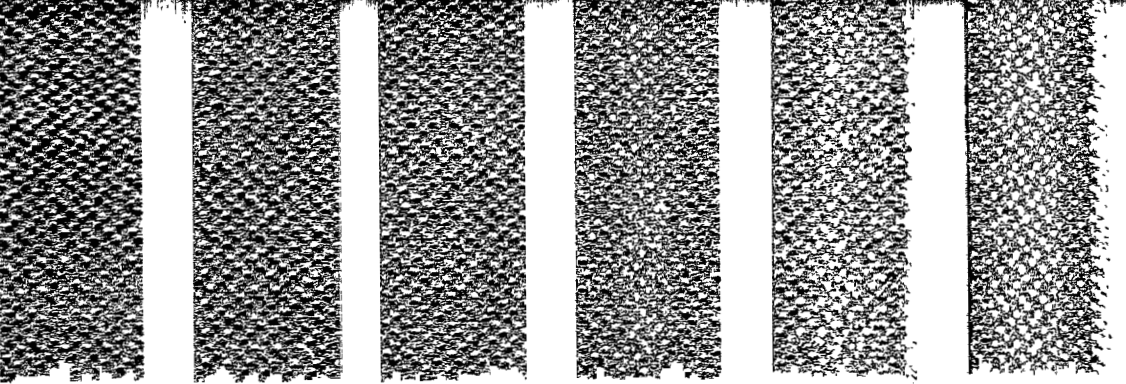
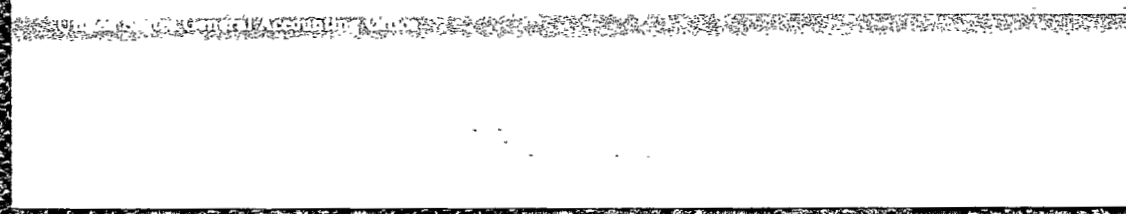
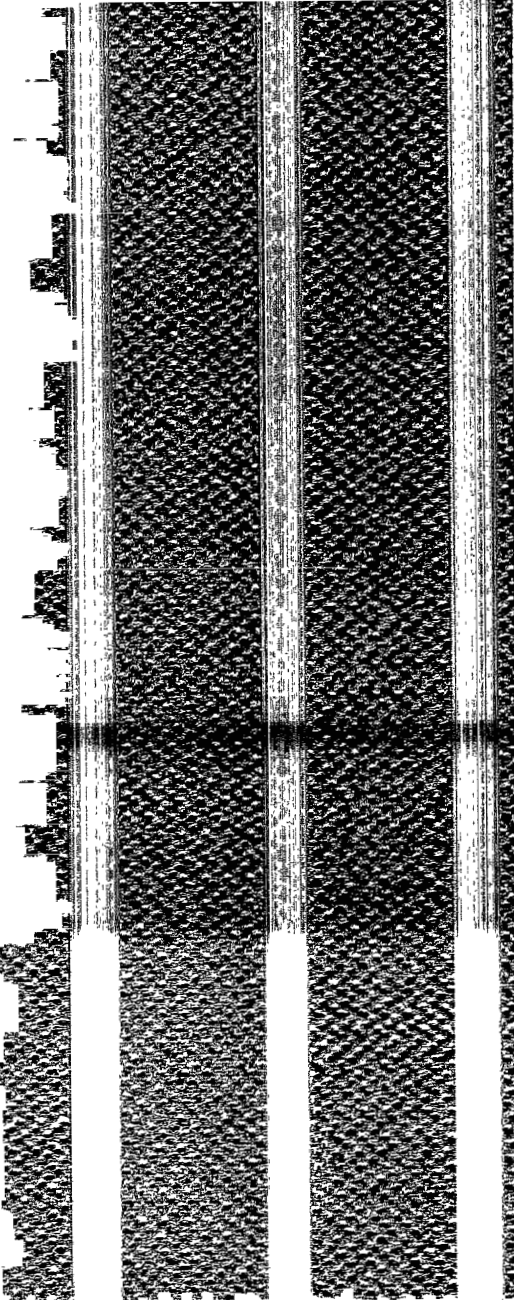
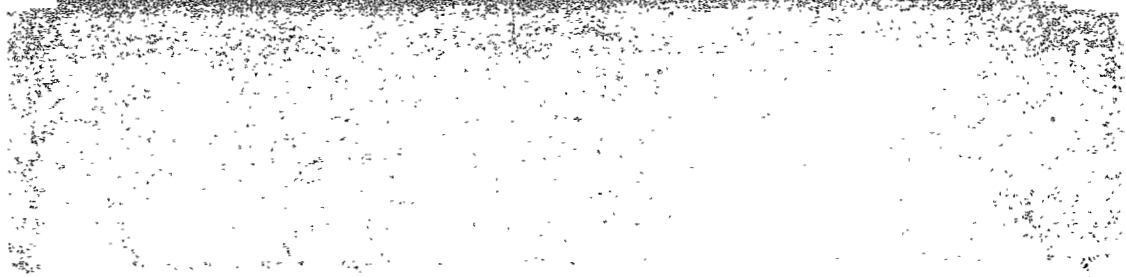


**Digests Of Unpublished Decisions Of
The Comptroller General
Of The United States-
OGC/Index-Digest Section**

JUNE 1985

Volume 1
Number 9



UNITED STATES GENERAL ACCOUNTING OFFICE

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VOLUME I

No. 9

JUNE 1985
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**GENERAL GOVERNMENT MATTERS
APPROPRIATIONS AND MISCELLANEOUS**

ACCOUNTABLE OFFICERS B-218799 June 7, 1985

Relief

Duplicate checks issued

Improper payment

Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official, and subsequent collection attempts have been pursued. Concern over pre-dating of checks by Army is expressed.

DEBT COLLECTIONS B-217402 June 10, 1985

Debt Collections Act of 1982

Applicability

When title 5 of the U.S. Code was recodified in 1966, the term "agency," was inserted into 5 U.S.C. 5514 in place of the phrase "Secretary of the department * * *, or the head of the agency or independent establishment." Since no substantive change was intended by that change in terminology, and GAO is not aware of anything in the recent amendments to section 5514 which alters the broad scope of the original statute, that act (which authorizes "agencies" to collect debts owed the United States by means of salary offset) is applicable to legislative branch agencies; such as the Government Printing Office.

DEBT COLLECTIONS B-214561.2 June 11, 1985
Referral to Justice
Debtors Request for Court of Law
Determination

Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 (1982), and in accordance with the requirements of 5 U.S.C. 5512 (1982), GAO reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer.

Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative offset is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 C.F.R. ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative offset under section 5512 should proceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or during the pendency of litigation does not present the courts with a moot issue since the issue at trial concerns the original amount asserted against the officer, not the balance remaining to be paid.

PAYMENTS **B-219009** **June 14, 1985**
Prompt Payments Act
Interest Payment

Constituent requested assistance in obtaining payment for work performed under contract with Department of Interior. Interior's Regional Office advised U.S. Treasury check #90397460 in full contract amount plus Prompt Payment Act penalty (31 U.S.C. 3902) mailed to constituent on April 23, 1985.

ACCOUNTABLE OFFICERS **B-218939** **June 17, 1985**
Relief
Duplicate Checks Issued
Improper Payment

Relief is granted Army disbursing official and his supervisor under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his superior, and subsequent collection attempts have been pursued. Substitute check issued with same date as original rather than actual date of issuance appears contrary to Army regulations, but did not contribute to loss.

CLAIMS **B-217861** **June 24, 1985**
Reporting to Congress
Meritorious Claims Act
Reporting not warranted

GAO affirms the decision of our Claims Group that claim for property damage by contractor's employee working for the Department of Defense does not warrant recommendation to the Congress under the Meritorious Claims Act of 1928, 31 U.S.C. 3702(d) because it does not meet GAO criteria for making such recommendations.

APPROPRIATIONS **B-213137.3** **June 25, 1985**
Defense Department
Honduras Military Exercises
Operation and Maintenance Funds
Availability

Letter provides GAO comments on DOD response to questions asked by Representatives Addabbo and Mineta on compliance with funding restrictions on assistance to military or para-military forces in Nicaragua. GAO disagrees with DOD response indicating that compliance with statutory restrictions is only within purview of CIA. GAO also concludes that factual information concerning use of facilities improved by DOD but under Honduran control may still be relevant to issue of DOD's compliance with statutory restrictions.

PERSONNEL LAW: CIVILIAN PERSONNEL

CLAIMS B-213777 June 3, 1985

Evidence to Support

Claimant's Responsibility

An employee, who performed temporary duty travel, asserted a claim for lodging expenses incident to that travel. That claim was denied by GAO in B-213777, October 2, 1984, since Federal Travel Regulations para. 1-8.5 required documentation of the incurrence of lodging expenses, and documents submitted were inconsistent, incomplete, and did not convincingly support claim. On reclaim, the earlier denial is sustained. The additional information submitted does not demonstrate that the individual who provided lodging to the employee received payment, or the amount thereof.

OFFICERS AND EMPLOYEES B-217080 June 3, 1985

Hours of Work

Flexible Hours of Employment

**Federal Employees Flexible and Compressed
Work Schedules Act**

Effect

Agency and union had negotiated agreement authorizing employees to use 5/4-9 flexible work schedule under 5 U.S.C. § 6122(a). Employee elected first day of pay period as extra day off or "flex day" under flexible schedule. When agency was closed for that entire day because of weather conditions, she claimed entitlement to an additional day off in lieu of that day. Employees taking day off or "flex day" under flexible schedule are in a nonpay status on those days, in contrast to employees on approved leave. Since the employee was not in a pay status on the day agency closed because of weather conditions, she has no entitlement to an additional day off. Her situation is not analogous to a holiday because employees are in pay status on holidays.

B-1

**OFFICERS AND
EMPLOYEES**

B-205149 June 4, 1985

Transfers

Real Estate Expenses

Finance Charges

Reimbursement Prohibition

Loan Closing Fees

A loan closing fee charged an employee who borrowed money in connection with the construction of a home at his new duty station was a "finance charge" which may not be reimbursed under travel regulations in effect at the time of the transfer. The employee's submission of correspondence from the lending institution advising that the charge was for the use of money borrowed at below the prevailing market rate confirms that the fee was in fact a finance charge.

**OFFICERS AND
EMPLOYEES**

B-217301 June 4, 1985

Transfers

Real Estate Expenses

Prior to Official Notice of Transfer

An employee sold his residence in Washington, D.C., prior to reporting to Olympia, Washington, for an Intergovernmental Personnel Act (IPA) assignment and bought a house in Seattle, Washington, one year into his two-year IPA assignment. He may not be reimbursed for real estate transaction expenses incident to his transfer to Seattle at the completion of that assignment. The employee incurred the expenses prior to the issuance of travel administrative intention to transfer him at the time he incurred those expenses.

APPOINTMENTS**B-218996(1) June 4, 1985****Validity**

Director of Office of Personnel Management illegally circumvented statutory 4-year limit on the Director's term of office under 5 U.S.C. 1102(a) where, on the last day of his term, he delegated all the Director's functions to the position of Executive Assistant to the Director (which position was created on the same day) and himself filled the position of Executive Assistant on the following day. However, ambiguities in the relevant documents and lack of specific factual information preclude GAO from reaching a conclusion on whether this same arrangement violated 5 U.S.C. 1102(b), which provides that the OPM Deputy Director shall act as Director during a vacancy in the office of Director.

DELEGATION OF AUTHORITY**Heads of Agencies to Subordinates****Authority Exceeded**

Director of Office of Personnel Management exceeded his authority under 5 U.S.C. 1103(a) by delegating all of the Director's functions to the subordinate position of Executive Assistant to the Director. While this action did not violate the literal terms of 1103(a), it goes beyond any known precedent, legislative history or logic defining the permissible scope and purpose of a delegation of functions.

DELEGATION OF B-218996(2) June 4, 1985
AUTHORITY

Heads of Agencies to Subordinates
Authority Exceeded

Chairman, Senate Governmental Affairs Committee, asked several questions concerning the delegation of authority by the Director of the Office of Personnel Management (OPM) following the end of his 4-year term. In our letter to Senator Stevens (B-218996, dated today), we concluded that the delegation of authority to the position of Executive Assistant to the Director was not legally appropriate. In answers to related questions we concluded: (1) that the position of Executive Assistant was properly created under the SES; (2) that actions taken by Dr. Devine after the expiration of his term could be validated on the basis of the de facto rule or by ratification by the Acting Director of OPM; (3) that the Freedom of Information Act requires that delegations of authority be made promptly available to the public; and (4) that the Hatch Act applies to the position of Executive Assistant to the Director of OPM.

**OFFICERS AND
EMPLOYEES**

B-216542 June 11, 1985

Transfers

Real estate expenses

Reimbursement

An employee is limited to the lower house selling expenses and household goods transportation permitted on the effective date of his transfer, prior to the increases authorized by section 118 of Public Law 98-151, November 14, 1983. The effective date of his transfer was the date he reported for duty at his new official station, August 2, 1982, but the amended Federal Travel Regulations restrict reimbursement of the increases under Public Law 98-151 to employees reporting on or after November 14, 1983. Contrary statements made by congressional sponsors after enactment are not sufficient to show that the regulation promulgated by the responsible agency is improper where it is not arbitrary or capricious nor clearly contrary to the statutory purpose. Also, earlier amendments of the regulations authorized greater house-selling expense increases but they did not apply to this employee because they were limited to employees reporting at their new official stations on or after October 1, 1982.

MERIT SYSTEMS B-167710 June 12, 1985
PROTECTION BOARD
Review Authority
Excepted Service Employees

H.R. 917 (99th Con., 1st Sess.) would amend 5. U.S.C. § 7511(a)(1) to extend to most employees in the excepted service in executive agencies the same appeal rights to the Merit Systems Protection Board granted to employees in the competitive service. GAO has no comment on the merits, but notes that the bill would apply to GAO employees. Because all nontemporary GAO employees, whether in positions that would be considered competitive or excepted in the executive branch, have appeal rights to GAO's Personnel Appeals Board, they should not be provided appeal rights to the MSPB. Appeal rights to different Boards could result in inconsistencies and contradictions in the handling of GAO employee cases.

GENERAL ACCOUNTING B-217172 June 12, 1985
OFFICE
Jurisdiction
Labor-management relations
Requests for decisions
Declined

A certifying officer requests a decision on the computation of overtime backpay awarded by an arbitrator pursuant to a collective bargaining agreement. In the absence of a request for an advisory opinion under 4 C.F.R. 22.5 or a joint request from both parties, this matter is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. Thus, the Comptroller General declines jurisdiction.

FEES**B-216118 June 20, 1985****Parking****Privately Owned Vehicles****Temporary Duty**

An employee authorized to drive his privately owned vehicle to his temporary duty station as a matter of personal preference may be reimbursed parking fees for keeping his vehicle at that location until his return trip, provided the total costs by that means of travel, including the parking, were less than the constructive cost of travel by commercial air. In addition to mileage, reimbursement of reasonable parking fees for official travel is authorized under FTR para. 1-4.lc, unless travel orders or other administrative provisions restrict their allowance. Similar authorization in 2 JTR paras. C2152 and C4654 conforms to the FTR. Under the circumstances, the inconsistent prohibition in 2 JTR para. C4661-26, denying parking reimbursement for a privately owned vehicle used as a matter of personal preference, is disregarded.

SUBSISTENCE**B-217686 June 20, 1985****Actual Expenses****Meals**

Employee traveled home on several nonworkdays during his temporary duty assignment, but claimed meal expenses without interruption for this travel. We hold that the employee is not entitled to reimbursement for meal costs incurred at home, because the Federal Travel Regulations prohibit payment of subsistence expenses at an employee's official station or residence from which he commutes daily to that station. Since the employee has admitted that he traveled home on several occasions, and he is not entitled to reimbursement, we would not object to disallowance of meal expenses for the nonworkdays based on an average of the employee's daily meal costs.

SUBSISTENCE**B-217686 Con't****Per Diem****June 20, 1985****Rates****Lodging Costs****Staying With Friends, Relatives, Etc.**

Agency denied an employee's claim for subsistence expenses, determining that his claim for lodging in a privately owned apartment was of doubtful validity. Although we find that the agency's evidence is insufficient to establish fraud on the part of the employee, the present record does not support payment of his private lodging expenses. Specifically, the employee has not shown that the expenses resulted from a business arrangement or, alternatively, that they reflected additional costs incurred by his host.

TRAVEL EXPENSES**Actual Expenses****Reimbursement Basis****Lodging****Limitation**

Agency denied an employee's claim for subsistence expenses, determining that he had misstated his motel expenses because the payments recorded on his receipts were higher than those entered into the motel records. We find that the agency's evidence is insufficient to establish fraud on the part of the employee, but that the employee has not sustained his burden of establishing the Government's liability for motel expenses at the higher rate shown on his receipts. Accordingly, the employee may be reimbursed only for those lodging payments which are documented in the motel records.

**OFFICERS AND
EMPLOYEES**

B-217822 June 20, 1985

Transfers

Real Estate Expenses

Insurance

A transferred employee claims reimbursement for a mortgage insurance premium required by the lender. Reimbursement of this type of charge is specifically precluded by FTR para. 2-6.2d(2)(a). In addition, mortgage insurance to protect the lender against default is a finance charge which may not be reimbursed under FTR para. 2-6.2d(2)(e).

TRANSPORTATION

B-217987 June 21, 1985

Household Effects

Time Limitation

Incident to her retirement an employee's household goods were shipped from Germany to Sacramento, California, and placed in storage without her designating a final destination of the shipment. After more than 2 years, she directed that her household goods be shipped from storage to her new residence. The employee may not be reimbursed for the cost of shipping the household goods from storage to her residence because placing the goods in storage does not operate to bring the shipment within the 2-year time period for beginning shipment to final destination set by statutory regulation.

OFFICERS AND EMPLOYEES **B-217297 June 24, 1985**

Transfers
Temporary Quarters
Vacating Residence Requirement

Employee transferred to the location where he had been assigned to temporary duty may not be paid temporary quarters subsistence expenses in connection with his and his family's continued occupancy of the rental apartment in which they had resided during the temporary duty assignment. The record does not establish that the employee or his family vacated and then reoccupied that residence.

OFFICERS AND EMPLOYEES **B-217936 June 24, 1985**

Transfers
Real Estate Expenses
House Title In More Than One Person
Pro Rata Expense Reimbursement

A transferred employee who held title to a residence at his former duty station with his nondependent parents, held title with individuals who were not members of his immediate family and, therefore, may be reimbursed for real estate expenses only in direct proportion to the extent of his interest in the residence at the time of settlement.

CLAIMS**B-217468 June 25, 1985****Parties In Interest**

An arbitrator employed as an individual submitted a claim for personal services to the National Mediation Board. On the claim voucher he requested that payment be made to a corporation of which he is the sole functioning officer and only owner. Since individuals and corporations are different legal entities, payment should be made only to the individual who performed the personal services.

MERIT SYSTEMS**B-215903 June 26, 1985****PROTECTION BOARD****Review Authority****Backpay/Benefits**

GAO will not object to the Merit Systems Protection Board's (MSPB) assertion of jurisdiction to adjudicate disputes over backpay and benefits to which an employee may be entitled as a result of a MSPB decision cancelling an erroneous personnel action. We will provide advisory opinions on backpay issues to the MSPB on request. If we receive a request for decision and an enforcement petition is pending before the MSPB on the same matter, we will defer to the Board's jurisdiction. In the absence of a pending petition, we will continue to issue backpay decisions as appropriate.

LEAVES OF ABSENCE B-217565 June 27, 1985
Civilians On Military Duty
Charging
Military Leave Exhausted

A Federal employee who was a member of the National Guard could not transfer 10 days of military leave from calendar year 1980 to fiscal year 1981 when legislation changed the method of granting military leave from a calendar year to a fiscal year basis. The employee suggests that the retroactivity of that legislation divested him of the 10 days' leave in contravention of his rights under the United States Constitution. It does not appear that the retroactivity of the statute divested the employee of any right, and, in any event, it is the policy of the Comptroller General not to question the constitutionality of a statute enacted by the Congress.

Legislation enacted in 1980 which changed the method of granting military leave for Federal employees from a calendar to a fiscal year basis operated to increase the military leave available to one employee from 10 to 15 days as of October 1, 1980. The employee was, however, misinformed by his personnel officer that under the new legislation he instead had 25 days' unused military leave to his credit on that date, and as a result he scheduled National Guard training duty exceeding his military leave entitlements the following year. The employee may not be allowed an additional 10 days' military leave on the basis of that misinformation, since in the absence of specific statutory authority the Government is not liable for the negligent or erroneous acts of its officers and agents.

STATUTORY CONSTRUCTION B-217565 Con't
Effective Date June 27, 1985

A provision of the United States Code authorizes military leave at the rate of 15 days per year for Federal employees who are members of Reserve components of the armed forces. On October 10, 1980, that provision was amended to change the method of granting annual military leave from a calendar year to a fiscal year basis. The amending legislation provided that it was to "take effect October 1, 1980," that is, on the first day of fiscal year 1981, or 10 days earlier than its date of enactment. The amendment must be given retroactive effect, since amending legislation may not be construed as being only prospective in its operation if it contains express language requiring retrospective application.

OFFICERS AND B-217159 June 28, 1985
EMPLOYEES

Transfers

Service Agreements

Overseas Employees Transferred To U.S.

Return Travel, Etc. Expense Liability

**Breach Of Agreement With Gaining
Agency**

Employee who had fulfilled his agreement with his employing agency to remain in the overseas service for 24 months was required to execute another agreement for 12 months Government service upon retransfer from Honolulu to Atlanta. Before completing the requisite 12 months' service, the employee was separated for participating in a strike against the Government. Since he violated his service agreement, the real estate and miscellaneous expenses paid in connection with his transfer to Atlanta are recoverable from him as a debt due to the Government.

PERSONNEL LAW: MILITARY PERSONNEL

DEBT COLLECTIONS B-217914 June 11, 1985
Waiver

Military Personnel

Effect Of Member's Fault

A retired Army officer was receiving compensation from the Veterans Administration since 1957 when in 1975, he became eligible for retired pay as a Reserve officer. The officer erroneously executed an application for retired pay which resulted in overpayments, since in order to receive the VA compensation a waiver of retired pay must be executed up to the amount of the veteran's compensation. The fact that the officer may have been in poor health at the time he executed the application does not provide a basis for waiving the Government's claim against him for the overpayments, since he must be considered at least partially at fault for not questioning the payments he received for 8 years prior to the date of discovery of the error. Financial hardship caused by collection is not a matter which may be considered in deciding whether to grant a waiver.

DISCHARGES AND DISMISSALS **B-217631 June 12, 1985**

**Military Personnel
Other Than Honorable
Changes, Revocations, Etc.
Pay, Allowances, Etc.
Status**

If the character of a former service member's discharge is upgraded from less than honorable to honorable, the former member becomes entitled to additional amounts that would have been payable at the time of actual discharge if it had been issued under honorable conditions. Thus, a former Army member who received a dishonorable discharge in 1953 later became entitled to the mustering-out payment authorized only for honorably discharged veterans of the Korean conflict when his discharge was upgraded in 1979.

**MILITARY PERSONNEL
Record Correction
Discharge Change As Entitlement To Pay,
Etc.
Veterans Benefits**

If the Veterans Administration makes a determination that an individual is liable for the costs of benefits claimed and received, but actually improperly furnished, those costs become a debt to the United States collectible by setoff against sums due the individual. Therefore, amounts due a former Army member on account of the upgrading of his military discharge were properly applied towards the satisfaction of a bill of collection issued by the Veterans Administration for the recoupment of benefit costs. Any disagreement the former Army member may have concerning the debt would be for consideration by the Veterans Administration, which has exclusive jurisdiction over veterans benefits.

MILITARY PERSONNEL B-217631 Con't
Record Correction June 12, 1985
Discharge Change As Entitlement To
Reenlistment Bonus Retention

Under the laws in effect in 1953, soldiers were entitled to retain reenlistment bonuses previously received, and to receive refunds of their Army savings deposits, even if they were issued dishonorable discharges. Hence, a former Army member did not acquire renewed rights to a reenlistment bonus and a savings deposit refund in 1979 on account of the upgrading of the characterization of his 1953 discharge from dishonorable to honorable conditions. His claim for a bonus is instead barred by the 6-year statute of limitations, since that claim accrued no later than the date of his 1953 discharge. No records to substantiate his claim for a savings deposit have been found.

COMPENSATION B-136167 June 25, 1985
Double
Concurrent Military Retired And
Civilian Service Pay
Reserve Membership
Temporary Commission Retired Status

A retired enlisted man who is advanced on the retired list to the highest commissioned grade in which he served on active duty is subject to the dual compensation restrictions in effect at the time of his retirement. He is not entitled to the exemption from these restrictions granted to Reserve officers.

PAY

B-217875 June 25, 1985

Retired

Disability

Temporary Retired List

Administrative Determination

Medical opinions were in conflict as to whether a member's disability was incurred as a result of disease or injury while on active duty, for the purposes of entitlement to pay and allowances during a period of incapacitation. The fact that the member was transferred to the temporary disability retired list by order of the Secretary of the Army because of a disability incurred as a result of injury is determinative of the issue, and he is entitled to the resulting benefits.

DISTRICT OF COLUMBIA B-217427 June 3, 1985
Contracts 85-1 CPD 627
District Of Columbia Minority Contracting
Act
Restriction Of Procurement

District of Columbia (D.C.) is not authorized to award noncompetitive contract under D.C. Minority Contracting Act, as amended, simply because the contractor is considered to be an "exemplary" minority business concern.

CONTRACTS B-218097 June 3, 1985
Protests 85-1 CPD 628
Allegations
Speculative

Where a solicitation for reforestation work already requires a contractor to possess, prior to commencing work, a specific state license which may be obtained only by applicants presenting proof to the state that worker's compensation insurance will be provided, the competitive prejudice suffered by a prospective bidder who alleges that it cannot economically compete with others who may violate state law unless the solicitation also includes a contractual requirement that the contractor maintain workers' compensation insurance, is too remote and speculative for GAO to resolve the question of whether a solicitation lacking such a requirement is defective.

CONTRACTS **B-218097 Con't**
Protests **June 3, 1985**
Interested Party Requirement
Trade Associations, Etc.

Under the Competition in Contracting Act of 1984 and GAO's implementing Bid Protest Regulations, a trade association which itself is not an "actual or prospective bidder or offeror" is not an interested party and, therefore, does not have standing to protest.

CONTRACTORS **B-218186.2 June 3, 1985**
Responsibility **85-1 CPD 629**
Determination
Review By GAO
Nonresponsibility Finding

Agency determination that protester was ineligible for master ship repair contract (MSRC), a permissible prequalification for award, constitutes a nonresponsibility determination for which there was a reasonable basis where the protester was found lacking in financial and organizational capability and without adequate production facilities, which findings the protester asserts would be rectified after it received an MSRC.

CONTRACTS
Protests
Interested Party Requirement
Protester Not In Line For Award

Protester who is ineligible for award is not an interested party to protest the qualifications of the awardee.

BIDS R-218237 June 3, 1985
Responsiveness 85-1 CPD 630
Descriptive Literature
Adequacy

Protest that bid was nonresponsive because it did not include descriptive literature is without merit where the literature in fact was furnished.

Where invitation for bids contained a descriptive literature clause but did not request specific information describing the operation of a pressure die interface zone recapture feature, bidders were not required to furnish such information and bid omitting it was responsive.

CONTRACTORS
Responsibility
Determination
Review By GAO

Protester's allegation that awardee will not be able to deliver a product that conforms to the requirements of the solicitation raises an issue involving the agency's determination that the awardee is responsible, a matter that GAO generally does not review.

BIDDERS B-218268 June 3, 1985
Qualifications 85-1 CPD 631
Prequalification Of Bidders
Propriety

Protester's contention that prequalification criteria unduly restrict competition, because a bidder could satisfy the responsibility standards in the solicitation, but fail to meet the prequalification criteria, is without merit, since prequalification criteria and responsibility standards are cumulative requirements, all of which must be met before a bidder may receive the contract award.

CONTRACTS **B-218893, B-218893.2**
Small Business **June 3, 1985**
Concerns **85-1 CPD 634**
Awards
Small Business Administration's
Authority
Certificate Of Competency
Period For Issuance

GAO will not consider a protest concerning an allegedly improper denial of a request for an extension of time for processing a Certificate of Competency application in the absence of a showing that the decision to deny the request may have been made fraudulently or in bad faith.

CONTRACTS **B-215303.5 June 4, 1985**
Negotiation **85-1 CPD 637**
Offers Or Proposals
Evaluation
Point Rating
Propriety Of Evaluation

An agency's use of a rating plan, which resulted in the award to the protester of zero points for certain evaluation criteria while not similarly rating the awardee, is arbitrary. Also, this rating plan gives inordinate weight to certain evaluation criteria and is inconsistent with the RFP evaluation criteria.

CONTRACTS

B-215303.5 Con't

Negotiation

June 4, 1985

Offers Or Proposals

Evaluation

Reasonable

Agency evaluation of the individual proposed goals and objectives of the protester and the awardee under an RFP is not arbitrary or contrary to procurement law in view of the considerable agency discretion involving a high degree of subjective judgment on the medical policy issues addressed.

CONTRACTS

Negotiation

Offers Or Proposals

Evaluation

Technical Superiority v. Cost

Even where the agency's evaluation of the protester's technical proposal is arbitrary and inconsistent with the RFP evaluation criteria such that the protester should have been highest rated technically, the award to a competitor is not objectionable where the award is to be based upon a formula contained in the RFP integrating technical and price factors and the protester received a significantly lower score than the awardee under the formula (even using the higher technical score which the protester should have received) because of its significantly higher price.

CONTRACTS **B-215303.5 Con't**
Protests **June 4, 1985**
Interested Party Requirement
Direct Interest Criterion

Third ranked and highest priced of three offerors, which protests the evaluation of its and the awardee's proposals, but not the second ranked offeror's proposal, is an interested party under GAO Bid Protest Procedures since it may be in line for award if the protest concerning the evaluation of its own proposal is sustained.

CONTRACTS **B-218611.2 June 4, 1985**
Protests
Basis For Protest Requirement

GAO affirms dismissal of protest that failed to state a basis for protest, where the request for reconsideration demonstrates that initial protest was untimely.

CONTRACTS **B-216408.2 June 5, 1985**
Negotiation **85-1 CPD 640**
Offers Or Proposals
Discussion With All Offerors
Requirement
"Meaningful" Discussions

While discussions must be meaningful, negotiations that lead offerors into the areas of their proposals which require amplification meet this criterion. The content and extent of meaningful discussions in a given procurement are matters primarily for determination by the agency, and GAO will not question such a determination unless it is clearly without a reasonable basis.



CONTRACTS **B-216408.2 Cont'**
Negotiation **June 5, 1985**
Offers Or Proposals
Evaluation
Cost Realism Analysis
Adequacy

GAO denies a protest alleging that a cost realism analysis was inadequate because the agency failed to consider the fact that the awardee would be required to pay its employees at the same rates as the predecessor contractor, since the Service Contract Act does not require a successor contractor to do so in the absence of a collective bargaining agreement.

Although agency's initial cost realism analysis allegedly was deficient, when the results of a second analysis, performed after the protest was filed, do not change the protester's competitive standing in relation to the awardee, the protester has not been prejudiced. GAO therefore denies a protest against an allegedly improper cost evaluation.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
General Accounting Office Review

GAO will not reevaluate proposals, but rather limits its review to an examination of whether the agency's evaluation was reasonable and in accord with listed criteria.

CONTRACTS **B-216408.2 Con't**
Negotiation **June 5, 1985**
Offers Or Proposals
Evaluation
Technically Equal Proposals
Price Determinative Factor

When a solicitation states that award will be made to the offeror whose proposal offers the greatest value in terms of technical capability and cost, rather than the offeror with the lowest estimated cost, cost may become the determinative factor when there are close technical scores.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To Protester

Where protester does not learn of specific grounds of protest until agency debriefing, a protest filed within 10 working days after the debriefing is timely.

CONTRACTS **B-216592 June 5, 1985**
Protests **85-1 CPD 641**
Conflict In Statements Of Protester And Contracting Agency

A protester has not carried its burden of proof when the only evidence in the record regarding issues of fact is conflicting statements between the protester and the contracting agency.

CONTRACTS **B-218407.2 June 5, 1985**
Protests **85-1 CPD 642**
General Accounting Office Procedures
Reconsideration Requests
Timeliness

Request for reconsideration of prior decision, filed more than 10 working days after decision was issued, is dismissed as untimely.

BIDS **B-218448.2 June 5, 1985**
Preparation **85-1 CPD 643**
Costs
Noncompensable

Award of bid preparation costs is only justified if protester shows both that the government's conduct toward the protester was arbitrary and capricious and that, if the government had acted properly, the protester would have had a substantial chance of receiving the award. Where the protester fails to show it had a substantial chance for award, GAO will deny a claim for bid preparation costs.

CONTRACTORS
Responsibility
Determination
Review By GAO
Nonresponsibility Finding

GAO will not question a nonresponsibility determination unless protester demonstrates bad faith by the contracting agency or lack of any reasonable basis for the determination.

CONTRACTS **B-218448.2 Con't**
Protests **June 5, 1985**
Preparation
Costs
Noncompensable

An unsuccessful bidder is not entitled to the costs of pursuing its protest, including attorneys fees, where the protest was filed prior to the effective date of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, even though GAO decided the protest in its favor.

CONTRACTS **B-218557.2, et al.**
Protests **June 5, 1985**
General **85-1 CPD 644**
Accounting
Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

GAO will deny a request for reconsideration where the protester makes the same basic assertion that was made in the initial protest and does not show that government officials acted fraudulently or in bad faith in connection with the denial of a certificate of competency.

CONTRACTS
Protests
General Accounting Office Procedures
Reconsideration Requests
Request For Conference
Denied

GAO will deny a request for a conference when the protest is not being considered on the merits, since a conference would serve no useful purpose.

BONDS **B-218627 June 5, 1985**
Bid **85-1 CPD 645**
Discrepancy Between Bid And Bid Bond
Bid Nonresponsive

Where a bid is submitted in the name of one firm and is accompanied by a bid bond in the name of a joint venture consisting of the bidder and another entity, the bid bond is materially deficient, as the obligation of the surety is unclear. Therefore the bid must be rejected as nonresponsive.

CONTRACTS **B-216381 June 6, 1985**
Negotiation **85-1 CPD 647**
Requests For Proposals
Construction
Reading All Provisions Together Rule
Presumption Against Conflict

Protest of the agency's rejection of the protester's technical proposal for noncompliance with a mandatory requirement contained in "Attachment 1" to the solicitation, when the solicitation referred only to "Attachment D1," is denied. The RFP and its amendments, when read as whole, clearly conveyed the agency's intent that proposals must comply with the requirement in order to be acceptable.

CONTRACTS
Protests
Allegations
Unsubstantiated

Where the RFP required that a target helicopter be based on a small, commercially available, two-person civilian helicopter, a protest contending that the awardee's target helicopter was based on a five-person helicopter is denied since the record indicates that awardee's proposed target helicopter was based on a small, commercially available, two-person civilian version of its five-person helicopter. D-13

CONTRACTS **B-216381 Con't**
Protests **June 6, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect
Interim Appeals To Agency—Effect
On 10 Working Day GAO Filing Period

Where protester protests to the agency within 10 working days of the agency's rejection of its technical proposal, its subsequent protest to GAO within 10 working days of the agency's denial of its protest is timely.

ESTOPPEL **B-218112 June 6, 1985**
Against Government **85-1 CPD 647**
Not Established
Prior Erroneous Advice, Contract
Actions, Etc.

Protest that oral advice from agency misled protester into believing that request for information (issued to multiple award schedule contractors) would be followed by a formal request for proposals is denied where advice was inconsistent with the request for information and with the procurement approach permitted by applicable regulations.

BIDS **B-218317 June 6, 1985**
Invitation For Bids **85-1 CPD 648**
Cancellation
After Bid Opening
Defective Solicitation

Cancellation of solicitation after bid opening is proper where agency reasonably determined that the solicitation did not reflect the agency's actual needs.

BIDS **B-218317** **Con't**
Invitation for Bids June 6, 1985
Cancellation
Justification
Minimum Needs Reassessment

Federal Acquisition Regulation provision precluding an agency from canceling a solicitation due to increased requirements applies when the agency is buying a supply of items, not where the agency is procuring services to perform specified work.

BIDS
Preparation
Costs
Noncompensable
Invitation Properly Cancelled

Requests for bid preparation costs and the cost of pursuing a protest with GAO against the cancellation of an IFB are denied where the cancellation was proper under applicable procurement regulations.

CONTRACTS
Awards
Propriety
Noncompetitive Situation Created

When after bid opening but before contract award an agency learns that its requirements exceed those in the solicitation, the agency may not award a contract under the initial solicitation with the intention of modifying that contract to include the increased requirements.

BONDS **B-218604.2 June 6, 1985**
Bid **85-1 CPD 649**
Surety
Obligation To Government
Established

If the bid bond itself as submitted is proper on its face, the bid is responsive, and the acceptability of the sureties may be established any time before award since this concerns a matter of responsibility.

CONTRACTORS
Responsibility
Determination
Review By GAO
Affirmative Finding Accepted

The General Accounting Office does not review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of government officials or that definitive responsibility criteria may not have been applied.

BIDS **B-218832 June 6, 1985**
Prices **85-1 CPD 650**
Independent Price Determination

Evidence that two bidders share common officers and directors and have some joint ownership does not establish that the certification of independent pricing was violated. In any case, jurisdiction in such matters is committed to the Attorney General and federal courts, not GAO.

CONTRACTS **B-218832 Con't**
Protests **June 6, 1985**
Conferences
Request Denied
Protest Not For Consideration On The
Merits

Where it is clear that a protest involves matters which GAO does not consider, GAO will dismiss protest without holding a conference which would serve no useful purpose.

CONTRACTS **B-218869.2 June 6, 1985**
Negotiation **85-1 CPD 651**
Sole-Source Basis
Determination To Use
Agency Discretion

GAO will not review protest that contracting agency should procure item from the protester on a sole-source basis.

CONTRACTS
Protests
Basis For Protest Requirement

Dismissal of original protest for failure to set forth a detailed statement of the legal and factual grounds of protest is affirmed where protester offers no explanation of basis of protest until request for reconsideration is filed and that request does not independently constitute a timely complete protest.

**GENERAL
ACCOUNTING OFFICE**

**B-218869.2 Con't
June 6, 1985**

**Jurisdiction
Contracts
Disputes
Between Private Parties**

Protester's contention that award to prospective awardee will violate protester's licensing agreement with prospective awardee involves dispute between private parties that is not for resolution by GAO.

CONTRACTS

B-218908 June 6, 1985

**Protests
Interested Party Requirement
Direct Interest Criterion**

To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offeror.

BIDS

B-218983 June 6, 1985

**Prices
Below Cost
Not Basis For Precluding Award**

No basis exists to preclude a contract award merely because the low bidder submitted a below-cost bid.

CONTRACTS **B-217037 June 7, 1985**
Conflict Of **85-1 CPD 654**
Interest Prohibitions
Generally

An allegation of a conflict of interest is denied where engineer, alleged employee of awardee, serves on national committee comprised of 18 individuals which formulated standards used in specifications, since it is unlikely engineer would have exerted enough influence to favor awardee.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect

Protest not made to GAO within 10 working days of initial adverse agency action on protest filed with agency is untimely. An agency's continued receipt of proposals after a protest has been filed without taking the requested corrective action is initial adverse agency action.

BIDS **B-217106 June 7, 1985**
Invitation for bids 85-1 CPD 655
Cancellation
After Bid Opening
Defective Solicitation

Air Force's cancellation after bid opening of invitation for bids (IFB) for aircraft tires listed on qualified products list is appropriate where: (1) protester has failed to show that a direct response to the specification cited in the IFB would have met Air Force's minimum needs, and (2) other bidder would be prejudiced by award to protester whose tire was not shown to be qualified as of bid opening.

BIDDERS **B-217327 June 7, 1985**

Debarment
Labor Stipulations Violations
Davis-Bacon Act
Wage Underpayments
Debarment Required

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional. Therefore, the contractor will be debarred under the Act.

BIDDERS **B-217329 June 7, 1985**

Debarment
Labor Stipulation Violations
Davis-Bacon Act
Wage Underpayments
Debarment Required

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had failed to pay the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the subcontractor will be debarred under the Act.

BIDDERS

B-217348 June 7, 1985

Debarment

Labor Stipulation Violations

Davis-Bacon Act

Wage Underpayments

Debarment Required

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had underpaid employees and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the subcontractor will be debarred under the Act.

BIDDERS

B-217349 June 7, 1985

Debarment

Labor Stipulation Violations

Davis-Bacon Act

Wage Underpayments

Debarment Required

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of payroll records was intentional. Therefore, the contractors will be debarred under the Act.

BIDS **B-218324 June 7, 1985**
Late **85-1 CPD 656**
Modification
Acceptance

Bid modification, received by contracting agency prior to bid opening time, that was misplaced and discovered after bid opening, may be accepted where agency determined that lateness was due solely to government mishandling after receipt at the government installation. The time of receipt is established by the time-date stamp of the installation on the envelope.

CONTRACTORS
Responsibility
Determination
Review By GAO
Affirmative Finding Accepted

Contention that awardee was not listed with a state agency, based on a general requirement for compliance with state and local laws, involves a question of responsibility which GAO will not review absent evidence of fraud or bad faith.

SMALL BUSINESS **B-218590.2 June 7, 1985**
ADMINISTRATION **85-1 CPD 657**
Contracts
Contracting With Other Government
Agencies
Procurement Under 8(a) Program
Review By GAO

GAO will not review agency determination not to procure services under section 8(a) of the Small Business Act because the government estimate of the in-house cost was lower than the price solicited from a firm eligible under section 8(a), absent a showing of fraud or bad faith by procurement officials.

CONTRACTS**B-218136.3 June 10, 1985****Protests****General Accounting Office Procedures
Timeliness Of Comments On Agency's
Report**

GAO will not reopen a protest file closed because more than 7 working days lapsed after the contracting agency report was received (on the scheduled due date) before the protester communicated to GAO that it did not receive the agency report. GAO's acknowledgment of the protest gave notice that the protest file would be closed in that event and reopening the file would be inconsistent with expeditious consideration of the protest.

CONTRACTORS**B-218343; B-218343.2****Responsibility****June 10, 1985****Administrative****85-1 CPD 660****Determination****Nonresponsibility Finding
Supported By The Record**

A contracting officer may base an initial determination of nonresponsibility on the evidence of record without affording offerors an opportunity to explain or otherwise defend against the evidence. The requirement for procedural due process enunciated in recent court decisions is only applicable where the government's nonresponsibility determination involves the offeror's perceived lack of integrity, thus affecting the protectible constitutional interest to be free from a governmental defamation of reputation.

CONTRACTORS **B-218343, B-218343.2 Con't**
Responsibility **June 10, 1985**
Determination
Review By GAO
Nonresponsibility Finding

Even if one aspect of a firm's capability may have been incorrectly evaluated by a preaward survey team, this does not necessarily impair the agency's ultimate determination that the firm is nonresponsible. Rather, it is only where the record shows that the ultimate negative determination is based upon unreasonable or unsupported conclusions in many areas that GAO will recommend that the determination be reconsidered.

CONTRACTS
Protests
Interested Party Requirement
Direct Interest Criterion

To be considered an "interested party" so as to have standing to protest under the Competition in Contracting Act of 1984 and GAO's implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offeror.

CONTRACTS **B-218343, B-218343.2** **Con't**
Subcontractors **June 10, 1985**
Responsibility
Determination

When a prospective contract involves substantial subcontracting, the contracting officer may directly determine the proposed subcontractor's responsibility. GAO generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the determination.

CONTRACTS **B-218741.3** **June 10, 1985**
Protests **85-1 CPD 662**
Notice
To Contracting Agency

While GAO retains discretion to grant exceptions to the requirement that a protester submit a copy of its protest to the contracting agency within 1 day after the protest is filed, such exceptions will be granted sparingly and only under compelling circumstances, to prevent erosion of the requirement's purpose.

SMALL BUSINESS **B-218912.2** **June 10, 1985**
ADMINISTRATION **85-1 CPD 663**
Contracts
Contracting With Other Government
Agencies
Procurement Under 8(a) Program
Review By GAO

GAO does not review an agency decision not to award a contract under the section 8(a) program unless there is a showing of possible fraud or bad faith on the part of government officials or that specific regulations may have been violated.

CONTRACTS **B-216947.2** **June 11, 1985**
Negotiation **85-1 CPD 664**
Request For Proposals
Specifications
Restrictive
General Accounting Office
Recommendation Of Less Restrictive

Protest against specifications as unduly restrictive is sustained where contracting agency has not established prima facie support for specific design requirements it has imposed. Needs should be stated functionally to permit consideration of other equipment that is capable of meeting the government's actual needs.

CONTRACTS **B-218166** **June 11, 1985**
In-House **85-1 CPD 666**
Performance v. Contracting Out
Cost Comparison
Failure To Follow Agency Policy And
Regulations

Protest against agency appeal board decision, affirming agency decision to perform services in-house following an OMB Circular A-76 cost comparison, is sustained where agency failed to comply with procedures for conducting cost comparison identified in the request for proposals.

CONTRACTS **B-218301.2** **June 11, 1985**
Awards **85-1 CPD 667**
Erroneous
Adjustment In Lieu Of Cancellation

Where agency inadvertently names offeror's subsidiary as awardee instead of offeror in the award document, agency may modify award document to designate proper offeror as the awardee.

CONTRACTS **B-218301.2 Con't**
Protests **June 11, 1985**
Contract Administration
Not For Resolution By GAO

Whether contractor will comply with contract terms during contract performance is a matter of contract administration which GAO will not consider.

CONTRACTS
Protests
Court Action
Protest Dismissed

GAO will not consider protest issue where issue already has been adjudicated by court of competent jurisdiction.

CONTRACTS **B-218403 June 11, 1985**
Negotiation **85-1 CPD 668**
Offers Or Proposals
Rejection
Failure To Meet Specification
Requirements

Rejection of multiple-award schedule proposal is proper where the items offered therein exceed the government's need because whole systems are offered instead of the specific system parts called for by the solicitation.

BIDS **B-218428 June 11, 1985**
Responsiveness **85-1 CPD 669**
Bid Guarantee Requirement

Bid is nonresponsive and not for consideration where the bidder's corporate surety on bid bond is not listed in Treasury Department Circular 570. Such a deficiency may not be corrected after bid opening.

BONDS **B-218428 Con't**
Bid **June 11, 1985**
Corporate Seal Missing

Bid bond is not invalid as a result of alleged absence of corporate seals of bidders and sureties.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
New Issues
Unrelated To Original Protest Basis

Protester's new and independent ground of protest is dismissed where the later-raised issue does not independently satisfy rules of GAO's Bid Protest Regulations.

CONTRACTS **B-218628.2**
Protests **June 11, 1985**
General **85-1 CPD 670**
Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect

When a protest alleging solicitation improprieties is filed initially with the contracting agency prior to bid opening, the opening of bids without an agency response constitutes initial adverse action, and a subsequent protest to GAO must be filed within 10 working days thereafter.

CONTRACTORS **B-218944 June 11, 1985**
Responsibility **85-1 CPD 671**
Determination
Review By GAO
Affirmative Finding Accepted

GAO does not review affirmative determinations of responsibility except under limited circumstances not present here.

FOREIGN GOVERNMENTS B-216312.2; et al.
Defense Articles June 12, 1985
And Services 85-1 CPD 672
Arms Export Control Act
Foreign Military Sales Program
Competition Requirement
Inapplicability
Sole-Source Award Requested

GAO properly dismissed one protest and denied another challenging sole-source specifications requested by a Foreign Military Sales (FMS) customer, since applicable regulations require the contracting agency to honor an FMS customer's request for a particular source.

BONDS B-217254 June 12, 1985
Bid 85-1 CPD 673
Requirement
Administrative Determination

Bonding requirement in grantee's RFP for school lunch program management is justified where disruption in contract performance would harm students and contractor will use school property in performing contract.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Criteria
Application Of Criteria

Offeror's financial capability generally should not be considered as technical evaluation factor unless the grantee can offer special justification for its use. However, an offeror is not prevented from competing by a requirement for financial data, since it pertains to responsibility and must be furnished so that it can be considered in that context.

OFFICE OF MANAGEMENT AND BUDGET **B-217254 Con't**
AND BUDGET **June 12, 1985**
Circulars
No. A-102
Attachment 0

Office of Management and Budget Circular A-102, attachment "0," does not require that a grantee's food service management contract be formally advertised. The grantee is responsible for determining how to satisfy its own requirements, including the method of procurement to be used, and GAO will not question a grantee's determination unless it is shown to be unreasonable.

CONTRACTS **B-218039.2 June 12, 1985**
Small Business **85-1 CPD 674**
Concerns
Awards
Responsibility Determination
Nonresponsibility Finding
Review By GAO

GAO will not consider a protest that an agency grant an extension of time for processing a Certificate of Competency application in the absence of showing that the contracting officer's decision may have been made fraudulently or in bad faith.

BONDS

B-218104.2 June 12, 1985

Bid

85-1 CPD 675

Surety

Affidavit (Standard Form 28)

Deficiencies

Nondisclosure Of Other

Bond Obligations

An agency may properly find a bidder to be nonresponsible based on a finding that the bidder's individual sureties failed to disclose outstanding bond obligations. This determination need not be referred to the Small Business Administration for consideration under its Certificate of Competency procedures even if the bidder is a small business.

CONTRACTORS

Responsibility

Determination

Review By GAO

Nonresponsibility Finding

In reviewing an agency's negative responsibility determination, GAO will defer to the agency's judgment unless the protester shows bad faith by the agency or no reasonable basis for the determination.

CONTRACTS **B-218143 June 12, 1985**
Protests **85-1 CPD 676**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest after rejection of proposal that evaluation criteria were vague, ambiguous and not meaningful is untimely where the evaluation method and lack of detail were apparent on face of solicitation. Where solicitation fails to specify relative weights of criteria, offerors may assume they are equally weighted.

CONTRACTS
Two-Step Procurement
Step One
Offers Or Proposals
Rejection

Rejection of proposal as unacceptable under step one of two-step advertised procurement is reasonable where evaluation shows that proposed missile transporter would require major redesign to satisfy requirements of request for technical proposals.

PROCUREMENT
Statutory Changes
Implementation
Effective Date Of Application

Contention that provisions of Competition in Contracting Act of 1984, Title VII of Pub. L. 98 - 369, should be applied to procurement initiated with solicitation issued in September 1984 is denied where Act applies only to procurements for which solicitations are issued after March 31, 1985.

CONTRACTS **B-218255.2 June 12, 1985**
Negotiation **85-1 CPD 677**
Competition
Exclusion Of Other Firms
Exclusion On Basis Of Conflict
Of Interest
Reasonableness Of Determination

The contracting agency has the responsibility for determining whether a company competing for a government contract has a conflict of interest, and GAO will overturn the agency's determination only when it is shown to be unreasonable.

CONTRACTS
Negotiation
Cost-Reimbursement Basis
Evaluation Factors

Evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal in cost-reimbursement procurements.

CONTRACTS
Negotiation
Offers Or Proposals
Discussion With All Offerors
Requirement
What Constitutes Discussion

Since the solicitation contemplated an ordinary negotiated procurement and not one for architect-engineering services as argued by the protester, discussions had to be held with all offerors in the competitive range.

CONTRACTS **B-218255.2 Con't**
Negotiation **June 12, 1985**
Offers Or Proposals
Evaluation
General Accounting Office Review

Procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and GAO will not disturb the evaluation unless shown to be arbitrary or in violation of the procurement laws and regulations.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Technical Superiority v. Cost

Where a solicitation does not indicate the relative importance of technical and cost considerations, it must be presumed that technical and cost will be approximately equal in weight.

CONTRACTS
Negotiation
Technical Evaluation Panel
Members
Qualifications

GAO generally will not become involved in appraising the qualifications of contracting personnel involved in the technical evaluation of offers.

CONTRACTS **B-218255.2 Con't**
Protests **June 12, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect

Protest that after best and final offers discussions were reopened only with one competitor is untimely where filed more than 10 working days after the protester knew of the alleged reopening.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Allegations that (1) the services described in the solicitation should have been secured through a formally-advertised procurement; (2) the solicitation's specifications were unclear; and (3) the agency failed to include certain clauses in its request for best and final offers clarifying the alleged specification uncertainties are untimely and not for consideration since the facts on which the allegations are based should have been apparent prior to either the initial or final closing date but were not raised until after award.

BIDS **B-218309 June 12, 1985**
Qualified **85-1 CPD 678**
Progress Payments
Expression Of Hope Or Desire
Bid Responsive
Military Procurement

A "request" for progress payments is precatory in nature and does not render a bid nonresponsive in the absence of circumstances which indicate that the request is more than a mere wish or desire.

SMALL BUSINESS **B-218537 June 12, 1985**
ADMINISTRATION **85-1 CPD 679**
Contracts
Contracting With Other Government
Agencies
Procurement Under 8(a) Program
Withdrawal Of Procurement

Protest that agency violated regulations by removing work previously reserved under the section 8(a) program (in the form of open 8(a) contract options) from a non-8(a) procurement (in which it had been inadvertently included) because the removal constituted an illegal exercise of the options at an unreasonable price is denied where protester fails to establish that contracting agency either has or will pay a price in excess of fair market price for the reserved 8(a) work.

CONTRACTS **B-218055.2 June 13, 1985**
Protests **85-1 CPD 680**
General Accounting Office Procedures
Reconsideration Requests
Timeliness

Where copies of a decision are mailed both to counsel for the protester and to the protester, a request for reconsideration received more than a month after the original decision was issued will be considered untimely since it is reasonable to conclude that the protester knew or should have known of the basis for its request for reconsideration within one calendar week after the issuance of the decision.

BIDS **B-218261.2 June 13, 1985**
Invitation For **85-1 CPD 681**
Bids
Cancellation
Justification
Minimum Needs Reassessment

Where agency's needs change after bid opening so that instead of relying on established procedures for asbestos containment as stated in the solicitation it wishes to experiment with new techniques, it has a compelling reason to cancel the solicitation in view of the evolving knowledge concerning the danger of asbestos.

CONTRACTS **B-218275 June 13, 1985**
Negotiation **85-1 CPD 682**
Offers Or Proposals
Discussion With All Offerors
Requirement
Exceptions
Offers Not With Competitive Range

Allegation that solicitation may have been inadequate is denied since protester has not met its burden of presenting sufficient evidence to support its position. Protester was provided an analysis of the technical evaluation of its proposal and was provided a sufficient basis to determine whether RFP misled the protester in the preparation of its proposal.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Competitive Range Exclusion
Reasonableness

Determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. Allegation that agency's decision to exclude protester from the competitive range was unreasonable is denied where agency's technical evaluation is not shown to be unreasonable an agency determined that protester's proposal was not reasonably susceptible of being made acceptable without major revisions.

CONTRACTS	B-218275 Con't
Protests	June 13, 1985
Burden Of Proof	
On Protester	

Protest that agency failed to inform offeror of all deficiencies in its proposal is denied where information solicited by agency after submission of initial proposals was only intended to clarify proposal ambiguities during evaluation, and was not the initiation of competitive range discussions. Agency is not obligated to conduct discussions with offeror eliminated from competitive range. Agency is not obligated to conduct discussions with offeror eliminated from competitive range.

CONTRACTS	B-219031; B-219031.2
Negotiation	June 13, 1985
Preaward Surveys	85-1 CPD 683
Propriety	

Contracting officials have broad discretion as to whether or not to conduct preaward surveys and to what degree they will rely on the surveys, and GAO will not review an affirmative determination of responsibility unless the protester shows possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria in the solicitation have not been properly applied.

CONTRACTS **B-219031, B-219031.2 Con't**
Protests **June 13, 1985**
Allegations
Bias
Unsubstantiated

The protester bears a heavy burden of proof when alleging bad faith on the part of government officials; it must show by virtually irrefutable proof that these officials had a specific or malicious intent to injure the protester.

BIDS **B-217443 June 14, 1985**
Competitive System 85-1 CPD 684
Superior Advantages Of Some Bidders

The government is not required to equalize one bidder's competitive advantage where such advantage does not result from preference or unfair action by the government.

BIDS
Invitation For Bids
Cancellation
After Bid Opening
Nonresponsive Bids

Agency properly canceled an IFB after bid opening when both of the two bids received were nonresponsive.

BONDS
Bid
Corporate Seal Missing

An irrevocable letter of credit from a bona fide financial institution satisfies a solicitation requirement for a bid bond, and the absence of corporate seal is a minor informality which may be corrected after bid opening.

CONTRACTS **B-217443 Con't**
Protests **June 14, 1985**
Moot, Academic, Etc. Questions

Protest that the bidding period was too short for the protester to secure required bond, so that the firm's bid, which was not low, admittedly included neither bond nor the premium for obtaining it is dismissed as academic since the bid would have been even higher if the premium had been included.

CONTRACTS **B-218891.2 June 14, 1985**
Protests **85-1 CPD 685**
Interested Party Requirement
Trade Associations

To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A trade association representing worker cooperative, some of which submitted bids in response to the solicitation, is not an interested party.

CONTRACTS **B-218182 June 17, 1985**
In-house **85-1 CPD 687**
Performance v. Contracting Out
Cost Comparison
Cancellation Of Solicitation
Specification Changes
Minimum Needs Understated

A protest against an agency's cancellation of a request for proposals issued as part of an Office of Management and Budget Circular A-76 is denied where the agency reasonably determines that the solicitation no longer accurately reflects its minimum needs.

CONTRACTS **B-218182 Con't**
Negotiation **June 17, 1985**
Offers Or Proposals
Preparation
Costs
Recovery Criteria

To succeed in a claim for proposals preparation costs, the claimant must show that the government's conduct was arbitrary and capricious and that if the government had acted properly, the protester would have had a substantial chance of receiving the contract award.

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
In-House Performance v. Contracting Out
Cost Comparison
Internal Study v. Competitive
Solicitation

GAO will review protests concerning the cancellation of a solicitation issued for A-76 cost comparison purposes since the competitive procurement system is involved.

CONTRACTORS **B-218243 June 17, 1985**
Responsibility **85-1 CPD 688**
Determination
Review By GAO
Affirmative Finding Accepted

Where the contracting officer relies on objective evidence favorable to an offeror in making an affirmative determination of responsibility, GAO will not question the relative quality of the evidence.

CONTRACTS **B-218243 Con't**
Negotiation **June 17, 1985**
Mistakes
Correction

Discrepancy between unit price and line item total is susceptible to correction under FAR § 15.607 since the alleged ambiguity admits of only one reasonable interpretation substantially ascertainable from the offer.

CONTRACTS **B-218360.2 June 17, 1985**
Protests **85-1 CPD 689**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

Prior decision is affirmed on reconsideration where the protester has not shown any error of fact or law which would warrant its reversal.

BIDS **B-218367 June 17, 1985**
Competitive System **85-1 CPD 690**
Equal Bidding
Delivery Requirements

Bidder's failure to specify shipping point does not render a bid nonresponsive where the invitation excludes transportation costs from price evaluation, since the omission had no effect on the competitive standing of the bidders.

BIDS **B-218375 June 17, 1985**
Late **85-1 CPD 691**
Mishandling
Determination
Express Mail

Where United States Postal Service attempted unsuccessfully to deliver a bid by express mail addressed to a post office box 5 hours prior to bid opening, but agency denies knowledge of attempted delivery and shows it had personnel in its offices at the time of purported delivery and its mail clerk checked its post office box three times prior to bid opening, protester has not carried its burden of proof in showing government mishandling in the receipt of the bid.

CONTRACTS **B-218427 June 17, 1985**
Negotiation **85-1 CPD 692**
Requests For Proposals
Specifications
Conformability Of Equipment, Etc.
Offered
Administrative Determination

Protest that solicitation requirement that offered tugboats be "classed" (approved) by a recognized classification society is unduly restrictive of competition is denied where the society's standards are necessary to fulfill the government's minimum needs, and the protester offers no other approach that would ensure these needs will be met.

SMALL BUSINESS ADMINISTRATION **B-218602 June 17, 1985**
85-1 CPD 693

Contracts
Contracting With Other Government
Agencies
Procurement Under 8(a) Program
Fraud Or Bad Faith Alleged
Evidence Sufficiency

Protest that Small Business Administration (SBA), in approving the restriction of a procurement to section 8(a) firms, acted fraudulently or in bad faith because such approval is contrary to SBA's Standard Operating Procedures is dismissed because protester has not met its burden of showing the possibility that SBA had a specific and malicious intent to injure protester. Request that GAO infer bad faith from SBA conduct is not sufficient to satisfy burden.

CONTRACTORS **B-219077 June 17, 1985**
Responsibility **85-1 CPD 694**

Determination
Review By GAO
Affirmative Finding Accepted

GAO does not review an affirmative determination of a prospective contractor's responsibility absent a showing of possible fraud or bad faith on the part of contracting officials, or an allegation that definitive responsibility criteria in the solicitation were misapplied.

CONTRACTS
Protests
GAO Function
Independent Investigation And
Conclusions

GAO does not conduct investigations under its bid protest function to ascertain whether a protester should have a basis for a protest.

CONTRACTS **B-219357 June 17, 1985**
Negotiation **85-1 CPD 695**
Late Proposals And Quotations
Rejection Propriety

Information concerning an offeror's responsibility has no bearing on the application of a solicitation's late proposal rules.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
Apparent Prior to Bid Opening/
Closing Date For Proposals

To be considered timely, a protest based on alleged improprieties in an RFP which are apparent prior to the closing date for receipt of proposals must be filed prior to that date.

CONTRACTS **B-218780.3 June 18, 1985**
Protests **85-1 CPD 697**
General Accounting Office Procedures
Piecemeal Development Of Issues
By Protester

Protester may not successfully advance a new argument in a request for reconsideration that it could and should have advanced in its original protest, as GAO's Bid Protest Regulations do not contemplate the unwarranted piecemeal development of protest issues.

CONTRACTS **B-218780.3 Con't**
Protests **June 18, 1985**
General Accounting Office Procedures
Reconsideration Requests
Error Of Law Or Fact
Not Established

Prior decision is affirmed on reconsideration where protester has not shown any error of law or fact which would warrant reversal of that decision.

CONTRACTS **B-219349 June 18, 1985**
Protests **85-1 CPD 698**
Allegations
Unsubstantiated

Protest on grounds that agency conducted "negotiations" with brand name producer prior to issuance of the solicitation, thereby violating the prohibition in the Federal Acquisition Regulation against pre-solicitation release of procurement information, is dismissed where the protester does not show that actual negotiations took place or that the contact was anything more than an agency effort to confirm the currency of the producer's specifications prior to their use in a brand name or equal procurement

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior to Bid Opening/
Closing Date For Proposals**

Protest of agency's use of brand name or equal specifications is untimely where the solicitation clearly set out such specification and protest was not filed prior to bid opening.

CONTRACTS **B-219349 Con't**
Protests **June 18, 1985**
Information Evaluation
Sufficiency Of Submitted Information

Protest of the rejection of a bid because the information submitted with the bid in a brand name or equal procurement did not show that it was equal to the specified brand name product is dismissed because the protest provides no information showing that the product offered was equal to the product specified.

CONTRACTS **B-218196; B-218196.3**
Negotiation **June 19, 1985**
Offers Or **85-1 CPD 699**
Proposals
Discussion With All Offerors
Requirement
What Constitutes Discussion

Submission, after best and final offers, of additional evidence of an offeror's financial resources does not constitute improper discussions or require an agency to request revised proposals from all offerors when the information does not affect the acceptability of the proposal. Rather, it relates to the offeror's responsibility.

CONTRACTS **B-218196; B-218196.3 Con't**
Negotiation **June 19, 1985**
Prices
Below Cost
Effect On Responsibility

Award of a fixed-price contract for required services is not precluded because the offeror allegedly proposes to pay wages that are below the minimum required by the Fair Labor Standards Act. A below-cost proposal may be rejected only if the offeror is determined not to be responsible, and GAO will not review an agency's affirmative determination of responsibility except in limited circumstances not present here.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known
To Protester

Protest issue is untimely when it is not raised in initial protest to the contracting agency or in a protest to GAO within 10 days after basis for it is known or should have been known.

BIDS **B-218548 June 19, 1985**
Competitive System 85-1 CPD 700
Adequacy Of Competition
Sustained By Record

There is adequate competition on a solicitation where the agency sends the solicitation to 77 prospective offerors, the government receives a reasonable price for the procurement and there is no deliberate attempt to exclude a particular firm.

BIDS **B-218548 Con't**
Responsiveness **June 19, 1985**
Failure To Furnish Something Required
Bonds
Bids

A bid bond requirement is a material part of the solicitation and cannot be waived by the contracting officer nor cured after bid opening.

BIDS
Responsiveness
Low Price Of Bid Not A Factor

A nonresponsive bid cannot be accepted even if it offers a monetary savings to the government since the maintenance of the integrity of the competitive bidding system is more in the government's best interest than the pecuniary advantage to be gained in a particular case.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known
To Protester

A protest will be dismissed as untimely if filed later than 10 days after the basis for the protest was known or should have been known.

CONTRACTS **B-218552 June 19, 1985**
Two-Step **85-1 CPD 535**
Procurement
Step One
Offers Or Proposals
Evaluation
Technical Acceptability

Agency properly rejected technical proposal submitted under first step of two-step formally advertised procurement since proposal was reasonably determined to be unacceptable for valid technical reasons under stated evaluation criteria. For example, incumbent offeror which fails to provide specific information required by solicitation after being requested to supply information during discussions is properly determined unacceptable.

CONTRACTS **B-217543 June 20, 1985**
Awards **85-1 CPD 702**
Multiple
Maintain Mobilization Base

Where the request for proposals specifically states that multiple awards could be made for any quantity within six ranges of quantities, the Army has flexibility and is not required to make award to mobilization base producers on the basis of the lowest price in any specific quantity range.

BIDDERS **B-218445; B-218445.2**
Debarment **June 20, 1985**
Contract Award **85-1 CPD 703**
Eligibility
Business Affiliates

Contracting officer's determination that an affiliate of debarred contractor is ineligible for contract award is reasonable where the affiliate was incorporated after the contractor received a notice of proposed debarment and the affiliate will employ assets of debarred firm.

BUY AMERICAN ACT **B-218588.2** **June 20, 1985**
Applicability **85-1 CPD 704**
Use Outside United States

The provisions of the Buy American Act, 41 U.S.C. §§ 10a-d (1982), are only applicable to contracts for the construction, alteration, or repair of public buildings or public work in the United States. Acquisitions for use outside the United States are governed by the Balance of Payments Program set forth in Federal Acquisition Regulation, which requires the use of domestic construction materials in overseas projects except where the cost of such materials, including transportation and handling, exceeds the cost of foreign materials by more than 50 percent.

CONTRACTS **B-218588.2** **June 20, 1985**
Protests **85-1 CPD 704**
Interested Party Requirement
Potential Contractors, Etc.
Not Submitting Bids, Etc.

To be considered an "interested party" so as to have standing to protest under the Competition in Contracting Act of 1984 and GAO's implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential supplier of domestic materials to firms competing for an overseas construction project cannot be considered an actual or prospective bidder or offeror.

BIDS **B-218971** **June 20, 1985**
Collusive Bidding **85-1 CPD 705**
Allegation
Unsupported By Evidence

Allegation of collusion between agency and low bidder is dismissed where no evidence is submitted to support allegation. However, if protester has specific information, it should be presented to the contracting officer for possible forwarding to the Department of Justice in accordance with Federal Acquisition Regulation.

CONTRACTS
Protests
Contract Administration
Not For Resolution By GAO

Protester's allegation that low bidder's bid was improper under the latter's GSA contract is a matter of contract administration which GAO will not consider.

CONTRACTS **B-219350.2** **June 20, 1985**
Protests **85-1 CPD 707**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

Request for reconsideration is dismissed where protester raises no new facts or legal arguments which were not previously considered while the initial protest was pending.

CONTRACTS **B-214269** **June 21, 1985**
Negotiation **85-1 CPD 708**
Offers Or Proposals
Evaluation
Criteria
Application Of Criteria

Property taxes need not be included in agency's cost projections for construction of its own facility, because neither the agency nor the protester--as government entities--need pay such taxes. In addition, it is not clear that the inclusion of this item would have affected the economic choice among the alternatives under consideration.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Criteria
Cost

Record does not support protester's contention that agency improperly determined present value of its construction costs by applying discount rate and by failing to apply deflation factor.

CONTRACTS **B-218374 Con't**
Negotiation **June 21, 1985**
Offers Or Proposals
Discussion With All Offerors
Requirement
What Constitutes Discussion

Protester has not met its burden of proof on its allegation that its competitors were given a greater opportunity to negotiate with the government when the record indicates that there was only one round of negotiations and that the protester was notified of this fact in writing and was given an equal opportunity to participate.

CONTRACTS
Negotiation
Offers Or Proposals
Preparation
Costs
Denied

When a protest is without merit, GAO will deny a claim for proposal preparation costs.

CONTRACTS
Protests
Burden Of Proof
On Protester

Protester has failed to carry its burden of proof where its offers nothing more than its suspicion to support the allegation that the preaward survey team improperly disclosed confidential information to someone outside of the government.

CONTRACTS **B-218374 Con't**
Protests **June 21, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest against alleged improprieties in a solicitation, raised for the first time in the protester's comments on an agency report, is untimely and not for consideration on the merits.

CONTRACTS
Small Business Concerns
Awards
**Small Business Administration's
Authority**
Certificate Of Competency
**Agency Request That SBA Suspend
COC Proceeding**

When it is no longer clear which offeror is low, the contracting officer properly may open negotiations and ask the Small Business Administration to suspend its consideration of the offeror that initially appeared to be low but nonresponsible. Moreover, when the protester is displaced as the low offeror, the agency may withdraw the COC referral.

GENERAL ACCOUNTING OFFICE B-218374 Con't
Jurisdiction June 21, 1985
Contracts
Disputes
Between Private Parties

Suppliers are under no legal obligation to offer uniform terms to all potential bidders on federal contracts; therefore, the protester's disagreement with vendor over the price quoted for a required item is a dispute between private parties and, as such, is beyond the scope of GAO's bid protest function.

CONTRACTS B-215265 June 24, 1985
Negotiation 85-1 CPD 711
Offers Or Proposals
Evaluation
Criteria
Cost

Protest that certain cost items improperly were not considered in evaluation of proposals is denied, because cost items were uncertain and difficult to estimate and, therefore, were not included in RFP's evaluation scheme.

CONTRACTS
Protests
General Accounting Office Procedures
In Camera Inspection Of Records, Etc.

Protest that awardee's proposal did not meet RFP shock testing requirement is denied because contracting agency has provided GAO with documentation which shows that awardee met shock testing requirement.

CONTRACTS **B-215265 Con't**
Protests **June 24, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known
To Protester

Protest, alleging that certain cost items associated with awardee's proposal improperly were not considered in evaluation of proposals, is timely. Protest was filed within 10 working days after "informal conferences" between contracting agency officials and protester revealed alleged evaluation improprieties. 4 C.F.R. § 21.2(b)(2)(1984).

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Failure To Diligently Pursue Protest

Issue first raised in supplemental protest letter filed approximately 4-1/2 months after initial protest letter was filed is untimely where protester has not shown that it diligently pursued information which made it aware of later-raised basis for protest nor has protester shown any intervening event between "informal conferences" which revealed initial basis of protest and supplemental filing which made it aware of new protest basis.

BIDS **B-218200.2 June 24, 1985**
Responsiveness **85-1 CPD 713**
Determination
On Basis Of Bid as Submitted At
Bid Opening

Protest that contracting agency should have rejected bid as nonresponsive on the basis of information submitted to the agency after bid opening is denied. It is a fundamental rule of formal advertising that the responsiveness of a bid must be determined from the bid submission itself and not on the basis of post-bid-opening submissions.

CONTRACTS
Protests
Interested Party Requirement
Mistake-In-Bid Questions

Protest that bid of competitor in line for award was in fact mistaken, even though contracting agency had accepted the competitor's verification of its bid price, will not be considered by GAO. Only the contracting parties (here, the government and the firm in line for award) are in a position to assert rights and to bring forth all the necessary evidence to resolve mistake in bid questions.

CONTRACTS **B-218304.2; B-218305.2**
Protests **June 24, 1985**
General **85-1 CPD 714**
Accounting Office Procedures
Reconsideration Requests
Eligible Party Requirement

Request for reconsideration of a protest which was dismissed on the grounds that the protester, as a potential subcontractor or supplier, was not an "interested party" is denied, where protester failed to state its status in its original protest, and where evidence indicates that protester has always been a subcontractor/supplier.

CONTRACTS B-218338 June 24, 1985
 Negotiation 85-1 CPD 715
 Evaluation 766 MS 653
 Offers Or Proposals
 Evaluation
 References

Protest that contracting officials failed either to contact more than one of the references listed in a proposal or to recontact a reference which claimed not to recall the work purportedly done by the protester is denied. Contracting officials have no duty to check any or all of the references listed in a proposal, to further investigate the accuracy of the information received from the references, or to permit an offeror to rebut information received from the references.

CONTRACTS
 Negotiation
 Offers Or Proposals
 Best And Final
 Additional Rounds
 Denial Propriety

Where a deficiency in a proposal was first introduced in the offeror's best and final offer, the contracting agency was not required to reopen discussions in order to allow the protester an opportunity to revise its proposals.

CONTRACTS **B-218338 Con't**
Negotiation **June 24, 1985**
Offers Or Proposals
Discussion With All Offerors
Requirement
"Meaningful" Discussions

Protest that discussions were inadequate is denied where GAO is unable to conclude that and inadequacy in discussions prejudiced the protester by depriving it of an opportunity for award.

CONTRACTS
Negotiation
Offers Or Proposals
Discussions With All Offerors
Requirement
Varying Degrees Of Discussions
Propriety

While a contracting agency generally must be as specific as practical considerations permit in disclosing perceived deficiencies in a proposal, if the agency is to satisfy its requirement of conducting meaningful discussions, the degree of specificity required is not constant and is primarily a matter for the agency to determine. Accordingly, GAO will not question an agency's judgment in this regard where the protester fails to establish that it lacked a reasonable basis.

CONTRACTS **B-218338 Con't**
Negotiation **June 24, 1985**
Offers Or Proposals
Evaluation
Reasonable

Since the determination of the relative merits of proposals is the responsibility of the procuring agency, GAO does not conduct a de novo review of technical proposals or make an independent determination as to their relative merit. Accordingly, a protest against the evaluation of proposals will be denied where the protester does not demonstrate that the evaluation was either unreasonable, not in accordance with the listed evaluation criteria, or in violation of procurement statutes or regulations.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Technical Superiority v. Cost
Solicitation Provisions

Protest that award was not made to the low offeror in a negotiated procurement is denied where the solicitation provided that technical factors would be more important than cost and contracting officials reasonably determined that the significant technical superiority of the awardee's proposal justified award at the higher price.

CONTRACTS **B-218338 Con't**
Negotiation **June 24, 1985**
Offers Or Proposals
Rejection
Notification Of Unsuccessful Offerors

Protest that notice of award was late and inadequate will not be considered on the merits, since a contracting agency's failure to give sufficient notice of award is a procedural deficiency that does not affect the validity of an otherwise proper award.

CONTRACTS
Negotiation
Source Selection
Plan

Protest that contracting agency did not use the formal source selection process set forth in the Federal Acquisition Regulation, § 15.612, and issue a source selection plan in procuring counseling services is denied where the procurement was not a high-dollar-value acquisition and the contracting agency's regulations did not otherwise require use of the formal source selection process.

CONTRACTS
Protests
Allegations
Bias

B-218338 Con't
June 24, 1985

Not Prejudicial To Protester

Protest that contracting officials were biased in favor of the incumbent as a result of familiarity with the firm and that any technical superiority the incumbent's proposal may have had resulted from advantages acquired by reason of incumbency is denied. Agencies may consider a firm's performance as an incumbent and a competitive advantage gained by virtue of incumbency is not an unfair advantage which must be eliminated.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness Of Protest

**Date Basis Of Protest Made Known To
Protester**

A protest filed more than 10 working days after the basis for protest is known or should have been known, whichever is earlier, is dismissed as untimely.

CONTRACTS **B-218338 Con't**
Protests **June 24, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest that copy of the solicitation was not received until 10 working days after issuance of the solicitation, that solicitation did not provide information as to previous contracts for the same services and that the solicitation was otherwise defective is untimely where not filed until after the closing date for receipt of proposals. Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that closing date in order to be timely.

CONTRACTS
Protests
Procedures
Information Disclosure

Protest that contracting agency refused to provide protester with access to certain documents for the development of its protest is denied. The contracting agency has the primary responsibility for determining which documents are subject to release under the Competition in Contracting Act of 1984, Pub. L. 98-369, § 2741(a), 98 Stat. 1175, 1199-1203, and, therefore, GAO will not question the agency determination in the absence of a showing of fraud or bad faith on the part of contracting officials.

FREEDOM OF INFORMATION ACT **B-218338 Con't**
June 24, 1985
General Accounting Office Authority

GAO has no authority under the Freedom of Information Act, 5 U.S.C. § 552 (1982), to determine what information agencies must disclose under the act.

CONTRACTS **B-218437.2**
Negotiation **June 24, 1985**
Requests For Proposals **85-1 CPD 716**
Specifications
Restrictive
Parts, Etc. Procurement

Protest that period allowed for demonstrating electronic ordering capacity for parts under contract unduly restricts competition because more firms, including the protester, could compete if period was extended is denied where protester has not shown that period for demonstrating capability is unreasonable and agency has received proposals from four different firms for services requested which state that they can meet this requirement.

CONTRACTS
Requirements
Estimated Amounts Basis
Best Information Available

Agency decision not to include in present solicitation for contractor operated parts depot delivery data from current contractor operated parts depot contract is legally unobjectionable since such information would not necessarily provide a more accurate basis for offerors to prepare their proposals.

SMALL BUSINESS ADMINISTRATION **B-218641 June 24, 1985**
85-1 CPD 717

Contracts
Contracting With Other Government
Agencies
Procurement Under 8(a) Program
Contractor Eligibility

GAO will not review the eligibility of a firm for assistance under section 8(a) of the Small Business Act. Also, GAO will not review the award of an 8(a) subcontract absent a showing of possible fraud or bad faith on the part of government officials or that regulations have been violated. 4 C.F.R. § 21.3(f)(4) (1985). The Competition in Contracting Act does not mandate that competitive procedures be applied to contracts let pursuant to section 8(a).

CONTRACTORS **B-218776 June 24, 1985**
Responsibility **85-1 CPD 718**

Determination
Review By GAO
Affirmative Finding Accepted

Protest that awardee will not perform the amount of work in a labor surplus area required to qualify for an evaluation preference is a matter of responsibility that GAO will not consider except in limited circumstances not present here.

CONTRACTS **B-218888.2 June 24, 1985**
Protests **85-1 CPD 719**
Notice
To Contracting Agency

Under 4 C.F.R. §§21.1(d) and (f) (1985) of GAO's Bid Protest Regulations, a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. We reverse our earlier dismissal of the protest as the agency was aware of protest basis prior to GAO's receipt of the protest and the protester was only 3 days late in furnishing a copy of its protest to the contracting activity in Europe and used reasonable means to facilitate expeditious delivery.

CONTRACTS **B-218198 et al.**
Transportation **June 25, 1985**
Services **85-1 CPD 720**
Procurement Procedures

Agency competitive selection of a contractor to make travel arrangements for federal employees is exempt from the procurement statutes since the contractual arrangement is only a management vehicle to obtain travel services which themselves are exempt from procurement procedures.

CONTRACTS **B-217179, B-217547**
Negotiation **June 26, 1985**
Competition **85-1 CPD 722**
Equal Bidding Basis For
All Offerors

Contracting agency is not required to provide technical data to all offerors in attempt to equalize alleged competitive advantage enjoyed by one offeror which already had access to the data, since the data were developed independently by the offeror's parent company and any advantage to the offeror thus was due solely to its parent company's prior experience.

CONTRACTS
Protests
Allegations
Unsubstantiated

Protester fails to show that company providing technical data to contracting agency for use in solicitation improperly modified data where only support is allegation by a former employee of the company, which is denied by the company, and, in any event, protester does not contend that technical data actually included in the solicitation were defective.

CONTRACTS **B-217179, B-217547 Con't**
Protests **June 26, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest regarding alleged solicitation defect is dismissed as untimely where initial protest on the same ground was untimely filed with the contracting agency.

BIDS **B-217219 June 26, 1985**
Responsiveness **85-1 CPD 723**
"Estimated Quantities" Provision
Interpretation

Rejection of bid based on bidder's mistaken interpretation of specifications was reasonable where bid was substantially below government estimates and where acceptance of it would have been unfair in view of unreasonableness of bid price.

BIDS **B-217593 June 26, 1985**
Responsiveness **85-1 CPD 724**
"No Charge," Etc. Notations

Bid containing "no charge" instead of prices for some items is responsive since bidder thereby indicated willingness to provide items at no charge or cost to government.

CONTRACTS
Protests
Allegations
Unsubstantiated

Mere allegation is not sufficient to meet protester's burden of establishing its case.

CONTRACTS **B-218442 Con't**
Two-Step **June 26, 1985**
Procurement
Step One
Offers Or Proposals
Rejection
Opportunity To Cure Perceived
Deficiency

Protester's technical proposal on the first step of a two-step, formally advertised procurement was properly rejected without discussions where it took exceptions to essential and mandatory requirements outlined in the request for technical proposals, which could only apparently be met by significant modifications to the protester's offered system.

CONTRACTS **B-218538 June 26, 1985**
Negotiation **85-1 CPD 726**
Conflict Of Interest Prohibitions
Organizational

Protest that award to selected contractor will create an organizational conflict of interest is denied where alleged conflicts concern potential review by the awardee of its past performance but, because of the different scope of work under the contracts, awardee will not be reviewing the usefulness of its past work in a manner which would impair its objectivity under the current contract.

CONTRACTS **B-218538 Con't**
Negotiation **June 26, 1985**
Offers Or Proposals
Evaluation
Technical Superiority v. Cost

Protest alleging that award to higher technically rated, higher cost offeror was not justified is denied where that result is consistent with the evaluation criteria stated in the solicitation and where procuring agency makes reasonable determination that difference in technical merit is sufficiently significant to justify cost difference.

CONTRACTS
Protests
Administrative Actions

Allegation that agency failed to formally document its decision concerning alleged organizational conflict of interest is a procedural irregularity which does not affect the validity of the award.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protests based upon alleged solicitation improprieties which do not exist in initial solicitation, but which are subsequently incorporated therein, must be protested not later than the next closing date for receipt of proposals.

BIDS **B-218594** **June 26, 1985**
Late **85-1 CPD 728**
Evidence Of Late
Time/Date Stamp
Conflict With Other Evidence

A delivery receipt prepared by a private courier cannot be used to determine whether a bid is late, because the only acceptable evidence to establish the time of receipt of a bid at a government installation is the time/date stamp of the installation or other documentary evidence of receipt maintained by the installation.

CONTRACTS **B-218595** **June 26, 1985**
Negotiation **85-1 CPD 729**
Sole-Source Basis
Justification

Sole-source award of delivery order for a computer system is justified where the contracting agency reasonably believed at the time of award that the awardee was the only source of a system that could run certain software needed by the agency.

CONTRACTS **B-218963.2** **June 26, 1985**
Protests **85-1 CPD 730**
General Accounting Office
Reconsideration Requests
Additional Evidence Submitted
Available But Not Previously
Provided To GAO

A protester cannot use a request for reconsideration to furnish evidence that was available, but not proffered, at the time of its original protest.

CONTRACTS B-218963.2 Con't
Protests June 26, 1985
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

GAO affirms prior decision where the request for reconsideration merely expresses dissatisfaction with the earlier decision and restates the arguments made during the original protest.

CONTRACTS B-217111 June 27, 1985
Negotiation 85-1 CPD 731
Awards
Initial Proposal Basis
Award Authority Discretionary

Although in a negotiated procurement award may be made on the basis of initial proposals under certain circumstances, the decision is discretionary; a procuring agency is under no obligation to make an award on the basis of initial proposals, and no offeror has a legal right to insist on such an award.

CONTRACTS
Protests
Allegations
Unsubstantiated

Protester's inference that alleged irregularities in agency conduct of negotiations indicate agency's intention to avoid awarding a contract to the protester is insufficient to establish bad faith; in order to establish bad faith, the protester must present virtually irrefutable evidence that agency officials acted with a specific and malicious intent to injure the protester.

CONTRACTS **R-217111** **Con't**
Small Business **June 27, 1985**
Concerns
Awards
Small Business Administration's
Authority
Certificate Of Competency
Agency Request That SRA Suspend
COC Proceedings

Where a contracting officer has referred a nonresponsibility determination to the Small Business Administration for consideration under its certificate of competency procedures because of critical need, time pressure, and the belief that the low priced initial offeror was unlikely to be displaced, withdrawal of the referral is proper when, after receipt of best and final offers, it becomes apparent that the offeror is no longer in line for award.

BIDS **R-217446** **June 27, 1985**
Invitation For Bids 85-1 **CPD 732**
Ambiguous
No Prejudice

Allegation that solicitation for security guard services is ambiguous is denied where agency adequately explains agency needs and performance requirements and protester has not shown that specifications were inadequate for intelligent and equal competition.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protests
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest concerning alleged solicitation impropriety, apparent prior to bid opening, must be filed prior to that date.

CONTRACTS **B-218188.2** **June 27, 1985**
Protests **85-1 CPD 73**
General Accounting Office Procedures
Reconsideration Requests
Original Decision Rendered In
Response To Court Request

GAO will not reconsider a prior decision rendered in response to an expression of interest from a court unless the court expresses an interest in the reconsideration of the decision.

CONTRACTS **B-218365.3** **June 27, 1985**
Offer And
Acceptance
Effect

Protest that contract should be conformed to extend the period of performance is denied. Absent fraud or willful deceit, one who signs a contract which he has had an opportunity to read is bound by the terms of that contract and will not be allowed to complain later that the contract does not express the terms to which it agreed.

CONTRACTS **B-218584** **June 27, 1985**
Negotiation **85-1 CPD 734**
Requests For Proposals
Brand Name "Or Equal" Procedure

When a brand name product is described in terms of precise design or performance characteristics, any proposed "equal" product must meet the stated requirements precisely, and mere functional equivalency will not do.

GENERAL **B-218809 Con't**
ACCOUNTING OFFICE **June 27, 1985**
Jurisdiction
Contracts
Defaults And Terminations
Matter Of Contract Administration

GAO will not consider the propriety of the procuring agency's decision to terminate a contract for default, or the degree of liability of the defaulted contractor for excess reprocurement costs since this is a matter for the procuring agency's board of contract appeals under the contract disputes clause.

CONTRACTS **B-218983.2 June 27, 1985**
Protests **85-1 CPD 736**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

Prior dismissal is affirmed where no new facts or legal arguments are raised on reconsideration which show that dismissal was erroneous.

CONTRACTS **B-219028 June 27, 1985**
Transportation **85-1 CPD 737**
Services
Procurement Procedures

Protest concerning competitive selection of contractor to provide travel management services for federal agencies is dismissed since selection of contractor is exempt from the procurement statutes and thus is not subject to review under GAO's Bid Protest Regulations.

CONTRACTS **B-219356.2** **June 27, 1985**
Protests **85-1 CPD 738**
General Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect

If a firm initially protests to the contracting agency, alleging a defect in the solicitation, the agency's opening of bids without taking the requested corrective action is the initial adverse agency action, and a subsequent protest to our Office more than 10 working days later is untimely.

CONTRACTS **B-216306.2** **June 28, 1985**
Protests **85-1 CPD 739**
Allegations
Bias
Unsubstantiated

Protest that alleged conflict of interest by agency procurement personnel tainted the evaluation of proposals is denied where it is based only on conjecture and speculation.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known
To Protester

Protest that the contracting agency held discussions with the eventual awardee after best and final offers, leading to a downward adjustment of the awardee's cost, is dismissed as untimely, since it was not filed within 10 working days after the protester knew or should have known of the protested actions.

CONTRACTS **B-216306.2 Con't**
Protests **June 28, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Significant Issue Exception
Prior GAO Consideration Of
Same Issue Effect

GAO will not review an untimely protest under the significant issue exception to GAO's timeliness rules where the protest does not present a matter of widespread interest or importance to the procurement community that has not been considered on the merits in previous decisions.

CONTRACTS **B-216945 June 28, 1985**
Federal Supply **85-1 CPD 740**
Schedule
Mandatory Use Requirement

There is no requirement to synopsise in the Commerce Business Daily delivery orders placed against mandatory FSS contracts.

**CONTRACTS
Federal Supply
Schedule
Prices
Reductions
Notice**

**B-216945 Con't
June 28, 1985**

Protester has not shown that the Air Force improperly placed 10 delivery orders at other than the lowest price under a General Services Administration (GSA) Federal Supply Schedule (FSS) contract where the protester has only produced conflicting evidence on the issue of whether its prices were low. Furthermore, even assuming that the protester had offered lower prices by modifying its FSS price list, the burden is on the supplier to notify the contracting agency of price reductions accepted by GSA and it has not shown that the Air Force had actual notice of any price reductions.

**CONTRACTS
Federal Supply Schedule
To Other Than The Low Bidder Or Offeror
Justification**

When placing orders against mandatory multiple award FSS contracts, agency can award six items, each valued at less than \$500, to same schedule contractor that it awarded 282 items, even though another schedule contractor was low on those six items, where awardee was either low or the only source for all other items. Agency indicated that administrative benefits of splitting requirements would outweigh \$392 price advantage of other FSS contractor for these six items and agency states that it would be difficult to work with two different companies' products.

CONTRACTS **B-216945 Con't**
Protests **June 28, 1985**
Interested Party Requirement
Protester Not In Line For Award

FSS contractor is not an interested party under GAO's Bid Protest Procedures to protest that awardee should have been issued one order instead of 10 orders from its FSS contract so as to obtain applicable quantity discounts where the protester was not the most advantageous FSS contractor in the absence of the discount.

CONTRACTS **B-218270, B-218270.2**
Negotiation **June 28, 1985**
Offers Or **85-1 CPD 741**
Proposals
Best and Final
Technically Unacceptable

An offeror may be eliminated from consideration for award after the submission of a best and final offer where the agency determines that the best and final offer is technically unacceptable.

CONTRACTS
Negotiation
Offers Or Proposals
Discussion With All Offerors
Requirement
"Meaningful" Discussions

Discussions between an agency and an offeror are meaningful where the offeror is made aware of deficiencies in its proposal, even though the agency merely indicates that certain aspects of a proposal are undesirable and not that they constitute grounds for rejecting the proposal if not corrected.

CONTRACTS **B-218270, B-218270.2 Con't**
Negotiation **June 28, 1985**
Offers Or Proposals
Discussion With All Offerors
Requirement
"Meaningful" Discussions

When an offeror concedes that proposed equipment has malfunctioned during demonstrations intended to show its operational capability, and the agency has stressed throughout the procurement that it requires a reliable system, the offeror should realize that the malfunctions are serious. GAO therefore will deny a protest alleging that the agency did not conduct meaningful discussions because it did not specifically advise the offeror that its proposal might be rejected due to the malfunctions.

CONTRACTS **B-218335 June 28, 1985**
Negotiations **85-1 CPD 742**
Offers Or Proposals
Evaluation
Administrative Discretion
Cost/Technical Tradeoffs

Although an agency may properly decide that the cost of a technically superior proposal, is so high that selection of a lower cost, technically inferior proposal will be more advantageous, notwithstanding an RFP evaluation scheme in which cost is stated as being the least important criterion, such a selection must be supported by an extremely strong justification.

CONTRACTS **B-218335 Con't**
Negotiations **June 28, 1985**
Offers Or Proposals
Evaluation
Technically Unequal Proposals
Price Determinative Factor

The fact that a proposal scored as being nearly perfect in terms of technical merit was more than 50 percent higher in proposed cost than the awardee's markedly inferior proposal did not by itself preclude the agency from selecting the superior proposal. Although an agency must consider cost in a negotiated procurement, the agency here deviated from established evaluation criteria by concluding that the superior technical merit of the protester's offer did not justify a significantly greater expenditure.

CONTRACTS **B-218337.2 June 28, 1985**
Termination **85-1 CPD 743**
Solicitation Inappropriate
Unduly Restrictive Of Competition

Where, after award of a contract, an agency discovers that it unnecessarily restricted competition on a sole-source basis, the remedy followed by the agency, termination of the awarded contract for the convenience of the government and resolicitation on an unrestricted basis, was proper.

CONTRACTS **B-218480 June 28, 1985**
Negotiation **85-2 CPD 10**
Offers Or Proposals
Evaluation
Competitive Range Exclusion
Reasonableness

In evaluating proposals, agency may reasonably exclude proposal from the competitive range for deficiencies which are so material that major revisions would be required to make the proposal acceptable.

CONTRACTS **B-219132 June 28, 1985**
Protests **85-2 CPD 13**
General Accounting Office Procedures
Timeliness
Date Basis Of Protest Made Known To
Protester

Protest against contract award filed more than 10 working days (plus reasonable delivery time) after agency sent notice of award to protester is untimely under GAO Bid Protest Regulations.

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EQUAL OPPORTUNITY EMPLOYER

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

BULK RATE
POSTAGE & FEES PAID
GAO
PERMIT NO. 8100

