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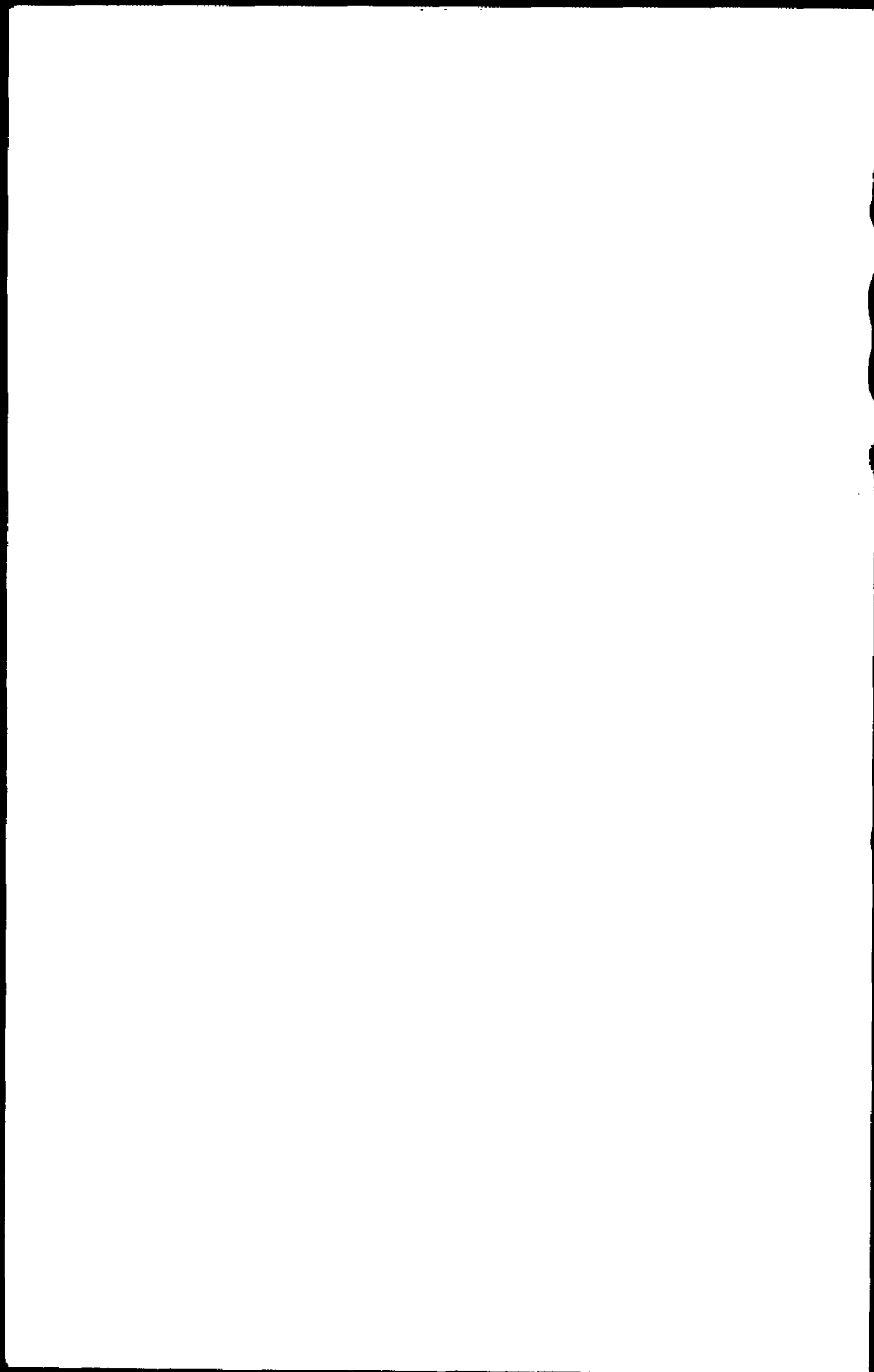
**United States General Accounting Office**  
**OGC/Index-Digest Section**

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**July 1986**  
**Vol II, No. 10**

**Digests of Unpublished  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

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# **UNITED STATES GENERAL ACCOUNTING OFFICE**

**CHARLES A. BOWSER**

Comptroller General of the United States

**MILTON J. SOCOLAR**

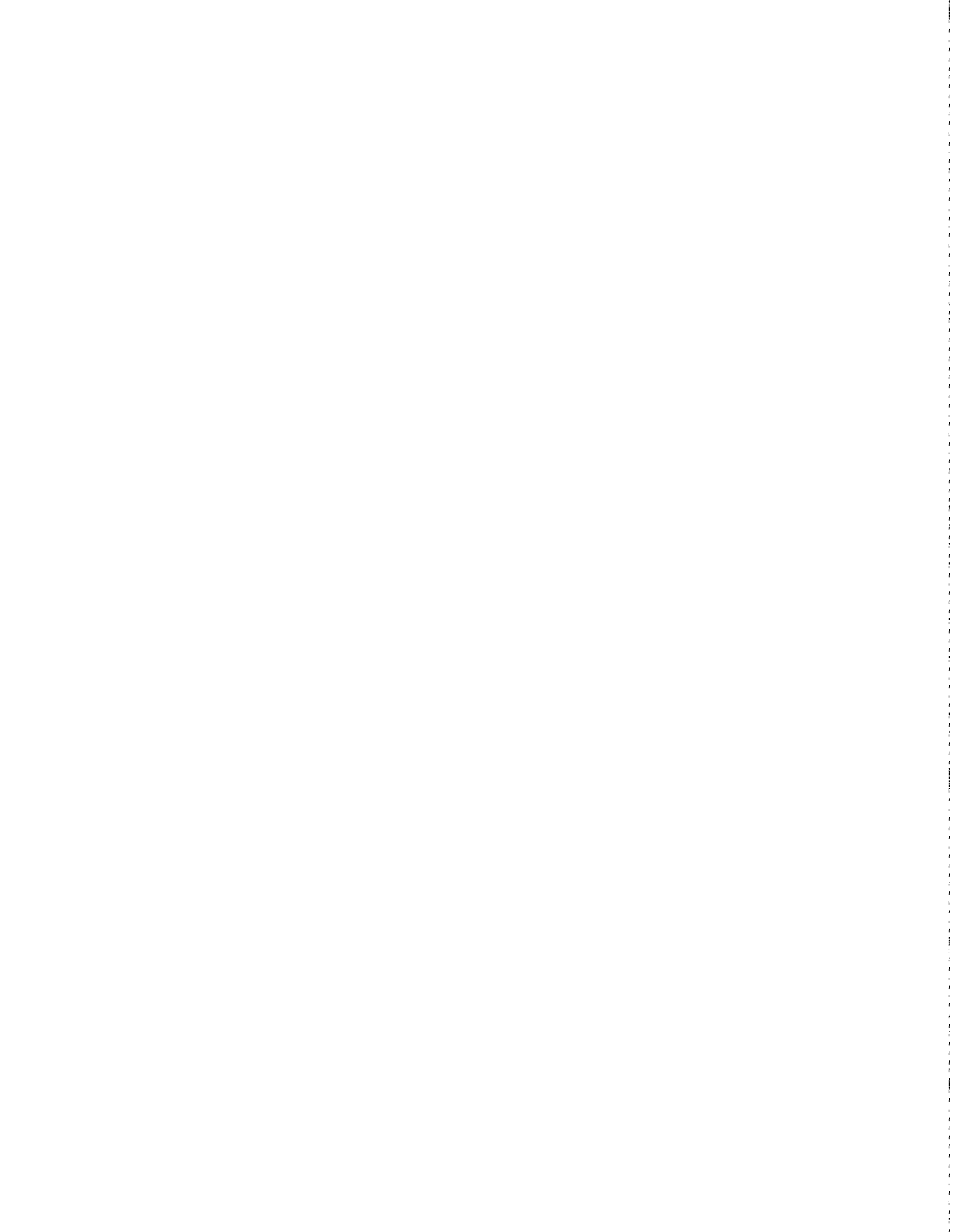
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JULY 1986

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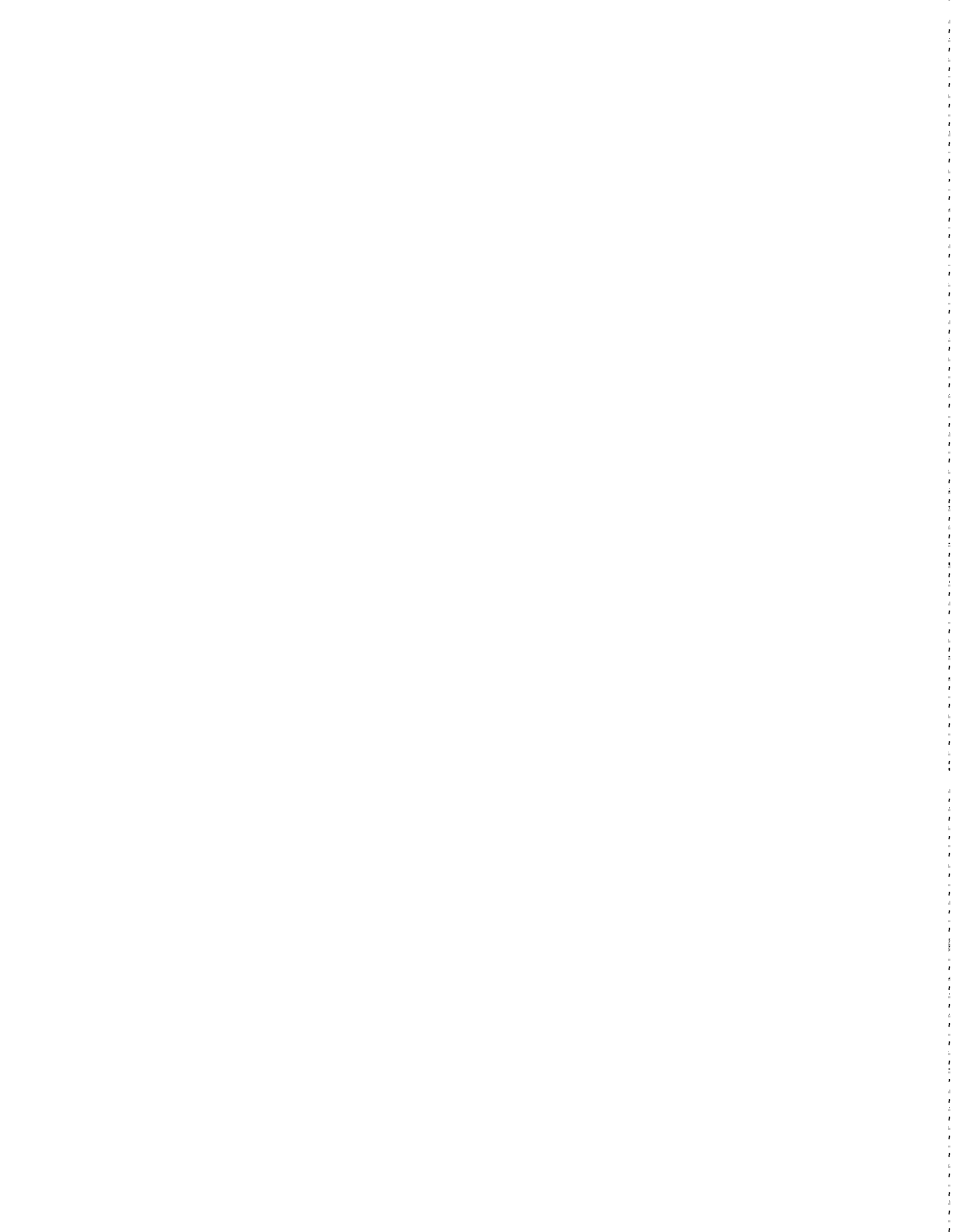


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**GENERAL GOVERNMENT MATTERS  
APPROPRIATIONS AND MISCELLANEOUS**

**CONTRACTS**

**B-221519 July 1, 1986**

**Payments**

**Bankrupt Contractor**

**Surety v. Trustee**

Consistent with Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136-37 (1962), the surety has priority over trustee in bankruptcy to contract retainage funds held by agency where funds never became the property of the contractor.

**INDIAN AFFAIRS**

**B-222665 July 2, 1986**

**Contracts**

**Bureau of Indian Affairs**

**Indian Self-Determination Act**

**Compliance Determination**

Under the Indian Self-Determination Act, which is Title I of Pub. L. No. 93-638, January 4, 1975, the Department of Interior used contracts with Indian Tribes to give money, property and services for the needs of the respective Tribes. Under the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6301 et seq., when the principal purpose of a relationship with a recipient is the transfer of money, property or services for the support of the recipient, a grant or cooperative agreement is to be used, and not a contract. By virtue of Pub. L. No. 98-250, April 3, 1984, this assistance under the Indian Self-Determination Act is not subject to the requirements of the Federal Grant and Cooperative Agreement Act, and therefore, the Department of Interior may continue to use the contract form of agreement.

**COMPENSATION****B-223069 July 3, 1986****Double****Concurrent Military Retired and Civilian Service Pay**

The Deficit Reduction Act of 1984, Public Law 98-369, repealed subsection 301(d) of Public Law 97-253, which required that for fiscal years 1983-1985 deductions be made from the civilian pay of retired members of the uniformed services who were employed as civilians by the Government, in amounts equal to the amounts of their military retired pay cost-of-living increases. Since the repealing legislation is not retroactive, collection action should be taken on the amounts still due under subsection 301(d) for the period during which the subsection was in effect. In addition, there is no authority to refund amounts that were previously and correctly deducted pursuant to subsection 301(d).

**DISBURSING OFFICERS****B-223511 July 11, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his deputy 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 deputy, and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division.

**DISBURSING OFFICERS****B-223611 July 21, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his deputy 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 deputy, and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will deny relief if Army delays more than 3 months in forwarding the debt to Army's collection division.

**TREASURY DEPARTMENT****B-220873.2 July 22, 1986****Secretary of Treasury****Authority****Payment of Obligations**

Pub. L. No. 99-155, 99 Stat. 814, directs the Secretary of the Treasury to immediately restore securities disinvested from the Civil Service Retirement and Disability Fund (Fund) after September 30, 1985, and redeemed between September 30, 1985 and November 14, 1985, which had higher interest rates than Federal Financing Bank securities held by the Fund. The restoration should be made as of the first date the restoration would not have the effect of exceeding the public debt limit.

Section 272 of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, 1095-98, authorizes restoration of interest to the Civil Service Retirement and Disability Fund lost between September 1, 1985 and December 12, 1985, the date of the Act's enactment, resulting from redemption of Treasury securities instead of Federal Financing Bank securities with a lower interest yield. Section 272, however, does not authorize restoration of losses of interest occurring after December 12, 1985.

**Department of Energy  
Authority and Responsibility  
Oil Price and Allocation Regulation  
Recovered Overcharges  
Distribution Propriety**

Proposed legislation altering the Department of Energy's restitution policy by directing that all future oil overcharge funds, which cannot be returned to individual victims of overcharges, be deposited in the Treasury rather than divided equally between the United States and the states, does not violate the constitutionally mandated separation of legislative and executive powers. The change of policy would be effected by a statute, enacted by both Houses of the Congress and presented to the President for signature. This is a proper exercise of the legislative function of the Congress.

Proposed legislation directing that all future oil overcharge funds, which cannot be returned to individual victims of the overcharges, be deposited in the Treasury, does not violate the constitutionally mandated separation of legislative and judicial functions even though the Department of Energy agreed to divide these funds equally between the United States and the states under a court-approved settlement agreement. The legislation would neither prescribe the outcome of pending litigation nor require that a case be decided in favor of the United States. Further, the legislation would not alter the rights of the parties established by the court order. The legislation would merely change the future application of the court order, which the Congress may do.

Proposed legislation directing that all future oil overcharge funds, which cannot be returned to individual victims of the overcharges, be deposited in the Treasury, rather than divided equally between the states and the United States, as provided in a court-approved settlement, does not constitute a Fifth Amendment taking of property of the states. States are not "persons" protected by the Due Process Clause of the Fifth Amendment. Further, the states have no vested rights to future oil overcharge revenue under the settlement or court order.

**PERSONNEL LAW:  
CIVILIAN PERSONNEL**

**OFFICERS AND EMPLOYEES                      B-221529    July 1, 1986**

**Transfers**

**Real Estate Expenses**

**Loan Origination Fee**

A transferred employee purchased a new residence and was charged 1.5 percent of her loan as a "commitment fee" at the time the loan was approved and an additional 1 percent of the loan at the time of settlement as an "origination fee." Agency denied reimbursement for both fees on basis of Settlement Statement characterization of both fees as "points." We look to nature of fee to determine if it can be allowed, and since the local office of the Department of Housing and Urban Development states that a 1 percent loan origination fee is customary for a conventional mortgage in the locality, the 1 percent loan origination fee may be reimbursed.

**COMPENSATION**

**B-221630    July 10, 1986**

**Overtime**

**Compensatory Time**

For nearly 2 years, certain FAA payroll employees were given the option of using compensatory time in lieu of overtime pay. One group of employees worked four 10-hour days the first week of each pay period and took Friday off. Although such overtime work normally would be considered "regularly scheduled" for which compensatory time is not available, we conclude that this was essentially an informal extension of the flexible work schedule worked in prior years. These employees are not entitled to overtime compensation for such "regularly scheduled" overtime work where they did not work more than 40 hours in that workweek. Other employees who worked frequent or sporadic overtime on an irregular or unscheduled basis were properly entitled to compensatory time for such work and are not entitled to additional compensation.

**OFFICERS AND EMPLOYEES**

**B-221751 July 11, 1986**

**Transfers**

**Temporary Quarters**

**Entitlement**

Members of an employee's immediate family joined him at his new duty station for varying periods after which they returned to and remained for a substantial period in the family's residence at the old duty station. Because they had not vacated their residence at the old duty station and because their travel was for visitation rather than to relocate to the new duty station, the employee is not entitled to reimbursement for their travel expenses or to temporary quarters subsistence expenses for their stay at the new duty station.

**OFFICERS AND EMPLOYEES**

**Transfers**

**Temporary Quarters**

**Time Limitation**

**Extension**

Agency properly exercised its discretion in denying request to extend temporary quarters subsistence expense eligibility for an additional 60-day period where the employee's need for further occupancy of temporary quarters was due to his inability to sell his former residence in a depressed housing market. Agency regulations provide that a poor housing market and inability to sell a former residence generally are not considered compelling reasons which justify granting an extension. Moreover, the Federal Travel Regulations provide that an extension may be granted only when the need for additional time in temporary quarters is due to circumstances which have occurred during the initial 60-day period of temporary quarters occupancy.

**OFFICERS AND EMPLOYEES****B-221677 July 21, 1986****Transfers****Service Agreements****Government v. Particular Agency Service**

An Agriculture employee, who signed a 1-year service agreement after a relocation at Government expense, left Agriculture after 11 months and accepted employment with the Federal Deposit Insurance Corporation (FDIC). Although the FDIC is not an agency covered by the relocation statutes, we conclude that employment with the FDIC is Government service for the purposes of a relocation service agreement.

**COMPENSATION****B-217517 July 28, 1986****Backpay****False Claims**

Employee filed false statement reporting no interim earnings during the period covered by his backpay award. Later, upon being advised that no action would be taken to pay his backpay claim because of his false statement, employee filed an accurate report of his interim earnings. We hold that the employee's backpay claim is tainted by fraud and may not be paid.

**TRAVEL EXPENSES****B-221662 July 28, 1986****Miscellaneous Expenses****Hotel, etc. Rooms****Cancellation of Reservation****Deposit Reimbursement**

Federal employees may be allowed reimbursement of their expenses when they reserve hotel accommodations for an official travel assignment and forfeit the room deposit because the assignment is subsequently canceled, but only if they exercise reasonable prudence in minimizing the costs involved. Hence, an employee of the Army Corps of Engineers may not be reimbursed for a forfeited room deposit where it appeared that he could have avoided the forfeiture if he had taken reasonable action to notify the hotel promptly after learning of the cancellation of his trip, and he failed to take that action.

**COMPENSATION**  
**Additional**  
**Hazardous Duty**  
**Effective Date**

**B-221749 July 28, 1986**

General Schedule employees were performing duties which were subsequently determined to be compensable under the hazardous duty differential provided for in 5 U.S.C. § 5545(d) (1982), and filed claims with the employing agency for retroactive payment of the differential. Agency requested an advance decision as to the propriety of making retroactive payment of the hazardous duty differential. Held, where General Schedule employees engage in a duty which is subsequently determined by the employing agency as a hazardous duty, and there is an adequate record of the days and hours during which the duty was performed, payment therefore may be granted retroactively.

**LEAVES OF ABSENCE**  
**Involuntary Leave**  
**Furlough**  
**Status**

**B-223452 July 28, 1986**

Proposed bill H.R. 4896, 99th Cong., 2d Sess., would amend title 5, United States Code, to prohibit agencies from furloughing employees solely on Federal holidays. We offer no objections to the proposed legislation which would codify existing law. We have previously held that agencies may not furlough employees solely on a holiday since the employees would already be in a non-duty status on those holidays. B-222836, May 8, 1986.



**EQUAL EMPLOYMENT OPPORTUNITY B-223711 July 28, 1986**  
**Commission**  
**Authority**  
**Uniform Standards, Guidelines, and Policies**  
**Development**  
**Employment Discrimination Under Federal Law**

Acting Chairman of the National Endowment for the Humanities refused to provide the Equal Employment Opportunity Commission (EEOC) with data concerning the underrepresentation of minority groups and hiring goals for those groups for fiscal year 1984, as required by EEOC directives implementing section 717(b) of Title VII of the Civil Rights Act of 1964, as amended. We find that the Acting Chairman was legally obligated to comply with the EEOC directives, because section 717(b) expressly provides that agency heads "shall comply" with the directives and instructions which EEOC issues pursuant to that section.

**OFFICERS AND EMPLOYEES B-217675 July 29, 1986**  
**Equal Employment Opportunity**  
**Discrimination Actions**

Two congressmen joined in requesting that GAO provide a supplementary report on pay equity practices in the public sector. In response to the legal portions of the request, we provide the congressmen with information on recent pay-inequality cases involving governmental employers and we discuss various statutes relating to federal classification and pay practices.

**DEBT COLLECTIONS****B-221670 July 29, 1986****Civilian Employees****Compensation Overpayments****Appointment to Erroneous Grade, etc.**

A wage grade employee employed in Alaska by the Federal Aviation Administration who converted from a wage grade position to a General Schedule position had his pay set erroneously based upon the highest wage grade rate earned in a wage grade position held outside Alaska rather than the appropriate Alaska wage grade rate. The error continued through subsequent pay increases including employment with the Bureau of Land Management. Waiver was allowed for the period the employee accepted the overpayments in good faith, but the denial of waiver is sustained for pay periods the employee received overpayments after being notified an error had been made.

**LEAVES OF ABSENCE****B-223225 July 29, 1986****Lump-Sum Payments****Rate at Which Payable****Competitive and Excepted Positions**

Employee, with accumulated annual leave, resigned competitive position without a break in service to accept presidential appointment to a position exempted from coverage under the Annual and Sick Leave Act of 1951, as amended. He later resigned presidential appointment and, without break in service, was reappointed to competitive position covered by Leave Act. When he was appointed to the exempted position he was not paid for his annual leave balance. The balance was recredited when he was reappointed to the competitive position. Upon retirement from that position he became entitled to lump-sum payment for annual leave at then current rate of compensation. See 5 U.S.C. § 5551 and § 6302(e).

**PERSONNEL LAW  
MILITARY PERSONNEL**

**TRAVEL EXPENSES**

**B-221201 July 10, 1986**

**Military Personnel  
Temporary Duty  
Reimbursement**

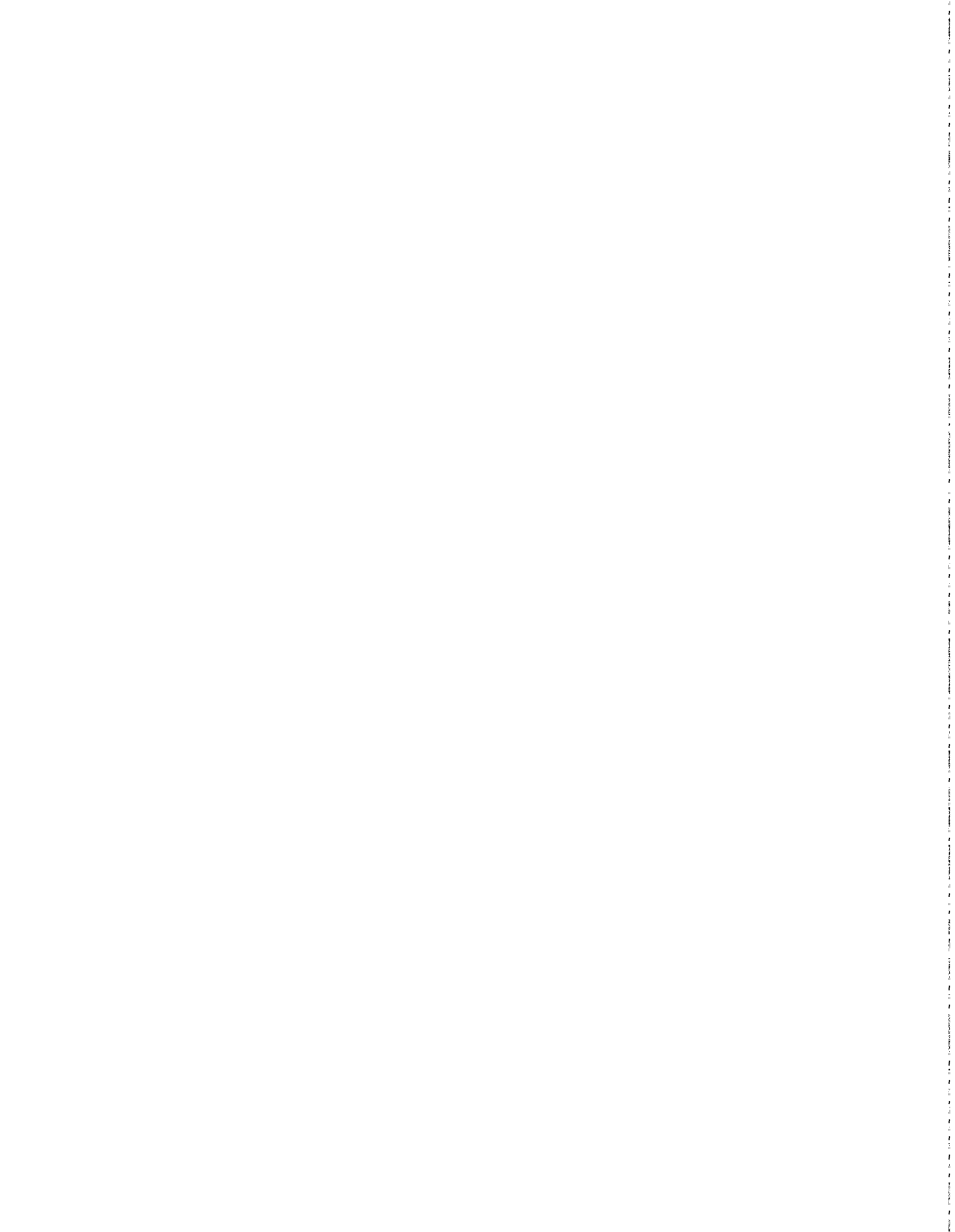
A military member's waiver of his entitlement to transportation allowances incident to his attendance at a training course is ineffective where the travel was directed by the service and not permissive. While the Joint Travel Regulations make provision for elimination of or reduction in per diem under certain conditions, no provision is made for waiving the transportation allowances in such a case. The member was directed to travel on temporary duty and he is entitled to be reimbursed for his airfare to attend the training.

**TRANSPORTATION**

**B-221656 July 14, 1986**

**Automobiles  
Military Personnel  
Authority**

The Department of Defense Per Diem, Travel and Transportation Allowance Committee asks whether the Joint Travel Regulations may be amended to allow shipment of privately owned vehicles at Government expense for certain service members who receive orders for a change of permanent station within the continental United States. Since nothing in the applicable statute prohibits transportation of the privately owned vehicles under the circumstances presented, the Comptroller General has no objection to the proposed changes.



**PROCUREMENT LAW**

**GENERAL ACCOUNTING OFFICE      B-222045.2    July 1, 1986**  
**Recommendations                86-2    CPD   1**  
**Contracts**  
**Prior Recommendation**  
**Affirmed**

Where solicitation understates agency's needs, but low offeror's proposal will meet those needs, award to that offeror rather than a resolicitation is appropriate where record further indicates that agency is not likely to obtain greater competition if it resolicits, so that award on original solicitation will satisfy the "full and open competition" standard of the Competition in Contracting Act.

**BIDS    B-222437    July 1, 1986**  
**Responsiveness                                86-2    CPD   2**  
**Test to Determine**  
**Unqualified Offer to Meet all Solicitation Terms**

Allegation that competitor's bid was nonresponsive because the bid samples submitted by the competitor were proprietary to protester is denied, where bid unequivocally offered to provide product conforming to specification requirements and the contracting officer had no knowledge that the bid samples allegedly belonged to the competitor.

**CONTRACTORS**  
**Responsibility**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Allegation that awardee lacked ability to perform the contract concerns the bidder's responsibility, the affirmative determination of which is not considered by General Accounting Office except under limited circumstances not present here.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

**B-222437 Con't**  
**July 1, 1986**

Allegation that bid is nonresponsive because it did not contain bid sample of certain item is without merit where solicitation did not specifically require sample of item.

**CONTRACTS**  
**Protests**  
**Authority to Consider**  
**Contract Administration Matters**

Protest that the product to be supplied will not comply with the specifications is a matter of contract administration for consideration by the agency, not General Accounting Office.

**GENERAL ACCOUNTING OFFICE**  
**Jurisdiction**  
**Contracts**  
**Disputes**  
**Between Private Parties**

Protest that a competitor allegedly used the protester's proprietary bid samples, descriptive literature and testing data in its bid without the protester's consent constitutes a dispute between private parties that is not for consideration under General Accounting Office Bid Protest Regulations.

**BIDS**  
**Invitation for Bids**  
**Ambiguous**  
**Objective Test**

**B-222640 July 1, 1986**  
**86-2 CPD 3**

An IFB evaluation factor which provides that bids shall be considered nonresponsive and will be rejected if received "without a dollar amount or N/C (No Charge) entered" for the individual items is not ambiguous. The only reasonable interpretation of this evaluation factor is that if a firm submits a bid for each item in the IFB either with a dollar amount or with the "N/C" (No Charge) notation, then the bid shall be considered responsive; only if the space provided in the IFB for the price of a particular item is left blank, or something other than a specific dollar amount or the "N/C" (No Charge) notation as authorized by the IFB is inserted, will the bid then be considered nonresponsive.

**BIDS**  
**Responsiveness**  
**"No Charge," etc. Notations**

Low bidder who submits a bid with specific dollar amounts for two items and a "No Charge" bid for a third item is responsive because, according to the IFB, the bidder clearly had the option of either submitting a bid with a dollar amount or with the "N/C" (No Charge) notation for each item. A "No Charge" bid for an item clearly corresponds with a zero dollar bid and represents the bidder's affirmative commitment or obligation to provide the item at no cost to the government.

**CONTRACTS****B-222642.2 July 1, 1986****Protests****General Accounting Office Procedures****Filing Protest With Agency**

Protest properly was dismissed where a copy was not filed with the contracting agency within 1 day after filing with the General Accounting Office.

**EQUIPMENT****B-222798.2 July 1, 1986****Automatic Data****86-2 CPD 4****Processing Systems****General Services Administration****Responsibilities Under Brooks Act**

Protest against General Services Administration's (GSA's) policy of not soliciting automatic data processing (ADP) components under its ADP Multiple Award Schedule Contract program unless the components are used with hardware or software offered under the same contract by the same vendor is denied. GSA has broad authority over government procurement of ADP, and protester has not shown that GSA's policy, based on the low dollar value of the components and potential warranty and service problems, is contrary to law or otherwise detrimental to the government's interest.

**BIDS****B-223048.2 July 1, 1986****Responsiveness****86-2 CPD 5****Exceptions Taken to Invitation Terms****Delivery Provisions**

Protester's bid was properly rejected as nonresponsive because it offered to deliver the equipment within 90 days after receipt of contract where IFB required a 90-day delivery as of the contract award date. The Federal Acquisition Regulation interprets such a bid as adding 5 days to the specified number of days as an allowance for delivery through the ordinary mails.



**CONTRACTS**  
**Negotiation**  
**Requests for Proposals**  
**Evaluation Criteria**  
**Cost**

**B-221888 July 2, 1986**  
**86-2 CPD 23**

Protest against agency's selection of lowest target price as the sole evaluation criterion is sustained, and costs for filing and pursuing the protest, including attorney's fees, are granted. In view of the unique nature of Pub. L. 99-190's public-private competition, the Navy should have conducted some type of analysis of the price elements to ascertain their reasonableness.

**CONTRACTS**  
**Negotiation**  
**Requests for Proposals**  
**Statement of Work**

Protest that ambiguities and omissions in the statement of work preclude a common basis of bidding is denied where the record shows that offerors have been given access to all information reasonably available to the agency. To the extent that there are uncertainties as to exactly what will be required, offerors can take these uncertainties into account in computing their offers; the mere presence of risk in a procurement does not make the competition improper.

**CONTRACTS**  
**Protests**  
**Authority to Consider**

Protest alleging improprieties in a solicitation issued under the Pub. L. 99-190 test program for overhaul of Navy vessels falls within the definition of protest in the Competition in Contracting Act (CICA) since CICA does not require that an award be proposed at the time a protest is filed and a proposed award within the statutory definition was contemplated when the solicitation was issued.

**CONTRACTS**

**B-221888 Con't**

**Protests**

**July 2, 1986**

**General Accounting Office Procedures**

**In Camera Inspection of Records, etc.**

Under the Competition in Contracting Act of 1984, agencies are primarily responsible for determining whether to release certain documents. Nevertheless, decisions on bid protests are based on the entire record and not merely on those portions that have been released to the protester.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**New Issues**

**Unrelated to Original Protest Basis**

Where protester raises new grounds of protest in its comments to the agency report and the grounds were known more than 10 working days prior to the submission of the comments, the new grounds of protest are untimely and will not be considered.

**CONTRACTS**

**Protests**

**Interested Party Requirement**

**Potential Contractors, etc. not Submitting Bids,  
etc.**

A protester which did not submit a proposal but is a potential competitor if the protest is successful is an interested party to pursue a protest alleging, among other things, that solicitation contains ambiguously defined work scope.

**CONTRACTORS**

B-222201 July 2, 1986

**Responsibility**

86-2 CPD 24

**Determination****Review by GAO****Affirmative Finding Accepted**

Allegation that the awardee will not be able to provide accommodations for transient personnel in accordance with solicitation requirements involves the contracting agency's determination of the awardee's responsibility which will not be reviewed absent a showing of possible fraud or bad faith by procurement officials or the failure to apply definitive responsibility criteria.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Technical Acceptability**

Under a solicitation for double bedroom accommodations with a minimum "sleeping area" of 90 square feet per person, the contracting agency reasonably determines that the awardee's offered condominiums, with a total floor space (including bedrooms) well exceeding 90 square feet per person, is acceptable where it is clear that the square footage requirement is based on single-room accommodations, and multiple-room accommodations are permitted.

Even if protester offering motel-type accommodations interpreted solicitation's requirement for a sleeping area of 90 square feet per person to require bedrooms with 90 square feet, acceptance of a competitor's offer of more spacious multiple-room condominiums having bedrooms with less than 90 square feet per person does not prejudice protester where the condominiums exceed the agency's basic requirements and the protester does not allege that it could have offered comparable accommodations at a lower price.

**CONTRACTS**  
**Negotiation**  
**Preaward Surveys**  
**Propriety**

**B-222201 Con't**  
**July 2, 1986**

Preaward survey is not a legal prerequisite to an affirmative determination of responsibility.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Self-Certification**  
**Acceptance**

Small Business Administration determination that the awardee of a contract, set aside for small businesses, was a large business does not affect the validity of the contract award where the contracting agency properly determines not to issue preaward notices to apprise offerors of the intended awardee due to urgency of procurement and awards the contract before the protester can file a size protest.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

**B-222530.3 July 2, 1986**  
**86-2 CPD 25**

Protesters must comply with requirement to furnish a copy of a protest filed with the General Accounting Office (GAO) to the contracting officer even where protester has previously advised contracting officer of the problem and of its intent to pursue "administrative hearings" since agency must be advised of what exactly is being protested at GAO.

**CONTRACTS** **B-222530.3 Con't**  
**Protests** **July 2, 1986**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Oral notification of basis of protest is sufficient to start 10-day period for filing a protest running and the protester may not delay filing a protest until the receipt of written justification of protest basis.

**BIDS** **B-222810 July 2, 1986**  
**Telegraphic Submission** **86-2 CPD 26**  
**Unauthorized**

A telegraphic bid submitted in response to a solicitation which did not authorize telegraphic bids is properly rejected.

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

Protest that solicitation specifications are restrictive and obsolete is untimely and not for consideration when it is filed after bid opening.

**CONTRACTS**  
**Protests**  
**Oral**  
**To Procuring Agency**

An oral complaint to the contracting officer prior to bid opening does not constitute a timely agency protest because oral protests are no longer permitted under the Federal Acquisition Regulation.

**BIDS****B-221889 July 3, 1986****Late****86-2 CPD 28****Modification****Agency Mishandling**

Agency should have considered protester's late bid modification because government mishandling in the process of receipt was paramount cause of the late receipt since the agency erroneously informed protester it had a telex to which Western Union could transmit the modification when, in fact, the agency had a telecopier connected to the telephone network.

**CONTRACTS****B-222037.2 July 3, 1986****Negotiation****86-2 CPD 29****Competition****Equality of Competition****Lacking****Evaluation of Proposals Improper**

Contracting agency acted improperly by granting extensions of dates for operational demonstrations to three offerors while denying the protester's request for extension, where all four offerors asserted the same reason for requesting extensions (proximity in time of major trade fair to which personnel and equipment were already committed). The protester was prejudiced by the agency's unequal treatment of the offerors since the protester had significantly less time to prepare for its demonstration than the offerors who were granted extensions.

**CONTRACTS****Protests****Authority to Consider****Nonappropriated Fund Activity Procurements**

General Accounting Office has jurisdiction under the Competition in Contracting Act (CICA) over a bid protest concerning a procurement of automatic data processing (ADP) equipment and software conducted by the Army, a federal agency as defined in CICA, even where the end user of the ADP resources is a nonappropriated fund activity and no appropriated funds are involved.

**CONTRACTS** **B-222037.2 Con't**  
**Protests** **July 3, 1986**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Challenge to contracting agency's decision to allow extensions of dates for operational demonstrations to only some offerors which requested extensions is timely where issue was raised in a protest to the agency filed within 10 days after the contracting officer confirmed the protester's speculation that some extensions had been granted.

**EQUIPMENT**  
**Automatic Data Processing Systems**  
**Acquisition, etc.**  
**Brooks Act Applicability**

Contracting agency is not required to obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA) under the Brooks Act where the value of the procurement (measured by the proposed awardee's best and final offer) is within the dollar ceilings for blanket DPAs from GSA.

**CONTRACTS** **B-222416 July 3, 1986**  
**Negotiation** **86-2 CPD 30**  
**Awards**  
**Initial Proposal Basis**  
**Propriety**

Protest against award of contract on the basis of initial proposals is denied where the solicitation advised offerors of that possibility and where a price analysis based on the other offers received and the actual cost of the same services under the previous contract demonstrate that acceptance of an initial proposal will result in the lowest overall cost to the government at a fair and reasonable price.

**CONTRACTS** **B-222454 July 3, 1986**  
**Negotiation** **86-2 CPD 31**  
**Requests for Proposals**  
**Specifications**  
**Minimum Needs**  
**Not Overstated**

A restriction limiting offerors to proposals to furnish office space divided on not more than two contiguous floors is not shown to be unduly restrictive when the protester does not submit evidence overcoming the contracting agency's prima facie showing that the restriction is needed to promote office efficiency and security.

**CONTRACTS** **B-222614 July 3, 1986**  
**Protests** **86-2 CPD 32**  
**Preparation**  
**Costs**  
**Noncompensable**

Bidder may not recover costs of preparing its offer and of pursuing protest where solicitation was properly canceled due to lack of funds. Lost profits may not be recovered in any event.

**CONTRACTS** **B-223482 July 3, 1986**  
**Negotiation** **86-2 CPD 33**  
**Requests for Proposals**  
**Specifications**  
**Minimum Needs**  
**Not Overstated**

Specifications are not unduly restrictive where the contracting agency presents a reasonable explanation of why the specifications are necessary to meet its minimum needs and the protester fails to show that the restrictions are unreasonable.





**CONTRACTS**  
**Negotiation**  
**Sole-Source Basis**  
**Propriety**

**B-222465 July 7, 1986**  
**86-2 CPD 36**

Although an agency is required to solicit as many sources as practicable when it uses other than competitive procedures based on the existence of an unusual and compelling urgency, an agency is justified in negotiating a contract with the only source it knows is capable of commencing performance immediately when the agency reasonably determines that the urgent nature of its requirement precludes the consideration of other sources.

**CONTRACTS**  
**Negotiation**  
**Awards**  
**Initial Proposal Basis**  
**Propriety**

**B-222478 July 7, 1986**  
**86-2 CPD 37**

Award on an initial proposal basis is proper where the solicitation advises offerors of this possibility and the record clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government, based on full and open competition and prior cost experience.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

Protester fails to meet burden of proof and the General Accounting Office denies protest, where protester merely raises general allegations regarding propriety of proposal evaluation and has not furnished any evidence refuting record which shows that proposals were evaluated in a manner consistent with solicitation "Evaluation Factors for Award" provision.

**CONTRACTS**

**B-222478 Con't**

**Protests**

**July 7, 1986**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Solicitation Improprieties**

**Apparent Prior to Bid Opening/Closing Date  
for Proposals**

General Accounting Office dismisses a protest concerning an alleged solicitation ambiguity because it was filed after the date for receipt of initial proposals. Protests based on alleged improprieties apparent on the face of a solicitation must be filed before the receipt of initial proposals.

**CONTRACTS**

**Small Business Concerns**

**Procurement not Restricted to Small Businesses**

Where a procurement has not been set aside for small business, the agency has no legal basis for giving preferential treatment to small business firms in the selection process.

**CONTRACTS**

**B-222834 July 7, 1986**

**Negotiation**

**86-2 CPD 38**

**Sole-Source Basis**

**Propriety**

Agency decision to award a sole-source contract to the only known qualified source is proper where agency has neither the data needed to conduct a competitive procurement nor sufficient time to qualify a new source.

**CONTRACTS** **B-223213.2 July 7, 1986**  
**Protests** **86-2 CPD 39**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest against a determination by the Small Business Administration (SBA) that a small business is ineligible for a certificate of competency (COC), even if otherwise for consideration, is untimely where the protest was first filed with the General Accounting Office more than 10 days after the firm was advised by the SBA of the denial of a COC.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Small Business Administration's Authority**  
**Certificate of Competency**  
**Conclusiveness**

Protest by small business bidder is properly for dismissal where the protester has not made a prima facie showing that the Small Business Administration has acted in bad faith in determining that it is ineligible for a certificate of competency.

**CONTRACTS** **B-223288 July 7, 1986**  
**Negotiation** **86-2 CPD 40**  
**Offers or Proposals**  
**Rejection**  
**Propriety**

Rejection of protester's unsigned offer and award to another offeror is proper since attempted acceptance of the protester's offer would not result in a binding contract without resort to confirming the protester's intention to be bound after the closing date for receipt of proposals, which would be unfair to other offerors.

**BIDS** **B-224344 July 7, 1986**  
**Responsiveness** **86-2 CPD 41**  
**Failure to Furnish Something Required**  
**Small Business Representation**

Failure of offeror for a construction contract to certify itself as a small business and to include other standard certifications in its bid is a minor informality which the contracting officer may either waive or allow the offeror an opportunity to correct.

**CONTRACTS** **B-224383 July 7, 1986**  
**Protests** **86-2 CPD 42**  
**General Accounting Office Procedures**  
**Constructive Notice**

Protester's assertion that it was unaware of timeliness rules does not provide a basis for considering an untimely protest since the protester is charged with constructive notice of Bid Protest Regulations through their publication in the Federal Register.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest alleging that agency improperly rejected late offer is dismissed as untimely when filed approximately 2 months after the protester received notice of initial adverse action on a protest filed first with the contracting agency.



**BIDDERS** **B-222308.2, et al.**  
**Debarment** **July 8, 1986**  
**Affiliates of Debarred** **86-2 CPD 44**  
**Firm**  
**Eligibility**

The General Accounting Office affirms a decision holding that the proposed debarment of one firm extends to an affiliated firm when the affiliated firm, in a request for reconsideration, presents no evidence to support an allegation that it was denied due process. Although the affiliated firm was not specifically named in the debarment notice, as required by applicable regulations, the uncontradicted record shows that the ownership and officership of the two firms is such that notice to one constitutes actual notice to the other.

**CONTRACTS** **B-222924 July 8, 1986**  
**Protests** **86-2 CPD 45**  
**Moot, Academic, etc. Questions**  
**Future Procurements**

Where agency is seeking additional funding for unawarded line items, General Accounting Office (GAO) will not retain jurisdiction of a protest that is based upon speculation as to future agency conduct concerning contract award, since protest is premature. If funding becomes available to the agency and the protester believes it has been improperly excluded from award, it may file a new protest under GAO Bid Protest Regulations.

**CONTRACTS** **B-218447.5 July 9, 1986**  
**Protests** **86-2 CPD 46**  
**Authority to Consider**  
**Contract Administration Matters**

Questions regarding contractor performance, payment and termination are matters of contract administration for consideration by the contracting agency, not the General Accounting Office.

**GENERAL ACCOUNTING OFFICE      B-218447.5 Con't**  
**Recommendations                July 9, 1986**  
**Contracts**  
**Prior Recommendation**  
**Affirmed**

Request by performing contractor for an increase in its contract price does not warrant reversing prior decision recommending award to that firm since the request does not change the fact that the contractor was entitled to award as the low responsive bidder.

**CONTRACTS                                B-221352.2 July 9, 1986**  
**In-House Performance v.        86-2 CPD 47**  
**Contracting Out**  
**Guidelines**

Office of Management and Budget Circular A-76 cost comparison guidelines concerning the number of contract administrators whose cost is to be included in the cost of contract performance must be interpreted in light of the general requirement that cost comparison studies consider all significant costs both for government and contract performance.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Piecemeal Development of Issues by Protester**

Argument first presented by protester in request for reconsideration will not be considered where the protester knew the basis for the argument no later than the date of its comments on the agency report responding to the initial protest, more than 3 months prior to the request for reconsideration. GAO's Bid Protest Regulations, 4 C.F.R. part 21 (1986), do not permit the piecemeal presentation of information or arguments and parties that fail to submit all relevant information for our initial presentation do so at their own peril.



**CONTRACTS** **B-221352.2 Con't**  
**Protests** **July 9, 1986**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Prior decision upholding contracting agency determination to exclude six staff positions from Office of Management and Budget Circular A-76 cost comparison is affirmed where the protester has not demonstrated that the agency acted improperly or in bad faith in finding that the six employees will perform governmental functions and will be retained to perform the functions whether the commercial activity under study is performed by government employees or contracted out.

**CONTRACTS** **B-222425 July 9, 1986**  
**Protests** **86-2 CPD 49**  
**Interested Party Requirement**  
**Protester not in Line for Award**

Protester is not an "interested party" to object to the cancellation of a solicitation where the protester would not have received award if the solicitation had not been canceled since its bid was nonresponsive to a material requirement.

**CONTRACTS** **B-223235.2 July 9, 1986**  
**Protests** **86-2 CPD 50**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Established**

Request for reconsideration of prior decision is denied where factual errors in that decision do not affect conclusion that protest objecting to agency's failure to use sealed bid procedures is untimely where not filed until months after proposals were due.

**CONTRACTS** **B-223434 July 9, 1986**  
**Small Business Concerns 86-2 CPD 51**  
**Awards**  
**Prior to Resolution of Size Protest**

Protest that agency improperly awarded contract while appeal of size determination was pending is dismissed because there is no requirement that agencies withhold award under such circumstances.

**CONTRACTS** **B-223440 July 9, 1986**  
**Awards 86-2 CPD 52**  
**Multiple**  
**Propriety**

Since invitation for bids (IFB) for electrical work did not clearly state that multiple awards were prohibited and multiple awards would be financially advantageous to the contracting agency, these awards are legally proper, even if the agency, for whatever reason, initially proposed to make single award.

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

Argument that multiple contracts will be impractical and costly compared with award of a single contract to protester essentially alleges that IFB for work was defective in permitting multiple awards. This alleged defect was not timely protested before bid opening under GAO's Bid Protest Regulations. Alternatively, if protester is really arguing that substantial monetary adjustments should be added to proposed awardees' bids for multiple contracts, addition would be improper because IFB did not provide for it.

**CONTRACTS**  
**Protests**  
**Summary Dismissal**

**B-223440 Con't**  
**July 9, 1986**

Protest is dismissed without General Accounting Office (GAO) obtaining protest report from contracting agency and without granting bid protest conference requested by protester where it is clear on face of protest that protest has no merit. Consequently, conference would serve no useful purpose.

**CONTRACTS**  
**Protests**  
**Moot, Academic, etc. Questions**  
**Solicitation Canceled**

**B-223497 July 9, 1986**  
**86-2 CPD 53**

Protest that solicitation is unduly restrictive is dismissed as academic where the agency has canceled the solicitation.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Bias**  
**Unsubstantiated**

**B-222517 July 10, 1986**  
**86-2 CPD 54**

Protest alleging bad faith by an agency in negotiating a contract under section 8(a) of the Small Business Act is denied where protester has not presented proof that agency officials had specific and malicious intent to injure protester.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest alleging that agency publicly disclosed proprietary information and conducted an auction is dismissed where protest was not filed within 10 days of the time the basis of the protest became known.

**CONTRACTS****B-222603 July 10, 1986****Performance****86-2 CPD 55****Suspension****Pending Final Resolution of Protest**

The right to a suspension of performance under the provisions of the Competition in Contracting Act of 1984 (CICA) apply to any new award decision that is based upon revised offers that gives rise to a viable, timely protest. Therefore, where an agency agrees to hold discussions, continue the suspension of performance, and to reconsider its initial award decision, termination of the existing contract is unnecessary.

**BIDS****B-218323.3; B-218785.2****Preparation****July 11, 1986****Costs****86-2 CPD 56****Noncompensable**

When protests are without merit, no basis exists for recovering bid preparation costs and the costs of pursuing the protests. Further, the recovery of lost profits is not permitted under any circumstances.

**BUY AMERICAN ACT****Buy American Certificate****Left Blank**

Contracting officer's reliance on blank Buy American certificate which obligates bidder to supply domestic source end product is not objectionable where, prior to award, contracting officer had no reason to suspect that the products being offered were in fact of foreign origin.

**CONTRACTS** **B-221862.2 July 11, 1986**  
**Negotiation** **86-2 CPD 57**  
**Requests for Proposals**  
**Cancellation**  
**Reasonable Basis**  
**Changed Conditions, Needs, etc.**

Reasonable basis exists to cancel an RFP for chairs for historic site where, subsequent to the issuance of the RFP, a private organization offers to donate the chairs to the government.

**CONTRACTS**  
**Protests**  
**Conferences**  
**Request Denied**

Request for a conference in connection with a request for reconsideration is denied since the matter can be promptly resolved without a conference.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Prior decision is affirmed on reconsideration where protesters have not shown that it contains any error of fact or law.

**CONTRACTS** **B-221879.2 July 11, 1986**  
**Protests** **86-2 CPD 58**  
**Moot, Academic, etc. Questions**

Request for reconsideration is dismissed as academic where the basis for the reconsideration request is the existence of an allegedly improper subsequent procurement which is inconsistent with our prior decision and where the subsequent procurement action is canceled by the agency.

**CONTRACTS**

B-222181 July 11, 1986

**Negotiation**

86-2 CPD 59

**Offers or Proposals****Preparation****Costs****Recovery**

Protest that agency improperly relaxed solicitation specifications in order to accept low proposal is sustained where technical data included in the awardee's offer reveals noncompliance with minimum requirements listed in the solicitation. Claim for proposal preparation costs and reasonable costs of filing and pursuing the protest is granted where the protester was unreasonably excluded from receiving the contract award, and the contract has been fully performed.

**CONTRACTS**

B-222439 July 11, 1986

**Negotiation**

86-2 CPD 60

**Justification**

Agency decision to negotiate, requesting competitive proposals in lieu of sealed bids, is justified where the agency foresees a need for discussions and the basis for award reasonably includes technical considerations in addition to price and price-related factors.

**CONTRACTS****Negotiation****Requests for Proposals****Evaluation Criteria**

Protest that solicitation is defective because it does not contain evaluation criteria stating the relative importance of agency's requirements is denied where the solicitation advises offerors of the basis upon which award will be made, states the agency's minimum requirements and the importance of those requirements.

**CONTRACTS**

**B-222439 Con't**

**Negotiation**

**July 11, 1986**

**Requests for Proposals**

**Specifications**

**Minimum Needs**

**Not Overstated**

Agency's requirement for stainless steel photographic processor tanks does not unduly restrict competition where agency establishes prima facie case that the restriction is legitimately related to its minimum needs and protester, while disagreeing with the agency's technical judgment, fails to clearly show that the agency's determination of its minimum needs has no reasonable basis.

**BIDDERS**

**B-222485 July 11, 1986**

**Qualifications**

**86-2 CPD 61**

**License Requirement**

**State, etc. Licensing Requirements**

Agency did not abuse its discretion by awarding contract to a firm that did not comply with state licensing requirements for insurance companies since offeror's failure to comply with state and local licensing requirements is a matter between the offeror and state and local officials which does not affect the legality of the award.

**CONTRACTS**

**Negotiation**

**Awards**

**To Other Than low Offeror**

Award to higher-priced, technically-superior offeror is not objectionable where solicitation states that technical considerations are significantly more important than price.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Propriety**

**B-222485 Con't**  
**July 11, 1986**

General Accounting Office (GAO) will not reevaluate proposals or substitute its judgment for that of agency evaluators who have considerable discretion. Rather, GAO will examine record to determine whether agency judgment was reasonable and in accord with evaluation criteria.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

Allegation that contract award for the delivery of mental health services violates Congressional mandate to reduce costs because awardee's proposed price exceeds agency's current costs for these services is without merit where authorizing legislation for this program contains no requirement that contract price be limited in such a manner.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Court Interest Exception**

General Accounting Office (GAO) will consider untimely protest issues on the merits where issues are before a court of competent jurisdiction and court has expressed interest in a GAO decision.



**CONTRACTS** B-222649.2; B-222649.3  
**Protests** July 11, 1986  
**Interested Party** 86-2 CPD 62  
**Requirement**  
**Trade Associations, etc.**

A union local is not an interested party eligible to maintain a protest before GAO since it is not an actual or prospective bidder or offeror under the solicitation involved.

**FREEDOM OF INFORMATION ACT**  
**General Accounting Office Authority**

GAO has no authority to decide what information an agency must disclose under the Freedom of Information Act.

**CONTRACTS** B-222958 July 11, 1986  
**Protests** 86-2 CPD 63  
**Authority to Consider**

Where a restriction imposed by a local authority, rather than by the contracting agency, creates a sole-source procurement because of the protester's inability to obtain a necessary operating franchise from the authority, the matter is not for consideration under the General Accounting Office's bid protest function.

**TIMBER SALES**  
**Auction**  
**Procedure**  
**Propriety**

**B-222385 July 14, 1986**  
**86-2 CPD 64**

Timber sale officer properly reopened an oral auction after he had made an ambiguous announcement about the time remaining for submitting bids that resulted in half the bidders losing an opportunity to submit higher bids.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

**B-222479 July 14, 1986**  
**86-2 CPD 65**

Protest that agency acted deliberately to exclude protester from the competition and failed to obtain reasonable prices is denied, since protester fails to prove allegations.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

**B-220680.4 July 15, 1986**  
**86-2 CPD 66**

Request for reconsideration of prior decision is denied where the request contains no statement of the facts and legal grounds warranting reversal or modification but merely restates arguments made by the protester and considered previously by the General Accounting Office.

**CONTRACTS** **B-222472 July 15, 1986**  
**Negotiation** **86-2 CPD 67**  
**Offers or Proposals**  
**Evaluation**  
**Competitive Range Exclusion**  
**Reasonableness**

GAO cannot question exclusion of protester's proposal from competitive range where proposal reasonably was found deficient in some areas to the extent that a completely new proposal would have been necessary in order for the proposal to have been considered to be competitive.

**CONTRACTS** **B-222595.3 July 15, 1986**  
**Protests** **86-2 CPD 68**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

A request for reconsideration of a decision dismissing a protest is denied where the protester does not show that the prior decision was factually or legally incorrect in holding that the protester's bid was properly rejected as nonresponsive because the delivery period stated in the bid, although alleged to be in error, exceeded that required by the invitation for bids.

**CONTRACTS** **B-223030 July 15, 1986**  
**Negotiation** **86-2 CPD 69**  
**Offers or Proposals**  
**Best and Final**

It is not necessarily unreasonable for an agency to solicit a best and final offer from a firm that submits the best technical proposal but whose offered price is too high, where the agency clearly advises the firm of the pricing deficiency.



**CONTRACTS** **B-223557 July 15, 1986**  
**Small Business Concerns 86-2 CPD 71**  
**Awards**  
**Prior to Resolution of Size Protest**

Except in instances where an award is made to protect the public interest, the contracting officer shall not award the contract until the Small Business Administration has made a size determination or 10 business days have expired, whichever occurs first.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Small Business Administration's Authority**  
**Size Determination**

Small Business Administration is empowered to conclusively determine matters of size status for federal procurements and the General Accounting Office will neither make nor review such determinations.

**CONTRACTS** **B-222443 July 16, 1986**  
**Negotiation 86-2 CPD 72**  
**Offers or Proposals**  
**Evaluation**  
**Technical Acceptability**  
**Offeror's Responsibility to Demonstrate**

Since the agency's technical evaluation in a negotiated procurement is based upon information submitted with the proposal, the burden is on the offeror to submit an adequately-written proposal from the outset.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Rejection**  
**Failure to Meet Solicitation Requirements**

Agency properly rejected proposal because of failure to propose adequate staffing since curing the deficiency would have required a major rewrite of the proposal.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Not Prejudicial**

B-222515 July 16, 1986  
86-2 CPD 73

Protest that agency did not debrief protester and that notice of award was late is dismissed since these are procedural matters which do not affect the validity of the award.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest concerning various procurement irregularities that allegedly occurred during the course of a procurement that was filed more than 10 working days after the protester knew or should have known of the bases for protest is untimely and will not be considered by the General Accounting Office.

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

Where protest alleging an impropriety contained in a pre-closing date solicitation amendment was not filed prior to the closing date for receipt of initial proposals, protest is untimely and will not be considered by the General Accounting Office.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Speculative**

**B-222613 July 16, 1986**  
**86-2 CPD 74**

Where a protester fails to offer any evidence that the agency disclosed the firm's proposed price to another offeror, its contention in this regard is mere conjecture and thus provides no basis to sustain the protest.

**CONTRACTS**  
**Protests**

**B-223055 July 16, 1986**  
**86-2 CPD 75**

**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest concerning alleged solicitation improprieties apparent before the submission of initial proposals is untimely when filed more than 3 months after the closing date for submission of initial proposals; neither inquiry before this date nor list of exceptions in letter submitted with initial proposal constitutes a timely agency-level protest.

**CONTRACTS**  
**Protests**

**B-223432 July 16, 1986**  
**86-2 CPD 76**

**Interested Party Requirement**  
**Potential Contractors, etc. not Submitting Bids,**  
**etc.**

To be considered an interested party to protest government solicitations, 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 the failure to award a contract. Potential subcontractor which is not an actual or prospective bidder itself is not an interested party.

**BUY AMERICAN ACT**  
**Applicability**  
**Waiver**

**B-B-223478; B-223480**  
**July 16, 1986**  
**86-2 CPD 77**

**Public Interest**  
**Administrative Discretion**  
**Defense Procurement**

The Buy American Act (Act) evaluation factors are not applicable to items being purchased that are included in the Defense Cooperation Agreement between Israel and the United States as items for which application of the Act has been waived.

**CONTRACTS**

**Negotiation**  
**Competition**  
**Evaluation of Competition**  
**Lacking**

There is no legal requirement that an agency equalize whatever competitive advantage foreign firms might have because they are not subject to socio-economic requirements applicable to domestic contractors.

**CONTRACTS**

**Negotiation**  
**Prices**  
**"Buy-Ins"**

The possibility of a buy-in is not a proper basis on which to challenge a contract award and there is no requirement that an agency offset foreign government subsidies in evaluating proposals other than through application of the Buy American Act, which is inapplicable here.



**BIDS** **B-222422 July 17, 1986**  
**Mistakes** **86-2 CPD 79**  
**Correction**  
**Intended Bid Price**  
**Establishment Required**

Discrepancies between unit and extended prices and between total cost and costs of line items that comprised that total may not be corrected where the intended bid cannot be ascertained from the bid and the bidder provides no other evidence to establish the allegedly intended bid.

**CONTRACTS** **B-223459.2 July 17, 1986**  
**Protests** **86-2 CPD 80**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Dismissal of protest as untimely is affirmed on reconsideration where the issue involved should have been known to the protester more than 1 month before filing of its protest, and evidence on which the reconsideration request is based shows only that the protester continued to pursue the matter with the agency after the agency had rejected the protester's argument.

**CONTRACTS** **B-222230.2; B-222231.2**  
**Protests** **July 18, 1986**  
**General Accounting** **86-2 CPD 81**  
**Office Procedures**  
**Reconsideration Requests**  
**Additional Evidence Submitted**  
**Available but not Previously Provided to GAO**

Request for reconsideration that alleges facts and makes arguments that could have been presented at the time of the protest does not provide a basis for reconsideration.

**BONDS** **B-222560 July 18, 1986**  
**Requirement 86-2 CPD 82**  
**Bid, Performance, etc.**  
**Administrative Determination**

Contracting agency's decision to impose bonding requirements in a procurement for base operating support services at a remote Naval installation was reasonable where contractor will be responsible for a significant amount of government property and contractor's failure to perform would seriously disrupt installation operations and cause financial loss to the government due to remote location of the installation and comprehensive nature of the services to be performed.

**CONTRACTS** **B-222618 July 18, 1986**  
**Negotiation 86-2 CPD 83**  
**Late Proposals and Quotations**  
**Lost**  
**Acceptance of Duplicate Copy**  
**Propriety**

Where the agency states it never received the protester's offer, the protester presents no acceptable evidence that the proposal was sent to or received by the agency, and no exception to the required rejection of late offers applies, the protester may not have an opportunity to submit another proposal.

**CONTRACTS** **B-222427 July 21, 1986**  
**Negotiation 86-2 CPD 85**  
**Awards**  
**To Other Than low Offeror**

Award of a contract to a higher priced offeror is proper where the awardee received the highest overall score under an evaluation formula that gave four times as much weight to technical factors as to price.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Experience Rating**

**B-222427 Con't**  
**July 21, 1986**

A protest alleging the evaluation of the protester's experience was improper and not based on the stated criteria is denied where the record shows that the agency's downgrading of the protester's proposal for lack of experience directly related to the work to be performed was reasonable and the requirement was encompassed by the stated evaluation criteria and subcriteria.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Bias**  
**Unsustantiated**

Where bias is alleged, the protester has the burden of affirmatively proving its case, and the General Accounting Office (GAO) will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Where the record is completely devoid of evidence supporting some of the protester's inferences and refutes others, GAO will deny the protest.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Time/Date Stamp Effect**

**B-223455.3 July 21, 1986**  
**86-2 CPD 86**

A mailgram protest is filed for purposes of General Accounting Office (GAO) timeliness rules when it is received in GAO notwithstanding when it was sent. GAO time/date stamp establishes the time of receipt absent other evidence to show actual earlier receipt.

**CONTRACTS**

B-224411 July 21, 1986

**Protests**

86-2 CPD 87

**Interested Party Requirement****Protester not in Line for Award**

A firm that is fourth low bidder is not an interested party to protest the agency's failure to send it an amendment to the solicitation that increases the scope of the work since all the lower bidders received the amendment and it is not plausible that the protester's bid would have been reduced had it received the amendment. A party that is not in line for award if its protest is upheld generally does not have the requisite direct economic interest to be considered an "interested party" under General Accounting Office Bid Protest Regulations.

**BIDS**

B-213401.3 July 22, 1986

**Preparation**

86-2 CPD 88

**Costs****Recovery****Quantum of Claim Establishment**

Amount claimed for bid preparation costs may be recovered to the extent that it is adequately documented and not shown to be unreasonable. To the extent that the claim is inadequately documented, however, the agency's settlement offer is considered reasonable, and claimant is entitled to no further recovery.

**INTEREST****Claims Against United****States****Rule**

Requests for payment of interest on bid preparation cost claim, and attorney's fees for pursuing the claim, are denied. Such costs are not recoverable in the absence of express statutory or contractual authority.

**CONTRACTS****B-222337 July 22, 1986****Negotiation****Authority****Job Order Contracts**

The Department of the Army's use of indefinite quantity construction repair contracts (job order contracts) does not violate procurement laws, regulations or policies, and thus is not legally objectionable. Specifically, the job order contracting method as implemented by the Army: (1) does not unduly restrict competition by small and minority-owned businesses; (2) is not an improper circumvention of the sealed bidding method of procurement; (3) does not utilize impermissible proposal evaluation and pricing methodologies; (4) is consistent with the requirement that government estimates be utilized in evaluating proposed prices; (5) is consistent with regulations governing bonding; and (6) does not involve the procurement of architect-engineering services covered by the Brooks Act, 40 U.S.C. § 541.

**BIDS****B-222482 July 22, 1986****Invitation for Bids****86-2 CPD 89****Cancellation****After Bid Opening****Low Bid in Excess of Government Estimate**

Agency's cancellation of solicitation on the basis that all otherwise acceptable bids are unreasonable in price is proper where all responsive bids are significantly higher in price than prices recently paid for the same services and a nonresponsive bidder's price, even though the low responsive bid is only 4 percent higher than the government estimate.

**BIDS** **B-222482 Con't**  
**Invitation for Bids** **July 22, 1986**  
**Cancellation**  
**Resolicitation**  
**Negotiated Procurement**

Where a canceled invitation for bids (IFB) has been converted to a request for proposals (RFP), protest that bidders whose bids were nonresponsive to the IFB or were withdrawn based on mistake should not be permitted to compete under the RFP is denied where the applicable regulation only precludes the participation of nonresponsive bidders, and the bidders in question were considered responsible.

**CONTRACTORS** **B-222564 July 22, 1986**  
**Responsibility** **86-2 CPD 90**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Protester's contention that awardee cannot perform in accordance with solicitation requirements constitutes a challenge to agency's determination that the awardee is a responsible offeror, a determination General Accounting Office (GAO) generally does not review. Similarly, contention that awardee will not comply with its contractual obligations involves a matter of contract administration which is not reviewed by GAO.

**CONTRACTS**  
**Negotiation**  
**Awards**  
**Initial Proposal Basis**  
**Propriety**

Contracting agency properly made award based on initial proposals without discussions where record supports reasonableness of awardee's proposed cost and solicitation advised offerors that award might be made without discussions.

**CONTRACTS**  
**Negotiation**  
**Awards**  
**Propriety**  
**Upheld**

**B-222564 Con't**  
**July 22, 1986**

Where technical proposals are found to be essentially equal, contracting agency properly made award to the offeror with the lowest adjusted cost.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Cost Realism Analysis**  
**Reasonableness**

Under request for proposals which contemplates award of cost-reimbursement contract, contracting agency properly may use ratio comparison method of evaluating cost proposals--under which the offeror with the lowest cost after adjustment for realism receives the maximum number of points and other offerors receive a portion of the maximum points relative to the difference between their adjusted costs and the lowest cost offer--since there is no risk of distorting the relative weight assigned to cost in the RFP which otherwise could result from including unrealistic cost proposals in the point spread.

Where cost-reimbursement contract is to be awarded, contracting agency properly evaluated proposals based on agency's cost realism analysis rather than offerors' estimated costs.

**CONTRACTS** **B-222564 Con't**  
**Negotiation** **July 22, 1986**  
**Offers or Proposals**  
**Evaluation**  
**Technical Acceptability**

In procurement for services where technical quality depends principally on program management and personnel capabilities, disparity between awardee's proposed costs and costs adjusted for realism does not necessarily detract from the quality of its technical proposal where the disparity is due principally to the awardee's failure to include all costs for required materials. Understatement of costs was not significant for evaluation purposes in any event, since evaluation was based on adjusted, not proposed, costs.

**CONTRACTS** **B-222576 July 22, 1986**  
**Protests** **86-2 CPD 91**  
**Allegations**  
**Not Prejudicial**

GAO dismisses protest alleging that contracting agency treated quoters unequally when it advised awardee of intended award before notifying protester, since failure to give similarly prompt notice of award is merely a procedural deficiency that does not affect the validity of the otherwise valid award.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

Protest that contracting agency improperly disclosed information in protester's quotation to its competitor before award is denied where it is not established that information was proprietary and only evidence of disclosure is protester's speculation.





**CONTRACTS** **B-222588 Con't**  
**Protests** **July 22, 1986**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest that bid samples should have been required is dismissed as untimely under 4 C.F.R. §21.2(a)(1) where not filed prior to closing date for receipt of initial proposals and it was clear from solicitation that first article test, not bid samples, was required.

**BIDS** **B-222889; B-222869.2**  
**Responsiveness** **July 22, 1986**  
**Failure to Furnish** **86-2 CPD 93**  
**Something Required**  
**Small Business Concerns**  
**End Product Contributor**

Bid on a total small business set-aside which indicates that not all supplies to be furnished will be manufactured or produced by a small business concern must be rejected as nonresponsive, because the bidder otherwise would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest filed more than 10 working days after protester received denial of protest filed initially with contracting agency is untimely and not for consideration by our Office.

**CONTRACTS**

**Protests**

**Allegations**

**Unsubstantiated**

**B-222931.2 July 22, 1986**

**86-2 CPD 94**

Protest that in a prebid opening conversation with another bidder, a government employee improperly may have disclosed certain bidding information is denied where the contracting agency maintains that the subject matter of the conversation concerned only the administration of an existing contract, and the protester has not shown otherwise.

**CONTRACTS**

**Protests**

**Conflict in Statements of Protester and Contracting Agency**

**B-223052 July 22, 1986**

**86-2 CPD 95**

GAO cannot conclude that protester was unfairly excluded from bidding where the only evidence regarding alleged erroneous oral advice that bid opening had been postponed consists of conflicting statements by the protester and the contracting agency.

**CONTRACTS**

**Protests**

**Interested Party Requirement  
Trade Associations, etc.**

**B-224480 July 22, 1986**

**86-2 CPD 96**

Neither an association of ship operating companies nor a labor organization comprised of ship operating company employees is an interested party eligible to bring a protest since the Competition in Contracting Act of 1984 limits the definition of interested parties to actual or prospective bidders or offerors.

**CONTRACTS**  
**Two-Step Procurement**  
**Step One**  
**Offers or Proposals**  
**Rejection**

**B-222542 July 23, 1986**  
**86-2 CPD 97**

Rejection of proposal as unacceptable under step one of a two-step sealed bid acquisition is reasonable where evaluation shows that proposal did not comply with solicitation's requirements and also failed to address several critical solicitation requirements and where additional changes and material required to make proposal competitive would constitute a major revision to the original proposal.

**BIDS**  
**Mistakes**  
**Correction**  
**Still Lowest Bid**

**B-222681 July 23, 1986**  
**86-2 CPD 98**

Correction of bidder's mistake in computing the price for quarrying 500,000 tons of riprap (large rock) is appropriate where: 1) the bidder mistakenly applied a subcontractor's orally quoted price to the required amount of riprap instead of to the subcontractor's estimate of 825,000 - 865,000 tons of rock material necessary to yield the required riprap; and 2) the corrected bid (even using 865,000 tons) is significantly lower than the next low bid. Since the tonnage to which the bidder would have applied the subcontractor's quoted price is uncertain, correction is limited to the bottom of the range of uncertainty (825,000 tons).

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

**B-222798.3 July 23, 1986**  
**86-2 CPD 99**

Request for reconsideration is denied where protester raises no new facts or legal arguments which were not previously considered.

**CONTRACTS** **B-223396.2 July 23, 1986**  
**Protests** **86-2 CPD 100**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Dismissal of original protest is affirmed where protester failed to file protest within 10 working days after the protester knew or should have known of the basis for protest.

**FEDERAL ACQUISITION** **B-223483 July 23, 1986**  
**REGULATION**  
**Proposed Revision**

GAO has no objection to proposed changes to sections 8.001, 8.602, 8.603, and 8.704 of the Federal Acquisition Regulation concerning acquisitions of services from Federal Prison Industries, Inc.

**CONTRACTS** **B-224476 July 23, 1986**  
**Awards** **86-2 CPD 101**  
**Procedural Defects**

Failure to provide prompt notice of award or to schedule a debriefing is a procedural deficiency that does not affect the validity of an otherwise proper award.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest based on knowledge obtained by protester during discussions is untimely when filed more than 10 working days after the discussions.

**CONTRACTS** **B-224476 Con't**  
**Protests** **July 23, 1986**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent in Request for Best and Final Offers**

Protest that contracting agency should have amended solicitation after discussions to reflect agency's oral changes to solicitation requirements is untimely when filed after the closing date for best and final offers.

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

Protest filed after award contending that solicitation is defective is untimely, since it alleges solicitation improprieties that were apparent before the initial closing date for receipt of proposals.

**BIDS** **B-221002.2; B-221003.2**  
**Rejection** **July 24, 1986**  
**Propriety** **86-2 CPD 102**  
**Conflict of Interest**

Responsibility for determining whether a firm competing for a contract should be excluded from the competition in order to avoid actual or apparent favoritism or preferential treatment primarily rests with the procuring agency, and GAO will not object to the agency's determination unless the protester establishes that it is unreasonable.

**BIDS** **B-222546 July 24, 1986**  
**Acceptance** **86-2 CPD 103**  
**Not Prejudicial to Other Bidders**

Bids which expired after improper cancellation of IFB may be revived upon reinstatement of the IFB where no bidders are prejudiced.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Evaluators**  
**Qualifications**

**B-222556 July 24, 1986**  
**86-2 CPD 104**

No requirement exists that all evaluators of original proposals must evaluate revised proposals.

**CONTRACTS**  
**Negotiation**  
**Requests for Proposals**  
**Evaluation**  
**Technical Superiority v. Cost**

Protest that award should not have been made to offeror whose proposal was 22 percent higher technically rated and 10 percent higher in cost than protester's proposal, where RFP advised that technical considerations were of paramount importance, is denied where selection had a rational basis.

**CONTRACTS**  
**Federal Supply Schedule**  
**Purchases for System**  
**Multiple-Award Schedule Contracts**  
**Evaluation**  
**Propriety**

**B-222559 July 24, 1986**  
**86-2 CPD 105**

Procuring agency's issuance of delivery order for automatic movable storage system to mandatory multiple-award Federal Supply Schedule contractor which offered the lowest cost per linear filing foot and per square storage foot is reasonable because the contractor offered the lowest priced item meeting the government's minimum needs.

**BIDS** **B-222578 July 24, 1986**  
**Competitive System** **86-2 CPD 106**  
**Equal Bidding Basis for all Bidders**  
**Bidders' Superior Advantages**

Protest that apparent low bidder and perhaps other bidders may have had inside information concerning the agency's plans to construct a new dining facility and, thus, may have had a competitive advantage in bidding on a food service contract is denied where there is no evidence or even an allegation that this was the result of unfair action by the government.

**BIDS**  
**Invitation for Bids**  
**Ambiguous**  
**Objective Test**

Protest that solicitation requirement that food services contractor have a "contract supervisor" present on all shifts is ambiguous because some bidders may have read the provision as requiring the use of salaried supervisors while others may have read it as permitting the use of hourly personnel is denied where the solicitation cannot reasonably be read as specifying or precluding any particular method of satisfying the requirement.

**CONSTITUTIONALITY** **B-222747 July 24, 1986**  
**Administrative Actions** **86-2 CPD 107**  
**Procurement Matters**  
**Due Process Right**

The requirement for administrative due process--notice of charges and an opportunity to be heard--is inapplicable where a firm's exclusion from a particular contract is based upon the appearance of a significant conflict of interest in the government-contractor relationship, and not upon a determination that the firm lacks integrity in its business dealings.



**CONTRACTS** **B-222747 Con't**  
**Negotiation** **July 24, 1986**  
**Conflict of Interest Prohibitions**  
**Organizational**

The General Accounting Office (GAO) properly denied an offeror the award of a particular contract for audit services on the ground of conflict of interest where the firm is being investigated by GAO on another matter because such an award could have created the appearance of GAO's lack of impartiality in conducting the investigation.

**CONTRACTS** **B-222986 July 24, 1986**  
**Federal Supply Schedule** **86-2 CPD 108**  
**Failure to Use**

Where agency needs services covered by protester's mandatory Federal Supply Schedule (FSS) contract as well as non-FSS services that constitute the predominant portion of the work, agency is not acting unreasonably in combining all the requirements for purchase on the open market rather than obtaining some or all of the services from the protester, since the non-FSS services are integral to the services covered by the otherwise mandatory FSS contract and the protester's charges for the non-FSS services are substantially higher than those usually charged on the open market.

**CONTRACTS** **B-223533 July 24, 1986**  
**Options** **86-2 CPD 109**  
**Exercisable at Sole Discretion of Government**  
**Review by GAO**

General Accounting Office (GAO) will not consider incumbent contractor's contention that contracting agency should exercise option under existing contract instead of conducting a new procurement, since decision whether to exercise option is a matter of contract administration outside the scope of GAO bid protest function.

**CONTRACTS** **B-221330.2** **July 25, 1986**  
**Protests** **86-2** **CPD 110**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Prior decision is affirmed where protester has not shown that decision contained errors of fact or law.

**CONTRACTS** **B-222324.2** **July 25, 1986**  
**Protests** **86-2** **CPD 111**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

Dismissal of protest for failure to furnish a copy to the contracting officer within 1 day of filing with the General Accounting Office (GAO) is not warranted where, as here, the protester pursued its protest with the agency so the contracting officer had actual knowledge of the grounds which formed the basis of the protest and the protester, whose agency level protest was never addressed by the agency, could have timely refiled the protest with GAO when its agency level protest was later denied.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Delayed**  
**Certificate of Competency Processing Time**

Where a contracting officer refers a nonresponsibility determination to the Small Business Administration under the certificate of competency procedure, the contracting officer is required to withhold award for 15 business days.

Certificate of competency referral is received by the Small Business Administration (SBA) for purposes of calculating the 15-day period for withholding award when the referral letter is received in the cognizant SBA Regional Office. Post Office receipt of delivery is better proof of receipt than date stamp on referral letter or office log of correspondence received.

**CONTRACTS** **B-222324.2 Con't**  
**Small Business Concerns** **July 25, 1986**  
**Awards**  
**Small Business Administration's Authority**  
**Certificate of Competency**  
**Conclusiveness**

The Small Business Administration (SBA) has conclusive authority to review a contracting officer's nonresponsibility determination by issuing or refusing to issue a certificate of competency (COC). The General Accounting Office (GAO) generally will not review a contracting officer's nonresponsibility determination since such a review would be tantamount to a substitution of its judgment for that of the SBA. While GAO has reviewed nonresponsibility determinations relating to small business bidders where the SBA refused to review the determination or where the nonresponsibility determination was not referred to the SBA, it will not review a nonresponsibility determination where SBA reviewed the matter but simply failed to issue a timely COC.

**CONTRACTS** **B-222432 July 25, 1986**  
**Negotiation** **86-2 CPD 112**  
**Offers or Proposals**  
**Discussion With all Offerors Requirement**  
**"Meaningful" Discussions**

Requirement to conduct meaningful discussions does not obligate agencies to identify every aspect of a technically acceptable proposal that receives less than a maximum score, particularly where the subject matter, the number of passenger airline seats available at the local airport, does not appear to be within the offeror's control.

**CONTRACTS**

B-222432 Con't

**Negotiation**

July 25, 1986

**Offers or Proposals****Evaluation****Administrative Discretion**

Procuring officials enjoy a reasonable degree of discretion in evaluating proposals, and the General Accounting Office will not disturb an evaluation where the record indicates that the conclusions reached are supported by the information in proposals and consistent with the criteria set forth in the solicitation. Where the relevant factual information was correctly presented to the selection official, technical rankings were not disturbed and differences in technical point scores were not considered determinative, a minor error in point scoring does not invalidate the evaluation.

**CONTRACTS****Negotiation****Requests for Proposals****Evaluation Criteria**

Where a solicitation does not indicate in relative terms the importance of cost, technical, and business management factors, it must be presumed that each will be considered approximately equal in weight.

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

Protest alleging that a solicitation contains an improper evaluation criterion, or that it did not contain certain necessary criteria, is untimely when it is not filed until after the closing date for receipt of initial proposals.

**CONTRACTS**

B-222455 July 25, 1986

Negotiation

86-2 CPD 113

Offers or Proposals

Evaluation

Competitive Range Exclusion

Reasonableness

Proposal for construction services that was ranked unacceptable for failure to include required information regarding manpower and equipment properly was excluded from the competitive range where the deficiencies reasonably caused the proposal to be ranked fourth and unacceptable in comparison to the three proposals included in the competitive range.

**BONDS**

B-222526 July 25, 1986

Bid

86-2 CPD 114

Surety

Affidavit (Standard Form 28)

Deficiencies

Nondisclosure of Other Bond Obligations

A surety must disclose all outstanding obligations, regardless of the actual risk of liability on them. Moreover, for payment and performance bonds, obligation does not end on contract completion date, but continues until warranty period has expired.

**CONTRACTORS**

Responsibility

Determination

Review by GAO

Nonresponsibility Finding

Where a bidder's individual surety fails to disclose an outstanding obligation, either pending completion of performance on a contract or during a warranty period, the agency properly may find the bidder to be nonresponsible, based on its surety's nondisclosure.

**CONTRACTS** **B-222526 Con't**  
**Small Business Concerns** **July 25, 1986**  
**Awards**  
**Small Business Administration's Authority**  
**Certificate of Competency**  
**Sureties on Bid Bonds Status**

A determination that a small business concern is nonresponsible, based on the failure of its surety to disclose an outstanding obligation, need not be referred to the Small Business Administration for consideration under its Certificate of Competency procedures.

**CONTRACTORS** **B-223090.2 July 25, 1986**  
**Responsibility** **86-2 CPD 115**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Dismissal of protest of contracting agency's affirmative responsibility determination is affirmed where the protester who alleges bad faith on the part of agency officials has not presented virtually irrefutable proof of bad faith. Delinquent deliveries under a prior contract do not alone require a finding of nonresponsibility by the procuring agency.

**CONTRACTS** **B-224378 July 25, 1986**  
**Protests** **86-2 CPD 116**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest regarding an alleged solicitation impropriety apparent on the face of the solicitation must be filed prior to the closing date for receipt of initial proposals and will not be considered by GAO when it was initially filed with the contracting agency after the closing date.

**CONTRACTS** **B-222132.2 July 28, 1986**  
**Protests** **86-2 CPD 117**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Decision is affirmed on reconsideration where firm requesting reconsideration fails to establish the existence of an error of law or fact in the decision.

**CONTRACTS** **B-222577 July 28, 1986**  
**Negotiation** **86-2 CPD 119**  
**Late Proposals and Quotations**  
**Hand Carried**  
**Delay not due to Government Action**

Contracting agency properly rejected protester's late hand-delivered proposal where the protester arrived only a few minutes before proposals were due and was delayed from entering the building as a result of the agency's security procedures, since the agency security guard's actions were based on a reasonable interpretation of the procedures then in effect and late receipt of the proposal was due to the protester's failure to allow sufficient time to deliver the proposal.

**CONTRACTS** **B-222579 July 28, 1986**  
**Negotiation** **86-2 CPD 120**  
**Requests for Proposals**  
**Brand Name "or Equal" Procedure**  
**Unduly Restrictive**

While request for proposals identified a brand name product and only permitted consideration of an alternate product that was physically, mechanically, electrically, and functionally interchangeable with the named product, the agency accepted an alternate product that deviated from these solicitation requirements. Because the acceptance of the deviating product showed that the solicitation overstated the government's needs, termination of awarded contract and resolicitation of the requirement are recommended by the General Accounting Office.

**BIDS**  
**Rejection**  
**Propriety**

**B-222746 July 28, 1986**  
**86-2 CPD 121**

Bid was not ambiguous, and agency's rejection of it as nonresponsive was improper, where bidder inserted in its bid the name of the manufacturer of the item it proposed to furnish and a correct narrative description of the item conforming to specifications, but also referred to the item by the manufacturer's catalog number which by virtue of a discrepancy of 1 digit out of 5 referred to a wholly inappropriate item instead of that correctly described by narrative. The only reasonable interpretation of the bid as a whole is that the bidder intended to furnish the type of item specified in the solicitation.

**CONTRACTS** **B-222972 July 28, 1986**  
**Small Business Concerns 86-2 CPD 122**  
**Awards**  
**Responsibility Determination**  
**Nonresponsibility Finding**  
**Certificate of Competency Requirement**

Bad faith on the part of contracting officials and the Small Business Administration (SBA) is not demonstrated where record shows that contracting and preaward survey agencies had a reasonable basis for finding protester nonresponsive and that the SBA, after giving protester additional time to file for a certificate of competency (COC), closed its file because the COC application ultimately filed was inadequate.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Responsibility Determination**  
**Nonresponsibility Finding**  
**Review by GAO**

The General Accounting Office will not review an allegation concerning a contracting officer's negative responsibility determination of a small business concern where the small business fails to file an acceptable application for a certificate of competency with the Small Business Administration.



**CONTRACTS** **B-223496.2 July 28, 1986**  
**Protests** **86-2 CPD 123**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Protest is dismissed for failure to set forth a detailed statement of the legal and factual grounds on which it is based where the protester, whose bid was rejected as nonresponsive, merely states that it is entitled to the contract award because it submitted the low responsive bid but, knowing of the bidding deficiencies that caused the rejection, suggests no reason why the bid should not have been rejected.

**CONTRACTS** **B-223624.2 July 28, 1986**  
**Protests** **86-2 CPD 124**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Decision dismissing protest as untimely is affirmed. The record shows that the protester knew the basis for its protest--that its alternative proposal was found unacceptable--almost 2 months before it received notice that the contract had been awarded to another firm. Since it did not file the protest until after it learned of the award, the protest was untimely, and was properly dismissed.

**CONTRACTORS** **B-222818 July 29, 1986**  
**Responsibility** **86-2 CPD 125**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

GAO does not review affirmative determinations of responsibility absent a showing of fraud or bad faith on the part of procuring officials or the misapplication of a definitive responsibility criterion.

**CONTRACTS**

**B-222818 Con't**

**Negotiation**

**July 29, 1986**

**Offers or Proposals**

**Discussion With all Offerors Requirement**

**What Constitutes Discussion**

Protest that National Aeronautics and Space Administration (NASA) is improperly continuing negotiations with only selected offeror is denied. Procurement was conducted under NASA procurement procedures under which "discussions" are limited essentially to proposal clarification after which a contract is "negotiated" with a selected offeror. Final negotiation process is intended to rectify correctable errors to ensure contract award on the most favorable terms to the government and negotiations being conducted are consistent with this authority.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Evaluation**

**Agency Adjustment of Proposal**

**Propriety**

Protest that agency improperly cured a deficiency in the awardee's cost proposal by increasing probable direct labor costs to reflect the fact that awardee would retain a substantial number of the incumbent's employees and would be required to pay those employees their current wages is denied since agency's evaluation of an offeror's proposed costs provides a more reliable estimate for evaluation purposes in a cost-type contract and where cost is considered in the award, agency's increase of an offeror's overall costs does not demonstrate favoritism towards that offeror.

**CONTRACTS**

**Protests**

**Allegations**

**Unsubstantiated**

**B-222818 Con't**

**July 25, 1986**

Protest that awardee's proposal failed to comply with the Service Contract Act because awardee failed to offer to pay its employees the minimum wages specified is denied when there is no evidence that awardee offered to pay its employees wages which did not meet the minimum required.

Allegation that awardee's proposal should be rejected because awardee did not propose a labor force with the exact skill mix utilized by the incumbent protester and pay those employees commensurate wages is denied since RFP did not impose any such requirement.

Allegation that major weaknesses identified by agency in awardee's proposal should have had a greater impact on agency's overall ranking of the awardee is denied where record evidences a reasonable basis for agency to conclude that strengths in other areas justified agency's rating.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Date Basis of Protest Made Known to Protester**

Protest based on information provided to protester at debriefing filed with GAO more than 10 working days after debriefing is untimely.

**CONTRACTS** **B-222037.3 July 30, 1986**  
**Protests** **86-2 CPD 126**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Request for reconsideration by an interested party that participated in the protest is dismissed where the arguments on which the request is based could have been, but were not, raised during initial consideration of the protest. In any event, the arguments offered do not show any error of law or fact in prior decision holding that contracting agency acted improperly by granting extensions of dates for operational demonstrations while denying the protester's request for extension, where all four offerors asserted the same reason for requesting extensions.

**BIDS** **B-222553.2 July 30, 1986**  
**Mistakes** **86-2 CPD 127**  
**Verification**  
**Propriety**

When a contracting officer suspects a mistake in a bid and requests verification in accordance with the Federal Acquisition Regulation, such action does not constitute "two bites at the apple" or impair the competitive bidding system.

**CONTRACTORS**  
**Responsibility**  
**Administrative Determination**  
**Security Clearances**  
**Absence at Time of Contract Award**

A bidder may obtain a required security clearance any time before award, because this constitutes a matter of bidder responsibility.

**CONTRACTS**

B-222553.2 Con't

**Protests**

July 30, 1986

**General Accounting Office Procedures****Reconsideration Requests****Additional Evidence Submitted****Available but not Previously Provided to GAO**

When, in request for reconsideration, a protester merely restates the grounds of its original protest, with additional arguments and citations, the General Accounting Office will not consider the arguments that could have been made initially.

**CONTRACTS****Protests****Moot, Academic, etc. Questions**

Protest based on the fact that a contracting officer has not made required determinations before exercising an option under a requirements contract is premature when the award covers only a first article and the first year's production quantity.

**GENERAL ACCOUNTING OFFICE**

B-223049 July 30, 1986

**Jurisdiction**

86-2 CPD 128

**Labor Stipulations****Davis-Bacon Act**

General Accounting Office (GAO) will not consider protest that commercial grade project was erroneously classified as "residential" for wage rate purposes, and that misclassification will cause bidders to either lose money, submit claims to cover increased wage costs, or perform contract in "shoddy" manner. Department of Labor (DOL), not GAO, determines correctness of wage determinations and matter has been submitted to DOL. Moreover, there is no evidence that bidder will either submit loss bid or submit claim to cover loss.

**BUY AMERICAN ACT  
Foreign Qualifying  
Country Status**

**B-224487 July 30, 1986  
86-2 CPD 129**

Contracting agency need not apply a Buy American Act evaluation factor to an offer for a product manufactured in Germany, since that country is designated under the Trade Agreements Act of 1979, and agencies must solicit and evaluate offers for products manufactured in such countries in the same manner as domestic products.

**CONTRACTORS  
Responsibility  
Determination  
Review by GAO  
Affirmative Finding Accepted**

**B-222521; B-222522  
July 31, 1986**

Protest of the awardee's financial and technical capabilities to perform the contract concern the contracting agency's affirmative determination of the awardee's responsibility which will not be questioned absent a showing of fraud or bad faith by procuring officials or that definitive criteria in the solicitation were not met.

**CONTRACTS  
Negotiation  
Awards  
Initial Proposal Basis  
Propriety**

Award may be made on the basis of initial proposals, without discussions, where the solicitation notified offerors that award might be made without discussions and acceptance of an initial proposal will result in the lowest overall cost to the government at a fair and reasonable price based on adequate competition and prior cost information.



**BIDS** **B-223647 Con't**  
**Prices** **July 31, 1986**  
**Below Cost**  
**Effect on Bidder Responsibility**

There is no legal basis to object to a below-cost bid. Whether a bidder can meet contract requirements in light of its low bid is a matter of bidder responsibility, the affirmative determination of which is not reviewed by General Accounting Office except in circumstances not present in this case.

**GENERAL ACCOUNTING OFFICE** **B-224422.2 July 31, 1986**  
**Jurisdiction**  
**Labor Stipulations**  
**Davis-Bacon Act**

Prior dismissal of protest challenging omission of wage determination from a solicitation is affirmed since omission is due to decision by Department of Labor (DOL), not the contracting agency, not to issue a wage determination, and any challenge to the decision therefore should be pursued through DOL's procedures, not a bid protest.

**BIDS** **B-224429 July 31, 1986**  
**Responsiveness** **86-2 CPD 132**  
**Exceptions Taken to Invitation Terms**

A provision in an invitation which requires that a bid remain available for acceptance by the government for 90 calendar days in order to be considered for award is a material requirement, and a bid that offers 60 calendar days is nonresponsive, even if the insertion was a typographical error. Agency's apparent consideration of the bid, including invoking the Certificate of Competency procedures, does not waive the bidder's error or estop the government from rejecting the bid.



**SPECIAL STUDIES & ANALYSIS**

**APPROPRIATIONS**

**B-222693 July 21, 1986**

**Impounding**

**Impoundment Control Act**

H.R. 4205, by eliminating the one-House veto of deferrals, would solve the Impoundment Control Act's Chadha problem; it would, however, also sacrifice the advantage of the existing deferral procedure, namely, that routine, non-controversial deferrals can be permitted to continue without the necessity for the Congress to take action. GAO suggests an alternative, which would require the President to specify a date certain on which he will release the deferred budget authority, and which would prohibit withholding after the date certain.

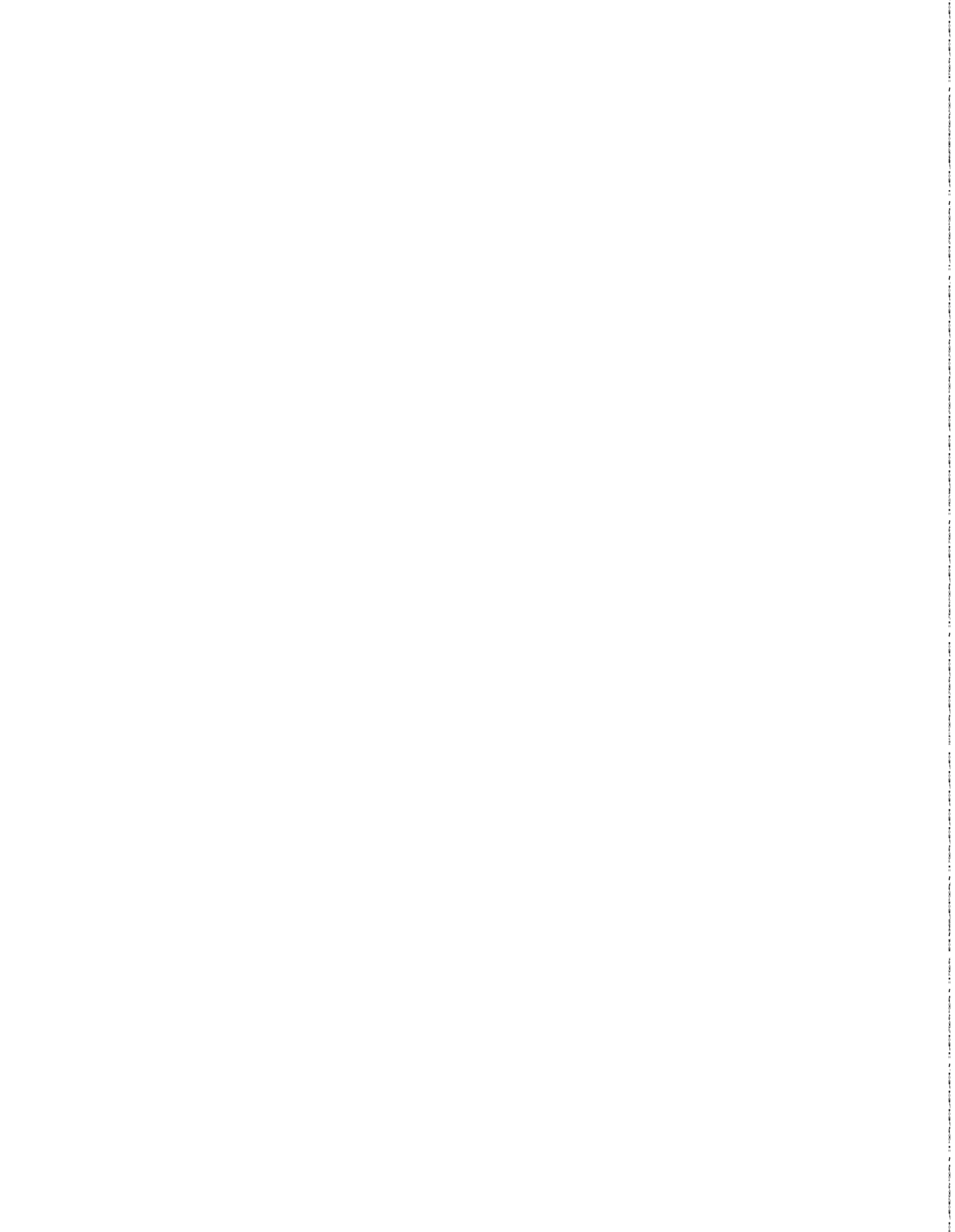
**APPROPRIATIONS**

**B-223160 July 21, 1986**

**Impounding**

**Impoundment Control Act**

S. 2229, by eliminating the one-House veto of deferrals, would solve the Impoundment Control Act's Chadha problem; it would, however, also sacrifice the advantage of the existing deferral procedure, namely, that routine, non-controversial deferrals can be permitted to continue without the necessity for the Congress to take action. GAO suggests an alternative, which would require the President to specify a date certain on which he will release the deferred budget authority, and which would prohibit withholding after the date certain.



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