

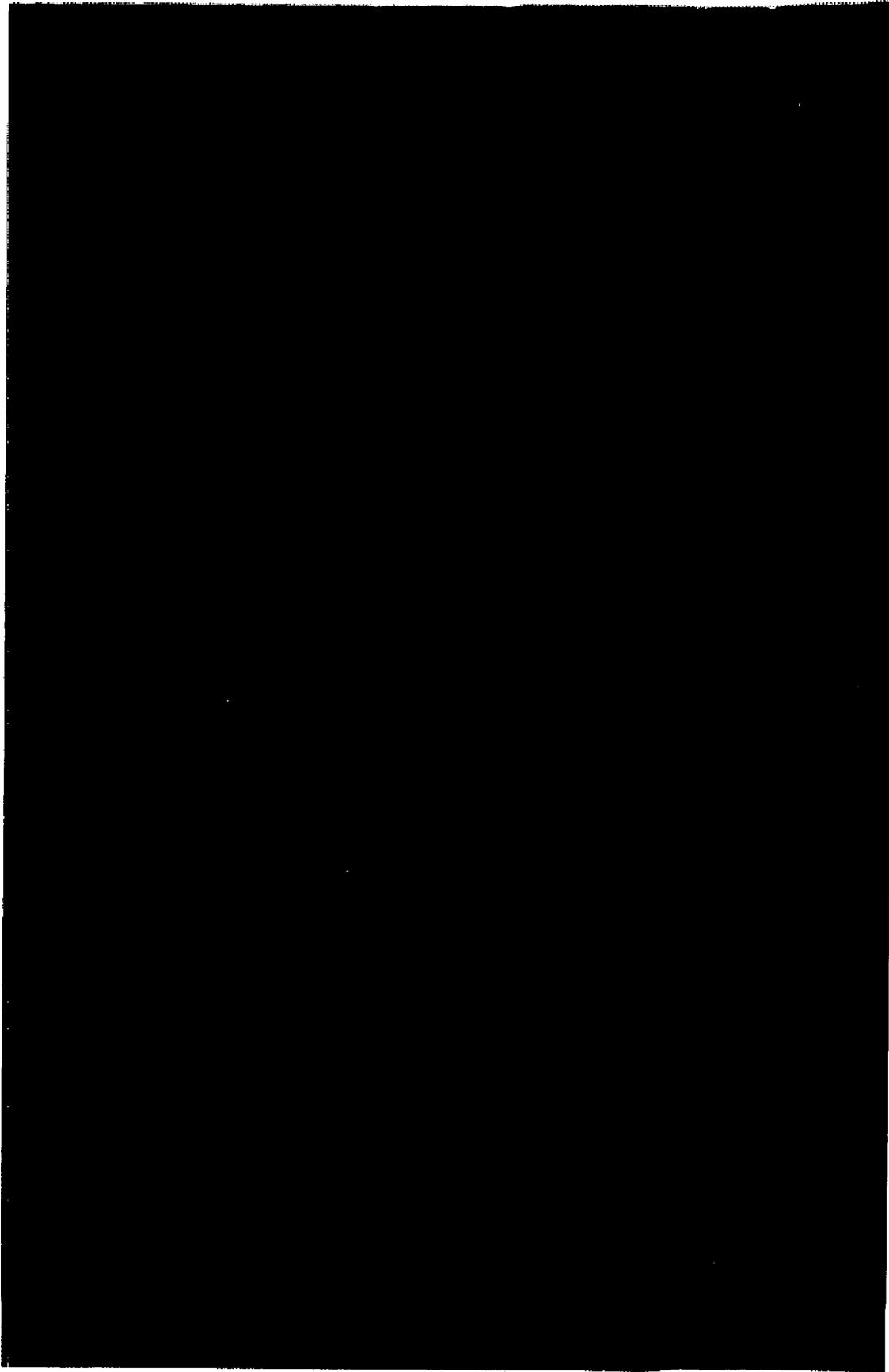
Digests Of Unpublished Decisions Of The Comptroller General Of The United States- OGC/Index-Digest Section

MAY 1985

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GAO

United States General Accounting Office



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UNITED STATES GENERAL ACCOUNTING OFFICE

CHARLES A. BOWSER

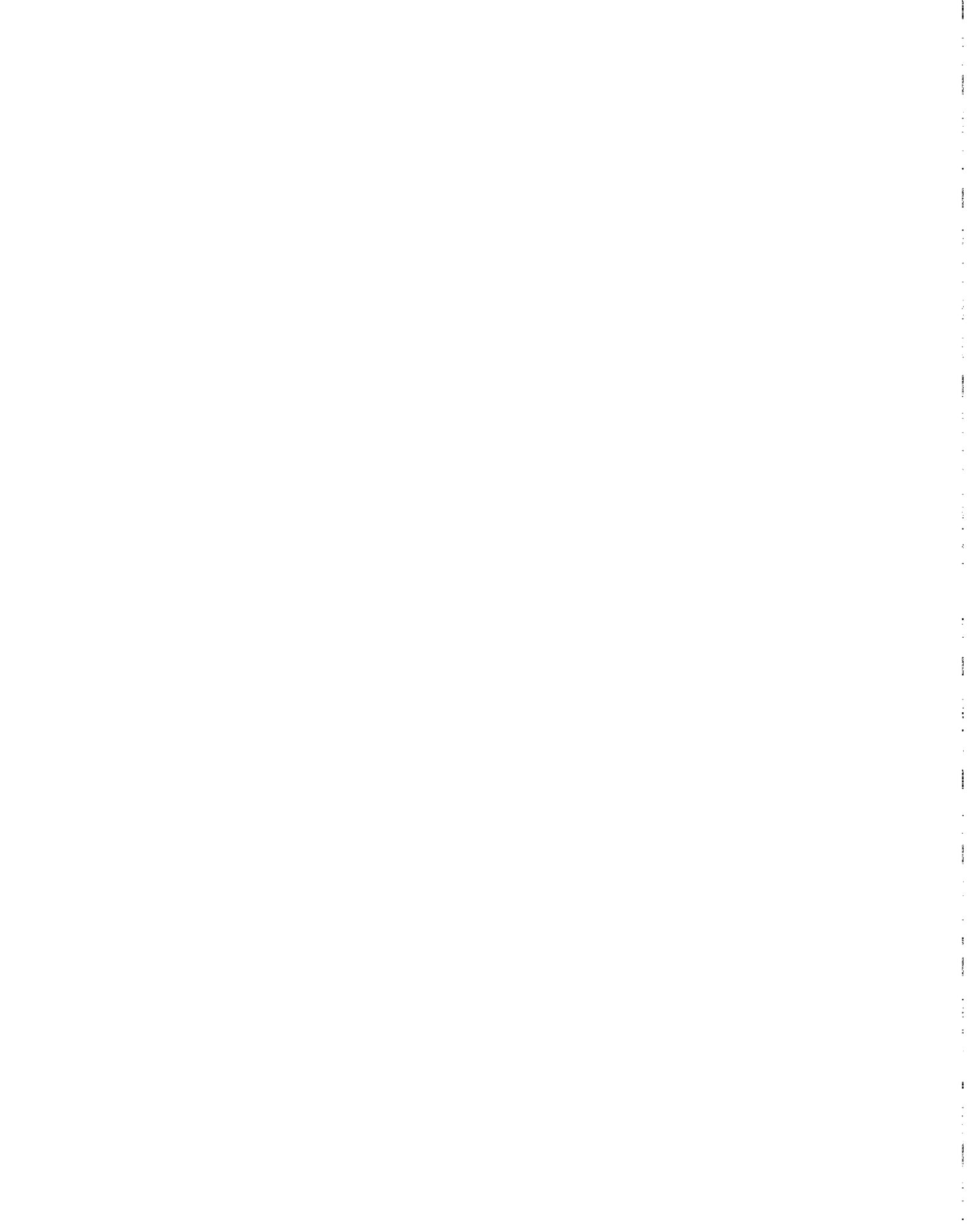
Comptroller General of the United States

VACANT

Deputy Comptroller General
of the United States

HARRY R. VAN CLEVE

General Counsel



VOLUME I

No. 8

MAY 1985

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Compiled in the
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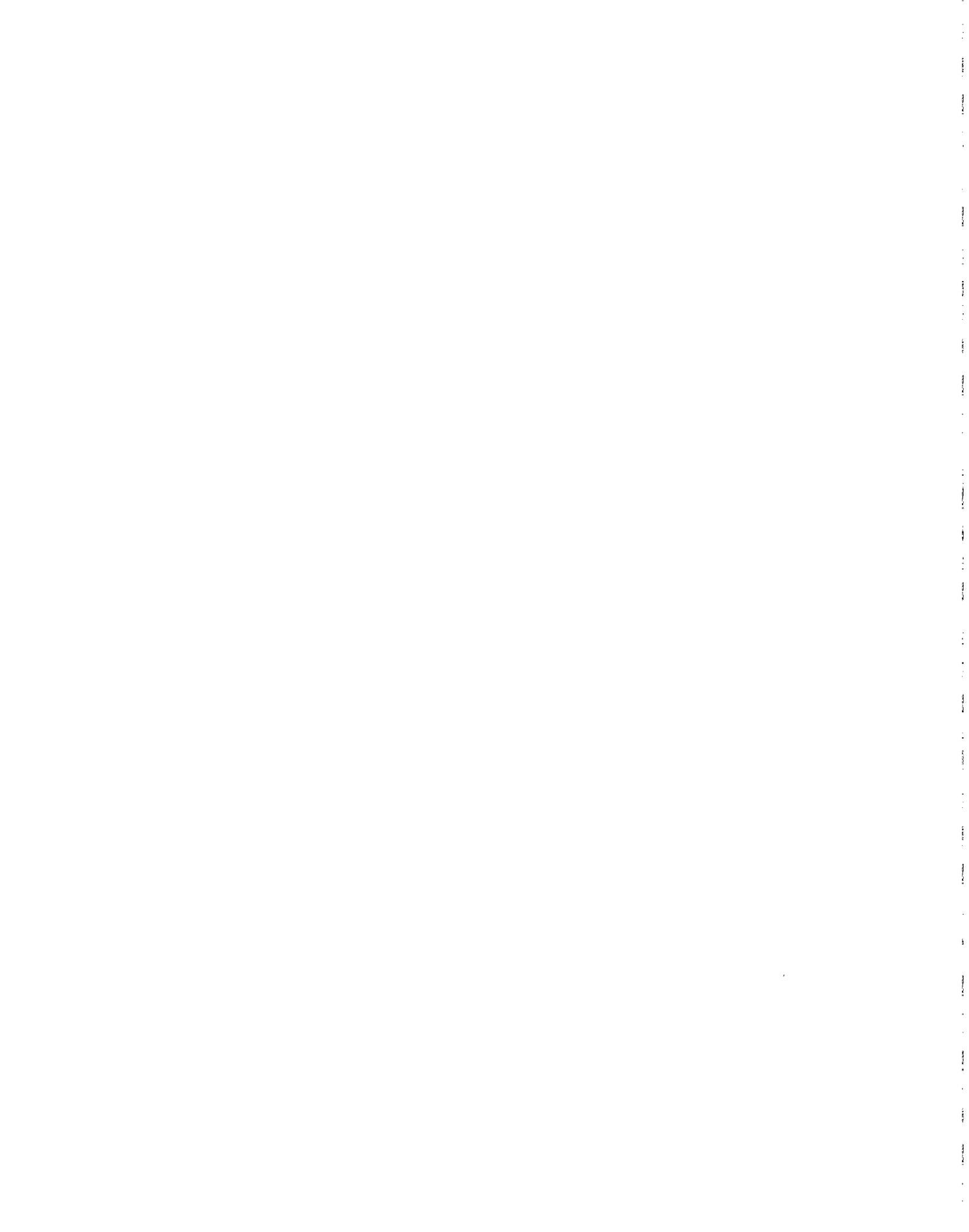
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DECISIONS OVERRULED, MODIFIED OR DISTINGUISHED

B-218359.2, May 6, 1985 reverses
B-218359, Mar. 28, 1985



**GENERAL GOVERNMENT MATTERS
APPROPRIATIONS AND MISCELLANEOUS**

ACCOUNTABLE OFFICERS B-218680 May 2, 1985

Relief

**Duplicate Checks Issued
Improper Payment**

Relief is granted Army Finance and Accounting official under 31 U.S.C. 3528 from liability for certification of improper payment resulting from payee's negotiation of both original issued Army instrument and substitute Treasury checks. The officer did not know and by reasonable diligence and inquiry could not have discovered that the payee had actually received both checks and intended to cash both payment instruments. Proper procedures were followed in the certification of the substitute check.

ACCOUNTABLE OFFICERS B-218752 May 7, 1985

Relief

**Illegal or Erroneous Payments
Without Fault Or Negligence**

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

CERTIFYING OFFICERS B-216246 May 22, 1985
Relief
Erroneous Payments
Administrative Action

Under Army Regulation (AR) 37-107-7.f a certifying officer is administratively liable for the correctness and adequacy of the documents he or she has certified. However, financial liability remains with the finance and accounting office. Therefore, it is not necessary for our office to relieve the certifying official. See, also 31 U.S.C. 3528(d).

CERTIFYING OFFICERS
Relief
Erroneous Payments
Basis For Relief

Relief granted to finance and accounting officer for loss due to improper payment of contract proceeds to assignor instead of assignee. Officer was entitled to rely on designated certifying officer's certification; he maintained and implemented an adequate system of procedures and controls and subsequent collection efforts have been made.

COURTS

B-217236

**Administrative Matters
Employees
Accountable Officers**

May 22, 1985

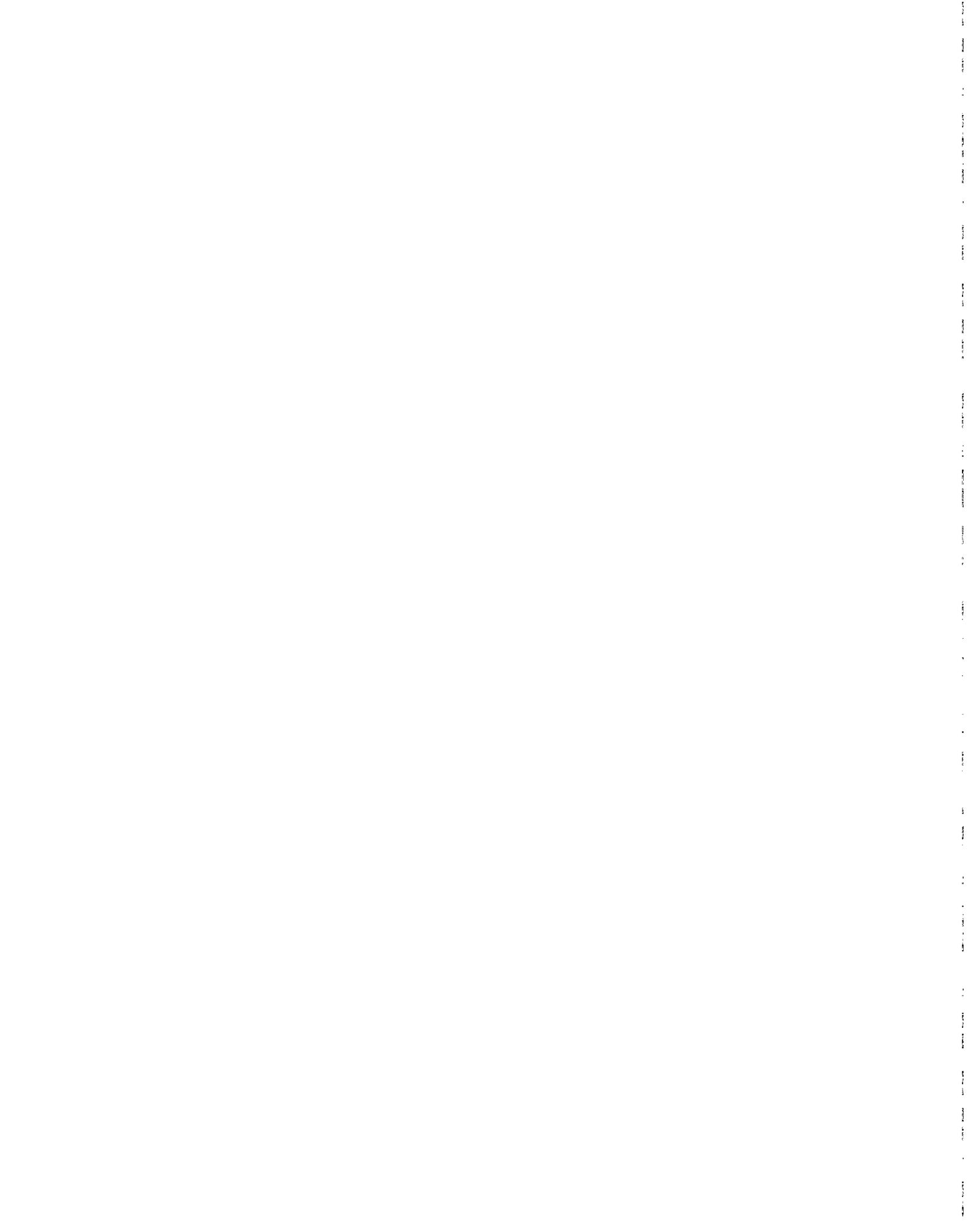
Under B-217236.2, issued today, bankruptcy fees and costs paid to the "clerk of the court" under 28 U.S.C. 1930, as amended includes payments to the clerk of the bankruptcy court incident to bankruptcy matters before the court. Therefore, the bankruptcy court clerk and not the district court clerk is the statutory accountable officer for these collections.

ACCOUNTABLE OFFICERS B-218679 May 22, 1985

Relief

**Duplicate Checks Issued
Improper Payment**

Relief is granted Army Finance and Accounting official under 31 U.S.C. 3528 from liability for certification of improper payment resulting from payee's negotiation of both original issued Army instrument and substitute Treasury check. The officer did not know and by reasonable diligence and inquiry could not have discovered that the payee had actually received both checks and intended to cash both payment instruments. Proper procedures were followed in the certification of the substitute check.



PERSONNEL LAW: CIVILIAN PERSONNEL

**OFFICERS AND
EMPLOYEES**

B-216652 May 6, 1985

Transfers

Government v. employee interest

Relocation expenses reimbursement

Administrative determination

Propriety

An employee is not entitled to relocation expenses when his transfer is not in the interest of the Government. The rule that when an employee is transferred under a merit promotion plan he should normally be allowed relocation expenses is not applicable when the transfer is to a position at the same grade level without known promotion potential, if the employee is not otherwise recruited for the position at the new duty station even though selection may have been on a competitive basis. In this case the agency decided that the transfer was not in the interest of the Government, even though the employee was competitively selected from a list of qualified eligibles furnished by the Office of Personnel Management. In the circumstance the determination of the agency is not overruled.

**OFFICERS AND
EMPLOYEES**

B-217189 May 6, 1985

Transfers

Real estate expenses

Finance charges

Reimbursement prohibition

Loan closing fees

An employee who purchased a residence incident to transfer may not be reimbursed for a commitment fee, as such payment is a finance charge under Regulation Z and is not reimbursable under Federal Travel Regulations, para. 2-6.2d (September 1981).

FRAUD

B-213624 May 10, 1985

False claims

Subsistence expenses

Agency recouped subsistence expenses advanced to an employee, determining that he had fraudulently claimed the payment of maid tips on each day of a 19-day temporary duty assignment. We find that the agency has sustained its burden of proving that the employee filed a fraudulent subsistence claim for one of the days, but that its evidence is insufficient to overcome the presumption of honesty and fair dealing in favor of the employee for the remaining 18 days. Accordingly, the employee may recover subsistence expenses for the 18 days which are not tainted by fraud. However, the agency may reduce reimbursement for maid tips if it determines that the claimed amounts are unreasonably high.

TRAVEL EXPENSES B-215285 May 10, 1985
Constructive travel costs
Computation

An employee of the Department of the Interior contended that a certifying officer's computation of his comparative cost reimbursement for temporary duty travel and our decision, Floyd L. Klavetter, B-215285, December 13, 1984, sustaining the computation, were based on erroneous facts. Both were based on a one-way coach airfare of \$143 published in the Official Airline Guide and schedules satisfying the employee's duty requirements while minimizing per diem. Where upon reconsideration it is found that carriers' passenger tariff restricted the fare to night-coach travel, the employee is entitled to additional reimbursement based on the lowest one-way fare (\$204) available to meet the employee's travel requirements without increasing per diem.

COMPENSATION**B-217171 May 28, 1985****Removals, suspensions, etc.****Backpay****Involuntary leave****Recrediting**

An employee was placed on involuntary leave on the basis of medical evidence provided by his own physician and the results of a fitness-for-duty examination, pending a determination by OPM on an agency-filed disability retirement application. OPM determined that the employee was not eligible for disability retirement but the agency failed to return the employee to duty until four months later. The employee is entitled to backpay and restoration of leave for the period of involuntary leave subsequent to OPM's determination since the agency was required at that point to either return the employee to duty or initiate his separation on the grounds of disability. The employee's claim for the period prior to OPM's determination may not be allowed since the agency reasonably interpreted the medical evidence presented as indicating the employee's incapacity to perform his duties and OPM did not overturn that evidence.

VEHICLES**B-217734 May, 28, 1985****Rental****Official and personal use**

A Navy employee ordered to perform temporary duty in Jeddah, Saudi Arabia, was instructed to rent a vehicle for consecutive 30-day periods for his use and for use by other personnel while he performed authorized weekend return travel to his duty station. The finance officer correctly denied reimbursement under the employee's travel orders for days that he was not in a temporary duty status. However, in this particular case, where the Navy activity itself had authority to lease a passenger vehicle for a period not in excess of 60 days, the employee's claim for the remainder of the car rental fee may be paid as an administrative expense incurred on behalf of the Navy.

COMPENSATION**B-217685 May 31, 1985****Overtime****Traveltime****Administratively controllable**

Employee claims overtime compensation for travel to temporary duty station on Sunday on grounds that such travel resulted from an uncontrollable event. Claim is denied since our decisions have held that travel to relieve another employee for scheduled annual leave is within the agency's administrative control and is not compensable under 5 U.S.C. § 5542(b)(2)(B)(iv) (1982).

COMPENSATION

B-217685 Con't

Overtime

May 31, 1985

Traveltime

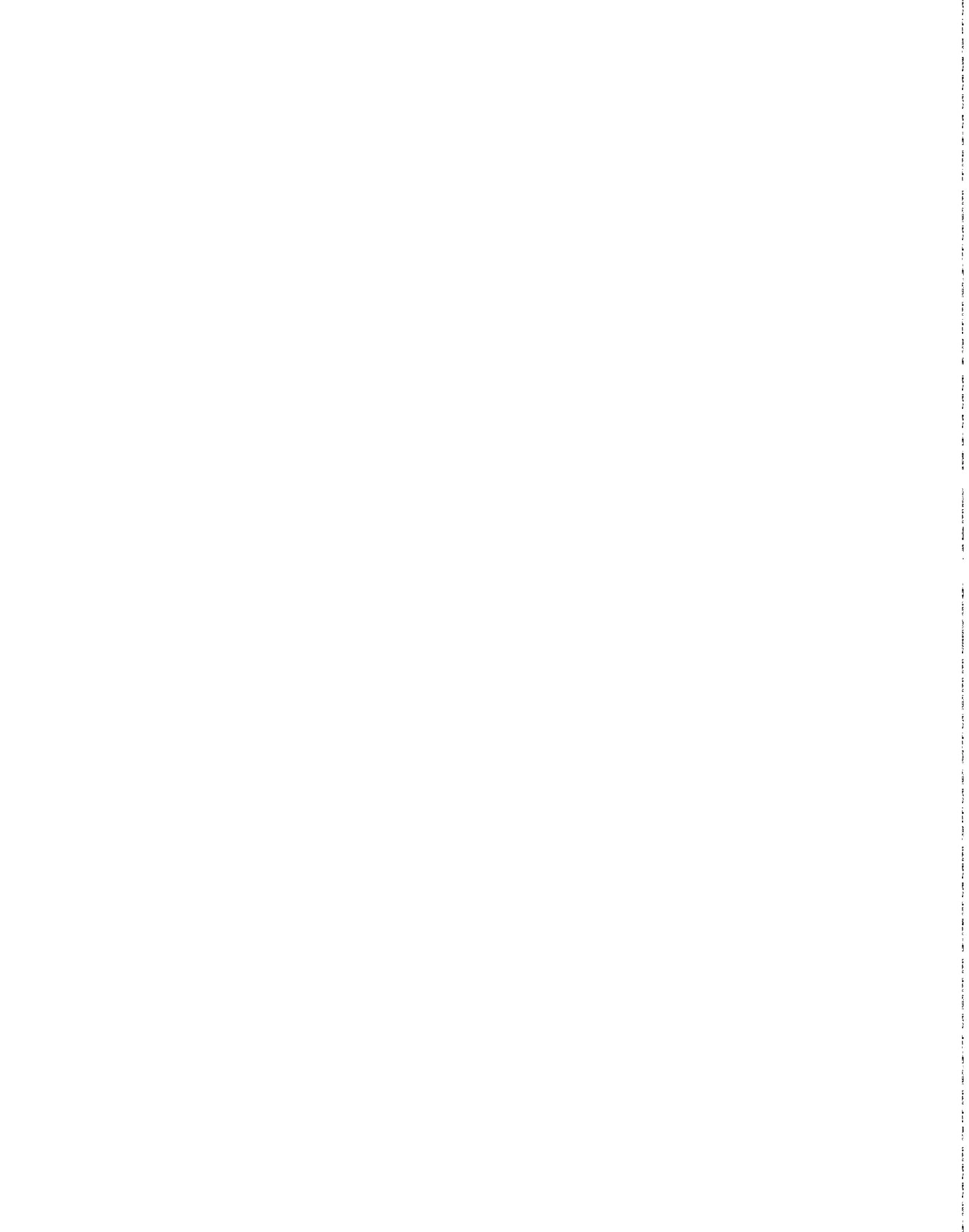
Arduous conditions

Employee claims overtime compensation for travel to temporary duty station on Sunday on grounds that such travel was arduous. Claim is denied since our decisions have held that, absent unusual conditions travel by automobile over hard-surfaced roads does not constitute travel under arduous conditions under 5 U.S.C. 5542(b)(2)(B)(iii) (1982).

PERSONNEL LAW: MILITARY PERSONNEL

SUBSISTENCE **B-216465** **May 22, 1985**
Per diem
Military personnel
Headquarters
Permanent or temporary duty

A service member ordered on a permanent change of station subsequently was issued temporary duty orders to attend a training course at the new permanent duty station just prior to reporting for his permanent assignment. Per diem and mileage allowances may not be paid for the period of temporary duty since the permanent transfer was effective when he reported for temporary duty and, thus, the member was not in a travel status performing travel away from his designated post of duty. While the itinerary on the temporary duty orders included a return to his old duty station, that appears to have been an error since his permanent change-of-station orders did not direct his return to the old permanent station and there was no apparent purpose for him to return there on public business.



CONTRACTS **B-218057.2 May 2, 1985**
Protests **85-1 CPD 494**
Moot, Academic, Etc. Questions

Protest against restrictive specifications is dismissed as academic where the protester submitted a bid based on the specifications it desired the procuring agency to use and was not the low bidder.

CONTRACTS **B-218512 May 2, 1985**
Protests **85-1 CPD 495**
Moot, Academic, Etc. Questions
Corrective Action Proposed, Taken,
Etc. By Agency

Allegation that agency is failing to conduct a market survey prior to the exercise of an option is academic where agency is undertaking the survey.

CONTRACTS **B-218545 May 2, 1985**
Protests **85-1 CPD 496**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
Apparent Prior To Bid Opening/
Closing Date For Proposals

Where the initial protest to the agency that the specifications were inadequate to meet the agency's minimum needs was not filed until after bid opening, the initial protest was untimely and a subsequent protest to GAO therefore will not be considered on the merits.

CONTRACTS **B-217188 May 3, 1985**
Negotiation **85-1 CPD 497**
Requests For Proposals
Specifications
Restrictive
Undue Restriction Not Established

Protest that specification for roofing panels is unduly restrictive where the RFP requires panels manufactured by only one company is denied where the agency's determination of its minimum needs has not been shown to be unreasonable.

CONTRACTS **B-218207.2 May 3, 1985**
Protests **85-1 CPD 498**
General Accounting Office Procedures
Timeliness Of Comments On Agency's
Report

GAO will not reopen a protest file closed because more than 7 working days after the contracting agency report was received on the scheduled due date protester had not commented on the report or stated an interest in having the protest decided on the existing record, since the GAO acknowledgment of the protest gave notice that the protest file would be closed in that event and reopening the file would be inconsistent with expeditious consideration of the protest.

CONTRACTS **B-218234.3** **May 3, 1985**
Protests **85-1** **CPD** **499**
Court Action
Protest Dismissed

A dismissal with prejudice by a court of competent jurisdiction constitutes a final adjudication on the merits of a complaint, which is conclusive not only to issues decided by the court, but also as to all issues that might have been decided. GAO therefore affirms a prior decision dismissing a protest which involved issues which were or could have been before the court.

CONTRACTS
Protests
General Accounting Office Procedures
Reconsideration Requests
Timeliness

A request for reconsideration of a prior decision must be filed (received) not later than 10 working days after the basis for reconsideration is known or should have been known, whichever is earlier.

CONTRACTORS **B-217129** **May 6, 1985**
Responsibility **85-1** **CPD** **500**
Determination
Definitive Responsibility Criteria
What Constitutes

Purchase descriptions for the items being procured under a solicitation do not constitute definitive responsibility criteria.

CONTRACTORS **B-217129 Con't**
Responsibility **May 6, 1985**
Determination
Review By GAO
Affirmative Finding Accepted

GAO will not review an affirmative responsibility determination based generally on alleged agency bad faith in conducting procurement, where there is no evidence or specific allegation that the agency's affirmative responsibility determination itself was motivated by bad faith.

CONTRACTS

Protests

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

Protest assertions based on alleged improprieties that were or should have been apparent to the protester prior to either the initial or final closing date for receipt of proposals are untimely and will not be considered on the merits where raised after the final closing date for receipt of proposals.

CONTRACTS

B-218137 May 6, 1985

Negotiation

85-1 CPD 501

Prices

Reasonableness

Where a solicitation issued as part of a cost comparison to determine whether installation support service functions should be contracted includes detailed performance requirements, firm acted unreasonably in pricing its offer to include support functions inherently governmental in nature simply because they were not expressly excluded from the statement of work.

CONTRACTS

Protests

Allegations

Unsubstantiated

GAO finds that the protester has failed to prove its assertion that the agency should have discussed areas of staffing in its proposal that were for non-solicitation functions because the protester has presented no evidence to show that the agency reasonably should have known that the offer included non-covered work.

CONTRACTS

Protests

Moot, Academic, Etc. Questions

Solicitation Cancelled

Protest that award of a contract would have created an improper personal services contract is dismissed as academic where the government properly determined to continue the function in-house.

CONTRACTS **B-218359.2 May 6, 1985**
Protests **85-1 CPD 503**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
Apparent Prior To Bid Opening/
Closing Date For Proposals

A protest which is filed with GAO prior to an amended RFP's closing date, alleging a specification defect, is timely even though the original RFP contained a provision similar to that protested in the amendment, since the amended RFP is for a subsequent year's needs and is therefore tantamount to a new procurement. Prior decision holding that the protest is untimely is reversed and protest will be considered on its merits.

BIDS **B-218388 May 6, 1985**
Preparation **85-1 CPD 504**
Costs
Noncompensable

Bid preparation costs, premised on allegedly arbitrary issuance of resolicitation while protest was pending may not be reimbursed since agency is not precluded from resoliciting procurement merely because protest was filed against cancellation of original solicitation.

CONTRACTS
Profits
Anticipated

B-218271 May 7, 1985
85-1 CPD 510

No legal basis exists to allow a protester to recover anticipated profits or to award a contract to the protester on a sole-source basis when competition is available.

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

B-218557; et al.
May 7, 1985
85-1 CPD 511

Where a small business concern is determined to be nonresponsible by a contracting officer, GAO will not review the subsequent denial by the Small Business Administration of a certificate of competency absent a showing of possible fraud or bad faith on the part of the contracting officials or of SBA's failure to consider vital information bearing on the firm's responsibility.

BIDS

B-218571 May 7, 1985

Prices

85-1 CPD 512

Below Cost**Not Basis For Precluding Award**

The allegation that an awardee submitted an unreasonably low bid in order to "buy-in" to a contract provides no legal basis for protest, as it is well-settled that a contracting agency may accept a below-cost bid if the bidder is determined to be responsible. By awarding the contract, the agency has made such an affirmative determination, and GAO does not review affirmative determinations of responsibility except in limited circumstances, which are not present here.

CONTRACTS**Awards****Procedural Defects**

Procedural deficiencies, involving an agency's award of a contract notwithstanding a pending agency protest, failure to furnish an administrative report on an earlier protest which was subsequently withdrawn, and failure to inform the present protester and other bidders of the earlier protest, do not affect the validity of an otherwise proper award.

CONTRACTS **B-217059** **May 8, 1985**
Negotiation **85-1 CPD 513**
Offers Or Proposals
Evaluation
Criteria
Application Of Criteria

Protest that technical evaluation of proposal was conducted improperly and that award was not made in accord with the evaluation scheme set forth in the RFP is denied. GAO's in camera review of all of the evaluation materials in light of issues raised by protest reveals no basis for finding that agency's evaluation was arbitrary or unreasonable or that evaluation officials abused their discretion. Record supports contracting agency's finding that awardee's proposal was superior to protester's proposal and that evaluations were performed in strict conformance with evaluation scheme set forth in the RFP.

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

In negotiated procurements there is no requirement that award be made on the basis of the lowest cost. The procuring agency has the discretion to select a higher rated technical proposal instead of a lower rated, lower cost proposal if doing so is consistent with the evaluation scheme in the solicitation.

FREEDOM OF INFORMATION ACT **B-217059** **Con't**
General Accounting Office Authority **May 8, 1985**

A firm's recourse to contracting agency documents that allegedly support its position, but which it has not been able to secure from that agency, is to pursue the disclosure remedies provided in the Freedom of Information Act. GAO has no authority under that act to determine what information other agencies must disclose.

BIDS **B-217184; B-218039**
Competitive System **May 8, 1985**
Adequacy Of **85-1 CPD 514**
Competition
Sustained By Record

It is not reasonable to accept protester's contention that it was placed at a competitive disadvantage by agency's disclosure as to solicitation requirements, where solicitation generally provides that oral information will not be binding as to its terms, and agency officials explicitly instructed protester that solicitation requirements were unchanged.

CONTRACTS **B-217184; B-218039 Con't**
Awards **May 8, 1985**
Procedural Defects

Fact that bid bond document was discovered in bid package after bid opening does not in itself evidence failure to follow proper procedures.

CONTRACTS
In-House Performance v. Contracting Out
Discretionary Functions Related To Legal
Mission Of agency

Whether or not Air Force should provide for itself commercial and industrial products which can be provided under contract by private enterprise is a matter of executive policy, not subject to review by GAO.

CONTRACTS
Options
Exercisable At Sole Discretion
Of Government
Review By GAO

Air Force decision as to whether to exercise contract renewal option is generally a matter of contract administration which is not for review under GAO's bid protest function.

CONTRACTS **B-217184; B-218039 Con't**
Protests **May 8, 1985**
Burden Of Proof
On Protester

Where protester challenges Air Force specifications as failing to state the government's minimum needs but does not show Air Force clearly acted unreasonably in determining them, protester has not met burden of proof.

CONTRACTS
Protests
Conflict In Statements Of
Protester And Contracting Agency

Where conflicting statements of protester and contracting agency constitute only evidence of discussion during which inside information was allegedly disclosed, protester has failed to meet burden of affirmatively proving its case.

CONTRACTS **B-218581 May 8, 1985**
Protests **85-1 CPD 515**
Contract Administration
Not For Resolution By GAO

Where offer on its face does not take exception to solicitation's specifications, contention that product supplied by contractor will not comply with contract specifications is a matter of contract administration for consideration by the agency, not GAO.

CONTRACTS **B-218571.2 May 9, 1985**
Protests **85-1 CPD 518**
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To
Protester

A protest alleging that an awardee submitted an unreasonably low bid is dismissed as untimely where it was filed more than 2 months after bids were opened, and where the protest expressly adopted arguments presented by another disappointed bidder in an earlier protest which was dismissed as not providing any legal basis for GAO's review of the matter.

CONTRACTS **B-218573 May 9, 1985**
Small Business **85-1 CPD 519**
Concerns
Awards
Prior To Resolution Of Size Protest

Contracting officer's award of a contract to the second-low bidder following a determination by the Small Business Administration's Regional Office that the low bidder is not small, without waiting for results of an appeal, is not improper and does not constitute bad faith. Under applicable regulations, the contracting officer need only wait for SBA's initial determination or for 10 working days after SBA receives a size status protest, whichever occurs first. Thereafter he may-- but is not required to--continue to withhold award.

CONTRACTS **B-216038 May 10, 1985**
Negotiation **85-1 CPD 523**
Requests For Proposals
Specifications
Restrictive
Undue Restriction Not Established

Specifications establishing mandatory technical requirements are not vendor-specific where five offerors other than the allegedly favored vendor submitted proposals which complied with them and were for other than that firm's equipment.

CONTRACTS
Negotiations
Requests For Proposals
Specifications
Minimum Needs
Not Overstated

Protest that agency has not adequately stated its needs is denied where protester merely states its technical disagreement with the agency's determination of its needs.

CONTRACTS **B-216038 Con't**
Protests **May 10, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest that RFP, which provided that award would go to the low conforming offeror, does not contain definitive evaluation criteria is dismissed as untimely where it was filed after the closing date for the receipt of proposals. Further, GAO will not consider protest under the exception to the timeliness rules for significant issues, since the matter is not of widespread interest or importance to the procurement community.

CONTRACTS **B-216084.2 May 10, 1985**
Negotiation **85-1 CPD 524**
Conflict Of Interest Prohibitions
Organizational
Agency Responsibilities

Responsibility for determining whether a firm has a conflict of interest under a contract and whether the firm should be excluded from competition rests with the contracting agency and GAO will not overturn such a determination unless it is shown to be unreasonable.

CONTRACTS **B-216084.2 Con't**
Termination **May 10, 1985**
Erroneous Award Remedy

Protest that procuring agency improperly terminated contract because it determined that awardee was a manufacturer of systems for which it would be in a position to recommend or develop specifications and, therefore, would be in a position to promote its own equipment is denied. Agency determination is reasonable since protester would be in a position to further its own interests regardless of whether it was considered a manufacturer of systems, or merely a supplier of systems and a manufacturer of software, as the protester contends.

CONTRACTS **B-216201 May 10, 1985**
In-house **85-1 CPD 525**
Performance v. Contracting Out
Cost Comparison
Cancellation Of Solicitation
Specification Changes
Minimum Needs Overstated

A protest against an agency's cancellation of a request for proposals issued as part of an Office of Management and Budget Circular A-76 cost comparison is denied where the agency reasonably determines that the solicitation does not accurately reflect its minimum needs.

CONTRACTS **B-216201 Con't**
Protests **May 10, 1985**
Allegations
Bias
Unsubstantiated

Unsupported allegations of bad faith by procuring officials do not meet the protester's burden of proof.

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
In-House Performance v.
Contracting Out
Cost Comparison
Adequacy

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

CONTRACTS **B-216441 May 10, 1985**
Negotiation **85-1 CPD 526**
Offers Or Proposals
Discussion With All Offerors
Requirement
Exceptions
Offerors Not Within Competitive
Range

Allegation that agency should have provided offerors with greater detail concerning the expected manner of compliance with the request for proposals' requirements for a research development effort is denied since there is no requirement that the agency precisely specify the manner in which offerors are to perform and the RFP clearly set forth the capabilities and characteristics of the product to be developed.

CONTRACTS **B-216441 Con't**
Negotiation **May 10, 1985**
Offers Or Proposals
Evaluation
Allegation Of Bias Not Sustained

Protest alleging that agency conducted procurement in bad faith is denied where agency actions which form the basis of the protester's complaint--such as not conducting the procurement under the section 8(a) program--are not found improper.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Competitive Range Formula
Administration Determination

An agency's determination of whether a proposal is in the competitive range is a matter of agency discretion which will not be disturbed absent a clear showing that the determination lacked a reasonable basis. Moreover, a protester's mere disagreement with the agency's judgment does not meet its burden of proving that the evaluation of proposals and competitive range determination were unreasonable.

CONTRACTS **B-216441 Con't**
Negotiation **May 10, 1985**
Offers Or Proposals
Evaluation
Criteria
Application Of Criteria

Review of record shows that agency technical evaluation was fair, reasonable and consistent with major evaluation criteria set forth in the request for proposals (RFP). Although agency gave greater emphasis to one subfactor than provided for by the evaluation scheme in the RFP, record indicates that the change in the relative importance of the subfactor was not prejudicial to protester.

BIDDERS **B-216844-O.M.**
Debarment **May 10, 1985**
Labor Stipulation 85-1 CPD **---**
Violations
Davis-Bacon Act
Debarment Unwarranted

Notwithstanding possible conclusion that employees were underpaid by the prime contractor, debarment of prime contractor is not warranted because of DOL assessment that evidence may be sufficient to persuade a DOL administrative law judge to recommend debarment under 29 C.F.R. § 5.12(b) (1984).

CONTRACTS **B-218507.2 May 10, 1985**
Protests **85-1 CPD 530**
General Accounting Office Procedures
Filing Protest With Agency

Dismissal of original protest is affirmed where the protester failed to furnish a copy of its protest to the contracting agency within 1 day after the protest was filed with GAO.

CONTRACTS **B-218658 May 10, 1985**
Protests **85-1 CPD 531**
General Accounting Office Procedures
Information Sufficiency
Clarification Requests By GAO
Duty To Make

Protest that does not include a statement of the factual and legal grounds for protest is dismissed. Moreover, a statement filed after the 10-day period for protesting expired does not cure the matter.

CONTRACTS **B-218802 May 10, 1985**
Protest **85-1 CPD 532**
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To
Protester

Protest letters filed more than 10 days after basis for protest is known or after denial of agency protest are untimely since both letters were received more than 10 days after the dates of the letters.

CONTRACTS **B-216113 Con't**
Negotiation **May 13, 1985**
Requests For Proposals
Specifications
Conformability Of Equipment, Etc.,
Offered
Commercial Product Requirement

RFP provision requiring that offered lathe be the manufacturer's current model which is merely a part of the general specifications concerning design and performance does not preclude offeror from modifying current model to meet agency's specifications.

BIDS **B-216172 May 13, 1985**
Unbalanced **85-1 CPD 534**
Responsiveness Of Bid

Bid for base and option quantities is not considered unbalanced, and thus subject to rejection as being nonresponsive, where the protester fails to show that it is materially unbalanced, in that the option quantities were not reasonably expected to be exercised or that there was such extreme front-loading that the risk of an inordinately high cost to the government and windfall to the bidder from failure fully to exercise the options overshadowed the agency's intention fully to exercise the options.

CONTRACTS **B-216172 Con't**
Awards **May 13, 1985**
Separable Or Aggregate
Partial Award
Propriety

Solicitation provision that bids would be evaluated by adding the total price for the option items to the total price offered did not require that only a single, aggregate award be made. GAO has previously found that such a provision merely advises bidders that both the base and the option quantities would be considered in evaluating bids. Moreover, the solicitation, read as a whole, clearly advised offerors that the agency reserved the right to make multiple awards on a lot-by-lot or item-by-item basis.

BIDDERS **B-216260.2 May 13, 1985**
Qualifications **85-1 CPD 535**
Certifications
Adequate Documentation

Solicitation requirement for manufacturer's certification of extended parts availability is met by certification from bidder which supplies entire system and itself manufactures at least half of the equipment supplied, where the procuring agency determines that the bidder should be considered the manufacturer of the entire system for certification purposes.

CONTRACTS **B-216260.2 Con't**
Protests **May 13, 1985**
Moot, Academic, Etc. Questions
Protester Not In Line For Award

Protest that bid was improperly rejected as nonresponsive is academic and not for consideration where protester would not be in line for award even if protest allegation was sustained.

BIDS **B-216709 May 13, 1985**
Invitation For Bids 85-1 CPD 536
Cancellation
After Bid Opening
Compelling Reasons Only

The use of specifications which do not adequately describe the government's actual needs provides a compelling reason to cancel an invitation after bid opening. GAO will not substitute its judgment about the adequacy of the specifications, and has no basis to object where the protester has not shown the agency's determination to be clearly unreasonable.

CONTRACTS **B-218421.2 and .3**
Protests **May 13, 1985**
General **85-1 CPD 538**
Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

GAO affirms recommendation that contract be terminated and awarded to the firm improperly rejected as nonresponsive, where reconsideration request includes only the awardee's self-serving statement that termination costs will be excessive, and the record include the prospective new contractor's un rebutted assertion that it can perform within the necessary time-frame. D-36

CONTRACTS **B-218422.2 May 13, 1985**
Protests **85-1 CPD 539**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

Prior decision sustaining a protest on grounds that negotiations for a building lease were improperly conducted with the awardee without negotiating with the protester, whose proposal was also within the competitive range, but recommending no corrective action because lack of termination for convenience clause could subject government to claim for substantial damages, is affirmed upon reconsideration where the protester has shown no error of law or fact which would warrant reversal.

CONTRACTS **B-218669 May 13, 1985**
Protests **85-1 CPD _____**
General Accounting Office Procedures
Timeliness Of Protest
Congressional Transmittal Of Protest

GAO will not consider a complaint against the cancellation of a small business set-aside referred to it by a Member of Congress since the referral was received at the GAO more than 10 working days after constituent knew of a basis for protest, but did not file a timely protest with either the contracting agency or GAO.

CONTRACTS **B-218669 Con't**
Small Business **May 13, 1985**
Concerns
Awards
Set-asides
Price Reasonableness
Comparison Criteria

A contracting officer may consider the price submitted by an otherwise ineligible business in deciding whether to cancel a small business set-aside on grounds of price unreasonableness and resolicit the requirement on an unrestricted basis. Receipt of a large business "courtesy" bid that is significantly lower than the low small business bid, however, does not automatically indicate the unreasonableness of the small business bid. The matter is essentially one of the contracting officer's judgment, which the protester has the burden of proving is unreasonable.

CONTRACTS **B-218707.2 May 13, 1985**
Protests **85-1 CPD 537**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

Request for reconsideration is dismissed where request does not contain a detailed statement of the factual and legal grounds upon which reversal is deemed warranted, specifying any error or law made or information not previously considered.

BIDS **B-218156** **May 14, 1985**
Invitation For Bids 85-1 CPD 541
Specifications
Tests
First Article
Waiver Propriety

The decision whether to waive first article testing is within the contracting officer's discretion, and GAO will not substitute its judgment, particularly when there is no evidence that the protester has been treated unfairly. Nevertheless, when a waiver is unsupported by the record, GAO will ask the agency's technical experts to review the matter.

CONTRACTS **B-218414.2** **May 14, 1985**
Protests **85-1 CPD 542**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

Prior dismissal of a protest for failure to state a valid basis for a protest is affirmed on reconsideration where the initial protest contained factual allegations, but either failed to relate the facts to a protestable issue or drew conclusions from the facts that were purely speculative and not even mentioned in the request for reconsideration.

CONTRACTORS **B-215535** **May 15, 1985**
Responsibility **85-1** **CPD** **545**
Determination
Review By GAO
Affirmative Finding Accepted

When a protester questions its competitor's capacity to perform the additional work under a proposed contract modification, it is either protesting against the agency's affirmative responsibility determination--a matter that GAO does not review except under certain limited circumstances not present here--or raising a question of contract administration--generally beyond the scope of GAO's bid protest function.

CONTRACTS
Modification
Beyond Scope Of Contract
Subject To GAO Review

Generally, GAO will not consider protests against contract modifications, since these involve contract administration; however, where, as here, a protester alleges that a modification went beyond the scope of an existing contract and should have been the subject of a new procurement, GAO will determine whether the nature of the original contract has been changed so substantially that a new procurement should be conducted.

CONTRACTS **B-215535 Con't**
Modification **May 15, 1985**
Scope Of Contract Requirement

When disputed modifications do not make the contract to be performed essentially different from the one originally competed, the additional work is within the scope of the contract and a new procurement is not required.

CONTRACTS
Protests
Burden Of Proof
On Protester

When improper conduct on the part of government officials is alleged, the protester has the burden of proof, and the GAO will not rely on inferences alone to find misconduct. In a case where the protester's evidence is nothing more than its suspicion that the contracting agency may have released or will release its proprietary data to a competitor, but the agency denies any such intention, the protester has not met its burden of proof.

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Disputes
Between Private Parties

If a protester intends to argue that its competitor is independently gaining unauthorized access to its proprietary data, i.e., without agency involvement, then this is a dispute between private parties and thus is beyond the scope of GAO's bid protest function.

CONTRACTS

B-217113 May 15, 1985

Awards

85-1 CPD 546

Separable Or Aggregate**Advantage To Government**

Where the IFB for two items contemplates that award will be based on the low bid for the first program year and/or the total 3-year low bid, whichever is more advantageous to the government, the contracting agency may award the contract to the single bidder with the lowest single or 3-year bid and is not required to award to separate bidders, even if the split award would be the lowest cost to the government, where continuity of service requires an award to a single bidder.

CONTRACTS

B-217481 May 15, 1985

Negotiation

85-1 CPD 547

Offers Or Proposals**Discussion With All Offerors****Requirement****Varying Degrees Of Discussions****Propriety**

Protest contending that an agency should have conducted technical discussions with protester, since they were held with the other offeror in the competitive range, is denied since protester's proposal received 49 of 50 points and could not have been materially improved by discussions. Although the other offeror's revised technical proposal received 50 points, the two proposals were essentially equal in technical merit and the protester lost the award because it raised its estimated costs in its best and final offer above those of its competitor.

CONTRACTS **B-217481 Con't**
Negotiation **May 15, 1985**
Offers Or Proposals
Evaluation
Reasonable

Protest contending that agency manipulated protester during cost discussions to increase its price to its detriment is denied since record shows that the agency's discussions were fair and reasonable, consisting only of requests for support or explanations of proposed costs.

BIDS **B-217573 May 15, 1985**
Competitive System 85-1 CPD 548
Equal Bidding Basis For All Bidders

Protest that is was unfair of the procuring agency to restrict the prebid inspection visit of construction site to the time announced in the IFB, and to deny protester access to the worksite when requested on the last working day prior to bid opening, is denied. As long as the solicitation gave bidders the same opportunity for a prebid site inspection, a bidder who elects not to attend the inspection must assume attendant risks in formulating its bid, or choose not to bid at all.

CONTRACTORS **B-218251 May 15, 1985**
Responsibility **85-1 CPD 550**
Determination
Review By GAO
Affirmative Finding Accepted

GAO does not review a contracting officer's affirmative determination of responsibility absent a showing it was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met.

CONTRACTS

Negotiation
Offers Or Proposals
Rejection
Failure To Meet Solicitation
Requirements
Delivery Provisions

When, based on agency's urgent need for aerial work platforms, and its dissatisfaction with the previous performance of used platforms, the RFP expressly requires delivery of new items 90 days after award, offer to deliver of new platforms in 120 days with interim use of used ones properly was rejected as unacceptable.

CONTRACTS

Protests
Contract Administration
Not For Resolution By GAO

Whether a contractor will deliver a product conforming to the awarded contract is a matter of contract administration for resolution by the contracting agency, not GAO.

CONTRACTS **B-218251 Con't**
Protests **May 15, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest based on alleged improprieties in a solicitation that were incorporated by amendment must be filed before the date proposals in response to the amendment are due.

CONTRACTS **B-218277.2 May 15, 1985**
Protests **85-1 CPD 551**
General Accounting Office Procedures
Timeliness Of Protest
**Date Basis Of Protest Made Known
To Protester**

Protest against cost of providing equipment demonstration which was requested by protester is untimely when filed more than 10 days after protester's request for demonstration was granted by agency.

CONTRACTS
Protests
Moot, Academic, Etc. Questions
**Corrective Action Proposed, Taken,
Etc. By Agency**

Protest is dismissed as academic where agency has provided relief requested by protester.

CONTRACTS **B-216634 May 16, 1985**
Negotiation **85-1 CPD 554**
Offers Or Proposals
Evaluation
Reasonable

An allegation that the procuring agency incorrectly rated the awardee's proposal technically superior to the protester's is denied where the record shows that the agency's determination was reasonable and consistent with the stated evaluation criteria.

CONTRACTS
Negotiation
Offers Or Proposals
Preparation
Costs
Recovery Criteria

Protester is entitled to recover its proposal preparation costs where the agency failed to assure that the protester and the awardee were competing on an equal basis and the protester had a colorable chance at receiving the award.

CONTRACTS
Negotiation
Requests For Proposals
Amendment
Equal Competitive Basis For All
Offerors

Protest is sustained where the agency relaxed a performance requirement and the delivery schedule for the awardee without informing the protester of these changes, which could have had a material impact on the protester's proposed cost.

MARITIME **B-216634 Con't**
ADMINISTRATION **May 16, 1985**

Contracts

Exemption from competitive procurement

Maritime Administration's own statutory exemption from competitive procurement requirements does not excuse improprieties where there is no indication that it was impracticable to comply with competitive requirements.

CONTRACTS **B-216954 May 16, 1985**

Termination **85-1 CPD 555**

Solicitation Inappropriate

Award under a deficient solicitation which omitted the payment due date does not justify termination of the awarded contract where the government's needs will be met and there is no evidence in the record that other bidders were prejudiced.

CONTRACTS **B-218121 May 16, 1985**

Negotiation **85-1 CPD 556**

Offers Or Proposals

Evaluation

Technical Acceptability

Administrative Determination

Protest alleging that solicitation cannot be satisfied by a common bus system is denied because the record supports the determination by the contracting activity (a prime contractor managing government-owned facility) that the RFP's technical requirements were met.

CONTRACTS **B-218121 Con't**
Protests **May 16, 1985**
Notice
To Contracting Agency

Agency request that protest be dismissed because it failed to set forth a clear statement of the grounds for protest and also because protester failed to furnish a copy of the protest to the contracting agency within 1 day of its filing with GAO is denied. Agency was aware and did not promptly object to the protester's failure to furnish a copy of the submission filed with GAO.

CONTRACTS **B-218292 May 16, 1985**
Negotiation **85-1 CPD 557**
Sole-source Basis
Administrative Determination
Reasonable Basis

Allegation that agency's cancellation of RFQ and award of sole-source contract were improper is denied since agency's determination that only one source was qualified to perform the work within the required timeframe was not unreasonable.

CONTRACTS

B-218292 Con't

Protests

May 16, 1985

Allegations

Unsubstantiated

Allegation that agency improperly split its total requirements and that small purchase procedures should not have been utilized since overall requirement exceeds the small purchase dollar limitation is without merit. Record shows that agency was not in a position to issue a solicitation for its long-range requirements and, under the circumstances, we do not find the agency's utilization of the small purchase procedures improper.

GENERAL ACCOUNTING OFFICE

Jurisdiction

Contracts

Disputes

Between Private Parties

Protest alleging that awardee's employee, who formerly worked with the protester, wrongfully competed with protester and misappropriated trade secrets is essentially a dispute between private parties which is not for consideration under GAO Bid Protest Regulations.

CONTRACTS **B-218393, et al.**
Protests **May 16, 1985**
General **85-1 CPD 558**
Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect

Protests that are not filed with GAO within 10 working days of initial adverse action on agency-level protests are untimely under Bid Protest Regulations. Moreover, the significant issue exception in the regulations will not be invoked when similar issues have been raised in other protests pending at GAO.

CONTRACTS **B-218613 May 16, 1985**
Protests **85-1 CPD 559**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
**Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest based upon alleged improprieties which do not exist in an initial RFP but which are subsequently incorporated into the RFP must be filed not later than the next closing date for receipt of proposals following the incorporation.

CONTRACTS **B-218824 May 16, 1985**
Protests **85-1 CPD 560**
Moot, Academic, Etc. Questions
Solicitation Cancelled

Protest is dismissed as academic where contract award being protested has been canceled.

BIDS B-216571, et al.
Invitation For Bids May 17, 1985
Amendments 85-1 CPD 562
Acknowledgment
Deviation From Required Procedure
Form v. Substance

Bid is responsive where bidder acknowledged an amendment transmitting a revised bid form but submitted its bid on the unamended bid form because it is clear from the acknowledgment that bidder intended to comply with amended bid acceptance period requirement and that the use of the unamended form was merely an oversight.

CONTRACTS B-218109.3 May 17, 1985
Protests 85-1 CPD 563
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To
Protester

Protest is untimely when it is not filed with either contracting agency or GAO within 10 days after basis of protest is known or should have been known.

CONTRACTS **B-218116 May 17, 1985**
Small Business **85-1 CPD 564**
Concerns
Awards

Responsibility Determination
Nonresponsibility Finding
Certificate Of Competency Denial
On Recent Procurement--
Resubmission To SBA Not Required

Following reevaluation of bidder's responsibility, which results in continuance of prior negative determination, contracting officer is not required to resubmit matter to the Small Business Administration after bidder withdrew certificate of competency application.

CONTRACTS
Small Business Concerns
Awards

Responsibility Determination
Nonresponsibility Finding
Review By GAO

Where bidder withdraws certificate of competency application with the Small Business Administration, GAO will not review nonresponsibility determination as that would amount to substitution of GAO for the agency statutorily authorized to review such determination.

CONTRACTS **B-218116 Con't**
Small Business **May 17, 1985**
Concerns
Awards

Review By GAO
Procurement Under 8(a) Program
Standard Operating Procedures
Compliance

Small Business Administration's Standard Operating Procedure (SOP) represents internal agency policy and guidelines, without the force and effect of law, and GAO does not generally review SBA's compliance with its SOP.

BIDS **B-218129.2 May 17, 1985**
Qualified **85-1 CPD 565**
Bid Nonresponsive

Where offeror qualifies bid to allow delivery later than required by the solicitation, the bid is nonresponsive and is properly rejected. In order to be responsive, a bid must contain an unequivocal offer to provide the requested items in conformance with the terms and specifications of the IFB.

CONTRACTS **B-218260.1 May 17, 1985**
Negotiation **85-1 CPD —**
Request For Proposals
Amendment
Equal Competitive Basis For All
Offerors

Protest is sustained where the agency significantly relaxed its requirements during discussions with the sole offeror in the competitive range and other offerors were not given an opportunity to compete on the altered requirement.

CONTRACTS **B-218475.2 May 17, 1985**
Protests **85-1 CPD 568**
Basis For Protest Requirement

Protester filed protest without stating detailed statement of legal and factual grounds of protest and its protest was dismissed. Protester's subsequent filing, which stated a more detailed explanation of its protest, is also dismissed since it was not received at GAO within the 10 working days required for a timely filing.

CONTRACTS **B-218484.2, et al.**
Protests **May 17, 1985**
General **85-1 CPD 569**
Accounting Office Procedures
Reconsideration Requests
Additional Evidence Submitted
Available But Not Previously
Provided to GAO

Arguments and analyses presented by an agency in its request for reconsideration of a decision will not be considered where the agency failed to present such arguments with its reports on the protest, and the information which forms the basis for the arguments was available at that time.

CONTRACTS **B-218484.2, et al. Con't**
Protests **May 17, 1985**
Interested Party Requirement
Potential Contractors, Etc. Not
Submitting Bids, Etc.

A small business contractor need not submit offers under unrestricted solicitations in order to be an interested party of protest that the procurements should have been set aside for small businesses since the contractor could gain a direct economic benefit from the remedies sought, cancellation and resolicitation as small business set-asides.

CONTRACTS **B-218502.2 May 17, 1985**
Small Business **85-1 CPD 570**
Concerns
Awards
Responsibility Determination
Nonresponsibility Finding
Review By GAO

GAO generally will not review a contracting officer's determination of nonresponsibility with respect to a small business bidder since by law the Small Business Administration is empowered to determine conclusively that a small business firm is responsible.

BONDS **B-218687 May 17, 1985**
Bid **85-1 CPD 571**
Form Variances
Personal Check

Sale solicitation is not ambiguous regarding bid deposit form when the general terms and conditions of IFB state acceptable forms of bid deposit, unless otherwise provided, and the special terms and conditions in fact provide otherwise. D-59

ESTOPPEL **B-218687 Con't**
Against Government **May 17, 1985**
Not Established
Prior Erroneous Advice, Contract
Actions, Etc.

Alleged erroneous oral advice given by an agency employee as to acceptability of a personal check for a bid deposit cannot estop the agency from rejecting a nonresponsive bid, since it is required to do so by law.

SALES
Bids
Deposits
Checks
Personal
Bid Nonresponsive

Bid deposit requirement is a material part of a sale solicitation and cannot be waived. Therefore, the submission of a personal check, rather than cash, a certified or cashier's check, or money order, as specified by the invitation, renders the bid nonresponsive.

BIDDERS

B-214342-OM

Debarment

May 20, 1985

**Labor Stipulation
Violations****Davis-Bacon Act****Debarment Unwarranted**

Payment of wages on the basis of the settlement agreement in the record between the prime contractor and the Department of Justice is approved, and funds on deposit with GAO may be disbursed in accordance with established procedures. Terms of settlement agreement are being accepted even though they conflict with position of this Office on issue of including per diem expenses in determining whether required wage rates are being paid.

CONTRACTS**Labor Stipulations****Davis-Bacon Act****Wage Underpayments****Expenses Paid By Contractor**

Department of Labor (DOL) does not recommend imposition of debarment sanctions against the contractors involved. In view of the settlement agreement between DOL and prime contractors, GAO concurs with DOL that no further action should be taken to debar the contractors involved. Acceptance of settlement agreement here does not mean GAO has abandoned its authority to make independent determinations in Davis-Bacon cases.

CONTRACTS **B-218049 May 21, 1985**
Negotiation **85-1 CPD 575**
Requests For Proposals
Specifications
Minimum Needs
Administrative Determination

Agency determination of its minimum needs and the best method of accommodating those needs will not be disturbed absent a clear showing that the decision is arbitrary or otherwise unreasonable. Protester has failed to sustain its burden of proof that agency's determination to require that telephone switching equipment be on-premises was unreasonable.

CONTRACTS **B-218056.2 May 21, 1985**
Protests **85-1 CPD 576**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

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

BIDS **B-218071 May 21, 1985**
Invitation For Bids **85-1 CPD 577**
Ambiguous
Objective Test

Allegation that typical menu worksheets exhibit altered solicitation specifications and that protester had insufficient time to review and assess the impact of these changes on its bid price is denied since typical menus did not impose additional requirements but were merely included to demonstrate to bidders the purpose and use of worksheets during contract performance.

BIDS **B-218071 Con't**
Invitation For Bids May 21, 1985
Specifications
Dissimilar Solicitation Package
Enclosures
Propriety

Solicitation language is not ambiguous where protester's interpretation of language is not reasonable and language, consequently, has not been shown to have more than one reasonable meaning.

CONTRACTS **B-218170 May 21, 1985**
Awards **85-1 CPD 578**
Separable Or Aggregate
Single Award
Propriety

No reasonable basis exists for an aggregate award under an RFP for various line items of peripheral equipment to be used with an existing automatic data processing system. The law's preference for maximum practicable competition mandates multiple awards for individual line items in the absence of a reasonable and supportable reason for an aggregate award.

CONTRACTS **B-218467.2 May 21, 1985**
Protests **85-1 CPD 579**
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To
Protester

Protest not properly filed within 10 working days after the protester was notified orally of basis for protest is untimely.

CONTRACTS **B-218467.2 Con't**
Protests **May 21, 1985**
Notice
To Contracting Agency

Protester that failed to furnish a copy of its protest to the contracting officer 1 day after filing with GAO failed to comply with the Bid Protest Regulations.

CONTRACTS **B-218833.2 May 21, 1985**
Protests **85-1 CPD 580**
Interested Party Requirement
Protester Not In Line For Award

A protester challenging a contract award is not an interested party under GAO Bid Protest Regulations, and its protest thus is dismissed where it would not be in line for award if its protest were upheld.

CONTRACTS **B-218872 May 21, 1985**
Negotiation **85-1 CPD 581**
Late Proposals And Quotations
Rejection Propriety

Late offer may not be considered for award where there is no indication that wrongful government action was paramount cause of delay in submission. The fact that the protester delayed submitting its offer while awaiting oral advice from contracting agency provides no basis for allowing consideration of late offer.

CONTRACTS **B-218872 Con't**
Protests **May 21, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
Apparent Prior To Bid Opening/
Closing Date For Proposals

Protest based on alleged ambiguity in solicitation is untimely where not filed before date for submission of offers.

BIDS **B-217267 May 22, 1985**
Invitation For Bids 85-1 CPD 583
Defective
Not Prejudicial To Protester, Etc.
Cancellation Of IFB Not Justified

Protest against IFB's failure to include historical information on material costs is denied where the protester has not shown that, given the data the IFB does provide, such information in fact is needed for bidders in general, or for the protester in particular, to prepare bids.

BONDS
Bid
Requirement
Reasonableness

The determination to require performance and payment bonds is reasonable where the contractor will have the use of government property and facilities, and the Navy installation where the contract will be performed is located in an area in which default would result in significant financial loss to the government.

CONTRACTS **B-218077.2 May 22, 1985**
Options **85-1 CPD 584**
Exercised
Administrative Discretion

GAO cannot object to exercise of purchase options in Air Force contract for lease of computer equipment since protester has not shown that exercise is unreasonable given Air Force's technical opinion which GAO cannot question.

CONTRACTS **B-218191, et al.**
Negotiation **May 22, 1985**
Offers Or **85-1 CPD 585**
Proposals
Discussion With All Offerors
Requirement
Failure To Discuss
Situations Not Requiring
Discussion

There is no obligation for a contracting agency to hold discussions with an offeror judged to be outside the competitive range.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Competitive Range Exclusion
Reasonableness

Protests against exclusion of proposals from competitive range is denied where protesters have not shown that evaluations finding protesters' proposals unacceptable were unreasonable.

CONTRACTS **B-218191, et al. Con't**
Negotiation **May 22, 1985**
Offers Or Proposals
Evaluation
Criteria
Nondisclosure Allegation

Contention that evaluation that found proposal deficient was based on elements not explicitly identified in solicitation as evaluation factors is without merit where solicitation adequately identified criteria as basis of evaluation.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Technically Unacceptable Proposals
Cost, Etc. Not A Factor

Where proposal is properly rejected as technically unacceptable, offered cost is irrelevant as the proposal could not be considered for award.

CONTRACTS **B-218545.2 May 22, 1985**
Protests **85-1 CPD 586**
General Accounting Office Procedures
Reconsideration Requests
Error Of Fact Or Law
Not Established

GAO will deny a request for reconsideration where no new facts or legal arguments are raised which show that a prior decision was erroneous.

CONTRACTS **B-218545.2 Con't**
Protests **May 22, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Significant Issue Exception
Not For Application

Untimely protest will not be considered under significant issue exception to GAO's timeliness rules where the issue, that the specifications were inadequate to meet the agency's minimum needs, is one that GAO has previously considered.

CONTRACTS **B-218554 May 22, 1985**
Small Business **85-1 CPD 587**
Concerns
Awards
Set-asides
Administrative Determination
Reasonable Expectation of
Competition

Since the basis for setting a procurement aside for small businesses is the reasonable expectation that offers will be obtained from at least two responsible small business concerns and that awards will be made at reasonable prices, the number of firms that actually submitted bids is not relevant to the propriety of the set-aside.

CONTRACTS **B-218554 Con't**
Small Business **May 22, 1985**
Concerns
Awards
Set-asides
Price Reasonableness
Administrative Determination

Determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such determination unless it is unreasonable or there is showing of possible fraud or bad faith on the part of contracting official.

CONTRACTS
Small Business Concerns
Awards
Set-asides
Price Reasonableness
Comparison Criteria

Fact that a small business bid on a procurement set aside for such concerns is more than a courtesy bid or the government estimate does not mean it must be rejected, since there is a range over and above those amounts that may be considered reasonable in a set-aside situation.

CONTRACTS **B-218676 May 22, 1985**
Protests
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To
Protester

A Senator is informed that his constituent's letter protesting the rejection of its late bid which was filed 6 weeks after the rejection is untimely. Moreover, GSA's basis for rejecting the bid is sound since the protester's hand-carried bid was 15 minutes late. The fact that a scheduled aircraft was late because of weather and mechanical problems does not provide a basis for considering the bid or for delaying bid opening.

CONTRACTS **B-216297 May 23, 1985**
Protests **85-1 CPD 588**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
Apparent Prior To Bid Opening/
Closing Date For Proposals

A solicitation which on its face contains inconsistent delivery provisions is ambiguous and any protest based on these inconsistencies should have been filed prior to bid opening with either the contracting agency or GAO for consideration on the merits. Failure to do so results in dismissal by our Office as untimely.

CONTRACTS **B-218075.2 May 23, 1985**
Small business **85-1 CPD 591**
Concerns
Awards
Small Business Administration's
Authority
Certificate Of Competency

Agency acted unreasonably in failing to refer its rejection of a small business low bidder to the Small Business Administration when the bid submitted was responsive on its face. Although the contracting officer rejected the bid as nonresponsive because he believed the bidder had violated a Certificate of Independent Price Determination, this basis for rejection actually concerns the bidder's responsibility.

CONTRACTS **B-218106 May 23, 1985**
Negotiation **85-1 CPD 592**
Offers Or Proposals
Preparation
Costs
Denied

GAO will not award proposal preparation costs and attorney's fees where it does not make a determination that a solicitation, proposed award or award does not comply with statute or regulation.

OFFICERS AND EMPLOYEES
Conflict Of Interest Statutes
Award Of Government Contracts
Propriety

An agency did not abuse its discretion when it refused to consider a proposal by a company whose president and owner was employed as an intermittent consultant by the contracting activity at the time the initial proposal was submitted.

CONTRACTS **B-218162 May 23, 1985**
Protests **85-1 CPD 593**
Interested Party Requirement
Potential Subcontractors
Restrictive Procurement Allegation

Under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a potential subcontractor-supplier in a direct federal procurement is not considered an interested party and, therefore, does not have standing to protest.

CONTRACTS **B-218202 May 23, 1985**
Negotiation **85-1 CPD 594**
Requests For Proposals
Cancellation
In-house Government Performance

Cancellation of a request for proposals (RFP) issued in accordance with Office of Management and Budget Circular A-76 was justified where agency adjusted its in-house estimate to reflect the scope of work specified in the RFP and the adjusted estimate was lower than any proposal.

CONTRACTS **B-218298 May 23, 1985**
Negotiation **85-1 CPD 595**
Offers Or Proposals
Evaluation
General Accounting Office Review

In reviewing protests against allegedly improper evaluations, GAO will not substitute its judgment for that of the contracting agency's evaluators, who have wide discretion, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed solicitation criteria.

CONTRACTS **B-218298 Con't**
Negotiation **May 23, 1985**
Offers Or Proposals
Evaluation
Information sufficiency

Although, as a general rule, an RFP must contain sufficient information for offerors to compete intelligently and on a relatively equal basis, the rule is inapplicable in a situation where the information not provided was virtually unrelated to the RFP's requirements and thus was not necessary for the proper preparation of proposals.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Personnel

A protester cannot realistically assert that its proposal was improperly determined to be materially deficient for not specifying a qualified project director and staff directly responsible for the contract effort, where the RFP clearly provided that the qualifications of personnel in charge of the work constituted the most important evaluation criterion.

CONTRACTS
Negotiation
Offers Or Proposals
Evaluation
Reasonable

Mere disagreement with the results of the agency's evaluation does not meet the protester's burden of proving that the evaluation was itself unreasonable.

CONTRACTORS **B-216125.2 May 24, 1985**
Responsibility **85-1 CPD 597**
Determination
Review By GAO
Nonresponsibility Finding

Bidder, which had submitted premarket notification of medical equipment to Food and Drug Administration (FDA) pursuant to 21 C.F.R. subchapter H, to which FDA had not responded as of the date of award, cannot be rejected as nonresponsible, where (1) solicitation does not state such approval must be obtained by the time of award; (2) the bidder had certified and fully complied with FDA requirements at that time; (3) the agency had no basis to believe negative FDA action would occur or that bidder had any probable inability to meet contract requirements in this regard; (4) delivery of the equipment was to be made 6 months after award; and (5) FDA has since positively responded to the bidder's submission.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness Of Protest

Solicitation Improprieties

**Not Apparent Prior To Bid Opening/
Closing Date For Proposals**

Protest that post-bid opening performance test was not conducted as described in the solicitation need not be filed prior to bid opening in order to be timely under GAO's Bid Protest Procedures.

CONTRACTS

B-216125.2 Con't

Two-step

May 24, 1985

Procurement

Step two

Benchmark Testing

Benchmark tests should only be performed on a low bidder after bid opening on the second step of two-step formally advertised procurement in unusual case; such a test relates to that bidder's responsibility.

Benchmark test conducted after bid opening on the second step of two-step formally advertised procurement on the proposed system of the low bidder was not properly or fairly conducted so as to justify rejection of that bidder as not responsible where (1) neither the solicitation nor the agency adequately informed the bidder of the nature, details, ground rules or "pass-fail" nature of the benchmark and (2) the bidder was not adequately informed of the nature of or afforded a reasonable opportunity to correct the evaluated system deficiencies consistent with its acceptable technical proposal.

CONTRACTS

Two-step Procurement

Step Two

Invitation For Bids

Deficient

Low bidder, on second step of two-step formally advertised procurement, cannot be rejected for failing to comply with invitation for bid requirement that it furnish "current production model," where the term is not defined in the solicitation, and the bidder had produced 11 models by the time of award.

CONTRACTS **B-216643 May 24, 1985**
Negotiation **85-1 CPD 598**
Competition
Equality Of Competition

Where agency, concerned that competitors for a cost reimbursement negotiated contract were "buying in," amended solicitation to specify "170,000 professional hours required," then whether proposed use of bookkeepers satisfied the requirement was not merely a matter of contract administration which could be ignored in evaluating offers, since offerors must be treated equally and provided with a common basis for the preparation of proposals.

CONTRACTS
Negotiation
Requests For Proposals
Ambiguous

Protest of award of a cost reimbursement contract is sustained. The protester's interpretation of RFP as prohibiting use of bookkeepers to fulfill solicitation requirement for "170,000 professional hours" was at least as reasonable as agency view that solicitation would be interpreted as not prohibiting the use of bookkeepers as professionals. Therefore, the solicitation requirement was at best ambiguous, resulting in competition on an unequal basis.

CONTRACTS **B-216643 Con't**
Termination **May 24, 1985**
Convenience Of Government
Not Recommended

GAO sustains protest but will not recommend termination of improperly awarded contract for a management study where the contracting agency reports that almost half of the contract amount has been expended and that any new firm awarded a contract to complete the study will necessarily have to duplicate much of the work already done, and our Office cannot conclude with any certainty that if the solicitation had not been ambiguous award would have gone to another offeror.

CONTRACTS **B-217459 May 24, 1985**
Labor Stipulations 85-1 CPD 599
Solicitation Provisions

Protester has the burden of proving that agency's estimates of work, which form the basis for designations of work items in a solicitation as within Davis-Bacon Act or Service Contract Act, are not based on the best information available, otherwise misrepresent agency's needs, or result from fraud or bad faith. Burden is not sustained where protester has not refuted agency statement that it relied on experience under prior contract, containing admittedly poor estimates, to correct and improve current solicitation.

GAO finds no requirement in the Federal Acquisition Regulation or Army regulations that there be separate solicitations and contracts for Service Contract Act and Davis-Bacon Act work.

CONTRACTS **B-217535 May 24, 1985**
Negotiation **85-1 CPD 600**
Sole-source Basis
Authority

The 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, does not authorize the State Department's noncompetitive purchase of a security card-entry system for use at the Department's facilities in Washington, D.C., since the Act confers extraordinary procurement authority only for the acquisition of items solely for use by Foreign Service posts abroad to meet emergency overseas security requirements.

CONTRACTS
Negotiation
Sole-source basis
Propriety

Agency's sole-source purchase of a security card-entry system is improper where the agency failed to publicize the intended purchase in the Commerce Business Daily at least 30 days before the award, and such failure precluded the protester, an alternative available source, from competing.

BUY AMERICAN ACT **B-218306 May 24, 1985**
Generally **85-1 CPD 601**

The Buy American Act does not prohibit bidding by foreign entities or the procurement of foreign products, but merely establishes a preference evaluation system for domestic goods.

CONTRACTS **B-218306 Con't**
Protests **May 24, 1985**
General Accounting Office Procedures
Timeliness of protest
Significant issue exception
Not for application

Untimely issues will not be considered where they neither present unique issues of first impression nor involve questions whose resolution would benefit parties other than the protester.

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

Allegations that a firm is not eligible to compete on a small business set-aside procurement because it is affiliated with a foreign firm and will supply foreign products must be reviewed by the Small Business Administration, which is empowered to make conclusive determinations of size status.

CONTRACTS **B-218410.3 May 24, 1985**
Protests **85-1 CPD 602**
General Accounting Office Procedures
Timeliness Of Protest
Date Basis Of Protest Made Known To
Protester

Prior dismissal of protest as untimely is affirmed where protest was not filed at GAO within 10 working days after protester learned of adverse agency action on its protest initially filed with procuring agency.

CONTRACTS **B-218440** **May 24, 1985**
Protests **85-1 CPD 603**
General Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect
Interim Appeals To Agency--Effect
on 10 Working Day GAO Filing
Period

Where the initial protest is untimely filed with the contracting agency (more than 10 working days after basis of protest is known), subsequent protest to GAO will not be considered even though it was filed within 10 working days of the agency denial of the protester's initial protest.

CONTRACTS **B-218618** **May 24, 1985**
Protests **85-1 CPD 604**
Contract Administration
Not for resolution by GAO

Whether potential awardee will be able to perform contract in accordance with all of its terms is a matter of contract administration that is within the purview of the contracting agency and not for review under GAO's Bid Protest Regulations.

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

Protest based upon alleged improprieties in a solicitation that are apparent on the face of a solicitation is untimely when filed after bid opening.

CONTRACTS **B-218618 Con't**
Protests **May 24, 1985**
Interested Party Requirement
Mistake-In-Bid Questions

GAO will not consider one firm's complaint that another's bid may be mistaken, as only the contracting parties are in a position to assert rights and bring forth all necessary evidence to resolve mistake-in-bid questions. Moreover, there is nothing illegal in the government's accepting a below-cost bid so long as the bidder is found responsible.

CONTRACTS
Protests
Moot, Academic, Etc. Questions
Future Procurements

Protest that low bidder is not responsible is premature where preaward survey of potential awardee has not been completed. In any event, GAO does not review affirmative determinations of responsibility except in limited circumstances which protester has failed to establish here. Fact that firm is in bankruptcy proceedings and is alleged to have performed poorly on prior contracts, does not necessitate a finding of nonresponsibility.

PAYMENTS

B-210226 May 28, 1985

**Quantum Meruit/
Valebant Basis
Absence, Etc. Of Contract
Authority To Pay Lacking**

GAO does not approve payment of a claim for extra compensation under the changes clause of a contract performed for a defunct federal agency where there is no written evidence that the alleged extra work performed was authorized, and the contracting officer of the defunct agency contends that such work was not authorized. Under the circumstances, the claimant has not met its burden of proving entitlement to payment.

CONTRACTS

B-215763.3 May 28, 1985

**Small Business
Concerns
Awards
Set-asides
Subcontractor, Supplier, Etc. Size
Status**

Protest contending that failure of agency to prohibit a small business mobilization base contractor from subcontracting with a large business violates the intent of 10 U.S.C. § 2304(a)(16) and the solicitation's 30 percent allocation of the total requirement to small businesses is denied since nothing in the statute, the solicitation or the contract prohibits such subcontracting.

CONTRACTS **B-218120.2 May 28, 1985**
Protests **85-1 CPD 606**
General Accounting Office Procedures
Reconsideration Requests
Additional Evidence Submitted
Available But Not Previously
Submitted to GAO

In concert with the requirements of section 2741(a) of the Competition in Contracting Act of 1984, the General Accounting Office will not consider a request for reconsideration of a protest on the basis of the protester's subsequent provision of relevant facts and information of which the protester was or should have been aware but failed to present at the time the protest was first filed in our Office.

CONTRACTS **B-218283.2 May 28, 1985**
Protests **85-1 CPD 607**
General Accounting Office Procedures
Timeliness Of Comments On Agency's
Report

Fact that the contracting agency sent its protest report directly to the protesting firm instead of the firm's attorney does not affect the propriety of GAO's dismissal of the protest for failure to comment on the report within 7 working days after the date anticipated for receipt. Attorney was advised when the protest was filed that receipt would be presumed to be on the anticipated date, yet failed to advise us of any problem in that respect within the 7-day comment period, as required by our Bid Protest Regulations.

CONTRACTS **B-218649 May 28, 1985**
Protests **85-1 CPD 608**
Interested Party Requirement
Direct Interest Criterion

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

CONTRACTS **B-218907 May 28, 1985**
Protests **85-1 CPD 609**
General Accounting Office Procedures
Timeliness Of Protest
Significant Issue Exception
Not For Application

Untimely protest with regard to inconsistent specifications will not be considered under significant issue exception to timeliness rules because issue raised is not one of widespread interest.

CONTRACTS **B-217231.2 Con't**
Negotiation **May 30, 1985**
Offers Or Proposals
Evaluation
Technical Superiority v. Cost

In a negotiated procurement, award may be made to a higher priced, higher technically rated offeror as long as the decision to do so is reasonable and in accordance with the stated evaluation criteria.

CONTRACTS
Negotiations
Offers Or Proposals
Preparation
Costs
Denied

Protester's claim for proposal preparation costs is denied because there is no showing that the government acted arbitrarily or capriciously in relation to protester's proposal.

BONDS**B-218228 Con't****Bid****May 30, 1985****Requirement****Reasonableness**

A bid bond may be required where payment and performance bonds also are required and the services covered by the solicitation are essential to the operation of a government installation. The rule applies whether or not the services covered are subject to the contingency of congressional approval before award.

CONTRACTS**B-218287 May 30, 1985****Small Business****85-1 CPD 616****Concerns****Awards****Self-Certification****Acceptance**

In a total small business set-aside procurement, a bidder's certification of itself as a manufacturer of the supplies to be furnished creates a binding obligation to furnish supplies manufactured or produced by a domestic small business concern, provided the bidder is in fact a small business concern.

BIDS **B-218720.2 May 30, 1985**
Responsiveness **85-1 CPD 617**
Determination
On Basis Of Bid As Submitted At Bid
Opening

Bid on total small set-aside rejected as nonresponsive because bidder indicated that not all supplies to be furnished will be the product of a small business concern may not be cured or defect waived as a minor informality since responsiveness must be determined from material available at bid opening and postopening explanations cannot be considered to correct a nonresponsive bid.

BIDS
Responsiveness
Failure To Furnish Something Required
Small Business Representation

Bid on total small business set-aside which indicates in the appropriate block that not all supplies to be furnished will be the product of a small business concern is not responsive and may not be considered for award, even though the bidder can demonstrate that it is small and lists its own plant as the place of performance, because bidder would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside.

CONTRACTS
Protests
Allegations
Bias

B-216596 Con't
May 31, 1985

Unsubstantiated

Protester fails to show that procurement was biased in favor of awardee where only support offered is a series of internal contracting agency memos regarding the procurement which show no evidence of bias in favor of awardee, and there is no evidence that Marine Corps officer who was a member of technical evaluation team exerted undue influence in favor of awardee.

CONTRACTS
Protests
Allegations
Unsubstantiated

Protester fails to show that any unauthorized disclosure of information regarding its proposal was made to awardee where only evidence offered is unsubstantiated rumor of disclosure of information regarding another offeror's proposal and, in any event, there is no indication that awardee changed its best and final offer based on information allegedly disclosed.

CONTRACTS **B-216596 Con't**
Protests **May 31, 1985**
General Accounting Office Procedures
Timeliness Of Protest
Solicitation Improprieties
Apparent Prior To Bid Opening/
Closing Date For Proposals

To the extent protester challenges contracting agency's decision, evident from the solicitation, not to require total compliance with specified technical standards, protest is untimely because not filed before date for receipt of initial proposals.

BIDS **B-216730 May 31, 1985**
Estimates Of **85-1 CPD 621**
Government
Reasonableness

A contracting agency's quantity estimates in a solicitation will be deemed reasonably accurate representations of anticipated actual needs, and thus unobjectionable, when based on the best information available.

BIDS
Invitation For Bids
Interpretation
As A Whole

Where the solicitation is silent as to whether the contractor is required to use full-time or part-time employees in performing certain tasks, it is sufficiently clear that the contractor can use either full-time or part-time employees.

BIDS **B-216730 Con't**
Invitation For Bids May 31, 1985
Pricing Structure
Risk

Solicitation provisions are not objectionable merely because they fail to account for every eventuality during performance and thus may impose on the contractor some risk of less than full reimbursement for performance.

CONTRACTS

Damages
Liquidated
Actual Damages v. Penalty
Price Deductions
Reasonableness

While the failure of an IFB damages provision to establish varying deduction rates for late performance of work varying in importance may evidence an impermissible penalty, a provision applying a single deduction rate for late performance of different record transcription tasks does not evidence an impermissible penalty where, although different tasks were assigned time priority over others, the agency did not consider timely completion of any task more important than others.

CONTRACTS **B-218102.3 May 31, 1985**
Protests **85-1 CPD 622**
Basis For Protest Requirement

Protest that contract award was improper is dismissed in the absence of any indication that awardee's bid took exception to specification requirement that work be performed by a registered surveyor.

CONTRACTS **B-218102.3 Con't**
Protests **May 31, 1985**
Contract Administration
Not For Resolution By GAO

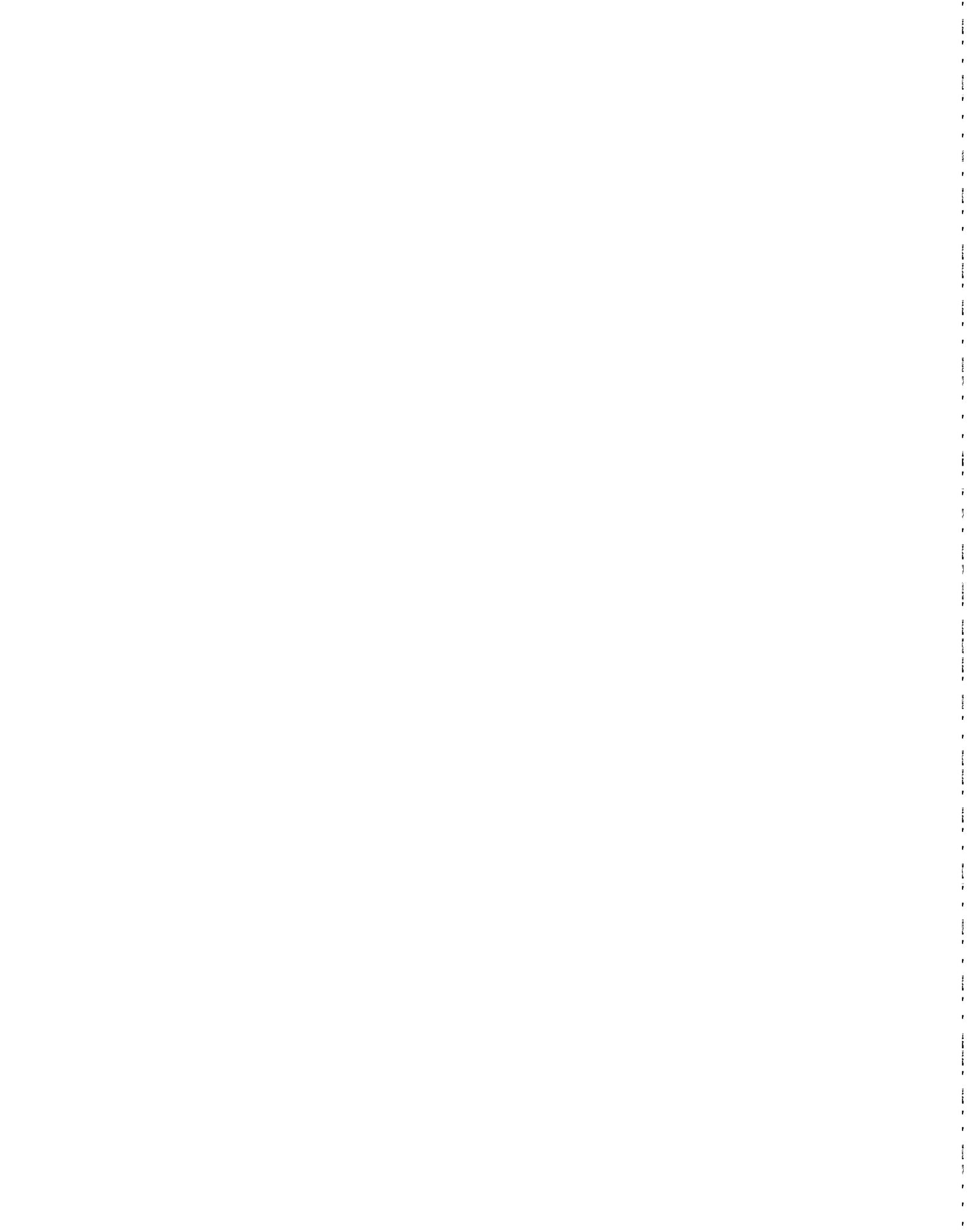
Protest that awardee is performing the contract in a manner inconsistent with its requirements, in that it allegedly does not employ a registered surveyor, is a matter of contract administration which GAO will not review.

CONTRACTS **B-218189.2 May 31, 1985**
Protests
General Accounting Office Procedures
Timeliness Of Comments Of Agency's
Report

Protest will not be considered where protester fails to file comments on agency report or to notify GAO within 7 working days of date agency report is due to be filed, that report was not received.

CONTRACTS **B-218214.3 May 31, 1985**
Protests
General Accounting Office Procedures
Timeliness Of Protest
Adverse Agency Action Effect

Protest filed with GAO more than 10 working days after the protester receives notice of initial adverse agency action by contracting agency--refusal to award protester contract and decision to continue with second round of best and final offers--is untimely and will not be considered on the merits. Protester's continued pursuit of protest with contracting agency does not alter this result.



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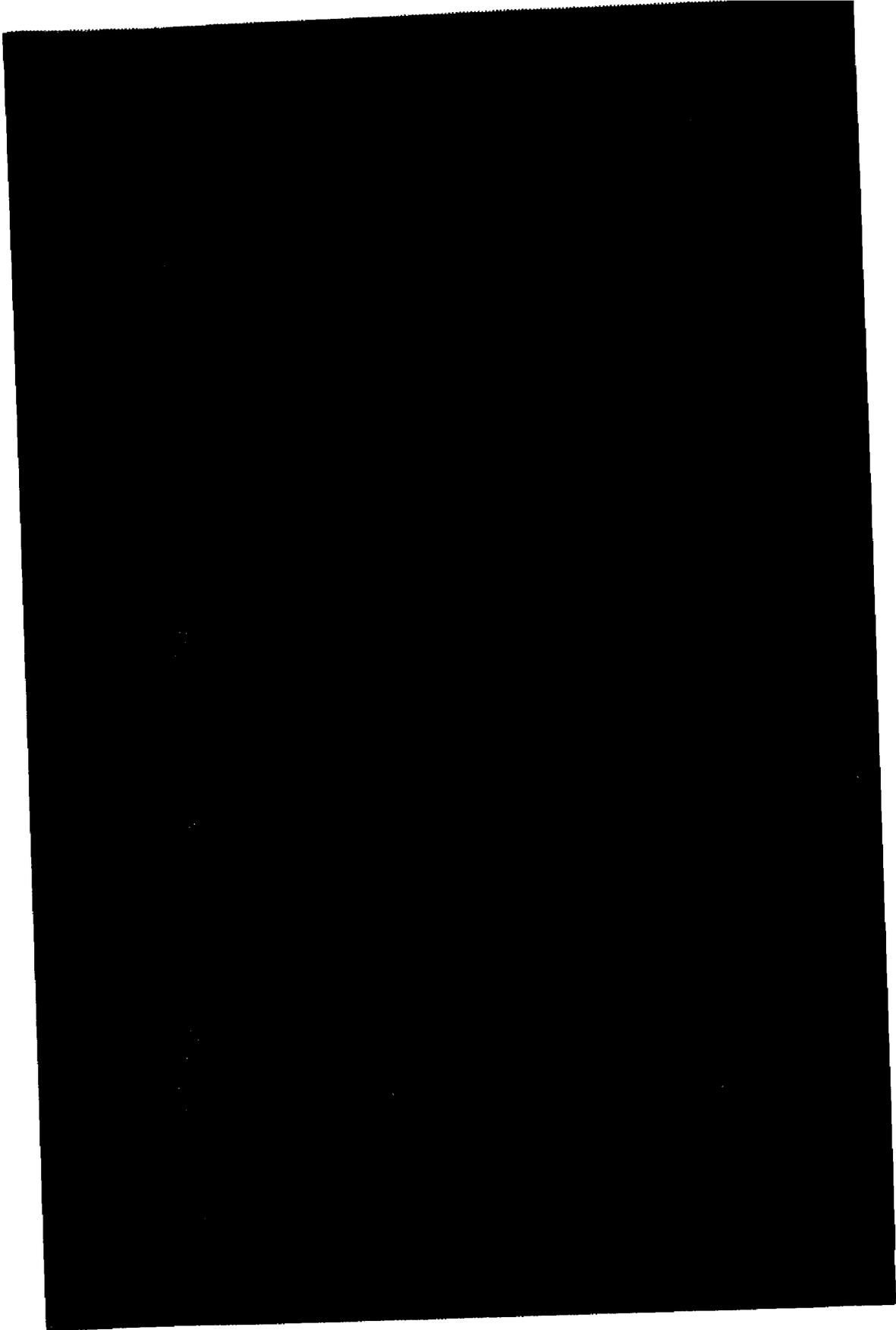
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