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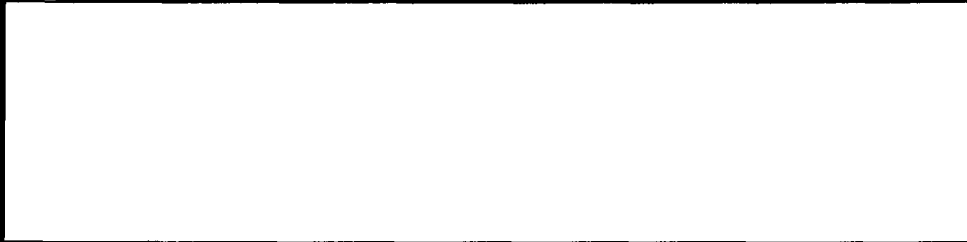
Office of General Counsel



1002

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

No. 8



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# Preface

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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

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**B-246773, May 5, 1993\*\*\***

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Purpose availability
- ■ Interagency agreements
- ■ ■ Determination

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Purpose availability
- ■ Research
- ■ ■ GOCO plants
- ■ ■ ■ Determination

The Library of Congress, Federal Research Division may not be treated as a "government-owned establishment" (GOGO) for the purposes of the Department of Defense (DOD) Project Orders Statute, 41 U.S.C. § 23 (1988). The Project Orders Statute addresses transactions between DOD and those establishments, such as arsenals and shipyards, which are owned and operated by or on behalf of the military departments. Transactions between DOD and other government agencies are governed by the Economy Act, 31 U.S.C. § 1535 (1988).

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**B-247950, May 7, 1993\*\*\***

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Time availability
- ■ Fiscal-year appropriation
- ■ ■ Unobligated balances

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## **Appropriations/Financial Management**

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### **Budget Process**

- Funds transfer
- ■ Unobligated balances
- ■ ■ Authority

The National Endowment for the Humanities may use unobligated fiscal years 1990 and 1991 appropriations, returned by some grantees as excess to their needs, to cover the cost of audits of other 1990 and 1991 grantees whose grant awards were not sufficient to fund audit costs.



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**B-249351, et al., May 11, 1993**

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**Appropriations/Financial Management**

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**Appropriation Availability**

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

Absent specific statutory authority, federal employees may not be paid per diem or actual subsistence or furnished meals at headquarters. However, 5 U.S.C. § 4110 provides such authority where the meal is included at no extra charge in a registration or attendance fee, and the meal is merely incidental to an informational program presented by a private association. Therefore, Department of Energy (DOE) may pay the registration fees charged two employees to attend an informational meeting of a private association if it confirms that the program was related to the functions for which DOE funds are appropriated. This provision, however, has little or no bearing upon purely internal business meetings or conferences sponsored by government agencies. Thus, DOE may not pay for meals provided to two employees who attended meetings of interagency coordinating groups (Federal Executive Boards) at their official duty station.

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**B-247563.2, May 12, 1993**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Miscellaneous expenses
- ■ ■ ■ Exhibits/visual displays

**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Miscellaneous expenses
- ■ ■ ■ Recruitment

Under 38 U.S.C. § 703(d) (Supp. III 1991), the Secretary of the Department of Veterans Affairs (VA) may provide for the display of exhibits, photographic displays, moving pictures, and other visual educational information and descriptive material. In view thereof, the Oklahoma City Medical Center was authorized to use VA's medical care appropriation for the rental of booth space at the Oklahoma State Fair and for the purchase of imprinted book matches and imprinted jar grip openers to be distributed at the fair for recruiting purposes and to provide veterans with a number to call to obtain information.

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**B-249795, May 12, 1993\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

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

Appropriated funds are not available to pay the cost of meals at quarterly managers meetings of the U.S. Army Corps of Engineers. These expenses do not fall under the training exception of 31 U.S.C. § 4109 merely because of the presence of speakers. The sessions also do not fall under the meetings exception of 31 U.S.C. § 4110 since this provision has little or no bearing on purely internal business meetings or conferences sponsored by government agencies.

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**B-244473.2, May 13, 1993**

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Liability insurance**

The Coast Guard may not pay the excess declared value fees for the shipment of "valuables" under the Government Losses in Shipment Act unless the Secretary of the Treasury specifically authorizes such payments. Claims for replacement of "valuables" are paid out of the Government Losses in Shipping Fund. For items not falling under the definition of "valuables", the Coast Guard may not pay excess declared value fees for such items under the self-insurance rule unless it can be shown that: (1) the economy sought by self-insurance would be defeated; or (2) sound business practice indicates that a savings can be effected; or (3) services or benefits not otherwise available may be obtained by purchasing insurance.

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**B-251668 , May 13, 1993**

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**Appropriations/Financial Management**

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**Claims Against Government**

■ **Unauthorized contracts**

■ ■ **Quantum meruit/valebant doctrine**

Firm that provided services to the Air Force in the absence of a written amendment extending the grant that had funded the services for the previous 4 years may be paid on a *quantum meruit* basis where the services in fact conferred a benefit directly on the agency, notwithstanding that they previously had been provided through a grant arrangement, and all other elements to support *quantum meruit* relief are present.

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**B-249061, May 17, 1993**

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Specific purpose restrictions**

■ ■ ■ **Personal expenses/furnishings**

■ ■ ■ ■ **Licenses**

Navy may not use appropriated funds to pay for licensing fees incurred by its Pearl Harbor Naval Shipyard employees, notwithstanding bargaining agreement provision contemplating such use of appropriated funds, since both the Federal Labor Relations Authority and our Office have held that fees for licenses necessary to qualify employee for his or her job are a personal expense of the employee.

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**B-247849.3, May 25, 1993**

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Public transportation systems**

■ ■ ■ **Commuting expenses**

■ ■ ■ ■ **Discounts**

Section 629 of Pub. L. 101-509, 104 Stat. 1478 (1990), authorizes an agency to participate in and subsidize any program established by a State or local government that encourages employees to use public transportation for commuting. A local government-operated ferry between Ketchikan and Gravina Island, Alaska, encourages employees to commute as pedestrians, rather than bring their automobiles, by charging lower fares for pedestrians, although the ferry is the only practical

commuting method to Gravina. Because the rate structure favoring pedestrians over automobiles has such marginal aspects as a program, the Federal Aviation Administration (FAA) should obtain Office of Management and Budget (OMB) agreement that the program meets OMB requirements before participating.

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**B-250400, May 28, 1993\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Travel expenses**

■ ■ ■ **Public transportation systems**

Federal agencies are required by section 118 of the Clean Air Act to comply with state regulations regarding the control of air pollution. 42 U.S.C. § 7418(a). Section 118 provides the statutory basis for an agency's use of appropriated funds to comply with a state regulation under which employers are required to provide financial incentives to employees for commuting to work by means of public transportation, carpooling and vanpooling, bicycling, and walking.

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**B-252551, May 28, 1993\*\*\***

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**Appropriations/Financial Management**

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**Appropriation Availability**

■ **Purpose availability**

■ ■ **Necessary expenses rule**

■ ■ ■ **Miscellaneous expenses**

■ ■ ■ ■ **Recruitment**

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**Appropriations/Financial Management**

---

**Appropriation Availability**

■ **Purpose availability**

■ ■ **Necessary expenses rule**

■ ■ ■ **Travel expenses**

■ ■ ■ ■ **Recruitment**

Department of Defense (DOD) may pay overseas travel expenses for recruiters from public schools to attend job fairs for teachers at DOD Dependent Schools provided DOD determines that the expenditure is necessary to accomplish the purpose of the appropriation charged.

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# Civilian Personnel

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**B-251567, May 6, 1993**

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## Civilian Personnel

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### Travel

#### ■ Lodging

#### ■ ■ Reimbursement

#### ■ ■ ■ Government quarters

#### ■ ■ ■ ■ Availability

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## Civilian Personnel

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### Travel

#### ■ Permanent duty stations

#### ■ ■ Actual subsistence expenses

#### ■ ■ ■ Prohibition

Due to water contamination of employees' government quarters, and no other practical alternatives being available, the Forest Service temporarily lodged two employees and their families at a hotel within their official duty station area. In view of these emergency circumstances, the general rule prohibiting the payment of subsistence expenses at an employee's official duty station is not applicable, and 5 U.S.C. § 5911(b) (1988) provides sufficient statutory authority for the Forest Service to pay for the temporary lodging expenses incurred.

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**B-249351, et al., May 11, 1993**

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## Civilian Personnel

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### Travel

#### ■ Permanent stations

#### ■ ■ Actual subsistence expenses

#### ■ ■ ■ Prohibition

Absent specific statutory authority, federal employees may not be paid per diem or actual subsistence or furnished meals at headquarters. However, 5 U.S.C. § 4110 provides such authority where the meal is included at no extra charge in a registration or attendance fee, and the meal is merely incidental to an informational program presented by a private association. Therefore, Department of Energy (DOE) may pay the registration fees charged two employees to attend an informational meeting of a private association if it confirms that the program was related to the functions for which DOE funds are appropriated. This provision, however, has little or no bearing upon purely internal business meetings or conferences sponsored by government agencies. Thus, DOE may not pay for meals provided to two employees who attended meetings of interagency coordinating groups (Federal Executive Boards) at their official duty station.

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**B-251518, May 26, 1993**

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**Civilian Personnel**

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**Travel**

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

Employee whose official duty station was Washington, DC, and whose residence is in Woodbridge, Virginia, was ordered to perform part of his duties as a security officer at three different sites in Virginia, and authorized to use his privately owned vehicle as advantageous to the government for this temporary duty. Under the provisions of Vol. 2, JTR para. C2153 (ch. 234, 4/1/85) and its succeeding provisions, he is entitled to reimbursement on a mileage basis for the distance traveled between his residence in Woodbridge, Virginia, and the alternate duty points in Virginia and return during this temporary duty period.

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**B-245281.2, May 28, 1993**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Time restrictions

A transferred employee, whose real estate related expense claim was denied because he sold his residence more than 3 years after he reported for duty at his new duty station, contends that the provisions of the Federal Supply Schedule relating to government-wide employee relocation services granted him an additional period of time within which to sell his residence. The claim denial is sustained. Relocation expense entitlements are governed by the Federal Travel Regulation (FTR) which has the force and effect of law. The provisions of the Federal Supply Schedule are administrative regulations and they may not enlarge the 3-year time limit specified in the FTR for real estate transactions, nor do they purport to do so.

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**B-251235, May 28, 1993**

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**Civilian Personnel**

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**Compensation**

- Overtime
- ■ Computation

Longevity pay authorized for members of the United States Secret Service Uniformed Division under section 4-415 of the District of Columbia Code (D.C. Code), is not a part of a member's rate of basic compensation for the purpose of computing overtime pay (section 4-1104(d)(1) of the D.C. Code); holiday pay (section 4-402 of the D.C. Code); night work (5 U.S.C. § 5545(a)); Sunday work (5 U.S.C. § 5546(a)); or FLSA overtime (5 C.F.R. § 551.512 (1992)).

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**B-251363, May 28, 1993**

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**Civilian Personnel**

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**Travel**

- Travel expenses
- ■ Vouchers
- ■ ■ Correction procedures
- ■ ■ ■ Administrative adjustments

A request to increase the limit on administrative correction of travel voucher underclaims to \$65 without a supplemental billing falls within the authority granted to agencies to set such limits not to exceed \$100 under newly-added paragraph 6.5(C) of recently revised Title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies as long as the risk to the government, extent of internal controls in operation, and type of claim involved are considered in establishing the specific limit.

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**B-251753, May 28, 1993**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Property titles

Although a transferred employee states she paid all settlement costs of purchase of a residence at her new duty station, she may be reimbursed for only 50 percent of her real estate purchase expenses since she held title to the property jointly with an individual who was not a member of her immediate family. The unique circumstances which were present in *Thomas A. Fournier*, B-217825, Aug. 2, 1985, under which additional amounts might have been reimbursable, are not present here.

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**B-252055, May 28, 1993**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

Employee purchased a residence in connection with his assignment under the Intergovernmental Personnel Act (IPA), codified at 5 U.S.C. § 3375 (1988). He may not be reimbursed since such payment is not authorized by the cited statutory provision and guidelines issued by OPM. Federal Personnel Manual, ch. 334, sec. 1-7c, Dec. 1, 1983. The fact that agency officials erroneously advised the employee of his entitlement to reimbursement does not estop the government from repudiating such advice since it was contrary to statute.

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**B-252287, May 28, 1993**

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**Civilian Personnel**

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**Compensation**

- Overtime
- ■ Night differentials
- ■ ■ Eligibility

Employee's claim for night shift differential and holiday pay as part of lump-sum leave payment upon separation is denied. Employee did not qualify for night shift differential at the time of his

separation, and language of statute providing for payment of lump-sum leave is clear and unambiguous and specifically excludes holiday pay.

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## **Civilian Personnel**

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### **Compensation**

#### **■ Overtime**

#### **■ ■ Eligibility**

#### **■ ■ ■ Weekends/holidays**

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## **Civilian Personnel**

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### **Compensation**

#### **■ Retroactive compensation**

#### **■ ■ Interest**

Agency paid backpay to employee for Sunday premium pay, but period of backpay exceeded 6 years. However, interest on backpay should have been computed retroactively since final action on the claim was not taken until after the effective date of the change in the statute (December 22, 1987) providing for such interest. 5 U.S.C. § 5596 (1988). Interest payments should be offset by erroneous backpay payments that exceeded the 6-year limitation in 31 U.S.C. § 3702(b) (1988). Claims Group's action is affirmed in part and overruled in part.

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# Military Personnel

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**B-251241, May 7, 1993**

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**Military Personnel**

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**Pay**

- Disability retirement
  - ■ Retroactive adjustments
- 

**Military Personnel**

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**Pay**

- Retroactive pay
- ■ Military correction boards
- ■ ■ Correction procedures
- ■ ■ ■ Finality

Because 10 U.S.C. § 1552 provides that the actions of Correction Boards are final and conclusive on all officers of the United States, this Office will not question the actions of the Board for the Correction of Public Health Service (PHS) Commissioned Corps Records when it corrected the records of a PHS officer to indicate that he was not terminated in 1979 but was retired with a disability rating of 50 percent.

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**B-252058, May 12, 1993**

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**Military Personnel**

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**Pay**

- Survivor benefits
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Retired member of the Air Force elected participation in Survivor Benefit Plan for spouse and child. Deductions from his retired pay were correctly made for 1 year. Retired pay was then stopped due to erroneous report of his death but was reinstated 19 days later. However, when retired pay was reinstated, SBP deductions were not resumed, again as the result of an administrative error. Member received earnings statements with his retired pay for 10 years which showed no SBP deductions, while member's beneficiaries received the benefit of continuous SBP coverage. Because member should have been aware deductions were not being made, he is not without "fault" in the matter, even though member was unaware of the overpayments, and waiver may not be granted.



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**B-252053, May 14, 1993**

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**Military Personnel**

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**Pay**

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

Former member of the Navy who received a direct deposit payment for active duty pay and allowances 2 weeks after his separation from the Navy should have known that the payment was erroneous since member knew he had already received all active duty pay owed to him, and because his credit union statement indicated that the payment was for active duty pay. Also, the payment was for the same amount he had previously been receiving as his "mid-month" active duty pay. Denial of his request for waiver of the amount owed is affirmed.

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**B-251346, May 18, 1993**

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**Military Personnel**

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**Pay**

- Retirement pay
- ■ Apportionment
- ■ ■ Spouses

**Military Personnel**

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**Pay**

- Retirement pay
- ■ Apportionment
- ■ ■ Effective dates
- ■ ■ ■ Divorce/annulment

A recent amendment to 10 U.S.C. § 1408(c)(1) states that courts may not retroactively divide military retired pay between a member and his former spouse if their final divorce decree was granted before June 25, 1981, *i.e.*, before the Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. § 210 (1981), and did not treat the member's military retired pay as the property of the member and his spouse or former spouse or reserve jurisdiction to do so. The amendment does not affect modifications issued before *McCarty*. The claim for termination of the division of retired pay by a member whose divorce decree was modified before *McCarty* is therefore denied.

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# Miscellaneous Topics

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**B-247849.3, May 25, 1993**

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## Miscellaneous Topics

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### Transportation

#### ■ Public transportation systems

#### ■ ■ Commuting expenses

#### ■ ■ ■ Discounts

Section 629 of Pub. L. 101-509, 104 Stat. 1478 (1990), authorizes an agency to participate in and subsidize any program established by a State or local government that encourages employees to use public transportation for commuting. A local government-operated ferry between Ketchikan and Gravina Island, Alaska, encourages employees to commute as pedestrians, rather than bring their automobiles, by charging lower fares for pedestrians, although the ferry is the only practical commuting method to Gravina. Because the rate structure favoring pedestrians over automobiles has such marginal aspects as a program, the Federal Aviation Administration (FAA) should obtain Office of Management and Budget (OMB) agreement that the program meets OMB requirements before participating.

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**B-250400, May 28, 1993\*\*\***

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## Miscellaneous Topics

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### Transportation

#### ■ Public transportation systems

#### ■ ■ Commuting expenses

#### ■ ■ ■ Discounts

Federal agencies are required by section 118 of the Clean Air Act to comply with state regulations regarding the control of air pollution. 42 U.S.C. § 7418(a). Section 118 provides the statutory basis for an agency's use of appropriated funds to comply with a state regulation under which employers are required to provide financial incentives to employees for commuting to work by means of public transportation, carpooling and vanpooling, bicycling, and walking.

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# Procurement

## Late case

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**B-250158, et al., Jan. 14, 1993    REDACTED VERSION**

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### Procurement

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#### Bid Protests

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

### Procurement

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#### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Meaningful discussions were not provided the protester regarding perceived weaknesses in the protester's technical proposal (relating to the lack of detail in the firm's proposed technical and management approaches) where agency did not inform offeror of concerns which significantly affected its proposal's point score; protester would have had a reasonable chance at being in line for award if the areas of concern had been pointed out and corrected.

## Current cases

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**B-244007.7, May 3, 1993\*\*\***

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**93-1 CPD 351**

### Procurement

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#### Bid Protests

- GAO procedures
- ■ Preparation costs

Protester forfeited its right to recover the costs of filing and pursuing its protest at the General Accounting Office where the protester failed to file its claim with the contracting agency detailing and certifying the time expended and costs incurred in connection with the protest within 60 days after receipt of the decision sustaining its protest.

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**B-247975.7, et al., May 3, 1993**

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**93-1 CPD 352**

### Procurement

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#### Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Subcriteria
- ■ ■ ■ Disclosure

Protests are sustained where agency evaluation gave importance to criterion for heavy lift capacity of proposed roll-on/roll-off ships beyond that which would reasonably be expected by offerors and, as a result, deprived offerors of the opportunity to modify their vessels, or otherwise secure higher approved capacity for deck space, so as to significantly increase their technical scores;

agencies are required to set forth in a solicitation all significant evaluation factors and subfactors, and their relative importance, which will be used in the evaluation.

---

**B-251224.2, et al., May 3, 1993**

**93-1 CPD 353**

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**Procurement**

**Sealed Bidding**

- **Invitations for bids**
- ■ **Post-bid opening cancellation**
- ■ ■ **Justification**
- ■ ■ ■ **Minimum needs standards**

Agency had compelling reason to cancel a procurement for computer equipment maintenance services after bid opening where the solicitation overstated the agency's needs with respect to service call response time.

---

**Procurement**

**Bid Protests**

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

Protester is entitled to the award of its costs of filing and pursuing its earlier protest where the agency unduly delayed canceling the solicitation because it overstated the government's minimum needs. Cancellation came only after first awarding to the second low bidder; terminating that award after a protest to the General Services Administration Board of Contract Appeals and awarding to the low bidder; defending a protest filed by the terminated awardee with GAO; and permitting the protester to file its comments on the agency report. Each of the agency reviews—both in the earlier protest by the low bidder and in the protest to our Office by the second low bidder—involved the same requirement now found overly restrictive.

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**B-251527, B-251527.2, May 3, 1993**

**93-1 CPD 354**

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**Procurement**

**Competitive Negotiation**

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

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**Procurement**

**Competitive Negotiation**

- **Offers**
- ■ **Acceptance time periods**
- ■ ■ **Expiration**

Where agency instructed offerors to either submit best and final offers (BAFO) or advise the agency that they did not wish to revise their initial proposals prior to time set for receipt of BAFOs, and awardee submitted its BAFO late, it was improper for the agency to make award on the basis of offeror's initial proposal, where the acceptance period of that offer had expired.

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**Procurement**

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**Socio-Economic Policies****■ Small business set-asides****■ ■ Use****■ ■ ■ Administrative discretion**

Agency's determination not to set aside a procurement for small business concerns is reasonable where the agency concluded, after a thorough consideration of relevant factors, including the procurement history of prior comparable requirements and the relatively complex nature of the requirement, and with the concurrence of the agency's Small Business Administration representative, that it could not reasonably expect to receive proposals from at least two responsible small business offerors.

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Price competition****■ ■ ■ Adequacy****■ ■ ■ ■ Fixed-price contracts**

Agency reasonably required that firm, fixed-price proposals for facility management services include all designated repair work under listed dollar thresholds. Offerors were provided sufficient information to estimate the likely cost of such repairs and factor it into their prices; procuring agency is entitled to reduce its administrative burden and is not obligated to remove all performance uncertainties and risks under solicitation specifications.

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**Procurement**

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**Competitive Negotiation****■ Requests for proposals****■ ■ Competition rights****■ ■ ■ Contractors****■ ■ ■ ■ Exclusion**

Where contracting agency has justified limiting competition based on unusual and compelling urgency of the requirement and has surveyed four potential sources, all of whom have stated they could meet the required delivery schedule, contracting specialist's deliberate decision not to solicit a quote from one firm because other agency personnel did not supply the firm's telephone number and because she believed three firms were sufficient to establish minimum competition is unreasonable and does not meet statutory standard for achieving maximum competition practicable under the circumstances.

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**Procurement**

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

Agency's elimination of the protester's proposal from the competitive range was reasonable where the protester's proposal failed to demonstrate an understanding of the requirements of the solicitation.

tion's statement of work (SOW) and failed to demonstrate that the protester's proposed personnel had experience relevant to the requirements of the SOW.

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**B-252979, May 3, 1993**

**93-1 CPD 358**

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**Procurement**

**Bid Protests**

■ **Subcontracts**

■ ■ **GAO review**

A subcontractor's protest of subcontract awards by a government prime contractor are not "by" the government so as to justify the General Accounting Office taking jurisdiction over the protest, where the government's involvement is not so pervasive that the government in effect took over the procurement from the prime contractor.

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**B-251750, B-252128 , May 4, 1993**

**93-1 CPD 364**

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**Procurement**

**Bid Protests**

■ **GAO procedures**

■ ■ **Protest timeliness**

■ ■ ■ **10-day rule**

Protest that Trade Agreements Act is not applicable to a solicitation for freight containers is untimely under the Bid Protest Regulations, where the protest is filed after the closing date for receipt of proposals and the solicitation announces the applicability of the Act.

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**Procurement**

**Contract Management**

■ **Contract administration**

■ ■ **Domestic products**

■ ■ ■ **Compliance**

■ ■ ■ ■ **GAO review**

Where an agency has no information prior to award which casts doubt on representations made by awardees on their certifications that the end products offered are in accordance with the Trade Agreements Act, the agency may properly rely on the awardees' representations without further investigation; whether the awardees actually supply end products in compliance with the Trade Agreement Act concerns a matter of contract administration not subject to review by the General Accounting Office.

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**B-251762, May 4, 1993**

**93-1 CPD 365**

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**Procurement**

**Sealed Bidding**

■ **Invitations for bids**

■ ■ **Competition rights**

■ ■ ■ **Contractors**

■ ■ ■ ■ **Exclusion**

Agency failure to solicit a small business concern known to be interested in an unrestricted procurement violated Federal Acquisition Regulation provisions governing distribution of solicitation documents.

**Procurement**

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

Protest that agency did not conduct a cost/price realism analysis as required in request for proposals (RFP) for fixed price contract is denied because: (1) RFP stated that proposals would be evaluated for cost/price realism but did not specify the manner or degree of analysis required; (2) agency made an intensive effort to formulate an accurate estimate and compared offerors' proposals to that estimate; (3) contracting officials looked at individual cost elements of proposals and requested responses from offerors where cost elements appeared unrealistic or otherwise inadequate; and (4) price proposals were compared with each other in an effort to determine that prices were fair and reasonable.

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**Procurement**

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

Protest that cost/price realism analysis was unreasonable because agency did not adjust awardee's evaluated price upward to reflect unrealistically low cost elements is denied where RFP was for a fixed price contract and contained no requirement that agency make upward adjustments for cost elements contracting officials believed to be priced too low.

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**Procurement**

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

Where request for proposals stated that technical factors combined were significantly more important than price, agency properly awarded fixed price contract to lower technically rated, lower priced offeror instead of higher technically rated, higher priced offeror, where agency determined that the difference in technical ratings did not warrant paying a \$9 million premium to higher technically rated offeror.

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**Procurement**

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**Competitive Negotiation****■ Best/final offers****■ ■ Clerical errors****■ ■ ■ Error correction****■ ■ ■ ■ Propriety**

Contracting officials properly may allow offeror to resolve apparent clerical mistakes in best and final offer without reopening discussions with all competitive range offerors; such communications are considered clarifications, not discussions, and do not allow offeror an opportunity to revise or modify its proposal.

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## Procurement

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### Competitive Negotiation

- Best/final offers
- ■ Clerical errors
- ■ ■ Error correction
- ■ ■ ■ Propriety

Where offeror's best and final offer (BAFO) contained discrepancies between unit and extended prices for a number of line items on the schedule, contracting agency properly allowed correction to reflect unit prices that were consistent with extended prices, where: (1) unit prices clearly were out of line with prices of other offerors in the competitive range and the independent government estimate, and, therefore, only the extended prices reasonably could be regarded as representing the intended offer and (2) the sum of all extended prices equaled exactly the total price stated in the Contract Pricing Proposal Cover Sheet (Standard Form 1411) that was part of BAFO.

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**B-251913, May 4, 1993**

**93-1 CPD 367**

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## Procurement

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### Competitive Negotiation

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

Allegation that protester was entitled to an award because it submitted a technically acceptable offer at a lower total price than that of the awardee is denied where the solicitation provided for award on the basis of proposals most advantageous to the government, and the agency reasonably concluded that the awardee's substantially higher rated proposal warranted payment of the higher total price.

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## Procurement

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### Bid Protests

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

Allegation concerning alleged solicitation impropriety that was incorporated into the solicitation by amendment is untimely where protest was not filed until after contract award.

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**B-251121.2, May 5, 1993**

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## Procurement

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### Payment/Discharge

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Prior decision establishing valuation of claimant's advertising services for *quantum meruit/quantum valebant* reimbursement purposes is affirmed on reconsideration where claimant has not presented any new evidence in support of its claim.



**Procurement**

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**Contract Management**

- Contract administration
  - ■ Convenience termination
  - ■ ■ Invitations for bids
- 

**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Terms
- ■ ■ Convenience termination

Protest that solicitation lacks consideration for government's right to terminate contract for convenience prior to ordering the specified minimum quantity in an indefinite quantity contract is denied where the solicitation incorporates a termination for convenience clause which by its terms obligates the government to pay the contractor for its costs of standing ready to perform the contract.

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**Procurement**

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**Contract Management**

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

**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Terms
- ■ ■ Defects

Clause providing that "should the government fail to affirmatively terminate for convenience then the contractor agrees that the [g]overnment's failure to order the minimum quantity shall be treated as a termination for convenience" is improper—and renders the solicitation defective—since government may not reserve to itself the right to constructively terminate for convenience after expiration of the contract performance period.

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Design specifications
- ■ ■ ■ Justification

Protest that specifications are unduly restrictive of competition because they require tool carriers with 4-speed transmissions without permitting as an option 3-speed transmissions is denied where the record shows that the restriction reasonably is based on evidence that the use of the 4-speed increases productivity, helps decrease fuel consumption, and reduces wear on the engine.

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## **Procurement**

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### **Specifications**

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

Protest that specifications for tool carrier are unduly restrictive of competition because they require an adjustable steering column or wheel in addition to adjustable seat is denied where the record shows that the restriction reasonably is based on safety concerns.

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## **Procurement**

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### **Specifications**

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

Protest that specifications are unduly restrictive of competition because they require a single lever to control the tilt and lift functions in a tool carrier without permitting as an option separate control levers is denied where the record shows that the restriction reasonably is based on health and safety reasons.

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## **Procurement**

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### **Specifications**

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

Protest that agency was required to use a standard federal specification for tool carriers is denied where the record shows that the 10-year old specification will not meet the agency's minimum needs.

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**B-252014.2, May 5, 1993**

**93-1 CPD 370**

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## **Procurement**

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### **Socio-Economic Policies**

- **Labor standards**
- ■ **Service contracts**
- ■ ■ **Wage rates**
- ■ ■ ■ **Applicability**

Bidder whose price allegedly does not cover hourly rates under Service Contract Act (SCA) wage determination is eligible for contract award where its bid is responsive and does not evidence an intent to violate the SCA, and the firm was determined to be responsible.

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**Procurement**

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**Competitive Negotiation**

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

Cancellation of request for proposals after submission and evaluation of offers is proper where the agency reasonably concludes that the solicitation no longer reflects its actual minimum needs.

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where an agency has advised an offeror during discussions of deficiencies in its proposal and the offeror fails to correct those deficiencies, the agency is not required to conduct an additional round of discussions to provide the offeror a second opportunity to revise its proposal.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

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**Procurement**

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**Bid Protests**

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

Dismissal of protest is affirmed where protester's comments on agency report or its expression of continued interest in the protest were not filed within 10 working days after receipt of the agency report. Letter filed in response to agency request for summary dismissal did not constitute comments on agency report as contemplated by Bid Protest Regulations, since dismissal request was not agency report.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Quality control
- ■ ■ ■ Testing

Protester's assertion that it can supply satisfactory aircraft braking system component does not establish that the contracting agency's requirement for qualification testing (including those tests required of the original equipment manufacturer) before approval of the protester as a source is

unreasonable where the part is reasonably determined to be critical to the safe, effective operation of the aircraft.

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## **Procurement**

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### **Contractor Qualification**

- **Approved sources**
- ■ **Evidence sufficiency**

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## **Procurement**

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### **Noncompetitive Negotiation**

- **Contract awards**
- ■ **Sole sources**
- ■ ■ **Propriety**

Protest challenging sole-source awardee's qualification for procurement of critical part is denied where agency reasonably determined that complete requalification of firm's product was unnecessary since transfer of ownership from previous qualified firm to awardee included all rights to relevant proprietary technical data of predecessor and there has been no change in plant location, personnel or processes of the qualified plant.

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## **Procurement**

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### **Noncompetitive Negotiation**

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

Air Force reasonably justified sole-source award, pursuant to 10 U.S.C. § 2304(c)(2) (1988), for F-16 brake piston assemblies to qualified firm where no other source, including protester, has qualified as an approved source of critical part; the limited number of pistons awarded under sole-source procurement is necessary—while Air Force completes qualification testing of protester's product—to meet agency's current urgent demand in light of agency's critical shortage of piston assemblies and the threatened grounding of aircraft.

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**B-251355.2, B-251355.4, May 7, 1993**

**93-1 CPD 373**

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## **Procurement**

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### **Contractor Qualification**

- **Contractor personnel**
- ■ **Misrepresentation**

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## **Procurement**

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### **Sealed Bidding**

- **Bids**
- ■ **Personnel experience**
- ■ ■ **Resumes**
- ■ ■ ■ **Misrepresentation**

Alleged material misrepresentation in resumes for managers submitted by a bidder to meet definitive responsibility criteria in invitation for bids for facilities maintenance contract did not make the bidder ineligible to receive the award where the misstatements were not made in bad faith and did not materially influence the agency's determination of the bidder's responsibility.

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## **Procurement**

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### **Socio-Economic Policies**

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

The General Accounting Office will consider protests by third parties concerning the Small Business Administration's issuance of a certificate of competency only upon a *prima facie* showing that government officials acted fraudulently or in bad faith or willfully disregarded vital information bearing on a small business firm's compliance with definitive responsibility criteria.

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**B-251702.2, May 7, 1993**

**93-1 CPD 374**

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## **Procurement**

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### **Competitive Negotiation**

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

Proposal was properly excluded from the competitive range where it failed to meet a mandatory solicitation requirement, notwithstanding repeated discussions on the requirement, and where the proposal was only minimally acceptable under the most important evaluation criterion.

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**B-252363, May 7, 1993**

**93-1 CPD 375**

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## **Procurement**

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### **Socio-Economic Policies**

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

The General Accounting Office will not consider the applicability of the Service Contract Act to a procurement for the operation of travel management centers where the Department of Labor, which is statutorily charged with implementation of the Act, has determined that the Act applies, as evidenced by its issuance of a wage determination specifically covering travel clerk service employees.

**Procurement**

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**Competitive Negotiation**

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

**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Source selection boards
- ■ ■ Documentation procedures
- ■ ■ ■ Compliance

Protest contending that agency failed to adequately document its evaluation and decision to select a higher priced offeror is denied where the documentation establishes that the awardee was entitled to a technical score sufficiently high to overcome the protester's slight price advantage under the greatest value scoring system used in the solicitation.

**Procurement**

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**Competitive Negotiation**

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

Where request for proposals did not provide for award on the basis of the lowest priced technically acceptable proposal, but provides for award to the offeror whose offer is most advantageous to the government, contracting agency may properly make a cost/technical tradeoff, subject only to the test of rationality and consistency with the established evaluation factors.

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**Procurement**

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**Competitive Negotiation**

- Discussion
  - ■ Adequacy
  - ■ ■ Criteria
- 

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Adequacy

Where agency considered the protester's proposed staffing level inadequate and advised protester during oral and written discussions to increase its staffing, protest that the agency should have identified the specific areas requiring additional staff and should have provided historical staffing data as guidance is denied. Agency is only required to lead offerors into areas in which their proposals are considered deficient.

**Procurement****Bid Protests**

- GAO procedures
- ■ Preparation costs

Protester is not entitled to the costs of filing and pursuing its protest where agency decision to cancel solicitation, based on excessive delays in the procurement, is not corrective action that was taken in response to a clearly meritorious protest.

**Procurement****Bid Protests**

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

Even if agency action is considered corrective action, General Accounting Office Bid Protest Regulations do not provide for the award of proposal preparation costs in cases where agency takes corrective action.

**Procurement****Sealed Bidding**

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

In a sealed bid procurement for construction services, a procuring agency had a compelling reason to cancel the solicitation after bid opening where additional substantial construction services, not provided by the solicitation but integrally related to the work solicited, were required, and where the agency reasonably determined that performance of the additional construction services under a separate contract would subject the agency to unacceptable risks of delays and claims, and to additional administrative costs and burdens.

**Procurement****Competitive Negotiation**

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

**Procurement****Competitive Negotiation**

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

Agency reasonably canceled a solicitation for leased office space where its space requirements substantially decreased from those described in the original solicitation and where, on resolicitation,

the potential exists for increased competition and cost savings to the government upon the agency's relaxation of a material construction requirement prohibiting build-to-suit facilities.

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**B-251668, May 13, 1993**

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**Procurement**

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**Payment/Discharge**

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Firm that provided services to the Air Force in the absence of a written amendment extending the grant that had funded the services for the previous 4 years may be paid on a *quantum meruit* basis where the services in fact conferred a benefit directly on the agency, notwithstanding that they previously had been provided through a grant arrangement, and all other elements to support *quantum meruit* relief are present.

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**B-251933, May 13, 1993**

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**93-1 CPD 381****Procurement**

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**Competitive Negotiation**

- Offers
- ■ Cost realism
- ■ ■ GAO review

**Procurement**

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**Competitive Negotiation**

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

Procuring agency in a negotiated procurement for the award of a fixed-price contract provided sufficient detail to allow the General Accounting Office to judge the reasonableness of the agency's cost/price analysis where the record consists of the agency's detailed cost estimate, against which offerors' cost breakdowns and proposed prices were compared, a contemporaneous memorandum of the cost/price analysis of initial proposals, and the contracting officer's statements during the protest that describe the cost/price analysis of best and final offers.

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**Procurement**

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**Competitive Negotiation**

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

A procuring agency's cost/price analysis was adequate in a negotiated procurement for the award of a fixed-price contract that provided for a cost realism analysis where: (1) adequate price competition was received; (2) the contracting officer compared the offerors' proposed prices and estimated costs with each other and the government's detailed cost estimate, and reasonably determined they were realistic; and (3) the protester does not show that any element of the awardee's estimated costs was unrealistic or that the awardee's low price was unreasonable.



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**Procurement**

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**REDACTED VERSION**

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**Bid Protests**

- Forum election
- ■ Finality

Timely protest initially filed with, and then withdrawn from the General Services Administration Board of Contract Appeals (GSBCA) in order to pursue the protest at the General Accounting Office (GAO) so as to consolidate the protest with another protest that was filed earlier at GAO by a different firm, may be considered by GAO, despite the fact that the GSBCA had not actually dismissed the protest until after it was filed at GAO.

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**Procurement**

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**Bid Protests**

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

Protester, which submitted a proposal on a multiple award contract for software, is not an interested party under the General Accounting Office Bid Protest Regulations eligible to protest the award of a bid lot on which it did not submit a proposal.

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**Procurement**

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**Bid Protests**

- Antitrust matters
- ■ GAO review

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Price determination
- ■ ■ Collusion
- ■ ■ ■ Allegation substantiation

The General Accounting Office will not generally review an allegation that two offerors colluded in violation of the Certificate of Independent Price Determination and the antitrust laws.

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**Procurement**

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**Competitive Negotiation**

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

A contracting agency must conduct discussions with all offerors in the competitive range and request best and final offers (BAFO), where during communications with the offerors after receipt of initial proposals—which the agency labeled clarifications—the agency sought and obtained information essential for determining the acceptability of the awardees' proposals and/or provided the awardees with an opportunity to revise or modify proposals, but did not request BAFOs.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Requests for proposals**

#### **■ ■ Terms**

#### **■ ■ ■ Compliance**

An award based on a proposal that does not comply with material solicitation specifications is improper; where an agency essentially changes or relaxes its requirements in accepting a proposal that takes exception to the specifications, it must issue a written amendment to notify all offerors of the changed requirements and to afford them an opportunity to revise their proposals in response to the changed requirements.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Best/final offers**

#### **■ ■ Rejection**

#### **■ ■ ■ Price reasonableness**

#### **■ ■ ■ ■ Risks**

A contracting agency may properly assess proposal risk, arising from the offeror's approach or demonstrated lack of understanding, where such consideration is consistent with and intrinsic to the solicitation evaluation criteria, even though the solicitation did not expressly state that proposal risk would be evaluated.

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**B-251996, May 13, 1993**

**93-1 CPD 382**

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## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

#### **■ ■ Protest timeliness**

#### **■ ■ ■ 10-day rule**

#### **■ ■ ■ ■ Adverse agency actions**

Where protester was given written reason for denial of bid correction request 36 working days before second written denial for the same reason, its protest filed after second notification was untimely; protest had to be filed not later than 10 working days after first notice of agency's adverse determination.

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## **Procurement**

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### **Bid Protests**

#### **■ GAO decisions**

#### **■ ■ Recommendations**

#### **■ ■ ■ Contract awards**

#### **■ ■ ■ ■ Withdrawal**

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## **Procurement**

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### **Sealed Bidding**

#### **■ Bids**

#### **■ ■ Pre-award withdrawal**

After correction of mistake was denied, bidder may not waive mistake and receive award at its original price where there is insufficient evidence to show what the intended bid price was and that it would remain the low bid; the agency properly permitted only withdrawal of the bid.

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**B-249880, May 14, 1993**

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**Procurement**

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**Payment/Discharge****■ Payment priority****■ ■ Subcontractors**

An agency may not ordinarily pay contract retainage directly to an unpaid subcontractor unless a court of competent jurisdiction orders the payment or all the interested parties have consented. An exception may be made, however, where: it is not reasonable to expect the subcontractor to obtain a court order in view of the small amount involved (\$847.35); the prime contractor has long ceased operations and its consent cannot be obtained; there is no evidence of competing claims to the amount; and the subcontractor has agreed to indemnify the agency from any further liability concerning the claim. Payment may be made to the subcontractor, provided the agency confirms that there are no competing claims to the funds.

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**B-251926, May 14, 1993**

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**93-1 CPD 383****Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Evaluation****■ ■ ■ Personnel experience**

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**Procurement**

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**Competitive Negotiation****■ Requests for proposals****■ ■ Evaluation criteria****■ ■ ■ Personnel****■ ■ ■ ■ Resumes**

Agency's determination that a protester's proposal for specialized training services was unacceptable was reasonable where the protester proposed an individual in its best and final offer to perform the required services whose resume did not demonstrate that he met the minimum experience requirements set forth in the solicitation.

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**B-250515.2, et al., May 17, 1993\*\*\***

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**93-1 CPD 385****Procurement**

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

Protests challenging rejection of firm as nonresponsible under two different solicitations for ship deactivation services are timely under the General Accounting Office's Bid Protest Regulations where each protest was separately filed within 10 days of formal notices of initial adverse agency action.

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## **Procurement**

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### **Socio-Economic Policies**

- Small businesses
- ■ Competency certifications
- ■ ■ Eligibility
- ■ ■ ■ Criteria

Contracting agency's determination in connection with procurement for ship deactivation services that small business bidder failed to meet certain criteria in agency's prequalification program with respect to facilities and resources relates directly to the firm's capability to perform the contract. As such, the agency's determination concerns the firm's responsibility, requiring that the matter be referred to the Small Business Administration under certificate of competency procedures.

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## **B-251698.3, B-251698.4, May 17, 1993    REDACTED VERSION**

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## **Procurement**

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### **Competitive Negotiation**

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

Agency cost realism analysis of offerors' proposed costs which mechanically adjusts proposed labor hours and material costs by essentially splitting the difference between the government's estimate and the contractor's estimate for all contractor estimates that are [deleted] percent greater or [deleted] percent less than the government estimate does not satisfy the requirement for an independent analysis of each offeror's proposed costs.

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## **Procurement**

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### **Competitive Negotiation**

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

Where government estimate of labor hours and material costs required to perform a contract differs substantially from the contractors' proposed estimates and is not revealed to offerors, contracting agency should conduct discussions with the offerors concerning the discrepancy.

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## **Procurement**

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### **Competitive Negotiation**

- Discussion
- ■ Determination criteria

Even where solicitation states that the agency intends to award a contract without holding discussions unless discussions are necessary, the decision that discussions are not necessary must be reasonably based on the particular circumstances of the procurement, including consideration of the proposals received and the basis for the selection decision.

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**Procurement**

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**Bid Protests**

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

Protester which is not eligible for award of contract under section 8(a) of the Small Business Act lacks the requisite direct economic interest to be considered an "interested party" under General Accounting Office's Bid Protest Regulations to challenge the award to an eligible 8(a) firm, since protester would not be eligible for award even if its protest were sustained.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Approved sources

Agency properly found that costs incurred to obtain product's inclusion on a qualified products list are not reimbursable as proposal preparation costs.

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**Procurement**

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**Bid Protests**

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

Where a protester fails to make any effort to segregate unallowable costs from potentially allowable ones, the entire amount must be disallowed.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Burden of proof

Unsupported claim is denied as to amounts which appear on their face to be excessive and where the reliability of the claim is placed in doubt by the protester's own contemporaneous documentation.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ ■ Preparation costs
- ■ ■ ■ Burden of proof

Where the agency's position in a cost dispute is reasonable, the protester is not entitled to the costs of challenging that position.

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**Procurement**

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**Bid Protests**

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

Where prior decision of our Office sustaining protest provides that protester is entitled to recover its reasonable attorneys' fees, other than those allocable to a particular issue, protester is not barred from recovering some part of the fees, even though protester's counsel is unable to segregate a substantial portion of its fees by issue. Where the protester's counsel is unable to provide a reasoned estimate of the fees allocable to the portion of the protest on which the protester prevailed and the parties are unable to agree to an amount, General Accounting Office will determine the amount.

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**Procurement**

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**Bid Protests**

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

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ GAO review

Allegation that evaluation of awardee's and protester's proposals was flawed, such that awardee's evaluation was too high and protester's was too low, is dismissed as academic; even if protester received highest possible evaluation and awardee's rating were lowered, intervening offeror with highest evaluation rating and lower price than protester would be in line for award.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Prior contracts
- ■ ■ ■ Contract performance

Selection of prior relevant contracts for evaluation of past performance was proper where agency's selection criteria were logically related to overall objective of conducting past performance evaluation (to evaluate offerors' capability to perform contract comparable in engineering and manufacturing complexity to the solicited requirement), and contracts were selected for review based on those criteria.

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**Procurement**

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**Competitive Negotiation**

- Technical evaluation boards
- ■ Information adequacy
- ■ ■ Allegation substantiation

Protest that agency lacked adequate information for determining whether prior contracts were relevant for past performance evaluation is denied where solicitation required offerors to provide

all available information, the information provided related to relevancy, and protester points to no specific relevancy determination that was affected by alleged lack of adequate information.

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**B-250827.2 , May 18, 1993\*\*\***

**93-1 CPD 390**

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**Procurement**

**Bid Protests**

■ **GAO procedures**

■ ■ **Preparation costs**

Protester is entitled to recover the costs of filing and pursuing its protest where the agency failed to promptly and adequately investigate protest allegation until after the protester undertook the time and expense to file comments on the agency's report, and did not take corrective action until 79 working days after the protest was filed, despite having access, at the time the protest was filed, to the evidence which supported the validity of the protest.

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**B-251974, May 18, 1993**

**93-1 CPD 391**

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**Procurement**

**Sealed Bidding**

■ **Bids**

■ ■ **Responsiveness**

■ ■ ■ **Certification**

■ ■ ■ ■ **Signatures**

Bid that contained a Certificate of Procurement Integrity signed by an individual other than the signatory of the bid is responsive where the individual who signed the certificate was the president of the company, and was thus authorized to sign the certificate and bind the bidder.

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**B-252027, May 18, 1993**

**93-1 CPD 392**

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**Procurement**

**Socio-Economic Policies**

■ **Small businesses**

■ ■ **Responsibility**

■ ■ ■ **Competency certification**

■ ■ ■ ■ **GAO review**

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

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**Procurement**

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**Specifications**

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

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**Procurement**

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**Specifications**

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

Protest alleging that specifications (salient characteristics) of brand name or equal solicitation are unduly restrictive of competition is denied where the protester makes no showing that the specifications do not reflect the agency's needs.

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Shipment schedules

Protest that delivery schedule is difficult for inexperienced companies to meet, and therefore unduly restricts competition, is denied where agency establishes that the delivery schedule is necessary to meet its minimum needs.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Compliance

Agency properly rejected as nonresponsive a bid which the protester submitted on a schedule that it had prepared itself which varied in material respects from the solicitation bid schedule.

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
- ■ Evaluation
- ■ ■ Tests
- ■ ■ ■ Administrative discretion

Where protester's best and final offer (BAFO) advised agency that it had extensively redesigned its proposed item to remedy deficiencies and weaknesses, agency reasonably determined that it could not raise protester's scores in all areas affected without retesting. In view of substantial cost of retest and protester's failure to submit sample of the item with its BAFO, agency reasonably determined to evaluate redesigned item without conducting retesting.



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## **Procurement**

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### **Competitive Negotiation**

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

Agency properly awarded contract to offeror whose higher priced proposal was technically higher rated, where the price/technical tradeoff was reasonably based and consistent with the solicitation's evaluation scheme.

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**B-252865.2, May 20, 1993**

**93-1 CPD 396**

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## **Procurement**

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### **Bid Protests**

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

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## **Procurement**

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### **Bid Protests**

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

Request for reconsideration of decision dismissing protest as untimely is denied where the protest was filed at the General Accounting Office more than 10 days after initial decision denying agency-level protest; protester's continued pursuit of protest with the agency does not toll timeliness requirements.

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**B-249910.2, May 24, 1993**

**93-1 CPD 397**

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## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **GAO decisions**
- ■ ■ **Reconsiderations**

Request for reconsideration is denied where protester fails to show error of fact or law or information not previously considered that would warrant reversal or modification of prior decision.

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**B-250135.4, May 24, 1993**

**93-1 CPD 398**

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## **Procurement**

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### **Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Prior contract performance**

In evaluating proposals for award of a contract for removal, transportation and disposal of multiple hazardous waste items, agency reasonably rated protester's past performance as "marginal" on the basis of the protester's multiple, documented deficiencies in performing two recently awarded similar contracts.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Evaluation**

#### **■ ■ ■ Prior contract performance**

#### **■ ■ ■ ■ Business affiliates**

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## **Procurement**

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### **Contract Management**

#### **■ Corporate entities**

#### **■ ■ Prior contract performance**

#### **■ ■ ■ Business affiliates**

Agency reasonably did not consider the past performance of awardee's "sister" corporations in evaluating awardee's past performance where these entities were not privy to the proposal, the agency had never contracted with them, and other offerors' proposals were similarly evaluated.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Contract awards**

#### **■ ■ Administrative discretion**

#### **■ ■ ■ Cost/technical tradeoffs**

#### **■ ■ ■ ■ Technical superiority**

Where solicitation contemplated removal, transportation and disposal of hazardous waste and provided that, in making the award determination, an offeror's past performance was the only factor that would be balanced against price, the agency reasonably determined that awardee's significantly superior past performance warranted payment of its higher price.

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**B-250282.2, May 24, 1993**

**93-1 CPD 399**

## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

#### **■ ■ GAO decisions**

#### **■ ■ ■ Reconsideration**

Request for reconsideration is denied where request fails to show that the decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of decision.

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**B-251265.2, May 24, 1993**

**93-1 CPD 400**

## **Procurement**

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### **Competitive Negotiation**

#### **■ Competitive advantage**

#### **■ ■ Non-prejudicial allegation**

Protest that a competitor received an improper competitive advantage by virtue of having been given a copy of a report by the agency is denied where the agency allowed the competitor to review the report because of its experience as the original equipment manufacturer, and its review of the report did not provide it an unfair competitive advantage.

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
- ■ Procedural defects

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Best/final offers
- ■ ■ Acceptance time periods

Protest that the agency failed to set a common cut-off date for the receipt of best and final offers is denied because the protester was not prejudiced by the agency's failure to comply with the procedural requirement.

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**B-251348.2, May 24, 1993****93-1 CPD 401**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Modification
- ■ ■ Late submission

Procuring agency properly rejected as late a proposal modification that did not reach the contracting officer until after the closing time, even though protester produced evidence of delivery of an Express Mail package to the installation prior to the closing time, since there is no evidence that the package contained the protester's modification or when its modification was received at the installation, and there is no evidence that the modification had been solely under the agency's control until it was discovered.

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**B-251409.2, May 24, 1993****93-1 CPD 402**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of a decision denying a protest against the cancellation of a solicitation where all the bid prices received exceeded the amount of money the agency had available for the procurement is denied since the protester has not shown that the decision was based on an error of fact or law.

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**B-251584.2, May 24, 1993****93-1 CPD 403**

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**Procurement**

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**Bid Protests**

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

Protester is not entitled to the costs of filing and pursuing its protest to the General Accounting Office (GAO), even though protest previously was filed with agency on the same matter, where agency took corrective action approximately 1 month after protest was filed with GAO.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Amendments
- ■ ■ Propriety

Protest is sustained where agency issued amendment materially changing terms of solicitation (from a requirements type to a definite quantity procurement) after the receipt of best and final offers (BAFO) but failed to request additional round of BAFOs to provide offerors a reasonable opportunity to revise offers to reflect changed requirements and record shows that competitive standing of offerors might have been different if given the opportunity to respond to solicitation's changed requirements.

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**B-252016, May 24, 1993****93-1 CPD 405**

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**Procurement**

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**Special Procurement Methods/Categories**

- Service contracts
- ■ Management services
- ■ ■ Multiple/aggregate awards
- ■ ■ ■ Justification

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**Procurement**

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**Specifications**

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

Agency properly bundled requirements for building maintenance services at separate facilities in two cities into "total package" commercial facilities management procurement—notwithstanding agency's previous practice of breaking out the services—since the "bundling" represents the government's minimum needs because of (1) unsatisfactory levels of competition for, and performance of, the various maintenance contracts and (2) staffing cuts which have limited the agency's ability to monitor multiple contracts in two cities.

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**B-252073.2, May 24, 1993\*\*\*****93-1 CPD 406**

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**Procurement**

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**Competitive Negotiation**

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

In a negotiated procurement, award to technically superior, higher priced firm offering a foreign product is proper where consistent with the solicitation evaluation criteria and the application of the Buy American Act, 41 U.S.C. § 10a-10d (1988), price differential, the agency reasonably determined that the superior technical merit of successful proposal was sufficiently significant to justify award at higher cost.

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## Procurement

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### Socio-Economic Policies

- Preferred products/services
- ■ Foreign products
- ■ ■ Acceptability
- ■ ■ ■ Advertising

The inclusion of a foreign source prohibition in the *Commerce Business Daily (CBD)* announcement did not “lock” the agency into such a prohibition where the terms of the subsequent solicitation itself did not prohibit foreign source participation. The solicitation alone represents the government’s minimum needs, and a CBD announcement is not the equivalent of a formal solicitation.

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**B-252091, May 24, 1993**

**93-1 CPD 407**

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## Procurement

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### Bid Protests

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

Agency-level protest challenging the postponement of bid opening was timely filed with the agency after bid opening but within 10 working days of the date the protester learned the basis of the protest for purposes of determining timeliness under our Bid Protest Regulations, where the protester learned the basis of its protest only 2 hours before bid opening and did not have a reasonable opportunity to file its protest before bid opening.

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## Procurement

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### Sealed Bidding

- Bid opening
- ■ Postponement
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

In a sealed bid procurement, a procuring agency may postpone the time set for bid opening for the purpose of enhancing competition, where the contracting officer has reason to believe that a significant segment of the competition would otherwise be excluded from the competition for reasons beyond the bidder’s control.

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**B-252168, May 24, 1993**

**93-1 CPD 408**

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## Procurement

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### Noncompetitive Negotiation

- Sole sources
- ■ Justification
- ■ ■ Intellectual property

Agency reasonably justified its procurement of a dynamometer under the small purchase procedures on a sole-source basis where the agency reasonably determined that only one source manufactured a dynamometer that meets the agency’s needs.

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## **Procurement**

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### **Noncompetitive Negotiation**

- **Contract awards**
- ■ **Sole sources**
- ■ ■ **Justification**
- ■ ■ ■ **Preferred products/services**

Buy American Act, 41 U.S.C. § 10 (1988), is not applicable to the purchase of a dynamometer from a foreign firm under small purchase procedures where the agency has a sufficient sole-source award justification and reasonably determines that a dynamometer which meets its needs is not manufactured in the United States.

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**B-252199, May 24, 1993\*\*\***

**93-1 CPD 409**

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## **Procurement**

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### **Competitive Negotiation**

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

Agency properly evaluated proposal by offeror which had not previously produced the exact item being procured as acceptable with respect to experience where the evaluation was reasonable and consistent with the evaluation criteria which indicated that production of similar items would be considered under the experience factor.

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**B-252349, May 24, 1993**

**93-1 CPD 410**

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## **Procurement**

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### **Sealed Bidding**

- **Invitations for bids**
- ■ **Wages rates**
- ■ ■ **Amendments**
- ■ ■ ■ **Acknowledgment**

Contracting agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment establishing a rate for an additional labor category, since the amendment's inclusion of the additional rate renders the amendment material, and there is no evidence that the bidder was otherwise legally obligated to pay employees in that additional labor category at a level at least as high as the rate set out in the amendment.

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**B-250407.4, May 26, 1993**

**93-1 CPD 411**

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## **Procurement**

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### **Bid Protests**

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

Second request for reconsideration of decision dismissing protester's challenge against award to technically acceptable, lowest priced offeror is denied since ground for reconsideration—that General Accounting Office cannot dismiss a protest for failure to state a valid basis of protest unless a full agency report has been submitted by the agency—is without merit.

---

**B-252182, May 26, 1993**

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**Procurement**

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**Competitive Negotiation****■ Requests for proposals****■ ■ Cancellation****■ ■ ■ Price reasonableness**

Contracting agency reasonably canceled a request for proposals where it could not determine that the only offer received was at a fair and reasonable price.

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**B-251959.2, May 27, 1993**

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**93-1 CPD 412**

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**Procurement**

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

Request for reconsideration is denied where protester fails to state any legal or factual grounds for reversal or modification of the decision.

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**B-252059, May 27, 1993**

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**93-1 CPD 413**

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**Procurement**

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**Small Purchase Method****■ Contract awards****■ ■ Propriety**

Protest against the issuance of a purchase order under small purchase procedures is denied where the record shows that, after the competing firms were provided an equal opportunity to compete, the contracting agency issued the order to the awardee because of its lower price and reliable record of past performance.

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**B-250158.4 , May 28, 1993\*\*\***

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**93-1 CPD 422**

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**Procurement**

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

Request for reconsideration is denied where agency failed to conduct meaningful discussions with firm; agency should have discussed its concerns regarding technical proposal's serious weaknesses which required amplification and had a significant adverse affect on the proposal's technical evaluation despite agency's failure to label these serious weaknesses as deficiencies or the determination that the proposal was otherwise acceptable. Reconsideration of protest decision is not warranted where requester essentially raises same arguments on reconsideration as were raised in original protest and request for reconsideration does not demonstrate that decision was based on an error of fact or law.

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**Procurement**

---

**Competitive Negotiation**

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

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**Procurement**

---

**Competitive Negotiation**

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

Protest that contracting officer improperly influenced technical evaluation—resulting in the downgrading of protester's initially higher scored proposal and upgrading of the awardee's lower scored proposal—is denied where the record does not reflect any bias; rather, it shows that the contracting officer provided appropriate input to assure that the proposals were evaluated in accordance with the evaluation criteria set forth in the solicitation.

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**Procurement**

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**Competitive Negotiation**

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

Agency properly awarded contract to higher priced offeror which had a higher rated technical proposal 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 represented the best value to the government.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Adequacy

Allegation that agency improperly relied on internal minimum staffing estimate as a benchmark in evaluating adequacy of staffing proposed by each offeror for support maintenance services is denied where agency's estimate was accurate and where protester's own assertions support the reasonableness of the agency's estimate.



**Procurement**

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**Bid Protests**

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

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protester's late receipt of agency report does not provide a basis to reopen a protest which was dismissed for failure to file comments or express continued interest in the protest within 10 working days after receipt of agency report, where the 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 the protest.

**Procurement**

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**Sealed Bidding**

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

Agency properly rejected as nonresponsive a bid which contained unsolicited descriptive literature concerning the product offered, which established that the product did not comply with a material solicitation requirement.

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**Procurement**

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**Contractor Qualification**

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

Allegation that the awardee has not previously supplied item to agency concerns the agency's affirmative determination of the awardee's responsibility which our Office will not review absent a showing of possible fraud, bad faith, or misapplication of a definitive responsibility criterion.

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