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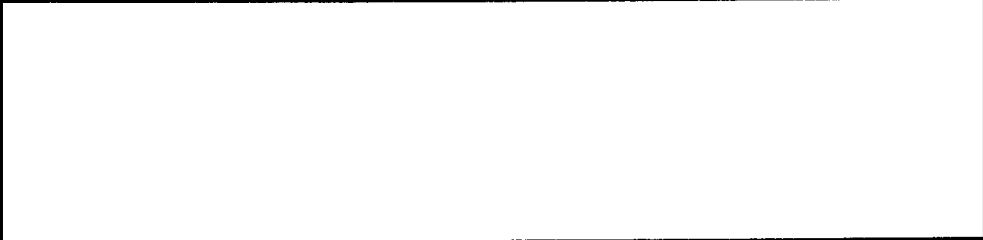
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Digests of Decisions of the Comptroller General of the United States

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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-257579, September 22, 1994***

Appropriations/Financial Management

Appropriation Availability

- Amount availability
 - ■ Augmentation
 - ■ ■ Lump-sum appropriation
-

Appropriations/Financial Management

Appropriation Availability

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

Appropriations/Financial Management

Appropriation Availability

- Time availability
 - ■ Funds transfer
 - ■ ■ Special accounts
-

The Administrative Office of the United States Courts (AOUSC) may recover the amount of offsetting receipts transferred from a special fund receipt account established pursuant to 28 U.S.C. § 1931 that exceeded the amount needed for purposes of the transferee fiscal year 1989 appropriation.

B-256158, September 27, 1994***

Appropriations/Financial Management

Appropriation Availability

- Experts/consultants
 - ■ Child care services
-

The Forest Service (FS) may use appropriated funds to pay a consultant for services rendered to a FS-supported child care center operated by a parent organization on FS premises so long as the FS determines that the consulting services were necessary to help maintain a viable child care facility.

B-253623, September 28, 1994***

Appropriations/Financial Management

Appropriation Availability

- Amount availability
- ■ Antideficiency prohibition
- ■ ■ Violation

Appropriations/Financial Management

Obligation

- Overobligation
- ■ Reports
- ■ ■ Closed accounts

The United States Arms Control and Disarmament Agency may not avoid adjusting an appropriation account and reporting any resulting Antideficiency Act violation on the basis that (1) the account has expired, (2) adjusting the account will result in overobligations, or (3) the overobligations were unintentional.

Appropriations/Financial Management

Obligation

- Expenditure recording
- ■ Closed accounts

Under the circumstances presented, GAO will not object should the United States Arms Control and Disarmament Agency (ACDA) reasonably determine not to adjust the accounting records for a closed "M" account comprised of salary and expense funds. To the extent that Antideficiency Act violations may have occurred in years covered by the closed account, ACDA should so report.

Appropriations/Financial Management

Accountable Officers

- Antideficiency prohibition
- ■ Violation
- ■ ■ Disciplinary actions
- ■ ■ ■ Administrative determination

Appropriations/Financial Management

Accountable Officers

- Certifying officers
- ■ Relief
- ■ ■ Overpayments
- ■ ■ ■ GAO authority

The authority to initiate disciplinary actions for Antideficiency Act violations is vested in the agency and is not within GAO's jurisdiction under 31 U.S.C. § 3528(b).

B-258163, September 29, 1994

Appropriations/Financial Management

Budget Process

- Authority
- ■ Allocation reduction

The direction in the District of Columbia Appropriations Act, 1994, for the Mayor to reduce appropriations and expenditures for communications cost within the various appropriation headings in the Act does not authorize the Mayor to reduce appropriations of the District's courts. The Mayor

did not have such authority under District law prior to the appropriations act and there is no evidence that Congress intended the appropriations act to provide such authority by suspending the application of District law.

B-251481.4, September 30, 1994

Appropriations/Financial Management

Claims Against Government**■ Unauthorized contracts****■ ■ Quantum meruit/valebant doctrine**

Executive agencies which procure duplicating services involving the use of high-speed duplicating equipment from outside sources in violation of section 207 of the Legislative Branch Appropriations Act, 1993 (Pub. L. No. 102-392) as amended by section 207 of the Legislative Branch Appropriations Act, 1995 (Pub. L. No. 103-283) may not pay contractors for that work. Section 207 of the Legislative Branch Appropriations Act, 1993 prohibits, with limited exceptions, the use of appropriated funds by executive branch agencies for the procurement of printing other than by or through the Government Printing Office. Section 207 of the Legislative Branch Appropriation Act, 1995 added the term “duplicating” to the definition of printing covered by that prohibition and is effective on the date that appropriation act was enacted.

Civilian Personnel

B-257917, September 12, 1994

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Leases
- ■ ■ Termination costs
- ■ ■ ■ Reimbursement

An employee may not be reimbursed the full amount of a forfeited deposit, under a lease with an option to purchase agreement, since the deposit does not qualify as a real estate transaction expense under the provisions of 5 U.S.C. § 5724a(a)(4) (1988). The employee's claim was properly reimbursed by the agency as a miscellaneous relocation expense to the extent authorized by the Federal Travel Regulation, 41 C.F.R. § 302-3.1 (1993).

B-256934, September 20, 1994

Civilian Personnel

Compensation

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

Five employees request waiver of erroneous payments because the agency allegedly failed to give them timely notice of the error. The request is denied because the employees knew or had reason to know of the error before the agency formally notified them of the error. In such cases, collection of the overpayment is not considered to be against equity, good conscience, or in the best interest of the United States, notwithstanding the fact that the employees may have brought the situation promptly to the attention of the proper authorities and sought an explanation or correction of the error.

B-256947, September 20, 1994

Civilian Personnel

Relocation

- Household goods
- ■ Shipment
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

A transferred employee may not be allowed reimbursement for shipping his household goods when the government has reimbursed him for shipping his mobile home to his new duty station under 5 U.S.C. § 5724(b) (1988). Under that statute, the allowance for shipping the mobile home is in lieu of the allowance for shipping household goods. *Robert B. Wood*, B-210867, July 13, 1983.

B-257380, September 20, 1994***

Civilian Personnel

Relocation

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

An employee delayed moving out of her old residence and into temporary quarters incident to a permanent change of station because of problems related to the sale of her old residence and the purchase of a new residence. To be eligible for temporary quarters subsistence expenses, the Federal Travel Regulation requires that an employee begin occupying temporary quarters within 30 days of the employee's reporting date at the new duty station. Because the employee did not meet this requirement, her claims for TQSE may not be paid.

B-257386, September 20, 1994

Civilian Personnel

Compensation

- Overtime
- ■ Standby overtime
- ■ ■ Eligibility

Park Ranger employed by National Park Service, Department of the Interior, claims premium pay for regularly scheduled standby duty at his living quarters. In order to be eligible for this type of pay, 5 C.F.R. § 550.143(a) and (b)(3) (1994) requires, *inter alia*, that an agency designate an employee's living quarters as his duty station, and that an employee's activities be substantially restricted. These conditions were not fulfilled and we deny the employee's claim.

B-256927, September 22, 1994***

Civilian Personnel

Compensation

- Statutory restrictions
- ■ Foreign citizenship
- ■ ■ Fire fighting services
- ■ ■ ■ Emergencies

The claim of a British citizen employed as a forest firefighter, under emergency circumstances, by the Forest Service comes within the statutory exceptions to the prohibition against payment of compensation to certain aliens, and neither 8 U.S.C. § 1324a nor 8 U.S.C. § 1342b (1988 and Supp. IV 1992) bars payment. Thus, he may be paid for emergency services rendered to the Forest Service.

B-255655, September 27, 1994

Civilian Personnel

Leaves Of Absence

- Lump-sum payments
- ■ Eligibility

Section 202 of Pub. L. No. 102-397 authorizes the Secretary of the Senate to make to an officer or member of the Capitol Police who separates from service with the Capitol Police a lump-sum payment for the accumulated and current accrued annual leave to which that individual is entitled if, at the time of separation, the officer or member satisfies the age and service requirements for title to an immediate annuity under subchapter III of chapter 83 or chapter 84 of title 5, United States Code, regardless of whether the individual's separation from service is in the form of retirement.

Military Personnel

B-256958, September 20, 1994

Military Personnel

Pay

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

Evidence from former reserve member regarding mental condition at time of erroneous payment of active duty pay while on standby status for Operation Desert Storm is sufficient that collection of overpayment would be against equity and good conscience and waiver is granted.

B-256711, September 22, 1994***

Military Personnel

Relocation

- Relocation travel
- ■ Reimbursement
- ■ ■ Circuitous routes

Military Personnel

Travel

- Overseas travel
- ■ Home leave
- ■ ■ Charging

An Air Force member being transferred from Germany to Hawaii obtained permission to defer his consecutive overseas tour (COT) leave entitlement, which authorizes payment of travel and transportation allowances for a member and his family while in a leave status. However, when he and his dependents traversed the United States during his permanent-change-of-station move, they visited both his family and his wife's family and used 11 days of leave. Although the member intended to defer his COT leave, finance officers computed his travel and transportation allowances to reflect his having taken COT leave when he took leave for those visits. Since the member complied with the Joint Federal Travel Regulations, his claim for reinstatement of his COT leave may be allowed.

B-257180, September 29, 1994

Military Personnel

Pay

- Survivor benefits
- ■ Eligibility

Claimant who married service member following his retirement is not entitled to widow's Survivor Benefit Plan annuity because retired member died before first anniversary and member's adoption of spouse's child prior to death did not constitute "issue of that marriage" to satisfy the requirement of 10 U.S.C. § 1447(3).

Miscellaneous Topics

B-244431.2, September 13, 1994***

Miscellaneous Topics

Finance Industry

- Statutory restrictions
- ■ Applicability
- ■ ■ Government checks
- ■ ■ ■ Payment time periods

The Barring Act, 31 U.S.C. § 3702(b), applies to obligations underlying unpaid Treasury checks. Thus, the imposition by the Competitive Equality Banking Act of 1987 (CEBA) of a 1-year time limit on the negotiability of Treasury checks means that an individual who holds a Treasury check beyond the 1-year period must submit a claim within 6 years of the accrual of the claim on the underlying obligation or the claim is barred.

Miscellaneous Topics

Finance Industry

- Statutory restrictions
- ■ Applicability
- ■ ■ Government checks
- ■ ■ ■ Payment time periods

The Competitive Equality Banking Act of 1987 (CEBA), which imposes a 1-year time limitation on the negotiability of Treasury checks, contains savings clauses which provide that nothing in the Act "shall be construed to affect the underlying obligation" of a Treasury check. The effect of the savings clauses is to provide that CEBA does not affect the underlying obligation. The enforceability of the underlying obligation is controlled by whether a claim is received by the Comptroller General or the applicable agency within 6 years.

Miscellaneous Topics

Finance Industry

- Statutory restrictions
- ■ Applicability
- ■ ■ Government checks
- ■ ■ ■ Payment time periods

The Competitive Equality Banking Act of 1987 (CEBA) did not amend 31 U.S.C. § 3328(c) which provides that a limitation on a claim imposed by 31 U.S.C. § 3702 does not apply to an unpaid Treasury check. Section 3328(c) only excepts unpaid Treasury checks from the limitation on claims against the United States contained in 31 U.S.C. § 3702. Although claims on unpaid checks are not subject to the 6-year limitation in section 3702, the obligation underlying an unpaid check is not affected by section 3328(c) and remains subject to the limitation on claims against the United States in section 3702.

Miscellaneous Topics

Federal Administrative/Legislative Matters**■ Statutory restrictions****■ ■ Printing**

Executive agencies which procure duplicating services involving the use of high-speed duplicating equipment from outside sources in violation of section 207 of the Legislative Branch Appropriations Act, 1993 (Pub. L. No. 102-392) as amended by section 207 of the Legislative Branch Appropriations Act, 1995 (Pub. L. No. 103-283) may not pay contractors for that work. Section 207 of the Legislative Branch Appropriations Act, 1993 prohibits, with limited exceptions, the use of appropriated funds by executive branch agencies for the procurement of printing other than by or through the Government Printing Office. Section 207 of the Legislative Branch Appropriation Act, 1995 added the term “duplicating” to the definition of printing covered by that prohibition and is effective on the date that appropriation act was enacted.

Procurement

Late case

B-257104, *et al.*, August 22, 1994

94-2 CPD ¶ 205

Procurement

REDACTED VERSION

Competitive Negotiation

- Requests for proposals
- ■ Government estimates
- ■ ■ Quantity variances

Procurement

Specifications

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

Protests that maximum quantities specified under solicitations for pediatric vaccines are excessive and, if actually ordered, would eliminate the private market for the vaccines, are denied where: (1) protester fails to show that, given information available to agency and statutory obligation to assure adequate supply to meet unanticipated needs, the maximum quantities, which represented the agency's best estimates, were not reasonably accurate representations of actual needs; and (2) nothing in the statute establishing the Vaccines for Children program precluded the agency from ordering sufficient vaccine to satisfy the expected total requirement for vaccines.

Current cases

B-254269.2, B-254269.3, September 2, 1994***

94-2 CPD ¶ 85

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency fulfilled its responsibility to conduct meaningful discussions concerning cost issues by advising protester that its proposal had not followed collective bargaining agreement or Department of Labor rates for all job classifications.

Procurement

Bid Protests

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

Protester asserting that award should be made on the basis of the low-cost, technically acceptable proposal is not an interested party to challenge the award to an offeror who submitted a technically superior, higher-cost proposal where another offeror with a technically acceptable proposal, and a lower cost than the protester, would be in line for award under the protester's rationale.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

Procurement

Contractor Qualification

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

Protest of agency evaluation and award determination is dismissed where factually unfounded, and the challenged matter primarily concerns the agency's affirmative determination of awardee's responsibility.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Propriety

Decision to cancel and resolicit was proper where invitation for bids inadvertently was not set aside for exclusive small business participation despite agency's intention to do so based on expectation that bids from at least two responsible small business concerns would be received and that award could be made at a reasonable price.

Procurement

Payment/Discharge

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

Proof of tender of lost household goods is established for purposes of a *prima facie* case of carrier liability, even though the articles were not specifically listed on the carrier's pick-up inventory. The carrier prepared the inventory and packed the cartons claimed to have contained the articles, and the record includes a statement by the owner reflecting his personal knowledge of the exact location of the articles at the time of the move and their proximity to other missing objects.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Descriptive literature
- ■ ■ ■ Absence

Where the invitation for bids (IFB) clearly required, for purposes of determining the responsiveness of a bid, as opposed to the responsibility of the bidder, the submission of descriptive literature and technical data sheets in order to establish that a bidder's specifically identified equipment would satisfy the IFB's listed salient characteristics, the contracting officer properly rejected the protester's bid as nonresponsive where the protester did not identify in its bid the specific equipment being offered and did not submit with its bid descriptive materials demonstrating that its unidentified equipment would satisfy the salient characteristics.

Procurement

Specifications

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

Protest against the inclusion of a solicitation requirement that diesel engines in power generators be 4-cycle is sustained where the agency has not demonstrated that the restriction is reasonably necessary to meet its minimum needs, it appears that there are other products (2-cycle diesel engine generators) that could meet its requirements, and the requirements could be specified using functional specifications.

Procurement

Sealed Bidding

- Invitations for bids
- ■ First-article testing
- ■ ■ Waiver
- ■ ■ ■ Administrative determination

Inclusion in a solicitation of the standard first article testing clause, which sets forth standards as to when the first article requirement can be waived, does not introduce legally objectionable risk in a procurement.

Procurement

Bid Protests

- Allegation substantiation
- ■ Lacking
- ■ ■ GAO review

A protest that merely lists allegedly ambiguous specifications without details or explanations is not legally sufficient.

Procurement

Competitive Negotiation

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

Agency properly excluded proposal from competitive range which had no reasonable chance of receiving award because it contained significant technical weaknesses and was scored substantially below the higher-rated competitive range proposals.

Procurement

Bid Protests

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

Allegation of bias is denied where the record contains no credible evidence that agency acted with specific intent to injure the protester.

Procurement

Socio-Economic Policies

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

Agency's determination not to set aside a procurement for small business concerns was reasonable where the agency concluded from a consideration of relevant factors that it could not reasonably expect to receive proposals from at least two responsible small business offerors at fair market prices.

Procurement

Competitive Negotiation

- Use
- ■ Criteria

Use of negotiation rather than sealed bidding procedures was proper where the agency reasonably determined, based on its experience, that it must evaluate technical factors in addition to price.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Justification

Protest of agency decision to procure engine test dynamometer system on a sole-source basis is denied where agency reasonably determined that only one source could furnish a dynamometer system meeting its requirement for a system capable of running on existing software.

Procurement

Competitive Negotiation

- Source selection boards
- ■ Offers
- ■ ■ Evaluation
- ■ ■ ■ Propriety

Protester's contention that source selection evaluation board (SSEB) improperly evaluated competing proposals is denied where the record shows that the SSEB evaluated proposals in accordance with the evaluation criteria announced in the solicitation, and the record reasonably supports the SSEB's rating the protester's proposal as "satisfactory."

Procurement

Competitive Negotiation

- Contract awards
- ■ Source selection boards
- ■ ■ Administrative discretion

Awards are unobjectionable under request for proposals that stated that the technical area was the most important evaluation area, where the source selection evaluation board identified several strengths in each of the awardees' proposals and found no similar strengths in the protester's proposal, reasonably leading the source selection authority to conclude that the awardees had submitted superior proposals.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency conducted meaningful discussions where agency provided protester with written "errors, omissions, and clarifications" requesting explanations related to 29 weaknesses in its proposal, and provided protester with several subsequent rounds of questions that sufficiently alerted the protester to specific areas of its proposal considered weak or requiring further explanation.

Procurement

Bid Protests

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

Protesters do not have the direct economic interest required to be considered interested parties to protest the evaluation of the awardee's proposal and the source selection authority's best value determination where the record shows that even if the protests were sustained, none of the protesters would be next in line for award.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest challenging agency's technical evaluation of protester's proposal for technical writing, analysis and assistance is denied where the evaluation was reasonable and in accordance with the solicitation's stated evaluation criteria for award.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency conducted meaningful discussions where it reasonably led the protester into area of its proposal that required amplification or clarification.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Urgent needs

Agency properly restricted urgent competition for parkas for use in severe cold, wet weather to two manufacturers that had timely delivered an earlier version of the parka under previous contracts, where the agency reasonably believed those offerors were the only manufacturers that would have a high probability of delivering quality parkas in a timely manner.

Procurement

Competitive Negotiation

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

Contracting officer's decision to exclude the protester from a competition for parkas urgently needed for use in severe cold, wet weather was proper where the contracting officer reasonably concluded that the protester's performance under three prior contracts for items of apparel was delinquent and, therefore, the protester could not be relied upon to meet the compressed delivery schedule in the present exigent situation.

Procurement

Bid Protests

- GAO authority

Protest by state licensing agency (SLA) for the blind alleging that agency has violated the terms of the Randolph-Sheppard Act in eliminating its proposal from the competitive range is dismissed;

General Accounting Office will not consider protests from SLAs because arbitration procedures are provided for under the act, and decisions of the arbitration panel are binding on the parties involved.

**B-257186, *et al.*,
September 7, 1994**

94-2 CPD ¶ 167

Procurement

REDACTED VERSION

Competitive Negotiation

■ Offers

■ ■ Organizational experience

■ ■ ■ Evaluation

■ ■ ■ ■ Subcontractors

Agency properly considered only the prime contractor/offeree's management experience in its evaluation of proposals, and not that of its proposed subcontractors, where the solicitation specified that past management experience would be evaluated based on the "offeror's" experience and it was necessary for the prime contractor to possess relevant management experience in order to assure successful performance of the contract.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Cost realism

■ ■ ■ ■ Analysis

Agency reasonably projected the protester's costs in its cost realism analysis to account for an apparent understatement in the protester's subcontractor's costs.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

Agency reasonably evaluated the awardee's proposed approach as excellent, even though the awardee's proposed staffing level was less than the agency's estimate, where the agency reasonably determined that, because of the awardee's innovative approach to the performance of the contract and its successful performance on a similar contract, the awardee's level of performance would not be compromised by its lower staffing level.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Personnel

■ ■ ■ ■ Adequacy

Agency reasonably found a protester's proposal unacceptable where the individuals proposed by the protester for certain positions failed to meet the minimum personnel requirements set forth in the solicitation.

B-256229, September 8, 1994

Procurement

Payment/Discharge**■ Shipment****■ ■ Carrier liability****■ ■ ■ Burden of proof**

A carrier is liable for transit damage to a shipment of a service member's household goods even though such damage was similar to damage reported on the origin inventory as pre-existing. An Air Force inspector examined the damaged items and found that additional damage occurred in transit, and the carrier has not presented clear and convincing evidence to rebut the inspector's report.

B-257297, September 8, 1994

94-2 CPD ¶ 97**Procurement**

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

Contracting agency properly excluded a proposal from the competitive range where the proposal included no significant technical advantage over the remaining proposals, its price exceeded the low offeror's by 31 percent, and the agency had no reason to believe that protester would improve its price standing based on information which could be provided to the firm during discussions.

B-256702.2, B-256702.3, September 9, 1994***

94-2 CPD ¶ 98**Procurement**

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

Protests are sustained where the agency overstates its actual requirements in a request for quotations (RFQ) issued to mandatory Federal Supply Schedule vendors and makes award to a vendor whose products do not comply with the RFQ's stated requirements.

B-257215, September 12, 1994

94-2 CPD ¶ 100**Procurement**

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

Protest that awardee's proposal should have been rejected is denied where the record shows that the evaluation of the awardee's proposal was reasonable and consistent with the solicitation.

B-257430, September 12, 1994

Procurement

Contracting Power/Authority**■ Federal procurement regulations/laws****■ ■ Applicability**

In response to a congressional request, GAO examined the propriety of the Office of Personnel Management's (OPM) utilization of a memorandum of understanding to arrange for the Center for the Study of Services to conduct a customer satisfaction survey of enrollees in the Federal Employee Health Benefits Plans. GAO finds that the primary purpose of OPM's arrangement with CSS was to enable OPM to obtain services in direct support of its statutory functions and therefore the arrangement should have been structured as a procurement contract.

B-257460, September 12, 1994***

94-2 CPD ¶ 101**Procurement**

Socio-Economic Policies**■ Small businesses****■ ■ Preferred products/services****■ ■ ■ Certification**

Under a total small business set-aside for supply items, bids must be rejected as nonresponsive where they fail to certify that all end items to be furnished will be manufactured or produced by small business concerns.

B-257480, September 12, 1994

94-2 CPD ¶ 136**Procurement**

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

General Accounting Office will not disturb an agency's decision to exclude protester's proposal from the competitive range on the ground that it had no reasonable chance of being selected for award where the agency reasonably evaluated six other offerors as relatively superior technically, and where the protester generally did not demonstrate or provide detailed information necessary to demonstrate the allegedly superior technical merits of its proposal.

B-254425.2, September 14, 1994

94-2 CPD ¶ 125**Procurement**

REDACTED VERSION**Competitive Negotiation****■ Discussion****■ ■ Misleading information****■ ■ ■ Allegation substantiation**

Agency conducted prejudicially misleading discussions with the protester where the agency considered the protester's initial proposal to be deficient for proposing cost discounts without adequate supporting information and the agency failed to advise the protester of this deficiency during discussions; but instead instructed the offeror not to discount costs, the amount of which, if accepted, would have resulted in the protester's offer being the lowest evaluated cost.

Procurement

Socio-Economic Policies

- Small businesses
 - ■ Preferred products/services
 - ■ ■ Certification
-

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Use
- ■ ■ Procedural defects

The elimination of the requirement in a total small business set-aside that the small business offer only end items manufactured by small business concerns, based upon a waiver by the Small Business Administration, was improper where the procuring agency conducted an incomplete investigation that failed to correctly identify a manufacturer as a small business.

Procurement

Sealed Bidding

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

Submission of a performance bond does not satisfy a solicitation's bid guarantee requirement, and a bid that omits the required bid guarantee is nonresponsive.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency reasonably concluded that awardee's proposal to provide drug test kits was technically acceptable where, although one set of test data submitted by the awardee to the agency indicated that the kit may not comply with a mandatory specification, other test data submitted by awardee showed compliance with the specification.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest that awardee's product did not comply with Food and Drug Administration (FDA) approval requirement contained in solicitation is denied where FDA, after independently reviewing the allegation, advised that the awardee's product complies with the requirement.

B-256450, September 16, 1994

Procurement

Payment/Discharge

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

Carrier claim for transportation charges that had been withheld in connection with the shipment of items damaged in transit is denied where carrier has not presented clear and convincing evidence to show that the items could have been repaired or were useful for the purpose intended.

B-257294, September 19, 1994*****94-2 CPD ¶ 105**

Procurement

Competitive Negotiation

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

The agency properly downgraded the protester's "very good" technical proposal for lack of detail in its description of certain tasks.

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Privileged information
- ■ ■ Disclosure

Protest that two agency employees disclosed proprietary information of the incumbent contractor (protester's proposed subcontractor) to the awardee is denied where record shows that, although they had signed letters of intent to work for the awardee, the agency employees were still working for the government when best and final offers were submitted, and there is no evidence that they participated in the preparation of the awardee's proposal.

B-256162.3, B-257058.2, September 20, 1994**94-2 CPD ¶ 106**

Procurement

Bid Protests

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

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Where protests are dismissed for failure to file comments within 10 working days after receipt of agency report, protester's failure to receive report does not provide a basis for reconsidering dismissal when the protester did not notify the General Accounting Office that it had not received the report until more than 10 working days after the report due date.

Procurement

Competitive Negotiation

- **Terms**
- ■ **Travel agencies**
- ■ ■ **Fees**
- ■ ■ ■ **Allocation**

Protest of solicitation's terms providing for payment of required concession fees to contracting agency for distribution to the U.S. Treasury (for fees related to official travel) or to a non-appropriated fund instrumentality (NAFI) (for fees related to unofficial travel) as violating laws governing the expenditure of appropriated funds and collection of public moneys is denied where the solicitation requires strict accounting by the contractor and provides adequate safeguards to keep official and unofficial travel funds separate, and where the required payment of concession fees to the NAFI for unofficial travel sales is derived solely from receipts from travel paid for with travelers' personal funds, not government funds.

Procurement

Competitive Negotiation

- **Terms**
- ■ **Evaluation**
- ■ ■ **Service contracts**
- ■ ■ ■ **Travel agencies**

Solicitation terms providing for the evaluation of proposed unofficial (leisure) travel services for the award of travel service contract for official and unofficial travel services is reasonable where bona fide agency-related benefits are derived from the provision of the unofficial travel services.

Procurement

Competitive Negotiation

- **Terms**
- ■ **Travel agencies**
- ■ ■ **Fees**
- ■ ■ ■ **Allocation**

Mandatory minimum concession fee requirement is reasonable where it is based on competitive procurement history, is reasonably reflective of the market value of the contract, and does not exceed the agency's minimum needs.

Procurement

Sealed Bidding

- **Bids**
- ■ **Evaluation errors**
- ■ ■ **Evaluation criteria**
- ■ ■ ■ **Application**

Agency properly evaluated bids based on the total price for the base requirement and all options where invitation for bids incorporates by reference the standard "Evaluation of Options" clause, as set forth at Federal Acquisition Regulation § 52.217-5, which states that bids will be evaluated for award purposes by adding the total price for all options to the total price for the basic requirement.

Procurement

Socio-Economic Policies

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

Protest objecting to rejection of small business bid as nonresponsive is sustained where determination was in reality one of nonresponsibility, and contracting officer failed to refer the matter to the Small Business Administration for consideration under certificate of competency procedures.

B-257588, September 21, 1994

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance
- ■ ■ ■ Leases

Protest that awardee failed to comply with solicitation provision requiring offerors to submit evidence demonstrating ownership, a current lease, or an "intent to lease" agreement for an outdoor vehicle storage site is denied where the awardee submitted a copy of its current lease for its proposed site.

B-257327, September 22, 1994

Procurement

REDACTED VERSION**Competitive Negotiation**

- Fixed-price contracts
- ■ Offers
- ■ ■ Acceptance criteria

In a negotiated procurement for the award of a fixed-price, indefinite quantity contract for assorted mailing machines and equipment, the awardee's deviation from the solicitation's instructions for the preparation of price proposals did not require the rejection of the awardee's proposal, where sufficient information was provided to allow the agency to determine exactly what had been offered and at what fixed price.

Procurement

Competitive Negotiation

- Offers
- ■ Technical acceptability
- ■ ■ Descriptive literature

Protest that awardee's descriptive literature did not show that awardee's proposed weighing scale could provide rate information for special delivery mail, as required by the solicitation, is denied where the awardee's scale incorporated replaceable "programmable read only memory" microchips, which allow for the programming of any postal rates including special delivery, and the awardee unequivocally promised to provide scales that satisfied all the postal rate requirements.

Procurement

Bid Protests**■ GAO procedures****■ ■ Protest timeliness****■ ■ ■ Apparent solicitation improprieties**

Protest of an alleged solicitation defect, filed with the agency 1 day after an oral request for quotations, was timely, where there was no formal or informal closing date for the receipt of quotations, and the time for receipt was practically simultaneous with the solicitation itself.

Procurement

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

Protest that solicitation provisions are ambiguous is denied, where all provisions to which the protester objects reasonably describe the work to be performed.

Procurement

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

Contracting Officer properly rejected a bid as nonresponsive where the bidder failed to acknowledge an amendment which changed the legal relationship between the parties by imposing an obligation on the contractor not contained in the original solicitation, thus rendering the amendment material; absent acknowledgment of the amendment, the bidder would not be required to furnish the services in accordance with the terms of the solicitation as amended.

Procurement

Payment/Discharge**■ Shipment****■ ■ Carrier liability****■ ■ ■ Burden of proof**

A *prima facie* case of carrier liability for the loss of a toolbox with tools is established even though the inventory description states "tools" with no specification as to the kind of tools or that they were contained in a toolbox, where it is reasonable to conclude that the missing tools were part of a toolbox set similar to one illustrated in a catalog furnished by the shipper.

Procurement

Specifications

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

Protest against allegedly restrictive specifications is denied where, contrary to the protester's allegations, the challenged specifications are broadly stated functional requirements.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Best-buy analysis

Protest against allegedly complex proposal preparation instruction and evaluation provisions is denied where record shows the provisions were reasonably necessary to effectuate a "best value" procurement for complex equipment.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

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

Procurement

Payment/Discharge

- Shipment
- ■ Damages
- ■ ■ Repairs

A repair estimate provided by a service member in connection with transit damage to his household goods tends to become less reliable as time elapses between the discovery of the damage and the estimate of repair. However, the fact that more than 1 year passed between delivery and estimate preparation does not, by itself, void the estimate when other facts suggest that it is reliable.

Procurement

Competitive Negotiation

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

Agency reasonably interpreted proposal, which raised the possibility of using a second individual as an alternative program manager, as not rendering the proposal unacceptable, but only of greater risk.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Awardee's cost proposal's use of different start dates for the option periods from those in the solicitation, did not require the rejection of its proposal because it committed the offeror to provide the same number of hours of service over the same period of time as required by the solicitation and included all the information that the agency reasonably found necessary for evaluation purposes.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Foreign products
- ■ ■ Self-certification

Prior decision that agency was permitted to consider evidence outside the awardee's written proposal in determining the acceptability of that proposal, is affirmed as consistent with General Accounting Office precedent.

Procurement

Bid Protests

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

Procurement

Bid Protests

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

Denial of entitlement to costs is affirmed where agency's action in response to protest was prompt and the protest was not clearly meritorious.

Procurement

Bid Protests

- GAO authority

Protests of nonselection of attorneys for inclusion on a list from which attorneys will be selected for appointment to represent financially eligible defendants under the Criminal Justice Act are dismissed as they do not involve a procurement of goods or services over which the General Accounting Office exercises bid protest jurisdiction.

Procurement

Competitive Negotiation

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

Agency determination to exclude proposal from the competitive range was proper where the agency concluded, on the basis of an evaluation which was reasonable and consistent with the solicitation evaluation criteria, that the proposal had no reasonable chance of being selected for award.

Procurement

Contract Management

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

Where an agency ascertained that it had made an award based on a miscalculation of the award-ee's technical proposal, the agency's corrective action of terminating the original contract and re-evaluating proposals was proper.

Procurement

Competitive Negotiation

■ Offers

■ ■ Debriefing conferences

Agency's post-award communications with the unsuccessful offeror did not constitute improper post-best and final offer discussions, but rather were simply clarifications, where, in its debriefing, the offeror objected to the agency's apparent misevaluation of its proposal and, in a subsequent meeting, offeror explained why the evaluation of its unambiguous proposal was erroneous, thereby prompting the agency to take appropriate corrective action.

B-257400, September 30, 1994

94-2 CPD ¶ 138

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical acceptability

Protest that the awardee's proposed equipment does not meet certain specifications in the solicitation is denied where the record shows that the agency's determination that the offered equipment complies with the specifications was reasonable.

B-257405, September 30, 1994

94-2 CPD ¶ 123

Procurement

Special Procurement Methods/Categories

■ Architect/engineering services

■ ■ Offers

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that firm was improperly excluded from further consideration in architect-engineer acquisition is denied where record shows that evaluation panel's conclusions concerning protester's submission were reasonable and consistent with stated evaluation factors.

Procurement

Special Procurement Methods/Categories

■ Architect/engineering services

■ ■ Use

■ ■ ■ Procedures

Protest that contracting agency violated applicable statute and regulations during the conduct of an architect-engineer acquisition with respect to the composition of the evaluation panel, and with respect to the number of small business concerns recommended for negotiation, is denied where the record shows that no such violations occurred.

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