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Office of General Counsel



Digests of  
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Decisions of the  
Comptroller General  
of the United States

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United States General Accounting Office

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## PREFACE

This publication is one in a series of monthly pamphlets entitled "Digests of Unpublished Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S. Code § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, 98 Pub. L. 369, July 18, 1984.

Decisions in this pamphlet are presented in digest form and represent approximately 90 percent of the total number of decisions rendered annually. Full text of these decisions are available through the circulation of individual copies and should be cited by the appropriate file number and date, e.g., B-219654, Sept. 30, 1986.

The remaining 10 percent of decisions rendered are published in full text. Copies of these decisions are available through the circulation of individual copies, the issuance of monthly pamphlets and annual volumes. Decisions appearing in these volumes should be cited by volume, page number and year issued, e.g., 65 Comp. Gen. 624 (1986).

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**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability B-232686 Dec. 7, 1988**

**Purpose availability**

**Necessary expenses rule**

**Voluntary expenditures**

**Reimbursement**

Neither government regulations nor the public necessity exception to the voluntary creditor rule authorizes reimbursement of Air Force crew member who reserved and paid for 12 motel rooms for crew members and maintenance personnel, which ultimately were not used because the personnel found other lodging, since the reservations were made absent any compelling need to act without delay to protect a legitimate government interest.



**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Claims Against Government B-231771 Dec. 7, 1988**

**Claims settlement**

**Permanent/indefinite appropriation**

**Purpose availability**

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Judgment Payments**

**Attorney fees**

Defense Investigative Service (DIS) entered into a compromise settlement with an employee that included the employee's attorney's fees and costs and submitted it to the General Accounting Office Claims Group to be certified for payment from the judgment fund, 31 U.S.C. § 1304. The Claims Group decided that the fees and costs had to be paid from the agency's appropriated funds pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). We affirm the Claims Group's position with respect to the attorney's fees because of a judicial determination, which the parties incorporated into the settlement, that the EAJA is applicable. However, to the extent that other costs are authorized under 28 U.S.C. § 2412(a), payment may be made from the judgment fund.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability B-229406 Dec. 9, 1988**

**Purpose availability**

**Specific purpose restrictions**

**Telephones**

The Food and Drug Administration may reimburse an official for charges and fees relating to official government calls made with a cellular phone installed in a private car. 31 U.S.C. § 1348(a) does not apply to cellular phones located in private automobiles; adequate safeguards to prevent abuse should be provided.

The Food and Drug Administration may reimburse an official for costs incurred in making long-distance telephone calls from a cellular phone installed in a private car. 31 U.S.C. § 1348(b) authorizes payments for such official long distance calls if such calls are certified as being for official business and necessary in the interest of the government.

The Food and Drug Administration may not use appropriated funds to reimburse official for all or part of the purchase price of a cellular phone that official intends to retain as his personal property.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Accountable Officers B-232744 Dec. 9, 1988**

**Cashiers**

**Relief**

**Physical losses**

**Theft**

National Park Service cashier is relieved of liability under 31 U.S.C. § 3527(a) for stolen imprest funds. Although cashier may have been negligent in improperly storing the combination to her safe, the negligence was not the proximate cause of the loss. The loss can be directly attributed to the pervasive laxity of office procedures over which the cashier had no control.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Accountable Officer            B-226708.3    Dec. 12, 1988**  
**Relief**  
**GAO authority**

GAO cannot take exception to any illegal payments that may have been made to certain entities created by the Federal Home Loan Bank Board. Since the Bank Board provides no direct financial support to these entities, there are no transactions by a Bank Board accountable officer to which GAO could take exception. While the Federal Savings and Loan Insurance Corporation (FSLIC) does provide financial support for one of the entities, GAO lacks authority to take exception to the financial transactions of FSLIC.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Claims By Government            B-228702    Dec. 16, 1988**  
**Commercial carriers**  
**Carrier liability**  
**Burden of proof**

A timely notice of loss or damage to a carrier need not contain specific, itemized exceptions to a delivery receipt in order for a subsequent, detailed claim to establish a prima facie case of liability against the carrier. Where the Navy identifies lost articles of household goods with specific, line-item numbers corresponding to the Descriptive Inventory produced by the carrier at the origin of the shipment, flaws in the government's claims process and minor discrepancies in the manner in which the claim is presented to the carrier do not defeat the prima facie case of carrier liability. Thus, the denial of a carrier's claim for refund of an amount the Navy set off for loss and damage is sustained.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability B-223608 Dec. 19, 1988**

**Purpose availability**

**Necessary expenses rule**

**Awards/honoraria**

GAO is aware of no authority to distribute merchandise items such as clock radios and tricycles as awards for safe job performance, as they are authorized neither by Army safety program regulations nor by Government Employees Incentive Awards Act. Office of Personnel Management, which has statutory authority to implement Incentive Awards Act, prohibits use of merchandise prizes.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability**

**Purpose availability**

**Necessary expenses rule**

**Publicity/propaganda**

**Safety programs**

Corps of Engineers district has proposed using appropriated funds to purchase plastic ice scrapers imprinted with safety slogan, costing less than \$1 each, to be distributed to employees as promotional material. Although Corps is required by law to establish and maintain safety promotional programs, the Corps has failed on the record of this case to connect the promotional material imprinted on the ice scraper with the purposes of the Occupational Safety and Health Act.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Federal Assistance B-227084.6 Dec. 19, 1988**

**Grants**

**Cooperative agreements**

**Use**

**Criteria**

Request for reconsideration by the Maritime Administration of B-227084.5, October 15, 1987, 67 Comp. Gen. 13, which concerned the Maritime Administration's award of a cooperative agreement for the operation of its Computer Aided Operations Research Facility. Upon reconsideration, we reaffirm our view that a procurement contract and not a cooperative agreement should have been used.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability B-229732 Dec. 22, 1988**

**Amount availability**

**Antideficiency prohibition**

**Violation**

The Department of Housing and Urban Development has violated the Antideficiency Act, 31 U.S.C. § 1341 (1982), where it has no funds available to fund international trade promotion programs since obligations for such activities may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability B-229732 Con't**  
**Purpose availability Dec. 22, 1988**  
**Research/development funds**

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability**  
**Purpose availability**  
**Salary and expense funds**

Department of Housing and Urban Development (HUD) appropriations for Research and Technology and for Salaries and Expenses are not available to fund programs primarily intended to promote international trade where HUD's authority to participate in international data exchange programs is limited to those mission related programs which benefit HUD in discharging its statutory responsibility to provide for the nation's housing needs.

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability B-230062 Dec. 22, 1988**  
**Purpose availability**  
**Necessary expenses rule**  
**Awards/honoraria**

**APPROPRIATIONS/FINANCIAL MANAGEMENT**

**Appropriation Availability**  
**Purpose Availability**  
**Necessary expenses rule**  
**Recruiting allowances**

The Army may use funds appropriated for recruiting and advertising to pay for framed recruiting posters for use as prizes to potential recruits in order to increase recruiting leads. Before the Army implements the proposal, it should determine whether award of a prize worth up to \$25.00 is consistent with its own regulations prohibiting gifts of more than slight monetary value in its recruiting efforts.

**CIVILIAN PERSONNEL**

**CIVILIAN PERSONNEL**

**B-231099 Dec. 2, 1988**

**Relocation**

**Residence transaction expenses**

**Relocation service contracts**

**Use**

A transferred employee, whose travel orders did not authorize him to participate in his agency's relocation contract services program, requests that his travel orders be retroactively amended to permit such participation. The request is denied since under the Federal Travel Regulations, the employing agency exercised its discretion and established the written policy that only certain categories of its employees would be permitted to participate in the program.

**CIVILIAN PERSONNEL**

**B-231688 Dec. 2, 1988**

**Relocation**

**Household goods**

**Shipment**

**Time restrictions**

**Extension**

**CIVILIAN PERSONNEL**

**Relocation**

**Relocation travel**

**Eligibility**

**Time restrictions**

**Extension**

A newly appointed federal judge seeks an extension to the 2-year time limitation to begin family travel and ship his household goods to his first duty station. The request is denied since under para. 2-1.5a(2) of the Federal Travel Regulations, the maximum time authorized to initiate travel and transportation is 2 years with an up-to-1-year extension authorized only in situations involving reimbursable real estate transactions.

**CIVILIAN PERSONNEL**  
**Travel**  
**Commuting expenses**  
**Prohibition**  
**Applicability**

**B-231688 Con't**  
**Dec. 2, 1988**

**CIVILIAN PERSONNEL**  
**Travel**  
**Commuting expenses**  
**Reimbursement**  
**Eligibility**

A federal judge, who was unable to sell his residence and move closer to his duty station within the 2-year period authorized for family travel and movement of household goods, seeks reimbursement for the cost of commuting between his old residence and his new station. The claim is denied since the Federal Travel Regulations do not authorize payment for the expenses of daily commuting between the employee's official station and his residence, regardless of the distance involved.

**CIVILIAN PERSONNEL**  
**Travel**

**B-228687 Dec. 5, 1988**

**Temporary duty**  
**Per diem**  
**Eligibility**

Agency properly authorized per diem for an employee who performed 3 days of temporary duty a short distance outside the corporate limits of the city in which she was permanently stationed. Since the employee had to work from early morning to late evening, the agency exercised its discretion in a reasonable manner and the employee may receive per diem for period of temporary duty.



**CIVILIAN PERSONNEL**

**B-229102 Dec. 5, 1988**

**Relocation**

**Household goods**

**Shipment**

**Restrictions**

**Privately-owned vehicles**

**CIVILIAN PERSONNEL**

**Travel**

**Advances**

**Overpayments**

**Debt collection**

**Waiver**

An appointee to a manpower shortage position was given erroneous advice that he could include his automobile as part of his household goods shipment for which he was to be reimbursed under the commuted rate system. Accordingly, he included the weight of the automobile in the estimated weight of his shipment resulting in his receiving an excessive travel advance. Following a review of the employee's voucher, the agency determined that the employee's allowable expenses of relocation, which by law could not include the cost of shipping an automobile, were less than the amount of his travel advance resulting in his being indebted for the outstanding balance of the travel advance. Partial waiver is granted under 5 U.S.C. § 5584 to the extent that the employee incurred actual expenses for shipping his vehicle over and above what the agency allowed him for shipping his household goods under the commuted rate system.

**CIVILIAN PERSONNEL****B-228711 Dec. 8, 1988****Compensation  
Retroactive compensation  
Promotion  
Eligibility**

An individual in the IRS Student Trainee Program was delayed 4 months in his promotion to a grade GS-7 position. The delay occurred when he was discovered to be ineligible for noncompetitive conversion to the target position upon completion of his bachelors degree because he was appointed under temporary appointment authority rather than from a competitive civil service register. His appointment may not be made retroactive since he was not deprived of a right granted by statute or regulation nor was there a failure to carry out nondiscretionary administrative policies or regulations.

**CIVILIAN PERSONNEL****B-229322 Dec. 8, 1988****Relocation  
Residence transaction expenses  
Attorney fees  
Reimbursement**

In purchasing a home at the new duty station, the employee's attorney fees were incurred for legal services necessary to transfer clear title and, therefore, are reimbursable. Although the bankruptcy court had to approve the purchase, the house was not the subject of a foreclosure proceeding, and the fees were not litigation costs.

**CIVILIAN PERSONNEL**                      **B-229322 Con't**  
**Relocation**                                **Dec. 8, 1988**  
**Residence transaction expenses**  
**Loan discount fees/points**  
**Reimbursement**

When the employee purchased a residence at his new duty station, the mortgage lender charged the employee a "loan discount fee" in addition to a "loan origination fee." The latter was reimbursed by the employing agency, and the employee asserts that the "loan discount fee" should also be reimbursed since it was actually a second "loan origination fee" charged for processing the loan rather than lending money. We hold that the "loan discount fee" may not be reimbursed since it appears to be a finance charge. Moreover, when added to the first "loan origination fee," it would exceed the customary cost of such fees in the local area of the residence.

**CIVILIAN PERSONNEL**                      **B-226189 Dec. 9, 1988**  
**Relocation**  
**Household goods**  
**Actual expenses**  
**Reimbursement**  
**Amount determination**

Shipment of household goods is to be made by the most economical method as determined by the agency based on a cost comparison. Once an administrative determination is made as to the most economical method, the employee's reimbursement is limited by the method authorized. Where the agency determined that the Government Bill of Lading (formerly referred to as the actual expense method) was most economical and authorized move by that method, employee may not be reimbursed under the commuted rate method.

**CIVILIAN PERSONNEL**

**B-226189 Con't**

**Relocation**

**Dec. 9, 1988**

**Temporary quarters**

**Actual subsistence expenses**

**Dependents**

**Eligibility**

While temporary quarters subsistence expenses (TQSE) may be paid for the dependent parent of a transferred employee, it is the employee's duty to submit satisfactory evidence of the parent's dependency on him and to show that the parent was a member of employee's household at time of transfer. In the absence of such showing, TQSE may not be paid for the parent.

**CIVILIAN PERSONNEL**

**Relocation**

**Temporary quarters**

**Determination**

**Criteria**

The mere fact that an employee entered into a short-term lease is not sufficient to conclude that his quarters were temporary in nature considering all the other factors that indicated permanence. The quarters consisted of an unfurnished house in which he lived for about 1 year, he moved his household effects into the quarters, he submitted no evidence of attempts to find permanent quarters, and he had personal checks printed with the quarters' address.

**CIVILIAN PERSONNEL**  
**Relocation**  
**Travel expenses**  
**Reimbursement**  
**Eligibility**

**B-226189 Con't**  
**Dec. 9, 1988**

Employee had an acquaintance fly from the new duty station to the old duty station and drive the employee's rental vehicle to his new duty station. The employee requested reimbursement for the acquaintance's meals and airfare. Such reimbursement may not be made. There are no provisions in the regulations which allow reimbursement for moving assistance of this kind.

**CIVILIAN PERSONNEL**  
**Travel**  
**Travel expenses**  
**Vouchers**  
**Fraud**

Where an employee, in response to queries about the accuracy of a travel voucher submitted by him, submits a second voucher which includes substantial and fundamental changes from the original, the employee's claim may not be paid absent satisfactory explanation for the discrepancies. Substantial changes from the original voucher, where unexplained, raise a presumption of fraud on the original voucher which may not be corrected by submitting a revised voucher.

**CIVILIAN PERSONNEL****B-229443 Dec. 9, 1988****Relocation****Residence transaction expenses****Loan origination fees****Amount determination**

An Air Force employee claimed reimbursement of a loan origination fee of 2 percent. The agency's determination to limit reimbursement to 1 percent was based on data showing that 1 percent was the dominant fee in the area of the employee's new duty station. The employee contends that the data shows a range of fees from 1 to 3 percent and that the 2 percent claimed is reasonably within that range. The Air Force, however, properly limited reimbursement to 1 percent since the law and implementing regulations limit reimbursement to the "customary" charge in the area for loan origination fees, and the dominant fee represents the customary charge.

**CIVILIAN PERSONNEL****B-226708.3 Dec. 12, 1988****Compensation****Civilian service****Determination**

While GAO has concluded that employees of certain entities created by the Federal Home Loan Bank Board should be regarded as federal employees, they are not in fact federal employees since they were not formally appointed in the civil service. See 5 U.S.C. § 2105(a) and court cases cited.

**CIVILIAN PERSONNEL**

**B-230464 Dec. 12, 1988**

**Compensation  
Overpayments  
Error detection  
Debt collection  
Waiver**

Waiver under 5 U.S.C. § 5584 of erroneous salary payments resulting from the agency's failure to increase an employee's health insurance deduction is inappropriate where it is determined that the employee concerned had notice of the error and failed to bring it to the attention of appropriate officials.

**CIVILIAN PERSONNEL**

**B-230880 Dec. 12, 1988**

**Relocation  
Residence transaction expenses  
Reimbursement  
Eligibility  
Time restrictions**

An employee, who reported to a new duty station effective on or about October 13, 1983, may not be reimbursed for the sale of his residence at his old duty station since settlement did not occur until October 31, 1986, more than 3 years after the date he reported to his new duty station. The 3-year time limitation imposed by the Federal Travel Regulations (FTR) has the force and effect of law and may not be waived in any individual case. The fact that the relocation expense authorization was not signed until November 1, 1983, has no effect on the starting date from which the 3-year time limitation is tolled, namely, the date that the employee reports to his new duty station as specifically provided under the FTR.

**CIVILIAN PERSONNEL**

**B-226937.2 Dec. 13, 1988**

**Relocation**

**Household goods**

**Temporary storage**

**Time restrictions**

**Additional expenses**

A transferred employee may not be allowed additional time for temporary storage of his household goods in excess of the 180-day period authorized by the Federal Travel Regulations. However, the overpayment which resulted from the agency's erroneous authorization of storage beyond 180 days may be considered for waiver under 5 U.S.C. § 5584 (Supp. IV 1986).

**CIVILIAN PERSONNEL**

**B-233430 Dec. 15, 1988**

**Relocation**

**Residence transaction expenses**

**Reimbursement**

**Eligibility**

**Time restrictions**

The Federal Travel Regulations require that a transferred employee go to settlement within 3 years from the duty reporting date in order to be reimbursed for real estate expenses. The agency's omission of an employee's correct duty reporting date is an error apparent on the face of the travel order and may be retroactively modified to reflect the date the employee actually reported for duty.



**CIVILIAN PERSONNEL****B-226666.2 Dec. 22, 1988****Relocation****Household goods****Commuted rates****Reimbursement****Amount determination**

The Honorable Brock Adams and the Honorable Thomas Foley are advised that an employee's entitlement to reimbursement under the commuted rate system is limited to the rates in effect at the time the household goods were shipped. There is no statutory or regulatory provision that guarantees an employee full reimbursement for his out-of-pocket expenses under the commuted rate method.

**CIVILIAN PERSONNEL****B-229089 Dec. 28, 1988****Compensation****Overtime****Eligibility****Compensation restrictions**

Employee on 60-day temporary duty assignment in Saudi Arabia who worked 276 hours of overtime may only be paid for 216 of those hours in view of 5 U.S.C. § 5547 which limits basic pay plus premium pay for any pay period to the maximum rate for GS-15. Limitation in section 5547 is mandatory and applies regardless of fact that Saudi Arabian Government reimbursed the United States Government for the full cost of the accelerated construction program on which the employee worked the overtime hours.

**MILITARY PERSONNEL**

**MILITARY PERSONNEL**

**B-226402 Dec. 5, 1988**

**Travel**

**Emergencies**

**Commercial carriers**

**Travel expenses**

**Reimbursement**

**MILITARY PERSONNEL**

**Travel**

**Emergencies**

**Privately-owned vehicles**

**Travel expenses**

**Reimbursement**

In 1981 legislation was enacted authorizing service members to be reimbursed for transportation expenses incurred for commercial air travel between international airports while on emergency leave. This does not provide additional authority either expressly or by implication to reimburse service members for the expenses of travel by private automobile across an international border to an emergency leave site. Hence, the implementing joint-service travel regulations may not properly be amended to authorize such additional reimbursement, nor may an Air Force sergeant be allowed payment on his claim for reimbursement of expenses incurred in performing emergency leave travel by private automobile between Canada and the United States.

**MILITARY PERSONNEL**

**B-229466 Dec. 5, 1988**

**Travel**

**Rental vehicles**

**Expenses**

**Reimbursement**

**Eligibility**

A military member was issued temporary duty travel orders authorizing a rental car at a 9-day workshop where the member's lodging and meals were available. The evidence now before the Comptroller General does not show that the authorization was clearly erroneous, and based on that evidence the travel orders should not be retroactively changed to deny reimbursement of the member's car rental expense. The agency sponsoring the workshop recommended a rental car to obtain meals and travel to and from the airport, and the car was to be available if the member traveled to a temporary duty site. The subjective determination as to whether meals for 9 days at the workshop location were "not suitable" so as to justify a rental car was a discretionary management decision upon issuance of the travel orders.

**MILITARY PERSONNEL**

**B-231965 Dec. 6, 1988**

**Travel**

**Emergencies**

**Commercial carriers**

**Travel expenses**

**Reimbursement**

In case of emergency leave, a member of the Armed Forces who is stationed in the continental United States but whose home of record is outside the continental United States is entitled to travel at government expense only on the portion of his trip between the nearest international airport which provides a direct flight overseas and his emergency leave site.

**MILITARY PERSONNEL**

**B-222331 Dec. 7, 1988**

**Pay**

**Retirement pay**

**Post-retirement active duty**

**Restrictions**

Decision Major General Francis R. Gerard, USAFR, B-222331, June 23, 1987, is affirmed, holding that once a military member applies for and becomes entitled to receive retired pay under 10 U.S.C. § 1331, he is no longer in an active status in which he may be "retained" and receive credit for additional service under 10 U.S.C. § 676. 10 U.S.C. § 684 does not provide the necessary statutory authority to enable a member retained in active status to simultaneously receive retired pay. Rather 10 U.S.C. § 684 only enables a member who is receiving retired pay to waive this pay and to receive active duty pay and allowances if restored to active duty. This does not mean that under other authority the member could not be placed in an active status and receive retired pay (except for periods for which it is waived under 10 U.S.C. § 684). However, he could not receive credit for the additional service as a member retained under 10 U.S.C. § 676.

**MILITARY PERSONNEL**

**B-232686 Dec. 7, 1988**

**Travel**

**Lodging**

**Cancellation**

**Miscellaneous expenses**

**Reimbursement**

Neither government regulations nor the public necessity exception to the voluntary creditor rule authorizes reimbursement of Air Force crew member who reserved and paid for 12 motel rooms for crew members and maintenance personnel, which ultimately were not used because the personnel found other lodging, since the reservations were made absent any compelling need to act without delay to protect a legitimate government interest.

**MILITARY PERSONNEL**

**B-229909 Dec. 16, 1988**

**Pay**

**Additional pay**

**Reimbursement**

**Medical treatment**

**Combat disabilities**

An Army reservist was injured in the line of duty while performing his annual 2 weeks of active duty for training. After he was released from active duty and returned to his home, he sought continued treatment for his injury from physicians engaged in the private practice of medicine. His claim for reimbursement of the medical expenses incurred for that continued treatment is denied since the private medical treatment sought had not been properly authorized, the treatment was not of an emergency nature, and there were federal treatment facilities available near his home.

MILITARY PERSONNEL

B-233347 Dec. 16, 1988

Pay  
Overpayments  
Error detection  
Debt collection  
Waiver

A service member was paid Basic Allowance for Quarters (BAQ) while assigned to the Officer Indoctrination School in Pensacola, Florida, at the rate of \$373.70 per month for the period September 1, 1985, through November 30, 1985. She was actually entitled to BAQ at the rate of \$238.50 from September 1, 1985, through September 13, 1985, and at the reduced rate of \$7.48 per month after occupying government quarters on September 14. Repayment of the \$380.35 overpayment for September is waived since the member did not receive Leave and Earnings Statements (LES) for that period and could not have known that she was being overpaid. Repayment of \$441.29 cannot be waived, however, even though she did not receive an LES, since a member with a number of years of service should have known that her pay should have decreased substantially upon moving into government quarters. The member, therefore, is partially at fault for the overpayment.

Pay

Retirement pay

Amount determination

Computation

Effective dates

A Reserve Officer who is otherwise eligible for retired pay at the age of 60, requests that retirement points earned after the date established for his mandatory removal, but prior to his actual removal from the active Reserve, be credited in computation of his retirement pay. This request is denied unless the officer is retained beyond his mandatory removal date through some affirmative action by the service secretary, or an appropriate official with authority to act for him, intending to retain the member. Unexplained failure to transfer the member from the active Reserve is not an affirmative action by an official with intent to retain the member.

**PROCUREMENT**

**PROCUREMENT** **B-230830.2 Dec. 1, 1988**  
**Sealed Bidding** **88-2 CPD 543**  
**Bids**  
**Responsiveness**  
**Bid guarantees**  
**Expiration**

A bid is considered responsive even though the bid bond expires prior to award due to extensions of the bid acceptance period.

**PROCUREMENT** **B-232125 Dec. 1, 1988**  
**Bid Protests** **88-2 CPD 544**  
**GAO procedures**  
**Protest timeliness**  
**Apparent solicitation improprieties**

Protest alleging deficiencies that were apparent on the face of a request for proposals is untimely where the protest was filed after the closing date for receipt of initial proposals.

Protest alleging deficiencies that were incorporated into the request for proposals during discussions is untimely where the protest was filed after the closing date for receipt of best and final offers.



**PROCUREMENT**

**Competitive Negotiation**

**Best/final offers**

**Oral statements**

**Acceptability**

**B-232125 Con't**

**Dec. 1, 1988**

Contracting agency properly considered and reevaluated only the written revisions the protester made to its proposal after discussions were held where the protester was advised during discussions that issues raised were to be addressed in writing and the agency solicited revisions in its request for a best and final offer. An offeror cannot reasonably expect the agency to evaluate revisions that were discussed orally but which were not received in writing.

**PROCUREMENT**

**Competitive Negotiation**

**Discussion**

**Adequacy**

**Criteria**

Contracting agency engaged in meaningful discussions with the protester where the agency held extensive discussions with the protester on several occasions, pointed out to the protester the areas of its initial proposal that were perceived as deficient, and gave the protester an opportunity to revise its proposal and submit a best and final offer.

**PROCUREMENT** **B-232125 Con't**  
**Competitive Negotiation** **Dec. 1, 1988**  
**Offers**  
**Evaluation errors**  
**Evaluation criteria**  
**Application**

Protest alleging that the contracting agency evaluated offers on requirements that were not stated as evaluation factors in the request for proposals (RFP) is denied where the record shows that the requirements evaluated were set forth in the statement of work and in several other places in the RFP, and the contracting agency properly applied the RFP's evaluation criteria to the work requirements.

**PROCUREMENT**  
**Competitive Negotiation**  
**Requests for proposals**  
**Evaluation criteria**  
**Cost/technical tradeoffs**  
**Technical superiority**

Contracting agency properly decided to award a contract to the offeror of the higher-priced, higher technically rated proposal where: (1) the solicitation emphasized that award would be made on the basis of a combination of price and technical factors; (2) the awardee's proposal received the highest overall weighted evaluation score and price was included in this computation; and (3) the contracting agency reasonably determined that the significantly higher technical merit of the awardee's proposal was worth the additional cost.



**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

**B-232216; B-232216.2 Con't**

**Dec. 1, 1988**

Protest contending that solicitation did not contain evaluation criteria is untimely when not filed until after the final revised closing date.

**PROCUREMENT**

**Competitive Negotiation**

**Requests for proposals**

**Evaluation criteria**

**Sample evaluation**

**Testing**

Contracting agency has discretion to determine degree of testing required to assess compliance with specifications in request for proposals (RFP) and General Accounting Office will disturb agency's determination only where it is shown to be unreasonable. Under RFP for ordnance disposal robots which included provision for testing to determine if robots met various specifications, protester failed to show that contracting agency testing and evaluation procedures were unreasonable where agency physically tested some requirements while verifying other requirements by determining that the proposed robots included components which met the requirements.

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Protest timeliness**

**10-day rule**

**Adverse agency actions**

**B-233568 Dec. 1, 1988**

**88-2 CPD 547**

Protest is untimely when it is filed with the General Accounting Office more than 10 working days after the initial adverse agency action on the protest to the agency.

**PROCUREMENT**  
**Contract Disputes**  
**Shipment costs**  
**Freight charges**

**B-197911.4 Dec. 2, 1988**

The government paid a carrier's charges for transporting a shipment of household goods belonging to an Air Force member, including two items delivered in a damaged condition. The Air Force recovered a portion of the freight charges in addition to the replacement value of the damaged items. The carrier claims refund of the freight charges, contending that an estimate of repair costs shows the items were repairable, and therefore, it earned the freight charges. The Air Force, however, has shown that it is not economically feasible to repair the damaged items because the repair costs exceed the items' replacement value. Thus, the items, in law, were not delivered in specie; therefore, the carrier is not entitled to the freight charges since they were not earned.

**PROCUREMENT**  
**Bid Protests**  
**Non-prejudicial allegation**  
**GAO review**

**B-229831.6 Dec. 2, 1988**  
**88-2 CPD 549**

**PROCUREMENT**  
**Competitive Negotiation**  
**Offers**  
**Evaluation**  
**Personnel**  
**Adequacy**

Where an agency lists unacceptable personnel during discussions with an offeror, but some of those personnel are actually rated "marginal" and other unacceptable personnel are not listed, the offeror is nevertheless not competitively prejudiced by these failures, where its proposal would still be unacceptable, even assuming it received full credit for the unacceptable personnel that were mislabeled or not listed.

**PROCUREMENT** **B-229831.6 Con't**  
**Competitive Negotiation** **Dec. 2, 1988**  
**Discussion**  
**Adequacy**  
**Criteria**

Contracting agency conducted meaningful discussions when it informed the protester that it considered certain resumes of the protester to be unacceptable, even though the agency did not specify why this was the case, because this information reasonably led the protester into the personnel areas of its proposal needing amplification, given the detailed personnel requirements set forth in the RFP.

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

The mere fact that scoring of initial and best and final proposals by different evaluators results in different conclusions as to the quality of an offeror's proposal does not automatically indicate an improper application of the evaluation criteria by any of the evaluators, given the subjective nature of the proposal evaluation process.

**PROCUREMENT** **B-231365.2 Dec. 2, 1988**  
**Bid Protests** **88-2 CPD 550**  
**GAO procedures**  
**Protest timeliness**  
**Deadlines**  
**Constructive notification**

Protest against disclosure of protester's contract price pursuant to Federal Acquisition Regulation notice requirements is untimely where protester knew or should have known about contract price disclosure and participated in competition without protest.



**PROCUREMENT**  
**Competitive Negotiation**  
**Offers**  
**Responsiveness**  
**Applicability**

**B-232234 Con't**  
**Dec. 2, 1988**

Concept of responsiveness generally does not apply to negotiated procurements, and offer that reflected gradual increase in price of battery packs, one component of uninterruptable power systems, over term of multi-year contract, may be accepted notwithstanding solicitation provision stating that such offers will be "nonresponsive," where offer remains low under any interpretation and where protester fails to show that it was prejudiced by acceptance of the offer.

**PROCUREMENT**  
**Bid Protests**  
**GAO procedures**  
**Interested parties**

**B-232238 Dec. 2, 1988**  
**88-2 CPD 553**

Since protester was properly excluded from the competitive range, it is not an interested party to challenge the award.

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

Protest concerning the scoring system set forth in the solicitation is untimely because it was filed after the date set for receipt of proposals.





**PROCUREMENT**  
**Competitive Negotiation**  
**Discussion reopening**  
**Propriety**

**B-233608 Con't**  
**Dec. 2, 1988**

Protest that agency should reopen discussions to allow offeror to shorten its proposal's extended delivery schedule, which was in conflict with the solicitation, is dismissed for failure to state a valid basis for protest since agency is not required to reopen discussions to afford offeror yet another chance to correct its proposal.

**PROCUREMENT**  
**Sealed Bidding**  
**Bids**  
**Responsiveness**  
**Determination criteria**

**B-232248 Dec. 5, 1988**  
**88-2 CPD 557**

Whether in the past contracting agency may have accepted from the awardee supplies which did not conform to specifications, which has not been established, is irrelevant to the issue of whether the awardee's bid was responsive to the current solicitation.

**PROCUREMENT**  
**Sealed Bidding**  
**Bids**  
**Responsiveness**  
**Pre-award samples**  
**Acceptability**

Contracting agency reasonably rejected protester's bid, and accepted another's, based on comparison of bid sample flags' color with the standard referenced in the solicitation.

**PROCUREMENT**

**Sealed Bidding**

**Bids**

**Responsiveness**

**Small business set-asides**

**Compliance**

**B-232248 Con't**

**Dec. 5, 1988**

A bid on a total small business set-aside, indicating that not all end items to be furnished would be produced by small business concerns, is nonresponsive because otherwise the bidder would be free to furnish supplies from a large business and therefore defeat the purpose of the set-aside.

**PROCUREMENT**

**Contractor Qualification**

**Approved sources**

**Qualification**

**Standards**

**B-232265 Dec. 5, 1988**

Where samples and documentation submitted by an unapproved source deviated from the approved design for critical, safety-related flight equipment, and the contracting agency lacks the technical data necessary to assure conformity in all significant respects, it is not unreasonable for the agency to refuse to further consider the proposed product until either the product undergoes testing, or an on-going agency-sponsored reverse engineering effort yields the necessary technical data.

**PROCUREMENT** **B-232363 Dec. 5, 1988**  
**Contractor Qualification 88-2 CPD 559**  
**Approved sources**  
**Information submission**  
**Timeliness**

Award to low-priced, qualified source for critical aviation parts was not unreasonable where the protester failed to furnish an adequate technical data package in support of its source approval request in a sufficiently timely manner to permit the agency to evaluate protester's product and still make an award in time to maintain an adequate spare parts inventory.

**PROCUREMENT** **B-232537 Dec. 5, 1988**  
**Sealed Bidding 88-2 CPD 560**  
**Bid guarantees**  
**Sureties**  
**Acceptability**

Contracting activity reasonably determined that individual sureties on a bid bond were nonresponsible where both sureties failed to disclose an outstanding bid bond obligation and engaged in business practices which reasonably called into question their integrity and the credibility of their representations regarding their financial resources.

**PROCUREMENT** **B-232542 Dec. 5, 1988**  
**Sealed Bidding 88-2 CPD 561**  
**Bid guarantees**  
**Responsiveness**  
**Signatures**  
**Sureties**

Bid bond is not defective even though the individual sureties did not sign the same bond form, since both sureties signed separate bid bonds and executed the required affidavits.

**PROCUREMENT**  
**Sealed Bidding**  
**Bid guarantees**  
**Sureties**  
**Acceptability**

**B-232542 Con't**  
**Dec. 5, 1988**

A bid cannot be rejected as nonresponsive on the basis that individual sureties' affidavits which accompanied the bid bond were defective because the affidavits serve only to assist the contracting officer in determining the responsibility of the sureties.

**PROCUREMENT**  
**Competitive Negotiation**  
**Federal procurement regulations/laws**  
**Applicability**

**B-232560 Dec. 5, 1988**

**88-2 CPD 562**

**PROCUREMENT**  
**Special Procurement Methods/Categories**  
**Requirements contracts**  
**Validity**  
**Determination**

A Department of the Army directive implementing a congressional request that the Army temporarily refrain from awarding photocopy contracts on a cost-per-copy basis does not have the force and effect of law and, therefore, provides no basis to question the validity of an award on a cost-per-copy basis.

**PROCUREMENT**  
**Special Procurement Methods/Categories**  
**Requirements contracts**  
**Validity**  
**Determination**

Requirements contracts to obtain all of various Army installations' photocopier needs are valid contractual arrangements even though there is no maximum limit on the number of copiers the agency may require, because the request for proposals contains the Army's best estimates of the number of copies needed and current monthly usage figures for each installation.

**PROCUREMENT** **B-232560 Con't**  
**Specifications** **Dec. 5, 1988**  
**Minimum needs standards**  
**Total package procurement**  
**Propriety**

An agency decision to procure photocopies and related services on a total package basis was legally unobjectionable where the agency reasonably believed that this method of contracting would allow greater flexibility in redistributing copiers to meet changing agency needs, increase competition for certain categories of copiers, result in savings (administrative costs and managerial time) related to dealing with more than one contractor at each using facility and improve copier operations by unifying all responsibility in a single contractor at each facility.

**PROCUREMENT** **B-233145 Dec. 5, 1988**  
**Bid Protests** **88-2 CPD 563**  
**GAO procedures**  
**Protest timeliness**  
**10-day rule**

Protest that procurement should have been set aside for competition exclusively by Indian firms is untimely and not for consideration on the merits when filed after the closing date for receipt of proposals.

**PROCUREMENT**  
**Socio-Economic Policies**  
**Preferred products/services**  
**American Indians**

Indian firm was not entitled to an award preference under the Buy Indian Act where the solicitation did not so provide.

**PROCUREMENT**

**Bid Protests**

**Agency-level protests**

**Protest timeliness**

**GAO review**

**B-233329.2 Dec. 5, 1988**

**88-2 CPD 564**

Where agency-level protest was not timely filed, subsequent protest to General Accounting Office is untimely.

**PROCUREMENT**

**Contract Management**

**Shipment costs**

**Rates**

**Overcharge**

**Set-off**

**B-231134 Dec. 6, 1988**

One version of a tender supplement received by the General Services Administration (GSA) depot at Fort Worth, Texas, restricted the tender's rates to shipments weighing 20,000 pounds or less. Another version of the same supplement received by the Military Traffic Management Command (MTMC) contained no similar restriction. The GSA depot tendered a shipment weighing 29,600 pounds. The carrier contended that higher tariff rates were applicable because the shipment weighed over 20,000 pounds. The GSA transportation audit determined that the lower tender rates were applicable and collected the difference as overcharges. GSA's audit action is sustained. Since the supplement received by MTMC was offered to the United States Government, without the exclusion of any agency, the lower tender rates were applicable to the shipment tendered by GSA.

**PROCUREMENT**

**B-233323 Dec. 6, 1988**

**Payment/Discharge**

**Shipment**

**Federal procurement regulations/laws**

**Amendments**

**Payment procedures**

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case no. 88-47, a proposal to add FAR subsection 42.1403-3 and a clause at FAR section 52.242-13 concerning the use of contractor-prepaid commercial bills of lading.

**PROCUREMENT**

**B-231578.2 Dec. 7, 1988**

**Bid Protests**

**88-2 CPD 567**

**GAO procedures**

**GAO decisions**

**Reconsideration**

Request for reconsideration is denied where protester essentially reiterates arguments initially raised and fails to show any error of fact or law that would warrant reversal or modification.

**PROCUREMENT**

**B-231789.2 Dec. 7, 1988**

**Sealed Bidding**

**88-2 CPD 568**

**Two-step sealed bidding**

**Bids**

**Responsiveness**

**Prices**

Protest that proposed awardee's step two bid in two-step sealed bid procurement should have been rejected for failure to include cost breakdown for possible future expansion of offered network system is denied where the estimates were requested to be included in step one proposals solely for informational purposes and were not to be used in evaluation of step two bids.



**PROCUREMENT**

**B-231789.2 Con't**

**Sealed Bidding**

**Dec. 7, 1988**

**Two-step sealed bidding**

**Responsiveness**

**Terms**

**Deviation**

Bidder's failure to furnish, in step one proposal or step two bid, block diagrams of its proposed network system as requested in step one solicitation, may be waived by the agency where requirement was not relevant to bid evaluation and where bidder submitted detailed narrative technical description of its system that was sufficient to determine how bidder intended to comply with the government's requirements.

**PROCUREMENT**

**B-228233.2 Dec. 8, 1988**

**Bid Protests**

**88-2 CPD 570**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

Protest allegations that: (1) initial solicitation omitted required terms, (2) restrictive provisions were added to solicitation, (3) proposal acceptance periods had expired and (4) procurement was repeatedly delayed by requests for best and final offers and proposal acceptance period extensions, are dismissed as untimely when protester competes under solicitation without objection and files protest after award.

**PROCUREMENT** **B-228233.2 Con't**  
**Competitive Negotiation** **Dec. 8, 1988**  
**Requests for proposals**  
**Evaluation criteria**  
**Cost/technical tradeoffs**  
**Price competition**

Protest that agency improperly evaluated proposals is denied where agency explains that it proposes to make award to firm that submitted the technically acceptable proposal with the lowest evaluated cost and protester does not respond to agency's position on the issue and it appears from the record that agency evaluated proposals properly.

**PROCUREMENT** **B-232330 Dec. 8, 1988**  
**Competitive Negotiation**  
**Contracting officer duties**  
**Communications**  
**Contractors**  
**Adequacy**

**PROCUREMENT**  
**Special Procurement Methods/Categories**  
**Service contracts**  
**Wage rates**  
**Computation**  
**Collective bargaining agreements**

Where contracting agency incorporated into its solicitation latest Department of Labor wage determination which includes a provision notifying offerors that the wage determination specifies only minimum wages and benefits and that awardee will be required to comply with the collective bargaining agreement, agency has done all that is required to insure that incumbent contractor subject to a collective bargaining agreement is not prejudiced by its status.

**PROCUREMENT**  
Special Procurement  
Methods/Categories  
Service contracts  
Wage rates  
GAO review

**B-232330 Con't**  
**Dec. 8, 1988**

General Accounting Office does not review the accuracy of wage rate determinations issued by the Department of Labor in connection with solicitations subject to the Service Contract Act. A challenge to such a wage determination should be processed through the administrative procedures established by the Department of Labor.

**PROCUREMENT**  
Bid Protests  
GAO procedures  
Preparation costs

**B-232711 Dec. 8, 1988**  
**88-2 CPD 573**

**PROCUREMENT**  
Competitive Negotiation  
Quotations  
Preparation costs

Where an agency finds an offeror nonresponsible and improperly fails to refer the matter to the Small Business Administration, the offeror is entitled to recover costs of preparing its quotation and pursuing its protest.

**PROCUREMENT** **B-232711 Con't**  
**Socio-Economic Policies** **Dec. 8, 1988**  
**Small businesses**  
**Responsibility**  
**Competency certification**  
**Negative determination**

Under the Small Business Act, contracting agency was required to refer its nonresponsibility determination regarding small business offeror to the Small Business Administration for certificate of competency consideration even though the solicitation was issued under small purchase procedures.

**PROCUREMENT** **B-232989 Dec. 8, 1988**  
**Sealed Bidding** **88-2 CPD 574**  
**Invitations for bids**  
**Amendments**  
**Acknowledgment**  
**Responsiveness**

Bid which fails to acknowledge material amendment must be rejected as nonresponsive. Agency may not waive failure to acknowledge as minor informality where amendment imposes substantially different performance obligations on contractor which have a potentially significant impact on price.

**PROCUREMENT** **B-233576 Dec. 8, 1988**  
**Contract Management** **88-2 CPD 575**  
**Contract administration**  
**Options**  
**Use**  
**GAO review**

Contracting agency's decision not to exercise an option involves a matter of contract administration that the General Accounting Office does not review.



**PROCUREMENT**  
**Bid Protests**  
**GAO procedures**  
**GAO decisions**  
**Reconsideration**

**B-232086.2; B-232087.2 Con't**  
**Dec. 9, 1988**

**PROCUREMENT**  
**Bid Protests**  
**GAO procedures**  
**Information submission**  
**Timeliness**

General Accounting Office Bid Protest Regulations do not permit a piecemeal presentation of evidence, information or analysis. Where protester presents no evidence that the information on which it bases its reconsideration request could not have been presented prior to the closing of the original protest record, the request for reconsideration will not be considered.

**PROCUREMENT**  
**Bid Protests**  
**GAO procedures**  
**Purposes**  
**Competition enhancement**

An agency's attempt to increase the number of offerors is consistent with the Competition in Contracting Act's mandate that agencies obtain full and open competition.

**PROCUREMENT**  
**Bid Protests**  
**Moot allegation**  
**GAO review**

**B-232130.2; B-232130.3**  
**Dec. 9, 1988**  
**88-2 CPD 577**

Protest alleging that the contracting agency improperly included another offeror's proposal in the competitive range is academic where the contracting agency properly canceled the original solicitation.

**PROCUREMENT**                      **B-232130.2; B-232130.3 Con't**  
**Competitive Negotiation**      **Dec. 9, 1988**  
**Requests for proposals**  
**Cancellation**  
**Justification**  
**GAO review**

Contracting agency's decision to cancel a request for proposals for supplying batteries was reasonable where: (1) the solicitation contained an obsolete drawing with the incorrect dimensions that overstated the agency's minimum needs; and (2) the passage of many months in connection with lengthy negotiations and bid protest caused approximately one-third of the required quantity to be needed on an emergency basis, thus requiring an accelerated delivery schedule for that portion of the total requirement.

**PROCUREMENT**                      **B-232571 Dec. 9, 1988**  
**Competitive Negotiation**      **88-2 CPD 578**  
**Offers**  
**Late submission**  
**Acceptance criteria**  
**Government mishandling**

Government mishandling was not the sole reason for the late receipt of bid received at installation prior to bid opening where bid envelope was not marked with information clearly identifying it as a bid and, as a result, the bid was transported to the bid opening site by the agency's regular mail delivery, rather than by expedited mail delivery; the bid therefore was properly rejected as late.

**PROCUREMENT** B-233044 Dec. 9, 1988  
Special Procurement 88-2 CPD 579  
Methods/Categories  
Architect/engineering services  
Contract awards  
Administrative discretion

Protest that evaluation criteria for award of architect-engineer (A-E) contract were not followed because agency should have given primary consideration to a firm's close proximity to project work site is without merit where evaluation criteria ranked location of a firm as fourth in importance and agency evaluated firms consistent with this announced criteria. To the extent that the protest challenges the ranking of the evaluation criteria, it is untimely since the ranking was apparent from the Commerce Business Daily announcement and the protest was filed after the closing date specified for the receipt of the qualification statements of the A-E firms.

**PROCUREMENT** B-232187 Dec. 12, 1988  
Noncompetitive Negotiation 88-2 CPD 580  
Contract awards  
Sole sources  
Propriety

Protest is sustained where an agency obtained support services from a contractor on a noncompetitive basis without proper justification and approval.



**PROCUREMENT**

**B-232217 Dec. 12, 1988**

**Bid Protests**

**Bias allegation**

**Allegation substantiation**

**Burden of proof**

Disparity in scores between evaluators does not alone signify that the evaluation of proposals was unreasonable or biased where there is no evidence in the record to suggest that the technical scoring by the individual evaluators reflected anything other than their reasonable judgments as to the relative merits of a given proposal.

**PROCUREMENT**

**Competitive Negotiation**

**Contract awards**

**Propriety**

**Evaluation errors**

**Materiality**

Fact that agency may have utilized incorrect evaluation criteria during evaluation of initial proposals does not provide a basis upon which to sustain protest where protester was included in the competitive range based on initial evaluation, and evaluation of best and final offers was conducted in accordance with criteria set forth in solicitation, thereby forming a proper basis for award.

**PROCUREMENT** **B-232217 Con't**  
**Competitive Negotiation** **Dec. 12, 1988**  
**Discussion**  
**Adequacy**  
**Criteria**

Contention that discussions were inadequate because agency officials failed to warn offeror of possible effects of the voluntary restructuring of its initial proposal is denied where initial proposal was not deficient and agency officials had no reason to anticipate that offeror would revise its technical approach to its detriment during its preparation of a best and final offer.

**PROCUREMENT**  
**Competitive Negotiation**  
**Offers**  
**Evaluation**  
**Downgrading**  
**Propriety**

**PROCUREMENT**  
**Competitive Negotiation**  
**Offers**  
**Evaluation**  
**Personnel experience**

Agency properly discounted proposed contributions of one designated key employee under evaluation criterion pertaining to qualifications of personnel where offeror simply stated that this employee would devote a certain percentage of time to the contract without also defining the employee's duties and responsibilities.



**PROCUREMENT** B-232392.2 Con't  
Contractor Qualification Dec. 12, 1988  
Responsibility  
Contracting officer findings  
Negative determination  
Pre-award surveys

Protest of rejection of protester's low offer is denied where it has not been shown that contracting officer's determination that the protester was not a responsible prospective contractor, based on a negative preaward survey report, was without any reasonable basis.

**PROCUREMENT** B-232430 Dec. 12, 1988  
Sealed Bidding 88-2 CPD 583  
Invitations for bids  
Cancellation  
Justification  
Price reasonableness

Contracting officer's rejection of sole responsive bid on the basis of unreasonable price, resulting in the cancellation of the solicitation, was proper where the bid was 33 to 42 percent higher than the prices paid for the equipment under the bidder's own recent contract and market conditions were found not to justify such an increase.

**PROCUREMENT** B-232879 Dec. 12, 1988  
Contract Management 88-2 CPD 584  
Convenience termination  
Justification  
Unbalanced bids

A contracting agency's determination to terminate the protester's contract as improperly awarded is reasonable where the protester's offer for a 1-year base period and 3 option years is materially unbalanced, since there is reasonable doubt that the offer--which has a substantially front-loaded base period price and does not become low until well into the last option year--would result in the lowest ultimate cost to the government.



**PROCUREMENT** B-231411.2; B-231411.3  
Sealed Bidding Dec. 13, 1988  
Invitations for bids 88-2 CPD 587  
Amendments  
Acknowledgment  
Responsiveness

Prior decision sustaining a protest over the rejection of a bid for failure to acknowledge an amendment is affirmed where the record does not show that the amendment's substantial reduction in the annual estimated production quantity was material so that the failure to acknowledge the amendment was prejudicial to other bidders.

**PROCUREMENT** B-232190; B-232190.2  
Contract Management Dec. 13, 1988  
Contract administration 88-2 CPD 588  
Contract terms  
Compliance  
GAO review

An offeror's actual compliance with restriction on the acquisition of foreign machine tools certifications is a matter of contract administration for determination by the agency, not the General Accounting Office.

**PROCUREMENT**  
Contractor Qualification  
Responsibility  
Contracting officer findings  
Affirmative determination  
GAO review

Experience of an offeror is a matter of responsibility and where contracting officer makes an affirmative responsibility determination, our Office does not review such determination except under limited circumstances not present here.



**PROCUREMENT**

**Sealed Bidding**

**Two-step sealed bidding**

**Offers**

**Discussion**

**Adequacy**

**B-232276 Con't**

**Dec. 13, 1988**

Discussions were meaningful where agency's clarifying questions accurately communicated the concerns of the evaluation board and led the protester to the areas of its proposal in need of amplification.

**PROCUREMENT**

**Sealed Bidding**

**Two-step sealed bidding**

**Offers**

**Evaluation**

**Personnel experience**

Agency properly sought data concerning operational experience with proposed new technology, under the first step of a two-step sealed bid procurement, in order to determine the technology's acceptability.

**PROCUREMENT**

**Sealed Bidding**

**Two-step sealed bidding**

**Offers**

**Rejection**

**Propriety**

Rejection of proposal under the first step of a two-step sealed bid procurement was reasonable, where protester proposed using a new technology previously employed only on smaller scale projects, the protester lacked data necessary to establish the technology's ability to comply with the government's time constraints and production requirements, and changes needed to make proposal competitive would have constituted a major revision to the original proposal.



**PROCUREMENT** B-232670 Dec. 14, 1988  
Sealed Bidding 88-2 CPD 591  
Bids  
Responsiveness  
Compliance certification

**PROCUREMENT**  
Sealed Bidding  
Bids  
Responsiveness  
Descriptive literature  
Adequacy

Bidder's failure to certify that bid is not based on applying paint by spray method does not render bid nonresponsive where contract requires the application of liquid roof sealant but does not require any painting.

**PROCUREMENT** B-227865.4 Dec. 15, 1988  
Competitive Negotiation 88-2 CPD 594  
Contract awards  
Transportation contracts  
Propriety

Protest against contract award of ocean transportation services for military preference cargo on the ground that awardee, a U.S. flag carrier, violated its certificate of independent price determination because of a cooperative working agreement with two foreign flag carriers, which includes a restriction in the charter arrangements of the awardee's vessels to those foreign flag carriers on the carriage of preference cargo, is denied where the Maritime Administration specifically required enforcement of the restriction in granting its approval of the charters under the Shipping Act of 1916, 46 U.S.C. App. § 808 (Supp. III 1985), and the Federal Maritime Commission declined to investigate the agreement under the Shipping Act of 1984, 46 U.S.C. App. § 1709 (Supp. III 1985).

**PROCUREMENT**

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

**B-231913.2 Dec. 15, 1988**  
**88-2 CPD 595**

Prior decision dismissing protest as untimely is affirmed where protester does not show that the decision was factually or legally incorrect.

**PROCUREMENT**

**Bid Protests**  
**Subcontracts**  
**GAO review**

**B-233314.2; B-233315.2**  
**Dec. 15, 1988**  
**88-2 CPD 597**

Prior dismissals of protests alleging that subcontracts for foreign products awarded by a government prime contractor were improper are affirmed since even if the government directed the selection of the subcontractors as alleged, the subcontract awards were not made by or for the government.

**PROCUREMENT**

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

**B-228702 Dec. 16, 1988**

A timely notice of loss or damage to a carrier need not contain specific, itemized exceptions to a delivery receipt in order for a subsequent, detailed claim to establish a prima facie case of liability against the carrier. Where the Navy identifies lost articles of household goods with specific, line-item numbers corresponding to the Descriptive Inventory produced by the carrier at the origin of the shipment, flaws in the government's claims process and minor discrepancies in the manner in which the claim is presented to the carrier do not defeat the prima facie case of carrier liability. Thus, the denial of a carrier's claim for refund of an amount the Navy set off for loss and damage is sustained.

**PROCUREMENT**  
**Sealed Bidding**  
**Bids**

**B-232630 Dec. 16, 1988**  
**88-2 CPD 598**

**Responsiveness**  
**Certification**  
**Omission**

Failure to furnish nonmaterial representations and certifications in a bid does not render the bid nonresponsive.

**PROCUREMENT**  
**Bid Protests**

**B-230224.2 Dec. 19, 1988**  
**88-2 CPD 599**

**GAO procedures**  
**Protest timeliness**  
**Apparent solicitation improprieties**

Protests involving alleged apparent solicitation defects are untimely filed with the General Accounting Office when initially filed months after closing date for proposals. Alleged earlier oral protests to contracting agency involving some of defects are not recognized under Federal Acquisition Regulation, 48 C.F.R. § 33.101 (1988).

**PROCUREMENT**

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

Exclusion of proposal from competitive range was reasonable where proposed equipment did not comply, at a minimum, with critical specification requirements.

**PROCUREMENT**

**B-232291 Dec. 19, 1988**

**Bid Protests**

**88-2 CPD 600**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

Protest of alleged solicitation defects, apparent on the face of the solicitation, is untimely when filed after receipt of initial proposals.

**PROCUREMENT**

**Competitive Negotiation**

**Offers**

**Competitive ranges**

**Exclusion**

**Administrative discretion**

Protest that offeror was improperly excluded from the competitive range is denied where agency reasonably concluded that the offeror's proposal was technically unacceptable and could not be made acceptable through discussions.

**PROCUREMENT**

**B-232564 Dec. 19, 1988**

**Sealed Bidding**

**88-2 CPD 601**

**Invitations for bids**

**Amendments**

**Acknowledgment**

**Responsiveness**

Protest against procuring agency's decision to reject the protester's bid as nonresponsive for failing to acknowledge two amendments to the solicitation is without merit where the amendments were material and there was sufficient time to consider and acknowledge them.



**PROCUREMENT**  
**Bid Protests**  
**Non-prejudicial allegation**  
**GAO review**

**B-230736.6 Con't**  
**Dec. 20, 1988**

Protest that agency did not comply with regulations concerning preaward notices to unsuccessful offerors is without merit where the protester fails to show that it was prejudiced by the agency's failure to provide the required preaward notices.

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

After conducting two rounds of discussions with offeror, agency properly determined that offeror was no longer in the competitive range since its proposal was found technically unacceptable based on agency's evaluation which was supported by reasonable bases.

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

**B-232651 Dec. 20, 1988**  
**88-2 CPD 606**

New and independent grounds of protest first raised in protester's comments on the agency's report are dismissed as untimely; under Bid Protest Regulations, protest of alleged improprieties apparent on the face of the request for proposals should have been filed by closing date for receipt of proposals, and protest that awardee's price was unreasonable had to be filed within 10 working days after protester knew of award price.

**PROCUREMENT**  
**Competitive Negotiation**  
**Contract awards**  
**Propriety**

**B-232651 Con't**  
**Dec. 20, 1988**

Protest that award improperly was made on basis differing from that set forth in the solicitation is denied where contract in fact incorporates the same specifications contained in solicitation, and the agency represents that no waivers or deviations from the specifications have been requested or granted since award.

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

**B-233195 Dec. 20, 1988**  
**88-2 CPD 607**

Protest that agency miscalculated protester's technical proposal, rated lowest of those received, in excluding the firm from the competitive range is denied where protester's price was so much higher than any other offeror's and the government estimate that the firm had no reasonable chance at the award irrespective of technical considerations.

**PROCUREMENT** **B-232260 Dec. 21, 1988**  
**Competitive Negotiation** **88-2 CPD 608**  
**Contract awards**  
**Propriety**  
**Specifications**  
**Defeats**

**PROCUREMENT**  
**Specifications**  
**Defeats**  
**Post-award error allegation**

Where an agency makes an award of a trailer contract based upon a tire specification which the agency should have known was defective, the protester is prejudiced, where its offer is only \$225 higher than the awardee's offer and the differences between the prices for the specified tires and the adequate tires exceeds \$225.

**PROCUREMENT** **B-232295 Dec. 21, 1988**  
**Bid Protests** **88-2 CPD 609**  
**Lobbying**

Attempts at political influence on behalf of the awardee do not warrant legal objection to the contract award where record fails to show that those attempts resulted in any action which unfairly affected the protester's competitive position.

**PROCUREMENT**  
**Competitive Negotiation**  
**Discussion reopening**  
**Propriety**

Agency did not abuse its discretion in not reopening negotiations after the receipt of best and final offer (BAFO) in which a major subcontractor was substituted where the BAFO contained sufficient information upon which the selection decision could be made.





**PROCUREMENT**  
**Bid Protests**  
**Lobbying**

**B-232295.2 Dec. 21, 1988**  
**88-2 CPD 610**

Attempts at political influence on behalf of the awardee do not warrant legal objection to the contract award where record fails to show that those attempts resulted in any action which unfairly affected the protester's competitive position.

**PROCUREMENT**  
**Competitive Negotiation**  
**Discussion**  
**Adequacy**  
**Criteria**

In order to conduct meaningful discussions the agency need not point out that offeror's technically acceptable approach was relatively less desirable than others received.

**PROCUREMENT**  
**Competitive Negotiation**  
**Requests for proposals**  
**Evaluation criteria**  
**Cost/technical tradeoffs**  
**Technical superiority**

Objections concerning the evaluation of proposals are without legal merit where they either are not supported by the record or do not concern matters which were significant to the final selection decision, and the selection of the awardee on the basis of its overall technical superiority and low risk notwithstanding its higher price is not objectionable where it is adequately explained in the evaluation documents and has not been shown to be unreasonable.

**PROCUREMENT**

**B-232574 Dec. 21, 1988**

**Bid Protests**

**88-2 CPD 611**

**GAO procedures**

**Protest timeliness**

**10-day rule**

Where agency-level protest that awardee is not an approved source as required by solicitation was filed with the contracting agency more than 10 days after the protester knew or should have known basis of protest and thus was untimely, subsequent protest to General Accounting Office on same ground also is untimely.

**PROCUREMENT**

**Competitive Negotiation**

**Requests for proposals**

**First-article testing**

**Waiver**

**Administrative determination**

Protest of agency's decision not to waive a first article testing requirement is denied where the 9-year old first article test report submitted in support of waiver request was for a product manufactured under a different process with a different design at different facilities for a predecessor company, and the other first article test reports submitted were for smaller or larger products, were tested by other agencies, and may not have been for a product identical to the product requested.

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Administrative reports**

**Comments timeliness**

**B-233084.2 Dec. 21, 1988**

**88-2 CPD 613**

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**GAO decisions**

**Reconsideration**

Dismissal of protest for failure to file comments on agency report in timely manner is affirmed on reconsideration where, despite notice of its responsibility for doing so, protester did not notify General Accounting Office of late receipt of agency report within 10 working days after report was due.

**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Protest timeliness**

**Significant issue exemptions**

**Applicability**

**B-233449.2 Dec. 21, 1988**

**88-2 CPD 614**

The General Accounting Office (GAO) will not consider the merits of an untimely protest under the significant issue exception to GAO's timeliness requirements where the issues raised are not matters of first impression or of widespread interest to the procurement community.



**PROCUREMENT** B-232361 Con't  
**Competitive Negotiation** Dec. 22, 1988  
**Offers**  
**Risks**  
**Pricing**

Agency properly rejected protester's offer as representing an unacceptable cost risk to the government where protester offered disproportionate prices for various labor categories, thereby creating an incentive to develop the task orders under the contract in such a way as to minimize the use of labor in a certain category and to maximize the use of other categories.

**PROCUREMENT** B-232411 Dec. 22, 1988  
**Socio-Economic Policies** 88-2 CPD 618  
**Small business 8(a) subcontracting**  
**Administrative regulations**  
**Compliance**  
**GAO review**

**PROCUREMENT**  
**Socio-Economic Policies**  
**Small business 8(a) subcontracting**  
**Technical evaluation boards**  
**Propriety**

The use of a technical review panel in conjunction with a procurement under section 8(a) of the Small Business Act is not inconsistent with the rules governing such procurements.



**PROCUREMENT** B-232633 Con't  
**Contractor Qualification Dec. 22, 1988**  
**Responsibility/responsiveness distinctions**

Firm's noncompliance with solicitation provision calling for Food and Drug Administration approval is a matter of the firm's responsibility, and agency's rejection of bid as nonresponsive instead of making responsibility determination (and referring any negative responsibility determination to the Small Business Administration for Certificate of Competency review) was improper.

**PROCUREMENT** B-232813 Dec. 22, 1988  
**Sealed Bidding 88-2 CPD 620**  
**Invitations for bids**  
**Amendments**  
**Acknowledgment**  
**Waiver**

Bidder's failure to acknowledge invitation for bids amendment providing that contractor would be responsible for cost of work involved in relocating a gas meter may be waived where provision merely clarified existing requirements in the solicitation and thus had no material effect on the procurement.

**PROCUREMENT** B-233746 Dec. 22, 1988  
**Sealed Bidding 88-2 CPD 621**  
**Bids**  
**Bid guarantees**  
**Omission**  
**Responsiveness**

A bid which does not comply with a solicitation requirement for a bid guarantee must be rejected as nonresponsive where none of the exceptions for rejection provided in the regulations are applicable.



**PROCUREMENT**

**B-232494 Dec. 23, 1988**

**Small Purchase Method**

**88-2 CPD 622**

**Competition**

**Use**

**Criteria**

Protest that award using small purchase procedures was improper because the procuring agency allegedly made award on a different basis than orally negotiated is denied where the protester mistakenly concluded that preliminary inquiry with it to determine minimum needs made by unauthorized procuring officials constituted oral negotiations.

**PROCUREMENT**

**B-233014 Dec. 23, 1988**

**Contractor Qualification**

**88-2 CPD 623**

**Responsibility**

**Contracting officer findings**

**Negative determination**

**Criteria**

Procuring agency reasonably found bidder was nonresponsible where bidder failed to provide sufficient information to establish financial acceptability of proposed individual sureties.

**PROCUREMENT**

**Sealed Bidding**

**Bid guarantees**

**Sureties**

**Acceptability**

**Information submission**

Although an agency may allow a prospective awardee a reasonable time period after bid opening to cure a problem related to the responsibility of a proposed surety, it is not obligated to delay award indefinitely while bidder attempts to cure the problem.

**PROCUREMENT**

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

**B-231097.2 Dec. 27, 1988**  
**88-2 CPD 624**

Request for reconsideration that reiterates previously considered arguments does not provide a basis for reconsideration of our original decision.

**PROCUREMENT**

**Bid Protests**  
**Allegation**  
**Abandonment**

**B-231966.2 Dec. 27, 1988**  
**88-2 CPD 625**

Where agency responds to issue raised by protester in its original letter of protest and protester does not attempt to rebut agency position in its comments, General Accounting Office will view issue as abandoned.

**PROCUREMENT**

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

Protest that agency requirement for a bumpless defrost system identified during negotiations exceeds agency's minimum needs is dismissed as untimely where not filed prior to the next closing date for receipt of proposals following the discussions.



**PROCUREMENT**

**Bid Protests**

**GAO procedures**

**Protest timeliness**

**Apparent solicitation improprieties**

**B-232608 Con't**

**Dec. 27, 1988**

Protest that specifications in invitation for bids are unduly restrictive of competition is untimely where it is not filed before bid opening date.

**PROCUREMENT**

**Contract Management**

**Contract administration**

**Domestic products**

**Compliance**

**GAO review**

Protest that awardee may not comply with the Buy American Act involves a matter of contract administration and is not for consideration under General Accounting Office's bid protest function.

**PROCUREMENT**

**Sealed Bidding**

**Bids**

**Responsiveness**

**Additional information**

**Post-bid opening periods**

Bid properly found to be nonresponsive at bid opening may not be made responsive by subsequent additions or corrections since responsiveness is determined as of bid opening.

**PROCUREMENT**  
**Sealed Bidding**  
**Bids**

**B-232608 Con't**  
**Dec. 27, 1988**

**Responsiveness**  
**Determination criteria**

Contracting agency properly found protester's bid to be nonresponsive where it did not comply with the terms and conditions of the invitation for bids. Protester is not permitted to correct and explain its nonresponsive bid after bid opening.

**PROCUREMENT**  
**Bid Protests**

**B-232661 Dec. 27, 1988**  
**88-2 CPD 627**

**GAO procedures**  
**Protest timeliness**  
**Apparent solicitation improprieties**

Protest alleging a defect in specifications, filed after the protester's bid was rejected as nonresponsive, is untimely because, under the General Accounting Office Bid Protest Regulations, protests of alleged improprieties in a solicitation which are apparent prior to bid opening are required to be filed before bid opening.

**PROCUREMENT**  
**Sealed Bidding**  
**Bids**

**Responsiveness**  
**Pre-award samples**  
**Acceptability**

Where a bidder states that it intends to provide a product that will not meet the solicitation's specifications and provides nonconforming samples for evaluation, the contracting officer properly rejected the bid.

**PROCUREMENT** **B-233783 Dec. 27, 1988**  
**Bid Protests** **88-2 CPD 628**  
**GAO procedures**  
**Interested parties**  
**Direct interest standards**

Protest by firm not in line for the award if the protest were sustained is dismissed, since the protester does not have the requisite direct interest in the contract award to be considered an interested party under General Accounting Office Bid Protest Regulations.

**PROCUREMENT** **B-233858 Dec. 27, 1988**  
**Sealed Bidding** **88-2 CPD 629**  
**Bids**  
**Responsiveness**  
**Acceptance time periods**  
**Deviation**

Where a bid offers a minimum bid acceptance period of 10 days in response to a sealed bid solicitation requiring 90 days, the bid is nonresponsive and must be rejected despite the bidder's contention that it intended to offer 100 days.

**PROCUREMENT** **B-232334; B-232334.2**  
**Competitive Negotiation** **Dec. 28, 1988**  
**Contract awards** **88-2 CPD 630**  
**Administrative discretion**  
**Technical equality**  
**Cost savings**

Where an agency reasonably finds that a slightly higher technical point score in the evaluation does not represent actual technical superiority, the agency may determine the proposals are essentially equal, such as to allow the agency to make award on the basis of cost.



**PROCUREMENT** **B-232334; B-232334.2 Con't**  
**Competitive Negotiation** **Dec. 28, 1988**  
**Offers**  
**Evaluation**  
**Technical equality**  
**Cost realism**

Technically equal proposals may be evaluated as having very different realistic costs.

**PROCUREMENT** **B-233104 Dec. 28, 1988**  
**Bid Protests** **88-2 CPD 631**  
**GAO procedures**  
**Interested parties**  
**Direct interest standards**

Where firm would not be in line for award were its protest sustained, protest is dismissed since firm does not have the required direct interest in the contract award to be considered an interested party under General Accounting Office's Bid Protest Regulations.

**PROCUREMENT**  
**Contractor Qualification**  
**Responsibility**  
**Contracting officer findings**  
**Affirmative determination**  
**GAO review**

Protest that awardee will be unable to perform computer maintenance contract, because it allegedly cannot acquire protester's proprietary hardware and software and does not have qualified employees as required by the solicitation, concerns matters of responsibility. The General Accounting Office will not review affirmative determinations of responsibility except in certain limited circumstances not applicable here.



**PROCUREMENT**

B-233106 Dec. 28, 1988

**Contract Management**

88-2 CPD 632

**Contract performance**

**GAO review**

The question of whether protester's performance deficiencies were excusable is a matter of contract administration which General Accounting Office does not consider under our Bid Protest Regulations.

**PROCUREMENT**

**Contractor Qualification**

**Responsibility**

**Contracting officer findings**

**Negative determination**

**Criteria**

Nonresponsibility determination may be based upon contracting agency's reasonable perception of inadequate performance even where the protester disputes the agency's interpretation of the facts.

**PROCUREMENT**

**Contractor Qualification**

**Responsibility**

**Contracting officer findings**

**Negative determination**

**Effects**

Agency's nonresponsibility determinations with respect to two prospective contracts does not amount to de facto suspension or debarment, because a finding of nonresponsibility unlike a debarment does not prevent a firm from competing for other government contracts and receiving awards if the firm is otherwise qualified and convinces the agency that it has corrected its past problems.

**PROCUREMENT**  
**Payment/Discharge**  
**Payment priority**  
**Subcontractors**

**B-231719 Dec. 29, 1988**  
**88-2 CPD 633**

The Army Corps of Engineers may distribute contract retainage to unpaid subcontractors if both the subcontractors and the primary contractor agree to an indemnity agreement which warrants that there are no other creditors and which calls for immediate repayment of contract retainage to the Government upon discovery of others who may have equitable claims. This approach satisfies the requirement that the rights of all parties be adequately determined prior to payment from any contract retainage.

**PROCUREMENT**  
**Specifications**  
**Ambiguity allegation**  
**Specification interpretation**

**B-232388 Dec. 29, 1988**  
**88-2 CPD 634**

Protest against numerous provisions of solicitation as being ambiguous or vague such that a bidder could not adequately prepare its bid is denied where review of each provision shows intent of agency was clear from solicitation.

**PROCUREMENT**  
**Specifications**  
**Minimum needs standards**  
**Competitive restrictions**  
**Justification**  
**Sufficiency**

Protest against experience requirements in solicitation for window restoration as being overly restrictive is denied where agency has justified restriction because of historical nature of building and fact that building will be occupied while contract is ongoing.

**PROCUREMENT**

**B-232702 Dec. 29, 1988  
88-2 CPD 636**

**Bid Protests  
GAO procedures  
Preparation costs**

**PROCUREMENT**

**Competitive Negotiation  
Quotations  
Preparation costs**

Protester is entitled to recover the cost of filing and pursuing its protest, including reasonable attorneys' fees, as well as its quotation preparation costs, where the protester was improperly denied a fair opportunity to compete for award.

**PROCUREMENT**

**Contractor Qualification  
Approved sources  
Alternate sources  
Approval  
Government delays**

Protest is sustained where agency's unreasonable delay in processing source approval request prevented protester from becoming qualified in time to receive award under request for quotations for helicopter part.

**PROCUREMENT**

**B-232759.2 Dec. 29, 1988  
88-2 CPD 637**

**Bid Protests  
GAO procedures  
Administrative reports  
Comments timeliness**

Decision to dismiss protest because protester failed to submit timely comments on the agency report is affirmed where protester's comments were filed later than 7 days after the conference date.

**PROCUREMENT** **B-233008 Dec. 29, 1988**  
**Contractor Qualification 88-2 CPD 638**  
**Responsibility/responsiveness distinctions**  
**Sureties**  
**Financial capacity**

Even though each individual surety proposed by a low bidder failed to disclose a single bond obligation for low bid submitted 5 days earlier under a different solicitation, as required by item 10 of the Standard Form 28, "Affidavit of Individual Surety," a contracting officer cannot automatically reject the bid, since what is involved is a matter of bidder responsibility, not bid responsiveness. Since there is no indication that sureties intentionally failed to list recent bond obligation's or that pattern of nondisclosure exists, nondisclosure does not alone support nonresponsibility determination.

**PROCUREMENT** **B-233147 Dec. 29, 1988**  
**Competitive Negotiation 88-2 CPD 639**  
**Contract awards**  
**Propriety**

Contention that contracting agency improperly made award under request for proposals (RFP) to a higher priced, higher rated offeror is without merit since there is no requirement to make award in a negotiated procurement on the basis of price where the RFP does not so provide and since protester's lower-priced offer was not in the competitive range and therefore ineligible for award.

Protest that the contracting agency acted in bad faith by failing to award a contract for videotape production to the protester on the basis of a videotape that was previously judged acceptable, thereby entitling protester to be placed on a Qualified Producers List, is without merit because inclusion on the list merely entitles the protester to receive copies of solicitations, not contract award.



**PROCUREMENT** **B-232501 Dec. 30, 1988**  
**Competitive Negotiation 88-2 CPD 642**  
**Discussion**  
**Determination criteria**

Agency's communications after submission of best and final offers (BAFOs) with the awardee to confirm the agency's understanding of matters that were already contained in the proposal did not constitute discussions since agency did not permit revision of the awardee's BAFO.

**PROCUREMENT**  
**Competitive Negotiation**  
**Unbalanced offers**  
**Materiality**  
**Determination**  
**Criteria**

Protest that cost figures in model contract submitted with best and final offer were unbalanced is without merit since these costs were not evaluated and did not affect the award selection decision.

**PROCUREMENT**  
**Contractor Qualification**  
**Organizational conflicts of interest**  
**Allegation substantiation**  
**Evidence sufficiency**

Protest that contracting agency abused its discretion by failing to exclude awardee from competition because of an alleged organizational conflict of interest involving its proposed subcontractor is without merit where the record shows that the proposed subcontractor was later eliminated from the awardee's proposal and the proposed subcontractor was not involved in any matter which would have given the awardee an unfair competitive advantage.

**PROCUREMENT**

**B-233176 Dec. 30, 1988**

**Socio-Economic Policies**

**Small businesses**

**Responsibility**

**Competency certification**

**Negative determination**

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 application for a certificate of competency with the Small Business Administration.

**MISCELLANEOUS TOPICS**

**MISCELLANEOUS TOPICS                    B-228982   Dec. 16, 1988**  
**Environment/Energy/Natural Resources**  
**Regulatory agencies**  
**Enforcement**  
**Administrative discretion**

The former Administrator of the Department of Energy's Economic Regulatory Administration exercised his administrative discretion in deciding to withdraw a draft Proposed Remedial Order without litigation, contrary to the recommendation of his staff. We recognize that making such a decision is within the discretionary authority of the former Administrator, but in our view the administrative process would have been better served in this instance if his written statements had provided an explanation of which arguments raised by Fina were so persuasive as to outweigh his own attorneys' assessment of the merits of the case, or a rebuttal of the specific evidence and legal arguments presented by ERA staff that he felt lacked credibility.

**MISCELLANEOUS TOPICS                    B-223608   Dec. 19, 1988**  
**Federal Administrative/Legislative Matters**  
**Administrative agencies**  
**Advisory opinions**  
**GAO procedures**  
**Evidence**

The original voucher need no longer be submitted along with a request for an advance decision. A photocopy of the voucher will be sufficient, with the original to be retained by the appropriate finance office.



MISCELLANEOUS TOPICS            B-208593.6   Dec. 22, 1988  
Environment/Energy/Natural Resources  
Environmental protection  
Air quality  
Standards  
Enforcement

GAO reaffirms earlier opinion on redesignation of nonattainment areas for purposes of the Clean Air Act. B-208593.3, Aug. 2, 1988. Referenced opinion concluded that EPA is not authorized under Clean Air Act section 107 or Mitchell-Conte amendment to Pub. L. 100-202 to act unilaterally to redesignate areas as nonattainment. Mitchell-Conte amendment directing EPA to postpone sanctions temporarily and to "take appropriate steps" to designate meant that EPA must follow the permanent statutory procedure for designation. Moreover, EPA lacks authority to designate as nonattainment areas where no violations of ambient air quality standards exist, even though sources in those areas may contribute to nonattainment downwind. EPA's several arguments in response to original August 2 opinion are unpersuasive. To Chairman Dingell.

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