

**GAO**

Office of General Counsel



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



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# Preface

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

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# Appropriations/Financial Management

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**B-242019, August 5, 1991\*\*\***

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## Appropriations/Financial Management

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### Claims Against Government

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

Notwithstanding agency failure to comply with procurement regulations in issuing a delivery order for vehicle repairs on a noncompetitive basis, the contractor who performed the repairs may be paid in accordance with the terms of the order.

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## Appropriations/Financial Management

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### Claims Against Government

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

A claim for repair work ordered by an agency official whose contract warrant had expired may be paid on a *quantum meruit* basis since the government received and accepted the benefit of the work, the claimant acted in good faith, and the amount claimed represents reasonable value of the benefits received.

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## Appropriations/Financial Management

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### Claims Against Government

- Interest

Because interest is generally not recoverable against the United States in the absence of express authorization by contract or statute, claimant who recovers from the government under the equitable theory of *quantum meruit* is not entitled to interest.

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**B-235147.2, August 14, 1991**

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## Appropriations/Financial Management

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### Accountable Officers

- Cashiers
- ■ Relief
- ■ ■ Physical losses
- ■ ■ ■ Theft

Relief is granted to State Department accountable officers where proximate cause of loss of travelers checks was not negligent practices of the accountable officers, but the general lack of concern and sense of laxity which pervaded the Department's operation and management of its cashier's office.

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**B-240914, August 14, 1991**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Purpose availability
- ■ Appropriation restrictions
- ■ ■ Government corporations

The expenditure of funds by Federal Prison Industries, Inc., a government corporation, to enter business of envelope manufacturing is within the range of discretion afforded the Corporation by its enabling statute.

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**B-241880, August 14, 1991**

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**Appropriations/Financial Management**

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**Accountable Officers**

- Disbursing officers
- ■ Relief
- ■ ■ Illegal/improper payments
- ■ ■ ■ Fraud

Relief is granted to Finance Officer who documented that he had in place at the time of the improper payments at issue an adequate system of procedures and controls to safeguard the funds in his care, and to the cashiers who followed these procedures. The improper payments resulted from criminal activity that even an adequate and effectively supervised system cannot always prevent.

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**B-242146, August 16, 1991**

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**Appropriations/Financial Management**

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**Appropriation Availability**

- Amount availability
- ■ Antideficiency prohibition
- ■ ■ Violation
- ■ ■ ■ Indemnification agreement

U.S. Park Police may not include an indemnification clause in mutual assistance memoranda of understanding with state and local police unless liability is limited to available appropriated funds and Congress approves such an arrangement.

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**B-241019, August 19, 1991**

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**Appropriations/Financial Management**

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**Accountable Officers**

- Certifying officers
- ■ Relief
- ■ ■ Illegal/improper payments
- ■ ■ ■ Overpayments

Requests for GAO to relieve supervisory accountable officers must contain the evidence necessary for GAO to independently determine whether the standards for relief have been met. For supervisory accountable officers, the standards to grant relief are whether the officer maintained a system of controls to prevent the loss and took steps to ensure that the controls were implemented. GAO cannot grant relief based upon an agency's unsubstantiated determination that these standards were met.

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**B-215432.3, August 22, 1991**

**Appropriations/Financial Management**

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**Accountable Officers**

- Relief
- ■ Illegal/improper payments
- ■ ■ GAO decisions
- ■ ■ ■ Reconsideration

On reconsideration, we grant relief to the disbursing officer under 31 U.S.C. § 3527(c) due to the Army's compliance with the conditions for relief set out in our prior decision. However, we advise that the Army conduct future collection actions promptly and diligently in accordance with our established standards.

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**B-242274, August 27, 1991**

**Appropriations/Financial Management**

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**Appropriation Availability**

- Time availability
- ■ Time restrictions
- ■ ■ Fiscal-year appropriation
- ■ ■ ■ Liquidated damages

The Minerals Management Service, Department of the Interior, may not use liquidated damages recovered under a computer conversion contract to pay for increased costs it incurred under other computer contracts in a subsequent fiscal year.

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**B-243043, August 27, 1991\*\*\***

**Appropriations/Financial Management**

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**Appropriation Availability**

- Amount availability
- ■ Augmentation
- ■ ■ User fees

**Appropriations/Financial Management**

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**Appropriation Availability**

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

The Forest Service may pay county landfill user fees as a reasonable service charge, analogous to other utility services provided the government, since the charge is based on levels of service provided and appears nondiscriminatory.

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**B-245027, August 29, 1991**

**Appropriations/Financial Management**

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**Claims Against Government**

- Claim settlement
- ■ GAO authority

Claimant, whose mortgage on his home is insured by Department of Housing and Urban Development (HUD), has filed a claim with this Office for reimbursement for engineering services for repairs to his home. The claimant is advised that HUD is authorized to make such repairs pursuant to its regulations, and decisions regarding such expenditures or payments are final and conclusive

and not subject to judicial review. Thus, this Office and the courts have no jurisdiction in this matter. 12 U.S.C. §§ 1735b(a), and (c) (1988); *Summers v. United States*, 510 F.2d 123 (Eighth Cir. 1975), *cert. denied*, 423 U.S. 851 (1975).

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# Civilian Personnel

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**B-238920.2, August 5, 1991**

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**Civilian Personnel**

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**Relocation**

■ **Relocation service contracts**

■ ■ **Costs**

■ ■ ■ **Liability**

An employee of the Social Security Administration requests reconsideration of a prior decision holding him liable for the relocation expenses his agency paid to a government relocation services contractor on his behalf. The employee maintains that he should not be held liable for the relocation expenses because his agency agreed to pay those expenses under a settlement agreement entered into with him in consideration of his withdrawal of a Merit Systems Protection Board appeal of an adverse action. However, the settlement agreement also stated that current standard change of station rules will apply. Under these rules, the agency determined that his relocation of residence was not incident to the change of official station. We will not upset the agency's determination where it is not incompatible with the terms of the settlement agreement, and the agency acted within its broad discretion. Upon reconsideration, *Gerald M. Anderson*, B-238920, Sept. 20, 1990, is affirmed.

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**B-243545, August 5, 1991**

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**Civilian Personnel**

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**Travel**

■ **Temporary duty**

■ ■ **Travel expenses**

■ ■ ■ **Return travel**

■ ■ ■ ■ **Personal convenience**

An employee voluntarily returned to his home over a weekend from temporary duty at a government training facility which provided lodging and meals. His reimbursement for round-trip transportation and per diem en route to his home is limited to the per diem allowance and travel expenses which the employee would have been allowed had he remained at the temporary duty station. Since meals were provided at the facility, he is entitled only to the amount of incidental expenses (\$2 per day) allowable at the facility.

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**B-243802, August 5, 1991**

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**Civilian Personnel**

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**Relocation**

■ **Residence transaction expenses**

■ ■ **Reimbursement**

■ ■ ■ **Maximum rates**

■ ■ ■ ■ **Pro rata shares**

A transferred employee sold her duplex at her old duty station and has claimed relocation expenses, based on a pro rata amount, up to the statutory maximum of \$17,177. The agency limited reimbursement to 50 percent of the statutory maximum or \$8,588.50 based on an interpretation of its own regulations. The claim may be paid since the statutory authority and the implementing

Federal Travel Regulations clearly contemplate that the employee shall be reimbursed up to the statutory maximum.

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**B-244616, August 5, 1991**

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**Civilian Personnel**

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**Leaves Of Absence**

- Sick leave
- ■ Accrual
- ■ ■ Pending litigation

Claim of employee of Federal Emergency Management Agency (FEMA) for backpay and annual and sick leave credits is presently pending in our Claims Group. Employee requests GAO to take action to compel FEMA to issue an administrative decision on his claim. Claimant has filed a civil action in the United States District Court for the District of Columbia, *Richard S. Buck, IV*, Civil Action No. 91-1349, for backpay and adjustments in his annual and sick leave balances. The GAO will not consider matters which are in the courts during pendency of litigation unless requested to do so by the court or the U.S. Department of Justice.

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**B-243017, August 6, 1991**

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**Civilian Personnel**

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**Relocation**

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

A transferred employee moved into leased quarters at his new duty station with the intention that they were or would become his permanent quarters, and his wife remained in their leased permanent quarters at the old duty station for several additional weeks before vacating those quarters and joining the employee at the new duty station. He may not be reimbursed temporary quarters subsistence expenses incident to occupying the new quarters during the overlapping period (41 C.F.R. Part 302-5), nor may he be reimbursed expenses incident to his wife's occupancy of the old quarters during that period as an unexpired lease expense (41 C.F.R. Part 302-6).

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**B-243482, August 12, 1991**

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**Civilian Personnel**

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**Compensation**

- Retroactive compensation
- ■ Promotion
- ■ ■ Veterans preferences
- ■ ■ ■ Violation

A former employee complains that the agency violated the Veterans' Preference Act when the agency passed him over for a promotion, instead filling the position with an applicant who was neither a federal employee nor a veteran. (Public Law 78-359, 58 Stat. 387, approved June 27, 1944, now codified in various sections of Title 5, United States Code (1988).) The Act authorizes the Office of Personnel Management (formerly, the Civil Service Commission) to prescribe and enforce regulations for the administration of veterans' preferences. 5 U.S.C. § 1302(b). Therefore, this Office is without authority to resolve grievances arising under the Act. Accordingly, the claim is denied.

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**B-244185, August 13, 1991**

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**Civilian Personnel**

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**Travel**

- Overseas allowances
- ■ Educational travel
- ■ ■ Dependents
- ■ ■ ■ Grace periods

The son of an overseas employee performed educational travel in January 1990 from a foreign post of duty to the United States to attend college, 3 days prior to the anniversary date for such travel, in order to meet the college class-scheduling requirements. The previous section 283.1, Standardized Regulations (Government Civilians, Foreign Areas), which precluded reimbursement of such travel expenses prior to the anniversary date, was amended in 1991 to allow a 14-day grace period to help ease scheduling problems. We regard the 1991 amendment as clarifying the earlier regulation and, therefore, reimbursement is authorized for the claimed educational travel expenses for travel between the foreign post of duty and the college site in the United States.

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**B-244670, August 13, 1991**

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**Civilian Personnel**

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**Travel**

- Advances
- ■ Foreign currencies
- ■ ■ Exchange rates
- ■ ■ ■ Losses

An employee requests reimbursement for losses incurred when, while on official travel in France, he converted United States dollars into French francs at different hotels which used an exchange rate lower than the official rate available in banks. The banks, however, charge a conversion fee which the hotels do not. The bank's conversion fee is reimbursable under the Federal Travel Regulations, and the employee argues that the hotel's lower exchange rate is in effect a conversion fee. The risk of losses on currency conversions is with the employee, and there is no authority to reimburse the employee for such losses.

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**B-241216.2, August 14, 1991**

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**Civilian Personnel**

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**Relocation**

- Expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Personal convenience

An agency that permits an employee to transfer noncompetitively to a position at a lower grade in order to accommodate the employee's desire to relocate, properly required the employee to pay his own relocation expenses, since the transfer was primarily for the employee's benefit.

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**B-241986, August 15, 1991**

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Mortgage insurance
- ■ ■ Reimbursement

An employee was authorized relocation expenses under the Federal Travel Regulation (FTR). In circumstances where original mortgagor was unable to be contacted because it is now defunct, secondary evidence supplied by another mortgagor, which now holds employee's mortgage, and by the Department of Housing and Urban Development, to the effect that the employee was required to take out an owner's title insurance policy as a prerequisite to financing on his new residence is sufficient to permit reimbursement of employee's costs for such a policy. FTR, 41 C.F.R. § 302-6.2(d)(1)(ix) (1990).

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Property titles
- ■ ■ Insurance premiums
- ■ ■ ■ Reimbursement

Mortgage insurance or insurance against loss or damage of property is a nonreimbursable item of relocation expenses, and thus employee's claim for reimbursement of a mortgage insurance premium is denied. FTR, 41 C.F.R. § 302-6.2(d)(2)(i) (1990).

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**Civilian Personnel**

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**Relocation**

- Miscellaneous expenses
- ■ Reimbursement
- ■ ■ Eligibility

Employee claims miscellaneous expenses (courier and messenger services). If required by mortgagor, these charges are reimbursable as incidental expenses under the FTR, 41 C.F.R. § 302-6.2(f) (1990). Although original mortgagor was unable to be contacted because it is now defunct, we believe that the Settlement Statement, which shows that these costs were imposed by the original mortgagor and paid for by the employee, and the employee's own statement of his claim constitute sufficient secondary evidence that these costs were required by the mortgagor. Thus, employee's claim for these expenses is granted.

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**Civilian Personnel**

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**Relocation**

- Residence transaction expenses
- ■ Broker fees
- ■ ■ Reimbursement

Employee's claim for reimbursement of a real estate commission paid to a broker for the purchase of the employee's residence at his new duty station is not reimbursable. FTR, 41 C.F.R. § 302-6.2(a) (1990).

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## Civilian Personnel

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### Relocation

#### ■ Meritorious claims

The record does not establish that an employee was given erroneous advice, or justifiably and detrimentally relied on such advice. Thus, we do not find that there is an appropriate basis for reporting his denied claims to Congress under the Meritorious Claims Act, 31 U.S.C. § 3702(d) (1988).

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## B-243501, August 20, 1991

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## Civilian Personnel

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### Relocation

#### ■ Actual expenses

#### ■ ■ Eligibility

#### ■ ■ ■ Distance determination

Transferred employee sold his residence at his old duty station and purchased a new residence which was only approximately 3.5 miles from his old residence and which only minimally reduced the commuting distance to his new duty station. Agency's determination that the sale and purchase of residences were not incident to either of two changes of official station is not arbitrary, capricious, or an abuse of discretion. Reimbursement of real estate expenses may not be authorized.

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## B-239592, August 23, 1991

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## Civilian Personnel

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### Relocation

#### ■ Expenses

#### ■ ■ Debt collection

#### ■ ■ ■ Waiver

Agreement in settlement of proposed personnel action which grants employee relocation expenses and simultaneously releases the employee from the requirement of 5 U.S.C. § 5724 that he remain in government service for 12 months after his transfer, constitutes an improper waiver of the statute. The agency official who certified payment of these expenses is liable for them.

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## Civilian Personnel

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### Leaves Of Absence

#### ■ Annual leave

#### ■ ■ Accrual

#### ■ ■ ■ Restrictions

#### ■ ■ ■ ■ Terminal leave

Agreement in settlement of personnel action proposed against employee which authorized terminal annual leave is improper since knowingly granting an employee leave immediately prior to separation from government service is limited to cases where the exigencies of service require such action. Further, under 5 U.S.C. § 5551 (a), holiday leave granted during the period the employee was on terminal annual leave is disallowed. Because the agency failed to identify in its submission to GAO the official who certified payment of these expenses, GAO suspends the statute of limitation to afford the agency an opportunity to develop and transmit the necessary information.

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**B-243610, August 26, 1991**

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**Civilian Personnel**

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**Relocation**

- Household goods
- ■ Shipment
- ■ ■ Reimbursement
- ■ ■ ■ Senior executive service

A 1998 amendment to 5 U.S.C. § 5724 authorizes relocation benefits for eligible Senior Executive Service (SES) members who relocate in the interests of the United States and who wish to be relocated elsewhere after they retire. Public Law No. 100-440, § 629, 102 Stat. 1758 (1988). In this case, the employee was not eligible for the so-called "last home move" benefits because he was not in the SES or transferring to an SES position at the time of his last transfer in the interest of the United States, as the statute and the implementing regulations require. Also, the expenses of his move were paid by his post-retirement employer and not incurred by him as the statute and regulations contemplate.

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**B-242942, August 27, 1991\*\*\***

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**Civilian Personnel**

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**Compensation**

- Civil Service regulations/laws
- ■ Service contracts
- ■ ■ Personal services
- ■ ■ ■ Prohibition

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

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**Civilian Personnel**

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**Compensation**

- Civil Service regulations/laws
- ■ Service contracts
- ■ ■ Personal services
- ■ ■ ■ Prohibition

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

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**B-243622, August 29, 1991**

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**Civilian Personnel**

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**Travel**

- Travel regulations
- ■ Revision
- ■ ■ Temporary duty
- ■ ■ ■ Departure

The Controller, Department of Energy, in response to a proposal to revise its travel policy to allow temporary duty travel to begin or end at places other than official duty stations or residences

when there are cost advantages to the government, is advised that the Administrator, General Services Administration (GSA), is charged with the responsibility for implementing and regulating the city-pair contract program. In response to our request for its comments, GSA has advised that the proposal would undermine the integrity of the program, result in higher costs to the government, require a change in the Federal Travel Regulations, and such change is not recommended. We defer to GSA's opinion.

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# Military Personnel

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**B-234529, August 12, 1991**

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**Military Personnel**

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**Travel**

- Temporary duty
- ■ Travel expenses
- ■ ■ Privately-owned vehicles
- ■ ■ ■ Reimbursement

Member on active duty for training traveling by privately-owned conveyance (POC) pursuant to travel orders which state that he would be reimbursed for travel expenses but which do not contain a determination that POC travel was advantageous to the government, while not entitled to a military allowance in lieu of transportation (MALT) was properly reimbursed for amount it would have cost the government had the Government Transportation Request (GTR) been used.

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**B-243864, August 13, 1991**

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**Military Personnel**

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**Pay**

- Dual compensation restrictions
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A retired Marine Corps officer appointed to a series of temporary positions by the United States Bureau of the Census may have overpayments of military retired pay waived pursuant to 10 U.S.C. § 2774 where facts show that he was not at fault in accepting overpayments in light of the passage of almost 20 years between his retirement and his civilian employment during which time dual compensation laws changed several times and the existence of statutory authority permitting exemption from dual compensation laws for Bureau of the Census employees in certain circumstances.

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**Military Personnel**

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**Pay**

- Dual compensation restrictions
- ■ Applicability

A retired Marine Corps officer who was employed under a temporary appointment with the U.S. Census Bureau just prior to passage of Public Law 101-86, effective August 16, 1989, which granted 6-month exemptions from the Dual Compensation Act, 5 U.S.C. § 5532, was unaffected by the amendment since the Act only applied to persons employed after its effective date and his employment preceded the Act's effective date.

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## **Military Personnel**

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### **Pay**

#### **■ Dual compensation restrictions**

#### **■ ■ Retired personnel**

Temporary appointments with the U.S. Census Bureau subsequent to enactment of Public Law 101-86 were not entitled to the law's 6-month exemption from the retired pay limitations of the Dual Compensation Act, where the member's retired pay was already subject to reduction by virtue of employment immediately prior to such appointments.

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## **B-242157, August 14, 1991**

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## **Military Personnel**

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### **Pay**

#### **■ Survivor benefits**

#### **■ ■ Annuity payments**

#### **■ ■ ■ Eligibility**

Retired member is informally advised that based on B-188932, December 23, 1977, a surviving spouse of retired member who validly elected into Survivor Benefit Plan to provide spouse coverage and later retired from Foreign Service with spouse coverage under the retirement system is entitled to payment of both annuities because of the absence of law comparable to 10 U.S.C. § 1452(e) (applicable to Civil Service) permitting termination of SBP participation.

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## **B-242964, August 14, 1991**

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## **Military Personnel**

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### **Pay**

#### **■ Survivor benefits**

#### **■ ■ Annuities**

#### **■ ■ ■ Eligibility**

#### **■ ■ ■ ■ Former spouses**

A service member made a Survivor Benefit Plan (SBP) election in favor of his ex-spouse as a natural person with an insurable interest. When they remarried, he attempted to change his SBP election to provide for her as his spouse. However, since the Air Force failed to notify her of the attempted change, she retained coverage as a person with an insurable interest despite their subsequent divorce and his remarriage and became entitled to an SBP annuity upon his death. The Air Force must collect from her the increased cost of coverage for a person with an insurable interest from March 1983 until the member's death.

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## **B-244180, August 19, 1991**

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## **Military Personnel**

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### **Pay**

#### **■ Eligibility**

#### **■ ■ Retired personnel**

#### **■ ■ ■ Reserve officers**

An enlisted member who qualifies for active duty military retired pay under other law is not eligible for retirement benefits under 10 U.S.C. § 1331 even if he or she waives active duty retirement for civil service retirement credit.

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## **Military Personnel**

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### **Pay**

- Eligibility
- ■ Retired personnel
- ■ ■ Reserve officers

A member of a reserve component who is drawing retired pay for prior military service, and who performs duty for which he or she is entitled to pay may elect to receive either retired pay, or pay and allowances for current duty, but not both.

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## **B-241848, August 23, 1991**

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### **Military Personnel**

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#### **Travel**

- Per diem
- ■ Eligibility
- ■ ■ Travel time
- ■ ■ ■ Delays

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### **Military Personnel**

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#### **Travel**

- Travel time
- ■ Delays
- ■ ■ Privately-owned vehicles
- ■ ■ ■ Breakdowns

Based on travel regulations allowing 1 day of travel time for each 350 miles of official distance, member was authorized a total of 8 days to go from his old duty station to a leave point to his new station. The fact that the member's car broke down on the seventh day en route to the leave point, which he would have reached in 6 days if he had traveled 350 miles per day, does not preclude him from being allowed time to account for the resultant delay, since his orders did not break the authorization into segments, and the breakdown was within the total authorized travel time.

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## **B-242927, August 23, 1991**

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### **Military Personnel**

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#### **Travel**

- Travel allowances
- ■ Eligibility

Member transferred to Fleet Marine Corps Reserve and who travels to "home of selection" under 37 U.S.C. § 404(c) but because of marital difficulties only resides there 2 months and does not ship his household goods to that location is not entitled to travel allowances based on a home of selection since he has not demonstrated that at the time travel was performed that he had the intent to establish a residence at his home of selection. He is entitled to reimbursement for travel and transportation allowances to his home of record or place from which ordered to active duty if he actually performed the travel.

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# Procurement

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**B-243420, August 1, 1991**

**91-2 CPD 109**

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## Procurement

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### Special Procurement Methods/Categories

- Architect/engineering services
- ■ Offers
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest that firm was improperly eliminated from consideration in acquisition for architect-engineer services is denied where record shows that the selection decision was reasonable and consistent with the announced evaluation criteria and protester's elimination was based on its low relative standing among the firms responding to the *Commerce Business Daily* announcement.

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## Procurement

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### Bid Protests

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

Allegation that requirement for particular design experience is unduly restrictive of competition is dismissed as untimely when first raised after the date for receipt of submittals since this protest ground is based on an alleged apparent impropriety.

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## Procurement

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### Bid Protests

- Bad faith
- ■ Allegation substantiation
- ■ ■ Lacking

Allegation of bad faith on the part of contracting officials due to alleged undue influence by third parties is denied where protester has provided no credible evidence in support of its assertion.

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**B-243439, August 1, 1991**

**91-2 CPD 110**

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## Procurement

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### Contractor Qualification

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

Whether a contract awardee is capable of complying with a specification requirement to provide a commercial product is encompassed by the agency's affirmative determination of the awardee's responsibility, which generally is not reviewed by the General Accounting Office absent circumstances not present here.

**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Powers of attorney

Agency properly determined a bid bond was defective and the bid therefore nonresponsive under a sealed bid procurement where the surety's power of attorney authorizing the named attorney-in-fact to sign the bid bond on the surety's behalf was not certified by the surety as not having been revoked.

**Procurement**

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**Specifications**

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

Protest that requirement for integration of building management and control system (BMCS) to be installed in federal building to be constructed in Baton Rouge, Louisiana, with an existing BMCS located at federal building complex in New Orleans exceeds agency's minimum needs and is restrictive of competition is denied where agency demonstrates reasonable basis for requiring integration of the two systems.

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Shipment schedules
- ■ ■ ■ Deviation

Where bidder offers a delivery schedule which fails unambiguously to commit the bidder to the required delivery period contained in the solicitation, bid is properly rejected as nonresponsive.

**Procurement**

---

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Omission

Protest that agency improperly rejected protester's bid as nonresponsive for failure to furnish a signed Certificate of Procurement Integrity with its bid is dismissed since completion of the required certificate imposes material legal obligations upon the bidder to which it is not otherwise bound.

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**Procurement**

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**Bid Protests**

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

This summary letter decision addresses well established rules which have been discussed in previous Comptroller General decisions. To locate substantive decisions addressing this issue, refer to decisions indexed under the above listed index entry.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Preparation costs

Where there is no basis for General Accounting Office to determine that agency acted contrary to statute or regulation in canceling solicitation, offeror is not entitled to recover proposal preparation costs.

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**Procurement**

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**Competitive Negotiation**

- Requests for quotations
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Prime contractor acting for the government reasonably canceled brand name or equal procurement, where the contractor determined that none of the offerors' quotes would meet the government's requirements and that the specifications were ambiguous and additional requirements were necessary; agency is not required to accept specified brand name product simply because the solicitation erroneously indicated that the brand name would meet the specifications.

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**Procurement**

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**Sealed Bidding**

- Unbalanced bids
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protest alleging that awardee's bid is materially unbalanced is denied where record supports accuracy of government estimates, and thus supports agency's conclusion that acceptance of awardee's bid would result in lowest cost to the government.

**Procurement**

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**Contract Management**

- **Contract administration**
- ■ **Convenience termination**
- ■ ■ **Administrative determination**
- ■ ■ ■ **GAO review**

Termination of contract for the convenience of the government was proper where shortly after award the agency determined that one of the specifications in the solicitation was defective and did not adequately describe its needs.

**Procurement**

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**Specifications**

- **Minimum needs standards**
- ■ **Competitive restrictions**
- ■ ■ **Justification**
- ■ ■ ■ **Sufficiency**

Agency designation of a required source for a component was not unduly restrictive of competition, even though the source would not provide the component, in circumstances where multiple quotes were submitted and all competitors, including the protester, obtained a quote from another acceptable source.

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**Procurement**

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**Specifications**

- **Ambiguity allegation**
- ■ **Specification interpretation**

Specification is not defective or ambiguous where, on consideration of the solicitation as a whole, there is only one reasonable interpretation and the solicitation contains sufficient information to allow offerors to compete on an equal basis.

**Procurement**

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**Contractor Qualification**

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

Contracting officer may base a determination of nonresponsibility upon consultation with administrative contracting office and reasonable judgment of inadequate performance under prior contracts for same part.

**Procurement**

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**Bid Protests****■ Definition**

Letter from contracting officer denying agency-level protest constitutes initial adverse agency action, and a subsequent protest filed with GAO more than 10 days after receipt of letter is untimely.

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**Procurement**

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

Letter to GAO advising of protester's intention to elevate agency-level protest to GAO, which provides no specific grounds for the protest and merely promises that details will follow, does not constitute a protest.

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**Procurement**

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**Bid Protests****■ GAO procedures****■ ■ Preparation costs****■ ■ ■ Burden of proof**

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

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**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Preparation costs**

Claim for bid preparation costs is disallowed where the protester was not awarded bid preparation costs in a General Accounting Office decision sustaining the protest and did not timely request reconsideration of the decision when he learned he would not receive award as conditionally recommended by the decision.

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**Procurement**

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**Payment/Discharge****■ Unauthorized contracts****■ ■ Quantum meruit/valebant doctrine**

Notwithstanding agency failure to comply with procurement regulations in issuing a delivery order for vehicle repairs on a noncompetitive basis, the contractor who performed the repairs may be paid in accordance with the terms of the order.

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## Procurement

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### Payment/Discharge

- Unauthorized contracts
- ■ Quantum meruit/valebant doctrine

A claim for repair work ordered by an agency official whose contract warrant had expired may be paid on a *quantum meruit* basis since the government received and accepted the benefit of the work, the claimant acted in good faith, and the amount claimed represents reasonable value of the benefits received.

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**B-242769.2, August 5, 1991**

**91-2 CPD 126**

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## Procurement

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### Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where request contains no statement of facts or legal grounds warranting reversal but merely restates arguments made by the protester and previously considered by the General Accounting Office.

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## Procurement

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### Sealed Bidding

- Contract awards
- ■ Prior contracts
- ■ ■ Errors
- ■ ■ ■ Effects

Each procurement is a separate transaction and the action taken on any one procurement does not govern the conduct of all similar procurements. Prior acceptance of bids with allegedly similar discrepancies in bid bonds does not require continued acceptance under other solicitations.

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**B-242970.2, August 5, 1991**

**91-2 CPD 127**

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## Procurement

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### Bid Protests

- Court decisions
- ■ Interpretation
- ■ ■ Contract awards

Where references in court's written decision to plaintiff as bidder in line for award under solicitation are consistent with the information before the court, General Accounting Office considers those references sufficient to indicate court's intent to order award to plaintiff, notwithstanding that order requires award to "highest responsive bidder," without specifying the plaintiff.

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## Procurement

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### Bid Protests

- Court decisions
- ■ Merits adjudication
- ■ ■ GAO review

Where court ordered agency to make award to another firm, protest that agency should make award to protester based on modified bid allegedly improperly rejected as late will not be considered; court's decision and order constitute final adjudication on issue of which firm was responsive

bidder entitled to award, and General Accounting Office will not consider protests involving matters that were or could have been adjudicated by court of competent jurisdiction.

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**B-243607, August 5, 1991****91-2 CPD 128**

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Propriety

Protest is sustained where agency improperly canceled solicitation on the basis of changed requirements which were not so substantial as to warrant cancellation, where changed requirements were previously the subject of a solicitation amendment under which offerors submitted best and final offers, and where agency's assertion of the potential for increased competition or cost savings upon resolicitation of identical requirement is not supported by the record.

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**B-243901, August 5, 1991****91-2 CPD 129**

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Pre-award surveys

Protester was properly found nonresponsible where contracting officer reasonably questioned firm's ability to comply with RFP's short delivery schedule based upon information obtained during a negative preaward survey. The contracting officer was not required to afford the offeror the opportunity to explain or otherwise defend against the survey information or to advise the firm of his responsibility determination in advance of the award.

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**B-244135, August 5, 1991****91-2 CPD 130**

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ GAO review

Protest that agency wrongfully steered competition from protester by failing to solicit firm for interim contract award is dismissed as academic where agency took corrective action and granted the relief requested, and the protester will be given an opportunity to compete upon resolicitation.

**Procurement**

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**Bid Protests**

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

**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Offers
- ■ ■ Clarification
- ■ ■ ■ Propriety

Request for reconsideration of decision sustaining protest on the basis that agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis, is denied where requesting parties had opportunity to raise reconsideration arguments during protest process but did not do so.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision sustaining protest on the basis that agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis, is denied where requester has not shown that conclusion that protester may have been prejudiced was erroneous.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that, based on the solicitation evaluation formula, the awardee's proposal offered the combination of technical factors and price most advantageous to the government.

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Propriety

An agency has no obligation to reopen negotiations so that an offeror may remedy defects introduced into a previously acceptable proposal by a best and final offer since the offeror assumes the risk that changes in its final offer might raise questions about its ability to meet the requirements of the solicitation.

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**Procurement**

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**Competitive Negotiation**

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

Where protester changed its structural design for modular office facility in its best and final offer in response to clarification requests, but failed to provide either a descriptive narrative for its new design or the necessary calculations on wind and seismic loads as required by the solicitation, the protester's proposal was properly downgraded in that area.

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**B-243730, August 6, 1991**

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**Procurement**

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**Payment/Discharge**

- Shipment
- ■ Tenders
- ■ ■ Applicability

As provided in a freight forwarder's rate tender to the government, the tender does not apply where charges would exceed those otherwise applicable for the same service.

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**B-242394.2, August 7, 1991**

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**91-2 CPD 133****Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Acceptance time periods
- ■ ■ ■ Deviation

Protest that agency should have rejected protester's bid as nonresponsive because protester offered a shorter bid acceptance period than the 120 days required by the invitation for bids is denied where the protester committed itself to meet the 120-day requirement by signing its bid.

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**Procurement**

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**Noncompetitive Negotiation**

- Use
- ■ Justification
- ■ ■ Urgent needs

The General Accounting Office will not review an agency determination that urgent and compelling circumstances necessitate award of a contract prior to the issuance of a decision on the protest.

**Procurement**

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**Bid Protests**

- GAO authority
  - ■ Protective orders
  - ■ ■ Information disclosure
- 

**Procurement**

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**Competitive Negotiation**

- Contracting officer duties
- ■ Information disclosure

In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decision-making and the degree and level of supervision to which the applicant is subject.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Cost evaluation

Where agency determined, based on a survey of similar staff positions under other contracts and the salaries contained in other technically acceptable proposals, that in order to supply district representatives under recruiting contract, protester would have to pay higher salaries than estimated in its proposal or to hire personnel with less qualifications than indicated in the protester's proposal, it was proper for agency to adjust estimated cost, since solicitation did provide for cost realism adjustments and since technical evaluation was based on assumption that protester would hire personnel with the qualifications proposed.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Cost evaluation

Agency adjustment of protester's estimated cost to reflect cost experience of incumbent in identifying salary required to recruit qualified district representatives was reasonable, where the limited data available indicated that the incumbent's salaries were generally in the middle range of those paid for similar staff positions.

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## Procurement

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### Competitive Negotiation

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

Award to higher-cost offeror was proper under solicitation that gave greater weight to technical merit compared to cost, where source selection authority determined that superiority of awardee's technical proposal was worth the extra cost, and the awardee received the highest greatest value score, as adjusted.

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where protester offered more highly qualified personnel in its best and final offer (BAFO) but lowered its estimated salaries for district representative positions, agency was not obligated to discuss concerns over cost realism that first arose after protester submitted its BAFO.

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**B-243548, August 7, 1991**

**91-2 CPD 135**

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Debriefing conferences

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Post-award error allegation

Although protester argues that during post award debriefing its proposal was criticized for deficiencies unrelated to the evaluation criteria in the solicitation, since a debriefing is only an after-the-fact explanation of the selection decision, in reviewing the selection, the General Accounting Office is primarily concerned with the evaluation record and not the debriefing.

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## Procurement

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### Competitive Negotiation

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

Award to offeror having higher cost, technically superior proposal under request for proposals which gave greater weight to technical merit compared to cost is justified where contracting agency reasonably determined that acceptance of the proposal was worth the higher cost.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties

Protester has no standing to assert that agency improperly refused to permit a competitor to withdraw its bid, and competitor's expressions of concern that its proposal might be nonresponsive did not constitute withdrawal of its bid.

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**Procurement**

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**Sealed Bidding**

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

A bidder's submission of photocopies and facsimile copies of portions of its bid does not render its bid nonresponsive and may be waived as a minor informality where accompanying amendments, a letter and a bid bond contained original signatures clearly evidencing an intent to be bound, and the facsimile portion of the bid was submitted by a person and not transmitted via electronic equipment.

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**Procurement**

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**Sealed Bidding**

- Bid guarantees
  - ■ Amounts
  - ■ ■ Indefinite quantities
- 

**Procurement**

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**Sealed Bidding**

- Terms
- ■ Materiality
- ■ ■ Integrity certification

Completed Certificate of Procurement Integrity is properly required under solicitation contemplating award of an indefinite quantity contract with a minimum quantity of \$50,000, where the estimated value of the orders to be placed exceeded \$100,000, as reflected by solicitation's evaluation provision which was based on specified maximum quantities which the solicitation estimated would fall within a range of \$1,000,000 to \$5,000,000.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Omission

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**Procurement**

---

**Sealed Bidding**

- Terms
- ■ Materiality
- ■ ■ Integrity certification

Bid was properly rejected as nonresponsive for failure to submit required Certificate of Procurement Integrity because completion of the certificate imposes material legal obligations on the bidder to which it is not otherwise bound.

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**B-243811, August 7, 1991****91-2 CPD 138**

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Acceptance time periods
- ■ ■ ■ Deviation

Since the minimum bid acceptance period is a nonwaivable, material solicitation requirement, a bidder's insertion of "30" in the space provided to designate the number of calendar days in the offered bid acceptance period requires that the bid be rejected as nonresponsive where the solicitation required a minimum bid acceptance period of 60 days.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Evaluation
- ■ ■ Price reasonableness
- ■ ■ ■ Administrative discretion

Contracting officer's determination concerning price reasonableness is a matter of administrative discretion which will not be questioned unless there is a showing that the determination itself is unreasonable, or that it is based on bad faith or fraud. The fact that a nonresponsive, low bid is very close to the government estimate does not render the other bids unreasonable.

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**B-243895, August 7, 1991****91-2 CPD 139**

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**Procurement**

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**Sealed Bidding**

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

Agency properly rejected bid as nonresponsive on a brand name or equal invitation for bids, where the low bidder submitted descriptive literature with its bid indicating that the equal product had a cable diameter of ".75 inches," while the salient characteristics required a cable diameter between .80 and .875 inches.

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Late submission
- ■ ■ ■ Mail/telegraph delays

Agency properly rejected as late protester's overseas bid modification and amendment acknowledgments which, while mailed to the APO address prior to bid opening, were not received at the government installation until 20 days after bid opening.

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**Procurement**

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**Bid Protests**

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

Protest against acceptability of awardee's bid is dismissed since protester, whose bid properly was rejected, lacks the direct economic interest necessary to qualify as an interested party because protester would not be in line for award even if its protest were sustained.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration based on arguments that protester could have, but did not, submit in initial protest is denied; General Accounting Office Bid Protest Regulations do not contemplate piecemeal development of protest issues.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties

Private person who does not represent any entity participating in questioned procurements and protests only as concerned taxpayer is not an interested party under Bid Protest Regulations. 56 Fed. Reg. 8,759 (1991) (to be codified at 4 C.F.R. § 21.0(a)).

**Procurement**

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**Competitive Negotiation**

- Hand-carried offers
- ■ Late submission
- ■ ■ Acceptance criteria

Protest of agency's rejection of late proposal is dismissed where protest submission shows that protester's misaddressing of proposal package was paramount cause of late receipt.

**Procurement**

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**Contract Management**

- Contract administration
  - ■ Convenience termination
  - ■ ■ Administrative determination
  - ■ ■ ■ GAO review
- 

**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Bad faith
- ■ ■ ■ Allegation substantiation

Where record shows that agency may have terminated a contract and canceled the acquisition in an effort to avoid protest proceedings at the General Accounting Office, agency's actions will be examined to determine whether those actions were otherwise reasonable.

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**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
  - ■ Cancellation
  - ■ ■ Justification
  - ■ ■ ■ GAO review
- 

**Procurement**

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**Contract Management**

- Contract administration
- ■ Convenience termination
- ■ ■ Administrative determination
- ■ ■ ■ GAO review

Agency actions in terminating a contract and canceling the acquisition were reasonable where contract award was improper because agency (1) failed to consider price in the source selection, and (2) improperly made award on the basis of initial offers to other than the lowest overall cost offeror.

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**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Powers of attorney

Low bid is responsive, even though bid opening officer stated, during bid opening, that a power of attorney was not attached to that bid's bid bond, where the record indicates the power of attorney was included in the bid documents and the protester, who attended the bid opening, did not examine the bid.

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**Procurement**

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**Sealed Bidding**

- Unbalanced bids
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protest alleging that bid is materially unbalanced is denied where there is no reasonable doubt that an award based on bid will ultimately result in the lowest overall cost to the government, since the bid is low for both the base items and the option items and no advance payments will be made.

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**Procurement**

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**Competitive Negotiation**

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

Protest is denied where protester does not show that late receipt of proposal on overseas procurement was due solely to mishandling by the government after receipt at the government installation.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Pre-award samples
- ■ ■ ■ Absence

A bid which was not accompanied by a bid sample required by the solicitation was properly rejected as nonresponsive.

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ GAO review

Protest was properly dismissed as academic where the agency canceled the underlying solicitation.

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## **Procurement**

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### **Sealed Bidding**

- **Invitations for bids**
- ■ **Post-bid opening cancellation**
- ■ ■ **Justification**
- ■ ■ ■ **Sufficiency**

Cancellation of solicitation was proper where the Certificate of Procurement Integrity clause included in solicitation did not contain a signature box or line and misled bidders regarding the certificate's signature requirement.

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**B-243808.3, August 12, 1991**

**91-2 CPD 182**

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## **Procurement**

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### **Socio-Economic Policies**

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

General Accounting Office will not consider protest of Small Business Administration's (SBA) refusal to grant certificate of competency (COC) absent a showing of possible fraud or bad faith on the part of government officials. Protester's allegation that agency and SBA failed to inform it that they were considering protester's financial ability to continue performance if agency ordered less than estimated quantity of services does not amount to the required showing of possible bad faith.

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**B-243353, B-243354, August 13, 1991**

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## **Procurement**

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### **Special Procurement Methods/Categories**

- **Federal procurement regulations/laws**
- ■ **Amendments**
- ■ ■ **Corporate entities**
- ■ ■ ■ **Identification**

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case No. 90-65, a proposal to amend FAR section 42.1205(a)(3), which concerns agreements to recognize a contractor's change of name, to delete a requirement to inform the government of the total dollar value and unpaid balance of all affected contracts.

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## **Procurement**

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### **Special Procurement Methods/Categories**

- **Federal procurement regulations/laws**
- ■ **Amendments**
- ■ ■ **Contractor personnel**
- ■ ■ ■ **Compensation**

General Accounting Office has no objection to Federal Acquisition Regulation (FAR) case No. 90-68, a proposal to amend FAR sections 22.1101 and 22.1103, delete the clause at FAR section 52.222-45, and revise the clause at FAR section 52.222-46.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Dismissal as untimely of protest against propriety of mistake correction is affirmed where protest was filed more than 10 working days after direct notification to the protester by the agency of agency's correction of competitor's bid which made the competitor the bidder in line for award.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Responsibility
- ■ ■ Negative determination
- ■ ■ ■ Prior contract performance

Although an agency may use traditional responsibility factors, like management and staff capabilities and company experience, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's proposal as technically unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the proposal but instead effectively constituted a finding of nonresponsibility.

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**Procurement**

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**Sealed Bidding**

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

Contracting agency properly accepted low bid despite absence of acknowledgment of solicitation amendment, where amendment merely clarified or restated requirements already contained in the solicitation, made insubstantial changes, and had a negligible impact on cost.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Cost realism
- ■ ■ Evaluation
- ■ ■ ■ Administrative discretion

Protest against price realism determination by procuring agency is denied where protester fails to show that such determination, necessarily a judgmental one, was clearly unreasonable.

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**Procurement**

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**Bid Protests**

- Bias allegation
- ■ Allegation substantiation
- ■ ■ Burden of proof

Bias or prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference or supposition.

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**Procurement**

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**Competitive Negotiation**

- Alternate offers
- ■ Rejection
- ■ ■ Propriety

Agency properly rejected protester's quotation for alternate product where protester failed to provide required technical information needed by agency to determine the acceptability of the product.

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**Procurement**

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**Bid Protests**

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

Protest against the set aside of a solicitation for small disadvantaged businesses, which was publicized through a *Commerce Business Daily* notice, is untimely since the protest was filed several months after the solicitation closing date.

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**Procurement**

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**Bid Protests**

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

Where a protester is ineligible for award under a total small disadvantaged business set-aside, General Accounting Office will not consider the firm's objection to the agency's failure to furnish it a copy of the solicitation since the protester is not an interested party whose direct economic interest would be affected by a resolution of this issue.

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**Procurement**

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**Socio-Economic Policies**

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

Protest alleging that two low bidders are ineligible for award of contract for electrical work under small disadvantaged business set-aside because they are general contractors and not licensed electrical contractors is dismissed, since it concerns a matter of bidder responsibility; General Accounting Office will not review a contracting agency's affirmative responsibility determination absent a showing of fraud or bad faith or that definitive responsibility criteria in the solicitation were not met.

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**Procurement**

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**Bid Protests**

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

Protest that the decision to set aside procurement under Section 8(a) of the Small Business Act violates the Small Business Administration's (SBA) regulations is dismissed as untimely when filed in the General Accounting Office approximately 1 month after the SBA denied the initial agency-level protest of its decision to place the procurement under the 8(a) program.

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**Procurement**

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**Socio-Economic Policies**

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

Protest of a decision not to set a solicitation aside for small disadvantaged businesses (SDB) is denied where agency reasonably determined that it would not receive offers from at least two responsible SDBs.

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**Procurement**

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**Socio-Economic Policies**

- Small businesses
- ■ Disadvantaged business set-asides
- ■ ■ Preferences
- ■ ■ ■ Computation

Agency is not required to apply evaluation preference for small disadvantaged businesses to contract price elements which are not evaluation factors for award.

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## **Procurement**

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### **Socio-Economic Policies**

- **Small businesses**
- ■ **Disadvantaged business set-asides**
- ■ ■ **Preferences**
- ■ ■ ■ **Computation**

Evaluation preference for small disadvantaged businesses is authorized by statute governing the obligation of Department of Defense (DOD) funds only and, therefore, should not be used in evaluation items which are to be acquired with non-DOD funds.

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## **Procurement**

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### **Competitive Negotiation**

- **Offers**
- ■ **Price reasonableness**
- ■ ■ **Determination**
- ■ ■ ■ **Administrative discretion**

Agency did not act improperly by using an economic price adjustment clause with two alternate price ceilings where the agency determined that the clause was necessary to protect the government against undue price increases.

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**B-243915, August 15, 1991**

**91-2 CPD 153**

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## **Procurement**

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### **Socio-Economic Policies**

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

Agency's fair market price estimate in connection with invitation for bids (IFB) set aside for small disadvantaged businesses, based solely on the estimated costs of performing the required services by military personnel in-house, is not reasonably based, since, despite regulatory direction to consider commercial prices for similar services and to obtain data from the Small Business Administration or from any other government agency, contracting agency made no reasonable effort to obtain available information upon which it could reasonably base an estimate of the price at which the services required under the IFB may be obtained from commercial sources.

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## **Procurement**

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### **Socio-Economic Policies**

- **Small business set-asides**
- ■ **Use**
- ■ ■ **Restrictions**

In the absence of a reasonably-based fair market price estimate, award to a small disadvantaged business (SDB) submitting a higher-priced bid under invitation for bids set aside exclusively for SDB participation is improper where the SDB bid exceeds the low non-SDB bid by more than 10 percent; in such cases, the Department of Defense Federal Acquisition Regulation Supplement implementing the SDB set-aside program requires that the contracting officer withdraw the SDB set-aside.

**Procurement**

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**Contractor Qualification**

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

Protest challenging propriety of award under solicitation for aircraft services on the basis that the awardee did not, prior to award, meet the solicitation requirement that the *contractor* possess Military Airlift Command approval is dismissed, since such approval was not a definitive responsibility criterion which was a condition to award, but rather was a contract performance requirement, and the General Accounting Office thus has no basis to review contracting officer's determination that awardee is a responsible firm.

**Procurement**

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**Bid Protests**

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

Protest against terms of proposed sole-source solicitation filed with General Accounting Office (GAO) 11 working days after receipt of denial of initial, agency-level protest (and 13 minutes after closing time for receipt of proposals) is untimely; under GAO Bid Protest Regulations, where initial protest is filed with the contracting agency, subsequent protest to GAO must be filed within 10 working days of initial adverse agency action.

**Procurement**

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**Socio-Economic Policies**

- Labor standards
- ■ Supply contracts
- ■ ■ Manufacturers/dealers
- ■ ■ ■ Determination

The General Accounting Office will not consider whether an offeror qualifies as a "regular dealer" under the Walsh-Healey Public Contracts Act.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Principal/agent relationships
- ■ ■ Identification

Offeror, which submits a proposal in its own name without indicating it is acting as an agent for a manufacturer, may not submit evidence after the closing date for proposals to show the agency-principal relationship because to do so, in effect, would constitute an improper transfer of a proposal.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Acceptance time periods
- ■ ■ Extension
- ■ ■ ■ Propriety

Proposal expiration date can be extended by offerors without the necessity of amending a request for proposals.

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**B-244848.2, B-245098, August 15, 1991****91-2 CPD 157**

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**Procurement**

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**Sealed Bidding**

- Suspended/debarred contractors
- ■ Bids
- ■ ■ Rejection
- ■ ■ ■ Propriety

Protests challenging suspension are dismissed where suspension was based on evidence of bribes by protester's former president to obtain contracts for protester, and agency complied with applicable procedural requirements; agency did not suspend protester arbitrarily to avoid awarding it contracts it otherwise was entitled to receive.

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**B-245185, August 15, 1991****91-2 CPD 158**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties

**Procurement**

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**Special Procurement Methods/Categories**

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

Protest of an agency's decision to contract for maintenance services, rather than to continue performing them in-house with federal employees, is dismissed since the agency's decision, which was not made pursuant to a solicitation issued for cost comparison purposes under Office of Management and Budget Circular A-76, is a matter of executive branch policy that is not for resolution through the bid protest process; in any event, a federal employees association, that would not be a bidder or offeror under a solicitation for the contract services, is not an interested party.

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**Procurement**

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**Bid Protests**

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

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Preparation costs

Claimant may recover costs of filing and pursuing General Accounting Office protest to the extent they are documented and were reasonably incurred in pursuing the protest.

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**Procurement**

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**Bid Protests**

- GAO authority
- ■ Protective orders
- ■ ■ Information disclosure

In determining whether to grant access to documents under a protective order, the General Accounting Office will consider whether the applicant is involved in competitive decisionmaking, thus creating an unacceptable risk that the protected materials will be inadvertently disclosed.

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency did not hold meaningful discussions with protester is denied where, assuming the agency did not adequately question protester concerning two subfactors for which the protester received an unsatisfactory score, the protester was not prejudiced as a result because, even if the protester received the maximum points available for the subfactors, the protester's technical proposal would remain technically equal to the awardee's technical proposal and, given the substantially higher cost of the protester's proposal, the award decision would not change.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel experience

In evaluating the protester's technical proposal under solicitation for program and integration support for a chemical weapons demilitarization program, it was reasonable for the agency to take into consideration that: (1) the proposed project manager did not have experience managing a task-type contract, since the solicitation contemplated the award of such a contract; and (2) neither the protester nor the protester's proposed subcontractors had sufficient trial burn experience, since the contractor would be required to support contractors performing trial burns under other contracts within the chemical weapons demilitarization program.

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## Procurement

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### Competitive Negotiation

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

Protest that agency failed to perform a reasonable cost realism analysis of the awardee's proposal because the agency did not consider that the awardee's low proposed cost reflected its lack of understanding of the agency's requirements is denied, where the agency downgraded the awardee's technical score in areas where the awardee's proposed level of effort was insufficient, but generally found that the awardee's proposed level of effort was reasonable for the awardee's approach.

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## Procurement

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### Bid Protests

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

Protest that agency should have eliminated protester's proposal from the competitive range is dismissed as untimely where it was not filed within 10 working days after the protester knew the protest basis.

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**B-243669, August 16, 1991**

**91-2 CPD 161**

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## Procurement

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### Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Criteria

Protest that awardee did not meet definitive responsibility criterion requiring installer to possess not less than 3 years experience specializing in installing type of waterproofing required for project is sustained where agency did not possess objective evidence upon which it could reasonably determine that the awardee satisfied the experience requirement.

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**B-243746, August 16, 1991**

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## Procurement

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### Payment/Discharge

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

A *prima facie* case of carrier liability for loss/damage is established by showing that the shipper tendered the goods to the carrier in a certain condition, that the property was not delivered by the carrier or was delivered in a more damaged condition, and the amount of loss/damage.

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## Procurement

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### Payment/Discharge

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

Where a *prima facie* case of carrier liability otherwise exists, a carrier that transported a service member's household goods in connection with an official move is presumed liable for the loss/damage to items so reported in a notice dispatched to the carrier within 75 days after delivery.

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**B-243693, August 19, 1991**

**91-2 CPD 162**

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## Procurement

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### Bid Protests

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

Protester is an interested party to maintain a protest even though it is sixth in line for contract award, where protester claims that its proposal was improperly evaluated, protester submitted the lowest evaluated cost, and the solicitation called for award to the proposal most advantageous to the government since, if protest were sustained, protester could be in line for award.

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## Procurement

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### Bid Protests

- Allegation substantiation
- ■ Burden of proof

Protester's request that the General Accounting Office draw an unfavorable inference regarding the content of documents protester alleges were withheld during the protest is denied where protester has failed to show that documents were not produced and where agency states that all documents have been provided.

---

## Procurement

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### Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency failed to hold meaningful oral discussions by withholding information that would permit protester to address perceived deficiencies in the resumes of proposed key personnel is denied where oral discussions were supplemented with a written review of the proposal that sufficiently alerted offeror to specific areas where its proposal was considered deficient.

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## Procurement

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### Competitive Negotiation

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Even though agency misled protester in one instance during oral discussions by ascribing a deficiency to the wrong key employee, protester was not prejudiced since the deficiency was also mentioned in the general written discussion materials provided to the protester and applicable to all 11 of the offeror's key employees.

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## Procurement

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### Competitive Negotiation

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

Protest that agency improperly evaluated proposal is denied where record indicates that the agency evaluation was reasonable and consistent with the solicitation's evaluation criteria.

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Non-prejudicial allegation

Protester's claim that evaluation was unreasonable because one scoresheet revealed that ratings on several criteria had been written over and replaced with lower ratings is denied where protester does not argue and there is no indication that the resulting evaluation scores were unreasonable.

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## Procurement

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### Competitive Negotiation

- Competitive advantage
- ■ Conflicts of interest
- ■ ■ Post-employment restrictions
- ■ ■ ■ Allegation substantiation

Contention that awardee received an unfair competitive advantage over other offerors by hiring and proposing as a key employee a former Navy official is denied where the protester acknowledges that the individual in question had no involvement with the procurement and makes no showing that the individual had access to sensitive information unavailable to other offerors.

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**B-243729, August 19, 1991**

**91-2 CPD 163**

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## Procurement

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### Competitive Negotiation

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

Agency properly excluded protester's proposal from the competitive range where the proposal did not demonstrate any operational experience and only limited other experience and understanding of the RFP's requirements, and offered higher cost than did other offerors.

**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ Preparation costs
- 

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where, in response to the protest, the agency promptly amended the challenged solicitation within 2 weeks after the protest was filed.

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**Procurement**

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**Bid Protests**

- Agency-level protests
  - ■ Protest timeliness
  - ■ ■ GAO review
- 

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

Where a protester initially files a timely agency-level protest, and subsequently files a protest with the General Accounting Office (GAO) which included additional grounds of protest, the additional grounds of protest must independently satisfy the GAO's timeliness requirements.

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**Procurement**

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**Competitive Negotiation**

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

Protest that the agency improperly made award to a firm whose proposal did not satisfy several of the salient characteristics listed in the solicitation is denied where the agency's technical judgment that the equipment offered by the awardee met the salient characteristics is reasonable.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Signatures

Bid was properly rejected as nonresponsive where bidder submitted unsigned Certificate of Procurement Integrity with its bid submission even though bidder had completed various provisions of the certificate.

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**Procurement**

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**Competitive Negotiation**

- Use
- ■ Criteria

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**Procurement**

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**Sealed Bidding**

- Use
- ■ Criteria

Protester's assertion that sealed bidding procedures should be used for the acquisition of a fire alarm system, rather than the competitive negotiation procedures chosen by the agency for the procurement, is without merit, where agency has reasonably determined that—due to the presence of historic buildings at the site and the possible acceptability of different technical approaches—discussions may be necessary.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision dismissing protest as untimely is denied where protest was filed more than 10 days after adverse action on agency-level protest, and protester has not shown that General Accounting Office's conclusion in that regard was in error.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Second request for reconsideration is denied where it is based on a new argument not raised in the initial protest.

**Procurement**

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**Bid Protests**

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

**Procurement**

---

**Competitive Negotiation**

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

Request for reconsideration alleging that decision sustaining protest improperly recommended that agency downgrade awardee's proposal on reevaluation is denied, where recommendation that agency reevaluate proposals in accordance with solicitation requirements was consistent with holding in decision that awardee's high score was based on application of incorrect criteria during evaluation.

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**Procurement**

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**Bid Protests**

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

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Prices

Request for reconsideration alleging that agency's price evaluation was proper, contrary to finding in prior decision, is denied where requester merely reiterates prior arguments.

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**Procurement**

---

**Bid Protests**

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

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Prices

Argument in reconsideration request that protester was not prejudiced by improper price evaluation, and that decision therefore erroneously sustained protest, is denied where record showed possibility of prejudice in that new technical and price evaluations pursuant to General Accounting Office recommendation could significantly affect offerors' relative standings.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ GAO review

Agency reasonably canceled solicitation for offers of space where space requirements have increased more than 28 percent over advertised space.

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**Procurement**

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**Bid Protests**

- Dismissal
- ■ Definition

Protest of conduct of solicitation for offers (SFO) of space was properly dismissed, where the SFO was properly canceled.

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**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ Preparation costs
- 

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Preparation costs

A protester is not entitled to reimbursement of the costs of proposal preparation and filing and pursuing the protest where the protest was properly dismissed as academic.

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**Procurement**

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**Noncompetitive Negotiation**

- Contract awards
- ■ Sole sources
- ■ ■ Propriety

Contracting agency may award contract for a critical replacement part on a sole-source basis under the authority of 10 U.S.C. § 2304(c)(1) where the agency reasonably determined that only one source could provide the item since the agency does not possess or have rights in the technical data necessary for a competitive procurement and does not have the current capability to test an alternate item to ensure it will function properly in the end product.

**Procurement**

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**Sealed Bidding**

- Unbalanced bids
- ■ Materiality
- ■ ■ Responsiveness

Protest that low bid should be rejected as nonresponsive because it is mathematically and materially unbalanced is denied where protester fails to demonstrate that bid contained both understated prices for some of the work and overstated prices for other work, and there is no doubt that award will result in the lowest overall cost to the government.

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**Procurement**

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**Sealed Bidding**

- Below-cost bids
- ■ Contract awards
- ■ ■ Propriety

Submission of below-cost bid is not improper; the government may not properly withhold award merely because a responsive bid is below cost.

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**Procurement**

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**Contractor Qualification**

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

Protest that proposed awardee submitted below-cost price for one contract line item, and therefore either does not understand the work required or will not be able to perform the work required, is essentially a challenge to contracting officer's affirmative determination of responsibility, which the General Accounting Office will not review except in limited circumstances.

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Alternate offers
- ■ ■ Evaluation criteria

Previously approved manufacturer is not required to comply with the request for quotations' alternate offers clause simply because its name and item numbers did not initially appear in the item description where the change in description is simply an administrative change to reflect the manufacturer's name and item number instead of a dealer's name and item number.

**Procurement**

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**Bid Protests**

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

Where *Commerce Business Daily* (CBD) notice announcing specifications and agency's intent to place an order without competition against a firm's nonmandatory schedule contract gives other potential alternative sources 15 days to submit expressions of interest showing their capability to respond to the agency's requirements, protest challenging specifications when they appear in subsequently issued solicitation is untimely, as it was filed well beyond the closing date for written expressions of interest and 10 working days after publication of the CBD notice.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

General Accounting Office (GAO) will not consider the merits of an untimely protest by invoking the significant issue exception in GAO's Bid Protest Regulations, where the protest does not raise an issue of first impression that would be of widespread interest to the procurement community.

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester essentially reiterates original basis of protest and disagrees with decision and does not show that prior denial was based on errors of fact or law or present information not previously considered that warrants reversal or modification of decision that agency reasonably determined that awardees satisfied solicitation requirement for proven ability to produce the items being procured.

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**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ Protest timeliness
  - ■ ■ Good cause exemptions
  - ■ ■ ■ Applicability
- 

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Significant issue exemptions
- ■ ■ ■ Applicability

The General Accounting Office will not invoke the significant issue or good cause exception under its Bid Protest Regulations in order to review an untimely protest that does not raise an issue of widespread interest to the procurement community and does not provide a compelling reason beyond the control of the protester that prevented the protester from submitting a timely protest.

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**Procurement**

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**Small Purchase Method**

- Quotations
- ■ Oral quotations
- ■ ■ Pricing errors

Protest is denied where agency properly awarded a purchase order to the firm which orally quoted the low price, despite protester's post-award allegation that the agency made a mistake in recording its oral price quote.

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**Procurement**

---

**Bid Protests**

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

**Procurement**

---

**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Price omission
- ■ ■ ■ Options

Protest challenging rejection of bid as nonresponsive for failure to include prices for all option years called for by the invitation for bids (IFB) is dismissed as untimely where the IFB failed to state whether option year prices would be evaluated. Since the IFB thus was ambiguous on its face, protester was on notice of defect in the IFB and should have raised any objection on this ground before bid opening; it could not simply make assumptions regarding the meaning of the IFB and then expect relief when the agency did not act in the manner the protester assumed it would in regard to evaluation of option year prices.

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**Procurement**

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**Specifications**

- Performance specifications
- ■ Adequacy

Protest by incumbent contractor that solicitation for military family housing grounds maintenance is defective for failing to provide historical data or anticipated estimates with regard to several services to be performed under the contract is denied, where the information contained in the solicitation in conjunction with the information available to prospective bidders through site visits is sufficient to permit bidders, using their expertise, to adequately estimate the cost of performing the services and thus to compete intelligently and on an equal basis.

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**Procurement**

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**Bid Protests**

- Definition

Protester's letter to agency expressing an interest concerning a solicitation and received by the agency before the closing date, does not constitute a protest to the agency, because it does not rise above an expression of a hope or expectation regarding the procurement.

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**Procurement**

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**Sealed Bidding**

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

Agency properly rejected bid as nonresponsive where bidder submitted a bid bond containing only a reproduction of the surety's signature affixed to the bond by a rubber stamp, since the lack of the surety's original signature cast doubt on the enforceability of the bond.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Determination time periods

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**Procurement**

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**Sealed Bidding**

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

Since responsiveness cannot be established after bid opening, defective bid bond which rendered bid nonresponsive cannot be cured by the bidder's offer to submit a substitute bond subsequent to bid opening, or by the bidder's post-bid opening assurances that it would provide required payment and performance bonds "within 48 hours" following rejection of its bid.

**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Sufficiency

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**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

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

---

**Procurement**

---

**Bid Protests**

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

Protester does not have the direct economic interest to be considered an interested party to protest the eligibility of the awardee where the protester would not be next in line for award.

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Cost realism
- ■ ■ ■ Analysis

There is no requirement for a cost realism analysis before the award of a competitive, fixed-price contract, and there is no legal basis to challenge a below-cost award to a contractor which has been determined responsible by the contracting officer.

---

**Procurement**

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**Special Procurement Methods/Categories**

- In-house performance
- ■ Cost evaluation
- ■ ■ Personnel

An agency is not required, in an Office of Management and Budget Circular A-76 cost comparison, to disclose to bidders the agency's determination that the agency's current operation is overstaffed where the solicitation described the services sufficiently to permit an intelligent competition on an equal basis.

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## Procurement

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### Special Procurement Methods/Categories

- In-house performance
- ■ Competitive advantage
- ■ ■ Allegation substantiation

Agency does not enjoy an unfair labor cost advantage in Office of Management and Budget Circular A-76 cost comparison even though the pay of federal employees is not subject to Service Contract Act requirements that are applicable to commercial bidders' employees; there is no requirement that an A-76 cost comparison include a factor to equalize any such inherent disparities in the agency's and bidders' legal obligations.

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## Procurement

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### Bid Protests

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

Protest against solicitation provision concerning contractor liability for maintenance repair work "up to \$10,000" is dismissed as untimely where filed after bid opening.

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**B-243892, August 23, 1991**

**91-2 CPD 192**

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## Procurement

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### Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Ambiguous prices

A bid is nonresponsive when the bid opening official is unable to determine the total bid price because of an ambiguous bid modification.

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## Procurement

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### Sealed Bidding

- Bids
- ■ Post-bid opening periods
- ■ ■ Error correction
- ■ ■ ■ Propriety

Mistake in bid procedures cannot be used to correct a mistake that would make a bid responsive nor can such an error be waived as a minor informality.

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## Procurement

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### Sealed Bidding

- Competitive system integrity
- ■ Non-responsive bids
- ■ ■ Acceptability

A nonresponsive bid may not be accepted even if it offers a lower price than next responsive bid, because to accept such a bid would compromise the integrity of the competitive bidding process.

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**Procurement**

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**Bid Protests**

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

Protests filed more than 5 months after awards were made are dismissed as untimely under the General Accounting Office Bid Protest Regulation which requires that a protest be filed within 10 working days after the basis of protest is known or should have been known, where the record shows that following notification of awards, the protester failed to meet its obligation to diligently pursue the information necessary to determine whether a basis of protest existed.

---

**Procurement**

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**Bid Protests**

- Non-prejudicial allegation
- ■ GAO review

Protests of awards for same items under invitation for bids (IFB) and request for proposals (RFP) on the basis that agency improperly waived a specification for awardee are dismissed based on lack of competitive prejudice, where record fails to show that the protester, who submitted the ninth low bid under the IFB and the third low price under the RFP, could have lowered its prices sufficiently to displace the awardee under either solicitation had it been afforded an opportunity to respond to the allegedly relaxed requirement.

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**Procurement**

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**Socio-Economic Policies**

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

There is no requirement for procurement, which was previously conducted as a small business set-aside, to be conducted under a repetitive small business set-aside instead of under Small Business Administration's section 8(a) set-aside program, where the agency has neither promulgated regulations requiring a repetitive set-aside nor publicly expressed a clear intention to reserve the requirement through a notice of intent to set it aside.

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**Procurement**

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**Bid Protests**

- Moot allegation
- ■ GAO review

Argument that Small Business Administration (SBA) should have determined potential adverse impact on incumbent small business concern prior to accepting procurement for inclusion in SBA's section 8(a) program is academic where SBA is currently conducting adverse impact study.

**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Powers of attorney

Where corporate surety's power of attorney form attached to bid bond failed to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety, the agency correctly determined the bond was defective and properly rejected bid as nonresponsive, since there was no evidence at the time of bid opening that surety would be bound.

**Procurement**

---

**Sealed Bidding**

- 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 failed to state accurately its minimum needs in some respects and overstated its minimum needs in other respects.

**Procurement**

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**Contractor Qualification**

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

The General Accounting Office will not review an affirmative determination of responsibility absent a showing of possible bad faith or fraud or misapplication of definitive responsibility criteria.

**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Liability restrictions

A rider to a bid bond, which by its language limits the liability of the surety and the bidder and which may be inferred to apply to the required performance and payment bonds in the event of award, renders the bid nonresponsive.

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## **Procurement**

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### **Sealed Bidding**

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

A rider to a bid bond, which by its language limits the liability of the surety and the bidder and which may be inferred to apply to the required performance and payment bonds in the event of award, renders the bid nonresponsive.

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## **B-242942, August 27, 1991\*\*\***

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## **Procurement**

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### **Special Procurement Methods/Categories**

- Service contracts
- ■ Personal services
- ■ ■ Criteria

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

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## **Procurement**

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### **Special Procurement Methods/Categories**

- Service contracts
- ■ Personal services
- ■ ■ Criteria

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

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## **B-243382.4, August 27, 1991**

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**91-2 CPD 199**

## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Preparation costs

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Preparation costs

Request for declaration of entitlement to costs of filing and pursuing a protest against a proposed sole-source award is dismissed where agency action affects only subsidiary protest argument and does not resolve ultimate issue of protest, the legal propriety of sole-source justification.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

---

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest under section 21.6(e) of the General Accounting Office (GAO) Bid Protest Regulations where GAO dismisses a protest because the agency canceled the protested solicitation and the record indicates this cancellation was not corrective action in response to the protest.

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**Procurement**

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**Bid Protests**

- GAO authority
- ■ Protective orders
- ■ ■ Information disclosure

In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decisionmaking and the degree and level of supervision to which the applicant in subject.

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**Procurement**

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**Competitive Negotiation**

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

Protest challenging elimination from the competitive range solely on the basis that protester's price was slightly higher than two other competitors is sustained where offerors' prices were based on different assumptions and inadequate analysis was performed to determine whether protester could reasonably lower its price during best and final offers.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Certification
- ■ ■ Signature lines
- ■ ■ ■ Omission

Bidder unequivocally committed itself to the requirements of the Certificate of Procurement Integrity by completing the certificate, which failed to contain a space for a signature, and signing the page in the margin adjacent to the certificate; the fact that the bidder's president signed the firm's bid using his full name, but signed the page containing the certificate with a shorter signature, is

not objectionable where the record is clear that the same person signed both the bid and the certificate.

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**B-243911, August 27, 1991**

**91-2 CPD 203**

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**Procurement**

**Socio-Economic Policies**

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

Agency's determination to solicit for an operations and maintenance contract on an unrestricted basis, rather than through a small business set-aside, is not an abuse of discretion where the contracting officer, after making a reasonable effort to ascertain whether offers from two or more responsible small business concerns would be received, concluded that there was no reasonable expectation of receiving such offers and where the agency's small and disadvantaged business utilization officer concurred with this decision.

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**B-244094, August 27, 1991**

**91-2 CPD 204**

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**Procurement**

**Bid Protests**

- GAO procedures
- ■ Interested parties

Protester may not assert a claim of mistake in the awardee's bid since it is the responsibility of the contracting parties—the government and the awardee—to assert rights and bring forth the necessary evidence to resolve mistake questions.

---

**Procurement**

**Bid Protests**

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

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**Procurement**

**Bid Protests**

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

Where the protester knew the awardee's bid prices prior to filing a separate protest on a different basis, the protester had sufficient information on which to base a protest that the bid was unbalanced, and a protest on that basis filed only after the receipt of the agency report is untimely.

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**B-244324, August 27, 1991**

**91-2 CPD 205**

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**Procurement**

**Socio-Economic Policies**

- Small business set-asides
- ■ Use
- ■ ■ Resolicitation

Where reprourement is for the account of a defaulted contractor, the statutes and regulations governing federal procurements are not strictly applicable, and agency is not required to set reprourement aside for small disadvantaged business (SDB), despite its knowledge that there are SDBs capable of competing.

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## Procurement

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### Socio-Economic Policies

- Small businesses
- ■ Disadvantaged business set-asides
- ■ ■ Preferences
- ■ ■ ■ Eligibility

Solicitation requirement that small disadvantaged business (SDB) regular dealers provide fuel manufactured by small business and not engage in product exchanges with large business in order to obtain SDB evaluation preference is a reasonable implementation of Department of Defense's regulations governing the granting of such evaluation preferences.

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## Procurement

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### Bid Protests

- Moot allegation
- ■ GAO review

Where agency advises General Accounting Office that it intends to hold discussions with offerors, in which they may submit product source information, protest against solicitation provision allowing agency to deny preference to offerors which do not provide such information with their initial proposals is dismissed as academic.

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**B-244407, August 27, 1991**

**91-2 CPD 206**

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## Procurement

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### Competitive Negotiation

- Requests for proposals
- ■ First-article testing
- ■ ■ Waiver
- ■ ■ ■ Administrative determination

Protest of agency's decision not to waive a first article testing requirement is denied where the protester has not furnished product to government for 7 years and agency records show that the protester has a poor quality history for similar products under contracts with agency since that time.

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**B-244437, August 27, 1991**

**91-2 CPD 207**

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## Procurement

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### Competitive Negotiation

- Quotations
- ■ Alternate offers
- ■ ■ Rejection
- ■ ■ ■ Propriety

Agency evaluation finding protester's offered alternate product technically unacceptable was reasonable where the protester failed to submit sufficient information demonstrating that its alternate product was the technical equivalent of the approved products listed in the request for quotations.

**Procurement**

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**Contract Management**

- Contract administration
- ■ Convenience termination
- ■ ■ Resolicitation
- ■ ■ ■ GAO review

Protest is dismissed where, in response to a previous protest of the rejection of protester's bid as nonresponsive for failure to submit a signed Certificate of Procurement Integrity, agency terminated awardee's contract for the convenience of the government and proposed to resolicit the requirement, notwithstanding that the protester requested award of the contract in its protest; agency's corrective action was the same as the recommendation the General Accounting Office would make under the circumstances.

**Procurement**

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**Bid Protests**

- Contractors
- ■ Suspension
- ■ ■ Propriety

**Procurement**

---

**Competitive Negotiation**

- Suspended/debarred contractors
- ■ Contract awards
- ■ ■ Eligibility

Protest challenging suspension is dismissed where suspension was based on evidence of a false claim by protester's general manager, and agency complied with applicable procedural requirements; agency did not suspend protester arbitrarily to avoid awarding it contracts it otherwise was entitled to receive.

**Procurement**

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**Socio-Economic Policies**

- Small business set-asides
- ■ Offers
- ■ ■ Evaluation
- ■ ■ ■ Risks

In procurement set aside for small business concerns, where protester's and awardee's proposals were both rated "blue/exceptional," and protester's evaluated cost was significantly lower than awardee's, agency's rejection of protester's proposal because of "high risk" based on agency's assessment of protester's financial capability, protester's intent or ability to comply with the solicitation's "Limitations on Subcontracting" clause, protester's capacity to form a contract, and protester's contract performance history, was improper in part because the risk assessment resulted in a circumvention of the requirements of the Small Business Act and in part because the risk assessment is unsupported by the record.

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**B-243750, August 28, 1991**

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**Procurement**

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**Payment/Discharge**

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

When a destination carrier delivers household goods in a more damaged condition than when they were picked up 2 years earlier by the origin carrier just prior to nontemporary storage, it is a presumption of the common law that the damage occurred in the hands of the delivering carrier. The destination carrier's allegation that the damage was caused by "extreme climatic conditions" in nontemporary storage, without more, does not overcome the presumption of the delivering carrier's liability.

---

**B-244870, August 28, 1991**

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**91-2 CPD 211****Procurement**

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**Bid Protests**

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

Protest that solicitation bond requirements are contrary to regulation and unduly restrictive of competition is dismissed as untimely when filed after bid opening.

---

**B-245069.2, August 28, 1991**

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**91-2 CPD 212****Procurement**

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**Bid Protests**

- GAO authority
- ■ Non-appropriated funds

General Accounting Office does not consider bid protests of procurements conducted by the Army and Air Force Exchange Service because it is nonappropriated fund instrumentality and therefore not a federal agency.

---

**B-242858.3, August 29, 1991**

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**91-2 CPD 217****Procurement**

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**Bid Protests**

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

Protest that awardee proposed less space than required by solicitation for building lease is dismissed as untimely when protester had in its possession on March 14 the awardee's proposal, which indicated the space offered, yet did not protest this matter until May 16.

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## **Procurement**

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### **Contract Management**

- **Contract administration**
- ■ **Contract terms**
- ■ ■ **Compliance**
- ■ ■ ■ **GAO review**

Acceptance of awardee's offer of office space meeting requirements of solicitation obligated awardee to provide space in accordance with solicitation requirements; whether awardee complies with this obligation is a matter of contract administration not reviewed by General Accounting Office.

---

**B-242957.2, August 29, 1991**

**91-2 CPD 218**

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## **Procurement**

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### **Competitive Negotiation**

- **Requests for proposals**
- ■ **Amendments**
- ■ ■ **Notification**
- ■ ■ ■ **Contractors**

Where protester did not submit a proposal by the closing date for receipt of proposals, agency was not required to provide to the protester a copy of a subsequent amendment which contained changes that did not warrant complete revision of the solicitation or alter the scope of the contract to be awarded.

---

## **Procurement**

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### **Bid Protests**

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

Protester that did not submit a proposal is not an interested party to challenge the agency's evaluation of proposals.

---

**B-243805, August 29, 1991**

**91-2 CPD 213**

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## **Procurement**

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### **Bid Protests**

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

Protester whose proposal did not receive the second highest combined technical/cost score is an interested party to protest agency's failure to notify unsuccessful offerors under a small business set-aside of the identity of the successful offeror prior to award, as required by Federal Acquisition Regulation § 15.1001(b)(2), since agency evaluators rejected all proposals other than the successful offeror's as technically unacceptable; thus, if the protest were sustained, the appropriate remedy would be termination of the awardee's contract and resolicitation of the services, and the protester would be entitled to compete under the resolicitation.

---

## **Procurement**

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### **Socio-Economic Policies**

- **Small businesses**
- ■ **Contract award notification**
- ■ ■ **Notification procedures**
- ■ ■ ■ **Pre-award periods**

Protest objecting to agency's failure to notify unsuccessful offerors under a small business set-aside of the successful offeror's identity prior to award is denied where agency reasonably determined that the urgency of the requirement necessitates award without delay.

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**B-245302, August 29, 1991**

**91-2 CPD 219**

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## **Procurement**

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### **Noncompetitive Negotiation**

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

Protest is dismissed where the identical issue concerning the sole-source procurement of certain replacement parts was considered and denied by our Office in a recently decided protest involving the same parties.

---

**B-238367.6, August 30, 1991**

**91-2 CPD 220**

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## **Procurement**

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### **Competitive Negotiation**

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

Agency reasonably concluded that protester's low-cost, "acceptable" proposal was not as advantageous to the government as a higher-cost, "exceptional" proposal where the protester's lower evaluation largely resulted from the fact that its proposal displayed a lack of understanding of the most important work required under the RFP, and the evaluation criteria provided that technical quality was more important than cost.

---

**B-241639.4, August 30, 1991**

**91-2 CPD 221**

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## **Procurement**

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### **Bid Protests**

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

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## **Procurement**

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### **Bid Protests**

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

Request for reconsideration is denied where it is based on an argument that could have been but was not raised by protester in the course of the original protest.

---

**Procurement**

---

**Bid Protests**

- GAO procedures
  - ■ Preparation costs
- 

**Procurement**

---

**Competitive Negotiation**

- Offers
- ■ Preparation costs

Protester is not entitled to the costs of filing and pursuing its protest where, in response to protest which challenged the specifications in a request for proposals (RFP) and sought cancellation of the RFP and resolicitation under sealed bidding procedures, the agency modified the RFP specifications approximately 2 weeks after the protest was filed and, 2 weeks later, canceled the RFP.

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**Procurement**

---

**Bid Protests**

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

**Procurement**

---

**Specifications**

- Design specifications
- ■ Intellectual property
- ■ ■ Unauthorized use
- ■ ■ ■ Evidence sufficiency

Protest that agency violated protesters' proprietary rights by disclosing in a solicitation drawings allegedly containing proprietary data submitted by the protesters under a prior solicitation is dismissed. Since the agency disclosed the information in competitive solicitations in 1980, 1982 and 1988 and made its position clear in denying an agency-level protest that it did not view the data as proprietary and the protesters failed to further pursue their contentions; it is not appropriate for the General Accounting Office to review the matter at this late date.

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**Procurement**

---

**Specifications**

- Minimum needs standards
  - ■ Competitive restrictions
  - ■ ■ Design specifications
  - ■ ■ ■ Justification
- 

**Procurement**

---

**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Performance specifications
- ■ ■ ■ Justification

Protest that various requirements listed in *Commerce Business Daily* notice and subsequent request for proposals for jet aircraft unduly restrict competition because they are allegedly "written

around" design features of a competitor's aircraft is denied where agency establishes that at least one requirement that the protester cannot meet, involving the ability to use a short runway for takeoff, is necessary to meet its mission needs.

---

## **Procurement**

---

### **Specifications**

- **Minimum needs standards**
- ■ **Competitive restrictions**
- ■ ■ **Performance specifications**
- ■ ■ ■ **Justification**

Agency is not required to accept an aircraft that only partially meets its valid minimum requirements, even at a cost savings.

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**B-243980, August 30, 1991**

**91-2 CPD 225**

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## **Procurement**

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### **Small Purchase Method**

- **Requests for quotations**
- ■ **Evaluation criteria**
- ■ ■ **Sufficiency**

Protest challenging contract award for farm appraisal services as inconsistent with basis for award in request for quotations (RFQ) is denied where record indicates that agency evaluated both awardee's and protester's quotes in accordance with factors stated in RFQ.

---

**B-244727.2, August 30, 1991**

**91-2 CPD 226**

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## **Procurement**

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### **Bid Protests**

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

Request for reconsideration is denied where request contains no statement of fact or legal grounds warranting reversal but merely restates arguments made by the protester and previously considered by the General Accounting Office.

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## **Procurement**

---

### **Bid Protests**

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

---

## **Procurement**

---

### **Bid Protests**

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

Request for reconsideration is denied when based on an argument that could have been but was not raised by protester in course of the original protest.

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