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**GAO**

United States General Accounting Office

Office of General Counsel

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

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# Preface

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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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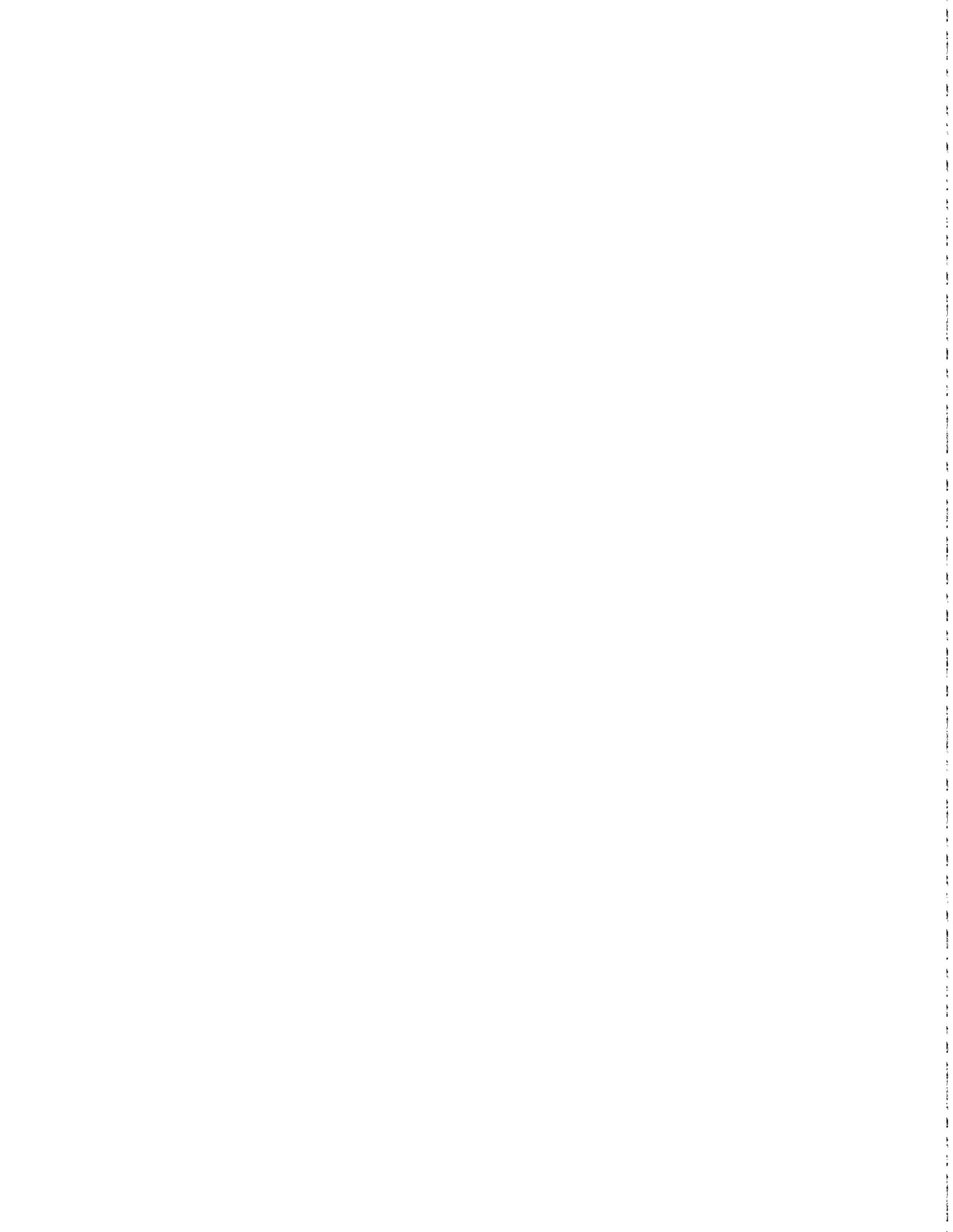
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# Appropriations/Financial Management

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**B-251706, August 17, 1994\*\*\***

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Amount availability
- ■ Antideficiency prohibition
- ■ ■ Violation

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## **Appropriation/Financial Management**

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### **Appropriation Availability**

- Time availability
- ■ Time restrictions
- ■ ■ Fiscal-year appropriation

The Farmers Home Administration (FmHA) improperly reobligated and expended FY 1990 funds for a FY 1991 order of office chairs after the original order was canceled. Although FY 1990 funds were unavailable to support the FY 1991 order, FmHA need not report an Antideficiency Act violation, since sufficient funds remained in the proper appropriation chargeable for the FY 1991 order.

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Time availability
- ■ Bona fide needs doctrine
- ■ ■ Applicability

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

- Time availability
- ■ Time restrictions
- ■ ■ Fiscal-year appropriation

While FmHA did not request delivery of chairs ordered during FY 1991 until early in FY 1992, no violation of the *bona fide* need rule occurred because the agency demonstrated a continuing need for the chairs to furnish office space and to replace stock. Items ordered under a federal supply schedule are properly chargeable to the year in which ordered.

**Appropriations/Financial Management**

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**Federal Assistance****■ Grant recipients****■ ■ Grant administration**

In 1990, pursuant to the America the Beautiful Act, Pub. L. No. 101-624, 104 Stat. 3359, 3353, the Forest Service (FS) had granted \$19,895,200 to the National Tree Trust Foundation. The Department of the Interior and Related Agencies Appropriation Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1399 (1993), in the no-year lump sum "State and Private Forestry" account, provided that "of the funds previously appropriated under this head as a grant to the National Tree Trust Foundation, \$2,500,000 shall be provided as a grant to the Texas Reforestation Foundation." Although the proviso does not indicate who (the National Tree Trust or the FS) is to make the grant, the FS may fulfill the statutory purpose by making a grant of \$2.5 million to the Texas Reforestation Foundation from the unobligated balance in that account.

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# Civilian Personnel

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**B-256828, August 2, 1994\*\*\***

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**Civilian Personnel**

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**Compensation**

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

Waiver of an employee's debt is denied where the employee was aware that he was being overpaid when he received salary payments over a 7-year period from which the agency failed to deduct premiums for his health insurance coverage. Although the employee states that he promptly notified the agency's personnel office of the errors several times during the first 10 months, he apparently pursued the matter no further, allowing the overpayments to continue for another 6 years. When an employee is aware of receiving overpayments the employee cannot reasonably expect to retain them, but should set them aside for refund while he pursues the matter with the agency to have the error corrected.

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**B-256485, August 5, 1994**

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**Civilian Personnel**

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**Compensation**

- **Overtime**
- ■ **Eligibility**
- ■ ■ **Travel time**

Employees who, under the provisions of 5 U.S.C. § 7131(d)(2) (1988) and the terms of a collective bargaining agreement, were granted official time to participate in a union-sponsored training seminar are not entitled to overtime pay under the Fair Labor Standards Act (FLSA) for return travel outside their normal duty hours. The travel was not directed by the agency nor primarily for its benefit so as to constitute "hours of work" under FLSA. However, the employees may be entitled to official time for the travel at straight-time rates under the collective bargaining agreement.

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**B-255591, August 10, 1994\*\*\***

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**Civilian Personnel**

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**Compensation**

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

An employee who was receiving an interim geographic adjustment (IGA) differential, was telephonically informed by an agency administrative official that the IGA payments might be in error. When the error was later confirmed and repayment was requested, the employee requested waiver of the debt. Partial waiver was granted by our Claims Group for the payments received during the period prior to notice of error. On appeal, the Claims Group action is sustained. Verbal notice by an administrative official of possible pay error imposed an obligation on the employee to set aside the amount in question for repayment if necessary. Since the error was later confirmed,

it is not against equity and good conscience to require repayment of the amounts received after notice was given.

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## **B-256699, August 12, 1994**

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### **Civilian Personnel**

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#### **Relocation**

- Residence transaction expenses
- ■ Eligibility
- ■ ■ Administrative determination
- ■ ■ ■ Errors

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### **Civilian Personnel**

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#### **Relocation**

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility
- ■ ■ ■ New residence construction

A transferred employee purchased a newly constructed residence from a new home builder and by agreement was required to pay full charges for state revenue stamps and transfer taxes at settlement. The agency disallowed 50 percent of those charges because it is customary for such charges to be evenly divided between buyers and sellers of existing housing. On appeal, the full amounts may be allowed. The customary local practice of new home builders is to require the purchaser of a newly constructed residence to pay the full expense of state revenue stamps and transfer taxes. Since the costs are authorized under 41 C.F.R. § 302-6.2(d)(1) (1993), they may be wholly reimbursed under that customary practice.

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## **B-256943, August 15, 1994**

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### **Civilian Personnel**

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#### **Compensation**

- Arbitration decisions
- ■ GAO review

Although GAO is precluded from taking jurisdiction of a claim from "members of a collective bargaining unit" on matters which are subject to negotiated grievance procedures under *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992), GAO may take jurisdiction of a claim from an employee who is not a member of a bargaining unit and who was not subject to negotiated grievance procedures even though the subject of the claim was a matter that was subject to negotiated grievance procedures covering other employees at the same duty station.

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### **Civilian Personnel**

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#### **Compensation**

- Hazardous duty differentials
- ■ Eligibility
- ■ ■ Administrative determination

An agency has the primary responsibility in determining entitlement to environmental differential pay, and GAO will not substitute its judgment for that of the agency in making such determinations unless that judgment was clearly wrong, arbitrary, or capricious. Where the agency personnel officer, based on medical evidence, determined a permanent employee's position did not warrant such pay, GAO will not disturb the determination merely because a different personnel officer determined that temporary employees in similar positions warranted a limited amount of such pay.

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**B-256230, August 17, 1994**

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**Civilian Personnel**

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**Relocation**

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

An employee who had been authorized a 60-day period of temporary quarters subsistence expenses (TQSE) incident to a transfer from an overseas post to Texas requested a 60-day extension. The agency's decision to limit the extension to 14 days was a reasonable exercise of agency discretion. On appeal, the employee alleges the agency abused its discretion in not granting the full 60 days since he was not authorized a househunting trip before his relocation, making it more difficult for him to move into permanent quarters within the initial 60-day period. This is a matter within the agency's discretion and the agency's decision was supported by provisions of governing regulations which make no special provision for employees who are not authorized a househunting trip because they are transferring from outside the United States. Denial is sustained.

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**B-256744, August 25, 1994**

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**Civilian Personnel**

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**Travel**

- Temporary duty
- ■ Per diem
- ■ ■ Eligibility
- ■ ■ ■ Local travel

Two employees of the Environmental Protection Agency (EPA) were assigned temporary duty to conduct training sessions in a city which is considered to be within EPA's local travel area of a 50-mile radius from their official duty station. While an agency has broad discretion in establishing a local travel area, where, as here, it has specifically limited its discretion, it may not disregard its own regulation which sets the criteria for reimbursement in particular circumstances. Claims for per diem allowances denied.

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**B-234451.2, August 26, 1994**

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**Civilian Personnel**

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**Relocation**

- Household goods
- ■ Shipment
- ■ ■ Time restrictions
- ■ ■ ■ Extension

A transferred employee turned his household goods over to a common carrier within several months after he reported for duty at his new station, designated a specific destination agent for the goods at his new duty station, and had the carrier crate the goods for shipment to the destination agent's address as specified on the bill of lading. However, instead of proceeding with the shipment, he had the goods placed in storage at his old duty station and waited more than 3 years before he requested that the goods be shipped to the destination agent at government expense. On appeal, the agency's disallowance of his request is sustained. The 2-year period allowed to begin transportation of household goods under paragraph 2-1.5a(2) of the Federal Travel Regulations (1988) is not satisfied when goods are placed in storage and are not moved out of storage for shipment to a particular destination within 2 years after the employee has reported for duty.

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# Military Personnel

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**B-256537, August 5, 1994**

**Military Personnel**

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**Pay**

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

Army officer who had a 3-year break in service received overpayments of pay beginning when he re-entered active duty in 1977, based on an erroneous Pay Entry Base Date. In 1983, calculations regarding his years of service were corrected, and his Pay Entry Base Date was adjusted, but the Finance Center did not correct the pay date entry on the officer's leave and earnings statements. While the officer received a form indicating that some calculations regarding his time in service had been corrected, it was not clear from the form that the Pay Entry Base Date had been wrong and was being adjusted. Therefore, the officer was not at fault for accepting the overpayments until the Army later discovered them, and the resulting debt may be waived.

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**B-240481.5, August 16, 1994**

**Military Personnel**

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**Pay**

- **Retirement pay**
- ■ **Apportionment**
- ■ ■ **Effective dates**
- ■ ■ ■ **Divorce/annulment**

Retired member is wrong in maintaining that the percentage of retired pay attributable to his service before June 25, 1981, is not subject to division in a divorce proceeding. That date was noted in the Former Spouses' Protection Act (10 U.S.C. § 1408), whose purpose was to eliminate the effect of a Supreme Court decision that state divorce courts could not treat military retired pay as a divisible marital asset. It has no bearing on the amount of retired pay that may be awarded to a former spouse in a state court divorce proceeding.

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**B-256669, August 31, 1994**

**Military Personnel**

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**Travel**

- **Travel expenses**
- ■ **Rental vehicles**
- ■ ■ **Liability insurance**
- ■ ■ ■ **Reimbursement**

Navy members' claims for reimbursement for purchase of extra collision insurance are denied even though the members were authorized to rent trucks in order to perform temporary additional duty and were instructed to purchase extra collision insurance. The Joint Federal Travel Regulations prohibit reimbursement for such insurance for vehicles rented within the United States when it is optional. The fact that the members were erroneously instructed to purchase the insurance provides no basis for payment.

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# Procurement

## Late case

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**B-256313.2, B-256313.4, June 27, 1994**

**94-2 CPD ¶ 104**

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**Procurement**

**REDACTED VERSION**

**Competitive Negotiation**

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

Contracting agency is not required to conduct an in-depth cost analysis or to verify each and every item of an offeror's proposed costs in conducting its cost realism analysis since the evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency; our review is limited to a determination of whether an agency's cost evaluation was reasonably based.

---

**Procurement**

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Cost evaluation

Contracting agency's use of "rate checks" for verifying offeror's proposed labor rates by obtaining information from the Defense Contract Audit Agency (DCAA) in connection with a cost realism analysis is a reasonable method for verifying such costs where certain labor rates cannot be verified by DCAA, agency may rely on information contained in proposals and perform its own cost realism analysis without seeking additional independent verification of each item of proposed costs, since the extent to which proposed costs will be examined is generally a matter for the agency to determine.

---

**Procurement**

**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

An offeror is responsible for affirmatively demonstrating the merits of its proposal.

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## Procurement

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### Competitive Negotiation

- Offers
  - ■ Evaluation
  - ■ ■ Personnel
  - ■ ■ ■ Cost evaluation
- 

## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Subcontractors

Where offeror for cost-type contract proposes certain personnel as consultants (*bona fide* independent subcontractors), contracting agency, in performing its cost realism analysis, may reasonably evaluate proposed charges for consultants as a direct cost and permit offeror to exclude consultants from application of offeror's overhead rate that is customarily allocated and charged to its own employees.

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## Procurement

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### Competitive Negotiation

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

Contracting agency is under no obligation to conduct discussions where the solicitation advised all offerors that the government intended to make award on the basis of initial proposals without holding discussions, unless discussions were determined to be necessary, and where the solicitation specifically warned offerors that initial proposals should contain the offeror's best technical and cost terms.

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## Current cases

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**B-256603, August 1, 1994**

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## Procurement

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### Payment/Discharge

- Administrative settlement
  - ■ Set-off
- 

## Procurement

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### Payment/Discharge

- Shipment
- ■ Carrier liability
- ■ ■ Burden of proof

Carrier has failed to establish that government setoff for loss of household goods was improper where the record establishes a *prima facie* case of carrier liability and the carrier has not proven that it was not responsible for the loss.

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**Procurement**

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**Sealed Bidding**

- Bids
  - ■ Late submission
  - ■ ■ Acceptance criteria
  - ■ ■ ■ Facsimile
- 

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Late submission
- ■ ■ Acceptance criteria
- ■ ■ ■ Government mishandling

Protest against agency's consideration of a faxed late bid is denied where the government's actions were the paramount cause of the bid's late receipt and the integrity of the procurement system would not be compromised by consideration of the bid.

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**Procurement**

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**Competitive Negotiation**

- Competitive advantage
- ■ Privileged information
- ■ ■ Disclosure

Incumbent's protest that awardee's contract should be terminated—and the firm excluded from a recompetition—because it employed a former government employee who had access to proprietary information of the incumbent, as well as to information concerning the incumbent's performance of that contract, and disclosed some of that information to the awardee as part of his participation in preparing the awardee's proposal for that follow-on procurement, is denied where the information disclosed did not give the awardee an unfair competitive advantage.

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**Procurement**

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**Bid Protests**

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

Protest that award of contract was improper because, during the conduct of the procurement, awardee employed the daughter of a NAVSEA official alleged to have been involved in the procurement, is dismissed as untimely where protest failed to diligently pursue information establishing this basis of protest.

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**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Price negotiation

Protest that agency improperly failed to conduct adequate discussions with protester by not informing the firm that its costs were excessive is denied where record shows agency did not consider protester's cost to be excessive considering its technical approach.

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## **Procurement**

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### **Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Protest that agency conducted unequal discussions among offerors is denied where record shows discussion questions were consistent with the deficiencies evident in both offerors' proposals.

---

## **Procurement**

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### **Competitive Negotiation**

- Technical transfusion/leveling
- ■ Allegation substantiation
- ■ ■ Evidence sufficiency

Protest that agency engaged in improper technical leveling with awardee is denied where, for some issues, no successive rounds of discussions took place, and for another issue, primary purpose of discussions was to ascertain what the offeror was proposing to furnish, rather than to raise the offeror's technical proposal to the level of the protester's proposal.

---

## **Procurement**

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### **Competitive Negotiation**

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

Protest that agency's cost realism analysis of awardee's cost proposal was defective because it failed to consider the possibility that the awardee might eventually be compelled to pay wages in accordance with a collective bargaining agreement is denied where this contention is unsupported.

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## **Procurement**

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### **Bid Protests**

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

Protest that agency violated a mandatory regulatory base fee limitation by making award to firm whose base fee exceeded that limitation is denied where there is no evidence that the protester could have been the successful offeror absent the violation.

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## **Procurement**

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### **Bid Protests**

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

Protest that agency improperly failed to determine that the Service Contract Act was applicable to this procurement is dismissed as untimely where protester should have known of this basis of protest prior to the date of submission of initial proposals, and did not file the protest until after award, and where issue does not fall within the significant issue exception to our timeliness rules.

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration motions
- ■ ■ ■ Interested parties

Request for reconsideration of decision dismissing protest on the basis that protester is not an interested party is denied where requesting party neither presents information that was not considered and warrants reversal nor demonstrates that decision is legally or factually inaccurate.

**Procurement**

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**Special Procurement Methods/Categories**

- Construction contracts
- ■ Determination

Protest that Service Contract Act provisions and wage rate determinations should apply to solicitation for family housing maintenance work, rather than Davis-Bacon Act provisions and wage rate determinations, is denied where the agency reasonably determined that the solicitation's requirements were principally for construction work.

---

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Prices

Protest that solicitation did not adequately explain how price proposals would be evaluated is denied where the nature of the price evaluation was specifically set forth and its relative weight designated.

---

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Price adjustments
- ■ ■ ■ Construction costs

Price adjustment clause included in a solicitation for family housing maintenance work, which is considered to be construction under the Davis-Bacon Act, reasonably included the construction cost index of the *Engineering News Record* as that index was found to bear a logical relationship to the solicitation's costs.

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest against agency's evaluation of protester's technical proposal is denied where record shows that the proposal failed to comply with material solicitation requirements.

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**Procurement**

---

**Bid Protests**

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

Where agency reasonably determined that protester's proposal did not meet material solicitation requirements and two firms other than the awardee submitted acceptable proposals, protester is not an interested party to maintain a protest against the agency's evaluation of the awardee's proposal and selection of awardee.

---

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Workmen compensation insurance

Requirement in a solicitation for office relocation services that the successful contractor or contractors carry and maintain workers' compensation insurance is unobjectionable where the agency reasonably determined that the requirement is necessary to protect the government's interests.

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ GAO review

Protest challenging solicitation specifications for laboratory testing services as unduly restrictive of competition is denied where record demonstrates that specifications are reasonably related to agency's minimum needs.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees claimed by prevailing protester are allowable if they are adequately documented and reasonable. They may not be recovered, however, to the extent the hours incurred are exces-

sive for the services performed or were incurred for research performed after the protester filed its comments on the agency report.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees may not be recovered to the extent they were incurred for hours spent by a second attorney to review the protest file when no information or documents were required by General Accounting Office or for hours spent performing work which duplicates work performed by another attorney.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' out-of-pocket expenses for document production—a per page fee charged for each document a secretary must type that is more than two pages in length—are disallowed since such costs should be included in the secretary's salary which is taken into consideration in the hourly rate the client is charged for attorney time.

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**B-253836.2, August 4, 1994**

**94-2 CPD ¶ 59**

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## **Procurement**

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### **Bid Protests**

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

Lowest-ranked offeror with highest evaluated cost in competitive range of six offerors is not an interested party to protest awardee's substitution of certain key employees where the awardee is the second-ranked offeror with the lowest proposed cost and several other offerors would be in line for award before the protester even if the issues raised were resolved in its favor.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Non-prejudicial allegation

Protester is not an interested party to allege an organizational conflict of interest where the protester is clearly not in line for award and fails to show how such a conflict prejudiced the other offerors between it and the awardee.

**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest is denied where, contrary to the protester's allegations, the awardee's proposal complied with the solicitation's technical requirements, no prejudicially disparate treatment of offerors occurred during the evaluation process, and the agency performed an adequate cost realism analysis.

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**B-253451.2, August 5, 1994**

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**Procurement**

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**Payment/Discharge**

- Shipment costs
- ■ Additional costs

Under Item 180 of the Military Traffic Management Command's Freight Traffic Rules Publication No. 1A, a carrier is allowed a diversion charge when, after the date of shipment and issuance of the bill of lading, the government requests that the destination on the bill of lading become a stop-off and that the shipment be sent to a new destination.

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**B-256085, August 5, 1994**

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**Procurement**

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**Payment/Discharge**

- Shipment costs
- ■ Additional costs
- ■ ■ Burden of proof

A carrier claiming additional charges based on the actual identity of an article transported years earlier has the burden of establishing the true description of the article where, at the time of shipment, the carrier knew from the contents of the bill of lading description prepared by the shipping agency that there were two possibly applicable classification ratings and the carrier failed to inspect the article or inquire concerning its pertinent classification characteristics.

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**B-256894, August 8, 1994**

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Error correction
- ■ ■ Pricing errors
- ■ ■ ■ Line items

While the Government Printing Office improperly allowed a bidder to correct an allegedly mistaken price in its bid without requiring evidence of the intended price, this impropriety did not result in competitive prejudice as the alleged error occurred on a line item of work that was only requested for contract administration purposes and was not to be evaluated in determining the low bidder under the solicitation, and the bid was responsive since it contained a price for the line item.

**Procurement**

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**Contract Management**

- Contract administration
- ■ Defaulted contractors
- ■ ■ Repurchase contracts
- ■ ■ ■ Price determination

Contracting agency reasonably awarded a repurchase contract to the third-low bidder from the original competition at its original bid prices since only a relatively short period of time had passed between the original competition and the default, and the second-low bidder on the original competition had submitted revised bid prices which were higher than the awardee's original prices.

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Modification
- ■ ■ Submission methods
- ■ ■ ■ Facsimile

Where invitation for bids does not permit submission of bids by facsimile but does allow bids to be modified by facsimile, a bidder's faxed modification does not render its bid nonresponsive merely because it instructs the agency to replace the original first page of its bid (which includes the bid price block) with a faxed page, thereby replacing the authorized agent's original signature with a faxed copy of the same agent's signature.

**Procurement**

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**Competitive Negotiation**

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

The Department of the Air Force properly made award based on initial proposals without conducting discussions where the request for proposals, read as a whole and in a manner that gives effect to all of its provisions, advised offerors that the award of the contract may be made based on initial proposals and the agency properly determined that discussions were unnecessary.

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**B-256923, August 8, 1994**

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**Procurement**

**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Competition enhancement

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**Procurement**

**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Funding restrictions

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**Procurement**

**Competitive Negotiation**

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

Agency reasonably canceled a solicitation for leased office space where the current space requirements decreased from those described in the original solicitation due to staffing level reductions and funding limitations and where on resolicitation the potential exists for increased competition based on the current space requirements.

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**B-257015, August 8, 1994**

**94-2 CPD ¶ 157**

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**Procurement**

**Competitive Negotiation**

- Offers
- ■ Modification
- ■ ■ Submission methods
- ■ ■ ■ Facsimile

An offeror is responsible for conveying its offer, including modifications, to the designated office on time; where an offeror's revised proposal was allegedly timely transmitted by telefacsimile, but the contracting agency denies receipt and there is no proof of receipt other than the protester's evidence that a facsimile transmission was sent to the agency, the protester must bear the risk of nonreceipt.

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**B-256543.4, August 10, 1994**

**94-2 CPD ¶ 67**

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**Procurement**

**Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest that agency improperly considered Phase I evaluation results during Phase II of a two-phase negotiated procurement is denied where record shows that solicitation contemplated evaluation of all considerations throughout acquisition, and protester was repeatedly notified during Phase II discussions of agency's continuing concern with protester's inability to meet Phase I requirements.

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Downgrading
- ■ ■ ■ Propriety

Protest that agency improperly downgraded protester's proposal and upgraded awardee's under two evaluation criteria during Phase II of acquisition is denied where record shows that changes in evaluation results were based either on proposal changes or on a reassessment by the evaluators of the relative merits of proposals. In addition, changes in scoring were not prejudicial to protester whose proposal was seriously deficient in other areas.

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## **Procurement**

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### **Competitive Negotiation**

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

Protest that agency failed to make proper cost/technical tradeoff is denied where record shows that agency carefully considered all evaluation criteria and the comparative benefits of each proposal in making its source selection.

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## **Procurement**

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### **Bid Protests**

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

Protest that agency violated Antideficiency Act in awarding contract is dismissed as untimely where allegation is first raised after protester's receipt of agency report; since appropriations statutes are a matter of public record, protester knew or should have known of basis for protest within 10 working days of agency's award decision.

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**B-257168, August 10, 1994**

**94-2 CPD ¶ 68**

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protester's contention that agency improperly concluded that the awardee's proposed equipment met the applicable specifications is denied where the agency amended the specifications after receipt of initial proposals to address areas where the awardee indicated its proposed equipment did not meet the agency's requirements and the agency's assessment of the equipment's compliance with the revised specifications was reasonable.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where requesting party merely expresses disagreement with our prior decision; General Accounting Office's resolution of protest without conducting a hearing does not constitute error warranting reconsideration of prior decision where protest record contained no inconsistent statements or evidence which suggested questionable or incomplete testimony by the contracting agency or that the record was otherwise incomplete.

**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Where an agency determines that a proposal is weak because it does not have an adequate plan to address the technical risk associated with proposed modifications to existing equipment and the agency is concerned whether the modifications will comply with the specification and schedule requirements, the agency satisfied its duty to conduct meaningful discussions when it raised questions with the offeror about its specific modifications, since this should have adequately apprised the offeror that the agency was concerned about the technical risk of the modifications, given that the solicitation expressly advised that the technical risk associated with equipment modifications was an important concern and advised offerors to address this concern.

**Procurement**

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**Competitive Negotiation**

- Discussion
- ■ Adequacy
- ■ ■ Criteria

Agency conducted meaningful discussions where, prior to oral presentation, agency provided protester with a written list of items that sufficiently alerted the protester to specific areas of its proposal considered weak or requiring further explanation; agency was not required to identify every aspect of the protester's proposal which received less than the maximum score.

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Propriety

Where weaknesses in a proposal are introduced in an offeror's best and final offer, agencies are not obligated to reopen discussions with that offeror to afford the firm an opportunity to cure those weaknesses.

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## Procurement

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### Socio-Economic Policies

- Small business 8(a) subcontracting
- ■ Contracts
- ■ ■ Terms
- ■ ■ ■ GAO review

General Accounting Office reviews procurements conducted competitively under section 8(a) of the Small Business Act, since award decisions are not purely discretionary and are subject to Federal Acquisition Regulation.

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## Procurement

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### Socio-Economic Policies

- Small business 8(a) subcontracting
- ■ Contract awards
- ■ ■ Propriety

Agency may properly make award under section 8(a) of the Small Business Act to a small business concern which has completed its period of participation in the 8(a) program where the solicitation was issued as a competitive section 8(a) set-aside, the awardee was an 8(a) program participant eligible for award on the date set in the solicitation for receipt of initial proposals, and the awardee had submitted its initial proposal by that date.

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**B-256851.2, August 11, 1994**

**94-2 CPD ¶ 159**

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Prior contract performance

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## Procurement

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### Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Prior contract performance

Protest that agency assigned proposal an unfairly low score under evaluation criterion "past performance" is denied where record demonstrates that evaluators reasonably concluded, based on unfavorable reports concerning the protester's performance on several prior contracts, that protester's past performance had been less than satisfactory.

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**B-257052, August 11, 1994**

**94-2 CPD ¶ 70**

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## Procurement

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### Contractor Qualification

- Approved sources
- ■ Administrative determination

Agency determination that the protester was not an approved source for a critical military item and therefore ineligible for award is unobjectionable where the item was critically needed; the determination that the protester was not approved was based on accurate, current information; and the government did not deny the protester a reasonable opportunity to have its item approved.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Post-bid opening cancellation
- ■ ■ Justification
- ■ ■ ■ Minimum needs standards

Compelling reason exists to cancel an invitation for bids after bid opening where the agency reasonably determines that the specifications on which the competition was based overstate the government's minimum needs and inadequately describe the agency's intended requirements.

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**B-257141, August 12, 1994**

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**Procurement**

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**Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ GAO review

Protest challenging agency's negative responsibility determination is denied where protester fails to show that agency acted in bad faith or that determination was unreasonable in light of firm's overall financial posture.

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**B-255934.3, August 16, 1994**

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**Procurement**

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**Bid Protests**

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

Where the final license agreement for electronic data interchange (EDI) value added network (VAN) services contains no closing date for receipt of executed agreements, and where the protester, a potential EDI VAN provider, challenges the absence of a provision in the final agreement requiring immediate acknowledgment by a contracting activity of receipt of an electronic transaction, the protest is untimely since the protester waited 6 weeks after the final agreement was issued to raise the matter.

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**B-257677, August 17, 1994**

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**Procurement**

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**Socio-Economic Policies**

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

Protest that contracting agency improperly failed to require offerors to recertify small business size status after amendment of solicitation, pursuant to 13 C.F.R. § 121.904(c) (1994), and that as a result Small Business Administration (SBA) based size determination on incorrect information, i.e., the wrong 3-year period for considering annual receipts, is dismissed; protest ultimately involves issue of which size status information should be considered by SBA, a matter within SBA's exclusive statutory authority to determine small business status.

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**B-255630, et al., August 18, 1994**

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**Procurement**

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**Payment/Discharge**

- Shipment costs
- ■ Rate schedules
- ■ ■ Applicability

An October 1992 amendment to the Military Traffic Management Command's Freight Traffic Rules Publication 1A, which discontinued the practice of shipping Department of Defense Unique Commodities as Freight All Kinds (FAK), cannot be applied retroactively to allow a carrier to charge higher rates for shipments in May and June 1990, despite the amendment's April 1990 effective date. See 65 Comp. Gen. 563 (1986). Our prior decision *Tri-State Motor Transit Co.*, B-254372, et al., July 15, 1994, is distinguishable because MTMC had publicly announced, prior to the movement of the wheeled vehicle shipments involved in that decision, that wheeled vehicles would no longer be transported as FAK and that specific nomenclature had to be used.

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**B-256280.2, B-256280.4, August 19, 1994**

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Cancellation
- ■ ■ Justification
- ■ ■ ■ Government advantage

Agency reasonably canceled a request for proposals for the operation of military dining facilities in the Republic of Korea, where the agency determined that it was more advantageous to fulfill its requirements by novating the existing contract for these services to a successor-in-interest to a bankrupt incumbent contractor and exercising an option under that contract.

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**B-256641.2, August 23, 1994**

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**94-2 CPD ¶ 76****Procurement**

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**Competitive Negotiation**

- Offers
- ■ Cost realism
- ■ ■ Adjustments
- ■ ■ ■ Rates

Under a level-of-effort solicitation which sets minimum and maximum labor hours and annual escalation rate, agency's cost realism analysis of proposals and determination of most probable cost which focuses on realism of labor rates is reasonable, where it includes: identification of cost issues by the agency; comparison of proposed labor rates with published surveys of prevailing labor rates; review of audits by Defense Contract Audit Agency; adjustments made by offerors in response to discussions; and adjustments by agency on basis of past labor rates.

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**Procurement**

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**Competitive Negotiation**

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

Agency evaluation of relative strengths and weaknesses of proposals, coupled with review of offerors' understanding of requirements throughout technical evaluation, is sufficient to meet any agency obligation to assess performance risk associated with proposals.

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## Procurement

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### Competitive Negotiation

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

Where cost and mission suitability factors are equal, record supports selection official's trade-off determination that technical superiority of protester's proposal does not justify its higher cost.

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**B-257037, August 23, 1994**

**94-2 CPD ¶ 77**

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## Procurement

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### Competitive Negotiation

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

A proposal was properly excluded from the competitive range where the agency reasonably determined that the protester's proposal was technically unacceptable and could not become acceptable without major revisions.

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**B-257056, August 23, 1994\*\*\***

**94-2 CPD ¶ 78**

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## Procurement

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### Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Bid guarantees

The protester's submission of multiple credit card accounts was responsive to the solicitation's material requirement for a bid guarantee, despite the solicitation's instructions that allowed the use of credit card accounts, but prohibited bidders from offering multiple credit cards, where the credit card information submitted with the protester's bid amounted to a binding bid guarantee; the submission of multiple credit card accounts is a waivable minor informality in these circumstances.

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**B-257085, B-257085.2, August 23, 1994**

**94-2 CPD ¶ 79**

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## Procurement

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### Competitive Negotiation

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

Agency reasonably excluded protester's proposal from the competitive range where the record shows that, due to the nature of the principal weaknesses in the proposal—*i.e.*, failure to propose sufficient staffing, contractor's reliance on significant number of substantially older, used vehicles for contract performance, firm's lack of direct prime contractor experience, as well as failure to propose contingency plan for labor strike or work slowdown situations—it could not have been improved enough through discussions to make it competitive with other technically superior, comparably priced proposals.

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## **Procurement**

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### **Competitive Negotiation**

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

## **Procurement**

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### **Competitive Negotiation**

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

Agency reasonably excluded protester's proposal from the competitive range where: (1) protester failed to provide required resumes for key superintendent personnel as well as required vehicle lease agreements; and (2) protester failed to propose sufficient staffing and otherwise lacked direct experience with similar projects.

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**B-257953, August 23, 1994**

**94-2 CPD ¶ 161**

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## **Procurement**

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### **Bid Protests**

- GAO authority

General Accounting Office will not consider under its bid protest jurisdiction allegation that an agency will not comply with the cable franchise renewal provisions of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (1988), because that Act expressly provides for judicial resolution of such disputes.

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**B-257057, August 25, 1994**

**94-2 CPD ¶ 80**

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## **Procurement**

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### **Contractor Qualification**

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Pre-award surveys

Protest that nonresponsibility determination lacked a reasonable basis is denied where the determination was based primarily on information received during pre-award survey showing that protester was inadequately performing two current government contracts.

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**B-257100, August 26, 1994**

**94-2 CPD ¶ 81**

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## **Procurement**

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### **Competitive Negotiation**

- Discussion
- ■ Misleading information
- ■ ■ Allegation substantiation

Protester was not reasonably misled by discussions with contracting agency on a solicitation containing mandatory options, notwithstanding that the protester alleges that the agency apprised it that its option-pricing contingency would be acceptable, where the record shows that the agency did not provide this alleged advice, which was in any case inconsistent with the solicitation's option clause.

**Procurement**

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**Bid Protests**

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

Protesters are not entitled to the costs of filing and pursuing their protests even though the agency did not take corrective action for more than 3 months after the initial protest was filed where the specific allegations in that protest were demonstrated to be without factual basis, and the agency took corrective action within 6 weeks of the first filing of any specific protest grounds that could be viewed as having relevance to the corrective action.

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Urgent needs

Protest challenging the failure to solicit the protester for a humanitarian daily rations requirement is denied where record indicates that contracting agency reasonably determined that only the four solicited firms were capable of promptly and properly meeting the urgent supply requirements caused by relief efforts in the former Yugoslavia; based on protester's lack of experience in assembling rations, agency reasonably concluded that the protester would be unable to perform the requirements within the urgent time frame.

**Procurement**

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**Sealed Bidding**

- Unbalanced bids
- ■ Rejection
- ■ ■ Propriety

The procuring agency improperly rejected the protester's bid for a 2-year, fixed-price construction contract in the Philippines as grossly front-loaded with respect to its mobilization line item price, where the protester's mobilization price was not grossly front-loaded so as to be tantamount to allowing an advance payment; moreover, there is no reasonable doubt that award to the protester will result in the lowest overall cost to the government.

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

Agency error in issuing solicitation incorporating Federal Acquisition Regulation clause providing for indemnification under Public Law 85-804 does not provide basis for award of proposal preparation costs where decision whether to include indemnification agreement in the solicitation is within the agency's discretion, and there is no evidence that the agency acted in violation of statute or regulation; mere issuance of a defective solicitation does not justify an award of such costs.

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**Procurement**

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**Contract Management**

- **Contract modification**
- ■ **Cardinal change doctrine**
- ■ ■ **GAO review**

Modification of existing Department of the Army contract to add laundry services for Department of the Air Force unit is proper where the additional services are within the general scope of the contract as originally awarded, which specifically provided for centralization of such services at the Army base.

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**Procurement**

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**Sealed Bidding**

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

Agency may cancel an invitation for bids for laundry services based on the potential cost savings that will be achieved by obtaining required laundry services under a proper modification to an existing contract.



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