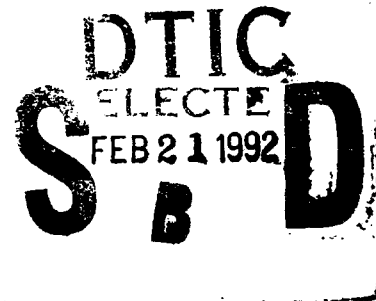


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NAVAL POSTGRADUATE SCHOOL
Monterey, California



THESIS

An Analysis of the General Services Administration Board
of Contract Appeals Bid Protest Decisions and the Effect
on Automated Data Processing Equipment/Federal
Information Processing Resources Procurements

by

David L. Garrard

December 1991

Thesis Advisor

Rodney F. Matsushima

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This thesis studied Automated Data Processing/Federal Information Processing (ADP/FIP) protest issues brought before the General Services Administration Board of Contract Appeals (GSBCA) over a two-year period. The ADP/FIP acquisition environment and process is presented. Also, the forums for ADP/FIP protests were explored with an understanding of each forum's decision-making criteria developed. The objective of this study was to identify the issues for protest most often faced by Contracting Officers, as well as the issues that were "favored most" by the GSBCA. A mathematical model for weighting all protest issues versus Board granted protest issues was developed and used for the ranking and analysis process of this study. Case decisions are highlighted as examples in support of the quantitative analysis.

The thesis concludes that the solicitation and specification process is the source of most sustained protests. Further, the contracting officer's selection and evaluation process is basically sound. Finally, this thesis demonstrates the GSBCA's adherence and demand for upholding the concept of competition. The Board's penchant for competition is sometimes at the expense of other equally sound concepts such as economy and efficiency.

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Automated Data Processing Equipment/Federal Information
Processing Resources Procurements

by

David L. Garrard
Major, United States Marine Corps
B.S., Tri-State University, 1977

Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF SCIENCE IN CONTRACTING


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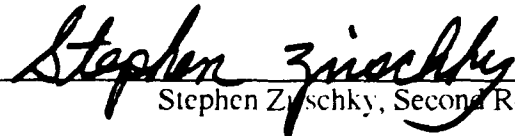
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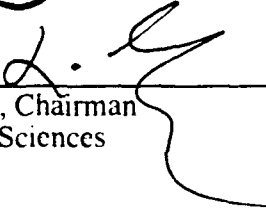
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ABSTRACT

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The thesis concludes that the solicitation and specification process is the source of most sustained protests. Further, the contracting officer's selection and evaluation process is basically sound. Finally, this thesis demonstrates the GSBCA's adherence and demand for upholding the concept of competition. The Board's penchant for competition is sometimes at the expense of other equally sound concepts such as economy and efficiency.



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I. INTRODUCTION

A. ADP/FIP ACQUISITION ENVIRONMENT - BACKGROUND

Congress has enacted many laws regarding the actions of the agencies of the United States Government. Since the acclaimed first operational computer in 1945, a flurry of laws regulating Government acquisition of computers and their use has been put forth by our Congressional leaders. The laws and subsequent regulations have developed a unique community of specialists that primarily deal with computer and computer related acquisitions.

A plethora of laws, regulations and guidance are provided by a large number of Government agencies to regulate other Government agencies. Not surprisingly, would be providers and contractors of computers and automated data processing equipment (ADPE)¹ have demanded the right to sell to the Government. When contractors are not awarded or perceive that they may not be awarded an acquisition contract, they are afforded the opportunity to protest. The protest is normally based on the belief that proper procedures were not complied with (i.e., a law, regulation or published guidance was not properly followed). The complexity of the laws and regulations surrounding Automated Data Processing/Federal Information Processing (ADP/FIP) makes it more likely that mistakes will be made [Ref 1:p. A1].

"There is a general perception in the ADP[E] industry that some type of protest will be filed on virtually every major ADP[E] buy" [Ref 2:p. 19]. Briefings by various military acquisition officials lead the researcher to an unsupported conclusion that contractors are making a business decision to protest a large number of Government

¹ The acronym - ADPE - has been replaced with another acronym - FIP (Federal Information Processing Resources) - in the new FIRMR, published and codified in the Federal Register, Vol. 55, No. 250, pp. 53386-53428, on 28 Dec 1990 as 41 CFR, Chapter 201.

ADPE acquisition contract awards. For purely business reasons, (i.e., hurt the competition, you can't lose - even if all you succeed in doing is delaying the original award) contractors feel it is worth the time and effort to protest a Government ADPE acquisition decision. Eben Townes, Director of Acquisition Management Services for International Data Corp. in Vienna VA, noted that, "Protests are becoming part of vendors' bidding strategy, rather than just a way to remedy wrongdoing." Critics of the protest system charge that,

...protests routinely are filed by sore losers, by companies seeking to recoup their cost or by firms that see the legal route as a way to compensate for lack of experience. [Ref 1:p. A1]

The protest decision may or may not be based on merit. The Government must then defend its decision in a forum of the contractor's choosing. The protest, whether the Government wins or loses, requires time and slows the procurement process. Mr. Renato A. DiPentima, Deputy Associate Commissioner for Systems Integration for the Social Security Administration in 1988, said: "I think we've finally gotten to the point where the procurement cycle is longer than the technology cycle" [Ref 1:p. A11].

The protest process is one of the biggest obstacles to Government efficiency. Just the threat of a protest can delay an award and/or force the Government to settle for older technology [Ref 3].

B. OBJECTIVES OF RESEARCH

Federal ADP/FIP acquisition officials must be aware of the statutes and regulations governing their profession. They must also be aware of the forums for protest as well as the rules and procedures of those forums. Each forum can be said to have its own unique "personality," or the persuasion around which it coddles. This thesis will present the environment in which Government ADPE procuring officials work and the forums of protest open to the disappointed offeror. The role of General Services Administration

Board of Contract Appeals (GSBCA) in ADP/FIP bid protests, the reasons for ADP/FIP bid protests, and suggested methods/procedures to consider in avoiding protests will be examined.

C. RESEARCH QUESTIONS

1. Primary

What has been the role of the GSBCA concerning Automatic Data Processing (ADP) protests and what can be learned from an analysis of recent GSBCA cases?

2. Subsidiary

1. What are the current GSBCA protest procedures?
2. How does the GSBCA define ADP/FIP?
3. What are the principal reasons for ADP/FIP protests?
4. What have been the results of these protests?
5. Since GSBCA received jurisdiction over ADP/FIP acquisitions, what trends can be identified regarding ADP protests?
6. What actions can be taken to minimize the number of ADP protests and the number of sustained GSBCA decisions?

D. SCOPE, LIMITATIONS, AND ASSUMPTIONS

This research effort will focus on the inner workings of the GSBCA. The study will be limited to pre-award or award protests and will specifically exclude contract appeals, disputes and claims. The study will involve an analysis of GSBCA protests filed during a two year period and their disposition.

The researcher will assume that the reader has a basic knowledge of procurement, acquisition, and contracting terminology and procedures. Terminology such as specification types (i.e., performance, functional, design, etc.) are presumed to be understood by the reader. However, some definitions specifically regarding computer procurements are deemed appropriate for the reader's knowledge. Those definitions follow in Section F of this chapter.

E. METHODOLOGY

The methodology and study consisted of a comprehensive literature and case review, data compilation and evaluation, and selective telephone and personal interviews. The literature review consisted of the GSBICA's ADP Protest Reports, Contract Law Journals, General Accounting Office (GAO) Reports, Federal Contract Reports and information from National Defense University's Information Resources Management curriculum, various reports on the bid protest system, and selected periodicals. Data and statistical analysis support were available from the General Services Administration's, (GSA) office of Information Resources Management Service (IRMS). IRMS publishes the quarterly ADP Protest Report.

The researcher established contact with selected contracting agencies to determine their problems and to identify issues associated with ADP/FIP protests. Navy and Marine Corps contracting agencies were contacted to determine their current experience in ADP/FIP contracting related to bid protests. Interviews were conducted to validate the information/data being compiled from the case analyses.

The focus of the research was on the GSBICA as a particular forum for protest of ADP/FIP. An objective and subjective analysis was conducted on 175 cases. The objective analysis involved a mathematical scoring process of ADP/FIP protest issues. The subjective analysis provided the supporting information regarding the objective analysis results.

F. DEFINITIONS

ADPE - A statutory term used in Public Law 89-306, the Brooks Act, as amended by Public Law 99-500, the Paperwork Reduction Reauthorization Act (PRRA). ADPE is generally accepted as meaning the hardware, software, and other ancillary equipment

associated with the manipulation of information. However, the statutory definition of this term is much broader. This term will be more fully explained in the next chapter.

ADP - Refers to the manipulation of information. This term is different from ADPE in common usage only. Normally, ADPE and ADP are used synonymously.

Federal Information Processing (FIP) - The term used in the Federal Information Resources Management Regulation (FIRMR). As used in this thesis, it includes FIP resources, equipment, maintenance, services, software, support services, and related supplies. FIP resources is identical to the statutory definition of ADPE. However, the GSA adopted the term FIP resources "as more descriptive than the statutory term ADPE" [Ref 2:p8 & Ref. 4]. The acronym ADP/FIP will be used when referring to the general domain, large body of data processing.

Bid protest - A written grievance or objection by one who would be economically affected by a Government agency's solicitation and award of a contract. The grievance can be made prior to award of a contract (pre-award) or after the award of the contract (post-award).

Protestor - The person or "interested party" filing the grievance.

Interested party - The protestor is an interested party, or any other person or party that may be economically affected by the bid protest. This would include the awardee or potential awardee and any potential contractor whose "bids were not submitted because of an alleged defective specification." [Ref 5, p.265]

Temporary restraining order - Order by a Federal Court to stop the awarding of a contract or performance of a contract for a temporary period, usually until a resolution of the bid protest.

Injunction - Order by a Federal Court, the same as a temporary restraining order, but with more permanence.

Other terms will be defined as necessary in the text of this thesis.

G. ORGANIZATION OF STUDY

1. Chapter II

This researcher intends to provide the reader with a short history and the requirements of the most pertinent legislation and regulations regarding Governmental ADPE acquisition. An open market environment exists for potential Defense contractors who decide they were wronged in some manner. Note that the word is not contractors but "potential contractors." A potential contractor who believes the Government was not fair or improperly selected a competitor can protest the Government's action. A signed contract need not exist in order for a potential Government contractor to proceed with a bid protest. To protest a bid, a contractor is only required to serve notice to the procuring Government agency or seek a remedy through the Federal Court system. This process is unique to Government contracting. Bid protests do not exist in commercial contracting. Government bid protest procedures exist because of written public policies and regulations such as: the Competition in Contracting Act, The Brooks Act, the Federal Acquisition Regulation (FAR) and the FIRMR and other public policy as discussed in Chapter II. These documents and supporting circulars and bulletins describe the manner in which the Government procurement process should take place.

2. Chapter III

The ADP/FIP Environment of Chapter II will be followed by a discussion in Chapter III of the various protest forums with an emphasis on the GSBICA. A protestor has many options in which to "avenge" their wrong. A Contracting Officer can therefore expect a variety of different protest forums with a substantial number of different rules to

abide by. The purpose of this research paper is to identify the forums a protestor may seek a remedy. Further, a secondary purpose is to impart some basic knowledge that a Contracting Officer should be aware of regarding the procedures of each forum. Although, generally the same protest rules apply regarding acquisition of automatic data processing equipment and other acquisitions, the researcher will consider those forums open to ADP/FIP purchases only. This chapter does not purport to treat each forum thoroughly. Many issues will not be addressed. Specifically eliminated from discussion are the timing and chronological requirements for protest actions.

3. Chapter IV

Chapter IV will present the methodology of the research in detail. A synopsis of the methodology was presented above.

4. Chapter V

Chapter V will present the data derived from the objective case analyses. An *analysis by numerical percentages* was conducted and found to have some weaknesses for a complete understanding of the implications of the data. A weighted index comparing the total sample population of cases with the same sample population of cases granted was devised. Results of both the percentage and weighted index analysis are presented in this chapter.

5. Chapter VI

Subjective case analyses were conducted and are presented in this chapter. The subjective analyses are shown to support the objective data from Chapter V.

6. Chapter VII

Chapter VII is the conclusion chapter where the research questions will be answered. Also, other conclusions and recommendations as a result of this research, will be presented.

A final series of quotes before proceeding into this thesis.

There is "no down side to protesting, no court costs" for the protestor. "...awards, debriefs and protests are automatic" in ADP/FIP procurements. There is "no penalty for frivolous lawsuits" from protestors. [Ref 6].

II. ADP/FIP ACQUISITION

ADP/FIP is a field in which a procurement professional could specialize for years and still feel deficient in knowledge about their area of expertise. There is a myriad of regulations, statutes, directives, and Court/Board decisions that provide procurement guidance and precedence. The "guidance" provides special restrictions that the Government levies on the use and acquisition of ADP/FIP. In addition, the procuring official must understand the unique characteristics of computer operations. In conducting this research, the researcher has found that there is a profusion of information that is often confusing regarding ADP/FIP acquisitions. The stout of heart could become overwhelmed with the seemingly endless amount of information and "must do's" in order to make fairly simple ADP purchases for the Government. This chapter is therefore limited to understanding the congressional laws and mandates and the applications of those by the various governing agencies. Specifically, the purpose is to examine the impact of the Brooks Act on ADP/FIP acquisition. The focus will be on ADP/FIP acquisitions in the general sense and the GSA's implementation regulations.

For the purpose of this thesis, ADPE and ADP/FIP will be used interchangeably. There is, however, a difference that should be noted. Normally, ADPE refers to the equipment, hardware, firmware, and any ancillary equipment. ADP refers to the process of manipulating information. It is the heart of all computer operations. FIP is the new "umbrella" term used by the GSA in the FIRMR that includes ADP, ADPE & telecommunications resources subject to their exclusive procurement authority. The term ADPE and ADP/FIP will be used somewhat loosely. In most cases, the acronyms include maintenance and ADP services.

A. LEGISLATION

1. Brooks Act

For Department of Defense (DoD) purposes, the Brooks Amendment (PL 89-306) is the first piece of major legislation regarding the acquisition of ADPE. This Act of Congress, passed in 1965, amended the Federal Property and Administrative Services (FPAS) Act of 1949. The new section of the FPAS, embodied in the Brooks Act, in effect created a new world of bureaucracy. The Act was:

To provide for the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies. [Ref. 7]

To this end, the Brooks Act gave three Federal Agencies significant control over the *Government-wide* use of computers [Ref. 8:p. 6]. They were the Office of Management and Budget (OMB), the GSA, and the National Bureau of Standards (NBS).¹

GSA became the focal point for the acquisition of ADPE. Government agencies were now required to coordinate the procurement of their ADPE through GSA. GSA assumed the responsibility for the "purchase, lease, and maintenance of automatic data processing equipment by Federal Agencies" [Public Law 89-306, 1965]. However, GSA had the power to delegate that very same responsibility, which it did in many specific cases. The Department of Defense Federal Acquisition Regulation Supplement (DFARS) contains a lengthy section, Part 270, describing those responsibilities. The unique aspect of this responsibility given to GSA is its limitations. The Brooks Act prohibited GSA

¹On Aug. 23, 1988 President Reagan signed the Omnibus Trade and Competitiveness Act into law; officially changing the name of the NBS to "National Institute of Standards and Technology" (NIST).

from impairing or interfering "with the determination by agencies of their individual ADPE requirements" [Ref. 7]. GSA could not control the use of ADPE by Federal Agencies.

Although GSA could not control requirement determinations, it was given policy control in conjunction with OMB. The Brooks Act placed responsibility upon the OMB for ADP fiscal policy and control¹ [Ref 9:p.1-2]. GSA's Deputy Assistant Administrator for Federal Information Resources Management (FIRM) in GSA's IRMS was charged with developing the *Government-wide* ADP policy [Ref. 9:p.1-2].

The Secretary of Commerce gained the responsibility for providing scientific and technological advisory services to agencies regarding ADP. It also was tasked with recommending and establishing ADP standards for the Government. The National Institute of Standards and Technology (NIST), part of the Department of Commerce, provides this function.

The Brooks Act obviously would cause problems for the DoD because of its unique applications of computers and ADP in weapon systems and other specialized applications. So, in 1981, the DoD Authorization Act of 1982, Public Law 97-86, commonly referred to as the Warner Amendment to FPAS, was passed.

2. Warner Amendment

The Warner Amendment excludes the DoD from GSA oversight in procurements which involve intelligence, national security cryptology, command & control, and weapon systems [Ref. 10]. However, when acquiring ADP equipment for general data processing, which is used for routine administrative and business applications, DoD is

¹Executive Orders in 1973 and 1975 modified Brooks. Today OMB is responsible for fiscal control, policy formulation, and general oversight; GSA is responsible for development and oversight of ADP policy.

subject to the same policies and standards that affect other branches of the Federal Government under the provisions of the Brooks Act [Ref. 9:p.1-3]. The Brooks Act with the Warner Amendment exemptions is included in Appendix A. If a procurement is excluded from GSA oversight, DoD still has the option to consult with GSA; however notification is not required. DoD has taken advantage of this legislation on occasion and interpreted the intent of the Warner Amendment loosely. According to GSA personnel, this has prevented them from providing proper procurement guidance when it should have been required [Ref. 11].

While the Brooks and Warner Amendments have had the greatest impact on DoD, specifically regarding ADP/FIP acquisition, there are several other congressional legislative actions that significantly affect procurement of supplies and services. Only a few will be mentioned here.

3. Competition in Contracting Act (CICA)

The CICA of 1984 [Ref. 12] mandated that procurement actions be held on a "full and open competition" basis. It also established seven exceptions to the requirement for competitive procedures. Most notably for ADP/FIP acquisition, it gave contractors an option of where to take their protests when dissatisfied with the Government's solicitation and selection process. Contractors could choose between the GAO, or the GSBCA [Ref. 12]. Other protest forums are available and will be discussed in Chapter III. The GSBCA is authorized, under CICA, to hear and decide protests involving procurements under the provisions of the Brooks Act [Ref. 4:p. 1-7]. Congress established the GSBCA procedure to provide a more formal process of resolving disputes resulting from the increasing number of ADP/FIP procurements and the complexity of the technology [Ref. 13].

4. The Paperwork Reduction Act

Public Law 93-511, passed in 1980, established the Office of Information and Regulatory Affairs in the OMB. This office, as part of the OMB, is charged with developing and implementing policy objectives of the Paperwork Reduction Act [Ref. 14]. The responsibility of the OMB is coordinating, promoting, evaluating and the overseeing of Federal Agencies' use of information systems. As a result, this affects DoD's use, and to a degree, acquisition of ADP/FIP systems. Further, the OMB must monitor compliance with the Privacy Act of 1974. This in effect gave the OMB regulatory authority over DoD and other Federal Agencies in the use of ADPE as information systems. It may be argued that this conflicts with the Brooks Act. However, upon closer examination it does not. There is a subtle difference in wording. The Brooks Act implies that agencies may determine their own requirements for ADPE. The Paperwork Reduction Act restricts/governs the use of that ADP equipment.

5. Paperwork Reduction Reauthorization Act

This Public Law 99-500 of 1986 redefined ADPE. The definition that follows is now preferred [Ref. 15:A-165] for acquisition purposes:

ADPE is any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information - by a Federal agency, or under a contract with a Federal agency which - requires the use of such equipment, or requires the performance of a service or the furnishings of a product which is performed or produced making significant use of such equipment. This includes: computers, ancillary equipment, software, firmware, and similar procedures, services, including support services, and related resources as defined by regulations issued by the Administrator for General Services. [Ref. 16:para 822]

A key phrase in the above passage is set off by dashes. This act not only expanded the definition of the term ADP, it also expanded the sphere of influence to include contractors providing ADP services to the Government. It virtually took in all aspects of data processing from support to software and hardware.

Additionally, GSBCA's jurisdiction was expanded by the PRRA to cover procurements that were "subject to delegation" rather than merely those "conducted under delegations" from GSA [Ref. 16:para 822]. The PRRA also gave permanent jurisdiction over any ADPE protest resolution to the GSA Board of Contract Appeals [Ref. 9:p. 1-8]. Notably the PRRA specifically restated the procurements excluded from the Brooks Act and GSBCA jurisdiction by virtue of the Warner Amendment provisions [Ref. 17:para 824].

6. Summary of Legislation

The preceding Acts of Congress are only a few acts that affect the acquisition process. However, they were worth special note because of the impact they have had on all Federal Agencies. Perhaps the most difficult aspect to understand is the number of Federal Agencies, organizations, and offices that control and influence the ADP acquisition process. The term "acquisition process," includes all phases from requirements determination through disposal. Figure 2.1 is a diagram of those major organizations that have regulatory responsibility and the agencies created to fulfill the requirements of congressional legislation as discussed previously.

B. REGULATIONS

There are two primary *Federal* regulations affecting ADP procurement. They are the FAR and the FIRMIR. Although not technically classified as a regulation, OMB circulars have the same impact as regulations. The DoD publishes a supplement to the FAR known as DFARS. DoD also has numerous directives and instructions governing specific areas of ADP acquisition (see Table 2.1). A short description of the major Federal regulations and directives follows.

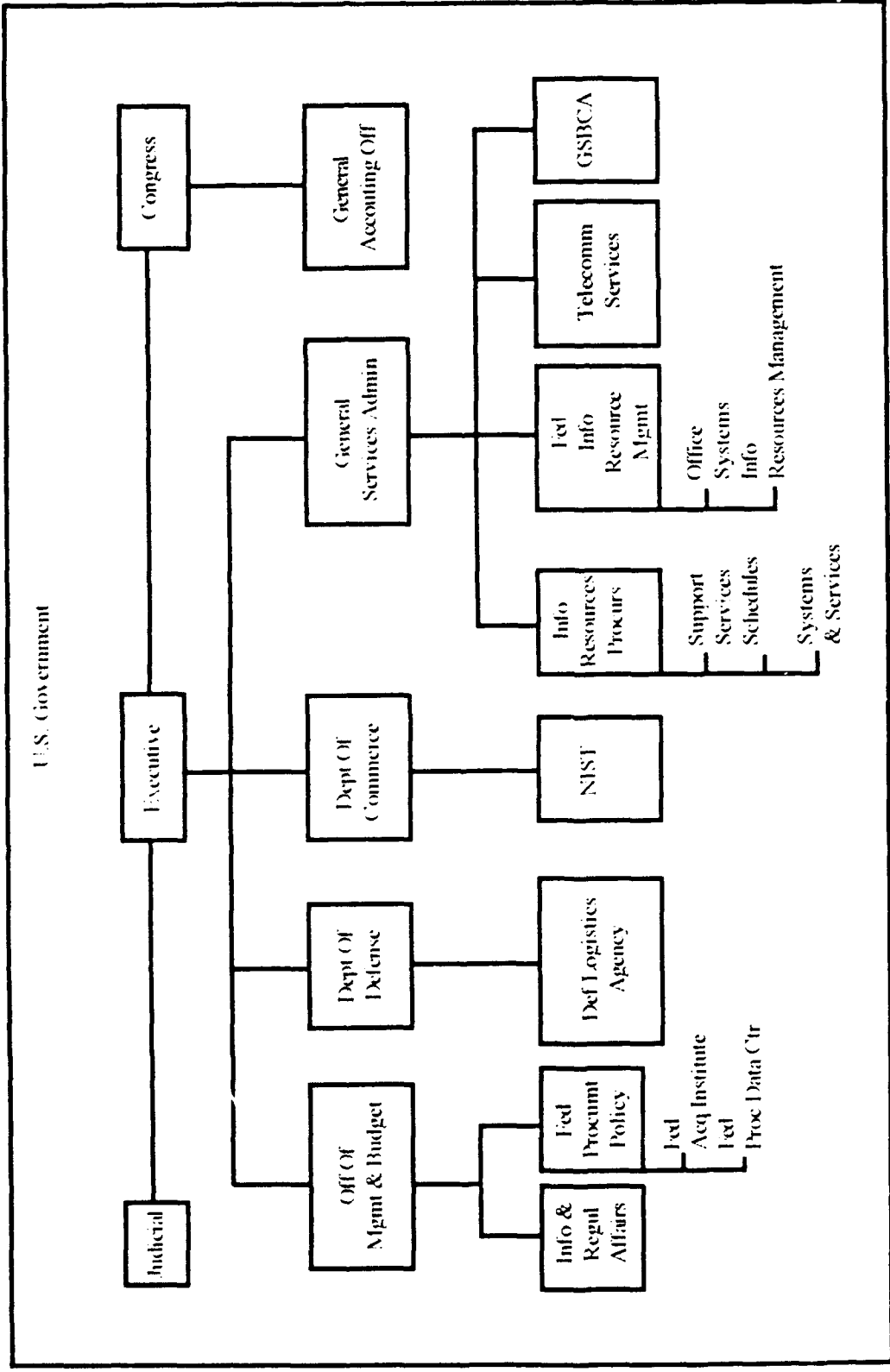


FIGURE 2.1. ADP/FIP REGULATORY AGENCIES

1. Office of Management and Budget Circulars

The Office of Federal Procurement Policy (OFPP) functions as the only entity with executive branch-wide authority [Ref 18:p. 67]. It publishes OMB circulars, OMB bulletins, OFPP policy letters, and numerous other policy documents. OMB circulars are Government-wide policy directives published by the OFPP. The policy documents direct executive branch agencies in the implementation of congressional laws or presidential policies. However, the OFPP does not have exclusive policy making authority. That authority is shared with GSA and the procuring agencies (i.e., DoD, National Aeronautics and Space Administration (NASA), etc.).

The OMB circulars that have major effects on ADP are OMB circulars A-76 and A-130.

a. OMB Circular A-76: Policies for Acquiring Commercial or Industrial Projects for Government Use

The principle of A-76 is that Government should not compete with its citizens in producing goods and services, except when necessary for reasons of security, financial control, or efficiency. The circular sets forth procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel [Ref. 8:p. 9]. The circular lists examples under Automatic Data Processing of the activities that should be commercialized.

1. ADP Services -- batch processing, time-sharing, facility management;
2. Programming and systems analysis, design, development, and simulation;
3. Data entry, transmission, and teleprocessing services;
4. Systems engineering and installation; and
5. Equipment installation, operation, and maintenance.

b. OMB Circular A-130: Management of Federal Information Resources

This circular prescribes a general policy framework, as required by the Paperwork Reduction Act of 1980, for "developing and implementing uniform and consistent information resources management policies." It canceled four OMB circulars and related transmittal memoranda to publish very specific responsibilities for Federal Agencies such as [Ref. 17]:

1. Departments of State, Commerce, Defense;
2. General Services Administration;
3. Office of Personnel Management;
4. National Archives and Records Administration; and
5. The Office of Management and Budget.

A thorough study of this document is not necessary for the correct application of ADP/FIP acquisitions. The text and information of this circular are embodied in other regulations such as the FIRMR, FAR and DFARS. Its existence should be acknowledged and its impact understood.

2. FIRMR

The FIRMR is issued by the General Services Administration and "within policy direction from the Office of Management and Budget, Executive Office of the President" [Ref. 19:Foreword]. Although the FIRMR is actually intended to supplement the FAR, in situations where the FIRMR and the FAR appear to contradict one another, the FIRMR takes precedence¹ [Ref. 8:p. 9]. The FIRMR consolidates current GSA information resource provisions into a single document [FIRMR, 1989, Foreword]. It governs: "the

¹Announced in the Federal Register 18 May 1988.

acquisition, management, and use of ADP, telecommunications, ..., and is used in conjunction with the FAR. ...the FIRMR should be the source of guidance in all applicable cases" [Ref. 9:p. 1-10].

The FIRMR is codified into law as:

1. Title 41 - Public Contracts and Property Management;
2. Subtitle E - Federal Information Resources Management Regulations Systems;
3. Chapter 201 - Federal Information Resources Management Regulations.

There are four Subchapters to the FIRMR, each with its own scope.

1. Subchapter A - Topics of general interest such as applicability, authorities, and definitions. (Parts 201-1 through 201-4).
2. Subchapter B - Discussion of considerations such as personal privacy, standards, record keeping, and competition. (Parts 201-6 through 201-16)
3. Subchapter C - Includes topics of interest to senior officials and executives such as budgeting, program management, GSA delegations of authority, and reporting requirements. Also includes operational provisions such as management of resources, sharing of resources, reuse of equipment, and use of GSA schedules. (Parts 201-17 through 201-38).
4. Subchapter D - This part parallels FAR part 39; it consolidates all policies and procedures unique to acquiring Government ADP and telecommunications resources by contracting. (Part 201-39)

The FIRMR is supplemented with bulletins, temporary regulations and amendments which are published when necessary. Bulletins and published guidance have been the subject of protest at the GSBICA. The protests have brought into question the binding and regulatory nature of such supplemental material on Government procuring agencies. A new FIRMR, effective 29 April 91, states very clearly in the opening Supplementary Information paragraph, that "The FIRMR bulletins are not regulatory; they provide guidance or detailed coverage of a subject ..." [Ref. 19].

The FIRMR and temporary regulations are contracting rules "with Government-wide applicability and the force and effect of law" [Ref. 19:Exec Summary]. However,

the FIRMR only contains general *acquisition* regulations. The FIRMR subpart that pertains to acquisition is for a special category of procurement and contracting regulations. Generally, the FIRMR contracting/acquisition subparts deal with computer security, evaluation factors, least cost and privacy matters. The FIRMR still must be used in conjunction with the FAR. The FIRMR states: The policies and procedures ... (of the FIRMR) ... are in addition to, not in lieu of, the FAR policies and procedures. [Ref 19:para 201-3.102]

3. FAR

The FAR is the primary regulation used by all Federal Agencies for the acquisition of supplies and services with appropriated funds [Ref. 9:p1-10]. It is principally concerned with the behavior, actions and procedures of the supplier [Ref. 18:p. 111]. The FAR deals with the mechanics of contracting vice strategy formulation [Ref. 20:p.14]. The FAR was issued by agreement between DoD, NASA and GSA and is maintained by the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Review Council (DARC). See Figure 2.2. The OFPP, which sponsored the drafting of the FAR, resolves controversies between agencies and the councils over issuance of FAR modifications.

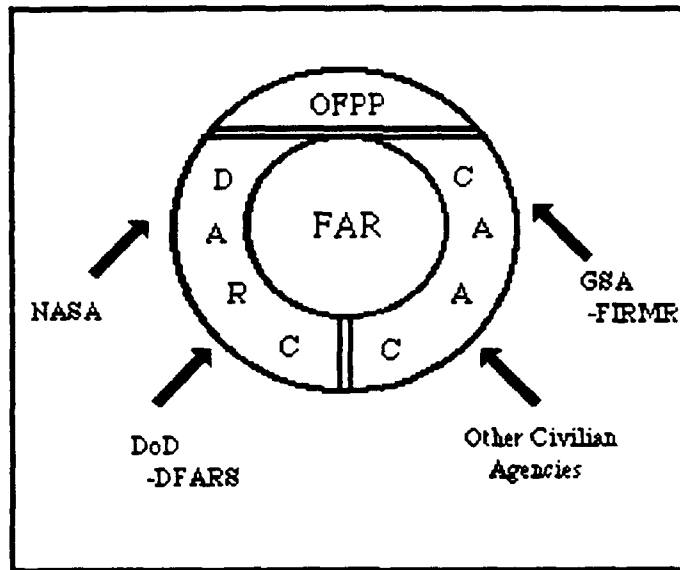


FIGURE 2.2. FAR COMMITTEES

Chapter 39 - Management, Acquisition, and Use of Information Resources - provides contract and acquisition guidance applicable to ADP/FIP. Of special interest, FAR Parts 6.204 and 19.8 outline requirements for use of the Small Business Administration 8(a) Program. Contracting Officers can limit competition to eligible 8(a) contractors without the requirements for justification or determinations and findings for ADPE and other acquisitions.

4. DFARS

The FIRMR and the FAR alone are not sufficient references for ADP acquisition within DoD. DFARS subpart 270 must also be conferred. Even though DFARS subpart 270 is an iteration of the FIRMR, it provides a "more complete and clearly written (source) than any other single ADP instruction" [Ref. 15:A-178]. This researcher agrees with the "clearly written single source" statement made in the Small Purchase Handbook,

but can not agree with "more complete." The fact still remains that both documents need to be searched for applicable sections in the FIRMR and the DFARS before making an ADPE purchase. The following subparts of DFARS are particularly useful:

1. Subpart 270.3 - Acquisitions under GSA Authority;
2. Subpart 270.4 - Acquisitions of ADPE exempted from GSA authority, specifically - the Warner Amendment exceptions.
3. Subpart 270.13 - Sharing of computer resources and the software exchange program.
4. Subpart 270.14 - Reuse of computer equipment.

In addition to FAR, FIRMR, and DFARS, there is specific guidance promulgated by DoD. Further, the Contracting Officer must also consult Service specific regulations for guidance. The following Table 2.1 is a partial listing of DoD instructions and directives that pertain to ADPE. All these must be considered to determine their applicability in the ADP acquisition process.

**TABLE 2.1.
DOD INSTRUCTIONS AND DIRECTIVES**

DODI 5000.2	Defense Acquisition Management Policies and Procedures
DODD 4160.19	DOD ADPE Reutilization Program
DODD 5200.28	Security Requirements for ADP
DODD 5400.11	DOD Privacy Program
DODI 7041.3	Economic Analysis Program Evaluation for Resources Management
DODD 7740.1	DOD Information Resource Management (IRM) Program
DODD 7920.1	Life Cycle Management of Automated Information Systems (AIS)
DODI 7920.2	Major AIS Approval Process
DODI 7930.1	ADP Users Groups
DODD 7935.1-S	AIS Documentation Standards
DODI 7939.2	ADP Software Exchange
DODD 7950.1	ADP Resources Management

5. Other Regulations

There are numerous regulations published by each of the procuring Services and Federal Agencies. The reader should be aware that there are Secretary of the Navy Instructions, Naval Supply Systems Command Instructions, Naval Air Systems Command Instructions, and Marine Corps Orders. They are too numerous and voluminous to mention here. Each is usually more restrictive and adds more detail and requirements to the process. For the purpose of this chapter, the researcher will not go any further than Federal and DoD policies and regulations mentioned above.

6. Regulations Summary

In retrospect, there are only three major regulations governing the acquisition of ADP/FIP. They are the FIRMR, the FAR, and the DFARS. There exist "countless" other regulations, instructions, bulletins, circulars, transmittals, and amendments that effect the ADP/FIP procurement process. Some are general in nature; others specialize in specific ADPE areas.

The review of legislation and regulations is necessary to understanding the ADPE procurement process. The precedence of regulations and the reason each of the controlling organizations authored these documents is as important as the procuring process. Sherman states that knowledge of rule making and policy development is necessary because, "Rule making in Federal procurement receives almost more attention than the acquisition of goods and services." [Ref. 18:p. 106].

C. ADPE PROCUREMENT PROCESS

The acquisition process for ADPE is unlike any other type of purchase.

The process of obtaining a new Automatic Data Processing system from the initial planning stage to final installation for an activity is at best a complicated, time consuming and often frustrating evolution. [Ref. 15:A-164]

The researcher adds, understanding the regulations and interagency relationships without attempting a purchase can be a frustrating process. You must start somewhere. That "somewhere" is a thorough understanding of the requirements of the ADPE user. The Contracting Officer's understanding of customer requirements will be assumed in this research.

1. Determination of Brooks Act Applicability

Regardless of the size of the ADPE purchase, the Contracting Officer must determine the applicability of the Brooks Act. The Warner Amendment defines the exceptions to the Brooks Act for DoD. If the Brooks Act applies, the Contracting officer becomes involved in the "world" of the GSA requirements, exceptions and delegations. If the acquisition is exempt from the Brooks Act by the Warner Amendment exceptions, the Contracting Officer is then guided by specific FAR, DFARS, DoD, and Service component regulations. The method, process, and paths for acquisition will differ. The GSA has vested procurement authority when contracting for ADPE, commercial software, maintenance services and certain other services and supplies not exempt by the Warner Amendment.

2. GSA Jurisdictional Authority

The GSA exercises control over the procurement of ADP/FIP through the use of a Delegation of Procurement Authority (DPA). The DPA is a written notification from GSA that grants contracting authority to the DoD component [Ref. 21:para 270.2-2]. The DPA is received in response to an Agency Procurement Request (APR).

An APR must be submitted to GSA prior to the initiation of a GSA vested contract action [Ref. 21:para 270.302-1]. There are exceptions to the APR submission requirement for ADP/FIP contract actions. These exceptions are called "regulatory delegations."

3. Regulatory Delegations

GSA allows for regulatory delegations¹ or exceptions in four areas: equipment, software, services and support services [Ref. 19:para 201-20.305.1]. Regulatory Delegation authority can be found in FIRMR 201-20.305 and DFARS 270.302. A regulatory DPA is given to agencies with procurement authority. The agency must have review procedures at least as stringent as GSA's procedures [Ref. 9:p. 4-2]. If a regulatory delegation exists, then an APR is not required. The new FIRMR significantly simplified the definition of regulatory delegation verses the blanket delegation. Now, there are only two dollar thresholds to be concerned with versus the eight previous thresholds. The following list is a synopsis of regulatory authority :

1. The contract life cost is less than \$2.5 million, for FIP equipment, software, services, and support services, or
 - a) is less than \$250,000 for specific make & model requirements, or
 - b) is less than \$250,000 for sole-source procurements.
2. The contract involves the acquisition of telecommunications services within the scope of GSA's FTS 2000 contract.
3. The contract is for ADP/FIP related supplies regardless of cost.
4. The contract is a software order against a GSA Requirements Contract or Schedules Contract. [Ref. 17:para. 201-20.305-1]

4. Specific Delegations

Other exceptions, if not allowed for by the regulatory delegation, are allowed for by GSA on a case-by-case basis. The case-by-case delegations are called "specific delegations." The request for specific delegation is submitted when an agency's planned

¹A "regulatory delegation" was known prior to the new FIRMR as a "blanket delegation" of procurement authority.

procurement exceeds the limitations of GSA's regulatory delegation or procurement authority [Ref. 8:p. 11]. In order to get a specific delegation, the Service component must submit an APR and receive a DPA from GSA.

5. GSA Response to APR

GSA, after receipt, review, and approval of the APR has three options. It can:

1. delegate authority to the agency,
2. delegate authority with GSA participation, or
3. make the procurement for the agency. [Ref. 9:p. 4-7]

GSA will take action in 20 workdays on the APR. At the end of 20 days, the DFARS states: "Upon expiration of the 20-workday period plus 5 calendar days for mail bag, {if no answer has been received} the DoD component may proceed with the acquisition as if a DPA had, in fact, been granted" [Ref. 21:para 270.303-2].

In the event that the third option is chosen by GSA, the DoD component and procuring agency effect a procurement as a joint venture with the GSA. The DoD component prepares all documentation, conducts solicitation and selection, debriefs and administers the contract, whereby, GSA actually awards the contract to the lowest overall cost contractor.

6. Schedule Contract

The schedule contracts are negotiated, noncompetitive contracts between the GSA and a vendor. The vendor guarantees that the prices shown in the schedule contract will be equal to or less than the prices offered to the vendor's most favored commercial customers [Ref. 22:App. B-1]. A Contracting Officer can place an order against the schedule contract subject to a Maximum Order Limit (MOL). A MOL is based on dollar value and quantity limits. The delivery order cannot exceed a \$300,000 purchase price or

ten different and separately priced items. If the Contracting Officer plans to exceed these limits, he/she must request authority from GSA to use the schedule contracts [Ref. 22:App. B-2].

The use of the schedule contract is not mandatory. The terms "schedule contract" and "non-mandatory schedules" are synonymous. Schedule contracts can be found in DFARS 270.313 and 270.314.

The existence of non-mandatory ADP schedules does not eliminate the requirement for competition. The rapid change in prices explains the need to ensure that competition is still sought in spite of existing non-mandatory ADP schedules. [Ref. 15:A-171]

The DoD Inspector General's (IG) Audit Report, 1985, (No. 85-113), noted several problems related to the use of schedule contracts. Schedule contracts are a good source of ADP/FIP, software and services if the Contracting Officer is familiar with their applicability. Some applications that the IG Audit noted as problems due to misunderstanding of schedule contracts are:

1. Schedule prices are negotiated on a non-competitive basis.
2. Only commercially available software is carried on schedule contracts.
3. Schedule contracts offer both commercial items and specialized items meeting Government requirements.

7. Requirements Contracts

The GSA also has requirements contracts. The Contracting Officer must order against the requirements contract, if the item he is procuring is on the GSA requirements list. This is mandatory! Orders placed against a requirements contract are considered a competitive contract, because the requirements contract awarded by GSA was competitive [Ref. 22:App. B-2].

8. Agency Requirements Contracts

Another method of obtaining data processing equipment is by having an Agency establish its own requirements contract [Ref. 22:p. 2]. In order for an agency to establish its own requirements contract, it must receive a DPA from the GSA. The requirements contract negotiated by the agency must be competitive. Thereafter, all other activities within the agency can place delivery orders against the contract and obtain the items at competitive prices.

An agency requirements contract will provide a lower price than a schedule contract and will eliminate the need and time required for negotiating a separate contract each time items are needed. [Ref. 22:App. B-2]

An agency requirements contract, if authorized, seems to provide a GSA sanctioned method of avoiding procurement through GSA. The GAO believes this provides a cost efficient method of procurement.

9. GSA ADP/FIP Acquisition Summary

The GSA has established five methods to procure general data processing equipment and services. They include:

1. The Regulatory Delegation for competitive and non-competitive procurements,
2. The Specific Delegation for procurements above threshold limits established for regulatory delegations,
3. Delivery orders against GSA Schedule Contracts (non-mandatory),
4. Delivery orders against GSA Requirements Contracts (mandatory), and
5. Agency or Service established competitive Requirements Contracts

Thus far, this chapter has addressed the legislation, regulations and GSA methods of procurement. But this is not the end of the discussion. Methods of procurement do not equate to sources of procurement.

The five GSA methods of procurement above are not the preferred "source." In fact, the transfer of Government-owned ADP/FIP amongst Government agencies is

preferred prior to the acquisition from established commercial sources. (Established commercial sources include those identified as part of the five GSA procurement methods). Open market procurement is the third "source" in order of preference to 1) Government transfers, and 2) commercial sources. In other words, in order of acquisition preference of general ADP/FIP, Government transfers is first, followed by the preference for commercial sources, then procurement from the open market. Open market procurement methods include sealed bid, or negotiated small purchase contracts by agencies other than GSA. This research would be incomplete without the discussion of Government transfer programs and open market purchases.

10. Government Transfer

Sharing and reutilization of computer resources are defined in DFARS 270.13 and 270.14. The DFARS states quite clearly that

DoD components shall not initiate the process of selection and acquiring resources unless it has made a reasonable effort to determine that the required capability cannot be met economically and efficiently by using existing resources on a shared basis. [Ref. 21:para 270.1302]

Government transfers can be obtained by:

1. Outright reassignment transfer of ADP/FIP, or
2. Sharing of computer time with other Government activities and agencies, or
3. Use of the GSA Information Technology Fund (ITF).

The ITF is supported by Congress with small amounts of funds on an irregular basis and the collection of service charges by GSA [Ref 4:p. 6-4]. It appears unlikely that DoD components will have favorable access to this fund.

GSA and DoD maintain lists of Government-owned and Government-leased ADPE available for reassignment. Also, GSA and DoD publishes bulletins containing information with ADP sharing opportunities. Sharing arrangements are made directly with the acquiring and providing agencies [Ref. 9:p. 6-3]. Both of these lists are lengthy

and burdensome. However, the Contracting Officer must certify that the requirements cannot be filled through sharing or reutilization before a procurement can go forward [Ref. 19:201-31]. Additionally, the Contracting Officer must keep in mind the requirements regarding sole-source procurement when acquiring Government-leased ADPE.

The transfer of Government-owned ADPE is not a procurement. The transfer of Government-leased ADPE is considered a sole-source procurement and must be justified. [Ref. 9:p. 6-3]

11. Open Market Contracts

Open market procurement is used when either the "GSA-five" commercial sources or Government transfer sources cannot meet the ADP/FIP requirement [GSA Training Center, 1990:p. 6-8]. Open market procurement is one of the three sources of procurements as opposed to a method of procurement. Open market procurements are small purchase contracts (sealed bid or negotiated) not requiring a DPA from GSA. However, approval and certifications are required for any ADP/FIP services procurements. The certifications state that the procuring officer has complied with applicable laws and regulations, that the ADPE requirement could not be filled via reutilization or sharing, and that ADP life-cycle costs were approved by appropriate authority [Ref. 15:A-172].

The provisions of DFARS part 213 (Small Purchase and other Simplified Purchase Procedures) apply when the aggregate amount of the procurement is not over \$25,000 annually or not over \$25,000 for the life-cycle cost of the item. This is referred to as a "small purchase." In this case, the small purchase, procedures of FAR 13 and DFARS 213 apply. The Certifications and Approvals (C&A) are still required.

D. SUMMARY

This chapter described the more important legislation, regulations, and process for acquiring ADP/FIP resources. This researcher has found that there are many other areas to understand in the acquisition of ADPE and ADP services. For example, this researcher did not attempt to determine synopsis requirements, publicizing of contract action requirements, software acquisition requirements, GSA teleprocessing requirements, or several other very important considerations for an ADP acquisition. In conclusion, the researcher has found the system to be complex and convoluted. The field of ADPE acquisition lends credence to the need for an agency to organize its buying structure around commodities. If not for all commodities, then in the very least a buyer should specialize in ADPE as a commodity. There are too many special rules that apply to ADPE uniquely.

Fortunately, GSA has assistance programs provided by the Office of Technical Assistance (OTA). Two offices within OTA that may be useful are the Office of Software Development and Information Technology (OSDIT) and the Federal System Integration and Management Center (FEDSIM). As the name implies, OSDIT offers assistance in software related matters. FEDSIM provides technical assistance in designing, procuring, managing and operating information systems and information technology [Ref. 9:p. 6-12].

The importance of thorough, adequate planning cannot be overlooked in the ADP/FIP acquisition process. A course of action should be mapped out with the customer; they should be made to understand the unique Governmental and regulatory requirements prior to the purchase and delivery of ADP. Most likely, they will not be satisfied with the many roadblocks to purchasing "their" computer or the time delays that are inherent in this system.

The system just described is by far not an efficient and economic method of procurement. The adherence to the statutes and regulations and procedures have been challenged in courts, boards, and other protest forums. The next chapter will present the forums for protesting an alleged agency violation.

III. BID PROTEST FORUMS FOR FEDERAL INFORMATION PROCESSING

A. BACKGROUND

There are many alternatives for an unsuccessful offeror today. Prior to 1940 this was not true. The US Supreme Court at that time held that statutes and regulations were intended to protect the Government, not contract bidders. [Ref. 23:p.533] In 1970, the District of Columbia Circuit Court established new direction for bid protests in its reasoning that unsuccessful bidders "have the incentive to bring suit to compel agencies [to] follow the regulations which control Government contracting." [Ref. 23:p.534]. Since this ruling, a whole new body of law and new forums were established and evolved to hear and judge bid protest cases.

In 1983, despite low bid protest reversal rates in both the GAO and Federal Courts, contractors found it advantageous to pursue all available remedies. [Ref. 24:p.2] The protestor accomplishes several objectives even if he subsequently loses the decision; he can delay or stop altogether the procurement, he can gain information about the award process and possibly gain access to commercially sensitive information about a competitor, and he may also establish an advantageous position for subsequent hearings and decisions if the protest is timed correctly.

A bid protestor has several options available to him. The Contracting Officer can expect that the protestor will choose the forum most advantageous to him and least advantageous to the Government procuring agency. For this reason, the Contracting Officer may find himself in a number of different bid protest resolution forums. See Figure 3.1 for a schematic of ADP/FIP bid protest forums and the paths for appeal. The

forums, for the purposes of this chapter, will be divided into three categories: 1) Legislative, 2) Administrative, and 3) Judicial. The Administrative forum consists of both an informal process and a formal process. The informal process is a protest with the procuring agency's Contracting Officer. The formal process is a protest with any one of the agency Boards authorized by Congress (administrative). The Legislative and Judicial forums are always formal processes.

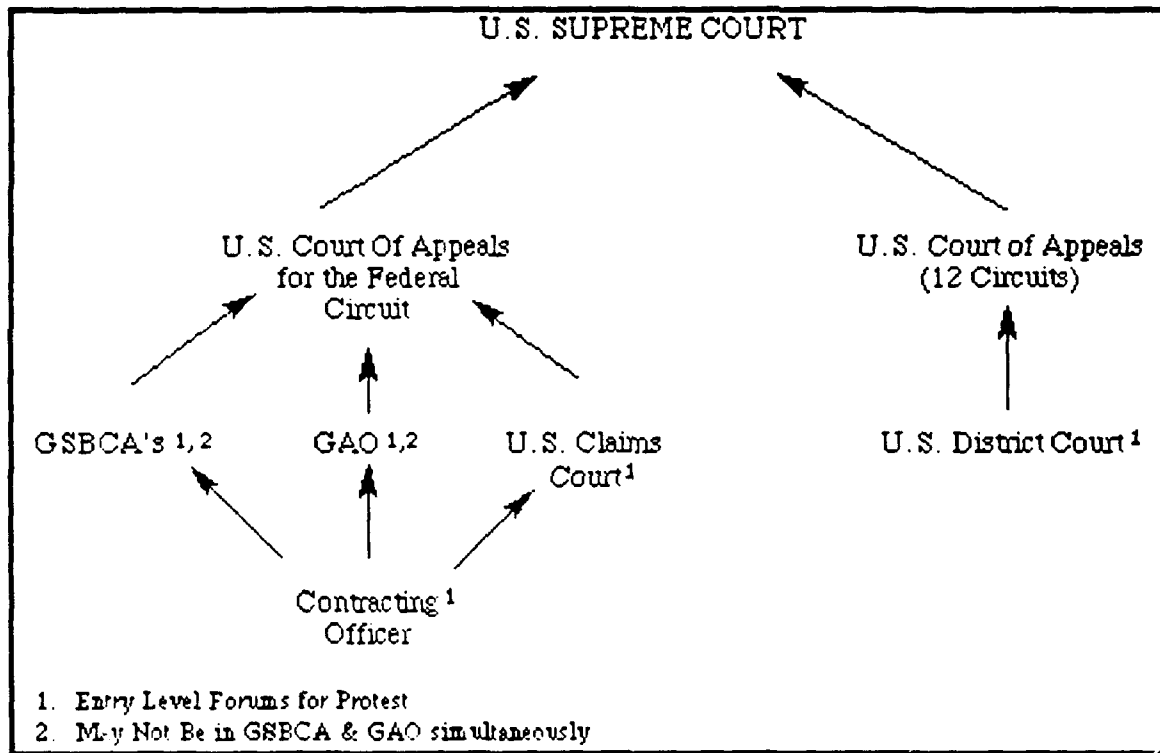


FIGURE 3.1. ADP/FIP BID PROTEST FORUMS

B. ADMINISTRATIVE FORUMS

The administrative forums include the procuring agency's Contracting Officer or higher authority. This forum also includes agency boards of contract appeals such as the Armed Services Board of Contract Appeals (ASBCA) for the DoD or the GSBCA for the GSA and ADP/FIP related acquisitions.

The judges on a Board are appointed by the agency, such as DoD, for the ASBCA. This particular agency board has demonstrated considerable independence from DoD influence. [Ref 5, p.335] The ASBCA will not be discussed further because this board does not fall within the context of the purpose of this chapter - namely "bid protest forums for Federal information processing (FIP)"¹

The administrative forums to be discussed are the procuring agency and the GSBCA. The legislative forum to be discussed is the GAO's Comptroller General's procedures. There is a difference that should be emphasized here. "Board decisions are considered final unless appealed to the U.S. Court of Appeals for the Federal Circuit within 120 days." [Ref. 25:p.133] GAO decisions are only advisory.

1. Procuring Agency Contracting Officer

This is logically the first person or agent that would be notified in the case of a bid protest. To protest here in this administrative forum is merely asking the agency to reconsider an earlier position in a Solicitation, Specification, Evaluation, or award. Statistics are not available regarding the number of protests lodged at the agency level. However, as an indication of the popularity and the number of protests that are resolved at this level, the researcher turns to the GSBCA statistics.

Of all protests filed with the GSBCA since January 1985 through March 1991, 61.9% have been either withdrawn² by the protestor or settled³ at the agency level

¹FIP is the new preferred acronym vice the previous term ADPE for Automatic Data Processing Equipment with the release of the revised FIRMR.

²Protests that are terminated without a Board hearing and the agency did not change its position, but may have persuaded the protestor that the agency was essentially correct.

³The protestor and the agency resolved their issue(s) without a Board hearing; usually the protestor achieved at least some of his initial objectives.

[Ref. 26:p. 21]. This is indicative of the fact that many of the formally filed protests are resolved at the agency level without the benefit of a formal hearing with the Board.

Of 17,128 General Purpose Automatic Data Processing Equipment acquisition actions in 1990 [Ref. 27:p.9], there were only 250 formal protests with the GSBCA [Ref. 28:p. 23]. Approximately 1.5% of all reported Government ADP/FIP procurement actions were formally protested. Other figures indicate as few as 0.4% of all computer-related procurements have been protested through the GSBCA [Ref. 29:p 48]. Still other statistics indicate that as high as 4.3% ADP procurements are formally protested [Ref. 30:p 14]. Although each of these statistics is arguable as to the application, source and validity, they lead to the same general conclusions.

1. There are relatively few formal ADP/FIP protests; and
2. Of the formal protests, many are resolved at the agency level without a formal protest filing; and
3. Given the perceptions cited in Chapter I, a greater majority (large percentage) of protests are never formally filed, but are resolved at the agency level.

If a potential contractor or interested party elects to use this forum, he must follow the varying procedures of all the various Government procuring agencies. However, there is not a requirement that a protestor must file his complaint with the agency before filing with any other forum [Ref. 31:Cir. 1970]. The protestor can in fact have an informal and a formal protest pending simultaneously [Ref. 12:para 759(h)(6)].

2. GSBCA

The 1984 CICA amended the Brooks Act¹. The amendment gave the GSBCA

... jurisdiction over a protest filed by an interested party alleging a violation of a statute or regulation in connection with any procurement conducted by the General Services Administration under the Brooks Act. [Ref. 32:p.121]

¹Public Law No 89-306, 79 Stat 1127 (1965)

This includes challenges for computer equipment and services acquired under the Brooks Act by DoD. The GSBCA did not gain exclusive jurisdiction in bid protests for FIP. A protestor still has the option of filing a claim with either GAO or GSBCA and the Federal Courts system. If the protestor chooses the administrative or legislative forum over the judicial forum, the FIP protestor must choose between the GAO or GSBCA. A protest cannot be filed/pending at the GAO or GSBCA concurrently. However, the protestor is not stopped from filing suit in the Federal Courts system at any time. He may have a protest filed with the administrative or legislative forum and concurrently with a judicial forum.

a. Jurisdiction

The subject of jurisdiction is usually not considered a subject for Contracting Officers and is left for the perview of legal assistance. However, the determination of GSBCA jurisdiction is tantamount to determining whether an ADP/FIP acquisition is subject to the Brooks Act. For this reason, the subject of jurisdiction must be examined here. Jurisdiction is a very broad topic and has been examined extensively by the legal profession and is subject to a continual debate. The prevailing issues from this researcher's point of view revolve around interpretations of the Brooks Act and Warner Amendments. Appendix A is a reproduction of the pertinent sections of the Brooks Act as amended by the Warner Act and the PRRA.

The Board has continually sought to expand its sphere of influence in ADP/FIP acquisitions. The Board's interpretations of The Brooks Act and Warner amendments has served the Board's purpose to "consistently expand and broaden its jurisdiction." [Ref 2:p. 11;Ref. 33:p. 23-24]. The DPA, Significant Use of ADP/FIP, incidental performance, and ADP/FIP definitions are continually evolving with new Board case decisions.

(1) Delegation of Procurement Authority. As stated earlier, because an agency did not obtain a GSA DPA does not exclude the agency from the reach of either Brooks or the GSBICA. The Paperwork Reduction Reauthorization Act of 1986 provided the Board with the statutory ability to include any ADP/FIP acquisitions that may "be subject to delegation." [Ref 16:para 824]. If an agency conducts a procurement that is later determined to be subject to Brooks, then the Board can order the award to be terminated and force the agency to obtain a DPA [Ref. 34].

(2) Brooks/Warner Jurisdictional Issues. (Important Examples)

Military test equipment was subject to Brooks because it was commercially available and was not "an integral part" of the weapon system. Warner did not apply because the test equipment was not mission essential [Ref. 35;Ref. 32:p. 123].

Military training equipment (such as the F14D trainer) is subject to Brooks because it was not "crucial to accomplishing a specific military mission." It should be noted that there was a dissenting opinion that felt the military mission cannot be accomplished without training and therefore this procurement was exempt under Warner. [Ref. 36].

A weapon system with a computer as an integral part is not subject to Brooks. A protested computer procurement in support of the Strategic Defense Initiative (SDI) was determined not to be within the jurisdiction of the Board due to the Warner exemptions. The protestor then argued, the procurement violated the Anti-Ballistic Missile (ABM) treaty and therefore could not be called a weapon system. The Board dismissed the protest as "overly technical" [Ref. 37;Ref. 2:p 13].

Functionality (use) may determine Brooks application. A military procurement of facsimile machines to be used with law enforcement officials for the "drug war" was exempt from Brooks. The machines were to be used to share intelligence

by DoD for its counternarcotics mission. [Ref. 38;Ref 2:p. 13]. Essentially, equipment, even though commercially available and not an integral part of a weapon system, may be exempt from the Brooks Act. The determination was dependent on the facsimile machines use for a specific DoD mission.

General purpose, off-the-shelf equipment is not pertinent to the determination of Brooks. The Board in this case looked to the primary intended purpose of the procurement. Even though ruggedized magnetic disks were commercially available, the disks were to be used as an integral part of a weapon system.¹ [Ref. 39:p.18]. Therefore, the magnetic disk procurement was Warner Amendment exempted from the Books Act and GSA involvement.

Political environment may have an impact on the Brooks determination. Computer-controlled security systems are subject to Brooks because they are based on "microprocessor technology" [Ref. 40;Ref. 2:p.12]. However, an intrusion detection security system was not Brooks because it was at a time (during the Persian Gulf War) when a "Congressionally mandated program to defend against military threats is a military mission." This was not a "general" base security system. Rather, it was a specific mission to protect planes and weapons during a high threat environment of terrorism [Ref. 41]. The second case cited here may have turned differently had the political environment been different, i.e., the same system may have been considered a general base security system using ADP/FIP and hence subject to Brooks.

(3) Significant Use/Incidental Performance. "Significant use" [Ref. 7:para 759(a)(2)(A)(ii)(II)] of ADP/FIP is a term that has become concurrently synonymous and antonymous with the Brooks Act term of "incidental to the performance" [Ref. 7:para

¹Case cited is GSBCA 9445-P. See also GSBCA 9469-P, GSBCA 9471-P, GSBCA 9207, and GSBCA 9243-P.

759(a)(3)(A)] of a contract. Significant use refers to the use of ADP/FIP in the performance of a service or in providing a product that is either performed or produced. ADP/FIP that is incidental to the performance of a contract is not subject to Brooks. However, if the ADP/FIP is "significant" it is subject to Brooks. Significant use is called out more than incidental performance by the Board. Significant use expands the power of the Board while incidental performance restricts their power.

The Board has stated that if ADP/FIP "were truly incidental, there would be no need to mention it in the solicitation or the contract as awarded"¹ [Ref. 39:p.14]. Several recent cases have challenged the element of significant use/incidental performance.

The use of a dollar percentage as a judging factor for determining significant use is an "unacceptable formulation" [Ref. 42]. On the other hand, the new FIRMR establishes both a dollar threshold and percentage for determining significant use. Significant use of FIP resources, among other things, means that:

. . . dollar value of FIP resources expended by the contractor to perform the service or furnish the product is expected to exceed \$500,000 or 20% of the estimated cost of the contract, whichever amount is lower. [Ref. 19:para 201-1.002-1]

Emphasis on data systems experience in the solicitation will call for a judgment of significant use [Ref. 43].

The contract need not be primarily for ADP/FIP. A contract for construction of a building that involved in part the installation of a security system was subject to Brooks. The ADP/FIP cost and function portion of the contract was deemed significant. This was despite "The fact that installing the ADPE system [security system] also involve[d] a considerable amount of costly construction ..." [Ref. 40].

¹Case cited is GSBICA 9108-P

A contract for reports is not considered significant use of ADP, it is therefore only incidental. The Government contracted for information/reports not for ADP/FIP. The Board noted the contractor may opt to use ADP/FIP in the performance of the contract but was not required by the terms of the solicitation [Ref. 44].

A contract for data input services is incidental, and therefore not considered significant. "The services being acquired [computer-aided design input services] ... use ADPE, but are not themselves data processing services" [Ref. 45].

Operation of a computer system (i.e., a computer services contract) is not significant use of ADP/FIP [Ref. 46]. The written opinion of the Board provides an excellent summary of the meaning of "significant use."

... we have held that 'significance' in the use of ADPE 'does not connote exclusivity, it merely requires importance or consequence.' ... In applying this test, we have held that even where ADP services are not the primary item being acquired, if they are a significant part of what is being procured, the procurement as a whole is subject to the Brooks Act. ... We have also made it clear, however, that requirements for services which use ADPE but do not involve ADP support or maintenance - such as secretarial services which entail the use of word processors - are not to be construed as involving the significant use of ADPE. ... The mere entering, accessing, and deleting of data into an existing automated data base, and manipulation of that information by invoking pre-programmed commands, is insufficient to bring a procurement within the ambit of the Brooks Act. [Ref. 46]

(4) Definition of ADPE. A continuation of the same topic above, significant use/incidental performance, in a slightly different vein is the Brooks Act, as amended, definition of ADPE. The Act is very specific as to what is included and what is not included in the description of ADPE (see Appendix A). That however, has not prevented the topic from being an issue of litigation before the Board. Decisions by the Board have provided some of the following interpretations.

Radar, sonar, radio or television equipment is exempt from the Brooks Act [Ref. 7:para 759(a)(3)(B)]. The Board's strict interpretation of this clause is evident in stating that the "four items excluded from Brooks Act's definition of ADPE are an all inclusive list" [Ref. 47].

Physical storage of ADP/FIP data does not constitute an ADP/FIP procurement. Here the Board stated that a contract for warehouse space for storage of ADP/FIP is not within their jurisdiction. The "warehouse will store the tapes, which will store the data; the warehouse does not store the data." [Ref. 48].

Reports if received via an electronic means are subject to Brooks. The Board appears to have contradicted itself with Sector Technologies [Ref. 46] and Cryptek, Inc. [Ref. 38] cited earlier regarding contracts for reports and data services. The contract was primarily for aviation services to be used in the drug war; whereby the contractor would provide, among other things, on-line access to the contractor's automated data reporting system. The Board found that the reports and services were an integral part of the contract. Albeit, an interesting dissent is voiced and is well worth repeating. Judge Hendley stated that he believed "the contract is for aviation services with a requirement to maintain records relating to the contract performance..." He further stated:

The use of ADPE has become nigh all pervasive in a modern technological society. A trip through the checkout counter of a grocery store involves tabulations and print-outs made by expensive ADPE. Is one buying groceries or an ADPE service? ... I would conclude that ADPE requirements relating to contract record keeping are 'incidental to the performance of a Federal contract', else we will be letting the 'tail wag the dog.' [Ref. 49]

In fact, this case decision was previous to Sector Technologies [Ref. 46] and Cryptek, Inc. [Ref. 38]. These two cases taken in actual chronology may indicate a willingness of the Board to accept the "pervasiveness of ADPE in a modern technological society."

The term "radio" as part of the exclusion to Brooks "does not include microwave or satellite [radio] transmissions." The Board narrowly interpreted Brooks when it suited its expansionary objectives. The Board's justification stated that "the term radio in the exception refers to the application of radio technology to the broadcast media and not to the use of radio technology for satellite transmissions for the movement of data between computer systems." [Ref. 50].

b. Timeliness

The issue of timeliness is not necessarily a jurisdictional issue, but if the protest is not "timely" the Board will refuse to hear the protest. Rule 5 of the GSBCA Rules of Procedures defines timeliness. The Board interprets the timeliness requirements more liberally than the GAO. A GSBCA Judge has stated that his interpretation is sufficiently more liberal than the GAO's, that "attorney's are wasting their time when they cite GAO decisions" [Ref. 32:p. 137]. Rule 5 indicates three situations under which a protest will be determined timely:

1. Improper solicitations must be protested prior to the bid opening or closing time for proposals, or
2. Ten days after the basis for protest is known or should have been known, or
3. Within ten days of adverse agency action on a procuring agency level protest. [Ref. 51:p. 1-18]

The Board has construed its timeliness rules strictly [Ref. 39:p.27]. Indeed, a protest alleging an impropriety in the solicitation was untimely because it was filed six minutes after the closing time for receipt of proposals¹ [Ref. 39:p. 28]. A more recent protest was untimely because the whole protest was not received before the deadline. The

¹Case cited is GSBCA 9387-P

first page of a protest sent by facsimile was one minute early. The complete text was not received until after the closing time for receipt of offers (applies to protests challenging terms of solicitation only) [Ref. 52].

c. Interested Party

For a protestor to have "standing" with the Board to pursue a protest they must be an "interested party." Statute defines interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract" [Ref. 7:para 759(f)(9)(B)]. The intent to bid is not sufficient grounds for being an interested party [Ref. 53]. As stated in ADP PR VII/N3: "if a party does not submit a proposal by the closing date for receipt of proposal, that party does not have standing to protest any aspect of the procurement action."

Furthermore, only the second-lowest bidder gains interested party status [Ref. 54]. A Federal Circuit Court limited who may gain interested party status and thereby reduced the Board's jurisdictional reach. However, the Board regained some of its jurisdiction on July 20, 1990. The Board decided that the second-lowest bidder standing applied to sealed-bid procurements only. It does not apply to negotiated procurements. Since the Board or agency may find it necessary to modify a solicitation, the second-lowest bidder cannot be determined directly [Ref. 55].

d. Decisions

The GSBCA issues binding opinions for all Federal agencies regarding acquisition of FIP. The opinions can be appealed to the U.S. Court of Appeals for the

Federal Circuit. Since the GSBCA is part of the Executive Branch of Government, there is not a problem of constitutionality with GSBCA decisions as discussed below in GAO decisions¹.

GSBCA has ruled that it will not give deference to the agency's decision like that of the GAO. [Ref. 56:p.73] As noted by an American Bar Association report, the GSBCA is not hesitant to substitute its judgment for that of an agency official [Ref. 2:p. 11;Ref. 33:p. 36-39].

Further, the GSBCA's burden of proof upon the protestor is relaxed. The Board stated very early its position in deciding protests brought before it:

[W]e decline to impose upon protestors the 'heavy burden' to show a 'clear and prejudicial' violation of law. All that is required by the CICA, and all that will be required here, is a showing of a violation of a statute, regulation, or delegation of procurement authority.² [Ref. 2:p.11]

The GSBCA requires only a preponderance of evidence that there has been a violation of a statute, regulation, or delegation of authority [Ref. 56:p. 73]. This means that an agency is not presumed to be correct.

The Board will normally issue its final decision within forty-five working days after a protest is filed.

e. Discovery

This forum allows a comprehensive discovery process. Discovery in GSBCA includes depositions and interrogatories by both the contracting agency and the protestor. GSBCA may issue subpoenas to get documents to aid discovery. Probably the single most GSBCA procedure subject to abuse is the discovery process. All interested parties can obtain information that was not available to them prior to the protest. Some of this

¹For a further discussion of the constitutionality issues involved in GAO and GSBCA decisions see *Public Contract Law Journal*, Vol 15, No. 2, May 1985.

²Case cited is GSBCA 7702-P

information may fall into the category of proprietary. The Board makes a determination regarding what must be disclosed. Discovery will be allowed for the "expeditious, fair, and reasonable resolution of the protest." [Ref. 32:p. 141] This can be successfully argued by the protestor to allow him access to sensitive information. Fortunately, discovery also works in the favor of both parties. It may lead to a better understanding of the dispute and a subsequent resolution without Board intervention.

f. Stay Authority

The Board has the authority under CICA to issue a "stay" for both pre-award and post-award protests. A stay is similar to an injunction or temporary restraining order. A stay by the GSBCA suspends, revises, or revokes the procurement authority of a GSA DPA. (A DPA is the authority granted by the GSA to a procuring agency for acquiring FIP). The Board must hold a hearing on the question of a temporary suspension of procurement authority. To gain a suspension of procurement authority (stay), the protest must be filed prior to award or within 10 calendar days of award [Ref. 7:para 759(f)(2) and (3)]. The Contracting Officer's defense is an "urgently compelling need." Unlike in the GAO forum, the Contracting Officer cannot override a stay decision by the Board. The protestor, in order for a stay to be granted, must demonstrate .."irreparable injury if the stay is not granted, ... no substantial harm to interested parties, ... and no harm to the public interest " [Ref. 32:p. 155].

g. Analysis

Congress favors the actions of the GSBCA. This is indicative of the permanent status it was granted in 1988. The GSBCA has gained a reputation as an enforcer of competition. This is not only looked upon favorably by Congress but also by protestors. In the period from Jan '85 to Sep '90, 49.3% of the protest cases filed with the GSBCA were either granted or settled (presumed satisfactorily to protestor). Only 25.3%

of the protest cases were dismissed or denied [Ref 57]. Remaining cases were withdrawn. A Contracting Officer arguing a protest at the GSBCA should be well prepared to defend his position. The tools of discovery and stay and the Board's application of proof requirements are generally in favor of the protestor. This is not to say that a Contracting Officer will always lose. But, if he intends on having a reasonable chance of "winning," he had better spend an adequate amount of preparation time during the award process in documenting his decisions. In fact, it was near unanimous in the researcher's telephone interviews, that the biggest impact that the GSBCA has had on ADP/FIP procurement procedures is the necessity to document every element of the procurement.

C. LEGISLATIVE FORUM

The only legislative body for bid protest and contract disputes is the GAO. This is an arm of Congressional power, and thus must be kept separate from Executive power.

1. GAO

a. Authority

The GAO's Comptroller General's authority to resolve bid protests did not come from a particular statute. The jurisdiction evolved out of the GAO's "statutory authority to settle public accounts." [Ref. 56:p. 69] The GAO, lacking any specific grant of authority, is merely a legislative body whose decisions are not binding on the procuring agency. The decisions of the GAO are "recommendations." The agency may disregard the GAO recommendation, but is required to notify the GAO of its intent. The GAO, in turn, must inform Congress [Ref. 2:p. 17]. If the Contracting Officer chooses to not follow the advice of the Comptroller General, he may be held "personally liable for a payment made on an improperly awarded contract" [Ref. 5.p. 262]. The GAO being a legislative body acting in stead of Congress and not the Judicial Branch (nor the

Executive Branch) cannot invoke an injunction or Temporary Restraining Order (TRO). This is something only a Federal court can do. The CICA, in 1984, codified the authority of the GAO to hear bid protests. However, this did not change the legislative stature of the GAO. GAO in response to constitutionality criticism of its new codified authority stated that its "protest decisions would continue to be recommendations, not binding decisions and the GAO would not be able to order an agency to take specific action." [Ref. 58:p. 182] CICA further granted the GAO "staying" authority. The stay authority is automatic if a protest is filed prior to award or within 10 calendar days. This gave GAO power to suspend award or performance of contracts that are pending resolution. Other than semantics, this is essentially the same as a court ordered injunction or TRO.

b. Timeliness

The protest can be filed with the GAO during the solicitation process if the basis for the protest is apparent. Otherwise, it must be filed within 10 working days after the basis for the protest is "known or should have been known." Note the difference in requirements for an automatic stay of 10 calendar days and timeliness of 10 working days. It is possible to have a timely filed protest but not be granted an automatic stay by the GAO.

c. Decision Making

The GAO is required to issue a decision within 90 working days of the protest filing. There is an "express option" whereby the procedural process will be shortened to 45 days. The GAO prefers this method, but it must be agreed upon by all concerned parties to the protest. [Ref. 59:p. 140] Again, the GAO's decisions are only recommendations — they are not binding.

A major difference between the GSBICA and GAO is in the decision making process. In its decisions, the GAO does give deference to the agency's opinion [Ref. 55:p.

73], unlike the GSBCA. This means that the procuring agency is presumed correct. The GAO further imposes upon the protestor the burden of proof of "clear and convincing" evidence of a procurement violation [Ref. 56:p. 73] and that the agency action is arbitrary, unreasonable or an abuse of discretion [Ref. 33:p. 10-12].

GAO decisions are based on the written record submitted before it. There is no opportunity for ascertaining disputed facts [Ref. 5:p. 267]. Because of the "clear and convincing" evidence rule, the GAO has been under exceedingly increasing criticism by procurement interests (lawyers, commercial firms, and congress). This forum is going through some slow changes that may transform the face of decision rules more in favor of competition and consequently the protestor. As part of the changes, a discussion of discovery and protective order will follow.

The GAO may refer a protest case to the claims court in areas where it has decided it does not have jurisdiction. Usually, this applies to cases involving constitutionality or criminal and tort cases. Also, the GAO will not normally hear protest cases involving subcontractors. There are exceptions however. The GAO will not refuse a protest case involving a cost reimbursement contract where refusal would be prejudicial to the Government.

d. Discovery

The GAO did not have a discovery mechanism like that of the GSBCA until after 1988. Protestors used the Freedom of Information Act (FOIA) to obtain necessary information for protests. FOIA requests were usually slow and the response could be delayed. The 1988 change allowed the same discovery-type process as that of the GSBCA.

e. Protective Order

On April 1, 1991, GAO's revised bid protest rules took effect. A major change in the discovery process involves "protective order." A protestor's in-house corporate counsel will be able to receive proprietary data and other useful confidential information. [Ref. 59:p. 115] The protestor's only requirement to receive this information is that he submit affidavits indicating that the information will be protected and safeguarded against disclosure to other parts of the corporation. This researcher believes it is naive to think that the in-house counsel will separate his interests from that of his corporate paycheck writer.

f. Analysis

GAO, is probably the most "friendly" forum for a Contracting Officer to find himself in. But, the GAO protest process is changing. Thirty percent of the protest cases were either sustained or corrective action was advised. Seventy percent were either denied, disposed or withdrawn during 1990¹. Between the period of 1978 through 1982, only five to six percent of protests filed were sustained. [Ref. 24:p. 2] The researcher suspects that the Government will "lose" more cases in the future. In changing the bid protest rules, along with the protective order, the GAO may now award attorney fees and other protest costs. With the incentive increasing for protestors to take their case to the GAO, corporations will be more apt to find "hired guns" to do their bidding within the GAO. Unless the Government is willing to fight back with its own specialists, i.e., "hired guns," more future cases will be decided in favor of the protestor. As this happens the only advantage the Government has, GAO's presumption of agency correctness, will be eroded.

¹Source: IRMC

D. JUDICIAL FORUMS

The Contract Disputes Act states that the decision of an agency board of contract appeals shall be final. However, a contractor still can appeal the decision to the US Court of Appeals for the Federal Circuit within 120 days. A protestor may go directly to the courts and bypass the boards. This is done because of the feeling by a contractor that review by the Contracting Officer, higher authority in the procuring agency, or the Comptroller General of the GAO is inadequate. The perceptions of inadequacy have been discussed above. Burdens of proof, GAO rules, presumptions of correctness and the small percentage of protests that are sustained by the GAO [Ref. 24:p. 1] lends credence to perceptions of inadequacies from the protestor's point of view.

Courts tend to be more assertive in cases (1) involving possible violations of regulatory procedures, and (2) requiring regulation interpretation. [Ref. 60:p. 660]

Courts consider themselves competent to decide what are essentially "questions of law" or interpretation. The three forums that will be briefly discussed here are the U.S. Claims Court, Federal District Courts, and the U.S. Court of Appeals for the Federal Circuit.

1. United States Claims Court

The U.S. Claims Court (Claims Court) is a national court authorized to sit anywhere in the United States in "order to minimize inconvenience and expense to litigants" [Ref. 23:p. 532]. Its jurisdiction is defined by subject matter not geography. [Ref. 23:p. 532] The Claims Court has a controversial past regarding its jurisdiction. In general, it is limited to hearing pre-award protest suits. A protest may arise even during the solicitation phase not just the selection phase of a procurement. The Courts biggest advantage was the ability to issue an injunction prior to contract award or the beginning of contract performance.

The Scanwell [Ref. 31] doctrine which "favors review for those who are likely to be injured by illegal agency action" is accepted by this Court. It opens the opportunity

for potential contractors and interested parties to be heard in this court when they might not have been in other forums. This is the "Court of last resort" where a protestor goes when he hasn't followed other legal and administrative procedures. If a protestor does not meet the filing requirements (especially in regards to time) of other forums, the Claims Court is his means for a remedy.

This is the Court the Contracting Officer would least prefer. The Contracting Officer's conduct will not be measured against the Administrative Procedures Act (APA)¹ [Ref. 24:p. 6] This Court limits itself to determine whether there has been a breach in considering a bid fairly and honestly. [Ref. 24:p. 6] This means that the Court will intervene where the Contracting Officer's actions are deemed irrational or unreasonable. In other words, this Court has shown its willingness to replace the Contracting Officer's decision with its own favored opinion/judgment.

A protest can be simultaneously filed in the Claims Court and an agency's Board. The court has no jurisdiction where the same claim is pending in any other court. [Ref. 5:p. 350]

2. U.S. District Courts

This Court has concurrent jurisdiction with the Claims Court. Even though the language establishing the Claims Court gave the Claims Court "exclusive jurisdiction"[Ref. 60] brought before an award is made, the Federal Circuit Court of Appeals has interpreted the Act as granting concurrent jurisdiction over pre-award claims. Therefore the District Court has both pre-award and post-award jurisdiction [Ref. 23:p. 539] The advantage for the Contracting Officer is that the standard of review

¹APA states in part the reviewing Court shall ... "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...".

is found in the APA [Ref. 62:para 701]. However, the District Courts are limited by the Contract Disputes Act of 1978 which took away its jurisdiction "over any civil action or claim founded upon any express or implied contract ... not sounding in tort." [Ref. 5:p. 351] This translates to: if a Contracting Officer or an Agency is in a U.S. District Court forum for a pre-award protest, it is for the purpose of resolving a criminal suit. The District Court retains the exclusive judicial jurisdiction for the hearing of all post-award protest suit.

The location of a court is a matter of choice to the protestor. This choice may give him a distinct advantage in litigation. He can choose to be heard in either 1) the District of Columbia, or 2) in the district where the contracting action occurs, or 3) the district where the protestor resides. [Ref. 24:p. 4]

The location advantage is offset by the protest action timing. The incurrence of significant performance costs prior to the issuance of a TRO or preliminary injunction may cause a Court to refuse to overturn an erroneous Contracting Officer decision on "public policy" grounds. [Ref. 24:p. 11] An injunction or TRO cannot be issued by the Court unless it has jurisdiction. Since in most cases the District Court does not have jurisdiction until after the award, it can not issue the injunction or TRO. Therefore as a matter of public policy, protests would not be sustained. The District Courts decided it would be more costly to the Government to terminate for convenience.

3. Court of Appeals for the Federal Circuit (CAFC)

This Court is limited in its jurisdiction. Although limited, it has jurisdiction over all appeals from decisions of the Claims Court and agency boards of contract appeals. [Ref. 5:p. 355] U.S. District Court's appealed decisions are heard by the U.S. Court of Appeals, except in the case of patents. The CAFC will hear patent appeals originating in the U.S. District Courts.

The CAFC uses a "clearly erroneous" standard when reviewing appeals from the Boards or subordinate Courts. [Ref. 5:p. 356] An appeal here should be to point an error by a lower court or board not to dispute the facts of the case.

E. SUMMARY

As a procuring official in the U.S. Government, the chances of defending against a bid protest in FIP are considerable. The choice of forum affords the Contracting Officer advantages and concurrent disadvantages. But the choice is that of the protestor's. Understanding the basic concepts of proof, discovery, timeliness, and standards of judgment prior to entering a court or board will help the Contracting Officer prepare his defense around the correct elements.

Currently the most advantageous forum for the Contracting Officer is the GAO. The least advantageous is the U.S. Claims Court. However, the GAO is changing and evolving with new rules of discovery, protective orders, and protest fee awards. As Mr. Peckinpugh pointed out "For Brooks Act procurements, the GSBCA has generally been the protestor's forum of choice since 1985" [Ref. 2:p. 10].

The Contracting Officer can expect an increasingly hostile environment in the protest resolution forums. A cliché that works here is: The best defense in a protest suit is a good offense. Yet, truly the best plan is protest avoidance. Proper planning and procedures during the solicitation and selection phase will not guarantee protection from protests, but it can certainly minimize them.

IV. METHOD OF RESEARCH

A. INTRODUCTION

The previous two chapters presented the environment for ADP/FIP acquisition and the forums for protesting an ADP/FIP procurement. This chapter will describe the methodology and concept for assembling the research data.

B. GENERAL METHODOLOGY

The research of this topic involved: 1) case analysis, 2) literature review, and 3) selected personal interviews. Some of the research questions posed in Chapter I were answered as a result of the literature review. It is worth noting that the preponderance of material involved the purely "legal aspects" of Board procedures (motions, stays, discovery, rules, etc.). Although the legal aspect is important and affects the procuring official's acquisition strategy, it was not the main thrust of this research. However, the researcher felt that the effects of the legal aspect are germane to the topic. A brief presentation of the material was presented in Chapter III.

The method used for the majority of this research was an analysis of the GSBICA cases as published in the General Services Administration's, Information Resources Management Service (GSA/IRMS) ADP Protest Reports. Published quarterly, the ADP Protest Report provides a synopsis of the cases where the Board issued a decision.

Decisions include only those cases that were granted, denied or dismissed. The ADP Protest Reports uses the following descriptions of granted, denied, and dismissed [Ref. 63]:

granted includes:

- granted;
- granted in part;
- granted in part, dismissed without prejudice in part;
- motion for summary relief granted.

denied includes:

- denied;
- denied in part, dismissed in part;
- denied in part, dismissed without prejudice in part.

dismissed includes:

- dismissal with prejudice;
- dismissal without prejudice;
- dismissal for lack of jurisdiction;
- dismissal for lack of interested party;
- dismissal for lack of protest basis;
- dismissal for untimely filing; or
- dismissal of other various GSBICA rules.

1. "Granting Rates"¹

Beginning in January 1985 to March 1991 there have been a total of 1251 protests to the Board.² During this time, 148 cases have been granted. A pure statistic indicates that only 11.8% of all protests filed with the Board have been "granted" as defined above. However, a further statistic is of value to show the Boards "real" results. Subtracting out the cases that have been withdrawn or settled leaves the Board with a total of 477 protests to be formally heard. The 148 protests granted now represent a 31%

¹Source: Developed by the author from information in ADP Protest Reports.

²Actual protests for this time period are 1334. Excluded from this number are protest that were withdrawn from the Board because they were erroneously filed with the wrong forum or dismissed by the Board for lack of jurisdiction. The excluded dismissed cases are cases that clearly did not involve ADPE and where jurisdiction of the Board was not a "genuine" issue.

rate of protests granted. Still further, a third rate can be determined. By discounting the cases heard but dismissed (146 protests) for lack of jurisdiction or other reasons, the Board's "granting rate" climbs to 44.7 percent.

The cases reviewed for the data base in this research yields similar "granting results" to that of the total population. See Figure 4.1 for a depiction of the cumulative and sample population protest results. Appendix B contains the quarterly protest results used for the summary in Table 4.1. The two year period is considered more reflective of the Board's current positions on the issues, and thus will result in more current and useful findings.

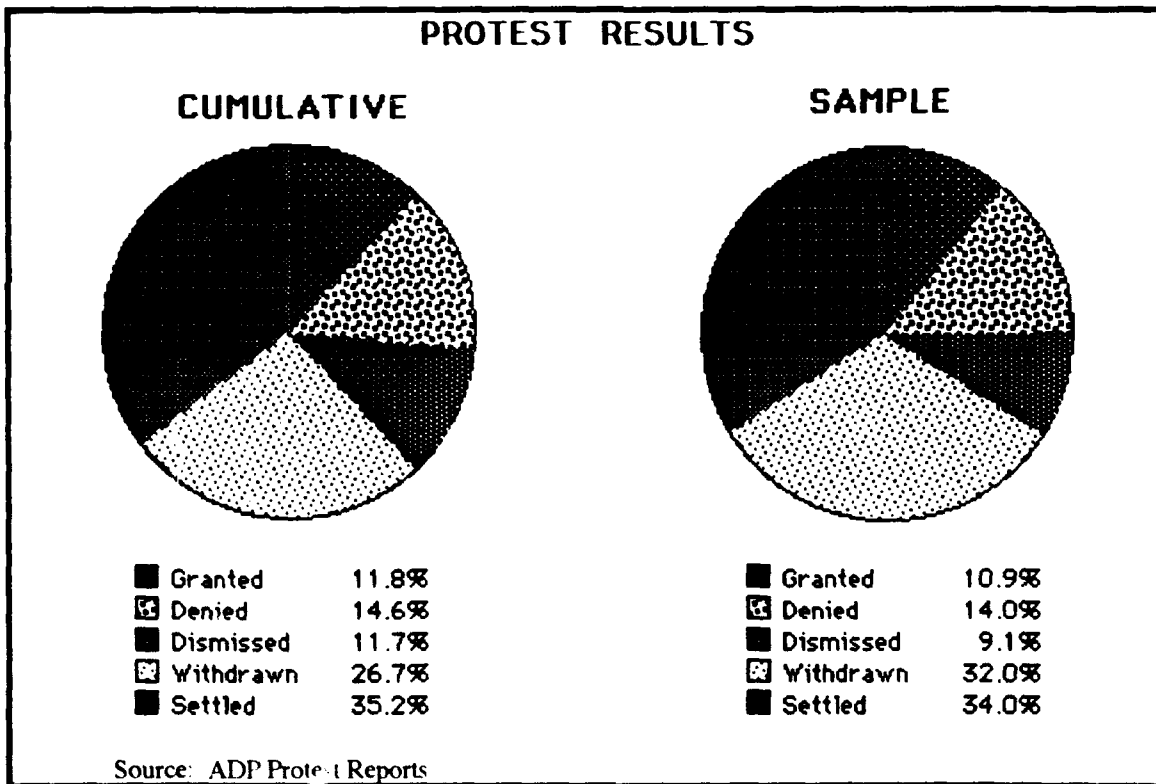


FIGURE 4.1. PROTEST RESULTS

**TABLE 4.1
QUARTERLY PROTEST GRANTING RATES**

	Sample Granting Rates	Population Granting Rates
Overall	10.9%	11.8%
Formal Hearing	32.0%	31.0%
Jurisdictional	43.8%	44.7%

2. Dismissed

Cases dismissed "for cause" are only partially included in the data base. "For cause" includes dismissals of cases as described above. Cases that are dismissed "without cause" fall into the category of withdrawn or settled.

In dismissed cases, the "issues of merit," as defined below, are not addressed by the Board; therefore, they are not germane to the analysis conducted. If issues of merit of cases dismissed for cause were included, they would taint the results of complaints versus decisions.

However, in dismissed cases, the "issues of jurisdiction," as defined below, are included in a separate section of the data base. The issues of jurisdiction were not analyzed in detail as were the issues of merit. The issues of jurisdiction are included for informational purposes only.

3. Withdrawn or Settled

Cases that are withdrawn or settled prior to a Board ruling are not included in the data that follow. Analysis of cases withdrawn or settled would provide a realistic look at the problems faced by Procuring Agencies. This information proved to be difficult to gather and beyond the capabilities of the researcher. Currently, there does not exist a requirement for the Board to approve agency level settled protests; nor, does there exist a

mechanism to gather data regarding cases withdrawn or settled. *Despite its potential value, the researcher does not promote a system of gathering this data as would be mandatory if the proposed Senate Bill 3123 is enacted. The added documentary burden may well outweigh the benefits.*

4. Literature Reviews

Literature reviews included several law journals, GAO reports, and special reports by the Board and other "watchdog" interest groups. Interviews with Navy/Marine Corps procurement officials and attorneys supplemented the data developed.

5. Interviews

Personal and telephone interviews were conducted with Navy and Marine Corps Procuring Officials (see Appendix C for a list of interviewees). The interviews consisted of questions generally in line with those shown in Appendix D. Interviews were used to establish a framework of the issues confronting procurement officials and to validate the information developed from the case examinations. *The interviews confirmed much of the statistical data developed from the case analysis. Specific references to interviewee comments will be made to provide additional insight and amplifying information where appropriate.*

C. SPECIFIC METHODOLOGY

1. Case Studies

The case studies involved a two year period beginning 1 April 1989 through 31 March 1991. Duplicative cases, where identified as such, constitute one case for tally purposes. For example, where multiple protestors filed separate complaints against an agency for the same procurement - the conglomerate comprised as one case. A total of 175 protests make up the foundation of the case base; whereas the "real cases" (non-duplicative) totaled 155 for this period.

Each case synopsis was examined for the issues raised by the protesting and responding parties and extraneous issues raised by the Board. Each issue in the case was then assigned a keyword or keywords that best described the issue(s) as succinctly as possible. In order to avoid a built in bias for identification of issues surfaced in each case, a rigid list of issues and keywords was avoided. The ultimate list of keywords was dynamic and continually additive. However, to provide an element of stability, keywords inferred a specific definition. As keywords were developed, a definition was assigned in order to maintain continuity throughout the case study.

After the completion of keyword assignments for all cases, a keyword list was compiled. Appendix E contains a list of the cases examined and the keyword(s) assigned for each case(s)¹. While compiling the keyword list from the several cases, an attempt to limit the accumulation of keywords was undertaken. To this end, unique keywords of a few cases (the keyword assignment has an element of the researcher's subjective bias included) were combined with comparable keywords in the tallying process. The final list of individual keywords totaled 107. Appendix F contains an alphabetical list of keywords for the issues of merit and selected definitions where necessary.

2. Keywords

Keywords were then assembled into "group" headings (total of 20). The groups accumulated a listing of related keywords. The groups of keywords, subsequently, fell fairly neatly into two major divisions "issues of jurisdiction" (5 groups) and "issues of merit" (15 groups). Issues of jurisdiction deal with the Board's authority to hear the

¹Federal Circuit Court of Appeals cases are not included in the tally. The appeals are included for information purposes only.

merits of the case. Issues of merit are the alleged improprieties of the acquisition. The issues of merit also include areas of concern specifically raised by the Board, such as an agency's solicitation that "overstated the requirements."

A tally by quarter for each keyword of each case was assigned. The calendar year quarter was determined by the case's decision date as issued by the GSBCA. See Appendix G for the raw data results of this tally. This appendix represents an overall tally of the keywords of all cases examined.

The data were further refined in a similar manner for cases specifically *granted* by the Board. See Appendix H for raw data results of this tally. The foundation for this refined data base was the same as for the overall tally presented earlier. Of 56 protests granted during this period, 40 "case records" comprise this data base. Moreover, a keyword was credited with a tally only if it was an issue expressly granted by the Board. In other words, if an issue was raised by the protestor, but not specifically granted by the Board as a winning argument, it was not tallied. Several cases raised issues that were not addressed by the Board; the finding of fault in one area, on occasion, precluded the Board from determinations on other issues. Further, the "refined" tally of granted issues was applied only to issues of merit. This process was not carried out for issues of jurisdiction.

D. LIMITATIONS OF APPROACH

As intent as the researcher was at maintaining a method that could be duplicated to verify results, it would be impossible for another person to replicate the data base exactly as formulated here. Personal feelings, judgment, estimation, opinions, and bias are unavoidable. On occasion, a re-reading of a case synopsis yielded new keywords. The result appeared to depend on the reader's particular perspective at the moment. This phenomenon was discounted as a minor instability of the study. A comparison of this

researcher's keyword assignments and random case validation with keyword assignments by Mr. Jeff Tucker, GSA/IRMS (editor of the ADP Protest Reports) yielded comparable results.

Another limitation of the study involves the number of data points. As discussed more fully in the next chapter, very few data points were accumulated on the granted tally sheet (Appendix G). This impacted the rankings by groups. A granted issue data point on a "low volume" group could significantly change its ranking. In other words, the system proved to be sensitive with adding one more data hit, especially in groups with relatively few aggregated data hits.

An initial goal of the study was to conduct a quantitative analysis of the data. Again, due to a limited number and relatively few data points, the approach was deemed inadequate. This will be more fully explained in the next chapter.

V. PRESENTATION OF DATA

A. INTRODUCTION

The methodology of data accumulation and assimilation was presented in the previous chapter. The results of that effort are discussed below. This chapter presents the data developed and gathered by the researcher regarding the GSBCA protest decisions on the ADP/FIP acquisition and procurement process. An initial and primary effort of this research focused on a quantitative analysis approach for future trend identification. A secondary effort focused on a purely subjective and objective appraisal of the historical data derived from the case analyses.

B. QUANTITATIVE/REGRESSION ANALYSIS

A quantitative/regression analysis effort was abandoned for two reasons:

1. the partial failure of previous attempts, and
2. expert advice.

1. Previous Attempts

An analysis of the GAO pre- and post-CICA experience was conducted by Michael J. Walsh. His analytical evaluations provided inconclusive, low correlation results [Ref. 64:pp. 85-98]. Mr. Walsh attempted the use of several analytical tools to include linear regression, moving averages, and exponential smoothing. He rated the models as only "fair" and "emphasized that the various forecasting methods used do not present compelling evidence" [Ref. 65:pp. 93 & 94]. This analysis of the GSBCA, although different in focus, experienced the same basic problems. Low volume input (i.e., numerical data consisting of mostly ones and zeros) and seasonal swings combine to preclude meaningful analytic evaluation.

2. Expert Advice

Mr. Jeff Tucker, editor of the Protest Reports, possessing both legal and statistical experience suggested that attempts to provide quantitative trend analysis would be inconsequential [Ref. 65]. Also, Professor D. Barr, a mathematics instructor and statistician at the Naval Postgraduate School, suggested that a mathematical tool for analyzing the data in the manner the researcher sought was not attainable.

C. HISTORICAL PATTERN OF DATA

The pattern of the historical data suggests that it holds meager value for predicting the new issues of the future. The data does, however, provide useful information regarding the protest experience with issues of concern today. The evident patterns using subjective analysis can be put into two general classifications: a perturbation and a continuum.

1. Perturbations

Issues classified as perturbations had significant activity for a definite period of time then diminished as an important issue. A subjective analysis, see Table 5.1 and Figure 5.1, includes the following issues/keywords in the perturbation class.

**TABLE 5.1
PERTURBATIONS BY QUARTER**

<u>Group/Keyword</u>	<u>Quarter/Year</u>
Best Value	
low cost	2Q/FY90
most advantageous	3Q/FY90
Termination	
by agency	4Q/FY89
Discussion	
auctioning	1Q & 2Q / FY90
technical leveling	1Q/FY90 & 1Q/FY91
Equivalency	
brand name or equal	1Q/FY90 & 4Q/FY90 & 1QFY91

A group/keyword was classified as a perturbation, not because the number was necessarily high, but rather, was classified as perturbed if it appeared to have a cluster of occurrences relatively higher than its preceding and succeeding quarters.

A perturbation suggests that the Board addressed the issues adequately and defined the "rules of engagement" sufficiently. Subsequently, Government procuring officials and offerors adjusted their methods to comply with the Board's guidance. Conversely, if a method for smoothing the data to adjust for "seasonal" swings could be used without losing valuable data points, then the results may be different. Smoothing was not used because four (first two and last two) of the eight quarters in the study would be lost in the process. For example, the major groups - Discussion and Termination - were raised as issues at the beginning and end of a fiscal year. A smoothing technique may render these perturbations "normal." Even still, a conclusion may be drawn from perturbations caused by seasonal increases in protest observations. Agencies rushing to obligate funds prior to the end of the fiscal year, may have been inclined to satisfy an award loser to avoid litigation of a formal protest. This in turn caused protests by the terminated original

Perturbations

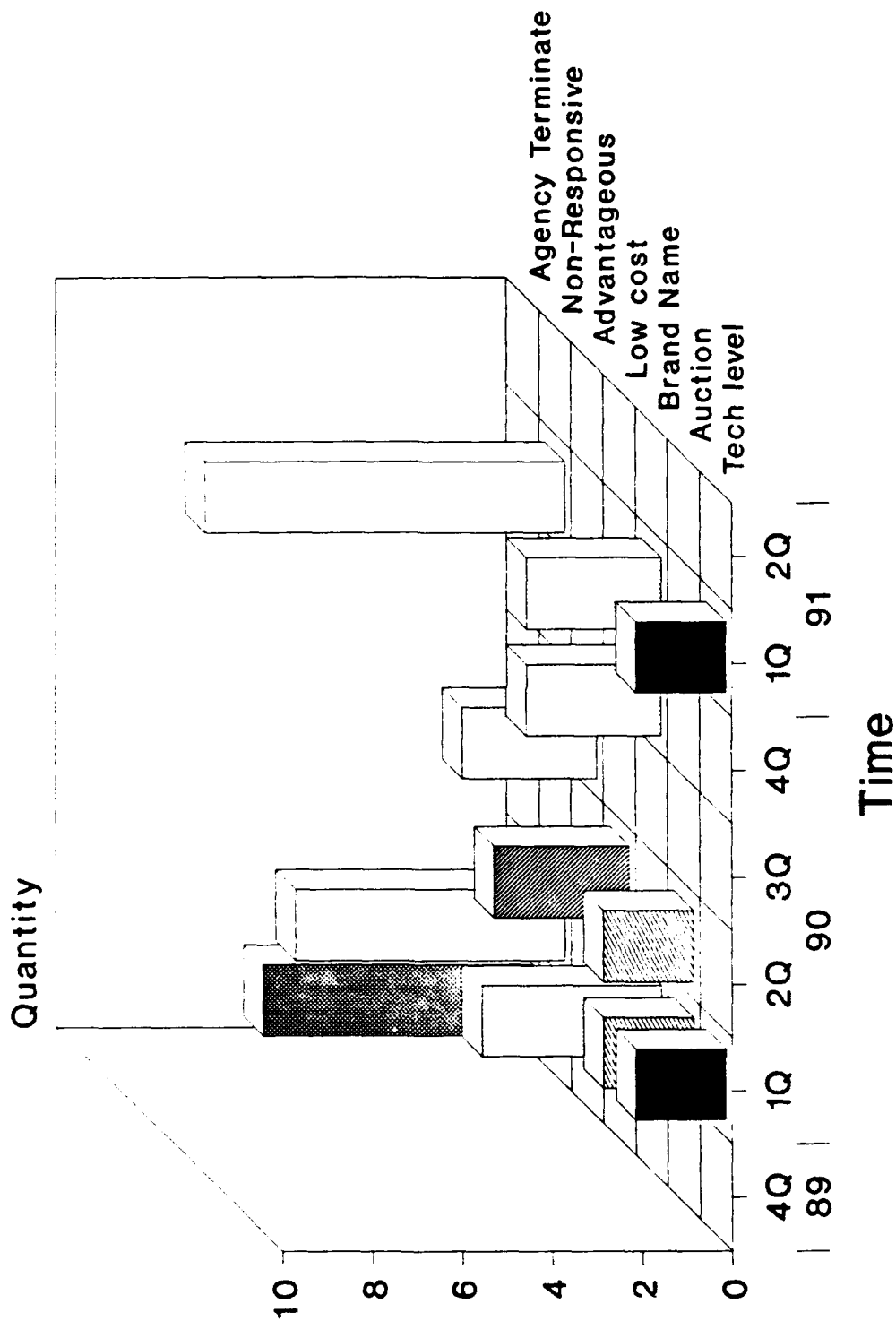


FIGURE 5.1. PERTURBATION ISSUES

awardee, thereby causing the agency to go to litigation to defend its actions. However, now the agency is defending a position that is nearly untenable. It must now defend a position that it erred in the first award and the second awardee should have been the original rightful awardee.

Likewise - Discussions, a major group - if smoothed, may not have stood out as an issue for classification as a perturbation. Discussions perturbed in this study in an apparent seasonal pattern during the first quarter of the fiscal year. This suggest the opposite phenomenon occurring than in agency terminations. Agencies are not necessarily "rushed" at the beginning of a new fiscal year, and therefore most likely take more time to conduct lengthy discussions. These in turn are perceived, rightfully or wrongfully as auctioning or technical leveling.

Additionally, the method of case/issue and keyword assignment used by the researcher is susceptible to an aggregation distortion. For example, the issues of auctioning and technical leveling are very closely related. In auctioning, a technical leveling process may be taking place, advertently or inadvertently. The scoring process of this research, in one case, assigned a tally to both keywords. In several cases, a single issue could be assigned more than one keyword. This was avoided to the extent possible, but the researcher sometimes felt it necessary to "double tally" an issue for data purposes.

Seasonal fluctuations are apparent when examining the number of issues raised per quarter. See Figure 5.2. The first quarter of the two fiscal years in the sample period indicates a dramatic rise in the numbers of issues raised. The end of a fiscal year and the beginning of a fiscal year also had noticeable increases in the numbers of protest filed for this same period. Despite the apparent seasonal problems in determining true perturbations, the data provides insight into the issues that emerge as a result of the fiscal environment or other outside influences.

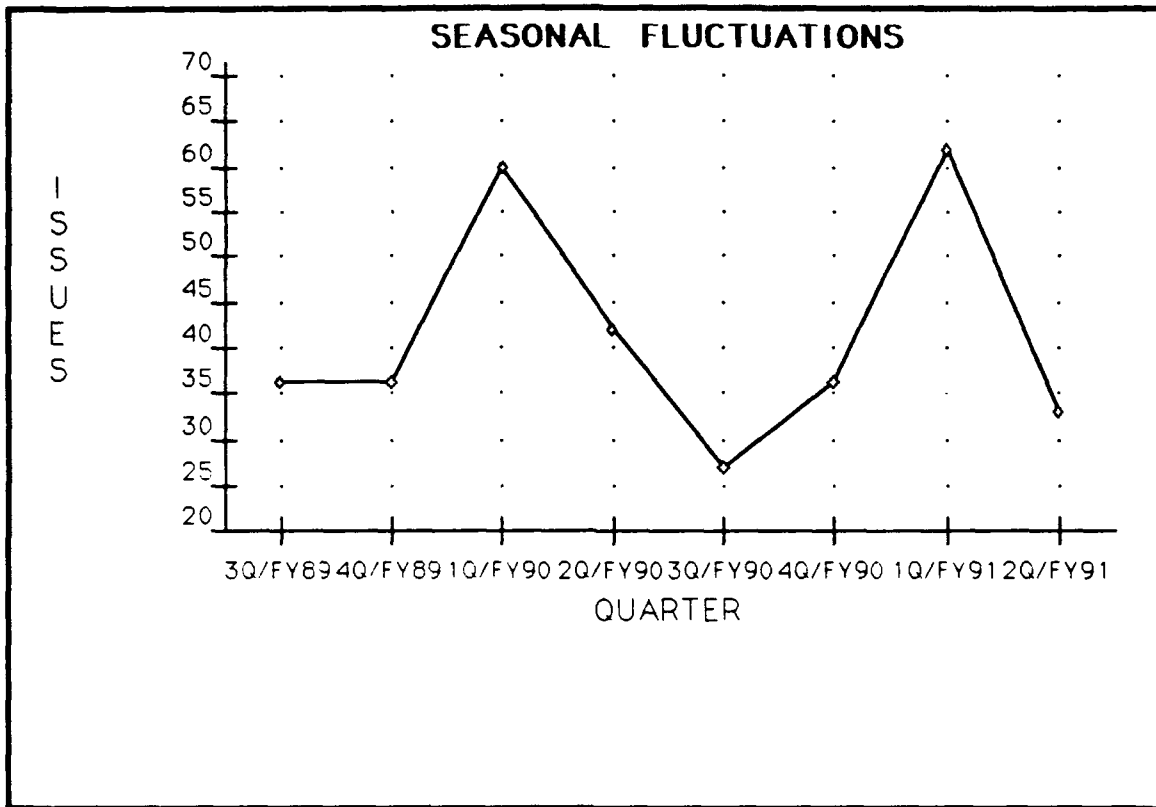


FIGURE 5.2. SEASONAL FLUCTUATIONS

2. Continuum

A subjective analysis indicates the issues of protest surfacing regularly. This list, see Table 5.2, consists of either:

1. an individual keyword where enough data points are regularly accumulated across the sample period to be of significance; or
2. a major group where the aggregate tally of keywords across the same period is significant while the individual keyword tally is not.

As in perturbations, it was not the quantity of data hits that accounted for a group/keyword to be classified as a continuum; rather, it was the steady accumulation of data hits regularly for the quarters in the study's sample period.

**TABLE 5.2
CONTINUUM**

<u>Group</u>	<u>Keyword</u>
Discussion	inadequate/improper
Evaluation	improper non-responsiveness responsiveness technical
Personnel	(as a group)
Solicitation	(as a group)
Specification	(as a group)

The groups and keywords identified in Table 5.2 are issues that the Board and Contracting Officers deal with routinely. Specifications, Solicitations, and Evaluations will be more thoroughly discussed in Chapter VI, Case Analysis. The group - Personnel - too: regular data hits throughout the sample period, but at a very low rate. The median data hits for Personnel was one for the eight quarters. The issues varied between resumés; conflicts of interest, and other Personnel issues. *Discussions and Personnel* issues will not be analyzed in detail in this study.

D. OBJECTIVE PRESENTATION OF THE TALLY RESULTS

1. Overall Analysis

The tally should be reflective of field procurement officials' perceptions of the prevailing protest issues. Indeed, it was unanimous of interviewees that the evaluation process was one of the most common reasons for protest complaints. Therefore, it is no surprise that the data also indicate that the evaluation process rated highest in reasons for protest. The evaluation process accounted for nearly 37% of all the issues raised during this two year period. The tally results for issues of merit resulted in a percentage ranking of the groups as shown in Table 5.3 and Figure 5.3. Within the top five groups, the keywords/issues that accounted for the most protests are presented in Table 5.4.

TABLE: 5.3
GROUP RANKING - OVERALL AND GRANTED

Group	Overall		Granted	
	Rank	Percent	Rank	Percent
Evaluation	1	36.6%	1	31.9
Specification	2	10.3%	3	15.3
Solicitation	3	10.3%	2	18.6
Discussions	4	9.4%	5	5.6
Best Value	5	4.5%	8	2.8
Termination	6	4.2%	4	8.2
Equivalency	7	3.9%	7	4.2
Regulation	8	3.9%	9	2.8
Personnel	9	3.6%	10	2.8
Procedure	10	3.3%	6	5.6
Bid	11	2.7%	12	1.4
Statute	12	2.4%	11	2.8
Competition	13	1.8%	13	2.8
Procurement	14	0.9%	14	1.4

The group percentages in Table 5.3 were calculated as a proportion of the sum of data hits for the sample period. There were 332 total data hits in the overall tally. Three groups - Evaluations, Specifications, and Solicitations - accounted for 57.2% of the data hits with 121, 35, and 34 (total -190) tallies respectively.

The keyword percentages of Table 5.4 were calculated as a proportion of their respective groups. Generally, the keywords that account for 2/3 or more of that group's issues are shown.

Complaints v. Grants

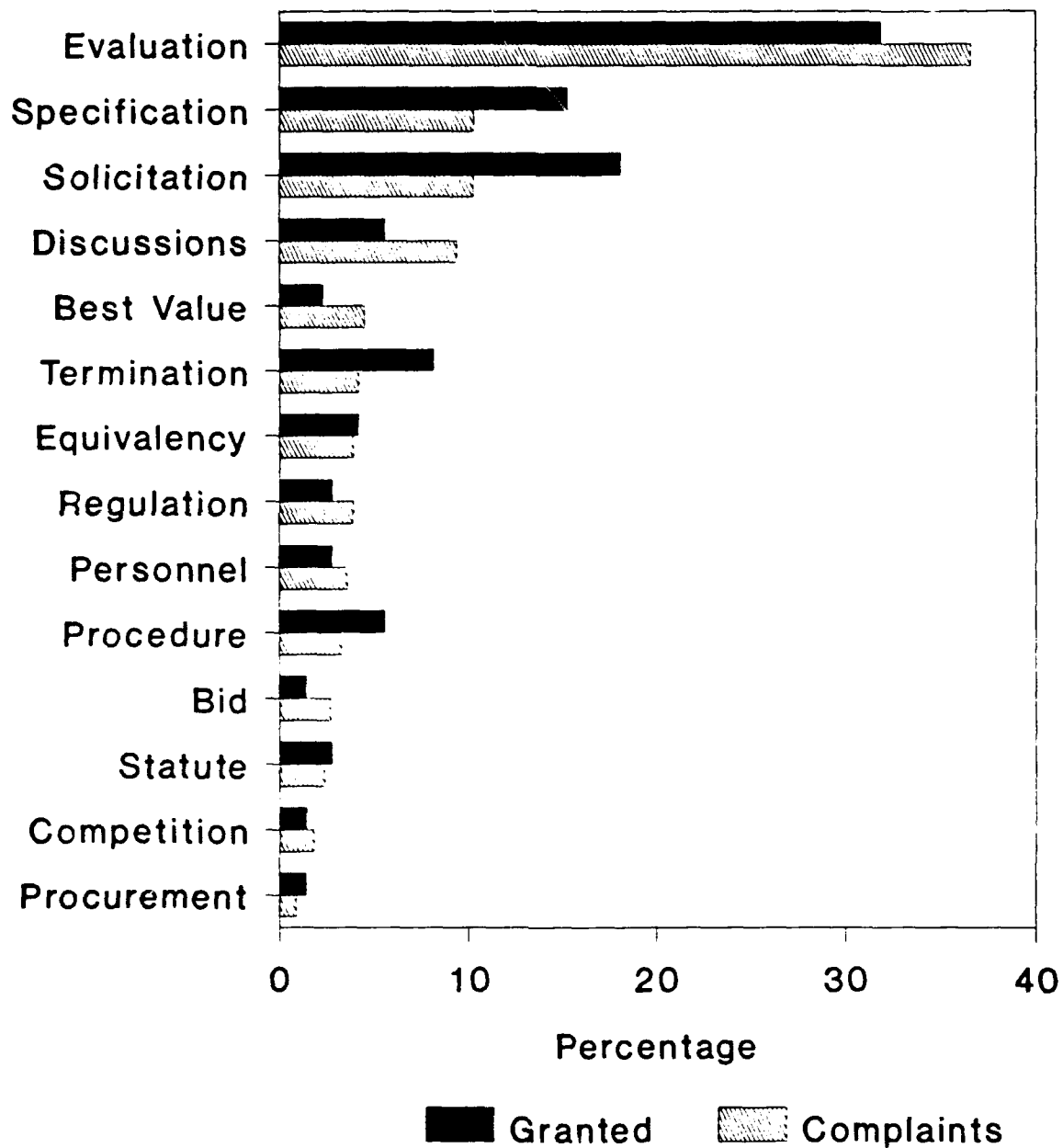


FIGURE 5.3. ISSUES OF MERIT RANKINGS

TABLE: 5.4
TOP FIVE PROTESTS ISSUES BY
GROUP AND KEYWORD

<u>Group/keyword</u>	<u>Percentage of group</u>
I. Evaluation	
responsiveness	.20
non-responsiveness	.15
technical	.15
improper	.15
competitive range	<u>.07</u>
	.72
II. Solicitation	
ambiguous	.17
cancellation	.14
inaccurate	.11
incomplete	.11
overstated requirements	<u>.11</u>
	.64
III. Specification	
restrictive	.29
ambiguous	.20
commerciality	<u>.17</u>
	.66
IV. Discussions	
inadequate/improper	.54
technical leveling	.16
auctioning	<u>.12</u>
	.82
V. Best Value	
low cost	.53
most advantageous	<u>.46</u>
	.99

2. Granted Analysis

As discussed in Chapter IV, a tally of keywords for cases granted by the Board was accomplished. Fifty-six cases were granted, using the definition of Chapter IV, during the sample period. The data represent 40 cases; 16 cases were not included to avoid duplicative scoring. Table 5.3 ranks the groups using percentages of issues granted

by the Board as a proportion of the sum of all issues granted. Again, Evaluation ranked number one with 23 granted data hits. Specifications and Solicitation exchanged seats for the second and third chair with 11 and 13 granted issues respectively. Between these three groups, 65.8% of all issues granted reside. That is 47 of the 72 issues granted by the Board.

A comparison of the rankings between overall and granted, indicate very little displacement of the groups. The two groups with the largest displacement, actually are not considered notable.

Best Value (5 to 8) and Procedure (10 to 6), as are all groups below three, are extremely sensitive to the number of issues granted for their ranking. The data hits (25) exclusive of the top three are distributed amongst the other 11 groups. One granted data hit means 1.4%. The percentage rankings are essentially meaningless for the group ranks. It is better to refer to the most and the least granted groups. The objective analysis using percentages for ranking the granted issues is a system that is only fair at best.

Continuing to use the same lexicographic analysis as above (i.e., determine the highest granting rate by group, then by individual keyword within the group), resulted in the presentation of Table 5.5. Due to the weakness of a percentage ranking discussed above, percentages are not provided. Although, percentages were used to derive the presentation of Table 5.5.

TABLE 5.5
TOP FIVE GRANTED ISSUES BY
GROUP AND KEYWORD

-
- I. Evaluation
improper
responsiveness
 - II. Solicitation
overstated requirements
CBD synopsis
inaccurate/incomplete
 - III. Specifications
restrictive
commerciality
 - IV. Discussions
inadequate/improper
auctioning
 - V. Procedural
all in group
-

E. WEIGHTED INDICES

The information above is interesting alone. Much analysis could be accomplished. Some generalized observations have been made with the data, but within the limitations as pointed out above. However, this researcher devised a mathematical scheme to compare the sample periods overall data of Appendix G with the granted data of Appendix H. The application of the formula returns an index number for each group and keyword. The resultant index is an indicator of how each keyword compares with other keywords in terms of success and failure (dependent on point of view) as issues before the Board.

1. The Formula

A data point was considered an equal part of the whole. Each data point was weighted as $1/332$ and $1/72$ for the overall and granted tallies respectively. Data points

were summed across the quarters for each keyword for both the overall and granted tallies. The sums were then multiplied by the weights determined by the aggregate of all data points for their respective lists. The value obtained for a keyword on the overall tally was subtracted from the value obtained for the same keyword on the granted tally sheet and finally, multiplied by 100. See Figure 5.4 below.

$$\left[\left(\sum_{q=1}^8 k_{q}^{Gr} \right) \left(\frac{1}{\alpha} \right) - \left(\sum_{q=1}^8 k_{q}^{Ov} \right) \left(\frac{1}{\beta} \right) \right] * 100$$

FIGURE 5.4 WEIGHTED INDICES FORMULA

where:

k^{Gr} = keyword tally point in quarter q , granted.

k^{Ov} = keyword tally point in quarter q , overall.

and:

q = quarters 1 through 8 of the sample period.

α = total data points on granted tally sheet.

β = total data points on overall tally sheet

2. Interpreting the Results

The weighted index has no positive or negative bounds. In other words, there are no positive or negative limits to the values of the index; the index values may go to +/- infinity. However, it is very unlikely that the values will be very large at all. Indeed, the values for this sample period range from a -4.5 low to a +7.5 high. More sample data would likely have increased the range of values. (But again, the sample period was limited to the recent two years in order to obtain the most current "picture.") The more positive the value, the more likely that issue will be favored by the Board. The more negative the value, the less likely that issue will be favored.

3. Validity of Index - Examples

The index values are not percentages. A percentage of times granted over total times heard would yield the same results. For example, a keyword tally of 1/1 and 19/19

yield 100 percent. A keyword tally of 0/1 and 0/19 also yield equivalent results: 0 percent. The weighted index avoids this problem.

The index, due to its unbounded nature, provides a much higher positive value in the 19/19 case than the 1/1 case. Conversely, the 0/19 case provides a more negative value than the 0/1 case. See Table 5.6 for selected case values. Relatively speaking, a higher level of confidence can be attributed to the indexes worth the more positive or more negative the value. An (leap of faith) assumption here is that the more often an issue is raised before the Board, the more in depth the nuances of the issue are explored. The formula accords more weight to an issue the more often it is placed before the Board for a decision.

**TABLE 5.6
SAMPLE INDEX RESULTS**

GRANTED	TOTAL	PERCENT	INDEX
1	1	100	+1.1
19	19	100	+20.7
5	10	50	+3.9
10	20	50	+7.9
0	1	0	-3
0	19	0	-5.7

4. Index Results

The raw-score, index calculation results are presented in Appendix I. This Appendix displays the sample period - overall and granted - tally totals, and the index scores. The relative index weights of each group are presented in Figure 5.5. Solicitation and Specification has a solid command of the first two positions with index scores of 7.5 and 5.0 respectively. Evaluation moved from always first by percentages to last by means of the weight index (-4.5).

Weighted Indices

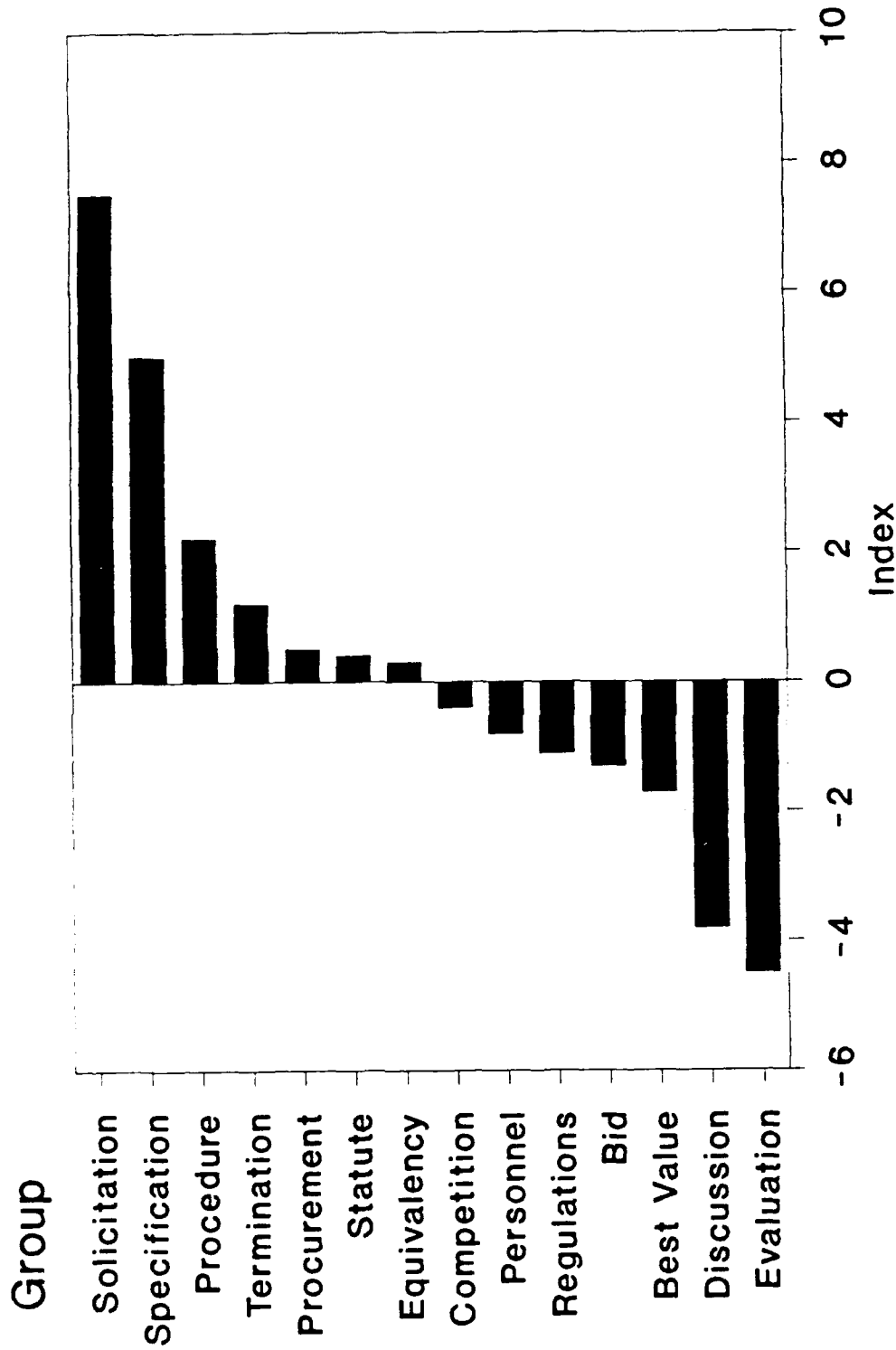


FIGURE 5.5. RELATIVE GROUP INDEX WEIGHTS

F. SUMMARY

This chapter presented the case study results in four formats:

1. Subjective analysis of
 - a. perturbed issues and
 - b. continuous issues,
2. Objective overall percentage rank from sample period data,
3. Objective granted percentage rank from sample period data, and
4. Indexed rank from sample period data.

The data were supported by graphs, tables and charts . Evaluation, Specification, and Solicitation, as major groups, were cited as continuing issues (i.e., continuum) and they also rated highest of all the groups by objective percentage ranking for overall issues and granted issues. However, by the weighted index ranking, Solicitation and Specifications rated as issues most favored by the Board. Evaluation fell to the least favored issue by the Board.

The next chapter will explore the reasons for the weighted index rankings. Case decisions and opinions of the Board will be discussed for the top two groups (Solicitation and Specifications) and the group that dramatically shifted to last (Evaluation).

VI. CASE ANALYSIS

A. INTRODUCTION

"The trend [in ADP] is to protest," CDR Ken Dewell noted [Ref. 66]. Michèle Templeman made a statement to the effect, that "if you think it uses ADP, if it might use ADP, or if there is a probability that ADP will be used, then it probably is ADP" [Ref. 67]. With these two general comments from two very knowledgeable and respected professionals in ADP/FIP acquisition, one can comprehend the value of knowing the reasons for protests. Knowledge of the protest issues and the GSBICA tendencies may help a Contracting Officer to avoid a protest, which is an intelligent goal in ADP/FIP contracting. If a protest cannot be avoided, knowledge of GSBICA decisions and interpretations regarding the issues may help the Contracting Officer weight a decision in favor of avoiding or pursuing litigation.

The data presented in the previous chapter noted the leading issues in a protest by percentage of total of protest issues. Also noted is the leading issues sustained in support of the protestor by percentage of granted issues. Finally, a formula to weight the issues and comparatively rank them was presented. The weighted indices was used to determine the issues to explore in more depth. A discussion of the issues identified by means of the weighted indices follows.

B. ANALYSIS VIA THE WEIGHTED INDICES

1. Problems Start at the Beginning

"Most failures begin with not defining your needs properly" [Ref. 6]. Indeed, the two group issues that remained with highest ranking throughout the different analyses were Specification and Solicitation. These two groups ranked consistently in the top three.

In the weighted index, Solicitations ranked highest with an index score of +7.5. Specifications ranked second with an index score of +5.0. Evaluations fell to last with an index score of -4.5.

It is worth noting, that many times throughout this study, the analysis was made difficult by the inability to differentiate between a strictly Specification issue or a Solicitation issue. The issue was sometime blurred as to the correct categorization. Because of this "blurring," it could be argued that the Solicitation and Specification groups should be combined into one. The researcher will not combine Solicitation and Specification for objective analysis purposes in this research. However, if they were combined, it would have a dramatic effect on the quantitative results. The combination of the two groups would consistently outreach any other issue of contention.

For the quantitative/objective analysis, the keywords have not been combined. However, in the case analyses of the issues at hand in this chapter, Specification and Solicitation will be combined. The keywords/issues that "win" at the GSBGA have similar implications from both the Specification and Solicitation groups. The leading keywords for Solicitation and Specifications and their index score are presented in Table 6.1.

TABLE 6.1
SPECIFICATION/SOLICITATION KEYWORDS

<u>Group/Keywords</u>	<u>Weighted Index</u>
Specifications —	
defective	+2.2
restrictive	+1.2
Solicitation —	
overstated requirements	+4.4
CBD synopsis	+3.3
amendments	+1.9

2. The Competition Angle

The Board established a penchant for competition early. In its first ten months of existence, the Board "enforced competition' 59 percent of the time" [Ref. 32:p. 159]. The weighted indices analysis bears out the fact that this is just as true now as it was earlier. From the researchers perspective, all five keywords listed above are dealt with by the Board from a "restrictive competition" interpretation. Additionally, many of the other groups and keywords could be linked to the Board's propensity to interpret the issues with some hint of avoiding "restrictive competition."

As will be presented, — Specification, Solicitation, and Evaluation — are evaluated by the Board with a view towards competition. The researcher will examine the Board's direction in regards to Specification and Solicitation as a whole, then turn to an examination of the evaluation issues and other pertinent issues that surfaced during the case analyses.

C. RESTRICTING COMPETITION VIA SPECIFICATIONS AND SOLICITATION

There are limitations on competition inherent in all procurements. . . . There is only one issue: are the agency's needs such that it acted properly - reasonably, legitimately, permissibly - in narrowing competition¹ [Ref. 38:p. 270].

The Board has held that it will not take issue with an agency's narrowing of competition in pursuit of legitimate agency requirements, but it can and will overturn those requirements that improperly limit competition² [Ref. 33:p. 39]. All specifications to one extent or another limit competition. The determining factor for the GSBCA regarding restrictive competition is whether the agency's specification/solicitation states requirements beyond its needs.

In this researcher's opinion, this is where the Board's judgment of agency needs takes on an air of controversy. The Board has noted that it will "grant deference to an agency's technical judgment, but . . . will not slavishly follow it." [Ref. 33:p. 39]. However, in practice and as demonstrated by the statistics, the protestor's best chance for "winning" is alleging restrictive competition. Again, restricting competition may come in many forms; however, the issues at hand appear to be the easiest, attainable target. Some Board decisions may be indicative of their persuasion.

1. Performance Requirements

In 1985, the GSBCA held that a performance requirement not being met was not sufficient grounds for disqualifying an offeror from competition. The performance requirement, as judged by the Board, was a Specification, not an Evaluation criteria. Had the performance requirement been a part of the Evaluation criteria, the Government, according to the Board, may have prevailed. Additionally, the Board said the agency

¹Case cited GSBCA 7929-P

²Case cited GSBCA 7927-P

could not justify its needs. Therefore, the agency overstated its minimum requirements¹. [Ref. 33]. This is a prime example of the Board's very liberal interpretation of a specification limiting competition.

2. New Versus Used Equipment

In 1986, a protest was upheld on the grounds of unduly restrictive specifications because the agency required new equipment. A major reason for granting the protest was that the Board found the agency's reasons for requiring new equipment non-supportable. The Board, in this decision, overrode the preference for new material set forth in FAR 10.010(a)² [Ref. 69:p. 17]. This marks again the Board's willingness to replace its judgment for the Contracting Officer's and its willingness to determine the "needs" of the agency. In this case, the Board granted the protest to "enforce competition." Additionally, the Board required that any restriction placed on the offering of used equipment must be justified and approved³ [Ref. 2:p. 22].

A GSA solicited non-mandatory schedules contract excluded used equipment from being offered. The Board granted the protest stating that competition should be open to all sources. Further, used equipment has the potential for providing the lowest overall cost alternative to the Government [Ref. 70]. It is hard to disagree with the reasoning of the Board regarding full and open competition. But in the opinion of this researcher, lowest overall cost gained by "competition" ignores most advantageous and life-cycle cost principles.

3. Justification and Approval

The Board, in a protest that it denied, openly stated its recognition that "every solicitation involves some restrictions . . . and is permitted under conditions which are

¹Case cited GSBCA 7927-P

²Case cited GSBCA 8131-P

³Case cited GSBCA 8131-P

necessary to satisfy [the] needs of any agency" [Ref. 71]. As evident from several cases, the agency should be well prepared to defend its position regarding needs and justification for limiting competition. In fact, the Board noted that restrictive specifications are acceptable if sufficiently justified by the agency¹ [Ref. 39:p. 51]. Further, this applies to software also (i.e., agency sufficiently justified the need for LOTUS 123 and dBase)² [Ref. 39:p. 51].

4. Economy and Efficiency

Convenience, economy, and efficiency are not valid reasons for limiting competition. In an "all or nothing" solicitation, the Government excluded an offer because it proposed using subcontractors. The Board opined that "economy and efficiency is best served by full & open competition." [Ref. 72].

5. Ambiguity

In this researcher's weighted indices analysis, ambiguity in both the Solicitation and Specifications rated low (-1.8 and -0.7). In the overall raw tally, ambiguity for Solicitation and Specification rated high. This seems to run counter to intuition. Upon further examination, this is consistent with the Board's ardor for competition.

A functional specification, that is ambiguous for the purpose of maximizing competition, is allowed. Where the ambiguity occurs, "the agency will be simply held to the least restrictive interpretation" [Ref. 73;Ref. 39:p 51].

If a protestor wants to challenge a Specification's or Solicitation's ambiguity, he must do it prior to the time required for submission of proposals³ [Ref. 39:p. 58]. Many of the ambiguity challenges are dismissed due to the timeliness issue (as discussed in Chapter III). If the protestor challenges the ambiguity after the proposal submission time,

¹Case cited GSBICA 91931-P

²Case cited GSBICA 8638-P

³Case cited GSBICA 9874-P

he cannot challenge the "ambiguity," but must challenge the reasonableness of the agency's interpretation¹ [Ref. 39:p. 58]. And if so challenged, "the agency must give the solicitation a less, rather than more, restrictive reading" [Ref. 39:p. 58;Ref. 34].

Additionally, many restrictive Specification protests are settled prior to filing a complaint or before a formal hearing with the Board. Mr. Tucker's informal study of withdrawn and settled protests, noted that many implicated a restrictive specification. He believes that it is in the agency's best interest to settle restrictive competition complaints, especially Specification and Solicitation issues, prior to formal litigations.

6. Amendment of Solicitation

"It is not improper to amend a solicitation to keep offerors in the competition so long as the amendment reflects legitimate Government requirements" [Ref. 74]. If amended, the agency must allow sufficient time for an offeror to respond [Ref. 75]. Further in the opinion of the researcher, the Board implied that amending a solicitation in response to a protest just to avoid litigation is unreasonable. The modifications in this case were "minor and did not reflect any changed requirements" [Ref. 76]. The Board granted the protestor's claim that the amendment was unnecessary. In the author's words, if a solicitation is amended, minor changes to satisfy a protestor is not sufficient. The solicitation must be altered as to reflect "true" changes of the agency's needs and minimum requirements.

7. Commerce Business Daily (CBD) Synopsis

CBD synopsis issues went three for three with an index score of +3.3, and therefore requires mention in this section. Again, the issues can be expressed in terms of competition. All the requirements and evaluation factors must be stated in the CBD

¹Case cited GSBCA 9874-P

synopsis [Ref. 77]. The Government must indicate its minimum requirements in the synopsis so "all prospective offerors can compete on an equal footing" [Ref. 78].

In another case, the agency did not synopsise its solicitation in the CBD as required by the GSA Handbook. In granting this protest, the geographic location requirement for teleprocessing services was considered competition restrictive. The solicitation required that the equipment be located in Washington DC, the protestor was in Johnstown, PA. The Board decreed "the end of a telephone line in Johnstown, PA, looks and performs much like the end of a line in Washington, DC." [Ref. 79]. The issues tallied under "CBD synopsis" did not necessarily deal with the CBD, inasmuch as the issues centered on the need to promote competition.

8. Section Summary - Solicitation/Specification

Competition is narrowed by the mere act of writing a specification. What is a reasonable limitation of competition has been addressed by the GSBICA in numerous protests. The Board has shown favor to protests complaints of unnecessarily restrictive Specifications. The Government, in order to prevail, must justify its minimum needs, and solicit only to meet its minimum needs. The Government's solicitation for its minimum needs cannot limit competition by excluding offeror's solutions that are not convenient for the Government or appear to be counter to economy and efficiency. Further, the GSBICA imposes upon the Government a duty to include the maximum number of offerors by interpreting both the Solicitation and Specification in the least restrictive manner. specifications that appear to be ambiguous are acceptable if the result enhances competition.

D. EVALUATION

Evaluation, as a group dropped to last in the weighted index analysis (score = -4.5). This was the most unexpected result of the weighted index analysis. In terms of raw tally

scores, Evaluation was the highest in overall complaints (121) and highest in complaints granted (23). Just the sheer numbers of complaints accounts for the apparent poor showing in the granting tally. However, by this researcher's analysis, it appears that the Government is doing better in Evaluation and selection process than the common perception would indicate.

The common perception, and rightfully so to a point, holds that the evaluation process is the cause of most protests¹. And, it is. However, by comparing the number of complaints versus those granted using the weighted index, it is evident that the Government is relatively successful in defending its position. The following comments may provide some insight to the Government's success.

In a decision regarding alleged agency bias, the Board stated the "presumption that Government Officials acting in the official capacity do so in good faith" [Ref. 80]

Mr. Carl Peckinpugh characterized the Board's persuasion very succinctly and clearly with:

Generally, in both the GSBCA and GAO, considerable discretion will be accorded to a source selection authority's reasonable exercise of discretion in selecting the successful offeror, and minor violations which are not prejudicial to the outcome will be tolerated. [Ref 2:p. 24]

Evaluation complaints centered on:

improper application of criteria	(19/7, index = +4.0)
responsiveness.....	(25/5, index = -0.6)
non-responsiveness	(19/1, index = -4.3)
technical evaluation	(20/3, index = -1.8)
and	
competitive range.....	(9/1, index = -1.3)

Additionally, use of a cost surcharge (2/2, index = +2.2), cost of doing business penalties, had a heavy influence on the Evaluation index score.

¹Source: Telephone interviews conducted by researcher.

1. Improper Application

The Board carries its penchant for competition into the source evaluation and selection process. Chief Judge and Chairman of the GSBCA Leonard J. Suchanek writes that "evaluation factors must not necessarily restrict competition" [Ref. 39:p. 52]. Disclosure of the pertinent factors and subfactors in Evaluation and selection are required by the FAR and FIRMR. These must be disclosed "in a manner that is not confusing" [Ref. 39:p. 53]. In this researcher's opinion, the Board is very strict in its application of the Evaluation factors as set forth in the solicitation. The decisions, in the large part, revolve around either "you did or did not" apply the criteria as stated.

The "gray" areas that creep into the process invariably involve interpretations and definitions. Terms such as current production [Ref. 81;Ref. 39:p. 54], formally announced [Ref. 82;Ref. 39:p. 54], and commercially available [Ref. 82] are terms that have caused problems recently. Mr. Peckinpaugh notes that:

The use of technical jargon as a short hand expression for what is desired is a very common mistake. Even . . . a requirement for commercial off-the-shelf products may be unacceptably vague. . . the parties all seem to interpret the provisions differently. [Ref 2:p. 25]

2. Responsiveness and Non-responsiveness

As used in this research, responsiveness and non-responsiveness are essentially the same. The not so subtle difference, however, is - who is complaining about what? In "responsiveness," the complaint is brought by a protestor claiming the awardee was not responsive. In "non-responsiveness," the protestor is denying the agency's evaluation of his own responsiveness.

In relation to each other, it is more difficult to have a protest sustained about an awardee's responsiveness. In the overall evaluation, Government agencies have generally made valid determinations regarding offeror's responsiveness.

The Board has taken a position that supports the data. "If an offer is deficient in an inconsequential manner that can be readily verified, so as to constitute a minor informality, its rejection is inappropriate¹" [Ref. 39:p 54]. In other words, a minor faux pas in the offer where the outcome is not effected will be tolerated. The Contracting Officer does not have to look for every little mistake in order to make a responsiveness determination. "Minor informalities [are] properly waived by Contracting Officer[s]"² [Ref. 39:p. 55]. In what should become a classic statement suitable for framing, the Board said, "Any good lawyer can pick lint off any Government procurement, . . . We will not set aside an award, even if violations of law are found, unless those violations have some significance" [Ref. 84]. An example of a minor informality that a Contracting Officer should be allowed to correct is a certification not completed by the offeror³ [Ref. 39:p. 54].

3. Technical Evaluation

This is not only a very difficult area for most Contracting Officers to understand, but it is also difficult to describe the synergistic effect the Board has had on technical evaluations. Several comments were received from interviewees that the Board does not always understand some of the complex technical issues. In the opinion of the researcher, the technical expertise assumed by the Board is based upon their position of final authority. However, the Board is required to make technical judgments when interpreting laws, statutes, and regulations.

Suffice it to say here that the Board's approach in technical evaluation is similar to its overall philosophy noted above - enhance competition and strict adherence to the

¹Case cited GSBCA 9508-P

²Case cited GSBCA 9548-P

³Federal Court Circuit No. 88-1106

specifications. Therefore, avoidance of the appearance of bias by the agency in the evaluation process and substantiated cost/technical tradeoff are demanded.

4. Documentation

The word substantiated cannot be emphasized enough. Most interviewees, stated that GSBCA decisions have caused them to more fully document their selection process. Subjective as well as objective reasoning is documented and substantiated completely. The documentation is accomplished with the forethought of protest litigation and defense. One interviewee said, "everyone involved in the selection process is a potential [protest] witness." As such, each is expected to thoroughly brief the chain-of-command and document the selection process.

A law review article stated,

The attorney should persuade both the Contracting Officer and technical personnel to do a thorough job of documenting the contract files, . . . because once a protest is filed, little time is available to prepare a well-reasoned justification. [Ref. 68:p. 269]

5. Cost Surcharge

Although the issue of cost surcharge appeared only twice during the sample period, it lent a high positive value to the index. The researcher feels that this is important to note because of the emergence of evaluation programs such as Red/Yellow/Green (RYG) in the Navy and Marine Corps. The RYG program, in a nutshell, tacks on a penalty, estimated to be the cost of doing business, to a proposal. A contractor is classified as either red, yellow, or green on various factors having to do with past performance and quality. Although, the researcher feels that this program has some merit, he also feels that the GSBCA will find fault if it is applied to ADP/FIP acquisitions.

The protestor maintained the surcharge was unreasonable. The Board granted the protest because it found fault with the study that estimated the cost of doing business [Ref. 85]. Taking this approach, the researcher feels that an estimate can always be found to have fault, or "lint."

6. Other Issues

a. Creative Offers

Some issues were not readily discernible from the study data. For example, the Board has ruled on creative offers. A creative price strategy is not a violation to be litigated. There is no "express prohibition" against it. The reason - competition. A competitive system encourages such flexibility¹. [Ref. 39:p. 55] However, the Board laid down its guidelines for Contracting Officers to follow when evaluating a "creative" offer. The Contracting Officer must:

- determine conformity to solicitation,
- determine if the offer meets agency requirements, and
- determine if all offerors had the same chance to be creative². [Ref. 39:p. 55]

Contracting Officers, now must pass judgment on the ability and opportunity of an offeror to be creative.

b. Judgment of Contracting Officer

There is an element of judgment rendered by the Board in every decision. Obviously, judgment was used in making the original award determination by the Contracting Officer and all the other members of the source selection team. As stated previously, the Board cannot impose its own views of agency needs [Ref. 7:para 759(e)].

¹Case cited GSBICA 8879-P

²Case cited GSBICA 9170-P

The Board's usual solution to resolving its "judgment" with the agency's needs, are to order the agency to re-examine its solicitation and the statement of their needs. Tally results are not available. This is a difficult issue to assign a numerical score.

In protests where the judgment of the Contracting Officer has been directly questioned, there are comments, decisions, and precedence. The Board's support of Contracting Officer's judgment in previous cases is noted when "discretion is exercised wisely" [Ref. 86]. The Board stated, ". . . we will not disturb . . . discretionary determinations absent a showing that the determinations lacked a rational basis . . ." [Ref. 87;Ref. 86]. The Contracting Officer's decision must be, in the Board's opinion, a "reasonable exercise of business judgment, consistent with the terms of the solicitation." Every decision of the Board on the issues of merit involves a judgment by the Board regarding the decision and judgment of the Contracting Officer. A truly in-depth analysis is not possible based upon case readings alone. Suffice it to say that the Board's own judgment was questioned by several interviewees. However, the record shows, that where judgment of the Contracting Officer was or became a specifically stated issue of the protest, the Board has favored upholding the Contracting Officer's decision.

Judgment of the Board is more labyrinthine. A recent decision on appeal to the Federal Circuit Court chastised the Board for replacing its judgment of agency needs with that of the agency's. The Federal Circuit Court reversed a decision because, amongst other reasons, the Board was ". . .driven by its own assessment of the agency's "true" data processing needs . . ." The Federal Circuit Court continued with

. . .the board has no warrant to question the agency's judgment or to revise its delegation of procurement authority to ensure that the agency's assessment of its 'true' needs is in harmony with the board's.¹ [Ref. 88]

¹Federal Court Circuit No. 90-1264 (9 October 1990) appeal of GSBCA 10468-P

The original protest of the appealed Board decision did not call into specific question the judgment of the Contracting Officer. In fact, the protest dealt with licensing requirements, unbalanced pricing, ambiguous solicitation and non-responsiveness. In the researcher's opinion, the Federal Circuit Court's decision could significantly weaken the Board. Routine decisions by the Board are open for questions as to the "assessment of agency need" and the direction provided the Government by the Board. Indeed the Board's granting rates fell significantly after the Federal Circuit Court decision. It is difficult to draw a direct correlation; however, for six months after this decision (an coincidentally the last two quarters of the sample period), the Board only granted eight protests. Appendix B provides the detailed data. A comparison of the granting rates is provided in Table 6.2 using the same approach as in Chapter IV.

**TABLE 6.2
SIX-MONTH PROTEST GRANTING RATES**

	6-Month Granting Rates	Population Granting Rates
Overall	5.8%	11.8%
Formal Hearing	14.5%	31.0%
Jurisdictional	26.6%	44.7%

The ADP Protest Report commentary, V3/N4, provides several other insightful possible explanations of this dramatic shift in the granting rate. It is this researcher's opinion that the Federal Circuit Court reversal had a large impact on the Board and its decision making. Government agency's, at least in the near term can expect less "judgmental" decisions from the Board.

7. Section Summary - Evaluation

Evaluation issues, a post-award protest issue, ranks the highest in numbers of complaints and issues granted. The overall high numbers might tend to indicate to the impercipient observer the Government's weakness. However, in the researcher's opinion, this is the "issue of convenience" for the sore losers described in Chapter I. This may account for the low index number (for evaluations many post-award protests do not have sufficient grounds to be sustained).

The Board's position on Evaluation issues may be summarized as follows: In evaluating the solicitation, strict adherence to the stated evaluation criteria is demanded. However, when making responsiveness determinations, a less than strict adherence is acceptable; thus, allowing offerors to stay in competition when they might otherwise have been eliminated. The Contracting Officers must provide equal opportunity for all to compete. Finally, the evaluation and selection process must be fully and accurately justified and documented.

E. GAO FINDINGS

A GAO study released in March 1990 studied ADP/FIP settlements. In the study, GAO looked at 123 protests, 17 of which were granted by the GSBCA. The study period began 1 April 1988 and ended 30 September 1988. The report summarized the findings of the granted protests. See Appendix J for a reproduction of the GAO specific violations.

The specific violations in these 17 protests primarily involved agencies limiting the protestors' opportunities to compete. For example, in three protests the GSBCA found that the agency evaluated proposals on factors not specified in the solicitation. In other cases, the GSBCA found that the agency did not properly document the need for specific make and model specifications in the solicitation and did not describe the Government's requirements clearly, accurately, and completely in the invitation for bids. [Ref. 30:p. 21]

The researcher's study found many of the same recurring violation themes. Listed below are some of the 1988 violations and recurrent violations of the immediate study.

1. Improper rejection of protestor's bid as nonresponsive.
2. Amended solicitation did not provide adequate response time.
3. Improper evaluation; application of criteria/factors not specified in solicitation.
4. Failure to document the need for specific make and model.
5. Failure to include a specific list of salient characteristics for brand name or equal features (equivalency in researcher's study data).
6. Improper agency termination of awarded contract.
7. Failure to obtain a DPA considered under jurisdiction, Brooks Act and Warner Amendment in researcher's study data).
8. Improper/inadequate discussions.
9. Improper system-life (life-cycle) cost analysis, i.e., no valid basis for lowest overall cost decision.
10. Best and Final Offers (BAFO) not considered in their entirety.

Other specific violations noted in the GAO report were overturned by the U.S. Court of Appeals for the Federal Circuit Court. Therefore, they do not appear in the above list.

F. USE OF THE WEIGHTED INDICES

The index provided a method for ranking the issues favored and not favored by the GSBCA. This can be used as a gauge for issues to avoid in a formal protest (i.e., avoid GSBCA litigation if possible) by the Contracting Officer. Unfortunately, it is not a foolproof gauge. It is a system to be used in assisting a Contracting Officer's decision to settle or pursue a formal protest proceeding. The issues are varied and often have slightly different twists. A more thorough research of the issues are necessary to obtain a full understanding of the keywords. Legal assistance is advisable. Short of always seeking legal advice, the index can provide a useful insight for the Contracting Officer regarding the issues and how Government agencies have fared in the past.

G. CHAPTER SUMMARY

Restricting competition in most any form results in a sustained GSBCA protest in favor of the protestor. The proper writing of the Solicitation and Specifications are the

most important factors necessary in avoiding a protest that will be sustained by the GSBCA. Although their numbers are higher, Evaluation issues (post-award protests) are not the "black cloud" of procurements as the weighted index indicates. Protests cannot be completely avoided from protestors seeking to use the legal route to compensate for their loss and to recoup bid and proposal costs. Claiming an Evaluation impropriety is the most popular post-award complaint. All things considered, it is the researcher's opinion that the GSBCA is fairly consistent in its selective application of the law and statutes. In particular, the Board has consistently demanded that competition not be restricted. The demand for application of the Board's concept of competition is held above other possibly conflicting concepts, such as economy and efficiency. Additionally, the prevalent issues found in this study were generally the same as those found in an earlier, similar study conducted by the GAO.

VII. SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

A. RESTATEMENT OF OBJECTIVES

The area of research for this thesis was the ADPE or FIP acquisition bid protest process. The goal was to determine the role of the GSBCA in ADP/FIP bid protests, the reasons for ADP/FIP bid protests, the trends in protests, and suggested methods/procedures to consider in avoiding protests.

Briefings by various military acquisition officials lead the researcher to an unsupported conclusion that contractors are making a business decision to protest a very large number of Government ADPE acquisition contract awards. For purely business reasons (i.e. hurt the competition, you can't lose - even if all you succeed in doing is delaying the original award), contractors feel it is worth the time and effort to protest a Government ADPE acquisition decision. The protest decision may or may not be based on merit. The Government must then *defend its decision in a forum of the contractor's choosing*. The research was focused on the forums of protest and their effects with particular attention on one forum, the GSBCA.

The role of the GSBCA was examined by case analysis. Then a numerical scoring system was applied. The role of the GSBCA was clearly defined in the case analysis. The trends were not so clearly defined. However, a personality regarding the Board could be identified.

The GSBCA, given concurrent authority over ADPE procurements by an Act of Congress in 1984 through the Competition in Contracting Act, takes its role to uphold competition seriously. This research necessarily involves actions by protestors against Government agencies. Therefore the view most apparent is Government agencies versus "them" (offerors) and the GSBCA. The cases given the closest scrutiny here are the

protests the Government agencies "lost." A cursory examination of the cases "won" by Government agencies, indicate a consistency of the Board. So, in the following comments, where the Government lost and where they won, the same Board principles applied consistently.

B. MAJOR CONCLUSIONS

1. Most ADP/FIP Procurements are not Protested

Relatively few ADP/FIP procurements are formally protested. However, the 4.3% (using the high number) that are, have significant affect on all ADP/FIP procurements. These protests are the definition setting, law and regulation interpreting cases.

2. Statute, Laws, and Regulations are Unnecessarily Complex

The FIRMR, created in response to congressional statute, is a separate regulation for purchasing essentially a single type commodity. The existence of the Brooks Act and many other laws, i.e., the FIRMR, and all the other supplemental regulations for this commodity, have complicated the purchasing process for ADP/FIP.

This commodity is pervasive in the personal and professional lives of Americans and its use is continually expanding. With the expansion of the use of computing, as such the use of ADP/FIP, the GSBCA has expanded its jurisdictional frontier. The GSBCA's jurisdictional expansion coincides with the narrowing of the scope of the Warner Amendment exemptions for the Department of Defense.

3. GSBCA has a Disposition for Competition

The Board's jurisdiction is rooted in the Brooks Act. The Brooks Act further established the ADP/FIP procurement system we live with today. However, the Board's

major emphasis in granting protests is the protection of competition as required by CICA. The GSBCA is resolved to support the concept of competition even at the expense of economy and efficiency as required by the Brooks Act.

4. Government Agencies Lack the Ability to Define ADP/FIP Requirements

As indicated by the weighted indices, the Solicitation and Specifications contained therein do not adequately define the agencies requirements. As required by the FAR, only the minimum requirements of the agency will be solicited. The evidence suggests that Contracting Officer's are not able to define the "requirement" adequately to the satisfaction of the GSBCA. The complex requirements of the agency are not understood by the Contracting Officer nor adequately conveyed by technical personnel. This lack of understanding translates to modifications and misinterpretations of the Solicitation. Also, due to the lack of understanding, the Evaluation criteria are poorly written or misapplied.

5. Protest Issues Have not Changed

Comparing the results of this study and the results of a similar 1988 study by the GAO indicate that many of the same issues are constantly recurring. Indeed, this study found many issues that occurred on a continuum throughout this two year sample period. These coincided with the same issues that the GAO study found. Exclusion from competitive range, improper evaluation, poor solicitation/specifications, failure to adequately justify deviations from full and open competition, minimum requirements overstated, and other competition limiting agency actions are recurring issues in ADP/FIP protests.

C. RECOMMENDATIONS

1. Emphasize Governmental Efficiency and Economy

During this time of tightening Governmental budgets, a shift in emphasis from a full and open competition commitment to economy and efficiency seems appropriate. However, this can not happen at the agency level without appropriate statutory and regulatory changes or the Board's more open recognition of the Brooks requirement for economy and efficiency.

2. Examine the Solicitation for Competition Restrictions

The specifications of the solicitation should be thoroughly examined for any hint of wording that may not allow a prospective offeror his statutory right to participate. Close examination of the solicitation for competition restrictive language is essential in avoiding a protest. If there is any limiting verbiage, change it or document the justification fully. Government agencies with ADP/FIP procuring authority should be made aware of the Board's penchant for competition.

The Contracting Officer should seek technical assistance from a source with a proven track record. Outside sources may be necessary. Further, the use of draft RFP's and other market research techniques will aid in eliminating restrictive verbiage and aid in more adequately defining the agency's competitive requirements.

3. Reduce ADP/FIP Oversight

The invasion of ADP/FIP as an ever increasing aspect of daily life serves to expand the reach of the GSBICA via the Brooks Act. There appears little touched in today's society by information processing systems. Congress is pleased with the Board's protection of competition in ADP/FIP resource procurements. ADP/FIP is a commodity that is competition protected by CICA. The Brooks Act has outlived its usefulness. It has created an unnecessarily, burdensome system for acquiring a commodity that is a

routine part of the American society. The 1984 Brooks Act is no longer necessary. It should be repealed, along with its associated amendments. ADP/FIP should be folded into the mainstream of the Federal procurement system.

D. ANSWER TO PRIMARY RESEARCH QUESTION

What has been the role of the General Services Administration Board of Contract Appeals (GSBCA) concerning Automatic Data Processing (ADP) protests and what can be learned from an analysis of recent GSBCA cases?

The GSBCA's role is twofold. First, the role of interpreting the Brooks Act definition of ADPE. Second, ensuring the application of laws, statutes, and regulations in the acquisition of ADP/FIP as defined in the Brooks Act as amended. In the first role, the GSBCA has been expansionary in its jurisdiction. Jurisdiction of the GSBCA demarcates the definition of ADPE. Therefore, the boundary of what is ADPE and what is not ADPE expands with the Board's reach for an ever increasing jurisdiction. In the second role, the GSBCA applies the Competition in Contracting Act with the emphasis on competition.

E. ANSWERS TO SUBSIDIARY QUESTIONS

1. What are the current GSBCA protest procedures?

A simple letter and a 29¢ stamp filed in a timely manner is all that is required to lodge a protest with the GSBCA. Following the filing of a protest, the protestor's attorney is allowed go "fact finding" through an agency's internal memoranda, notes, and contract information files through a process called "discovery." Discovery allows the protestor access to internal source selection and evaluation procedures and other pertinent agency information. The close examination of agency paperwork is augmented by the protestor's capability to gain access to a competitor's proprietary data through a

"protective order." The protestor's opportunity for discovery and protective order information are then enhanced by the trial-type hearing of the GSBCA. Wherein, witnesses are called to testify before the Board.

Additionally, the Board's willingness to take issue with the agency's discretionary decision favors protestors. Offerors prefer the GSBCA, while the Government favors the GAO.

Timeliness, interested party status, and issues of jurisdiction are required determinations prior to a case being decided on the issues of merit.

2. How Does the GSBCA Define ADP/FIP?

ADPE is defined by the Brooks Act. The GSBCA has expanded the realm of ADP/FIP through its expansive interpretations. Significant use and incidental performance are the key to determining the GSBCA definition of ADP/FIP. Each acquisition that entails any aspect of using ADP/FIP directly or indirectly will require a determination for Brooks Act application or Warner Amendment exclusions. The user's requirement does not necessarily need to be for ADP/FIP primarily for the Brooks Act to apply. The best way to approach the GSBCA definition of ADP/FIP is to assume that if there is a hint that computing resources are being acquired or used in the contract, then the Brooks Act applies. For the DoD, Warner Amendments exemptions are strictly interpreted. If it is not specifically included in the Warner Amendment then it is not exempt. Best advise - do not read beyond the Warner Amendments exemptions. Do not look for a "loophole" exemption, it most likely will not be there.

3. What are the Principal Reasons for ADP/FIP Protests?

The principal reasons for protest centers around the evaluation process. The numbers indicate that this is the primary reason for protest. However, protests regarding the solicitation and specifications are held in check by the GSBCA's strict application of timeliness rules.

The Evaluation complaints are usually in regard to the procuring agency's application of the Evaluation factors as stated in the solicitation and the determination of responsiveness and technical acceptability of the offer. The responsiveness and technical acceptability issues attacks both the agency's determination that the awardee was acceptable and that of an unsuccessful offerors non-acceptability.

The numbers indicate that Solicitation and Specification complaints follow a close second and third in reasons for protests. The restriction of competition through the Solicitation and Specification process is the underlying theme in most complaints. The complaints are varied, ranging from implied contractual obligation to ambiguous Solicitations and delivery specification to ambiguous and restrictive specifications.

Generally, exclusion from competition from various agencies' actions is the leading complaint from protestors. Exclusion may be elicited via the evaluation process, or in the wording of the solicitation and the specifications.

4. What Have Been the Results of These Protests?

The Government procuring agency's actions have been contested in a relatively small number of ADP/FIP acquisitions. However, it is the few usually high dollar value cases that are formally heard at the GSBCA. These are the cases that test literal meanings and interpretations of laws and regulations. These are the cases that redefine and sometimes obscure the definition of ADPE and interpret statute.

Overall, by percentage, it appears that the evaluation process is most susceptible to the GSBCA's sagacity. Because of the rules of timeliness, many cases are dismissed without a hearing on other issues regarding the solicitation or specifications. When the weighted indices are applied giving a higher value to issues granted by the Board, issues concerning the solicitation and specifications are heavily favored by the Board. Again, competition is the keyword and it is protected adamantly, both for and against the protestor. There is always a third party interested in the protest proceedings. Usually this is the original awardee. His right to compete is also protected by the Board.

Competition is enforced by the Board throughout the ADP/FIP procurement process. Agencies must fully justify deviations from full and open competition.

5. Since GSBCA Received Jurisdiction Over ADP/FIP Acquisitions, What Trends can be Identified Regarding ADP Protests?

The trend from industry's perspective is to protest. A protestor has an excellent chance of being satisfied prior to a formal protest hearing with the GSBCA. If the protest goes to a Board hearing for resolution on the issues of merit, the protestor has a better than 45% chance of being granted. A protestor that successfully argues unreasonable, or unfair exclusion from competition enjoys the most favor by the Board.

Future trends and the issues in favor tomorrow are not easily extrapolated from the data. The issues swing and vary from quarter to quarter and year to year. However, there is always the omni present theme of protection of competition.

6. What Actions can be Taken to Minimize the Number of ADP Protests and the Number of Sustained GSBCA Decisions?

The best way to avoid a protest is by starting with a plan to avoid the protest. This requires more front end time consumption but will reduce the possibility of the tail end panic of a protest. The plan should include time to review the Solicitation, Specifications, and Evaluation criteria thoroughly. The review, amongst other things,

should be critical to verbiage that may unnecessarily restrict competition. The examination of the Solicitation, Specifications, and Evaluation factors should look for any hint of language restricting competition. Although this is true for other commodities as well, ADP/FIP requires a special knowledge of the commodity and the language to successfully procure information processing capabilities.

The ADP/FIP procurement staff should be trained and educated in the technical as well as the contracting aspects of this type of commodity purchase. Understanding the language is vital. Being able to recognize language that is "buzzword" versus that of words that are well defined within the accepted industry practice is essential.

The source selection evaluation team/board should not deviate from the stated criteria. Strict application is required. If the solicitation is determined not to meet the needs of the agency, once the evaluation process has begun, cancel and resolicit to the bona fide needs of the agency.

Avoid terminating an award because of a protest, rather resolve any and all issues with potential protestors early. If a complaint involves unfair exclusion from competition, take it seriously and accommodate the protestor, if at all possible.

F. SUGGESTIONS FOR FURTHER RESEARCH

1. Congressmen Conyers (D-Mich) has introduced several House Bills regarding Federal Acquisition. If passed or if still in debate, the impact or potential impact of HR 3161, Title III on the GSBCA and ADP/FIP procurement process could be explored.

2. A continuation of this study methodology after sufficient time has passed would be appropriate to determine any variations in the GSBCA "personality" due to current pending legislation, budget constraints, or other factors. Also, an expansion of this study methodology in regards to time is suggested to adequately factor out the seasonal swings noted in Chapter VI.

3. A study of the necessity for the Brooks Act in ADP/FIP acquisition in today's ever expanding role of information processing in society. Are there viable alternatives to the way Federal ADP/FIP is acquired? Could ADP/FIP procurement be successfully folded into the larger body of Federal procurement regulations?

4. An in-depth study of GSBCA decisions on a particular issue of concern could be conducted. For example, researching issues regarding Best Value vs. Low Cost, or Commercial style solicitations and specification have been issues of recent concern and are still not fully resolved.

G. SUMMARY

The Board, whose authority was established by CICA, has lived up to its namesake law - competition. In this respect, it has fulfilled its responsibility laid upon it by the Congress of the United States. The Board has upheld the concept of competition almost slavishly; even at the expense of other Governmental responsibilities. Economy and efficiency of Government operations is a bit of a misnomer by all popular accounts in the literature and the media. The direction of the Board is to disregard the Contracting Officer's and the Government's responsibility to economy and efficiency believing that competition in and of itself leads to economy and efficiency. In this researcher's opinion, competition where it makes sense supports economy and efficiency. The need for competition must be properly balanced with the need for economy and efficiency.

The weighted index adds a higher numerical value to a protest granted. The operative assumption is that once an issue is tilted against the Government and in favor of the protestor, the Government's vulnerability is increased. The most interesting element indicated by the indexing is that the Government, overall, is doing well at litigation in the

area of evaluation. The areas of consistent concern are the Specification and Solicitation areas. Protests of this nature are avoidable to a large extent. Avoid restricting competition!

An underlying factor in all the foregoing discussion is "minimum requirements of the government" and "avoidance of restricting competition." The combination of the two philosophies is noble in utterance but in the opinion of the researcher conflict with "best value" in terms of technology and price.

Full and open competition is always restricted by the terms of any solicitation. A balance of the fulcrum must be found by the Contracting Officer regarding competition. And then, the position of the fulcrum must be documentarily justified.

APPENDIX A

BROOKS ACT, AS AMENDED, 40 U.S.C. § 759

Section 759, title 40, United States Code, contains the Brooks Act, Public Law No. 89-306, 79 Statute 1127 (1965), as amended.

§ 759. Procurement, maintenance, operation and utilization of automatic data processing equipment

(a) Authority of Administrator to coordinate and provide for purchase, lease and maintenance of equipment by Federal agencies

(1) The administrator is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

(2) (A) For purposes of this section, the term "automatic data processing equipment" means any equipment or interconnected system or subsystems of equipment that is used in automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission or reception, of data or information

(i) by a Federal agency, or

(ii) under a contract with a Federal agency which — —

(I) requires the use of such equipment, or

(II) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

(B) Such term includes — —

(i) computers;

(ii) ancillary equipment;

(iii) software, firmware, and similar procedures;

(iv) services, including support services; and

(v) related resources as defined by regulations issued by the Administrator for General Services.

(3) This sections does not apply to — —

(A) automatic data processing equipment acquired by a Federal contractor which is incidental to the performance of a Federal contract;

(B) radar, sonar, radio, or television equipment;

(C) the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of which — —

(i) involves intelligence activities;

(ii) involve cryptologic activities related to national security;

(iii) involves the command and control of military forces;

(iv) involves equipment which is an integral part of a weapon or weapon system; or

(v) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing equipment used for routine administrative and business applications such as payroll, finance, logistics, and personnel management; or

(D) the procurement of automatic data processing equipment or services by the Central Intelligence Agency.

(b) Procurement, maintenance and repair of equipment; transfer between agencies, ont utilization; establishment and operation of equipment pools and data processing centers; delegation of Administrator' authority

(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, . . .

APPENDIX B

QUARTERLY PROTEST RESULTS

	<u>Granted</u>	<u>Denied</u>	<u>Dismissed</u>	<u>Withdrawn</u>	<u>Settled</u>	<u>Total</u>
3Q/FY 89	12	7	1	6	24	63
4Q/FY 89	7	5	8	15	36	71
1Q/FY 90	9	13	7	20	22	71
2Q/FY 90	5	6	2	15	15	43
3Q/FY 90	2	7	3	25	13	50
4Q/FY 90	13	4	6	22	35	80
1Q/FY 91	4	18	10	45	17	94
2Q/FY 91	4	12	7	7	13	43
Total	56	72	47	165	175	515

APPENDIX C

INTERVIEWS

Telephone conversation between ...

Mr. Roscoe Crawford, Naval Regional Contracting Center, Washington D.C., and the researcher, 8 Aug 91.

CDR Ken Dewell, USN, former Executive Officer, Information Technology Acquisition Center, and the researcher, 29 Aug 91.

Ms. Pat Elleby, Information Technology Acquisition Center, USN, and the researcher, 12 Aug 91.

Mr. Floyd Groce, ITAC, Chief of ADP Contracting, and the researcher, 29 Aug 91.

Maj J. Hill, USMC, Marine Corps Research, Development and Acquisition Command (MCRDAC)/CCIR, and the researcher 9 Aug 91.

Ms. Pat Hondo, Naval Supply Center, Contract Management Group, and the researcher, 6 Aug 91.

Mr. Doug Larsen, Naval Supply Center, Chief Counsel, and the researcher, 29 Aug 91.

CPT Tom McQueen, USN, Commanding Officer, Information Technology Acquisition Center, and the researcher, 19 Aug 91.

Mr. Carl Peckinpaugh, Secretary of the Air Force/General Counsel, (F/GCP), ADP/FIP Acquisitions, and the researcher, 16 Sep 91.

Ms. Dorothy Rogers, Naval Regional Contracting Center, Long Beach, and the researcher, 13 Aug 91.

Mr. Jeff Tucker, General Services Administration, Information Resources Management System/KMAD, Acquisition Evaluation and Analysis Branch, and the researcher, several conversations beginning 27 July 91.

Personal conversation between ...

Mr. Floyd Groce, Information Technology Acquisition Center, Chief of ADP Contracting, and the researcher, 24 Sep 91.

Mr. Jeff Tucker, General Services Administration, Information Resources Management System/KMAD, Acquisition Evaluation and Analysis Branch, and the researcher, 25 Sep 91.

Mr. Mark Weiner, Information Technology Acquisition Center, Chief Counsel, and the researcher, 24 Sep 91.

Mrs. Michèle Templeman, Instructor, Procurement Analysis School of Acquisition Management, and the researcher, 22 Oct 90.

APPENDIX D

TELEPHONE INTERVIEW

1. Does your agency buy ADP/FIP? What are the dollar thresholds authorized?
 2. Have you or your agency been involved in ADP protests resolved at the GSBICA?
If Yes - continue with question #3.
If No -
Does your agency buy ADP?
If no - who buys for you? -- End Interview --
If yes - how have you avoided ADP protests?
 3. What were the 5 predominant, major issues involved in your case(s)?
 4. In light of the decisions of the GSBICA, how would you characterize your agencies defenses?
(i.e., win/win, total win, total loss)
 5. What are your impressions of the GSBICA proceedings?
 6. Has your agency changed its ADP procurement procedures because of a GSBICA ruling -
 - a. in your specific case?
 - b. in general based upon other published GSBICA decisions?
 6. Are ADP bid protests increasing or decreasing in frequency at your organization?
 7. Are ADP protests handled / processed the same as other bid protests?
 8. What actions has your agency taken to minimize the chances of an ADP protest?
 9. Who (specific person) handles agency bid protests?
 10. How much experience does that person have in ADP protests?
 11. Are ADP protests considered a routine or exceptional situation?
 12. Which forum would you prefer for an ADP protest - GAO or GSBICA? Why?
- Organization full name and office. _____.

APPENDIX E

GSBCA KEYWORDS

Keyword 1.	Case No.
Keyword 2.	Reference 1
Keyword 3.	Reference 2
Keyword 4.	Decision date
Keyword 5.	Result

Keyword	
1: Evaluation-Mathematical	FED CIR 89-1504 & 1505
2: Evaluation-Material	ADP PR; V3/N1; P8
3: Best Value	GSBCA 9834-P & 9894-P
4:	Decision Date: 900411
5:	Result: Upheld

Keyword	
1: Frivolousness	FED CIR 90-119
2: Bad Faith	ADP PR; V3/N1; P9
3:	GSBCA 10218-P
4:	Decision Date: 900625
5:	Result: Reversed

Keyword	
1: Jurisdiction	FED CIR 90-1264
2: Brooks Act	ADP PR; V3/N3; P5-6
3: *Judgment*	
4:	Decision Date: 901009
5:	Result: Reversed

COMMENTARY - No keywords Assigned

Keyword	
1:	GSBCA 8372-P
2:	ADP PR; V2/N1; P1
3:	
4:	Decision Date: 860421
5:	Result:

COMMENTARY - No Keywords Assigned

Keyword

1: GSBCA 9356-P
2: ADP PR; V2/N1; P3
3:
4: Decision Date: 880321
5: Result:

COMMENTARY - No Keywords Assigned

Keyword

1: GSBCA 9533-P
2: ADP PR; V2/N1; P4
3:
4: Decision Date: 880830
5: Result:

COMMENTARY - No Keywords Assigned

Keyword

1: GSBCA 9706-P
2: ADP PR; V2/N1; P2
3:
4: Decision Date: 881121
5: Result:

COMMENTARY - No Keywords Assigned

Keyword

1: GSBCA 9735-P
2: ADP PR; V2/N1; P2,4
3:
4: Decision Date: 881212
5: Result:

COMMENTARY - No Keywords Assigned

Keyword

1: GSBCA 9869-P
2: ADP PR; V2/N1; P3
3:
4: Decision Date: 890301
5: Result:

See Fed Cir 89-1504 & 1505 at beginning.

Keyword

1:	GSBCA 9884-C
2:	ADP PR; V3/N1; P9
3:	GSBCA 9733-P
4:	Decision Date: 900518
5:	Result: N/A

Keyword

1: Personnel - Resumes	GSBCA 9920-P
2:	ADP PR; V2/N1; P2 & 5
3:	9735
4:	Decision Date: 890404
5:	Result: Granted

Keyword

1: Conflicts of interests	GSBCA 9921-P
2:	ADP PR; V2/N1; P5
3:	
4:	Decision Date: 890405
5:	Result: Denied

Keyword

1: Non-Responsibility	GSBCA 9923-P
2: Pre-award survey	ADP PR; V2/N1; P5
3: Personnel	
4: Bid Acceptance -Late Bid	Decision Date: 890405
5:	Result: Denied

Keyword

1: CBD Synopsis - incomplete	GSBCA 9924-P
2: Selection-Process: Cost	ADP PR; V2/N1; P6
3: Solicitation-Incomplete	GSBCA 9947-P
4: Evaluation Improper	Decision Date: 890411
5:	Result: Granted

Keyword

- 1: Jurisdiction
- 2: Interested party
- 3:
- 4:
- 5:

GSBCA 9926-P
ADP PR; V2/N1; P6

Decision Date: 890223
Result: Dismissed

Keyword

- 1: Restrictive Specs
- 2: Price reasonableness
- 3:
- 4:
- 5:

GSBCA 9946-P & 9965-P
ADP PR; V2/N1; P7

GSBCA 9965
Decision Date: 890511
Result: Granted

Keyword

- 1: Specs -Inaccurate
- 2: Best Value
- 3: Evaluation-Improper
- 4:
- 5:

GSBCA 9957-P
ADP PR; V2/N1; P8

Decision Date: 890508
Result: Granted

Keyword

- 1: Jurisdiction-Gov't Agent
- 2: Low Cost
- 3: Brooks Act
- 4: Gov't Agent
- 5:

GSBCA 9962-P
ADP PR; V2/N1; P8

Decision Date: 890502
Result: Denied

Keyword

- 1: Jurisdiction-Warner Amend
- 2:
- 3:
- 4:
- 5:

GSBCA 9966-P
ADP PR; V2/N1; P9

Decision Date: 890413
Result: Dismissed

Keyword

- 1: Restrictive Specification
- 2: Ambiguous Specs
- 3:
- 4:
- 5:

GSBCA 9967-P
ADP PR; V2/N1; P9

Decision Date: 890508
Result: Denied

Keyword

- 1: Interested Party
- 2: Timeliness
- 3:
- 4:
- 5:

GSBCA 9969-P
ADP PR; V2/N1; P10
9828-P
Decision Date: 890421
Result: Dismissed

Keyword

- 1: Solicitation-Cancellation
- 2: Implied K
- 3:
- 4:
- 5:

GSBCA 9971-P
ADP PR; V2/N1; P10&11

Decision Date: 890515
Result: Denied

Keyword

- 1: Warner Amendment
- 2: Low cost
- 3: Procedural problem
- 4: Discussions-Improper
- 5:

GSBCA 9978-P
ADP PR; V2/N1; P11

Decision Date: 890621
Result: Granted

Keyword

- 1: Competitive range
- 2: Discussion
- 3: Notification, prompt
- 4:
- 5:

GSBCA 9983-P
ADP PR; V2/N1; P12

Decision Date: 890524
Result: Granted

Keyword

- 1: Competitive range
- 2: Judgment/discretion
- 3:
- 4:
- 5:

GSBCA 9986-P
ADP PR; V2/N1; P13

Decision Date: 890601
Result: Denied

Keyword

- 1: Non-compliance,FAR
- 2: Solicitation-Cancellation
- 3: Competition-Full & Open
- 4:
- 5:

GSBCA 10009-P
ADP PR; V2/N1; P13

Decision Date: 890609
Result: Denied

Keyword

- 1: Sanctions
- 2: Specification-Restrictive
- 3: Specification-Ambiguous
- 4: Timeliness
- 5:

GSBCA 10010-P
ADP PR; V2/N1; P13

Decision Date: 890502
Result: Dismissed

Keyword

- 1: Gov't Agent
- 2: Significant ADP
- 3: Conflict of Interest
- 4:
- 5:

GSBCA 10031-P
ADP PR; V2/N2; P5

Decision Date: 890725
Result: Granted

Keyword

- 1: Solicitation-Restrictive
- 2:
- 3:
- 4:
- 5:

GSBCA 10032-P
ADP PR; V2/N1; P14

Decision Date: 890629
Result: Granted

Keyword

- 1: Agency termination
- 2:
- 3:
- 4:
- 5:

GSBCA 10034-P
ADP PR; V2/N1; P15
9493; V2/N2; P 3&7
Decision Date: 890626
Result: Granted

Keyword

- 1: Non-compliant
- 2:
- 3:
- 4:
- 5:

GSBCA 10034-P-R
ADP PR; V2/N1; P7

Decision Date: 890728
Result: Granted

Keyword

- 1: Synopsis-CBD-Incomplete
- 2: Evaluation - Technical
- 3: Brand Name or Equal
- 4: Salient Characteristics
- 5:

GSBCA 10039-P
ADP PR; V2/N2; P8

Decision Date: 890710
Result: Granted

Keyword

- 1: Frivolousness
- 2: Sanctions
- 3:
- 4:
- 5:

GSBCA 10056-P
ADP PR; V2/N3; P6

Decision Date: 891016
Result: Dismissed

Keyword

- 1: Buy American Act
- 2: Discussions-Improper
- 3:
- 4:
- 5:

GSBCA 10060-P
ADP PR; V2/N1; P15

GSBCA 10063-P/10065-P
Decision Date: 890620
Result: Granted (3)

Keyword

- 1: *DPA-Agency Internal Guide
- 2: T4D
- 3: Defective specs
- 4: C & P Data
- 5:

GSBCA 10066-P
ADP PR; V2/N2; P9

Decision Date: 890710
Result: Granted

Keyword

- 1: Discussions
- 2:
- 3:
- 4:
- 5:

GSBCA 10067-P
ADP PR; V2/N2; P10

100-1
Decision Date: 890725
Result: Denied

Keyword

- 1: Agency termination
- 2: Amended solicitation
- 3: Discussions-Defective
- 4:
- 5:

GSBCA 10071-P
ADP PR; V2/N2; P10

Decision Date: 890725
Result: Granted

Keyword

- 1: Timeliness
- 2:
- 3:
- 4:
- 5:

GSBCA 10098-P
ADP PR; V2/N2; P18

Decision Date: 890810
Result: Denied

Keyword

- 1: 8 (a)
- 2: Agency Requirements
- 3: Competition Full & Open
- 4:
- 5:

GSBCA 10100-P
ADP PR; V2/N3; P7
9869-P
Decision Date: 891010
Result: Granted

Keyword

- 1: Urgency
- 2: Discussion
- 3: Eval criteria application
- 4: Solicitation-Improper
- 5: Solicitation-Undisclosed

GSBCA 10107-P
ADP PR; V2/N2; P11

Decision Date: 890725
Result: Granted

Keyword

- 1: Solicitation Incomplete
- 2: Evaluation Scoring
- 3: Conflict of interest
- 4:
- 5:

GSBCA 10108-P
ADP PR; V2/N2; P11

Decision Date: 890818
Result: Denied

Keyword

- 1: Agency termination
- 2: Auctioning - BAFO's
- 3: Evaluation-Improper
- 4:
- 5:

GSBCA 10115-P
ADP PR; V2/N2; P12

Decision Date: 890823
Result: Granted

Keyword

- 1: Non-Responsiveness
- 2:
- 3:
- 4:
- 5:

GSBCA 10163-P
ADP PR; V2/N2; P13

Decision Date: 890919
Result: Denied

Keyword

- 1: Price reasonableness
- 2: Telecommunications
- 3:
- 4:
- 5:

GSBCA 10168-P
ADP PR; V2/N2; P13

Decision Date: 890922
Result: Denied

Keyword

- 1: 8 (a)
- 2: Implied Contract
- 3: A-76
- 4: Fragmental Requirements
- 5: Solicitation-Cancellation

GSBCA 10177-P
ADP PR; V2/N3; P8

Decision Date: 891027
Result: Denied

Keyword

- 1: Restrictive Specs
- 2:
- 3:
- 4:
- 5:

GSBCA 10183-P
ADP PR; V2/N2; P18

Decision Date: 890811
Result: Denied

Keyword

- 1: Competitive Range
- 2: Technical leveling
- 3: Auctioning
- 4:
- 5:

GSBCA 10186-P
ADP PR; V2/N3; P9
10127-P
Decision Date: 891025
Result: Granted

Keyword

- 1: Stay
- 2: Agency Termination
- 3:
- 4:
- 5:

GSBCA 10186-P
ADP PR; V2/N2; P14

Decision Date: 890927
Result: Granted

Keyword

- 1: Timeliness
- 2:
- 3:
- 4:
- 5:

GSBCA 10200-P
ADP PR; V2/N2; P18

Decision Date: 890914
Result: Denied

Keyword

- 1: Solicitation-Ambiguous
- 2:
- 3:
- 4:
- 5:

GSBCA 10210-P
ADP PR; V2/N2; P18

Decision Date: 890911
Result: Dismissed

Keyword

- 1: Non-Responsibility
- 2: Past performance
- 3: Due Process
- 4:
- 5:

GSBCA 10213-P
ADP PR; V2/N3; P9

Decision Date: 891027
Result: Denied

Keyword

- 1: Ambiguous Specs
- 2:
- 3:
- 4:
- 5:

GSBCA 10216-P
ADP PR; V2/N2; P18

Decision Date: 890925
Result: Denied

Keyword

- 1: Frivolous protest
- 2: Timeliness
- 3: Technical-MIPS
- 4:
- 5:

GSBCA 10218-P
ADP PR; V2/N2; P15

Decision Date: 890914
Result: Dismissed

Keyword

- 1: Bulletins
- 2: MIPS
- 3: performance
- 4: validation
- 5:

GSBCA 10218-P-REM
ADP PR; V3/N3; p2-5

Decision Date: 901024
Result: Denied

COMMENTARY - Not Tallied

Keyword

- 1: bulletins
- 2: handbook
- 3:
- 4:
- 5:

GSBCA 10227-P
ADP PR; V3/N3; P3
ADP PR; V2/N3
Decision Date: 891027
Result: N/A

Keyword

- 1: Requirements Contracts
- 2: CICA
- 3: Restrictive Spec
- 4: CBD Synopsis
- 5:

GSBCA 10227-P
ADP PR; V2/N3; P10

Decision Date: 891027
Result: Granted

Keyword

- 1: Non-responsive
- 2: Responsiveness
- 3:
- 4:
- 5:

GSBCA 10228-P
ADP PR; V2/N3; P11

GSBCA 10235-P
Decision Date: 891122
Result: Denied

Keyword

- 1: Agency Termination
- 2:
- 3:
- 4:
- 5:

GSBCA 10237-P
ADP PR; V2/N2; P18

Decision Date: 890914
Result: Dismissed

Keyword

- 1: Non-Cooperative Protestor
- 2:
- 3:
- 4:
- 5:

GSBCA 10244-P
ADP PR; V2/N3; P12

Decision Date: 891028
Result: Denied

Keyword

- 1: Bid Acceptance
- 2: Mail
- 3:
- 4:
- 5:

GSBCA 10247-P
ADP PR; V2/N3; P12

Decision Date: 891031
Result: Denied

Keyword

- 1: Untimely
- 2:
- 3:
- 4:
- 5:

GSBCA 10249-P
ADP PR; V2/N3; P12

Decision Date: 891026
Result: Dismissed

Keyword

1: Brand name or equal	GSBCA 10250-P
2: Salient Characteristics	ADP PR; V2/N3; P13
3:	Non-responsiveness-Prime
4: Decision Date: 891026	
5:	Result: Denied

Keyword

1: Protective order	GSBCA 10254-P
2: OFPP Act	ADP PR; V2/N2; P17
3: Proprietary Data	
4:	Decision Date: 890914
5:	Result: N/A

Keyword

1: Warner Amendment/Brooks	GSBCA 10264-P
2: Technical leveling	ADP PR; V2/N3; P13
3: Ambiguous Spec	
4: Functional Spec	Decision Date: 891115
5:	Result: Denied/Part

Keyword

1: Timeliness	GSBCA 10269-P
2:	ADP PR; V2/N2; P18
3:	
4:	Decision Date: 890926
5:	Result: Dismissed

Keyword

1: Restrictive Spec	GSBCA 10273-P
2: Timeliness	ADP PR; V2/N3; P14
3:	
4:	Decision Date: 891013
5:	Result: Denied

Keyword

1: Brand Name or equal	GSBCA 10286-P
2: Non-responsive	ADP PR; V2/N3; P15
3:	
4:	Decision Date: 891207
5:	Result: Denied

Keyword

1: Timeliness
2:
3:
4:
5:

GSBCA 10288-P
ADP PR; V2/N2; P18

Decision Date: 890929
Result: Dismissed

Keyword

1: Implied contract
2: Solicitation Cancellation
3: Non-responsiveness
4:
5:

GSBCA 10301-P
ADP PR; V2/N3; P16
10293-P
Decision Date: 891128
Result: Denied

Keyword

1: Responsiveness
2: Contract type
3: Evaluation-Improper
4:
5:

GSBCA 10303-P
ADP PR; V2/N3; P16

Decision Date: 891201
Result: Denied

Keyword

1: Competitive range
2: Timeliness
3:
4:
5:

GSBCA 10311-P
ADP PR; V2/N3; P25

Decision Date: 891019
Result: Denied

Keyword

1: Responsiveness
2: Evaluation - Improper
3: Solicitation - Min Reqr
4: Solicitation - Functional
5:

GSBCA 10317-P
ADP PR; V2/N4; P5

Decision Date: 900101
Result: Granted

Keyword

1: Procurement type
2: Non-responsive
3: Ambiguous bid
4: Clerical error
5:

GSBCA 10321-P
ADP PR; V2/N3; P17

Decision Date: 891205
Result: Denied

Keyword

- 1: Discussions
- 2: Improper evaluation
- 3: Undisclosed eval criteria
- 4: Commerciality
- 5:

GSBCA 10331-P
ADP PR; V2/N3; P19
9297-P
Decision Date: 891214
Result: Granted(4)

Keyword

- 1: Significant ADPE
- 2: Brooks Act
- 3: Price Negotiation
- 4: Auctioning
- 5: Responsibility

GSBCA 10332-P
ADP PR; V2/N3; P19
Decision Date: 891213
Result: Denied

Keyword

- 1: Brooks Act-DPA
- 2: Best Value
- 3: Barter
- 4: Evaluation, improper
- 5: Award w/o discussion

GSBCA 10337-P
ADP PR; V2/N3; P21
Decision Date: 891219
Result: Granted

Keyword

- 1: Evaluation-technical
- 2: Solicitation-reqr. overstd
- 3: Best Value
- 4: Brand name or equal
- 5: Discussions-Inadequate

GSBCA 10338-P
ADP PR; V2/N3; P22
Decision Date: 891128
Result: Granted

Keyword

- 1: Responsible
- 2: Conflict of interest
- 3: Jurisdiction-GAO
- 4:
- 5:

GSBCA 10339-P
ADP PR; V2/N3; P22
Decision Date: 891108
Result: Dismissed

Keyword

- 1: Timeliness
- 2:
- 3:
- 4:
- 5:

GSBCA 10351-P
ADP PR; V2/N3; P25
Decision Date: 891116
Result: Dismissed

Keyword

- 1: Evaluation-Misapplied
- 2: Evaluation-technical
- 3: Specification-ambiguous
- 4:
- 5:

GSBCA 10352-P
ADP PR; V2/N3; P22 & 23

Decision Date: 891220
Result: Denied

Keyword

- 1: Brand name or equal
- 2: Eval-technical
- 3: Offer unacceptable
- 4: Timeliness
- 5: Non-responsiveness

GSBCA 10365-P
ADP PR; V2/N3; P23

Decision Date: 891207
Result: Denied

Keyword

- 1: Gov't agent
- 2: Brooks Act
- 3: Responsiveness
- 4: Jurisdiction
- 5: Eval-technical

GSBCA 10369-P
ADP PR; V2/N3; P23

Decision Date: 891205
Result: Denied/Grntd

Keyword

- 1: Business Judgment
- 2: Low cost
- 3:
- 4:
- 5:

GSBCA 10379-P
ADP PR; V2/N4; P5

Decision Date: 900112
Result: Denied

Keyword

- 1: Competitive range
- 2: Evaluation - Improper
- 3: Personnel - Rates
- 4: Best Value-Advantageous
- 5: Misrepresentation-Bid

GSBCA 10381-P
ADP PR; V2/N4; P5

Decision Date: 900320
Result: Granted

Keyword

- 1: Legal Matters
- 2:
- 3:
- 4:
- 5:

GSBCA 10381-P
ADP PR; V3/N1; P10
V2/N4

Decision Date: 900517
Result: Granted

Keyword

- 1: Warner Amendment
- 2:
- 3:
- 4:
- 5:

GSBCA 10388-P
 ADP PR; V2/N3; P25

 Decision Date: 891206
 Result: Denied

Keyword

- 1: Commerciality
- 2: Responsiveness
- 3: Evaluation-Tech v Price
- 4: Evaluation - Improper
- 5: Discussions - Post BAFO

GSBCA 10389-P
 ADP PR; V2/N4; P7

 Decision Date: 900202
 Result: Granted

Keyword

- 1: Competitive Range
- 2: Solicitation - Ambiguous
- 3:
- 4:
- 5:

GSBCA 10409-P
 ADP PR; V2/N4; P8

 Decision Date: 900216
 Result: Denied

Keyword

- 1: Timeliness
- 2: Responsiveness
- 3: Solicitation - Ambiguous
- 4:
- 5:

GSBCA 10421-P
 ADP PR; V2/N4; P9

 Decision Date: 900212
 Result: Denied

Keyword

- 1: Cost - Surcharge
- 2: Evaluation - Cost
- 3: Schedules Contract
- 4:
- 5:

GSBCA 10443-P
 ADP PR; V2/N4; P10

 Decision Date: 900216
 Result: Granted

Keyword

- 1: Mod of Contract - Scope
- 2: Competition (CICA)
- 3: Technical Enhancement
- 4:
- 5:

GSBCA 10450-P
 ADP PR; V2/N4; P10
 10357 (not synop)
 Decision Date: 900228
 Result: Denied

Keyword

- 1: Non-responsiveness
- 2: Solicitation-Ambiguous
- 3: Licensing *
- 4: Evaluation-Price Imbalance
- 5: *Judgment of Board*

GSBCA 10468-P
ADP PR; V2/N4; P12
FedCirNo 90-1264 (ADP PR V3/N3/P5)
Decision Date: 900315
Result: Granted

Keyword

- 1: Best Value
- 2: Benchmark
- 3: Discussions-Inadequate
- 4: Disc-Technical Leveling
- 5: Evaluation-Cost/Tech

GSBCA 10472-P
ADP PR; V2/N4; P13

Decision Date: 900309
Result: Denied

Keyword

- 1: Evaluation - Improper
- 2: Responsiveness
- 3: Discussion-Tech Leveling
- 4: Solicitation-Amendment
- 5: *Standards*

GSBCA 10474-P
ADP PR; V2/N4; P14
10468
Decision Date: 900315
Result: Denied

Keyword

- 1: Non-responsiveness
- 2:
- 3:
- 4:
- 5:

GSBCA 10517-P
ADP PR; V3/N1; P11

Decision Date: 900412
Result: Dismissed

Keyword

- 1: Specification-Restrictive
- 2: *Specification-Ambiguous*
- 3: Specific make or model
- 4: Solicitation-Amendment
- 5:

GSBCA 10518-P
ADP PR; V3/N1; P11

Decision Date: 900425
Result: Granted

Keyword

- 1: Responsiveness
- 2: Low Cost
- 3: Timeliness
- 4:
- 5:

GSBCA 10526-P
ADP PR; V2/N4; P15

Decision Date: 900330
Result: Denied

Keyword

- 1: Buy American Act
- 2: Trade Agreement Act
- 3: Jurisdiction
- 4:
- 5:

GSBCA 10532-P
ADP PR; V3/N1; P12

Decision Date: 900518
Result: Granted

Keyword

- 1: Delivery-Solicitation
- 2: Responsiveness
- 3: Interested Party
- 4:
- 5:

GSBCA 10536-P
ADP PR; V2/N4; P15

Decision Date: 900326
Result: Dismissed

Keyword

- 1: Lowest Cost-Best Value
- 2: Notification of award
- 3: Debriefing to loser
- 4:
- 5:

GSBCA 10539-P
ADP PR; V3/N1; P13

Decision Date: 900510
Result: Denied

Keyword

- 1: Specification-Ambiguous
- 2: Evaluation-Pre-Eval
- 3: Interpretation- FIRMR
- 4:
- 5:

GSBCA 10551-P
ADP PR; V3/N1; P13

Decision Date: 900522
Result: Denied

Keyword

- 1: Significant use of ADP
- 2: Brooks Act-ADP definition
- 3:
- 4:
- 5:

GSBCA 10566-P
ADP PR; V3/N1; P14

Decision Date: 900423
Result: Dismissed

Keyword

- 1: Low Cost
- 2: SDB
- 3: Brooks Act
- 4: Jurisdiction
- 5:

GSBCA 10571-P
ADP PR; V3/N1; P14

Decision Date: 900606
Result: Denied

Keyword

- 1: Restrictive specs
- 2: Brooks Act
- 3:
- 4:
- 5:

GSBCA 10575-P
ADP PR; V3/N1; P 15

Decision Date: 900608
Result: Denied

Keyword

- 1: Non-responsive offeror
- 2: Competitive range
- 3: Meaningful discussions
- 4:
- 5:

GSBCA 10578-P
ADP PR; V3/N1; P16
10525
Decision Date: 900611
Result: Denied

Keyword

- 1: Restrictive specs
- 2: Competitive range
- 3:
- 4:
- 5:

GSBCA 10587-P
ADP PR; V3/N1; P17
10468-P
Decision Date: 900605
Result: Denied

Keyword

- 1: Commerciality
- 2: Responsive awardee
- 3:
- 4:
- 5:

GSBCA 10598-P
ADP PR; V3/N1; P18

Decision Date: 900619
Result: Denied

Keyword

- 1: Low cost
- 2: Best value
- 3:
- 4:
- 5:

GSBCA 10600-P
ADP PR; V3/N1; P18

Decision Date: 900625
Result: Denied

Keyword

- 1: T4C clause
- 2: modifications of K
- 3: Solicitation-Inaccurate
- 4:
- 5:

GSBCA 10613-P
ADP PR; v3/n2; p1

Decision Date: 900702
Result: Granted

Keyword

- 1: brand name or equal
- 2: functionally equivalent
- 3: responsiveness
- 4: delivery
- 5:

GSBCA 10632-P
ADP PR; v3/n2; p1

Decision Date: 900716
Result: Granted

Keyword

- 1: Commerciality
- 2: Responsiveness
- 3: Modification of Offer
- 4: Interested party
- 5: Overstated Requirements

GSBCA 10642-P
ADP PR; v3/n2; p2
10644-P, 10656-P
Decision Date: 900720
Result: Granted

Keyword

- 1: Responsiveness
- 2: Solicitation-Ambiguity
- 3: Personnel-Experience
- 4: Responsibility
- 5:

GSBCA 10647-P
ADP PR; V3/N2; p3

Decision Date: 900725
Result: Granted

Keyword

- 1: regulation application
- 2: Buy American Act
- 3: Trade Agreements Act
- 4:
- 5:

GSBCA 10658-P
ADP PR; V3/N2; P4
10532-p; Companion K**
Decision Date: 900710
Result: dismissed

Keyword

- 1: legal - contract formation
- 2: FTS-2000 telecommunications
- 3:
- 4:
- 5:

GSBCA 10665-P
ADP PR; V3/N2; P4

Decision Date: 900909
Result: Denied

Keyword

- 1: agency termination
- 2:
- 3:
- 4:
- 5:

GSBCA 10671-P
ADP PR; V3/N2; P5
10622-P (not in db)
Decision Date: 900706
Result: granted

Keyword

- 1: responsiveness
- 2: Warner Amendment
- 3:
- 4:
- 5:

GSBCA 10680-P
ADP PR; V3/N2; P6

Decision Date: 900827
Result: denied

Keyword

- 1: 8(a)
- 2: significant ADPE
- 3: Brooks act
- 4:
- 5:

GSBCA 10681-P
ADP PR; V3/N2; P6

Decision Date: 900706
Result: denied

Keyword

- 1: Responsiveness
- 2: Solicitation-Min Reqr
- 3:
- 4:
- 5:

GSBCA 10684-P
ADP PR; V3/N2; P6
10911; V3/N3; P16
Decision Date: 900912
Result: granted

Keyword

- 1: Evaluation - cost
- 2: (Price realism)
- 3:
- 4:
- 5:

GSBCA 10694-P & 10697-P
ADP PR; V3/N2; P7
11009; V3/N4; P8
Decision Date: 900910
Result: granted

Keyword

- 1: restrictive specs
- 2: security
- 3:
- 4:
- 5:

GSBCA 10711-P
ADP PR; V3/N2; P8

Decision Date: 900919
Result: granted

Keyword

- 1: Non-responsiveness
- 2: Spec-Inaccurate
- 3:
- 4:
- 5:

GSBCA 10714-P
ADP PR; V3/N2; P8

Decision Date: 900814
Result: granted

Keyword

- 1: Evaluation Improper
- 2: Significant ADPE
- 3: Brooks Act
- 4:
- 5:

GSBCA 10717-P
 ADP PR; V3/N2; P9
 10566-P; V3/N1
 Decision Date: 900813
 Result: denied

Keyword

- 1: DCAA audit
- 2: accounting
- 3: SBA
- 4: 8(a)
- 5:

GSBCA 10721-P
 ADP PR; V3/N3; P6
 Decision Date: 901005
 Result: Denied

Keyword

- 1: commerciality
- 2:
- 3:
- 4:
- 5:

GSBCA 10722-P
 ADP PR; V3/N2; P9
 10677-P; (not synops)
 Decision Date: 900924
 Result: denied

Keyword

- 1: restrictive specs
- 2:
- 3:
- 4:
- 5:

GSBCA 10723-P
 ADP PR; V3/N2; P10
 10251-P (not synops)
 Decision Date: 900920
 Result: denied

Keyword

- 1: non-responsive
- 2:
- 3:
- 4:
- 5:

GSBCA 10737-P
 ADP PR; v3/n3; p7
 Decision Date: 901005
 Result: Denied

Keyword

- 1: SBA
- 2: responsiveness
- 3: discussion
- 4: specific make & model
- 5: offeror ambiguities

GSBCA 10750-P
 ADP PR; V3/N2; P10
 9773-P; v1/n3
 Decision Date: 900921
 Result: denied

Keyword

- 1: jurisdiction
- 2: non-responsibility
- 3: Warner amendment
- 4: T4D
- 5: Competition

GSBCA 10755-P
ADP PR; v3/n3; p7

Decision Date: 901001
Result: Dismissed

Keyword

- 1: Brand name or equal
- 2: Responsiveness
- 3: Evaluation-Improper
- 4:
- 5:

GSBCA 10760-P
ADP PR; V3/N2; P11

Decision Date: 900924
Result: granted

Keyword

- 1: SBA
- 2: set-aside
- 3: jurisdiction
- 4: interested party
- 5:

GSBCA 10775-P
ADP PR; v3/n3; p7

Decision Date: 901106
Result: Denied

Keyword

- 1: Excess Capacity
- 2: sole source
- 3:
- 4:
- 5:

GSBCA 10776-P
ADP PR; v3/n3; p8

Decision Date: 901025
Result: Denied

Keyword

- 1: sole-source
- 2: justification & approval
- 3:
- 4:
- 5:

GSBCA 10802-P
ADP PR; V3/N2; P11

Decision Date: 900918
Result: granted

Keyword

- 1: non-responsive
- 2: SDB
- 3: Brand Name or Equal
- 4:
- 5:

GSBCA 10810-P & 10824-P
ADP PR; v3/n3; p9

Decision Date: 901106
Result: Denied

Keyword

- 1: competitive range
- 2:
- 3:
- 4:
- 5:

GSBCA 10816-P
ADP PR; V3/N2; P12

Decision Date: 900925
Result: denied

Keyword

- 1: proposals, late
- 2: discussion
- 3:
- 4:
- 5:

GSBCA 10817-P
ADP PR; v3/n3; p9

Decision Date: 901116
Result: Denied

Keyword

- 1: SBA
- 2: set-aside
- 3: non-responsive
- 4:
- 5:

GSBCA 10819-P
ADP PR; v3/n3; p10

Decision Date: 901116
Result: Denied

Keyword

- 1: evaluation improper
- 2: technical evaluation
- 3: Judgment
- 4:
- 5:

GSBCA 10823-P
ADP PR; v3/n3; p10
See 10831
Decision Date: 901116
Result: granted

Keyword

- 1: Evaluation - improper
- 2: Evaluation - technical
- 3:
- 4:
- 5:

GSBCA 10831-P
ADP PR; v3/n3; p10
See 10831
Decision Date: 901116
Result: Granted

Keyword

- 1: DEBRIEFING
- 2: Brooks act
- 3: technical leveling
- 4: clerical errors
- 5: price evaluation

GSBCA 10833-P
ADP PR; V3/N3; P11

Decision Date: 901121
Result: Denied

Keyword

- 1: interested party
- 2: non-responsive
- 3: brand name or equal
- 4:
- 5:

GSBCA 10844
ADP PR; v3/n3; p12

Decision Date: 901101
Result: Denied

Keyword

- 1: commerciality
- 2: non-responsive
- 3: timeliness
- 4:
- 5:

GSBCA 10851-P
ADP PR; v3/n3; p12

Decision Date: 901005
Result: Denied

Keyword

- 1: solicitation-modification
- 2: evaluation
- 3: judgment
- 4: agency requirements
- 5:

GSBCA 10864-P
ADP PR; v3/n3; p13
See10642 V3/N2; P2
Decision Date: 901023
Result: Denied

Keyword

- 1: Non-responsive
- 2:
- 3:
- 4:
- 5:

GSBCA 10876-P
ADP PR; v3/n3; p14

Decision Date: 901206
Result: Denied

Keyword

- 1: no key words
- 2:
- 3:
- 4:
- 5:

GSBCA 10882-P
ADP PR; V3/N3; p14

Decision Date: 901120
Result: Dismissed

Keyword

- 1: interested party
- 2: responsiveness
- 3:
- 4:
- 5:

GSBCA 10884-P
ADP PR; v3/n3; p14

See 10893
Decision Date: 901211
Result: Dismissed

Keyword

1: Technical evaluation
2: Evaluation
3: Low cost
4:
5:

GSBCA 10889-P
ADP PR; v3/n3; p14
Decision Date: 901213
Result: Denied

Keyword

1: Non-responsive
2: Evaluation-Improper
3: Interpretation-specification
4: Certifications
5:

GSBCA 10893-P
ADP PR; v3/n3; p15
See 10884
Decision Date: 901211
Result: Granted

Keyword

1: Evaluation-Cost Surcharge
2: Jurisdiction
3: Certification
4: K formation
5: K administration-jurisdic

GSBCA 10894-P
ADP PR; v3/n3; p15
Decision Date: 901214
Result: Granted

Keyword

1: proprietary data
2: technical leveling
3:
4:
5:

GSBCA 10910-P
ADP PR; v3/n3; p16
GSBCA 10642-P, 10644-P, 10656-P
Decision Date: 901023
Result: denied

Keyword

1: telecommunications
2: non-compliant
3: judgment
4:
5:

GSBCA 10911-P
ADP PR; v3/n3; p16
10684-P, 12 Sep 90; ADPPR v3/n2.
Decision Date: 901212
Result: Denied

Keyword

1: evaluation
2: discussions
3: BAFO (post): discussions
4: cost analysis
5: interested party

GSBCA 10920-P
ADP PR; v3/n3; p17
Decision Date: 901221
Result: Denied

Keyword

- 1: responsiveness
- 2: materially unbalanced
- 3: bid acceptance period
- 4:
- 5:

GSBCA 10923-P & 10953-P
ADP PR; v3/n3; p17
10861-p
Decision Date: 901114
Result: Denied

Keyword

- 1: evaluation
- 2: technical evaluation
- 3:
- 4:
- 5:

GSBCA 10924-P
ADP PR; v3/n3; p18
10818-p
Decision Date: 901220
Result: Denied

Keyword

- 1: untimeliness
- 2: evaluation
- 3:
- 4:
- 5:

GSBCA 10925-P
ADP PR; v3/n3; p19

Decision Date: 901211
Result: Denied

Keyword

- 1: jurisdiction
- 2: definition of ADP
- 3:
- 4:
- 5:

GSBCA 10954-P
ADP PR; v3/n3; p19

Decision Date: 901121
Result: Denied

Keyword

- 1: Evaluation - Technical
- 2: Evaluation - Cost
- 3: Discussions
- 4: Debriefing
- 5:

GSBCA 10956-P
ADP PR; V3/N4; P5

Decision Date: 910114
Result: Grant On Appeal

Keyword

- 1: Solicitation-Incomplete
- 2: Discussions-Untruthful
- 3:
- 4:
- 5:

GSBCA 10984-P
ADP PR; V3/N4; P6

Decision Date: 910114
Result: Denied

Keyword

- 1: Competition-Unfair Advantage
- 2: Solicitation-Incomplete
- 3:
- 4:
- 5:

GSBCA 10986-P & 10987-P6
ADP PR; V3/N4; P6
GSBCA 10960-P
Decision Date: 910124
Result: Denied

Keyword

- 1: Evaluation-Mathematical
- 2: Evaluation-Material
- 3: Brooks Act-Jurisdiction*
- 4: Responsive
- 5: Low Cost

GSBCA 10997-P
ADP PR; V3/N4; P7

Decision Date: 910205
Result: Denied

Keyword

- 1: specific make and model
- 2: justification and approval
- 3: untimeliness
- 4:
- 5:

GSBCA 11006-P
ADP PR; v3/n3; p19

Decision Date: 901220
Result: Denied

Keyword

- 1: Evaluation - Price
- 2: Evaluation - Criteria
- 3: Discussions-Inadequate
- 4: Evaluation - Cost
- 5:

GSBCA 11009-P
ADP PR; V3/N4; P8
10694-P & 10697-P
Decision Date: 910219
Result: Denied

Keyword

- 1: Responsiveness
- 2: Brooks Act-Jurisdiction
- 3: GAO v GSBCA
- 4:
- 5:

GSBCA 11034-P
ADP PR; V3/N4; P9

Decision Date: 910129
Result: Dismissed

Keyword

- 1: 8 (a) - Competitive
- 2: SBA
- 3: Competitive range
- 4: Timeliness
- 5:

GSBCA 11037-P
ADP PR; V3/N4; P9

Decision Date: 910118
Result: Dismissed

Keyword

1: Bulletins	GSBCA 11048-P
2: MIPS	ADP PR; V3/N3; P2-5
3: Performance	
4: Validation	Decision Date: 910215
5:	Result: Denied

Keyword

1: Competitive range	GSBCA 11049-P
2: Brooks Act - Sig ADPE*	ADP PR; V3/N4; P 10
3: Evaluation - Technical	Fed Cir 889 F2d 1067
4:	Decision Date: 910314
5:	Result: Denied

Keyword

1: Warner Amendment	GSBCA 11060-P
2: (Telecommunications)	ADP PR; V3/N4; P 11
3:	
4:	Decision Date: 910218
5:	Result: Settled

Keyword

1: Responsiveness	GSBCA 11069-P
2: Evaluation - Improper	ADP PR; V3/N4; P 11
3: Personnel - Resumes	
4: Evaluation - Cost	Decision Date: 910327
5: Walsh - Healy	Result: Denied

Keyword

1: Specification-Restrictive	GSBCA 11075-P
2: Timeliness - FAX	ADP PR; V3/N4; P 12
3:	
4:	Decision Date: 910221
5:	Result: Dismissed

Keyword

1: Solicitation-Inaccurate	GSBCA 11103-P
2: DPA	ADP PR; V3/N4; P 13
3: Performance Validation	
4: Interested Party	Decision Date: 910307
5: Timeliness	Result: Denied

Keyword

- 1: Responsiveness
- 2: Commerciality
- 3: Buy American act
- 4:
- 5:

GSBCA 11113-P
ADP PR; V3/N4; P 14

Decision Date: 910321
Result: Denied

Keyword

- 1: Non-Responsive
- 2: Interested Party
- 3:
- 4:
- 5:

GSBCA 11115-P
ADP PR; V3/N4; P 14

Decision Date: 910315
Result: Dismissed

Keyword

- 1: Responsiveness
- 2: Interested Party
- 3:
- 4:
- 5:

GSBCA 11121-P
ADP PR; V3/N4; P 14

Decision Date: 910326
Result: Dismissed

Keyword

- 1: Jurisdiction - Contract Administration
- 2:
- 3:
- 4:
- 5:

GSBCA 11138-P
ADP PR; V3/N4; P 15

Decision Date: 910320
Result: Dismissed

COMMENTARY

Keyword

- 1: Bulletins
- 2:
- 3:
- 4:
- 5:

No Case Number
ADP PR; V3/N3; p1
41CFR 201-3.001(b)
Decision Date:
Result: N/A

APPENDIX F

Best Value

- low cost: complaint concerned selection or non-selection of low cost offer.
- most advantageous: award based on other than price factors.

Bid

- acceptance period: includes mail, facsimile, specific location, etc.
- clerical errors: typographical and other administrative errors.
- late bid/proposal: includes timing of offer.
- misrepresentation/fraud:

- modification of offer
refers to modification of bid after initial proposal.

Competition

- full & open
complaint that full and open competition was not obtained.

- sole source
complaint regarding the use or non-use of a single source of procurement.

- unfair advantage

Discussion

- auctioning
complaint of "playing" offerors prices against each other.

- debriefing
information meeting with losing offeror(s).

- inadequate/improper
also includes the lack of discussions, (i.e., award without discussions).

- post BAFO
implies discussion being held after the best and final offer, but before award.

- technical leveling
advertent or inadvertent transfer of technology between offerors, may have been used as defense also in defending a charge of inadequate discussions.

Equivalency

- brand name or equal
where agency identifies a particular brand of ADP/FIP for acquisition and is willing to accept other ADP/FIP of comparable capability.
- functionally equivalent
similar to brand name or equal, but where the protestor's claim is not specifically challenging a "brand name or equal" or a "specific make or model" acquisition.
- specific make or model
where a particular piece of ADP/FIP must be exactly what the agency stated as their requirements.

Evaluation

- tech - excess capacity
complaint of flawed evaluation process whereby one offeror provided more than minimum required capability requested by the agency. Closely aligned with a best value judgment.
- tech - MIPS
subset of technical evaluation keyword. Millions of Instructions per Second (MIPS) is used as a benchmark test. This keyword was broken out because of an interviewee interest.
- tech - perf validation
short for performance validation, i.e. benchmarking.
- ambiguous criteria
- competitive range
a complaint of inclusion or exclusion of an offeror into the competitive range.
- cost
includes cost of options that have been "properly" evaluated.
- cost analysis
refers specifically to the process of evaluating the cost of a proposal.
- cost surcharge
the addition of fixed dollar amount to the offer by the evaluating agency.
- improper
complaint of the process of evaluating offers.
- material
refers to material imbalance in the evaluation process or an offer.
- mathematical
refers to a mathematical imbalance in the evaluation process or an offer.

- non-responsibility
protestors denial of a non-responsibility determination.
- non-responsiveness
protestor's denial of non-responsiveness determination.
- price
complaint of the price evaluation process.
- price reasonableness
complaint of determination on the price reasonableness of an offer, either awarded or denied.
- responsibility
claim by protestor that awardee is not responsible.
- responsiveness
claim by protestor that awardee's offer was not responsive; term used in the broad sense, includes both sealed bid and negotiated procurements.
- scoring
complaint concerning the scoring process in an evaluation.
- technical
complaint usually concerning the agency's technical evaluation of an offer, either protestors or awardees.
- undisclosed
complaint where evaluation criteria was undisclosed.

GSBCA

- economic & efficient
reference by the GSBCA, agency, or protestor to economic and efficient actions by the Government.
- judgment of KO
where issue of Contracting Officer's judgment was specifically an issue, or could have been an issue.
- non-compliant
refers to an agency not taking actions on a Board decision.
- Personnel
conflict of interest

Personnel

- integrity
where integrity was a specific issue.
- personnel
general keyword for collecting other personnel issues.

- rates
where labor rates or other wages in an offer were an issue.
- resumes
where resumes were required as part of the solicitation.

Procedure

- certifications
where certification required by the solicitation became an issue, includes refusal to provide, error in certification, questioning validity and integrity of certification, etc.
- cost & pricing data
complaint where the submission or validity of cost and pricing data was an issue.
- just and approval
where the justification and approval process or reasoning became an issue.
- notification of award
complaint of prompt notification of award or non-award requirements.
- pre-award survey
complaint regarding pre-award survey process.
- proprietary data
complaint regarding disclosure or non-disclosure of corporate trade secrets.

Procurement

- procurement type
complaint regarding type of procurement used by Government, i.e., sole-source, small business, etc.
- sole source
where sole source procurement became an issue, i.e., the Government should have or should not have...
- urgency
complaint questioning Governments use of "urgency," or used in defense by the Government to explain its actions.

Regulation

- A-76
complaint requiring interpretation or enforcement of OMB circular A-76.
- bulletins
issues regarding published bulletins; i.e. applicability, enforceability, etc.
- DPA
issue directly involving or questioning the delegation of procurement authority; does not include requirements by the Board to submit for a new DPA.

- handbook;agency guide
same as other issues under bulletins.
- interpretation
issues of a general nature requiring the interpretation of regulations.
- OFPP
issues regarding Office of Federal Procurement Policy statements.

Solicitation

- incomplete
no explanation necessary, closely related to specification.
- ambiguous
issue regarding ambiguous solicitations.
- amendment
issues regarding the amendment of the original solicitation.
- cancellation
complaint regarding the cancellation of a solicitation.
- CBD synopsis
issues raised by either the GSBICA or protestor or agency concerning the synopsis in the Commerce Business Daily (CBD).
- implied contract
complaint questioning the implied contracts of a solicitation.
- inaccurate
complaint of incorrect information in the solicitation.
- modification
similar in definition to amendment of solicitation.
- requirement overstated
complaint that the requirements of an agency are more than its minimum needs.
- requirements - agency
complaints regarding agency requirements in a solicitation.
- restrictive
complaint that terms of solicitation unduly limited competition.

Specification

- ambiguous
issue regarding the ambiguity of specification as opposed to the ambiguity of the solicitation as a whole.

- commerciality
issue regarding commerciality requirements or lack thereof in a specification.
- defective
issue regarding the correctness of a specification.
- delivery
issue regarding a delivery specification.
- functional
issue regarding the type of specification used, in this instance - use or non-use of a functional specification.
- licensing
issue regarding the requirement to license the use of ADP/FIP.
- restrictive
complaint that a specification un-necessarily limits competition.
- salient characteristic
usually deals with the requirement to provide or not provide specific characteristics of the ADP/FIP being procured in an equivalency procurement.
- security
complaint regarding security issues involved in an ADP/FIP procurement.
- standards
use of military standards or other recognized standards.

Statute

- Buy American Act
issue specifically regarding the Buy American Act.
- CICA
issue specifically regarding the Competition in Contracting Act.
- Trade Agreement Act
issue specifically regarding the Trade Agreement Act.
- Walsh-Healy
issue specifically regarding the Walsh-Healy Act.

Termination

- by agency
case where a protest was filed at the agency level and "resolved" by the agency. Either the original protestor was dissatisfied or the original awardee is subsequently dissatisfied.
- T4C clause
issues regarding the termination for convenience of the Government.
- T4D
issues regarding the termination for default of the protestor.

APPENDIX G

RAW TALLY OVERALL

GROUP	KEYWORD	3Q 89	4Q 89	1Q 90	2Q 90	3Q 90	4Q 90	1Q 91	2Q 91	Ttl Ov
I. ISSUES OF MERIT										
Best Value	low cost	2			3	1		1	1	8
	most advantageous	1		2	1	3				7
	GROUP TOTAL	3	0	2	4	4	0	1	1	15
Bid	acceptance period	1		1				1	1	4
	late bid/proposal							1		1
	modification of offer						1			1
	clerical errors			1				1		2
	misrepresentation/fraud				1					1
GROUP TOTAL	1	0	2	1	0	2	3	0	9	
Competition	full & open	1		1	1			1		4
	sole source							1		1
	unfair advantage								1	1
GROUP TOTAL	1	0	1	1	0	0	2	1	6	
Discussion	auctioning			2	2					4
	debriefing					1		1	1	3
	inadequate/improper post BAFO	3	3	3	1	1	1	2	3	17
	technical leveling		1	2	1			2		5
GROUP TOTAL	3	4	7	4	2	1	6	4	31	
Equivalency	brand name or equal		1	4			2	2		9
	functionally equivalent							1		1
	specific make or model					1	1	1		3
GROUP TOTAL	0	1	4	0	1	3	4	0	13	

Evaluation	ambiguous criteria						1	1	2
	cost	1			2		1	3	7
	cost analysis						1		1
	cost surcharge				1		1		2
	competitive range	2	1	2		1	1	2	9
	improper	2	2	4	4	1	2	2	19
	material					1		1	3
	mathematical					1			1
	non-responsibility	1		1					2
	non-responsiveness		1	6	1	1	1	8	19
	price				1			1	2
	price reasonableness	1	1				1		3
	responsibility	1		2			1		4
	responsiveness			4	6	2	7	1	25
	scoring		1						1
	technical		1	4	3		1	3	13
	tech - MIPS		1					2	3
	tech - excess capacity							1	1
	tech - perf validation							2	3
	undisclosed				1				1
GROUP TOTAL	8	8	24	18	7	15	23	121	
GSBCA	economic & efficient						2	2	
	non-compliant	1	1				1	3	
	judgment of KO	1			1		4	6	
GROUP TOTAL	2	1	0	1	0	0	7	11	
Personnel	resumés							1	1
	conflict of interest	1	2	1					4
	integrity						1		1
	rates				1				1
	personnel	2				2	1		5
GROUP TOTAL	3	2	1	1	2	1	1	12	
Procedure	just and approval						1	1	2
	certifications				1			2	3
	cost & pricing data		1						1
	notification of award	1				1			2
	proprietary data		1					1	2
	pre-award survey	1							1
GROUP TOTAL	2	2	1	0	1	1	4	11	
Procurement	procurement type			1					1
	sole source						1		1
	urgency		1						1
GROUP TOTAL	0	1	1	0	0	1	0	3	

Regulation	A-76			1					1
	DPA		2	1				1	4
	interpretation					1			1
	OFPP			1					1
	bulletins							2	2
	Handbook; Agency Guide	1			1			2	4
	GROUP TOTAL	1	2	3	1	1	0	4	13
Solicitation	ambiguous	1	1		3		1		6
	amendment		1		1	1			3
	cancellation	2		3					5
	CBD synopsis		1	1	1				3
	implied contract			1					1
	inaccurate	1	1				1		4
	incomplete	1	1					2	4
	requirements - agency						1		1
	requirement overstated			1	1		2		4
	restrictive	2	1						3
	modification							1	1
		GROUP TOTAL	7	6	6	6	1	4	2
Specification	ambiguous	1	1	2		2		1	7
	commerciality			1		1	2	1	6
	defective		1				1		2
	delivery				1				1
	functional			1	1				2
	licensing				1				1
	restrictive	2		2		3	1	1	10
	salient characteristic			1	1			1	3
	security							1	1
	standards				1				1
	GROUP TOTAL	3	2	7	5	6	4	5	34
Statute	CICA			1					1
	Trade Agreement Act					1	1		2
	Walsh-Healy							1	1
	Buy American Act	1				1	1	1	4
	GROUP TOTAL	1	0	1	0	2	2	0	8
Termination	T4C clause						1		1
	T4D		1						1
	by Agency	1	6				1		8
	GROUP TOTAL	1	7	0	0	0	2	0	10
	MERIT TOTALS	36	36	60	42	27	36	62	333

II ISSUES OF JURISDICTION

Contract	contract administration						1	1		
	contract type formation		1					1		
	modifications					1		1		
	GROUP TOTAL	0	0	1	0	0	2	1	0	4
Defenses	frivolousness		1	1		1				3
	interested party sanctions	1			1		1	4	2	9
	timeliness	1		1						2
	GROUP TOTAL	1	8	5	2			3	2	21
General/ Procedure	K admin matter							1	1	2
	DCAA audit jurisdiction					2		1		3
	Government agent	1	1	1			1			4
	GROUP TOTAL	1	1	1	0	2	1	3	1	10
Socio-econ	8(a)			1			1	1	1	4
	SBA						1	3	1	5
	SDB					1		1		2
GROUP TOTAL	0	0	1	0	1	2	5	2	11	
Statute	Warner Amendment	2		2			1	1	1	7
	Brooks Act	1		4		1	2		1	9
	ADP Definition							1	1	2
	Significant ADP		1	1		2	2		1	7
GROUP TOTAL	3	1	7	0	3	5	2	4	25	
JURISDICTION TOTAL		7	11	17	3	7	11	18	11	85
MERIT TOTALS		36	36	60	42	27	36	62	33	332
QUARTER GRAND TOTALS		43	47	77	45	34	47	80	44	417

APPENDIX H

RAW TALLY - GRANTED

GROUP	KEYWORD	3Q 89	4Q 89	1Q 90	2Q 90	3Q 90	4Q 90	1Q 91	2Q 91	TtIs
ISSUES OF MERIT										
Best Value	low cost	1								1
	most advantageous				1					1
	GROUP TOTAL	1	0	0	1	0	0	0	0	2
Bid	acceptance period									0
	late bid/proposal									0
	modification of offer									0
	clerical errors									0
	misrepresentation/fraud				1					1
GROUP TOTAL	0	0	0	1	0	0	0	0	1	
Competition	full & open			1						1
	sole source									0
	unfair advantage									0
GROUP TOTAL	0	0	1	0	0	0	0	0	1	
Discussion	auctioning		1							1
	debriefing									0
	inadequate/improper	2		1						3
	post BAFO									0
	technical leveling									0
GROUP TOTAL	2	1	1	0	0	0	0	0	4	
Equivalency	brand name or equal			1			1			2
	functionally equivalent						1			1
	specific make or model									0
GROUP TOTAL	0	0	1	0	0	2	0	0	3	

Evaluation	ambiguous criteria									0	
	cost					1				1	
	cost analysis									0	
	cost surcharge			1			1			2	
	competitive range	1								1	
	improper material	2	1	2		1	1			7	
	mathematical									0	
	non-responsibility									0	
	non-responsiveness							1		1	
	price									0	
	price reasonableness	1								1	
	responsibility							1		1	
	responsiveness							5		5	
	scoring									0	
	technical		1	1				1		3	
	tech - MIPS									0	
	tech - excess capacity									0	
	tech - perf validation									0	
	undisclosed		1							1	
	GROUP TOTAL	4	3	1	3	0	2	10	0	23	
	GSBCA	economic & efficient									0
		non-compliant									0
judgment of KO										0	
GROUP TOTAL	0	0	0	0	0	0	0	0	0		
Personnel	resumés	1								1	
	conflict of interest									0	
	integrity									0	
	rates									0	
	personnel						1			1	
GROUP TOTAL	1	0	0	0	0	1	0	0	2		
Procedure	just and approval					1				1	
	certifications						1			1	
	cost & pricing data		1							1	
	notification of award	1								1	
	proprietary data									0	
	pre-award survey									0	
GROUP TOTAL	1	1	0	0	0	1	1	0	4		
Procurement	procurement type									0	
	sole source						1			1	
	urgency									0	
	GROUP TOTAL	0	0	0	0	0	1	0	0	1	

Regulation	A-76								0
	DPA	1							1
	interpretation								0
	OFPP								0
	bulletins								0
	handbook; agency guide	1							1
	GROUP TOTAL	0	2	0	0	0	0	0	2
Solicitation	ambiguous								0
	amendment	1			1				2
	cancellation								0
	CBD synopsis	1	1						3
	implied contract			1					0
	inaccurate						2		2
	incomplete	1							1
	requirements - agency								0
	requirement overstated			1	1		2		4
	restrictive	1							1
	modification								0
	GROUP TOTAL	3	2	2	1	1	4	0	13
Specification	ambiguous					1			1
	commerciality			1	1				2
	defective	1	1						2
	delivery								0
	functional								0
	licensing						1		1
	restrictive	1		1			1		3
	salient characteristic								0
	security						1		1
	standards	1							1
	GROUP TOTAL	3	1	2	1	1	3	0	11
Statute	CICA								0
	Trade Agreement Act					1			1
	Walsh-Healy								0
	Buy American Act					1			1
	GROUP TOTAL	0	0	0	0	2	0	0	2
Termination	T4C clause								0
	T4D								0
	by Agency		3						3
	GROUP TOTAL	0	3	0	0	0	0	0	3
	MERIT TOTALS	15	13	8	7	4	14	11	72

APPENDIX I

GROUP	KEYWORD	<u>OVERALL</u>		<u>GRANTED</u>		WTD INDICES
		<u>Ttls</u> O	<u>Pct.</u> Ttls	<u>Ttls</u> Gr	<u>Pct</u> Ttls	
ISSUES OF MERIT						
Best Value	low cost	8		1		-1.0
	most advantageous	7		1		-0.7
	GROUP TOTAL	15	4.5%	2	2.8%	-1.7
Bid	acceptance period	4		0		-1.2
	late bid/proposal	1		0		-0.3
	modification of offer	1		0		-0.3
	clerical errors	2		0		-0.6
	misrepresentation/fraud	1		1		1.1
	GROUP TOTAL	9	2.7%	1	1.4%	-1.3
Competition	full & open	4		1		0.2
	sole source	1		0		-0.3
	unfair advantage	1		0		-0.3
	GROUP TOTAL	6	1.8%	1	1.4%	-0.4
Discussion	auctioning	4		1		0.2
	debriefing	3		0		-0.9
	inadequate/improper	17		3		-1.0
	post BAFO	2		0		-0.6
	technical leveling	5		0		-1.5
	GROUP TOTAL	31	9.3%	4	5.6%	-3.8
Equivalency	brand name or equal	9		2		0.1
	functionally equivalent	1		1		1.1
	specific make or model	3		0		-0.9
	GROUP TOTAL	13	3.9%	3	4.2%	0.3

Evaluation	ambiguous criteria	2		0		-0.5	
	cost	7		1		-0.7	
	cost analysis	1		0		-0.3	
	cost surcharge	2		2		2.2	
	competitive range	9		1		-1.3	
	improper	19		7		4.0	
	material	3		0		-0.9	
	mathematical	1		0		-0.3	
	non-responsibility	2		0		-0.6	
	non-responsiveness	19		1		-4.3	
	price	2		0		-0.6	
	price reasonableness	3		1		0.5	
	responsibility	4		1		0.2	
	responsiveness	25		5		-0.6	
	scoring	1		0		-0.3	
	technical	13		3		0.3	
	tech - MIPS	3		0		-0.9	
	tech - excess capacity	1		0		-0.3	
	tech - perf validation	3		0		-0.9	
	undisclosed	1		1		1.1	
	GROUP TOTAL	121	36.4%	23	31.9%	-4.5	
	GSBCA	economic & efficient	2		0		-0.6
		non-compliant	3		0		-0.9
		judgment of KO	6		0		-1.8
		GROUP TOTAL	11	3.3%	2	2.8%	-0.8
Personnel	resumés	1		1		1.1	
	conflict of interest	4		0		-1.2	
	integrity	1		0		-0.3	
	rates	1		0		-0.3	
	personnel	5		1		-0.1	
	GROUP TOTAL	12	3.6%	2	2.8%	-0.8	
Procedure	just and approval	2		1		0.8	
	certifications	3		1		0.5	
	cost & pricing data	1		1		1.1	
	notification of award	2		1		0.8	
	propriety data	2		0		-0.6	
	pre-award survey	1		0		-0.3	
	GROUP TOTAL	11	3.3%	4	5.6%	2.2	
Procurement	procurement type	1		0		-0.3	
	sole source	1		1		1.1	
	urgency	1		0		-0.3	
	GROUP TOTAL	3	0.9%	1	1.4%	0.5	

Regulation	A-76	1		0		-0.3
	DPA	4		1		0.2
	interpretation	1		0		-0.3
	OFPP	1		0		-0.3
	bulletins	2		0		-0.6
	Handbook; Agency Guide	4		1		0.2
	GROUP TOTAL	13	3.9%	2	2.8%	-1.1
Solicitation	ambiguous	6		0		-1.8
	amendment	3		2		1.9
	cancellation	5		0		-1.5
	CBD synopsis	3		3		3.3
	implied contract	1		0		-0.3
	inaccurate	4		2		1.6
	incomplete	4		1		0.2
	requirements - agency	1		0		-0.3
	requirement overstated	4		4		4.4
	restrictive	3		1		0.5
	modification	1		0		-0.3
		GROUP TOTAL	35	10.5%	13	18.1%
Specification	ambiguous	7		1		-0.7
	commerciality	6		2		1.0
	defective	2		2		2.2
	delivery	1		0		-0.3
	functional	2		0		-0.6
	licensing	1		1		1.1
	restrictive	10		3		1.2
	salient characteristic	3		0		-0.9
	security	1		1		1.1
	standards	1		1		1.1
		GROUP TOTAL	34	10.2%	11	15.3%
Statute	CICA	1		0		-0.3
	Trade Agreement Act	2		1		0.8
	Walsh-Healy	1		0		-0.3
	Buy American Act	4		1		0.2
		GROUP TOTAL	8	2.4%	2	2.8%
Termination	T4C Clause	1		0		-0.3
	T4D	1		0		-0.3
	by Agency	8		3		1.8
		GROUP TOTAL	10	3.0%	3	4.2%
MERIT TOTALS		332	100.0%	72	100.0%	

APPENDIX J

SPECIFIC VIOLATIONS

GAO Study
March 1990

Agency improperly rejected protestor's bid as nonresponsive. (2)

Agency's amended solicitation did not provide for the minimum 30-day response time.

Agency failed to properly document the need for specific make and model specifications in the solicitation.

Agency terminated a contract improperly by claiming, but not proving, that there were irregularities in the procurement process.

Agency failed to provide advance notice of a contemplated award with clear knowledge that other companies existed with competency to do the work. (two protest, both of which were later overturned by the United States Court of Appeals on jurisdictional grounds)

Agency waived the proscriptions against organizational conflicts of interest under different phases of the work. (two protests, both of which were later overturned by the United States Court of Appeals on jurisdictional grounds)

Agency did not make a proper system-life cost analysis and had no valid basis upon which to conclude what was the lowest overall cost alternative.

Agency did not limit scope of best and final offers.

Agency improperly failed to consider best and final offers in their entireties.

Agency failed to describe the Government's requirements clearly, accurately, and completely in the invitation for bids.

Agency failed to do procurement planning and adequate market research to be able to prepare specifications that reflected its minimum needs vis-a-vis the commercial availability of products to satisfy those needs.

Agency evaluated proposal on factors not specified in the solicitation. (three protests)

Agency did not promptly notify offerors that their proposal had been rejected.

Agency failed to include a specific list of salient characteristics in invitation for bids that would be required for brand name or equal features.

Agency did not properly conduct discussions with offerors.

Agency failed to obtain delegation of authority from the Administrator of the General Services Administration to conduct the procurement.

* Unless indicated otherwise, violations are for one protest.

Note: There were 20 violations in the 17 protests. Some violations occurred in more than 1 protest and some protests had more than 1 violation; therefore the number of violations will not total 20. Two protest decisions were overturned by the United States Court of Appeals. These two protests contained more than one violation.

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