



131721

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OVERRULED, MODIFIED OR DISTINGUISHED

B-212279, Sept. 2, 1986 modifies B-212279, Nov. 13, 1984, and distinguishes B-193964, June 27, 1980.

B-222585.6, Sept. 11, 1986 distinguishes B-218359.2, May 6, 1985.

SEPTEMBER 1986

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**GENERAL GOVERNMENT MATTERS
APPROPRIATIONS AND MISCELLANEOUS**

**DISTRICT OF COLUMBIA
Appropriations
Prisons**

B-223128 Sept. 8, 1986

The District of Columbia's use of D.C. prison project funds to construct modular housing facilities at Lorton Reformatory does not constitute an illegal misapplication of those funds. The District was granted authority to use the funds in question for "emergency needs" of the Department of Corrections in its fiscal year 1986 appropriations act (as enacted by Pub. L. No. 99-190, 99 Stat. 1185, 1224 (1985)). The District complied with the requirement that it certify the emergency needs to pertinent committees of Congress. It has been the longstanding policy of this Office to grant great weight to the interpretation of a statute by an agency or department which must carry out its functions under that statute.

Language in a House report recommending that "all possible alternatives be exhausted" by the District of Columbia before moving inmates to Lorton Reformatory is not legally binding on the District. Restrictions on the use of appropriated funds in legislative materials are not legally binding on the department concerned unless they are incorporated, either verbatim or by reference, in the appropriation act itself or some other statute.

DISBURSING OFFICERS**B-223375 Sept. 9, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing officials under 31 U.S.C. § 3527(c) from liability for improper payment resulting from the negotiation of two checks drawn on closed bank accounts as part of a fraudulent check cashing scheme. Proper procedures were followed in the payment of the checks and there was no indication of bad faith on the part of the disbursing official and his subordinates.

CERTIFYING OFFICERS**B-217668 Sept. 12, 1986****Relief****Erroneous Payments****Basis for Relief**

Accounting and finance officer denied relief for loss resulting from improper payment of improperly certified purchase request. Although officer might be expected to question certification of payment for beer with appropriated funds, under circumstances of this case, staff to whom approval authority was delegated would not necessarily question certification. We are unable to determine from the record presented to us whether officer maintained and implemented adequate system of payment procedures and controls, and are unable to grant relief at this time.

DISBURSING OFFICERS**B-220500 Sept. 12, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official under 31 U.S.C. § 3527(c) from liability for three improper payments resulting from payee's negotiation of 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 subsequent collection attempts are being pursued. However, we recommend that Army develop guidelines for dealing with payees requesting more than one substitute check within a relatively short period of time.

APPROPRIATIONS**B-213771.3 Sept. 17, 1986****Fiscal Year****Availability Beyond****Current Fiscal Year Obligation**

The House of Representatives has no authority to charge under-recorded or unrecorded obligations more than 2 years old against withdrawn balances of expired appropriations. Under 2 U.S.C. § 102a, such balances are no longer available for expenditure, and the obligations would have to be paid from current appropriations.

PROPERTY**Public****Office Furnishings**

Property purchased by General Services Administration (GSA) through General Supply Fund and for which it receives annual use fee from House of Representatives for use in members' home district offices is property owned by the United States and not by either the House of Representatives or GSA, since no Federal entity is authorized to own property in its own name.

PROPERTY
Public
Office Furnishings

B-213771.3 Con't
Sept. 17, 1986

GSA has no authority to purchase property for the sole use of the House of Representatives and then to lease it to the House in order to permit incremental reimbursement. Beginning with fiscal year 1987, GSA must receive reimbursement of the total purchase price of new furnishings within 45 days of the purchase, as required by law.

DISBURSING OFFICERS **B-221398 Sept. 19, 1986**
Relief
Erroneous Payments
Not Result of Bad Faith or Negligence

Relief is granted Army disbursing official 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 subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division. We, also, recommend that Army develop guidelines to deal with payees that make multiple claims of non-receipt of pay checks within a relatively short period of time.

GIFTS **B-217909 Sept. 22, 1986**
To Officers and Employees
Accountability

Acceptance of discounts on purchases of foreign cars offered to Federal officers and employees holding diplomatic or official passports generally is not improper; nevertheless such discounts should be considered on a case-by-case basis.

OFFICERS AND EMPLOYEES**B-217909 Con't****Ethics****Sept. 22, 1986****Acceptance of Gifts, etc. Prohibited**

Acceptance of discounts on foreign cars offered only to a limited number of Federal officers may have contravened the prohibition in Executive Office regulations, setting forth standards of conduct for Federal Government officers and employees and precluding conduct resulting in or creating the appearance of using public office for private gain, 3 C.F.R. § 100.735-4(c)(1), a similar standard in Executive Order No. 11222, as amended, 18 U.S.C. § 201n. Our views are consistent with guidance offered by the United States Office of Government Ethics and the former Counsel to the President, issued subsequent to the events inquired about in the submission.

DISBURSING OFFICERS**B-220846 Sept. 23, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official 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 subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, we will deny relief if Army delays more than 3 months in forwarding the debt to its collection division. We, also, recommend that Army develop guidelines to deal with payees who make multiple claims of non-receipt of pay checks within a relatively short period of time.

ACCOUNTABLE OFFICERS**B-220689 Sept. 24, 1986****Accounts****Settlement****Statutes of Limitation**

Since the 3-year statute of limitations, set forth in section 3526(c) of title 31 of the United States Code governing this Office's disposition of accountable officer relief requests has run, there is no longer a need for us to grant relief to Army Accounting and Financing Officer for a \$375 loss resulting from an improper payment. In duplicate check cases the 3-year period of limitation begins to run when the Army Finance and Accounting Center first receives the Treasury's debit voucher informing the Center about the loss.

APPROPRIATIONS**B-213345 Sept. 26, 1986****Transfers****Between Appropriations**

Sums apportioned under section 5(a) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1604(o), before October 1, 1982 that were available for expenditure in any urbanized area and were unobligated on October 1, 1985, may be transferred to amounts available for apportionment under section 9 of the Urban Mass Transportation Act, 49 U.S.C. § 1607a, for the fiscal year ending September 30, 1986. Subsection 5(o) was a conforming provision intended to preserve availability of the described unobligated apportionments for the new section 9 program.

ACCOUNTABLE OFFICERS**B-213720 Sept. 26, 1986****Accounts****Settlement****Statutes of Limitation**

Request for reconsideration of decision B-213720, Oct. 2, 1984, denying relief to accountable officer whose subordinate disregarded payment instructions and mistakenly certified payment to the wrong party raised a question about the statute of limitations, 31 U.S.C. § 3526(c) (1982). The original decision computed the limitations period using the date of the second check to the correct party, on the theory that this was when the Government actually sustained a loss. However, in view of the fact that the account was auditable and the error could have been discovered at the time the first payment was made, since there was a valid notice of assignment in the file, the account should be deemed settled by operation of law. Any deductions from the salary of the accountable officer, based on our previous decision, should be refunded to him.

TRANSPORTATION DEPARTMENT B-217744.6 Sept. 26, 1986
National Highway Traffic Safety Administration
Administration Efficiency

National Highway Traffic Safety Administration's (NHTSA) objection to statement in B-217744.2, Aug. 30, 1985, that manufacturers' sales data should not be used to provide a basis for lowering the Corporate Average Fuel Economy standards by regulation is not well founded. The statute creating the CAFE program allows the Secretary of Transportation to set standards reflecting the "maximum feasible fuel economy," determined by balancing "technological feasibility; [and] economic practicability" with two other factors. NHTSA argues that economic practicability encompasses sales figures because of the common meaning of the words, and because consumer reaction is an element of the practicability requirement for motor vehicle safety standards. Contrary to NHTSA's argument, the common meaning of the words "economic practicability" refers to the cost of fuel economy improvements, not how many fuel efficient cars manufacturers can sell. Moreover, our opinion was based on persuasive legislative history which NHTSA did not address when stating its objection. Accordingly, there is no reason to modify our Aug. 30, 1985, opinion.

MISCELLANEOUS RECEIPTS B-219257 Sept. 26, 1986
Special Account v. Miscellaneous Receipts
Proceeds From Sales, etc.

Proceeds obtained as a result of the sale of coal, excavated in the course of Abandoned Mine Land emergency reclamation projects to extinguish coal mine fires, should be deemed "recovered moneys" and be deposited in the Abandoned Mine Reclamation Fund under 30 U.S.C. § 401(b)(4).

CERTIFYING OFFICERS**B-224715 Sept. 29, 1986****Relief****Erroneous Payments****Duplicate Payments**

Relief is granted Army Finance and Accounting official under 31 U.S.C. § 3528 from liability for certification of improper payment resulting from payee's negotiation of both original issued Army instrument and substitute Treasury check. The officer did not know and by reasonable diligence and inquiry could not have discovered that the payee had actually received both checks and intended to cash both payment instruments. Proper procedures were followed in the certification of the substitute check.

**PERSONNEL LAW:
CIVILIAN PERSONNEL**

TRANSPORTATION

B-219489 Sept. 8, 1986

Travel Agencies

Restriction on Use

Violations by Government Travelers

Reimbursement Claims

Criteria for Allowance

Employee, authorized official travel from San Francisco to Honolulu in December 1982, purchased an airline ticket, with cash, from a travel agent. The employee may be reimbursed the amount he paid for the ticket since the record shows that the cost was less than the regular fare; that he was not aware of the general prohibition against use of travel agents; that he did not intend to circumvent the regulations; and that precautionary actions he took prior to purchasing ticket from a travel agent were reasonable and prudent under the circumstances.

OFFICERS AND EMPLOYEES

B-220720; B-220791

De Facto

Sept. 8, 1986

Criteria

An Air Force employee who served under an erroneous appointment for 3-1/2 months may be considered a de facto employee. The agency's failure to consult a regional register of civil service positions did not violate an absolute statutory prohibition, and there is no evidence of fraud or misrepresentation by the employee.

An Air Force employee who received three erroneous appointments among the many Federal positions she held over a period of 30 years may be considered a de facto employee during the periods of erroneous appointments. Although the employee never achieved career status because she held temporary or excepted appointments, she was erroneously appointed to career positions on three occasions. These erroneous appointments did not violate any absolute statutory prohibition, and there is no evidence of fraud or misrepresentation by the employee.

LEAVES OF ABSENCE**B-222221 Sept. 8, 1986****Annual****Restored****Administrative Error Determination**

An agency erroneously advised two employees who had qualified for early retirement benefits that they were subject to mandatory age retirement. In anticipation of their separation, the employees applied for voluntary retirement at the end of the 1985 leave year and did not schedule or use annual leave exceeding their personal leave ceilings. By the time the agency discovered its error and the employees withdrew their retirement applications, they had insufficient time to schedule and use much of their excess annual leave and they forfeited that leave. We hold that the forfeited annual leave may be restored to the employees under 5 U.S.C. § 6304(d)(1)(A), because the record shows that the forfeiture resulted from an administrative error.

OFFICERS AND EMPLOYEES**B-222366 Sept. 8, 1986****Training****Non-Government Facilities****Expense Reimbursement**

Defense Logistics Agency employee was orally authorized to attend seminar at non-government facility but the authorization was later cancelled. Since the employee was not notified of the cancellation until too late to avoid a cancellation fee, our Office will not object to payment or reimbursement of seminar cancellation fee.

OFFICERS AND EMPLOYEES**B-223240 Sept. 8, 1986****Transfers****Real Estate Expenses****Loan Origination Fee**

A transferred employee claimed a 3 percent loan origination fee, but the agency limited reimbursement to 1 percent. The employee's claim for an additional 2 percent fee is returned to the agency for further consideration, because there is no indication that the agency contacted the local office of HUD to determine the customary loan origination fee for the locality of the employee's new residence. Since the record submitted shows the employee incurred loan origination fees totaling 3 percent of the loan amount, and his claim was filed in accordance with provisions of the Federal Travel Regulations addressing required supporting documents, it becomes the responsibility of the disbursing agency to obtain any additional documentation from HUD to disallow the employee's claim.

COMPENSATION**B-220330 Sept. 11, 1986****Overtime****Irregular, Unscheduled****"Call-back" Overtime**

A civilian wage grade employee had finished his regular shift, but had not yet entered his car to return home, when he was directed to return to work for an emergency. Since this was a continuation of his regular shift and not a return to his place of employment, the employee is only entitled to overtime compensation for the time he actually worked and not to 2 hours "callback" overtime compensation.

COMPENSATION**B-221088 Sept. 11, 1986****Overtime****Fair Labor Standards Act****Traveltime**

Claims Group's disallowance of employee's claim for overtime compensation for time spent traveling between point he obtained Government vehicle and point he performed actual duties outside regular duty hours is sustained since travel did not meet requirements of FLSA. Since primary purpose of stopping at point where Government vehicle was made available was to obtain transportation, such travel cannot be regarded as incidental or inherent part of his work and thus is not compensable as overtime hours under FLSA. The day's work did not begin until employee reached the point he performed actual duties; the day's work ended before he commenced travel to return Government vehicle and no work was performed while traveling. Therefore, travel does not meet requirements of FLSA for payment of overtime compensation for time spent in travel status.

COMPENSATION**B-221088 Con't****Prevailing Rate Employees Sept. 11, 1986
Overtime**

A former employee claims entitlement to overtime compensation under title 5, U.S. Code for the period November 12, 1975, to November 12, 1982. The claim, which was received in the General Accounting Office on December 1, 1982, is not barred from consideration for the period after December 1, 1976. However, the earlier disallowance of the claim is sustained. Employee was allowed to commute in Government vehicle from the Public Works Compound, Naval Weapons Center, China Lake, California, to the Randsburg Wash Target Range, Naval Weapons Center, his duty station. Employee picked up Government vehicle at Public Works Compound at 5:15 a.m. in order to start work at Randsburg Wash at 6:00 a.m. His work day ended at 2:30 p.m. at which time he drove the Government vehicle back to the Public Works Compound, arriving at 3:15 p.m., traveling a distance of 28 miles. His claim for overtime compensation for the round trip travel is denied since such traveltime was a part of the normal travel between work and home and commuting time is noncompensable under 5 U.S.C. § 5544(a).

Naval Weapons Center former employee claimed overtime compensation under Fair Labor Standards Act (FLSA), and the Office of Personnel Management (OPM) issued a decision finding no overtime compensation to be due. Since OPM is authorized to administer the FLSA with respect to most Federal employees, great weight will be accorded to OPM's administrative determinations as to entitlements under the Act. However, since OPM was not given authority to settle or adjudicate claims arising under the FLSA, the General Accounting Office retains jurisdiction to decide the propriety of payment on such claims.

STATUTES OF LIMITATION B-221088 Con't
Claims Sept. 11, 1986
General Accounting Office
Civil Service Matters
Overtime Claims

A former employee claims entitlement to overtime compensation for the period November 12, 1975, to November 12, 1982. The claim was received in the General Accounting Office (GAO) on December 1, 1982. Since 31 U.S.C. § 3702(b)(1) (1982) bars consideration of a claim presented to the GAO more than 6 years after the date the claim accrued, that portion of the claim arising before December 1, 1976, is barred and may not be considered on its merits.

OFFICERS AND EMPLOYEES B-219859 Sept. 19, 1986
Back Pay Act
Applicability
No Unjustified or Unwarranted Personnel Action

Claimant resigned his position with one agency and applied for an appointment with a different agency doing the same type of job. His application was rejected based on a determination of unsuitability following an Office of Personnel Management investigation. This negative determination was ultimately reversed by the Merit Systems Protection Board and claimant was then appointed to the position. Claimant now seeks backpay and benefits under 5 U.S.C. § 5596, for the period of the delay caused by the improper suitability determination. Claim for backpay is denied. Since the claimant was not a federal employee at the time of his application and had no vested right to employment, he was not eligible for backpay under 5 U.S.C. § 5596.

OFFICERS AND EMPLOYEES**B-221103 Sept. 19, 1986****Transfers****Real Estate Expenses****Loan Origination Fee**

Transferred employee claimed 4 percent loan origination fee but agency limited reimbursement to 1 percent, based on HUD's advice that a 1 percent loan origination fee was customary in the locality of the employee's new residence at the time of the purchase. However, subsequent information from HUD revealed that in financing both at claimant's lending institution and in the metropolitan area of claimant's new home, 2 percent loan origination fee was typical. Since the local HUD office now states that a 2 percent loan origination fee is customary for the locality, the employee may be reimbursed an additional 1 percent for a total of 2 percent reimbursement.

STATUTES OF LIMITATION**B-221252 Sept. 19, 1986****Claims****Date of Accrual****Compensation Payments**

Claims for accrued annual leave are subject to the Barring Act (31 U.S.C. § 3702(b)) forever eliminating claims cognizable by the Comptroller General unless received in the General Accounting Office within 6 years after the claim accrues. Since annual leave claims involve money and are not exclusively decided by agencies other than the General Accounting Office, they are cognizable by the Comptroller General. The claim accrual date when the 6-year limitation period begins to run is the date liability is fixed and is ordinarily upon completion of each biweekly pay period when annual leave is earned.

STATUTES OF LIMITATION B-221252 Con't
Claims Sept. 19, 1986
General Accounting Office
Civil Service Matters
Leave

The Barring Act (31 U.S.C. § 3702(b)) forever eliminated a Federal civilian employee's retroactive claim for 302 hours of additional annual leave allegedly accumulated between 1975 and 1979 at the rate of 8 hours each biweekly pay period, based on 20 years of creditable service on the date of the employee's appointment in 1975. Approximately 4 years after the appointment, the employing agency received notice that the employee's military disability retirement resulted from a disability incurred in combat, entitling the employee to 20 years of credit for civilian leave purposes based on his prior military service, and therefore 8 hours leave per pay period. Since the employee did not file a claim with the General Accounting Office within 6 years of the final pay period in 1979 covered by the claim his claim may not be considered.

OFFICERS AND EMPLOYEES B-222121 Sept. 19, 1986
Transfers
Real Estate Expenses
Losses due to Market Conditions
House Sale
Delay

An employee of the Department of Agriculture who was transferred to a new permanent duty station was unable to sell his residence at the old duty station and deeded the residence back to the mortgage holder. The employee was required to pay a \$5,000 charge to the mortgage holder in connection with the transaction. Such payment was essentially a loss sustained by the employee due to market conditions, and this is not a reimbursable relocation expense under the applicable statute and regulations.

OFFICERS AND EMPLOYEES**B-222136 Sept. 19, 1986****Transfers****Temporary Quarters****Subsistence Expenses**

A transferred employee claims temporary quarters subsistence expenses associated with his occupancy of a furnished one-bedroom condominium he had purchased. The employee's claim may be allowed because the record shows that the employee intended to occupy the condominium on only a temporary basis pending his purchase of a suitable family residence. Specifically, the temporary character of the employee's occupancy of the condominium is evidenced by the fact that the one-bedroom unit would not accommodate his six-person family and by the fact that he kept his household goods in storage while residing there.

SUBSISTENCE**B-222861 Sept. 19, 1986****Actual Expenses****High Rate Area****Entitlement**

An employee performed temporary duty travel to a high rate geographical area (HRGA) and lodged at his family domicile while there. He was authorized reimbursement on an actual subsistence basis, but requests reimbursement on a per diem basis. The per diem claim is denied. Paragraph 1-8.1b of the Federal Travel Regulations grants agency heads discretionary authority to allow special per diem in lieu of actual subsistence in HRGA's in certain circumstances. Where agency has not approved a special per diem in the individual case, reimbursement on an actual subsistence basis is proper. Que Quigley, B-190329, February 9, 1978. Since employee remained on temporary duty over the weekend, he is also entitled to actual meal expenses, if incurred.

SUBSISTENCE
Actual Expenses
High Rate Area
Entitlement

B-222861 Con't
Sept. 19, 1986

An employee performing temporary duty travel to Detroit, Michigan, a high rate geographical area (HRGA), lodged at his family domicile in Toledo, Ohio, 65 miles from the HRGA location. Such actual subsistence reimbursement entitlement he may have incident to that commuting and lodging depends on whether that domicile was his residence in connection with his permanent duty station. Record shows that his permanent duty station was Chicago, Illinois, and whenever he performed duty there he resided with a relative in Michigan City, Indiana. Since Michigan City was his designated residence in connection with his permanent duty station, such cost associated with lodging and commuting to and from Toledo to Detroit may be allowed, so long as those expenses do not exceed the costs the employee would have incurred had he remained in Detroit.

DEFENSE DEPARTMENT
Teachers Employed in Areas Overseas
Compensation
Claims

B-223389 Sept. 19, 1986

Two employees were hired by the Department of Defense in Germany as part-time teachers and compensated at the rate of one-half of that earned by full-time teachers. The employees taught two-thirds the number of classes taught by full-time teachers and claim compensation in that proportion. Since it is a longstanding departmental policy established under statute that the pay of part-time overseas teaching positions be fixed at exactly one-half the rate of corresponding full-time positions, and this policy has not been shown to be contrary to the statute or otherwise invalid, their claims are denied.

COMPENSATION**B-170264 Sept. 22, 1986****Overtime****Fair Labor Standards Act****Evidence Sufficiency****Burden of Proof**

Electronics Maintenance Technician employed by the Federal Aviation Administration (FAA) claims additional Fair Labor Standards Act (FLSA) compensation. The employee's original entitlement was based on an administrative compromise settlement of an action filed by similarly situated employees. Employee's claim is denied in the absence of evidence that the FAA acted unreasonably in its implementation of the compromise settlement for claimant here and the other 3,000 similarly situated employees. Further, employee has not met his burden of proof to show that meal and sleep periods were not bona fide.

DEBT COLLECTIONS**B-222340; B-223101****Waiver****Sept. 22, 1986****Civilian Employees****Compensation Overpayments****Collection not Against Equity and Good
Conscience, etc.**

Supervisory firefighters, at their request, were converted from a two- to a three-shift schedule resulting in a change from 72-hour to 56-hour workweek. However, because personnel ceilings prevented staffing of third shift, supervisory firefighters continued to work same 72-hour workweek, earning 16 hours of overtime compensation under Title 5 of United States Code. This overtime resulted in \$300 per pay period increase in pay. Schedule change and payment of overtime were found to be improper. Supervisory firefighters seek waiver of collection under 5 U.S.C. § 5584. Waiver is denied because knowledge by firefighters that third-shift would not be staffed, workweek would remain the same, and pay would increase by \$300 per pay period was sufficient to demonstrate that firefighters knew or should have known payments were erroneous. Additionally, under all circumstances presented, collection of erroneous payments would not be against equity and good conscience.

EXPERTS AND CONSULTANTS**B-222095 Sept. 24, 1986****Status****Contractor or Employee**

Congressman questions hiring of panel of experts at \$1,000 per day by the Strategic Defense Initiative Organization (SDIO) as an improper personal services contract in excess of the normal compensation limitation for hiring experts and consultants. We conclude that the services of these panel members were performed on an independent contractor basis and thus did not involve an improper contract for personal services. We also hold that expert or consultant services obtained through an independent contract are not subject to the normal limitation on compensation for experts or consultants.

LEAVES OF ABSENCE
Administrative Leave
Climatic Conditions
Tardiness

B-219232 Sept. 26, 1986

Where, because of exigent circumstances it becomes necessary to provide for the tardy arrival of a significant number of employees at a given federal installation, administrative leave as to those employees reporting late may be authorized. Unless the installation is properly closed, those employees who had previously scheduled either annual or sick leave and those employees who chose not to report for duty as a result of the exigent circumstance, may not be authorized administrative leave.

Fort Eustis, Virginia, and Fort Monroe, Virginia, experienced heavy snowfall resulting in a large number of employees reporting late for duty on January 21, 1985. The Commanders at both installations originally authorized up to 2 hours of administrative leave for employees reporting late. Several days thereafter, the Commander of Fort Monroe retroactively declared Fort Monroe to have been closed for 2 hours on the date in question, resulting in a 6 hour workday. The decision whether to close a federal installation is committed to agency discretion, but in this case the decision of the Fort Monroe Commander to retroactively close the fort for 2 hours on the day in question was an abuse of agency discretion. Therefore, his decision was not effective to alter the leave status of employees who did not report to the installation on January 21.

DEBT COLLECTIONS**B-219290 Sept. 26, 1986****Waiver****Compensation Overpayments**

Twenty-two employees of NASA received merit increases under the Performance Management Recognition System (PMRS) during the period from October 1984 to January 1985. However, guidance in Federal Personnel Manual Bulletin 540-27, December 11, 1984, and subsequent regulations precluded the granting of PMRS merit increases to employees moving into the PMRS who had received a promotion, within-grade increase, or quality step increase within 90 days of the effective date of the merit increase. These NASA employees were not entitled to receive pay increases which were specifically precluded by regulations issued by the OPM to implement the PMRS. The overpayments of salary to the 22 employees may be considered for waiver by the agency under the authority of 5 U.S.C. § 5584 (1982).

COMPENSATION**B-220829 Sept. 26, 1986****Downgrading****Saved Compensation****Entitlement**

An Internal Revenue Service employee requested pay retention upon his return from a "limited assignment" overseas, the request being based upon 5 U.S.C. § 5363 (1982). The employee had attained career status; therefore, a limited assignment of that employee to an overseas duty station was not proper. However, since the employee was assigned overseas for a definite period of time, and was informed in advance that the assignment was temporary, he is not entitled to pay retention because 5 C.F.R. § 536.105(b) (1985) precludes pay retention for the pay rate earned during a temporary assignment.

Overseas**Hired Locally****Benefits Entitlement**

Former Forest Service employee hired locally in Alaska does not qualify for payment of return travel and transportation expenses under 5 U.S.C. § 5722(a)(2). Benefits under section 5722 are not available to an employee whose place of actual residence at the time of appointment is the same as the official duty station outside of the continental United States at which he is appointed. Forest Service's determination in this case that the employee was a resident of Alaska at the time of his appointment is reasonable and, therefore, entitled to deference.

STATUTES OF LIMITATION**General Accounting Office****Civil Service Matters****Overseas Employment**

Former employee of the Forest Service claims payment under 5 U.S.C. § 5722(a)(1) for travel from his alleged residence in Red Wing, Minnesota, on November 4 and 5, 1978, to accept a permanent position of forester with the Forest Service in Petersburg, Alaska, beginning November 5, 1978. The General Accounting Office first received the claim on June 19, 1985, more than 6 years after the date the claim first accrued in November 1978. The claim may not be allowed since 31 U.S.C. § 3702(b) bars consideration of claims received in the General Accounting Office more than 6 years after the date the claim first accrues, regardless of a prior filing with the claimant's agency.

COMPENSATION**B-221128 Sept. 26, 1986****Increases****Quality Increases****Retroactive**

Quality Step Increase (QSI) for IRS employee was delayed due to administrative oversight in failing to timely process paperwork necessary for approval. Agency has policy of mandatory Sustained Superior Performance Awards of at least 1 percent of salary for various employee categories including that of employee here. An award is automatically triggered if an employee receives a rating above a stated level when his annual rating is completed each year. Employee here was evaluated as Distinguished for the evaluation period of October 1, 1983, to September 30, 1984, which mandated a sustained performance award. At time of employee's annual rating which qualified him for performance award, supervisor tentatively decided that award would be a lump-sum cash payment of at least 1 percent of salary. However, some months later when supervisor submitted formal written recommendation he decided to recommend upgraded award of QSI. Approving official authorized QSI. Retroactive granting of QSI may not be made since IRS retained discretion to grant or deny it until approving official acted. As long as final agency discretion to grant or deny a QSI has not been exercised, employee has no vested right to the QSI and it may not be made retroactively effective.

OFFICERS AND EMPLOYEES**B-221518 Sept. 26, 1986****Transfers****Real Estate Expenses****Actual Residence at Time of Official Transfer Requirement**

An employee claimed reimbursement for the expenses of the sale of a residence in Ann Arbor, Michigan, incident to a permanent change of station. However, at the time of the relocation, the employee was living in an apartment in Ypsilanti, Michigan, from which he was commuting to work, and the residence in Ann Arbor, Michigan, was rented out. The latter residence was not occupied by the employee at the time he was first notified of the transfer, nor was it the residence from which he commuted to work on a daily basis, as the Federal Travel Regulations require, and thus his claim is denied.

TRAVEL EXPENSES**B-219046 Sept. 29, 1986****Interviews, Qualifications, Determinations, etc.****Reimbursement**

Four government civilian employees who interviewed with the Marine Corps Air Ground Combat Center, Twentynine Palms, California, may be reimbursed for actual travel expenses they incurred when attending interviews to determine their qualifications for an appointment to a vacant position with the Marine Corps, even though they were then currently employed by other governmental agencies and were on annual leave. The employees were issued orders by the Marine Corps authorizing the preemployment interview travel at Marine Corps expense. In these circumstances they may be considered to be in a similar position to a non-government employee for whom such travel is authorized by a government agency.

COMPENSATION**B-214541 Sept. 30, 1986****Rates****Highest Previous Rate
Transfers**

Claimant transferred in August 1983 from District of Columbia (D.C.) government to the Government Printing Office (GPO). Under sections 422(3) and 714(c) of the D.C. Self-Government Act, Public Law 93-198, December 24, 1973, the merit system authorized to be established by the D.C. government must provide for personnel benefits, including leave and retirement benefits, for its employees equal or equivalent to those provided to them under legislation in existence at the time of enactment. Since the Act provides no authority for the D.C. government to eliminate annual and sick leave transfer rights of its employees, the annual and sick leave to the employee's credit was transferable upon employment by the Federal Government.

DISTRICT OF COLUMBIA**Employees****Leaves of Absence****Federal Annual and Sick Leave Provisions**

Claimant transferred from D.C. government to Federal Government in August 1983, and all of his sick leave was transferable from the D.C. government to GPO. Upon his retirement from GPO in September 1985, all of the unused sick leave to his credit at that time, including the leave transferred from the D.C. government, is includable in computing his civil service retirement annuity under 5 U.S.C. § 8339(m) (1982). See 5 C.F.R. § 831.302 (1985).

LEAVES OF ABSENCE**B-214541 Con't****Sick****Sept. 30, 1986****Transfers****Different Leave System****Disposition of Unused Leave**

Employee of D.C. government was previously employed by Social Security Administration (SSA) at the GS-15, step 7, level. He transferred from D.C. government, where he held a District Schedule, DS-15, step 8, position, to GPO in August 1983. The District Schedule rates are not equivalent to the General Schedule rates and do not entitle him to rate of pay of GS-15, step 8. In employing claimant at the GS-15, step 7, level, GPO matched his highest previous salary rate under a similar pay system. This was proper and in accordance with established policy of GPO.

OFFICERS AND EMPLOYEES**B-223018 Sept. 30, 1986****Transfers****Real Estate Expenses****House Title in More Than One Person****Pro Rata Expense Reimbursement**

A transferred employee who purchased a home with his fiancée at his new duty station is entitled to only 50 percent of his allowable residence transaction expenses since, at the time of purchase, he did not own the home alone, nor did he own it with a member of his immediate family as required by the Federal Travel Regulations.

**PERSONNEL LAW:
MILITARY PERSONNEL**

TRANSPORTATION

B-222114 Sept. 4, 1986

Automobiles

Military Personnel

Reimbursement

Personally Procured Transportation

A retired Army sergeant is not allowed reimbursement for shipping his automobile at personal expense to his home of retirement in Hawaii, since he was under a requirement to have the shipment arranged by the government. While as an exception reimbursement for personally procured transportation of an automobile in those circumstances may be allowed when it is demonstrated that the service member acted in reliance on erroneous advice furnished by a government representative, the service member in this case did not actually receive erroneous advice, despite his contention that he was misled by general information he received when he retired concerning reimbursement of his traveling expenses.

PROCUREMENT LAW

CONTRACTS

B-223558 Sept. 2, 1986

Protests

Interested Party Requirement

Trade Associations, etc.

GAO advises a Member of Congress that it does not consider protests regarding OMB Circular A-76 cost comparisons filed by unions or affected agency employees because the statutory definition of "interested parties" eligible to file bid protests with GAO under the Competition in Contracting Act of 1984 does not encompass unions or federal employees.

CONTRACTS

Small Business Concerns

Awards

Small Business Administration's Authority

Size Determination

GAO advises a Member of Congress that it does not consider bid protests about the small business size status of firms selected for federal contracts because the Small Business Administration has conclusive statutory authority to make small business size determinations. The concerned constituent may raise the question with the contracting officer, who is under a duty to consider evidence questioning the size status of a potential contractor before making award.

BIDS

B-224068 Sept. 2, 1986

Responsiveness

86-2 CPD 247

Exceptions Taken to Invitation Terms

Small Business Requirements

Bid received under total small business set-aside, wherein the bidder represented that it was a small business but represented that not all supplies to be furnished would be manufactured by a small business, is not responsive and may not be considered for award.

BIDS **B-224376** **Sept. 2, 1986**
Evaluation **86-2 CPD 249**
Discount Provisions
Propriety of Evaluation

Protest contending that Government Printing Office improperly determined that a bid offering a prompt-payment discount was the low bid because the agency did not take into consideration the cost of money lost to the government as a result of making payment within 20 days in accordance with the prompt-payment terms is denied, since invitation for bids (IFB) provided for evaluation of prompt-payment discounts and nothing in the IFB terms or the underlying procurement regulations provided that the cost of money would be considered in evaluating bids.

CONTRACTS **B-222517.2** **Sept. 3, 1986**
Protests **86-2 CPD 253**
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

Protest that agency did not properly request best and final offers is dismissed as untimely since it was filed more than 10 working days after basis for it was known to the protester.

FEDERAL ACQUISITION REGULATION **B-223585** **Sept. 3, 1986**
Proposed Revision

GAO has no objection to a proposal to amend paragraph 5 of Table 15-2 at Federal Acquisition Regulation (FAR) § 15.804-6(b)(2) and Standard Form 1411, which appears at FAR 53.301-1411, to ensure that the government has access to those records of a contractor necessary to permit an adequate evaluation of the proposed price.

FEDERAL ACQUISITION REGULATION B-223585 Con't
Proposed Revision Sept. 3, 1986

GAO has no objection to a proposal to amend Federal Acquisition Regulation (FAR) Parts 13, 19, 20, and 52 to provide for the use of small purchase procedures in awarding small business set-aside contracts valued between \$10,000 and \$25,000.

BIDS B-224348.2 Sept. 3, 1986
Responsiveness 86-2 CPD 254
Descriptive Literature
Indication that Item Offered Failed to Meet
Specifications

Where an invitation for bids requires the submission of descriptive literature to establish conformance of the product offered with the material specifications of the solicitation, a bid must be rejected as nonresponsive if the literature submitted evidences nonconformity with the specifications.

BIDS
Responsiveness
Offer of Compliance After Bid Opening
Acceptance not Authorized

The inadequacy of submitted descriptive literature may not be cured by explanations offered after bid opening under the fundamental principle of sealed bidding that responsiveness must be determined on the basis of the bid as submitted.

CONTRACTS**B-224423 Sept. 3, 1986****Protests****86-2 CPD 255****Interested Party Requirement****Direct Interest Criterion**

Where protester is the fourth low offeror in a procurement in which price is the determining factor, has been so advised, and has not contested the acceptability of the second-low and third-low offerors (who the agency advises meet the solicitation's requirements), the protester lacks the necessary direct economic interest to qualify as an interested party eligible to pursue a protest against award to the low offeror.

CONTRACTORS**B-224465 Sept. 3, 1986****Responsibility****86-2 CPD 256****Determination****Definitive Responsibility Criteria****Compliance**

The requirement that a bidder have experience for a specific time period on a particular type of elevator installation and service is a definitive responsibility criterion, and a bidder's alleged failure to meet it does not justify rejection of its bid as nonresponsive.

CONTRACTS**Small Business Concerns****Awards****Responsibility Determination****Nonresponsibility Finding****Certificate of Competency Requirement**

A negative determination of responsibility of a small business, based on the bidder's failure to meet a definitive responsibility criterion, must be referred to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures; GAO will not question SBA's issuance of a COC absent evidence of fraud or failure to consider vital information.

CONTRACTS

B-222432.2 Sept. 4, 1986

Negotiation

86-2 CPD 257

Offers or Proposals

Preparation

Costs

Denied

Proposal preparation costs and the cost of pursuing a protest will not be granted where the General Accounting Office finds no violation of applicable statutes or regulations.

CONTRACTS

Protests

General Accounting Office Procedures

Reconsideration Requests

Additional Evidence Submitted

Available but not Previously Provided to GAO

The General Accounting Office Bid Protest Regulations, 4 C.F.R § 21.12(a) (1986), do not permit a piecemeal presentation of evidence, information, or analyses. Where in its request for reconsideration a party submits arguments that it could have presented at the time of the protest, but did not, the arguments do not provide a basis for reconsideration.

BONDS

B-223199 Sept. 4, 1986

Bid

86-2 CPD 258

Deficiencies

Amount

Bid is properly rejected where the solicitation required a bid bond of 20 percent of the total bid and the bid bond was substantially below that amount and was not equal to or greater than the difference between the price stated in the bid and the next higher acceptable bid, notwithstanding that the deficiency may have resulted from the bidder's good faith reliance on its erroneous understanding of the bonding requirement.

BIDS **B-223380** **Sept. 4, 1986**
Invitation for Bids **86-2 CPD 259**
Cancellation
After Bid Opening
Low Bid in Excess of Government Estimate

Agency's cancellation of solicitation, after bids had been opened, on basis of determination that protester's price was unreasonably high, will not be disturbed by the General Accounting Office, even though the validity of that determination is questionable because the agency unknowingly compared the protester's price with those for a less expensive item, where as a result of the protest, the agency reviewed its specifications and reasonably concluded they no longer reflect its actual needs.

CONTRACTS **B-223623.2** **Sept. 4, 1986**
Protests **86-2 CPD 260**
General Accounting Office Procedures
Timeliness of Protest
Adverse Agency Action Effect

Dismissal of original protest is affirmed, and protest will not be considered on the merits, where protester failed to file protest within 10 working days of agency denial of firm's agency-level protest.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Significant Issue Exception
Not for Application

General Accounting Office (GAO) will not consider the merits of an untimely protest under either the significant issue or good cause exceptions to GAO timeliness requirements, since there has been no showing of a compelling reason beyond the protester's control that prevented the timely filing of a protest, and the protest does not present a unique issue of widespread interest to the procurement community.

CONTRACTS

B-223705 Sept. 4, 1986

Protests

86-2 CPD 261

General Accounting Office Procedures**Timeliness of Protest****Adverse Agency Action Effect**

A protest filed with the General Accounting Office more than 10 working days after the contracting agency denied the firm's agency-level protest is untimely and will not be considered.

CONTRACTS**Protests****What Constitutes Protest**

Letter to agency which expresses dissatisfaction with a procurement action and seeks corrective action, is sufficient to constitute protest to agency.

CONTRACTS

B-223714.3 Sept. 4, 1986

Protests

86-2 CPD 262

General Accounting Office Procedures**Reconsideration Requests****Timeliness**

A protest that appeared to challenge a refusal by the Small Business Administration to issue a certificate of competency was properly dismissed since the General Accounting Office (GAO) generally does not review such determinations except in circumstances not present here. Protester's request for reconsideration, which indicates that protest was intended to raise issue considered by GAO, will not be granted where the issue is first clearly raised in the request for reconsideration and as such is untimely.

BUY AMERICAN ACT **B-223992; B-223992.2**
Bids **Sept. 4, 1986**
Evaluation **86-2 CPD 263**
Foreign Country Classification
Not Prejudicial to Protester

The Department of Defense Federal Acquisition Regulation (FAR) Supplement, providing for a 50 percent factor to be utilized to evaluate offers of defense equipment which do not qualify for exemption from the provisions of the Buy American Act, is not inconsistent with the FAR, which sets forth factors of 6 and 12 percent, since the FAR allows agency heads to utilize other factors.

BIDS **B-223993 Sept. 4, 1986**
Prices **86-2 CPD 264**
Below Cost
Not Basis for Precluding Award

The government's acceptance of a below cost bid by a responsible firm is not legally objectionable.

BIDS
Unbalanced
Not Automatically Precluded

Protest against the procuring agency's acceptance of an allegedly unbalanced bid will not be considered where the protester has not suggested that the award will not result in the lowest ultimate cost to the government.

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

Protest that solicitation is vague is dismissed as untimely when not filed before bid opening date.

CONTRACTS**B-224361 Sept. 4, 1986****Protests****86-2 CPD 265****Same Issue(s) Raised in Prior Case by Same Protester**

Protest raising arguments identical to ones previously rejected by General Accounting Office in considering protests filed by the same firm is denied where the protester fails to distinguish its current protest and the record does not show that it is significantly different from the ones previously denied.

CONTRACTS**B-224400 Sept. 4, 1986****Negotiation****86-2 CPD 266****Late Proposals and Quotations
Rejection Propriety**

National Aeronautics and Space Administration (NASA) properly rejected a late proposal, despite NASA's failure to give required public notice that it repealed its regulation permitting the consideration of late proposals in the government's interest, where the Federal Acquisition Regulation was amended to reflect the repeal and the solicitation contained the standard late clause which did not permit the consideration of late proposals in the government's interest.

BIDS**B-222568 Sept. 5, 1986****Invitation for Bids****86-2 CPD 267****Ambiguous****Objective Test**

Agency's inadvertent omission of language providing that one of four similar items included in a solicitation was to be acquired on a brand name or equal basis did not render the solicitation ambiguous because, when read in its entirety, the solicitation is subject to only one reasonable interpretation, i.e., that the item was also to be acquired on a brand name or equal basis.

BIDS	B-222568	Con't
Invitation for Bids	Sept. 5, 1986	
Specifications		
Minimum Needs Requirement		
Administrative Determination		
Reasonableness		

BIDS	B-222568	Con't
Invitation for Bids	Sept. 5, 1986	
Specifications		
Minimum Needs Requirement		
Administrative Determination		
Reasonableness		

Where an agency demonstrates that a provision requiring delivery within 14 days of contract award is reasonably related to its needs, the fact that only one offeror can satisfy the requirement does not automatically make it unduly restrictive.

CONTRACTS
Protests
Allegations
Unsubstantiated

Protests
Allegations
Unsubstantiated

Protest that specified delivery schedule unduly restricts competition is denied where protester fails to support its allegation.

CONTRACTS B-224014.2 Sept. 5, 1986
Protests 86-2 CPD 269
 General Accounting Office Procedures
 Timeliness of Protest
 Solicitation Improprieties
 Apparent Prior to Bid Opening/Closing Date
 for Proposals

CONTRACTS B-224014.2 Sept. 5, 1986
Protests 86-2 CPD 269

Protests 86-2 CPD 269

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

Apparent Prior to Bid Opening/Closing Date
for Proposals

Dismissal of a protest against alleged solicitation defects as untimely is affirmed because the protest was not filed prior to the closing date for receipt of proposals as required by Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986).

BIDS**B-224120 Sept. 5, 1986****Mistakes****86-2 CPD 270****Correction****Nonresponsive Bids**

Mistake-in-bid procedures may not be used to cure an otherwise nonresponsive bid.

BIDS**Responsiveness****Descriptive Literature****Indication That Item Offered Failed to Meet Specifications**

Where a bidder submits required descriptive literature with its bid showing that material requirements of the solicitation will not be met, the agency must reject the bid as nonresponsive.

CONTRACTS**B-222647 Sept. 8, 1986****Protests****86-2 CPD 272****Preparation****Costs****Noncompensable**

Where protest is denied, protester is not entitled to recover the costs of filing the protest. Protester's argument--that despite denial of the protest, protester should be considered to have prevailed in its protest since contracting agency delayed placing purchase order under challenged request for quotations while the protest was pending--is without merit since in cases where agency agrees to grant the relief requested by the protester, recovery of costs is not allowed since there is no decision on the merits of the protest.

CONTRACTS

B-222647 Con't

Requests for Quotations

Sept. 8, 1986

Specifications

Minimum Needs Requirement

Administrative Determination

Reasonableness

BIDS

B-223723 Sept. 8, 1986

Opening

86-2 CPD 273

Time for Opening Determination

D-12

CONTRACTS

B-224354 Sept. 8, 1986

Negotiation

86-2 CPD 274

Offers or Proposals**Discussion With all Offerors Requirement****Exceptions****Offers not Within Competitive Range**

Agency was not required to conduct discussions with a firm whose proposal was included in the initial competitive range, but was found technically unacceptable based on its system's performance during the operational capability demonstration. The agency properly could utilize the capability demonstration as part of an ongoing process for determining which proposals should be included in the competitive range for purposes of discussions, and once the agency determined that the protester's proposal was technically unacceptable, it properly could exclude the proposal from further consideration without discussions.

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

Agency's decision to eliminate the protester's proposal from the competitive range was reasonable even though it resulted in a competitive range of one. The totality of major and minor deficiencies reasonably found by the evaluators in the protester's system after the operational capability demonstration provide adequate support for the decision.

CONTRACTS
Negotiation
Offers or Proposals
Evaluation
Reasonable

B-224354 Con't
Sept. 8, 1986

Operational capability demonstration was not improperly conducted on a pass/fail basis where the evaluators identified seven major and minor deficiencies in the offeror's system that rendered the system technically unacceptable. While the General Accounting Office has criticized the strict application of pass/fail test criteria that lead to the automatic exclusion of potentially acceptable proposals, those cases generally involve situations where the offeror is unable to demonstrate compliance with only one out of a number of mandatory requirements, and is eliminated from the competition solely for that reason.

BIDS
Invitation for Bids
Clauses
Liquidated Damages
Legality

B-221316.2 Sept. 9, 1986
86-2 CPD 275

Provisions in a solicitation which authorizes contract price deduction for value of unsatisfactorily performed tasks, monitored by random sampling and checklist, in proportion to the defective performance imposes a reasonable measure of damages.

BIDS
Invitation for Bids
Specifications
Defective
Allegation not Sustained

Contrary to protester's unsupported assertions, solicitation provides clear definition of defective performance and details how much defective performance of each task constitutes unsatisfactory performance requiring a contract price deduction.

CONTRACTS

B-222587 Sept. 9, 1986

Negotiation

86-2 CPD 276

Offers or Proposals**Discussion With all Offerors Requirement****"Meaningful" Discussions**

When procuring agency presents an offeror with a list of 89 questions indicating its concerns regarding the developmental nature of proposed equipment and the lack of demonstrated compliance with specifications, and provides the offeror with an opportunity to revise its proposal, protest that discussions were not meaningful is without merit.

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

When a procuring agency, seeking nondevelopmental equipment that has been tested under government supervision and control, reasonably determines that proposed equipment is based upon other equipment that has neither been fully developed nor tested, the agency need not include the proposal in a revised competitive range or select the offeror for final negotiations, since the proposal has no reasonable chance for award.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Technical Acceptability****Based on Content of Proposal**

Test reports, submitted as part of the protest record, that were not previously available or listed in an offeror's technical proposal, do not provide a basis for questioning an agency's evaluation, since this must be based on information submitted with the proposal.

CONTRACTS
Protests
Allegations
Unsubstantiated

B-222587 Con't
Sept. 9, 1986

When offeror has had an opportunity to review a solicitation that the agency originally intended to issue on a sole source basis, and to suggest selection criteria and other changes that the agency subsequently incorporates into a competitive solicitation, protest that agency acted in bad faith in opening up the competition is not supported.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester

B-224065.2 Sept. 9, 1986
86-2 CPD 277

Protester's mailgram to contracting agency stating that it "protests the award" of a contract, but not specifying basis of protest, does not toll 10-day timeliness period for filing protest with GAO, and specific basis of protest raised for first time in GAO protest filed more than 10 days after they were known thus are untimely raised.

CONTRACTS
Protests
General Accounting Office Procedures
Timeliness of Protest
Date Basis of Protest Made Known to Protester
What Constitutes Notice

Oral notification of the basis of protest is sufficient to start the running of the 10-day period for filing a protest; protester's failure to receive some formal notification of protest basis does not warrant delay in filing protest with General Accounting Office.

CONTRACTS
Negotiation
Awards
Validity

B-219406.2 Sept. 10, 1986
86-2 CPD 278

Agency properly rejected its source selection official's recommendation for award where source selection official's recommendation was inconsistent with the evaluation factors established by the solicitation.

CONTRACTS
Negotiation
Requests for Proposals
Amendment
Propriety

Where protester would not have received award under RFP's original evaluation criteria, protester has not been competitively prejudiced by amendment which, among other things, changes RFP's evaluation criteria and allows protester a second chance to compete for award.

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

B-222439.2 Sept. 10, 1986
86-2 CPD 279

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

GENERAL ACCOUNTING OFFICE B-222961.3 Sept. 10, 1986
Jurisdiction 86-2 CPD 280
Contracts
Procurements From Workshops, etc., for Blind and
Other Severely Handicapped
Not Reviewable by GAO

General Accounting Office will not review a determination by an executive agency not to purchase particular services from workshops designated by the Committee for Purchase from the Blind and Other Severely Handicapped pursuant to the Wagner-O'Day Act instead of performing them in-house, since the act requires such purchase only if the agency otherwise would procure the services from another commercial source.

CONTRACTS B-223121.3, et al.
Protests Sept. 10, 1986
Allegations 86-2 CPD 281
Not Prejudicial

Since there is no statute or regulation requiring a procuring agency to provide offerors with samples of products that are considered acceptable, GAO finds this basis of protest without legal merit.

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

Request for reconsideration which merely reiterates grounds of previous protest does not provide a basis for this Office to reconsider the protest.

CONTRACTS**B-223920 Sept. 10, 1986****Negotiation****86-2 CPD 282****Offers or Proposals****Evaluation****Errors****Not Prejudicial**

Procuring agency's failure to accord an evaluation factor the most importance as provided in the solicitation did not prejudice the protester's competitive standing, since its proposal was ranked last for that evaluation factor and any increase in the relative importance of the factor would have increased the difference between the protester's evaluation score and those of the other offerors.

CONTRACTS**Negotiation****Offers or Proposals****Evaluation****Reasonable**

Protest that agency improperly evaluated a proposal by giving credit for a college degree to education considered to be reasonably equivalent and by giving credit for experience in the computer industry towards a minimum requirement for technical experience is denied, where the evaluation was consistent with the criteria set forth in the solicitation and information in the proposals.

Protest that agency engaged in technical leveling is denied, where the agency did not seek to bring a proposal up to the level of others or otherwise treat offerors unequally during discussions.

CONTRACTS**B-223920 Con't****Protests****Sept. 10, 1986****Allegations****Speculative**

Protester's claim that procuring agency engaged in improper discussions with an offeror is without merit, since the allegation is speculative and the questioned discussions did not influence the selection decision.

CONTRACTS**B-224353.2 Sept. 10, 1986****Protests****86-2 CPD 283****Moot, Academic, etc. Questions****Future Procurements**

General Accounting Office need not resolve issue of propriety of dismissal of protest for failure to provide designated personnel of contracting agency with copy of the protest within 1 day. Protest is dismissed as premature where record now indicates it does not concern immediate procurement but challenges future agency procurement actions.

BIDS**B-224390 Sept. 10, 1986****Responsiveness****86-2 CPD 284****Exceptions Taken to Invitation Terms**

A commercial bid bond form that limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a reprocurement contract materially differs from the standard form government bid bond and thus renders a bid nonresponsive.

CONTRACTS

B-222585.6 Sept. 11, 1986

Protests

86-2 CPD 285

General Accounting Office Procedures**Timeliness of Protest**

Where an amendment merely reopens competition and makes no substantial change in the agency's needs, it does not provide a new period for timely filing a protest against earlier amendments.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Significant Issue Exception****Not for Application**

We have considered numerous protests against the use of negotiated procurements and the propriety of evaluation criteria so an untimely protest raising those issues will not be considered under our significant issue exception.

CONTRACTS

B-223462 Sept. 11, 1986

Protests

86-2 CPD 286

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

Protest of agency's determination that protester's offer of a particular brand of lathe and accessories was unacceptable is dismissed where the protester is not an interested party under GAO Bid Protest Regulations since it would not be in line for award even if its protest were upheld. If GAO were to find that agency improperly rejected the protester's offer of particular brand of lathe, firm which offered identical lathe at lower price, not the protester, would be in line for award.

PURCHASES**B-223462 Con't****Small****Sept. 11, 1986****Price Reasonableness****Determination Basis****Propriety**

In conducting a procurement under small purchase procedures, the contracting officer has broad discretion to determine how to meet the government's needs and the manner of obtaining quotations. Award under small purchase procedures on the basis of specifications revised after initial evaluation of quotations is not objectionable where protester was not prejudiced since it was requested to, and did, provide quotation after being orally advised of changes in the government's requirements.

BIDS**B-223821.2 Sept. 11, 1986****Prices****86-2 CPD 287****Reasonableness****Administrative Determination**

Protest by nonresponsive bidder that award to next low bidder at a higher cost would be improper does not state valid basis of protest because protester offers no reason why a finding that the higher bidder's price is reasonable would be an abuse of the contracting officer's discretion.

CONTRACTS**B-223996 Sept. 11, 1986****Protests****86-2 CPD 288****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest against cancellation of solicitation is untimely filed with GAO where it was initially untimely filed with contracting agency (more than 10 working days after protester knew of cancellation).

CONTRACTORS	B-222622; B-222622.2
Responsibility	Sept. 12, 1986
Determination	86-2 CPD 289
Review by GAO	
Affirmative Finding Accepted	

Question of availability of public utilities to a construction site pertains to responsibility and may be fulfilled after submission of an offer; agency's affirmative determination of offeror's responsibility will not be reviewed by GAO absent factors not present in this case.

CONTRACTS

Protests

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

Apparent Prior to Bid Opening/Closing Date for Proposals

Allegation that Davis-Bacon Act is applicable to procurement is untimely when filed after receipt of initial proposals, where the solicitation indicates that the act was not applicable.

PUBLIC BUILDINGS

Construction

Solicitation for Offers

While offer which provides for net usable square footage approximately 2 percent less than low end of range required under solicitation deviates from technical requirements, offer need not be rejected where it meets the agency's actual requirements, there is no material change in the awardee's price advantage as a result of the lower square footage offered, and protester was not prejudiced under the solicitation's method of award.

CONTRACTS B-222651.2 Sept. 12, 1986
Negotiation 86-2 CPD 290
Requests for Proposals
Minimum Needs Requirement
Reasonableness

Negotiation

Minimum Needs Requirement

Protest that proposal bond requirement unduly restricts competition is dismissed where performance bond was required because government funds are to be used by the contractor in the performance of the contract and regulations permit the use of proposal bond where performance bond is necessary.

CONTRACTS	B-223207	Sept. 12, 1986
Negotiation	86-2	CPD 291
Awards		
Propriety		
Upheld		

Negotiation

Propriety

Upheld

Protest against selection of contractor for surveying contract is denied where protester has not shown that the Forest Service unreasonably evaluated awardee's proposal.

FREEDOM OF INFORMATION ACT
Disclosure Requests
Records of Agencies, etc. Other Than GAO
Authority of GAO to Require Disclosure

Records of Agencies, etc. Other Than GAO

Authority of GAO to Require Disclosure

Contracting agency has primary responsibility for determining which documents are subject to release. Only contracting agency and courts have authority under Freedom of Information Act, 5 U.S.C. § 552 (1982), to determine what information must be disclosed.

BIDS
Mistakes
Correction
After Bid Opening
Rule

B-223583 Sept. 12, 1986
86-2 CPD 292

Where a bidder alleges after opening but before award that there is a mistake in its low bid and presents clear and convincing evidence of the existence of the mistake and how it occurred but presents no persuasive evidence supporting its intended bid, the bid may not be corrected. However, where the evidence clearly shows that the intended bid would also be low, even though the intended bid cannot be established with certainty, the claim of error may be waived by the bidder and award can be made at the initial uncorrected price as there is no prejudice to other bidders.

CONTRACTS
Architect, Engineering,
etc. Services
Procurement Practices
Brooks Bill Applicability

B-223650, et al.
Sept. 12, 1986
86-2 CPD 293

Where performance of mine subsidence surveys does not require architectural and engineering (A-E) services and is independent of any A-E project, competitive procurement procedures may be used in lieu of selection method prescribed in the Brooks Act, 40 U.S.C. § 541 et seq. (1982).

CONTRACTS
Protests
Interested Party Requirement
Direct Interest Criterion

B-223963.4 Sept. 12, 1986
86-2 CPD 294

A protester which is not an actual or prospective offeror in the procurement is not an interested party to contest the restrictiveness of the specifications.

CONTRACTS

B-224280 Sept. 12, 1986

Protests

86-2 CPD 295

Authority to Consider**Nonappropriated Fund Activity Procurements**

Protest of a procurement for bowling equipment that appears to be conducted by a nonappropriated fund activity is dismissed because General Accounting Office does not review procurements conducted by nonappropriated fund activities because such an activity is not a federal agency.

BIDDERS

B-224371 Sept. 12, 1986

Identity

86-2 CPD 296

Substitution of Bidders**Propriety**

Sale by parent company of subsidiary that submitted low bid is not objectionable since buyer of subsidiary purchased entire portion of the business encompassed by the bid.

BIDS**Evaluation****Aggregate v. Separable Items, Prices, etc.****Propriety**

Allegation that agency improperly evaluated bidder's price for technical manuals as an aggregate price rather than a per manual price is without merit where only reasonable reading of the solicitation is that it required bidders to submit an aggregate price for the total number of technical manuals solicited.

BIDS**B-224371 Con't****Responsiveness****Sept. 12, 1986****Test to Determine****Unqualified Offer to Meet all Solicitation Terms**

Bid accompanied by a letter which expresses nothing more than a desire for changes to the specification and which was not intended for agency's consideration at bid opening does not render bid nonresponsive.

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

Request that General Accounting Office (GAO) withhold decision pending agency's responsibility determination of low bidder's new ownership is denied where there is no indication that agency will not consider the change in its responsibility determination. Furthermore, contracting officials have broad discretion in this area, and GAO will not object to an affirmative determination of responsibility absent fraud or bad faith on the part of contracting officials or misapplication of definitive responsibility criteria.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Adverse Agency Action Effect**

Protest alleging that competitor's low bid is neither low nor responsive and should be rejected need not be filed before agency notification of intent to award to competitor since grounds for protest do not arise until protester has learned of agency action or intended action adverse or inimical to protester's position.

B-222601.4 Sept. 15, 1986
86-2 CPD 297

CONTRACTS

General Accounting Office Procedures

Timeliness of Protest

CONTRACTS

General Accounting Office Procedures

Timeliness of Protest

D-28

CONTRACTS**B-222601.4 Con't****Protests****Sept. 15, 1986****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest alleging that a contractor cannot know the skill level of unknown government office workers, for whom solicitation states that instructions for telephone system must be written, is untimely when filed after the closing date for initial proposals, since failure to define workers' capability is an alleged defect apparent on the face of the solicitation.

CONTRACTS**B-223136 Sept. 15, 1986****Negotiation****86-2 CPD 298****Authority**

Sealed bid procedures are not appropriate where the contracting agency requires discussions with offerors in order to determine whether to upgrade or replace an existing fire alarm system and the award will be based on technical factors as well as price.

CONTRACTS**Negotiation****Requests for Proposals****Specifications****Minimum Needs****Not Overstated**

Where the contracting agency determines that its needs can be met by either upgrading or replacing an existing radio fire alarm system, and permits offers on either basis, protest that competition should be limited only to replacing the system, because only the manufacturer of the existing system can meet the upgrading requirements, lacks merit where the protester does not show that the agency's determination of its needs or method of meeting its needs is unreasonable.

B-223136 Con't

Sept. 15, 1986

Requests for Proposals

Specifications

Restrictive

Undue Restriction not Established

Where protester merely disagrees with the contracting agency's requirement for a radio fire alarm system using AM tone modulation, which the agency contends is less likely to be affected by interference than an FM system, the protester fails to meet its burden of showing that the requirement is unreasonable.

CONTRACTS

Protests

Allegations

Not Prejudicial

Offeror is not prejudiced by solicitation requirement for Factory Mutual approval of a radio fire alarm system where offeror cannot comply with another material solicitation requirement.

BIDS

B-223659 Sept. 15, 1986

Invitation for Bids

86-2 CPD 299

Amendments

Failure to Acknowledge

Bid Nonresponsive

Bid that failed to acknowledge amendment requiring upward wage rate revision properly was rejected as nonresponsive where the amendment's effect on price is not clearly de minimis.

CONTRACTS
Protests
Allegations
Unsubstantiated

B-223659 Con't
Sept. 15, 1986

Protest that contracting agency orally awarded a contract to the protester is without merit where agency did not transmit any written notice of award and informed the protester that contract documents would not be executed until later date.

BIDDERS
Responsibility v.
Bid Responsiveness

B-224011 Sept. 15, 1986
86-2 CPD 300

Protest contending that agency should order a preaward survey to determine if the two lowest bidders' prices include all costs concerns bidder responsibility and the depth of investigation necessary to make a determination thereon. This is a matter primarily within the broad discretion of the contracting officer who, prior to awarding the contract, must make an affirmative determination of responsibility. General Accounting Office will not review such a determination in absence of conditions not present here.

BIDS
Prices
Below Cost
Effect on Bidder Responsibility

Protest alleging that two lowest bids were nonresponsive because their prices would not cover their costs is dismissed because the allegation concerns responsibility, not responsiveness, and the General Accounting Office does not review affirmative determinations of responsibility in the absence of conditions not present here.

CONTRACTS B-224011 Con't
Protests Sept. 15, 1986
Interested Party Requirement
Protester not in Line for Award

Where the third lowest bidder protests the responsiveness of the second lowest bid but presents no evidence that the lowest bid is nonresponsive or otherwise ineligible for award, General Accounting Office will not consider the merits of the allegation, since the protester would not be in line for the award even if its protest were sustained.

CONTRACTS B-224130.2 Sept. 15, 1986
Protests 86-2 CPD 301
General Accounting Office Procedures
Timeliness of Protest
Adverse Agency Action Effect

Protest to the General Accounting Office following an initial protest to the contracting agency alleging that the agency denied the protester/incumbent contractor an opportunity to compete by failing to provide it with a copy of the solicitation is untimely and will not be considered when it is not filed within 10 working days of formal notification of the agency's denial of the initial protest, notwithstanding that the protester continued to pursue the matter with the agency following the initial denial.

CONTRACTS B-224401 Sept. 15, 1986
Negotiation 86-2 CPD 302
Awards
Procedural Deficiencies
Not Prejudicial to Protester

Allegation that agency failed to notify protester in writing of the award to a competitor does not form basis for protest since this is a procedural matter which does not affect the validity of the award. Moreover, protester was orally advised of the award and therefore was not prejudiced by the lack of a written notice.

CONTRACTS
Negotiation
Awards
Propriety
Upheld

B-224401 Con't
Sept. 15, 1986

Where firm's offer for a digital analysis imaging system is not low, the firm has not been prejudiced by award to a firm that offered a technically higher rated and lower-priced system.

CONTRACTS
Negotiation
Offers or Proposals
Best and Final
Additional Rounds

An agency is not required to reopen discussions after receipt of best and final offers to cure deficiencies first introduced in a revised proposal submitted with the best and final offer.

CONTRACTS
Negotiation
Offers or Proposals
Evaluation
Agency Adjustment of Proposal
Propriety

Protest that the price of an extra item in a proposal should have been deducted by the agency to enable the protester to become the low-priced offeror is denied since there is no evidence in the record to support its position that the item was not in fact required by the Request for Proposals.

CONTRACTS B-224437 Sept. 15, 1986
Protests 86-2 CPD 303
Authority to Consider
Contract Administration Matters

Whether irrevocable letters of credit tendered after contract award are acceptable alternatives to sureties on performance and payment bonds involves a matter of contract administration not cognizable under General Accounting Office Bid Protest Regulations.

CONTRACTS	B-224443	Sept. 15, 1986
Negotiation	86-2	CPD 304
Offers or Proposals		
Best and Final		
Failure to Request		
Unacceptable Revised Proposal		

Contracting agency need not request a best and final offer from an offeror and may instead exclude it from a revised competitive range if it becomes clear from discussions that the offeror no longer has a reasonable chance for award.

CONTRACTS B-224473 Sept. 15, 1986
Negotiation 86-2 CPD 305
National Emergency Authority
Competition Consideration

By statute, military agencies need not obtain full and open competition and may use other than competitive procedures when it is necessary for industrial mobilization purposes to award the contract to a particular source or sources. Therefore, since the normal concern of maximizing competition is secondary to the needs of industrial mobilization, decisions as to the producers that should be included in the mobilization base and the restrictions required to meet the needs of industrial mobilization will be left to the discretion of the military agencies absent compelling evidence of an abuse of that discretion.

CONTRACTS**B-224473 Con't****Negotiation****Sept. 15, 1986****National Emergency Authority****Eligibility for Award**

An entire fiscal year requirement can be awarded to one of several mobilization base producers regardless of the effect on dormant producers since participation in an industrial mobilization base does not guarantee award of any of an agency's current requirements.

CONTRACTS**B-224506.2 Sept. 15, 1986****Small Business Concerns****86-2 CPD 306****Awards****Set-Asides****Status of Bidders**

Where Small Business Administration determines that an initial proposal, submitted under a procurement set aside for small business concerns only, constructively constitutes an offer from a joint venture including large businesses based on the extent to which the offeror proposes large business subcontractors, the offeror cannot be given the opportunity to submit a revised proposal relying less on large business subcontractors since that would allow the impermissible substitution of offerors for the purpose of qualifying for the set-aside.

BIDDERS**B-219262 Sept. 16, 1986****Debarment
Listing**

By this memorandum, these four recommendations are approved for implementation: (1) that the General Accounting Office (GAO) no longer make independent distribution (independent of distribution through the General Services Administration's (GSA's) "List of Debarred, Suspended, and Ineligible Contractors") of the Comptroller General's "List of Persons or Firms Currently Debarred for Violations of Various Public Contracts Acts Incorporating Labor Standards Provisions;" (2) that GAO no longer consolidate the Comptroller General's list; (3) that GAO publish the Comptroller General's list monthly; and (4) that GAO use the same format for entries as that used by GSA.

By this letter, government officers, contractors, and other interested parties, are notified: (1) that the General Accounting Office (GAO) will no longer make independent distribution (independent of distribution through the General Services Administration's (GSA's) "List of Debarred, Suspended, and Ineligible Contractors") of the Comptroller General's "List of Persons or Firms Currently Debarred for Violations of Various Public Contracts Acts Incorporating Labor Standards Provisions;" and (2) of the availability of GSA's list.

CONTRACTS **B-223473 Sept. 16, 1986**
Protests **86-2 CPD 307**
General Accounting Office Procedures
Piecemeal Development of Issues by Protester

Protest is dismissed where protester failed to detail its protest basis until filing its comments on the agency report, more than 2 months after the protest was initially filed, although protester could have done so at the time the protest was filed.

CONTRACTORS **B-223577 Sept. 16, 1986**
Responsibility **86-2 CPD 308**
Determination
Review by GAO
Affirmative Finding Accepted

Protest challenging proposed awardee's ability to comply with solicitation requirements concerns contracting officer's affirmative determination of the awardee's responsibility which General Accounting Office (GAO) will not review absent a showing of possible fraud or bad faith on the part of procuring officials or that definitive responsibility criteria may not have been applied.

CONTRACTS
Protests
Authority to Consider
Contract Administration Matters

Whether a contractor actually performs in accordance with specifications is a matter of contract administration which General Accounting Office will not review.

Protest against sole-source procurement is untimely where protester knew agency's basis for determination to procure by other than full and open competition more than 10 working days prior to filing of protest.

An agency's evaluation must be based on the proposal submitted and an offeror that does not submit its lowest proposed costs at the first opportunity runs the risk of being excluded from further competition for the award.

Agency may exclude proposal from the competitive range where the agency reasonably determines that because of the proposal's high price it has no reasonable chance of being selected for award.

CONTRACTS
Profits
Anticipated

B-221808.2 Sept. 17, 1986
86-2 CPD 311

Claim for reimbursement of lost profits is denied since there is no legal basis for allowing recovery of lost profits even if claimant was wrongfully denied award of a contract.

BIDS
Invitation for Bids
Specifications
Minimum Needs Requirement
Administrative Determination
Reasonableness

B-223481 Sept. 17, 1986
86-2 CPD 312

Protest that agency should have solicited bids for the replacement of piping using two design alternatives rather than merely using one of the design alternatives is denied where there is no evidence that law or regulations applicable to the procurement required the solicitation to incorporate both design alternatives and an architect-engineer study conducted prior to soliciting bids shows that the design selected would be substantially less costly to the government than the other approach.

BIDS
Responsiveness
Solicitation Requirements not Satisfied
Conformability of Equipment, etc. Offered

B-224310 Sept. 17, 1986
86-2 CPD 313

Qualified Products List (QPL) requirement in invitation for bids is a material requirement that must be met at the time of bid opening. Protester's failure to identify product offered in response to QPL requirement renders its bid nonresponsive which may not be cured after bid opening.

CONTRACTS**B-220087.5 Sept. 18, 1986****Protests****86-2 CPD 314****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Request for reconsideration is denied where protester fails to show any error of law or fact in prior decision holding that contracting agency properly canceled invitation for bids (IFB) for design and installation of a local area network since agency's needs had changed to require a more extensive system than described in the IFB.

CONTRACTS**B-221333.2, et al.****Protests****Sept. 18, 1986****General Accounting****86-2 CPD 315****Office Procedures****Reconsideration Requests****Eligible Party Requirement**

A supplier to a government contractor that did not actively participate during the consideration of the original protest is not entitled to request reconsideration of a decision recommending termination where the prime contract is found to have been improperly awarded.

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

Request for reconsideration is denied where requesting party does not demonstrate an error of law or fact in original decision, but rather, reargues issues that have been previously considered.

GENERAL ACCOUNTING OFFICE B-221333.2, et al. Con't
Recommendations Sept. 18, 1986
Contracts
Prior Recommendation
Modified
Termination Action Postponement

Previous recommendation that agency terminate a contract is modified to allow postponement of termination pending results of reprourement where the agency will place no orders against the contract until the reprourement is completed, at which time it will terminate the contract if award can be made at lower price.

CONTRACTORS B-222589 Sept. 18, 1986
Responsibility 86-2 CPD 316
Determination
Review by GAO
Affirmative Finding Accepted

A contracting officer's nonresponsibility determination generally will not be disturbed absent a showing of bad faith, abuse of discretion, or a lack of any reasonable basis for the determination.

CONTRACTORS
Responsibility
Determination
Review by GAO
Nonresponsibility Finding

While instances of unsatisfactory performance on a previous contract do not in themselves establish an offeror's nonresponsibility, the circumstances and the fact of the prior deficiencies are appropriate for consideration and a contracting officer can reasonably determine that they constitute the grounds for a nonresponsibility determination.

CONTRACTS**Negotiation****Awards****Aggregate Basis****Propriety****B-222589 Con't****Sept. 18, 1986**

General Accounting Office will not object to multiple awards to two offerors responding to a request for proposals for the production of various denominations of food stamp coupons where the awards result in the lowest aggregate cost to the government consistent with more than a single award; where solicitation permitted the multiple awards which were made; and where separate awards--based upon a finding that no one contractor can perform the entire contract--are necessary to meet the government's requirement for an uninterrupted supply of food stamps.

CONTRACTS**Negotiation****Offers or Proposals****Discussion With all Offerors Requirement****"Meaningful" Discussions**

Protester has not established that meaningful discussions were not held with it or that oral advice from unnamed agency officials--which advice the agency denies giving--misled the protester into not submitting alternate price proposals which may have been to its advantage.

CONTRACTS**Protests****Abandoned**

Protest that awardee's price proposal is materially unbalanced is deemed abandoned where protester fails to respond to the agency's rebuttal of the issue when protester comments on the agency's report.

CONTRACTS

B-223439.2 Sept. 18, 1986

Negotiation

86-2 CPD 317

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

An agency is not required to equalize competition for a particular procurement by considering the competitive advantage accruing to offerors by virtue of incumbency or business acumen.

CONTRACTS**Negotiation****Requests for Proposals****Specifications****Minimum Needs****Not Overstated**

Solicitation provisions requiring that computer operators have experience on the same type of computers that are at the facility where the work will be performed is reasonable where the requirement is restricted to key personnel and the computer is highly sophisticated so that the government could not be assured of continuous smooth operation of the facility without such specific experience.

BIDS

B-223463 Sept. 18, 1986

Invitation for Bids

86-2 CPD 318

Pricing Structure**Risk**

Protest challenging requirement that contractor perform various services for which the solicitation does not provide specific compensation is without merit where the protester does not show that the risks imposed are unreasonable. The mere presence of risk in a solicitation does not render it inappropriate, and bidders are expected to consider the degree of risk in calculating bid prices.

CONTRACTS

B-223744; B-224355

Offer and Acceptance

Sept. 18, 1986

Precontract Costs

86-2 CPD 320

Where invitation for sale of surplus real property specifically states that settlement will be within 90 days after acceptance of bids, any expenditures by bidders before the property is actually conveyed to them are at their own risk.

SALES**Cancellation**

Agency has discretion to cancel a sale of surplus real property where (1) the highest bid is less than the agency's appraisal of the fair market value of the property; (2) regulations permit resolicitation in these circumstances; and (3) the solicitation reserves the government's right to reject all offers.

BIDDERS

B-224291 Sept. 18, 1986

Qualifications

86-2 CPD 321

Preaward Surveys

Utilization

An agency need not conduct a preaward survey of a firm not in line for award, since the survey is part of the evaluation of the prospective contractor's ability to perform.

CONTRACTORS

Responsibility

Determination

Review by GAO

Affirmative Finding Accepted

GAO 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.

Circumstance	Percentage (%)
If someone is attacking you	85
If someone is threatening you	75
If someone is harassing you	65
If someone is insulting you	55
If someone is annoying you	45

GAO will not review whether a contractor actually complies with specifications during the performance of a contract because that is a matter of contract administration.

CONTRACTS

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

Protest of alleged improprieties in an initial solicitation and improprieties subsequently incorporated into a solicitation is untimely if not filed prior to the respective closing dates for receipt of proposals.

CONTRACTS	B-224386	Sept. 18, 1986
Protests	86-2 CPD	322
Moot, Academic, etc. Questions		
Future Procurements		

Protest against the agency's intent to make a sole-source award for the production of light-weight fuel tanks is premature where the solicitation for the production contract is not expected to be announced or issued for several months and the agency as yet has not detailed a basis for limiting competition in a written, approved justification as required by the Competition in Contracting Act.

CONTRACTS**B-222579.2 Sept. 19, 1986****Protests****86-2 CPD 323****Preparation****Costs****Compensable**

Where it is not feasible to terminate a contract for the convenience of the government and to resolicit as recommended in a prior decision, the protester, in effect previously determined to have been unreasonably excluded from the procurement, is entitled to its costs of filing and pursuing the protest, including attorney's fees, and also its proposal preparation costs.

BIDS**B-223581; B-223965****Invitation for Bids****Sept. 19, 1986****Cancellation****86-2 CPD 324****After Bid Opening****Low Bid in Excess of Government Estimate**

Contracting officer's rejection of sole bid on the basis of his inability to determine price reasonableness, resulting in cancellation of the solicitation, is proper when the bid is significantly more than the government estimate and previous contract prices for similar services and when the record discloses no bad faith or fraud on the part of government officials.

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

Protest against a geographic restriction mandated by the Navy's Homeport Policy is untimely where the restriction is apparent on the face of a solicitation for drydocking services, but the protest is not filed until after bid opening.

CONTRACTORS**B-223715 Sept. 19, 1986****Responsibility****86-2 CPD 325****Determination****Review by GAO****Affirmative Finding Accepted**

Allegation that awardee will not be able to provide equipment that conforms to the requirements of the solicitation raises an issue involving the agency's determination that the awardee is responsible, a matter the General Accounting Office generally does not review.

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

Whether an awardee's delivered equipment actually conforms to the contract requirements is a matter of contract administration and is not encompassed by the General Accounting Office's bid protest function.

CONTRACTS**B-224315 Sept. 19, 1986****Protests****86-2 CPD 326****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest to GAO of alleged improprieties in a solicitation, initially filed with the contracting agency, must have been filed with the agency prior to closing date for receipt of proposals for it to be considered timely.

CONTRACTS **B-224317 Sept. 19, 1986**
Negotiation **86-2 CPD 327**
Late Proposals and Quotations
Rejection Propriety
Proposal Sent by Federal Express, etc.

Proposal delivered late by Federal Express properly was rejected where the late delivery was caused by the omission of the recipient's room number from the address and was not caused by the government.

CONTRACTS **B-224339.2 Sept. 19, 1986**
Federal Supply Schedule **86-2 CPD 328**
Awards
Propriety

Federal Supply Schedule (FSS) contract must be awarded to FSS contractor offering lowest price, and the fact that the lowest-priced firm's FSS contract may not include as many of the required items as another firm's does not affect the lowest-priced firm's entitlement to the award.

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

Prior decision is affirmed where protester does not establish that it was based on a mistake of law or fact.

CONTRACTS **B-224609 Sept. 19, 1986**
Protests **86-2 CPD 329**
Oral

Oral complaint to the contracting agency about its rejection of the protester's low offer did not constitute a protest to the agency since oral protests are no longer provided for under the Federal Acquisition Regulation. Therefore, a subsequent written protest filed more than 10 days after the basis of the protest was known is untimely.

B-223603 Sept. 22, 1986

86-2 CPD 334

General Accounting Office Procedures

Timeliness of Protest

Date Basis of Protest Made Known to Protester

When protester is on notice, from pre-solicitation notice and Commerce Business Daily synopsis, of the intended dates of issuance and closing of a Federal Supply Schedule solicitation, a protest alleging that the General Services Administration failed to provide it with a requested copy of the solicitation is untimely when it is not filed until a month after the announced closing date.

B-224287 Sept. 22, 1986

86-2 CPD 330

General Accounting Office Procedures

Timeliness of Protest

Solicitation Improprieties

**Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest against alleged solicitation defects is untimely unless it is filed with either the procuring agency or the General Accounting Office (GAO) before bid opening. In the absence of evidence of a timely agency-level protest, GAO will therefore dismiss a protest against alleged solicitation defects that is filed with it after opening.

B-224499 Sept. 22, 1986

86-2 CPD 331

First Article Testing

When a solicitation is structured to require bids both with and without first article testing, alternate bids are permitted and will be responsive. To require all bidders to include prices based on a waiver of first article testing, regardless of whether they are qualified for a waiver, would be meaningless.

CONTRACTS**B-224670 Sept. 22, 1986****Protests****86-2 CPD 332****Interested Party Requirement****Prospective Subcontractors**

Indian-owned firm that is a potential supplier or subcontractor is not an interested party for purposes of filing a bid protest alleging that a Bureau of Indian Affairs prime contractor has violated regulations concerning Indian preference. There is no indication that any subcontracts will be "by or for" the government, and the protester itself was not a bidder.

CONTRACTS**B-222476.2 Sept. 23, 1986****Protests****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Prior decision upholding an agency's rejection of a bid as materially unbalanced is affirmed as the General Accounting Office (GAO) sees no basis upon which to alter its conclusion that the protester's first article bid price was grossly inflated because of the firm's failure properly to allocate its equipment and tooling costs over the entire life of the contemplated contract.

CONTRACTS

B-222606 Sept. 23, 1986

Architect, Engineering, etc. Services**Procurement Practices****Brooks Bill Applicability****Equality of Competition Requirement**

Allegation that agency improperly reopened selection process after protester was selected as the highest qualified architect-engineer firm and negotiations for contract award were completed is denied since agency discovered during contract clearance procedures that the published weights for two major evaluation criteria had been reversed by the evaluation board and the record shows that the protester would not have been included in the top five ranked firms which were interviewed and should not have been provided the opportunity to continue in the selection process. Agency's error had a direct and substantial impact on the outcome of the competition and agency's action in reopening the process is reasonable in view of broad discretion of contracting officials to take corrective action.

CONTRACTS**Architect, Engineering, etc. Services****Procurement Practices****Brooks Bill Applicability****Procedures**

Protest that agency did not comply with its regulations concerning the award of architect-engineer contract because agency failed to advise its evaluation board to consider certain factors is denied where record shows that evaluation board nonetheless considered these factors in ranking the firms.

CONTRACTS **B-222606 Con't**
Architect, Engineering, Sept. 23, 1986
etc. Services
Procurement Practices
Evaluation of Competitors
Application of Stated Criteria

Allegation that agency evaluation was not consistent with the published selection criteria because agency utilized some subfactors in its evaluation which were not explicitly stated is denied since agency may consider subfactors not specifically identified where such subfactors are reasonably related or encompassed by specified evaluation criteria.

BIDS **B-223515 Sept. 23, 1986**
Late
Hand Carried Delay
Rejection of Bid

Bid delivered by commercial carrier is considered to be hand-carried rather than sent by mail. Where failure of a bidder to address its bid envelope with the address given in the solicitation for hand-carried bids or to direct its commercial carrier to make delivery at that location appears to be the paramount cause for the late receipt of the bid, the bid was properly rejected as late.

CONTRACTORS **B-223609 Sept. 23, 1986**
Responsibility
Determination
Review by GAO
Affirmative Finding Accepted

Allegation that contracting officer's affirmative determination of awardee's responsibility was made in bad faith because contracting officer failed to consider awardee's past history of late delivery as a subcontractor is without merit where record shows that contracting officer considered awardee's prior performance history; to establish bad faith, protester must submit virtually irrefutable proof that procurement officials had specific and malicious intent to harm protester.

Protest against alleged apparent solicitation defect--agency inclusion of allegedly unqualified producer as approved source--is untimely when filed after closing date for receipt of initial proposals.

Protest filed with GAO more than 10 working days after the contracting agency denied the firm's agency-level protest is untimely and will not be considered. Protester's continued pursuit of matter with the contracting agency before filing with GAO does not alter this result.

Protest that invitation for bids is unduly restrictive of competition because specifications allegedly were "written around a competitor's machine" is untimely where not filed prior to bid opening.

CONTRACTS**B-224618.2 Con't****Protests****Sept. 23, 1986****Moot, Academic, etc. Questions**

No useful purpose would be served by GAO's consideration of whether the protester's bid is nonresponsive, as asserted by the agency, where the propriety of the award made to another firm is not being considered because it was not timely protested to GAO.

CONTRACTS**B-223175 Sept. 24, 1986****Negotiation****Offers or Proposals****Evaluation****Competitive Range Exclusion****Reasonableness**

Where solicitation requires that offeror submit Federal Aviation Administration (FAA) approved type certificate and operation manuals, which specify aircraft's operating limitations and which will be utilized by contracting agency to evaluate whether offered aircraft can meet RFP requirements, offered aircraft, which exceeds its current certificated maximum take-off weight and for which an amendment to current certificate and approval by FAA is required, is properly excluded from the competitive range since without an FAA approved certificate incorporating the proposed modification, agency is not able to evaluate whether offered aircraft will comply with RFP requirements.

CONTRACTS

Negotiation

Evaluation

Based on Content of Proposal

CONTRACTS

Federal Supply Schedule

Reductions

CONTRACTS

General Accounting Office Procedures

Date Basis of Protest Made Known to Protester

D-56

PURCHASES
Purchase Orders
Federal Supply Schedule
Purchase Propriety

B-223310 Con't
Sept. 24, 1986

Issuance of purchase order under Federal Supply Schedule (FSS) contract for central dictation system deleting one item and adding others to low-priced FSS vendor's informational proposal is proper since (1) there is no requirement that the purchase order conforms exactly to the vendor's informational proposal; and (2) protester was not prejudiced since there is no indication that its price would have been lower had it been informed of the changes.

SALES
Bids
Discarding all Bids
Administrative Determination

B-223646 Sept. 24, 1986

Although a qualifying sealed bid on a timber sale had been delivered to the auction room before the oral auction, the bidder was misdirected by agency personnel and therefore did not reach the room on time, so that only one firm participated. Forest Service decision to cancel the sale and readvertise on basis that one-party auction did not meet regulatory requirements for full and open competition and that sale be at not less than fair market value was reasonable.

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Disputes
Between Private Parties

B-224173 Sept. 24, 1986

Allegation that bidder's former employee obtained unfair competitive advantage in preparing bid for new company founded by that employee involves a dispute between private parties which does not provide a basis for protest to GAO.

CONTRACTS**B-224433 Sept. 24, 1986****Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

A protest not filed within 10 working days after the protester is advised its agency protest is denied is untimely and will not be considered on the merits.

Protest which is not filed within 10 working days after protester knew its basis for protest is untimely. Allegation questioning the propriety of an amendment to a solicitation must be filed before the date proposals in response to the amendment are due.

CONTRACTS**B-224668 Sept. 24, 1986****Protests****Authority to Consider****Activities not Involving Federal Procurement**

Since GAO bid protest authority extends only to protests concerning solicitations issued by or for federal agencies, protest challenging award of contract by nonfederal entity is dismissed even though contract may be funded by loan from federal agency.

CONTRACTS**B-224669 Sept. 24, 1986****Small Business Concerns****Awards****Prior to Resolution of Size Protest**

A protest against any contract award until protester's appeal to the Small Business Administration (SBA) from a SBA size determination has been decided is dismissed since the contracting officer is not required to delay the award when such an appeal has been filed.

BIDS

B-224696 Sept. 24, 1986

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

A bidder's failure to acknowledge receipt of a material amendment renders the bid nonresponsive; the fact that the bidder may not have received the amendment until the day after bid opening is irrelevant absent evidence that the failure to receive the amendment resulted from a deliberate attempt by the contracting agency to exclude the firm from competing.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest that amendment was not received until after bid opening is untimely when not filed within 10 working days after the protester received the amendment.

CONTRACTORS

B-224701 Sept. 24, 1986

Responsibility**Determination****Review by GAO****Nonresponsibility Finding**

Possibility that contracting officer may have based nonresponsibility determination on unsatisfactory results under prior contract, despite contract appeals board ruling that protester performed satisfactorily, does not in itself constitute the prima facie showing of fraud or bad faith necessary to invoke General Accounting Office review of negative determination of small business concern's responsibility.

SMALL BUSINESS ADMINISTRATION B-224167 Sept. 25, 1986

Contracts

Contracting With Other Government Agencies

Procurement Under 8(a) Program

Contractor Eligibility

Protest challenging award under section 8(a) program to firm whose eligibility under the program was to expire soon after award is dismissed, since there is no requirement that firm's eligibility extend through the entire period of contract performance.

SMALL BUSINESS ADMINISTRATION

Contracts

Contracting With Other Government Agencies

Procurement Under 8(a) Program

Procedures

Competition not Required

In view of broad discretion afforded Small Business Administration and contracting agency in selecting contractors under section 8(a) program, there is no requirement that capabilities of other eligible firms be considered before one firm is selected for award.

BONDS

B-224169 Sept. 25, 1986

Bid

Surety

Unacceptable

Bidder and Principal as Surety

Where a bid is submitted in the name of one firm, but is accompanied by a bid bond which identifies that firm and also another firm as the principal, the bond is materially defective, requiring rejection of the bid as nonresponsive, because the surety's obligation under the bond is unclear.

CONTRACTORS**B-224179 Sept. 25, 1986****Responsibility****Determination****Review by GAO****Nonresponsibility Finding**

Protest by small business against finding of nonresponsibility and possible affirmative determination of responsibility of another offeror is dismissed. GAO will not generally review such determinations of nonresponsibility since to do so would amount to substitution of our judgment for that of Small Business Administration, which is specifically authorized by statute to determine small business responsibility. Also, absent certain exceptions not applicable here, GAO will not review affirmative determinations of responsibility.

CONTRACTS**B-224377.2 Sept. 25, 1986****Protests****Moot, Academic, etc. Questions****Future Procurements**

Protest by the fourth low bidder against award to third low bidder is dismissed as premature because although agency has rejected the low bid it has not yet determined whether to accept second low bid.

BIDS**B-224474 Sept. 25, 1986****Responsiveness****Exceptions Taken to Invitation Terms****Small Business Requirements**

Bid on a total small business set-aside, which indicates that all supplies to be furnished will not be the product of small businesses, must be rejected as nonresponsive. The bidder otherwise would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside program.

CONTRACTS**B-224587 Sept. 25, 1986****Protests****Basis for Protest Requirement**

A protester's general disagreement with an agency's evaluation of its proposal does not constitute an adequately detailed statement of the legal and factual grounds of a protest required by Bid Protest Regulations.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest filed more than 10 working days after the basis of protest is known is untimely.

CONTRACTORS**B-224726 Sept. 25, 1986****Responsibility****Determination****Review by GAO****Affirmative Finding Accepted**

GAO does not review affirmative determinations of responsibility except in certain limited situations.

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

Agency properly made award to second low bidder after Small Business Administration declined to issue certificate of competency for low bidder which agency had found nonresponsible.

CONTRACTS**B-219988.7 Sept. 26, 1986****Protests****Preparation****Costs****Noncompensable**

Claim for proposal preparation costs and costs of pursuing protest is denied where there is no showing that the government acted arbitrarily or capriciously with respect to the claimant's offer.

CONTRACTS**B-223359 Sept. 26, 1986****Labor Stipulations****Davis-Bacon Act****Applicability****Criteria**

Contracting agency, which has the primary responsibility for determining whether Davis-Bacon Act provisions should be included in a particular contract, acted properly by including these provisions where a Department of Labor Wage Appeals Board decision reasonably concluded that the Act applied to privately financed housing for Department of Defense families to be leased by the government for 20 years because the housing is for public purpose and its cost will be reimbursed through lease payments.

CONTRACTS**B-223556 Sept. 26, 1986****Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date
for Proposals**

Protest against agency's acceptance of alternate offer under solicitation that allegedly did not provide for the acceptance of alternate offers is untimely where the agency notified offerors of its decision to accept alternate offer in request for updated offers and the protester did not protest before the next closing date.

CONTRACTS**B-224193 Sept. 26, 1986****Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest filed more than 10 working days after protester knew of bases for protest is untimely and will not be considered.

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

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

CONTRACTS**B-224351; B-224351.2****Protests****Sept. 26, 1986****Allegations****Not Prejudicial**

Protest that agency relaxed specifications without notifying protester is denied where the protester does not demonstrate it was prejudiced by the agency's actions.

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

Protest concerning awardee's actual compliance with its contract obligations concerns a matter of contract administration, which is not within the General Accounting Office's bid protest function.

CONTRACTS**B-224626 Sept. 26, 1986****Protests****Authority to Consider****Activities not Involving Federal Procurement**

Procurement by private nonprofit corporation using its own funds is not a federal procurement and, therefore, protest of that procurement is not reviewable pursuant to General Accounting Office bid protest jurisdiction.

APPROPRIATIONS**B-219795 Sept. 29, 1986****Availability****Federal Executive Boards**

A certifying officer of the U.S. Equal Employment Opportunity Commission may not properly certify for payment a claim for a portion of the expenses incurred by a Federal Executive Board in sponsoring an awards banquet for the honorary recognition of equal employment opportunity activities. A general Government-wide appropriation act restriction, appearing in its current form since 1982, prohibits the use of appropriated funds for interagency financing of boards or commissions "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality." This restriction applies to Federal Executive Boards since the boards lack statutory approval for interagency financing.

CONTRACTS**B-221863.3 Sept. 29, 1986****Protests****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

In order to prevail in a request for reconsideration of a prior decision of the General Accounting Office, the requesting party must convincingly show that the decision contains errors of fact or of law which warrant its reversal or modification. The repetition of arguments made during resolution of the original protest or mere disagreement with our decision does not serve to meet that standard.

GENERAL ACCOUNTING OFFICE**Recommendations****Contracts****Prior Recommendation****Affirmed**

The risk of an auction situation and concerns as to technical leveling or technical transfusion in implementing a General Accounting Office recommendation that corrective action be taken are secondary to the need to remedy a procurement which failed to satisfy the statutory requirement for full and open competition.

BIDS**B-222384.3; B-222384.4****Invitation for Bids****Sept. 29, 1986****Cancellation****Reinstatement****Recommended by GAO****Factors Considered**

Although agency canceled IFB after bid opening because it believed that an ambiguity between the bid schedule and a portion of the specifications confused bidders as to what work the "lump sum bid" was intended to cover, GAO recommends that the solicitation be reinstated because the low bidder priced all items of work required by the solicitation in its bid; the solicitation accurately represents the agency's needs, so that award to the low bidder would fulfill the agency's requirement; and there is no prejudice to the other bidders.

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

Protest that lower bids were nonresponsive because they did not include bid bonds and that cancellation of IFB ostensibly for other ambiguous requirements in fact was motivated by desire to avoid contracting with protester has no merit, since invitation did not require bonds.

CONTRACTORS

B-224346 Sept. 29, 1986

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

General Accounting Office will not review a challenge to a contracting agency's affirmative responsibility determination where there has been no showing that contracting officials may have acted fraudulently or in bad faith and where an allegedly deficient semiconductor device list (the submission of which the protester argues should have precluded an affirmative determination) was untimely protested.

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

Protest against alleged failure of bidder to include a semiconductor device list with its bid is denied since record shows the list was submitted with the bid.

CONTRACTS**Protests****General Accounting Office Procedures****Timeliness of Protest****Significant Issue Exception****Not for Application**

General Accounting Office will not consider the merits of an untimely protest under significant-issue exception to the timeliness requirements since similar issues have been ruled on frequently in the past.

CONTRACTS**B-224388 Sept. 29, 1986****Protests****Preparation****Costs****Compensable**

Where protest is sustained, but contract has already been performed, protester is entitled to recovery of its costs of filing and pursuing the protest, including attorney's fees.

PURCHASES**Small****Competition****Adequacy**

Where a procuring agency fails to obtain adequate competition on a solicitation for a small purchase through error on the part of procuring officials by soliciting only one of several suppliers it has violated the procurement regulations.

BIDS**B-223630 Sept. 30, 1986****Acceptance****Not Prejudicial to Other Bidders**

Although an obviously erroneous bid may not be accepted even if verified by bidder, contracting agency acted properly in accepting verified bid offering one line item at no charge since the bid was not obviously erroneous. Disparity between no-cost bid and government estimate and other bids does not establish a mistake was made, since a bidder in its business judgment may decide to bid no-charge and submit a below-cost bid.

BIDS **B-223630 Con't**
Prices **Sept. 30, 1986**
Below Cost
Not Basis for Precluding Award

Submission of a below-cost bid is not illegal and the government may not withhold award merely because a responsive bid is below cost.

BIDS
Responsiveness
"No-Charge", etc. Notations

Bidder may elect not to charge for certain item and if bidder indicates commitment to furnish item in question--as by inserting "\$0" in its bid--its bid is responsive.

BIDS **B-224357 Sept. 30, 1986**
Invitation for Bids
Clauses
Profit Limitation

Clause in an invitation for bids for a fixed-price construction contract that limits the allowable percentage of profit on certain change orders is inconsistent with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.901(c), which prohibits administrative profit ceilings that are less than any applicable statutory ceilings.

BIDS **B-224760 Sept. 30, 1986**
Responsiveness
Exceptions Taken to Invitation Terms
Small Business Requirements

Bid received under total small business set-aside that represented that the bidder was a small business but that not all supplies to be furnished would be manufactured by a small business is not responsive and may not be considered for award.

SPECIAL STUDIES & ANALYSIS

ENVIRONMENTAL PROTECTION AND IMPROVEMENT B-221037 Sept. 3, 1986

Clean Air Act

Environmental Protection Agency Authority State Implementation Plans

State law barring implementation of gasoline vapor recovery during automobile refueling (stage II controls) might put state in position to be subject to sanctions under Clean Air Act if state fails to submit adequate state implementation plan or to implement stage II when required by EPA. See Clean Air Act §§ 172 and 176, 42 U.S.C. §§ 7502 and 7506.

Regardless of whether EPA requires states to implement gasoline vapor recovery during automobile refueling (stage II controls), states that do not achieve attainment of ozone standards by the statutory deadline may be subject to sanctions. See Clean Air Act § 176, 42 U.S.C. § 7506.

APPROPRIATIONS

B-220532 Sept. 8, 1986

Impounding

Impoundment Control Act

H.R. 4888, by eliminating the one-House veto of deferrals, would solve the Impoundment Control Act's Chadha problem. GAO endorses provisions requiring the President to specify for each deferral dates certain on which he will release the deferred budget authority, and prohibiting withholding after the date certain. GAO recommends deleting or altering the bill's provision requiring the Comptroller General to promulgate and apply standards defining Antideficiency Act deferrals, as opposed to fiscal policy deferrals. Such provision may be subject to constitutional challenge in light of Bowsher v. Synar.

ENERGY**B-223315; B-223370****Department of Energy****Sept. 12, 1986****Authority and Responsibility****Nuclear Energy**

Although the Department of Energy (DOE) has no authority to change or eliminate second repository deadlines imposed on it by the Nuclear Waste Policy Act, there may be little the Congress can do to require DOE to adhere to the legislated schedule. The Congress can require compliance by appropriating second repository funds as a line item.

If the Congress agrees with DOE that second repository siting activities should be postponed, the Congress should amend the Nuclear Waste Policy Act to change deadlines currently imposed by the Act, or, at a minimum, specify that DOE may not use appropriated funds for such activities.

TRANSPORTATION LAW

TRANSPORTATION

B-212279 Sept. 2, 1986

Rates

Section 22 Quotations

Cancellation, etc.

Effect

Where an air cargo carrier purports to substitute a new rate tender for an existing tender, and in the same document cancel the existing tender, and the Military Traffic Management Command returns the document because of numerous deficiencies, rejection of the document for filing prevents cancellation of existing rates as well as substitution of new rates. Therefore, the rates in the existing tender may be used in determining correct charges on shipments to which they apply. On reconsideration, Starflight, Inc., B-212279, November 13, 1984, modified. Mercury Van Lines--Reconsideration, B-193964, June 27, 1980, distinguished.

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