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General of the
United States**

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Preface

This publication is one in a series of monthly pamphlets entitled "Digests of Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions concerning claims are issued in accordance with 31 U.S.C. § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition In Contracting Act, Pub. L. No. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by file number and date, e.g., B-248928, Sept. 30, 1992. Approximately 10 percent of GAO's decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies and in annual volumes. Decisions in these volumes should be cited by volume, page number, and year issued, e.g., 71 Comp. Gen. 530 (1992).

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Appropriations/Financial Management

B-253613, December 3, 1993

Appropriations/Financial Management

Claims Against Government

- Torts
- ■ Government liability
- ■ ■ Waiver

The Federal Highway Administration (FHWA) may pay the Tennessee Valley Authority (TVA) costs arising out of the collapse of two TVA electric power transmission line towers resulting from FHWA's Natchez Trace construction projects. Since TVA's power operations are wholly consumer financed, and TVA's customers would ultimately bear the costs if the claim were disallowed, the interdepartmental waiver doctrine does not apply. 71 Comp. Gen. 1 (1991).

B-253947, December 6, 1993

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Cable television

Employees, who are performing long-term temporary duty assignments and who occupy quarters at the temporary duty location other than hotels or motels, may be reimbursed for cable TV charges and at least one premium channel, since it is the general practice of hotels and motels in the commuting area to include those services in their charges at no additional cost. 52 Comp. Gen. 730 (1973); and *Kevin L. Mendenhall*, B-223239, Apr. 2, 1987.

B-253582, December 13, 1993

Appropriations/Financial Management

Claims By Government

- Debt collection
- ■ Agency officials
- ■ ■ Authority
- ■ ■ ■ Waiver

Absent a statutory basis, no federal agency is authorized to waive a debt claim owing to the United States.

B-255338.5, December 23, 1993

Appropriations/Financial Management

Budget Process

■ **Impoundment**

■ ■ **Deferral**

GAO concludes six deferrals reported in the President's third special impoundment message for fiscal year 1994 are in accordance with the Impoundment Control Act. GAO also provides specific information with regard to three of the deferrals.

Civilian Personnel

B-252598, December 1, 1993

Civilian Personnel

Compensation

■ **Arbitration decisions**

■ ■ **GAO review**

Civilian Personnel

Compensation

■ **Taxes**

■ ■ **GAO authority**

A labor organization representative requests a decision on behalf of an organization member regarding the effect on the member's income taxes of a waiver granted under the authority of 5 U.S.C. § 5584. We declined jurisdiction. By letter, the representative is advised that the application of Federal tax laws to individuals is a matter primarily for the Internal Revenue Service. Further, the letter noted that we do not settle claims subject to arbitration under a collective bargaining agreement and that this particular issue is scheduled for arbitration later this year or early in 1994.

B-253947, December 6, 1993

Civilian Personnel

Travel

■ **Temporary duty**

■ ■ **Miscellaneous expenses**

■ ■ ■ **Reimbursement**

Employees, who are performing long-term temporary duty assignments and who occupy quarters at the temporary duty location other than hotels or motels, may be reimbursed for cable TV charges and at least one premium channel, since it is the general practice of hotels and motels in the commuting area to include those services in their charges at no additional cost. 52 Comp. Gen. 730 (1973); and *Kevin L. Mendenhall*, B-223239, Apr. 2, 1987.

B-254187, December 8, 1993

Civilian Personnel

Leaves Of Absence

■ **Leave transfer**

■ ■ **Leave substitution**

■ ■ ■ **Propriety**

■ ■ ■ ■ **Personnel death**

Under the Voluntary Leave Transfer Program, donated leave may not be used by the recipient after the medical emergency terminates, and any unused leave must be restored to the leave donors. Donated leave that is credited to a recipient but is not used because of a government coding error by the time of the recipient's death must be restored to the donors in accord with *Mary Dawson*, 70 Comp. Gen. 432 (1991).

B-254444, December 8, 1993

Civilian Personnel

Compensation**■ Retroactive compensation****■ ■ Promotion****■ ■ ■ Eligibility**

The Selective Service System detailed an employee from her GS-11 position to a GS-12 position, and the employee performed the higher level duties of the GS-12 position for almost 2 years. A federal employee is generally entitled only to the salary of the employee's appointed position even though higher level duties are performed. In the absence of any evidence of mandatory agency regulation or collective bargaining agreement provision requiring temporary promotions for details to higher-graded positions, the employee's backpay claim based on her performance of the duties of the higher-graded position is denied.

B-254509, December 8, 1993

Civilian Personnel

Relocation**■ Residence transaction expenses****■ ■ Additional expenses****■ ■ ■ Reimbursement****■ ■ ■ ■ Eligibility**

Civilian Personnel

Relocation**■ Residence transaction expenses****■ ■ Miscellaneous expenses****■ ■ ■ Reimbursement**

A transferring employee claims the expense of installing a fence around her septic tank required by the county health department before the house could be sold. The claim is denied. A repair or correction necessary to comply with the applicable law, although the law was not in effect when the property was purchased, is considered an operating or maintenance expense for which reimbursement in connection with a residence transaction is expressly barred by the Federal Travel Regulations. 41 C.F.R. § 302-6.2(d)(2)(iv) (1993). Neither may such expense be reimbursed under the miscellaneous expense allowance provisions since they do not cover the costs of newly acquired items, structural alterations, or an expense expressly barred by the other provisions. FTR § 302-3.1(c).

B-253427, December 14, 1993

Civilian Personnel

Relocation**■ Relocation service contracts****■ ■ Eligibility**

Civilian Personnel

Relocation**■ Residence transaction expenses****■ ■ Reimbursement****■ ■ ■ Eligibility****■ ■ ■ ■ Property titles**

A transferred employee, who held title to his residence in connection with his old duty station in joint tenancy with an individual who was not a member of his immediate family, asserted in his

written application for relocation services that title to the residence was in his name only. The agency did not learn about the co-owner until after it had authorized use of its relocation service company and had reimbursed the service company for all expenses incurred. Under section 302-12.5(d) and 302-12.6(b)(2) of the Federal Travel Regulation and agency regulations, if title is not solely in the name of the members of the immediate family, the agency will pay only the proportional share of the relocation service company's fee.

B-254120, December 14, 1993

Civilian Personnel

Relocation

- **Temporary quarters**
- ■ **Actual subsistence expenses**
- ■ ■ **Eligibility**
- ■ ■ ■ **Extension**

A transferred employee contracted to purchase a yet-to-be constructed residence before he began his initial 60-day period of temporary quarters occupancy which was not scheduled for completion until after the 60 days had expired. He requested an 30-day extension based on construction delay due to wet weather and it was approved locally. However, his voucher claim for extended period was disallowed. On appeal, the agency disallowance is sustained. Under 41 C.F.R. § 302-5.2(a)(2), the agency is authorized to grant an extension of time for occupying temporary quarters, but only if the additional time is due to circumstances occurring during the initial temporary quarters period that are beyond the employee's control. Since construction was not scheduled for completion prior to end of initial period, the agency had the discretion to conclude that any delay due to weather was not a basis to approve an extension. *Paul E. Storer*, 67 Comp. Gen. 567 (1988); *William M. Stoddard*, B-248012, Aug. 25, 1992, and decisions cited.

B-252773, December 16, 1993***

Civilian Personnel

Leaves Of Absence

- **Annual leave**
- ■ **Forfeiture**
- ■ ■ **Restoration**

An employee failed to use 140 hours of restored annual leave within the 2-year period permitted by the Office of Personnel Management regulation at 5 C.F.R. § 630.306 (1993), thus resulting in its forfeiture a second time. The agency's failure to plan and schedule the employee's leave to avoid forfeiture, as required by the agency's nondiscretionary policy, constituted administrative error. The error may be corrected by substituting the restored leave for annual leave the employee took during the period. The resulting forfeited annual leave may be restored under 5 U.S.C. § 6304(d)(1)(A) (1988). *Robert D. McFarren*, 56 Comp. Gen. 1014 (1977).

B-253791, December 21, 1993

Civilian Personnel

Relocation

- **Temporary quarters**
- ■ **Actual subsistence expenses**
- ■ ■ **Eligibility**
- ■ ■ ■ **Extension**

Employee requested an extension of temporary quarters subsistence expenses (TQSE) of 60 days beyond the initial 60-day period authorized by the agency because he had been unable to take a househunting trip, which had delayed his locating a residence, and he wished to add attic flooring and construct an outbuilding at his new residence before moving in. The authorizing official approved the extension, but agency travel management officials allowed only an additional 35 days

to cover the period through settlement on August 29 plus 5 more days to permit moving in after the Labor Day holiday. The disallowance of the additional 16 days of TQSE while attic flooring was installed and an outbuilding constructed was in accordance with agency regulations which exclude time for refurbishing, and was not arbitrary or an abuse of discretion. Therefore, the agency's disallowance of the remaining 16 days of TQSE is sustained.

B-254031, December 21, 1993

Civilian Personnel

Relocation**■ Mobile homes****■ ■ Shipment****■ ■ ■ Actual expenses****■ ■ ■ ■ Reimbursement**

A transferred employee purchased a houseboat as his permanent residence and had it transported to his new duty station. He seeks reimbursement for ancillary expenses incurred to set up the vessel as his residence at destination. The expenses claimed include the costs of scraping, painting, and waxing the hull and repairing the bilge pump. Paragraph 2-3.1c of the Federal Travel Regulations (FTR) provides that the miscellaneous expense allowance shall not be used to reimburse an employee for expenses which are disallowed elsewhere in the regulations. Paragraph 2-7.3a(3) of the FTR excludes from reimbursement the cost of maintenance and repair of a mobile dwelling. Therefore, the claimed items may not be reimbursed as miscellaneous expenses.

Civilian Personnel

Relocation**■ Miscellaneous expenses****■ ■ Reimbursement****■ ■ ■ Eligibility**

A transferred employee purchased a houseboat as his permanent residence and had it transported to his new duty station. He seeks reimbursement for ancillary expenses incurred to set up the vessel as his residence at destination. The expenses claimed include costs for hoisting, towing, and use of a crane, reassembly of the bridge which had been removed for transportation, and making all onboard systems operational (appliances and sanitary facilities). Under paragraph 2-3.1b of the Federal Travel Regulations (FTR), those expenses are includable as miscellaneous expense allowance items. However, since the employee has already received \$700 under paragraph 2-3.3a(2) of the FTR and the allowable expenses do not exceed that amount, he is not entitled to any additional amount under those provisions.

Military Personnel

B-253557, December 3, 1993

Military Personnel

Pay

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Sentence of special court-martial included reduction in rank and loss of portion of pay but due to administrative error, action was not taken to implement sentence resulting in erroneous payment. Resulting debt may not be waived under 10 U.S.C. § 2774 since member was aware of erroneous payments at time of receipt. Moreover, member's argument that special court-martial sentence was improper because it was not endorsed by commanding officer is without merit since Uniform Code of Military Justice contains no such requirement and time for appeal has passed.

B-253839, December 20, 1993

Military Personnel

Pay

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

Retired Air Force officer who accepted employment with the Navy on a temporary intermittent basis was aware of the dual compensation restrictions and that his retired pay would be reduced, but no reduction of his retired pay was made. Since he had been told that his pay was subject to dual compensation restrictions and he questioned the overpayments, it cannot be said that he was without fault in the matter and waiver is not appropriate.

B-254265, December 20, 1993

Military Personnel

Pay

- Retirement pay
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Air Force Reserve member elected Survivor Benefit Plan (SBP) coverage but when he began receiving retired pay, no SBP premiums were deducted from his pay. He had been told the amount of his gross retired pay and should have suspected an error and contacted the proper authorities when his retired pay was not reduced to cover SBP premiums. His request for waiver of the resulting debt is denied.

B-254399, December 22, 1993

Military Personnel

Pay

- Survivor benefits
- ■ Annuities
- ■ ■ Amount determination

Widow's Survivor Benefit Plan annuity was reinstated following her divorce, but through error, a cost of living adjustment to which she was entitled was not included in annuity computation. When error is discovered 13 years later, payment of increased annuity may only be made for preceeding 6 years since remainder of claim is barred under the Barring Act, 31 U.S.C. § 3702(b).

B-253968, December 23, 1993

Military Personnel

Pay

- Retirement pay
- ■ Overpayments
- ■ ■ Debt collection
- ■ ■ ■ Waiver

A member's retired pay was being reduced to meet the pay cap set out in 5 U.S.C. § 5532. He requested waiver when he was overpaid due to errors in the calculation of the deductions. His request is denied because he should have suspected that the calculation was in error.

B-254196, December 23, 1993

Military Personnel

Compensation

- Debt collection
- ■ Waiver
- ■ ■ Authority

A former Navy member received a Selective Reenlistment Bonus (SRB), but was discharged before the end of his term of enlistment. The unearned portion of his SRB may not be considered for waiver because the SRB payment was proper when made.

B-254264, December 27, 1993

Military Personnel

Pay

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Former Navy member's request for waiver of his debt to the United States which arose when his savings allotment continued after his separation from the service is denied because former member is not without fault which bars waiver under 10 U.S.C. § 2774.

B-254266, December 27, 1993

Military Personnel

Pay

■ Overpayments

■ ■ Error detection

■ ■ ■ Debt collection

■ ■ ■ ■ Waiver

Former Navy member's request for waiver of her debt to the United States which arose when she was erroneously overpaid pay and allowances more than twice her entitlement is denied because former member is not without fault under 10 U.S.C. § 2774.

Procurement

B-254260, December 1, 1993

93-2 CPD 303

Procurement

Competitive Negotiation

■ Discussion

■ ■ Misleading information

■ ■ ■ Allegation substantiation

Protest that agency failed to disclose all proposal deficiencies during discussions, and that discussions therefore were not meaningful, is denied where record shows that written discussions in fact included all deficiencies on which rejection of protester's proposal was based.

Procurement

Bid Protests

■ Moot allegation

■ ■ GAO review

Allegation that agency improperly downgraded protester's technical proposal under one evaluation factor is dismissed as academic since, even if protester's evaluation score were increased by the total amount of points available under that factor, its overall score would remain so much lower than awardee's that protester would not be in line for award.

B-253461.2, December 1, 1993

Procurement

Competitive Negotiation

■ Offers

■ ■ Evaluation

■ ■ ■ Technical superiority

Technical proposal which offered related and allegedly more sophisticated capabilities, as opposed to directly applicable, less sophisticated capabilities contemplated by the solicitation, was reasonably considered by agency as not warranting a higher rating than a proposal reflecting directly applicable capabilities.

Procurement

Competitive Negotiation

■ Offers

■ ■ Cost realism

■ ■ ■ Evaluation

■ ■ ■ ■ Administrative discretion

Agency, in performing a cost realism analysis, reasonably accepted the awardee's proposed labor and escalation rates as realistic where the labor rates were verified as the awardee's current rates as the incumbent contractor and an independent contractor retained by the Defense Contract Audit Agency verified the escalation rates.

Procurement

Sealed Bidding

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

Agency properly determined a bid bond was defective and the bid therefore nonresponsive where the surety's power of attorney authorizing the named attorney-in-fact to sign the bid bond on the surety's behalf contained an undated certification that the power of attorney had not been revoked, raising the question of whether the power of attorney could have been revoked prior to the execution of the bid bond.

B-253655.2, December 2, 1993

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Best-buy analysis

Where protester's and awardee's proposals received the same adjectival scores for technical merit and the agency reasonably concluded that the awardee's lower priced proposal offered advantages not present in the protester's proposal, the agency reasonably determined that awardee's proposal provided the highest technical capability and represented the best value to the government.

Procurement

Competitive Negotiation

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Agency did not mislead protester into raising its price where, based on the agency's concern that the protester had offered unreasonably low prices, during discussions the agency advised the protester to review its proposed price, without stating that the protester was required to raise its price.

Procurement

Competitive Negotiation

- Unbalanced offers
- ■ Materiality
- ■ ■ Determination
- ■ ■ ■ Criteria

Where proposal does not contain any enhanced prices, and the record supports the government's belief that it will purchase all services evaluated, there is no basis to reject proposal as unbalanced.

Procurement

Competitive Negotiation

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

Agency properly awarded contract to higher-priced offeror with higher-rated past performance where price/past performance tradeoff was reasonable and consistent with evaluation scheme.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Competency certification
- ■ ■ Eligibility
- ■ ■ ■ Criteria

Agency may not, consistent with statutory requirement to make award on the basis of evaluation criteria contained in the solicitation, reject a technically acceptable proposal from a small business because of concern that the price is unreasonably low when the solicitation contains no technical evaluation criterion to which that concern is related; under such circumstances the matter involves the small business's responsibility and is subject to referral to the Small Business Administration for a determination under certificate of competency procedures.

Procurement

Contractor Qualification

- Pre-qualification
- ■ Allegation substantiation

In a procurement covered by the Percy Amendment, 22 U.S.C. § 302 (1988), protest of the agency's finding that the awardee, a foreign firm, is eligible for award under that statute is denied where the agency has presented support for its finding and the protester has proffered no evidence which calls into doubt the reasonableness of that finding.

Procurement

Socio-Economic Policies

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

Contracting Officer's determination not to set aside a procurement for small disadvantaged business (SDB) concerns was reasonable where the agency synopsisized the procurement in the *Commerce Business Daily* (CBD) to assess whether responsible SDB concerns were interested in the procurement and received expressions of interest from SDB concerns that either did not provide the screening information requested by the CBD announcement or from SDB concerns that evidenced that the firms may lack the capability to perform a contract of the magnitude contemplated by the announcement.

Procurement

Competitive Negotiation

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

Protest that protester should have received the contract award because it submitted the low cost proposal which was technically equal to the awardee's proposal is denied where the procuring agency reasonably determined that the awardee's proposal was technically superior to the protester's proposal.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Justification
- ■ ■ ■ Urgent needs

Agency reasonably limited competition to one source, without soliciting offer from the protester, where the agency properly based its action on unusual and compelling urgency and reasonably concluded that the protester would not be able to provide the supplies needed in the time required.

Procurement

Noncompetitive Negotiation

- Contract awards
- ■ Sole sources
- ■ ■ Justification
- ■ ■ ■ Urgent needs

Five-month term for a sole-source contract issued on the basis of unusual and compelling urgency is not excessive in light of the anticipated unavailability of additional sources during that time period.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Deadlines
- ■ ■ ■ Constructive notification

Dismissal of protest for failure to comment on agency report or to inform General Accounting Office (GAO) of continuing interest in protest within 10 working days after agency report due date is affirmed despite protester's assertion that it did not receive GAO acknowledgment notice stating 10-day deadline; requirement for timely communication to GAO after report receipt is set forth in Bid Protest Regulations, 4 C.F.R. part 21 (1993), which are published in Federal Register and the Code of Federal Regulations, and protesters are charged with notice of their contents, and protester otherwise knew or should have known of requirement.

B-254322, December 9, 1993

Procurement

Competitive Negotiation

- Contract awards
- ■ Administrative discretion
- ■ ■ Technical equality
- ■ ■ ■ Cost savings

Where agency evaluators reasonably conclude that two proposals are essentially technically equal, award without discussions to the low-priced offeror was proper.

B-253293, *et al.*, December 10, 1993

Procurement

Payment/Discharge

- Shipment costs
- ■ Amount determination
- ■ ■ GAO review

Shipment of commodities classified as "ammunition for cannon with smoke projectiles" and "special fireworks" are not subject to additional shipping charges that apply to "chemical ammunition" since, according to the applicable hazardous materials regulations, each of the three designations identifies a clearly distinguishable explosive.

B-254338; B-254338.2, December 10, 1993

93-2 CPD 312**Procurement**

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Weighting

Protest that award to lower-priced offeror under solicitation for leased space failed to give consideration to aesthetic and technical factors is denied, where record shows that agency considered offeror's ability to provide an aesthetically pleasing building, as well as all technical factors listed in the solicitation, and decision to select awardee based on price was consistent with solicitation, which did not give technical factors any greater weight than price in the selection decision.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Submission
- ■ ■ Timeliness

Where request for best and final offers (BAFO) did not require offerors to submit signed offer forms, cover letter to awardee's offer demonstrated offeror's intent to be bound, so that later submission of signed form did not constitute submission of a late BAFO.

Procurement

Competitive Negotiation

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

Where agency instructed offerors during discussions to include cost of services and utilities in lease price, agency's verification that low offeror had followed instructions constituted a clarification, not discussions, since it was merely an inquiry for the purpose of eliminating a minor uncertainty in the proposal.

B-254355, December 13, 1993

93-2 CPD 314

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Justification

Protest that agency improperly eliminated proposal from competitive range is denied where record shows that agency reasonably concluded, in light of competing proposals, that protester's proposal had no reasonable chance of award.

B-254887.2, December 13, 1993

93-2 CPD 313

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Prices

Contracting agency properly did not include protester's proposed reduced award fee in price evaluation of proposal, where it was clear from the solicitation that offerors were not intended to propose other than the fee stated on the pricing schedule contained in the solicitation, and that different award fees would not be evaluated.

B-255134.2, December 13, 1993

93-2 CPD 314

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Where protester does not show that original decision contains either an error of fact or law which would warrant its reversal, decision is affirmed.

B-247442.2, December 14, 1993

Procurement

Payment/Discharge**■ Shipment****■ ■ Carrier liability****■ ■ ■ Burden of proof**

A *prima facie* case of carrier liability is not established where a shipper provides no evidence to support his claim that the carpet he received from the carrier was different than the one he says he had tendered to a nontemporary storage (NTS) contractor for shipment in 1985; the only evidence in the record describing the carpet delivered indicates that it matched the NTS contractor's inventory at origin.

B-251698.7, December 14, 1993

93-2 CPD 315**Procurement**

Competitive Negotiation**■ Competitive advantage****■ ■ Privileged information****■ ■ ■ Disclosure**

Procuring agency decision not to reveal to awardee competitors' cost information after protest was sustained and competition reopened is proper even though awardee's cost information was revealed to its competitors after it was awarded the contract. The agency reasonably determined that no competitive harm would result to the awardee because (1) the award is based on evaluated costs and only proposed costs were revealed; (2) 1 year has passed since the awardee's proposed costs were submitted; and (3) the requirements under the solicitation have changed.

B-252796.2; B-252797.2, December 14, 1993

93-2 CPD 316**Procurement**

Bid Protests**■ GAO procedures****■ ■ GAO decisions****■ ■ ■ Reconsideration**

Request for reconsideration is denied where the protester has not shown that our prior decision contains errors of fact or law, and where it has not presented information not previously considered.

B-252859.2; B-253352.2, December 14, 1993

93-2 CPD 317**Procurement**

Bid Protests**■ GAO procedures****■ ■ GAO decisions****■ ■ ■ Reconsideration**

Request for reconsideration is denied where request fails to demonstrate that prior decision contained an error of fact or law which would warrant its reversal and repeats arguments previously considered by our Office in the original decision.

Procurement

Competitive Negotiation

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

Protest challenging cost/technical tradeoff resulting in award to higher technically rated, higher cost offeror is denied where solicitation provided that technical considerations were more important than cost and record shows that agency reasonably determined that superiority of awardee's technical proposal warranted award notwithstanding higher price.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Auction prohibition

Protest that agency engaged in improper auction technique during discussions is denied where there is no evidence supporting allegation that contracting agency provided the awardee with the protester's pricing information during discussions.

Procurement

Competitive Negotiation

- Source selection boards
- ■ Conflicts of interest

Protest that personal conflict of interest of government employee initially designated as source selection official impermissibly tainted evaluation and award process is denied where government employee recused himself from the selection decision, and record contains no evidence that employee with conflict influenced agency's technical evaluators or replacement source selection official, or that awardee gained access to any competitor's proposal or other sensitive information.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protester was not afforded meaningful discussions where the agency heavily downgraded the protester's technical proposal for various weaknesses, but did not inform the protester of any of the agency's concerns regarding those weaknesses, and the protester's proposal offered the lowest price by a significant margin and could have had a reasonable chance for award had the protester revised its proposal to correct the weaknesses perceived by the agency.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Purchases
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Protest of agency's rejection of quote for rigid hull inflatable boat is sustained where agency's description of its minimum needs misled protester into offering more expensive model where boat which agency intended to purchase off schedule was less than 25 feet long not including engines and protester reasonably assumed that the required 25-foot length did not include length of motors.

B-254429; B-254429.2, December 15, 1993

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Adequacy

Protester's proposal for technical support of aviation maintenance programs reasonably was found to be technically unacceptable where, for the first time in its best and final offer (BAFO), protester substituted two key individuals whose personnel data forms—unlike those of the individuals they replaced—failed to demonstrate the minimum experience and qualifications required by the solicitation.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Non-prejudicial allegation

Protest that agency improperly failed to reopen negotiations after finding protester's best and final offer (BAFO) technically unacceptable is denied where (1) BAFO was downgraded based on changes introduced for the first time in BAFO, and (2) it was not clearly in government's interest to reopen negotiations, since technical factors were most important and, even disregarding the BAFO modifications, awardee's proposal was technically superior to protester's.

B-254489; B-254489.2, December 15, 1993

Procurement

Bid Protests

- Evidence evaluation
- ■ Factual issues
- ■ ■ Discrepancies
- ■ ■ ■ Burden of proof

In determining whether a contracting agency's evaluation and selection decision is supportable, the General Accounting Office will accord greater weight to contemporaneous evaluation and source selection documents rather than documents prepared in response to protest allegations, especially where allegations and statements contained in contracting officer's after-the-fact protest document is wholly inconsistent with the evaluation and procurement record.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agencies are required to discuss weaknesses, excesses, and deficiencies in an offeror's proposal where the weaknesses have a significant adverse impact on the proposal's technical rating; discussions need not address every area in which a proposal receives less than a perfect score, and the need for meaningful discussions may be constrained to avoid technical leveling, technical transfusion, and an auction.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Administrative discretion

The evaluation of proposals is primarily within the discretion of the procuring agency. Consequently, the General Accounting Office will not make an independent determination of the merits of offers; rather, our Office will examine the agency evaluation to ensure that it was reasonable and consistent with the stated evaluation factors.

Procurement

Competitive Negotiation

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

Contracting agency is not required to conduct an in-depth analysis or to verify each item in conducting a cost realism analysis.

B-249858.5, December 17, 1993***

93-2 CPD 323

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Claim for protester's proposal preparation and bid protest costs is untimely since it was not filed with the agency within 60-day timeframe established by General Accounting Office Bid Protest Regulations.

B-250480.5, December 17, 1993

93-2 CPD 324

Procurement

Sealed Bidding

- Bids
- ■ Options
- ■ ■ Evaluation

Agency reasonably decided not to evaluate an option in determining the low bidder under a previously protested invitation for bids where the using activity advised the contracting officer—more than a year after bid opening and less than a month after the issuance of a General Accounting Office decision allowing for an award to the protester—who is the low bidder if the option is evalu-

ated—that the option could no longer be reasonably exercised because of lack of funding; there is no evidence that the agency purposely delayed the award to avoid making award to the protester.

B-253866.2, December 17, 1993

93-2 CPD 325

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency failed to conduct meaningful discussions by misleading protester into believing that written and oral responses provided prior to best and final offers (BAFO) sufficiently addressed proposal deficiencies is denied where complained of BAFO letter made no comment on the acceptability of the information previously provided, repeated previously submitted discussion questions, and gave protester an opportunity to correct deficiencies.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency failed to conduct meaningful discussions is denied where written discussion question was sufficient to lead the protester into one area of proposal deficiency and protester was not prejudiced by the agency's failure to inform protester of another area of deficiency.

Procurement

Competitive Negotiation

- Offers
- ■ Risks
- ■ ■ Evaluation
- ■ ■ ■ Technical acceptability

Protest that consensus risk evaluation did not reflect the individual evaluators' ratings is denied where there is no indication in the record that the consensus evaluation was unreasonable.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Best-buy analysis

Award is proper where record contains a source selection document which explains the best value determination and a source selection authority's post-protest affidavit which sets forth detailed basis for determining that awardee's higher-rated proposal was worth price premium and this affidavit is consistent with contemporaneous source selection document.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Clerical errors
- ■ ■ Error correction
- ■ ■ ■ Propriety

Where solicitation requires that prices for lot VII be based on prices for lot VI and in its best and final offer (BAFO) protester based its lot VII prices on its lot III prices, and there is nothing in the BAFO to demonstrate that the error was a mistake, procuring agency properly refused to permit protester to change its lot VII prices as a clerical error.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Price adjustments

Contracting Officer was not required to reopen discussions to permit protester to change its proposed prices where the government would not benefit from reopened discussions because the agency would not have received a better price as the result of discussions and there is no indication that there would be any other benefit to the government.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Restrictive markings

General legend in front of bid package stating that pages of "proposal or quotation" marked with restrictive legend are proprietary and are not releasable outside of the government does not render bid nonresponsive where none of the pages of the bid are marked with the referenced restrictive legend or are otherwise identified as proprietary or restrictive material.

Procurement

Competitive Negotiation

- Contract awards
- ■ Initial-offer awards
- ■ ■ Discussion
- ■ ■ ■ Propriety

Bonneville Power Administration properly made award based on discounted price offered by the awardee which was conditioned on early exercise of option without giving protester an opportunity to revise its proposal where solicitation specifically advised offerors to propose the best delivery terms they could and the procurement was conducted using simplified procedures authorized by the Bonneville Acquisition Guide which contemplate award without discussions.

Procurement

Bid Protests

■ Allegation

■ ■ Abandonment

Where protester submits a response to the agency report and fails to address certain issues raised in the initial protest and responded to in the report, General Accounting Office considers such issues abandoned.

B-254498; B-254498.2, December 17, 1993

93-2 CPD 329

Procurement

Bid Protests

■ Moot allegation

■ ■ Determination

Challenge to the domestic content of the awardee's product need not be resolved, where the awardee submitted the low, technically acceptable offer with or without application of a 50 percent evaluation premium which is required to be added to offers of foreign made machine tools.

Procurement

Competitive Negotiation

■ Offers

■ ■ Technical acceptability

■ ■ ■ Descriptive literature

Firm offering lathe which meets technical specifications after minor modification satisfies the specification requirement that a current production model be proposed where the firm manufactures the lathe using an imported lathe bed and non-imported components, has offered this lathe for sale for 3 years prior to solicitation and provides descriptive literature with its offer showing that the lathe meets solicitation specifications.

Procurement

Competitive Negotiation

■ Offers

■ ■ Designs

■ ■ ■ Evaluation

■ ■ ■ ■ Technical acceptability

Where the solicitation lists minimum dimensional specifications for lathes without providing maximum limits, the agency reasonably concluded that a proposal in which certain dimensions of the offered lathe are slightly larger than the specified minimums is technically acceptable.

B-254512, December 17, 1993***

93-2 CPD 330

Procurement

Sealed Bidding

■ Unbalanced bids

■ ■ Contract awards

■ ■ ■ Propriety

Although the apparent low bid on a contract for armed guard services was mathematically unbalanced where bidder front-loaded all equipment and start-up costs in its base year price and these costs were not for unique or specialized equipment, it was not materially unbalanced, where the bid becomes low in the first month of the third option period of the contract which included 4 option periods, and where agency reasonably intends to exercise all options.

Procurement

Socio-Economic Policies**■ Disadvantaged business set-asides****■ ■ Use****■ ■ ■ Administrative discretion**

Agency decision to conduct a procurement for paving maintenance services on an unrestricted basis and not as a small disadvantaged business (SDB) set-aside was reasonable where the agency concluded, based on the lack of responses from SDB concerns to a *Commerce Business Daily* advertisement and the procurement history, that it could not reasonably expect to receive bids from at least two responsible SDB concerns at prices not exceeding the fair market price by more than 10 percent.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation errors****■ ■ ■ Best-buy analysis**

Protest against award to other than the low-priced offeror is denied where that solicitation provided that award would be made to the offeror whose proposal was determined to be of the best value, based on price and other factors listed in the solicitation, and where agency reasonably evaluated proposal in accordance with these stated factors, and concluded that higher-priced, higher-rated proposal represented the best value to the government.

Procurement

REDACTED VERSION**Competitive Negotiation****■ Offers****■ ■ Evaluation errors****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Application**

Protests are sustained where, in procurement for managed health care services, the agency did not follow the evaluation scheme for technical and cost proposals as provided in the solicitation by failing to evaluate the effectiveness of the offerors' proposed managed health care approaches or the likely impact of their approaches on the total health care costs that would be incurred by the government.

Procurement

Specifications**■ Minimum needs standards****■ ■ Competitive restrictions****■ ■ ■ Design specifications****■ ■ ■ ■ Justification**

Protest that solicitation is unduly restrictive because it requires the rehabilitation of sanitary sewers with a cured-in-place pipe method without permitting the use of the protester's pipe lining method is sustained where the record fails to show that the agency has a reasonable basis for this requirement.

Procurement

Competitive Negotiation

- Utility services
- ■ Propriety
- ■ ■ State/local laws

Protest alleging that competitive solicitation for electric utility services violates section 8093 of the Fiscal Year 1988 Department of Defense Appropriations Act, which prohibits agencies from procuring electricity in a manner inconsistent with state law, is denied where the solicitation does not violate state law.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Ambiguity allegation
- ■ ■ ■ Interpretation

Protest allegation that solicitation does not provide a meaningful basis for comparing offered prices because there is no meaningful way to compare protester's state-regulated tariff rates to unit prices submitted by non-regulated offerors is denied where solicitation requires award to be made based on lowest total price; agency therefore is required to compare total proposed prices, not unit prices or tariff rates.

Procurement

Competitive Negotiation

- Contract awards
- ■ Qualified offers
- ■ ■ Propriety

Solicitation provision allowing offerors to submit proposed prices conditioned upon state regulatory approval is not contrary to Anti-Deficiency Act where no award will be made until after any required approval is obtained.

Procurement

Socio-Economic Policies

- Labor standards
- ■ Utility services
- ■ ■ Wage rates
- ■ ■ ■ Determination

Agency improperly failed to include Service Contract Act wage determination in solicitation for electric utility services generally exempt from the Act's application where Act applies to offerors that are not state-regulated; agency received offers from such firms, but has provided no explanation for its failure to obtain wage determination applicable to them.

Procurement

Competitive Negotiation

- Offers
- ■ Prices
- ■ ■ Evaluation
- ■ ■ ■ Technical acceptability

Agency reasonably evaluated awardee's proposal in accordance with solicitation's valuation criteria and made award to lowest-priced, technically acceptable offeror as set forth in the solicitation.

Procurement

Competitive Negotiation

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

In-depth cost realism analysis is not required for award of firm, fixed-price requirements contract since government's liability is fixed and the risk of cost escalation is borne by the contractor; evaluation of awardee's price was reasonable where agency compared offerors' prices with each other and government estimate.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Price adjustments

Protest that agency improperly "directed" offeror during discussions to increase its best and final offer (BAFO) price is denied where record shows agency reasonably told protester during discussions of its concerns with protester's drastically reduced proposed hours (to levels significantly less than the independent government estimates) since agency was concerned about protester's ability to satisfy contract requirement at the levels proposed; protester, in the exercise of its own business judgment, substantially increased its hours and price in its subsequent BAFO.

Procurement

Contractor Qualification

- Responsibility
- ■ Information
- ■ ■ Submission time periods

Bidder's failure to submit, with bid, documentation demonstrating compliance with solicitation security clearance requirement does not render bid nonresponsive because the requirement relates to the bidder's responsibility and the information can be furnished any time before award of the contract.

Procurement

Contractor Qualification

■ Responsibility/responsiveness distinctions

Protest that awardee's bid should have been rejected as nonresponsive for failure to include a management plan called for by the solicitation is denied where the requirement could only relate to bidder responsibility.

Procurement

Contract Management

■ Contract administration

■ ■ GAO review

Allegation that the awardee has not been performing the contract in compliance with the solicitation pertains to a matter of contract administration which is not for consideration by the General Accounting Office.

B-254517, December 23, 1993***

93-2 CPD 338

Procurement

Sealed Bidding

■ Bids

■ ■ Late submission

■ ■ ■ Acceptance criteria

■ ■ ■ ■ Government mishandling

Protest is sustained where, due to administrative oversight, agency failed to follow its established procedures for receipt of registered mail, and this mishandling during the process of receipt improperly precluded consideration of protester's bid.

Procurement

Sealed Bidding

■ Bids

■ ■ Late submission

■ ■ ■ Acceptance criteria

■ ■ ■ ■ Government mishandling

Where, as a result of agency's mishandling in receipt, bid was returned to protester and not considered for award, General Accounting Office recommends that bid be resubmitted to agency and that the agency make a determination whether or not the bid envelope has been opened or tampered with, if it has not, the bid should be considered for award.

B-253794.2, December 27, 1993

93-2 CPD 339

Procurement

Competitive Negotiation

■ Offers

■ ■ Designs

■ ■ ■ Evaluation

■ ■ ■ ■ Technical acceptability

Protest challenging evaluation of proposed staffing under awardee's proposal is denied where agency reasonably concluded that the awardee's staffing plan in connection with stated efficiencies resulting from particular equipment and approach proposed presented an acceptable approach to successfully accomplishing the solicitation requirements.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Prices

Agency performed appropriate price analysis under solicitation which contemplated award of fixed-price contract where the agency determined that awardee's price was reasonable on the basis of a comparison to the other prices offered.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency failed to conduct meaningful discussions by not advising protester that its proposed staffing level exceeded the agency's needs is denied where the solicitation contained performance specifications and did not call for any particular staffing requirement.

B-254527, December 27, 1993

93-2 CPD 340

Procurement

Contract Types

- Fixed-price contracts
- ■ Price determination
- ■ ■ Cost increase
- ■ ■ ■ Risk allocation

Protest against solicitation for appraisal services is denied where record shows that, although some risk was shifted to bidders under the fixed-priced contract format, the risk was not unreasonable where the solicitation provided bidders with sufficient information to compete intelligently and on an equal basis.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Multiple/aggregate awards
- ■ ■ ■ Best-buy analysis

Protest against aggregate method of award provision is denied where solicitation provides a reasonable method for determining which combination of awards represent the best value to the government.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Terms
- ■ ■ Ambiguity allegation
- ■ ■ ■ Interpretation

Protest that solicitation is defective because it does not provide sufficient information to allow offerors to compete on an equal basis is denied where the information provided reasonably describes the services required and is sufficient to permit offerors, using their expertise, to adequately estimate the cost of providing the required services.

Procurement

Sealed Bidding

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

Under a brand name or equal procurement for filing cabinets, where bidders were informed that the front design was critical and that the front design, including the drawer pulls, of equal products must be similar to that of the stated brand name, a bid offering an equal product was properly rejected as non-responsive where the procuring agency reasonably determined that the front design and drawer pulls of the protester's equal product were not similar to that of the brand name.

Procurement

Competitive Negotiation

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

Procurement

Competitive Negotiation

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

Protester's contention that evaluations of mission suitability and cost realism were unreasonable is denied where the record shows that the agency had a reasonable basis for its conclusions and conducted the evaluation in accordance with the terms of the solicitation.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Cancellation
- ■ ■ Resolicitation
- ■ ■ ■ Information disclosure

Contention that agency should cancel the procurement and resolicit after releasing the protester's initial protest document—which included the protester's proprietary information—to the awardee is denied where there is no evidence that the release of the protest document caused competitive harm to the protester because the agency had already selected the awardee for final negotiations leading to award, debriefed the protester, and there is no evidence that the agency intends to give further consideration to awarding to the protester.

B-250465.8; B-250783.4, December 30, 1993

93-2 CPD 347

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision that Randolph-Sheppard Act had priority over Small Business Act, and that withdrawal of section 8(a) set-aside in favor of proceeding under Randolph-Sheppard Act therefore was proper, is affirmed on reconsideration where there is no showing either that prior decision was factually or legally erroneous, or that new information warrants changing prior decision.

B-254461.2, December 30, 1993

93-2 CPD 345

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Responsibility

Contracting agency reasonably determined a bidder to be nonresponsible where the agency found that the bidder's individual sureties were unacceptable because their Affidavits of Individual Surety contained misrepresentations, which cast doubt as to the integrity of the sureties and the credibility of their representations.

B-254667, December 30, 1993

94-1 CPD 4

Procurement

Small Purchase Method

- Quotations
- ■ Late submission
- ■ ■ Evidence
- ■ ■ ■ Sufficiency

Protest that agency failed to consider small purchase quote is denied where it is not clear that the quote was ever received by the agency.

Procurement

Competitive Negotiation

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

Since an agency may properly cancel a solicitation, no matter when the information arises, the cancellation of a request for proposals for backplane assemblies after receipt of initial proposals was proper where the specifications in the RFP were inadequate and the correct specifications were proprietary.

Procurement

Bid Protests

- Allegation
- ■ Abandonment

Where protester fails to address in its comments agency's rebuttal to original protest issues, such issues are deemed abandoned.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest of agency's evaluation of proposals is denied where evaluation was conducted in accordance with evaluation criteria set forth in the solicitation.

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