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# Procurement Law

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decisions

**GAO**

United States General Accounting Office

April-June 1983

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**UNITED STATES GENERAL ACCOUNTING OFFICE**

**CHARLES A. BOWSER**

Comptroller General of the United States

**VACANT**

Deputy Comptroller General  
of the United States

**HARRY R. VAN CLEVE**

Acting General Counsel

*April through June 1983*

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 B-208189.2, Mar. 17, 1983, modified in part by B-208189.3,  
 May 20, 1983

*April through June 1983*

*B-207898.3 Apr. 1, 1983 83-1 CPD 340*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER*

Protest filed after award and debriefing contending that protester's proposal was improperly found to be outside of competitive range, and that opportunity to correct its deficiencies should have been afforded, is dismissed as untimely since record indicates protester was aware of alleged improprieties months before protest was filed.

Protest contending agency based evaluation on criteria not stated in solicitation is dismissed as untimely since it was not filed within 10 working days after protester was aware of alleged improprieties.

Protest contending that awardee's design is deficient is dismissed as untimely since record shows alleged deficiency was known to protester more than 10 working days before protest was submitted.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--"GOOD CAUSE" EXCEPTION APPLICABILITY*

GAO will not consider untimely protest under either good cause or significant issue exception to timeliness requirements of GAO's Bid Protest Procedures where there has been no showing of compelling reason beyond protester's control which prevented timely filing of protest, and protest presents no issues which have not been previously considered.

*B-208964.4 Apr. 1, 1983 83-1 CPD 341*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--TIMELINESS*

Request for reconsideration of protest decision filed more than 10 working days after protester received our decision, with which it disagrees, is untimely.

B-209338 Apr. 1, 1983 83-1 CPD 342

*BIDS--RESPONSIVENESS--DESCRIPTIVE LITERATURE--UNSOLICITED--  
DESCRIBING EXCEPTIONS TO IFB--MATERIALITY OF DEVIATIONS*

Bid was improperly rejected as nonresponsive where unsolicited equipment instruction manual submitted with bid took exception to IFB specifications in immaterial respect and where another provision of instruction manual which could be read so as to conflict with IFB specifications was superseded by "supplement," also included with bid, which conformed to specifications.

B-209429 Apr. 1, 1983 83-1 CPD 342

*BIDS--LATE--MISHANDLING DETERMINATION*

Even though firm's bid was misaddressed and initially delivered to wrong office, bid may properly be considered because bid was delivered in sufficient time to office identified in solicitation to obtain information and would have been included in bid opening but for Government action (placing bid in unmarked envelope) which delayed identification of the firm's bid, and Government employee failed to direct bidder to proper office for bid submission.

*CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER*

Protester alleges that bid was nonresponsive since certain information provided by firm on bid form was inaccurate. Agency has determined that response submitted was correct. Under these circumstances, protester has failed to meet its burden of affirmatively proving its allegation.

B-210669 Apr. 1, 1983 83-1 CPD 370

*BIDS--RESPONSIVENESS--EXCEPTIONS TAKEN TO INVITATION TERMS--  
SMALL BUSINESS REQUIREMENTS*

Bid received on total small business set-aside solicitation which indicates bidder would not furnish products manufactured or produced by small business concerns was properly rejected as nonresponsive.

B-210669 Apr. 1, 1983 83-1 CPD 310 - Con.  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Allegation, after bid opening, that questions whether any small business concerns could manufacture or produce item procured by total small business set-aside is untimely and is not for consideration on merits by GAO as it relates to apparent impropriety in solicitation which was not protested to agency prior to bid opening.

B-210798 Apr. 1, 1983 83-1 CPD 344  
CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Contract award necessarily includes finding by contracting officer that awardee is responsible. GAO will not review affirmative determination of responsibility absent showing of fraud or allegation that definitive responsibility criteria were misapplied.

CONTRACTS--NEGOTIATION--"BUYING IN"--NOT PROPER BASIS TO  
PREVENT AWARD

Possibility of buy-in does not furnish ground on which to protest contract.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that solicitation did not contain necessary enclosure goes to impropriety in solicitation. GAO therefore will not consider such protest unless it is filed before closing date for receipt of initial proposals.

GENERAL ACCOUNTING OFFICE--JURISDICTION--ANTI-TRUST MATTERS

Allegation of anti-trust violations is for consideration by Attorney General, not GAO.

B-211047 Apr. 1, 1983 83-1 CPD 345  
BIDS--LATE--WEATHER CONDITIONS, ETC.

Bid dispatched by other than registered or certified mail 4 days before opening, which is received late due to adverse weather conditions and not as result of mishandling after receipt at Govt. installation, is properly rejected.

B-211241 Apr. 1, 1983 83-1 CPD 346  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest of alleged impropriety in solicitation is untimely under GAO Bid Protest Procedures when filed after closing time for receipt of initial proposals.

B-196021.2 Apr. 4, 1983 83-1 CPD 347  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION

Protest concerning small business size status of competing bidder is by law matter for decision by SBA and not for consideration by GAO.

B-208867 Apr. 4, 1983 83-1 CPD 348  
CONTRACTS--PROTESTS--WHAT CONSTITUTES PROTEST

Time for fixing date of protest is when protest is made and not when protester indicates intention to file future protest.

B-209662.2, B-209662.3 Apr. 4, 1983 83-1 CPD 349  
CONTRACTS--NEGOTIATION--CONFLICT OF INTEREST PROHIBITIONS--  
REQUESTS FOR PROPOSALS PROVISIONS--REQUIREMENT FOR  
DISCUSSIONS NOTWITHSTANDING CONFLICT

Where RFP indicates that, if offeror's proposal reveals apparent conflict of interest, offeror will be permitted to negotiate special contract clause to lessen effects of such conflict, agency determination to not hold discus-

sions with offeror which had apparent conflict of interest was unreasonable. Since offeror with apparent conflict of interest was otherwise technically acceptable, award to another offeror on basis of initial proposals without discussions was inappropriate and based on premature nonresponsibility determination.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED*

Allegation that one of offerors under labor surplus area set-aside procurement will not perform enough contract work in labor surplus area to be eligible for award is dismissed. Issue deals with matter of responsibility; before awarding contract to any offeror, agency will have to affirmatively determine awardee to be responsible. Our Office does not review affirmative determinations of responsibility in these circumstances.

*CONTRACTS--AWARDS--ERRONEOUS--PROCEDURE FOR CORRECTING--  
REPROCUREMENT LIMITED TO ORIGINAL OFFERORS--DISCLOSURE OF  
ORIGINAL PRICE QUOTATIONS REQUIRED*

Agency which improperly awarded contract on initial proposals has decided to terminate contract for convenience and to negotiate with original offerors. Agency's proposed method of remedying erroneous award, requiring other offerors to reveal substantially similar pricing information as prerequisite to participating in negotiations, is not objectionable. Protester's price under awarded contract is already disclosed and other offerors have not objected to proposed disclosure.

*CONTRACTS--NEGOTIATION--CONFLICT OF INTEREST PROHIBITIONS--  
DISCUSSIONS CONCERNING APPARENT CONFLICT IN PROPOSALS--  
SMALL BUSINESS PROPOSALS--NONAPPLICABILITY OF CERTIFICATE OF  
COMPETENCY PROCEDURES*

Apparent conflict of interest contained in proposal is properly matter for discussions between contracting agency and small business offeror with apparent conflict of interest rather than for referral to SBA for certi-

ficate of competency review. This is especially so where RFP indicated that offeror with apparent conflict of interest will be allowed to negotiate contract clause designed to lessen effects of conflict of interest.

B-210229 Apr. 4, 1983 83-1 CPD 350

CONTRACTS--PROTESTS--COURT ACTION--DISMISSAL--WITH PREJUDICE

Court's dismissal with prejudice of complaint presenting same issues as pending protest precludes GAO from considering protest since dismissal with prejudice constitutes final adjudication on merits.

B-210951 Apr. 4, 1983 83-1 CPD 351

CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT--PROSPECTIVE SUBCONTRACTORS

GAO will not consider protest raised by potential supplier to disappointed bidder alleging that awardee's bid was nonresponsive. Protester, who is ineligible for award, is not interested party under GAO Bid Protest Procedures.

B-211024 Apr. 4, 1983 83-1 CPD 352

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED

Whether bidder is capable of furnishing required item if bid is accepted concerns firm's responsibility, and GAO will not review contracting officer's determination that bidder is responsible except in limited circumstances.

PATENTS--INFRINGEMENT--REMEDY

Exclusive remedy for alleged patent infringement by Govt. contractor is a suit for damages in Claims Ct.

B-211124 Apr. 4, 1983 83-1 CPD 353

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO PROTESTER

Protest received about 2 months after protester had notice of rejection of its offer with reason for rejection is untimely.

*B-211165 Apr. 4, 1983 83-1 CPD 354  
CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED*

Protest of contracting agency's affirmative determination of responsibility is dismissed since GAO does not review such determinations unless fraud on part of procuring officials is alleged or solicitation contains definitive responsibility criteria which have been misapplied.

*B-206449.3, B-206449.4 Apr. 5, 1983 83-1 CPD 355  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT  
ESTABLISHED*

Prior decision, which sustained protest on basis that awardee's bid was mathematically and materially unbalanced, but did not recommend that contracting agency terminate contract or refrain from exercising options, is affirmed where it has not been established that decision was based on error of law of fact.

*B-206901 Apr. 5, 1983 83-1 CPD 356  
CONTRACTS--NEGOTIATION--CHANGES, ETC.--SPECIFICATIONS--  
LEVEL OF EFFORT CHANGES--NOT PREJUDICIAL*

While agency should have advised offerors, in writing, of change in level-of-effort estimate contained in solicitation, since offerors were advised during discussions of recommended changes in their proposed staffing level needed to conform to revised level of effort failure to issue written amendment was not prejudicial to offerors.

*B-206901 Apr. 5, 1983 83-1 CPD 356 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--DISCUSSION WITH  
ALL OFFERORS REQUIREMENT--"MEANINGFUL" DISCUSSIONS*

Where protester was informed of deficiencies in its technical proposal during initial negotiations and of need to increase its level of effort during second negotiation session agency fulfilled its obligation to point out deficiencies during discussions. Agency is not obligated to help bring protester's lower rated proposal to level of awardee's higher rated proposal.

*B-207631.2 Apr. 5, 1983 83-1 CPD 357  
BIDS--TIMELY RECEIPT--MISPLACED--MISHANDLING BY GOVT.*

Bid received by Govt. before bid opening should not be rejected as late where, despite bidder's oral request for return of bid, agency retained bid and later advised bidder that it still had bid, after which bidder submitted acknowledgment of subsequent solicitation amendments.

*B-207631.2 Apr. 5, 1983 83-1 CPD 357  
BONDS--BID--DISCREPANCY BETWEEN BID AND BID BOND--BID  
RESPONSIVE--SAME LEGAL ENTITY*

Although low bidder's name appears in its bid as "Crimson Enterprises," and in its bid bond as "Crimson Enterprises, Inc." where evidence existing prior to bid opening establishes sameness of two entities, difference may properly be waived as matter of form which does not affect bidder's identity and bid may properly be accepted.

B-207631.2 Apr. 5, 1983 83-1 CPD 357 - Con.  
OFFICERS AND EMPLOYEES--CONFLICT OF INTEREST STATUTES--  
AWARD OF GOVERNMENT CONTRACTS--PROPRIETY

Attendance at prebid conference by noncommissioned officer (NCO) did not undermine integrity of process where agency determined that NCO was not affiliated with any of bidders prior to submission of bids and that NCO's participation in prebid conference had no effect on procurement and record contains no evidence to contrary.

B-207722.2 Apr. 5, 1983 83-1 CPD 358  
PURCHASES--SMALL--SOLE-SOURCE BASIS--ONE KNOWN SOURCE

Issurance of purchase order on sole-source basis to obtain electronic surveillance equipment is not objectionable where contracting officer was informed of threat of imminent terrorist attack and that only one firm could provide 24-hour service and system connected to centrally-monitored police system.

B-207853, B-207969 Apr. 5, 1983 83-1 CPD 359  
CONTRACTS--ARCHITECT, ENGINEERING, ETC. SERVICE--GRANT-  
FUNDED PROCUREMENTS--BROOKS BILL NOT APPLICABLE PER SE

Since protester has not shown that second grantee State's procurement of soil engineer's services was legally improper, its complaint is denied.

GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--NON-  
APPROPRIATED FUND ACTIVITIES

Complaint with respect to procurement practices followed by State in procuring site survey will not be considered where no Fed. funding is involved.

B-208271 Apr. 5, 1983 83-1 CPD 360  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
ALLEGATION OF BIAS NOT SUSTAINED

Where no evidence is presented to support alleged biased evaluation of proposal by procuring agency, allegation must be rejected.

B-208271 Apr. 5, 1983 83-1 CPD 360 - Con.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
COMPETITIVE RANGE EXCLUSION--NOT FOR SBA REVIEW

Agency is not required to refer small business firm's acceptability to SBA for COC determination where firm's proposal was found to be technically unacceptable and thus not within competitive range.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
COMPETITIVE RANGE EXCLUSION--REASONABLENESS

Agency evaluation of protester's proposal and determination that proposal is not technically acceptable are upheld where record fails to establish unreasonableness of agency's assessment of proposal deficiencies.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
INFORMATION SUFFICIENCY

Evaluators are not required to seek information on offeror's capacity from another agency. Such information should have been included in protester's proposal.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICALLY UNACCEPTABLE PROPOSALS--COST NOT A FACTOR

Protester's allegedly lower price is not reason to consider its technically unacceptable proposal since once offer is properly eliminated from competitive range its price is irrelevant.

B-208307 Apr. 5, 1983 83-1 CPD 361

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATIONS  
MINIMUM NEEDS--ADMINISTRATIVE DETERMINATION

Protest that experience requirements in solicitation for hospital aseptic management services unduly restrict competition and exceed Govt.'s actual needs is denied where protester has not shown that contracting agency's belief that such experience is necessary to assure acceptable level of cleaning in critical hospital areas is unreasonable.

B-209610 Apr. 5, 1983 83-1 CPD 363

*EQUIPMENT--AUTOMATIC DATA PROCESSING SYSTEMS--ACQUISITION,  
ETC.--FEDERAL SUPPLY SCHEDULE--MINIMUM NEEDS DETERMINATION*

Drafting specifications to meet the Govt. minimum needs and determination of whether items offered meet specifications are functions of procuring agency.

*EQUIPMENT--AUTOMATIC DATA PROCESSING SYSTEMS--ACQUISITION,  
ETC.--FEDERAL SUPPLY SCHEDULE--MULTIPLE-AWARD V . SINGLE-  
AWARD PROCUREMENT*

FPR allow agency to change from multiple-award procurement to single-award procurement when agency is able to develop standards and specifications for item and agency finds that single-award solicitations would be in best interest of Govt.

B-209750 Apr. 5, 1983 83-1 CPD 364

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--BRAND NAME OR  
EQUAL--"EQUAL" PRODUCT EVALUATION--SALIENT CHARACTERISTICS  
NOT MET*

Bid proposing "equal" film processor in response to brand name or equal invitation may be rejected as nonresponsive when solicitation calls for stainless steel tanks, but bidder offers plastic tanks.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

GAO will dismiss protest alleging that specification is unduly restrictive when it is not filed before bid opening.

B-210416 Apr. 5, 1983 83-1 CPD 365

*BIDS--COMPETITIVE SYSTEM--PRESERVATION OF SYSTEM'S INTEGRITY--  
PRECUNINARY DISADVANTAGE TO GOVERNMENT*

Importance of maintaining integrity of competitive bidding system outweighs possibility that Govt. might realize monetary savings if material deficiency in bid is corrected or waived.

B-210416 Apr. 5, 1983 83-1 CPD 365 - Con.

~~BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT~~

Where bid failed to include descriptive data on offered "or equal" item (and data had not previously been submitted and was not reasonably available to contracting activity), bid was properly determined to be nonresponsive. Failure may not be waived as minor informality/irregularity and data may not be submitted after bid opening in order to make nonresponsive bid responsive where data was not commercially available prior to bid opening.

B-210585.2 Apr. 5, 1983 83-1 CPD 366

~~BIDS--LATE--RULE~~

Agency may consider bid received after bid opening only if bid was sent by registered or certified mail 5 calendar days before bid opening or bid was received late due solely to Govt. mishandling. Bid submitted after bid opening may not be considered in any case.

~~CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED~~

Prior decision that protest alleging that contracting agency denied protester opportunity to compete was untimely because it was filed more than 3 months after protester learned basis of its protest is affirmed.

B-210652.2 Apr. 5, 1983 83-1 CPD 367

~~CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--TIMELINESS~~

GAO will dismiss request for reconsideration relying on new grounds for protest when request is not filed within 10 working days after basis for protest is known or should be known, whichever is earlier. New grounds of protest must independently satisfy timeliness requirements of GAO Bid Protest Procedures.

B-210794 Apr. 5, 1983 83-1 CPD 368  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Protest against award under purchase order is rendered academic by agency's subsequent cancellation of purchase order.

B-211216 Apr. 5, 1983 83-1 CPD 369  
BIDS--PRICES--BELOW COST--NOT BASIS FOR PRECLUDING AWARD

Protester's contention that prospective awardee's bid price is so low that firm will not be able to profitably perform contract will not be considered because it constitutes challenge of bidder's responsibility. GAO will not review affirmative determinations of responsibility absent showing that procuring officials committed fraud or failed to apply definitive responsibility criteria.

CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--  
PROTESTER NOT IN LINE FOR AWARD

Protest concerning evaluation of second-low bid is academic where protester has not presented basis upon which to question prospective award to low bidder.

B-209804.2 Apr. 6, 1983  
CONTRACTS--PROTESTS--COURT ACTION--DISMISSAL

U.S. District Court's final judgment on merits bars further action by GAO on protest involving same issue.

B-211191 Apr. 6, 1983 83-1 CPD 370  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SET-ASIDES--  
ADMINISTRATIVE DETERMINATION

Where neither Small Business Act nor applicable regs. mandate that particular procurement be set aside for small business concerns, matter of whether particular procurement should be set aside is one within discretion of contracting agency.

B-211239 Apr. 6, 1983 83-1 CPD 371

BID--RESPONSIVENESS--EXCEPTIONS TAKEN TO INVITATION TERMS--  
LABOR SURPLUS AREA REQUIREMENTS

Bid submitted under total labor surplus area (LSA) set-aside which designates place of performance that does not appear on Dept. of Labor's published list of LSA's is nonresponsive.

B-209692 Apr. 7, 1983 83-1 CPD 372

BIDS--MISTAKES--CORRECTION--LOW BID DISPLACEMENT

Twelfth low bidder--claiming that it erroneously included its line item price for fueling hose in line item price for fueling hose reel on which hose is to be installed--may not be permitted to correct bid and displace 11 lower bidders, since intended bid is not apparent from bid, invitation, or other bids.

B-208147 Apr. 8, 1983 83-1 CPD 373

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
ADMINISTRATIVE DISCRETION

GAO will not question agency's technical evaluation unless protester shows agency's judgment lacked reasonable basis, was abuse of discretion, or otherwise was in violation of procurement statutes or regulations.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
REASONABLE

Even though results of technical evaluation under one of four evaluation factors appear questionable, protest by lower-cost offeror against selection of contractor is denied since in view of evaluation results under other three factors, and RFP's cost/technical weighting scheme, GAO cannot conclude that selection was unreasonable.

CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED

Bias will not be attributed to technical evaluation committee member based only on inference or supposition.

B-209483 Apr. 8, 1983 83-1 CPD 374  
CONTRACTS--NEGOTIATION--LATE PROPOSALS AND QUOTATIONS--  
GOVERNMENT MISHANDLING DETERMINATION--RULE

Govt. fault was not sole or paramount cause for late receipt of proposal hand-delivered by commercial carrier where it has not been shown that commercial carrier made any attempt to make proper delivery and was not permitted to do so.

CONTRACTS--NEGOTIATION--LATE PROPOSALS AND QUOTATIONS--RULE--  
EXCEPTIONS--APPLICABILITY

Where late proposal was hand-delivered by commercial carrier, rule is that Govt. mishandling exception (found in standard late proposals clause) cannot be utilized to allow consideration of proposal.

B-209634 Apr. 8, 1983 83-1 CPD 375  
BIDS--OPENING--PUBLIC--DRAWINGS, ETC. INSPECTION

Where solicitation requires submission of sample with bid, sample relates to bid's responsiveness, and therefore must be made available for public inspection.

CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED

Protester has failed to meet its burden of proving its case where only evidence on issue is protester's unsupported allegation.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest alleging defects in solicitation which were apparent from face of solicitation is untimely since it was not filed prior to bid opening.

FREEDOM OF INFORMATION ACT--DISCLOSURE REQUESTS--RECORDS  
OF AGENCIES, ETC., OTHER THAN GAO--AUTHORITY OF GAO TO  
REQUIRE DISCLOSURE

GAO is not proper forum for appeal of agency's refusal to allow examination by protester of results

of tests conducted on awardee's bid sample. Protester's recourse is to pursue disclosure remedies provided by Freedom of Information Act.

B-209992 Apr. 11, 1983 83-1 CPD 376

GENERAL ACCOUNTING OFFICE--RECOMMENDATIONS--CONTRACTS--  
SMALL BUSINESS CONCERNS--REQUESTS FOR PROPOSALS--NECESSITY  
TO AMEND OPTION PROVISIONS

Since proposed 8(a) contractor's eligibility under 8(a) program is schedule to expire shortly unless extended by SBA, GAO recommends that solicitation be amended to provide that option provisions will only be exercised if contractor continues to be eligible 8(a) firm.

SMALL BUSINESS ADMINISTRATION--CONTRACTS--CONTRACTING WITH  
OTHER GOVERNMENT AGENCIES--PROCUREMENT UNDER 8(a) PROGRAM--  
AWARD VALIDITY--REVIEW BY GAO

In view of broad discretion afforded SBA and contracting agency under Small Business Act in selection of 8(a) contractors, GAO has no basis to question proposed selection of protester's competitor where record indicates that SBA has followed its own regs. in determining competitor's 8(a) eligibility and there has been no showing of fraud or bad faith on part of Govt. officials.

B-211065 Apr. 11, 1983 83-1 CPD 377

CONTRACTS--PROTESTS--AUTHORITY TO CONSIDER--HOUSING AND  
URBAN DEVELOPMENT DEPARTMENT PROCUREMENTS

GAO will not consider protest concerning procurement actions of Dept. of Housing and Urban Development (HUD) in connection with property maintenance responsibilities under National Housing Act, 12 U.S.C. 1701 et seq., in view of broad statutory authority of HUD to make expenditures in connection with those responsibilities.

B-211234 Apr. 11, 1983 83-1 CPD 378  
CONTRACTS--NEGOTIATION--LATE PROPOSALS AND QUOTATIONS--HAND  
CARRIED--DELAY NOT DUE TO GOVERNMENT ACTION

Offeror is responsible for delivery of its proposal to proper place at proper time, and any exception to general rule requiring rejection of late proposals is permitted only in exact circumstances provided by solicitation. Proposal delivered by commercial carrier--even if timely received in main receiving area--generally must be rejected if it arrives at office designated in solicitation after exact time specified.

B-206641, et al. Apr. 12, 1983 83-1 CPD 380  
BIDS--INVITATION FOR BIDS--SPECIFICATIONS--MINIMUM NEEDS  
REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS

Where several heat distribution system designs have been approved under multi-agency prequalification which would exclude one or more of approved systems are unduly restrictive, and protest on that ground is sustained, since agency has not shown that restrictions are reasonably related to its minimum needs.

Agency is not required to use Guide Specification, drafted to be used with multi-agency prequalification procedure for heat distribution systems, so long as agency can show Guide Specification will not meet its minimum needs..

B-207852.2 Apr. 12, 1983 83-1 CPD 379  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
BRAND NAME OR EQUAL--SALIENT CHARACTERISTICS--SATISFACTION  
OF REQUIREMENT

Protest that awardee's product was not equal to brand name product specified in solicitation is denied. Protester has failed to establish as unreasonable agency's acceptance during discussions of awardee's statement regarding features of awardee's product that allowed it to meet questioned salient characteristic.

B-209262.2 Apr. 12, 1983 83-1 CPD 381  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
JUSTIFICATION--INACCURATE SPECIFICATIONS

Army solicited bids on basis that it later determined did not meet its needs, then added proper basis to IFB, but failed to delete initial one. Resolicitation rather than acceptance of lowest bid submitted on initial basis is proper, since IFB was defective, and agency is not required to award contract for item that does not meet its needs.

CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER

Mere statements contradicting or disagreeing with agency's opinion concerning its actual needs do not meet the protester's burden of proving that agency's opinion was unreasonable.

B-209412 Apr. 12, 1983 83-1 CPD 382  
BIDS--RESPONSIVENESS--EFFECT ON CONFIDENTIAL LEGEND--  
RESTRICTIVE OF COMPETITION

Bid which included restriction on release of price is nonresponsive and should have been rejected, even where contracting officer ignored restriction and disclosed price at bid opening.

B-209617, B-209617.2 Apr. 12, 1983 83-1 CPD 384  
ADMINISTRATIVE DETERMINATIONS--CONCLUSIVENESS--GENERAL  
ACCOUNTING OFFICE--ACCEPTANCE OF CONCLUSION

GAO does not find contracting agency's determination that services being procured are not subject to tariff to be arbitrary.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--BEST AND FINAL--  
ADDITIONAL ROUNDS

Requests for second and third rounds of best and final offers are not objectionable where valid reasons existed for action.

B-209617, B-209617.2 Apr. 12, 1983 83-1 CPD 384 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--UNBALANCED

Where first month of proposal is only month priced differently than remaining 11 months of contract and 36 months which make up 3 option years, and difference totally relates to installation costs, proposal is not mathematically unbalanced, since each month appears to be reasonably related to expenses offeror will incur in each of those years.

B-211153 Apr. 12, 1983 83-1 CPD 385  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT

Protest filed 1 month after protester received notice of award is untimely because although agency did not respond to protest filed with it, subsequent notice of award was initial adverse agency action and protest was not filed within 10 days of such notice as required by GAO Bid Protest Procedures.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--TIME FOR FILING--CONSULTATION WITH  
COUNSEL--NOT VALID BASIS FOR EXTENSION

Delay in filing protest because protester was unable to secure legal counsel is not basis to extend filing time for protest.

B-211189 Apr. 12, 1983 83-1 CPD 386  
CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT--TRADE  
ASSOCIATIONS, ETC.

Labor union protest, alleging agency selection of improper method of procurement (negotiation), is dismissed because union is not an "interested" party for purposes of this issue under GAO Bid Protest Procedures.

GENERAL ACCOUNTING OFFICE--JURISDICTION--LABOR STIPULATIONS--  
WAGE DETERMINATIONS

Labor union protest, alleging agency intention to use

improper wage rates, is for consideration by Dept. of Labor and not by GAO.

B-211219 Apr. 12, 1983 83-1 CPD 387  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION

Protest concerning bidder's small business size status is not for review by GAO since by law it is matter for decision by SBA.

B-211247 Apr. 12, 1983 83-1 CPD 387  
BIDS--INVITATION FOR BIDS--SPECIFICATIONS--MINIMUM NEEDS  
REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS

GAO will not object to a contracting agency's determination that less restrictive specifications will meet its minimum needs. Protest therefore is dismissed.

CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO

Protest alleging that award of contract for maintenance services contract to any other firm may violate software rights protester has under contract with contracting agency is dismissed because it either is matter of contract administration or involves potential patent infringement, matters which are not appropriate for review under our bid protest function.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SET-ASIDES--  
ADMINISTRATIVE DETERMINATION

Protest that procurement for maintenance services to be performed on energy management system should not be set aside for small business concerns because protester, large business and manufacturer of energy management system, could best perform maintenance services is dismissed. Protest does not involve any allegation that adequate small business competition is not available or that contracting agency abused its discretion in this regard.

B-211252 Apr. 12, 1983 83-1 CPD 389

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest of ambiguous specifications is dismissed as un-  
timely since it was not filed prior to the receipt  
of initial proposals as required by GAO Bid Protest  
Procedures.

B-207573.3 Apr. 13, 1983 83-1 CPD 390

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ADDITIONAL EVIDENCE SUBMITTED--  
AVAILABLE BUT NOT PREVIOUSLY PROVIDED TO GAO

Protester which failed to prove that agency's technical  
evaluation was unreasonable cannot provide evidence in  
request for reconsideration that was available during  
initial consideration of protest and which should have  
been presented at that time.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT  
ESTABLISHED

Prior decision that awardee's proposal met request for  
proposals performance-based specification is affirmed  
because protester has not shown that decision was  
erroneous.

B-208510.2 Apr. 13, 1983 83-1 CPD 391

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest alleging that awardee will not be able to  
meet required delivery schedule is dismissed since  
it involves challenge to contracting agency's affir-  
mative determination of awardee's responsibility which  
GAO will not review in circumstances presented.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICALLY EQUAL PROPOSALS--PRICE DETERMINATIVE FACTOR

Protest alleging that contracting agency should have  
considered technical superiority of protester's proposal

and awarded to protester even though its price was higher than awardee's price is denied. Solicitation's evaluation criteria essentially stated only that price and other factors would be considered and that ability to perform also would be considered. Agency reasonably considered products of protester and awardee to be technically equal except for fact that protester offered to deliver product on accelerated basis. Our review finds that solicitation's rather limited criteria were followed. Moreover, in view of fact that protester and awardee offered products which were essentially technically equal, decision to award to lower priced offeror is not objectionable.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest alleging improprieties in solicitation which was filed with contracting agency and GAO after date set for receipt of initial proposals is untimely under sec. 21.2 (b)(1) of our Bid Protest Procedures, which requires such protests to be filed before date for receipt of initial proposals.

*B-208670, B-208809 Apr. 13, 1983 83-1 CPD 392 BIDS--COMPETITIVE SYSTEM--ADEQUACY OF COMPETITION--BIDDER NOT TIMELY SOLICITED, ETC.*

Where rejection of four out of five bids for failure to provide a bid guarantee resulted in award to fourth low bidder at price more than \$1 million higher than low bid, contracting officials should have been alerted to possibility that adequate competition and reasonable price had not been obtained, requiring further investigation before making award. Under circumstances, GAO recommends that agency not exercise contract's option provisions.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED*

GAO will not question contracting agency's affirmative responsibility determination where protesters' various grounds for disputing agency's determination

do not show that there was fraud or bad faith on part of contracting officials or that there were definitive responsibility criteria which were not applied.

*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Allegation that awardee's bid bond was not adequate and was not provided until 10 days after bid opening is without merit where record shows that bid bond accompanied awardee's bid and was for penal sum required by solicitation.

*CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER*

Protesters did not meet their burden of affirmatively proving their case where under evidence presented, GAO cannot determine that agency failed to include in all bid packages page which informed bidders of bid guarantee requirement. Consequently, GAO cannot object to agency's decision to reject protesters' bids as nonresponsive for their failure to include adequate bid guarantee.

*CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION*

GAO will not consider protesters' speculative allegation that awardee is affiliated with large business; moreover, SBA has exclusive authority for determining firm's size status.

*B-208690.3 Apr. 13, 1983 83-1 CPD 393*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED*

Where request for reconsideration fails to present facts or legal arguments which show that previous decision dismissing protest because issues raised by protester had been decided by court of competent jurisdiction was erroneous, decision is affirmed.

B-209083 Apr. 13, 1983 83-1 CPD 394

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--MINIMUM NEEDS  
REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS*

Protest that specifications are not sufficiently rigorous to produce safe and usable product is dismissed since GAO will not question agency determination that less restrictive description will meet agency needs. GAO generally will not consider allegation that more restrictive specifications should have been employed, since use of unduly restrictive specifications violates statutes and Regs. requiring free and open competition in Fed. procurement.

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--TESTS--ADMINISTRATIVE  
DETERMINATION*

Responsibility for tests and procedures to determine product acceptability rests with contracting officials and user activities which are in best position to determine Govt.'s minimum needs and methods of meeting them.

B-209431 Apr. 13, 1983 83-1 CPD 395

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED*

Protest against contracting agency's affirmative responsibility determination will not be considered since GAO no longer reviews contracting agency's affirmative responsibility determinations except for reasons not present here.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
REASONABLENESS*

GAO will not question contracting agency's evaluation of awardee's proposal since it had reasonable basis.

*CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO*

Whether awardee fulfills its contractual obligations is matter for contracting agency in administration of contract,

B-209459 Apr. 13, 1983 83-1 CPD 396

*BIDS--COMPETITIVE SYSTEM--LATE BIDS*

Govt.'s improper action was paramount cause of protester's late arrival, consideration of protester's bid on two items for which no bids had been opened would not compromise integrity of competitive bidding system. However, where bids have been read on other items, late bid should not be considered on those items because to do so might compromise integrity of system.

*BIDS--OPENING--PLACE OF OPENING--CHANGES--NOTICE TO BIDDERS REQUIREMENT*

Govt. acted improperly by changing bid opening room without amending solicitation because original bid opening room was unoccupied and available. If change was necessary, Govt. should have, at minimum, telephonically advised all known bidders of change or that bid opening would be postponed and written amendment issued.

Secretary's statements were not sufficiently clear to put protester on notice that bid opening room had been changed and protester made reasonable and diligent effort to locate bid opening room and did not significantly contribute to delay. Govt.'s change of bid opening room was paramount cause of protester's late arrival.

B-209446 Apr. 13, 1983 83-1 CPD 397

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--SOLICITATION CANCELLED*

Protest of proposed award under solicitation is rendered academic by agency's subsequent cancellation of solicitation.

B-210657.2 Apr. 13, 1983 83-1 CPD 398

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED*

Prior decision is affirmed because protester has

not established that it was based on erroneous conclusion of law or fact.

B-210339 Apr. 13, 1983 83-1 CPD 399

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATIONS--  
MINIMUM NEEDS--ADMINISTRATIVE DETERMINATION

Where agency's minimum need is for new C-130H aircraft, and only single firm can supply one, sole-source purchase from that firm is justified.

CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--PROCEDURES--  
COMMERCE BUSINESS DAILY NOTICE REQUIREMENT--FAILURE TO  
FOLLOW- NOT PREJUDICIAL

Agency's award of sole-source contract before expiration of 5-day period promised in Commerce Business Daily notice of impending sole-source award for responses from firms interested in competing for contract did not prejudice protester, since protester could not have met agency's need.

FREEDOM OF INFORMATION ACT--GENERAL ACCOUNTING OFFICE AUTHORITY

GAO has no authority under FOIA to determine what information must be disclosed by other Govt. agencies.

B-210782 Apr. 13, 1983 83-1 CPD 400

BONDS--BID--ALTERATION--NO EVIDENCE OF SURETY'S CONSENT--  
BID RENDERED NONRESPONSIVE

Bid accompanied by materially altered bid bond--where penal amount has been typed over white-out without evidence in bid documents or on bond itself of surety's consent to be bound by changes--is nonresponsive.

B-211139 Apr. 13, 1983 83-1 CPD 401

BIDS--PREPARATION--COSTS--NONCOMPENSABLE--UNTIMELY PROTEST

Claim for bid preparation costs submitted in connection with untimely protest will not be considered.

B-211139 Apr. 13, 1983 83-1 CPD 401 - Con.  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SIGNIFICANT ISSUE EXCEPTION--PRIOR  
GAO CONSIDERATION OF SAME ISSUE EFFECT

Protest concerning contracting agency's rejection of bid for failure to acknowledge amendment does not involve significant issue warranting exception to timeliness rules under GAO's Bid Protest Procedures, since issue has been considered in previous decisions.

B-211245 Apr. 13, 1983 83-1 CPD 402  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against ambiguous specifications that were apparent from contracting agency's request for prices is dismissed as untimely because filed after closing date for receipt of initial proposals.

B-208143, B-208143.2 Apr. 14, 1983 83-1 CPD 403  
CONTRACTS--NEGOTIATION--PUBLIC EXIGENCY--NEGOTIATION  
LIMITATION

Contract providing A.D.P.E. and related software and services on negotiated basis under "public exigency" exception to formal advertising should not have been for longer period than was necessary to cover urgent need. GAO recommends that contracting agency not exercise remaining options in contract.

B-208504 Apr. 14, 1983 83-1 CPD 404  
CONTRACTS--NEGOTIATION--COMPETITION--RESTRICTIONS--UNDUE  
RESTRICTION--NOT ESTABLISHED

Where protester alleges that solicitation's specifications for recovery bed stretchers are unduly restrictive of competition, contracting agency is required to make prima facie case that specifications are related to its minimum needs. However, once contracting agency has made such case, protester must bear burden of affirmatively proving its case. Protester fails to carry this burden when its arguments do not clearly show that agency's

determination of its actual ~~minimum~~ needs has no reasonable basis.

*CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--JUSTIFICATION*

Agency decisions to procure sole source ~~must~~ be adequately justified and are subject to close scrutiny by GAO. Agency did not justify protested sole-source procurement of transport, pediatric and X-ray stretchers based on need for compatibility and interchangeability of stretcher parts. Other reasons for sole-source procurement, such as ease of training hospital staff and ease of handling stretchers, provides no basis by itself for restricting competition where "training" is no more than simple, routing demonstration of equipment.

*B-209202, B-209202.2 Apr. 14, 1983 83-1 CPD 405  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--CERTIFICATE OF COMPETENCY--  
CONCLUSIVENESS*

While issuance of COC is conclusive as to matters of responsibility, it does not preclude subsequent cancellation of solicitation that contains defective evaluation provisions which provide no assurance that award would be made on basis of most favorable cost to the Govt.

*B-211138 Apr. 14, 1983 83-1 CPD 406  
INDIAN AFFAIRS--CONTRACTING WITH GOVERNMENT--PREFERENCE TO  
INDIAN CONCERNS*

GAO will review Bureau of Indian Affairs' decision not to limit procurements to Indian contractors under Buy Indian Act only where there is prima facie showing of abuse of broad discretion conferred by Act. Implementing policy in Bureau of Indian Affairs Manual to restrict procurements to Indian firms when practicable does not limit discretion to waive policy for particular procurement.

B-211167 Apr. 14, 1983 83-1 CPD 407  
CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest that low bidder (1) submitted unrealistically low bid and (2) cannot properly conduct and maintain quality of college level academic program so as to adequately serve Navy personnel involves affirmative determination of responsibility which is not reviewed by GAO in absence of circumstances not present here.

B-189121 Apr. 15, 1983 83-1 OBD 408  
CLAIMS--EVIDENCE TO SUPPORT--FOREIGN LAW--CLAIMANT'S  
RESPONSIBILITY

Request for reconsideration of denial of claim for payment allegedly due under lease is denied where claimants assert that claim should be decided using foreign law but fail to produce sufficient evidence as to content of foreign law.

LEASES--RENEWALS--OPTION INCORPORATED INTO LEASE--  
CONSIDERATION MATTERS--RULE

Option to renew lease that is incorporated into lease requires no separately stated consideration. Further, there is no requirement that exercise of renewal option be independently supported by consideration.

LEASES--RENEWALS--OPTION INCORPORATED INTO LEASE--EXERCISE  
OF OPTION--UNCONSCIONABILITY CONCEPT--TIME FOR APPLICATION

Where exercise of renewal option is not making of new contract, concept of unconscionability does not apply at time option is exercised.

B-207936 Apr. 15, 1983 83-1 CPD 409  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--DISCUSSION  
WITH ALL OFFERORS REQUIREMENT--"MEANINGFUL" DISCUSSIONS

Protest objecting to lack of specific questions during discussions with respect to its proposal

which contained no major deficiencies is denied since record shows protester was notified of nine areas which evaluators believed could be improved and under circumstances such notification constituted meaningful discussions as required by regulations.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
GENERAL ACCOUNTING OFFICE REVIEW*

GAO will not review competing technical proposals to determine their relative merits because function of GAO is not to make its own determinations as to relative merits of proposals but to examine record and apply standard of reasonableness to agency's determinations.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest contending due date for submission of best final offers allowed insufficient time for preparation and shipment of such offers is untimely under GAO Bid Protest Procedures since protest was filed after closing date.

*B-209531 Apr. 15, 1983 83-1 CPD 410*

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATIONS--  
MINIMUM NEEDS--ADMINISTRATIVE DETERMINATION*

Contracting agency has primary responsibility for drafting specifications reflecting minimum needs of Govt. and GAO will not object in absence of evidence of lack of reasonable basis for questioned specification.

*B-209535 Apr. 15, 1983 83-1 CPD 411*

*BIDS--INVITATION FOR BIDS--AMENDMENTS--ACKNOWLEDGEMENT--  
DEVIATION FROM REQUIRED PROCEDURE--FORM V, SUBSTANCE*

Low bid was improperly rejected as nonresponsive for failure to acknowledge material amendment because only reasonable construction of bid indicates that bidder was aware of amendment and intended to perform its terms.

B-209576 Apr. 15, 1983 83-1 CPD 412  
CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--PROCEDURES--  
COMMERCE BUSINESS DAILY NOTICE PROCEDURES--FAILURE TO FOLLOW--  
PREJUDICIAL TO PROTESTER

Protest against noncompetitive award for film processor is sustained where record indicates requirement was not synopsized timely in Commerce Business Daily. Although procurement was improperly sole-sourced, there is no legal basis to allow any compensation for alleged loss of business to firm which did not submit offer.

B-209611 Apr. 15, 1983 83-1 CPD 413  
BIDS--LATE--MAIL DELAY EVIDENCE--EXPRESS MAIL

Where U.S. Postal Service attempts unsuccessfully to deliver proposal by Express Mail 1/2 hour before closing time for receipt of proposals, proposal may not thereafter be considered under solicitation's late proposal clause since late delivery was not due solely to Govt. mishandling after receipt at Govt. installation.

B-209765 Apr. 15, 1983 83-1 CPD 414  
BIDS--ESTIMATES OF GOVERNMENT--FAULTY--CANCELLATION OF  
INVITATION

Agency's cancellation of solicitation after bid opening is not unreasonable where bidder's protest discloses that estimated quantity for one item is inconsistent with reasonably anticipated usage; agency's review of estimate indicates that it was inadvertently increased tenfold; cost impact of error is significant both in terms of projecting Govt.'s actual cost and in displacing low bidder; and two of bidders appeared to have suspected error and submitted unbalanced bids on that basis, thereby gaining unfair competitive advantage.

B-209775 Apr, 15, 1983 83-1 CPD 475

*CONTRACTORS--RESPONSIBILITY--ADMINISTRATIVE DETERMINATION--  
NONRESPONSIBILITY FINDING--SUPPORTED BY RECORD*

GAO will not disturb procuring agency's determination that firm is nonresponsible when that determination is reasonably based on requirement for timely response to demands for service and specification sets forth minimum levels of repair teams, repair parts and manuals that contractor must have in local area to provide timely service, which levels firm clearly does not satisfy.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest initially filed with procuring agency after bid opening alleging that specification provisions concerning minimum level of repair teams, repair parts and manuals that contractor must have in local area are restrictive is untimely under GAO Bid Protest Procedures and will not be considered on merits.

B-210123.2 Apr. 15, 1983 83-1 CPD 476

*BIDS--RESPONSIVENESS--DESCRIPTIVE LITERATURE--DEFICIENCIES--  
DESCRIPTION OF MODEL*

Bid is nonresponsive where descriptive data required to be submitted with it for evaluation purposes does not show that item offered meets invitation's specifications.

*BIDS--RESPONSIVENESS--TEST TO DETERMINE--UNQUALIFIED OFFER  
TO MEET ALL SOLICITATION TERMS*

Statement in cover letter to bid that bidder will furnish item that meets all IFB specifications does not cure otherwise nonresponsive bid.

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS*

Because bid that does not offer to meet invitation's material requirements is nonresponsive and must be rejected, bidders' actual ability to meet those

requirements is irrelevant.

B-210258 Apr. 15, 1983 83-1 CPD 417  
BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--  
BID NONRESPONSIVE

Agency correctly rejected bid as nonresponsive where bidder failed to acknowledge receipt of amendment incorporating wage rate determination and where record fails to show that bidder is legally obligated to pay wages not less than those provided for in minimum wage rate determination. Fact that bidder may not have received amendment is irrelevant unless failure to receive bid resulted from deliberate attempt by contracting agency to exclude firm from competition.

B-211073.2 Apr. 15, 1983 83-1 CPD 418  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--PRIOR TO RESOLUTION  
OF SIZE PROTEST--NOT PREJUDICIAL TO PROTESTER--SMALL BUSINESS  
ADMINISTRATION CONFIRMATION OF SIZE STATUS AFTER AWARD

Protest against agency's award of contract under small business set-aside 3 days before Small Business Administration (SBA) was scheduled to issue its decision on protest of prospective awardee's small business status is dismissed, since SBA's decision confirmed awardee's status as small business and protester therefore was not prejudiced by award.

B-211261 Apr. 15, 1983 83-1 CPD 419  
CONTRACTS--NEGOTIATION--REQUEST FOR PROPOSALS--CERTIFICATION  
PREFERENCE--CARRIAGE OF PASSENGERS AND CARGO

Where solicitation provision advised that offerors not offering vessels certified for carriage of passengers and cargo by Coast Guard would only be considered if no responsive offers of certified vessels were received, and two responsive offers of certified vessels were received, agency's refusal to consider protester's offer of non-certified vessel was proper.

B-211261 - Apr. 15, 1983 83-1 CPD 419 - Con.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against solicitation vessel certification requirement is dismissed as untimely since protest was not filed in GAO or agency before closing date for receipt of initial proposals.

B-211355 Apr. 15, 1983 83-1 CPD 420

CONTRACTS--AWARDS--DELAYED AWARDS--EXTENSION OF BID ACCEPTANCE  
PERIOD

Protest that contracting officer violated DAR by not awarding contract within bid acceptance period is summarily denied. DAR does not require that award be made within bid acceptance period and DAR specifically permits agency to request bid extension where administrative difficulties delay award beyond bidder's acceptance period.

B-211356 Apr. 15, 1983 83-1 CPD 421

CONTRACTS--AWARDS--DELAYED AWARDS--EXTENSION OF BID ACCEPTANCE  
PERIOD

Protest that contracting officer violated DAR by not awarding contract within bid acceptance period is summarily denied. DAR does not require that award be made within bid acceptance period and DAR specifically permits agency to request bid extension where administrative difficulties delay award beyond bidder's acceptance period.

B-208237 Apr. 19, 1983 83-1 CPD 422

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest is untimely where protester learned of requirements to be imposed on benchmark during pre-benchmark discussions but waited until after date set for benchmark to protest.

B-208237 Apr. 19, 1983 83-1 CPD 422 - Con.  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--BENCHMARKING  
PROCEDURES

Since it is not always feasible to schedule benchmarking on date that is common to all offerors, time set for benchmarking each offeror's equipment controls "next closing date" for purpose of GAO Bid Protest Procedures.

B-203652 Apr. 20, 1983 83-1 CPD 423  
CONTRACTS--PROTESTS--SUSTAINED--EVALUATION OF PROPOSALS--  
DEVIATION FROM STATED CRITERIA

Protest is sustained where Navy did not evaluate proposal for air cushion landing craft design on common basis or in accord with stated requirements and evaluation criteria. In circumstances, decision to reject protester's proposal without discussions had no rational basis.

B-208365.2 Apr. 20, 1983 83-1 CPD 424  
BIDDERS--RESPONSIBILITY V. BID RESPONSIVENESS--CONTRACTOR'S  
WORK FORCE--PERCENTAGE USE REQUIREMENT

Compliance with solicitation provision that contractor perform 30 percent of work with contractor's own organization, contract performance requirement in that provision states how work is to be accomplished, does not relate to responsiveness.

BIDS--RESPONSIVENESS--TEST TO DETERMINE--UNQUALIFIED OFFER  
TO MEET ALL SOLICITATION TERMS

Bid that does not reduce, limit or modify requirement that contractor perform 30 percent of work with contractor's own organization is responsive to solicitation.

B-211202 Apr. 20, 1983 83-1 CPD 425  
BIDDERS--RESPONSIBILITY V. BID RESPONSIVENESS--BOND REQUIREMENT

Matter of acceptability of individual bid bond sureties concerns question of responsibility,

not responsiveness.

B-211202 Apr. 20, 1983 83-1 CPD 425

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest on basis of sufficiency of individual bid bond sureties is dismissed since it involves matter of responsibility and GAO does not review affirmative determinations of responsibility unless protester shows fraud on part of procurement officials or solicitation contains definitive criteria which allegedly have not been applied.

B-206799 Apr. 21, 1983 83-1 CPD 426

CONTRACTS--PAYMENTS--ASSIGNMENT--VALIDITY OF ASSIGNMENT--  
ASSIGNEES' RIGHT TO PAYMENT

Where Govt. has received notice of valid assignment, but thereafter erroneously pays assignor, it remains liable to assignee for erroneous payment.

Although third party guarantor repaid assignee financing bank sum outstanding on loan made by bank to Govt. contractor, Govt. remains obligated to pay assignee bank since Govt. is stranger to transactions between assignee and third party.

Third party guarantor becomes subrogated to financing bank's rights under latter's assignment of Govt. contractor's right to contract payments where guarantor paid contractor's debt to financing bank pursuant to obligation as guarantor of loan. Accordingly, guarantor stands in place of original financing bank and obtains right to be paid by Govt. in amount which guarantor paid to bank.

CONTRACTS--PAYMENTS--ASSIGNMENT--ASSIGNEES' CLAIMS--SETTLEMENT

Because of apparent validity of both assignee's claim and subrogee's claim, GAO recommends that both parties be requested to direct Govt. as to form in which payment should be issued, with

appropriate waiver of possible claims sufficient to provide Govt. with an acquittance which shall be binding on both.

*B-208986 Apr. 21, 1983 83-1 CPD 427*

*BIDDERS--RESPONSIBILITY Y. BID RESPONSIVENESS--MANUFACTURER OR DEALER DETERMINATION*

Bidder's failure to certify in bid that it was regular dealer or manufacturer does not render bid non-responsive, since such information may be, and was, submitted prior to award.

*BIDS--INVITATION FOR BIDS--DEFECTIVE--NOT PREJUDICIAL TO PROTESTER--EVALUATION CRITERIA--UNDISCLOSED*

Invitation for bids that did not clearly state that travel cost estimate would be used in bid evaluation and did not state how it would be used is defective, where travel costs were evaluated, because solicitation must apprise bidders of basis for bid evaluation. However, protester was not prejudiced by defect, since awardee's bid was low whether travel costs were evaluated or not.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED*

Adequacy of bidder's place of performance is matter of responsibility, not responsiveness and will not be reviewed by GAO.

*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Contrary to protester's assertion, agency did not change bid evaluation factor of travel cost estimate after bid opening where estimate was developed on per unit basis and number of units being procured was reduced prior to bid opening, because estimate was automatically reduced at that time, even though actual calculation was not made until after bid opening.

B-208986 Apr. 21, 1983 83-1 CPD 427 - Con.  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Bidders failure to certify that product will be produced by small business is irrelevant, since procurement is not small business set-aside.

B-211197 Apr. 21, 1983 83-1 CPD 428  
CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest that bidder is incapable of meeting solicitation delivery schedule is dismissed since it concerns challenge to agency's affirmative determination of responsibility which is not matter for review by GAO absent showing of possible fraud or bad faith on part of procuring officials or that solicitation contains definitive responsibility criteria that have not been applied.

B-201642.2 Apr. 22, 1983 83-1 CPD 430  
EQUIPMENT--AUTOMATIC DATA PROCESSING SYSTEMS--COMPUTERS--  
MINIMUM NEEDS REQUIREMENT--OVERSTATED

Earlier decision denied protest that agency was procuring computing capacity in excess of its minimum needs because agency provided studies justifying needs and protester did not show that basis for needs was unreasonable. Subsequent GAO audit found that studies were erroneously performed and reached incorrect conclusions. Request for reconsideration based on that information is sustained, and prior decision is modified accordingly.

B-206070.2 Apr. 22, 1983 83-1 CPD 431  
CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--ADMINISTRATIVE  
DETERMINATION--REASONABLE BASIS

Mere submission of unsolicited proposal is not sufficient to call into question sole-source determination which has been found to be reasonable.

B-206070.3 Apr. 22, 1983 83-1 CPD 431 - Con.  
CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--INTERIM CONTRACT

Sole-source award to incumbent contractor to provide critical services for period from expiration of firm's contract to completion of competition for new contract was justified where agency reasonably concluded that incumbent was only firm that could meet agency's requirements within required timeframe.

CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Complaint regarding agency's dilatory actions in completing procurement action is without merit where record of agency action shows that agency was proceeding at reasonable pace in view of complexity of agency requirements and number of protests filed in regard to procurement.

B-206399, B-207258 Apr. 22, 1983 83-1 CPD 432  
BIDS--INVITATION FOR BIDS--SPECIFICATIONS--DEVIATIONS--  
WAIVER--FURNISHING MORE THAN IFB REQUIREMENTS

It is not inconsistent for agency to accept floor carpeting with density factor greater than minimum specified in IFB, while rejecting protester's stairway carpeting because it had primary and secondary backings and weighed 160 ounces per square yard when specification required primary backing only and minimum of 82 ounces. Increased density of floor carpeting improved its utility and exceeded agency's requirements, while stairway carpeting's primary and secondary backing and excess weight rendered it unfit for stairway use.

BIDS--AMBIGUOUS--DISCREPANCY BETWEEN BID DATA, ETC. AND  
SAMPLES, ETC. SUBMITTED--WAIVER OF AMBIGUITY--PRICE, QUALITY,  
QUANTITY NOT EFFECTED

Where bidder offered carpet which, according to bid's cover letter, met required noise reduction coefficient of .25 and agency determined actual conformance to requirement from samples and other

specifications with respect to pile material, height and density, any ambiguity created by accompanying bid data indicating coefficient of .15 was properly waived, since it had no effect on price, quantity, quality or delivery.

*BIDS--RESPONSIVENESS--SAMPLE REQUIREMENT*

Where IFB required inclusion with bid of samples of carpet tile for floors and separate samples of broadloom carpeting for stairwats, each of which had to meet particular specifications, but protester submitted samples only for carpet tile, agency properly rejected bid as nonresponsive. Protester's subsequent declaration that it intended to furnish same carpet for both uses is irrelevant, since that intention was not apparent from bid as submitted.

*B-207495 Apr. 22, 1983 83-1 CPD 433*

*GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--DISPUTES--  
UNDER DISPUTES CLAUSE--FACT QUESTIONS*

GAO will not consider objections regarding solicitation specifications which protester was obligated to meet by virtue of prior contracts for virtually identical work since protester is required to submit all claims arising under that contract to contracting officer. GAO consideration of objections would permit protester to circumvent claim resolving process of protester's prior contract since favorable decision by GAO could be used as basis to challenge prior contract.

*B-207519.2 Apr. 22, 1983 83-1 CPD 434*

*CONTRACTS--FEDERAL SUPPLY SCHEDULE--SPECIFICATIONS--  
RESTRICTIVE--BURDEN OF PROVING UNDUE RESTRICTION*

GSA decision to meet its stock program requirements for coat hangers by purchasing two types of clothes hangers separately is reasonable Govt. minimum needs decision.

B-208204.2 Apr. 22, 1983 83-1 CPD 435  
CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--  
NOT JUSTIFIED

Cancellation of request for proposals (RFP) issued in accordance with OMB Circular A-76 was unjustified where agency could have adjusted its in-house estimate, if necessary, to correct possibility that Govt. estimate was not based on same scope of work as reflected in revised RFP under which commercial offerors submitted best and final offers.

B-208744 Apr. 22, 1983 83-1 CPD 437  
CONTRACTORS--RESPONSIBILITY--ADMINISTRATIVE DETERMINATION--  
NONRESPONSIBILITY FINDING--PROPRIETY OF DETERMINATION

Contracting officer's nonresponsibility determination based on data supplied by another procurement activity which showed that protester had significant problems performing prior contracts, had suffered four default terminations, and had been determined nonresponsible on several occasions, was reasonable notwithstanding fact that protester had successfully performed several other contracts.

Fact that protester may recently have been found responsible by other contracting officers does not show that contracting officer acted unreasonably in making nonresponsibility determination, because such determinations are judgmental and two contracting officers may reach opposite conclusions on similar facts.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--FACTORS FOR  
CONSIDERATION--DEFAULT TERMINATIONS--DESPITE PENDING  
APPEALS

Fact that default terminations had been appealed to ASBCA does not eliminate such termination as evidence of bidder's nonresponsibility.

B-208763 Apr. 22, 1983 83-1 CPD 436  
CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATIONS--  
MINIMUM NEEDS--ADMINISTRATIVE DETERMINATION

Protester has not met burden of showing that experience requirement in solicitation was in excess of minimum needs or unduly restricted competition.

B-208795.2, B-209311 Apr. 22, 1983 83-1 CPD 438  
BIDS--UNBALANCED--PROPRIETY OF UNBALANCE--"MATHEMATICALLY  
UNBALANCED BIDS"--MATERIALITY OF UNBALANCE

Apparent low bid on contract for 1-year base period and 2 option years is materially unbalanced where there is reasonable doubt that acceptance of bid--which has substantially front-loaded base period price and does not become low until well into last option year--will result in lowest ultimate cost to Govt.

B-209241 Apr. 22, 1983 83-1 CPD 440  
BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--  
BID RESPONSIVE

Where estimated cost increased, occasioned by amendment, constituted, at minimum, approximately 11.25 percent of difference between low and second low bid prices, amendment had more than trivial or negligible effect on standing of bidders, and failure of bidder to acknowledge receipt of amendment prior to bid opening was valid basis for determining bid to be nonresponsive.

BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--  
EFFECT OF ACKNOWLEDGEMENT OF LATER AMENDMENT WHICH REFERENCES  
EARLIER AMENDMENT

Fact that amendment acknowledged by bidder referenced portion of earlier unacknowledged amendment did not constitute incorporation of former amendment into later or acknowledgement of all previously issued and unacknowledged amendments.

*B-209241 Apr. 22, 1983 83-1 CPD 440 - Con.  
CONTRACTS--AWARDS--PROTEST PENDING--LEGALITY OF AWARD--  
EFFECT OF AGENCY REGULATIONS*

Even assuming protest was filed prior to award and contracting officer did not comply with requirements in DAR 2-407.8(b)(3) (1976 ed.) before making award, such failure is procedural defect and does not affect validity of otherwise valid award.

*B-209297, B-209297.2 Apr. 22, 1983 83-1 CPD 441  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--UNBALANCED--  
NOT AUTOMATICALLY PRECLUDED*

Only offers found to be materially (versus mathematically) unbalanced must be rejected.

*CONTRACTS--NEGOTIATION--PRICES--BELOW COST--EFFECT ON  
RESPONSIBILITY*

Absent nonresponsibility determination by procuring agency, no basis exists to preclude contract award merely because offeror may have submitted below-cost prices or below-cost proposal where contract is not on cost-reimbursement basis.

*CONTRACTS--PROTESTS--ALLEGATIONS--BIAS--NOT PREJUDICIAL TO  
PROTESTER*

Even if bias is proven, protest will be denied if there is no indication that bias adversely affected protester's competitive standing.

*CONTRACTS--PROTESTS--ALLEGATIONS--SPECULATIVE*

Where bias is alleged, protester has burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on basis of inference or supposition.

B-209297, B-209297,2 Apr. 22, 1983 83-1 CPD 441  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against alleged deficiencies apparent on  
face of request for proposals must be filed prior  
to closing date for receipt of proposals in order to  
be timely.

B-209358 Apr. 22, 1983 83-1 CPD 442  
GENERAL ACCOUNTING OFFICE--JURISDICTION--SUBCONTRACTS

Potential subcontractor's protest against subcontract  
awards is dismissed because it does not meet any of  
circumstances under which GAO considers subcontractor  
protests.

B-209703 Apr. 22, 1983 83-1 CPD 443  
ADVERTISING--COMMERCE BUSINESS DAILY--PROCUREMENT NOT PROPERLY  
CATERGORIZED--ERRONEOUS SMALL BUSINESS RESTRICTION--EFFECT

Although procurement was advertised in Commerce  
Business Daily--first as unrestricted and later  
as restricted to small business--award to large  
business concern would not be improper, since RFP  
was not restricted and it would be improper to  
base award on preference not stated in RFP.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--DEFINITIVE  
RESPONSIBILITY CRITERIA--WAIVER BY AGENCY--PROPRIETY

Contracting agency cannot properly waive de-  
finitive criteria of responsibility specifica-  
lly and purposely placed in solicitation.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER--DOUBTFUL

Doubt as to timeliness of protest is resolved  
in favor of protester.

B-209707 Apr. 22, 1983 83-1 CPD 444

*BIDS--INVITATION FOR BIDS--AMENDMENTS--ACKNOWLEDGEMENT--  
DEVIATION FROM REQUIRED PROCEDURE--FORM V. SUBSTANCE*

Protester's bid should not have been rejected as nonresponsive because of protester's failure to use revised Bidding Schedule included as part of amendment No. 0001. Since protester expressly acknowledged amendment No. 0001, it is legally bound to perform, without exception, exact thing called for by amended invitation.

*BIDS--PRICES--REDUCTION BY LOW BIDDER--AFTER BID OPENING*

Low responsive bid may be reduced after bid opening since this does not affect relative standing of bidders. Therefore, protester's bid may be reduced by amount bid for item deleted under revised Bidding Schedule.

B-210000 Apr. 22, 1983 83-1 CPD 445

*BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
COMPELLING REASONS ONLY*

Cancellation of formally advertised solicitation after bid opening requires cogent and compelling reason, but is appropriate when fair and equal competition—or competition on equal basis—appears to have been thwarted.

*BIDS--INVITATION FOR BIDS--DEFECTIVE--ESTIMATES OF  
GOVERNMENT REQUIREMENTS--LACKING*

When bidder quotes hourly rates for service calls, but solicitation contains neither historical data nor estimated number of calls, hourly rates cannot be extended or properly evaluated under solicitation that indicates that prices for such calls will be considered in determining lowest total bid price.

*BIDS--OMISSIONS--PRICES IN BIDS--SUBITEMS*

When services covered by sub-item are material, and nothing on face of bid indicates that item

prices are all-inclusive, omission of prices for sub-items cannot be waived as minor informality or corrected after bid opening. Rather, bid must be considered nonresponsive.

*CONTRACTORS--INCUMBENT--COMPETITIVE ADVANTAGE*

When incumbent for repair and maintenance contract has records as to number of service calls required in past years, but solicitation includes neither historical data nor estimated number of calls required in future, other bidders lack information necessary for intelligent preparation of their bids, and incumbent gains competitive advantage.

*B-210201 Apr. 22, 1983 83-1 CPD 446*

*CONTRACTORS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--CRITERIA--APPLICATION OF CRITERIA*

Protest that evaluation scheme employed by agency was inconsistent with criteria listed in request for proposals (RFP) is denied where description contained in RFP adequately supports weights which were utilized.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--TECHNICAL SUPERIORITY V. COST*

Protest that award to higher scored but higher priced offeror should have been supported by specific determination that technical superiority of proposal warranted additional costs involved is denied where record indicates that such determination could have been made and that award was in accordance with criteria set forth in solicitation and had rational basis.

*B-210243 Apr. 22, 1983 83-1 CPD 447*

*CONTRACTS--DISCOUNTS--PROMPT PAYMENT--DELAY IN MAKING--CAUSED BY CONTRACTOR*

Govt. may not be deprived of its right to prompt payment discount where delay in making payment is caused by contractor. Further, agency's claim to

prompt payment discount on funds withheld from contractor who has not submitted invoices takes priority over claims resulting from wage underpayments and over IRS tax lien.

*CONTRACTS--LABOR STIPULATIONS--VIOLATIONS--LIQUIDATED DAMAGES V. EMPLOYEE CLAIMS*

Dept. of Labor's claim to withheld funds on behalf of workers underpaid by Govt. contractor has priority over Govt.'s claim for as yet undetermined liquidated damages stemming from contractor's violation of Contract Work Hours and Safety Standards Act.

*CONTRACTS--LABOR STIPULATIONS--SERVICE CONTRACT ACT OF 1965--WAGE UNDERPAYMENTS--CLAIM PRIORITY AS TO FUNDS WITHELD--UNDERPAID WORKERS V. IRS LEVY*

Dept. of Labor's claims to withheld funds on behalf of workers underpaid by contractor in violation of Service Contract Act and Contract Work Hours and Safety Standards Act (CWSSA), and to liquidated damages for violation of the CWSSA, have priority over IRS lien for unpaid taxes.

*LIENS--TAXES--PRIORITY--INTERNAL REVENUE SERVICE V. STATE TAX LIEN--FIRST IN TIME*

IRS tax lien on funds withheld from contractor has priority over state levy of attachment where tax lien was filed first.

B-210870 Apr. 22, 1983 83-1 CPD 448

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS*

Timeliness of protest is academic because, regardless of when protest was filed, GAO will not question contracting officer's nonresponsibility determination where SBA affirms determination by refusing to issue protester certificate of competency.

B-210870 Apr. 22, 1983. 83-1 CPD 448 - Con.  
CONTRACTS--PROTESTS--SUMMARY DISMISSAL

Protest is dismissed without requesting protester's comments on contracting agency report because report clearly demonstrates that matter is not reviewable by GAO.

B-211231 Apr. 22, 1983 83-1 CPD 449  
BIDS--PRICES--BELOW COST--NOT BASIS FOR PRECLUDING AWARD

Mere fact that awardee may have submitted below-cost bid does not constitute legal basis for precluding contract award.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest challenging capability of awardee to perform contract relates to matter of responsibility which will not be reviewed absent showing that contracting officer acted fraudulently or in bad faith.

CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--DETERMINATION NOT  
TO USE--SCOPE OF GAO REVIEW

In general, GAO will not review protest that agency should procure item from particular firm on sole-source basis. Further, decision whether particular procurement should be set aside for small business essentially is one within discretion of the contracting agency.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest alleging that agency used confidential and propriety information in developing specifications for first-step solicitation of a two-step procurement is untimely when filed more than 4 months after the first-step closing date for receipt of proposals.

B-211269 Apr, 22, 1983 83-1 CPD 450  
SALES--BIDS--DEPOSITS--PERSONAL CHECKS--SUFFICIENCY OF FUNDS  
VERIFICATION--RIGHT TO FINANCIAL PRIVACY ACT 09781

Defense Disposal Manual, covering sale of surplus property, provides that bid deposits may be in any one or combination of forms, specifically including personal checks, and does not require contracting officers to attempt to determine whether such checks are covered by sufficient funds. Protester therefore has no legal basis to challenge award of sales contract to firm submitting personal check that allegedly will be dishonored.

B-211299 Apr. 22, 1983 83-1 CPD 451  
CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

GAO does not review affirmative determinations of responsibility absent showing of possible fraud or bad faith or misapplication of definitive responsibility criteria.

CONTRACTS--REQUEST FOR QUOTATIONS--SPECIFICATIONS--RESTRICTIVE  
"APPROVED SOURCE" REQUIREMENT

While DAR 1-313(c) allows purchasing activity to solicit only approved suppliers of "source controlled" parts, reg. does not preclude consideration of unapproved sources that can qualify their products.

B-211326 Apr. 22, 1983 83-1 CPD 452  
BIDS--RESPONSIVENESS--FAILURE TO FURNISH SOMETHING REQUIRED--  
PRICES

Agency properly rejected bid as nonresponsive where bidder left blank space designated for mileage charge under solicitation for automobile rental.

BIDS--SIGNATURES--CONTINUATION SHEETS

Failure to sign bid continuation sheets does not render bid nonresponsive where bidder indicated

intent to be bound by bid by signing bid form in space provided for that purpose.

B-210410 et al. Apr. 25, 1983 83-1 CPD 453  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO CLOSING DATE FOR RECEIPT OF QUOTATIONS

Protests concerning alleged failure to require inspection and acceptance at source for critical application aircraft parts concern improprieties in solicitation that are apparent and therefore must be filed prior to the closing dates for receipt of initial quotations.

B-210766.2 Apr. 25, 1983 83-1 CPD 454  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--REVIEW BY GAO--  
PROCUREMENT UNDER 8(a) PROGRAM--STANDARD OPERATING  
PROCEDURES COMPLIANCE

GAO will not review SBA's compliance with its own internal guidelines for Small Business Act's section 8(a) program absent showing of possible fraud or bad faith on part of Govt. officials.

B-210959, B-211208 Apr. 25, 1983 83-1 CPD 455  
CONTRACTS--GRANT FUNDED PROCUREMENTS--GENERAL ACCOUNTING  
OFFICE REVIEW--SUBCONTRACT AWARDS--"BY OR FOR" GRANTEE  
REQUIREMENT FOR REVIEW

GAO will not consider complaint that prime contractor with Indian Housing Authority did not comply with Department of Housing and Urban Development regulations and contract provision requiring preference in awarding subcontracts be given to Indian-owned enterprises unless it is shown subcontract award was "for" Indian Housing Authority.

B-210290.2 Apr. 26, 1983 83-1 CPD 484  
CONTRACTS--PROTESTS--ISSUES IN LITIGATION

GAO will not reconsider decision where same material issues are pending before Claims Ct. without expression of interest from ct.

B-210851 Apr. 26, 1983 83-1 CPD 456  
CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT--PROTESTER  
NOT IN LINE FOR AWARD

Where third low bidder protests that low bid should be rejected, but does not protest against second low bid, third low bidder is not "interested party" under Bid Protest Procedures because it would not be in line for award if protest is sustained.

B-211318 Apr. 26, 1983 83-1 CPD 457  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest concerning alleged solicitation impropriety received by GAO after closing date for receipt of initial proposals is dismissed as untimely.

B-211353 Apr. 26, 1983 83-1 CPD 458  
CONTRACTORS--RESPONSIBILITY--ADMINISTRATIVE DETERMINATION--  
NONRESPONSIBILITY FINDING--LACK OF INTEGRITY--REASONABLENESS  
OF FINDING

Lack of integrity of key employee of bidder/firm may properly constitute grounds for finding bidder nonresponsible when it appears that significant influence might be exercised by employee in performance of contract.

Question whether evidence of bidder's employees' lack of integrity is sufficient to warrant finding in particular case that bidder is not responsible is matter primarily for determination by administrative officials concerned, and such determination will not be disturbed by GAO absent clear showing of lack of reasonable basis for finding.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--RESPONSIBILITY  
DETERMINATION--NONRESPONSIBILITY FINDING--REVIEW BY GAO

While generally GAO will not consider protest of nonresponsibility determination where SBA has denied

B-211505 Apr. 26, 1983 83-1 CPD 459

~~CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--~~  
~~TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT~~

Protest filed with GAO more than 10 days after protester receives notice of adverse agency action on protest initially filed with agency is untimely and will not be considered.

B-209446.2 Apr. 29, 1983 83-1 CPD 460

~~BIDS--RESPONSIVENESS--BID GUARANTEE REQUIREMENT~~

Prior decision holding that bid bond naming two different sureties was materially defective is reversed since under facts and circumstances it now appears that contingency feared--intended surety's ability to avoid any obligation under bond--is too remote in view of other indicia on or accompanying bond reasonably indicating that surety would be bound.

B-210094 Apr. 29, 1983 83-1 CPD 461

~~BIDDERS--RESPONSIBILITY V. BID RESPONSIVENESS--RESUMES~~  
~~SUBMISSION REQUIREMENT~~

IFB requirement that low bidder submit resumes and other specified information after bid opening but prior to award relates to responsibility, not bid responsiveness. GAO will not review sufficiency and relative quality of information submitted pursuant to such requirement.

~~CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--~~  
~~TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT~~  
~~PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS~~

Allegation that agency should have used different procurement format is untimely and not for consideration on merits since it concerns defect apparent on face of solicitation but was not raised before bid opening date as required by GAO Bid Protest Procedures.

B-210094 Apr. 29, 1983 83-1 CPD 461 - Con.  
BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--  
WAIVER--SIGNIFICANCE OF AMENDMENT

Amendment is not material, and bid not containing acknowledgement of its receipt will not be found nonresponsive, where amendment imposes no different or additional requirement on bidders; mere theoretical possibility that amendment could have increased bid prices does not make it material where record contains no evidence substantiating that possibility.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Whether bidder is capable of performing in accordance with terms of solicitation is matter of that bidder's responsibility as prospective contractor. Affirmative determinations of responsibility are based in large part on business judgments of contracting officer, and will not be questioned by GAO absent circumstances not present here.

B-207847 May 2, 1983 83-1 CPD 462  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--DISCUSSION  
WITH ALL OFFERORS REQUIREMENT--"MEANINGFUL" DISCUSSIONS

Protest contending discussions were not meaningful because agency did not specifically convey its concern regarding use of analytic model which agency thought was inappropriate is denied since agency identified its area of concern when it requested explanation of proposed low level of effort which proposal showed was primarily attributable to use of model.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICALLY UNACCEPTABLE PROPOSALS--ADMINISTRATIVE  
DETERMINATION

Protest that agency's failure to rescore protester's proposal after best and final offers before rejecting it as unacceptable was improper is denied, since agency reasonably determined that proposal was not acceptable, and that determination was not inconsistent with stated evaluation criteria.

B-208309 May 2, 1983 83-1 CPD 463

*BIDS--COMPETITIVE SYSTEM--EQUAL BIDDING BASIS FOR ALL BIDDERS--  
FRONT END LOADING OF BID--FINANCE COST SAVINGS BUILT INTO BID*

Even if protester is correct that awardee was able to build financing cost savings into its bid by loading its bid price into category of charges to be paid up front, awardee in fact realized no competitive advantage from doing so since awardee would have been low bidder even without these alleged savings.

*BIDS--UNBALANCED--PROPRIETY OF UNBALANCE--"MATHEMATICALLY  
UNBALANCED BIDS"--MATERIALITY OF UNBALANCE*

Mathematically unbalanced low bid is not materially unbalanced, and thus need not be rejected, where acceptance of that bid will result in lowest cost to Govt.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Allegation that solicitation for leasing of modular office units was defective for failing to advise bidders how much of their total bid price would be paid to them up front as delivery and installation charges, as opposed to being amortized over term of lease, is untimely because it was not raised prior to bid opening.

B-208797 May 2, 1983 83-1 CPD 464

*CONTRACTS--NEGOTIATION--COMPETITION--EQUALITY OF COMPETITION--  
INCUMBENT CONTRACTOR'S ADVANTAGE*

Protest that competition was unfair because incumbent on preliminary study enjoyed competitive advantage on follow-on contract because of superior knowledge is without merit. Agency is not obligated to compensate for advantages of incumbency unless they result from unfair Govt. action. Moreover, draft report, based on study, was included in solicitation and proposals were evaluated against this study, effectively negating advantage.

B-208797 May 2, 1983 83-1 CPD 464 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--APPLICATION OF CRITERIA

Protest filed after award that agency failed to give preference to minority- and woman-owned business is denied where solicitation did not provide for any such preference.

Contention that agency did not consider informational deficiencies in solicitation in evaluating proposals is without merit where record shows that agency recognized omissions and evaluated proposal against only information and requirements stated in solicitation.

CONTRACTS--PROTEST--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that solicitation contained inadequate data upon which to base a proposal is untimely where not filed with GAO until after award.

B-209243 May 2, 1983 83-1 CPD 465  
CONTRACTS--NEGOTIATION--AWARDS--INITIAL PROPOSAL BASIS--  
PROPRIETY

Contract may be awarded without discussions if offerors are apprised of this possibility and there is adequate competition to ensure that award is at fair and reasonable price.

CONTRACTS--NEGOTIATION--AWARDS--PROPRIETY--TECHNICAL  
SUPERIORITY-PARAMOUNT CONSIDERATION

Procuring agency may award contract to offeror whose technical superiority outweighs additional cost to Govt. if determination is reasonable and offerors are adequately apprised of relative values of technical and cost criteria.

B-209243 May 2, 1983 83-1 CPD 465 - Con.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
EVALUATORS--SLIGHT INACCURACIES IN COMMENTS

Slight inaccuracies in comments made by agency evaluators do not provide basis for sustaining protest where correction of inaccuracies would not significantly alter relative standing of protester and awardee.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
INSPECTION OF FACILITIES--NOT REQUIRED

GAO is aware of no requirement that procuring agency inspect facilities of offeror responding to RFP.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
POINT RATING--PROPRIETY OF EVALUATION

When protester has suffered substantial losses and has poor ratio of assets to liabilities, evaluators reasonably may award higher point score to financially stable offeror. While financial condition generally relates to offeror's responsibility, in appropriate circumstances, it may be used to compare relative merits of technical proposals. In future, however, procuring agency must fully justify such use.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL ACCEPTABILITY--SCOPE OF GAO REVIEW

GAO will question procuring agency's assessment of technical merit of proposals only upon clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regs.

B-207485.3 May 3, 1983 83-1 CPD 467

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--  
REASONABLE BASIS--CHANGED CONDITIONS, NEEDS, ETC.

Agency properly may cancel solicitation and resolicit in lieu of issuing solicitation amendment and seeking revised proposal where nature of Govt.'s requirements

its changed from indefinite quantity to reduced fixed quantity and fixed quantity is significantly less than estimated quantity listed in original solicitation.

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--RESOLICITATION--AUCTION ATMOSPHERE NOT CREATED*

Auction situation will not be created by resolicitation even though prices under initial solicitation were disclosed because resolicitation reduced quantity of items to be procured, changed nature of contract from indefinite to fixed quantity, and was issued approximately 1 year after initial prices were submitted.

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--RESOLICITATION--EFFECT OF PUBLIC DISCLOSURE OF ALL OFFERORS' PRICES*

Public disclosure of all offerors' prices does not require that award be made to offeror originally in line for award under initial solicitation, where cancellation of solicitation and resolicitation are in accordance with Govt. legal requirements.

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CONSTRUCTION--REASONABLE INTERPRETATION*

Solicitation provision which states that Govt. is obligated to order minimum quantity can only be reasonably interpreted as applying to figure identified in solicitation as minimum quantity, not figure identified as initial order quantity.

*B-207688 May 3, 1983 83-1 CPD 468*

*CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR RESOLUTION BY GAO*

Dispute between protester and contracting agency concerning whether protester was entitled to extension of contract is matter of contract administration which is not for resolution by our Office.

B-207688 May 3, 1983 83-1 CPD 468 - Con.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Bid protest alleging that solicitation improperly excluded protester and its affiliates from competition is timely even though protest was filed in GAO at 12:19 p.m. and bids were opened at 10 a.m. that same day. There is 3-hour time difference between location of bid opening (Eugene, Oregon) and location of GAO (Washington, D.C.). Therefore, protest was filed in our Office before bids were actually required to be submitted in accord with section 21.2(b)(1) of our Bid Protest Procedures. B-195497, June 2, 1983, modified.

*TIMBER SALES--DEFAULT--DEFAULTING PURCHASER--EXCLUSION FROM  
BIDDING ON RESALE*

Forest Service reg. (36 C.F.R. 223.5(h)(1)), which excludes defaulted purchaser from bidding on resale of timber remaining under defaulted contract, unless Forest Service determines that allowing defaulted purchaser to bid is in public interest, is valid. GAO recommendation in B-195497, June 2, 1980, is modified in accord with Siller Brothers, Incorporated v. United States, 655 F.2d 1039 (Ct. Cl. 1981), cert. denied, 102 S. Ct. 1970 (1982).

B-210266 May 3, 1983 83-1 CPD 470

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
BASIS FOR EVALUATION--INFORMATION CONTAINED IN PROPOSAL V.  
THAT DERIVED FROM PRE-AWARD SURVEY, ETC.*

Technical evaluation must be based on information contained in proposal and, consequently, pre-award survey is not substitute for information that should have been included in offeror's technical proposal.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
EXPERIENCE RATING--PERSONNEL EXPERIENCE V. EXPERIENCE OF  
ORGANIZATION*

Where evaluation of "experience" in technical proposal is to be based on experience of person-

nel to be assigned to contract, resumes of those personnel included in proposal must support level of experience claimed in text of proposal.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL ACCEPTABILITY V. RESPONSIBILITY DETERMINATION--  
INAPPLICABILITY OF CERTIFICATE OF COMPETENCY PROCEDURES*

Agency determination in course of technical evaluation that proposal submitted by small business concern does not demonstrate adequate experience or resource capability is element of proposal evaluation, not determination of nonresponsibility requiring referral to SBA.

B-210582 May 3, 1983 83-1 CPD 471

*BIDS--COMPETITIVE SYSTEM--COMPLIANCE REQUIREMENT--PECUNIARY  
ADVANTAGE NOTWITHSTANDING*

Possibility that Govt. might realize monetary savings in particular procurement if material bid deficiency is waived is outweighed by importance of maintaining integrity of competitive bidding system.

*BIDS--INVITATION FOR BIDS--AMBIGUITY ALLEGATION--NOT  
SUSTAINED--ONLY ONE REASONABLE INTERPRETATION*

Where protester's interpretation of IFB instruction is inconsistent with format used in solicitation, interpretation is not reasonable and provides no basis for concluding that IFB was ambiguous.

*BIDS--RESPONSIVENESS--DETERMINATION--ON BASIS OF BID AS  
SUBMITTED AT BID OPENING*

Where protester includes in its bid completed clauses regarding ordering and guaranteed minimum quantities not applicable to procurement, agency may properly find bid nonresponsive if bidder's intention to comply with terms of solicitation is not discernible from face of bid.

B-210582 May 3, 1983 83-1 CPD 471 - Con.  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--NOT APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Bid protest filed after bid opening alleging that solicitation provisions are ambiguous is timely since protester was unaware of agency interpretation forming basis of protest until after bids were opened.

B-199540.4 May 5, 1983 83-1 CPD 472  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

Prior decision is affirmed where protester, in its request for reconsideration, disagrees with GAO's conclusions and with relevance of cases cited, but has not provided any basis which would warrant reversal of prior decisions.

B-209239 May 5, 1983 83-1 CPD 473  
BIDS--ALL OR NONE--AWARD TO ONE BIDDER ADVANTAGEOUS

Bidder who offered "all or none" on groups of items and then gave lower bid price if minimum quantity was awarded was entitled to award when it offered lower overall price for combination of items bid, even though its prices for some of individual items necessary to reach minimum quantity may have been higher than those of another bidder.

BIDS--AMBIGUOUS--"ALL OR NONE" LANGUAGE USE

Protester's bid offering alternative prices based on all or none by State or all or none by State with minimum award quantity was not ambiguous.

B-210625 May 6, 1983 83-1 CPD 474  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Protest filed more than 10 working days after basis for protest is known is untimely and will not be considered.

B-210625 May 6, 1983 83-1 CPD 474 - Con.  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that agency improperly waived requirements of qualified products list (QPL) in solicitation is untimely since it was not filed prior to bid opening.

B-210941.3 May 6, 1983 83-1 CPD 475  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Where an agency informs a protester that its proposal is outside competitive range and provides specific list of reasons for such determination, protest against that determination must be filed within 10 working days from date protester is so informed. Protester is not entitled to wait for debriefing since basis of protest is already known to it.

B-211361 May 6, 1983 83-1 CPD 476  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT--INTERIM  
APPEALS TO AGENCY- EFFECT ON 10 WORKING DAY FILING PERIOD

Protest with GAO is untimely where filed more than 10 working days after protester received contracting officer's denial of initial protest filed with contracting agency. Protester's continued pursuit of its protest with contracting agency does not extend time frame for filing subsequent protest with GAO.

B-211377 May 6, 1983 83-1 CPD 477  
CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest questioning awardee's ability to supply wheelchair cushions at offered price is matter of responsibility which GAO will not consider except in circumstances not present here.

CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO

Contention that awardee is substituting less costly filling for that required by specification is matter of contract administration which is function and

responsibility of procuring agency which GAO does not resolve,

B-211428 May 6, 1983 83-1 CPD 478

CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR RESOLUTION BY GAO

GAO generally will not review potential subcontractor's protest of prime's award to another subcontractor where Govt. only approved award since matter involves contract administration, which is procuring agency's responsibility.

CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT--PROSPECTIVE SUBCONTRACTORS

Potential supplier to prime contractor is not interested party under GAO's Bid Protest Procedures to challenge propriety of procuring agency's acceptance of bid for prime contract.

B-211468 May 6, 1983 83-1 CPD 479

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT

Protest filed with GAO more than 10 working days after initial adverse agency action (bid opening) on protest filed with contracting agency is untimely and not for consideration notwithstanding its submission to GAO by certified mail, since certified letter was not mailed not later than fifth day prior to final date for timely filing of protest with GAO.

B-211523 May 6, 1983 83-1 CPD 480

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SET-ASIDES--ADMINISTRATIVE DETERMINATION

GAO does not review agency decision to set aside or not set aside contracts for 8(a) award because of broad discretion Small Business Act has given contracting officials for this purpose, unless there is showing of fraud or bad faith on part of Govt. officials.

B-211537 May 6, 1983 83-1 CPD 481  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--RESPONSIBILITY  
DETERMINATION--NONRESPONSIBILITY FINDING--REVIEW BY GAO

GAO will not undertake independent review of contracting officer's nonresponsibility determination of small business concern because SBA has statutory authority to determine conclusively small business concern's responsibility.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--CERTIFICATE OF COMPETENCY--  
CONCLUSIVENESS

GAO will not review SBA's decision not to issue COC where protester fails to make prima facie showing of fraud or willful disregard of facts.

B-211546 May 6, 1983 83-1 CPD 482  
CONTRACTS--PROTESTS--DENIAL--SUMMARY DENIAL

Protest that agency should have set aside procurement for small business concerns is summarily denied since, with two exceptions not alleged to exist in this case, there is no legal requirements that particular procurement be set aside for small business.

B-211579 May 6, 1983 83-1 CPD 483  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that agency improperly requested revised proposals must be filed before closing date for their receipt.

B-208799 May 9, 1983 83-1 CPD 485  
LEASES--NEGOTIATION--DEVIATION OF OFFERS FROM RFP--  
ACCEPTABILITY--SOLICITATION PERMITTING DEVIATIONS

Agency may accept proposal for lease of office space which offers only weekly janitorial service under solicitation which calls for daily janitorial service when solicitation also permits deviations

from requirements by providing that evaluation of rent price will be adjusted for any specification item required but not offered by offeror.

*LEASES--NEGOTIATION--EVALUATION OF OFFERS--COST/PRICING--REASONABLENESS*

Where small lease procedures are utilized and award is to be made in very brief period of time, contracting officer's basing his estimate of cost of cleaning service on informal survey of area lessors appears to be reasonable and is not shown to be inappropriate by protester's statement, unsupported by any evidence, that amount was inadequate.

*LEASES--NEGOTIATION--REVISION OF OFFERS--REFUSAL TO PERMIT--PROPRIETY*

Protester was not treated unfairly by contracting officer who did not permit protester to submit revised offer since solicitation for small lease award did not contemplate submission of revised proposals.

*B-209235 May 9, 1983 83-1 CPD 486*

*BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--DEFECTIVE SOLICITATION*

Cancellation of solicitation was reasonable where solicitation did not clearly indicate that alternate bids were requested.

*CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT*

Where protester, second low bidder, protests not only cancellation of invitation for bids, but also alleges that low bidder was nonresponsive, protester is interested party because it would be eligible for award if its protest is sustained.

*CONTRACTS--AWARDS--PROPRIETY--LICENSING-TYPE REQUIREMENTS--GENERAL V. SPECIFIC SOLICITATION REQUIREMENT*

GAO will not consider allegation that firm is not in compliance with solicitation's general licensing require-

ment because this is matter to be resolved between State and local authorities and contractor, and only in limited situations concerns affirmative finding of responsibility which is not reviewed by GAO except in circumstances not present here.

*B-209488.2 May 9, 1983 83-1 CPD 487  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--CONTRACT  
TERMINATED FOR DEFAULT*

Protest against award of contract to firm is dismissed as academic where contract has been terminated for default.

*B-211300 May 9, 1983 83-1 CPD 488  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT*

Protest filed with GAO more than 10 working days after protester learns of initial adverse agency action on protest filed with agency is dismissed as untimely.

*B-211547 May 9, 1983 83-1 CPD 489  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest that various provisions in solicitation were arbitrary or unduly restrictive is untimely since it involves alleged solicitation improprieties but was not filed prior to closing date for receipt of initial proposals

*B-211552 May 9, 1983 83-1 CPD 490  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Postaward protest based on inadequate specifications which were apparent prior to bid opening is dismissed as untimely.

B-211589 May 9, 1983 83-1 CPD 491

BIDS--"BUYING IN"--NOT BASIS FOR PRECLUDING AWARD

Possibility of buy-in is not proper basis upon which to challenge validity of award.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

GAO does not review affirmative determination of responsibility absent showing of possible fraud or bad faith by procurement officials or misapplication of definitive responsibility criterion.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest filed after award that solicitation should have contained requirement for first article approval testing is untimely, since protest based upon alleged solicitation impropriety must be filed prior to bid opening.

B-211618 May 9, 1983 83-1 CPD 492

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest alleging improprieties in solicitation is dismissed as untimely when filed after bid opening because GAO Bid Protest Procedures require filing prior to bid opening.

B-208559.2 May 10, 1983 83-1 CPD 493

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

Decision is affirmed on reconsideration in absence of any showing that earlier decision was based on errors of fact or law.

B-208786.3. May 10, 1983. 83-1 CPD 494

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
ERRORS--NOT PREJUDICIAL*

GAO will deny protest that Navy used incorrect cost figures in evaluating protester's best and final offer where protester, though aware of mistake in initial proposal, failed to take advantage of opportunity to change figures in best and final.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
NOT FOR SBA REVIEW*

Statute requiring matter to be referred to SBA before small business concern can be precluded from award as nonresponsible does not apply when small business' elimination from competition is not based on determination of nonresponsibility, but rather on decision that awardee's proposal is most advantageous to Govt.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
POINT RATING--SIGNIFICANCE OF DIFFERENCES*

Whether given point spread between two competing proposals indicates significant technical superiority of one over other depends on facts and circumstances of each case, and is primarily matter within discretion of procuring agency. That protester's proposal was considered technically acceptable does not mean that it was equivalent to that of awardee and does not render evaluation of awardee's proposal abuse of discretion.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL SUPERIORITY V. COST*

In negotiated procurement, agency need not make award on basis of lowest cost, but rather, has discretion to select highly-rated technical proposal over lower-rated, but lower cost, proposal if such action is in best interest of Govt. and is consistent with evaluation criteria in FRP.

B-208786.3 May 10, 1983 83-1 CPD 494 - Con.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Since protester should have known when it received request for best and final offers that agency did not intend to conduct oral negotiations, protest on this basis filed 2 months after due date for best and finals is untimely.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER--DOUBTFUL

While protesters must diligently pursue information that forms basis of protest, when agency admits that announcement of award dated July 7 may not have been mailed until period of July 30 to Aug. 4, GAO will resolve doubts about timeliness of protest based on information obtained in debriefing requested on Aug 6 in favor of protester.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--NEW ISSUES--UNRELATED TO ORIGINAL  
PROTEST BASIS

New grounds of protest must independently satisfy timeliness requirements of GAO bid protest procedures and thus must be filed within 10 working days after basis for them is known or should have been known.

B-209438.2 May 10, 1983 83-1 CPD 495

BIDS--MISTAKES--CORRECTION--AFTER BID OPENING--RULE

In order to have error in bid corrected after bid opening, bidder must submit clear and convincing evidence of error and intended bid price. Moreover, weight given to such evidence is question of fact to be considered administratively by procuring agency, whose decision will not be disturbed by our Office unless it is without reasonable basis.

B-209438,2 May 10, 1983. 83-1 CPD 495 - Con.  
~~BIDS--MISTAKES--CORRECTION--DELEGATION OF AUTHORITY--TO  
PROCUREMENT AGENCY~~

GAO cannot question procuring agency's refusal to permit correction of bid mistake alleged after bid opening where documentation submitted in support of claim allows more than one interpretation as to intended bid.

~~BIDS--MISTAKES--WAIVER, ETC. OF ERROR--"INTENDED BID"  
STILL LOWEST--EVIDENCE SUFFICIENCY~~

Where bidder alleges mistake after bid opening, it is not then generally free to decide to waive its claim. Nevertheless, waiver will be permitted if it is clear that intended bid would have been lowest even though intended bid could not be clearly proven for purpose of bid correction. However, it is impossible to conclude that alleged mistaken bid would have been lowest where intended bid is subject to interpretations which would make bid high.

B-209723 May 10, 1983 83-1 CPD 496  
~~CONTRACTS--MODIFICATION--ADDITIONAL WORK OR QUANTITIES--  
WITHIN SCOPE OF CONTRACT REQUIREMENT~~

Contract modification, issued 2 months after contract award, which represented exercise of contract option to expand contractor's level of effort, did not exceed scope of contract or have effect of circumventing procurement statutes.

~~CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--AMENDMENT--  
EQUAL COMPETITIVE BASIS FOR ALL OFFERORS~~

Acceptance of proposal which does not conform with material solicitation requirement without amending solicitation to provide offerors opportunity to respond to changed requirements is improper.

B-210013 May 10, 1983 83-1 CPD 497

~~BIDS--EVALUATION--TECHNICAL ADEQUACY--ADMINISTRATIVE DETERMINATION~~

Overall determination of technical adequacy of bids is primarily function of procuring agency. Therefore, contracting officer has reasonable amount of discretion in evaluation of bids. Moreover, judgment of procuring agency's technicians and specialists as to technical adequacy of bids or proposals submitted in response to agency's statement of its needs will generally be accepted by our Office. Our Office will only question such determinations where there is clear showing of unreasonableness, arbitrariness, abuse of discretion or violation of procurement statute or Reg.

~~BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT~~

Where bidder failed to list salient characteristic in brand name or equal procurement, procuring agency may not seek clarification from bidder, after bid opening, as to why salient characteristic was not included in bid since this would permit bidder to make its nonresponsive bid responsive after bid opening and would be tantamount to permitting bidder to submit new bid.

Where "equal" item does not conform to salient characteristics of brand name product, bid must be rejected as nonresponsive.

B-210173 May 10, 1983 83-1 CPD 498

~~BIDS--INVITATION FOR BIDS--SPECIFICATIONS--MINIMUM NEEDS REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS~~

GAO will not object to specification requirements for underground portion of steam mains, since contracting agency has broad discretion in determining its needs and it has not been shown that requirements are not necessary to meet agency's needs. Fact that protester disagrees with agency's determination of its needs does not invalidate determination.

B-210317 May 10, 1983 83-1 CPD 499  
BIDS--OPENING--PREMATURE OPENING

Cancellation of solicitation after bid opening and resolicitation was proper where agency reasonably determined that, since bids had been opened prematurely, there was apparent prejudice to awardee under prior procurement, which had protested premature opening, and to other potential bidders. Even if protester has shown that increased competition was unlikely based on limited competition in past and on resolicitation (prior awardee did not bid), agency's exclusion of incumbent alone supports cancellation.

B-211370 May 10, 1983 83-1 CPD 500  
BIDS--RESPONSIVENESS--FAILURE TO FURNISH SOMETHING REQUIRED--  
DESCRIPTIVE LITERATURE

Even if contracting agency allegedly requested protester to submit, after bid opening, additional literature necessary to evaluate its bid, such request does not negate descriptive literature clause, which requires rejection of bids not containing literature at opening as nonresponsive.

B-202813.3 May 12, 1983 83-1 CPD 502  
CONTRACTS--PROTESTS--PREMATURE

Protest and claim for proposal preparation costs based on Govt. allegation filed in Federal court that contractor fraudulently rigged preaward demonstration tests conducted by contracting agency to evaluate equipment proposed is dismissed as premature because resolution of matter must depend upon evidence that ultimately will be presented in court litigation.

B-210652.3 May 12, 1983 83-1 CPD 503  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--CERTIFICATE OF COMPETENCY--  
CONCLUSIVENESS

GAO generally will not review denial of certificate of competency, since SBA has conclusive statutory

authority to determine all elements of small business bidder's responsibility. Failure to adopt regional office's affirmative recommendation does not, of itself, show fraud or bad faith on part of SBA headquarters officials, since this is business judgment of type that such officials are expected to make. Nor are SBA's coordination of information with procuring activity, adoption of pre-award survey findings, or failure to provide bidder with opportunity to supplement information in application evidence of fraud or bad faith sufficient to invoke GAO review.

*B-210689 May 12, 1983 83-1 CPD 504*

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--  
PROTESTER NOT IN LINE FOR AWARD*

Protest that solicitation was ambiguous as to the manner in which items were to be bid is dismissed as academic because, even using intended bid of protester, bid is not low.

*B-211636 May 12, 1983 83-1 CPD 505*

*CONTRACTS--PROTEST--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER*

Protest is untimely where filed 1 month after date of publication of notice of award in Commerce Business Daily (CBD), since protester is charged with constructive notice of CBD announcement and protest was not filed within 10 working days after basis of protest was known or should have been known. 4 C.F.R. 21.2(b)(2).

*B-211659 May 12, 1983 83-1 CPD 506*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT*

Protest to GAO filed more than 10 working days after protester's receipt of contracting agency's denial of protest filed with contracting agency is untimely and will not be considered on merits.

B-205994.2, et al. May 16, 1983 83-1 CPD 507  
BIDS--INVITATION FOR BIDS--SPECIFICATIONS--ACCREDITATION  
REQUIREMENT--NOT MET BY JOINT VENTURE

Joint venture composed of accredited educational institution and managing venturer which is not accredited does not meet solicitation requirement for contractor accreditation, since imputing accredited firm's status to joint venture would frustrate intent of requirement, which is to insure that educational programs are managed by accredited institutions.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--DEFINITIVE  
RESPONSIBILITY CRITERIA--ACCREDITATION REQUIREMENT

GAO will not object to definitive responsibility requirement in solicitation for basic skills education programs for military trainees, that contractor be accredited educational institution, since contracting agency's view that requirement is needed to assure quality instructional programs is reasonable.

B-207660.3 May 16, 1983 83-1 CPD 508  
CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION  
V. AMENDMENT--SUBSTANTIALITY OF CHANGES--DETERMINATION TO  
AMEND

Navy's decision, after amending the RFP, to refuse to consider revised proposal from offeror whose initial proposal was rejected as late is upheld where protester has not shown that amendment substantially changed RFP requirements so as to require solicitation of new offers.

B-209028 May 16, 1983 83-1 CPD 509  
CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--  
REASONABLE BASIS--TECHNICALLY UNACCEPTABLE PROPOSALS

Cancellation of solicitation is proper where there is no offeror eligible for award. Solicitation which contemplates research, development and redesign and in

which Govt. specifically refuses to guarantee specifications involves more than build-to-print effort. Proposal which contemplates build-to-print effort therefore may be found technically unacceptable.

B-209359 May 16, 1983 83-1 CPD 510

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--APPLICATION OF CRITERIA

Evaluators' consideration of offeror's unique approach to satisfying solicitation requirements does not demonstrate that criteria other than those set forth in RFP have been applied.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
REASONABLE

Protest of technical evaluation of proposals and contract award to offeror proposing higher cost than protester's is denied where contracting agency's determinations have not been shown to be unreasonable or inconsistent with evaluation criteria contained in solicitation.

B-209456 May 16, 1983 83-1 CPD 511

BIDS--RESPONSIVENESS--EXCEPTIONS TAKEN TO INVITATION TERMS--  
DELIVERY PROVISIONS--LIMITATIONS ON GOVERNMENT'S RIGHT TO  
ISSUE NOTICE TO PROCEED

Solicitation indicated that work was to begin in October 1982, 10 days after issuance of Notice to Proceed. Bid which contains condition which limits Govt.'s right to issue effective Notice to Proceed because bidder states it cannot begin performance until October 31, 1982, is nonresponsive and was properly rejected.

B-209474 May 16, 1983 83-1 CPD 512

CONTRACTS--NEGOTIATION--LATE PROPOSALS AND QUOTATIONS--  
BEST AND FINAL OFFERS

Only best and final offers submitted by common cutoff date are for consideration.

B-209474 May 16, 1983 83-1 CPD 512 - Con.  
~~CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--BEST AND FINAL--~~  
~~WRITTEN NOTIFICATION~~

Contracting agency's failure to confirm in writing oral request for best and final offers does not automatically result in disturbance of contract award.

B-210056 May 16, 1983 83-1 CPD 513  
~~HOUSING AND URBAN DEVELOPMENT DEPARTMENT--HOUSING ASSISTANCE~~  
~~PROGRAMS--INDIAN LOW-INCOME PROJECTS--AWARDS OF SUBCONTRACTS--~~  
~~PREFERENCE TO INDIAN-OWNED ENTERPRISES--GENERAL ACCOUNTING~~  
~~OFFICE REVIEW~~

GAO will not consider hypothetical questions about various agencies' implementations of Indian preference in Indian Self-Determination and Education Assistance Act in response to request by Indian firm that was not awarded contract by Indian Housing Authority.

GAO will not review Dept. of Housing and Urban Development's implementation of Indian preference in Indian Self-Determination and Education Assistance Act programs nationwide, since same matter is before court of competent jurisdiction.

~~HOUSING AND URBAN DEVELOPMENT DEPARTMENT--HOUSING ASSISTANCE~~  
~~PROGRAMS--INDIAN LOW-INCOME PROJECTS--AWARDS OF SUBCONTRACTS--~~  
~~PREFERENCE TO INDIAN-OWNED ENTERPRISES--"TO THE GREATEST~~  
~~EXTENT FEASIBLE" REQUIREMENT~~

Indian Self-Determination and Education Assistance Act does not require the recipient of Dept. of Housing and Urban Development (HUD) assistance funds to select an Indian-owned firm for contract for benefit of Indians where agency reasonable decides firm does not have experience to perform as required, because statute, as well as HUD's implementing grant regs., call for preference "to the greatest extent feasible," which confers broad discretionary authority with respect to selection decisions.

B-210132 May 16, 1983 83-1 CPD 514

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest that prospective awardee offering another company's items does not have that company's express authorization to do so is dismissed, since whether prospective awardee in fact can supply items is matter of responsibility and, absent circumstances not present, GAO will not review contracting officer's affirmative responsibility determination.

DEFENSE ACQUISITION REGULATION--PURCHASE OF "SOURCE CONTROLLED"  
PARTS (Sec. 1-313(c))--APPROVED SUPPLIER REQUIREMENT--  
NONPRECLUSION OF NONMANUFACTURER OFFERING APPROVED SOURCE'S  
PRODUCT

While procurement of critical items may be restricted to approved sources pursuant to Defense Acquisition Reg. 1-313, neither that reg. nor Air Force's supplemental reg. precludes award to non-manufacturer offering approved source's product.

B-210204 May 16, 1983 83-1 CPD 515

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--EVALUATION  
CRITERIA--ALTERED BY AMENDMENT AFTER RECEIPT OF INITIAL  
PROPOSALS--PROPRIETY

Alteration of evaluation plan after receipt of initial proposals by issuance of amendment to request for proposals was proper since all offerors were informed of change and given opportunity to restructure their technical proposals to reflect change.

B-211396.2 May 16, 1983 83-1 CPD 516

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against specifications in request for proposals is untimely when filed after closing date for receipt of proposals.

B-211521 May 16, 1983 83-1 CPD 517

GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--DISPUTES--  
BOARD OF CONTRACT APPEALS DECISIONS

GAO will not consider claim concerning contract administration matter which was previously raised before ASBCA.

B-211604 May 16, 1983 83-1 CPD 518

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that specifications restrict competition, which was not filed until after bid opening, is dismissed as untimely under 4 C.F.R. 21.2(b)(1) (1983) since impropriety in specifications was apparent prior to bid opening.

B-207898.4 May 17, 1983 83-1 CPD 520

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

Request for reconsideration is denied where protester presents no new information or error of law not fully considered in reaching prior decision.

B-208877 May 17, 1983 83-1 CPD 521

BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--  
BID NONRESPONSIVE

Where bidder fails to acknowledge receipt of amendment to solicitation which changes applicable wage rate and extends bid opening date, bidder's failure to acknowledge receipt, either actually or constructively, cannot be waived as minor irregularity and bid must be rejected.

B-209092 May 17, 1983 83-1 CPD 522

BIDS--INVITATION FOR BIDS--AMBIGUOUS--OBJECTIVE TEST

Test of whether solicitation is ambiguous is objective one and is not necessarily dependent on any particular bidder's interpretation.

B-209092 May 17, 1983 83-1 CPD 522 - Con.

*BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
DEFECTIVE SOLICITATION*

Cancellation of solicitation was proper where phrase explaining statutory cost limitation was ambiguous and ambiguity was clearly prejudicial to at least apparent low bidder.

B-209816 May 17, 1983 83-1 CPD 523

*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

GAO will deny protest alleging that contracting officer's decision to cancel solicitation in negotiated procurement for office space was not independently made, as required by regulations, when protester has failed to show undue influence or that cancellation was motivated by fraud or bad faith.

*LEASES--NEGOTIATION--PROCEDURAL DEVIATIONS--NO SHOWING OF  
PREJUDICE--NO EFFECT ON LEGALITY*

Since minor procedural deviations on part of agency do not affect legality of action to which they relate, absent showing of prejudice, GAO will deny protests based on such deviations.

*LEASES--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--  
REASONABLE BASIS--CHANGED CONDITIONS, NEEDS, ETC.*

Where Govt. no longer needs to lease additional office space, and where, even if additional space ultimately is needed, it can be obtained at considerably lower rate than offeror's, contracting officer has reasonable basis to reject offer and cancel solicitation.

*LEASES--OFFER AND ACCEPTANCE--WHAT CONSTITUTES ACCEPTANCE*

Acceptance of prospective contractor's offer by Govt. must be clear and unconditional, and contract does not arise when purported acceptance by contracting officer is conditioned on future actions by both offeror and procuring agency.

B-209929 May 17, 1983 83-1 CPD 524

*BIDS--ESTIMATES OF GOVERNMENT--REASONABLENESS*

Govt. estimate will not be questioned where contracting agency has submitted detailed supporting evidence which provides reasonable basis for estimate.

*BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--LOW BID IN EXCESS OF GOVERNMENT SETIMATE*

Contracting officer did not abuse her discretion when she concluded that sole bid received--approximately 24 percent higher than Govt. estimate--was unreasonable and that this provided compelling reason to cancel invitation and resolicit.

*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Contrary to protester's belief, there is no evidence that agency's contracting personnel were biased against contracting out since solicitation was not issued for purposes of cost comparison under OMB circular No. A-76 and, after resolicitation, contract was in fact awarded.

*CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER*

Protester did not meet its burden of proof when it claimed that contracting agency had acted in bad faith. To support finding of bad faith, record must show by irrefutable proof that agency had malicious and specific intent to injure party alleging bad faith. No such showing has been made here.

*FREEDOM OF INFORMATION ACT--DISCLOSURE REQUESTS--RECORDS OF AGENCIES, ETC. OTHER THAN GAO--AUTHORITY OF GAO TO REQUIRE DISCLOSURE*

GAO has no authority under FOIA to determine what information must be disclosed by Govt. agencies; protester has to pursue its disclosure remedy under procedures provided by act.

*B-210104 May 17, 1983 83-1 CPD 525  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--TIME LIMITATION  
FOR SUBMISSION--APPROXIMATE*

Where solicitation for expedited procurement did not contain "late quotation" provision and there was dispute concerning whether part of awardee's proposal arrived before or after time called for in solicitation, GAO cannot conclude that procuring activity limited itself to considering only those proposals submitted prior to time specified in solicitation. Rather, record indicates that procuring activity was indicating general timeframe prior to award for receipt of proposals.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--TIME LIMITATION  
FOR SUBMISSION--EVIDENCE OF TIMELINESS--STATEMENTS OF OFFERORS,  
SUBCONTRACTORS, ETC.*

Statement by president of subcontractor, who was to prepare and submit part of awardee's proposal, that it submitted its part of proposal prior to 10.a.m. deadline indicated in solicitation may, in absence of evidence refuting statement, be accepted by procuring activity as competent evidence of when subcontractor submitted its proposal.

*B-210161 May 17, 1983 83-1 CPD 526  
BIDS--RESPONSIVENESS--SAMPLE REQUIREMENT*

Where bid sample submitted with low offer was evaluated against listed subjective characteristic of "serviceability" and bidder submitted noncompliant sample which affected "accuracy" of product, sample was properly rejected since direct correlation exists between serviceability and accuracy of equipment being examined.

*B-211548 May 17, 1983 83-1 CPD 527  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
DEFECTIVE SOLICITATION--PROMPT PAYMENT DISCOUNT PROVISION  
INCLUDED CONTRARY TO AGENCY REGULATIONS*

Cancellation of solicitation is proper where solicitation provided for consideration of prompt

payment discounts in bid evaluation contrary to provision in Defense Acquisition Reg. 2-407.3.

*B-211669 May 17, 1983 83-1 CPD 528  
BIDS--RESPONSIVENESS--FAILURE TO FURNISH SOMETHING REQUIRED--  
BID SIGNATURE*

Rejection of bid as nonresponsive is proper when bid is unsigned and not accompanied by other material indicating bidder's intention to be bound.

*B-211670 May 18, 1983 83-1 CPD 529  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION*

Questions concerning bidder's small business size status are not for consideration by GAO since conclusive authority over such matters is vested by statute in SBA.

*B-211703 May 18, 1983 83-1 CPD 530  
GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--WALSH-  
HEALEY ACT*

GAO does not consider legal status of firm as regular dealer or manufacturer within meaning of Walsh-Healey Act. By law this matter is to be determined by contracting agency in first instance, subject to review by SBA and Sec. of Labor.

*B-211709 May 18, 1983 83-1 CPD 531  
GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--WALSH-  
HEALEY ACT*

GAO does not consider legal status of firm as regular dealer or manufacturer within meaning of Walsh-Healey Act. By law this matter is to be determined by contracting agency in first instance, subject to review by SBA and Sec. of Labor.

B-210423.3 May 19, 1983 83-1 CPD 532

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Protest contending proposal was improperly determined to be outside of competitive range is dismissed as untimely because it was filed more than 10 working days after protester received debriefing, when firm knew reasons for agency's action.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against RFP's evaluation criteria is untimely where it was not filed before proposals were due.

B-210726, B-210726.2 May 19, 1983 83-1 CPD 533

CONTRACTS--PROTESTS--SUBCONTRACTOR PROTESTS

Protests of award of subcontract by Dept. of Navy prime contractor are dismissed because subcontract award does not meet any of circumstances under which GAO considers subcontractor protests.

B-210776 May 19, 1983 83-1 CPD 534

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest questioning awardee's financial and physical capability of performing contract presents matter of responsibility and GAO will not review affirmative determination of responsibility except in limited circumstances.

CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO

Allegation that awardee does not intend to perform contract in accordance with its terms is matter of contract administration which will not be considered by GAO.

B-211246 May 19, 1983 83-1 CPD 535  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Protest is dismissed where stipulation entered into by protester and agency and approved by court renders protest to GAO moot.

B-211335 May 19, 1983 83-1 CPD 536  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against procuring activity's refusal to furnish invitation for bids is untimely when filed after bid opening.

B-211534 May 19, 1983 83-1 CPD 537  
CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO

Whether items supplied by contractor conform to contract specifications is matter of contract administration which is responsibility of procuring agency and not GAO.

B-211664 May 19, 1983 83-1 CPD 538  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest alleging unduly restrictive requirements in solicitation apparent prior to bid opening must be filed with either contracting agency or GAO prior to bid opening.

B-211673 May 19, 1983 83-1 CPD 539  
CONTRACTS--NEGOTIATION--LATE PROPOSALS AND QUOTATIONS--MAIL  
DELAY EVIDENCE--EXPRESS MAIL

Late proposal sent by Express Mail 2 days before due date can only be considered if late receipt is found to be due solely to mishandling by Govt. after receipt at Govt. installation.

B-211673 May 19, 1983 83-1 CPD 539 - Con.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Protest received nearly 1 month after protester knew or should have known that its proposal was rejected as late is untimely under GAO Bid Protest Procedures.

B-205700.3 May 20, 1983 83-1 CPD 540

BIDS--INVITATION FOR BIDS--SPECIFICATIONS--BRAND NAME--  
CONSIDERATION OF "EQUAL" BID--PROPRIETY

Where significant data and warranty requirements would have to be added to canceled IFB for brand name transmissions in order to permit consideration of alleged "equal" bid for award, addition may not be allowed since this would result in essentially new IFB under which no competition had been achieved. In any event, record does not show that alleged "equal" bid was, in fact, equal to brand name product; therefore, prior decision denying protest against Army's failure to award to alleged "equal" bidder under canceled IFB is affirmed.

B-208189.3 May 20, 1983 83-1 CPD 541

GENERAL ACCOUNTING OFFICE--RECOMMENDATIONS--CONTRACTS--PRIOR  
RECOMMENDATION--MODIFIED--LAPSE OF TIME

Because only 2 weeks' work remains until contract will be completed, GAO modifies prior recommendation to terminate contract for convenience of Govt. Instead GAO recommends that protester be awarded bid preparation costs and that agency head take steps to prevent future improper solicitation cancellation. B-208189.2, Mar. 17, 1983, modified in part.

B-209912 May 20, 1983 83-1 CPD 542

CONTRACTS--LABOR SURPLUS AREAS--TOTAL SET-ASIDES--NOTICE OF  
SET-ASIDE IN SOLICITATION--DEFECTIVE--AWARD PROPRIETY

Award cannot be made on basis of superseded partial labor surplus area (LSA) set-aside notice improperly included in total LSA set-aside solicitation.

Solicitation should have been amended or resolicitation issued.

*CONTRACTS--LABOR SURPLUS AREAS--TOTAL SET-ASIDES--REJECTION OF BID--BASED ON TERMS NOT IN SOLICITATION--PROPRIETY*

Procuring agency rejected low bid as nonresponsive under terms of current labor surplus area requirements, Fed. Procurement Regs. 1-1.804-1, which were not contained in solicitation. Protest is sustained. Bid cannot be rejected as nonresponsive on basis of terms not contained in solicitation.

*B-210139 May 20, 1983 83-1 CPD 543*

*CONTRACTS--SMALL BUSINESS CONCERNS--SIZE STANDARDS--ERRONEOUS IN SOLICITATION--NOT TIMELY PROTESTER--SIZE DETERMINATION BY SBA BASED ON ERRONEOUS STANDARDS BINDING ON SOLICITATION AND AGENCY*

Where SBA regional office determines low bidder under small business set-aside procurement to be other than small, agency may not award contract to that firm on basis that improper size standard was used. Because size standard included in solicitation was not timely protested, it was binding with respect to that particular solicitation and contracting officer, by making award under size standard different from that listed in solicitation, improperly changed one of "ground rules" of procurement.

*B-211563 May 20, 1983 83-1 CPD 544*

*BIDS--RESPONSIVENESS--TEST TO DETERMINE--UNQUALIFIED OFFER TO MEET ALL SOLICITATION TERMS*

Responsiveness of bid concerns whether bidder has unequivocally offered to provide required item in conformance with IFB.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED*

Bidder's ability to perform contract according to specifications is matter of responsibility and GAO does not review contracting officer's affirmative determination of responsibility except

in limited circumstances not applicable here.

*CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR RESOLUTION BY GAO*

Whether specification requirements are met during performance of contract is matter of contract administration which GAO will not consider.

*FREEDOM OF INFORMATION ACT--DISCLOSURE REQUESTS--RECORDS OF AGENCIES, ETC., OTHER THAN GAO--AUTHORITY OF GAO TO REQUIRE DISCLOSURE*

GAO has no authority to determine what information must be disclosed to protester by Govt. agency. Protester's recourse is to pursue disclosure remedies under Freedom of Information Act.

*B-206798.2 May 23, 1983 83-1 CPD 545*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED*

Where agency has not advanced additional facts or legal arguments which show prior decision was erroneous, decision is affirmed.

*B-208148.3, B-208148.4 May 23, 1983 83-1 CPD 546*

*BIDS--RESPONSIVENESS--PRICING RESPONSE--MINOR DEVIATIONS FROM IFB REQUIREMENTS*

Bid for full food service is responsive in all material respects to IFB pricing schedule requiring that bid price for part "B" (variable costs) must be at least 25 percent of bid price for part "A" (fixed costs) for basic year and both option years. Although bid price for part "B" was only 24.94942 percent of bid price for part "A" in both option years, deviation was insignificant, prices for basic year met 25-percent requirement, prices for basic plus option years met requirement, and competition was not affected. Therefore, deviation was negligible and was properly waived as minor informality.

B-208148.3, B-208148.4 May 23, 1983 83-1 CPD 546 - Con.  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Protest filed by twelfth low bidder before award, alleging that seventh and ninth low bidders are nonresponsive, is timely. Contrary to agency's assertion, protest did not need to be filed within 10 days of bid opening. Protester had right to await outcome of agency deliberations which eliminated nine bidders lower than protester and, at time protest was filed, agency had not yet decided which bidder was entitled to award.

CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Protest alleging that rejected bid is nonresponsive is academic.

B-208574 May 23, 1983 83-1 CPD 547  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL ACCEPTABILITY--BASED ON CONTENT OF PROPOSAL

Agency's finding that protester's proposal was technically unacceptable is reasonable where protester merely submitted list of equipment and nearly verbatim restatements of solicitation performance requirements in response to requirement that proposals specifically identify each item of offered equipment and provide complete technical data showing capacity and characteristics of equipment and describe operational sequence of system. Protester's system also exceeded space limitations stated in solicitation.

Agency's finding that awardee's proposal was technically acceptable was reasonable where, as solicitation required, it described characteristics of proposed equipment, included descriptive literature, and provided individualized operational sequence. Awardee's failure to fully detail its approach to peripheral requirements was not sufficient to render its proposal technically unacceptable, since solicitation clearly emphasized proposed equipment, not peripheral requirements.

B-208631 May 23, 1983 83-1 CPD 548

*BIDS--COMPETITIVE SYSTEM--ADEQUACY OF COMPETITION--SUSTAINED  
BY RECORD*

Since six responsive bids were received, it does not appear from record that adequate competition was precluded by any lack of information in invitation.

*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Mere allegation of fraud is not sufficient for consideration in context of bid protest. Moreover, fact that award is made to firm which has had previous contract with agency does not in itself indicate any fraudulent relationship between agency and awardee.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Where protester by letter to agency before bid opening conveyed without use of word "protest" its dissatisfaction with specific areas of invitation and asked for corrective action, protest submitted to GAO within 10 working days of bid opening without agency having taken corrective action is timely under GAO Bid Protest Procedures.

*GENERAL ACCOUNTING OFFICE--JURISDICTION--ANTITRUST MATTERS*

Allegations of restraint of trade, anti-trust violations and collusive bidding are matters for Atty. Gen. and GAO will not consider them under its bid protest function.

B-209387 May 23, 1983 83-1 CPD 549

*BIDS--RESPONSIVENESS--FAILURE TO FURNISH SOMETHING REQUIRED--  
DESCRIPTIVE LITERATURE*

Although descriptive literature requirement in solicitation was not as precise as it should have been, agency properly rejected bid as non-responsive where bidder failed to include any of

required descriptive literature with its bid and agency could not determine that bidder was offering product that conformed with solicitation's specifications.

B-209541.2 May 23, 1983 83-1 CPD 550

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
EVALUATORS--ADHERENCE TO EVALUATION SCHEME*

Once offerors are informed of criteria against which their proposals will be evaluated, contracting agency must adhere to those criteria or inform all offerors of any significant changes made in evaluation scheme. GAO finds, however, that contracting agency did not deviate from solicitation's stated evaluation criteria in evaluating offerors' proposals.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
EVALUATORS--BIAS ALLEGED*

GAO finds that protester was not prejudiced by statements of chairman of agency's technical evaluation committee concerning protester's integrity. Protester's average technical point score would have increased only slightly had chairman scored protester same as other evaluators did under responsibility and past performance, solicitation's least important technical evaluation criteria.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
REASONABLE*

GAO finds no evidence to indicate that agency's evaluation of technical proposals of protester and awardee was inconsistent. Contracting agency found awardee's revised proposal, which eliminated unnecessary features contained in awardee's original proposal, to have most direct approach to what was required by solicitation. On other hand, agency found that certain of protester's technical features were nonessential or beyond solicitation's minimum requirements. GAO also finds that contracting agency advised protester during discussions that protester's level of effort was overstated.

B-209541, 2 May 23, 1983 83-1 CPD 550 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL SUPERIORITY Y. COST

While contracting agency's position concerning technical equivalency of proposals contradicts position taken by agency in earlier protest filed by awardee, GAO finds that written reports of agency's technical evaluation committee, prepared before awardee's protest, reveal that eventual awardee was agency's considered choice for award.

In negotiated procurements, procurement officials have broad discretion in determining manner and extent to which they will make use of technical and cost evaluation results. Cost/technical tradeoffs are governed only by tests of rationality and consistency with established evaluation factors. While protester's technical proposal was point rated higher than awardee's technical proposal, GAO finds no basis to object to agency's determination that proposals were technically equal, thus making cost controlling award factor under terms of solicitation.

CONTRACTS--NEGOTIATION--TECHNICAL EVALUATION PANEL--  
EVALUATION PROPRIETY

All members of technical evaluation board need not rescore revised proposals submitted by offerors except where there is question of bias involved. GAO finds no indication of bias in instant protest.

CONTRACTS--TERMINATION--CONVENIENCE OF GOVERNMENT--NOTICE TO  
CONTRACTOR OF INTENT TO TERMINATE--NOT REQUIRED

There is no requirement in procurement regs. for contracting agency to provide notice to contractor of agency's intent to terminate for convenience of Govt. prior to actual termination itself. As to agency's termination of protester's contract before protester had opportunity to comment on awardee's protest, GAO finds no bar to agency taking such corrective action as it deems appropriate upon acknowledgment of validity of awardee's protest.

B-209547 May 23, 1983 83-1 CPD 557  
BIDS--INVITATION FOR BIDS--SPECIFICATIONS--RESTRICTIVE--  
UNDUE RESTRICTION

Protest that solicitation requirement that "engineer" perform contract and affix his seal to surveys and drawings is unduly restrictive of competition is denied since there was no prejudice to firms represented by protester.

CONTRACTS--ARCHITECT, ENGINEERING, ETC. SERVICES--PROCUREMENT PRACTICES--BROOKS BILL APPLICABILITY--PROCUREMENT NOT RESTRICTED TO A-E FIRMS--ADMINISTRATIVE DETERMINATION

GAO will not question contracting agency's determination to secure services through competitive bidding procedures rather than through procedures prescribed in Brooks Act for selection of architectural or engineering firms unless protester demonstrates that agency clearly intended to circumvent Act.

B-209710, B-209710.2(1) May 23, 1983 83-1 CPD 552  
BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT

Under brand name or equal solicitation, bid which offered to supply some of required furniture items with dimensions different from those listed in solicitation as salient characteristics was nonresponsive as to those items. Because acceptance of deviating bid showed that solicitation overstated Govt. needs and solicitation contained no required or desired delivery schedule, cancellation would have been recommended if contract had not been performed.

B-210018, B-210018.2 May 23, 1983 83-1 CPD 553  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
COMPELLING REASONS ONLY

Failure to state proper evaluation criterion in IFB is compelling reason to cancel and resolicit requirement where award to lowest priced offeror could not otherwise be assured.

B-210168 May 23, 1983 83-1 CPD 554

*BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT*

Protest--alleging that awardee was nonresponsive to IFB calling for brand name product or equal because of failure to submit technical proposal or published technical brochures as required under terms of IFB--is denied. IFB afforded offerors of "equal" product broad latitude as to type of information to show that offered product is equal to named product and information submitted by awardee with bid was sufficient for agency to determine that awardee's product met salient characteristics listed in IFB and for evaluation purposes.

Protest--alleging that awardee was nonresponsive to brand name or equal IFB because of failure to submit with bid list of firms or institutions which had previously used offered product--is denied. Awardee's bid referenced use of product by institution which was sufficient for agency's technical personnel to ascertain that product offered was not developmental or prototype model--stated purpose of this requirement. Moreover, contrary to protester's assertions, there was no requirement that item had to be used under contract rather than under loan arrangement nor any requirement for testing of product by prior user.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED*

Protest that awardee should have been rejected for allegedly poor performance and late deliveries under prior contracts is dismissed. This allegation concerns matter of awardee's responsibility, and GAO does not review contracting agency's affirmative determination of responsibility in these circumstances.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--NEW ISSUES--UNRELATED TO ORIGINAL  
PROTEST BASIS*

Protest issues raised after protester's receipt of agency report on original timely protest are dismissed

as untimely. Later-raised issues must independently satisfy timeliness rules of our Bid Protest Procedures (4 C.F.R. part 21 (1983)). Here, later-raised issues concern awardee's responsiveness and should have been known to protester after public opening and its protest filed with knowledge of bid's content. Since they were first raised more than 2 months after initial protest was filed, they are untimely under sec. 21.2(b)(2) of our Procedures.

*B-210227 May 23, 1983 83-1 CPD 555*

*CONTRACTS--NEGOTIATION--"BUYING IN"--NOT PROPER BASIS TO PREVENT AWARD*

No basis exists to preclude contract award merely because low offer may be below cost.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--CRITERIA--APPLICATION OF CRITERIA*

In camera review of source-selection documents shows evaluation was fair and reasonable and consistent with evaluation criteria in solicitation.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--TECHNICAL SUPERIORITY--SIGNIFICANT*

Protest that agency improperly awarded points for features exceeding minimum requirements is without merit where technical factors are important part of competition and higher technical evaluation score accorded awardee's data processing system and beneficiary/provider relations program reflects nothing more than agency's reasonable assessment that awardee's system offered superior ability to meet requirements in RFP. Offerors are or should be on notice that qualitative distinctions will be made when technical factors are part of competition.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO PROTESTER*

Protest against technical evaluation of protester's proposal is untimely where protester does not challenge

technical evaluation of proposal in initial protest and does not do so until more than 10 days after being advised of technical deficiencies at debriefing or subsequent meeting.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest after award that price rather than technical factors should have been basis for award is untimely, since RFP states that technical content of proposals is significantly more important than price.

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--PROTESTER  
NOT IN LINE FOR AWARD*

Protest against propriety of agency's cost evaluation is denied where, because of protester's low technical score, protester would not have been selected for award in any case.

*B-210335 May 23, 1983 83-1 CPD 556*

*CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SET-ASIDES--  
ADMINISTRATIVE DETERMINATION--REPETITIVE MILITARY PROCUREMENTS*

Once service has been successfully acquired by contracting office on basis of small business set-aside, DAR requires that future procurements of that service by same office continue to be procured on set-aside basis unless contracting officer determines that there is no reasonable expectation that competitive bids at reasonable prices will be obtained.

*B-209538 May 24, 1983 83-1 CPD 557*

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--BEST AND FINAL--  
ACCEPTABILITY*

When offeror relies on general language in report that solicitation states will serve as "baseline" for work to be performed, rather than on specific solicitation requirements, and states in best and final that it does not intend to meet requirements, agency's rejection of proposal is not unreasonable.

B-209538 May 24, 1983. 83-1 CPD 557 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL ACCEPTABILITY--SCOPE OF GAO REVIEW

GAO limits its review of protests alleging improper evaluation of proposals to determination of whether evaluation was reasonable and in accord with solicitation criteria, and will not reevaluate proposals simply because protest is filed or bias is alleged.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--OFFEROR--  
PRESUMPTION THAT ORIGINAL DESIGNER IS BEST QUALIFIED--  
APPLICATION OF PRESUMPTION

Original designer is not necessarily presumed best qualified for further development or production of its designs, particularly when all offerors have been provided with copies of published reports on research and development that led to design.

CONTRACTS--REQUESTS FOR QUOTATIONS--AWARD BASIS--COST AS  
DETERMINING FACTOR--APPLICABILITY--WHEN ONE OF TWO PROPOSALS  
TECHNICALLY UNACCEPTABLE

Solicitation provision stating that cost realism study will be performed and that in absence of significant technical differences between proposals, cost may be determining factor in award, does not apply when one of two proposals is technically unacceptable.

CONTRACTS--REQUESTS FOR QUOTATIONS--SPECIFICATIONS--MINIMUM  
NEEDS REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS

When tests for helicopter clutch cover areas that have not previously been addressed or that have presented problems in prior research and development, in absence of protester's showing that tests are clearly unreasonable, GAO will not question procuring activity's determination that they represent its minimum needs.

*B-209607 May 24, 1983 83-1 CPD 558*  
*CONTRACTS--PROTESTS--TO AGENCIES, ETC. OTHER THAN GAO--*  
*TIMELINESS OF PROTEST*

Letter objecting to agency's position and stating protester's view of proper way to evaluate bid, sent to agency within 10 working days of agency's statement of position, is timely initial protest to agency. Subsequent protest to GAO, filed within 10 working days of receipt of letter from agency taking position adverse to initial protest, is also timely. Protest against agency's interpretation of solicitation is not protest against alleged impropriety apparent in solicitation which must be filed prior to bid opening.

*DEFENSE ACQUISITION REGULATION--ACQUISITION OF DESIGNATED FOREIGN COUNTRY END PRODUCTS--EVALUATION OF OFFERS/BIDS--DUTY-INCLUDED BASIS*

Regs. implementing multinational Agreement on Govt. Procurement (TIAS 10403) and Trade Agreements Act of 1979, Pub. L. 96-39, 19 U.S.C. 2501, et seq. (1982), do not provide for elimination of duty from bids offering designated country end products. In view of these regs., agency properly considered bid offering designated country end product on duty-included basis. Letter associated with bid, confirming bidder's reliance on oral advice that bid would be evaluated duty-excluded, does not shift peril of relying on oral advice to Govt. so as to compel evaluation on duty-free basis.

*B-209761.2 May 24, 1983 83-1 CPD 559*  
*BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--*  
*BID NONRESPONSIVE*

Bidder's failure to acknowledge material amendment--substantially changing basis for payment deductions for unsatisfactory service--requires bid's rejection as nonresponsive.

B-209941 May 24, 1983 83-1 CPD 560  
BIDS--PRICES--BELOW COST--NOT BASIS FOR PRECLUDING AWARD

Submission of below cost bid does not preclude award to that bidder if contracting officer judges that bidder is responsible, that is, that it can meet contract's requirements at bid price. Moreover, GAO will not review an affirmative determination of responsibility absent showing of possible fraud by contracting officials or that solicitation contained definitive responsibility criterion that was misapplied.

B-210445 May 24, 1983 83-1 CPD 561  
BIDDERS--QUALIFICATIONS--CERTIFICATIONS--FAILURE OF BIDDER TO COMPLETE--MINOR INFORMALITIES--WAIVER

Failure by bidder to complete various standard representations and certifications on bid form, as well as provision designating location where supplies are to be inspected, may be waived as minor informality, since omissions do not relate to bid responsiveness.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED

GAO does not review affirmative determinations of responsibility except in limited circumstances.

CONTRACTS--LABOR SURPLUS AREAS--EVALUATION PREFERENCE--ELIGIBILITY OF BIDDER--PLACE OF SUBSTANTIAL PERFORMANCE--CHANGED AFTER BID OPENING

Fact that bidder qualifying for labor surplus area (LSA) preference changes, after bid opening and with contracting agency's consent, performance location and percentage of costs to be incurred in LSA does not affect bidder's eligibility for preference, since firm still will perform at least minimum required percentage in LSA.

B-211049, B-211049,2 May 24, 1983 83-1 CPD 562  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
INADEQUATE FUNDING

Contracting agency may properly cancel invitation for bids after bid opening where agency determines that sufficient funds are not available to make award.

B-211583 May 24, 1983 83-1 CPD 564  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT

Protest based on alleged improper specifications filed with GAO more than 10 working days after agency opened bids without responding to protester's pre-bid-opening protest to agency is untimely filed and will not be considered.

B-209478 May 25, 1983 83-1 CPD 564  
CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--DETERMINATION  
NOT TO USE--SCOPE OF GAO REVIEW

Contention that contract should have been awarded on sole-source basis to protester will not be reviewed by GAO in absence of fraud or willful misconduct by procurement or user personnel, and because of other practical circumstances.

B-209742 May 25, 1983 83-1 CPD 565  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--APPLICATION OF CRITERIA

GAO has no basis to object to use of evaluation subcriteria that reasonably relate to stated major criteria and reflect relative weight accorded those major criteria.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--NONDISCLOSURE ALLEGATION

Since agency is required to disclose in advance neither details of evaluation process nor existence of evaluation subcriteria, there is no obligation

to provide prospective offerors with copies of evaluation forms containing subcriteria.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--REASONABLE*

Where review of both numerical scores assigned to protesters' proposals and written comments of evaluators reveals that low scores achieved by protesters were rationally based, there is no basis for concluding that evaluations of protesters' proposals were arbitrary.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SIGNIFICANT ISSUE EXCEPTION*

Whether particular procurement should have been advertised rather than negotiated depends largely on special facts and circumstances existing in each case and is not significant issue under GAO Bid Protest Procedures so as to warrant consideration as issue despite its untimely filing.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest that procurement should have been advertised rather than negotiated is dismissed as untimely since choice of procurement method was apparent from face of solicitation and protest was not filed until after contract had been awarded.

*B-210203 May 25, 1983*

*PERSONAL SERVICES--CONTRACTS--TRAVEL EXPENSES--REIMBURSEMENT--CONTRACT CLAUSE ALLOWANCE*

~~Personal services~~ contractor under contract funded by Agency for International Development claims reimbursement for temporary lodging based upon contract rate of \$60 per day for each family member. Although agency suggests that contract rate was intended as maximum amount and that only actual expenses should be reimbursed (subject to

maximum), contractor should be reimbursed amount claimed, since contract provision governing temporary lodging allowance clearly authorizes reimbursement based on flat rate.

B-210411 May 25, 1983 83-1 CPD 566

BIDS--RESPONSIVENESS--TEST TO DETERMINE--UNQUALIFIED OFFER TO MEET ALL SOLICITATION TERMS

Where bidder makes unqualified offer to comply with invitation's material terms, bid is responsive and acceptance legally binds bidder to comply with those terms. Whether firm in fact does so involves matter of contract administration, not bid responsiveness, for which contracting agency is responsible.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that invitation requirements are unreasonable, filed by firm whose bid was rejected because it failed to comply with those requirements, is untimely since protest involves alleged improprieties apparent prior to bid opening but was not filed before that date as required by GAO Bid Protest Procedures.

B-211019 May 25, 1983 83-1 CPD 567

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--NONRESPONSIBILITY FINDING

Contracting officer's determination on nonresponsibility was reasonable where it was based upon pre-award survey which showed that protester would be financially unable to perform proposed contract due to estimated \$94,660 shortfall in meeting current business commitments, and that protester was delinquent in four out of five of its existing Govt. contracts.

B-211535 May 26, 1983 83-1 CPD 568

CONTRACTS--PROTESTS--COURT ACTION--DISMISSAL--WITH PREJUDICE

Dismissal with prejudice of complaint filed in court constitutes final adjudication on merits,

barring further action by GAO on protest involving same issue.

*B-211704 May 26, 1983 83-1 CPD 569  
CONTRACTS--GRANT-FUNDED PROCUREMENTS--PROTESTS--INTERESTED  
PARTY REQUIREMENT--CITIZENS ASSOCIATION*

GAO will not consider complaint by citizens association questioning award of contract funded by Fed. agency grant where legitimate, recognizable interests in award are adequately protected by limiting parties eligible to request GAO review under public notice at 40 Fed. Reg. 42406, Sept. 12, 1975, to firms that submitted bids.

*B-209351 May 27, 1983 83-1 CPD 570  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--  
SOLICITATION CANCELLED*

Protest based on allegedly restrictive solicitation provisions is dismissed as academic where agency has withdrawn authority for restriction and has canceled solicitation.

*B-209379 May 27, 1983 83-1 CPD 571  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest that assessment of software conversion cost in evaluating proposals restricts competition is untimely since RFP stated that such costs would be considered and protest was not filed prior to closing date for receipt of initial proposals.

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS*

Protest concerning amount of software conversion cost which might have been assessed in evaluating proposals in second part of two phase funded procurement became academic when protester declined to submit phase II proposal.

*B-211613 May 27, 1983 83-1 CPD 572*  
*CONTRACTS--PROTESTS--ISSUES IN LITIGATION*

Protest is dismissed where material issues are before court of competent jurisdiction, plaintiff has not requested judicial relief pending GAO decision, and court has not indicated interest in GAO decision.

*B-207602 May 31, 1983 83-1 CPD 573*  
*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Mere allegation of improprieties without supporting evidence will not satisfy protester's burden of affirmatively proving its case. Therefore, protest based on unsupported allegation that best and final offer was opened prematurely must be denied.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest alleging that procuring agency's conduct of negotiations improperly favored incumbent contractor, filed after closing date for receipt of final offers, is untimely as alleged improprieties were apparent from either solicitation itself or agency actions during negotiations and good cause and significant issues exceptions to timeliness requirements are not applicable.

*B-208925.3 May 31, 1983 83-1 CPD 574*  
*CONTRACTS--ARCHITECT, ENGINEERING, ETC. SERVICES--PROCUREMENT PRACTICES--BROOKS BILL APPLICABILITY--PROCUREMENT NOT RESTRICTED TO A-E FIRMS--ADMINISTRATIVE DETERMINATION*

Prior decisions in which GAO declined to question contracting agency's determination to secure services through competitive bidding procedures rather than procedures prescribed in Brooks Act for selection of architectural or engineering firms are affirmed, since it has not been established that decisions were based on errors of fact or law.

B-208964.5 May 31, 1983 83-1 CPD 575  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

Decision is affirmed on reconsideration in absence of any showing that earlier decision was based on errors of fact or law.

B-210001 May 31, 1983 83-1 CPD 576  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Protest that contracting agency afforded insufficient time for pre-award size status protest is dismissed since post-award protest was referred to SBA which subsequently ruled in favor of company against whom protest was made.

B-210216 May 31, 1983 83-1 CPD 584  
CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--  
ADMINISTRATIVE DISCRETION--REASONABLE EXERCISE STANDARD

GAO will not question contracting agency's decision to cancel its request for proposals (RFP) for janitorial services and include those services under RFP for facilities operating services contract since protester has not shown that agency lacked reasonable basis for its decision and, therefore, has not carried its burden of proof.

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATION--  
MINIMUM NEEDS--ADMINISTRATIVE DETERMINATION

Determination of Govt.'s minimum needs and best method of accommodating those needs is primarily responsibility of contracting agency, and GAO will not question agency's determination of its minimum needs unless there is clear showing that determination has no reasonable basis.

B-210237 May 31, 1983  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--APPLICATION OF CRITERIA

Although item for which offeror was rejected may represent only small part of contract, contracting

agency acted properly in adhering to requirement in evaluation of offers, since item involves material and essential service.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICALLY UNACCEPTABLE PROPOSALS--COST, ETC. NOT A FACTOR*

Since offer was technically unacceptable vis-a-vis RFP, fact that it was lowest in price, that offeror was experienced and that it proposed to perform in manner that may have been acceptable under previous RFP is irrelevant.

*B-210239 May 31, 1983 83-1 CPD 577*

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--  
REASONABLE BASIS--CHANGED CONDITIONS, NEEDS, ETC.*

Cancellation of solicitation was reasonable where procuring activity was advised that service being procured, originally required by March 1, 1984, would not be required until June 1, 1985, and, as result of delay, service requirements would be increased and other changes may occur in interim.

*B-210345 May 31, 1983 83-1 CPD 578*

*CONTRACTS--FEDERAL SUPPLY SCHEDULE--PURCHASES ELSEWHERE--  
NONMANDATORY FEDERAL SUPPLY SCHEDULE*

Where Fed. Supply Schedule is not mandatory on agency, contracting officer is not precluded from issuing IFB for items, and determination whether to proceed with solicitation is business judgment for contracting officer which GAO will not question absent clear showing of abuse of discretion.

Prohibition contained in 41 C.F.R. 101-26.401(a) (1982), that agencies shall not seek alternate sources to Fed. Supply Schedule (FSS), is applicable only where FSS is mandatory.

*BIDS--ACCEPTANCE TIME LIMITATION--EXTENSION--AFTER EXPIRATION--  
NOT GOVERNMENT'S ENFORCEABLE RIGHT TO REQUIRE*

Contracting agency generally has discretion to request bidders to extend their bid acceptance periods. Although bidders are free to refuse such requests and withdraw their bids, delay in award beyond original acceptance period does not provide legal basis to challenge award.

*BIDS--EVALUATION--CRITERIA--APPLICATION OF CRITERIA*

Innovative features and alleged advantage to Govt. that would be gained by bidder's use of large number of subcontractors may not be considered in determining lowest responsive, responsible bidder when they have not been specified in solicitation and there is no indication that evaluation credit will be given for them.

*BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT*

When contracting agency specifies salient characteristics of brand name product and requires descriptive data to show that they will be met, responsiveness of "equal" bid depends on completeness of information submitted or reasonably available to procuring activity. It is not enough that bidder believes its product is equal to--or even better than--brand name product, or makes blanket statement that all salient characteristics will be met; rather, bidder must demonstrate equivalency.

When bid on "equal" product includes neither model number nor descriptive data that would permit procuring activity to determine what it is agreeing to purchase, bid must be rejected as nonresponsive. To allow bidder to provide information after opening would give it opportunity to make nonresponsive bid responsive.

B-210946.2 May 31, 1983

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

GAO denies reconsideration of its decision dismissing protest as untimely where protester fails to specify errors of law made or information not previously considered which shows that protest was timely, but only restates its original argument in more detail.

B-211326.2 May 31, 1983 83-1 CPD 580

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Protest not received in GAO within 10 working days after protester was orally notified of basis for protest is untimely and will not be considered. Protester may not delay filing protest until receipt of written notification which merely reiterated prior oral advice.

B-211602 May 31, 1983 83-1 CPD 581

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against solicitation provision is untimely when not filed until after closing date for receipt of initial proposals.

B-211622 May 31, 1983 83-1 CPD 582

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Protest received more than 10 working days after notice of rejection of bid is untimely and will not be considered on merits.

B-211655 May 31, 1983 83-1 CPD 585

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO P  
PROTESTER

Incumbent contractor's protest that award of lease to another offeror prevents protester from recouping investment required to construct and remodel office building to meet agency specifications is untimely under GAO Bid Protest Procedures when filed more than 10 days after protester learns of award.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
IN REQUEST FOR BEST AND FINAL OFFERS

Protest against call for second round of best and final offers filed with GAO after closing date for receipt of offers is untimely, and GAO will not consider it on merits.

B-211747 May 31, 1983

CONTRACTS--PROTESTS--INJUNCTIVE RELIEF--NOT AVAILABLE THROUGH  
GAO

GAO has no authority to prohibit contract award pending resolution of district court suit against SBA determination that bidder is not small business.

B-211836 May 31, 1983 83-1 CPD 583

BIDS--LATE--MISHANDLING DETERMINATION--REGULAR MAIL

Exception for consideration of late bid because of Govt. mishandling refers to mishandling by procuring agency and not U.S. Postal Service.

B-211853 May 31, 1983 83-1 CPD 594

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--RESPONSIBILITY  
DETERMINATION--NONRESPONSIBILITY FINDING--REVIEW BY GAO

Protest by small business against contracting officer's finding that firm is nonresponsible is dismissed where matter properly has been referred to SBA for possible issuance of certificate of competency.

B-208827 June 1, 1983 83-1 CPD 587

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
COMPETITIVE RANGE DETERMINATION--IMPROPER

Protest is sustained where contracting agency admits that contracting officer used unauthorized evaluation methodology to eliminate protester's proposal from competitive range.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--PREPARATION--  
COSTS--RECOVERY

Claim for proposal preparation costs is allowed where agency arbitrarily excluded proposal from competitive range thereby preventing technical evaluation and opportunity for offeror to show it had substantial chance of receiving award.

CONTRACTS--PROTESTS--PREPARATION--COSTS--NONCOMPENSABLE

Claim for anticipated profits and costs of pursuing bid protest is denied since no legal basis exists which authorizes such recovery; moreover, no legal basis exists for authorizing sole-source award to protester under future procurement as means of compensating protester for loss of earlier contract.

B-209598 June 1, 1983 83-1 CPD 588

DISTRICT OF COLUMBIA--CONTRACTS--SOLE-SOURCE--JUSTIFICATION--  
APPROPRIATION ACT

Protest of proposed sole-source award is sustained where D.C. relies upon its annual appropriation act for authority to award contract to particular firm without competition, but act makes lump sum appropriation without reference to matter and congressional committee reports indicate only that funds were approved for particular activity, not particular contractor. In such circumstances testimony of District's representatives that they desired to make award to particular firm is not evidence of congressional intent.

B-209660 June 1, 1983 83-1 CPD 589

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATIONS  
RESTRICTIVE--UNDUE RESTRICTION NOT ESTABLISHED

Where protester alleges that solicitation's specification for gauze bandage, which requires bandage to have woven edge, is unduly restrictive of competition, contracting agency is required to make prima facie case that specification is related to its minimum needs. However, once agency has made prima facie case, protester must make clear showing that agency's determination has no reasonable basis. Mere difference of opinion with agency's technical judgment, as is case here, does not satisfy protester's burden of proof.

CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--ONE KNOWN SOURCE

Sole-source negotiations were proper since legitimate needs of Govt. can only be satisfied by single source; agency did not have to compromise those needs in order to obtain competition.

REPORTS--ADMINISTRATIVE--CONTRACT PROTEST--TIMELINESS OF REPORT

GAO has no basis to disregard substantive information in agency's administrative report merely because report was not submitted within GAO guidelines for intermediate case development; moreover, in view of GAO's conclusion, protester was not prejudiced by lateness of report.

B-210314.4 June 1, 1983 83-1 CPD 590

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION

SBA has conclusive authority to determine small business size status for Federal procurement purposes.

B-210321 June 1, 1983 83-1 CPD 591  
CONTRACTS--DEFAULT--TERMINATION OF CONTRACT--CLAIM  
SETTLEMENT--DISPUTES CLAUSE

Question of whether contract should be terminated for default and whether defaulted contractor should be held liable for excess reprocurement cost is matter within jurisdiction of ASBCA under disputes clause of contract and is not for consideration by GAO.

CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--REPROCUREMENT--  
DEFAULT TERMINATION OF ORIGINAL CONTRACT

Contracting officer acted reasonably in negotiation reprocurement contract on sole-source basis with only other bidder on original procurement at minimal price increase over original bid where defaulting contractor delivered nonconforming products, failed to meet original and extended delivery dates, and was uncertain as to timetable for proposed corrective action prior to default.

B-211675 June 1, 1983 83-1 CPD 592  
BIDS--RESPONSIVENESS--EXCEPTIONS TAKEN TO INVITATION TERMS--  
SMALL BUSINESS REQUIREMENTS

Where small business firm bidding on items set aside for small business represents in bid that supplies to be furnished will not be manufactured or produced by small business, bid is nonresponsive with respect to set-aside items.

B-211796 June 1, 1983 83-1 CPD 593  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION

Protest concerning small business size status of competing bidder is by law matter for decision by SBA and not for consideration by GAO.

B-209038 June 2, 1983 83-1 CPD 596  
GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--IN-HOUSE  
PERFORMANCE V. CONTRACTING OUT--COST COMPARISON--EXHAUSTION  
OF ADMINISTRATIVE REMEDIES

Protest against propriety of cost comparison performed under OMB Circular A-76 is dismissed where protester failed to exhaust administrative review procedure.

B-209200 June 2, 1983 83-1 CPD 597  
CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER

Where protester argues that agency recorded its oral quotation incorrectly on bid abstract and where only other evidence available is protester's conflicting statement, protester has not met burden of affirmatively proving its case.

PURCHASES--SMALL--PROCEDURES--EVALUATION OF QUOTES, ETC.--  
PROMPT-PAYMENT DISCOUNT--PROPRIETY OF EVALUATION

Agency did not act improperly in evaluating prompt-payment discount under small purchase solicitation even though at time award was made Defense Acquisition Regulation (DAR) was amended to preclude such evaluation under formally advertised procurements since it was not clear at that time that the policy against evaluation of such discounts extended to small purchase procedures.

B-209641 June 2, 1983 83-1 CPD 598  
BIDS--MISTAKES--EVIDENCE OF ERROR--"CLEAR AND CONVINCING  
EVIDENCE" OF ERROR AND INTENDED BID PRICE

Where mistake in bid is alleged prior to award and bidder presents clear and convincing evidence of mistake and of bid actually intended by submitting worksheets (estimate sheet and telephone quotation sheets) and affidavit showing mistake was made when transferring figures from telephone quotation sheet to estimate sheet and bid as corrected remains low, there is reasonable basis for agency determination to

allow bid correction so as to reflect intended bid, even though bid, as corrected, is only approximately 1.5 percent below second low bid.

*B-211032 June 2, 1983 83-1 CPD 599  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT*

Protest against use of Service Contract Act wage determination in option exercised under contract is untimely because it was not filed with GAO more than 10 working days after notification by contracting officer of initial adverse action on protest filed with contracting agency.

*B-209886, B-209886.2 June 3, 1983 83-1 CPD 600  
BIDS--RESPONSIVENESS--SOLICITATION REQUIREMENTS NOT SATISFIED--  
CONFORMABILITY OF EQUIPMENT, ETC. OFFERED*

Solicitation requirement that prospective contractor must have manufactured and operated air compressor meeting particular specifications is not met by bidder's assertion that while it has not actually done so, it has capability to manufacture and operate complaint compressor.

*B-211633 June 3, 1983 83-1 CPD 601  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT*

Protest to GAO against rejection of bid and cancellation of solicitation is untimely where it was filed more than 10 days after agency issued new solicitation and opened bids in face of protest pending before it.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Since protest to agency against alleged improprieties in solicitation was not filed prior to bid opening, subsequent protest to GAO is untimely.

B-211800 June 3, 1983 83-1 CPD 602  
GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--MISTAKES

GAO will not consider request for rescission of contract due to mistake in bid alleged after award since, according to Contract Disputes Act of 1978, matter should be submitted to contracting officer for decision.

B-211807 June 3, 1983 83-1 CPD 603  
GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--WALSH-HEALEY ACT

Whether bidder is regular dealer under Walsh-Healey Act is for determination by contracting agency subject to final review by SBA (if small business is involved) and Dept. of Labor.

B-207285 June 6, 1983 83-1 CPD 604  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--DISCUSSION WITH ALL OFFERORS REQUIREMENT--"MEANINGFUL" DISCUSSIONS

For negotiations to be meaningful, Govt. negotiators must be as specific as practical considerations permit in advising offerors of deficiencies in their proposals. Where Navy advised offeror of one of bases for agency conclusion that offeror's proposal was unrealistic, but failed to disclose other basis, thus denying offeror opportunity to fully correct deficiencies when preparing its best and final proposal, agency has failed to conduct meaningful negotiations with offeror.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--CRITERIA--APPLICATION OF CRITERIA

Given agency's finding that protester's proposal was unrealistic, with high potential for large cost overruns, protester alleging that agency departed from evaluation criteria set forth in RFP, which assigned equal weight to cost and technical criteria, does not carry its burden of clearly proving such departure merely by showing that agency awarded contract to offeror who proposed total cost exceeding that proposed by protester.

B-207285 June 6, 1983 83-1 CPD 604 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--PREPARATION--  
COSTS--DENIED

Award of proposal preparation costs is only justified if protester shows both that Govt.'s conduct towards protester was arbitrary and capricious and that, if Govt. had acted properly, protester would have had substantial chance of receiving award. Where protester fails to show it had substantial chance for award, GAO will deny proposal preparation costs.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--NEW ISSUES--UNRELATED TO ORIGINAL  
PROTEST BASIS

New grounds of protest must independently satisfy timeliness requirements of our Bid Protest Procedures. Where protester supplements its original protest against award of contract with new grounds of protest more than 10 working days after basis for them should have been known, new grounds are untimely and we will not consider them on their merits.

CONTRACTS--TERMINATION--RESOLICITATION--BOT REQUIRED--  
INSUFFICIENT FUNDING

Where awardee has exhausted contract funds in unsuccessful attempt to fulfill his obligations under contract and agency lacks funds to resolicit, we will not recommend resolicitation even though we are sustaining unsuccessful offeror's protest against award. GAO will not question agency's determination as to unavailability of funds.

B-208652 June 6, 1983 83-1 CPD 605  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL SUPERIORITY--SIGNIFICANT

Protest that protester's proposal, lower in cost than awardee's, offered equal technical competence and therefore was of greater value to Govt. is denied, since successful proposal reasonable was rated better

technically, evaluated cost difference was not great, and technical considerations were of greater importance to Govt. than cost.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--PREPARATION--COSTS--DENIED*

Claim for proposal preparation cost is denied where there is no showing that Govt. acted arbitrarily or capriciously in rejecting proposal.

*B-209322.2 June 6, 1983 83-1 CPD 606*

*CONTRACTS--PROTESTS--NOTICE--TO INTERESTED PARTIES--AWARDEE--FAILURE TO GIVE NOTICE EFFECT*

Contracting agency's failure to notify awardee of protest does not confer substantive rights on awardee whose contract was terminated when agency agreed with protester but, rather, proper remedy is that protest will be reheard with participation of awardee. This protest is essentially that rehearing.

*CONTRACTS--TWO-STEP PROCUREMENT--STEP TWO--BIDS--CORRECTION OF MISTAKES--UNIT PRICE V. EXTENSION DIFFERENCES*

VA's correction of obviously mistaken quantities in bidder's bid cost worksheet does not render bid non-responsive because bidder's unit prices were not changed and solicitation advised bidders that such adjustments could be made.

*CONTRACTS--TWO-STEP PROCUREMENT--STEP TWO--BIDS--RESPONSIVENESS PRICING RESPONSE TO IFB REQUIREMENTS*

Where solicitation requests separate bid prices for telephone system and public address system, bid which states that public address system is included in price for telephone system is responsive even though life cycle cost analysis is performed only on telephone system and telephone system price is required for analysis, because only reasonable reading of bid is that total price is for telephone system and public address system is being provided at no cost. Also, bidder is bound to provide both systems at stated price.

B-209366 June 6, 1983 83-1 CPD 607  
CONTRACTS--NEGOTIATION--AWARDS--INITIAL PROPOSAL BASIS--  
COMPETITION SUFFICIENCY

Contract may be awarded without discussions where there is adequate competition and offerors are advised that contract might be awarded on basis of initial proposals. Award of contracts to higher technically ranked fixed-price offerors, rather than lower ranked cost-type offeror, is reasonable because fixed-price contracts are preferable to cost-type.

B-209481 June 6, 1983 83-1 CPD 608  
CONTRACTS--FEDERAL SUPPLY SCHEDULE--MULTIPLE SUPPLIERS--  
AGENCY ISSUANCE OF A REQUEST FOR QUOTATIONS--EVALUATION  
PROPRIETY

Where multiple award Fed. Supply Schedule vendor submitted standard brochure in response to request for quotations and brochure did not show that equipment proposed met technical requirements listed in solicitation, contracting agency acted reasonably in assuming that firms equipment would not meet its needs.

B-209933 June 6, 1983 83-1 CPD 609  
CONTRACTS--NEGOTIATION--ADMINISTRATIVE DETERMINATION--  
ADVERTISING V. NEGOTIATION

Agency's decision to procure requirement for operation and maintenance of gunnery range by competitive negotiation rather than formal advertising is reasonable where services needed are technically complex and Govt. is unable to draft adequate descriptive specifications.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SET-ASIDES--  
ADMINISTRATIVE DETERMINATION

Protest that procurement should be set aside for small businesses is denied because decision whether to set aside particular procurement is within discretion of contracting agency.

B-209933 June 6, 1983 83-1 CPD 609 - Con.  
FEES--SERVICE TO THE PUBLIC--CHARGES--FURNISHING SOLICITATION  
DOCUMENTS

Contracting agency may properly charge modest fee for solicitation documents to cover costs of providing them, under the authority of the User Charge Statute, 31 U.S.C. 9701, formerly 31 U.S.C. 483a (1976).

B-211735 June 6, 1983 83-1 CPD 610  
BIDS--ACCEPTANCE TIME LIMITATION--EXTENSION--PROOF OF EXTENSION

Agency properly did not make award to low bidder where award was made after expiration of bid acceptance period and agency did not receive requested express statement from bidder extending bid or otherwise had reason to know that bidder intended to extend.

B-211859 June 6, 1983 83-1 CPD 611  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
INSUFFICIENT FUNDING

Contracting agency may properly cancel solicitation after bid opening where it determines that sufficient funds are not available for award.

B-205754.2 June 7, 1983 83-1 CPD 612  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
COST REALISM ANALYSIS--ADEQUACY

Protest that contracting agency did not properly evaluate cost realism of awardee's proposal is denied. Contrary to protester's assertion that awardee did not have facility in Washington, D.C., area as required by RFP and, therefore, underestimated costs of opening new office and relocating employees to that office, awardee did have office in Washington, D.C., area and correctly did not include costs to open new office. Since protester did not provide any evidence to show that awardee's cost proposal was otherwise too low or that Navy's evaluation was otherwise unreasonable, protester has not carried burden of proof.

*B-205754,2 June 7, 1983 83-1 CPD 612 - Con.  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
EVALUATORS--BIAS ALLEGED*

Protest alleging bias on part of technical evaluators is denied. Protester bears burden of proving its case and bias will not be attributed to technical evaluators on basis of inference or supposition. Where record contains no evidence to support allegation of bias, protester has not carried its burden of proof.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICALLY EQUAL PROPOSALS--PRICE DETERMINATION FACTOR*

Award based primarily on cost savings represented by awardee's proposal is proper where contracting agency reasonably considered technical proposals of awardee and protester to be essentially equal technically, cost was listed as one of four evaluation factors in RFP, and RFP stated that award would be based on "cost and other factors."

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--STATEMENT OF  
WORK--REVISION AFTER INITIAL PROPOSALS SUBMITTED--AMENDED  
COST PROPOSALS- CONSIDERATION PROPRIETY*

Fact that awardee's cost proposal showed significant cost increase between initial and best and final offers provides no basis to invalidate award since agency modified statement of work between submission of initial and best and final proposals.

*CONTRACTS--PROTESTS--ALLEGATIONS--SPECULATIVE*

Protest that awardee's proposed personnel may not be available to work on contract is rejected as speculative absent evidence that awardee intentionally misstated its intentions in its proposal. Whether awardee will be able to meet its contractual obligations is matter of contract administration which is not for GAO review.

B-205754.2 June 7, 1983 83-1 CPD 612 - Con.  
CONTRACTS--PROTESTS--WITHDRAWAL--EFFECT

Withdrawal of protest filed by eventual awardee shortly before award of contract provides no basis to invalidate award.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION

Charge that awardee under small business set-aside may have become large when awarded similar contract is dismissed. SBA, not GAO, has exclusive jurisdiction to determine size status for procurement purposes.

B-206803 June 7, 1983 83-1 CPD 613  
BIDDERS--RESPONSIBILITY V. BID RESPONSIVENESS--DESCRIPTIVE LITERATURE REQUIREMENT

Compliance with solicitation's descriptive literature provision that requires literature to be submitted after bid opening is matter of responsibility and not responsiveness. Therefore, procuring agency may not reject as nonresponsive bid of bidder which indicates in its bid that it will furnish product of specific manufacturer but after bid opening submits descriptive literature of another manufacturer. Rather, question of whether bidder's intention is consistent with specifications is one of bidder's responsibility.

B-208500 June 7, 1983 83-1 CPD 614  
BIDS--RESPONSIVENESS--FAILURE TO FURNISH SOMETHING REQUIRED-- INVITATION FOR BIDS ATTACHMENTS, ETC.

Bid which omits major portions of invitation for bids and does not incorporate or reference material provisions omitted so that bidder, upon acceptance of bid, clearly would be bound to those material requirements properly may be rejected.

B-208876 June 7, 1983 83-1 CPD 615  
BIDS--EVALUATION--CRITERIA--APPLICATION OF CRITERIA

Award under IFB must be made to lowest priced bidder absent listing of "other factors" in IFB which will be used for evaluation.

B-208876 June 7, 1983 83-1 CPD 615 - Con.  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
DEFECTIVE SOLICITATION

Changing requirements of procurement after opening of bids to properly express minimum needs of Govt. constitutes compelling reason to cancel solicitation where protest against cancellation fails to show both that protesting low bidder appears on face of bid to satisfy minimum needs of Govt. and that no prejudice would arise from award without resolicitation.

CONTRACTS--PROTESTS--ADMINISTRATIVE ACTIONS--PENDING PROTEST  
TO CANCELLATION OF IFB--ISSUANCE OF NEW IFB

Protest against cancellation of solicitation does not restrict or prevent agency from resoliciting procurement or taking other steps preliminary to award.

B-209263 June 7, 1983 83-1 CPD 616  
BIDS--INVITATION FOR BIDS--SPECIFICATIONS--PERFORMANCE  
REQUIREMENT V. BIDDER QUALIFICATION

Specification requiring contractor experience is performance requirement where: (a) neither specification nor rest of solicitation requires data showing experience to be submitted before award; (b) experience is required only for part of work to be performed under contract; and (c) requirement is listed in specification covering contract's performance requirements.

CONTRACTS--AWARDS--PROTEST PENDING--LEGALITY OF AWARD

Legality of contract award is not affected even if contracting officer erroneously decided to award contract while protest is pending.

CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO

Protest alleging noncompliance with performance requirement is directed toward matter of contract administration and is not reviewable under GAO Bid Protest Procedures.

*B-209908 June 7, 1983 83-1 CPD 617  
BIDS--UNBALANCED--PROPRIETY OF UNBALANCED--"MATHEMATICALLY  
UNBALANCED BIDS"--WHAT CONSTITUTES*

Protest against alleged unbalanced bidding is denied where record shows only that allegedly unbalanced bids are lower than either Govt. estimate or bid of incumbent protester.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest against aspect of allegedly defective evaluation scheme is untimely when filed after bid opening.

*B-210413 June 7, 1983 83-1 CPD 618  
BIDS--MISTAKES--CORRECTION--PROPRIETY*

Agency reasonably permitted bid correction because bidder's worksheets clearly show that bidder made mistake in transposing \$52,935 cost to summary worksheet as \$22,935, and that \$30,000 error should be multiplied by 1.15 contingency factor. Uncertainty regarding whether bidder, which also reduced erroneous bid by \$6,329 prior to opening, would have reduced correct bid by that same amount does not prohibit correction because uncertainty is small and upper range of uncertainty (that is, no reduction) still leaves bid substantially below next low bid.

*BIDS--PRICES--BELOW COST--NOT BASIS FOR PRECLUDING AWARD*

Absent finding of nonresponsibility, below-cost bid does not provide reason to challenge award.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED*

Protest against awardee's capacity to perform contract is protest against affirmative determination of responsibility which we do not review except in circumstances not present in this case.

B-211677 June 7, 1983 83-1 CPD 619

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
CONSTRUCTIVE NOTICE

Bid Protest Procedures are published in Fed. Reg. and protesters are charged with constructive knowledge of their contents.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest that bid rejected as nonresponsive should have been considered responsive because there was not adequate time to obtain complete bid set and submit it by bid opening time is dismissed as untimely when protest is received after bid opening and more than 10 days after receipt of written notice of rejection from contracting officer.

B-211711 June 7, 1983 83-1 CPD 620

CONTRACTS--NEGOTIATION--COMPETITION--ADEQUACY

Propriety of particular procurement is judged with regard to Govt.'s interest in obtaining reasonable prices through adequate competition, not on whether every potential contractor was included. Adequate competition was obtained where Army received two responsive, reasonably priced quotations.

CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER

Where assertion that branches of Army colluded to exclude protester from bidding is unsupported and is denied by Army, GAO concludes that protester has not carried its burden of proof to establish that it was deliberately or consciously excluded from competing.

B-207338 June 8, 1983 83-1 CPD 621

CONTRACTS--LABOR SURPLUS AREAS--EVALUATION PREFERENCE--  
ELIGIBILITY OF BIDDER--PLACE OF SUBSTANTIAL PERFORMANCE--  
AMBIGUITY - EFFECT

Protester offered in best and finals to perform in labor surplus area (LSA) and indicated that perfor-

mance would be in one of two locations. One was LSA and other was not. Offer was ambiguous. Procuring agency was not required to inquire as to performance location because this information was essential for determining acceptability of LSA offer and, therefore, inquiry would have been discussion rather than clarification. Discussions need not be conducted after best and final offers.

B-207458.2, B-207458.3 June 8, 1983 83-1 CPD 622  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--ESTABLISHED

GAO reverses prior decision and withdraws recommendation for possible corrective action because of information contracting agency has presented subsequent to issuance of decision.

B-208311 June 8, 1983 83-1 CPD 623  
CONTRACTS--DEFAULT--REPROCUREMENT--DEFAULTED CONTRACTOR--NOT  
SOLICITED

Although defaulted contractor may not be automatically excluded from competition, defaulted supplier of air tanker services was not improperly excluded from competition where services were urgently needed because of start of fire fighting season and contracting officer limited his telegraphic solicitation to two firms that he considered qualified to commence work within matter of days.

CONTRACTS--DEFAULT--REPROCUREMENT--DEFAULTED CONTRACTOR LOW  
BIDDER--BID REJECTION--PROPRIETY

Contracting officer acted reasonably in rejecting defaulted contractor's unsolicited bid upon telegraphic solicitation seeking to reprocure air tanker services because (1) services were urgently needed, (2) defaulted contractor's air tanker had failed inspection twice, and (3) acceptance of its bid could have caused unwarranted delay due to possibility of repetitive reinspections of that aircraft. Moreover,

statutes and regulations governing Fed. procurements are not strictly applicable to reprocurments in behalf of defaulted contractor.

*B-208757.2 June 8, 1983 83-1 CPD 624*

*GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--WALSH-HEALEY ACT*

GAO role in protest concerning regular dealer status under Walsh-Healey Act is limited to considering whether contracting officer complied with procedural requirements.

*B-208776, B-208776.2 June 8, 1983 83-1 CPD 625*

*BIDS--COMPETITIVE SYSTEM--UNESSENTIAL REQUIREMENTS*

Requirement which limits potential offeror's freedom to propose products it believes are suitable to meet agency's needs is undue restriction on competition where record shows only that restriction is based on unsupported conclusions, without consideration of all relevant factors which demonstrate that restriction is needed to satisfy agency's minimum needs.

*B-209915.2 June 8, 1983 83-1 CPD 626*

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED*

Conviction for criminal acts in connection with prior Govt. contracts of individual who has or had interest in bidding firm determined by contracting officer to be responsible does not, in itself, constitute failure to apply definitive responsibility criteria in solicitation. Prior decision declining to review affirmative determination of responsibility is affirmed.

*B-211361.2 June 8, 1983 83-1 CPD 627*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--CONSTRUCTIVE NOTICE*

Protesters have constructive notice of GAO's Bid Protest Procedures since they are published in the Fed. Reg. and CFR, and cannot rely on their alleged

unawareness of procedures or allegedly erroneous advice of contracting personnel to excuse failure to comply with procedures' timeliness requirements.

*B-211546.2 June 8, 1983 83-1 CPD 628*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED*

Prior decision which held that Department of the Navy was under no legal obligation to set aside particular procurement for small business concerns is affirmed because request for reconsideration contains no factual or legal grounds upon which decision should be reversed or modified.

*B-211686 June 8, 1983 83-1 CPD 629*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT*  
*PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

It is not clear that protest against alleged improprieties was timely filed with procuring agency prior to bid opening. Even if protest was timely filed with procuring agency prior to bid opening, protest to GAO is untimely and not for consideration since it was filed more than 10 days after contracting agency opened bids. Moreover, letter allegedly sent to GAO, but never received in our Office, cannot be considered "filed" for timeliness purposes.

*B-211931 June 8, 1983 83-1 CPD 630*  
*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--*  
*AFFIRMATIVE FINDING ACCEPTED*

Responsive bidder's ability to meet solicitation's requirements is matter of responsibility, and GAO will not review agency's affirmative determination of responsibility except when protester shows possible fraud on part of contracting officer or misapplication of definitive responsibility criteria.

*B-208036, B-208036.2 June 9, 1983 83-1 CPD 631  
BIDS--INVITATION FOR BIDS--DEFECTIVE--EVALUATION CRITERIA*

IFB for Govt.'s meal services requirements that permits bidder to apportion 20-100 percent of its evaluated (based on Govt. estimate) bid price to unit meal price, and any remaining portion to lump-sum price to cover contractor's fixed costs, does not provide evaluation basis that reasonably assures that award to lowest evaluated bidder will result in lowest cost during performance. Since all bidders do not have to apportion same percentage of their bid price to unit meal price, slight deviations from Govt. estimate could result in one bidder displacing another as least costly.

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--MINIMUM NEEDS REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS*

GAO will not question the AF's determination of its need for pricing format for meal services that requires bidder to apportion at least 20 percent of its bid price to unit meal price while permitting bidder to apply remainder to lump-sum price to cover its fixed costs, since protester failed to show determination, which is based on need for incentive to furnish good service, is unreasonable.

*CONTRACTS--FIXED-PRICE--REQUIREMENTS OF FORMALLY ADVERTISED PROCUREMENTS--NOT VIOLATED BY FIXED-PRICE INDEFINITE QUANTITY CONTRACTS*

IFB for Govt.'s meal services requirements that permits bidder to apportion 20-100 percent of its evaluated bid price to unit meal price, and any remaining portion to lump-sum price to cover contractor's fixed costs, does not result in other than firm fixed price contract even though Govt.'s average cost per meal may change with volume of meals served. Prices are fixed without regard to actual cost experience of contractor, thus meeting requirement for firm fixed price contract.

Fact that IFB for Govt.'s meal services requirements provides for negotiation of price for meals served in

excess of 120 percent or less than 80 percent of Govt. estimate does not violate requirement for firm fixed price contract resulting from formal advertising. DAR 3-409(2)(a) authorizes placing maximum and minimum quantity limitations on requirements contracts, and resulting contract will be firm fixed price contract for meal services within those limitations. Provision for negotiation is only mechanism for making equitable adjustment where Govt. deviates from those quantities.

*CONTRACTS--REQUIREMENTS--ESTIMATED AMOUNTS BASIS--BEST INFORMATION AVAILABLE*

GAO will not question Govt's estimate for meal services where protester has failed to show estimate misrepresents anticipated actual requirements, was based on less than best information available, or was result of bad faith or fraud.

*B-208320 June 9, 1983 83-1 CPD 632*

*CONTRACTS--GRANT-FUNDED PROCUREMENTS--GENERAL ACCOUNTING OFFICE REVIEW*

GAO review of grant complaints deals exclusively with propriety of procedures followed in awarding of contracts by grantees, not issues concerning contract performance and contract administration.

*CONTRACTS--GRANT-FUNDED PROCUREMENTS--SPECIFICATIONS--MINIMUM NEEDS REQUIREMENT--ADMINISTRATIVE DETERMINATION--REASONABLENESS*

Grantee procuring activity's determination of its minimum need for fresh milk has not been shown to be clearly unreasonable by complainant's speculation that no firm is able to provide required amount of fresh milk.

Grantee's requirement for fresh milk, although limitation on competition, is not unduly restrictive since it represents actual needs of grantee.

B-209096, B-209096.2 June 9, 1983 83-1 CPD 633  
BIDS--AMBIGUOUS--NONRESPONSIVE BID

Where bid is subject to two reasonable interpretations, under one of which it is nonresponsive, bid is nonresponsive.

BIDS--PRICES--REASONABLENESS--ADMINISTRATIVE DETERMINATION

Contracting officer's determination concerning price reasonableness is matter of administrative discretion which GAO will not question unless determination is unreasonable.

BIDS--RESPONSIVENESS--DESCRIPTIVE LITERATURE--INDICATION THAT ITEM OFFERED FAILED TO MEET SPECIFICATIONS

Where descriptive literature furnished for informational purposes only describes same model offered in bid, relationship between literature and bid is sufficient so that literature of low bidder, which describes nonconforming equipment, may not be disregarded by contracting agency.

BIDS--RESPONSIVENESS--DETERMINATION--ON BASIS OF BID AS SUBMITTED AT BID OPENING

Agency's determination whether product offered by bidder meets specifications must be based on data submitted with bid.

CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS

Where agency acknowledges all facts necessary to establish validity of protest and proposes to take corrective action, it is unnecessary for GAO to consider whether protest complied with Bid Protest Procedures.

B-209429.2 June 9, 1983 83-1 CPD 634

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

Where request for reconsideration fails to demonstrate any error of fact or law, prior decision is affirmed.

B-210515 June 9, 1983 83-1 CPD 636  
CONTRACTS--PROTESTS--AUTHORITY TO CONSIDER--HOUSING AND URBAN  
DEVELOPMENT DEPARTMENT PROCUREMENTS

GAO will not consider protest concerning procurement actions of Dept. of HUD in connection with property maintenance responsibilities under National Housing Act, 12 U.S.C. 1701 et seq. (1976), in view of Secretary's broad statutory authority to make expenditures in connection with those responsibilities.

B-210609 June 9, 1983 83-1 CPD 637  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
INFORMATION SUFFICIENCY--CLARIFICATION REQUESTS BY GAO--DUTY  
TO MAKE

GAO will not dismiss protest because of protester's failure to submit additional statement in support of its initial protest within 5 working days after receipt of GAO's letter of acknowledgement since GAO's Bid Protest Procedures require that protester be expressly notified of this requirement and, due to administrative error, GAO's acknowledgment letter failed to do this.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--CERTIFICATE OF COMPETENCY--  
CONCLUSIVENESS

GAO will not dismiss protest on grounds that, when protester submitted statement of specific grounds upon which its protest was based, it indicated disagreement with SBA decision not to issue certificate of competency (COC). While, as general rule, GAO does not review such matters, protester's additional statement alleged that SBA had acted in bad faith, allegation which GAO will review.

Although protester made no showing that SBA had acted in bad faith, it did present evidence that SBA's original refusal to issue COC was because of SBA's determination that protester was not eligible for COC program but, because of new infor-

mation presented by protester, SBA is now willing to reopen matter of protester's responsibility if contracting agency will resubmit matter to SBA.

*GENERAL ACCOUNTING OFFICE--RECOMMENDATIONS--CONTRACTS--SMALL BUSINESS CONCERNS--NONRESPONSIBILITY DETERMINATION--RESUBMISSION OF RESPONSIBILITY ISSUE TO SBA*

Contrary to agency's belief, it cannot refuse to resubmit matter of protester's responsibility to SBA. Original SBA decision was not final determination and, since SBA and not contracting agency has statutory authority to make final disposition with respect to protester's responsibility, GAO recommends that agency resubmit matter to SBA.

*B-210873 June 9, 1983 83-1 CPD 638*

*BIDS--COMPETITIVE SYSTEM--SUPERIOR ADVANTAGE OF SOME BIDDERS*

Solicitation's relaxation of Fed. specification resulting in alleged competitive advantage to one manufacturer of diesel loaders which can offer less expensive machine than used by other manufacturers does not result in "unfair advantage." In any event, actual competition refuted alleged "unfair advantage."

*B-211488 June 9, 1983 83-1 CPD 639*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO PROTESTER*

Protest against rejection of protester's proposal filed more than 10 working days after protester was advised of rejection and reasons therefor is untimely and not for consideration.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest alleging that time allotted for submission of proposals was too short is untimely and not for consideration since it was filed after closing date for receipt of proposals.

B-211861 June 9, 1983 83-1 CPD 640  
CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION

GAO does not consider small business size status protest since by law conclusive authority over matter is vested in SBA.

B-211902 June 9, 1983 83-1 CPD 641  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO CLOSING DATE FOR RECEIPT OF QUOTATIONS

Protest against provisions in request for quotations is untimely when filed after closing date for receipt of quotations.

B-210392 June 10, 1983 83-1 CPD 642  
CONTRACTS--AWARDS--ERRONEOUS--IMPROPER V. ILLEGAL AWARD

Where award is made in good faith to firm ultimately found not to have been low bidder because of mistake in higher bid alleged only after award which, if corrected, would have displaced awardee as low, contract is not illegal and therefore need not be canceled. In addition, GAO will not recommend termination for convenience since bidder's error in computing bid total and its failure to bring error to contracting officer's attention before award contributed to erroneous evaluation.

B-210968 June 10, 1983 83-1 CPD 643  
BUY AMERICAN ACT--CONTRACTOR COMPLIANCE WITH CERTIFICATION--  
CONTRACT ADMINISTRATION MATTER

Contractor's compliance with Buy American provisions of contract concerns administration of contract which is not for resolution under bid protest procedures.

CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--  
AFFIRMATIVE FINDING ACCEPTED

Protest against bidder's ability to comply with Buy American provisions concerns matter of responsibility which GAO generally does not review.

B-210968 June 10, 1983 83-1 CPD 643 - Con.  
CONTRACTS--LABOR SURPLUS AREAS--EVALUATION PREFERENCE--  
ELIGIBILITY OF BIDDER--PLACE OF SUBSTANTIAL PERFORMANCE--  
RESPONSIBILITY MATTER

Protest that bidder will not perform in Labor Surplus Area concerns matter of responsibility which GAO will not review.

B-211889 June 10, 1983 83-1 CPD 644  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT--  
SOLICITATION IMPROPRIETIES

Protest filed with GAO before closing date for receipt of proposals but more than 10 working days after protester learns of initial adverse agency action in response to protester's preclosing date protest to agency is dismissed as untimely.

B-208928 June 13, 1983 83-1 CPD 646  
CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--JUSTIFICATION--  
INADEQUATE DATA PACKAGE

Agency decision to make sole-source award because of inadequate specification and data package and awardee's prior experience with maintaining nonstandard equipment is upheld because protester has failed to establish decision lacks reasonable basis.

B-209455 June 13, 1983 83-1 CPD 647  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
COMPETITIVE RANGE EXCLUSION--REASONABLENESS

Protest that minimum needs of agency were not made clear in solicitation and that exclusion of protester's proposal from competitive range for failure to meet such needs was improper is denied, since protester was informed during discussions of agency's actual needs and given opportunity to revise its proposal accordingly.

*B-209455 June 13, 1983 83-1 CPD 647 - Con.*  
*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--*  
*COMPETITIVE RANGE OFFERORS--TECHNICAL CLARIFICATION QUESTIONS*

Initial proposal need not be excluded from competitive range simply because offeror did not return with proposal all requested documents, if initial proposal was reasonably susceptible to being made acceptable through normal revisions that occur during discussions.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--*  
*TECHNICALLY UNACCEPTABLE PROPOSALS--COST, ETC. NOT A FACTOR*

Where protester's proposal, after discussions, was reasonably found to be outside of competitive range, agency was not required to afford protester opportunity to submit best and final offer even though firm's price was substantially less than that of awardee, only other offeror, since technically unacceptable proposal is of no value to agency.

*B-209815 June 13, 1983 83-1 CPD 648*  
*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--*  
*SOLICITATION CANCELLED*

Protest that correction of mistake in bid was improper is academic where solicitation is subsequently canceled and protester fails to show that cancellation was improper.

*B-209910 June 13, 1983 83-1 CPD 649*  
*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--*  
*COMPETITIVE RANGE EXCLUSION--REASONABLENESS*

Based on review of record, GAO is unable to say that there was no rational basis for procuring agency's ultimate decision which excluded protester's proposal from competitive range for "container and trailer handling vehicles." Protester did no more than state its intention to provide required equipment feature even after being requested to provide a more complete description of its proposed equipment; however, mere statement of intention was unacceptable response. Agency request was in accord with request for proposals which specifically required all offerors to provide "detailed specifications with illustrated literature" concerning proposed equipment.

B-210366 June 13, 1983 83-1 CPD 650

CONTRACTS--TWO-STEP PROCUREMENT--STEP ONE--OFFERS OR PROPOSALS--  
DISCUSSION WITH ALL OFFERORS REQUIREMENT--"MEANINGFUL"  
DISCUSSIONS

Agency was not required to provide list of every specific deficiency found in protester's proposal where proposal was lacking in informational detail, and agency reasonably believed that degree of specific direction necessary was likely to result in technical transfusion or leveling. Under circumstances, agency's clear advice that proposal was informationally inadequate in key respects, and its identification of number, but not all, of proposal's specific deficiencies, was adequate.

B-210499 June 13, 1983 83-1 CPD 651

BIDS--EVALUATION--PROPRIETY--UPHELD

Contracting agency properly evaluated bids consistent with evaluation scheme based on anticipated work requirements set forth in amendment to IFB as amended, rather than, as protester contends, pursuant to initially issued scheme which set forth three possible evaluation alternatives.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Bid protest, filed after bid opening, alleging that the IFB, as amended, was ambiguous, is timely since the protester was unaware of the amendment and, therefore, the basis of protest until after bid opening.

B-210500.2 June 13, 1983 83-1 CPD 652

BIDS--INVITATION FOR BIDS--INTERPRETATION--ORAL EXPLANATION

Bidder relied at its own risk on alleged oral advice by contracting personnel that firm could qualify its bid price, where invitation incorporated standard language that oral explanations or instructions are not

binding. Moreover, erroneous advice cannot estop contracting agency from rejecting nonresponsive bid since it is required to do so by law.

*BIDS--RESPONSIVENESS--DETERMINATION--ON BASIS OF BID AS SUBMITTED AT BID OPENING*

Bid responsiveness must be determined from material available at bid opening, and post-opening explanations therefore cannot be considered to correct nonresponsive bid, even if lower price could be obtained by accepting corrected bid.

*BIDS--RESPONSIVENESS--TEST TO DETERMINE--UNQUALIFIED OFFER TO MEET ALL SOLICITATION TERMS*

Bid is nonresponsive where invitation required successful bidder to supply and supervise installation of incinerator, and bid contains notation that price includes 5 days of installation supervision. To be responsive, bid must represent unequivocal offer to meet invitation's material requirements at bid price, but this bid conditions its price upon no more than 5 days of supervision, and limits Govt.'s right to require supervision of incinerator's installation until completed.

*B-210608 June 13, 1983 83-1 CPD 653*

*BIDS--UNBALANCED--PROPRIETY OF UNBALANCE--"MATHEMATICALLY UNBALANCED BIDS"--WHAT CONSTITUTES*

Factoring startup costs into initial bid period does not create mathematically unbalanced bid so long as each time period under contract carries its proportional share of cost and profit. Moreover, alleged unbalanced bid remains low throughout contract regardless of whether Govt. exercises options.

*B-210941.4 June 13, 1983 83-1 CPD 654*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--SIGNIFICANT ISSUE EXCEPTION--NOT FOR APPLICATION*

Issue of whether firm's offer properly was excluded from competitive range does not involve principle of

widespread interest to procurement community to be considered under exception to GAO's timeliness requirements for issues significant to procurement practices or procedures.

*B-210223.2 June 14, 1983 83-1 CPD 657*

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--REASONABLE BASIS--ADVERTISING PROCEDURE SUBSTITUTED*

Where agency initiates negotiated procurement when it should have conducted advertised procurement, contracting officer has reasonable basis to cancel request for proposals in order to issue invitation for bids.

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--CANCELLATION--RESOLICITATION--AUCTION ATMOSPHERE NOT CREATED*

Where neither prices received in response to request for proposals (RFP) nor relative positions of offerors have been disclosed and protester merely presents speculation as to greater risk of disclosure arising from agency's cancellation RFP and resolicitation under invitation for bids, fear of possible auction is not sufficient reason to object to resolicitation.

*B-211943 June 14, 1983 83-1 CPD 655*

*GENERAL ACCOUNTING OFFICE--JURISDICTION--CONTRACTS--NONAPPROPRIATED FUND ACTIVITIES*

Award of contract for construction which does not involve appropriated funds is not subject to GAO review.

*B-209658 June 15, 1983 83-1 CPD 658*

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--BEST AND FINAL--REVISED PROPOSAL SUBMITTED--REOPENING OF NEGOTIATIONS NOT REQUIRED*

When offeror changes best and final offer in areas that have not been discussed, contracting agency may--but is not required to--reopen discussions and provide offeror with opportunity to explain changes. When request for best and finals specifically states that any technical or price revisions must be fully documented, decision not to reopen is reasonable.

*B-209658 June 15, 1983 83-1 CPD 658 - Con.*  
*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--DISCUSSION WITH*  
*ALL OFFERORS REQUIREMENT--"MEANINGFUL" DISCUSSIONS*

When, during discussions, contracting agency encourages offeror to reduce proposed costs in certain areas, but offeror makes greater reductions than anticipated by agency, as well as others that were not discussed, GAO cannot conclude that discussions were inadequate.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--*  
*COST REALISM ANALYSIS--ADEQUACY*

GAO review of cost realism assessments is limited to determination of whether agency's evaluation is reasonably based and not arbitrary, capricious, or in violation of procurement regulations. Extent to which agency examines proposed costs is generally matter of discretion.

Even when offeror has previously been rated as superior in technical approach and organization, unsupported cost reductions in best and final may lead contracting agency reasonably to conclude that risk has increased that offeror will not be able to perform at proposed cost.

*CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--AMENDMENT--*  
*FIXED-PRICE CONTRACT TO COST-TYPE CONTRACT--COST REALISM*  
*ANALYSIS REQUIREMENT*

When contracting agency changes request for proposals from one for fixed-price contract to one for cost-type contract, it also should amend evaluation factors to notify offerors that it will assess cost realism and may adjust proposed costs accordingly.

*B-211934 June 15, 1983 83-1 CPD 659*  
*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--*  
*AFFIRMATIVE FINDING ACCEPTED*

GAO does not review affirmative responsibility determination except in limited circumstances.

*B-208461.2 June 16, 1983 83-1 CPD 660*  
*BIDS--AMBIGUOUS--TWO CONFLICTING PRICES FOR SAME ITEM*

Where invitation for bids called for single overtime call-back service price and low bid contained two prices, bid is not nonresponsive, but, rather, ambiguous bid which may be accepted because ambiguity does not affect evaluation, bid is low under either interpretation, and low bidder agrees to accept interpretation which is most favorable to Govt.

*CONTRACTS--AWARDS--PROPRIETY*

Where GAO agrees that contract was improperly awarded, GAO will not review agency proposal to terminate contract for convenience of Govt.

*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS*

Where agency acknowledges all facts necessary to establish validity of protest and proposes to take corrective action, it is unnecessary for GAO to consider whether protest was timely.

*B-208275 June 17, 1983 83-1 CPD 661*  
*CONTRACTS--PROTESTS--SUSTAINED--SOLE-SOURCE PROCUREMENT--UNJUSTIFIED*

Sole-source procurement of smoke detectors was improper because agency's belief that there was no other source of acceptable detectors did not have reasonable basis.

*B-210394 June 17, 1983 83-1 CPD 662*  
*CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS*

Protest against rejection of its bid by GSA is academic since protester offered to supply items manufactured in Mainland, China, and Public Law 97-377 (96 Stat. 1830) provided that no part of any DOD appropriation could be used to purchase any of items in question that were manufactured in foreign country. DOD is primary user of items.

B-210482 June 17, 1983 83-1 CPD 663  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Contention that protest is timely filed because protester, joint venture, did not learn of basis of protest until few days prior to filing its protest with GAO, when it received copy of contract awarded successful offeror, is contradicted by agency's uncontested statement that copy of contract was furnished to principal of joint venture months earlier. Protest not filed within 10 working days of when protester knew or should have known of basis of protest is untimely.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest of various alleged solicitation defects is untimely because it was not filed until 6 months after closing date for receipt of initial proposals.

B-211090 June 17, 1983 83-1 CPD 664  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
NONRESPONSIVE BIDS

Where all three bids received under IFB were properly rejected as nonresponsive, cancellation of IFB is proper.

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest against restrictiveness of salient characteristics filed after bid opening is untimely under 4 C.F.R. 21.2(b)(1) (1983).

B-211887 June 17, 1983 83-1 CPD 665  
CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT--PROTESTER  
NOT IN LINE FOR AWARD

Protest by fifth low bidder that contract was improperly awarded is dismissed. Protester is not

"interested party" under GAO's Bid Protest Procedures because even if protest were upheld, firm would not be in line for award.

*B-212022 June 17, 1983 83-1 CPD 666  
CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--DETERMINATION NOT  
TO USE--SCOPE OF GAO REVIEW*

GAO will not consider protest that competitive procurement should be conducted on sole-source basis with particular firm.

*B-209220 June 20, 1983 83-1 CPD 667  
CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
TECHNICAL SUPERIORITY V. COST--SOLICITATION PROVISIONS*

Award of negotiated contract to higher rated, higher priced offeror is proper where that result is consistent with evaluation criteria stated in request for proposals and where procuring agency makes reasonable determination that difference in technical merit is sufficiently significant to justify difference in price.

*CONTRACTS--PROTESTS--CONTRACT ADMINISTRATION--NOT FOR  
RESOLUTION BY GAO*

Whether awardee's leader/follower plan will achieve goal of Leader/Follower Program is matter of contract administration, which is responsibility of procuring agency and not GAO.

*B-209604.2 June 20, 1983 83-1 CPD 668  
CONTRACTS--LABOR STIPULATIONS--SERVICE CONTRACT ACT OF 1965--  
MINIMUM WAGE, ETC. DETERMINATIONS--PROSPECTIVE WAGE RATE  
INCREASES--INTERPRETATION OF SOLICITATION PROVISION*

Although merits of protest are determined appropriate for GAO consideration upon request for reconsideration, protest is denied where protester's allegation that agency failed to properly apply solicitation wage increase requirement is found to be based on protester's misinterpretation of requirement.

B-209683 June 20, 1983 83-1 CPD 669  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
BEST INTERESTS OF THE GOVERNMENT--IN-HOUSE PERFORMANCE FOUND  
TO BE CHEAPER, FASTER, ETC.

When agency can obtain needed item faster and more cheaply by building it in-house rather than by awarding contract, agency may cancel solicitation on ground that cancellation is in best interests of Govt.

BIDS--PREPARATION--COSTS--NONCOMPENSABLE--INVITATION PROPERLY CANCELLED

Claim for bid preparation costs is denied where cancellation of solicitation was justified.

B-209780 June 20, 1983 83-1 CPD 670  
CONTRACTS--NEGOTIATION--OFFERS OF PROPOSALS--EVALUATION--  
ADMINISTRATIVE DISCRETION

Evaluation of proposals is primarily responsibility of procuring agency and not subject to objection unless shown to be unreasonable, arbitrary, or violative of law. Where protester received 20 technical points less than maximum and would not have been in line for award if it had received even one point less than maximum, evaluation has not been shown to have been unreasonable.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--APPLICATION OF CRITERIA

Incumbent contractor is not entitled to presumption that it has experience and capability required by evaluation criteria. Incumbent's proposal must demonstrate compliance with experience and capability requirement.

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--  
CRITERIA--IMPLICIT FACTORS

Procuring agency need not explicitly identify evaluation subcriteria which are reasonably related to and encompassed by evaluation criterion which is explicitly identified in solicitation.

*B-209837, B-209761 June 20, 1983 83-1 CPD 672*  
*CONTRACTS--DAMAGES--LIQUIDATED--ACTUAL DAMAGES V. PENALTY--*  
*PRICES DEDUCTIONS--REASONABLENESS*

Solicitation provision permitting deduction from contractor's payment where contractor fails to reperform satisfactorily service found defective by agency's quality assurance evaluator responding to customer complaint is not improper under agency regulations as quality assurance measure.

*B-209968 June 20, 1983 83-1 CPD 672*  
*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--*  
*TRANSPORTATION COSTS--PREFERENTIAL RATES*

Protest that contracting officer failed to solicit and thus properly consider preferential transportation rates in evaluating protester's proposal is denied because there was no duty to solicit such rates.

*B-210215 June 20, 1983 83-2 CPD 1*  
*CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--JUSTIFICATION--*  
*INADEQUATE DATA PACKAGE*

Protest against sole-source nature of procurement is denied, since contracting agency does not possess or have rights in technical data necessary for competitive procurement and protester has not shown that performance could be accomplished without data.

*B-211211 June 20, 1983 83-2 CPD 3*  
*BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT'*

Rejection of bid which failed at least in one respect to meet salient characteristics required by brand name or equal IFB was proper.

*BIDS--RESPONSIVENESS--LOW PRICE OF BID NOT A FACTOR*

Since bid was nonresponsive vis-a-vis IFB, fact that it was lowest in price and offered equipment that may have been acceptable under previous solicitation is irrelevant.

*B-211211 June 20, 1983 83-2 CPD 3 - Con.*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest against contracting agency's choice of salient characteristics in brand name or equal IFB must be filed before bid opening to be timely.

*B-211816 June 20, 1983 83-2 CPD 4*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
CONSTRUCTIVE NOTICE*

Bid Protest Procedures are published in Fed. Reg., and protesters therefore are charged with constructive knowledge of their contents. Therefore, lack of actual knowledge of timeliness requirements does not excuse untimely filing of protest.

*B-211908 June 20, 1983 83-2 CPD 5*

*BIDS--COMPETITIVE SYSTEM--SUPERIOR ADVANTAGES OF SOME BIDDERS*

Fact that bidder enjoys competitive advantage because it is owner of distributorship for material needed for contract is not unfair advantage that Govt. is required to equalize among bidders.

*B-211985 June 20, 1983 83-2 CPD 6*

*CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--RESPONSIBILITY  
DETERMINATION--NONRESPONSIBILITY FINDING--CERTIFICATE OF  
COMPETENCY REQUIREMENT*

GAO will not review contracting officer's nonresponsibility determination where it has been affirmed by SBA's denial of certificate of competency.

*B-212056 June 20, 1983 83-2 CPD 7*

*CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--SMALL BUSINESS  
ADMINISTRATION'S AUTHORITY--SIZE DETERMINATION*

Protest concerning small business size status of bidders is by law matter for decision by SBA and not for consideration by GAO.

B-208929 June 21, 1983 83-2 CPD 8

*BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT*

Bid proposing "equal" product in response to brand name or equal invitation was properly rejected as nonresponsive where descriptive information submitted or reasonably available is not sufficient to establish that product bid meets all of listed salient characteristics of brand name item.

B-209287.2 June 21, 1983 83-2 CPD 9

*BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
DEFECTIVE SOLICITATION*

Post-bid opening cancellation of IFB for underground heat distribution system is reasonable where IFB contained unjustifiable requirement for metallic conduit and, as result, one or more potential suppliers may have been prevented from competing.

Defective specifications which would unjustifiably impair competition among potential subcontractors may constitute compelling reason to cancel solicitation after bid opening.

*CONTRACTS--MODIFICATION--BEYOND SCOPE OF CONTRACT--SUBJECT TO  
GAO REVIEW*

Agency may not avoid canceling solicitation by changing requirements after award where it is aware before award of need for change.

B-210483 June 21, 1983 83-2 CPD 10

*BIDS--INVITATION FOR BIDS--CANCELLATION--RESOLICITATION--  
REVISED SPECIFICATIONS*

Cancellation of solicitation and resolicitation for barge drylocking and overhaul were proper where agency reasonably determined that initial solicitation specifications did not reflect agency's actual requirements.

B-210649.2 June 21, 1983 83-2 CPD 11  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER

Prior decision dismissed claim for bid preparation costs because protest of matters upon which claim was based was not timely filed with agency. Protester now asserts new facts which, if accepted as true, would make agency protest timely. However, claim is dismissed and prior decision is affirmed because protest was not filed with GAO within 10 working days of agency denial of protest.

B-210819 June 21, 1983 83-2 CPD 12  
BIDS--INVITATION FOR BIDS--CANCELLATION--AFTER BID OPENING--  
PARTIAL--LESSER QUANTITIES, ETC.

Partial cancellation of solicitation is justified when agency no longer needs quantity of supplies originally solicited.

CONTRACTS--AWARDS--VALIDITY--PROCEDURAL DEFICIENCIES--NOTICE  
OF AWARD

Protest by firm which is not bidder under solicitations against failure to receive notice of awards is without merit. Under DAR, agency is required to provide prompt notice of award only to unsuccessful offerors. In any event, failure to provide notice is procedural matter which does not affect validity of award.

CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--  
QUESTIONS FOUND NOT MOOT, ACADEMIC, ETC.

Protest issues do not become academic so long as protest, if sustained, may result in award of contract to protester.

CONTRACTS--SMALL BUSINESS CONCERNS--AWARDS--DELAYED--  
CERTIFICATE OF COMPETENCY PROCESSING TIME

Agency need not withhold award of contract to another bidder found to be responsible or indefinitely suspend

emergency procurement to meet critical need pending SBA COC determination since applicable reg. permits award 15 working days after notice to SBA of request for COC.

*B-210927.2 June 21, 1983 83-2 CPD 13*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO PROTESTER*

Protest not received by GAO within 10 working days after protester knew or should have known basis of its protest is untimely and will not be considered.

*B-211846 June 21, 1983 83-2 CPD 14*

*BIDS--INVITATION FOR BIDS--AMENDMENTS--FAILURE TO ACKNOWLEDGE--BID NONRESPONSIVE*

Failure to acknowledge amendment which materially modifies delivery requirements renders bid nonresponsive.

*BIDS--INVITATION FOR BIDS--AMENDMENTS--NONRECEIPT--BIDDER'S RISK--BIDDER EXCLUSION NOT INTENDED*

Bidder's failure to acknowledge IFB amendment may not be waived on basis that bidder did not receive amendment from agency prior to bid opening where no evidence indicates deliberate attempt by agency to exclude bidder from competition.

*B-210805 June 24, 1983 83-2 CPD 15*

*CONTRACTS--GRANT-FUNDED PROCUREMENTS--GENERAL ACCOUNTING OFFICE REVIEW*

While GAO will review award of contract under grant, GAO will not consider complaint that grantee failed to permit prime contractor to substitute complainant's product for one of products specified in contract, since matter is one of contract administration.

*B-211879 June 24, 1983 83-2 CPD 16*

*BIDS--PRICES--BELOW COST--NOT BASIS FOR PRECLUDING AWARD*

Submission of allegedly below-cost bids does not provide basis for challenging award of contract.

*B-212023 June 24, 1983 83-2 CPD 17*  
*CONTRACTS--PROTESTS--INTERESTED PARTY REQUIREMENT--SMALL*  
*BUSINESS SET-ASIDES*

Protests is dismissed where procurement is 100-percent small business set-aside and SBA has determined that protester is not small business and, therefore, not interested party to challenge award to another bidder.

*B-212063 June 24, 1983 83-2 CPD 18*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT*  
*PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest against alleged improprieties in solicitation which is filed after closing date for receipt of proposals is untimely.

*B-212096 June 24, 1983 83-2 CPD 19*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT*  
*PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest alleging improprieties apparent in solicitation must be filed prior to bid opening. 4 C.F.R. 21.2 (1983).

*B-207335.2 June 27, 1983 83-2 CPD 20*  
*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Statement by one Govt. witness at suspension hearing that he believed two companies whose respective presidents were husband and wife were affiliated because "there could not be separation of decision making between two companies, in two people who are husband and wife" is insufficient to show that suspension of wife's company was motivated by sex discrimination.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*RECONSIDERATION REQUESTS--ADDITIONAL EVIDENCE SUBMITTED*

GAO affirms, upon reconsideration, its prior decision in which it concluded that agency did not act arbitrarily in suspending firm on basis that it was affiliated

with another previously-suspended firm, because even after considering new evidence presented by protester most of facts upon which agency based its determination of affiliation remain undisputed.

*B-208445.2 June 27, 1983 83-2 CPD 21*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED*

Prior decision holding that contract awardee did not have conflict of interest is affirmed.

*B-209232 June 27, 1983 83-2 CPD 22*

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--DEFECTIVE--  
ALLEGATION NOT SUSTAINED*

Protest by incumbent that certain acceptable quality levels required by solicitation have never been achieved consistently, and that this fact was not made known to potential bidders, is denied. GAO will not object to contracting agency's judgment that specification is necessary and practicable absent clear and convincing evidence to contrary, since responsibility for drafting proper specifications is contracting agency's. Fact that protester-incumbent has not achieved certain performance requirements does not establish that agency's judgment of its needs is incorrect. Further, GAO knows of no legal requirement for agency to have revealed incumbent's actual performance record to other prospective bidders.

Protest that data used in solicitation is misleading and incomplete is denied, where agency relates that earlier data is more reliable than current data furnished by protester, incumbent contractor, and agency further advises that more recent data was furnished to all prospective bidders in form of attachment to minutes of pre-bid conference.

Provision in solicitation allowing for equitable price adjustment should anticipated workload increase or decrease 15 percent was not improper, as provision affects all potential bidders equally, and fact that bidders may respond to risk of workload deviations

differently in calculating their bid prices is matter of business judgment that does not preclude fair competition.

*B-209232 June 27, 1983 83-2 CPD 22*

*BIDS--PREPARATION--PRICE ACCURACY--BIDDER RESPONSIBILITY*

Govt. is under no legal obligation to eliminate risk from procurement entirely. Although specifications must be ambiguous, state minimum needs accurately, and provide for equal competition, prospective bidders are expected to take attendant risks into account when preparing their bids.

*B-209692.2 June 27, 1983 83-2 CPD 23*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO PROTESTER*

Bid protest submitted 7 weeks after protester was advised that, based on reevaluation of bids, it was not low bidder is untimely.

*B-209918.2 June 27, 1983 83-2 CPD 24*

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--ADEQUACY--SCOPE OF WORK--SUFFICIENCY OF DETAIL*

Where specifications adequately inform bidders of Navy's requirements for grounds maintenance service, fact that they do not detail every aspect of performance does not render them insufficient to permit bidding on intelligent and equal basis.

*B-210043 June 27, 1983 83-2 CPD 25*

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--AFFIRMATIVE FINDING ACCEPTED*

GAO will not question affirmative responsibility determination absent showing of possible fraud or bad faith by Govt. officials, or that definitive responsibility criteria were not met. To show bad faith, firm must proffer virtually irrefutable evidence that officials acted with malicious and specific

intent to injure firm, which has not been done has not been done here. Also, solicitation request for dealer status, sources of supply, and nature and value of inventory does not establish definitive criteria, but rather involves only kind of information normally used by contracting officials to determine offeror's responsibility in general.

*CONTRACTS--LABOR STIPULATIONS--WALSH-HEALEY ACT--ADMINISTRATION AND ENFORCEMENT--DEPARTMENT OF LABOR*

GAO will not consider complaint that firm is not regular dealer under Walsh-Healey Public Contracts Act, 41 U.S.C. 35-45 (1976). By law, such matters are for determination by contracting agency in first instance, subject to final review by SBA (if small business is involved) and Sec. of Labor.

*CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--EVALUATION--TECHNICAL ACCEPTABILITY*

Offer that does not include statement required by RFP about how offeror will meet delivery schedule of contract to supply DOD with replacement automotive parts, e.g., from existing stock or wholesale distributors, did not have to be rejected as technically unacceptable, as competitor argues, since submission of statement was not prerequisite to finding of technical acceptability.

*B-210692 June 27, 1983 83-2 CPD 26*

*AGENTS--OF PRIVATE PARTIES--AUTHORITY--CONTRACTS--EVIDENCE TO ESTABLISH--ADMINISTRATIVE DETERMINATION*

Where conduct of protester caused procuring activity to reasonably believe that protester consented to its employee making offer, employee had apparent authority to make offer and procuring activity could act in reliance on offer even if employee lacked actual authority to make offer.

B-210692 June 27, 1983 83-2 CPD 26 - Con.  
CONTRACTS--FEDERAL SUPPLY SCHEDULE--PRICES--REDUCTIONS--NOTICE

Burden is on supplier of item listed under FSS contract to notify contracting activity of price reductions accepted by GSA. Where protester failed to inform procurement agent of price reduction and procurement agent lacked actual notice of reduction, procuring activity need not consider price reduction in determining low price.

CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER

Where only evidence on issue of fact is conflicting statements of protester and contracting officials, protester has not carried burden of proving its case.

B-210779.2 June 27, 1983 83-2 CPD 27  
CONTRACTS--PROTESTS--MOOT, ACADEMIC, ETC. QUESTIONS--AWARD MADE TO PROTESTER

Request for reconsideration is dismissed as academic where requesting firm has been awarded contract under disputed procurement.

B-211899 June 27, 1983 83-2 CPD 28  
BIDDERS--RESPONSIBILITY V. BID RESPONSIVENESS--INFORMATION--QUALITY CONTROL REQUIREMENTS--PROPOSED METHOD OF COMPLIANCE

While information as to how bidders propose to comply with quality control requirements for services may be required under IFB to determine bidder's responsibility, it could not be required for purpose of making responsiveness determination, regardless of solicitation language to that effect. Agency thus correctly determined that bidder's failure to submit quality control program with its bid did not make bid nonresponsive.

B-211916 June 27, 1983 83-2 CPD 29  
CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--TIMELINESS OF PROTEST--ADVERSE AGENCY ACTION EFFECT

Protest that proper Dept. of Labor wage rate was not used in solicitation is untimely because it was filed with GAO

more than 10 working days after notification by contracting agency of initial adverse action on protest filed with contracting agency.

*B-209157 June 28, 1983 83-2 CPD 30*

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--RESTRICTIVE--UNDUE RESTRICTION*

Solicitation requirement that heat distribution system be constructed with calcium silicate insulation to exclusion of any other type is unduly restrictive, where: (1) agency justified requirement as necessary due to severe groundwater conditions; (2) protester's foam glass insulated system has been approved for most severe groundwater conditions under applicable prequalification procedures; and (3) agency presents no evidence that protester's foam glass-insulated system would not be suitable for project.

*B-209260.2 June 28, 1983 83-2 CPD 31*

*BIDS--INVITATION FOR BIDS--CLAUSES--DESCRIPTIVE LITERATURE--JUSTIFICATION FOR--SUFFICIENCY*

Sufficiency of formal written justification for use of descriptive literature clause is matter of form and does not constitute basis for sustaining protest where circumstances necessary for including such clause are present. Further, issue of whether those circumstances are such that descriptive literature clause may be properly included must be protested prior to bid opening date.

*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--DEFECTIVE--NOT PREJUDICIAL*

Where IFB provision requiring "light pen" to control board work on digitizer was imprecise in that term was used in its generic rather than its literal sense, since protester's bid was properly found nonresponsive on other basis, it was not prejudiced by this vague specification.

*B-209260.2 June 28, 1983 83-2 CPD 31 - Con.  
BIDS--RESPONSIVENESS--DESCRIPTIVE LITERATURE--CLARIFICATION  
OF PRE-PRINTED LITERATURE--BID RESPONSIVE*

Where statement in proposed awardee's descriptive literature indicates that it tends to supply graphic processors with 500,000 bytes of memory as required by IFB, this statement clarifies bidder's pre-printed descriptive literature which indicates that processors have only 440,000 bytes of memory.

*BIDS--RESPONSIVENESS--SOLICITATION REQUIREMENTS NOT SATISFIED--  
CONFORMABILITY OF EQUIPMENT, ETC. OFFERED--NOT DETERMINABLE  
FROM BID--TWO MODELS OF COMPONENT IDENTIFIED IN BID*

Protester's bid for computer system was properly found to be nonresponsive where it failed to show which of two models of component identified in its bid was to be offered where at least one of models did not conform to specification requirements. Further, protester's bid contained no literature describing another component and its literature showed that bidder was proposing only four hardware communication links where solicitation required eight.

*CONTRACTS--PROTESTS--ALLEGATIONS--UNSUBSTANTIATED*

Protester's contentions that proposed awardee failed to supply descriptive literature for number of items in its bid, and that low responsive bidder failed to include maintenance contract in its bid as required by specifications, are without merit where record contains literature on each item, agency determined that literature was adequate to determine responsiveness of proposed awardee's bid, and specifications did not require that actual maintenance contract be submitted with bid.

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS*

Protest alleging that requirement for descriptive literature contained in solicitation was defective because it did not meet specificity requirements of DAR will not

be considered since protest concerns alleged defect in solicitation and it should have been filed prior to bid opening.

*B-209745 et al. June 28, 1983 83-2 CPD 32*  
*BIDS--ESTIMATES OF GOVERNMENT--REASONABLENESS*

There is no basis to conclude that solicitation's estimated quantities caused bids submitted under solicitation to be materially unbalanced, where estimated quantities are not shown to be inaccurate.

*CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER*

Protester fails to meet its burden of proof in challenging solicitation's estimates for landscaping services where protester submits no evidence that estimates are wrong but merely alleges that as contractor under previous contracts, it found actual work to be "drastically curtailed" from estimates.

*CONTRACTS--REQUIREMENTS--REQUIREMENTS V. INDEFINITE QUANTITY--ADMINISTRATIVE DETERMINATION*

Contracting officer did not abuse his discretion in deciding that Govt.'s need for landscaping services would be better served under requirements contract rather than indefinite quantity contract (which guarantees that minimum quantity of services will be ordered) since quantity of services needed depended upon factors that were not predictable, so that it was not in Govt.'s interest to commit itself to specified minimum.

*B-210087 June 28, 1983 83-2 CPD 33*  
*BIDS--INVITATION FOR BIDS--SPECIFICATIONS--RESTRICTIVE--BURDEN OF PROVING UNDUE RESTRICTION*

When protester challenges agency's solicitation specifications, and agency has made prima facie case that specifications are related to its minimum needs, protester has not met its burden of showing that needs determination is clearly unreasonable.

*B-210680.2 June 28, 1983 83-2 CPD 34*  
*CONTRACTS--PROTESTS--BURDEN OF PROOF--ON PROTESTER*

Protester fails to carry his burden of proving that contracting officials acted without reasonable basis or in bad faith in requiring performance and payment bonds where record reveals that contracting officials determined in good faith that bonds were necessary to protect Govt.'s interest in considerable quantity of valuable Govt. property which will be provided to contractor for use in performing contract.

*B-210823 June 28, 1983 83-1 CPD 35*  
*BIDS--RESPONSIVENESS--DESCRIPTIVE LITERATURE--INDICATION THAT ITEM OFFERED FAILED TO MEET SPECIFICATIONS*

Rejection of low bid as nonresponsive is proper where descriptive data required to be submitted with bid for evaluation purposes does not demonstrate bidder's compliance with specifications.

*B-210848 June 28, 1983 83-2 CPD 36*  
*BIDS--ACCEPTANCE--NOT PREJUDICIAL TO OTHER BIDDERS*

Revelation of bid price in telegraphic modification prior to bid opening, although contrary to terms of solicitation, is waivable error where no proof of prejudice to other bidders is presented.

*B-211252.2 June 28, 1983 83-2 CPD 37*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--RECONSIDERATION REQUESTS--ADDITIONAL EVIDENCE, INFORMATION, ETC. REQUESTED BY GAO--FIVE DAY RULE*

GAO will dismiss request for reconsideration when protester alleges it filed oral and written protests with contracting agency before closing date for receipt of initial proposals, but agency has no record of protests and protester has not submitted additional information concerning them within 5 days after GAO's request for such information.

*B-211252.2 June 28, 1983 83-2 CPD 37 - Con.*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED*

Request for reconsideration that does not challenge facts or law upon which initial decision was based, but raises new issues based on facts available to protester at time of original protest, is considered new protest, and GAO will dismiss if for failure to independently meet timeliness requirements.

*B-211333 June 28, 1983 83-2 CPD 38*  
*PURCHASES--SMALL--REQUESTS FOR QUOTATIONS--MISPLACED LOWER*  
*OFFER--EFFECT ON AWARD*

After issuance of purchase order in small purchase procurement, agency discovered that it had misplaced protester's timely lower quotation. GAO will not disturb contract, however, since agency's error was not result of conscious or deliberate effort to exclude protester from consideration.

*B-211378 June 28, 1983 83-2 CPD 39*  
*BIDS--RESPONSIVENESS--BRAND NAME OR EQUAL PROCUREMENT*

Bid offering equal product which does not contain adequate descriptive literature showing that all salient characteristics will be met is nonresponsive.

*B-211455 June 28, 1983 83-2 CPD 40*  
*BIDS--LATE--TELEGRAPHIC MODIFICATIONS--DELAY DUE TO WESTERN*  
*UNION*

Telegraphic bid modification received almost 4 hours after bid opening is properly rejected as late despite submission of modification by protester to Western Union more than 19 hours before bid opening, absent evidence that late receipt was due to Govt. mishandling.

*B-211547.2 June 28, 1983 83-2 CPD 41*  
*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--*  
*TIMELINESS OF PROTEST--PROTEST ADDRESSED INCORRECTLY*

While reasonable dispute over timeliness of protest ordinarily is resolved in protester's favor, protester alleging that it timely protested to agency both orally and in writing before proposals were due still must present some reasonable degree of evidence to support its version of facts where agency unequivocally disagrees. Neither copies of telephone bills that show that calls were placed to agency, which contracting officer denies receiving, nor copies of letters of protest that were incorrectly addressed to that agency, which agency also says it never received, constitute necessary evidence.

*B-212084 June 28, 1983 83-2 CPD 42*  
*BIDS--PRICES--BELOW COST--NOT BASIS FOR PRECLUDING AWARD*

Below-cost bidding is not illegal and low bidder thus may not be denied award merely because it submitted below-cost bid.

*CONTRACTORS--RESPONSIBILITY--DETERMINATION--REVIEW BY GAO--*  
*AFFIRMATIVE FINDING ACCEPTED*

GAO will not review affirmative determinations of responsibility except in limited circumstances not relevant here.

*B-210285 June 29, 1983 83-2 CPD 43*  
*BIDS--AMBIGUOUS--ACCEPTANCE*

Second low bidder is not prejudiced where low bidder created ambiguity only as to price by adding item to bid schedule and agency requested that bidder explain its bid after bid opening because bid remains low whether or not additional item is included in total price.

B-210870.2 June 29, 1983 83-2 CPD 44

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--SOLICITATION IMPROPRIETIES--APPARENT  
PRIOR TO BID OPENING/CLOSING DATE FOR PROPOSALS

Protest alleging inadequacy of solicitation is dismissed as untimely when filed more than six months after bid opening because GAO Bid Protest Procedures require filing prior to bid opening.

B-209186 June 30, 1983 83-2 CPD 45

CONTRACTS--NEGOTIATION--REQUESTS FOR PROPOSALS--SPECIFICATIONS--  
RESTRICTIVE--UNDUE RESTRICTION NOT ESTABLISHED

Where agency advances multiple justifications in support of alleged unduly restrictive specification, specification is not objectionable when at least one of justifications has not been shown to be clearly unreasonable.

CONTRACTS--NEGOTIATION--SOLE-SOURCE BASIS--ONE KNOWN SOURCE

Where agency's minimum need is for optical microscope that can be used simultaneously with scanning electron microscope, and it appears that protester's equipment will not permit simultaneous use, protester cannot be considered to be possible source of supply for required equipment.

B-209446.3 June 30, 1983 83-2 CPD 46

CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
RECONSIDERATION REQUESTS--ERROR OF FACT OR LAW--NOT ESTABLISHED

Prior decision is affirmed where reconsideration request merely reflects protester's disagreement with prior decision and does not provide any evidence that prior decision was erroneous.

B-210709 June 30, 1983 83-2 CPD 47

CONTRACTS--NEGOTIATION--OFFERS OR PROPOSALS--DISCUSSION WITH  
ALL OFFERORS REQUIREMENT--EXCEPTION--NO REASONABLE CHANCE FOR  
AWARD

Protester's contention that agency erred in excluding its technically acceptable proposal from competitive

range without discussions is denied, since record shows that agency had reasonable basis for its belief that protester's initial price, which was 44 percent higher than price of low technically acceptable proposal, was so far out of line with prices of other proposals that protester's proposal did not have reasonable chance of being selected for award.

*B-212125 June 30, 1983 83-2 CPD 48*

*CONTRACTS--PROTESTS--GENERAL ACCOUNTING OFFICE PROCEDURES--  
TIMELINESS OF PROTEST--DATE BASIS OF PROTEST MADE KNOWN TO  
PROTESTER*

Protest against rejection of bid which is filed with contracting agency more than 10 working days after reason for rejection is known is untimely under Bid Protest Procedures and will not be considered by GAO.

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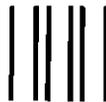
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