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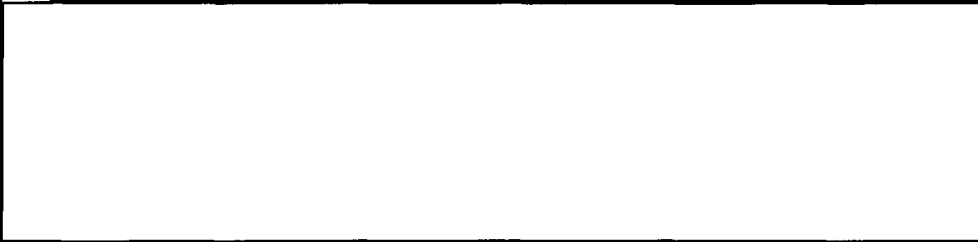
Office of General Counsel



December 1970

Digests of Decisions
of the Comptroller
General of the United States

143606



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Preface

This publication is one in a series of monthly pamphlets entitled “Digests of Decisions of the Comptroller General of the United States” which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions concerning claims are issued in accordance with 31 U.S. Code § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, Pub. L. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by the file number and date, e.g., B-229329.2, Sept. 29, 1989. Approximately 10 percent of GAO’s decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies, in monthly pamphlets and in annual volumes. Decisions in these volumes should be cited by volume, page number and year issued, e.g., 68 Comp. Gen. 644 (1989).

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Appropriations/Financial Management

B-237789, December 10, 1990

Appropriations/Financial Management

Appropriation Availability

- Time availability
- ■ Time restrictions
- ■ ■ Advance payments

Naval hospital may not make advance payments for cable television service. The United States Government is prohibited by 31 U.S.C. § 3324(a) from paying in advance for goods and services. Exceptions to the advance payment prohibition such as 10 U.S.C. § 2307 and 41 U.S.C. § 255 are not applicable to utility service contracts for the provision of cable television service.

B-239608, December 14, 1990

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Utility services
- ■ ■ ■ Use taxes

The Rhode Island 9-1-1 surcharge appears to be a vendee tax, not payable by the federal government. The Rhode Island law provides for levying a surcharge on each residence and business exchange line in the state, and holds each user liable for payment of the surcharge; Rhode Island telephone companies appear, by law, to be collection agents for the state.

B-241432.2, December 26, 1990

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Health services

Department of Health and Human Services/Social Security Administration policy excluding amounts spent for medical consultants to assist in the review of disability decisions from a 1990 appropriations limitation on HHS funds that may be spent for advisory or assistance services is consistent with that limitation. Labor, Health and Human Services and Education, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-166, § 514, 103 Stat. 1159, 1191 (1989).

Appropriations/Financial Management

Accountable Officers

■ **Certifying officers**

■ ■ **Relief**

■ ■ ■ **Illegal/improper payments**

■ ■ ■ ■ **Overpayments**

Relief is granted to U.S. Army Special Disbursing Agent under 31 U.S.C. § 3527(c) for an improper payment to a credit union that was credited to only one account. The issued check should have listed two accounts for payment. Although the overpayment was the result of a subordinate's error, the accountable officer maintained an adequate system of procedures which, but for clerical error combined with a review failure, should have prevented the loss. Adequate collection efforts have also been taken.

Civilian Personnel

B-241902, December 3, 1990

Civilian Personnel

Compensation

- Personnel death
- ■ Balances
- ■ ■ Payees

Copies of decisions on unpaid compensation order of precedence provisions, 5 U.S.C. § 5582 (1988), which are virtually identical with FEGLI order of precedence provisions, 5 U.S.C. § 8705 (1988), are provided to Department of Justice. Our Office noted similarity of these statutory provisions in 54 Comp. Gen. 858, 861 (1975).

B-235638, December 4, 1990***

Civilian Personnel

Compensation

- Retroactive compensation
- ■ Deductions
- ■ ■ Outside employment

An employee who was retroactively restored to duty and awarded backpay disputes the employing agency's determination to deduct the full amount the employee earned through outside employment during the period of the corrected action from the gross amount of the backpay award. In accordance with 5 U.S.C. § 5596(b)(1)(A)(i) (1988) and implementing regulations, the full amount earned by the employee through other employment during the period of improper separation must be deducted from the gross amount of the backpay award. The repayment obligation for lump-sum leave payment is subject to waiver consideration under 5 U.S.C. § 5584. Refunded retirement contributions may be considered for waiver by the Office of Personnel Management under 5 U.S.C. § 8346(b).

B-239589, December 6, 1990

Civilian Personnel

Relocation

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

Civilian Personnel

Relocation

- Temporary quarters
- ■ Determination
- ■ ■ Criteria

Transferred employee temporarily occupied rental property owned by her and her husband at new duty station. The employee paid monthly rent to a property management firm owned by her hus-

band as the sole proprietor. An employee who, while occupying temporary quarters incident to a permanent change of station, lodges in a residence which he or she owns and holds as rental property may not be paid lodging expenses absent clear and convincing evidence that, but for lodging there, the residence would have been rented during the period covered by the claim. Here, the employee has not presented such evidence and, therefore, the lodging portion of the TQSE may not be paid.

B-240200, December 20, 1990

Civilian Personnel

Compensation**■ Overtime****■ ■ Eligibility****■ ■ ■ Statutory****■ ■ ■ ■ Maximum rates**

Two civilian employees who participated in military operation "Just Cause" involving the country of Panama, performed overtime work, which, when added to their gross bi-weekly salary, caused their aggregate rate of pay for certain pay periods to exceed the maximum rate for GS-15. Section 5547, title 5, United States Code, 1988, places the above-stated restriction upon the aggregate compensation which may be paid federal civilian employees. The statutory provision does not contain any exclusions or exceptions that permit waiver of the limitation. Accordingly, the two employees may not be paid overtime compensation which would cause their gross bi-weekly salary for any pay period to exceed the maximum rate for GS-15.

B-239511, December 31, 1990***

Civilian Personnel

Travel**■ Rental vehicles****■ ■ Fines****■ ■ ■ Liability**

Absent a clear and unambiguous law to the contrary, United States and its activities are free from state regulation including payment of fines. Therefore, parking tickets are personal liability of employee responsible for their being issued. See court cases cited.

Civilian Personnel

Travel**■ Rental vehicles****■ ■ Fines****■ ■ ■ Liability**

A Selective Service System (SSS) employee paid a \$50 parking ticket written on a vehicle leased by SSS to prevent the ticket from doubling. SSS determined that the paying employee was not the party responsible for receipt of the ticket and did not identify another employee as responsible for receipt of ticket. Whether SSS may reimburse paying employee depends upon whether employee paid a valid obligation of the United States arising by virtue of the language in motor vehicle lease agreement whereby SSS as lessee agreed to not permit leased "vehicle to be used in violation of" District of Columbia law and regulations and that SSS would "indemnify and hold lessor harmless from any and all . . . penalties resulting from violation of such laws."

Civilian Personnel

Travel

■ Rental vehicles

■ ■ Fines

■ ■ ■ Liability

Although the operator of vehicle is liable for payment of parking ticket, District of Columbia law makes owner of vehicle ultimately liable for payment of parking ticket. District law also provides that lessor of vehicle may eliminate liability for parking tickets incurred by lessee. Therefore, whether employee who paid \$50 ticket on assumption that agency was liable for such as damages to lessor under a hold-harmless clause in lease agreement paid an obligation of the government for which employee may be reimbursed, depends upon whether lessor would have had to pay the ticket. Request is returned to agency with instruction to make determination regarding lessor's liability since submission lacks requisite finding.

Military Personnel

B-241217, December 14, 1990

Military Personnel

Pay

■ Retirement pay

■ ■ Payment time periods

Military Personnel

Pay

■ Retirement pay

■ ■ Underpayments

In the first 11 months of 1984, retired member was paid retired pay on the last day of month earned. Pursuant to a change in the law regarding payment dates, payment for December 1984 was made on January 2, 1985. Fact that member received only 11 checks in 1984 does not mean he was underpaid, since he clearly received 12 payments for the year.

Procurement

B-237122.3, B-237122.4, December 3, 1990***

90-2 CPD 442

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Auction prohibition

Protest that agency, in taking corrective action to remedy previously improper procurement, is engaged in improper auction technique is denied. Fact that agency did not ultimately make various changes in its requirements, as agency represented it would do, does not affect the need for appropriate corrective action in cases where explicit statutory violations have occurred, and this need takes primacy over possible risk of auction.

Procurement

Competitive Negotiation

- Technical transfusion/leveling
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Agency did not engage in improper technical transfusion by permitting competitor of protester to conduct a site visit to a government-owned facility at which protester was incumbent.

Procurement

Competitive Negotiation

- Offers
- ■ Late submission
- ■ ■ Acceptance criteria

Protester's revised offer was properly rejected as late where revised offer was not a modification of an otherwise successful offer which proposed terms more favorable than those contained in original offer.

B-238289.2, B-238289.3, December 3, 1990

90-2 CPD 443

Procurement

Competitive Negotiation

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

Protest challenging elimination of protester's proposal from the competitive range is denied where the contracting agency's evaluation of the proposal was reasonable and in accordance with the stated criteria.

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protester's mere assertion in request for reconsideration that because it is the exclusive authorized dealer of the required item in the United States, it would have been able to lower its price if it were given an opportunity to delete certain nonconforming terms from a standard form submitted with its offer, is not sufficient to establish that protester was competitively prejudiced by the award to the low offeror, especially where the protester's proposed price was approximately 43 percent higher than awardee's price for the same item and protester did not argue in initial protest that it could have lowered its price.

Procurement

Sealed Bidding

- Unbalanced bids
- ■ Materiality
- ■ ■ Responsiveness

The apparent low bid on a contract for a 3-month base period and three 1-year options properly was determined to be materially unbalanced where there is an unexplained price decrease for the final option period, the bid would not become low until the fifth month of the final option period, and there is reasonable doubt that acceptance of the bid would result in the lowest overall cost to the government because the government determined that it was likely that the final option period may not be exercised due to funding uncertainty.

Procurement

Competitive Negotiation

- Initial offers
- ■ Rejection
- ■ ■ Propriety

Procuring agency properly determined that the protester's initial proposal for services in support of the agency's review of grantees' procurement systems was unacceptable and not in the competitive range, where the protester's technical proposal indicated that proposed key personnel lacked sufficient procurement and procurement system review experience and the protester's proposed management plan essentially parroted the solicitation's statement of work.

Procurement

Competitive Negotiation

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

Erroneous listing of prospective offeror's address does not justify sustaining protest against offeror's non-receipt of request for proposals (RFP) where error appears to be an inadvertent, isolated occurrence not suggestive of significant deficiencies in the contracting agency's solicitation process, and where protester did not avail itself of every reasonable opportunity to obtain the solicitation in that during the approximately 2 months following the presolicitation conference which it attended it made only one inquiry as to the status of the procurement.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ Negative determination

General Accounting Office generally will not review a nonresponsibility determination where a small business is concerned since by law the Small Business Authority has conclusive authority to determine the responsibility of a small business.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest of award to another offeror is dismissed as untimely where not filed within 10 working days after the protester learned of the award.

Procurement

Bid Protests

- GAO authority

General Accounting Office does not conduct investigations as part of its bid protest function.

Procurement

Bid Protests

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

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Dismissal, as academic, of protest challenging agency's evaluation of offers and award decisions, was proper where agency took corrective action of amending solicitation, reopening negotiations, and providing opportunity for offerors to revise their proposals and submit best and final offers. Requests for reconsideration of dismissal are denied, notwithstanding corrective action did not include contract award to protesters, since such relief would have been inappropriate.

Procurement

Contract Management

- Contract performance
- ■ Pending resolicitation
- ■ ■ GAO review

Where agency has complied with Competition in Contracting Act of 1984, by making written determination and notifying General Accounting Office (GAO) of urgent and compelling circumstances significantly affecting the interests of the United States which would not permit staying contract performance until GAO rendered decision on protests, and is allowing performing contractors to continue performance pending the outcome of reopened negotiations, GAO will not review the agency's determination.

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Evaluation errors

Protest challenging contracting agency's evaluation of protester's proposal and exclusion of the proposal from the competitive range is denied where a review of the agency's evaluation shows that it was conducted in accordance with the solicitation evaluation criteria and that the agency's decision to exclude the proposal was reasonable, notwithstanding the protester's allegation that the exclusion was the result of a biased evaluation.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Checks
- ■ ■ ■ Adequacy

Bid which was accompanied by a bid guarantee including uncertified company checks was properly rejected as nonresponsive, even though the checks were erroneously cashed by the agency after bid opening.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

Agency decision to cancel after bid opening an invitation for bids which had been set aside for small disadvantaged business concerns and to reprocure on an unrestricted basis was proper where no responsive bids had been received and the contracting officer determined that there was not a reasonable expectation that offers would be obtained from two responsible small disadvantaged businesses at prices not exceeding the fair market price by more than 10 percent.

Procurement

Sealed Bidding

- Use
- ■ Criteria

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (1988), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Waiver

Failure of low bidder to acknowledge receipt of an amendment should be waived where the amendment imposed no substantive or different requirement on bidders; the only reasonable interpretation of the solution prior to the amendment, when read as a whole, was that the contractor already was required to close the nine storage tanks specified by the amendment.

Procurement

Sealed Bidding

- Amendments
- ■ Acknowledgment
- ■ ■ Government mishandling

Procuring agency properly considered misplaced acknowledgment of solicitation amendment where record establishes that the acknowledgment was deposited at the government installation 2 days prior to bid opening and was misplaced by the agency, but was in the agency's possession until it was found, and it was discovered prior to award.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that the contracting officer's decision to conduct a resolicitation for the same requirement for office and storage space instead of awarding a contract to protester, the next low and the only remaining offeror under the original solicitation, is dismissed as untimely where protester did not file its protest until more than 10 working days after receiving notice of the contracting officer's decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior dismissal due to protester's failure to file timely comments on agency report is denied since protester's claimed confusion regarding filing requirements does not excuse failure to file comments. Protester is charged with constructive notice of Bid Protest Regulations through their publication in *Federal Register* and *Code of Federal Regulations* and, in any event, had actual notice of requirements from standard protest acknowledgement letter.

Procurement

Competitive Negotiation

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

Protest challenging the agency's selection of awardee, based on allegation that agency's evaluation departed from solicitation criteria to include consideration of undisclosed criteria, is denied where record shows that the agency's evaluation was reasonable and in accordance with the evaluation criteria and that the resulting award to the technically superior offeror was the most advantageous to the government.

B-238896.3, December 5, 1990

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest filed more than 10 working days after protester knows of its basis of protest is untimely filed under Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1990).

B-240623, December 5, 1990**90-2 CPD 459****Procurement**

Bid Protests

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

Bidder whose direct economic interest would be affected by award to only other bidder is an interested party under General Accounting Office's Bid Protest Regulations entitled to protest the terms of invitation for bids, where it is an ongoing business concern with access to equipment necessary to provide the required food services, and is willing and capable of providing the required services if it were awarded the contract.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Ambiguity allegation
- ■ ■ ■ Interpretation

Procurement

Specifications

- Ambiguity allegation
- ■ Specification interpretation

Protest that specifications in invitation for bids (IFB) concerning the type of container used to deliver temperature-controlled food items create an ambiguity in the IFB is denied where, when read as a whole, the only reasonable interpretation of the IFB is that it allows bidders to submit bids based on the use of alternative types of containers to deliver the required food items, so long as the container selected is capable of maintaining temperatures established in the IFB.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Information adequacy

There is no requirement that a solicitation be so detailed as to completely eliminate all performance uncertainties and risks, and lack of some detail does not render the solicitation defective where information provided is adequate to enable bidders to compete intelligently and on an equal basis.

Procurement

Sealed Bidding

- Invitations for bids
 - ■ Service contracts
 - ■ ■ Wage rates
 - ■ ■ ■ Omission
-

Procurement

Socio-Economic Policies

- Labor standards
- ■ Service contracts
- ■ ■ Wage rates
- ■ ■ ■ Omission

Failure of invitation for bids (IFB) to incorporate applicable Department of Labor (DOL) wage determinations does not render the IFB defective where, due to the urgency of the procurement, the agency could not wait for DOL to issue the applicable wage determinations before releasing the IFB, and complied with the requirements in the applicable regulations to notify DOL of its intent to enter into a service contract and to advise bidders that the applicable wage determination would be incorporated upon receipt from DOL.

B-241035.2, December 5, 1990

90-2 CPD 460

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

General Accounting Office affirms prior dismissal based on the determination that protest became academic when agency terminated the protested contract award for the convenience of the government and stated agency intention to solicit best and final offers from the offerors after revising solicitation to reflect agency's minimum needs.

Procurement

Bid Protests

- GAO procedures
 - ■ Preparation costs
 - ■ ■ Attorney fees
-

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Protester is not entitled to proposal preparation costs and costs of filing and pursuing protest, including attorneys' fees, where General Accounting Office did not issue a decision on the merits of the protest after agency's corrective action rendered the protest academic.

Procurement

Contractor Qualification**■ Licenses**

Protest that at time of award, awardee did not have Nuclear Regulatory Commission (NRC) licenses required by solicitation is denied where, in earlier decision, it was recommended that agency determine whether awardee "possesses" licenses that meet requirement, protester did not question that recommendation, and agency relied on the recommendation to allow performance to continue upon determining that awardee was in possession of required licenses.

B-240603, B-240891, December 6, 1990**90-2 CPD 462**

Procurement

Competitive Negotiation**■ Contract awards****■ ■ Government delays****■ ■ ■ Justification****■ ■ ■ ■ Pending protests**

Agency delay in awarding a contract which resulted from initial determination of low offeror's nonresponsibility and reconsideration of that finding does not evidence preferential treatment where there is a material change in a principal factor on which the original determination was based.

Procurement

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

Allegation that, based on protester's experience, awardee will be unable to meet a particular specification, therefore agency must have relaxed that specification for awardee, does not provide basis to sustain protest.

Procurement

Competitive Negotiation**■ Offers****■ ■ Price reasonableness****■ ■ ■ Determination****■ ■ ■ ■ Administrative discretion**

Contracting agency may accept a price reduction from the low-priced offeror who, having been found responsible, has submitted the proposal most advantageous to the government.

Procurement

Bid Protests**■ GAO procedures****■ ■ Interested parties****■ ■ ■ Direct interest standards**

Highest priced offeror under request for proposals providing for award to the offeror whose price represents the best overall buy is not an interested party under the General Accounting Office Bid Protest Regulations to protest alleged preferential treatment of lowest offeror, where protester does not allege that second low offeror is not otherwise entitled to award.

Procurement

Socio-Economic Policies

- Small business set-asides
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ Small business 8(a) subcontracting

Protest that Air Force improperly canceled solicitation synopsisized in *Commerce Business Daily* as 100 percent small business set-aside in order to set the procurement aside for the Small Business Administration's 8(a) program is denied where record indicates that agency always intended to offer the requirement to the 8(a) program and only erroneously synopsisized the requirement as a small business set-aside.

Procurement

Socio-Economic Policies

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

Protest is sustained where Small Business Administration failed to properly consider potential adverse impact on small businesses prior to accepting requirement, which previously was set aside for small business, into 8(a) program.

Procurement

Bid Protests

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

Protest alleging solicitation improprieties is untimely where not filed prior to closing date for receipt of proposals.

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Evaluation errors

Exclusion of proposal from competitive range without considering proposed price was improper where proposal, although rated marginal, was not determined to be unacceptable.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Where agency based award on a motor it believed was superior to the one offered by the awardee in its proposal, but subsequently determined that only the originally proposed motor would meet its needs, agency properly modified awardee's contract to require the originally proposed motor; modification was within scope of contract since (1) price was not changed, (2) same motor, with alterations, would be furnished, and (3) agency is requiring an item that satisfies precisely the solicitation requirements on which the original competition was based.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Contractor Qualification

- Contract personnel
- ■ Misrepresentation

Protest that awardee's failure to notify contracting agency that it no longer had a business relationship with a subcontractor whose computer hardware was used by awardee during negotiations constituted a material misrepresentation warranting rejection of proposal is denied where solicitation did not require listing of subcontractors, subcontractors were not evaluated and there is no evidence that the awardee will not utilize similar hardware obtained from another source.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest that agency failed to properly evaluate awardee's corporate experience is denied where agency's technical evaluation is not shown to be unreasonable or inconsistent with the solicitation's evaluation scheme.

Procurement

Bid Protests

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

Procurement

Competitive Negotiation

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

Evaluation of offers based on the application of a small disadvantaged business concern evaluation preference, not provided for by the solicitation, would be improper. Protest that solicitation should have included such an evaluation preference is untimely under Bid Protest Regulations since it alleges a solicitation impropriety apparent before the closing date for receipt of proposals but was not filed before that time.

Procurement

Bid Protests

- GAO procedures
 - ■ Protest timeliness
 - ■ ■ 10-day rule
-

Procurement

Competitive Negotiation

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

Contracting agency properly did not evaluate transition costs where the solicitation requesting fixed-price proposals did not provide for the evaluation of such costs. Protest that such costs should have been included in the evaluation criteria is untimely under Bid Protest Regulations when protested after the closing date for receipt of proposals.

B-240689, December 10, 1990

90-2 CPD 468

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel

Evaluators reasonably found that protester's proposed staffing plan and relocation/phase-in plan, while acceptable, contained a moderate to high element of risk where protester failed to submit evidence of firm commitment of incumbent's expert employees to accept employment with the protester as contemplated and proposed by the protester.

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Where record shows that evaluation panel advised source selection official correctly of relative advantages and disadvantages of the protester's proposal, including potential cost savings substantiated in offer, official could nevertheless reasonably determine that awardee's technical superiority outweighed such savings, and award to higher-priced, higher-rated offeror was proper.

Procurement

Competitive Negotiation

- Technical evaluation boards
- ■ Bias allegation
- ■ ■ Corrective actions

Procurement

Competitive Negotiation

- Technical evaluation boards
- ■ Conflicts of interest
- ■ ■ Corrective actions

Where agency removed individual from evaluation panel, based on potential conflict of interest, and reviewed and removed that individual's ratings from the evaluation results, there is no basis for finding that evaluation was biased against protester.

B-240728, December 10, 1990*****90-2 CPD 469**

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability
- ■ ■ ■ Information submission

Where agency investigation revealed misstatements and discrepancies in individual sureties' net worth information furnished in Affidavits of Individual Surety in support of bid guarantee, agency reasonably determined that there was inadequate evidence of value and ownership of claimed assets as well as doubt as to the integrity of the sureties and the credibility of their representations; contracting officer therefore properly rejected bidder as nonresponsible.

B-240743, et al., December 10, 1990**90-2 CPD 470**

Procurement

Socio-Economic Policies

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

An agency decision to set aside a solicitation for small disadvantaged business (SDB) concerns is proper where the contracting officer determines that there is a reasonable expectation of bids from at least two responsible SDB concerns and that award can be made at a price not exceeding the fair market price by more than 10 percent.

Procurement

Socio-Economic Policies

■ Small business set-asides

■ ■ Use

■ ■ ■ Restrictions

Under the Small Business Competitiveness Demonstration Act of 1988, 15 U.S.C. § 644 note (1988), setting aside procurements in four designated industry groups for small businesses is prohibited.

B-240809, December 10, 1990

90-2 CPD 471

Procurement

Competitive Negotiation

■ Contract awards

■ ■ Administrative discretion

■ ■ ■ Cost/technical tradeoffs

■ ■ ■ ■ Technical superiority

Protest that agency did not properly justify award to higher priced offeror is denied where the solicitation made technical considerations more important than price and the agency reasonably concluded that the technical superiority of the awardee's proposal was worth the additional cost.

B-240951, December 10, 1990

90-2 CPD 472

Procurement

Competitive Negotiation

■ Discussion

■ ■ Adequacy

■ ■ ■ Criteria

Protest that agency failed to point out deficiency in manning area of protester's proposal during discussions is denied where agency's second request for best and final offer clearly led protester into area of deficiency, asking how protester planned to accomplish the required work with its proposed manning levels.

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation errors

■ ■ ■ Evaluation criteria

■ ■ ■ ■ Application

Protest that agency improperly relied on undisclosed manning estimates in technical evaluation of proposals is denied where estimates were based on solicitation requirements and merely reflected the agency's judgment concerning the minimum number of personnel necessary to perform the work; disclosure of such estimates is not required.

Procurement

Competitive Negotiation

- **Contract awards**
- ■ **Administrative discretion**
- ■ ■ **Cost/technical tradeoffs**
- ■ ■ ■ **Technical superiority**

Decision not to award to lowest-priced offeror was unobjectionable where agency reasonably concluded that the proposal represented a significant performance risk and that the technical superiority of another offeror's proposal outweighed its cost advantage.

B-241129, December 10, 1990***

90-2 CPD 473

Procurement

Competitive Negotiation

- **Discussion reopening**
- ■ **Propriety**
- ■ ■ **Best/final offers**
- ■ ■ ■ **Non-prejudicial allegation**

Protest that agency improperly reopened negotiations and requested best and final offers after announcing that protester was apparent successful offeror is denied where prices were not disclosed, and other offerors did not gain advantage from knowing identity of apparent successful offeror.

B-241444, December 10, 1990

90-2 CPD 474

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Technical acceptability**
- ■ ■ ■ **Equivalent products**

Protest of agency's rejection of proposal as technically unacceptable is denied where record shows that protester did not offer to provide product which met solicitation's specifications.

B-241449, December 10, 1990

90-2 CPD 475

Procurement

Specifications

- **Minimum needs standards**
- ■ **Competitive restrictions**
- ■ ■ **GAO review**

General Accounting Office will not question the contracting agency's decision to issue a delivery order for the development of specifications for a Transionospheric Sensing System under an existing indefinite-quantity contract, where requirement is within the scope of such contract.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Modification
- ■ ■ Propriety

Agency properly rejected as nonresponsive a bid accompanied by a bid bond where the penal sum of the bond had been typed over a whited-out figure without evidence in the bid documents or the bond itself that the surety had consented to the alteration.

Procurement

Bid Protests

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

Low bidder whose bid properly was rejected as nonresponsive is not an interested party to argue that the next low bid also should be rejected as nonresponsive where there is another bidder which would be in line for award if the next low bid were rejected.

Procurement

Special Procurement Methods/Categories

- In-house performance
- ■ Administrative discretion
- ■ ■ GAO review

General Accounting Office will not review agency decision to perform services in-house where no competitive solicitation has been issued for cost comparison purposes.

Procurement

Payment/Discharge

- Payment priority
- ■ Payment sureties

Requests for payments to sureties of final contract payments were considered in two cases presented. In first case, federal agency may pay the surety because state court judgment is a judicial determination of the rights of the parties under FAR section 28.106-7(b). In the second case, pursuant to FAR section 28.106-7(b), final contract payment is not authorized to be made to the surety until a court has decided who is entitled to such proceeds.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest alleging that awardee failed to comply with essential solicitation requirement to provide chemical material quality data is untimely where protester states that it knew of the awardee's

alleged noncompliance more than 3 months before it filed its protest. Protester's failure to file timely protest is not excused by pending protests filed by other offerors under the solicitation.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest alleging that agency failed to conduct meaningful discussions is untimely where protest is filed more than 10 days after protester knew or should have known that no discussions would be conducted.

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Selection of the awardee on the basis of its overall technical superiority, notwithstanding its 1 percent higher price, is unobjectionable where agency reasonably determined awardee's higher-priced proposal was worth the additional cost, and cost/technical tradeoff was consistent with the evaluation scheme.

B-242242, B-242243, December 11, 1990

90-2 CPD 479

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Competency certification
- ■ ■ ■ Negative determination

Protests of agency's negative determinations of protester's responsibility are dismissed where protester unsuccessfully availed itself of Small Business Administration (SBA) certificate of competency (COC) procedures and protester does not allege fraudulent or bad faith actions by SBA in the consideration of its COC applications.

B-238187.2, B-238187.3, December 12, 1990

90-2 CPD 480

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

Protest against agency's evaluation of proposals for electric services for newly constructed facility is denied where protester's proposed rate required that certain assumptions be made because of the lack of historical data and while protester disagrees with assumptions used by agency, they reflected agency's reasonable technical judgment.

Procurement

Bid Protests

- **GAO procedures**
- ■ **Preparation costs**

Reconsideration request from agency that award of protest costs be rescinded because original protester did not receive award under reevaluation is denied because award of costs of pursuing protest is appropriate where a protest is sustained and the fact that protester's proposal is reevaluated and found not to be in line for award following the decision does not preclude entitlement to such costs.

B-240033.3, December 12, 1990

90-2 CPD 481

Procurement

Socio-Economic Policies

- **Small businesses**
- ■ **Size standards**
- ■ ■ **Administrative determination**
- ■ ■ ■ **GAO review**

General Accounting Office does not review size status determinations made by the Small Business Administration (SBA) since SBA has conclusive authority to determine small business size status for federal procurements.

Procurement

Socio-Economic Policies

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

Small Business Administration (SBA) issuance of certificate of competency is not subject to review by the General Accounting Office absent a showing of possible fraud or bad faith on the part of government officials or that the SBA failed to consider information vital to a determination of responsibility.

Procurement

Bid Protests

- **GAO authority**

General Accounting Office does not have authority to impose monetary sanctions against protester for filing a protest in bad faith.

B-240051, December 12, 1990

Procurement

Payment/Discharge

- **Shipment**
- ■ **Carrier liability**
- ■ ■ **Amount determination**

The measure of damages to repair an item damaged in shipment is the reasonable cost to put it in as good a condition as it was in before the damage occurred, so long as the cost is not out of proportion to the item's value and does not exceed the value before injury.

Procurement

Payment/Discharge

- Shipment
- ■ Damages
- ■ ■ Repairs

Shipper whose goods were damaged in transit is not required to use the repair method or repair person offered by the carrier.

B-240647, December 12, 1990

90-2 CPD 482

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Contracting agency held adequate discussions where questions posed to offeror in successive rounds of written discussions were sufficient to lead the offeror into those areas of its proposal about which the agency was concerned.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost estimates

In cost-reimbursement contract, contracting agency reasonably increased offeror's proposed costs to reflect additional travel costs where agency reasonably concluded that due to the nature of the contract effort, the advance planning necessary to take advantage of the lower cost, discount travel fares the offeror proposed might not be feasible.

Procurement

Competitive Negotiation

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

Contracting agency's evaluation of offeror's technical proposal for flight test analysis services is not reasonable where, in light of the detailed proposal submissions from the offeror and the lack of detail in the agency's evaluation documents, the record does not support the agency's generalized conclusion that the offeror's proposal was poorly organized and lacked technical detail.

Procurement

Sealed Bidding

- Bids
 - ■ Modification
 - ■ ■ Interpretation
 - ■ ■ ■ Intent
-

Procurement

Sealed Bidding

- Bids
- ■ Modification
- ■ ■ Submission methods
- ■ ■ ■ Procedural defects

Contracting agency properly refused to allow modification that would have made protester's bid low where modification initially conveyed before bid opening by telephone would not have made bid low and confirming telegram containing different modification that would make bid low was not received until after bid opening; a pre-opening telephonic bid modification may be considered if subsequently confirmed by telegram, but there is no basis for accepting modification conveyed in the confirming telegram where that modification is different from the telephonic modification received before bid opening.

Procurement

Specifications

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

Protest against geographically delineated area set forth in solicitation for offers for leased office space as unduly restrictive is denied where reduction in original delineated area was necessary to reduce walking distance between United States Attorney's Office and Courthouse and the reduction has been adequately justified to reflect agency's minimum needs.

Procurement

Sealed Bidding

- Bid guarantees
 - ■ Responsiveness
 - ■ ■ Liability restrictions
-

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Deviation

Bid was properly rejected as nonresponsive where it contained a standard form with terms and conditions which took exception to a material requirement of the solicitation and limited the protester's liability to the government under the contract.

Procurement

Bid Protests

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

Protest challenging an alleged impropriety apparent from the face of a solicitation is untimely where filed after bid opening.

Procurement

Sealed Bidding

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

A nonresponsive bid must be rejected and may not be changed or corrected based on explanations offered by the bidder after bid opening; the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived.

B-241120, December 13, 1990

90-2 CPD 486

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest that the Department of Housing and Urban Development lost the protester's quotation is dismissed as untimely because the protester failed to diligently pursue the information on which the protest is based by waiting 5 months before attempting to verify the contracting officer's receipt of the quotation, and 4 months between inquiries as to the status of the procurement.

B-241170, December 13, 1990

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Adverse agency actions

Protest filed more than 10 working days after receipt of denial of agency-level protest is dismissed as untimely under 4 C.F.R. § 21.2(a)(3) (1990).

Procurement

Bid Protests

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

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Request for reconsideration of dismissal as academic of protest that awardee lacked required technical experience is denied where the agency advised that no award had been made and discussions would be conducted.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest against successful offeror's misuse of allegedly confidential data, filed more than 10 working days after oral notice of award from the agency, is untimely.

Procurement

Bid Protests

- GAO authority

General Accounting Office is without jurisdiction to consider a protest of a procurement by the Resolution Trust Corporation (RTC) because RTC is defined by statute as a mixed-ownership corporation and is therefore not a federal agency for bid protest purposes.

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Cost savings

Contracting agency's determination to award cost-plus-fixed-fee contract to offeror with a lower rated technical proposal to take advantage of its lower proposed cost was proper, even though cost was the third in importance of evaluation factors, where the agency reasonably decided that the cost premium involved in an award to a higher rated, higher priced offeror was not warranted in light of the acceptable level of technical competence available at the lower cost, and where offerors were explicitly advised that cost was a significant evaluation factor.

Procurement

Competitive Negotiation

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

Challenge to agency's review of awardee's cost realism is denied where record shows that cost realism review was reasonable and thorough and where agency sought advice from the Defense Contract Audit Agency regarding indirect cost rates and negotiated a rate ceiling with the successful offeror to protect against increases in those rates.

Procurement

Competitive Negotiation

- Technical transfusion/leveling
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protest alleging that agency violated the prohibition against technical leveling is denied where there is no indication that agency either conducted successive rounds of technical discussions or provided impermissible assistance to the awardee.

Procurement

Competitive Negotiation

- Contract awards
- ■ Propriety

Fact that agency awarded contract to a different corporate affiliate than the one that responded to the *Commerce Business Daily* (CBD) announcement regarding the procurement has no bearing on the propriety of the award because a CBD announcement is not a solicitation and has no legal effect on the validity of a contract formed when an agency accepts an offer submitted in response to a request for proposals.

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Performance capabilities

Fact that awardee is not meeting a contract requirement during performance does not show that awardee's proposal failed to conform to the solicitation's requirements where the proposal in fact offered to perform as required.

B-240729, December 14, 1990

Procurement

Bid Protests

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

Protest that solicitation specifications and evaluation scheme were deficient concerns apparent solicitation improprieties, which must be protested prior to receipt of initial offers in order to be timely under Bid Protest Regulations.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency reasonably found awardee's proposal for training course in aircraft structural fatigue acceptable where awardee's resumes demonstrated significant experience in structural fatigue.

Procurement

Competitive Negotiation

- Technical evaluation boards
- ■ Bias allegation
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that agency technical evaluator was a graduate of the university which was awarded the contract and consequently may be biased against the protester is denied where the record is devoid of any evidence of improper influence or bias.

B-241079, December 14, 1990

Procurement

Special Procurement Methods/Categories

- Subcontracts
- ■ Quotations
- ■ ■ Rejection
- ■ ■ ■ Propriety

Protest that agency improperly rejected protester's quotation because protester did not have its logo listed with the agency is denied where in order to have a logo listed a company must be a manufacturer and the protester did not demonstrate that the agency unreasonably found that the protester was not a manufacturer.

B-241309, December 14, 1990

Procurement

Socio-Economic Policies

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

General Accounting Office will not object to agency's decision to set aside procurement for small business concerns where record indicates the contracting officer had a reasonable expectation that offers would be obtained from at least two small business concerns and that award would be made at a reasonable price.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties

Where General Accounting Office finds that small business set-aside was proper and award was made at a fair market price, a large business protester is not an interested party to protest use of small purchase procedures, solicitation provisions, or award.

Procurement

Bid Protests

- GAO procedures
- ■ Pending litigation
- ■ ■ GAO review

Where court does not request General Accounting Office (GAO) decision on merits of protest issues and GAO lacks jurisdiction to consider those issues GAO will not decide the issues on the merits.

B-241336.3, December 14, 1990

90-2 CPD 491

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Request for reconsideration of decision is denied as untimely where filed more than 10 days after the basis for reconsideration was known or should have been known.

B-242167, December 14, 1990

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest challenging the agency's rejection of the low bid filed more than 10 working days after protester was notified of denial of a certificate of competency (COC) by the Small Business Administration is untimely since the rejection was the result of the COC denial.

B-240831, December 17, 1990

90-2 CPD 493

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification

Agency has a compelling reason to cancel solicitation for janitorial services, issued in anticipation of terminating incumbent contractor, where cancellation is based on an agency's decision not to terminate incumbent contractor because the contractor cured deficiencies in its performance.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Claim for bid preparation costs based on an allegation that the agency issued a solicitation for janitorial services under which it had "little or no intent to contract" is denied where agency acted properly in issuing solicitation to ensure the continuous provision of such services in the event the incumbent contractor failed to cure the deficiencies in its performance.

Procurement

Competitive Negotiation

- **Technical evaluation boards**
- ■ **Conflicts of interest**
- ■ ■ **Corrective actions**

Agency's decision to exclude a government official from technical evaluation board is reasonable where agency acted to avoid a potential conflict of interest.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation errors**
- ■ ■ **Allegation substantiation**

Allegation that agency did not properly evaluate protester's personnel qualifications and performance history is denied where record shows that even assuming protester's proposal received perfect scores for these evaluation factors, it would not be entitled to award, since awardee's proposal would still be higher-rated technically and awardee's price was considerably lower than protester's.

Procurement

Bid Protests

- **GAO procedures**
 - ■ **Protest timeliness**
 - ■ ■ **10-day rule**
-

Procurement

Bid Protests

- **Premature allegation**
- ■ **GAO review**

Protest is dismissed where its grounds, which include contentions of solicitation improprieties, insufficient notice of elimination from the competitive range, and the nonresponsibility of offerors, are speculative, legally insufficient, untimely, or premature.

Procurement

Payment/Discharge

- **Shipment costs**
- ■ **Additional costs**

An air freight carrier cannot be paid additional charges for ferrying its aircraft from its home base to a shipment's origin and from destination back to home base, nor can it be paid additional charges for the use of a larger aircraft, when such services and charges for them are not provided for in the carrier's rate tender.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Amount determination

Where a claimant, seeking the recovery of its proposal preparation and protest costs, fails to adequately document its claim to show that the hourly rate, upon which its claim is based, reflects the employee's actual rate of compensation plus reasonable overhead and fringe benefits, the claim for costs is denied.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Amount determination

Protester awarded the costs of pursuing its protest is not entitled to be reimbursed costs associated with communicating to Congressmen seeking assistance in the protest.

B-240350, December 18, 1990

Procurement

Payment/Discharge

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

Carrier that packed an Army member's household goods is not liable for the loss of a compact disc player that was not listed on the inventory absent a specific statement by the shipper about the loss based on his personal knowledge of the circumstances surrounding tender, or other substantive evidence to support the allegation of tender.

B-240726, December 18, 1990

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost estimates

Contracting agency's workload estimates for operation of a supply depot are reasonable where based on averaged, actual operating experience for same services over the past 30 months operation of the facility. Moreover, contracting agency was not legally required to provide a minimum work guarantee, especially where funding constraints precluded guarantee.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Cost data
- ■ ■ Administrative discretion

Contracting agency's decision not to request cost data from offerors is reasonable where competition received under prior, canceled solicitation for the same services supports agency's expectation

that adequate competition will be received to permit award to be made to lowest-priced, technically acceptable offeror.

Procurement

Competitive Negotiation

- Pre-proposal conferences
- ■ Administrative discretion

Contracting agency's decision not to provide for site visits or a preproposal conference was reasonable where the services to be contracted for are the same as those sought under an earlier, canceled solicitation under which offerors—including the protester—were provided with a site visit and preproposal conference—and the site conditions and work requirements remain the same.

B-240777, December 18, 1990

90-2 CPD 498

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Brand name/equal specifications
- ■ ■ ■ Salient characteristics

Protester's bid was properly rejected as nonresponsive where information supplied with protester's bid under a brand name or equal solicitation demonstrated that offered product failed to meet a material requirement of the solicitation.

B-240789, December 18, 1990***

90-2 CPD 499

Procurement

Socio-Economic Policies

- Small business 8(a) subcontracting
- ■ Contract awards
- ■ ■ Administrative discretion

General Accounting Office will review procurements conducted competitively under section 8(a) of the Small Business Act since award decisions are no longer purely discretionary and are subject to Federal Acquisition Regulation.

Procurement

Special Procurement Methods/Categories

- Service contracts
- ■ Commercial products/services
- ■ ■ Use
- ■ ■ ■ Indefinite quantities

Federal Acquisition Regulation (FAR) does not prohibit the use of an indefinite quantity contract for the acquisition of other than commercial items. Maintenance services, sold to the general public in the course of normal business operations based on market prices, constitute a commercial product as defined in FAR.

B-241759.4, December 18, 1990

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Adverse agency actions

Protest to the General Accounting Office filed more than 10 working days after notice of denial of agency-level protest is untimely and will not be considered.

B-238527.3, December 19, 1990

90-2 CPD 500

Procurement

Competitive Negotiation

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

In a procurement for travel services, agency had reasonable basis to downgrade protester's proposal for not offering an operational facility in a mandatory location where the solicitation provided that offerors who would be able to satisfy government's requirements immediately upon award would be assessed more favorably.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

In evaluating proposals received under request for proposals for government travel services, it was proper to assess more favorably an offer which demonstrated that it had corporate sales accounting for 85 percent of its total sales, and which exceeded the estimated government volume by almost five times, than an offer demonstrating that it had corporate sales accounting for only 50 percent of its total sales, and which exceeded the government volume by less than two times, where solicitation stated that firms demonstrating significant corporate sales would be assessed more favorably.

B-238977.3, December 19, 1990

90-2 CPD 501

Procurement

Bid Protests

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

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protester's late receipt of agency report is not a basis for reopening protest dismissed for failure to file comments within 10 days after receipt of agency report where protester failed to notify Gener-

al Accounting Office (GAO) that it had not received report until after due date shown on GAO notice acknowledging receipt of the protest.

B-240736, December 19, 1990

90-2 CPD 502

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency reasonably found competing proposals to be technically equal despite the awardee's proposing a higher number of staff hours than did the protester in its solution to a sample task problem, where such staffing was not a significant factor in the listed evaluation criteria, the difference in hours involved only one of three sample tasks, and the protester's advantage on the first sample task was reasonably found to be an advantage of incumbency which was not indicative of technical superiority.

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Technical equality
- ■ ■ ■ Cost savings

Protest is sustained where, in deciding to award a time and materials contract on the basis of cost because competing proposals had been determined to be technically equivalent, agency failed to evaluate cost proposals involving sample task costs in accordance with the listed solicitation evaluation criteria and thereby did not reasonably consider the impact that widely divergent sample task costs should have had on the selection decision.

B-240747, December 19, 1990

90-2 CPD 503

Procurement

Competitive Negotiation

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

Protest that in cost realism analysis agency incorrectly applied Service Contract Act (SCA) wage rates to labor categories filled by employees that are considered professional by protester and therefore exempt from the SCA is denied where protester has not shown that agency unreasonably determined, for purposes of determining low-cost offeror, that labor categories in question would likely be found to be subject to the SCA under the contract.

B-240799, B-240802, December 19, 1990

90-2 CPD 504

Procurement

Sealed Bidding

- Bids
- ■ Evaluation
- ■ ■ Discussion
- ■ ■ ■ Propriety

Protest that agency improperly conducted written decisions with protester since oral discussions were conducted with low bidder under a two-step sealed bid acquisition is denied since the protest-

er was provided with an opportunity sufficient to make its step-one proposal acceptable, which satisfies the agency's obligations under the applicable regulation.

Procurement

Sealed Bidding

- **Two-step sealed bidding**
- ■ **Technical transfusion/leveling**
- ■ ■ **Allegation substantiation**
- ■ ■ ■ **Evidence sufficiency**

Protest that agency engaged in technical leveling and transfusion in its discussions with the low bidder is denied where agency did not discuss protester's proposal with awardee nor did the agency repeatedly ask the same or similar questions or suggest technical approaches necessary to render the step-one technical proposal acceptable.

Procurement

Contractor Qualification

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

Protest that low offeror's bid in two-step procurement is below-cost or that bidder cannot adequately perform at the cost of its bid is denied since it is not illegal to submit a below-cost bid, and whether a bidder can perform at its bid price concerns a matter of responsibility which is not for review by the General Accounting Office.

B-240943, December 19, 1990

90-2 CPD 505

Procurement

Contract Management

- **Contract performance**
- ■ **GAO review**

Procurement

Socio-Economic Policies

- **Preferred products/services**
- ■ **American Indians**

Where record shows that under Indian set-aside, agency reasonably accepted awardee's self-certification as Indian firm after verifying status on National Roster which identifies Indian firms, General Accounting Office will not disturb performance of contract because 6 months later, under separate solicitation, agency concludes firm is not in fact eligible for Indian set-asides.

B-241010, B-241010.2, December 19, 1990***

Procurement

Noncompetitive Negotiation

- **Contract awards**
- ■ **Sole sources**
- ■ ■ **Propriety**

Protest challenging sole-source award of two interim contracts for automated data processing services based on unusual and compelling urgency is denied where, as a result of protests filed against long-term contract, contracting agency makes a series of short-term awards to incumbent whom agency reasonably believes to be only firm capable of timely fulfilling agency's requirements.

Procurement

Sealed Bidding

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

Agency's acceptance of a late bid was proper where the failure of agency personnel to follow established procedures for receipt of express mail on weekends was the paramount cause of the late receipt.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Determination criteria

Failure of bidder to complete representation in its bid regarding its corporate status for taxpayer identification purposes has no bearing on the material aspects of the bid and thus does not render the bid nonresponsive.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size determination
- ■ ■ GAO review

Since the Small Business Administration has conclusive statutory authority to determine small business status for federal procurement purposes, the General Accounting Office will not consider a size status protest.

B-241520, B-241520.2, December 19, 1990

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size determination
- ■ ■ GAO review

A protest that an awardee does not qualify as a small business for a small business set-aside on a sealed bid procurement must be filed within 5 days of bid opening to affect that procurement.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Responsibility
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

Whether a bidder will comply with the limitation on subcontracting provision in an invitation for bids is a matter of responsibility not reviewable by the General Accounting Office absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria on the part of contracting officials.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Forum election

Filing of protest with General Services Administration Board of Contract Appeals (GSBCA) does not toll the requirement that a protest be timely filed with the General Accounting Office (GAO). Thus, protest filed with GAO more than 10 days after initial adverse agency action is dismissed as untimely.

Procurement

Contract Management

- Contract administration
- ■ GAO review

Protest that agency failed to issue orders under an alleged requirements contract concerns a matter of contract administration not appropriate for review by the General Accounting Office.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Bad faith
- ■ ■ ■ Allegation substantiation

The protester, a small business concern, was not afforded a fair opportunity for the Small Business Administration (SBA) to consider its application for a certificate of competency (COC) where the central reason for the SBA's denial of a COC was the protester's failure to have a complete quality assurance program, including full work instructions, in place before the date of contract award, and where the procuring agency failed to inform SBA that a complete quality assurance program was not required before contract award and that all offerors had been so informed during discussions.

Procurement

Bid Protests

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

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

Procurement

Competitive Negotiation

- Requests for proposals
 - ■ Amendments
 - ■ ■ Materiality
-

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest that offerors were not competing on an equal basis because agency changed its position with regard to offeror's recruitment of government personnel after exclusion of the protester's proposal from the competitive range is denied where solicitation amendment did not materially change initial solicitation provisions regarding offerors' contacts with agency personnel for recruitment purposes.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Applicability

Clause requiring domestic forgings was properly included in a Department of Defense solicitation for items that are considered "final drive gears" on combat support vehicles, where the agency does not find the quantity being acquired is greater than that required to maintain the domestic mobilization base for these items.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest that awardee's offers were technically unacceptable under solicitations for components of final drive gears for combat support vehicles, which required domestically manufactured metal forgings, is sustained, where the awardee's proposals indicated that the forging would be done in a foreign country.

Procurement

Competitive Negotiation

- Contract awards
 - ■ Propriety
 - ■ ■ Offers
 - ■ ■ ■ Minor deviations
-

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Compliance

Contract awards to offeror, whose offer indicated it did not intend to comply with the Department of Defense Federal Acquisition Regulation Supplement § 208.7801 *et seq.* requirements for domestic forging, are not void *ab initio*, where agency and awardee were confused as to the applicability of the requirements and appeared to be acting in good faith.

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Protest that contracting agency improperly deleted clause from request for proposals (RFP), which required domestically manufactured forgings, is rendered academic where the agency reinstates the clause.

Procurement

Bid Protests

- Moot allegation
- ■ GAO review

Awardee's protests against the contracting agency's requesting new proposals are rendered academic where the awardee's contracts are ultimately not disturbed.

B-240826, December 21, 1990

90-2 CPD 513

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Deviation

Where invitation for bids (IFB) required a specific typeface or manufacturer's generic equivalent, agency properly rejected as nonresponsive a bid that offered a typeface determined not to be a generic equivalent, since the bidder did not agree to provide precisely what was called for in the IFB.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Late submission
- ■ ■ Rejection
- ■ ■ ■ Propriety

Best and final offer (BAFO) which was received late at location designated for receipt of proposals was properly rejected where the offeror telefaxed its BAFO too late to allow a reasonable time for it to be timely received.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Price reasonableness

Contracting Officer's decision to cancel line item of invitation for bids based on unreasonableness of bid prices was proper where low bid for the item exceeded government estimate by more than 100 percent.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Price adjustments
- ■ ■ Reduction

Agency may accept a general price reduction by a General Services Administration automatic data processing schedule contractor at any time prior to award.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Quotations
- ■ ■ Submission time periods
- ■ ■ ■ Purchases

Purchases from the General Services Administration automatic data processing schedule contract do not require a common cutoff date for receipt of best and final quotations.

Procurement

Sealed Bidding

- Performance bonds
- ■ Justification

Protest that performance bond requirement is restrictive of competition is denied where agency reasonably required a bond to assure continuous provision of custodial services and record does not disclose that this determination was unreasonable or made in bad faith.

Procurement

Competitive Negotiation

- Contract awards
- ■ Initial-offer awards
- ■ ■ Propriety

Protests are sustained where contracting agency makes award of contracts based on initial offers to other than the lowest overall cost offeror.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Omission

A bidder's failure to sign its bid may not be waived as a minor informality when the accompanying signed solicitation amendments fail to clearly identify the bidder and demonstrate the bidder's intent to be bound.

Procurement

Sealed Bidding

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

Procurement

Sealed Bidding

- Contract awards
- ■ Propriety
- ■ ■ Line items

Protest that agency should have evaluated bids on an item basis and made award to the low bidder for each item is denied since the IFB does not contain the multiple awards clause which would permit the agency to make award on that basis.

Procurement

Bid Protests**■ Antitrust matters****■ ■ GAO review**

Procurement

Bid Protests**■ Private disputes****■ ■ GAO review**

The alleged infringement of one private party's proprietary data by another is a matter between those private parties, not appropriate for consideration under the bid protest function of the General Accounting Office.

Procurement

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

The General Accounting Office will not consider challenges to affirmative determinations of responsibility where there is no showing of fraud or bad faith on the part of the agency nor that definitive responsibility criteria in the solicitation were not met.

Procurement

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

Protest that agency deviated from stated evaluation criteria in evaluating protester's proposal by point scoring quality control and safety plans is denied where the solicitation specifically provided that those plans would be evaluated as part of each offeror's management proposal.

Procurement

Noncompetitive Negotiation**■ Contract awards****■ ■ Sole sources****■ ■ ■ Propriety**

Proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1)(1988) is not objectionable where the agency reasonably determined that only one source was available to supply the required equipment, and protester, who submitted descriptive literature for review and evaluation by the agency in response to a notice published in the *Commerce Business Daily*, failed to establish it had current equipment which could meet the agency's requirements.



Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Prior contract performance

Protest that agency's nonresponsibility determination lacked a reasonable basis is denied where determination was based on contracting officer's reasonable conclusion that the protester, who previously had experienced performance problems, did not provide proof that it had the necessary technical skills to perform the requirement.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Sole-source award of a contract is proper where the contracting agency reasonably determined that it required a mobile X-ray system utilizing proprietary "backscatter" technology which could be supplied by only one source, and where the agency complied with the statutory procedural requirements for a sole-source award.

Procurement

Competitive Negotiation

- Alternate offers
- ■ Acceptance
- ■ ■ Propriety

Procurement

Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest that agency acted improperly in determining that proposed alternate product satisfied solicitation requirement for interchangeability with referenced brand name voltage standard is denied where, although alternate model was not subject to same shock and vibration standards as the referenced model, the relaxation of this requirement did not result in competitive prejudice to the protester, and thus was unobjectionable.

Procurement

Bid Protests

- **GAO procedures**
 - ■ **Information submission**
 - ■ ■ **Timeliness**
-

Procurement

Competitive Negotiation

- **Alternate offers**
- ■ **Acceptance**
- ■ ■ **Propriety**

Where protest as initially filed asserted only generally that the awardee's voltage standard, offered as an alternate product, should not have been accepted for award because it is of a lesser quality than the specified product manufactured by the protester, and a detailed argument that specific characteristics of the alternate product differ materially from those of the specified product was raised for the first time in the protester's comments on the agency report, the detailed argument is untimely and will not be considered; the detailed argument was based on information that the protester had in its possession when it filed its protest, and thus had to be raised at that time.

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