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Office of General Counsel



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Comptroller General
of the United States

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PREFACE

This publication is one in a series of monthly pamphlets entitled "Digests of Unpublished Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and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

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

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

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APPROPRIATIONS/FINANCIAL MANAGEMENT

APPROPRIATIONS/FINANCIAL MANAGEMENT

Claims by Government B-233300 Jan. 9, 1989

Past due accounts

Debt collection

Statutory compliance

Federal Claims Collection Act, 31 U.S.C. § 3711(a)(1), requires Veterans Administration (VA) take reasonable action to enforce claims against: (1) Third party payers that insure veterans receiving medical care from VA under 38 U.S.C. § 629(a)(1); and (2) Those veterans determined able to pay who receive medical care from VA under 38 U.S.C. § 610(f)(1). Such action should be "aggressive," "timely," with "effective follow-up," and must include written demand for payment. 4 C.F.R. §§ 102.1 and 102.2 (1988).

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-232773 Jan. 12, 1989

Certifying officers

Relief

Illegal/improper payments

Substitute checks

Relief is granted DLA disbursing official under 31 U.S.C. § 3527 from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official, and adequate collection efforts were made.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Claims by Government B-231496.1 Jan. 13, 1989
Past due accounts
Debt collection
GAO authority

Subject to the conditions set forth below, the GAO Office of Financial Management is advised that no legal objection will be raised to its compliance with the request of the Accounting and Financial Management Division (AFMD) to reduce the amount assessed against the Pennsylvania Avenue Development Corporation (PADC) as reimbursement for GAO's audit (pursuant to section 301 of the Government Corporations Control Act, 31 U.S.C. § 9105 (1982)) of PADC financial records for the year ended September 30, 1985. This advice is predicated upon AFMD's representation that the initial assessment against the PADC included amounts stemming from unwarranted inefficiencies, and that AFMD's final assessment was calculated to include the otherwise appropriate, "full" costs of GAO's audit, consistent with B-207203-O.M., June 4, 1982.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers B-233757 Jan. 25, 1989

Cashiers

Relief

Illegal/improper payments

Forgeries

APPROPRIATIONS/FINANCIAL MANAGEMENT

Accountable Officers

Disbursing officers

Relief

Illegal/improper payments

Forgeries

Under 31 U.S.C. § 3527, we grant relief to a supervising officer who is liable for the fraudulent negotiation of a forged check, because the disbursing officer properly supervised his subordinates by maintaining an adequate system of procedures and controls to safeguard funds. We also grant relief to the cashier who negotiated the check, because she followed these procedures and otherwise acted reasonably.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Appropriation Availability B-232487 Jan. 26, 1989

Purpose availability

Specific purpose restrictions

Meals

Imprest fund cashier claims reimbursement of expenditures for food for employees dispatched to a major train derailment. The train tank cars were filled with toxic liquids. The employees assisted in the evacuation of all people within the dangerous area and manned command posts, road blocks and waterways checkpoints for a 24-hour period. In these circumstances, which presented a clear danger to human life, the claim may be paid notwithstanding the general prohibition on payment for employee's meals from appropriated funds.

APPROPRIATIONS/FINANCIAL MANAGEMENT

Claims by Government B-229329 Jan. 30, 1989
Commercial carriers
Carrier liability
Compromises

The matter of a carrier's offer to compromise a claim of the United States for the loss of an atomic clock valued at \$63,749.86, is referred to the Department of Justice with a recommendation for favorable consideration where the record shows that in the event of litigation there would be a substantial legal question of whether a carrier is relieved of all liability when a shipper fails to inform the carrier of the article's high value; the government might not be able to show that the clock was delivered to the carrier, and there are practical considerations tending to favor the carrier's position.

CIVILIAN PERSONNEL

CIVILIAN PERSONNEL

B-226191.2 Jan. 4, 1989

**Compensation
Overtime
Eligibility
Travel time**

Five employees of the U.S. Naval Ship Repair Facility, Guam, claim that they are entitled to overtime pay under the Fair Labor Standards Act or tile 5, United States Code, for time they spent waiting at air terminals for their flights to depart and for time they spent clearing the airport after their arrival while traveling to and from their temporary duty station at Diego Garcia. They are not entitled to overtime pay under either law because they did not meet the required criteria, particularly the time was outside regular work hours and corresponding hours on nonwork days, and they performed no work while traveling.

CIVILIAN PERSONNEL

B-231759 Jan. 4, 1989

**Leaves of Absence
Annual leave
Forfeiture
Restoration**

A part-time employee is not entitled to restoration of annual leave forfeited when she exceeded the 240-hour ceiling on annual leave hours that may be carried over from one leave year to the next. Neither the erroneous advice of agency personnel nor the pay slips which failed to reflect the projected forfeiture of leave constituted the requisite administrative error necessary for restoration of the forfeited leave.

CIVILIAN PERSONNEL

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B-226191.2 Jan. 4, 1989

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Eligibility

Travel time

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CIVILIAN PERSONNEL

B-231759 Jan. 4, 1989

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CIVILIAN PERSONNEL

B-232313 Jan. 9, 1989

Relocation

Residence transaction expenses

Broker fees

Prevailing rates

Determination

A transferred employee who sold his residence at his old duty station claims reimbursement of an 8 percent broker's commission fee. The local Housing and Urban Development (HUD) office advised that the customary broker's commission fee in the locality is 7 percent. Absent sufficient evidence submitted by the employee that the customary charge is greater, the determination by HUD is controlling, and his claim is limited to 7 percent.

CIVILIAN PERSONNEL

B-230414 Jan. 10, 1989

Compensation

Overtime

Standby overtime

Eligibility

Seasonal firefighters who were placed on standby duty may, because of the emergency conditions in effect, be paid under title 5, United States Code, or under the Fair Labor Standards Act, overtime for their entire shift without deduction of 8 hours for sleep and meal time under the "two-thirds rule." Further, only bona fide meals may be deducted to determine compensable hours of overtime.

CIVILIAN PERSONNEL

B-230341 Jan. 12, 1989

Compensation**Retroactive compensation****Eligibility****Adverse personnel actions****Compensatory damages**

An employee who successfully appealed his separation from the civil service requests the imposition of sanctions against his employing agency. We cannot authorize sanctions against the agency for delays in processing the claim which may have caused the employee to incur additional expenses in the sale of his home.

CIVILIAN PERSONNEL**Relocation****Actual expenses****Eligibility****Adverse personnel actions****Reinstatement**

An employee, who was removed from the civil service, moved from Colorado to Kansas while he pursued his appeal. Upon appeal, his separation was overturned and he was reinstated to his position in Colorado and then transferred to Utah. His claim for direct reimbursement for the expenses related to the sale of his residence in Kansas is denied since that expense is not allowable under either the relocation statutes and regulations or the Back Pay Act.

An employee, who moved from Colorado to Kansas while he pursued his appeal of his separation, won his appeal and was reinstated to his position in Colorado and then transferred to Utah. The United States Court of Appeals for the Federal Circuit awarded backpay and allowed the employee to deduct from his interim earnings the cost of relocation expenses from Kansas to Utah. Since the expense of selling his house in Kansas would not be allowable under either the relocation statutes or the Back Pay Act, we find no basis to allow the employee direct reimbursement by the agency for this expense.

CIVILIAN PERSONNEL

B-232122 Jan. 18, 1989

Relocation

Temporary quarters

Actual subsistence expenses

Reimbursement

Deadlines

CIVILIAN PERSONNEL

Relocation

Temporary quarters

Actual subsistence expenses

Reimbursement

Eligibility

An employee, who was transferred from an overseas location with long-term training en route to his new permanent duty station in Leesburg, Virginia, questions when he must begin claiming temporary quarters subsistence at his new permanent station. Since the employee did not report for duty in Leesburg prior to his long-term training assignment, the period must begin not later than 30 days after the date he reports for duty in Leesburg.

CIVILIAN PERSONNEL B-231485 Jan. 19, 1989

Relocation
Residence transaction expenses
Inspection fees
Reimbursement

CIVILIAN PERSONNEL
Relocation
Residence transaction expenses
Loan discount fees/points
Reimbursement

CIVILIAN PERSONNEL
Relocation
Residence transaction expenses
Relocation service contracts
Use

A transferred employee may not be reimbursed a tax service fee, messenger service fee, or discount points for the purchase of a new residence. Since the employee used a relocation service contractor for the sale of his old residence, he may not be reimbursed for legal fees for the sale of the former residence. Upon the production of proper documentation, the employee may be reimbursed for a structural inspection fee if it was a required service.

CIVILIAN PERSONNEL

B-232111 Jan. 19, 1989

Relocation

Temporary quarters

Actual subsistence expenses

Eligibility

Extension

An employee of the Department of Defense was authorized a permanent change of station from Brussels, Belgium, to Washington, D.C., and shortly thereafter he transferred to the Department of Energy. His request for additional temporary quarters subsistence expenses beyond the 60 days authorized and paid for by Defense should be considered by Defense, the agency that authorized the permanent change of duty station.

CIVILIAN PERSONNEL

B-226863 Jan. 26, 1989

Travel

Temporary duty

Travel expenses

Reimbursement

CIVILIAN PERSONNEL

Travel

Travel expenses

Official business

Determination

Burden of proof

An employee stationed near Washington, D.C., traveled to Boston, Massachusetts, for major surgery and worked there for approximately 8 weeks following discharge from the hospital concomitant with receiving out-patient therapy there. The employee claimed and was paid travel expenses and per diem. The agency later determined that reimbursement was inappropriate since the travel to Boston was for personal health purposes and the work there was an accommodation to the employee to enable to work while receiving medical treatment. We uphold the agency. Since the employee's travel was for medical treatment and not for official business, there is no authority for payment of travel expenses and per diem. However, collection of the erroneous payments from employee is subject to waiver consideration under 5 U.S.C. § 5584, as amended (1982 & Supp. IV 1986).

CIVILIAN PERSONNEL

B-231019 Jan. 26, 1989

**Compensation
Overpayments
Error detection
Debt collection
Waiver**

An employee requests waiver of cost-of-living allowance overpayments arising due to payroll error. Waiver is denied since the employee had actual notice of the error and called it to the attention of his payroll office.

CIVILIAN PERSONNEL

B-231061 Jan. 26, 1989

**Compensation
Compensation retention
Administrative regulations**

CIVILIAN PERSONNEL

**Compensation
Retirement plans
Reinstatement**

A grade GS-12 employee of the Department of the Air Force stationed overseas was subject to a reduction in force, and he refused a grade GS-9 position and chose to go on discontinued service retirement. Approximately 6 months later, he accepted a grade GS-9 position with the Department of the Army in the same area. The Army committed an unjustified and unwarranted personnel action when it erroneously denied him grade retention, pay retention, and living quarters allowance on the basis of his previous denial of a grade GS-9 position. We are unaware of any authority that would permit reinstatement of his retirement.

CIVILIAN PERSONNEL B-219546.2 Jan. 30, 1989

- Relocation
 - Residence transaction expenses
 - Broker fees
 - Reimbursement

CIVILIAN PERSONNEL

- Relocation
 - Residence transaction expenses
 - Taxes
 - Reimbursement
 - Eligibility

An employee may not be reimbursed for a tax service fee or a broker fee as relocation expenses. Both fees are finance charges under the Truth in Lending Act, Regulation Z, since they are fees imposed in connection with the extension of credit. Except as specifically provided, the Federal Travel Regulations preclude reimbursement for finance charges.

CIVILIAN PERSONNEL B-233214 Jan. 31, 1989

- Travel
 - Commuting expenses
 - Reimbursement
 - Eligibility

CIVILIAN PERSONNEL

- Travel
 - Temporary duty
 - Travel expenses
 - Privately-owned vehicles
 - Mileage

In accordance with the specific provisions of Food Safety and Inspection Service Directive 3800.2, two employees are entitled to reimbursement for mileage driven in direct travel between their residences and their temporary duty points outside their official duty station area.

MILITARY PERSONNEL

MILITARY PERSONNEL

B-195691 Jan. 9, 1989

Pay

Variable incentive pay

Eligibility

Termination of aviator status upon granting of Coast Guard officer's request to attend law school, resulting in the termination of entitlement to aviation career incentive pay, was proper under the authority granted to the Commandant of the Coast Guard under 14 U.S.C. § 632 to assign personnel to such duties as may be deemed necessary and complied with 37 U.S.C. § 301a, which provides for such incentive pay only for those remaining in aviation service on a career basis. Further, the Comptroller General has no jurisdiction to review the Commandant's determination that the officer's aviation career designation should be terminated when he ceased operational flying duties and began attending law school, notwithstanding the officer's contention that the Coast Guard should have given him a dual assignment as an aviator and as a law specialist.

MILITARY PERSONNEL

B-233529 Jan. 9, 1989

Pay

Additional pay

Eligibility

Statutes of limitation

A claim by the spouse of a World War II Army Medical Corps veteran, on the veteran's behalf, for unpaid additional pay due to combat and aviation activities of that veteran, cannot be paid because the claim is barred by the statute of limitations since it was not received in this Office for more than 43 years after it accrued.

Travel

Emergencies

Commercial carriers

Travel expenses

Reimbursement

Under applicable Department of Defense regulations, round-trip commercial transportation may be provided to a member incident to emergency leave upon a determination that, considering the nature of the emergency involved, space required government transportation is not reasonably available. The cost of such transportation for a member stationed in the Continental United States (CONUS) whose place of domicile is outside CONUS will not exceed the cost of government procured commercial air travel. Erroneous advice provided by an agent of the government concerning the availability of Military Airlift Command transportation or the amount of reimbursement that the member is entitled to does not provide a basis for reimbursement of costs which are not statutorily authorized.

PROCUREMENT

PROCUREMENT
Sealed Bidding
Unbalanced bids
Materiality
Responsiveness

B-232530.2 Jan. 3, 1989
89-1 CPD 1

Under a two step procurement, awardee's step two bid for base and option quantities is not considered materially unbalanced, and thus subject to rejection as being nonresponsive, where the protester fails to show that the option quantities were not reasonably expected to be exercised and that award to firm will not result in the lowest ultimate cost to the government.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Cost estimates

B-233139 Jan. 3, 1989
89-1 CPD 2

Contracting agency properly considered the cost of consumables (paper) in determining the lowest overall cost of computer printers, even though such costs were not specifically mentioned in the original solicitation as issued, since the Federal Information Resource Management Regulation requires consideration of all identifiable and quantifiable costs that are directly related to the acquisition and use of the system being acquired, and since the necessity for evaluating costs of different types of paper did not reasonably become apparent to the agency until the solicitation was amended to permit use of different types of paper.

PROCUREMENT **B-232346.2 Con't**
Socio-Economic Policies **Jan. 4, 1989**
Small businesses
Competency certification
Reconsideration
Additional information

Where contracting officer, following determination that bidder is nonresponsible and Small Business Administration (SBA) declination to issue certificate of competency, reconsiders nonresponsibility determination in light of new information presented by bidder and determines that it did not warrant changing the initial nonresponsibility determination, there is no legal requirement that agency request SBA's reconsideration.

PROCUREMENT **B-232391 Jan. 4, 1989**
Special Procurement **89-1 CPD 6**
Methods/Categories
Research/development contracts
Use
Propriety

Agency's use of phased development approach for the development of a propulsion system will not result in a potential conflict of interest requiring exclusion from the subsequent work phases of any one of multiple awardees under initial work effort, where the awardees will not be directly involved in the preparation of statements of work for the subsequent work effort and will be unable to exert more than minimal influence on the source selection process for these follow-on efforts.

PROCUREMENT
Specifications
Ambiguity allegation
Specification interpretation

Amendment which merely reemphasizes the stated objective of the procurement as set forth in the solicitation does not render the solicitation ambiguous.

PROCUREMENT B-233027 Jan. 4, 1989
Contractor Qualification 89-1 CPD 7
Responsibility
Contracting officer findings
Negative determination
Criteria

Protester was properly found not responsible where it failed to provide sufficient information to permit a finding that the individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonably based.

PROCUREMENT
Contractor Qualification
Responsibility
Information
Submission time periods

An agency is not required to delay award indefinitely until a bidder cures the causes of its nonresponsibility. Rejection of protester's bid is proper where the agency set a reasonable deadline for receipt of information concerning the bidder's responsibility and protester's supplemental information is insufficient to support a finding of responsibility.

PROCUREMENT
Contractor Qualification
Responsibility/responsiveness/distinctions
Sureties
Financial capacity

While financial acceptability of an individual surety is a matter of responsibility, contracting officer's erroneous use of word "nonresponsive" in rejecting protester's bid is of no legal consequence where contracting officer's actions and decision were plainly based on a determination of protester's responsibility, and a corrected rejection letter was sent to protester.

PROCUREMENT **B-233186 Jan. 4, 1989**
Bid Protests **89-1 CPD 8**
GAO procedures
Interested parties
Direct interest standards

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

PROCUREMENT **B-232067.2 Jan. 5, 1989**
Sealed Bidding **89-1 CPD 9**
Invitations for bids
Post-bid opening cancellation
Justification
Evaluation criteria

Cancellation of solicitation which contains a flawed evaluation scheme is justified where defect made it impossible to accurately determine which bid represented the lowest cost to the government.

PROCUREMENT **B-232418 Jan. 5, 1989**
Competitive Negotiation **89-1 CPD 10**
Requests for proposals
Cancellation
Justification
Government advantage

Decision to cancel solicitation and perform work in-house is proper where agency reasonably determines that interests of government are best served if work is performed in this manner.

PROCUREMENT

B-232473; B-232473.2

Competitive Negotiation

Jan. 5, 1989

Offers

89-1 CPD 11

Cost realism

Evaluation errors

Allegation substantiation

Protest that agency did not conduct a proper cost realism analysis of awardee's proposal is denied where, even though agency accepted awardee's low overhead rates, these rates are capped under contract and thus the contractor will be limited to charging the government those rates. Moreover, regardless of the propriety of the cost realism analysis, the management and technical portions of protester's proposal were determined to be unacceptable and, thus, it would not have been in line for award in any event.

PROCUREMENT

Competitive Negotiation

Offers

Evaluation

Downgrading

Propriety

Protest that agency improperly downgraded management and technical portions of protester's proposal is denied where record shows that agency's evaluation of protester's proposal was reasonable and in accordance with the stated evaluation criteria.

PROCUREMENT **B-232473; B-232473.2** **Con't**
Noncompetitive Negotiation **Jan. 5, 1989**
Contract awards
Sole sources
Propriety

PROCUREMENT
Noncompetitive Negotiation
Use
Justification
Urgent needs

Sole-source award on urgency grounds is unobjectionable where agency offers reasonable justification for award and awarded contract is limited in scope to cover only urgently needed requirement.

PROCUREMENT **B-232373.5** **Jan. 9, 1989**
Contract Management **89-1 CPD 12**
Contract administration
Options
Use
GAO review

A contractor may waive an agency's failure to provide timely written notice of its intent to exercise an option and once the condition of notice is waived, the exercise of the option results in a binding contract between the parties.

PROCUREMENT **B-232424** **Jan. 9, 1989**
Sealed Bidding **89-1 CPD 13**
Bid guarantees
Responsiveness
Sureties
Liability restrictions

A protester's bid bond is enforceable against a single corporate surety that, in executing the bond, specifies an intent to be bound to the penal sum by completing the liability limit portion of the bid bond form, even though the penal sum is left blank.

PROCUREMENT

B-232483 Jan. 9, 1989

Bid Protests

89-1 CPD 14

GAO procedures

Protest timeliness

Apparent solicitation improprieties

A protest concerning the type of contract to be awarded and alleged ambiguities in the specifications must be filed prior to bid opening to be timely.

PROCUREMENT

Bid Protests

GAO procedures

Protest timeliness

10-day rule

Protest of the rejection of a bid as late is untimely when filed more than 10 days after basis of the protest is known.

PROCUREMENT

Bid Protests

Non-prejudicial allegation

GAO review

A bidder that submits a late bid is not prejudiced by information that it alone received which allegedly caused it to bid higher than other bidders where its bid is not available for consideration for award because it is received late.

PROCUREMENT
Bid Protests
Allegation substantiation
Lacking
GAO review

B-232681.4 Jan. 9, 1989
89-1 CPD 16

Decision dismissing as without merit on its face protest challenging alleged failure of contracting agency in connection with follow-on procurement of handguns to advise protester that agency would not exercise option under protester's existing contract unless protester's handgun passed all mandatory tests under request for test samples (RFTS) is affirmed where the protester fails to show that initial holding—that RFTS clearly indicated that all sample weapons, including protester's, were required to pass all mandatory tests to be considered for follow-on quantity—is erroneous.

Summary dismissal of protest is appropriate under General Accounting Office Bid Protest Regulations where on its face protest does not state a valid basis for protest.

PROCUREMENT
Bid Protests
Allegation
substantiation
Lacking
GAO review

B-232694, et al.
Jan. 9, 1989
89-1 CPD 17

Protest that labor hour quantity estimates in solicitation for repairs are defective because the agency will not guarantee that it will order that number of labor hours is denied where there is no evidence that the estimates are not based on the best information available to the agency and estimates by their nature are speculative and to be used for purposes of evaluation, not as a guarantee as to what services will be ordered during the term of the contract.

PROCUREMENT B-232694, et al. Con't
Contract Types Jan. 9, 1989
Fixed-price contracts
Use
Administrative determination

Protest that solicitation should have provided for a firm, fixed-price contract is denied where there is no evidence that the agency's choice of procurement method was unreasonable.

PROCUREMENT B-232704 Jan. 9, 1989
Competitive Negotiation 89-1 CPD 18
Best/final offers
Technical acceptability
Negative determination
Propriety

Protester's proposal was properly rejected as unacceptable where agency reasonably determined that the firm took exception in its best and final offer (BAFO) to solicitation requirement for technical studies and correspondingly made significant manhour reductions for this effort. An offeror should not anticipate a further opportunity to revise its proposal after it makes its BAFO submission.

PROCUREMENT B-233599.2 Jan. 9, 1989
Bid Protests 89-1 CPD 15
Contract performance
Work suspension

Requirement that contract performance be suspended is statutory procedural requirement designed, not as final relief to be granted successful protesters, but as means of maintaining status quo during pendency of protest; agency failure to suspend performance therefore does not constitute failure to grant relief to which protester could be entitled, and does not make otherwise academic protest viable.

PROCUREMENT
Bid Protests
Moot allegation
GAO review

B-233599.2 Con't
Jan. 9, 1989

Dismissal of protest as academic is affirmed on reconsideration where protester initially challenged agency's alleged intent to extend contract without competition, and agency reports that, in fact, it has no such intention.

PROCUREMENT
Payment/Discharge
Shipment costs
Rate schedules
Interpretation

B-229023 Jan. 10, 1989

Part II of a carrier's rate tender provided an exception shipment charge on shipments that moved in "a trailer" 29 feet or less in length. A shipment that could have been loaded in such a trailer was actually split between two trailers of less than 29 feet in length. While a technical argument could be made that therefore, Part II of the tender did not apply and, thus, the lower general, unrestricted rate in Part I of the tender did apply, this would be a strained interpretation of the tender. Therefore, the bill should be reaudited and rates from sources other than this tender applied, if available, which produce charges lower than the tender's Part II charge.

PROCUREMENT

B-231715.3 Jan. 10, 1989

Bid Protests

89-1 CPD 19

GAO procedures

GAO decisions

Reconsideration

To be considered, a request for reconsideration must indicate error of fact or law or information not previously considered that would warrant reversal or modification of a prior decision. The mere restatement of arguments previously considered, or mere disagreement with the initial decision does not meet this standard.

PROCUREMENT

Sealed Bidding

Invitations for bids

Risks

The presence of some risk under a solicitation because a reimbursement provision does not absolutely limit contractor liability does not render the solicitation improper since bidders are expected to consider the degree of risk in calculating their bids.

PROCUREMENT

B-231848.2 Jan. 10, 1989

Contractor Qualification

89-1 CPD 20

Responsibility

Contracting officer findings

Negative determination

Criteria

Nonresponsibility determination based on unacceptability of individual surety on required bid bond need not be referred to the Small Business Administration for review under the certificate of competency procedure, since such determinations are based solely on the qualifications of the surety, not the small business offeror.

PROCUREMENT	B-231848.2 Con't
Sealed Bidding	Jan. 10, 1989
Bid guarantees	
Sureties	
Acceptability	
Information submission	

Rejection of protester's bid was proper where agency reasonably found that protester failed to provide sufficient information to permit finding the individual sureties on its bid bond acceptable.

PROCUREMENT	B-232500; B-232500.2
Bid Protests	Jan. 10, 1989
GAO procedures	89-1 CPD 21
Protest timeliness	
10-day rule	

Protest bases that agency held inadequate discussions with the protester, improperly conducted its debriefing and gave the protester late notice of award to another firm are dismissed as untimely since each basis was filed more than 10 working days after it was learned.

PROCUREMENT
Competitive Negotiation
Contract awards
Administrative discretion
Cost/technical tradeoffs
Technical superiority

Protest that agency improperly awarded contract to an offeror that submitted a proposal that was technically equal to the protester's is denied where the record demonstrates that the procuring agency reasonably determined that the awardee's proposal was technically superior to the protester's proposal.

PROCUREMENT B-232532 Con't
Competitive Negotiation Jan. 10, 1989
Offers
Price disclosure
Allegation substantiation
Evidence sufficiency

Contentions of improper disclosure of offerors' pricing and standings are dismissed where the protester does not produce any evidence to support its general allegations aside from the observation that the awardee's price dropped between successive rounds of best and final offers.

PROCUREMENT B-232565; B-232565.2
Competitive Negotiation Jan. 10, 1989
Contract awards 89-1 CPD 23
Administrative discretion
Cost/technical tradeoffs
Technical superiority

Award to highest cost, highest technically rated offeror is proper where solicitation provides that technical considerations are more important than probable cost, and the agency reasonably determined that the technical advantages outweighed the possible cost savings.

PROCUREMENT
Competitive Negotiation
Offers
Competitive ranges
Exclusion
Discussion

Proposals were not improperly eliminated from consideration because of an unstated agency predisposition against the use of ignitrons where the proposals lost only one point on a total point scale of 100 as the result of proposing ignitrons, and the point deduction was directly related to a question raised during discussions regarding how efficiently the ignitrons could satisfy a specific solicitation requirement.

PROCUREMENT **B-232660 Jan. 10, 1989**
Contract Types **89-1 CPD 25**
Requirements contracts
Federal supply schedule
Purchase orders
Notification

Since a Federal Supply Schedule (FSS) contract is a requirements type contract the agency need not publish a notice in the Commerce Business Daily of its intent to place an order under the FSS.

PROCUREMENT
Contract Types
Requirements contracts
Use

Agency may in its discretion, order a non-mandatory item from a Federal Supply Schedule contract even though other suppliers exist where the agency determines that it would cost \$8,000 to \$10,000 to conduct a competitive procurement which would negate any savings from the use of a competitive solicitation.

PROCUREMENT **B-233286 Jan. 10, 1989**
Bid Protests **89-1 CPD 26**
GAO procedures
Interested parties
Direct interest standards

Protest that the contract was improperly awarded to a nonresponsive bidder is dismissed because the protester is not an interested party with standing to protest under General Accounting Office Bid Protest Regulations where the protester would not be in line for contract award even if its protest were to be sustained.

PROCUREMENT
Contract Management
Contract performance
GAO review

B-232650 Con't
Jan. 11, 1989

Protest that firm selected for negotiation of an architect-engineering contract will be unable to perform because it cannot obtain access to required inspection report form which is alleged to be proprietary to the protester is denied where statement of work did not require use of protester's form.

PROCUREMENT
Special Procurement Methods/Categories
Architect/engineering services
Contract awards
Administrative discretion

Where record indicates that agency judged firm selected for negotiation of an architect-engineering (A-E) contract to be technically superior, its selection was proper despite the fact that it had received prior A-E awards while the protester had received none.

PROCUREMENT
Sealed Bidding
Bids
Responsiveness
Determination criteria

B-233863 Jan. 11, 1989
89-1 CPD 30

A bidder's failure to conduct a pre-bid site inspection, even where the solicitation so requires, provides no basis to reject an otherwise responsive bid.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule

B-232954; B-232955 Con't
Jan. 12, 1989

Protest allegations that agency improperly canceled invitation for bids and converted the procurement to a negotiated one are untimely filed where they are based on information the protester received more than 10 working days before protest was filed.

PROCUREMENT
Competitive Negotiation
Contract awards
Initial-offer awards
Propriety

Protest that discussions improperly were not held in negotiated procurement, hence precluding protester from submitting its best and final offer, is denied where agency found that acceptance of low offer would result in lowest overall cost to the government, and the solicitation provided that award might be made without discussions and warned offerors that their initial offer should be their best offer.

PROCUREMENT
Sealed Bidding
Bids
Late submission
Rejection
Propriety

B-233178 Jan. 12, 1989
89-1 CPD 33

A bid that was delivered late by Federal Express properly was rejected where the late delivery was caused by Federal Express and not by improper government action.

PROCUREMENT

B-233173 Jan. 13, 1989

Bid Protests

89-1 CPD 37

GAO procedures

Protest timeliness

Apparent solicitation improprieties

Protest alleging that the solicitation contained ambiguities, which were known to protester prior to the closing date for submission of proposals, is untimely where protester failed to raise the issue until after contract award.

PROCUREMENT

Competitive Negotiation

Offers

Competitive ranges

Exclusion

Administrative discretion

Proposal is properly rejected from the competitive range as technically unacceptable for failure to demonstrate an understanding of the project where it fails to provide sufficient detail regarding how the offeror will perform contract calling for preparation of an extensive historical manuscript; fails to include certain items highlighted in the primary evaluation factor; and otherwise merely restates the solicitation requirements.

PROCUREMENT

Competitive Negotiation

Offers

Debriefing conferences

Allegation that debriefing was inadequate concerns a procedural matter that does not affect the competitive standing of offerors or the validity of the award.

PROCUREMENT

B-234052 Jan. 13, 1989

**Contractor Qualification 89-1 CPD 41
Responsibility/responsiveness distinctions**

Generally, completion of the Place of Performance clause relates to the responsibility of a bidder and not the responsiveness of a bid; therefore completion of the clause does not cure failure to certify that all end items will be manufactured or produced by a small business.

PROCUREMENT

**Sealed Bidding
Bids
Responsiveness
Determination time periods**

Post-bid opening explanations of a bidder's intent cannot be used to make a nonresponsive bid responsive even if the government would obtain a lower price by waiving the deficiency or permitting the bidder to cure it.

PROCUREMENT

**Sealed Bidding
Bids
Responsiveness
Small business set-asides
Compliance**

Bid submitted in response to a total small business set-aside which failed to certify that all end items will be manufactured or produced by small business concerns properly was rejected as nonresponsive.

PROCUREMENT

Bid Protests

GAO decisions

Recommendations

Contract awards

Withdrawal

B-230309.6 Jan. 18, 1989

89-1 CPD 42

In light of evidence presented by the protester to the effect that at least one individual proposed as a lead technician had not given the awardee permission for his name to be used, General Accounting Office recommends that the agency terminate the contract unless it determines that the awardee has a satisfactory explanation regarding the use of the individual's name.

PROCUREMENT

Competitive Negotiation

Contract awards

Award procedures

Procedural defects

Agency's failure to provide timely notice of award is a procedural defect which does not affect the validity of the award.

PROCUREMENT

Competitive Negotiation

Unbalanced offers

Materiality

Determination

Criteria

Fact that awardee's prices for two different length work weeks are the same, or that its base period and option period prices did not conform to what the protester states should have been expected does not render the offer unbalanced.

PROCUREMENT
Bid Protests
Private disputes
GAO review

B-232640, et al.
Jan. 18, 1989
89-1 CPD 43

There is no indication that the agency participated in any alleged misuse of the protester's proprietary data by the awardee; accordingly, the protester's allegation concerning such misuse is a private dispute appropriate for resolution by the courts.

PROCUREMENT
Competitive Negotiation
Contract awards
Propriety

There is no legal basis for concluding that awards to firms submitting lower prices than the protester were improper or that awardees could not meet their contractual obligations to pay wages at rates determined pursuant to the Service Contract Act of 1965, as amended.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Personnel

Agency was under no obligation to consider that awardee might be proposing to use employees of the protester since the solicitation did not require offerors to identify specific individuals in their proposals and, in any event, offerors are not precluded from proposing to hire employees of other concerns.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Personnel
Work schedules

B-232640, et al., Con't
Jan. 18, 1989

Record indicates that agency acted reasonably in concluding that awardees' proposed staffing levels were in line with government estimates and therefore acceptable.

PROCUREMENT
Contract Management
Contract performance
GAO review

Protester's objection to the agency's evaluation of the credentials of the awardee's proposed Director of Housekeeping is without merit since the solicitation provisions concerning qualifications for that position were contract performance requirements and not preconditions to award as alleged; accordingly, whether the awardee satisfies the requirements is a matter of contract administration which the General Accounting Office will not review.

PROCUREMENT
Sealed Bidding
Bids
Responsiveness
Price omission

B-232675 Jan. 18, 1989
89-1 CPD 44

Bid is not nonresponsive where bidder omitted price for duplicative data item which was deleted by amendment. Moreover, a contracting officer may properly waive a price omission as a minor informality where, as here, the defect is immaterial in that proposed awardee offered and is legally obligated to provide required data under different solicitation provision, and waiver will not be prejudicial to other bidders.

PROCUREMENT
Sealed Bidding
Invitations for bids
Amendments
Criteria

B-232675 Con't
Jan. 18, 1989

Transcript of questions and answers raised at pre-bid conference, which is attached to and incorporated into solicitation amendment furnished to all bidders by contracting officer, is part of the amendment and therefore had the effect of amending the solicitation.

PROCUREMENT
Competitive Negotiation
Best/final offers
Technical acceptability
Negative determination
Propriety

B-232799 Jan. 18, 1989
89-1 CPD 46

Protester's best and final offer (BAFO) properly was rejected as being technically unacceptable where protester failed to rectify technical deficiencies brought to protester's attention prior to the date for submission of BAFOs.

PROCUREMENT
Competitive Negotiation
Offers
Competitive ranges
Exclusion
Administrative discretion

A technically unacceptable proposal may be excluded from the competitive range irrespective of its low offered price.

PROCUREMENT **B-232799 Con't**
Competitive Negotiation **Jan. 18, 1989**
Offers
 Competitive ranges
 Inclusion
 Administrative discretion

An initial proposal was properly included in the competitive range where the agency reasonably determined that the proposal was susceptible of being made acceptable through discussions.

PROCUREMENT **B-231213.2 Jan. 23, 1989**
Competitive Negotiation **89-1 CPD 49**
Offers
 Evaluation errors
 Evaluation criteria
 Application

Contention that agency's decision to make award under solicitation to low offeror improperly was based on factors other than price which were not disclosed to the protester is without merit, where the award was in fact based on price alone, and remarks by contracting officials to protester after award could not reasonably be interpreted to mean that the agency had changed the basis for award.

PROCUREMENT
 Contractor Qualification
 Responsibility
 Contracting officer findings
 Affirmative determination
 GAO review

Where record shows that contracting officer reasonably relied upon preaward survey in finding offeror to be responsible, there is no basis for concluding that affirmative responsibility determination of contracting officer was made in bad faith.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule

B-232156.2 Jan. 23, 1989
89-1 CPD 50

Protest is dismissed as untimely where protest is filed 11 weeks after award, and protester allowed more than 4 months to expire without inquiry as to status of procurement; protester thus has not met its obligation of diligently pursuing the basis of its protest.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule
Reconsideration motions

B-232287.2 Jan. 23, 1989
89-1 CPD 51

Request for reconsideration of bid protest decision is untimely when not filed within 10 working days after the basis for the request is known.

PROCUREMENT
Bid Protests
Non-prejudicial
allegation
GAO review

B-232548; B-232548.2
Jan. 23, 1989
89-1 CPD 52

Although protester's proposal was not given credit in cost evaluation for justified reductions in costs of materials below agency's cost estimates, protest is denied since, even when protester's proposal is given credit for reductions, its evaluated cost is still higher than that of the awardee and its technical and management proposal is not rated as high so protester is still not in line for award.

PROCUREMENT

B-232548; B-232548.2 Con't

Competitive Negotiation

Jan. 23, 1989

Discussion

Adequacy

Criteria

Since protester was told to submit material on current system, which should have led protester to enhance its approach in that respect and, since protester does not argue that other deficiencies, which were a significant cause of protester's failure to receive award, were not discussed, General Accounting Office does not conclude that more detailed discussions concerning the focus of proposal on upgraded system would have been relevant to the evaluation.

PROCUREMENT

Competitive Negotiation

Offers

Evaluation errors

Evaluation criteria

Application

Protest that evaluation was improperly based on offerors providing operation and maintenance support for current configuration of training center control system, rather than upgraded system which will be in use for most of the contract, is denied where solicitation called for proposals to provide support for system in any state of upgrade over the course of the contract and solicitation included line items allowing upgrade of the system over the course of the contract. Protester's proposal was not rejected because the evaluation was based on current system, as opposed to upgraded system, as protester contends; but rather as a result of technical and management deficiencies in proposal.

PROCUREMENT **B-232548; B-232548.2 Con't**
Competitive Negotiation **Jan. 23, 1989**
Unbalanced offers
Materiality
Determination
Criteria

Although awardee's offer was mathematically unbalanced between various labor rates for time and materials work and also unbalanced between time and materials labor rates and labor rates for other separately priced work, offer can still be accepted by contracting agency since it is not materially unbalanced.

PROCUREMENT **B-232644 Jan. 23, 1989**
Socio-Economic Policies **89-1 CPD 53**
Preferred products/services
American Indians

Determination of Bureau of Indian Affairs that a firm meets eligibility criteria for responding to Buy Indian Act procurement will not be disturbed by the General Accounting Office where not shown to be unreasonable, arbitrary, capricious or contrary to law or regulation.

PROCUREMENT **B-232689 Jan. 23, 1989**
Bid Protests **89-1 CPD 54**
Allegation substantiation
Lacking
GAO review

Where protester alleges that information regarding the replacement of engines in trucks to be maintained by the contractor under a contract for trash collection services was provided to another offeror but not to it, but record contains no evidence to support the allegation, General Accounting Office will not attribute improper action to the agency on that basis.

PROCUREMENT **B-232962 Jan. 23, 1989**
Contractor Qualification 89-1 CPD 56
Responsibility
Contracting officer findings
Negative determination
Pre-award surveys

A contracting officer properly may base a determination of nonresponsibility on a preaward survey without affording an offeror the opportunity to explain or otherwise defend against the survey information.

Protest against a negative responsibility determination is denied where the determination was reasonably based on a current negative preaward survey report that found protester did not have an adequate quality control system and did not demonstrate an ability to comply with the agency's specifications.

PROCUREMENT **B-233051 Jan. 23, 1989**
Competitive Negotiation 89-1 CPD 57
Requests for proposals
Cancellation
Resolicitation
Propriety

Since an agency may properly cancel a solicitation no matter when the information precipitating the cancellation arises, the cancellation of request for proposals (RFP) during the proposal evaluation period is proper where the evaluation factors listed in the RFP are deficient and the agency determines that resolicitation to reflect properly weighted evaluation factors is necessary to meet its actual minimum needs.

PROCUREMENT
Bid Protests
GAO authority

B-233321; B-233321.2
Jan. 23, 1989
89-1 CPD 58

Protest against proposed withdrawal of small business set-aside is not for consideration where no solicitation has yet been issued because the General Accounting Office by law considers only protests involving solicitations and proposed or actual contract awards.

PROCUREMENT
Bid Protests
GAO procedures
Interested parties
Direct interest standards

Protester whose bid is properly found nonresponsive is not an interested party entitled to protest where the protester would not be in line for award if the protest were sustained.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule

Protest filed more than 10 working days after basis of protest was known or should have been known is untimely.

PROCUREMENT **B-233321; B-233321.2 Con't**
Sealed Bidding **Jan. 23, 1989**
Bids
Responsiveness
Small business set-asides
Compliance

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

PROCUREMENT **B-233410 Jan. 23, 1989**
Contractor Qualification **89-1 CPD 59**
Responsibility
Contracting officer findings
Affirmative determination
GAO review

Contention that awardee failed to meet definitive responsibility criteria is without merit where awardee submitted information from which the contracting officer reasonably could conclude that the awardee met the criteria. The relative quality of the information and the need for further investigation are within the discretion of the contracting officer.

The General Accounting Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of the procurement officials or that definitive responsibility criteria in the solicitation were misapplied.

PROCUREMENT
Bid Protests
GAO procedures
Pending litigation
GAO review

B-233876 Jan. 23, 1989
89-1 CPD 62

Protest that questions the propriety of competitively soliciting follow-on refuse collection services contract is dismissed where the same issue is encompassed in the broader issues (propriety of current and future competitive refuse collection procurements) of a civil action initiated by the protester challenging prior refuse services procurement and the court has not expressed interest in a General Accounting Office decision.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-231393.2 Jan. 24, 1989
89-1 CPD 63

Request for reconsideration that basically reiterates argument that was previously made and considered in the initial bid protest does not warrant reversal of the prior decision.

PROCUREMENT

**Sealed Bidding
Invitations for bids
Terms**

B-232431.2; B-232431.3

**Jan. 24, 1989
89-1 CPD 64**

**Liquidated damages
Propriety**

Solicitation provision requiring payment for shortages in government-furnished linen inventory is unobjectionable where procedure is deemed necessary by agency to prevent extensive losses which had been experienced previously under incumbent contract.

Liquidated damages provision allowing for contract payment deductions for unsuccessful performance of maintenance and repair requirement is reasonably related to probable actual damages when the maximum deduction is based on the criticality of the services to be performed and the value of the government-furnished equipment to be maintained, not solely on labor and repair costs, and the amount of the deduction increases with the number of deficiencies found.

PROCUREMENT

**Sealed Bidding
Invitations for bids
Terms**

**Pricing
Additional work/quantities**

Solicitation provision setting forth computation method for increasing contract price in option years to reflect prior issuance of new Department of Labor wage determinations is not unreasonable on basis that it does not fully reimburse contractor for prior years' increased cost; the purpose of the provision is to provide prospectively a basis to reflect the future impact of a new wage determination, and not to provide retroactive compensation on a cost reimbursement basis, which would be inconsistent with the contemplated fixed-price contract.

PROCUREMENT B-232497.2 Jan. 24, 1989
Competitive Negotiation 89-1 CPD 65
Offers
Evaluation
Technical acceptability

Protest that awardee's fire alarm system does not comply with certain provisions of a National Fire Protection Association Standard concerning publicly accessible fire alarm boxes is denied where the request for proposals indicates that the agency is not purchasing items to which the provisions apply.

Protester's bare allegation that the successful offeror's fire alarm system testing device has not been approved by the Factory Mutual System in accordance with the solicitation is not sufficient to refute the successful offeror's representation that the offered system is approved and the agency's confirmation in that regard.

PROCUREMENT B-232589 Jan. 24, 1989
Bid Protests 89-1 CPD 66
GAO procedures
Protest timeliness
Apparent solicitation improprieties

Protest alleging solicitation was not sufficiently specific is untimely under General Accounting Office's Bid Protest Regulations where not filed prior to closing date for receipt of proposals.

PROCUREMENT
Bid Protests
Non-prejudicial allegation
GAO review

Agency failure to give a protester prompt notification of an award did not prejudice a protester nor does it provide a basis to sustain a protest.

PROCUREMENT B-233081; B-233081.2 Con't
Contractor Qualification Jan. 24, 1989
Responsibility
Contracting officer findings
Negative determination
GAO review

Responsibility determinations are based on circumstances at the time of award and are inherently judgmental. Thus, the fact that different conclusions as to a firm's responsibility may be reached by others, does not demonstrate unreasonableness or bad faith on the part of the contracting officer.

PROCUREMENT
Contractor Qualification
Responsibility
Contracting officer findings
Negative determination
Pre-award surveys

A contracting officer properly may base a determination of nonresponsibility on a negative preaward survey so long as it is based upon accurate information and conclusions.

PROCUREMENT
Contractor Qualification
Responsibility
Contracting officer findings
Negative determination
Prior contract performance

A bidder's delinquent contract performance at one facility properly may be considered by a contracting officer in making a determination of responsibility where the bidder intends to perform the new contract at a facility with no record of contract performance.

PROCUREMENT B-233081; B-233081.2 Con't
Contractor Qualification Jan. 24, 1989
Responsibility
Contracting officer findings
Reconsideration
Contracting officers

A contracting officer may legitimately reconsider a nonresponsibility determination where there is ample time and there is a material change in a principal factor on which the determination is based.

PROCUREMENT B-233102 Jan. 24, 1989
Competitive Negotiation 89-1 CPD 68
Offers
Competitive ranges
Exclusion
Administrative discretion

Where offeror fails to furnish sufficient information in its proposal to determine its technical acceptability, an agency can reasonably conclude the offer is technically unacceptable and exclude it from the competitive range.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Administrative discretion

Agency violates no regulation or legal duty in not advising an offeror that its proposal was unacceptable, where subsequent to the evaluation of initial offers the request for proposals (RFP) was completely revised and new proposals were solicited and the RFP, both before and after revision, clearly identified the proposal requirements and evaluation criteria.

PROCUREMENT B-233114 Jan. 24, 1989
Sealed Bidding 89-1 CPD 69
Ambiguous bids
Determination criteria

Bid was properly rejected as nonresponsive where standard form containing the bidder's general terms and conditions of sale included with bid documents made bid ambiguous as to whether the bidder intended to comply with material terms of the solicitation.

PROCUREMENT B-233125, et al.
Competitive Negotiation Jan. 24, 1989
Requests for proposals 89-1 CPD 70
Amendments
Compliance time periods
Adequacy

Protest that offeror did not receive amendments to solicitations until after the time set for closing is denied absent evidence that the failure resulted from a deliberate attempt on the part of the agency to exclude firm. Record shows that misaddressing of amendments was due merely to agency inadvertence and that protester and agency were not aware of mailing error until after the offer closing time.

PROCUREMENT B-233458 Jan. 24, 1989
Contractor Qualification 89-1 CPD 71
Responsibility/responsiveness distinctions
Sureties
Financial capacity

The question of the acceptability of an individual bid bond surety is one of bidder responsibility, not responsiveness; the fact that the contracting officer labeled the reason for the rejection of the protester's bid as nonresponsiveness rather than nonresponsibility has no bearing on the merits of the rejection of the bid.

PROCUREMENT
Sealed Bidding
Bid guarantees
Sureties
Acceptability

B-233458 Con't
Jan. 24, 1989

Where the record indicates a continuing pattern by an individual bid bond surety of not disclosing outstanding bond obligations on its standard form 28, a contracting officer has a reasonable basis to reject the bidder's surety as unacceptable.

PROCUREMENT
Sealed Bidding
Bid guarantees
Sureties
Acceptability
Information submission

In determining the acceptability of an individual bid bond surety, an agency may consider, under appropriate circumstances, the surety's failure to disclose other bond obligations on the affidavit of individual surety, standard form 28, as such disclosure is necessary to enable the contracting officer to make an informed judgment concerning a surety's financial soundness.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
Apparent solicitation improprieties

B-233776.3 Jan. 24, 1989
89-1 CPD 72

Protest filed after closing date that protester effectively was precluded from competing under solicitation calling for application of a 10 percent evaluation preference for eligible small disadvantaged businesses is dismissed as untimely since the protester was on notice before the closing date that contracting agency had determined that it was not eligible for the preference.

PROCUREMENT
Bid Protests
Private disputes
GAO review

B-232634 Jan. 25, 1989
89-1 CPD 75

Allegation that awardee improperly obtained protester's proprietary information by hiring protester's former employee is essentially a matter of dispute between private parties and will not be considered by the General Accounting Office.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Technical acceptability

Protester who criticizes awardee's proposal as deficient has not shown that the proposal was technically unacceptable where the agency identifies where awardee's proposal addressed the items which are the subjects of the protester's criticisms.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
Apparent solicitation improprieties

B-232766 Jan. 25, 1989
89-1 CPD 78

Protest that dates for receipt of initial and best and final offers allowed insufficient time for preparation of proposals is dismissed as untimely when not filed prior to the closing date for the receipt of proposals.

PROCUREMENT
Bid Protests
GAO procedures
Protest timeliness
10-day rule

B-233029 Jan. 25, 1989
89-1 CPD 81

Protest that agency failed to provide written notice that discussions had ended and that agency improperly advised potential competitor of protester's price is dismissed as untimely where the issues were raised more than 10 days after protester learned of the protest bases. Moreover, protester was not prejudiced thereby.

PROCUREMENT
Competitive Negotiation
Requests for proposals
Cancellation
Justification
Competition enhancement

Protest that agency improperly rejected protester's proposal is denied where the record does not demonstrate that the agency unreasonably concluded that the protester's proposal was unreasonably priced. In any event, the agency could properly resolicit the requirement based on the anticipation of lower prices and increased competition.

PROCUREMENT
Competitive Negotiation
Contract awards
Administrative discretion
Cost/technical tradeoffs
Technical superiority

B-233116 Jan. 25, 1989
89-1 CPD 83

In a negotiated procurement, award to a higher cost, higher technically ranked offeror is not objectionable where the solicitation award criteria made technical considerations more important than cost and the agency reasonably concluded that the awardee's superior proposal provided the best overall value.

PROCUREMENT **B-233277 Jan. 25, 1989**
Sealed Bidding **89-1 CPD 85**
Bids
Acceptance time periods
Extension

PROCUREMENT
Sealed Bidding
Invitations for bids
Amendments
Acknowledgment
Responsiveness

Where bidder agreed to the 60-day minimum bid acceptance period on its original bid form, but also acknowledged an amendment that changed the minimum period from 60 to 90 days, bid was properly deemed responsive because bidder's blanket acknowledgement of the amendment indicated its acceptance of all amendment terms including the longer bid acceptance period.

PROCUREMENT **B-233719.2 Jan. 25, 1989**
Bid Protests **89-1 CPD 86**
GAO procedures
GAO decisions
Reconsideration

Protest dismissed as untimely will not be reconsidered when protester's second protest letter does not discuss General Accounting Office's finding that the initial protest was untimely.

PROCUREMENT B-232839 Jan. 26, 1989
Competitive Negotiation 89-1 CPD 79
Contract awards
Multiple/aggregate awards
Propriety

PROCUREMENT
Special Procurement Methods/Categories
Computer equipment/services
Multiple/aggregate awards
Contract awards
Propriety

Protest against award for the leasing of systems furniture alleging that awardee, a mandatory, multiple-award Federal Supply Schedule contractor, failed to meet requirement for medium grade fabric for office panels, is denied where the record shows that awardee's quote complied with requirement, as reasonably defined by agency, for medium grade fabric.

PROCUREMENT B-232619; B-232619.2
Bid Protests Jan. 27, 1989
Evidence evaluation 89-1 CPD 90
Privileged information

While General Accounting Office (GAO) finds that offerors' proprietary information should not be released to other offerors, GAO finds that release to the protesters of the evaluations of their own proposals, the relative standing of proposals, and those portions of the source selection plan explaining the evaluation scheme was necessary to provide the protesters a meaningful opportunity to develop their protests, and thus was proper.

PROCUREMENT B-232619; B-232619.2 Con't
Competitive Negotiation Jan. 27, 1989
Offers
Evaluation errors
Evaluation criteria
Application

PROCUREMENT
Competitive Negotiation
Offers
Organizational experience
Evaluation
Propriety

Where technical evaluation scheme in a request for proposals sets forth prior experience and performance under prior contracts as an evaluation factor and awardee referenced in its proposal its performance under a major, ongoing contract with the contracting agency, the technical evaluation was unreasonable where the agency ignored the problems encountered by the awardee in performing the contract.

PROCUREMENT B-233204 Jan. 27, 1989
Sealed Bidding 89-1 CPD 91
Bids
Responsiveness
Acceptance time periods
Deviation

Procuring agency's rejection of protester's bid as nonresponsive is upheld where bid was accompanied by a cover letter which conditioned the bid upon acceptance within 30 calendar days and the solicitation stated that bids for less than 60 calendar days will be rejected. The fact that the protester did not insert a shorter period in the space provided on the bid document does not alter the nonresponsiveness of the bid. In these circumstances, the protester has no legal right to have the error corrected under the mistake in bid procedures.

PROCUREMENT

B-233436 Jan. 27, 1989

Bid Protests

89-1 CPD 93

GAO procedures

Protest timeliness

10-day rule

Protest that requirement should be resolicited because original proposals were lost by contracting agency, filed with General Accounting Office more than 7 weeks after protester knew the basis for its protest is untimely. Agency notification to the protester that all proposals had been lost and the issuance of an amendment to the solicitation requesting new proposals for a revised requirement provided sufficient notice of the protest grounds.

PROCUREMENT

B-229329 Jan. 30, 1989

Payment/Discharge

Shipment

Carrier liability

Burden of proof

The matter of a carrier's offer to compromise a claim of the United States for the loss of an atomic clock valued at \$63,749.86, is referred to the Department of Justice with a recommendation for favorable consideration where the record shows that in the event of litigation there would be a substantial legal question of whether a carrier is relieved of all liability when a shipper fails to inform the carrier of the article's high value; the government might not be able to show that the clock was delivered to the carrier, and there are practical considerations tending to favor the carrier's position.

PROCUREMENT
Bid Protests
Moot allegation
GAO review

B-233045; B-233046
Jan. 30, 1989
89-1 CPD 94

Allegation that second low bid was nonresponsive because materially unbalanced is academic where the low bidder is eligible for the award.

PROCUREMENT
Contractor Qualification
Responsibility
Contracting officer findings
Affirmative determination
GAO review

This Office will not review a protest against the procuring agency's affirmative determination of responsibility where there is no showing that the contracting officials acted fraudulently or in bad faith, or that the solicitation contained definitive responsibility criteria that have not been met.

PROCUREMENT
Sealed Bidding
Bids
Responsiveness
Price omission
Unit prices

Bid which did not contain unit prices as required by the solicitation is responsive when the price per unit can be determined by dividing the total price for the item by the estimated quantity, because the bid commits the contractor to perform the exact thing called for in the solicitation at a fixed price and no other bidder is prejudiced by the agency's waiver of the defect as a minor irregularity.

PROCUREMENT
Bid Protests
Allegation
Abandonment

B-233095 Jan. 30, 1989
89-1 CPD 95

Where agency's report specifically addresses argument raised in initial protest that protester's proposal was improperly excluded from the competitive range as technically unacceptable, and protester fails to rebut the agency position in its comments on the agency report, the issue is deemed abandoned.

PROCUREMENT
Bid Protests
Allegation investigation
GAO review

B-233007 Jan. 31, 1989
89-1 CPD 97

PROCUREMENT
Competitive Negotiation
Technical evaluation boards
Bias allegation
Allegation substantiation
Evidence sufficiency

Improper action will not be attributed to an agency's procurement officials on the basis of unsupported allegations, inference or supposition. Furthermore, General Accounting Office will not conduct an independent investigation in connection with a bid protest in order to substantiate a protester's speculative allegations.

PROCUREMENT **B-233007** **Con't**
Bid Protests **Jan. 31, 1989**
Allegation substantiation
Lacking
GAO review

Allegation that agency did not state a common cut off date for best and final offers (BAFO) is denied where evidence in the record indicates that agency notified both offerors early the same morning that deadline for submission of BAFOs was extended to the following day at 2 p.m.

PROCUREMENT
Competitive Negotiation
Offers
Evaluation
Administrative discretion

In reviewing protests concerning the evaluation of technical proposals, the General Accounting Office will not substitute its judgment for that of agency's evaluators but will examine the record to determine whether the evaluators' judgments were reasonable and in accordance with the listed criteria and whether there were any violations of procurement statutes and regulations.

PROCUREMENT **B-233133** **Jan. 31, 1989**
Competitive Negotiation **89-1 CPD 98**
Contract awards
Administrative discretion
Cost/technical tradeoffs
Technical superiority

Award of contract to higher-priced offeror which had higher-ranked proposal in technical areas is proper where contracting agency's selection decision is reasonable since selection officials have broad discretion in making a price/technical tradeoff so long as it is consistent with the solicitation's evaluation scheme.

PROCUREMENT **B-233133 Con't**
Competitive Negotiation **Jan. 31, 1989**
Contracting officer duties
Contract award notification

Contracting agency is only obligated to notify unsuccessful firms of the agency's award decision after the award has been made.

PROCUREMENT **B-233142 Jan. 31, 1989**
Bid Protests
Contract performance
Work suspension

Agency was not required to suspend contract performance under the Competition in Contracting Act when protest was filed more than 10 calendar days after contract award.

PROCUREMENT
Competitive Negotiation
Best/final offers
Pricing errors
Correction
Propriety

Agency properly clarified clerical error in awardee's price proposal, without opening discussions, where the existence of the mistake and the intended price was apparent from the solicitation and proposal.

PROCUREMENT
Competitive Negotiation
Contract awards
Personnel
Substitution
Propriety

Awardee's post-award substitution of personnel, in accordance with the solicitation and with agency approval, is a matter of contract administration which the General Accounting Office does not review.

PROCUREMENT B-233142 Con't
Competitive Negotiation Jan. 31, 1989
Discussion
Determination criteria

Procuring agency's communications with offeror concerning required subcontracting plan relate to offeror's responsibility and do not constitute discussions or require that revised proposals be solicited from all offerors.

PROCUREMENT B-233142 Jan. 31, 1989
Competitive Negotiation
Offers
Price reasonableness
Determination
Administrative discretion

Protest against agency determination of price reasonableness is denied where there is no indication of bad faith or fraud and the awardee's price is lower than both the government estimate and the price of the other competitors.

PROCUREMENT B-233142 Jan. 31, 1989
Competitive Negotiation
Technical evaluation boards
Qualification
GAO review

General Accounting Office will not appraise adequacy of qualifications of agency contracting personnel absent a showing of possible fraud, conflict of interest or actual bias on their part.

MISCELLANEOUS TOPICS

MISCELLANEOUS TOPICS **B-229398 Jan. 5, 1989**
Federal Administrative/Legislative Matters
Administrative agencies
Veterans benefits
Administrative proceedings
Due process doctrine

The Veterans Administration's practices and procedures (38 C.F.R. § 3.103 (1987)) for deciding claims for veterans' benefits provides for necessary due process protections.

The common reference to the Veterans Administration's relationship with veterans as "paternalistic" is a description of the system embodied in existing law.

MISCELLANEOUS TOPICS **B-233300 Jan. 9, 1989**
Human Resources
Health care
Health insurance
Payment deductions

"Deductible or copayment," as used in 38 U.S.C. § 629(a)(3), refers to that which is required by private health plan contract under its terms with veteran and does not refer to deductible which Veterans Administration (VA) may require certain veterans to pay for receiving treatment in a VA facility under 38 U.S.C. § 610(f).

MISCELLANEOUS TOPICS

B-233300 Con't

Human Resources

Jan. 9, 1989

Health care

Outpatient

Administrative discretion

In absence of any statutory specification of what is outplacement visit, Veterans Administration has reasonable discretion to determine what would constitute "visit" for outplacement purposes, under 38 U.S.C. § 612(f)(4)(B).

MISCELLANEOUS TOPICS

Human Resources

Health care

Veterans

Medicare

Payment procedures

Private insurance policy supplementing Medicare benefits would appear to fall within definition of "health plan contract" in 38 U.S.C. § 629(i)(1)(A). Thus, under terms of such policy, it is appropriate for Veterans Administration to bill Medicare supplemental insurer to recover costs of treating insured veteran.

While 38 U.S.C. § 629(i)(1)(B) specifically excludes the Veterans Administration (VA) right of recovery from Medicare for furnishing treatment to veterans, it does not explicitly prohibit VA from nominally seeking recovery from Medicare for limited purposes of satisfying conditions in supplemental insurer contracts.

MISCELLANEOUS TOPICS

B-233612.2 Jan. 9, 1989

**Human Resources
Health care
Medicare
Rates**

Section 422(a)(1) of Medicare Catastrophic Protection Act of 1988 requires Office of Personnel Management (OPM) to reduce insurance rates charged medicare-eligible individuals participating in federal employee health plans by "prorated" amount. OPM's interpretation permitting calculation of flat reduction in rates pertaining to all affected carriers is reasonable.

MISCELLANEOUS TOPICS

B-231496.1 Jan. 13, 1989

**Federal Administrative/Legislative Matters
Audits
Payments**

Subject to the conditions set forth below, the GAO Office of Financial Management is advised that no legal objection will be raised to its compliance with the request of the Accounting and Financial Management Division (AFMD) to reduce the amount assessed against the Pennsylvania Avenue Development Corporation (PADC) as reimbursement for GAO's audit (pursuant to section 301 of the Government Corporations Control Act, 31 U.S.C. § 9105 (1982)) of PADC financial records for the year ended September 30, 1985. This advice is predicated upon AFMD's representation that the initial assessment against the PADC included amounts stemming from unwarranted inefficiencies, and that AFMD's final assessment was calculated to include the otherwise appropriate, "full" costs of GAO's audit, consistent with B-207203-O.M., June 4, 1982.

MISCELLANEOUS TOPICS

B-234152 Jan. 13, 1989

Human Resources

Health care

Medicare

Malpractice

Government liability

It is unclear whether 42 U.S.C. § 1320c-6(d) would obligate the federal government to pay malpractice judgment incurred by Peer Review Organization in connection with performance of its duties under Medicare.

While Congress has declared that U.S. shall be liable for its actions relating to certain negligence-based claims in same manner and to same extent as private citizens, such liability would not to issuance or promulgation of standards or rules. 28 U.S.C. § 2674.

MISCELLANEOUS TOPICS

Human Resources

Health care

Medicare

Physicians

Malpractice

If increased national standards for Medicare reimbursement force physicians to deviate from local common law standards of care, those physicians would no longer be protected by existing statutory immunity. 42 U.S.C. § 1320c-6(c).

MISCELLANEOUS TOPICS
Human Resources
Health care
Medicare
Review procedures

B-234152 Con't
Jan. 13, 1989

Any expansion of Peer Review Organization review of health care services under Medicare may not be arbitrary or lack procedural due process and must bear rational relationship to legitimate governmental end. Association of American Physicians & Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill.) (three judge court) (1975).

Whether increased use of national standards of Peer Review Organizations in reviewing Medicare health care services would conflict with statutory requirement for regional norms of care depends on number of factors, including scope and specificity of national standards and how different they are from regional practice. 42 U.S.C. § 1320c-3(a)(6).

If Peer Review Organization (PRO) review of health care services under Medicare interferes with the treatment of Medicare patients, it is possible such interference may subject PRO to malpractice liability. See Wickline v. California, 192 Cal. App. 3d 1630, 228 Cal. Rptr. 661 (1986).

MISCELLANEOUS TOPICS
Human Resources
Health care
Medicare
Revision

Any significant changes in the Medicare program which are not enacted in legislation or promulgated as rules are vulnerable to potential legal challenges on procedural grounds. 5 U.S.C. §§ 551 et seq.

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