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Office of General Counsel



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Digests of Unpublished Decisions of the Comptroller General of the United States

Charles A. Bowsher

Comptroller General of the United States

Milton J. Socolar

Special Assistant to the Comptroller General

James F. Hinchman

General Counsel

Vacant

Deputy General Counsel

Volume V No. 7

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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This publication is one in a series of monthly pamphlets entitled "Digests of Unpublished Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and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 Budget Process B-233847 Apr. 14, 1989 Working capital funds Reimbursement

40 U.S.C. § 293 (1982), which authorizes the establishment of a working capital fund (fund) within the General Services Administration, does not require the GSA fund to be reimbursed with the net proceeds from transfers to other federal agencies of excess equipment originally purchased by the fund.

The Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 483 and 485 (1982), grants the General Services Administration the discretion to request reimbursement from a federal agency to which excess equipment originally purchased by a GSA working capital fund has been transferred.

MILITARY PERSONNEL

MILITARY PERSONNEL B-234135 Apr. 21, 1989
Relocation
Household goods
Weight restrictions
Liability
Waiver

10 U.S.C. § 2774 authorizes waiver of a claim against a service member arising out of an "erroneous" payment of travel and transportation allowances. The Joint Federal Travel Regulations provide for the shipment of a member's household goods (HHG) at government expense upon a permanent change of duty station, not in excess of the member's maximum authorized HHG weight allowance. An Air Force officer's request for waiver of collection of an indebtedness arising from excess weight charges for shipment of HHG, incurred because of a delay in the issuance of his orders and his alleged resulting inability to dispose of the HHG which caused the excess, cannot be considered under the waiver statute since no "erroneous" payment by the government was involved.

PROCUREMENT

PROCUREMENT Bid Protests GAO procedures B-233541.2 Apr. 3, 1989 89-1 CPD 341

Protest timeliness
10-day rule

General Accounting Office will not consider a protest filed more than 10 working days after the protester receives oral notification of the denial of its agencylevel protest.

PROCUREMENT

B-233709 Apr. 3, 1989

Bid Protests

89-1 CPD 342

GAO procedures
Protest timeliness
10-day rule

Where doubt exists concerning the date on which a protester became aware of the basis of its protest, the doubt is resolved in favor of the protester.

PROCUREMENT

Contract Management
Contract modification
Cardinal change doctrine
Criteria
Determination

Protest that a contract modification was beyond the scope of the contract is denied where the modification did not result in the procurement of services materially different from the services competed under the original contract.

PROCUREMENT

Contractor Qualification

Responsibility criteria

Distinctions

Evaluation criteria

Experience requirement in solicitation set aside for small business was an evaluation factor not a definitive responsibility criterion, and the agency's consideration of large business subcontractor's experience under the relevant evaluation factor was proper where solicitation allowed use of subcontractors to perform the contract and did not prohibit use of a subcontractor to satisfy experience requirement.

PROCUREMENT

Socio-Economic Policies
Small businesses
Size status
Subcontracts
Effects

Protest that small business' use of a large business subcontractor contradicts Small Business Administration (SBA) size status determination and is a matter which the SBA has conclusive authority to decide.

PROCUREMENT B-233958 Apr. 3, 1989
Competitive Negotiation 89-1 CPD 344
Contract awards
Administrative discretion
Cost/non-cost tradeoffs

Award of contract to higher priced offeror is proper where solicitation sought quality rooms at a price less than stated per diem rate and made other considerations more important than cost since so long as it is consistent with the solicitation's evaluation scheme, selection officials have broad discretion in making a tradeoff between price and noncost factors.

PROCUREMENT
Bid Protests
Premature allegation

GAO review

B-234311 Apr. 3, 1989 89-1 CPD 345

Protest by sixth low bidder that all lower-priced bidders are nonresponsible is premature with respect to intervening bidders that are not currently in line for award.

PROCUREMENT

Socio-Economic Policies
Small businesses
Responsibility
Competency certification
GAO review

General Accounting Office will consider protests by third parties concerning the Small Business Administration's issuance of a certificate of competency only upon a prima facie showing that government officials acted fraudulently or in bad faith or willfully disregarded vital information bearing on a small business firm's compliance with definitive responsibility criteria.

PROCUREMENT

B-234614 Apr. 3, 1989 89-1 CPD 346

Bid Protests GAO procedures

O procedures Protest timeliness

Apparent solicitation improprieties

Protest alleging solicitation deficiencies (failure to issue solicitation as a small business set-aside) which is not filed before the bid opening date is untimely.

PROCUREMENT
Bid Protests

B-233105.3 Apr. 4, 1989 89-1 CPD 351

GAO procedures
Protest timeliness
10-day rule

Reconsideration motions

Request for reconsideration filed more than 10 days after basis for request was known is untimely and not for consideration on the merits.

PROCUREMENT

Bid Protests
Premature allegation
GAO review

Protester's speculation regarding agency's possible determination of technical acceptability does not provide a basis for protest.

PROCUREMENT

B-233763.2 Apr. 4, 1989 89-1 CPD 352

Socio-Economic Policies 89-1 CPD 352

Small businesses

Competency certification Eligibility

Criteria

Where, after Small Business Administration (SBA) declines to issue a certificate of competency, protester furnishes to SBA, but not contracting activity, information allegedly sufficient to cure firm's nonresponsibility, agency decision to award to second low bidder was reasonable, since record contains no evidence to show that the contracting agency was apprised of new information until after award.

PROCUREMENT
Bid Protests
GAO procedures
Anticipated profits

B-233904.2 Apr. 4, 1989 89-1 CPD 353

Protester is not entitled to reimbursement for costs incurred in anticipation of being awarded a government contract which it did not receive.

PROCUREMENT

B-233628.4 Apr. 5, 1989

Competitive Negotiation

89-1 CPD 354

Offers

Competitive ranges Exclusion

Administrative discretion

PROCUREMENT

Competitive Negotiation

Offers

Technical acceptability

Deficiency

Blanket offers of compliance

An agency can reasonably conclude an offer is technically unacceptable and exclude it from the competitive range where the offer contains significant informational deficiencies. Although a technical evaluation of a proposal must be based on information submitted with the proposal, a blanket offer of compliance is not sufficient to comply with solicitation requirements for descriptive information which an agency deems necessary for evaluating the technical acceptability of proposals.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-234616.2 Apr. 5, 1989 89-1 CPD 356

A bidder whose bid was properly found nonresponsive due to insertion of a 60-day acceptance period rather than the 90-day minimum required in the solicitation may not correct its acceptance period after bid opening, because allowing a bidder to change its bid acceptance period after bid opening would give the bidder an unfair advantage over other bidders who initially offered the required minimum time. Bidder's reiteration, in its request for reconsideration, that it is willing to change its acceptance time is irrelevant and serves no basis for us to reverse our prior decision dismissing protest.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-233166.3 Apr. 6, 1989 89-1 CPD 357

Reconsideration request is denied where the protester has presented no evidence that prior decision was based on factual or legal errors.

PROCUREMENT
Bid Protests

B-233354.3 Apr. 6, 1989 89-1 CPD 358

GAO procedures
Protest timeliness

Apparent solicitation improprieties

Allegation that the specifications were defective is dismissed as untimely where alleged defect was apparent in the specifications but was not raised until after the closing date for receipt of proposals.

PROCUREMENT B-233354.3 Con't
Sealed Bidding Apr. 6, 1989
Invitations for bids
Post-bid opening cancellation
Resolicitation

Contracting officer properly canceled invitation for bids after bid opening and resolicited on the basis of revised specifications where original specifications overstated the government's minimum needs in several respects.

PROCUREMENT
Sealed Bidding
Invitations for bids
Terms
Contractor personnel
Training

B-233726.2 Apr. 6, 1989
89-1 CPD 359

Protest of solicitation requirement that guards receive 80 hours of training prior to assignment to duty is denied where protester does not show that required training exceeds the government's minimum needs.

Protest that refresher training should be required on a monthly, rather than an annual, basis is denied where protester does not show that annual training would be insufficient to keep guards up-to-date with regard to their job responsibilities.

PROCUREMENT B-234116 Apr. 6, 1989
Competitive Negotiation 89-1 CPD 360
Contract awards
Administrative discretion

In assessing the relative desirability of proposals and determining which offer should be accepted for award, contracting agency enjoys a reasonable range of discretion, and we will not question a determination of the technical merit of proposals unless there is a clear showing of unreasonableness or abuse of discretion.

PROCUREMENT B-234116 Con't Competitive Negotiation Apr. 6, 1989 Contract awards Administrative discretion Cost/technical tradeoffs Technical superiority

Contracting agency may properly award contract to a higher priced, higher technically rated offeror where doing so is reasonable and consistent with the solicitation's evaluation criteria.

B-234230; B-234230.2

Government Property Sales Apr. 6, 1989 Timber sales

89-1 CPD 361

Bids

Certification

Under a combined sealed bid-auction timber sale, the failure of the higher bidder to furnish a completed certificate of non-substitution with its sealed bid--a failure which was corrected before oral bidding closed-did not prevent the Forest Service from properly considering the bid.

PROCUREMENT

B-234269.2 Apr. 6, 1989

Bid Protests

89-1 CPD 362

GAO procedures GAO decisions

Reconsideration

Prior dismissal of protest because protester failed to timely respond to the agency's report is affirmed. Although the protester contends it was not clear to which agency's report it was required to respond, the standard notice acknowledging its protest reasonably indicated that the report referred to was that of the contracting agency.

PROCUREMENT
Bid Protests
Competition
Adequacy

B-234019 Apr. 7, 1989 89-1 CPD 363

Protest that agency failed to obtain full and open competition because only two firms, one of which is the incumbent contractor, submitted proposals is without merit where agency made a good faith effort to obtain competition by publicizing the requirement, and any competitive advantage to the incumbent was not the result of any preferential or unfair action by the government.

PROCUREMENT

Competitive Negotiation
Discussion
Adequacy
Criteria

Protest that agency failed to conduct meaningful discussions with offeror is without merit where agency conducted oral discussions with protester and provided protester with detailed questions that informed the protester of areas in its proposal with which the agency was concerned, and the protester was given an opportunity to revise its proposal in response to these questions.

PROCUREMENT B-234082 Apr. 10, 1989
Sealed Bidding 89-1 CPD 365
Unbalanced bids
Allegation substantiation
Evidence sufficiency

A low bid for a requirements type contract is not materially unbalanced unless it can be shown that the government's estimates are so unreliable that award to the low bidder will not result in the lowest cost to the government.

PROCUREMENT B-234082 Con't
Sealed Bidding Apr. 10, 1989
Unbalanced bids
Allegation substantiation
Evidence sufficiency

Where despite evidence of unbalancing in individual line items, protester presents no evidence that awardee's total bid for any performance period is unbalanced, and where agency expects to exercise options, bid is not materially unbalanced.

PROCUREMENT
Socio-Economic Policies
Small business
set-asides

B-234808; B-234894
Apr. 10, 1989
89-1 CPD 366

Industrial code Classification Administrative discretion

General Accounting Office will not consider protest that a solicitation has the wrong standard industrial classification (SIC) code, since the Small Business Administration is vested with conclusive authority to determine the proper SIC code.

PROCUREMENT

Socio-Economic Policies
Small business set-asides
Use
Restrictions

Protests that agency was required by Federal Acquisition Regulation § 19.501(g) to issue solicitation as a small business set—aside because previous requirement had been successfully acquired on that basis are dismissed where record shows the immediately preceding procurement was not a small business set—aside.

PROCUREMENT
Bid Protests
GAO procedures

B-234936 Apr. 10, 1989 89-1 CPD 367

Protest timeliness
10-day rule

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

PROCUREMENT

B-232666.3 Apr. 11, 1989

Contractor Qualification 89-1 CPD 368

Responsibility

Contracting officer findings
Affirmative determination
GAO review

Protest that awardee's subcontractor failed to meet definitive responsibility criteria concerning experience in performing similar services is denied where record indicates that awardee submitted adequate objective evidence of its subcontractor's past experience from which the contracting officer could reasonably conclude that the criteria were met.

PROCUREMENT

Contractor Qualification Responsibility criteria Organizational experience

Protest that firm did not meet 3 years experience requirement set forth in solicitation is denied where contracting officer reasonably considered that the prior experience of the corporation's principal officers satisfied the requirement.

PROCUREMENT Sealed Bidding B-233500.2 Apr. 11, 1989 89-1 CPD 369

Bids

Late submission Acceptance criteria Government mishandling

Protest of consideration of a misplaced bid is denied where evidence in the record indicates that bid was received at government installation prior to bid opening, it was in the agency's possession until it was found and it was discovered prior to award.

PROCUREMENT

B-234761 Apr. 11, 1989

89-1 CPD 371 Bid Protests

GAO procedures

Interested parties

Suspended/debarred contractors

Protester is not an interested party to maintain protest where it would not be eligible to receive award even if protest were sustained due to initiation of debarment proceedings against it.

PROCUREMENT

B-234850.2 Apr. 11, 1989

Socio-Economic Policies 89-1 CPD 372

Small businesses Contract awards Pending protests Justification

Dismissal of protest is affirmed where reconsideration is requested based on agency's failure to delay award to another firm pending Small Business Administration (SBA) action on protester's request for second certificate of competency (COC) review; there is no provision for appeal of COC denial, and no requirement that agency delay award pending further SBA review.

PROCUREMENT B-234916 Apr. 11, 1989
Socio-Economic Policies 89-1 CPD 373
Small businesses
Disadvantaged business set-asides
Preferences
Eliqibility

Solicitation requirement that ultimate contractor agree to award subcontracts consistent with the federal policy of providing small disadvantaged business concerns (SDBs) the maximum practicable opportunity to participate in performing contracts does not entitle bidder to receive an evaluation preference based on its SDB status.

PROCUREMENT

B-230430 Apr. 12, 1989

Payment/Discharge
Shipment costs
Additional costs
Bills of lading
Ambiguity

A carrier filed a supplemental claim for additional charges with the General Services Administration (GSA) on the theory that the articles transported were not "sensitive" within the meaning of the rate tender originally applied, and, therefore, the rate from that tender did not apply. GSA's disallowance of the claim is sustained, since the articles required signature and tally record service, a separate category of articles also specifically covered by the tender, regardless of whether the articles are "sensitive."

PROCUREMENT B-234840 Apr. 12, 1989
Competitive Negotiation 89-1 CPD 375
Suspended/debarred contractors
Offers
Rejection
Propriety

While the General Accounting Office will consider protests against the rejection of a proposal because of a proposed debarment to ensure the proposed debarment was not arbitrarily issued to avoid making award or to ensure minimum standards of due process have been met, neither circumstance is involved here.

PROCUREMENT
Bid Protests
GAO procedures
Anticipated profits

B-226941.3 Apr. 13, 1989
89-1 CPD 376

A manufacturer's representative's lost commission costs cannot be recovered by a protester as part of its awarded costs of pursuing a sustained protest, even if the lost commission is claimed at a putative fixed daily rate, since such costs are what might be expected to be incurred by the manufacturer's representative to ensure a sale.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs

B-226941.3 Con't Apr. 13, 1989

Protester awarded the costs of pursuing its protest is not entitled to be reimbursed costs associated with meeting with or writing to congressmen seeking their assistance in the protest or in substantiating and pursuing the claim for the costs.

A successful protester who was not represented by an attorney can be reimbursed for the time its employees spent pursuing the protest, where it documents the number of hours/days spent by each employee on activities directly related to pursuing the protest and the cost elements of each claimed employee's hourly/daily charge.

PROCUREMENT

Bid Protests
GAO procedures
Preparation costs
Attorney fees
Amount determination

Where a procuring agency challenges the legitimacy and reasonableness of invoices for consultant services, including attorneys' fees, submitted in support of a claim for reimbursement of the costs of pursuing a protest, and the protester does not substantively respond, the claim for these invoiced costs will not be allowed in the absence of other evidence that the consultant service costs were reasonable and incurred for activities directly related to the pursuit of the protest.

PROCUREMENT
Bid Protests
GAO procedures
Preparation costs
Interest

B-226941.3 Con't Apr. 13, 1989

Payment of interest on a claim for reimbursement of costs of pursuing a sustained protest is not authorized.

PROCUREMENT
Bid Protests

B-233885.3; B-233885.4 Apr. 13, 1989 89-1 CPD 377

Allegation substantiation Lacking GAO review

Protests that contracting agency failed to give preaward notice of award to a lower bidder and that it made award to a firm whose bid had expired are dismissed under authority of 4 C.F.R. § 21.3(m) (1989) without obtaining a report from the contracting agency where: (1) agency fulfilled its responsibilities under applicable regulation by giving protesters prompt notification of award by letter dated the day of award; and (2) successful bidder was properly requested to extend its bid acceptance period, prior to expiration of its bid acceptance period, because of delay in processing award prompted by filing of an earlier protest by another firm.

PROCUREMENT

B-233892 Apr. 13, 1989

Socio-Economic Policies

89-1 CPD 378

Small businesses

Research/development contracts

Offers

Evaluation

General Accounting Office review of agency selection of research proposals solicited pursuant to the Small Business Innovation Research Act is limited to determining whether agency violated any applicable regulations or solicitation provisions and whether the agency acted fraudulently or in bad faith.

PROCUREMENT
Bid Protests
Moot allegation
GAO review

B-233623.2 Apr. 14, 1989 89-1 CPD 379

Prior dismissal of protest is affirmed where action taken by the agency has rendered issues raised therein academic.

PROCUREMENT
Competitive Negotiation
Offers

B-233773 Apr. 14, 1989 89-1 CPD 380

Evaluation errors
Evaluation criteria
Application

An agency may not give undue weight to the fact that an offeror will perform work with its own forces, rather than subcontract for some of the work, when the evaluation criteria of a request for proposals do not indicate such a preference.

PROCUREMENT

Competitive Negotiation
Offers
Evaluation errors
Organizational experience

An offeror on a request for proposals (RFP) for a contract for the rehabilitation of a movable bridge has not been reasonably evaluated where it receives a perfect score for the "mechanical machinery" subcriterion of the "experience and qualifications" criterion of the RFP, notwithstanding that its last known experience is 12 years old and the offeror does not show compliance with the specific criteria that the contractor and its supervisory personnel have certain minimum experience in the repair or rehabilitation of movable bridge mechanical machinery, and where the protester, who has identified several recent movable bridge projects, receives a significantly lower score because of a stricter application of these criteria.

PROCUREMENT
Bid Protests
GAO procedures
GAO decisions
Reconsideration

B-233350.2 Apr. 18, 1989 89-1 CPD 382

Request for reconsideration of prior decision holding that procuring agency properly canceled solicitation after bid opening where the specifications were ambiguous and award would not meet the government's minimum needs is denied where the protester essentially restates its initial arguments and does not show that the prior decision was based on an error of fact or law.

PROCUREMENT
Bid Protests

B-233793 Apr. 18, 1989 89-1 CPD 383

GAO procedures
Protest timeliness

_

Apparent solicitation improprieties

Allegations that the procuring agency improperly deleted a requirement for a current production model and made the delivery term unreasonable in an amendment issued after the closing date for the receipt of proposals are untimely where filed after the next closing date for the receipt of proposals.

PROCUREMENT

Competitive Negotiation Contract awards Propriety

Allegation that the awardee's milling machine did not meet the requirement in the specifications for front and rear controls is denied where the protester is unreasonably interpreting the specifications.

PROCUREMENT B-233793 Con't
Socio-Economic Policies Apr. 18, 1989
Preferred products/services
Domestic products
Interpretation

In the absence of any specific guidance on the definition of manufacturing found in the Department of Defense Federal Acquisition Regulation Supplement (DFARS) which requires that no appropriated funds be used to purchase machine tools unless manufactured in the United States or Canada, an agency's evaluation of a product as domestically manufactured will not be disturbed where a foreign manufactured machine iron is transformed into a finished milling machine by a domestic manufacturer who installs domestically manufactured electrical components and the domestic components constitute more than 50 percent of the cost of the end product.

PROCUREMENT
Specifications
Minimum needs
standards

B-234001; B-234140 Apr. 18, 1989 89-1 CPD 384

Competitive restrictions Design specifications Overstatement

Protests that solicitations for pressure gauges are overly restrictive because they allow direct drive but not C-spring, gear drive gauges are denied where: (1) C-spring gauges are being over-requisitioned, leading agency to conclude that the gauges are failing at an unacceptable rate; (2) agency made technical determination that direct drive gauges will be more reliable due to fewer moving parts, as confirmed by limited testing; and (3) gauges are for use on shipboard and failure could result in fire hazard or failure of vital system.

PROCUREMENT B-234089 Apr. 18, 1989
Competitive Negotiation 89-1 CPD 385
Offers
Evaluation
Options
Prices

Statute requiring agencies to negotiate prices for certain unpriced options does not apply to options which had by their terms expired prior to the enactment of the law.

PROCUREMENT
Sealed Bidding
Invitations for bids
Oral statements
Contractors
Notification

B-234137 Apr. 18, 1989
89-1 CPD 386

CPD 386

Sealed Bidding
Seale

Where invitation for bids required bidders to submit questions in writing, agency's failure to provide written notice to all bidders of one bidder's oral question and agency's response, in which agency merely reiterated information contained in the solicitation, is harmless.

PROCUREMENT

Sealed Bidding
Unbalanced bids
Contract awards
Propriety

The apparent low bid on a contract for maintenance of photocopiers is not unbalanced where there is no evidence that bid contained both overstated and understated prices and where there is no reasonable doubt that acceptance of bid will result in the lowest ultimate cost to the government.

PROCUREMENT
B-234471.2 Apr. 18, 1989
Bid Protests
GAO procedures
GAO decisions
Reconsideration
Additional information

Prior dismissal as untimely of protest asserting that agency improperly did not reconsider nonresponsibility determination based on alleged new information submitted by protester is affirmed where protest was filed more than 10 working days after protester learned of initial adverse agency action on agency-level protest.

PROCUREMENT B-233832 Apr. 19, 1989
Competitive Negotiation 89-1 CPD 389
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 that the offer is technically unacceptable and exclude it from the competitive range.

PROCUREMENT B-233877 Apr. 19, 1989
Sealed Bidding 89-1 CPD 390
Contract awards
Multiple/aggregate awards

Protest alleging agency improperly made an aggregate award for midday and rush-hour shuttle bus services is denied where it is clear that the agency intended to make one award for the services.

PROCUREMENT B-233877 Con't
Sealed Bidding Apr. 19, 1989
Contract awards
Propriety
Allegation substantiation
Evidence sufficiency

Protest that contracting agency orally awarded a contract for shuttle bus service to the protester subject only to inspection and acceptance of its buses is without merit where agency did not transmit any written notice of award as prescribed in the invitation for bids; acceptance of a contractor's offer by the government must be clear and unconditional and a contract does not come into existence when the purported acceptance is conditioned on future actions by the offeror or the procuring agency.

PROCUREMENT B-234883 Apr. 19, 1989
Bid Protests 89-1 CPD 391
GAO procedures
Interested parties

Direct interest standards

Third low bidder, on a solicitation under which award was made to the low responsible, responsive bidder, is not an interested party under General Accounting Office Bid Protest Regulations to protest propriety of award to bidder which allegedly submitted an unbalanced bid, where protester has not also protested against any possible award to the intervening bidder.

PROCUREMENT
Bid Protests
GAO procedures

B-235140 Apr. 19, 1989 89-1 CPD 392

Interested parties
Direct interest standards

Fourth low bidder, on a solicitation under which award was made to the low responsible, responsive bidder, is not an interested party under General Accounting Office Bid Protest Regulations to protest propriety of award to bidder which allegedly submitted an unbalanced bid, where protester has not also protested against any possible award to the intervening bidders.

PROCUREMENT
Bid Protests
Award pending appeals
Propriety

B-232431.4 Apr. 20, 1989 89-1 CPD 393

While agency generally may not proceed with award under procurement subject to General Accounting Office protest, there is nothing which prohibits the agency from proceeding with bid opening and all other steps up to the point of award.

PROCUREMENT
Sealed Bidding
Invitations for bids
Amendments
Notification

Where full and open competition and a reasonable price are obtained and the record does not show a deliberate attempt by the contracting agency to exclude the firm from the competition, the firm's nonreceipt of a solicitation amendment establishing a new bid opening date does not require cancellation and resolicitation of the procurement.

PROCUREMENT
Sealed Bidding
Performance bonds
Justification

B-234108 Apr. 20, 1989 89-1 CPD 394

Performance bond requirement for medical center warehouse services contract is justifiably imposed to protect the government's interest where the contractor will be responsible for up to \$2 million worth of buildings, property and warehouse inventory including medical supplies, pharmaceuticals, equipment and subsistence and continuous operation of the warehouse is an essential service, which if not performed, could jeopardize patient care at medical center.

PROCUREMENT

Special Procurement Methods/Categories
In-house performance
Government property
Use
Contractors

There is no requirement that agency make available to private contractors equipment currently used in an inhouse operation. Under Office of Management and Budget Circular A-76, agencies are to determine whether to make available to contractors facilities, equipment and real property based on an informal cost-benefit analysis of what is most advantageous to the government.

PROCUREMENT B-234178, et al.
Payment/Discharge Apr. 20, 1989
Federal procurement regulations/laws
Revision
Payment procedures

General Accounting Office (GAO) comments on Federal Acquisition Regulation (FAR) case No. 88-69, a proposal to revise FAR Subpart 32.9, and to revise several contract clauses in FAR Part 52 and add others, to implement the Prompt Payment Act Amendments of 1988, Pub. L. 100-496. GAO suggests changes relating to adjustments to the payment due date, disagreements over invoices, and Office of Management and Budget Circular A-125.

PROCUREMENT

Sealed Bidding
Federal procurement regulations/laws
Revision
Bid guarantees

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case No. 88-61, a proposal to revise FAR section 28.101-1 concerning the requirement for bid guarantees.

PROCUREMENT

Socio-Economic Policies
Preferred products/services
Domestic products
Federal procurement regulations/laws
Revision

General Accounting Office has no objection to Federal Acquisition Circular 84-41, an interim rule revising Federal Acquisition Regulation (FAR) Part 25 and the contract clause at FAR section 52.225-3 to implement the United States - Canada Free - Trade Agreement and the United States - Canada Free - Trade Agreement Implementation Act of 1988, Pub. L. 100-449.

PROCUREMENT B-234181 Apr. 20, 1989
Competitive Negotiation 89-1 CPD 395
Contract awards
Administrative discretion
Cost/technical tradeoffs
Technical superiority

Protest that agency improperly failed to make award to the lowest-priced, technically acceptable offeror is denied where solicitation provided for award to the offeror submitting the most advantageous proposal, considering price and technical factors, and agency reasonably made a price/technical tradeoff in selecting a technically superior, slightly higher-priced offeror.

PROCUREMENT B-234628 Apr. 20, 1989
Socio-Economic Policies 89-1 CPD 397
Small business 8(a) subcontracting
Use

Administrative discretion

Protest challenging agency decision to set aside procurement under section 8(a) of the Small Business Act on the basis that it was not the most economical approach nor in the best interests of the government, as had been stated by the agency, is dismissed because the General Accounting Office only will review a decision to set aside a procurement to determine whether the regulations have been followed or whether there has been a showing of any bad faith or fraud on the part of the government officials.

PROCUREMENT
Sealed Bidding
Contract awards
Quantity reduction
Propriety

B-232144.3; B-232144.4 Apr. 21, 1989 89-1 CPD 398

An award of less than all line items in solicitation is not improper where an earlier protest delayed award process beyond end of fiscal year and available funds for certain items expired, preventing award on those items, and where, in any event, solicitation provides that the government may accept any item or group of items of a bid.

PROCUREMENT
Sealed Bidding
Low bids
Determination
Information sufficiency

Protest contending that agency should have rejected low bid because bidder failed to furnish complete information for evaluation of f.o.b. origin transportation costs is denied where record indicates agency had sufficient information available to evaluate transportation costs for the bidder and where bid is low even under least favorable method of shipping.

PROCUREMENT

B-234015 Apr. 21, 1989

Socio-Economic Policies
Small business 8(a) subcontracting
Contract awards
Propriety

PROCUREMENT

Socio-Economic Policies
Small business 8(a) subcontracting
Use
Administrative discretion

An agency's determination that funds are not available for obligation is a sufficient reason for not awarding a contract. PROCUREMENT
Competitive Negotiation
Below-cost offers

Acceptability

B-234018 Apr. 21, 1989 89-1 CPD 399

An alleged "buy-in" (offering cost estimate less than anticipated costs with expectation of increasing costs during performance) by low-priced offeror furnishes no basis to challenge an award where agency knew the realistic estimated cost of contractor's performance before award and made award based on that knowledge.

PROCUREMENT

Competitive Negotiation Offers Cost realism GAO review

Since an agency's cost realism analysis of a time and materials contract necessarily involves the exercise of informed judgment, the General Accounting Office will not disturb the results of that analysis unless it clearly lacks a reasonable basis.

PROCUREMENT

Competitive Negotiation
Unbalanced offers
Materiality
Determination
Criteria

Awardee's proposal is not objectionable as materially unbalanced where it represents lowest price to government for all lots.

PROCUREMENT
Contract Management
Contract performance
GAO review

B-234018 Con't Apr. 21, 1989

An offeror's ability to meet its contractual obligations at the price offered is a matter of the firm's responsibility for the contracting agency to determine before award, and the General Accounting Office (GAO) will not review an affirmative determination in that respect except in limited circumstances. Whether awardee actually performs in compliance with contract requirements is a matter of contract administration not reviewable under GAO bid protest function.

PROCUREMENT B-234887 Apr. 24, 1989
Bid Protests 89-1 CPD 403
GAO procedures
Protest timeliness
Apparent solicitation improprieties

Protest of agency's failure to include non-cost/price evaluation factors in solicitation is untimely when not filed prior to the closing date for receipt of initial proposals. Alleged improprieties that are apparent on the face of a solicitation must be filed by that date.

PROCUREMENT

Contractor Qualification
Responsibility
Contracting officer findings
Affirmative determination
GAO review

Contracting officer, who is vested with a wide degree of discretion in exercising his business judgment, is not precluded from finding an offeror to be responsible simply because he initially determined the firm to be nonresponsible.

PROCUREMENT
Bid Protests
GAO procedures
Interested parties
Subcontractors

B-234895 Apr. 24, 1989 89-1 CPD 404

Prospective subcontractor is not an interested party to protest specifications in request for proposals.

PROCUREMENT

Bid Protests
GAO procedures
Protest timeliness
10-day rule
Adverse agency actions

Where a firm initially protested to the contracting activity alleging that the solicitation is overly restrictive prior to the closing date for receipt of proposals, the agency's receipt of initial proposals without taking the requested corrective action constitutes initial adverse agency action on the protest, such that a protest to the General Accounting Office (GAO) more than 10 working days later, based on agency's written denial of the agency-level protest, is untimely under GAO's Bid Protest Regulations.

PROCUREMENT
Bid Protests
GAO procedures

B-235083 Apr. 24, 1989 89-1 CPD 405

Protest timeliness
Apparent solicitation improprieties

Protest based upon alleged solicitation impropriety is untimely, when not filed until after quotations were due and a purchase order had been issued to another firm.

PROCUREMENT B-233971 Apr. 26, 1989
Bid Protests 89-1 CPD 407
Allegation substantiation
Burden of proof

Assertion that awardee was improperly found to be responsible because it made false statements is without merit where assertion is based on a telephone conversation memorandum which, the record establishes, does not accurately reflect the conversation.

PROCUREMENT

Bid Protests
GAO procedures
Protest timeliness
10-day rule

Protest that agency's disclosure of its price goals amounted to the use of an impermissible auction technique is untimely, and will not be considered where it is not filed within 10 days after the protester learned the protest basis.

B-230427 Apr. 27, 1989

PROCUREMENT
Payment/Discharge
Shipment costs
Rate schedules
Applicability

PROCUREMENT

Payment/Discharge Shipment costs Rate schedules Interpretation

The General Services Administration (GSA) disallowed a motor carrier's claim for additional freight charges relating to the transportation of a shipment weighing 24,888 pounds that was originally billed based on less-truckload (LTL) rates in its tender. The carrier contends that a rules tariff, governing the tender, restricted application of the tender's lower LTL rates to shipments weighing less than 20,000 pounds. GSA, however, has shown that the edition of the tender in effect at the time the carrier received this shipment was not governed by the rules tariff containing the weight limit on LTL rates. Therefore, the lower rates originally billed were applicable, and GSA's settlement action is sustained.

PROCUREMENT

B-234352.2 Apr. 27, 1989 89-1 CPD 408

Bid Protests
GAO procedures
GAO decisions
Reconsideration

Prior decision dismissing protest of fifth lowest bidder because it did not challenge the eligibility for award of one of the interviewing bidders and was therefore not an interested party to pursue the protest is affirmed where protester does not show that original decision was based on an error of fact or law.

PROCUREMENT B-235200 Apr. 27, 1989

Bid Protests

GAO procedures

Interested parties

Direct interest standards

A nonresponsive bidder is not an interested party under General Accounting Office Bid Protest Regulations to protest cancellation of invitation for bids for which it was found nonresponsive.

PROCUREMENT

Bid Protests Moot allegation GAO review

Bidder's objection to the agency's failure to verify and permit correction of an alleged clerical error in its bid is dismissed as academic where bid was found nonresponsive.

PROCUREMENT

Sealed Bidding
Bid guarantees
Post-bid opening modification
Propriety

Where invitation for bids requires a bid bond, bidder's submission of bond in an insufficient penal amount renders the bid nonresponsive and defect may not be corrected after bid opening.

PROCUREMENT B-234568 Apr. 28, 1989 Competitive Negotiation 89-1 CPD 409 Discussion Adequacy Criteria

Protest that agency did not hold adequate discussions is denied where the record demonstrates that the major deficiencies were discussed with the protester.

PROCUREMENT B-234568 Con't
Competitive Negotiation Apr. 28, 1989
Offers
Evaluation
Administration discretion

Procuring officials enjoy a reasonable degree of discretion in evaluating proposals, and the General Accounting Office will not disturb an evaluation where the record supports the conclusions reached and the evaluation is consistent with the criteria set forth in the solicitation.

PROCUREMENT

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

In negotiated procurements award need not be made to the offeror who proposes the lowest cost. Award to higher priced, higher technically-ranked offeror is not objectionable where the solicitation made technical considerations more important than cost and agency reasonably concluded that the technical superiority of the awardee's proposal was worth the additional cost.

PROCUREMENT B-234997 Apr. 28, 1989
Socio-Economic Policies 89-1 CPD 410
Small businesses
Preferred products/services
Certification

A bid on a total small business set—aside, which fails to indicate that all end items to be furnished would be manufactured or produced by small business concerns, is nonresponsive because the bidder is not obligated to furnish supplies from a small business.

PROCUREMENT
Competitive Negotiation
Offers

B-235191 Apr. 28, 1989 89-1 CPD 411

Late submission
Acceptance criteria
Government mishandling

Protester's late proposal, sent by United States Postal Service Express Mail 1 day prior to the closing date for receipt of proposals, properly was rejected notwithstanding Postal Service guarantee of next day delivery. Late mailed proposal that is not sent by registered or certified mail 5 or more days prior to the closing date for receipt of proposals can only be considered if there was government mishandling after receipt at the government installation.

PROCUREMENT
Bid Protests
GAO procedures

B-235258 Apr. 28, 1989 89-1 CPD 412

Protest timeliness
10-day rule

Protest concerning proposed award of a contract on a sole-source basis is dismissed as untimely when filed more than 10 working days after the protester knew or should have known the basis of protest.

MISCELLANEOUS TOPICS

MISCELLANEOUS TOPICS B-234910 Apr. 14, 1989
Commerce
Mailing provisions
Misrepresentation
Determination criteria

MISCELIANEOUS TOPICS
Law Enforcement
Mailing provisions
Misrepresentation
Determination criteria

Chairmen of House Ways and Means Subcommittees on Oversight and Social Security asked us to discuss the legality of mail solicitations by a private organization, the Social Security Protection Bureau. Issue generally is whether Bureau improperly used term "social security" to misrepresent itself or otherwise defrauded recipients. Memorandum discusses the possible application of: (1) Section 428 of Public Law 100-360 (classified to 42 U.S.C. § 1320b-10); (2) 18 U.S.C. § 1341; (3) 39 U.S.C. § 3005; (4) 15 U.S.C. § 45; and (5) S. 273, introduced in the 101st Congress, without attempting to determine whether violations occurred.

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