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Preface

This publication is one in a series of monthly pamphlets entitled "Digests of Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions concerning claims are issued in accordance with 31 U.S.C. § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition In Contracting Act, Pub. L. No. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by file number and date, e.g., B-248928, Sept. 30, 1992. Approximately 10 percent of GAO's decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies and in annual volumes. Decisions in these volumes should be cited by volume, page number, and year issued, e.g., 71 Comp. Gen. 530 (1992).

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Appropriations/Financial Management

B-253946, January 1, 1994

Appropriations/Financial Management

Claims By Government

- Claim settlement
- ■ Amount determination
- ■ ■ Tax liability
- ■ ■ ■ GAO review

GAO will not review conclusion of the Bureau of Alcohol Tobacco and Firearms that the Defense Commissary Agency is liable for the cigarette floor stocks tax imposed under section 11202(i) of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, 104 Stat. 1328-420). DeCA should make arrangements to finance the tax payment with funds obtained through the sale of cigarettes.

B-255529, January 10, 1994

Appropriations/Financial Management

Budget Process

- Funds transfer
- ■ Amount availability
- ■ ■ Appropriation restrictions

The advance apportionment and obligation of about 75 percent of the funds appropriated for payments to the United Nations under the fiscal year 1994 continuing resolution violated neither the continuing resolution nor the provisions of title 31, United States Code, controlling apportionment of funds.

B-253507, January 11, 1994

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Attorney fees

The National Archives and Records Administration does not have authority to pay attorney fees incurred by an employee during the administrative settlement of a personnel matter when the employee did not appeal to the Merit Systems Protection Board.

Appropriations/Financial Management

Budget Process

■ **Funds**

■ ■ **Impoundment**

■ ■ ■ **Statutory restrictions**

GAO report concludes that 37 rescissions proposed by the President in his second special impoundment message for fiscal year 1994 are in accordance with the Impoundment Control Act. GAO report, however, provides specific comments on 26 of the rescissions.

Civilian Personnel

B-249923, January 11, 1994

Civilian Personnel

Travel

- Temporary duty
- ■ Per diem
- ■ ■ Eligibility

A federal employee was detailed to a 1-year assignment at his request to a state government under an Intergovernmental Personnel Act assignment which made no provision for the agency to pay per diem while the employee was at the assignment location, the employee specifically was advised in advance that the agency would not pay such per diem, and no authorization for such per diem was given by the agency. The employee resided in his personally owned condominium during the assignment. Subsequently, he claimed partial per diem for meals and incidentals which the agency denied. In the circumstances, the agency did not abuse its discretion in not authorizing per diem. The denial of the claim is sustained.

B-253507, January 11, 1994

Civilian Personnel

Compensation

- Retroactive compensation
- ■ Adverse personnel actions
- ■ ■ Attorney fees
- ■ ■ ■ Eligibility

The National Archives and Records Administration does not have authority to pay attorney fees incurred by an employee during the administrative settlement of a personnel matter when the employee did not appeal to the Merit Systems Protection Board.

B-254216, January 11, 1994

Civilian Personnel

Relocation

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

A recently transferred employee was in temporary quarters at her new duty station and was assigned 5 days of temporary duty at another location. She retained her temporary quarters during the 5-day temporary duty period since her son had to stay there and go to school, and her clothing and possessions would have been too bulky to transport and would have required storage space. Since the agency agrees that it was reasonable for the employee to retain her temporary quarters under these circumstances, her claim for temporary quarters subsistence expenses is allowed, as recalculated below.

B-254289, January 13, 1994

Civilian Personnel

Travel

- Temporary duty
- ■ Miscellaneous expenses
- ■ ■ Reimbursement
- ■ ■ ■ Child care services

Child care expenses are not reimbursable in connection with an employee's official travel since neither the governing statutes nor the Federal Travel Regulation authorize such reimbursement.

B-252521*, January 21, 1994**

Civilian Personnel

Compensation

- Payroll deductions
- ■ Annuity deductions
- ■ ■ Underdeductions
- ■ ■ ■ Error detection

A temporary employee of the General Services Administration (GSA) who applied for and began receiving a deferred annuity from the Office of Personnel Management at age 62, while continuing his temporary employment, received overpayments as his annuity was not deducted from his pay. Waiver is denied since the employee did not pursue the matter adequately when he suspected possible overpayment.

B-254556, January 21, 1994

Civilian Personnel

Compensation

- Foreign service
- ■ Personnel
- ■ ■ Complaints
- ■ ■ ■ GAO authority

Assistant General Counsel for Employee and Public Affairs, US Agency for International Development, is advised that nothing in the Foreign Service Act of 1980, as amended, would preclude this office from taking jurisdiction over a claim of a Foreign Service Officer (FSO) unless a claim has been filed previously with the Board. The statutory authority for filing a grievance with the Foreign Service Grievance Board does not contain an "exclusivity" provision similar to the language in 5 U.S.C. § 7121(a) which would preclude this Office from taking jurisdiction pursuant to our decision *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992). Rather, FSOs are given a choice to (1) file a claim with the Foreign Service Grievance Board, or (2) seek relief under another provision of law, regulation, or Executive Order. 22 U.S.C. § 4139.

B-255038, January 26, 1994

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Mortgage insurance
- ■ ■ Reimbursement

Notwithstanding the fact that he received erroneous advice to the contrary by an agency employee, an employee may not be reimbursed for a mortgage insurance premium he had to pay incident to his transfer because it is specifically prohibited in the Federal Travel Regulation, 41 C.F.R. § 302-6.2(d)(2)(i)(1993).

Miscellaneous Topics

B-251181.2, January 14, 1994

Miscellaneous Topics

Federal Administrative/Legislative Matters

■ Advisory committees

■ ■ Statutes

■ ■ ■ Applicability

Miscellaneous Topics

Federal Administrative/Legislative Matters

■ Advisory committees

■ ■ Board members

■ ■ ■ Basic compensation

Nuclear Regulatory Commission (NRC) is advised that arrangements adopted by NRC in 1993 to pay advisory committee members employed by the National Laboratories directly for their compensation and expenses are consistent with statutory requirements and avoids necessity of specifically deciding the legality of prior practice of making such payments to the National Laboratories.

Procurement

Late cases

B-252070.6, B-252070.7, October 12, 1993

94-1 CPD ¶ 195

Procurement

REDACTED VERSION

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Protest against agency cost evaluation is sustained where agency accepts proposed costs without adjusting for differing approaches to identifying evaluated management and support effort, which resulted in the awardee assigning significant costs to the unevaluated environmental restoration effort which cost were based on projected funding availability, not actual costs; since the government generally is bound to pay the contractor its actual and allowable costs, regardless of the costs proposed, a cost-realism analysis must be performed on proposals for a cost-reimbursement contract to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that discussions were inadequate is denied where agency's question to protester during discussions was reasonably calculated to lead generally into the area of its proposal requiring amplification.

Procurement

Competitive Negotiation

- Offers
 - ■ Technical acceptability
 - ■ ■ Negative determination
 - ■ ■ ■ Propriety
-

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost reimbursement
- ■ ■ ■ Cost realism

Protest against exclusion of proposal from competitive range for informational deficiencies rendering proposal technically unacceptable is denied where request for proposals called for detailed information, and the informational deficiencies called into question the protester's understanding of the required contract effort and were so pervasive that correction would require a major rewrite.

Procurement

Competitive Negotiation

- Discussion
 - ■ Adequacy
 - ■ ■ Criteria
-

Procurement

Competitive Negotiation

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

Agency reasonably determined to amend rather than cancel request for proposals after receipt of initial proposals where the additional required effort amounted to an increase of only 12.3 percent in the overall contract effort and the nature of the additional effort was the same as that already required under the solicitation as issued.

Current cases

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Prices
- ■ ■ ■ Line items

A bid containing an apparent obvious mistake for one major line item of construction services was properly rejected where this line item price was significantly lower than the other bidders' prices and the government estimate, and the bidder declined to provide the agency with requested documentation that would support its asserted claim that the bid was correct as submitted.

Procurement

Specifications

- Minimum needs standards
- ■ Determination
- ■ ■ Administrative discretion

Protest against agency's decision not to require interfacing of offerors' radiosondes with existing government computer systems prior to award is denied where protester has not shown that the agency's determination of its minimum needs was unreasonable.

Procurement

Competitive Negotiation

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

Protest against agency's decision not to include post-award interfacing costs as a price-related factor in the solicitation is denied where record shows that the decision had the effect of increasing competition and was not prejudicial to the protester.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Off-schedule purchases
- ■ ■ Justification
- ■ ■ ■ Low prices

Although the total price of a dictation system, consisting of two item numbers on the awardee's Federal Supply Schedule (FSS) contract and a non-FSS, open market item, exceeds the contract's maximum ordering limitation, issuance of a delivery order for the system was reasonable where the total price of the items covered under the awardee's FSS contract was less than the maximum ordering limitation and the non-FSS, open market item appears to be incidental to the acquisition and represents less than 4 percent of the awardee's total system price.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Price omission

Bidder's failure to indicate its cumulative bid price on Standard Form 1442 bid cover sheet does not render bid nonresponsive where bidder has properly completed its bid pricing schedule—by setting forth a fixed price estimate for every required contract line item number—and thus bidder's total price offer is easily determinable from the face of its bid documents.

Procurement

Contract Disputes

- Sureties
- ■ Liability
- ■ ■ Amount determination

Where bid bond properly references accompanying bid by solicitation number, is otherwise properly executed, and where the cumulative bid price is ascertainable from the face of the submitted bid pricing schedule, fact that bidder indicated bid bond indemnification amount as a percentage rather than exact numerical amount does not require rejection of bid as nonresponsive since the surety is clearly bound to indemnify the government in the required amount.

B-253908.2, January 10, 1994 REDACTED VERSION 94-1 CPD ¶ 17

Procurement

Bid Protests

- Contract performance
- ■ Work suspension

A procuring agency is not required to suspend performance of a contract under the Competition in Contracting Act of 1984, where the agency did not receive notice from the General Accounting Office (GAO) within 10 calendar days of the date of award that a protest had been filed with GAO.

Procurement

Contractor Qualification

- Eligibility
- ■ Certification
- ■ ■ Acceptability

In a procurement for Medicare Program peer review services under which contracts can only be awarded to eligible physician-sponsored or physician-access organizations, a procuring agency may not reasonably rely upon an offeror's certification of eligibility where it has reason to believe that the certification may be inaccurate.

Procurement

Competitive Negotiation

- Contract awards
- ■ Error allegation
- ■ ■ Allegation substantiation
- ■ ■ ■ Lacking

The protester is not entitled to the solicitation's evaluation preference for physician-sponsored, peer review organizations, where the agency reasonably did not rely upon the protester's certification of eligibility as a physician-sponsored organization because the protester's certificate was facially defective and the protester did not demonstrate its claimed status, despite the agency's specific request to do so during discussions.

Procurement

Bid Protests

- Non-prejudicial allegation
- ■ GAO review

The General Accounting Office does not recommend disturbing an award of a contract for Medicare Program peer review services, notwithstanding the awardee's proposal's failure to indicate that it had an arrangement with one physician in "every generally recognized specialty," as re-

quired by applicable regulations to be eligible to receive such a contract, where the record otherwise evidences the existence of such an arrangement and the protester is not prejudiced because its proposal did not evidence arrangements with physicians in "every generally recognized specialty."

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Cost data

The procuring agency reasonably did not credit the protester's asserted "cost savings" in the agency's evaluation of the protester's proposed costs where the protester did not make a firm commitment to achieve these savings.

Procurement

Competitive Negotiation

■ Competitive advantage

■ ■ Incumbent contractors

The government is not required to equalize competition with the respect to the advantage that an incumbent may have or to exclude an incumbent from the competition, as long as that advantage does not result from unfair action by the government.

B-254045.2, January 10, 1994 REDACTED VERSION 94-1 CPD ¶ 18

Procurement

Competitive Negotiation

■ Contract awards

■ ■ Propriety

■ ■ ■ Source selection boards

■ ■ ■ ■ Deficiency

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Evaluation criteria

■ ■ ■ Cost reimbursement

■ ■ ■ ■ Cost realism

Agency's source selection of a cost reimbursement contract under best value evaluation criteria is unreasonable where the source selection official fails to reasonably resolve the evaluated negative questions in the awardee's technical proposal, caused by its apparent inconsistency with the cost proposal, or to adequately assess the substantial "unquantified" concerns about the awardee's evaluated costs.

Procurement

Contract Management**■ Contract administration****■ ■ Contract terms****■ ■ ■ Modification****■ ■ ■ ■ Propriety**

Agency properly made a noncompetitive modification to the contract of its current, active mobilization base producer where: (1) protester and its competitor have been the only qualified industrial mobilization base suppliers of rocket motors for several years; (2) one of protester's motors exploded during acceptance testing and agency reasonably determined after investigating that protester must make major manufacturing process changes and complete requalification testing before agency would accept any more rocket motors from protester; and (3) a critical shortage of rocket motors existed as a result of protester's motor exploding.

Procurement

Competitive Negotiation**■ Requests for proposals****■ ■ Terms****■ ■ ■ Ambiguity allegation****■ ■ ■ ■ Interpretation**

Where agency learns after award that a material solicitation requirement was susceptible of more than one reasonable interpretation and that the awardee's interpretation of the requirement was different from the agency's, the agency properly determined to terminate the awardee's contract, clarify the solicitation, and recompute the requirement

Procurement

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

Protest that contracting agency improperly evaluated proposals under solicitation which sought offers for electro-optical/infrared engineering and technical support is denied where record shows that agency reasonably evaluated the proposals under each of the solicitation evaluation factors.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Justification**

Agency may exclude proposal from the competitive range where the agency reasonably determines that because of the proposal's high price it has no reasonable chance of being selected for award.

B-255080, January 10, 1994

Procurement

Specifications

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

Contention that specifications issued by contracting agency should be more restrictive to meet the needs of the user agency is not generally reviewable by the General Accounting Office since the use of broadened or less stringent specifications is consistent with the requirement for full and open competition.

B-255098, January 10, 1994

94-1 CPD ¶ 10**Procurement**

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Invitations for bids
- ■ ■ ■ Identification

Contracting agency properly rejected bid as nonresponsive where discrepancies between the principal listed on the bid bond submitted with the bid and the nominal bidder reasonably raised doubts as to the enforceability of the bond.

B-255177, January 10, 1994

94-1 CPD ¶ 63**Procurement**

Competitive Negotiation

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

Protester's hand-carried proposal, which was delivered via commercial carrier to the mailing address rather than the address for hand-carried proposals, and was received by the contracting officer after the closing time for receipt of proposals, was properly rejected as late where there is no evidence of government mishandling after receipt.

B-255279, January 10, 1994

94-1 CPD ¶ 11**Procurement**

Sealed Bidding

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

Agency's decision to reject bid due to suspected mistake was reasonable where the bid price is significantly lower than both the other bid prices submitted and the government estimate, and where the bidder failed to submit sufficient documentation or explanation to support its bid calculations, creating a reasonable doubt that the bid price included all costs associated with the work required by the solicitation.

Procurement

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

Protester is entitled to the costs of filing and pursuing its protests challenging the proposed sole-source awards of contracts for the maintenance of land mobile radios where the agency failed to promptly or adequately investigate the clearly meritorious protest allegations attacking the sole-source justifications, but only took corrective action when the hearing testimony showed the bases for the sole-source awards were unfounded.

Procurement

Bid Protests**■ Premature allegation****■ ■ GAO review**

Protest that firms selected for award under solicitation for laboratory services contracts have organizational conflicts of interest which preclude award—because they had also been proposed as sub-contractors to the facility environmental restoration management contractor (ERMC) and in that role could determine the extent of testing to be performed under the laboratory services contracts—is dismissed as premature where protest against award of ERMC contract has been sustained and agency is reevaluating proposals.

Procurement

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

Protest that discussions were inadequate is denied where agency's questions to protester during discussions were reasonably calculated to lead protester into significant areas of weakness in its proposal which were susceptible to correction.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Prior contract performance**

Contracting agency reasonably evaluated protester's past performance as merely acceptable based on protester's prior performance of only one similar contract. Agency properly did not consider protester's references for work performed in Mexico since that work was not relevant to this solicitation because it involved environmental consulting, not hazardous waste removal.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Agency properly awarded contract to higher-priced offeror which had a better rated past performance record where the price/past performance tradeoff was reasonable and consistent with solicitation's evaluation scheme.

Procurement

Contract Management

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

Whether a potential contractor can comply with limitations on subcontracting provision in solicitation issued as a small business set-aside is a matter of responsibility not reviewable by the General Accounting Office absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria on the part of contracting officials; whether the contractor in fact complies is a matter of contract administration, also not reviewable under the bid protest function.

B-251789.3, January 14, 1994 REDACTED VERSION 94-1 CPD ¶ 197

Procurement

Contractor Qualification

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

Where protest as initially filed asserted only generally that statements in preaward survey were incorrect and did not support determination of nonresponsibility, and detailed arguments concerning specific observations and findings in the preaward survey were raised for the first time in comments on the agency report, the detailed arguments are untimely and will not be considered.

Procurement

Contractor Qualification

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

Agency's determination, based on information acquired during preaward survey, that offeror lacked the understanding and capability to implement its proposed approach to meeting the specification requirements, constituted a nonresponsibility determination, not a revised technical evaluation. Agency therefore was not required to reopen discussions and request revised proposals.

B-254650, January 14, 1994

Procurement

Payment/Discharge

- Shipment costs
- ■ Additional costs
- ■ ■ Administrative settlement
- ■ ■ ■ GAO review

A carrier submitted a supplemental bill (claim) for additional charges under a Government Bill of Lading transaction involving services which were originally paid on October 23, 1988, and which did not involve other payment activities, including refunds or deductions. The General Services Administration denied the claim on May 13, 1992. Under 31 U.S.C. § 3726(g), this Office must receive the carrier's request for review of GSA's settlement before November 13, 1992.

B-254743, January 14, 1994

94-1 CPD ¶ 15**Procurement**

Socio-Economic Policies

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

Protest challenging agency's failure to set procurement aside for small disadvantaged businesses (SDB) is sustained where in determining whether or not bids from two or more SDBs could reasonably be expected, agency failed to investigate whether SDB bidders under previous solicitation for same services were interested in competing, and agency received expressions of interest from two SDBs prior to issuance of the solicitation.

B-254815.3, January 14, 1994

94-1 CPD ¶ 16**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester has not shown that original decision dismissing protest contained errors of fact or law or that General Accounting Office failed to consider information that would warrant reversal or modification of earlier decision.

B-253813.2, January 18, 1994

94-1 CPD ¶ 19**Procurement**

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

The General Accounting Office affirms prior decision that recommended the cancellation of an award by the Forest Service of a small business set-aside timber sale to a bidder, which erroneously certified itself as a small business concern in the face of an applicable adverse Small Business Administration (SBA) size determination, where the Forest Service had been expressly apprised by the SBA prior to award that the bidder could not be considered a small business under the applicable SBA regulations which control such size determinations.

Procurement

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

Protest of technical acceptability of proposal is denied where contracting officer reasonably concluded that the awardee met the solicitation requirements and sufficiently demonstrated its ability to perform the required services.

Procurement

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

Pre-award samples were properly rejected as technically unacceptable where record shows samples were evaluated in accordance with the solicitation's evaluation factors and that the protester's third sample still contained a high number of uncorrected deficiencies.

Procurement

Competitive Negotiation**■ Discussion****■ ■ Offers****■ ■ ■ Error correction**

Where 1 firm submits a second pre-award sample in which it has corrected each of the deficiencies noted in its initial sample and which includes only 3 deficiencies, agency's determination to allow the offeror to certify to the correction of the remaining deficiencies does not represent unequal treatment in comparison to requiring the protester, whose second sample included 11 deficiencies (many of which repeated deficiencies noted in its initial sample), to submit a corrected sample; nor was it unequal in comparison to rejecting the protester's third sample, which included 16 deficiencies.

Procurement

Sealed Bidding**■ Invitations for bids****■ ■ Terms****■ ■ ■ Performance bonds**

Agency properly imposed bonding requirements under solicitations for janitorial services where the agency reasonably determined that the bonds were necessary to ensure continuous service, and to protect the government from losses of government property or that would result from contractor default.

Procurement

Sealed Bidding

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

Agency had a compelling reason to cancel, after bid opening, an invitation for bids (IFB) for lodging, dining facilities, and transportation of visiting cadets for training, where the IFB's stated geographic restriction failed to ensure satisfaction of the agency's minimum need that there be predictable travel time between the cadets' lodging and the scheduled classes because the stated restriction permitted lodging, such as offered by the protester, on the other side of a tunnel which has a history of traffic delays.

B-255989; B-255990, January 18, 1994

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Applicability

The Small Business Administration's consideration of a small business's intention not to perform a significant portion of a contract with its own forces in determining whether to issue a certificate of competency (COC) is not inconsistent with that agency's COC regulations.

Procurement

Socio-Economic Policies

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

The General Accounting Office (GAO) will consider a protest of a contracting officer's decision that a small business is not responsible where the Small Business Administration (SBA) declines to issue certificate of competency (COC) for eligibility rather than responsibility reasons. However, where SBA declination is based on a determination that the small business will not perform a significant portion of the contract with its own forces, it is viewed as based on responsibility reasons, precluding GAO review of the contracting officer's decision.

B-254457.2; B-254457.3, January 19, 1994

Procurement

Contractor Qualification

- Licenses
- ■ Determination time periods

Protest that bid which failed to include proof of possession of a specific license, as required under the invitation for bids, was nonresponsive is denied since the requirement pertained to responsibility and therefore could be satisfied at any time prior to award.

Procurement

Sealed Bidding

■ Unbalanced bids

■ ■ Rejection

■ ■ ■ Propriety

Although the apparent low bid on a contract for the installation, maintenance, and monitoring of an intrusion detection system is mathematically unbalanced, it is not materially unbalanced, and therefore nonresponsive, since the bid becomes low early in the contract term, including the option periods, and the agency intends to exercise all options.

Procurement

Sealed Bidding

■ Unbalanced bids

■ ■ Rejection

■ ■ ■ Propriety

The front-loaded installation bid price of a mathematically unbalanced bid for installation, maintenance, and monitoring of an intrusion detection system, in which the installation price is less than three times the government estimate and is not even two times greater than the protester's next low bid, is not so grossly front-loaded as to be tantamount to an improper advance payment that would require the rejection of the bid.

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Descriptive literature

■ ■ ■ ■ Absence

Protest that low bid should be rejected as nonresponsive because bidder did not submit with its bid descriptive literature that established that the offered equipment conformed to the specifications is denied where the solicitation did not require submission of descriptive literature and the literature submitted did not indicate that the bidder intended to qualify its bid.

B-254787, January 19, 1994

94-1 CPD ¶ 25

Procurement

Competitive Negotiation

■ Offers

■ ■ Technical acceptability

■ ■ ■ Descriptive literature

Where the solicitation instructed offerors to address technical requirements in sufficient detail by submitting descriptive materials demonstrating the firm's understanding of the requirements and how its system would satisfy the requirements, the agency reasonably excluded the protester's proposal from the competitive range where the protester failed to substantiate narrative claims in its proposal that its system would satisfy the requirements and reasonably led the agency to believe that major design changes would be needed before the proposal would be technically acceptable.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Agency-level protests

Protester is entitled to the costs of filing and pursuing its protests that the awardees' proposal was technically unacceptable and had been unreasonably evaluated, where the agency took corrective action in response to meritorious protest allegations and the agency requests that the General Accounting Office find the protester so entitled.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration
- ■ ■ ■ Additional information

Request for reconsideration is denied where request is based on information that was available to, but not proffered by, requester during consideration of the initial protest.

Procurement

Payment/Discharge

- Shipment costs
- ■ Additional costs
- ■ ■ Evidence sufficiency

Carrier should be paid for furnishing a second dromedary for a shipment where the evidence of record, including the bill of lading, supports the argument that two containers were ordered and used.

Procurement

Competitive Negotiation

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

Protest that agency improperly applied an unstated evaluation criterion and misevaluated protester's proposal is denied where record shows that allegedly unstated criterion was reasonably encompassed by the stated criteria, and the agency's evaluation of protester's proposal, while containing one minor error, was reasonable.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Non-prejudicial allegation

Protest that agency improperly included certain contract line items (CLINs) in cost evaluation is denied where record shows that agency at all times intended to evaluate all CLINs, but inadvertently failed to amend one section of solicitation; in any event, agency included the CLINs in its evaluation of all offerors, and protester therefore suffered no prejudice.

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Evaluation criteria

■ ■ ■ Cost/technical tradeoffs

■ ■ ■ ■ Technical superiority

Agency properly made award to higher priced, technically superior offeror where solicitation provided that technical considerations were more important than cost, and awardee's proposal reasonably was found technically superior to all other proposals.

B-254797; B-254797.2, January 21, 1994

94-1 CPD ¶ 167

Procurement

REDACTED VERSION

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

Protests that evaluation of awardee's proposal was impermissibly based on an inflated assessment of its technical merit are denied where the record shows that the evaluation was reasonably based on the information in the awardee's proposal and was consistent with the stated evaluation criteria.

Procurement

Competitive Negotiation

■ Competitive advantage

■ ■ Allegation substantiation

Protests alleging preferential and unequal treatment of offerors and other improper conduct are denied where nothing in the record shows that the awardee improperly received information or gained an improper competitive advantage as a result of communications between the awardee's representative and the source selection chairman acting within the scope of his duties as point of contact for providing technical clarification to prospective offerors.

Procurement

Sealed Bidding

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

Protest of cancellation of solicitation and withdrawal of small business set-aside after bid opening is denied where record supports reasonableness of contracting officer's determination that all bid prices were unreasonably high, a compelling basis for cancellation.

Procurement

Specifications

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

Solicitation requirement for certification by a specified testing laboratory of a radio fire alarm system along with a computer-aided dispatching (CAD) system does not unduly restrict competition, where the requirement was reasonably based on the agency's need to be assured that the radio fire alarm system would function as tested when interfaced with the CAD system being offered so as to provide reliable fire protection for agency personnel.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost realism
- ■ ■ ■ Rates

Contention that agency performed an unreasonable cost realism review by accepting a cap on awardee's direct costs in certain specific labor categories is denied where agency performed a reasonable evaluation of the cost proposal, both with and without the cap, and where the agency clearly understood the impact and limitations of the terms of the cap clause, which was set forth in the contract schedule.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Post evaluation

Contention that cost realism review was improper for failing to reject the cost benefits of an agreement between the awardee and a representative of the union for certain of the incumbent's employees is denied where the agreement is consistent with the awardee's approach when it was the incumbent; the contracting officer sought expert advice regarding the soundness of the approach; and the cost cap clause included in the awardee's contract is not contingent upon the awardee's ability to obtain the benefits of this agreement after receiving the contract.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Sureties
- ■ ■ ■ Adequacy

Agency's rejection of protester's bid bond based on reliance upon tax assessed value rather than market appraised value of bid bond surety's real estate holding, in order to determine if pledged assets were sufficient to cover bid bond, was reasonable where appraisal of property was not current, as required by the Federal Acquisition Regulation, and tax assessed value was less than required bid bond.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Compliance certification

Where an invitation for bids for the application of epoxy to floors required bidders to submit certified test data showing that the epoxy they proposed to use had been tested for compliance with certain listed minimum specification requirements, a bidder which failed to submit with its bid test data addressing two of the requirements must be rejected as nonresponsive.

Procurement

Sealed Bidding

- Bids
- ■ Clerical errors
- ■ ■ Error correction
- ■ ■ ■ Propriety

Correction of a clerical error in one unit price in the apparent low bid is proper where the error in, and the intended meaning of, a line item monthly unit price stated as "\$5,0005," with a yearly extended price of \$60,060, was obvious and clear from the face of the bid; the erroneous unit price was inconsistent with the bidder's bidding pattern and was outside the price range of the other bidders; and the correct unit price of \$5,005 (\$60,060 divided by 12) was consistent with the bid's pricing pattern and the other bids' unit prices for the line item, and was the only reasonable interpretation of the bid.

Procurement

Contractor Qualification

- Responsibility
- ■ Information
- ■ ■ Submission time periods

Agency's acceptance of a bid that did not contain all the information required by the place of performance clause in the solicitation was proper since the information, which concerns the question of a bidder's responsibility and not the responsiveness of a bid, may be furnished at any time prior to award.

Procurement

Sealed Bidding

- Unbalanced bids
- ■ Contract awards
- ■ ■ Propriety

Bid containing a line item price which may be below cost is not unbalanced where the bid does not contain overstated prices for any line item.

B-254890, January 24, 1994

94-1 CPD ¶ 35

Procurement

Sealed Bidding

- Invitations for bids
- ■ Government estimates
- ■ ■ Defects

Protest alleging that invitation for bids (IFB) for facility maintenance services is defective because it does not include an estimate of the hours required to assist tenant moves is denied where the agency has no historical data to use to provide an estimate, and the IFB contains sufficient information for bidders to compete intelligently and on a relatively equal basis; there is no requirement that a solicitation be so detailed as to completely eliminate all performance uncertainties and risks.

B-255083, January 24, 1994

94-1 CPD ¶ 36

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Protester is not an interested party for the purpose of filing a protest where its bid was found nonresponsive for reasons uncontested by the protester and unrelated to the basis of protest.

B-255587, January 24, 1994

94-1 CPD ¶ 37

Procurement

Competitive Negotiation

- Requests for quotations
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Cancellation of solicitation for lease of build-to-suit warehouse space and reissuance with less restrictive requirements that will permit competition from existing warehouse facilities in expectation of lower costs is reasonable.

B-254852, January 25, 1994

94-1 CPD ¶ 38

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency failed to conduct meaningful discussions with the protester is denied where record shows that during discussions agency adequately identified the deficiency in the protester's

proposal—the lack of experience of its proposed assistant project manager—and gave the protester the opportunity to revise its proposal to remedy this deficiency.

Procurement

Socio-Economic Policies

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

Although an agency may use a traditional responsibility factor, such as a minimum management experience requirement, as a technical evaluation factor where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business concern's proposal as technically unacceptable based solely on the offeror's failure to comply with such a factor, without referring the matter to the Small Business Administration, is improper where the agency's decision is not based on a relative assessment of the proposal but effectively constitutes a finding of nonresponsibility.

B-254875; B-254875.2, January 25, 1994

94-1 CPD ¶ 39

Procurement

Socio-Economic Policies

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

Contracting agency reasonably determined not to set aside for small business a procurement for lodging and meal services, notwithstanding a previous small business set-aside acquisition, where the agency made a reasonable effort to locate potential responsible small business concerns who would submit a bid for the services, by requesting the Small Business Administration (SBA) to identify small business sources and by publishing a notice in the *Commerce Business Daily* soliciting small business interest, but was unable to conclude that bids would be received from at least two responsible small business concerns, and where the SBA concurred in the withdrawal of the set-aside.

Procurement

Sealed Bidding

- Bids
- ■ Modification
- ■ ■ Post-bid opening periods
- ■ ■ ■ Propriety

Protest that bidder changed its place of performance as identified in its bid for lodging and meal services in order to provide an acceptable facility involves a question of responsibility and does not provide a basis to object to the award.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Contracts
- ■ ■ ■ Assignment

Small business protester is an "interested party" to challenge Small Business Administration's (SBA) determination that acceptance of follow-on requirement into section 8(a) program would have no adverse impact on protester where (1) protester acquired incumbent's entire business during contract performance; (2) incumbent's contract thus transferred to protester by operation of law; (3) protester specifically challenges SBA's determination that acceptance of the follow-on requirement for 8(a) award would not adversely impact protester; and (4) protester would be eligible to compete for the follow-on requirement if SBA determines that acceptance of the requirement into the 8(a) program was inappropriate.

Procurement

Payment/Discharge

- Payment procedures
- ■ Contracts
- ■ ■ Assignment

While the transfer of government contracts and claims is generally prohibited, such transfers are exempted from the anti-assignment statutes where they occur "by operation of law."

Procurement

Socio-Economic Policies

- Small business 8(a) subcontracting
- ■ Incumbent contractors
- ■ ■ Adverse effects
- ■ ■ ■ Determination

Although under the regulations applicable to procurements proposed for 8(a) award the Small Business Administration (SBA) presumes adverse impact to exist when a small business concern meets certain enumerated criteria, the regulations require SBA to determine whether acceptance of the procurement for 8(a) award nevertheless would have an adverse impact on other small business programs or on an individual small business, even if the factors that create a presumption of adverse impact are not present.

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Justification

Protest is denied where agency reasonably determined that protester's proposed price, which was 73 percent higher than its competitor's price, precluded protester from a reasonable chance for award and, therefore, justified protester's elimination from the competitive range.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Invitations for bids
- ■ ■ ■ Identification

Where protester's bid bond referenced a project number other than the one for which bids were sought, the agency properly found the bond to be materially defective and properly rejected the protester's bid as nonresponsive.

Procurement

Bid Protests

- Bias allegation
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

In public/private competition, allegation that agency favored public offerors is denied where it is unsupported by the record.

Procurement

Competency Negotiation

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Allegation that protester was misled into submitting a proposal by agency's guaranteeing that necessary tool drawings would be available to offerors is denied where agency made no such guarantee.

Procurement

Socio-Economic Policies

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

The Bureau of Indian Affairs reasonably determined that the low bidder did not qualify as an Indian economic enterprise eligible for award of a contract under a Buy Indian Act set-aside because the bidder's majority owner, who claimed some Indian lineal descent, was reasonably not considered an Indian for the purposes of the set-aside because he was not a member of a federally recognized Indian tribe.

Procurement

Competitive Negotiation**■ Discussion****■ ■ Offers****■ ■ ■ Clarification****■ ■ ■ ■ Propriety**

Protest that agency improperly failed to provide answers to protester's pre-proposal questions submitted shortly before the time set for the receipt of initial proposals is denied where agency reasonably determined insufficient time existed for a reply to reach all prospective offerors before submission of their offers and there was no apparent need to issue further clarifications.

Procurement

Socio-Economic Policies**■ Small business set-asides****■ ■ Cancellation****■ ■ ■ Unrestricted resolicitation****■ ■ ■ ■ Propriety**

An agency improperly converted a small business-small purchase set-aside into an unrestricted procurement when its weekend staff did not use the small purchase source list in its unsuccessful attempt to contact a small business concern to perform urgently needed repair work.

Procurement

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

Protests that agency improperly set procurement aside for exclusive small business participation are denied where the contracting officer's decision to set the procurement aside was reasonable.

Procurement

Small Purchase Method**■ Quotations****■ ■ Evaluation****■ ■ ■ Technical acceptability**

Protests that the procuring agency improperly evaluated quotes in small purchase procurements are denied where the record does not show that the agency failed to consider any reasonably available information in evaluating the offerors' past performance, the most important technical evaluation factor.

Procurement

Small Purchase Method

- Quotations
- ■ Evaluation
- ■ ■ Cost realism

In negotiated, small purchase procurements leading to fixed-price contracts, the procuring agency is not required to conduct cost realism analyses where the solicitations did not provide for cost realism evaluations and adequate price competition was received.

B-255198.2, January 31, 1994

94-1 CPD ¶ 52

Procurement

Competitive Negotiation

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

Protest that agency improperly evaluated technical proposal is denied where record shows that evaluation was reasonable and consistent with the solicitation's stated evaluation criteria.

Procurement

Bid Protests

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

Protest challenging evaluation scheme set out in solicitation is untimely where not filed until after time set for receipt of initial proposals.

B-255201.2, January 31, 1994

94-1 CPD ¶ 53

Procurement

Bid Protests

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

Where price is the determining evaluation criterion, there is an intervening proposal between the protester's and the awardee's proposals, and the protest challenges only the acceptability of the awardee's proposal, the protester is not an interested party for the purpose of filing a protest.

Procurement

Bid Protests

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

A challenge to the accuracy of a solicitation's estimated quantities under a requirement contract must be filed prior to the time for receipt of offers where the protest is based on knowledge of the actual quantities needed and that information was known to the protester prior to time for receipt of offers.

Procurement

Sealed Bidding

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

Protest of agency rejection of late bid is denied where bid was delivered after the bid opening and bid could not be considered for award under the late bid rules.

B-255252, January 31, 1994

Procurement

Bid Protests

- Subcontracts
- ■ GAO review

Protest challenging award of subcontract by Department of Energy prime contractor is dismissed as outside the bid protest jurisdiction of the General Accounting Office where the subcontract was not awarded "by or for" the government.

B-255278, January 31, 1994

Procurement

Bid Protests

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

Protest that the awardee's proposal was materially unbalanced is untimely when filed after bid opening where protester's allegation is based upon alleged inaccuracies in the government work estimate which the protester knew of prior to bid opening.

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