

GAO

Office of General Counsel



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**OVERRULED, MODIFIED, AND DISTINGUISHED**

B-221979, May 6, 1986 distinguishes 54 Comp. Gen. 999, and B-215832, Jan. 23, 1985

B-216090, May 8, 1986 modifies B-216090, Feb. 12, 1985

**GENERAL GOVERNMENT MATTERS  
APPROPRIATIONS AND MISCELLANEOUS**

**DISBURSING OFFICERS**                      **B-221398, et al. May 1, 1986**  
**Relief**  
**Erroneous Payments**  
**Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing officials and deputies under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing officials or deputies, and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

**CONGRESS**                                      **B-221498.26 May 2, 1986**  
**Franking Privilege**  
**Reimbursement**

No violation of 31 U.S.C. § 1341 is incurred when the cost of handling franked mail exceeds the amount appropriated by the Congress to pay the Postal Service for handling the franked mail. This practice is authorized by 39 U.S.C. § 3216(c) which makes the lump-sum appropriation made to the legislative branch for payment to the Postal Service full payment for all matter mailed under the frank. Furthermore, absent later appropriations for additional costs incurred by the Postal Service for delivery of franked mail, the Postal Service is entitled to receive no more than the amount initially appropriated for the fiscal year in question for payment for handling franked mail, as reduced by any sequestration under Pub. L. No. 99-177.

**APPROPRIATIONS**

B-217475 May 5, 1986

**Obligation****Deobligation****Disposition of Funds**

National Mediation Board may deobligate and return to the Treasury the amounts it estimates are owed to an arbitrator for compensation and expenses that are barred from his collection by the 6-year period of limitation in section 3702(b) of title 31.

**LIENS****Taxes****Lien on Contract Payments**

An Internal Revenue Service levy for delinquent taxes filed with the National Mediation Board on estimated amounts the Board owes to an arbitrator for his professional services cannot be honored at this time since the arbitrator has never submitted a claim or vouchers showing the actual amount due. As the Board can only roughly estimate the amounts due, they are not fixed or determinable as required by the Internal Revenue Code and Treasury Regulations. 26 U.S.C. § 6331; Treas. Reg. § 301.6331-1.

If, at any future time, the arbitrator files a timely claim, supported by the requisite vouchers and other documentation, the IRS is entitled to assert a lien on all compensation and expenses to which he might then be entitled, up to the amount of the tax debt. 26 U.S.C. § 6321; Treas. Reg. 301.6321-1.

**DISBURSING OFFICERS****B-222875 May 6, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his deputy under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his deputy, subsequent collection attempts are being pursued. However, for debit vouchers dated after June 1, 1986, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division.

**ACCOUNTABLE OFFICERS****B-221720 May 8, 1986****Accounts****Irregularities, etc.****Reporting to GAO****Time Limitation**

Agencies are required to report financial irregularities to GAO within 2 years after the date the accounts are made available to GAO for audit (that is, the date the agency has substantially complete accounts). 7 GAO Policy and Procedures Manual for the Guidance of Federal Agencies § 28.14. This timeframe provides the agencies time to try to resolve the irregularities on their own, as well as, our Office an adequate opportunity to determine whether relief should be granted or denied prior to the expiration of the 3-year statute of limitation period.



**STATUTES OF LIMITATION                      B-221720    Con't**  
**Accountable Officers                      May 8, 1986**  
**Irregularities in Account**

It is not necessary for our Office to grant relief in a case where the 3-year statute of limitation period has expired. Under these circumstances, the account in question must be considered settled and the accountable officer involved cannot be held liable for any erroneous payment. 31 U.S.C. § 3526(c).

**DISBURSING OFFICERS                      B-222966    May 9, 1986**  
**Relief**  
**Erroneous Payments**  
**Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his deputy under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his deputy, subsequent collection attempts are being pursued. However, for debit vouchers dated after June 1, 1986, where the payee has left the Army or its employ, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division.

**CHECKS    B-220765    May 12, 1986**  
**Substitute**  
**Replacement of Lost or Stolen Checks**

In duplicate check cases, Treasury will reverse the charges to the finance and accounting officer's account, if it verifies the payee's contention that the payee only negotiated one of the checks. Treasury Fiscal Requirements Manual, Part 4, para. 7085.25. In this case, there seems to be no question that the designated guardian of two minors only negotiated the substitute instruments and that the original checks were taken by the minor's older brother. Therefore, it is not necessary for GAO to grant relief since Treasury should clear the debt from the finance and accounting officer's account.

**DISBURSING OFFICERS****B-222933 May 12, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his deputy under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his deputy, subsequent collection attempts are being pursued. However, for debit vouchers dated after June 1, 1986, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division.

**DISBURSING OFFICERS****B-222945 May 12, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and his deputy under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and his deputy and subsequent collection attempts are being pursued. However, for debit vouchers dated after June 1, 1986, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division.

**DISBURSING OFFICERS      B-222976; B-222981    May 12, 1986**

**Relief**

**Erroneous Payments**

**Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing officials and their deputies under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing officials and their deputies, and subsequent collection attempts are being pursued. However, for debit vouchers dated after June 1, 1986, where the payee has left the Army or its employ, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division.

**AGRICULTURE DEPARTMENT      B-218923    May 28, 1986**

**Inspectional Services**

**Meat and Poultry Inspection Program**

**Consolidated With State System**

We think that the authority the Secretary of Agriculture has under the Talmadge-Aiken Act, 7 U.S.C. § 450, to allow state inspectors to perform Federal meat inspection, together with the authority all agency heads have under 31 U.S.C. § 6505, formerly known as the Intergovernmental Cooperation Act, to provide services to states, would allow USDA to implement an arrangement which would involve the hour-for-hour exchange of services between Federal and state meat inspectors on a nonreimbursable basis. No reimbursement would be required because the money USDA saves by not paying Federal inspectors to perform Federal inspections would offset the cost of having Federal inspectors perform state inspections.

**PERSONNEL LAW:  
CIVILIAN PERSONNEL**

**OFFICERS AND EMPLOYEES                      B-221010    May 6, 1986**  
**Transfers**  
**Real Estate Expenses**  
**Loan Origination Fee**

The agency was not in error when it allowed reimbursement for a 1 percent loan origination fee, which the lending institution originally referred to as "points," a nonreimbursable item. We look to the nature of the fee to determine if it can be allowed, and both the settlement sheet and a bank statement designated the item as a loan origination fee.

A transferred employee was reimbursed a 1 percent loan origination fee and claims an additional 1.5 percent fee in connection with the construction of a residence at her new duty station. The claim for the additional 1.5 percent is denied, since paragraph 2-6.2d(1)(j) of the Federal Travel Regulations limits reimbursement of expenses that result from the construction of a residence to those which are comparable to expenses that are reimbursable in connection with the purchase of an existing residence in the area, which in this case is 1 percent.

**FRAUD    B-213618    May 8, 1986**  
**False Claims**  
**Subsistence Expenses**

Agency recouped subsistence expenses advanced to an employee, determining that he had fraudulently claimed payment of tips to hotel maids. We find that the investigative report relied upon by the agency does not contain evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. In the absence of such evidence, the employee is entitled to be refunded amounts covering his subsistence expenses.

**OFFICERS AND EMPLOYEES****B-216090 May 8, 1986****De Facto****Compensation****Accrued**

In decision B-216090, February 12, 1985, we ruled that a claimant who qualified as a de facto employee may be compensated the reasonable value of services rendered, but that such de facto status and compensation therefore may not continue beyond the date he was notified that he was without authority to perform the duties of the position. Additional facts in case show that the claimant was in a travel status when he was notified. On reconsideration, the claimant may be considered as continuing in a de facto status for the remainder of that travel period and may receive additional compensation for those 2 days. Decision B-216090, February 12, 1985, is modified accordingly.

**LEAVES OF ABSENCE****B-222836 May 8, 1986****Involuntary Leave****Furlough****Status**

Member of Congress questions authority of agencies to furlough employees solely on Federal holidays and thereby deny them compensation on those days. The advisory statement issued by the Office of Personnel Management (OPM) which authorizes such furloughs too narrowly interprets the statutes and misapplies our decisions concerning compensation for holidays. Our decisions require that employees be paid for a holiday when they are in a pay status either immediately before or after the holiday. This furlough plan is also inconsistent with the definition of a furlough under 5 U.S.C. § 7511(a)(5) of placing an employee in a non-duty status. The proposal is not supported by our decisions and cannot be justified as a "furlough."

**SUBSISTENCE**  
**Actual Expenses**  
**High Rate Area**  
**Entitlement**

**B-217629 May 13, 1986**

Employee, who was on authorized travel to a high rate geographical area, claims reimbursement of expenses for breakfast and lunch meals incurred while on temporary duty near his family domicile in Pennsylvania. He rents a room at his official duty station in Baltimore, Maryland, and commutes to such station when his presence there is required. Since Baltimore was his permanent duty station, and he was in a travel status while staying at his family domicile, he may be reimbursed the actual cost of meals, in accordance with paragraph C4611-1g, Volume 2, of the Joint Travel Regulations.

**DEBT COLLECTIONS**  
**Waiver**  
**Civilian Employees**  
**Compensation Overpayments**  
**Collection Against Equity and Good Conscience**

**B-221605 May 19, 1986**

A GM-13 merit pay employee was granted a pay increase in 1981, shortly after merit pay was initiated in his agency. Due to administrative error, his annual pay rate was incorrectly established at a rate in excess of his individual entitlement, and also in excess of the maximum rate of GS-13. Waiver was disallowed for entire overpayment on basis he should have been aware of error and was, thus, at fault since his leave and earnings statement specifically noted his annual pay rate to be in excess of his entitlement. Waiver is granted and the employee is not held at fault where the record indicates that he did not know, at the time of the overpayment, that the rate for a GM-13 cannot exceed the maximum rate of a GS-13, and where he contacted his payroll office and was assured his pay was correct.

**COMPENSATION**  
**Computation**

**B-221651 May 27, 1986 \***

Statutory authority to use 2,087 divisor instead of 2,080 divisor for Federal employee pay computation expired September 30, 1985, but several Federal agencies did not convert their payroll systems in anticipation that the 2,087 divisor would be reinstituted. Employees of those agencies whose pay was computed based on 2,087 divisor since October 1, 1985, are entitled to backpay for the applicable pay periods from October 1, 1985, to March 1, 1986, when the 2,087 divisor was reimposed by statute.

**COMPENSATION**  
**Severance Pay**  
**Interest**

**B-213346 May 30, 1986**

Pursuant to our decision in Franklin L. Musser, B-213346, March 3, 1986, an employee was awarded severance pay following the termination of a temporary appointment. An interested congressman asks whether the employee is entitled to interest on that severance pay, and whether he may be reccredited with unused sick leave he had earned prior to the termination of his appointment. The congressman is advised that: (1) the employee's claim for interest is not allowable, because no statutory provision authorizes the award of interest on severance pay; and (2) sick leave may not be reccredited to the employee because he became reemployed with the government more than 3 years after the termination of his appointment.

**PROCUREMENT LAW**

**CONTRACTS** **B-221230.5 May 1, 1986**  
**Negotiation** **86-1 CPD 416**  
**Offers or Proposals**  
**Best and Final**  
**Mistakes**  
**Correction**

Correction of an alleged mistake in proposal after selection and before award constitutes discussions where other offerors are prejudiced by the correction.

**CONTRACTORS** **B-222461.2 May 1, 1986**  
**Responsibility** **86-1 CPD 417**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Allegation that awardee will not be able to perform in accordance with solicitation's terms deals with the responsibility of the awardee and not with the responsiveness of the awardee's bid. GAO does not review affirmative determinations of responsibility absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

**CONTRACTS**  
**Protests**  
**Authority to Consider**  
**Contract Administration Matters**

Compliance with the contract specifications is a matter of contract administration for the agency, not GAO.



<b>CONTRACTS</b>	<b>B-222461.2</b>	<b>Con't</b>
<b>Protests</b>	<b>May 1, 1986</b>	
<b>General Accounting Office Procedures</b>		
<b>Reconsideration Requests</b>		
<b>Error of Fact or Law</b>		
<b>Not Established</b>		

Dismissal of a protest is affirmed where protester does not show that the dismissal was improper.

CONTRACTS B-222867 May 1, 1986  
Protests 86-1 CPD 418  
General Accounting Office Procedures  
Timeliness of Protest  
Adverse Agency Action Effect  
Solicitation Improprieties

Protest based on alleged impropriety apparent in an invitation for bids filed with the agency before bid opening was timely, but subsequent protest filed with GAO more than 10 days after initial adverse agency action, the opening of bids, is untimely.

**BIDDERS** B-221510 May 2, 1986  
**Qualifications** 86-1 CPD 426  
**Manufacturer or Dealer**  
**Administrative Determination**

Allegation that low bidder does not qualify as a regular dealer under the Walsh-Healey Act is not for consideration by General Accounting Office since by law that is a matter for determination by the contracting agency subject to final review by the SBA, where bidder is a small business, and the Department of Labor.

**BIDDERS**  
**Responsibility v. Bid Responsiveness**  
**Certification Requirements**

Place of Performance certification in bid for non-labor-surplus area set-aside (LSA) portion of a partial LSA set-aside procurement is a matter of responsibility, not responsiveness, and failure to complete certification as required for LSA set-aside does not require rejection of bid.

**CONTRACTORS** **B-221510 Con't**  
**Responsibility** **May 2, 1986**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Protest of agency's determination of low bidder's qualifications to perform contract, in part based on a cover letter submitted with bid asserting the existence of a licensing agreement with another company, which agreement became effective after bid opening, concerns a matter of responsibility which the General Accounting Office does not generally review.

**CONTRACTS**  
**Small Business Concerns**  
**Procurement Not Restricted to Small Businesses**

Allegation that low bid is nonresponsive because the small business bidder has a limited licensing agreement with a large business and, therefore, will not furnish products manufactured by a small business, is without merit since solicitation is not restricted to small businesses.

**CONTRACTS** **B-221954.2 May 2, 1986**  
**Protests** **86-1 CPD 427**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

A request for reconsideration of a decision dismissing a protest is denied where the protester does not show that the prior decision was factually or legally incorrect in holding that submission of an information copy of an agency-level protest is not sufficient to constitute a timely protest to the General Accounting Office.

BIDS B-220436.2 May 5, 1986  
 Invitation for Bids 86-1 CPD 429  
 Amendments  
 Failure to Acknowledge  
 Bid Nonresponsive

## Invitation for Bids Amendments

B-220436.2 May 5, 1986  
86-1 CPD 429

## Failure to Acknowledge Bid Nonresponsive

Low bidder's failure to acknowledge a solicitation amendment which, among other things, required the removal of asbestos, renders the bid nonresponsive, even if state law governs the method for removal of asbestos, since such law cannot obligate a contractor to perform any particular work without its consent.

## BIDS

## Invitation for Bids Amendments

## Failure to Acknowledge Waiver

### Significance of Amendment

Failure to acknowledge a material amendment may not be waived as a minor informality, even though impact on bid price of the work added by the amendment is de minimus, when the amendment also has an impact on the quality of performance.

## BUY AMERICAN ACT

## Contractor Compliance With Certification

B-221588; B-221588.2  
May 5, 1986  
86-1 CPD 430

**Contract Administration Matter**

A bidder's actual compliance with Buy American Act certifications is an issue of contract administration. In the circumstances, however, it is recommended that the agency should verify that the low bidder's manufacturing approach will result in the supply of end products which qualify for waiver of the provisions of the Buy American Act before making an award to the firm.

**CONTRACTS**  
**Awards**  
**Foreign Firm Awardee**  
**Propriety of Award**

**B-221588; B-221588.2 Con't**  
**May 5, 1986**

Protest is denied where it is the position of the Department of State, in consultation with the Office of Foreign Assets Control, Department of the Treasury, that an award to a wholly-owned subsidiary of a foreign corporation that is 15 percent-owned by the Government of Libya will not violate the Libyan Sanctions Regulations severing all direct economic relations with that government.

**BIDS**  
**Invitation for Bids**  
**Specifications**  
**Adequacy**

**B-221661.2 May 5, 1986**  
**86-1 CPD 431**

Protest that solicitation is defective because it does not include sufficient information for bidders to determine their costs for materials for maintenance service calls is denied where solicitation limits the contractor's liability for materials to \$50 per item per job order and provides daily and monthly service call estimates as well as estimates for various types of repairs to enable bidders to calculate their costs.

**BIDS**  
**Invitation for Bids**  
**Specifications**  
**Minimum Needs Requirement**  
**Administrative Determination**  
**Reasonableness**

Protest that change of occupancy maintenance on vacant housing cannot be performed in 1-1/2 days is denied where record indicates that change of occupancy maintenance services reasonably can be expected to be performed within this time period.

**BIDS****B-221661.2 Con't****Invitation for Bids****May 5, 1986****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

Protest against requirement for 2-hour service call response time for "urgent" maintenance jobs is denied where service call response time is consistent with agency's need to improve military family living conditions. Further, protest against requirement for 1-hour "emergency" maintenance service call response time is denied where failure to provide emergency repairs will potentially increase the ultimate cost of repairs.

**CONTRACTS****Amounts****Estimates****Validity**

Protest by incumbent contractor that agency has understated number of service calls for military family housing maintenance is denied where agency reasonably determined that number of service calls would decrease from previous years because substantial improvements have been made to many housing units which should result in a decreased need for servicing.

**CONTRACTS****Labor Stipulations****Service Contract Act of 1965****Minimum Wage, etc. Determinations****Review Authority**

General Accounting Office does not review accuracy of wage rate determinations issued by Department of Labor in connection with the Service Contract Act.

**CONTRACTS** **B-221661.2 Con't**  
**Protests** **May 5, 1986**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest issue raised more than 10 working days after basis of protest should have been known is untimely.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date for Proposals**

Protest that solicitation's quality control provisions impose unfair monetary deductions for unsatisfactory performance and that certain historical data contained in the solicitation is inaccurate is untimely where filed after bid opening.

**CONTRACTS** **B-221880.2 May 5, 1986**  
**Termination** **86-1 CPD 432**  
**Convenience of Government**  
**Erroneous Awards**

Protest that agency improperly terminated a contract awarded to the protester for convenience, upon finding that another firm actually offered evaluated lower costs and therefore should have received the award, is dismissed where protester does not allege that the initial award in fact was proper or that the termination action compromises the integrity of the procurement process.

**BIDS** **B-222132 May 5, 1986**  
**Timely Receipt** **86-1 CPD 433**  
**Evidence to Establish**  
**Time/Date Stamp, etc.**

Protest that bid was not late is sustained where protester's time/date-stamped bid envelope is lost; contracting agency concedes that protester submitted its bid prior to bid opening; and record supports finding that bid was submitted on time.

**CONTRACTS** **B-222429.2 May 5, 1986**  
**Protests** **86-1 CPD 434**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest that agency provided insufficient time to revise proposals after altering a solicitation requirement, filed after the closing date for best and final offers, is untimely under GAO Bid Protest Regulations where protester had an adequate opportunity to protest prior to the closing date.

**CONTRACTS** **B-222800.2 May 5, 1986**  
**Protests** **86-1 CPD 435**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

Prior dismissal of protest is affirmed where issue protester asserts it had raised but was misunderstood has no legal merit and where contracting agency now advises protester failed to timely furnish contracting officer with copy of protest filed with General Accounting Office, as required by applicable Bid Protest Regulations.

**CONTRACTS****B-219590.3 May 6, 1986****Protests****86-1 CPD 436****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Dismissal of protest is affirmed where request for reconsideration does not establish that the dismissal was based on error of fact or law.

**CONTRACTS****B-221352 May 6, 1986****In-House Performance v.****86-1 CPD 437****Contracting Out****Cost Comparison**

Protester's objection to exclusion of six staff positions from Office of Management and Budget Circular A-76 cost comparison is denied. Agency's determinations that the six employees will perform governmental functions and not work required under the performance work statement (PWS) and that the staffing levels under the agency's proposed most efficient organization can perform the work required under the PWS is a management decision that will not be reviewed by GAO where not unreasonable.

Where contractor will be provided government-furnished material required to complete job orders approved prior to the start of the contract and government staff will use the same material to perform job orders if the function under study is retained in-house rather than contracted-out, then the cost of the government-furnished material is a common cost not to be considered in an Office of Management and Budget Circular A-76 cost comparison.

Where the government must pay a contractor outside the contract for the labor required to complete unexecuted job orders approved prior to the start of the contract, but apparently could perform the job orders in-house at no additional labor cost, then GAO finds no basis to object to the agency's determination that the cost of labor is a one-time cost of conversion to contract performance.



**CONTRACTS****Protests****Authority to Consider****B-221352 Con't****May 6, 1986**

Office of Management and Budget Circular A-76 does not preclude a protest to GAO from an agency's administrative review of an offeror's appeal of the agency's in-house cost estimate.

**BIDS****Late****Telegraphic Modification****Delay Due to Western Union****Machine Malfunction, etc.****B-221979 May 6, 1986****86-1 CPD 438**

Telegraphic bid modification which was not received by bid opening because transmission was prevented by malfunction in telephone lines utilized by Western Union (protester's agent) is properly rejected as late, even assuming some negligence on the part of the agency telex operator, where the failure of the protester's agent to transmit and the protester's waiting until just more than one hour before opening to send the modification significantly contributed to the nonreceipt.

**CONTRACTS****Protests****General Accounting Office Procedures****Filing Protest With Agency**

Protest need not be dismissed for failure to furnish the contracting officer a copy of the protest within 1 day after filing with the General Accounting Office (GAO) as required by GAO's Bid Protest Regulations, where the agency had knowledge of the grounds that formed the basis for protest and was able to submit a report within the time required.

**CONTRACTS** **B-222464.2 May 6, 1986**  
**Protests** **86-1 CPD 439**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest challenging as defective the technical data package in a request for proposals (RFP) involves alleged improprieties apparent on the face of the RFP and therefore is untimely when not filed before the closing date for receipt of initial proposals. Protester's delay in completing its technical analysis of the RFP does not justify filing the protest after the initial closing date, since the protester does not contend that the alleged technical defects in the RFP were latent and offers no reason beyond its control for failure to identify the grounds of protest before initial proposals were due.

**CONTRACTS** **B-222891 May 6, 1986**  
**Protests** **86-1 CPD 440**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Protest that was not timely filed either with the contracting agency or the General Accounting Office is dismissed. Protester's lack of knowledge concerning filing deadlines is not a basis for waiving timeliness requirement since prospective contractors are on constructive notice of Bid Protest Regulations.

**BIDS** **B-221891; B-221892**  
**Invitation for Bids** **May 7, 1986**  
**Cancellation** **86-1 CPD 441**  
**After Bid Opening**  
**Compelling Reasons Only**

Although an agency may have initially erred by issuing a total small business set-aside solicitation for a particular scope of work that was already contained in an unrestricted solicitation for a much larger effort, a compelling reason exists to cancel the set-aside where the remaining low, responsive small business bid, on its face, is 137 percent higher than the combined item price for the equivalent work submitted by the large business awardee under the unrestricted solicitation and is 153 percent higher than the rejected low bid under the set-aside.

**BIDS**  
**Preparation**  
**Costs**  
**Noncompensable**  
**Invitation Properly Cancelled**

Where the proposed cancellation of a solicitation is found to be proper, and in the absence of any showing of bad faith on the agency's part in originally issuing the solicitation, the protester's bid preparation costs and its costs of filing and pursuing the protest, including attorney's fees, are not recoverable.

**CONTRACTS** **B-222931 May 7, 1986**  
**Protests** **86-1 CPD 442**  
**Allegations**  
**Unsubstantiated**

Protest, contending that proposed agency procurement is improper because of the existence of protester's exclusive franchise as sole refuse collector within city limits, is dismissed where terms of protester's franchise expressly exclude the federal facility in question from the scope of the franchise.

**CONTRACTS** **B-222931 Con't**  
**Small Business Concerns** **May 7, 1986**  
**Awards**  
**Small Business Administration's Authority**  
**Size Determination**

Question concerning small business size status definition is not for consideration by GAO as conclusive authority over such matters is vested by statute in SBA.

**CONTRACTORS** **B-221539 May 8, 1986**  
**Responsibility** **86-1 CPD 443**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Whether awardee will perform contract for radiological services with staff with credentials required by Request for Proposals pertains to the affirmative determination of that firm's responsibility, which the General Accounting Office will not review absent a showing that contracting officials may have acted fraudulently or in bad faith or an allegation that agency misapplied definitive responsibility criteria in solicitation.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Time Limitation for Submission**

Agency properly considered proposal received by extended closing date for receipt of offers, even though such proposal had not been received by an earlier closing date that was extended by an amendment to the solicitation, since it is the actual final closing date that governs.

**BIDDERS****B-221768 May 8, 1986****Responsibility v. Bid  
Responsiveness****86-1 CPD 444**

The ability to perform a contract and whether a bidder has the capacity to perform are matters of responsibility, not of responsiveness.

Compliance with dredging plant and equipment schedule attached to the bid form setting out the capacity required for the dredging equipment does not involve a matter of responsiveness. The sufficiency of the capacity of the equipment is a matter of responsibility and could be determined after bid opening and prior to award.

**CONTRACTORS****Responsibility****Determination****Review by GAO****Definitive Responsibility Criteria**

Our scope of review in matters involving definitive responsibility criteria is limited to ascertaining whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive responsibility criteria had been met.

**CONTRACTS****B-222374.2 May 8, 1986****Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Where initial protest was dismissed for failure to state the legal and factual grounds for protest, a later supplemental statement containing such grounds filed more than 10 days after the protester knew the basis for protest is untimely.

**CONTRACTS** **B-222817.2 May 8, 1986**  
**Protests** **86-1 CPD 445**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Under our Bid Protest Regulations, a protest must be filed with the contracting agency or the General Accounting Office within 10 working days after the basis for protest is known or should have been known, whichever is earlier. A Freedom of Information Act request does not constitute a protest to the agency for purposes of our timeliness requirements.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Freedom of Information Act Request Involvement**

Where protester submits Freedom of Information Act (FOIA) request prior to filing of protest with General Accounting Office (GAO) and record shows that information requested under FOIA did not reveal basis of protest and protester already knew the basis of its protest, the FOIA request does not toll the GAO timeliness requirements.

**BIDS** **B-221792 May 9, 1986**  
**Invitation for Bids** **86-1 CPD 446**  
**Cancellation**  
**After Bid Opening**  
**Administrative Determination**

An agency properly may cancel an invitation for bids after bid opening where it reasonably determines that all otherwise acceptable bids received are at unreasonable prices. Moreover, the determination may be based in part on a nonresponsive bid price that is 16 percent less than the next-low bid.

**BIDS****B-221792 Con't****Prices****May 9, 1986****Reasonableness****Administrative Determination**

A contracting officer's determination concerning price reasonableness is a matter of administrative discretion that the General Accounting Office will not question unless the determination is clearly unreasonable or there is a showing of possible fraud or bad faith.

Past procurement history is only one factor to be considered in a determination of price reasonableness. Moreover, even when the apparent low responsive bid is in line with the agency's most recent purchase of the same item, if the quantities purchased in the past were considerably less than those currently being procured, the contracting officer reasonably may assume that lower prices will be available for larger quantities.

**CONTRACTS****B-221831 May 9, 1986****Negotiation****86-1 CPD 447****Awards****Propriety****Upheld**

Where solicitation stated that technical factors would be weighted more than price factors in selecting a contractor, the source selection official properly selected a lower priced proposal which the evaluators had given a 8 percent lower technical ranking and therefore 1 percent lower overall ranking, because the source selection official reasonably determined that the proposals were essentially equal technically and price therefore became determinative.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Prices**  
**Unprofitable**

**B-221831 Con't**  
**May 9, 1986**

Protest that the proposed awardee of a fixed price contract submitted an offer that was below cost provides no legal basis for questioning the award.

**CONTRACTS**  
**Negotiation**  
**Source Selection**  
**Board, Commission, etc.**  
**Overruled by Source Selection Official**

Source selection officials are not bound by the recommendations and conclusions of evaluators and may overrule those recommendations and conclusions if the decision to do is rationally reached.

**CONTRACTS**  
**Protests**  
**Basis for Protest Requirement**

Allegation that the contracting agency led the protester to believe that it would receive the award provides no valid basis for protest where the protester was aware that any award was contingent upon determining the protester's financial responsibility and it is clear that the agency did not unconditionally accept the protester's offer.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Protester not in Line for Award**

**B-222200.2 May 9, 1986**  
**86-1 CPD 448**

Seventh-low bidder under canceled solicitation is not an "interested party" under General Accounting Office Bid Protest Regulations to protest the cancellation and subsequent sole-source award of a contract for the requirement pursuant to section 8(a) of the Small Business Act because, assuming that the protest were sustained, the firm would not be in line for award.



Original decision concluding that the protester's bid properly was rejected as nonresponsive is affirmed where the protester offers no evidence in its request for reconsideration that the basis of the decision--that the protester had submitted a qualified bid--was in error.

GAO will not consider protest that agency improperly solicited bids for services covered under an allegedly improperly terminated contract, because protester has been suspended from government contracting and is ineligible to receive a government contract and, therefore, is not an interested party to protest under Bid Protest Regulations.

Whether or not agency followed proper procedures for termination of contract is a matter of contract administration which is not for consideration under GAO's Bid Protest Regulations.

**BIDS**

B-222119 May 12, 1986

**Invitation for Bids**

86-1 CPD 451

**Clauses****"Equitable Adjustments: Waiver and Release of Claims"****Validity**

Provision in solicitation allowing equitable price adjustment only where variations in estimated quantities exceed estimated quantity by more than 30 percent or fall below 25 percent, is not improper, as provision affects all potential bidders equally, and the fact that bidders face risk in calculating their bid prices does not invalidate the provision since bidders should determine their bid prices taking into consideration the amount of risk involved.

**CONTRACTS****Protests****Moot, Academic, etc. Questions****Corrective Action Proposed, Taken, etc. by Agency**

Protest is academic where the contracting agency modifies the challenged solicitation as the protester requests to insert appropriate wage determinations.

**BIDS**

B-219825.2 May 13, 1986

**Responsiveness**

86-1 CPD 453

**Failure to Furnish Something Required****Itemized Buy American Act Information**

Bidder's failure to state the tariff for foreign end products, as required by the solicitation, for applying the Buy American preference, may be waived as a minor informality where no bid would have received a preference under the evaluation scheme because all bidders offered products from the same country.

**CONTRACTS**  
**Negotiation**  
**Awards**  
**Propriety**

**B-221347.2; B-221347.3**  
**May 13, 1986**  
**86-1 CPD 454**

Protest of award to offeror of a noncommercial-type portable weighing scale is sustained where agency advised all offerors that the scale being procured shall be considered a commercial-type product; protester, relying on this misleading agency advice, did not offer noncommercial-type item it otherwise would have offered; and agency apparently accepted noncommercial-type product for award.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

**B-222279.3**  
**May 13, 1986**  
**86-1 CPD 456**

Request for reconsideration is denied where the protester restates earlier argument which was considered in prior decision because the protester has failed to specify errors of law made or information not previously considered in our prior decision.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Suspended, Debarred, etc. Contractors**

**B-222527**  
**May 13, 1986**  
**86-1 CPD 457**

Firm against which debarment action has been initiated is ineligible for contract award.

**BIDS**  
**Invitation for Bids**  
**Amendments**  
**Failure to Acknowledge**  
**Bid Nonresponsive**

**B-220574.4**  
**May 14, 1986**

Bidder who failed to acknowledge a material amendment to solicitation may not have such failure waived since, generally, award of a formally advertised contract must be made to the low responsible bidder who has submitted a responsive bid.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

**B-221348 May 14, 1986**  
**86-1 CPD 458**

Although the protester alleges that its low bid was incomplete because the agency failed to furnish it with a complete solicitation package, the award was properly made to another bidder, since the record does not establish that the agency failed to furnish a complete package.

**BIDS**  
**Acceptance Time Limitation**  
**Extension**  
**Price Increase**

**B-221806 May 14, 1986**  
**86-1 CPD 460**

Bidder that conditions an extension of its bid acceptance period upon an increase in price renders itself ineligible for award after its bid expires, since it has attempted to change a material term of the bid.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

Protest that contracting officer acted in bad faith in requesting extension of bid acceptance period is denied when the record shows that the request was for the purpose of completing inquiries as to the protester's responsibility and to allow sufficient time for the Small Business Administration to review and independently evaluate the firm's ability to perform the contract.

**CONTRACTS**  
**Protests**  
**Preparation**  
**Costs**  
**Noncompensable**

Claim for reimbursement of costs of bid preparation and of pursuing a protest, including attorney's fees, is denied where the protest is without merit.

CONTRACTS	B-221806	Con't
Small Business Concerns	May 14, 1986	
Awards		
Responsibility Determination		
Nonresponsibility Finding		
Review by GAO		

The General Accounting Office will not review a contracting officer's negative responsibility determination when the small business concern fails to submit to the Small Business Administration the information necessary for a certificate of competency proceeding.

CONTRACTS	B-222023	May 14, 1986
Negotiation	86-1	CPD 461
Offers or Proposals		
Evaluation		
Technical Acceptability		
Offeror's Responsibility to Demonstrate		

Technical evaluation of proposal in a negotiated procurement is based on the content of the proposal. Demonstration of alleged technical capability through both a preaward survey and protest submissions will not overcome agency's determination that proposal was technically unacceptable and outside the competitive range. Therefore, agency properly excluded proposal from competitive range once it determined that the proposal's deficiencies were such as to require a new proposal in order to be acceptable.

CONTRACTS	B-221385, et al.	May 15, 1986
Negotiation	86-1 CPD	463
Conflict of Interest Prohibitions		
Organizational		

Protest that award to selected contractor for technical advisory services for the Navy's Habitability Improvement Self-Help Program will create an organizational conflict of interest because of awardee's prior contracts to provide habitability hardware is denied where agency determines that barring the contractor from acquiring future contracts for the provision of habitability hardware is sufficient to avoid any potential conflict.

**CONTRACTS**

B-221385, et al. Con't

Negotiation

May 15, 1986

Offers or Proposals

Evaluation

Technical Acceptability

Administrative Determination

Protest that agency's technical evaluation was improper and failed to adhere to stated evaluation criteria is denied where agency evaluation was consistent with the evaluation criteria and, despite protester's disagreement, the record provides no basis to conclude that agency evaluation was unreasonable.

**CONTRACTS**

Protests

Allegations

Bias

Unsubstantiated

Protest that agency was biased and did not treat all offerors fairly is denied where record contains no evidence of bias or unfair treatment.

**CONTRACTS**

Protests

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

Apparent Prior to Bid Opening/Closing Date  
for Proposals

Allegation that RFP's conflict of interest clause should be amended is dismissed as untimely since allegation concerns an apparent solicitation impropriety which must be protested prior to the closing date for receipt of proposals.

**CONTRACTS**

Small Business Concerns

Notification of Solicitation

Commerce Business Daily Notification

Protest that agency improperly awarded small business set-aside contract without any advance notice of the intended award is denied where agency determined that award was urgent, since agency is not required to follow 5-day notification rule where urgency determination is made.

D-23

**CONTRACTS**  
**Negotiation**  
**Awards**  
**Propriety**  
**Upheld**

**B-221620 May 15, 1986**  
**86-1 CPD 464**

Where "Brand Name or Equal" clause is not included in request for proposals there is no basis for the protester's contention that award was improper because the awardee does not propose to offer an "equal product." Under the solicitation, offerors were not required to provide information demonstrating the "equality" of products offered and in its proposal the awardee did not take any exception to the solicitation's requirements.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

**B-221653.2 May 15, 1986**  
**86-1 CPD 465**

Dismissal of protest because of protester's failure to furnish contracting officer with a copy of its protest within 1 day of its filing with General Accounting Office (GAO), as required by the Bid Protest Regulations, is affirmed. Applicable regulation is not satisfied by protester's filing of an agency-level protest 1 day prior to protesting to GAO.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**

**B-222804.2 May 15, 1986**  
**86-1 CPD 466**

Where an initial protest is untimely filed with the contracting agency under GAO Bid Protest Regulations, subsequent protest to GAO is untimely and will not be considered even though it was filed within 10 working days of the agency denial of the protester's initial protest.

**CONTRACTS** **B-222804.2 Con't**  
**Protests** **May 15, 1986**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Significant Issue Exception**  
**Prior GAO Consideration of Same Issue Effect**

Untimely filed protest will not be considered under the "significant issue" exception to GAO's timeliness rules where the issue had been previously considered by GAO.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest against an award of an architect-engineer (A-E) contract alleging that the awardee received an evaluation preference based on its status as a minority owned or controlled firm is untimely when filed after award because the protested preference was apparent from the Commerce Business Daily announcement of the procurement and therefore any objections to the preference should have been raised prior to the date specified in the announcement for the receipt of qualification statements of the A-E firms.

**CONTRACTS**  
**Protests**  
**Moot, Academic, etc. Protests**  
**Future Procurements**

Under GAO Bid Protest Regulations, GAO considers the propriety of an award or proposed award and not, as here, general allegations that the agency is acting or will act improperly in regards to unspecified present and future procurements.



**GENERAL ACCOUNTING OFFICE      B-221821   May 16, 1986**  
**Jurisdiction                      86-1   CPD   467**  
**Contracts**  
**Disputes**  
**Between Private Parties**

Allegation that a proposed awardee's subcontractor improperly interfered with the protester's prior contract constitutes a private dispute for resolution through the courts if necessary and does not affect the validity of the current procurement.

**SMALL BUSINESS ADMINISTRATION**  
**Contracts**  
**Contracting With Other Government Agencies**  
**Procurement Under 8(a) Program**  
**Award Validity**  
**Review by GAO**

Review of a contract award under section 8(a) of the Small Business Act is limited to determining whether applicable regulations have been followed and whether there has been fraud or bad faith on the part of government officials.

**SMALL BUSINESS ADMINISTRATION**  
**Contracts**  
**Contracting With Other Government Agencies**  
**Procurement Under 8(a) Program**  
**Fraud or Bad Faith Alleged**  
**Evidence Sufficiency**

Protest fails to show that the selection of a section 8(a) contractor is in bad faith based on a proposed subcontractor's alleged breach of a previous government contract for the same work, where the subcontractor could not possibly have been in breach as it was not a party to the contract and therefore not in privity with the government.

**CONTRACTS** **B-222471 May 16, 1986**  
**Protests** **86-1 CPD 468**  
**Moot, Academic, etc. Questions**  
**Future Procurements**

Protest against agency evaluation of proposals is dismissed as premature where agency advised that it has not made an award and that it is reexamining both the solicitation and the source selection process and will take whatever action is appropriate and necessary to assure that it will make a selection most advantageous to the government.

**GENERAL SERVICES** **B-208159.9 May 19, 1986**  
**ADMINISTRATION**  
**Authority**  
**Contract Protests**

Regarding S. 2030, a bill to authorize the General Services Board of Contract Appeals to decide bid protests, GAO position is that vesting permanent, comprehensive jurisdiction in the Board is premature. A longer trial period would provide a fuller review of the Board's performance in deciding bid protests involving automatic data processing equipment. GAO also believes that comparison of GAO's and Board's performance on basis of rate of cases sustained is misleading in view of different procedures and standards of review used by both forums. If Congress decides to adopt approach currently used by the Board, GAO believes jurisdiction should be vested in individual boards at each contracting agency rather than being centralized in GSA Board.

**CONTRACTS** **B-217036.2 May 19, 1986**  
**Protests**  
**Authority to Consider**  
**Contract Administration Matters**

Whether awardee had furnished a product in accord with specifications is a matter of contract administration and thus is the responsibility of the procuring activity and not the General Accounting Office.

**GENERAL ACCOUNTING OFFICE      B-217036.2    Con't**  
**Jurisdiction                      May 19, 1986**  
**Contracts**  
**Disputes**  
**Between Private Parties**

Manufacturer's allegation that the awardee of a government contract obtained an item through unauthorized channels involves a dispute between the manufacturer and the awardee and is not for resolution by the General Accounting Office.

**CONTRACTS                              B-221847    May 19, 1986**  
**Negotiation                          86-1    CPD   469**  
**Offers or Proposals**  
**Discussion With all Offerors Requirement**  
**Exceptions**  
**Offers not Within Competitive Range**

Agency is not required to conduct discussions with an offeror whose proposal is found technically unacceptable and properly excluded from the competitive range.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Competitive Range Exclusion**  
**Reasonableness**

Determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. Allegation that agency's decision to exclude protester from the competitive range was unreasonable is denied where agency determined that protester's proposal was technically unacceptable and had no chance of being selected for award.

**CONTRACTS**

B-221847 Con't

Negotiation

May 19, 1986

Offers or Proposals

Evaluation

Technical Acceptability

Based on Content of Proposal

A technical evaluation must be based on information contained in the proposal and consequently, information contained in a preaward survey is not a substitute for information that should have been included in an offeror's technical proposal.

**CONTRACTS**

Negotiation

Source Selection

Board, Commission, etc.

Protest alleging that contracting officer improperly convened a second source selection board is denied since it is within the contracting officer's discretion to convene a new source selection board where it is determined that such action is necessary to ensure the fair and impartial evaluation of proposals.

**CONTRACTS**

Protests

General Accounting Office Procedures

Timeliness of Protest

Date Basis of Protest Made Known to Protester

Where doubt exists concerning the date the protester became aware of the protest, doubt is resolved in favor of the protester.

CONTRACTS B-221906 May 19, 1986  
Protests 86-1 CPD 470  
Interested Party Requirement  
Protester not in Line for Award

**B-221906 May 19, 1986**

## Protests

86-1 CPD 470

### Interested Party Requirement

## Protester not in Line for Award

Protest by firm not in line for the award if the protest were to be sustained is dismissed, since the protester does not have the requisite direct and substantial interest in the contract award to be considered an interested party under GAO Bid Protest Regulations.

## CONTRACTS

## Protests

## Procedures

## Information Disclosure

GAO has no authority to determine, in connection with a bid protest, what information must be disclosed by government agencies. The protester's recourse, if it believes information has been withheld improperly, is to pursue the disclosure remedies provided by the Freedom of Information Act.

## GENERAL ACCOUNTING OFFICE

## Jurisdiction

## Contracts

## Disputes

### Between Private Parties

Protest based on potential awardee's use of protester's employees is essentially a dispute between private parties which is not for consideration under GAO Bid Protest Regulations.

**BIDS** **B-221391.2, et al.**  
**Invitation for Bids** **May 20, 1986**  
**Cancellation** **86-1 CPD 471**  
**After Bid Opening**  
**Compelling Reasons Only**

An agency reasonably may determine that a compelling reason exists for canceling a brand name or equal invitation for bids (IFB) where the IFB listed as a salient characteristic a performance feature that exceeded the actual needs of the government and one of the two bids received was nonresponsive for failure to satisfy the stated requirement.

**BIDS**  
**Responsiveness**  
**Brand Name or Equal Procurement**

Where an offered "equal" item in a brand name or equal procurement does not meet a precise performance feature listed as a salient characteristic, the bid must be rejected as nonresponsive even though the item meets the actual needs of the government.

**CONTRACTS** **B-221709.4 May 20, 1986**  
**Negotiation** **86-1 CPD 472**  
**Offers or Proposals**  
**Evaluation**  
**Administrative Discretion**

Procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and an evaluation will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. A mere disagreement between the protester and the agency over a technical evaluation is not sufficient, in itself, to show that the agency's judgment was unreasonable.

B-221841 May 20, 1986

86-1 CPD 473

### Determination

## Review by GAO

**Affirmative Finding Accepted**

The General Accounting Office does not review affirmative determinations of responsibility in the absence of a showing of possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria were not applied.

## CONTRACTS

## Negotiation

## Offers or Proposals

## Prices

### Disallowed Items

Offerors may submit prices for some but not all items where the solicitation provides that the procuring agency may accept any item or group of items.

## CONTRACTS

## Protests

## Allegations

**Unsubstantiated**

Protester has not established that procuring agency gave advance notice of award to the successful offeror where the only evidence is a purported statement by the offeror, made before completion of proposal evaluation and a preaward survey, that it had received the contract.

Protest that contract for maintenance and repair of office equipment did not include final prices for replacement parts, but provided for definitization of those prices after award, is without merit where the only supplier of the replacement parts refuses to provide a price list to the sole offeror until after contract award.

**CONTRACTS****B-221841 Con't****Protests****May 20, 1986****Basis for Protest Requirement**

Protest that successful offeror provided inaccurate estimates of supplies and services to be purchased in the United States provides no basis for questioning an award where the estimates were solely for informational purposes and were not used in evaluation of proposals.

**CONTRACTS****Protests****Interested Party Requirement**

**Potential Contractors, etc. not Submitting Bids,  
etc.**

A protester that would be a potential competitor if the protest were sustained and the requirement resolicited is an interested party although it did not submit a timely offer on the protested solicitation.

**BIDS****B-219057.4 May 21, 1986****Evaluation****86-1 CPD 474****Delivery Provisions****Freight Rates**

A freight rate tender filed with the Military Traffic Management Command (MTMC) and available for use on bid opening date may be used to estimate transportation costs even though the tender contains a "lineal foot rule" that, if recognized, would have caused MTMC to reject the application for filing.



**B-219057.4 Con't**  
**May 21, 1986**

CONTRACTS B-221866 May 21, 1986  
Negotiation 86-1 CPD 475  
Requests for Proposals  
Cancellation  
Administrative Discretion  
Reasonable Exercise

**CONTRACTS**  
**Protests**  
 General Accounting Office Procedures  
 Filing Protest With Agency

D-34

**BIDS****B-222109.2 May 21, 1986****Unbalanced****86-1 CPD 476****Bid Evaluation Formula**

Any assessment as to whether or not a bid is mathematically unbalanced must go beyond the percentage differentials between base and option year prices to determine if in fact those prices are accurate reflections of the actual costs to be borne by the bidder in performing each year of the contemplated contract.

**BIDS****Unbalanced****Propriety of Unbalance****"Mathematically Unbalanced Bids"****Materiality of Unbalance**

A mathematically unbalanced bid which did not become low until after the beginning of the second option year, the last year of performance, was properly rejected as materially unbalanced where the agency had clear reason to doubt that this option would be exercised.

**CONTRACTS****B-220859.4 May 22, 1986****Protests****86-1 CPD 477****General Accounting Office Function****Independent Investigation and Conclusions****Speculative Allegations**

GAO will not conduct an independent investigation in connection with a bid protest in order to substantiate a protester's speculative allegations.

Contracting officer acted reasonably in determining that awardee's proposal met the functional requirements contained in the solicitation where solicitation permits consideration of alternate methods to perform the contract work.

Protest that agency advised offeror that only one contract would be awarded under solicitation, and then made multiple awards, is dismissed as academic where the agency canceled the solicitation.

General Accounting Office will not consider protest referred to it for decision by the Department of Housing and Urban Development Board of Contract Appeals where the protest was untimely filed with the Board.

GAO will not review an affirmative determination of responsibility absent a showing of fraud or bad faith, or that a definitive responsibility criterion was not met.

**CONTRACTS**  
**Protests**  
**Authority to Consider**

**B-223089 Con't**  
**May 22, 1986**

GAO dismisses protest that dollar threshold established pursuant to Trade Agreements Act of 1979 for offers of eligible products originating in designated countries, over which amount domestic-preference provisions of Buy American Act are waived, is too low. Dollar threshold is determined by United States Trade Representative by direction of the President to implement the Act, and GAO has no legal authority to review it in a bid protest.

**CONTRACTS**  
**Protests**  
**Authority to Consider**  
**Walsh-Healey Act Contracts**

GAO does not consider whether a bidder qualifies as a manufacturer or regular dealer under the Walsh-Healey Act.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest against apparent IFB improprieties is untimely where filed after bid opening.

**BIDS**  
**Collusive Bidding**  
**Referral to Justice Department**

**B-221530.2 May 23, 1986**  
**86-1 CPD 483**

Allegation of collusive bidding is a matter for the Department of Justice, not GAO.

**BIDS**  
**Invitation for Bids**  
**Cancellation**  
**Reinstatement**  
**Propriety**

**B-221530.2 Con't**  
**May 23, 1986**

An agency's reinstatement of a canceled solicitation is proper where justification for cancellation no longer exists and where the needs of the agency would be met by an award under the original solicitation.

**CONTRACTORS**

**Responsibility**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Challenges to an agency's affirmative determination of responsibility will not be reviewed by our Office absent a showing of bad faith or that definitive responsibility criteria in the solicitation have not been met.

**CONTRACTS**

**B-221845 May 23, 1986**  
**86-1 CPD 484**

**Protests**  
**Allegations**  
**Bias**  
**Unsubstantiated**

Protester has not shown that Navy's contracting officer or any other government official acted in bad faith in finding protester to be nonresponsible or that SBA ignored information vital to protester's competency in declining to issue certificate of competency to protester where Navy's and SBA's decisions were based on: (1) protester's unsatisfactory "quality of work" performance rating on identical prior contract for "super flat concrete construction," which was to be employed on the proposed contract; and (2) the proposed contract's critical performance schedule which did not allow time for contractor to rework mistakes. Other contracts cited by protester as evidence of its responsibility did not involve this construction requirement or contain critical construction schedule.

**CONTRACTS**

B-221845 Con't

**Small Business Concerns**

May 23, 1986

**Awards****Responsibility Determination****Nonresponsibility Finding****New Information--Effect**

Protester has not shown that Navy's contracting officer refused in bad faith to reverse his determination of nonresponsibility based on new information arising after SBA had declined to issue protester certificate of competency but before contract was awarded. Even though new information showed that protester's overall performance rating on prior, critical Navy contract had been changed from "unsatisfactory" to "marginally satisfactory," protester's "quality of work" rating on prior contract was still rated as unsatisfactory.

**CONTRACTS****Small Business Concerns****Awards****Responsibility Determination****Nonresponsibility Finding****Review by GAO**

General Accounting Office (GAO) will not review contracting officer's nonresponsibility decision relating to a small business unless the protester shows either possible fraud or bad faith on the part of government officials or where the Small Business Administration (SBA) either failed to follow its own regulations or failed to consider vital information bearing on the bidder's responsibility.

**CONTRACTS****B-222311 May 23, 1986****Negotiation****86-1 CPD 485****Offers or Proposals****Evaluation****Not for SBA Review**

Small Business Administration (SBA) certificate of competency procedures do not apply, and a referral thereunder is not required, when a small business firm's offer to perform cost studies under Office of Management and Budget Circular A-76 is downgraded under technical evaluation criteria relating to past experience. The SBA reviews matters that pertain to the nonresponsibility of small business concerns, not the evaluation of their technical proposals.

**CONTRACTS****Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date  
for Proposals**

Protest filed after award alleging that evaluation method for proposals was unfair because it placed too much emphasis on past experience is untimely, since it is an allegation of a solicitation impropriety which was apparent prior to the initial closing date for receipt of proposals.

**BIDS****B-223048 May 23, 1986****Responsiveness****86-1 CPD 486****Exceptions Taken to Invitation Terms****Delivery Provisions**

A bid offering a delivery period 90 days after receipt of contract where a 90-day delivery period was required was properly rejected as nonresponsive because it effectively added 5 days, for delivery through the ordinary mails of notice of the contract award, to the 90-day delivery period.

**CONTRACTS****B-221383.2 May 27, 1986****Protests****86-1 CPD 487****Moot, Academic, etc. Questions****Corrective Action Proposed, Taken, etc. by  
Agency**

Protest challenging invitation for bids (IFB) as defective for lack of sufficient detail is dismissed as academic where contracting agency cancels the challenged IFB and plans to issue revised IFB responsive to issues raised by protester. Even if, as protester contends, agency actually plans to perform work in-house rather than issue a revised IFB, cancellation of the IFB renders the protest academic since no award will be made under the challenged IFB.

**CONTRACTS****Protests****Preparation****Costs****Noncompensable**

There is no basis for the award of protest costs where the protest is dismissed as academic, since a prerequisite to the award of costs under the Competition in Contracting Act is a decision on the merits of the protest.

**CONTRACTS****B-221390.2 May 27, 1986****Protests****86-1 CPD 488****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Prior decision denying protest is affirmed where protester has not shown any error of fact or law which warrants reversal.



**B-222934.2 May 27, 1986 \***

86-1 CPD 489

## General Accounting Office Procedures

## Reconsideration Requests

### Error of Fact or Law

**Not Established**

When, in requesting reconsideration of a protest dismissed as untimely because it was not filed within 10 days of initial adverse agency action, the protester does not show that the dismissal was factually or legally incorrect or present new information as to when it learned of the denial of an agency-level protest, the General Accounting Office will deny the request for reconsideration.

## CONTRACTS

## Protests

## General Accounting Office Procedures

### Timeliness of Protest

### Adverse Agency Action Effect

The fact that a protester continues to pursue a protest with the contracting agency after notice of initial adverse agency action does not extend the time for filing the protest with the General Accounting Office.

## CONTRACTS

**B-223031 May 27, 1986**

**Small Business Concerns 86-1 CPD 490**

## Awards

## Responsibility Determination

### Nonresponsibility Finding

## Review by GAO

General Accounting Office will not review a contracting officer's determination of nonresponsibility with respect to a small business concern since by statute the Small Business Administration is empowered to determine conclusively whether a small business is responsible.

**CONTRACTS**  
**Negotiation**  
**Awards**

**B-221363.2 May 28, 1986**  
**86-1 CPD 491**

**To Other Than low Offeror**

Contracting agency properly may make award to offeror submitting higher cost proposal where cost is of less importance than technical factors and where the superiority of the higher cost proposal is reasonably considered by the agency to be worth the possible price premium.

**CONTRACTS**

**Negotiation**  
**Competition**  
**Equality of Competition**  
**Incumbent Contractor's Advantage**

Agency is not required to equalize competitive advantage which may arise from a competitor's incumbency unless it results from preferential or unfair government action.

**CONTRACTS**

**B-221796 May 28, 1986**  
**86-1 CPD 492**

**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Closing Date for Receipt**  
**of Quotations**

Protest that specification was unduly restrictive, first raised after award of contract, is untimely because not filed prior to closing date of solicitation.

**CONTRACTS**

**Requests for Quotations**  
**Evaluation**  
**Technical Acceptability**  
**Scope of GAO Review**

Protest that quotation was improperly rejected is denied where offered equipment did not meet all requirements of solicitation.

**CONTRACTS**

B-221862 May 28, 1986  
86-1 CPD 493

Negotiation

Offers or Proposals

Preparation

Costs

Denied

Claim for proposal preparation and protest filing costs is denied where protest against cancellation of solicitation is denied.

**CONTRACTS**

Negotiation

Requests for Proposals

Cancellation

Administrative Discretion

Reasonable Exercise

Reasonable basis exists to cancel an RFP for chairs for historic site where subsequent to the issuance of the RFP, a private organization offers to donate chairs to government.

**FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT**

Applicability

The Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act of 1984, does not apply to a procurement conducted by a nonprofit organization using private contributions even though the property which is the subject of the procurement is subsequently donated to the federal government.

**HISTORICAL MONUMENTS**

Preservation, Restoration, etc.

Under the Historic Sites Act, 16 U.S.C. § 461, et seq. (1982), the Secretary of the Interior, through the National Park Service, has broad discretion to perform acts necessary to preserve for public use designated historic sites, including acquiring personal or real property by gift, purchase or otherwise from patriotic associations or individuals.

**BIDS****B-221896 May 28, 1986****Late****86-1 CPD 494****Telegraphic Modifications**

Where bidder allegedly transmits modification lowering bid price by Western Union telex at 2:19 p.m. on the day of a 2:30 p.m. bid opening, late receipt is due to the bidder's failure to allow sufficient time for delivery, rather than to mishandling in the process of receipt. Agency properly did not consider the modification.

**BIDS****Late****Telegraphic Modifications****Evidence of Timely Delivery**

Telegraphic bid modification which is time/date stamped by the procuring activity 33 minutes after bid opening is properly rejected as late, notwithstanding information from Western Union purporting to show that it was transmitted and received before bid opening, since the only acceptable evidence to establish timely receipt is the government's time/date stamp. Information provided by Western Union may not be used to establish time of receipt or inaccuracy of time/date stamp.

**CONTRACTS****B-221980.2 May 28, 1986****Protests****86-1 CPD 495****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Decision is affirmed on reconsideration where protester raises no new facts or legal arguments that were not considered.

CONTRACTS	B-221980.2	Con't
Protests	May 28, 1986	
General Accounting Office Procedures		
Timeliness of Protest		
Significant Issue Exception		
Not for Application		

Untimely protest will not be considered under exception to timeliness rules for a protest that raises a significant issue where the issue is not of general interest to the procurement community and previously has been addressed by this Office.

BIDDERS	B-222431	May 28, 1986
Invitation Right	86-1	CPD 496
Incumbent Contractor		

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of several requests by the incumbent contractor that agency procurement officials do so, incumbent contractor was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open competitive procedures."

CONTRACTS B-222488.2 May 28, 1986  
Protests 86-1 CPD 497  
General Accounting Office Procedures  
Constructive Notice

Protester's assertion that it was unaware of the requirement to furnish a copy of the protest to the contracting agency is not a defense to a dismissal of the protest since the protester is charged with constructive notice of GAO's Bid Protest Regulations through their publication in the Federal Register and Code of Federal Regulations.

**CONTRACTS** **B-222605 May 28, 1986**  
**Negotiation** **86-1 CPD 498**  
**Late Proposals and Quotations**  
**Government Mishandling Determination**  
**Rule**

A late offer sent by a commercial carrier can be considered only if it is shown that the paramount cause for the late receipt was some improper government action.

**CONTRACTS** **B-222890.2 May 28, 1986**  
**Protests** **86-1 CPD 499**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

Protester's alleged mailing of a copy of its protest to an employee of the contracting agency who was not connected with the issuing activity or the procurement does not satisfy the requirement in GAO Bid Protest Regulations to file a copy of the protest with designated agency personnel within 1 day of filing with GAO, since the appropriate agency people had no notice of the basis for the protest.

**CONTRACTS** **B-222936.2 May 28, 1986**  
**Protests** **86-1 CPD 500**  
**Subcontractor Protests**  
**Awards "for" Government**

The fact that goods purchased by a prime contractor will ultimately be used by the government does not mean that the prime contractor's procurement is one conducted "for" the government so as to invoke the General Accounting Office's bid protest jurisdiction. A procurement is made for the government generally where the prime contractor principally provides large-scale management services to the government and acts essentially as a middleman or conduit between the government and the subcontractor.

**B-220320.2 May 29, 1986**

**86-1 CPD 501**

## General Accounting Office Procedures

## Reconsideration Requests

### Error of Fact or Law

**Not Established**

Dismissal of one basis of protest is affirmed where protester, having stated one version of facts relating to timeliness of protest during initial protest, recharacterizes facts in request for reconsideration in an effort to cure untimeliness. A protester must present all relevant facts known to it during initial consideration of the protest.

## CONTRACTS

## Protests

## General Accounting Office Procedures

### Timeliness of Protest

## New Issues

### Unrelated to Original Protest Basis

Supplemental protest against alleged ambiguity in a solicitation is not encompassed within original protest against unfair treatment of protester occurring during proposal evaluations and unrelated to the alleged ambiguity; the supplemental basis of protest must independently meet timeliness requirements.

## CONTRACTS

**B-221897 May 29, 1986**

## Negotiation

86-1 CPD 502

## Offers or Proposals

## Evaluation

## Cost Realism

## Function

Where a cost-reimbursement contract is involved, contracting agency's cost realism analysis of the offerors' proposed costs is a fundamental part of the proposal evaluation process, since the government bears the risk of loss due to cost overruns. Upward adjustment of the protester's proposed costs based on the cost realism analysis does not constitute a determination that the protester is nonresponsible, since the issue of responsibility arises only after the evaluation of proposals is completed and the prospective contractor is selected.

**CONTRACTS****B-221897 Con't****Negotiation****May 29, 1986****Offers or Proposals****Evaluation****Cost Realism Analysis****Reasonableness**

Contracting officer's reliance in cost realism analysis on the protester's actual overhead rate from prior years rather than the rate proposed by the protester was reasonable where historical data showed a significant discrepancy between the protester's proposed and actual costs under its prior contracts and the contracting officer found that the actual data available did not support the protester's estimates of work to be performed under existing and potential contracts on which its proposed overhead rate was based.

**CONTRACTS****B-222438 May 29, 1986****Small Business Concerns****86-1 CPD 503****Awards****Responsibility Determination****Nonresponsibility Finding****Review by GAO**

General Accounting Office will not consider a protest by a small business concerning a contracting agency's nonresponsibility determination where the protester fails to apply to the Small Business Administration for a certificate of competency after the nonresponsibility determination is made.

Protester fails to make any reasonable showing that the contracting agency's nonresponsibility determination was the result of discrimination by contracting officials against the protester where the protester offers no explanation and provides no supporting information or documentation for its general allegation of discrimination.



**CONTRACTS****B-208159.5 May 30, 1986****Negotiation****Sole-Source Basis****Authority**

In connection with a review of federal agencies' compliance with the Competition in Contracting Act of 1984 (CICA) by GAO's interdivisional task force on CICA, group managing attorney advises the National Security and International Affairs Division that he has no objections to proposed conclusions that (1) the use of a brand name only solicitation is inconsistent with the statutory requirement for full and open competition and therefore must be certified, justified, and approved in accordance with the Act's provisions for the use of other than competitive procedures, and (2) the Federal Acquisition Regulation should be revised accordingly.

**CONTRACTS****B-221335.2 May 30, 1986****Protests****86-1 CPD 504****General Accounting Office Procedures****Reconsideration Requests****Eligible Party Requirement**

When agency and General Accounting Office records indicate that an incumbent contractor was notified of a protest, the incumbent's unsupported statement that it did not receive such notice is not sufficient to meet its burden of proving that it was deprived of its right to participate in the protest process. Since Bid Protest Regulations limit the right to request reconsideration to interested parties that participated in a protest, the General Accounting Office will dismiss a request for reconsideration filed by an incumbent that did not participate, along with a request for costs of recompeting and requesting reconsideration.

**CONTRACTS**

B-221966.2 May 30, 1986

**Negotiation**

86-1 CPD 512

**Offers or Proposals****Best and Final****Technically Unacceptable**

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

**CONTRACTS****Negotiation****Offers or Proposals****Preparation****Costs****Denied**

Where protest is without merit, GAO will deny claim by protester for proposal preparation costs.

**CONTRACTS****Protests****Burden of Proof****On Protester**

Protest allegation that procuring activity already knew which firm it wanted to do business with is denied where protester has not met its burden of affirmatively proving its case. Unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.

**CONTRACTS****Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date  
for Proposals**

Protest of solicitation requirement based on allegedly defective solicitation drawings filed after closing date is untimely.

**BIDDERS****B-222108 May 30, 1986****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Required**

The Department of Labor recommended debarment of a subcontractor and its owners/partners under the Davis-Bacon Act because of underpayment of wages to its employees and falsification of certified payroll records. Based on our independent review of the record in this matter, we find that there was a substantial violation of the Act in that the underpayment was intentional. Therefore, the subcontractor and one of its partners will be debarred under the Act. The other partner will not be debarred. The record shows that he severed his relationship with the firm part way through the contract performance period and there is nothing in the record to demonstrate his involvement in those violations.

**CONTRACTS****B-222436 May 30, 1986****Performance****Suspension****Pending Final Resolution of Protest**

Competition in Contracting Act of 1984 permits contracting agency to allow contract performance to proceed despite pendency of a protest against the contract award upon a determination that urgent and compelling reasons exist and notification to the General Accounting Office that such a determination has been made.

**CONTRACTS****Protests****Interested Party Requirement****Direct Interest Criterion**

Protest challenging cost realism of awardee's proposal by offeror not in line for award if the protest is sustained is dismissed since the protester lacks the direct and substantial interest with regard to the contract award to be considered an interested party.

**TRANSPORTATION LAW**

**TRANSPORTATION**

**B-217354 May 5, 1986**

**Rates**

**Special Services**

The Navy instructed a motor carrier, which arrived in Virginia for pick up of a ship's propeller on a Friday, to provide special military service in the transportation of the shipment to California. Since the service included performance of continuous line-haul transportation to meet a delivery deadline, the carrier should be allowed a special hourly rate for the hours between 5 p.m. Monday and 7 a.m. Tuesday, because these were unusual hours within the meaning of the carrier's tariff; however, the carrier is not entitled to the special hourly rate for unusual hours prior to the commencement of transportation on Friday where the delay in the commencement of transportation was caused by the carrier's obtaining special permits which was its responsibility.

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