Procurement

Bid Protests

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

Protest that agency did not give protester adequate time to revise its proposal by either demonstrating the financial viability of its proposed subcontractors or substituting alternative subcontractors is untimely where protest was not filed prior to the closing time for the receipt of best and final offers.

Procurement

Bid Protests

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

Procurement

Contract Management

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

Dismissal of protest challenging agency's failure to exercise contract option is affirmed; even if, as protester alleges, agency official who made the decision not to exercise the option was not the contracting officer, the decision is a matter of contract administration outside the scope of General Accounting Office's bid protest function.

Procurement

Sealed Bidding

- Bids
- ■ Evaluation
- ■ ■ Price reasonableness
- ■ ■ ■ Administrative discretion

Agency properly rejected bid since its total price of \$179,975 for the work, which was more than twice the agency estimate of \$88,320, was clearly unreasonable. The protester makes no argument that the agency estimate is incorrect or that the determination of unreasonableness was based on fraud or bad faith.

Procurement

Contractor Qualification

- Approved sources
- ■ Qualification
- ■ ■ Delays

Agency award to only approved source was reasonable where the agency had provided protester a reasonable opportunity to become an approved source prior to the award.

Procurement

Bid Protests

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

Procurement

Contract Types

- Requirements contracts
- ■ Quantity restrictions

Maximum order limitation in requirements contract is for the purpose of permitting agencies to explore the possibility of securing lower prices for quantities exceeding the order limitation, and protester who contends that agency's desire for a lower price constitutes bad faith motive for not waiving limitation fails to state a valid basis of protest.

Procurement

Competitive Negotiation

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

Protest that agency improperly canceled request for proposals (RFP) for an integrated voice/data telecommunications system and an interactive voice response subsystem and then purchased a simple private branch exchange telephone system is denied where contracting officer reasonably determined that the RFP should be canceled because proposed prices received under RFP greatly exceeded available funds and, therefore, agency had to reduce its requirements significantly.

Procurement

Special Procurement Methods/Categories

- Computer equipment/services
 - ■ Alternate offers
 - ■ ■ Rejection
 - ■ ■ ■ Propriety
-

Procurement

Special Procurement Methods/Categories

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

In deciding whether to issue delivery orders for maintenance services for government-owned automatic data processing equipment under nonmandatory schedule contract with the General Services Administration, agency properly rejected responses submitted by protester where the agency reasonably concluded that the services offered by the protester did not meet the agency's minimum needs.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Requests for reconsideration are denied where bids were properly rejected as nonresponsive due to the questionable enforceability of copies of required bid bonds submitted with the bids and protesters essentially raise same matters on reconsideration as were raised in original protests; protesters have not demonstrated that decision was based on an error of fact or law.

Procurement

Bid Protests

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

Protester does not have the direct economic interest to be considered an interested party to protest that the awardee's offer is materially unbalanced or to challenge the agency's affirmative determination of the awardee's responsibility where the record shows that even if the protest were sustained, the protester would not be next in line for award.

Procurement

Bid Protests

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

Protester is not entitled to reimbursement of the costs of filing and pursuing its protest where agency implemented corrective action within 17 working days after the protest was filed.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest that awardee's proposal failed to comply with solicitation requirements is denied where record shows that, consistent with the solicitation, the awardee proposed modifications to its existing product in order to satisfy the specifications.

Procurement

Competitive Negotiation

- Offers
- ■ Commercial products/services
- ■ ■ Administrative determination

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest challenging acceptability of awardee's proposal on the basis that awardee had not produced the item before submitting its proposal is denied where the solicitation does not call for a commercial item or otherwise require that the item proposed have been produced before proposals were submitted.

Procurement

Competitive Negotiation

- Technical transfusion/leveling
- ■ Determination criteria

Agency's discussions with awardee did not constitute technical leveling where agency asked awardee only one set of questions which identified the solicitation requirements with which awardee's initial proposal failed to comply, and awardee responded with only one set of revisions to its technical proposal.

Procurement

Contracting Qualification

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

Solicitation clause that requires pre-marketing approval by the U.S. Food and Drug Administration of item offered constitutes a matter of responsibility compliance with which need only occur prior to contract performance.

B-251243, March 18, 1993

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability
- ■ ■ ■ Point ratings

Where solicitation provided that agency would score proposals found compliant with requirements, or compliant with minor revision, protester's assertion that act of scoring its proposal was inconsistent with subsequent determination that proposal was unacceptable is without merit since scoring was an integral part of assessment of whether offerors met requirements.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Personnel experience

Where the protester's proposal contained no evidence that either the firm or any of its personnel had more than limited experience with similar systems, the agency's assignment of a low technical score was reasonable and consistent with the solicitation, which provided for an evaluation of personnel experience and maintenance of similar systems.

B-251248, March 18, 1993

93-1 CPD 242

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Terms

■ ■ ■ ■ Compliance

Agency reasonably concluded, based on information submitted with awardee's bid, that awardee intended to supply buildings that met standards of Underwriters Laboratory 2-hour fire rating classification.

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

Protest contentions filed 8 weeks after award based on information obtained in agency report in response to an initial protest challenging whether awardee's bid offered to comply with the requirements of the invitation for bids (IFB) and whether awardee is capable of meeting IFB requirements are dismissed as untimely because protester failed to diligently pursue information that formed the basis of the new protest contentions.

B-251264, March 18, 1993

93-1 CPD 243

Procurement

Contractor Qualification

■ Responsibility

■ ■ Contracting officer findings

■ ■ ■ Affirmative determination

■ ■ ■ ■ Prior contract performance

Protest that awardee failed to meet solicitation requirement that offeror demonstrate that custodial services performed under its prior contracts were similar in size and scope to the custodial services under the current solicitation—and thus should not have received the award—is denied where record indicates that agency had a reasonable basis for finding that awardee's experience involved services similar in size and scope to those under the current requirement.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Pre-award surveys

Protester, the incumbent-lessor of office space, was not prejudiced by contracting agency's failure to solicit the firm, where, based on the results of a market survey and information subsequently provided by the protester, the contracting agency reasonably determined that the protester would be unable to offer an acceptable building that conforms to the solicitation's minimum space requirements.

Procurement

Competitive Negotiation

- Initial-offer awards
- ■ Cost proposals
- ■ ■ Cost revision
- ■ ■ ■ Cost reimbursement contracts

Offeror's failure to submit requested best and final offer did not preclude consideration of proposal for award of cost-reimbursement contract where acceptance period specified in proposal had not expired at time of award, initial proposal as modified by technical revisions during negotiations was technically acceptable, and cost impact of technical revisions was sufficiently minimal that failure to submit a revised cost proposal reflecting revisions did not preclude a reasonable cost evaluation.

Procurement

Competitive Negotiation

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

The procuring agency, in conducting a cost realism analysis in a negotiated procurement for a cost-reimbursement contract, reasonably used the protester's actual indirect cost rates from the prior fiscal year, instead of the protester's significantly lower proposed rates, where there was a significant discrepancy between the protester's historical indirect cost rates and its proposed rates,

and the proposed indirect rates were based upon speculative projections of increased future business and unexplained reductions in overhead expenses.

B-250605.2, March 19, 1993

93-1 CPD 246

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Bid Protests

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

The General Accounting Office affirms dismissal of a protest—which was dismissed on the basis that the protester was not an interested party under the Bid Protest Regulations to raise the particular protest ground—where, under the theory of the protest that a bid bond defect is a waivable minor deficiency, a lower priced bidder with the same bid bond defect would be in line for award ahead of the protester.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Liability restrictions

Where, in response to an invitation for bids for an indefinite quantity of construction work with a guaranteed minimum price of \$50,000, a bid bond is expressed as 20 percent of the bid price and the bid price is expressed as a coefficient multiplier, the putative contract value for determining the penal amount of the bid bond is \$50,000 and the bond's penal amount is \$10,000 (20 percent of the \$50,000); in the absence of a firm government estimate, this figure must be the same putative contract value that is used in calculating whether the insufficient bid guarantee can be waived under Federal Acquisition Regulation § 28.101-4(c)(2), which provides for waiver where the insufficient bid guarantee is greater than the difference between the bid price and the next higher acceptable bid price.

B-251223, March 19, 1993

93-1 CPD 247

Procurement

Bid Protests

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

Protest to the General Accounting Office is timely filed under the Bid Protest Regulations where it is filed within a reasonable time after an agency had an opportunity to respond, but did not respond, to a timely agency-level protest.

Procurement

Sealed Bidding

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

Procurement

Specifications

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

Bid for chemical sealant, whose descriptive literature did not show that the offered product met the invitation for bid requirements regarding adhesion, set-time or self-application, was properly rejected as nonresponsive under the solicitation's descriptive literature clause.

Procurement

Bid Protests

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

Where agency properly rejects the low bid as nonresponsive, the low nonresponsive bidder is an interested party to protest, as a matter of equal treatment, that the agency should have rejected the awardee's bid as nonresponsive for the same reasons that the protester's bid was rejected, even though other bidders were in line for award if protest were sustained.

Procurement

Sealed Bidding

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

Procurement

Specifications

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

Bid for chemical sealant is nonresponsive where the required descriptive literature does not demonstrate compliance with the invitation for bid requirements that the sealant bond to asphalt or surfaces previously coated with lead-based paint; the fact that the bid took no exception to these requirements does not satisfy the descriptive literature requirement to provide sufficient data to demonstrate compliance with the requirements.

Procurement

Contractor Qualification

- Responsibility/responsiveness distinctions
 - ■ Competency certification
-

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Eligibility
- ■ ■ ■ Criteria

Under small business set-aside procurement, where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility as well as responsibility-related ones, agency is not required to refer the matter to the Small Business Administration under its certificate of competency procedures.

B-252007, March 19, 1993**93-1 CPD 249**

Procurement

Bid Protests

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

Protester which does not protest its proposal's exclusion from the competitive range is not an interested party to challenge whether the awardee's proposal should have been accepted where other acceptable proposal would be in line for award if the protest were sustained on that issue.

B-252452, March 19, 1993**93-1 CPD 250**

Procurement

Bid Protests

- GAO procedures
 - ■ Purposes
 - ■ ■ Competition enhancement
-

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Protest that agency should award contract for ventilated rat and mouse caging systems to the protester on a sole-source basis rather than conducting an unrestricted brand-name-or-equal procurement, or that invitation for bids on a brand-name-or-equal basis should contain more restrictive specifications, is dismissed because the General Accounting Office (GAO) will not entertain arguments that agencies should use more restrictive specification since GAO's bid protest role is to ensure that the statutory requirements for full and open competition are met.

Procurement

Bid Protests

- **Patent infringement**
- ■ **GAO review**

Protest that award of contract to any other bidder may result in awardee violating protester's patents and possible claim for damages against contracting agency is dismissed, because exclusive remedy for patent infringement by the government or by a government contractor who acts with the authorization or consent of the government is a suit against the government in the United States Court of Federal Claims.

B-251001.2, March 22, 1993

93-1 CPD 253

Procurement

Bid Protests

- **Dismissal**

Protest raising same arguments that were resolved in a recent decision on a protest involving the same procurement is dismissed as no useful purpose would be served by further consideration of the arguments.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- **Requests for proposals**
- ■ **Government estimates**
- ■ ■ **Wage rates**

Protest that agency's use of undisclosed estimates was unreasonable because agency downgraded proposal for low staffing level estimates without regard to proposed state of the art cleaning equipment is denied where the protest proposed more, not fewer, hours than the agency deemed necessary to perform services in which such equipment could be used and where the agency did in fact take labor savings due to state of the art equipment use into account.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Personnel

■ ■ ■ ■ Adequacy

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Terms

■ ■ ■ Contractor personnel

■ ■ ■ ■ Training

Protest that agency's use of undisclosed estimates was unreasonable because agency downgraded proposals for low staffing levels without regard to training of personnel is denied where the record shows that agency took training into account and the protester fails to show that its low proposed manhour levels resulted from the training of its personnel.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Downgrading

■ ■ ■ ■ Propriety

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that agency improperly downgraded proposal for failure to include cleaning job assignment forms is denied where the solicitation specifically advised offerors to provide a detailed proposed cleaning schedule and, thus, evaluation was reasonable and in accordance with the solicitation's evaluation criteria.

B-251316.2, B-251316.3, March 22, 1993

93-1 CPD 254

Procurement

Sealed Bidding

■ Bids

■ ■ Evaluation

■ ■ ■ Options

■ ■ ■ ■ Low bid displacement

Procurement

Sealed Bidding

■ Unbalanced bids

■ ■ Materiality

■ ■ ■ Responsiveness

Although the apparent low bid on a refuse collection contract was mathematically unbalanced, it was not materially unbalanced, and therefore nonresponsive, where the bid becomes low early in

the contract term, including option periods, and where the agency reasonably intends to exercise all options.

Procurement

Sealed Bidding

- **Unbalanced bids**
 - ■ **Contract awards**
 - ■ ■ **Propriety**
-

Procurement

Sealed Bidding

- **Unbalanced bids**
- ■ **Rejection**
- ■ ■ **Propriety**

The front-loaded base period price of a mathematically unbalanced bid for a refuse collection contract, in which the base period price was not even twice any of the option period prices, was not so grossly front-loaded as to be tantamount to an improper advance payment that would require the rejection of the bid.

B-251375, March 22, 1993

93-1 CPD 255

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

- **Hand-carried offers**
- ■ **Late submission**
- ■ ■ **Determination**

Where protester erroneously addressed hand-carried proposal to agency address in Washington, D.C. (designated by solicitation as address for submission of proposals sent by registered or certified mail and, then, only if registered or certified at least 15 calendar days before date set for receipt of proposals), rather than to contracting office in New Delhi, India (designated by solicitation as address for submission of hand-carried proposals), and proposal was not received by the contracting office until 10 days after the date set in solicitation for receipt of initial proposals, contracting officer properly rejected proposal as late.

Procurement

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

Procurement

Specifications**■ Minimum needs standards****■ ■ Competitive restrictions****■ ■ ■ Design specifications****■ ■ ■ ■ Justification**

Protest alleging that agency improperly made award to firm whose proposal did not conform to design specification without informing the protester of the relaxed requirement is denied where specification was not a mandatory requirement under solicitation.

Procurement

Competitive Negotiation**■ Requests for proposals****■ ■ Terms****■ ■ ■ Performance bonds**

Procurement

Socio-Economic Policies**■ Small business set-asides****■ ■ Disadvantaged businesses****■ ■ ■ Terms****■ ■ ■ ■ Performance bonds**

Protest that performance bond requirement in request for proposals unduly restricts competition to the prejudice of small business concerns is denied where contracting officer reasonably determined that performance bond is necessary to ensure that contractor will continuously maintain mechanical systems of two government buildings in order to preserve safe and healthful environment for government employees and others doing business in the buildings as well as preventing damage to federal property.

Procurement

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

The General Accounting Office denies request for reconsideration of decision, which denied the protester's entitlement to protest costs arising out of its protest of allegedly overly restrictive specifications in a procurement canceled because the agency stated that it intended to sole-source the requirement, inasmuch as the cancellation for this reason does not constitute corrective action responsive to a protest; reconsideration request based on *Commerce Business Daily* announcement seeking potential sources for the requirement does not demonstrate that the agency took corrective action responsive to the protest because no solicitation was issued that amended the protested specifications as was requested by the protester.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where the requesting party does not provide any facts, evidence or arguments that were not already considered in the prior decision, but merely disagrees with the decision.

B-250305.2, March 23, 1993**93-1 CPD 260**

Procurement

Competitive Negotiation

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

Agency reasonably downgraded protester's proposal where, during discussions, agency expressly requested protester to provide skill level information regarding the personnel on which its proposal was based and protester failed to disclose that information.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost estimates
- ■ ■ ■ Labor costs

Procurement

Competitive Negotiation

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

Agency reasonably applied offerors' proposed labor and overhead rates to agency's manhour estimate where agency's total manhour estimate differed only slightly from the offerors' manhour estimates and agency reasonably determined, on the basis of input from the Defense Contract Audit Agency and from the offerors during discussions, that the offerors' proposed rates were unlikely to be affected by minor variations in manhour requirements.

Procurement

Bid Protests

- Definition

Allegation that agency failed to follow its source selection plan with regard to when evaluation weighting factors were established does not state a valid basis for protest.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Funding restrictions

Agency properly canceled solicitation after bid opening where all bids exceeded the amount the agency had available for the procurement.

Procurement

Bid Protests

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

Specific allegations, pertaining to evaluation of protester's proposal, first raised in comments on agency report were untimely filed where not raised within 10 days of when the protester learned the basis for protest, *i.e.*, when it received detailed evaluation results.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reversal
- ■ ■ ■ Criteria

Party seeking reversal or modification of prior decision must convincingly show that decision contains either error of fact or law or information not previously considered that warrants its reversal or modification.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Protest of award to offeror whose slightly higher priced proposal was properly evaluated as technically substantially superior to protester's is denied where, even though the agency failed to contemporaneously document the basis for its price/technical tradeoff and the agency's proposal evaluation plan improperly assigned technical factors and price relative weights different from those established by the solicitation, it is clear from the record that the protester was not prejudiced as a result.

Procurement

Bid Protests

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

Procurement

Contract Management

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

Contracting agency has no obligation to exercise an option in an existing contract awarded under solicitation issued pursuant to Office of Management and Budget Circular No. A-76 and need not justify such decision with a cost comparison.

Procurement

Competitive Negotiation

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

Protest against award to offeror who submitted higher priced, higher technically rated proposal is denied where the solicitation evaluation scheme gave greater weight to technical merit than to price, and the agency reasonably concluded that the technical superiority of the awardee's proposal was worth the additional cost.

Procurement

Specifications

- Minimum needs standards
- ■ Total package procurement
- ■ ■ Propriety

Protester's contention that an agency's package approach to procuring 97 different types of rivets in 4 lots unduly restricts competition is sustained where: (1) the structure of the solicitation excludes the participation of the protester—who could offer 88 of the 97 rivets—but who cannot submit an offer to provide any 1 of the 4 lots of rivets because each lot contains at least 1 rivet listed in an administrative agreement in lieu of debarment between the agency and the protester; (2) the agency failed to provide any evidence that this particular grouping of rivets was necessary to meet its minimum needs; (3) excluding the protester has a significant effect on the level of competition for these rivets; and (4) the protester has shown that a minor adjustment to the allocation of rivets may save the agency even more money than the package approach in the current solicitation.

Procurement

Competitive Negotiation

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

Notwithstanding greater importance of technical factors in overall evaluation scheme, agency may award contract to a lower priced offeror where the record establishes that the contracting officer reasonably determined that proposals were essentially equal technically.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Time/materials contracts
- ■ ■ ■ Wage rates

Protest that agency failed to adequately analyze low-priced offeror's proposed price under solicitation for time and materials contract is denied where the agency's evaluation was reasonably based on comparison of the offeror's proposed price and the predecessor contractor's actual costs.

Procurement

Contractor Qualification

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

Where contracting agency restricts a procurement to approved products, it must give offerors proposing alternate products a reasonable opportunity to qualify. Agency delay of approximately 1 year to obtain necessary technical drawings and to draft first article requirements which would permit alternate sources to compete is unreasonable and improperly deprived alternate source of the opportunity for contract award.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Second request for reconsideration is denied where protester fails to show that prior decision contains either error of fact or law or information not previously considered that warrants its reversal or modification.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest against award of two contracts where agency notifies our Office prior to date for submission of its administrative report that it would terminate awardees' contracts and issue a new solicitation for the requirements.

B-251384, March 26, 1993**93-1 CPD 271**

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

In procurement for maintenance of personal computers, agency had reasonable basis for downscoring protester's proposal under subfactors requiring that offeror's resumes and information concerning offeror's prior contracts both demonstrate relevant computer maintenance experience; agency reasonably determined from information contained in the proposal that protester's experience was primarily with mainframe computers and minicomputers, not personal computers.

Procurement

Competitive Negotiation

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

Objection that agency improperly evaluated protester's and awardee's proposals under several evaluation criteria is denied where record shows that agency evaluators had a reasonable basis for their conclusions.

Procurement

Bid Protests

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

Procurement

Contractor Qualification

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

Where solicitation does not impose a specific license requirement, agency may make award without regard to whether contractor is licensed under state or local laws.

Procurement

Contract Management

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

The General Accounting Office will consider protest by a potential offeror alleging that an agency's decision to exercise an option in an incumbent's contract, rather than conduct a new procurement, is unreasonable.

Procurement

Contract Management

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

Agency properly exercised option to extend for 6 months the period of performance on a contract for independent validation and verification services, instead of issuing a competitive solicitation for the services, where the record shows that only the incumbent contractor could provide the services for that brief period without disruption.

Procurement

Noncompetitive Negotiation

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

Department of Energy arrangement with its management and operating contractor, to have contractor make available leased general purpose office space for temporary use by DOE employees, was inconsistent with federal procurement procedures because it was not appropriately justified as a noncompetitive sole-source contract award. 41 U.S.C. §§ 253(c)(2), 253(f).

Procurement

Contract Management

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

Department of Energy arrangement with its management and operating contractor, to have contractor make available leased general purpose office space for temporary use by DOE employees, was not within the scope of its M&O contract, and was contrary to DOE internal leasing policies and procedures.

B-251644, March 29, 1993

Procurement

Contract Management

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

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Corporate entities

Agency reasonably terminated apparent second low bidder's improperly awarded contract since acceptance of apparent low bid was warranted; despite different bidder names on apparent low bid and bid bond, public information available at, but obtained, after bid opening confirmed that the different names identified same legal entity.

B-249699.3, March 30, 1993

93-1 CPD 275

●Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency properly determined not to consider additional technical data submitted immediately prior to the due date for best and final offers, because the agency evaluators concluded that they could not reliably interpret the data without conducting further discussions with the offeror.

Procurement

Competitive Negotiation

- Alternate offers
- ■ Acceptance
- ■ ■ Propriety

Protester has no basis to challenge agency's consideration of competitor's alternate proposal submitted during negotiations where the agency also considered an alternate proposal that the protester submitted during the course of those negotiations.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

Protester's mere disagreement with the agency's reasoned technical judgment does not constitute a valid basis to challenge the agency's evaluation of technical proposals.

B-250516.3, March 30, 1993

93-1 CPD 276

Procurement

Competitive Negotiation

■ Discussion

■ ■ Adequacy

■ ■ ■ Criteria

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Terms

■ ■ ■ Compliance

Protest is sustained where: (1) proposal selected for award fails to comply with material solicitation requirement—offer of communications switch not yet built could not reasonably be viewed as meeting solicitation requirement that proposal conclusively demonstrate current availability of proposed technology; and (2) contracting officials conducted discussions with proposed awardee—by visiting its proposed subcontractor's facilities to determine technical acceptability of proposed communications switch—but did not conduct discussions with the other offerors in competitive range.

B-250532.3, March 30, 1993

93-1 CPD 277

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Allegation substantiation

Protest alleging that agency improperly awarded contract for cockpit voice recorders to firm whose product does not meet certain technical standards and other specification requirements is denied where (1) solicitation did not provide for evaluation of item for compliance with standards but, rather, merely called for evidence of authorization by Federal Aviation Administration, which has statutory authority to approve items as complying with standards; (2) solicitation did not provide for submission of technical information for evaluation to verify compliance with requirements; and (3) awardee unequivocally offered to furnish items in accordance with solicitation requirements.

Procurement

Sealed Bidding

- Low bids
 - ■ Error correction
-

Procurement

Sealed Bidding

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

Where agency reasonably concluded that the awardee presented clear and convincing evidence of a mistake in its bid and the intended bid price, within a narrow range of uncertainty, and the bid is low with or without correction, agency properly allowed bidder to correct the mistake and increase its price to the amount representing the low end of the range of uncertainty.

Procurement

Competitive Negotiation

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

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic sources
- ■ ■ Evaluation
- ■ ■ ■ Preferences

Protests that selection criteria in solicitations for overseas embassy guard services which provide 35 points for technical factors and 65 points for price violates statutory requirement that the Department of State (DOS) establish procedures to ensure that appropriate measures are taken so that United States persons are not disadvantaged during the solicitation and bid evaluation process due to their distance from the post is denied since the statutory provision does not require DOS to establish a particular source selection formula to ensure that United States firms are not disadvantaged.

Procurement

Competitive Negotiation

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

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic sources
- ■ ■ Evaluation
- ■ ■ ■ Preferences

Protests that changing the evaluation criteria in solicitations for overseas security guard services from 60 points for technical and 40 points for low price, as it was in prior solicitation, to 35 points for technical and 65 points for low price, disadvantages United States firms and violates statutory requirement that Department of State provide an evaluation preference for price competitive United States firms bidding on overseas guard service contracts is denied where solicitations contain a five point preference for United States firms.

B-251344, March 31, 1993

93-1 CPD 280

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Government advantage

Agency may cancel a negotiated procurement based on the potential for cost savings.

B-251411, B-251413, March 31, 1993

93-1 CPD 281

Procurement

Socio-Economic Policies

- Small business set-asides
 - ■ Cancellation
 - ■ ■ Unrestricted resolicitation
 - ■ ■ ■ Propriety
-

Procurement

Socio-Economic Policies

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

Agency decision to conduct procurements on an unrestricted basis and not as small business set-asides is improper where the contracting officer did not investigate the performance capabilities of at least four small businesses that had bid on the prior set-asides of these requirements and therefore could not reasonably conclude that a reasonable expectation did not exist that offers could be obtained from at least two responsible small businesses.

B-251599, March 31, 1993

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation
- ■ ■ Shipment schedules
- ■ ■ ■ Best-buy analysis

Evaluation of quotes using a factor to quantify delays in quoted delivery times beyond the 90 days specified in solicitation was proper where solicitation stated that price and delivery would be evaluated and that preference could be given to earliest possible delivery.

B-252396, March 31, 1993

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Determination criteria

Where an invitation for bids (IFB) contemplates the award of a firm, fixed-price contract, a bidder's request in its bid cover letter for an additional charge of \$1,000 per hour for government conducted pre-acceptance inspections and tests at the bidder's facility, which tests the government reserved the right to conduct in the IFB, renders the bid nonresponsive because the bid did not offer to meet all material specifications at a firm, fixed-price, where the IFB did not contemplate a separate bid price for the government conducted testing and provided no means of predicting the amount of testing the government would conduct.

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