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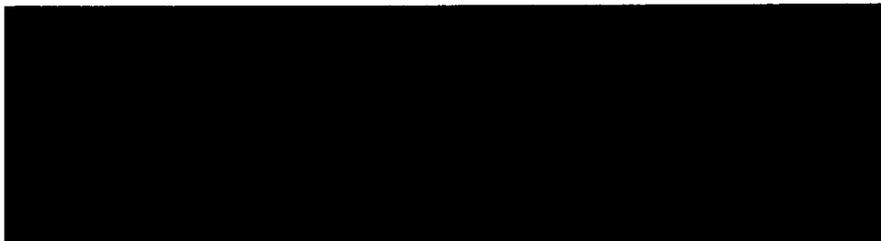


September 1993

**Digests of Decisions
of the Comptroller
General of the
United States**

Vol. IV, No. 12





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Preface

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

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Appropriations/Financial Management

B-250988, September 2, 1993***

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Representational funds
- ■ ■ Meals

The Director of the Trade and Development Program (TDP) may use "representation and entertainment" fund to pay the cost of meals at interagency briefings for executive branch employees hosted by him in his official capacity since the TDP briefings given by the Director are representational in nature and occur during regular business hours.

B-252975, September 8, 1993

Appropriations/Financial Management

Claims By Government

- Commercial carriers
- ■ Carrier liability
- ■ ■ Concealed damages
- ■ ■ ■ Evidence sufficiency

Carrier is not liable for damage to an item in a shipment of household goods where the record shows that the item already was damaged in the same respect when the carrier picked it up for delivery.

B-251285, September 9, 1993***

Appropriations/Financial Management

Federal Assistance

- Grants
- ■ Use

The General Services Administration (GSA) had no authority to establish a reserve account for administrative expenses using a portion of grant funds awarded to various grantees pursuant to line-item appropriations. GSA must disburse amounts in the administrative expense reserve to the appropriate grantees and reimburse the grantees for any amounts previously expended for administrative purposes.

B-251994, September 24, 1993

Appropriations/Financial Management

Accountable Officers

- Certifying officers
- ■ Illegal/improper payments
- ■ ■ Liability restrictions
- ■ ■ ■ Statutes of limitation

Certifying officer is not liable for improper payment because the three year statute of limitations in 31 U.S.C. § 3526 (c) had expired. The statute of limitations began to run when the voucher and supporting documentation for the improper payment was substantially complete, i.e., available for audit, and GAO did not receive the request for relief until more than three years thereafter.

B-251287, September 29, 1993***

Appropriations/Financial Management

Obligation

- Obligated balances
- ■ Expenditure recording
- ■ ■ Clerical errors

Under the fiscal year 1991 National Defense Authorization Act, canceled merged appropriation account balances may not be restored. 31 U.S.C. § 1551 note. However, if the Department of the Treasury is presented with convincing evidence that a reporting error has occurred as a result of an obvious clerical mistake, it may restore such balances to correct the mistake. We recommend that Treasury establish reasonable time limits within which agencies must submit requests for correction of errors.

Appropriations/Financial Management

Obligation

- Expenditure recording
- ■ Closed accounts

Under the fiscal year 1991 National Defense Authorization Act, canceled appropriation account balances are not available for obligation or expenditure for any purpose. 31 U.S.C. §§ 1552(a), 1555. The Department of the Treasury, however, may record a disbursement made before cancellation as a payment. Recording the disbursement is neither a new obligation of, nor an expenditure from, a canceled account, but is merely an accounting entry to reflect the liquidation of an obligation before cancellation.

Civilian Personnel

B-252039, September 1, 1993***

Civilian Personnel

Compensation

■ Handicapped personnel attendants

The Office of Special Education and Rehabilitative Services, Department of Education, may pay for personal assistants for handicapped grant and compliance reviewers who are not federal employees since the cost of the personal assistants is an allowable cost of acquiring the personal services of the handicapped grant and compliance reviewer.

B-251231, September 2, 1993

Civilian Personnel

Travel

■ Overseas personnel

■ ■ Dependents

■ ■ ■ Travel expenses

■ ■ ■ ■ Reimbursement

A "family member" who is incapable of caring for himself at an employee's overseas post of duty is authorized to travel at government expense with the employee who is traveling under medical evacuation orders. Although all such "family members" are usually listed on the employee's residence and dependency report prescribed by Foreign Affairs Manual, Vol. 3, § 124.3, the employee, in accord with an agency practice pertaining to employees who are married to other employees of the agency, listed one "family member" on her residence and dependency report, and her spouse listed the other "family member" on his report. In these circumstances, an agency may pay for the travel of a "family member" who is listed on one spouse's residence and dependency report but not on the spouse's report who is being medically evacuated.

Civilian Personnel

Travel

■ Overseas personnel

■ ■ Rest periods

Foreign Affairs Manual, Vol. 3, § 698.10-2, states that rest and recuperation (R&R) travel should be scheduled at the least possible cost and to take advantage of other official travel by the employee. This does not require a retroactive reduction to the employee's reimbursement for R&R travel performed in April which might have been, but was not, combined with medical evacuation travel due to pregnancy which was planned in March and performed in May. The authorization of the R&R travel was within the discretion of the agency, and in this case it was authorized, and the record does not show that the employee misled the agency to provide a basis for an exception to the general rule that an employee should not be denied reimbursement for travel performed as authorized.

B-253298, September 2, 1993

Civilian Personnel

Relocation

- Miscellaneous expenses
- ■ Reimbursement
- ■ ■ Eligibility

A transferred employee's claim may not be paid for an additional miscellaneous expense allowance based on the cost of prepaid dental treatment for his wife at his old duty station. While an employee may be reimbursed the cost of dental services paid for and forfeited upon a transfer of duty stations, here, the employee's wife traveled back to the old official station and completed her dental treatment. Accordingly, there was no forfeiture of the prepaid dental treatment.

B-249726, September 7, 1993

Civilian Personnel

Relocation

- Breach of service agreements
- ■ Expenses
- ■ ■ Liability

Employee received travel orders directing a change in his permanent duty station, and executed a service agreement whereby he agreed to remain in government service for 12 months from the date of his relocation. He canceled his request to transfer for personal reasons. Employee is responsible for the amount paid by his agency on his behalf to a relocation service company. The Federal Travel Regulation, 41 C.F.R. §§ 302-1.5(a), and 302-12.5(c) (1991), specifically provides that an employee who violates an agreement, including failure to effect a transfer, is liable for any funds expended by the government for relocation expenses on his behalf.

B-252901, September 9, 1993

Civilian Personnel

Travel

- Temporary duty
- ■ Travel expenses
- ■ ■ Privately-owned vehicles
- ■ ■ ■ Mileage

Employees were directed to use a government-owned van to attend a training course. An employee, who chose for personal reasons not to travel in the government-owned van but to travel in his own automobile, may be reimbursed at the reduced rate of 9.5 cents per mile. See title 41 C.F.R. §§ 301-2.2(e) and 301-4.4(c) (1992).

B-253469, September 9, 1993***

Civilian Personnel

Compensation

- Compensation restrictions
- ■ Applicability

Civilian Personnel

Compensation

- Compensation restrictions
- ■ Deferred compensation
- ■ ■ Propriety

Supplemental Executive Retirement Plan benefits provided the president of Radio Free Europe/Radio Liberty, Inc., effectively are additions to salary in contravention of the salary cap set forth in 22 U.S.C. § 2882.

B-254089, September 10, 1993

Civilian Personnel

Travel

- Travel expenses
- ■ Advances
- ■ ■ Theft

Personnel clerk of the National Park Service, whose cash travel advance was stolen may not be relieved of liability for the stolen funds since travel advancements are considered to be like loans, and not government funds in the possession of an accountable officer. The cash travel advance in the clerk's possession was the clerk's private property, and she remains indebted to the government for the advance. The clerk, therefore, must refund to the government any amount of the travel advance not expended for official travel.

B-252670, September 15, 1993

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ Property titles

Claimant and his wife, both federal employees with the same agency, were both transferred in the interest of the government to the same new duty station. The travel orders authorized relocation expenses for the claimant, with his wife shown as a dependent. The wife purchased a residence solely in her name at the new station, and a few weeks thereafter they executed a formal separation agreement. Claimant is not entitled to reimbursement of the real estate purchase expenses since he did not pay such expenses and since the parties were in the process of separating at the time of settlement of the purchase. However, since his wife took title to the new residence in her own name and paid all the purchase expenses, she may be reimbursed for the allowable expenses of the purchase.

B-251301.2, September 17, 1993

Civilian Personnel

Compensation

- Rates
- ■ Determination
- ■ ■ Highest previous rate rule

A former employee of the Bureau of Alcohol, Tobacco and Firearms applied for backpay in January 1992, which would have been due him under the highest previous rate rule during 1978 to 1982, if his prior service as an intelligence case officer with the Department of the Navy under a "personal service contract" was creditable for additional compensation purposes. Even though a special law in 1988 made such service retroactively creditable for retirement purposes under certain conditions, that law did not make such service creditable for additional compensation purposes. Employee's backpay claim is denied.

B-246809.2, September 22, 1993

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Loan origination fees
- ■ ■ Reimbursement

Claim for reimbursement of a loan origination fee in excess of 1 percent of the loan amount is denied because the lender's administrative charges are not itemized as required by section 302-6.2(d)(1)(ii) of the Federal Travel Regulation. Where a lender's letter merely provides a listing of the categories of expenses, and fails to specify the cost attributable to each, it has not satisfied the itemization requirement.

B-253701, September 22, 1993

Civilian Personnel

Travel

- Temporary duty
- ■ Miscellaneous expenses
- ■ ■ Reimbursement
- ■ ■ ■ Telephone calls

Agencies have broad discretion whether and under what conditions to allow employees to call their homes at government expense while on official travel. Therefore, where an agency exercises its discretion to allow reimbursement to an employee traveling overseas for calls she made to her home but denied reimbursement for calls her husband made from their home to her, the agency's action is sustained.

B-252973, September 23, 1993

Civilian Personnel

Compensation

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

Employee received a comparability pay adjustment in January 1989 but was also erroneously granted a step increase from GS-11, step 4, to GS-11, step 5, with the resulting erroneous pay increases until the error was discovered 2 years later, seeks waiver of the debt. Since he received an SF-50 clearly showing the erroneous step 5, and he also received leave and earnings statements

for each 2-week pay period which showed the incorrect step, as a reasonable person, he should have been on notice of the error, and he had a duty to inquire as to the accuracy of his pay. His failure to do so makes him at least partially at fault, which statutorily precludes waiver of the overpayment of pay.

B-254491, September 28, 1993

Civilian Personnel

Compensation

- Presidential appointment
- ■ Temporary appointment
- ■ ■ Time restrictions

A vacancy in an office of United States attorney is filled according to 28 U.S.C. § 546, which provides that the Attorney General may appoint an acting U.S. attorney for a district in which there is a vacancy. The appointment is effective until the earlier of (1) the qualification of a presidentially appointed U.S. attorney for the district, or (2) the expiration of 120 days after the appointment by the Attorney General. Upon expiration of the 120-day appointment, the district court for the relevant district may appoint an acting U.S. attorney to serve until the vacancy is filled. If the district court fails to act, the Attorney General may under certain circumstances make a second interim appointment.

B-248906.2, September 30, 1993

Civilian Personnel

Travel

- Temporary duty
- ■ Miscellaneous expenses
- ■ ■ Reimbursement

A transferred employee's temporary quarters subsistence expense claim under 41 C.F.R. § 302-5.4(a) for laundry supplies may be allowed. Consumable laundry goods, such as detergent, bleach, etc., may be included as part of subsistence expenses, so long as the quantity purchased is consistent with the period of temporary quarters authorized and the cost is reasonable.

Military Personnel

B-252347, September 3, 1993

Military Personnel

Travel

- Commercial carriers
- ■ Travel expenses
- ■ ■ Reimbursement

Service member who, because of closure of base and its Travel Management Office was unable to obtain a reissued ticket or revised Government Travel Request after he received amended orders for permanent change of station may be reimbursed for the added cost of the commercial ticket cost he incurred for transoceanic flight. The member acted reasonably and prudently, and upon the advice of Travel Management Office personnel, and thus should be reimbursed.

B-252194, September 7, 1993

Military Personnel

Pay

- Survivor benefits
- ■ Eligibility

A widow contemplating marriage 4 months before her 60th birthday called the Defense Finance and Accounting Service, Denver Center, to ask what effect marriage would have on her annuity income. She was erroneously informed that marriage at that time would not affect her Retired Serviceman's Family Protection Plan annuity. She remarried, and the annuity was terminated. Although she relied on the erroneous information, her annuity may not be reinstated because the government is not liable for the erroneous actions of its officers, agents, and employees.

B-252672, September 20, 1993

Military Personnel

Pay

- Overpayments
- ■ Direct payroll deposit
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Former Navy member's request for waiver of her debt to the United States which arose when an extra paycheck was issued upon her separation from the service and automatically deposited in her bank account is denied because former member is not without fault which bars waiver under 10 U.S.C. § 2774.

B-252760, September 20, 1993

Military Personnel

Relocation

- Relocation travel
- ■ Eligibility
- ■ ■ Administrative determination
- ■ ■ ■ Errors

Retired member of the Army was erroneously authorized transportation expenses to his home of selection in Canberra, Australia. After the travel was completed retired member filed travel claim which was denied, since under the regulations he was not entitled to expenses to his home of choice outside of the continental United States. Travel authorization to Australia was contrary to that authorized by law and regulation. Under these circumstances no authority exists for payment of the claim. Thus the member's claim must be denied.

B-252930, September 24, 1993

Military Personnel

Pay

- Survivor benefits
- ■ Eligibility

Where there is no proof of divorce from alleged first wife and member during open season under Survivor Benefit Plan affirmatively elected coverage for current spouse, election was invalid and no annuity is payable. Annuity already paid is waived by Comptroller General under 10 U.S.C. § 1453 since there is no evidence of fault on part of recipient.

B-254491, September 28, 1993**Miscellaneous Topics****Federal Administrative/Legislative Matters**

- Executive branch personnel
- ■ Vacancies
- ■ ■ Temporary appointment
- ■ ■ ■ Durations

A vacancy in an office of United States attorney is filled according to 28 U.S.C. § 546, which provides that the Attorney General may appoint an acting U.S. attorney for a district in which there is a vacancy. The appointment is effective until the earlier of (1) the qualification of a presidentially appointed U.S. attorney for the district, or (2) the expiration of 120 days after the appointment by the Attorney General. Upon expiration of the 120-day appointment, the district court for the relevant district may appoint an acting U.S. attorney to serve until the vacancy is filled. If the district court fails to act, the Attorney General may under certain circumstances make a second interim appointment.

B-254396, September 29, 1993*****Miscellaneous Topics****Finance Industry**

- Government corporations
- ■ Small business set-asides
- ■ ■ Funding levels
- ■ ■ ■ Amount determination

The Export-Import Bank (Bank) should calculate the amount authorized for the small business set-aside mandated by 12 U.S.C. § 635(b)(1)(E)(v) by using its subsidy appropriation as the basis for its projection, plus such other reasonable factors that reflect aggregate Bank program activity. Since the set-aside is available exclusively for small business, the Bank may not use unspent amounts in the set-aside for other purposes.

Procurement

B-252982.3, B-252982.4, September 1, 1993

93-2 CPD 142

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Protesters, the fourth and sixth low offerors, which alleged that the agency accepted a nonconforming offer from the low priced offeror and waived or relaxed solicitation requirements for this firm, are not interested parties to protest the award where, if the protests were sustained, the agency could make an award to the second low priced offeror whose offer has not been challenged.

B-253369, September 1, 1993***

93-2 CPD 143

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Contractors
- ■ ■ ■ Identification

Bid submitted in the name of Nicholson Construction Company, a Georgia corporation, cannot be accepted where there is no such corporation and there is no contemporaneous, publicly available evidence in the record that supports the claim that Nicholson Construction Company was the trade name or assumed name of a Georgia corporation, National Foundation Company, which was not mentioned in the bid (except by reference to that firm's expired Cage Code and a county business license number, now also expired, for the firm), although individual who signed the bid as vice president was also the vice president of National Foundation Company and both named companies were located at the same address.

B-249834.2, September 3, 1993

Procurement

Payment/Discharge

- Shipment
- ■ Damages
- ■ ■ Evidence sufficiency

The evidence reasonably necessary to establish the measure of in-transit damage to an item of household goods depends on the nature of the item and other facts, and may include the shipper's opinion on the value of loss and damage.

Procurement

Payment/Discharge

- **Shipment**
- ■ **Damages**
- ■ ■ **Repairs**

Carrier's speculation that repair firm on whose estimates carrier's liability for loss/damage to household goods was based is inexperienced does not prove that the estimates or the agency's calculation of the carrier's liability was unreasonable.

Procurement

Payment/Discharge

- **Shipment**
- ■ **Damages**
- ■ ■ **Evidence sufficiency**

Carrier is not relieved of liability for loss/damage to a shipment of household goods simply because the agency did not inspect the shipment before settling with the member and setting off against the carrier. Agency inspection is intended to protect the government, not the carrier, which has its own inspection right and opportunity, and the carrier still must establish that it was not liable.

B-249929, September 3, 1993

Procurement

Competitive Negotiation

- **Offers**
- ■ **Competitive ranges**
- ■ ■ **Exclusion**
- ■ ■ ■ **Administrative discretion**

Procurement

Payment/Discharge

- **Shipment**
- ■ **Damages**
- ■ ■ **Amount determination**

In measuring a carrier's liability for transit loss or damages to upholstered furniture in a shipment of a service member's household goods, an agency should not ignore the possibility of depreciation during periods of nontemporary storage.

B-253278, September 3, 1993***

93-2 CPD 144

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Cost estimates**

The Defense Contract Audit Agency's (DCAA) certification pursuant to section 9095 of the Department of Defense (DOD) Appropriations Act, which authorizes DOD depots to submit proposals to repair aircraft components, that a price proposal submitted by a depot included comparable estimates of all direct and indirect costs at the depot's proposed price of \$14.1 million was unreasonable, where DCAA audited the depot's price proposal, and concluded that the proposal, considering all direct and indirect costs and comparability adjustments, was understated by \$1.3 million and should be adjusted upwards to \$15.4 million.

Procurement

Contractor Qualification

- **Organizational conflicts of interest**
- ■ **Allegation substantiation**
- ■ ■ **Evidence sufficiency**

Protest that agency improperly failed to evaluate the impact of awardee's organizational conflict of interest avoidance plan on its technical proposal is denied where information obtained during review of such a plan does not clearly contradict representations in the offeror's technical proposal.

Procurement

Contractor Qualification

- **Organizational conflicts of interest**
- ■ **Determination**

Protest that agency improperly evaluated the organizational conflict of interest (OCI) presented by awardee's proposed subcontractors is denied where protester has not shown agency unreasonably determined that any potential OCIs can be successfully avoided by the combination of internal agency controls and the awardee's OCI avoidance plan.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Competitive ranges**
- ■ ■ **Exclusion**
- ■ ■ ■ **Administrative discretion**

Exclusion of proposal from the competitive range is proper where the cumulative effect of the omissions and conflicting information in the protester's cost proposal would require major revision in order for the proposal to be acceptable.

Procurement

Contractor Qualification

- **Responsibility criteria**
- ■ **Determination**

Procurement

Socio-Economic Policies

- **Small businesses**
- ■ **Size determination**
- ■ ■ **GAO review**

Protest that offeror's status as "small" under Department of Defense small disadvantaged business set-aside program is to be determined as of the date of its initial offer rather than as of the date of award is denied where protest is premised upon an interpretation of the applicable statute that is inconsistent with the plain statutory language.

B-253441, September 7, 1993**93-2 CPD 130**

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency properly rejected protester's offers of copier equipment not complying with solicitation's stated requirements where solicitation did not authorize offers for supplies or services other than those specified.

B-253359, September 7, 1993**93-2 CPD 155**

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Procurement

Specifications

- Minimum needs standards
- ■ Determination
- ■ ■ Administrative discretion

Specification requiring new computer equipment is not unduly restrictive where the equipment is part of a continuously operated critical military weapons system, and new equipment was reasonably found to be more reliable over the expected 20 year usage of the equipment.

B-253390, September 7, 1993**93-2 CPD 145**

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Price reasonableness

Agency properly canceled invitation for bids set aside for small disadvantaged businesses (SDB) in accordance with Defense Federal Acquisition Regulation Supplement implementing the SDB set-aside program where low bid exceeded the fair market price by more than 10 percent.

B-253608, September 7, 1993**93-2 CPD 131**

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Agency reasonably excluded protester's proposal from the competitive range where proposal was so lacking in detail and otherwise deficient that it would have required substantial revision to be made acceptable.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency properly rejected protester's proposal as technically unacceptable where the proposal took exception to material technical requirements under the solicitation.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest of alleged solicitation improprieties apparent from the face of the solicitation is dismissed as untimely where the protest was first filed after the closing time for receipt of initial proposals.

Procurement

Sealed Bidding

- Low bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

The procuring agency properly allowed the upward correction of the awardee's low bid where the agency reasonably concluded that the awardee's work papers presented clear and convincing evidence of a mistake in the awardee's bid and the awardee's intended bid price.

Procurement

Contractor Qualification

- Approved sources
- ■ Evidence sufficiency

Where awardee had acquired facilities of previously qualified producer, with no substantive change in employees, products, or manufacturing processes, agency reasonably determined that successor corporation met solicitation requirement that low offeror be a qualified producer.

Procurement

Sealed Bidding

- Invitations for bids
 - ■ First-article testing
 - ■ ■ Waiver
 - ■ ■ ■ Administrative determination
-

Procurement

Specifications

- Performance specifications
- ■ Waiver
- ■ ■ Propriety

Protest that agency improperly waived material solicitation requirement for only the awardee is denied where awardee did not request waiver or condition its proposal upon waiver of pilot lot testing; protester concedes that tests required are substantially equivalent to pilot lot testing; and agency reasonably determined that waiver would have no effect upon competition.

B-253282, September 8, 1993**93-2 CPD 149**

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Additional work/quantities
- ■ ■ ■ Price omission

Minimum price term did not qualify bid and thereby render it nonresponsive where minimum price applied only to indefinite quantity work, the price for that work was not included in the price evaluation, and the ultimate price was to be definitized through negotiations at the time a specific requirement arose under the contract.

B-253382, September 8, 1993**93-2 CPD 150**

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Where protester's proposal under small disadvantaged business (SDB) set-aside was found technically unacceptable, and thus ineligible for award, protester is not interested party eligible to protest cancellation of solicitation and resolicitation on unrestricted basis on ground that the proposals of two of the other SDB offerors on original solicitation improperly were rejected for failure to offer acceptable price; if protest were sustained, one of the other two SDB offerors would be in line for award under original solicitation.

Procurement

Bid Protests

- Forum election
- ■ Finality

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Decision dismissing protest because of concurrent protest on same basis at General Services Board of Contract Appeals is affirmed; initial dismissal was proper, and latest filing of protest at General Accounting Office is untimely.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Party's request for reconsideration of prior decision recommending termination of its contract and award to the low bidder is denied where the protester expresses disagreement with the decision but fails to show that decision resulted from error of fact or law.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Protester that does not protest its proposal's elimination from the competitive range is not an interested party to protest the awardee's eligibility for award and the agency's evaluation of the awardee's proposal where several other offerors would be in line for award if the protest were sustained on those issues.

Procurement

Sealed Bidding

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

Agency properly rejected bid received in response to brand name or equal solicitation as nonresponsive where item offered did not conform to listed salient characteristics.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that attributes listed as salient characteristics are not significant features of the item to be acquired is dismissed as untimely where not filed prior to bid opening.

B-253957, September 13, 1993**93-2 CPD 158**

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest alleging defects in the evaluation of proposals is denied where the record establishes that the evaluation was reasonable and consistent with the solicitation.

B-254723, September 13, 1993**93-2 CPD 159**

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Signatures

Bid was properly rejected as nonresponsive where the bid did not contain a required signed Certificate of Procurement Integrity; a certificate submitted under a prior procurement does not cure the failure to provide a signed certificate under the current solicitation.

B-252892.3, September 14, 1993**93-2 CPD 160**

Procurement

Sealed Bidding

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Resolicitation

Cancellation and resolicitation of procurement was proper where invitation for bids did not allow 30 days for submission of bids as required by 15 U.S.C. § 637(e)(3) (Supp. IV 1992).

B-253350, September 14, 1993**93-2 CPD 161**

Procurement

Competitive Negotiation

- Unbalanced offers
- ■ Rejection
- ■ ■ Propriety

Protester's offered prices for three alternative options were not impermissibly unbalanced where, even if one option was lower in price than another option encompassing more work, there is no indication that this lower price was offset by enhanced prices elsewhere, or that each element of contract performance did not bear its proportionate share of cost; protester therefore was entitled to award, since solicitation provided that evaluation would be based on price for base requirement

plus option reflecting most likely scenario, and protester's proposal was lowest priced under this scheme.

B-253371, September 14, 1993

93-2 CPD 162

Procurement

Small Purchase Method

- Quotations
- ■ Technical acceptability
- ■ ■ Small businesses

An agency reasonably determined the protester's low-priced quote to be technically unacceptable under a small purchase acquisition for technical evaluation services in support of a pollution control project at a mine site, where the protester's stated general experience did not address the specific technical expertise required under the stated evaluation scheme.

B-253376, September 14, 1993

93-2 CPD 163

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Organizational experience

Protest that awardee fails to comply with solicitation's definitive responsibility criterion requiring bidders to submit a list of "five successfully completed sewer relining projects within the last [3] years that are of similar size, design and complexity" to one of two patented sewer relining rehabilitation processes specified in the solicitation is denied where: (1) the awardee holds extensive project experience in a similar sewer rehabilitation technique and is licensed and trained to perform one of the patented methods; and (2) the awardee has submitted evidence—in the form of contractual agreements—from one of the solicitation's specified sewer rehabilitation method licensors—who has completed five identical sewer relining projects to that required under the solicitation—demonstrating that the licensor will supervise and provide other requested technical support to the awardee for the duration of the required sewer relining project.

B-253407, September 14, 1993

93-2 CPD 164

Procurement

Contractor Qualification

- Approved sources
- ■ Equivalent products
- ■ ■ Acceptance
- ■ ■ ■ Administrative discretion

Solicitation requirement that offers for recycled toner cartridges be accompanied by independent laboratory certification is not subject to regulations governing the establishment of qualified products lists because the certification relates to the qualifications of the producer of the cartridges and not to the products themselves.

Procurement

Competitive Negotiation

- **Offers**
- ■ **Evaluation**
- ■ ■ **Approved sources**
- ■ ■ ■ **Technical acceptability**

Since the evaluation of proposals must be in accordance with the solicitation's evaluation provisions, agency properly rejected protester's offer because it was not accompanied by independent laboratory certification as required by the solicitation.

B-253408, September 14, 1993

93-2 CPD 165

Procurement

Sealed Bidding

- **Competitive advantage**
- ■ **Non-prejudicial allegation**

Low bidder on an invitation for bids (IFB) to repair wind tunnel welds did not have an unfair competitive advantage justifying its exclusion from the competition by virtue of the fact that it prepared and had access to radiographs and associated reader sheets, where the agency analyzed, extracted and distilled the competitively useful information from these documents and included this summary as an appendix to the IFB, which allowed other bidders to intelligently compete on a relatively equal basis.

B-252947.5, September 15, 1993

93-2 CPD 166

Procurement

Bid Protests

- **GAO procedures**
- ■ **Preparation costs**
- ■ ■ **Administrative remedies**

Protester is not entitled to award of the costs of filing and pursuing its protest where agency took corrective action 11 working days after the protest was filed.

B-253249.2, September 15, 1993

93-2 CPD 167

Procurement

Competitive Negotiation

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

Agency properly canceled solicitation for office space after protester challenged solicitation amendment where procuring activity reasonably determined that tenants may not need to relocate from current space.

Procurement

Competitive Negotiation

- Offers
- ■ ■ Evaluation
- ■ ■ ■ Prior contract performance

Agency can consider information regarding actual performance under the incumbent contract in judging that firm's proposal for matters that are encompassed in evaluation criteria listed in the solicitation.

Procurement

Competitive Negotiation

- Best/final offers
- ■ Technical acceptability
- ■ ■ Negative determination
- ■ ■ ■ Propriety

Procuring agency reasonably eliminated the protester's technically acceptable proposal from the competitive range that narrowed the remaining offerors to two firms, after giving consideration to cost, even though the protester's proposal had previously been included in the competitive range, where multiple weaknesses in the protester's best and final offer (BAFO), which was submitted after discussions, caused its BAFO to receive the lowest technical ranking of the seven competitive range proposals, such that it no longer had a reasonable chance of being selected for award.

Procurement

Competitive Negotiation

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Meaningful discussions have been conducted where the offeror is questioned about the three areas of its proposal that are considered to contain weaknesses.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability
- ■ ■ ■ Equivalent products

Protest that agency improperly rejected firm's alternate part in acquisition limited to approved sources is denied where firm fails to provide adequate technical data package for agency to determine that alternate part is interchangeable with original equipment manufacturer's part.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Level-of-effort contracts

Agency properly accepted offer to provide visual information technical support services which proposed a reduction in labor hours from the government's estimates where the solicitation advised offerors that the agency would consider unique approaches that maximized the use of personnel and resources; the solicitation was written in functional, performance-oriented terms without specifying type or number of required employees; and nothing in the solicitation prohibited offerors from proposing the level of professional and support staff they believed necessary to perform the work.

Procurement

Socio-Economic Policies

- Small business 8(a) subcontracting
- ■ Technical evaluation boards
- ■ ■ Propriety

Agency did not violate applicable regulations in conducting informal assessment, as opposed to a formal technical evaluation, to assist in determining which firm to negotiate a noncompetitive contract for support services pursuant to section 8(a) of the Small Business Act.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Protester's late receipt of agency report does not provide a basis to reopen a protest which was dismissed for failure to file comments or express continued interest in the protest within 10 working days after due date for receipt of agency report, where protester failed to notify the General Accounting Office (GAO) that it had not received the report until after the due date shown on the GAO notice acknowledging receipt of the protest.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of protest against agency decision to reopen negotiations, instead of reissuing solicitation, is denied where protester essentially disagrees with prior decision and reiterates arguments raised initially.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Personnel experience**

Contention that technical evaluation was unreasonable because agency considered experience of awardee's management personnel under the corporate experience evaluation factor is denied because the experience of supervisory personnel may properly be considered as part of a corporate experience review when the offeror is a new business and there is no other way to assess prior corporate experience.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Cost realism****■ ■ ■ ■ Analysis**

Protester's claim that agency cost realism analysis was flawed because awardee's proposed indirect rates in its best and final offer (BAFO) were lower than the rates recommended by government auditors after review of the awardee's initial proposal is denied where the awardee raised its rates as suggested but made decreases in certain discretionary costs which slightly decreased those rates from the levels recommended, and where the record shows that the agency expressly considered whether the BAFO rates should be accepted, concluded that they were reasonable, and imposed a cap on the rates to protect the government from cost growth.

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Cost/technical tradeoffs****■ ■ ■ ■ Weighting**

Contention that agency abandoned evaluation scheme providing that technical factors were more important than cost by selecting a technically lower rated, lower cost offeror, instead of a higher cost, higher technically rated offeror, is denied where the contracting officer reasonably decided that the small technical difference between the two proposals was not worth the protester's higher proposed costs.

Procurement

Competitive Negotiation**■ Source selection boards****■ ■ Offers****■ ■ ■ Evaluation****■ ■ ■ ■ Propriety**

Error in Source Selection Determination document reversing the standing of the protester and awardee regarding the proposed direct labor costs of the two offerors does not invalidate the agency's selection decision where: (1) the difference between the direct labor costs of the two offerors is minor; (2) the difference in direct labor costs was not one of the bases repeated in the conclusion supporting the selection decision; and (3) the error at issue is limited to the source selection document while other documents in the record show that the agency did, in fact, properly evaluate the relative difference between the two firms' proposed direct labor costs.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Terms
- ■ ■ Price adjustments

Contracting agency properly may decline to include an economic price adjustment (EPA) clause in a solicitation where the agency has a reasonable basis for omitting the clause, since use of the EPA clause is a matter within the agency's discretion.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision sustaining protest against acceptance of initial proposal, where offeror submitted a late best and final offer, is denied where request identifies no errors of law or fact in the previous decision.

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Price omission
- ■ ■ ■ Line items

Agency reasonably treated a subline item as part of the base bid item for purposes of evaluating bidders' prices, even though not clearly so labeled, where the solicitation as a whole made clear that the subline item was intended as part of the base bid item, and the protester's alternative interpretation of the solicitation is not reasonable.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Weighting

Where solicitation stated that both cost and technical factors would be considered and clearly advised that a cost/technical tradeoff would be performed, agency was required to give equal weight to cost and technical factors.

Procurement

Competitive Negotiation

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

Agency's cost realism analysis which included application of each offeror's direct and indirect labor rates to a common number of manhours was reasonable where the adjusted number of man-hours was within 5 percent of the total hours proposed by each offeror.

Procurement

Competitive Negotiation

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

Agency properly evaluated technical/management proposals under "staffing" subfactor by considering the potential peak workload and the maximum number of exercises the contractor could be required to perform.

Procurement

Competitive Negotiation

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

Agency reasonably concluded that awardee was likely to succeed in its stated intent to recruit and retain a substantial portion of the incumbent workforce.

Procurement

Competitive Negotiation

- **Discussion**
- ■ **Adequacy**
- ■ ■ **Criteria**

Agency engaged in meaningful discussions where it advised protester of multiple, specific areas of its proposal which the agency believed to be overstaffed.

Procurement

Competitive Negotiation

- **Contract awards**
- ■ **Cost savings**
- ■ ■ **Technical superiority**

Agency reasonably concluded that protester's technical superiority, reflected in score that was 14 percentage points higher than awardee's score, was insufficient to justify probable costs that were 60 percent or \$16 million higher than awardee's probable costs.

B-252378, September 21, 1993

Procurement

Contract Types**■ Authority**

Cost-type contract which provides for overhead payment based on a fixed percentage rate of some element of direct cost, but does not provide for retroactive adjustment to actual cost, violates the prohibition of 41 U.S.C. § 254(b) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs.

Procurement

Payment/Discharge**■ Unauthorized contracts****■ ■ Quantum meruit/valebant doctrine**

When procurement is invalid due to failure to comply with Federal statute, Government has obligation to pay reasonable value of goods or services furnished upon an implied contract on a *quantum meruit* or *quantum valebant* basis.

B-253178.3, B-253178.4, September 21, 1993

Procurement

Bid Protests**■ GAO procedures****■ ■ Purposes****■ ■ ■ Competition enhancement**

Where solicitation specifies either of two materials for manufacture of trousers and government is satisfied that both materials meet its needs and operational requirements, protester's argument that solicitation fails to state agency's minimum needs—because one material allegedly is in short supply and does not meet specifications—is essentially a contention that agency should have imposed more restrictive specification. General Accounting Office's role is to ensure that statutory requirements for full and open competition are met, not to protect the interest a protester may have in more restrictive specifications.

Procurement

Contractor Qualification**■ Responsibility criteria****■ ■ Administrative discretion**

Agency reasonably exercised its discretion in deciding to use general, rather than special, standards of responsibility in solicitation for supply of materials and machines for manufacture of trousers.

Procurement

Specifications**■ Ambiguity allegation****■ ■ Specification interpretation**

Protest that agency-furnished clothing pattern and square inch table that are inconsistent and ambiguous, is denied where use of both items permits bidders to arrive at reasonable estimates of cloth necessary for cut garments.

Procurement

Contractor Qualification

- Responsibility
- ■ Information
- ■ ■ Restrictive markings

Awardee's submission, under restrictive legend, of information bearing on responsibility matter did not violate requirements for public bid opening.

Procurement

Sealed Bidding

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

Where solicitation specifies brand name or equal items, but effectively does not require submission of descriptive literature, awardee's bid is responsive where it sufficiently identifies proposed items to allow agency to determine equality.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment

Awardee's submission of signed copies of amendments with its bid satisfies requirement that bidder acknowledge all amendments to solicitation.

B-254356.2, September 21, 1993

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of dismissal of protest as untimely is denied where protester fails to show that General Accounting Office's conclusion as to when protester learned of basis for protest was in error.

B-251791.4, September 24, 1993

93-2 CPD 180

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest against selection of higher-priced offeror is denied where protester fails to show that prior decision contained error of fact or law warranting reversal.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Weighting

Protest that contracting agency failed to properly evaluate price “weighted against the [proposed] technical effort (and the depth of that effort),” as provided for in the solicitation, is denied; agency reasonably found that protester’s 10 percent greater manhours did not warrant award where protester’s price was 22 percent higher than awardee’s, more than 59 percent of disparity in total hours was due to protester’s proposal of more administrative/clerical hours, awardee proposed 6.4 percent more hours in critical senior-level labor categories, and awardee’s price calculated on an hourly basis was 8.4 percent lower than protester’s.

Procurement

Competitive Negotiation

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Sample evaluation
- ■ ■ ■ Testing

Protest challenging rejection of protester’s proposal based on its failure to comply with the solicitation’s requirement for contractor testing on proposed collision warning system is denied where solicitation, read as a whole, required that such testing be conducted no later than 4 months after contract award and protester’s proposed schedule for testing was 4 1/2 months after award.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest challenging agency’s evaluation of the awardee’s proposal and determination that the awardee’s technical approach should be upgraded to reflect its identification and proposed resolution of a problem that the agency did not know existed is denied where the record establishes that the protester was not prejudiced by the agency’s consideration of the proposed modification because the determinative factor in its selection of the awardee’s proposal was the fact that it did not pose certain risks that were inherent in the protester’s nonconforming schedule for contractor testing.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest allegation—first raised in comments on the agency report—that agency misled the protester during discussions to believe that its proposed performance schedule was acceptable is dismissed as untimely where the record establishes that the protester was aware of the specific reason for the rejection of its proposal prior to the time it filed its initial protest.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Where the protester allowed at least 4 months to elapse without inquiry as to the status of the procurement, the protester has not met its obligation of diligently pursuing the information on which it bases its protest, which renders the protest untimely under the Bid Protest Regulations.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Request for reconsideration of decision dismissing protester's challenge to elimination of its proposal from competitive range is denied since protester's initial pleadings failed to allege any impropriety in the agency's determination to exclude protester's proposal from the competitive range and therefore failed to allege a valid basis upon which to protest the elimination.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Prior decision is affirmed where requests for reconsideration contain no statement of facts or legal grounds warranting reversal but merely restate protest arguments and disagree with the original decision.

Procurement

Competitive Negotiation

- Discussion reopening
- ■ Competitive system integrity
- ■ ■ GAO decisions
- ■ ■ ■ Recommendations

When the head of a procuring activity decides under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(d)(2)(A)(i), to continue performance of a protested contract based on a finding that to do so would be in the best interest of the government, the General Accounting Office (GAO) is required under 31 U.S.C. § 3554(b)(2) to make any recommendation without regard to any

cost or disruption that would result from terminating, recompeting, or reawarding the contract; accordingly, with respect to the ships not yet delivered to the government, GAO will not modify recommendation to reopen negotiations on the basis of agency claim that continued performance of the contracts after best interest determination made implementation of recommendation impracticable.

Procurement

Bid Protests

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Protester remained an interested party to pursue protest notwithstanding offer during protest process to charter to another agency vessels proposed under protested procurement where contracting agency had previously determined to continue performance notwithstanding the protest and had accepted delivery of up to 9 of the 12 ships for which award had been made; in these circumstances, it was primarily the actions of the agency, and not those of the protester, after the protest was filed that were responsible for precluding the possibility of the protester receiving an effective opportunity to compete for award.

B-249352.7, September 27, 1993

93-2 CPD 185

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Requests for reconsideration are denied where protester has not shown that earlier decisions contained errors of fact or law, or information not previously considered, warranting reversal or modification of those decisions.

B-251053.6, September 27, 1993

93-2 CPD 192

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Reconsideration request is denied where protester does not show that decision dismissing its protest contained any errors of fact or law or present information not previously considered that warrants reversal or modification of the decision.

B-251719.2, September 27, 1993

93-2 CPD 193

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where protester does not allege errors of fact or law, or provide information not previously considered, which would warrant reversal or modification of earlier decision.

Procurement

Bid Protests

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest against award of contracts to higher-rated, higher-priced offerors is denied where request identifies no errors of law or fact in the previous decision.

Procurement

Competitive Negotiation

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

Although the evaluation of proposals is primarily within the discretion of the contracting agency, the General Accounting Office will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation factors and will sustain the protest where the record shows that the evaluation was unreasonable.

Procurement

Socio-Economic Policies

- Preferred products/services
- ■ Domestic products
- ■ ■ Applicability

Agency properly determined that fireman's boot did not fall within the "chemical protective warfare clothing" exception to a statutory domestic item restriction where record shows that: (1) agency has included domestic item restriction in its procurements for this item since 1977; (2) fireman's boot was not designed or intended to be worn by personnel engaged in chemical warfare role; (3) boot's protective capability against chemical agents is speculative and, at best, limited to resisting only liquid chemical agents for a very short period of time; and (4) to the extent ship-board firefighting or fuel handler personnel—for whom the boot is being procured—might be involved in chemical warfare, agency requires personnel to wear a different chemical protective footwear item specifically designed and tested to withstand chemical warfare agents.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to recover the costs of filing and pursuing its protest where the agency took corrective action within 3 weeks of filing protest.

Procurement

Bid Protests**■ GAO procedures****■ ■ Purposes****■ ■ ■ Competition enhancement**

Protest that evaluation factors were improperly relaxed to permit consideration of other competitors' proposals is dismissed because the General Accounting Office will not entertain arguments that agencies should use more restrictive specifications.

B-251140.4, September 28, 1993***

Procurement

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

Once it is determined that a carrier is *prima facie* liable for transit loss or damage, to escape liability the carrier must prove by clear and convincing evidence that it was not negligent and that the damage was due to an excepted cause (e.g., caused by the shipper).

Procurement

Payment/Discharge**■ Shipment****■ ■ Tenders****■ ■ ■ Terms****■ ■ ■ ■ Interpretation**

Insertion of a tender number on a bill of lading, while some indication of the parties' intent, is not conclusive as to the agreement and is not necessarily determinative of the government's obligations.

B-252717.3, September 28, 1993**Procurement**

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

In reviewing protests concerning the evaluation of proposals, the General Accounting Office will examine the agency's evaluation to ensure that it had a reasonable basis. The fact that a protester does not agree with the agency's evaluation does not render the evaluation unreasonable.

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Discussion

Allegation that agency improperly excluded protester from further consideration for award on the basis of its higher proposed cost without conducting adequate discussions is without merit where record shows protester was excluded not on the basis of cost, but primarily due to its significantly inferior technical proposal.

Procurement

Competitive Negotiation

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

Determination that awardee's proposed cost was realistic was proper where based on review of the cost of its performance as the incumbent contractor, comparison of awardee's proposed costs with protester's, and the fact that awardee could pay lower wage rates than protester by virtue of its Department of Labor certificate of exemption from the Service Contract Act for handicapped organizations.

B-253520, September 29, 1993**Procurement**

Specifications

- Performance specifications
- ■ Adequacy

Specification in commercial item solicitation for rain jackets and trousers that requires, among other things, that the items be waterproof and moisture vapor permeable, and includes the commercial item warranty provision that requires, among other things, that the products be fit for the ordinary purposes for which the products are used and of a quality to pass without objection in the trade, adequately describes the products in terms of performance required and form, fit and function or essential physical characteristics.

B-253129.4, September 30, 1993

Procurement

Bid Protests

- GAO procedures
- ■ Pending litigation
- ■ ■ GAO review

An agency's request for reconsideration of a prior protest decision, sustaining a protest of the agency's award of a contract, will not be considered by the General Accounting Office where the matter involved is the subject of litigation before a court of competent jurisdiction and there has been no expression of interest in our opinion by the court.

Procurement

Bid Protests**■ GAO procedures****■ ■ Protest timeliness****■ ■ ■ Apparent solicitation improprieties**

Protest that solicitation did not include a necessary Department of Labor wage determination is dismissed as untimely when filed after closing time for receipt of initial proposals.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Administrative discretion**

Where, after discussions, protester's technical proposal was evaluated as unacceptable but capable of being made acceptable, and its cost proposal included lowest proposed hours but highest costs of all other proposals, agency properly excluded proposal from competitive range as having no reasonable chance for award.

Procurement

Bid Protests**■ Bias allegation****■ ■ Allegation substantiation****■ ■ ■ Burden of proof**

Allegation of bias is denied where the record contains no credible evidence that agency acted with specific intent to injure the protester which resulted in prejudicial agency action.

Procurement

Competitive Negotiation**■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Administrative discretion**

Procurement

Competitive Negotiation**■ Offers****■ ■ Evaluation****■ ■ ■ Technical acceptability**

Protester's proposal was properly rejected as technically unacceptable and outside the competitive range where agency reasonably determined that the proposal as submitted failed to demonstrate understanding of the solicitation requirements and did not present a feasible technical solution.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to the costs of filing and pursuing its protest to the General Accounting Office (GAO) where agency took corrective action 16 working days after protest was filed with GAO; protester was not required to expend resources to convince the agency, or our Office, of the merits of the protest.

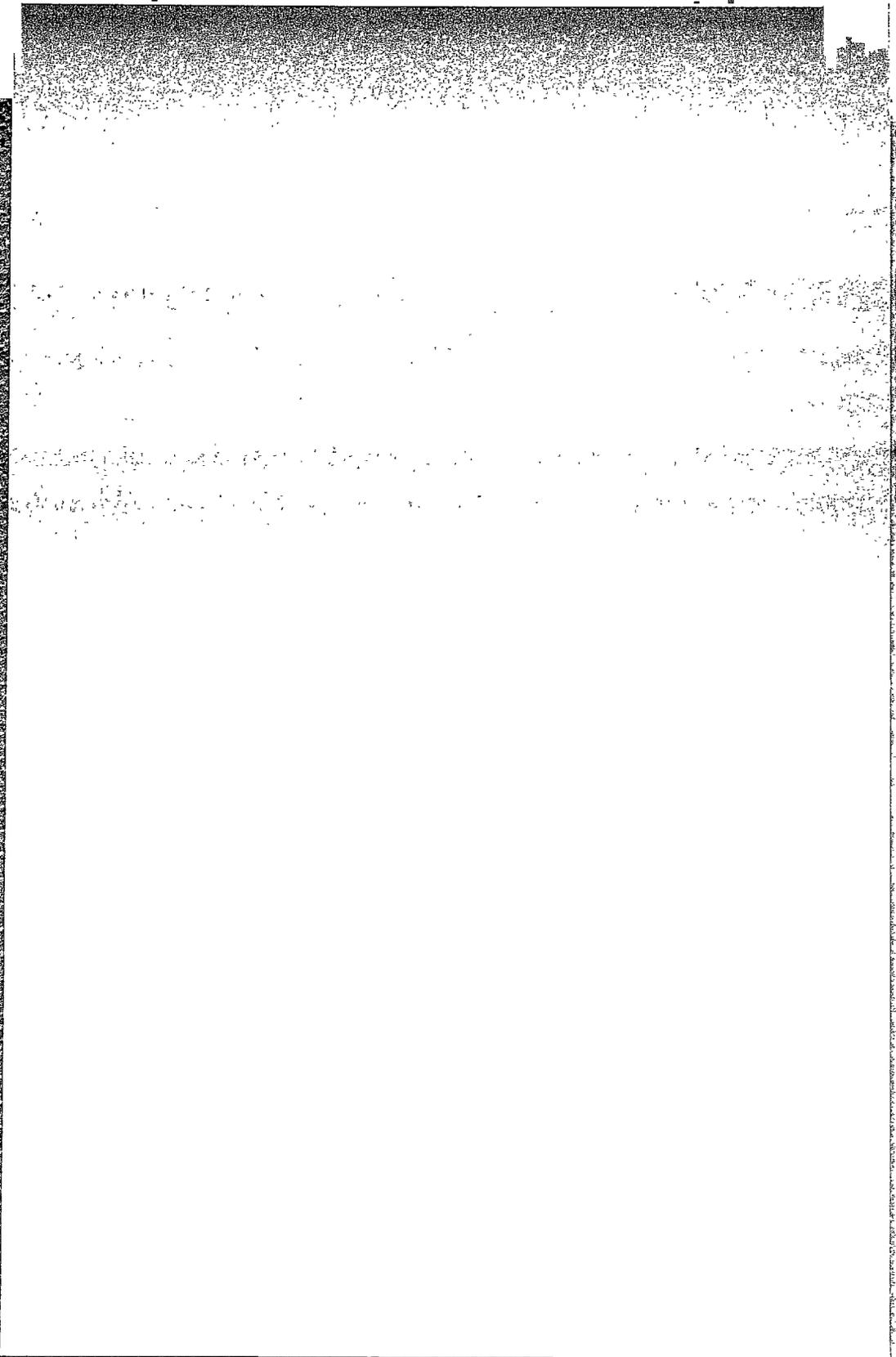
B-255066, September 30, 1993

Procurement

Bid Protests

- GAO authority
- ■ Non-appropriated funds

General Accounting Office (GAO) is without jurisdiction to consider a protest of a procurement conducted by a Department of Defense nonappropriated fund activity because that office is not a federal agency over which GAO has statutory bid protest authority.



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