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**OVERRULED, MODIFIED, AND DISTINGUISHED**

B-219668.2, Apr. 23, 1986 distinguishes B-202966.2, Feb. 16, 1982.

**GENERAL GOVERNMENT MATTERS  
APPROPRIATION AND MISCELLANEOUS**

**SAINT LAWRENCE SEAWAY                    B-210555.11   Apr. 1, 1986**  
**DEVELOPMENT CORPORATION**  
**Appropriations**  
**User Fees**  
**Status**

The Saint Lawrence Seaway Development Corporation operates with appropriated funds, despite the fact that the source of those funds is user fees. Further the Corporation is a wholly owned Government corporation, subject to the home-to-work transportation prohibition of 31 U.S.C. § 1344. An analysis of the original 1946 act which enacted the prohibition clearly indicates that wholly owned Government corporations are subject to the prohibition. Subsequent codification of Title 31 did not effect any change in substantive law.

**APPROPRIATIONS    B-217595   Apr. 2, 1986**  
**Refund of Moneys Erroneously Received and Covered**

Forest Service interpreted provision in timber sale contract as requiring full month's interest on payments late by only a portion of a month. Based on challenge by one contractor, Agriculture Board of Contract Appeals held that Forest Service improperly construed contract and that interest should have been charged only for actual number of days payments were late. For all other timber sale contracts governed by the Board's decision, Forest Service may refund the overcharges without requiring formal submission of claims. Since interest collections had been deposited in Treasury as miscellaneous receipts, refunds may be charged to permanent appropriation established by 31. U.S.C. § 1322(b)(2). Contractors who file claims under Contract Disputes Act are entitled to interest on refunds from date of filing, payable from current Forest Service appropriations for administration of timber sale contracts.

**ACCOUNTABLE OFFICERS**                      **B-221447 Apr. 2, 1986**  
**Physical Losses, etc. of Funds, Vouchers, etc.**  
**Employee Liability**

The unexplained loss of patient funds which were deposited with a Veterans Administration hospital is presumed to be due to the negligence of the accountable officer who had custody of the funds. Denial of negligence is not sufficient to rebut the presumption of negligence, nor is proof that lax procedures for the acceptance and storage of patient funds existed, when they were not shown to have been the proximate cause of the loss of funds.

**ARMY DEPARTMENT**                              **B-221499 Apr. 7, 1986**  
**Corps of Engineers**  
**Rivers and Harbors Projects**  
**Deviations From Project Authorization**

Section 123 of the River and Harbor Act of 1970, Pub. L. No. 91-611, established a program under which the U.S. Army Corps of Engineers constructs and maintains contained spoil disposal facilities at the Great Lakes on land owned by local governments. The Kenosha, Wisconsin, Confined Soil Disposal Facility may only be used for a period of 10 years since section 123 contemplated that the site would only be used for that period as a temporary measure until permanent water pollution control measures would take effect. The fact that the facility's total capacity has not been reached does not serve to extend the time in which it may be used.

**VEHICLES****B-210555.2 Apr. 8, 1986****Government****Home to Work Transportation****Government Employees****Prohibition****Exemptions**

The Chief of Protocol is not exempt from the home-to-work transportation prohibition of 31 U.S.C. § 1344 (1982). Although GAO concluded in B-210555.2, September 1, 1983 that we would not at that time "seek to distinguish between circumstances when it would be permissible for the chief of protocol to use a Government car for home-to-work travel and those when it would not be," it is now impossible for this Office to accept less than full compliance with the law.

**APPROPRIATIONS****B-221694 Apr. 8, 1986****Continuing Resolutions**

Amendments reported in "technical disagreement" by the committee of conference on the District of Columbia Appropriations Act, 1986, were incorporated by reference into the 1986 continuing resolution and thus enacted into law. By appropriating funds for the D.C. act to the extent and in the manner provided for in the conference report and joint explanatory statement of the committee of conference "as if enacted into law," the Congress indicated its intent that the entire act, including restrictions and substantive provisions, be incorporated into the resolution.

**APPROPRIATIONS**  
**Continuing Resolutions**

**B-221694 Con't**  
**Apr. 8, 1986**

Amendments reported in "technical disagreement" by the committee of conference on the District of Columbia Appropriations Act, 1986, were incorporated by reference into the 1986 continuing resolution and thus enacted into law. The D.C. act was incorporated to the extent and in the manner provided for in the conference report and the joint explanatory statement of the committee of conference. The amendments reported in "technical disagreement" by the joint explanatory statement were actually agreed to by the House and Senate conferees but were so reported to avoid violating rules of the House of Representatives. By referring to both the conference report and the joint explanatory statement, the Congress indicated its intent that amendments reported in "technical disagreement" as well as those reported in agreement were to be incorporated into the resolution.

**CLAIMS**

**B-200440 Apr. 9, 1986**

**Evidence to Support**

**Absence of Record**

**Disallowance of Claim**

**Contract Claim**

Denial of a claim for work allegedly performed for the American Embassy prior to the fall of Phnom Penh, Cambodia, is reaffirmed. A claim for services allegedly provided under contract to the Government may not be paid where no Government records exist relating to the claim and the claimant has not met the burden of proof as to the existence and nonpayment of a valid claim against the Government. Even if sufficient proof were submitted establishing the existence of a contract, the value of any judgment recovery could only be based on the value of the Cambodian riel at the time of judgment.

**CONTRACTS****B-218813 Apr. 9, 1986****Privity****Subcontractors****Default of Prime Contractor****Debts to Subcontractors**

The United States Coast Guard should make payments of contract retainage to subcontractors only pursuant to an order of a court of competent jurisdiction when the prime contractor refuses to indicate whether or not it has paid its subcontractors and the surety appears unable to fulfill its payment bond obligations.

**TAXES****B-217805 Apr. 11, 1986****State****Government Immunity****Hotel-Motel Tax**

A proposal that Government assume primary liability for the lodging and other costs of employees on travel, thereby avoiding state or local taxation, could result in costs which exceed potential savings. In any event, the General Services Administration, the executive branch agency responsible for Government-wide procurements, would be the agency authorized to implement such a proposal.

**VEHICLES****B-210555.15 Apr. 14, 1986****Government****Home to Work Transportation****Government Employees**

Persons "acting" in the position of an official entitled to receive Government home-to-work transportation under 31 U.S.C. § 1344(b) or other statutes during his or her temporary absence are not, in general, themselves entitled to receive home-to-work transportation for that reason. The only exception occurs when the position of an official entitled to home-to-work transportation becomes vacant. The official "acting" in that position becomes entitled to home-to-work transportation as the de facto "head" of the agency.

**VEHICLES****B-210555.15 Con't****Government****Apr. 14, 1986****Home to Work Transportation****Government Employees****Prohibition****Exemptions**

With regard to home-to-work transportation provided the Commandant and four District Commanders of the Coast Guard, the Department of Transportation has sufficiently demonstrated the elements necessary under GAO decisions for justifying an exception to the home-to-work transportation prohibition for security reasons.

**DISBURSING OFFICERS****B-222672; B-222674****Relief****Apr. 14, 1986****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 payments resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing officials and subsequent collection attempts are being pursued. However, in the future, we will deny relief if Army delays more than 3 months in processing the debit voucher.

**CERTIFYING OFFICERS****B-222389, et al. Apr. 15, 1986****Relief****Erroneous Payments****Basis for Relief**

Relief is granted Army Finance and Accounting officials 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 officers 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.

**DISBURSING OFFICERS****B-222671 Apr. 15, 1986****Relief****Erroneous Payments****Not Result of Bad Faith or Negligence**

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

**CLAIMS****B-219738 Apr. 16, 1986****Settlement Acceptance****Finality**

Settlement agreement between the Department of Education and a claimant should not be paid because the claimant has abrogated the agreement and filed a complaint in the Claims Court.

**ACCOUNTABLE OFFICERS****B-222115 Apr. 18, 1986****Relief****Debt Collection****Diligence in Pursuing**

The General Accounting Office has agreed to extend the time frame established in B-220836, November 29, 1985 and January 10, 1986, for implementing its policy to deny relief under the diligent claims collection standard of 31 U.S.C. § 3527(c) if there has been more than a 3-month delay in notifying Army's collection representatives of the loss after the debit voucher has been received by the finance officer. This policy will now be instituted for debit vouchers dated after June 1, 1986.

**DISBURSING OFFICERS**

**B-221144 Apr. 22, 1986**

**Relief**

**Erroneous Payments**

**Not Result of Bad Faith or Negligence**

Army Finance and Accounting Officer is relieved of liability for improper payment, by his subordinate, of an altered U.S. Treasury check. The record indicates that an adequate system of procedures and controls was in effect at the time of the erroneous payment and that the officer adequately policed the system.

**ACCOUNTABLE OFFICERS**

**B-217876 Apr. 29, 1986**

**Physical Losses, etc. of Funds, Vouchers, etc.**

**Cashiers, etc.**

**Imprest Fund**

**Relief Granted**

Relief is granted to cashier and alternate cashier under 31 U.S.C. § 3527(a) for an unexplained loss because agency failed to provide proper security arrangements and that failure may be viewed as the proximate cause of the ensuing loss.

**PERSONNEL LAW:  
CIVILIAN PERSONNEL**

**LEAVES OF ABSENCE**

**B-218920 Apr. 2, 1986**

**Annual**

**Restored**

**Use**

**Time Limitation**

Under federal regulations, restored annual leave must generally be used by the end of the leave year ending 2 years after the date the agency restores leave to an employee. An employee entitled to restoration of leave forfeited in 1984 is therefore eligible to use it during the period lasting until the end of the leave year ending 2 years after the date on which the agency actually restores the leave to him, even though because of administrative delays in the matter the leave was not restored for more than 2 years after it was originally forfeited.

**LEAVES OF ABSENCE**

**Forfeiture**

**Restoration**

**Administrative Error**

Federal employees who forfeit annual leave because of maximum annual leave carryover limitations are entitled to restoration of annual leave which was properly scheduled to be taken but cancelled as a result of public exigency, and also restoration of leave lost as the result of administrative error. When unauthorized officials cancel leave based on their personal determination that this is required by public exigency, the affected employees become eligible on grounds of administrative error for restoration of the number of hours of annual leave improperly cancelled. An employee whose immediate supervisor without proper authorization cancelled his scheduled annual leave for reasons of public exigency is consequently eligible for restoration of the number of hours improperly cancelled.

**OFFICERS AND EMPLOYEES**

**B-221978 Apr. 2, 1986**

**Transfers**

**Temporary Quarters**

**Time Limitation**

**Extension**

Reimbursement of temporary quarters subsistence expenses of transferred employee is limited to the 30 days authorized by the agency where the employee failed to obtain authorization to spend 90 additional days in temporary quarters and the agency did not approve the additional time by administrative action.

Transferred employee may not be paid temporary quarters subsistence expenses on the basis that she was erroneously advised that she did not have to request an extension until she submitted her final travel voucher for payment.

**OFFICERS AND EMPLOYEES**

**B-220741 Apr. 3, 1986**

**Transfers**

**Real Estate Expenses**

**Loan Assumption Fee**

A transferred employee who sold a residence at his old duty station may not be reimbursed for the portion of the loan assumption fee he paid incident to that sale since this expense is not customarily paid by the seller of a residence in the locality of the employee's old duty station.



**OFFICERS AND EMPLOYEES****B-221019 Apr. 7, 1986****Overseas****Dependents****Education****Travel Expenses**

An overseas employee is entitled to reimbursement for the educational travel expenses of his dependent because the definition of "college education" in section 281c of the Standardized Regulations (Government Civilians, Foreign Areas), which implements 5 U.S.C. § 5924 (1982), is sufficiently broad to include a specialized school offering a 3-year program in marine engineering whose graduates receive a diploma certifying to their proficiency in marine engineering, as well as qualifying them for a commission in the Merchant Marine Naval Reserve.

**OFFICERS AND EMPLOYEES****B-218955 Apr. 11, 1986****Transfers****Real Estate Expenses****Loan Discount Fees**

A transferred employee purchased a residence near his new duty station. Among the expenses charged by his mortgage lender was a 1 percent "rate buydown." He claims that item is reimbursable as part of a loan origination fee package. A "rate buydown" on a mortgage loan is simply another name for a mortgage discount or points. Since paragraph 2-6.2d(2)(b) of the Federal Travel Regulations specifically excludes such an item from reimbursement, the claim is denied.

**OFFICERS AND EMPLOYEES**            **B-218955 Con't**  
**Transfers**                            **Apr. 11, 1986**  
**Real Estate Expenses**  
**Loan Document Preparation Fee**

A transferred employee purchased a residence near his new duty station. Among the expenses charged by his mortgage lender was a \$100 document preparation fee, in addition to the loan service charge. Since paragraph 2-6.2c of the Federal Travel Regulations specifically authorizes reimbursement of the costs of preparing conveyances and related instruments and HUD has found this fee to be reasonable, the employee may be reimbursed for the document preparation fee.

**OFFICERS AND EMPLOYEES**  
**Transfers**  
**Real Estate Expenses**  
**Loan Origination Fee**

A transferred employee purchased a residence near his new duty station. Among the expenses charged by his mortgage lender was a 2-1/2 percent service charge for originating the loan. He was reimbursed \$1,100 (1 percent of the loan) and now claims the remainder. Under paragraph 2-6.2d(1)(b) of the Federal Travel Regulations, such fees are reimbursable, but not to exceed amounts customarily charged in the area. Since we give great weight to HUD information regarding customary locality rates, and HUD has advised that the customary rate is 1 percent, reimbursement was properly limited to that amount and the claim for the remainder is disallowed.

**OFFICERS AND EMPLOYEES****B-221062 Apr. 15, 1986****Transfers****Real Estate Expenses****Broker's Fees**

In his official capacity, Farmers Home administration employee engaged in agency business with the only two realtors in Hardin, Montana. Upon transfer elsewhere he was required by his agency's standards of conduct to list his former residence for sale under open listing agreements with both realtors and he incurred a brokerage fee in excess of 6 percent fee customary in the area. The 6 percent fee is the fee customarily charged for an exclusive listing. Because the employee was precluded by his agency regulations from entering into an exclusive listing, he may be reimbursed the 7 percent fee customarily charged in the locality for open listings.

**DEBT COLLECTIONS****B-219734 Apr. 16, 1986****Due Process Protection**

The Social Security Administration's debt collection procedures did not require hearing for the collection of an outstanding travel advance. The Debt Collection Act of 1982 and implementing Federal Claims Collection Standards do not require a hearing when collection is under the general provisions of 31 U.S.C. § 3716 and the travel advance recoupment provisions of 5 U.S.C. § 5705, even though a hearing would be required for collection of other debts under 5 U.S.C. § 5514.

**TRAVEL EXPENSES****Air Travel****Routing**

An employee of Social Security Administration claims the cost of air travel which arose from the use of an indirect route from Baltimore, Maryland, to San Francisco, California. The higher costs due to the indirect route must be borne by the traveler even though they may have been erroneously included in the cost of a direct route quotation by the Government's contracted travel service.

**MILEAGE****B-219085 Apr. 23, 1986****Travel by Privately Owned Automobile  
Between Residence and Temporary Duty Station  
Distance Between Residence and Headquarters**

The employing agency has discretionary authority, consistent with its own regulations, to restrict mileage so as to exclude from payable mileage the round-trip distance between the employee's residence and permanent duty station when the employee reports to a temporary duty point in the vicinity of the permanent duty station. Such mileage restriction may apply to call-back overtime and to other than regularly scheduled workdays.

**OFFICERS AND EMPLOYEES****B-219047 Apr. 24, 1986****Transfers****Government v. Employee Interest  
Relocation Expense Reimbursement  
Administrative Determination  
Finality**

The employee is not entitled to relocation benefits where the employing agency properly exercised its discretion in determining that the employee's lateral transfer at the same grade and salary was not primarily in the interest of the Government. The employee applied and was competitively selected for the transfer under a vacancy announcement notifying applicants that a lateral transfer would preclude reimbursement of relocation benefits unless considerations related to labor market conditions or other factors resulted in a determination that the lateral transfer was in the interest of the Government. The agency's decision under this standard is not overturned unless clearly unreasonable.

**COMPENSATION****B-221176 Apr. 24, 1986****Backpay****Retroactive Promotions  
Computation**

Where, as the result of a discrimination complaint, an employee is promoted to GS-12 retroactive to a date prior to the date he was awarded a quality step increase in his GS-11 position, amounts attributable to the quality step increase in the lower grade are to be deducted from the pay of the higher grade position to determine the employee's backpay entitlement. Because a quality step increase may not be granted retroactively, the employee may not be granted a quality step increase effective retroactive to a date 1 year after the effective date of his retroactive promotion to GS-12.

**POSTAL SERVICE, UNITED STATES B-222766 Apr. 25, 1986****Employees****Transfers****Relocation Expenses  
Eligibility**

Section 106 of Pub. L. No. 99-234, which added a new § 5734 to title 5, U.S.C., to make Postal Service employees who transfer to other agencies eligible for relocation expense reimbursement, does not become effective until issuance of implementing regulations or until 180 days after date of its enactment on January 2, 1986. Postal Service employee who transferred to Social Security Administration in March 1986 is not covered by § 106 of Pub. L. No. 99-234 and, therefore, is not eligible for relocation expense reimbursement under statutory provisions construed in 58 Comp. Gen. 132 (1978). However, private relief legislation may warrant consideration in this case.

**LEAVES OF ABSENCE**

**B-218666 Apr. 29, 1986**

**Sick**

**Recredit of Prior Leave**

**Involuntary Leave**

Former air traffic controller was placed on involuntary sick leave pending his placement into second career training program and eventual retirement on disability. The employee is entitled to restoration of the involuntary sick leave since the determination to place him on sick leave was not based on competent medical evidence, and was contrary to agency procedures.

**OFFICERS AND EMPLOYEES**

**Separation Action Changes**

**Effective Date of Retirement**

Former air traffic controller seeks to change his separation date in order to exhaust 159 hours of restored sick leave. The agency, in accordance with its own regulations concerning the use of sick leave prior to retirement, is required to adjust the employee's separation date to permit use of this restored leave.

**OFFICERS AND EMPLOYEES**

**B-219209 Apr. 29, 1986**

**Transfers**

**Short Distances**

**Administrative Determination of Reimbursement**

**Entitlement**

New appointee to manpower shortage position may not be reimbursed for relocation expenses since change of residence, which was a relatively short distance, was not made incident to his appointment. Additionally, employee may not be reimbursed for expenses based on subsequent transfer which was also for only a short distance. Reimbursement is not proper even though first agency initially issued travel orders erroneously authorizing relocation expenses prior to its decision that appointee had not met the requirements for short distance moves in FTR paragraphs 2-1.3 and 2-1.5(b). Findings of both agencies that reimbursement requirements for short distance transfers were not met are sustained as not arbitrary, capricious or an abuse of discretion.

**LEAVES OF ABSENCE**

B-221664 Apr. 29, 1986

**Annual****Accrual****Maximum Limitation****Forfeiture by Operation of Law**

A personnel officer of the Advisory Commission on Intergovernmental Relations (ACIR) asks whether the ACIR Executive Director is entitled to carry over from one leave year to the next any annual leave in excess of 240 hours? We conclude that 42 U.S.C. § 4276 (1982), subjects the ACIR Executive Director to the same 240-hour annual leave accumulation limitations of 5 U.S.C. § 6304 (1982) as other Federal employees. Therefore, except as otherwise provided by section 6304, the ACIR Executive Director is not entitled to carry over from one leave year to the next any annual leave in excess of 240 hours.

**COMPENSATION**

B-217935 Apr. 30, 1986

**Night Work****Night Differential****Entitlement****For Regularly Scheduled Work**

For entitlement to night pay differential for overtime work performed between 6 p.m. and 6 a.m. the overtime must be "regularly scheduled." An employee's claim for night pay differential for overtime performed between 1976 and 1980 on the basis of vague assertions of entitlement and information as to the number of overtime hours worked at night may not be favorably considered in the absence of evidence from the claimant or his agency showing that the overtime was regularly scheduled under the rules applied in Comptroller General decisions during the period in question.

**PERSONNEL LAW:  
MILITARY PERSONNEL**

**PAY** **B-219079 Apr. 3, 1986**  
**Medical and Dental Officers**  
**Special Pay**  
**Entitlement**

Under applicable statutes and regulations Army medical officers who meet prescribed conditions of eligibility are entitled to special additional pay of \$10,000, provided that they agree in writing to remain on active duty for a 1-year period, with the stipulation that an earlier separation from service may be allowed only on grounds of hardship or in the interests of the Army. Consequently, a medical officer is liable to refund a \$10,000 payment he received under an agreement he negotiated with his commander which altered this stipulation, since the agreement did not conform to the governing provisions of statute and regulation and was therefore invalid. Entitlement to military pay is dependent upon provisions of statute and regulation, and may not be established through private negotiation.

**PAY**

**B-220546 Apr. 7, 1986**

**Retired**

**Survivor Benefit Plan**

**Remarriage of Member**

**Spouse's Annuity Eligibility**

A retired Navy petty officer's general agreement to "continue to maintain his military benefits" for his family, included in a separation agreement he executed in 1974, is not an agreement to elect to "provide an annuity" for his former wife under the Survivor Benefit Plan. Under the laws then in effect military retirees could not provide survivor annuity coverage for a former spouse and consequently such general language in a separation agreement executed then may not be construed to include the election of annuity coverage for his former wife. Moreover, the agreement placed him under no obligation to provide annuity coverage for his former wife later when the laws were amended to permit military retirees voluntarily to elect coverage for a former spouse to the exclusion of a current spouse. Hence, after the petty officer died his widow rather than his former wife was entitled to his Survivor Benefit Plan annuity.

**GENERAL ACCOUNTING OFFICE B-222198 Apr. 10, 1986**

**Jurisdiction**

**Claims**

**Personal Property Damage or Loss**

Military member who suffered loss of camera equipment incident to shipment of household goods has claim under the Military Personnel and Civilian Employees Claims Act of 1964. Under this Act, decision regarding payment claim is for agency head or designee and GAO has no jurisdiction to consider claim under the Act. Moreover, since claims under the Act fall outside GAO's settlement authority, member's claim is inappropriate for submission to Congress as a meritorious claim pursuant to 31 U.S.C. § 3702(d), the Meritorious Claims Act of 1928.

**VEHICLES****B-220779 Apr. 30, 1986****Rental****Damage Claims**

An Army member was authorized to rent a car for use with other Army members while on temporary duty. The vehicle was damaged while being driven by another member authorized to drive and the circumstances of the damage are unknown. Under the rental agreement, the renter was liable for up to the first \$500 damage and paid the rental company \$141 for the damage. Since the damage occurred while the vehicle was being used for official business, he may be reimbursed for the payment.



**GENERAL SERVICES ADMINISTRATION B-221280 Apr. 1, 1986**  
**Services for Other Agencies 86-1 CPD 307**  
etc.

**Teleprocessing Services Program (TSP)**  
**Multiple Award Schedule Contracts (MASC)**

Where agency does not properly identify its actual requirements when it requests prices from GSA Teleprocessing Services Program, Multiple Award Schedule Contract (MASC) vendors for an electronic mail system and prices were therefore not evaluated based on government's actual requirements, award may not have been made to vendor offering lowest overall cost to government.

**CONTRACTS B-221353 Apr. 1, 1986**  
**Negotiation 86-1 CPD 308**  
**Offers or Proposals**  
**Evaluation**  
**Competitive Range Exclusion**  
**Reasonableness**

A technically acceptable proposal may be excluded from the competitive range where the agency determines that the proposal has no reasonable chance of being selected for award. The agency has a reasonable basis for excluding the protester's proposal where the proposal's technical score is significantly lower, and its evaluated cost higher, than the firms that are included in the competitive range.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Cost Realism Analysis**  
**Reasonableness**

Evaluated costs provide a sounder basis than proposed costs for determining the most advantageous proposal in cost reimbursement procurements. Where protester merely speculates that the cost-realism analysis was arbitrary, but does not show any unreasonable action on the agency's part, protest must be denied.

**BIDS** **B-221728 Apr. 1, 1986**  
**Invitation for Bids** **86-1 CPD 309**  
**Specifications**  
**Minimum Needs Requirement**  
**Administrative Determination**  
**Reasonableness**

Requirement that hospital custodial services contract be performed using a "task system" rather than a "unit system", and that the contractor provide a detailed work schedule to indicate when various tasks will be done, is not objectionable where it is necessary for effective inspection of the contractor's work and reasonably reflects the agency's minimum needs.

Requirement that patient units be cleaned within 60 minutes from the time contractor is notified, regardless of the number of units per call, is not unreasonable where hospital has high admissions rate and quick availability of beds reflects agency's minimum need.

**BIDS** **B-221824 Apr. 1, 1986**  
**Invitation for Bids** **86-1 CPD 310**  
**Cancellation**  
**After Bid Opening**  
**Administrative Determination**

An issuing agency may cancel a solicitation after bid opening regardless of when the information justifying cancellation first surfaces.

**BIDS**  
**Invitation for Bids**  
**Cancellation**  
**After Bid Opening**  
**Justification**  
**Inaccurate Specifications**

Where agency determines that solicitation specifications overstate its minimum needs and that award based on revised specifications will result in lower overall costs to the government, cancellation of solicitation is proper.

**CONTRACTS****B-221867.2 Apr. 1, 1986****Protests****Authority to Consider****Walsh-Healey Act Contracts**

We inform a congresswoman that the reason we dismissed a protest concerning protester's status as a regular dealer or manufacturer is because such status determinations are not within GAO's jurisdiction.

**CONTRACTS****B-222365.2 Apr. 1, 1986****Protests****86-1 CPD 311****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest filed by Western Union "Easylink" message more than 10 days after protester receives notice of initial adverse action on protest first filed with agency is untimely even though protester forwarded its protest message to Western Union several days prior to Western Union's transmission of the message.

**CONTRACTORS****B-221181; B-221182 Apr. 2, 1986****Responsibility****86-1 CPD 313****Determination****Review by GAO****Affirmative Finding Accepted**

Whether a bidder has the ability to establish manufacturing facilities and perform in accordance with contract requirements is a question of responsibility, and our Office does not review protests against affirmative determinations of responsibility absent a showing of fraud or bad faith on the part of the contracting agency.

**GENERAL ACCOUNTING OFFICE****Jurisdiction****Contracts****Performance****Contract Administration Matter**

Whether an awardee performs in compliance with contract requirements is a matter of contract administration not for consideration under Bid Protest Regulations.

**TIMBER SALES****B-221181; B-221182 Con't****Bids****Apr. 2, 1986****Rights of Bidders**

The Federal Sustained Yield Act does not require a prospective bidder for a sales contract for timber located in a sustained yield unit to own or operate a permanent facility located in that unit in order for the prospective bidder to submit a bid.

Policy Statement for the Big Valley Federal Sustained Yield Unit, which permits the sale of timber within the Unit to any bidder who agrees to give primary manufacture to 80 percent of the timber within the Big Valley area and to establish sufficient yard facilities and planning mill capacity in the Big Valley area, is not inconsistent with the Federal Sustained Yield Act, which requires timber to be sold only to responsible purchasers within the community or communities.

**CONTRACTS****B-221551 Apr. 2, 1986****Negotiation****86-1 CPD 314****Late Proposals and Quotations****Government Mishandling Determination**

The timely arrival of awardee's offer, which apparently was sent a day later than the protester's untimely offer, does not indicate any impropriety in the agency's handling of offers. Simply, the awardee, unlike the protester, which sent its offer to the mailing address, chose to hand deliver its offer to the opening site to ensure timely delivery.

**CONTRACTS**

**B-221551 Con't**

**Negotiation**

**Apr. 2, 1986**

**Late Proposals and Quotations**

**Mail Delay Evidence**

**Express Mail**

Where offer arrives late in the designated office, to be considered acceptable, it must have been received in the post office box mailing address before the opening time and the late receipt must have been due "solely" to mishandling by the government. Record indicates that the offer was delivered to post office box the day after opening and, thus, there is no basis to conclude that offer was late solely due to mishandling by the government.

**CONTRACTS**

**Protests**

**Interested Party Requirement**

**Protester not in Line for Award**

Firm that submitted an offer that was rejected properly for arriving late is not an "interested party" qualified to protest award to the lowest of the remaining offerors.

**CONTRACTS**

**B-221935 Apr. 2, 1986**

**Protests**

**86-1 CPD 315**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Date Basis of Protest Made Known to Protester**

Where a protester is not aware at the time of proposal submission that the agency interprets a specification differently than the protester, any protest of the allegedly ambiguous specification must be filed within 10 days after the protester learns of the agency's interpretation.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Prices**  
**Reasonableness**

**B-219348.3 Apr. 3, 1986**  
**86-1 CPD 316**

Contracting officer's determination of price reasonableness involves broad discretion and, ordinarily, will not be disturbed absent a showing of fraud or bad faith. Price reasonableness may be based upon comparisons of past procurement history and market conditions. However, one past procurement having higher price than protester's bid price submitted in response to canceled solicitation, lower price received on resolicitation and lower price received as result of contractor lowering its price on an option, are not sufficient evidence to establish that protester's price, submitted in response to canceled invitation, was unreasonable.

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

**B-220282.3 Apr. 3, 1986**  
**86-1 CPD 317**

Prior decision is affirmed where the protester has not convincingly shown any factual or legal grounds which would warrant reversal of the prior decision.

**BIDS**  
**Invitation for Bids**  
**Specifications**  
**Site Visits**

**B-220437.3 Apr. 3, 1986**  
**86-1 CPD 318**

Where the solicitation for custodial services provided information on the buildings to be cleaned and specifically advised bidders that they were expected to visit the site in order to satisfy themselves regarding all conditions that might affect the cost of contract performance, protest that the specifications should have provided the specific numbers of items to be cleaned is without merit because the contracting agency is not required to draft specifications in order to eliminate the need for site visits.

**CONTRACTS**

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

Protest will not be dismissed for failure to furnish the contracting officer a copy of the protest 1 day after filing as required by Bid Protest Regulations, where the 1-day delay in doing so did not delay protest proceedings.

**CONTRACTS**

**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Evaluators**  
**Bias Alleged**

**B-221319 Apr. 3, 1986**  
**86-1 CPD 319**

Protest that source selection chairman was biased in favor of another offeror is denied where record does not indicate that this official influenced the remaining members evaluating the protester's proposal.

**CONTRACTS**

B-221319 Con't

**Negotiation**

Apr. 3, 1986

**Offers or Proposals**

**Evaluation**

**Evaluators**

**Qualifications**

Protest that members of the technical evaluation team were not qualified to evaluate proposals is denied where there is no evidence of fraud, conflict of interest or actual bias.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Rejection**

**Proposed Technical Approach Insufficiently**

**Proven**

Protest that agency improperly eliminated protester's proposal for a cost-reimbursement contract to design and manufacture a resuscitation fluids production and reconstitution system from the competitive range based on design, a criterion not in the solicitation, is denied where evaluation factors specifically state that design will be evaluated. Moreover, fact that protester's offered system might meet the government's functional need does not preclude rejecting the offer based on inappropriate design, since the agency has no legal obligation to pay the firm on a cost-reimbursement basis to attempt a redesign that might meet the government's needs in that respect.

**CONTRACTS**

**B-221375 Apr. 3, 1986**

**Negotiation**

**86-1 CPD 320**

**Requests for Proposals**

**Specifications**

**Minimum Needs**

**Administrative Determination**

Protest against geographic restriction (limiting procurement to firms able to perform contract at contractor facilities located in Pacific Theater defined by Department of the Air Force) is denied where military contracting agency establishes that restriction is necessary to meet its actual need for military operational readiness.

**CONTRACTS**

**Protests**

**Interested Party Requirement**

**Protester not in Line for Award**

Protester, which cannot comply with proper geographic restriction and, thus, is not an actual or prospective offeror under the challenged request for proposals, is not an "interested party" under bid protest regulations for purposes of challenging provisions of the solicitation other than the geographic restriction.

**CONTRACTS**

**B-221386 Apr. 3, 1986**

**Negotiation**

**86-1 CPD 321**

**Awards**

**Propriety**

**Upheld**

By awarding a contract, an agency has determined a firm to be a responsible prospective contractor, and the General Accounting Office, therefore, will not review a challenge to that affirmative determination on the basis of the protester's continued assertion that the manner in which the awardee chose to configure and price aircraft structural modification kits reflected its lack of technical capability to perform the work.

**CONTRACTS**

**B-221386 Con't**

**Negotiation**

**Apr. 3, 1986**

**Offers or Proposals**

**Evaluation**

**Technical Acceptability**

**Administrative Determination**

An agency's determination that a proposal to furnish aircraft structural modification kits was technically acceptable was reasonable where all that was required under the solicitation's evaluation criteria was a demonstration that the offeror have the capability to design kits that would meet the agency's needs, rather than a precise showing of what parts the kits would eventually contain.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Prices**

**Reasonableness**

The Federal Acquisition Regulation's requirement for the integrity of unit prices is not violated by an offer of identical unit prices for items with allegedly dissimilar base costs where the alleged violation has not been shown to have worked to the prejudice of the protester.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Unbalanced**

**Determination**

**Criteria**

A price proposal cannot be materially unbalanced where it is both low in the base year and also low in each of the four option years, since an award will ultimately result in the lowest overall cost to the government.

**CONTRACTS****B-221713 Apr. 3, 1986****Protests****86-1 CPD 322****Interested Party Requirement****Trade Associations, etc.**

Protester, to be an interested party under the Competition in Contracting Act of 1984 and GAO's Bid Protest Regulations, must be an actual or prospective offeror whose direct economic interest would be affected by the award of, or failure to award the contract involved. Union local representing federal employees therefore is not an interested party to protest a contracting agency's decision to contract for services rather than to perform them in-house, since the union is not an actual or prospective offeror.

**BIDS****B-222326 Apr. 3, 1986****Responsiveness****86-1 CPD 323****Exceptions Taken to Invitation Terms**

The protester's bid was properly rejected where the bid bond was required to be 20 percent of the bid price, and the protester's bond stated the penal sum to be 20 percent of the bid price, but stipulated that the amount was not to exceed a specific amount which was less than 20 percent of the bid price and also less than the difference between the protester's bid and the next low acceptable bid.

**BIDS****B-219312.3; B-221231****Invitation for Bids****Apr. 4, 1986****Cancellation****86-1 CPD 324****After Bid Opening****Justification****Inaccurate Specifications**

Cancellation of solicitation after bid opening is proper where agency reasonably determined that the solicitation did not reflect the agency's actual anticipated needs.

**BIDS** **B-219312.3; B-221231 Con't**  
**Invitation for Bids** **Apr. 4, 1986**  
**Cancellation**  
**Resolicitation**  
**Revised Specifications**

Where there is no reasonable expectation of obtaining bids from two or more competitive small businesses, a contracting officer may resolicit on an unrestricted basis.

**CONTRACTS** **B-220378.2 Apr. 4, 1986**  
**Protests** **86-1 CPD 325**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Allegation that decision which held that protest was rendered academic when the agency advised that funding for requirement was unavailable is denied on reconsideration where the agency rebuts the protester's allegations that the requirements were obtained through other means or that the funding determination was improper.

**CONTRACTORS** **B-221299 Apr. 4, 1986**  
**Responsibility** **86-1 CPD 326**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

The General Accounting Office will not review a contracting agency's affirmative responsibility determination where there is no showing that the contracting officials possibly acted fraudulently or in bad faith and the solicitation contains no definitive responsibility criteria.



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

**B-221410 Con't**  
**Apr. 4, 1986**

Where proposals were evaluated in a manner consistent with solicitation "Evaluation and Award Factors" provision, and where the protester merely raises general allegations regarding the propriety of analysis, the protester has not met its burden of affirmatively proving its case.

**BIDDERS**  
**Qualifications**  
**Manufacturer or Dealer**  
**Administrative Determination**  
**Labor Department Review**

**B-222203 Apr. 4, 1986**  
**86-1 CPD 328**

The contracting agency, not GAO, considers the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act, subject to review by the Small Business Administration and the Secretary of Labor.

**CONTRACTORS**  
**Responsibility**  
**Determination**  
**Time for Making Determination**

Protest allegations that low bidder may have falsely represented itself in certain clauses of the "Representations and Certifications" section of its bid are dismissed because the certifications pertain to matters of bidder responsibility which GAO will not consider. The information required may be provided by the bidder and confirmed by the contracting agency after bid opening.



**CONTRACTS**

B-222669 Apr. 4, 1986

**Protests**

86-1 CPD 331

**Authority to Consider****Nonappropriated Fund Activity Procurements**

Protest of procurement conducted by nonappropriated fund activity is dismissed since General Accounting Office bid protest jurisdiction is limited to procurements of federal agencies and nonappropriated fund activities are not federal agencies.

**BIDDERS**

B-219723 Apr. 7, 1986

**Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Required**

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had failed to pay its employees the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There were substantial violations of the Act in that the underpayment of employees and subsequent falsification of records were intentional. Therefore, the subcontractor will be debarred under the Act.



**GENERAL ACCOUNTING OFFICE**      **B-220049.2 Con't**  
**Recommendations**              **Apr. 7, 1986**  
**Contracts**  
**Prior Recommendation**  
**Affirmed**

A decision sustaining a protest and recommending additional discussions with the offerors and possible contract termination will not be reconsidered based upon the estimated costs of termination where, although the protest was filed within 10 days of award, the agency proceeded with performance of the contract upon a finding that to do so would be in the best interest of the government, since the General Accounting Office is required by the Competition in Contracting Act to disregard such costs in recommending a protest remedy.

Previous disclosure of an offeror's ceiling price for a fixed-price, incentive contract does not constitute grounds for changing GAO's recommendation that discussions be reopened where the offeror's target price and incentive formula were not disclosed, prejudice to the parties would be minimal, and the agency failed in its obligation to conduct meaningful discussions in the first instance.

**CONTRACTS**                              **B-220367.3 Apr. 7, 1986**  
**Protests**                                **86-1 CPD 334**  
**General Accounting Office Procedures**  
**Timeliness of Comments on Agency's Report**

A protest file that was closed because the protester's comments on the agency report were not received within 7 working days after the protester received the report, as required by the Bid Protest Regulations, will not be reopened where the protester simply relied on the mail for timely delivery of comments and delivery in fact was not timely made.

**BIDS** **B-220615.3 Apr. 7, 1986**  
**Responsiveness** **86-1 CPD 335**  
**Brand Name Procurement**  
**Compliance Requirements**

Bid for an "equal" product should be rejected as nonresponsive if it fails to comply with a particular design characteristic of the brand name product identified in a solicitation. Where a solicitation includes precise performance or design characteristics, the "equal" product must meet them exactly.

**CONTRACTS** **B-221087.2 Apr. 7, 1986**  
**Protests** **86-1 CPD 336**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Prior decision which held that bid on a total small business set-aside solicitation which fails to indicate that bidder intends to furnish supplies manufactured by a small business is nonresponsive is affirmed on reconsideration where the bidder has misinterpreted a Small Business Administration Office of Hearings and Appeals decision which the bidder cited as contrary to our ruling.

**CONTRACTS** **B-221192; B-221192.2**  
**Negotiation** **Apr. 7, 1986**  
**Awards** **86-1 CPD 337**  
**Aggregate Basis**  
**Propriety**

Agency procurement of casegood and upholstered furniture as a total package rather than on the basis of separate awards for each type of furniture was reasonable where the agency reasonably concluded that it had an urgent need for both types of furniture and that a single award would facilitate the expeditious delivery of the furniture.

**GENERAL ACCOUNTING OFFICE      B-221192; B-221192.2    Con't**  
**Jurisdiction                      Apr. 7, 1986**  
**Administrative Agency v. General Accounting Office**  
**Dispute as to Jurisdiction**

Department of State's contention that asserted exemption from the Federal Property and Administrative Services Act of 1949, as amended, (FPASA) and the Federal Acquisition Regulation (FAR) of procurement of supplies for embassy precludes GAO's consideration of protest is without merit. GAO's authority to consider bid protests arises out of its authority under the Competition in Contracting Act of 1984 to consider protests of procurements by "federal agency." GAO's bid protest jurisdiction is not affected by the extent to which an agency may be covered by the FPASA and the FAR.

**CONTRACTS                                      B-221292    Apr. 7, 1986**  
**Negotiation                                      86-1    CPD    338**  
**Offers or Proposals**  
**Rejection**  
**Propriety**

Protester has not satisfied burden of demonstrating that rejection of proposal was improper where protester does not respond to specific deficiencies cited by agency as justifying rejection.

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

Protest that agency was biased and acted in bad faith in conduct of procurement is denied where protester has provided no evidence to support its conjecture or refute agency denial of allegations.



**CONTRACTS**

**Negotiation**

**Awards**

**Propriety**

**Technical Superiority-Paramount Consideration**

**B-221336; B-221336.2**

**Apr. 7, 1986**

**86-1 CPD 340**

Selection for award of the offeror whose proposal was ranked highest technically and who proposed the highest costs was justified where the solicitation stated that source selection would be made on the basis of technical merit, management abilities, and proposed costs, in that order of importance, and the agency reasonably determined that the proposal represented the best overall value.

**CONTRACTS**

**Negotiation**

**Competition**

**Equality of Competition**

**Not Denied to Protester**

Competitive advantage that an offeror may enjoy is not objectionable where it is not the result of unfair action by the government.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Discussion With all Offerors Requirement**

**"Meaningful" Discussions**

Contention that agency failed to conduct adequate discussions is without merit where the agency issued a list of questions to each offeror under the heading "Clarification Requests/Deficiency Notices" and allowed offerors an opportunity to submit best and final offers.



**CONTRACTS** B-221727 Apr. 7, 1986  
Negotiation 86-1 CPD 342  
Late Proposals and Quotations  
Hand Carried  
Delay not Due to Government Action

Proposal delivered late by Federal Express properly was rejected where late delivery was caused by Federal Express and not the government.

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

Protest that agency should have considered late proposal because receipt of the proposal late allegedly was due to government impropriety--the agency's omission of the zip code from the solicitation's address for delivery of hand-carried proposals--is timely filed within 10 working days of receipt of agency's denial of agency level protest.

**CONTRACTS** B-221746 Apr. 7, 1986  
Architect, Engineering, 86-1 CPD 343  
etc. Services  
Contractor Selection Base

GAO's review of agency selection of an architect-engineer (A-E) contractor is limited to examining whether the selection is reasonable. GAO will question the agency's judgment only if it is shown to be arbitrary. Speculation that agency considered three of five A-E firms selected for interviews too small is denied as being unsupported by the evidence contained in the record.



**CONTRACTS**

B-221869 Con't

**Requests for Quotations  
Specifications**

Apr. 7, 1986

**Brand Name or Equal****"Equal" Product Evaluation**

Contracting agency's determination that awardee's descriptive literature is sufficient to establish equivalence of awardee's product to protester's "brand name" product will not be disturbed where protester has not shown that the products are not equal, or that the agency's determination is otherwise erroneous, and where the awardee's descriptive literature is not insufficient on its face.

**BIDDERS**

B-222076 Apr. 7, 1986

**Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Required**

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had underpaid employees and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the subcontractor will be debarred under the Act.

**BIDDERS****B-222100 Apr. 7, 1986****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor failed to pay minimum wages--he did not pay any wages at all--as required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional. Therefore, the contractor will be debarred under the Act.

**CONTRACTS****B-222424 Apr. 7, 1986****Small Business Concerns 86-1 CPD 345****Awards****Responsibility Determination****Administrative Determination**

A requirement in a small business set-aside solicitation that bidders submit with their bids evidence that they have, or have applied for necessary and local licenses involves a matter of responsibility, and an allegation that the awardee did not comply with the requirement is for resolution by the contracting agency and the Small Business Administration under certificate of competency procedures, not the General Accounting Office.

**CONTRACTS** **B-222424 Con't**  
**Small Business Concerns** **Apr. 7, 1986**  
**Awards**  
**Small Business Administration's Authority**  
**Certificate of Competency**  
**Conclusiveness**

Protester's allegation that the Small Business Administration (SBA) improperly issued a certificate of competency for the awardee in the face of evidence that the awardee was not qualified is dismissed where protester has provided no evidence that SBA, which has the statutory authority to determine conclusively a small firm's responsibility, acted fraudulently or in bad faith or disregarded material information. Fact that agency allowed extra time for awardee to satisfy responsibility requirements does not indicate bad faith; such agency decisions are within their discretion.

**CONTRACTS** **B-222429 Apr. 7, 1986**  
**Protests** **86-1 CPD 346**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest that deadline for submission of best and final offers did not allow adequate proposal preparation time is untimely under GAO Bid Protest Regulations since protest was submitted after the closing date.

**BIDS**

B-220561.2 Apr. 8, 1986

**Opening****Time for Opening Determination**

The bid opening officer's declaration of bid opening time, based on the bid opening room clock, must be regarded as prima facie evidence of the correct time to resolve inevitable differences of reported times. Absent a clear indication that the bid opening room clock showed a different time than announced, or that the officer's reliance on the clock was unreasonable under the circumstances, the authorized declaration of the bid opening time establishes that a subsequently hand-delivered bid is late.

**CONTRACTS**

B-221260 Apr. 8, 1986

**Subcontracts****Award Propriety**

Upon the record before GAO, it appears that a first-tier subcontractor had a reasonable basis for not selecting as a second-tier subcontractor a company from which it requested--prior to the award of the subcontract to the first-tier subcontractor--a price quotation where (1) the first-tier subcontractor did not list the company as a subcontractor in its proposal to the prime contractor, and (2) the first-tier subcontractor concluded that another firm offered excellent prices, was equal to the protesting company in regard to material quality and experience, and was superior in all other respects.

**BIDS**

B-221341 Apr. 8, 1986

**Prices**

86-1 CPD 347

**Reasonableness****Administrative Determination**

In view of prior procurement history, there is no reason to question the contracting officer's determination that reasonable prices have been obtained.

**BIDS**  
**Responsiveness**  
**Sample Requirement**

**B-221341 Con't**  
**Apr. 8, 1986**

A bid which was not accompanied by required bid samples was properly rejected by the procuring agency as nonresponsive where the solicitation clearly required samples of all offered items including brand name items designated as acceptable.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**New Issues**

**Unrelated to Original Protest Basis**

New allegations and grounds for protest which were first raised by the protester in its comments on the agency report are dismissed as untimely. New grounds for protest first raised after the initial filing of a protest must independently satisfy the timeliness requirements.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Solicitation Improprieties**

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

Protest that bidder was prejudiced by its receipt of a copy of the solicitation only 1 day before bid opening, as a result of which it overlooked a bid sample requirement and, therefore, submitted a nonresponsive bid, is untimely because the protest of the time available for bid preparation was not filed until after bid opening.

**CONTRACTS** B-221346.2 Apr. 8, 1986  
**Protests** 86-1 CPD 348  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Reconsideration request based on new argument untimely raised and protester's mere disagreement with legal conclusion that is based on well-settled federal procurement principle fails to establish any error of fact or law warranting reversal of original decision.

**CONTRACTS** B-222375 Apr. 8, 1986  
**Protests** 86-1 CPD 349  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Closing Date for Receipt**  
**of Quotations**

Protest that specifications are restrictive is untimely when filed after closing date for receipt of quotations.

**CONTRACTS** B-219001.2 Apr. 9, 1986  
**Protests** 86-1 CPD 350  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Request for reconsideration is denied where additional information provided by protester does not show error of fact or law in initial decision.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**New Issues**  
**Unrelated to Original Protest Basis**

Request for reconsideration which raises new issues that pertain to agency action under a subsequent procurement is considered a new protest and is dismissed for failure to meet independently the timeliness requirements of GAO's Bid Protest Regulations.

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

B-220632.2 Apr. 9, 1986  
86-1 CPD 351

**To Other Than Low Offeror**

Agency decision to award to a higher cost, technically superior offeror is reasonable when the solicitation does not state that award will be made to the lowest priced, technically acceptable offeror and the selection of a higher priced offeror is consistent with the evaluation criteria and deemed worth the additional cost.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Discussions With all Offerors Requirement**

**"Meaningful" Discussions**

An agency's task when conducting discussions is to furnish offerors within the competitive range with information concerning areas of perceived deficiencies in their proposals and to give those offerors the opportunity to revise their proposals. The extent and content of discussions are matters primarily for the judgment of the contracting agency, so long as the judgment is reasonable.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Evaluation**

**Cost Realism Analysis**

**Reasonableness**

In a cost-type contract, an agency properly may use government manhour estimates in the evaluation of cost realism and may use evaluated costs, rather than proposed costs, to determine which proposal is the most advantageous to the government.



**BIDDERS****B-222082 Apr. 9, 1986****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor failed to pay its employees the minimum wages required by the Act and falsified certified payroll records. Based on an independent review of the record it is concluded that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation in that underpayment of employees and falsification of records was intentional. Therefore, the contractor is debarred under the Act.

**BIDDERS****B-221810 Apr. 10, 1986****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, and failed to pay its employees minimum wages and proper overtime compensation. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act.

**CONTRACTS**  
**Labor Stipulations**  
**Davis-Bacon Act**  
**Wage Underpayments**

**B-221810 Con't**  
**Apr. 10, 1986**

Where, as here, the funds on deposit with GAO which have been withheld by a contracting officer pursuant to § 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1982), are insufficient to cover the amount due to the workers involved, the amount on deposit should be distributed among them on a pro-rata basis.

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

**B-221928 Apr. 10, 1986**  
**86-1 CPD 355**

While disputes over the timeliness of protests ordinarily are resolved in favor of the protester, where agency furnishes signed and dated return receipt for mail which supports agency's position that protester first learned of rejection of bid and basis for rejection more than 10 working days before the protest was filed in GAO, the protest is viewed as untimely.

**CONTRACTS**  
**Protests**  
**Subcontractor Protests**

**B-222402 Apr. 10, 1986**  
**86-1 CPD 356**

Protest is dismissed where protester is a potential subcontractor, whose protests are no longer considered under the General Accounting Office's Bid Protest Regulations absent circumstances not shown to be present here, 4 C.F.R. § 21.3(f)(10) (1985), and where substantially the same issue is being litigated before the General Services Administration Board of Contract Appeals by a potential prime contractor.

**GENERAL SERVICES ADMINISTRATION B-208159.9**  
**Authority Apr. 11, 1986**  
**Contract Protests**

Regarding H.R. 4086, a bill to authorize the General Services Board of Contract Appeals to decide bid protests, GAO position is that vesting permanent, comprehensive jurisdiction in the Board is premature. A longer trial period would provide a fuller review of the Board's performance in deciding bid protests involving automatic data processing equipment. GAO also believes that comparison of GAO's and Board's performance on basis of rate of cases sustained is misleading in view of different procedures and standards of review used by both forums. If Congress decides to adopt approach currently used by the Board, GAO believes jurisdiction should be vested in individual boards at each contracting agency rather than being centralized in GSA Board.

**BIDDERS B-219712 Apr. 11, 1986**  
**Debarment**  
**Labor Stipulation Violations**  
**Davis-Bacon Act**  
**Wage Underpayments**  
**Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay its employees the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and subsequent falsification of records was intentional. Therefore, the contractor will be debarred under the Act.

**CONTRACTS****B-221980 Apr. 11, 1986****Protests****86-1 CPD 357****General Accounting Office Procedures****Timeliness of Protest****Adverse Agency Action Effect****Solicitation Improprieties**

Protest of alleged solicitation defects is untimely even if the protester's letter to the contracting agency is considered a protest prior to the closing date for receipt of proposals, since no protest was filed with GAO within 10 working days of closing. Where the agency does not take corrective action requested regarding solicitation defects, closing constitutes the initial adverse action on an agency-level protest.

**CONTRACTS****B-220649.2 Apr. 14, 1986****Protests****86-1 CPD 360****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Prior decision is affirmed where request for reconsideration fails to show error in concluding that a low lump-sum bid, although technically nonresponsive as submitted because it mistakenly exceeded a statutory cost limitation for a particular line item, properly could be corrected by reallocating prices to another item since the lump-sum price remained unchanged and, therefore, neither the competition nor the integrity of the sealed bidding system was prejudiced by the correction.

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

**B-220957.2 Apr. 14, 1986**  
**86-1 CPD 361**

Where amendment revising wage rates has more than a trivial effect on the price of the solicited services, bidder's failure to acknowledge amendment cannot be waived notwithstanding bidder's obligation to pay the revised wage rates under its collective bargaining agreement. In determining materiality of amendment, consideration must be given to actual and potential adverse impact of amendment on competition and prejudice to bidders.

**TRANSPORTATION**  
**Household Effects**  
**House Trailer Shipments, etc.**  
**Damages En Route**

**B-211194 Apr. 15, 1986**

When the carrier received a member's 6-month old mobile home its agent noted some pre-existing damage, but the shipper noted only minor damage. Repair estimates presented by the member and evidence of an accident en route support the Air Force's determination that the unit was delivered in substantially damaged condition. Although the agency did not break down the amount charged the carrier for damage, that charge was less than half the amount of the repair estimates. The agency's determination of damages to be charged the carrier is sustained since it was not unreasonable in light of the evidence.



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

B-221320, B-221320.2 Con't  
Apr. 15, 1986

Protest that agency was constrained to award the contract for a certain dollar amount and conducted successive rounds of discussions to ensure award to the lowest cost offeror is denied where record does not show that funding was limited in such a manner so as to require award only to the low offeror.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Subcontracting Plan**

Protest that agency's evaluation improperly ignored proposed subcontractor's prior performance record and that agency should have directly considered proposed subcontractor's responsibility because of the subcontractor's poor performance record is denied where agency evaluated subcontractor's capabilities as part of the overall evaluation and agency evaluation is not found unreasonable.

**CONTRACTS**

**Negotiation**

**Offers or Proposals**

**Evaluation**

**Technical Transfusion Prohibition**

Protest that agency's successive rounds of discussions constituted technical leveling is denied where record does not show that discussions were utilized to point out weaknesses caused by the awardee's lack of diligence or competence or that agency improperly coached the awardee to bring the awardee's proposal up to the protester's level. Agency questions and comments advised all offerors of the deficiencies in their proposals and resolved uncertainties regarding each offeror's proposed approach and agency's actions are consistent with Federal Acquisition Regulation, 48 C.F.R. § 610(d)(1) (1984), which requires an agency to conduct meaningful discussions by pointing out weaknesses, excesses or deficiencies in the proposals.

Where record reveals no evidence that the agency conveyed to an offeror, either directly or indirectly, during discussions a better technical approach or the protester's technical approach, technical transfusion has not been shown.

**CONTRACTS**

**B-221807 Apr. 15, 1986**

**Protests**

**86-1 CPD 368**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Solicitation Improprieties**

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

Protest based upon alleged improprieties in a solicitation which is apparent prior to bid opening is dismissed where protest was not filed until after bid opening and award. 4 C.F.R. § 21.2(a)(1) (1985).

**CONTRACTS** B-222329 Apr. 15, 1986  
**Negotiation** 86-1 CPD 369  
**Late Proposals and Quotations**  
**Hand Carried**

A proposal hand-delivered after the time specified for receipt must be rejected as late, even though the cause of the delay, bad weather and congested air traffic, was beyond the offeror's control.

**CONTRACTORS** B-222737 Apr. 15, 1986  
**Responsibility** 86-1 CPD 370  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

GAO will not review an affirmative determination of responsibility except in limited circumstances.

**CONTRACTS**  
**Protests**  
**General Accounting Office Function**  
**Free and Full Competition Objective**

GAO will not consider a protest that a procurement should be conducted on a sole-source basis with the protester since the objective of GAO's bid protest function is to insure full and free competition for government contracts.

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

A protest that is based upon speculation as to possible future agency conduct is premature and will not be considered.

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

**B-221261 Apr. 16, 1986**  
**86-1 CPD 371**

**To Other Than Low Offeror**

Award of a contract to a higher priced offeror is proper where the awardee received the highest technical overall score under an evaluation formula set forth in the solicitation which gave significantly greater weight to technical concerns than to cost.

**CONTRACTS**

**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Experience Rating**

A protest alleging that the technical evaluation of a protester's corporate experience is improper because the agency failed to consider the experience of key personnel is denied where the record demonstrates that the contracting activity properly considered this experience but reasonably concluded that it only partially offset a lack of any corporate experience.

**CONTRACTS**

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

Where a protester fails to provide any direct evidence that the contracting activity disclosed portions of its proposal to the successful offeror, the protester has not met its burden of establishing that the activity engaged in technical leveling.

**CONTRACTS** **B-221261 Con't**  
**Small Business Concerns** **Apr. 16, 1986**  
**Awards**  
**Set-Asides**  
**Administrative Determination**  
**Reasonable Expectation of Competition**

Contracting officer does not abuse his discretion in not setting aside a particular procurement for small business concerns where the record shows that he did not expect a sufficient number of offers from responsible small business concerns to assure award at a reasonable price and where the protester has provided no evidence that other small business concerns were interested in competing.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Small Business Administration's Authority**  
**Certificate of Competency**  
**Inapplicability of COC Procedures**

Small Business Administration (SBA) certificate of competency procedures are inapplicable, and referral is not required, when a small business firm's offer is downgraded under technical evaluation criteria relating to experience. The SBA reviews matters relating to the nonresponsibility of small business concerns, but not the evaluation of their technical proposals.

**CONTRACTS** **B-221330 Apr. 16, 1986**  
**Protests** **86-1 CPD 372**  
**Allegations**  
**Not Prejudicial**

Where protester is specifically advised during negotiations that its direct labor rates were excessively high and exceeded the fair and reasonable prices at which contract award could be made, but fails to significantly revise its proposed costs, protest against award to contractor whose costs were determined to be fair and reasonable is without merit.

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

**B-221330 Con't**  
**Apr. 16, 1986**

Where there is no evidence in the record, other than the protester's bare allegation, that the contracting agency conducted the procurement in a manner that favored the awardee, the protester has not met its burden of affirmatively proving its case. Unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Review by GAO**  
**Scope**

**B-221584.3 Apr. 16, 1986**  
**86-1 CPD 373**

**Certificate of Competency Requirement**

GAO will not review the Small Business Administration's refusal to issue a certificate of competency (COC) where the protester fails to make a showing that it stemmed from fraud or bad faith, does not identify any material information not considered, and fails to demonstrate how it was prejudiced by any alleged deficiencies in the record which it had the burden and the opportunity to correct in making its application for a COC.

**BIDS**  
**Late**  
**Mishandling Determination**

**B-221793 Apr. 16, 1986**  
**86-1 CPD 374**

Late bid to purchase timber from a national forest is not excused where the delay cannot be attributed to mishandling by the Forest Service after receipt at the post office or the Forest Service installation.

**BIDS**  
**Late**  
**Mishandling Determination**  
**Regular Mail**

**B-221793 Con't**  
**Apr. 16, 1986**

Delay in the mail does not excuse a late bid.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Criteria**  
**Application of Criteria**

**B-221817 Apr. 16, 1986**  
**86-1 CPD 375**

Protester was not prejudiced by contracting agency's deviation from the evaluation criteria in the request for proposals (RFP) where protester was not in line for award under either the evaluation scheme in the RFP or the evaluation scheme actually applied by the agency. Protester's bare statement that it would have lowered its price significantly is not sufficient, standing alone, to show that protester would have had a reasonable chance of receiving the award if it had known of the changed evaluation scheme.

**CONTRACTS**  
**Negotiation**  
**Requests for Proposals**  
**Evaluation Criteria**  
**Interpretation**

Where request for proposals (RFP) lists cost last of three evaluation factors shown in descending order of importance and also states that cost is slightly less important than the other two factors, the most reasonable interpretation of the RFP is that cost is the least important evaluation factor. Contracting agency's evaluation of offers therefore was inconsistent with the evaluation scheme in the RFP, since the agency made cost the most, not least, important of the three evaluation factors.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Not Prejudicial**

**B-221817 Con't**  
**Apr. 16, 1986**

Contracting agency's alleged disclosure of the unsuccessful offeror's price to the awardee would not have prejudiced the unsuccessful offeror.

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

**B-222294 Apr. 16, 1986**  
**86-1 CPD 376**

Acknowledgment of a later amendment to a solicitation does not constitute acknowledgment of prior amendments. A bidder's failure to acknowledge each material amendment generally renders the bid nonresponsive.

**BIDS**  
**Invitation for Bids**  
**Amendments**  
**Nonreceipt**  
**Bidder's Risk**

The risk of nonreceipt of a solicitation amendment generally rests with the bidder. The fact that the bidder does not receive an amendment at all or receives it in what the bidder considers insufficient time to respond does not change the fact that failure to timely acknowledge a material amendment generally renders the bid nonresponsive.

**CONTRACTS** **B-220641.3 Apr. 17, 1986**  
**Protests** **86-1 CPD 378**  
**Authority to Consider**  
**Contract Administration Matters**

Decision as to costs recoverable due to termination of a contract for convenience of the government is a matter of contract administration to be determined by the contracting agency, not the General Accounting Office.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Reconsideration Requests**

Where prior decision sustained protest and recommended termination of contract and resolicitation on the basis that the invitation for bids was misleading, prior awardee's charge that successful protester's bid was defective does not provide a basis for reconsideration.

**CONTRACTS** **B-222103.2 Apr. 17, 1986**  
**Protests** **86-1 CPD 379**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Allegation, unsupported by evidence, that protester may not have received correct information over telephone concerning GAO's address for filing a protest is nevertheless immaterial to the fact protest was untimely filed since protesters are charged with constructive notice of GAO's Bid Protest Regulations.

**CONTRACTS**

B-222103.2 Con't

**Protests**

Apr. 17, 1986

**What Constitutes Protest**

Protest must be filed in writing at GAO and a telephone call to GAO that protester might make does not serve as a constructive filing.

**CONTRACTS**

B-222731 Apr. 17, 1986

**In-house Performance v.**

86-1 CPD 380

**Contracting out****Discretionary Functions Related to Legal Mission of Agency**

The General Accounting Office will not review an agency decision to perform work in-house rather than to continue to contract for the services where no competitive solicitation was issued pursuant to Office of Management and Budget Circular No. A-76 for the purpose of determining the cost of contracting out.

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

Protest against termination of a contract is dismissed because terminations for convenience are, by law, matters of contract administration and are not reviewable under the General Accounting Office's bid protest function. The only exception to this rule, where the termination is the result of an agency finding that the contract was improperly awarded in the first instance, is not applicable here.

**BIDS** B-222803 Apr. 17, 1986  
Prices 86-1 CPD 381  
Below Cost  
Not Basis for Precluding Award

Protest that the low bid was below cost does not provide a valid basis on which to challenge a contract award. Such a protest questions the bidder's responsibility, which the General Accounting Office does not review except in limited circumstances.

**CONTRACTS** B-222804 Apr. 17, 1986  
Protests 86-1 CPD 382  
General Accounting Office Procedures  
Timeliness of Protest  
Date Basis of Protest Made Known to Protester

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

**CONTRACTS** B-220859.3 Apr. 18, 1986  
Negotiation 86-1 CPD 383  
Offers or Proposals  
Public Opening  
Not Required

Unlike sealed bid procurements where bids are publicly opened, there is no public opening of offers received under a negotiated procurement.

**CONTRACTS**

B-221438.2 Apr. 18, 1986

**Negotiation**

86-1 CPD 384

**Offers or Proposals****Discussion With all Offerors Requirement****Exceptions****No Reasonable Chance for Award**

There is no requirement for the contracting agency to conduct discussions with offerors of technically unacceptable proposals.

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

Protester fails to meet burden of proving that the contracting agency improperly rejected its offer of an allegedly identical radiator to the one specified in the solicitation where the protester presents no evidence to refute the agency's assertion that the offered radiator was dimensionally different from the specified one.

**CONTRACTS****Protests****General Accounting Office Procedures****Piecemeal Development of Issues by Protester**

GAO's Bid Protest Regulations do not contemplate the piecemeal presentation of arguments or information relating to a protest, and it is incumbent upon a protester raising one basis of protest to diligently pursue information pertinent to the protest as well as information that reasonably would be expected to reveal additional bases for protest. Where the record does not indicate the protester diligently pursued such information, allegations raised after the receipt of the agency report and more than 2 months after the filing of the initial protest are untimely.

**CONTRACTS**

B-22279.2 Apr. 18, 1986

**Protests**

86-1 CPD 386

**Interested Party Requirement**

**Protester not in Line for Award**

Protest is dismissed where protester, third low bidder, is not an interested party to maintain the protest where, even if the protest were sustained the protester would not be in line for award.

**BIDS**

B-221540 Apr. 21, 1986

**Invitation for Bids**

86-1 CPD 387

**Specifications**

**Drawings**

**Included in Work Requirement**

Invitation's requirement for the submission of shop drawings and catalog cuts by the contractor clearly related to contract performance and did not require the submission of the information with the bid, especially where the invitation failed to include a descriptive literature clause specifically describing what information needed to be submitted with the bid and the consequences for failing to submit it.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Date Basis of Protest Made Known to Protester**

Protest that bid should be rejected for failing to comply with alleged descriptive data requirement in solicitation is timely where filed within 10 working days after bid opening.



**CONTRACTS****B-212979.3 Con't****Protests****Apr. 22, 1986****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

GAO affirms prior reconsideration decision sustaining protest against the rejection of the protester's offer based on the results of a second benchmark from which the agency concluded that the protester violated the terms of the solicitation by fine tuning its computer equipment and by failing to protect against loss of data in case of a power failure. GAO rejects the agency's argument that comparison of the first and second benchmarks supports its position since there were significant changes made in running the second benchmark and there are other logical, acceptable explanations for the second benchmark results.

**BIDS****B-221313 Apr. 22, 1986****Invitation for Bids****86-1 CPD 390****Specifications****Qualified Products****Listing****Requirement**

Under applicable provision of Federal Acquisition Regulation a component of an end item need not qualify for inclusion on the qualified products list until time of award of a subcontract for the component. Where the solicitation did not require the bidders to identify the manufacturer of the fabric used in the end product being procured and low bid did not take any exception to the solicitation's requirements, protest that the low bid was nonresponsive for failure to offer an end product which was made of a qualified product list fabric is denied.



**BIDS**

B-222514 Apr. 22, 1986

Prices

86-1 CPD 392

Below Cost

Effect on Bidder Responsibility

There is no legal basis to object to below-cost bid. Whether a bidder can meet contract requirements in light of the low price is a matter of bidder responsibility, the affirmative determination of which is not reviewed by the General Accounting Office except in limited circumstances not present here.

**CONTRACTS**

B-219668.2 Apr. 23, 1986

Negotiation

86-1 CPD 393

Requests for Proposals

Cancellation

Administrative Discretion

Reasonable Exercise

In deciding a bid protest challenging a contracting agency's decision to cancel a request for proposals, General Accounting Office (GAO) may rely on information in a GAO report regarding grounds for the cancellation, even though the parties to the protest did not introduce the GAO report into the bid protest record. Distinguishes B-202966.2, Feb. 16, 1982.

Even though a contracting agency asserts an improper basis for canceling a request for proposals, cancellation is reasonable where it is supported by other proper grounds. Distinguishes B-202966.2, Feb. 16, 1982.



**GENERAL ACCOUNTING OFFICE**      **B-220327.2; B-220327.3**    **Con't**  
**Recommendations**                      **Apr. 23, 1986**  
**Contracts**  
**Prior Recommendation**  
**Withdrawn**  
**Not in Best Interest of Government**

The General Accounting Office (GAO) withdraws its recommendation to terminate an existing contract, based on belief that performance had been suspended, when the agency points out in its request for reconsideration that because it was notified of the protest more than 10 days after award, it was not required to suspend performance. Because termination and award to the protester is therefore neither practicable nor in the best interest of the government, GAO now finds the protester entitled to the costs of filing and pursuing the protest and of bid preparation.

**CONTRACTS**                                      **B-220666.3**    **Apr. 23, 1986**  
**Protests**                                        **86-1 CPD 396**  
**Preparation**  
**Costs**  
**Noncompensable**

There is no basis for payment to protester of costs of filing and pursuing protests, including attorney's fees, where the first two protests were voluntarily withdrawn by the protester and the final protest is dismissed as academic.

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

**B-221349 Apr. 23, 1986**  
**86-1 CPD 397**

**To Other Than Low Offeror**

Decision to award cost-reimbursement contract to a higher cost, technically superior offeror is not objectionable. Award is consistent with the RFP's evaluation criteria, source selection official found that awardee's proposal was most advantageous to the government, and the protester's proposal, even after submission of its best and final offer, is outside the competitive range.

**CONTRACTS**  
**Federal Supply Schedule**  
**Failure to Use**

**B-221808 Apr. 23, 1986**  
**86-1 CPD 399**

Contracting agency should have acquired needed services under protester's mandatory Federal Supply Schedule (FSS) contract rather than under invitation for bids (IFB) where FSS contract was awarded prior to IFB bid opening and cost of services did not exceed the maximum order limitation in the FSS contract.

**FEDERAL ACQUISITION REGULATION B-222225 Apr. 23, 1986**  
**Proposed Revision**

GAO has no objection to proposed amendments to Federal Acquisition Regulation (FAR) sections 45.103 and 45.106 and the contract clause at FAR section 52.245-4, all of which concern a contractor's liability for government-furnished property.

**CONTRACTS**

B-221814 Apr. 24, 1986

**Negotiation**

86-1 CPD 400

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

Contracting agencies generally must hold discussions with all responsible offerors for a negotiated procurement whose proposals are within the competitive range. An agency acted improperly by not advising a competitive range offeror that its proposal, which otherwise received relatively strong technical scores and was much lower in cost, contained informational deficiencies which were the proper subject for resolution through discussions, since the discussions would not have resulted in prohibited technical leveling or technical transfusion.

**CONTRACTS**

B-221828, et al.

**Small Business Concerns**

Apr. 24, 1986

**Awards**

86-1 CPD 401

**Responsibility Determination****Nonresponsibility Finding****Certificate of Competency Requirement**

Negative responsibility determination of small business concerns is upheld where the protester elects not to file an application for a certificate of competency with the Small Business Administration.

**CONTRACTS**

B-222727 Apr. 24, 1986

**Protests**

86-1 CPD 402

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

Protest is dismissed where untimely filed and both issues raised--alleged below-cost bid and failure to comply with contract requirements--are for determination by the contracting agency and are not for review by our Office absent circumstances not present here.



**CONTRACTS**

**B-221329 Con't**

**Protests**

**Apr. 25, 1986**

**Authority to Consider**

**Contract Administration Matters**

Whether the contractor's delivered seal assembly actually conforms to the solicitation's performance requirements involves a matter of contract administration which is the responsibility of the procuring agency and not GAO.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Solicitation Improprieties**

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

Where the solicitation does not require preaward testing to determine whether offered seal assemblies meet a particular specification requirement for which none of the approved seals have been tested by the contracting agency, protest that the award should not be made to an offeror whose seal was not previously tested for meeting the requirement lacks merit, and any protest that the solicitation should have required testing is untimely since it was not filed before the closing date for receipt of proposals.

**CONTRACTS**

**B-221500 Apr. 25, 1986**

**Protests**

**86-1 CPD 406**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Date Basis of Protest Made Known to Protester**

Protest challenging qualification requirements is untimely under 4 C.F.R. § 21.2(a)(2) where it is not filed within 10 working days of the date that the agency advises the protester of testing requirements and costs.



**CONTRACTS** **B-222519 Apr. 25, 1986**  
**Small Business Concerns** **86-1 CPD 408**  
**Awards**  
**Prior to Resolution of Size Protest**

After the Small Business Administration Regional Office issues its determination that the protester is not a small business concern, the contracting agency may make award to another bidder without waiting for the protester's appeal of the size status determination to be resolved.

**CONTRACTS** **B-222694 Apr. 25, 1986**  
**Protests** **86-1 CPD 409**  
**Authority to Consider**  
**Contract Administration Matters**

Protest against termination of barge towing contract is dismissed where contracting agency did not decide that initial contract award was improper, but rather terminated contract because of facts arising after contract award. Consequently, propriety of termination relates to contract administration which GAO will not review.

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

Protest against implementation of backup contract at price higher than primary contract--which was terminated for convenience--is dismissed. Protest involves alleged, apparent solicitation defect--provision which contemplated that backup award would be at price higher than primary contract--but defect was not protested before solicitation's closing date; consequently, protest is untimely filed and will not be considered. See 4 C.F.R. § 21.2(a)(1) (1985).

**BIDDERS**  
Qualifications  
License Requirement  
Lacking

B-222799 Apr. 25, 1986  
86-1 CPD 410

In the absence of a solicitation provision requiring that bidders possess a specific license or permit, the contracting officer need not consider whether bidders intend to comply with licensing requirements imposed by state or local authorities in determining bidders' eligibility for award.

**CONTRACTS**  
Negotiation  
Awards  
To Other Than Low Offeror

B-220367.4 Apr. 28, 1986  
86-1 CPD 411

Where the solicitation in a negotiated procurement advises that technical factors are more important than cost, the government may conclude that it is more advantageous to award a contract to an offeror with a superior technical proposal even though its proposed costs were not low.

**CONTRACTS**  
Negotiation  
Offers or Proposals  
Evaluation  
Technical Acceptability  
Administrative Determination

Each procurement is a separate transaction and the action taken on any one procurement does not govern the conduct of all similar procurements. Prior determination of technical unacceptability does not require continued similar determination under subsequent solicitation for the same services.

**CONTRACTS** **B-220367.4 Con't**  
**Small Business Concerns** **Apr. 28, 1986**  
**Awards**  
**Small Business Administration's Authority**  
**Size Determination**

The Small Business Administration has conclusive statutory authority to determine matters of small business size status for federal procurements, and therefore the General Accounting Office will not consider an allegation that the low bidder is not a small business concern.

**SMALL BUSINESS ADMINISTRATION** **B-222153 Apr. 28, 1986**  
**Contracts** **86-1 CPD 412**  
**Contracting With Other Government Agencies**  
**Procurement Under 8(a) Program**  
**Fraud or Bad Faith Alleged**  
**Evidence Sufficiency**

Protest that agency officials acted in bad faith in awarding a section 8(a) contract to a firm other than the protester is denied where the record establishes that the agency had an appropriate basis for its action and did not act with specific intent to harm the protester.

**CONTRACTS** **B-221857 Apr. 29, 1986**  
**Protests** **86-1 CPD 414**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest of alleged defect in a request for proposals, concerning the solicitation's evaluation scheme of normalizing the cost of spare parts, must be filed prior to the closing date for receipt of initial proposals in order to be timely.

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

**B-221857 Con't**  
**Apr. 29, 1986**

There is no basis for payment to protester of costs of filing and pursuing protests, including attorney's fees, where the protest grounds are either academic or dismissed as untimely and General Accounting Office has not determined that the procurement does not comply with statute or regulation.

**CONTRACTS**  
**Small Business Concerns**  
**Awards**  
**Set-Asides**  
**Administrative Determination**  
**Reasonable Expectation of Competition**

**B-222229 Apr. 29, 1986**  
**86-1 CPD 415**

General Accounting Office will not question contracting officer's decision to set a procurement aside for small business concerns where the contracting officer reasonably determined that adequate small business competition and reasonable prices could be expected.

**CONTRACTS**  
**Negotiation**  
**Late Proposals and Quotations**  
**Hand Carried**  
**Delay not Due to Government Action**

**B-222423 Apr. 29, 1986**

Protest against the rejection of a hand-carried proposal submitted after the time offers were due is denied where the protester significantly contributed to the late submission of the proposal, so that improper government action was not the paramount cause of late receipt.

**CONTRACTS**

B-219654.3 Apr. 30, 1986

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

Prior decision in The W.H. Smith Hardware Co., B-219654, Nov. 12, 1985, 85-2 C.P.D. ¶ 536, is clarified to assure that it not be construed as establishing a waiver from the Certificate of Competency procedure.

**CONTRACTS**

B-221241.2 Apr. 30, 1986

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

A protest filed with the General Accounting Office following adverse agency action on a protest that was untimely filed with the contracting agency is untimely because the initial agency protest was not timely filed. The fact that the contracting agency considered the protest on the merits does not change this result.

**CONTRACTS**

B-221335 Apr. 30, 1986

**Negotiation****Offers or Proposals****Best and Final****Discussions****All Offerors Requirement**

If an agency reopens discussions with one offeror after best and final offers, it must conduct discussions with all offerors whose proposals are in the competitive range and issue an additional request for best and final offers.

**CONTRACTS**

**B-221335 Con't  
Apr. 30, 1986**

**Negotiation  
Offers or Proposals  
Preparation  
Costs  
Denied**

Recovery of the costs of preparing a proposal and filing and pursuing a protest is inappropriate where the protester is afforded the opportunity to recompete under the same solicitation.

**CONTRACTS**

**B-221384 Apr. 30, 1986**

**Negotiation  
Authority**

Agency's decision to negotiate a fixed-price contract for overall food service operation at the agency's facility in lieu of requiring sealed bids is justified where the variety of services required justifies holding discussions with responding sources.

**CONTRACTS**

**Negotiation  
Requests for Proposals  
Specifications  
Minimum Needs  
Overstated**

Solicitation provision that corporate food service experience, and not just individual experience, is a prerequisite for award of a contract for food service operations is not reasonable where the agency has not established that the requirement is necessary to meet the government's needs, and only one firm is known to meet the requirement.

**CONTRACTS**

**B-222823, et al. Apr. 30, 1986**

**Protests**

**Interested Party Requirement**

**Suspended, Debarred, etc. Contractors**

A company proposed for debarment and then debarred is not eligible to compete for or to be awarded government contracts and is not an interested party entitled to protest to the General Accounting Office.

## **SPECIAL STUDIES & ANALYSIS**

### **APPROPRIATIONS**

**B-222710 Apr. 9, 1986**

#### **Augmentation**

#### **Reimbursement of Expenses of Official Function**

Senate use of its contingency fund to support investigation carried out by Helsinki Commission does not improperly supplement or augment the Commission's appropriation because the Economy Act type arrangement for the investigation is for a Senate purpose.

### **CONGRESS**

#### **Contingent Funds**

#### **Availability**

Senate resolution to assign investigators to work with Helsinki Commission on investigation of Medvid defection case satisfies restrictions contained in 2 U.S.C. § 68-2 on use of Senate contingency fund.

### **NUCLEAR ENERGY**

**B-197742 Apr. 10, 1986**

#### **Price-Anderson Act**

#### **Liability**

#### **Nuclear Accidents**

If the Nuclear Regulatory Commission's indemnification authority under the Price-Anderson Act, 42 U.S.C. § 2210, were to expire, and the Congress failed otherwise to amend the Act, the Commission would retain its authority to require licensees to obtain private insurance and to assess deferred premiums.

### **APPROPRIATIONS**

**B-222410 Apr. 28, 1986**

#### **Lump-sum**

#### **Availability**

Because funds for the Department of Energy's MOD-5B project are part of a lump-sum appropriation, congressional disapproval of the deferral will not assure that the project is carried out unless the disapproval language requires that the funds be made available for the project.

**TRANSPORTATION LAW**

**MOBILE HOMES**

**B-208364 Apr. 29, 1986**

**Transportation**

**Damage, Loss, etc.**

**Carrier's Liability**

Based on its interpretation of a previous decision of this Office, a motor carrier contends that it was improper for the Air Force to hold it liable for the cost of sealing the roof of a mobile home after transportation. Where no roof damage was noted at origin but the roof was found damaged at destination and there is evidence that the 1-year-old unit was roughly handled during delivery there is a reasonable basis to conclude that the roof was damaged as a result of transportation, and that the application of roof sealant was not merely for routine maintenance. Our Claims Group's settlement disallowing the carrier's claim is sustained. Chandler Trailer Convoy, Inc., 55 Comp. Gen. 1209 (1976) distinguished.

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United States  
General Accounting Office  
Washington, D.C. 20548

Special Fourth Class Rate  
Postage & Fees Paid

Public Law 94-408, Title 5, Section 552

