

## **A PRIMER ON FEDERAL INFORMATION SYSTEMS ACQUISITIONS: FIRST PART OF A TWO-PART ARTICLE**

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### **\*32 I. Introduction**

Government contract law is considered a highly esoteric and technical field.<sup>1</sup> Within this field is an even more specialized subdivision—Federal information systems contracts. Since the Federal Government is the largest single consumer and disseminator of information in the United States, the size of this subdivision is enormous.<sup>2</sup> One expert estimates that of the 190 billion dollars the Federal

Government spends annually for goods and services, approximately fifty-five billion dollars is for computers and communications related expenditures.<sup>3</sup> Because the information technology industry is extraordinarily competitive, a disproportionately high number of contract awards are contested by disappointed bidders. Also, information systems contracts are notorious for generating disputes after award.<sup>4</sup> These characteristics make Federal information systems an especially enticing area of practice for private attorneys. However, there are two difficult barriers to entering this specialized practice. First, it is important for the attorney to have a strong background in information technology.<sup>5</sup> Secondly, the attorney must be familiar with, and adept at using the numerous regulations and miscellaneous authoritative decisions that are unique to these contracts.<sup>6</sup> The focus of this article is on the second requirement. As a primer, the article is structured to acquaint a person who is familiar with Government contracts with the peculiarities of information systems contracts.

### **\*33 II. Information Systems: Avoiding a Definitional Abyss**

Wrestling with nebulous technical terms is almost unavoidable when dealing with information systems contracts. Frustrated by the experience, one jurist has retorted:

[I]n the computer age, lawyers and courts need no longer feel ashamed or even sensitive about the charge . . . that they confuse the issue by resort to legal 'jargon,' law Latin or Norman French. By comparison, the misnomers and industrial shorthand of the computer world make the most esoteric legal writing seem as clear and lucid as the Ten Commandments or the Gettysburg Address; and to add to this Babel, the experts in the computer field, while using exactly the same words, uniformly disagree as to precisely what they mean.<sup>7</sup>

Even the term information system lacks a uniform meaning. The term was coined in the private sector as a de facto recognition of three formally distinct technologies: telecommunications, computing, and office automation.<sup>8</sup> Federal procurement directives do not mention information systems.<sup>9</sup> For the last several years, Federal contracts for information technology have been predicated on laws and regulations which continued to envision telecommunications and automatic data processing equipment as distinct technologies. Although the General Services Administration (GSA) had asserted oversight authority over contracting for these technologies, the statutory scheme has been imprecise and often a source of inter-agency friction.<sup>10</sup>

As early as 1965, Congress recognized that the Federal agencies were not properly planning or acquiring their automatic data processing resources. In that year Congress passed the Brooks Act by which the GSA was 'authorized and directed to coordinate \*34 and provide for the economic and efficient purchase, lease and maintenance of automatic data processing equipment by the Federal agencies.'<sup>11</sup> Since the definition of automatic data processing equipment (ADPE) established the boundaries of the GSA's authority, the definition has been a source of inter agency disagreement.<sup>12</sup> For instance, prior to 1986, there was confusion whether GSA's authority extended to separately priced software, maintenance services and commercial ADP support services.<sup>13</sup> Recently, in the

Paperwork Reduction Reauthorization Act of 1986, Congress has begun to recognize the merger of the technologies and has broadened the definition of ADPE to clarify GSA's authority.<sup>14</sup>

GSA's oversight of telecommunications can be traced to the Federal Property and Administrative Services Act of 1949 which authorized the GSA to represent other Federal agencies in negotiations for public utility services.<sup>15</sup> However, the telecommunications industry has changed since 1949. Two major developments suggest that Federal telecommunications contracts are no longer a public utility service.<sup>16</sup> First, the Federal Communications Commission has fostered deregulation. Second, the Justice Department has forced divestiture of the American Telephone and Telegraph Company's regional operating companies.<sup>17</sup> Nevertheless, the GSA has retained almost complete oversight of the acquisition \*35 of telecommunications services by civilian agencies.<sup>18</sup> For instance, civilian agency requirements for major changes or new installation of telecommunication resources must be submitted to GSA for approval.<sup>19</sup> Furthermore, the GSA has promulgated a broad definition of telecommunication services.<sup>20</sup> In summary, the term information systems must be used generically since it can not be traced to a statute or procurement regulation. Fortuitously, this term offers a convenient way to avoid the definitional abyss of the underlying technologies.

### **III. Forums**

There are a variety of formal and informal forums available to a sophisticated attorney seeking to advance the interests of a client. Unless the appropriate forum is selected, a client's cause can be lost regardless of how meritorious it might be.

#### **A. Informal Forums**

Informal forums consist of offices that are able to impact the conduct of the procuring activity. Often the appropriate informal forum depends on the nature of the vendor's concern. An example would be the OMB's Office of Information and Regulatory Affairs (OIRA). Under the Paperwork Reduction Act of 1980, OIRA is empowered to 'develop and implement Federal information policies, principles, standards, and guidelines . . . [for the] acquisition and use of automatic processing, telecommunications, \*36 and other technology for managing information resources.'<sup>21</sup> Under this authority, OIRA has issued three circulars.<sup>22</sup> Additionally, this office has authority to resolve disputes between the GSA and other agencies concerning the Brooks Act.<sup>23</sup> Furthermore, OIRA approves agency procedures to request information from the public.<sup>24</sup> For example, industry representatives have convinced OIRA to disapprove proposed regulations that require offerors to submit certificates of commercial pricing.<sup>25</sup>

Another informal forum with noteworthy potential to influence a Brooks Act procurement is the GSA Office of Information Resources Management (OIRM). OIRM decides whether GSA will conduct the acquisition. Alternatively, OIRM can authorize the requesting agency to undertake the procurement. Because of manpower constraints, GSA conducts the procurement for less than 10 percent of the Federal projects. The document which authorizes the agency to undertake the acquisition itself is

known as a Delegation of Procurement Authority (DPA).<sup>26</sup> Without a DPA, an agency lacks authority to award a contract.<sup>27</sup> By threatening to revoke a DPA, OIRM can exercise considerable leverage over procuring activities. In this regard, close attention should be paid to the provisions in the DPA document. Deviating from the DPA can result in the agency exceeding its authority.<sup>28</sup>

The House Government Operations Committee (HGOC) is chaired by Congressman Jack Brooks of Texas. HGOC has a reputation<sup>37</sup> for investigating precarious information systems acquisitions. Although the Committee has no statutory authority to suspend procurements, during a recent four year period, over thirty acquisitions have been suspended at the Committee's request.<sup>29</sup> Normally, a mere inquiry from the Committee is sufficient to have an agency seriously reflect upon a particular undertaking.<sup>30</sup> Where the agency has not responded to the satisfaction of the Committee, HGOC has found ways to influence the questioned acquisition. For example, the Committee was instrumental in having the funds for the Air Force's Advanced Logistics Systems withdrawn.<sup>31</sup> Another example would be the Air Force's PHASE IV Program where the HGOC's criticisms resulted in the DPA being revoked.<sup>32</sup>

The Department of Commerce's National Bureau of Standards (NBS) has responsibility for creating 'uniform Federal automatic data processing standards.'<sup>33</sup> These are commonly referred to as Federal Information Processing Standards (FIPS). A significant competitive advantage is to be gained for a vendor who persuades the NBS to adopt a standard that subsumes his product line. Astute vendors do their utmost to prevail in this informal forum. The role of the lawyer is nominal since the dialogue is almost exclusively on a technical level. Moreover, disappointed vendors probably do not have standing to appeal an FIPS determination.<sup>34</sup> Each FIPS publication explains under what circumstances a Federal agency is free to deviate from the standard. Normally, NBS approval is required. Agencies risk having a protest sustained if they attempt to relax an FIPS without obtaining a proper deviation.<sup>35</sup>

Another informal forum is to contact senior officials within the procuring agency. This can be accomplished by either an agency level<sup>38</sup> protest or an impromptu communication. The protest procedures for both the GAO and GSBICA favor first seeking resolution within agency channels.<sup>36</sup> Agency supplements to FAR Subpart 15.10 delineate how to file a protest with the agency. An impromptu communication can be made to any official in the agency. A likely candidate would be the senior official, who, pursuant to the Paperwork Reduction Act of 1980, has 'responsibility for the conduct of and accountability for any acquisitions' of information systems.<sup>37</sup> Pursuing a disagreement initially through agency channels has two advantages. First, there is less likelihood of engendering ill-will, and second, it provides an opportunity to prevail without resorting to a formal forum. Seeking assistance from senior agency officials should normally be undertaken before pursuing the matter outside the agency unless time is of the essence or it would be futile to contact senior agency officials.

A prominent example of an impromptu communication persuading a senior agency official occurred when the National Security Industry Association complained to the Deputy Secretary of Defense about military organizations generating contract clauses that were more stringent than the standard clauses in the Defense Acquisition Regulation. The Deputy Secretary of Defense directed that the non-standard clauses be rescinded.<sup>38</sup>

## **B. The General Accounting Office**

Although the GAO has responsibility for many functions, it performs two oversight functions that are especially important to information systems procurements. The first function involves evaluating programs or activities of the Federal Government. Many of these studies are performed by the Information Management and Technology Division (IMTD). Poignant reports are not uncommon.<sup>39</sup> Most reports are initiated upon the request of a committee \*39 of Congress with jurisdiction over the program or activity.<sup>40</sup> Agencies do not have the prerogative to ignore an IMTD report; an agency response must be prepared.<sup>41</sup>

The GAO Office of General Counsel performs the second important oversight function by rendering decisions on the propriety of actions by a procuring activity. Long before the Competition in Contracting Act (CICA) gave statutory recognition to the GAO's role in resolving protests, it was recognized that 'a protest to the GAO strikes fear into the hearts of contracting officers.'<sup>42</sup> In previous years, there has been a perception in the vendor community that the GAO was not an effective forum. Recent statistics should dispel this perception. Prior to CICA, protesters had approximately a 14.4 percent success rate before the GAO.<sup>43</sup> The post-CICA success rate is approximately 18.7 percent.<sup>44</sup>

With one exception, protests before the GAO concerning information systems procurements do not differ materially from protests concerning procurements for other forms of goods and services. The one exception applies to the general rule that the GAO will only question determinations of technical adequacy to ascertain if they are arbitrary or an abuse of discretion.<sup>45</sup> Instead, for information systems acquisitions, the GAO will use its own technical ADP staff to render advice on the evaluation of offers.<sup>46</sup> Furthermore, the interrelationship between other GAO divisions and the Office of General Counsel can be used to the protester's advantage. In a protest by Four-Phase Systems, Inc., the Federal Aviation Administration (FAA) initially succeeded in convincing the GAO Office of General Counsel that the specifications for ten computer systems met the agency's minimum needs.<sup>47</sup> However, the protest was eventually sustained when a GAO audit report \*40 concluded that the FAA specifications exceeded the agency's minimum needs.<sup>48</sup> In summary, by studying controversial acquisitions as well as rendering decisions on protests, the GAO has two important oversight functions in the Federal information systems procurement process.

## **C. General Services Board of Contract Appeals (GSBCA)**

In response to protester criticism that the GAO was not an effective tribunal for ADPE protests, Congress initially authorized a three year experiment that granted the GSBCA jurisdiction to revoke protests concerning acquisitions conducted under the Brooks Act.<sup>49</sup> Law firms and procurement consultants were especially pleased with this Congressional initiative:

The GSA Board holds real promise of cleaning up what is often a large procurement mess. Wired RFPs are not uncommon. Violation of the Brooks Law by DOD is common. Improper procurement execution is common. The GSA Board shows every sign of being smart, fair and tough. We love it. . . . Incompetent procurement officers buying high tech—and they are legion—have much to fear. It is our opinion that we are entering a whole new ball game.<sup>50</sup>

Statistics confirm that the GSBCA has been a favorable forum for protesters.<sup>51</sup> Since many scholarly articles have been written about the GSBCA, this article need only highlight some of the more noteworthy aspects of the Board.<sup>52</sup> Simply put, a protest before the GSBCA is full-fledged litigation compressed into an intense forty-five working day schedule.<sup>53</sup> Unlike a protest to the GAO \*41 where the determination whether to suspend a procurement is made by the agency, a protest to the GSBCA results in the Board making the decision.<sup>54</sup> To avoid having the procurement suspended, the contracting agency has the burden of proving that 'urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.'<sup>55</sup> Perhaps even more important from a protester's perspective, the GSBCA affords an opportunity to engage in limited discovery.<sup>56</sup> Another advantage to the protester is that the Board does not apply a presumption of agency correctness but instead renders a de novo review.<sup>57</sup> Interested parties who intervene in a GSBCA protest participate as a full party, and may even raise new issues.<sup>58</sup> Interested parties may not pursue a protest before the GSBCA if they have previously protested the same procurement by filing at the GAO.<sup>59</sup> In deference to the GSBCA's authority to bind an agency to decisions, the GAO will dismiss any protests involving an acquisition that has already been protested to the Board.<sup>60</sup>

Probably the most controversial aspect of the Board has been its aggressive assertion of jurisdiction. For instance, the Board has proclaimed its jurisdiction over interagency transfers of ADPE under the Economy Act;<sup>61</sup> over ADP support services such as system analysis and programming;<sup>62</sup> and over private packet \*42 switched data networks.<sup>63</sup> To date, there has been surprisingly little strife with DOD over the boundaries of the Nunn-Warner Amendment which excludes some DOD acquisitions from the Brooks Act. These exclusions involve war-fighting capabilities.<sup>64</sup> The first skirmish is likely to be a talisman of future encounters. That decision concerned a microcomputer used to calibrate equipment for submarines. The Board quoted the protester's argument that 'to classify every nail as 'critical' to the direct fulfillment of military missions . . . bears some relationships to . . . 'for want of a nail a kingdom can be lost'.'<sup>65</sup> In asserting jurisdiction over the subject matter initially, the Board quipped, 'This equipment is an integral part of a weapons system only in the sense that it is light-

weight and portable, and perhaps can be easily thrown at the enemy.<sup>66</sup> Nevertheless, the first skirmish was inconclusive because the protest was subsequently dismissed because it involved a foreign military sale.<sup>67</sup>

Overall, an old cliché best summarizes the jurisdictional struggle: the GSBCA 'lost the battle but won the war.' The battle began when Xerox Corp. and Volt Information Sciences, Inc. protested to the GSBCA concerning a Government Printing Office (GPO) procurement for integrated printing and publishing services for Army manuals.<sup>68</sup> GPO filed a motion to dismiss for lack of jurisdiction \*43 on the basis that the contract was for printed materials and not ADPE. The Board denied the motion.<sup>69</sup> Two days later the Board ordered the contract between the GAO and Electronic Data Systems, Inc. (EDS) suspended pending resolution of the protest.<sup>70</sup> The next day, EDS filed suit in Federal court seeking injunctive relief against the GSBCA order. EDS alleged that the Board had no jurisdiction.<sup>71</sup> At the U.S. Court of Appeals for the Federal Circuit, EDS prevailed on the merits. The Court held that the statute granted protest jurisdiction to the GSBCA only over 'procurements conducted under the Brooks Act, not those which should have been conducted under the Brooks Act.'<sup>72</sup> The case was remanded to the GSBCA with instructions to dismiss.<sup>73</sup>

The EDS case represents the lost battle. However, the GSBCA won the war when Congress legislatively overruled the EDS case in the Paperwork Reduction Reauthorization Act of 1986.<sup>74</sup> The Act granted the GSBCA 'authority to determine whether any procurement is subject to this section.'<sup>75</sup> Additionally, the Act made clear that OMB could not override GSBCA decisions concerning protest jurisdiction.<sup>76</sup> Finally, the Act prematurely terminated the three year experiment by making permanent the GSBCA's jurisdiction over ADPE protests.<sup>77</sup>

Overall, the Board deserves high marks for staying within the forty-five working day time limitation and thereby mitigating disruption of the procurement process. The Board has also done a thorough job of coming to grips with difficult technical issues.<sup>78</sup> Ironically, despite the numerous commentaries on the GSBCA, none have observed perhaps its greatest contribution. The ominous threat of a GSBCA protest has had a prophylactic impact \*44 on the acquisition process. Federal agencies have become more conscientious about properly conducting procurements for information systems.

#### **IV. Proper Planning**

Proper planning is indispensable if an agency is to gain the benefits of information technology. There are two distinct types of planning: managerial and acquisition. Without proper managerial planning, a project is doomed to failure regardless of how well the acquisition is planned. On a grandiose scale, the Federal Government has identified the need for managerial planning. OMB Circular A-130, Management of Federal Information Resources, requires agencies to:

Establish multiyear strategic planning processes for acquiring and operating information technology that meet program and mission needs, reflect budget constraints, and form the bases for their budget requests;

Establish systems of management control that document the requirements that each major information system is intended to serve and provide for periodic review of those requirements over the life of the system in order to determine whether the requirements continue to exist and the system continues to meet the purposes for which it was developed; and

Ensure that existing and planned major information systems do not unnecessarily duplicate information systems available from other agencies or from the private sector.<sup>79</sup>

Agencies have promulgated regulations to implement the OMB Circular.<sup>80</sup> In actual practice, the degree of managerial planning varies significantly among agencies.<sup>81</sup> Government executives should look to the private sector to learn two important lessons. First, Government executives should resist the temptation to overindulge in information technology. Before prudent corporate managers approve expenditures for information technology, one of the following conditions must be met: either there must be a \*45 commensurate cost reduction or the acquisition must be the only means of satisfying a bona fide information requirement that is necessary to enhance the profitability of the corporation.<sup>82</sup> Similarly, Government executives should never approve more information technology unless automation is the only means of satisfying a bona fide information requirement that is necessary to fulfill the agency's mission. Without proper management oversight, agency uses for information systems tend to proliferate beyond the minimum needs of the Government. The Government should not acquire more than its actual minimum needs.<sup>83</sup>

Second, unlike corporate executives, Government executives rarely plan for the profound impact that a new information system has upon an organization's 'culture.' Job insecurity, computerphobia, lethargy to change, union resistance, and even Luddites can cause a technically sound information system never to be productive. Government executives need to appreciate that proper planning involves considerably more than finding the right combination of hardware and software.<sup>84</sup>

Notwithstanding the grandiose scheme of OMB Circular A-130, the more effective directive in forcing agencies to plan their information technology requirements has been OMB Circular A-11, Preparation and Submission of Budget Estimates. Subpart 43, 'Data on Acquisition, Operation, and Use of Information Technology Systems,' requires a detailed listing of anticipated expenses that exceed \$100,000 in any of the three fiscal years covered in the budget submission. Furthermore, acquisitions of equipment or services in excess of a million dollars require a narrative statement. Therefore, to prepare a meaningful budget submission, the agency must anticipate its information technology requirements. In conclusion, unless there has been proper managerial planning, even a well-conceived acquisition plan is not apt to produce an information system that is responsive to the needs of the agency.

\*46 CICA requires 'advanced procurement planning.'<sup>85</sup> Recently, the GAO criticized the Federal Acquisition Regulation as inadequate.<sup>86</sup> CICA has added new teeth to the requirement that agencies properly plan an acquisition. No longer can an agency use a claim of urgency to justify a sole source

acquisition where the underlying reason for the noncompetitive acquisition was a lack of advance planning.<sup>87</sup> Where the acquisition is conducted under the Brooks Act, the GSA forces the agency to conduct advance planning by requiring detailed information in the agency procurement request (APR).<sup>88</sup> Even if the acquisition is not under the Brooks Act, the APR procedure should be followed as a guide.<sup>89</sup>

Proper acquisition planning invariably means exercising sound business judgment. There is no universal strategy.<sup>90</sup> One of the most beneficial innovations has been the early use of a business strategy panel. These panels should consist of highly experienced individuals representing a variety of disciplines to include hardware, software, telecommunications, maintenance, project management, contracting, auditing, and legal.<sup>91</sup> Unfortunately, business strategy panels are not used as frequently as they should be. Typically, there is pressure to rush the project. Rather than take the time to conduct a business strategy panel, the program manager and contracting officer rely on their preconceived notions about the acquisition strategy. This approach can be 'penny wise and pound foolish.' Without proper acquisition planning, a procurement is rarely successful in satisfying an agency's requirements at a fair and reasonable price.

#### **\*47 V. Alternatives to Letting a Contract**

##### **A. Existing Government Resources**

Before purchasing or leasing hardware, agencies are required to ascertain if there is excess Government owned equipment.<sup>92</sup> Each agency is directed to have a point of contact for excess computer equipment.<sup>93</sup> Sometimes excess Government-owned equipment does not prove to be a bargain. It can be expensive to package and ship. Often it has to be refurbished. Also, because it is older equipment, spare parts might be scarce and maintenance costs may be excessive.<sup>94</sup> Nor is excess Government equipment as plentiful as one might anticipate. Frequently the agencies 'trade-in' the aging equipment for newer equipment.<sup>95</sup>

Another alternative to letting a contract is to share information system resources with other agencies. OMB has directed that 'Agencies shall, to the maximum extent feasible, share their excess data processing capacity with users from other agencies.'<sup>96</sup> Thorough guidance exists on how the servicing agency is to be reimbursed.<sup>97</sup> The GSA has prepared an extensive list, by location, of organizations that are likely to be able to share information systems resources.<sup>98</sup> The following are important factors that should be considered prior to using another agency's excess resources: economic advantages; microcomputer or minicomputer alternatives; available software and the scope of the accompanying licenses; the requirement for greater capacity at peak times; access to more sophisticated software and equipment configurations; security; and the Privacy Act.<sup>99</sup> A decade ago, sharing computer resources was very common. Today sharing is not as prevalent \*48 for a variety of reasons. First, hardware is more affordable. Second, the use of batch processing is diminishing. Third, telecommunications costs have increased. Finally, information systems are

becoming more essential to the daily operation of each office. Hence, agency officials want greater control of this key resource.

## **B. ADP Schedule Contracts**

GSA nonmandatory ADP schedule contracts are an excellent means of quickly procuring an agency's requirements that involve relatively small purchases.<sup>100</sup> Nonmandatory ADP schedule contracts are awarded on a noncompetitive basis.<sup>101</sup> Nevertheless, GSA schedule prices characteristically are lower than the vendor's published commercial catalogue prices.<sup>102</sup> In fact, private sector customers frequently use GSA schedule prices as a desired target price when negotiating with the respective vendor.<sup>103</sup> In recent years, the GSA has become increasingly aggressive about obtaining 'most favored customer' prices from vendors.<sup>104</sup> Generally, the computer industry has not been successful in resisting GSA demands.<sup>105</sup> It appears that ADP schedule contracts are too lucrative for vendors not to endure GSA probing into their commercial discounting practices.<sup>106</sup>

GSA's OIRM categorizes ADP schedule contracts into three groups. Group A is for the full line of general purpose ADPE and related software, maintenance and training. Group B is for peripheral equipment. Group C is for microcomputers and microcomputer \*49 related products. Schedule contracts are best suited for instances where the anticipated savings gained by a competitive acquisition are not expected to offset the administrative expenses of issuing a solicitation. Each schedule contract contains a maximum order limitation (MOL) clause to stop agencies from using the schedule when the volume of the order suggests competition would produce a savings to the government. It is inappropriate for an agency to place multiple orders against a nonmandatory ADP schedule contract as a means of avoiding the maximum order limitation.<sup>107</sup> Nor may an agency place an order to a schedule contract where the order deviates materially from the terms of the original contract.<sup>108</sup>

Orders in excess of \$50,000 must be advertised in the Commerce Business Daily (CBD).<sup>109</sup>

Although the FAR requires an agency to wait only fifteen days after synopsisizing the requirement in the CBD before placing an order against the schedule, the GAO contends that there is a legal requirement to wait thirty days before placing the order.<sup>110</sup> After waiting the appropriate time without receiving responses to the CBD notice, an order may be placed against the schedule, provided the procurement file is documented to substantiate that the ADP schedule offers the lowest overall cost alternative to the Government.<sup>111</sup> Orders may not differ materially from what was synopsisized in the CBD.<sup>112</sup>

If a response to the CBD notice is received, the duties of the contracting officer become more complicated. Overall, the process is primarily informational and therefore less structured than a formal competition. The purpose is to ascertain if any nonschedule vendors would be interested in competing at prices that would make competition practicable.<sup>113</sup> Hence, vendors responding to a

CBD notice must make an acceptable affirmative written response. \*50 Where the response does not provide ample information that the respondent will meet the requirement, the agency may disregard the response and place an order against the synopsis schedule contract.<sup>114</sup> For instance, prior to leasing a central processor from an IBM schedule contract, the Marine Corps synopsis in the CBD. A vendor offered a lower price but did not address either a critical delivery schedule or maintenance. The Marine Corps' decision to proceed with placing an order on the IBM schedule contract was upheld.<sup>115</sup>

Even if a vendor submits a response that is not deficient informationally, there are circumstances in which an agency may still place a delivery order against the schedule contract. Clearly, issuing the delivery order is appropriate where the item on the synopsis schedule contract is at a lower price than the prices offered by any respondents.<sup>116</sup> Also, paying a higher price can be justified where the synopsis item offers specific features which the agency requires.<sup>117</sup> Additionally, equipment capability and availability of maintenance can justify disregarding a lower priced response.<sup>118</sup> Unless one of the above exceptions applies, a contracting officer who receives an acceptable response to a CBD notice should conduct a competitive acquisition.<sup>119</sup> The resulting competitive acquisition must be re-synopsis in the CBD.<sup>120</sup> It should be noted that the vendor whose schedule was originally synopsis is free to reduce his price for the subsequent solicitation without invoking the price reduction clause in the schedule contract.<sup>121</sup>

### **C. GSA's Office of Technology Plus Stores**

In June 1983, through a competitive procurement, GSA awarded a contract to MathBox, Inc. for the operation of the multiservice \*51 Office of Technology Plus (OTP) computer stores. The first OTP store opened in Washington, D.C. in August 1983. Stores in Philadelphia and Atlanta opened in 1984. Specifically, these stores are to provide:

- information to Federal agencies on how microcomputer technology can be used to increase the effectiveness and efficiency of their operations;
- assistance in selecting hardware and software to meet specific agency functional requirements;
- side-by-side comparison of similar products from several manufacturers;
- sales of end-user computing equipment, software, and supplies;
- seminars on using products supplied by the store; and
- service and maintenance for products sold by the stores.

OTP sales have grown from about \$12.8 million to \$31 million over the first two years of operation. The majority of sales have been made through the Washington, D.C. store which accounted for 92 percent of the receipts.<sup>122</sup>

OTP purchases are subject to a maximum order limitation of \$100,000.<sup>123</sup> Many Department of Defense organizations are precluded from acquiring microcomputers from the OTP stores because of existing requirements contracts.<sup>124</sup> Items acquired from OTP stores cost an estimated 12.8

percent more than identical items acquired from schedule contracts.<sup>125</sup> It is suspected that frequently Federal employees use the OTP stores rather than schedule contracts merely for the convenience of not having to wait for a microcomputer to be delivered.<sup>126</sup> In other instances, the OTP stores provide valuable assistance through configuration advice, seminars and extended service. Additionally, the OTP stores provide a 'risk-free, money back, satisfaction guarantee' which allows a full refund for any reason.<sup>127</sup>

#### **\*52 VI. Fiscal Law**

Federal fiscal law permeates information systems contracts well beyond what one might initially suspect. Frequently, fiscal law is the predominant factor in the Government's acquisition strategy. For instance, most large contracts for hardware are indefinite-delivery, indefinite-quantity contracts (IDIQ). IDIQ contracts require the Government to identify a minimum and maximum quantity.<sup>128</sup> A key characteristic of an IDIQ contract is that at the time of award, the Government need only obligate sufficient funds to pay for the minimum quantity.<sup>129</sup> It is not unusual for the Government to get the minimum quantity as low as possible without the amount being nominal.<sup>130</sup> There are three primary reasons why agencies take this tack. A frequent reason is that the agency desires a large contract to promote uniformity within the agency. Yet, often the funds for the acquisition are located at the decentralized offices of the agency. Consolidating the funds can be difficult especially if subordinate organizations are recalcitrant. A second reason is that many of the potential users do not actively participate in the acquisition. They are reluctant to commit their money until they are fully satisfied that the winning vendor will meet their expectations.

The third reason why IDIQ contracts are often used is because they can be structured to implement an agency's long range automation plans. This is accomplished by making the minimum quantity equal to the amount of money presently appropriated to the agency for information systems. The remaining quantities on the IDIQ contract are projected to be purchased with money which has not yet been appropriated although it has been requested through the agency's budget submission. For any of these three reasons, there are advantages for an agency to offer only a small minimum quantity on an IDIQ contract. Despite the administrative advantages, a small minimum quantity is not prudent business judgment since the prices obtained beyond the minimum probably do not reflect the lowest obtainable price.<sup>131</sup>

\*53 In recent years, DOD has astutely consolidated its buying power for microcomputers. The acquisition strategy has been to use requirements contracts.<sup>132</sup> Fiscal law limitations have been the predominant factor in selecting this type of contract. The money for these purchases stem from the numerous post/camp/station accounts which are world-wide. Consolidating the money into a single account available to be obligated at the time of contract award was not feasible. Hence, requirements contracts were selected primarily because funds are obligated by each delivery order and not by the contract itself.<sup>133</sup> Although requirements contracts are remarkably convenient for the

Government in terms of fiscal law, they also involve two significant liabilities. First, 'the Government may not agree to purchase its requirements from one contractor and then, with impunity, satisfy them elsewhere.'<sup>134</sup> Second, a contractor is entitled to an equitable adjustment where the Government has been negligent in failing to consider all relevant information in preparing its estimates.<sup>135</sup>

Generally, when the Government seeks to acquire a major item of equipment, the article is purchased. An exception would be information systems for which leasing is not uncommon. Other contractual arrangements include lease-with-option-to-purchase and lease-to-ownership plans.<sup>136</sup> In theory, the Government should award to the plan that offers the lowest overall life cycle costs.<sup>137</sup> Yet, in many instances the agency did not pursue a purchase plan solely because of a lack of funds.<sup>138</sup> In DOD, the problem is even more complex because of the various categories of appropriations made available by Congress.<sup>139</sup> To illustrate, if the Air Force wanted to purchase a supercomputer but only had 'Operational & Maintenance' funds, the Air Force would be required to lease. Similarly, if the Air Force determined leasing was the lowest overall life cycle \*54 cost, but the only money available were 'Procurement' funds, the supercomputer probably should be purchased.<sup>140</sup>

Initially, one would think that fiscal law should be subservient to the prudent use of tax dollars, but that is not always the case.<sup>141</sup> There have been protests by offerors who have submitted proposals with the lowest life cycle costs, but, because the agency lacked funds to purchase the information system, did not receive the contract.<sup>142</sup> These protests have been denied. Notwithstanding the potential monetary loss to the Government, the GAO recognizes that it was more important that an agency scrupulously adhere to statutory funding constraints.<sup>143</sup> Although the strict application of the statute appears in isolated instances to be wasteful, it is a price that must be paid for the underlying constitutional right of Congress to control the expenditure of funds.<sup>144</sup>

Lease-with-option-to-purchase plans and lease-to-ownership plans are recognized hybrids of traditional purchase or lease arrangements.<sup>145</sup> Variations of these recognized hybrids are apt to have fiscal law pitfalls. For example, a lease-purchase plan differs from a lease-to-ownership plan in that, instead of using options, the contract automatically extends beyond the current fiscal year. This arrangement can violate the Anti-Deficiency Act.<sup>146</sup> Once offerors appreciate that, as a norm, Government contracts can not automatically cross fiscal years, they sometimes insist on a separate charge if an option is not exercised. Where the charge is only a recapturing of installation expenses which had been amortized through the option years, the charge is permissible.<sup>147</sup> However, if \*55 the charge is punitive or to capture anticipated profits, it is not permissible.<sup>148</sup> Another troublesome variation is the installment purchase plan. This plan places the risk of loss for the information system on the agency. Unless the risk of loss provision is modified, the agency is required to obligate sufficient money to cover the possible liability.<sup>149</sup>

Finally, to add to the confusion, there is a scheme known as third party leasebacks. This scheme may be useful where existing leasing arrangements have resulted in the Government accruing monetary credits towards purchasing the system. Eventually, it becomes more economical to purchase the system than to continue leasing. Where the agency lacks the funds to undertake the purchase, the third party leaseback is another alternative available to the Government. In a third party leaseback, the Government transfers the purchase credits to a private financier who buys the system from the existing contractor. The Government then leases the system from the financier but for a reduced rate. These peculiar arrangements have withstood GAO scrutiny.<sup>150</sup>

## **VII. Specifications**

Agencies have broad discretion when drafting specifications. Judicial and GAO review is limited to whether procurement officials have a rational or reasonable basis for the action.<sup>151</sup> It is fundamental to appreciate that specifications are restrictive *per se*:

[W]e recognize that once an agency adopts any kind of specification or limiting condition—such as a single vendor requirement—competition is automatically restricted to some extent. The vital point is not that competition is restricted but whether competition is unduly restricted.<sup>152</sup>

There are limits on competition inherent in all procurements. A decision to purchase an electronic pocket calculator excludes . . . the abacus. . . . There is only one issue: are the agency's needs such that it acted properly—reasonably, legitimately, permissibly—in narrowing competition.<sup>153</sup>

\*56 Once one appreciates that specifications are *per se* restrictive, specific groups of specifications merit particular attention.

### **A. Hierarchy of Specifications**

CICA directed that 'the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs.'<sup>154</sup> Without designating any preference for the type of specification, CICA identifies functional, performance and design specifications as acceptable.<sup>155</sup> The FIRMR establishes a hierarchy for the various types of specifications based on the following order of preference: functional, performance, plug-to-plug compatible, brand-name or equal, and specific make and model.<sup>156</sup> Since CICA allows a protest to be sustained where the challenged agency action violates a regulation, agencies should be prepared to justify using other than a functional specification.<sup>157</sup> A functional specification delineates the objectives which the information system is intended to accomplish in the form of underlying data processing requirements.<sup>158</sup> For instance, requiring the installation of a minicomputer is not using a functional specification; maybe the agency's needs can be met by a timesharing approach.<sup>159</sup> In actual practice, functional specifications and performance specifications can be difficult to distinguish. By definition, the major characteristic of a performance specification is that it states output requirements.<sup>160</sup> Yet, output requirements just as easily can be the functional objective of the information system.

Perhaps because of the difficulty in distinguishing between performance and functional specifications, the FAR regards either as equally acceptable.<sup>161</sup> Similarly, the Comptroller General has not vigorously insisted on functional specifications.<sup>162</sup> With regard to \*57 information systems, rarely do the specifications fall within a single classification. It is not atypical to see an arrangement where the application software is functional; the central processing unit (CPU) is performance;<sup>163</sup> the peripherals are plug-to-plug compatible; and the operating system is brand-name or equal. It is also illuminating to note that despite the preference for functional specifications, the multitude of mandatory FIPS are highly detailed design specifications.<sup>164</sup>

The underlying preference for functional specifications is prompted by policy considerations of enhancing competition and relying on private sector innovation to assist the Government. Each of these two policy considerations have been explicitly recognized by the Comptroller General: The first policy consideration was evident in a protest by Honeywell Information Systems, Inc., to a requirement for reentrant software that was deemed to be a design specification. Since the agency was able to express its minimum needs in terms of a performance specification, the GAO held that the use of a design specification was unnecessarily restrictive.<sup>165</sup> The second policy consideration can be found in a protest by IBM where the Comptroller General considered the issue whether an awardee should have been allowed to deviate from the agency's concept that accompanied a performance specification. Denying the protest, the Comptroller General remarked that the purpose of a performance specification is to encourage offerors 'to use their own inventiveness and ingenuity in coming up with designs and approaches that will meet the Government's performance requirements.'<sup>166</sup>

'Plug-to-plug compatible' primarily refers to peripheral devices which can replace an existing device made by the mainframe manufacturer.<sup>167</sup> Where the only other alternative is a prohibitively expensive software conversion effort, the use of a plug-to-plug \*58 compatible specification is fully justified.<sup>168</sup> In recent years, the use of plug-to-plug compatible specifications has increased. The increase can be partially attributed to the successful standardization of peripheral interfaces. FIPS have enabled multivendor plug compatible systems to exist in almost every Federal data processing center.<sup>169</sup>

Overall, plug-to-plug compatible specifications have enhanced competition. However, where the compatibility characteristics are not based on a public standard, or otherwise not in the public domain, a plug-to-plug compatible specification does little to promote competition.<sup>170</sup> Plug-to-plug compatible specifications are rarely protested. The leading decision involves an agency making no apparent effort to examine the protester's claim of compatibility. The GAO recommended that the agency determine the acceptability of the offered hardware.<sup>171</sup> A more intriguing decision involved the Pentagon Consolidated Telecommunications Center seeking disk drives. The solicitation

required compatibility at the device level. The protestor prevailed by statistically proving that compatibility at the string level would meet the system availability rate required by the Pentagon.<sup>172</sup> From a competition viewpoint, a brand-name or equal specification is regarded as 'the minimum acceptable purchase description.'<sup>173</sup> Nevertheless, an agency decision to use a brand-name or equal specification will not be disturbed if the decision is reasonable.<sup>174</sup> A protestor has the burden of proof that its product is 'equal' to the brand name item.<sup>175</sup> Normally, an agency will require that descriptive literature accompany any proposal that offers an equal product.<sup>176</sup> Failure to provide the requested literature can be grounds for rejecting the proposal.<sup>177</sup>

\*59 GAO decisions, as well as many agency supplements to the FAR, require that the salient characteristics of the brand-name product be included in the solicitation.<sup>178</sup> The agency supplements to the FAR also provide other useful guidance. DOD and GSA require a listing of all known acceptable products.<sup>179</sup> The Air Force attempts to prohibit sham competitive acquisitions by requiring a determination 'that a reasonable expectation exists that competitive offers will be received.'<sup>180</sup> Sham competitive acquisitions are more likely than ever, given CICA's disfavor for noncompetitive acquisitions as well as the administrative inconvenience of preparing a justification and approval document. Nevertheless, vendors who are reluctant to bid because they perceive a sham competition should consider the following provocative comment by the GSBICA: 'A brand-name or equal solicitation means what it says, and anyone proceeding on the assumption that there are no 'equals' runs the risk of finding out he was wrong.'<sup>181</sup>

In addition to guarding against sham acquisitions, the purpose for listing the salient characteristics is to permit vendors to compete on an equal basis. Vendors should not be compelled to guess which features of the brand-name equipment are important to the procuring agency.<sup>182</sup> Care must be taken to describe scrupulously the characteristics which are necessary to satisfy the agency's requirements. Where nothing in the listed salient characteristics identify a specific feature, the procuring agency can not consider that feature in its evaluation.<sup>183</sup> For example, if the brand-name article is a high resolution display terminal and the substitute item complies with the minimum acceptable performance level stated in the solicitation, it makes no difference that the brand-name product has superior resolution.<sup>184</sup> Conversely, if an offered item \*60 meets the agency's needs but does not comply with a salient characteristic, it is improper to select the non-compliant item until the unnecessary salient characteristic is deleted through an amendment.<sup>185</sup>

Where the listed salient characteristic is stated in precise performance requirements, the 'equal' product must meet them exactly; mere functional equivalency will not suffice.<sup>186</sup> An example is a performance characteristic that requires magnetic tapes to be cleaned at 96 percent efficiency. It would be inappropriate to accept a functionally equivalent system that is only 90 percent efficient.<sup>187</sup> Yet, where the salient characteristic is not listed as a performance requirement but instead is identified in general terms, the substitute item need only be 'substantially equivalent' to the brand-

name item.<sup>188</sup> Despite an agency's painstaking attempt to list salient characteristics, an offerer who is disadvantaged by an onerous salient characteristic alternatively can raise the challenge that his product 'can do the same job in a like manner and with the desired results' notwithstanding that his product does not comply with certain design features of the brand-name product.<sup>189</sup>

There is a paradox to brand-name or equal specifications. Supposedly, they are only to be used in instances where adequate specifications are not feasible.<sup>190</sup> Yet, if a brand-name or equal specification is to withstand GAO scrutiny, it must be accompanied with detailed salient characteristics. Ironically, if an agency can promulgate detailed salient characteristics, there probably is no reason to use a brand-name or equal specification.

A brand-name specification which does not mention 'or equal' is synonymous with a specific make and model specification.<sup>191</sup> Both are categorized as noncompetitive acquisitions.<sup>192</sup> A justification \*61 and approval document must be completed.<sup>193</sup> Nevertheless, specific make and model specifications do not necessarily compel a sole source acquisition. Limited competition might still be generated among the original manufacturer, established distributors, and used equipment dealers. The GAO will uphold an agency decision to use a specific make and model specification where a rational basis exists for the decision and the protester can not prove the decision was clearly unreasonable.<sup>194</sup> The wide latitude available to agencies in deciding to use a specific make and model specification is exemplified in a protest by M/A-Com Alanthus Data, Inc. The protester offered a comparable product at a lower price. The agency rejected the offer because of a negative experience with the protester's product. The protest was denied without even requiring the agency to re-test the protester's product.<sup>195</sup> Ideally, the use of a specific make or model specification involves an agency conclusion that no substitute products exist. Where the agency conclusion is incorrect, the GAO seems to vacillate between judging the situation from the objective facts or from the subjective information known by the procuring agency at the time of contract award.<sup>196</sup>

## **B. Unduly Restrictive Specifications**

It has long been recognized by the GAO that unduly restrictive specifications are objectionable because they improperly inhibit competition.<sup>197</sup> The application of this rule is not always easy because the term 'unduly' is merely a conclusion that offers no substantive guidance. Ascertaining how that conclusion was \*62 reached can be a tortuous process. The process begins with FAR 10.001 which directs that 'Specifications shall state only the Government's actual minimum needs and be designed to promote full and open competition. . . .' Accordingly, a specification that requires more than the Government's actual minimum needs is unduly restrictive.<sup>198</sup> Conversely, a specification is never unduly restrictive if it represents an agency's actual minimum needs.<sup>199</sup> Nor is a specification unduly restrictive merely because only one offeror can comply with it.<sup>200</sup>

Once a protester at GAO challenges a provision in a solicitation as unduly restrictive, the burden initially is on the agency to establish prima facie support for its minimum needs.<sup>201</sup> A prima facie

case is relatively easy for an agency to establish. This is because the GAO affords contracting agencies great discretion to determine their needs since they are in the best position to render that judgment.<sup>202</sup> Even so, the GAO will not condone restrictions based on unsupported conclusions.<sup>203</sup> Instead, the agency is required to consider carefully all relevant factors such as costs and impact on competition.<sup>204</sup> Once substantially documented, the conclusions of an agency are entitled to great weight.<sup>205</sup> After the agency has presented a prima facie case, the burden of proof shifts to the protester to establish that the challenged specification is clearly unreasonable.<sup>206</sup>

\*63 The best way to become acquainted with the nebulous concept of 'unduly restrictive' is to survey the multitude of decisions: Concerning hardware, requirements to withstand an ambient temperature of 120 degrees Fahrenheit and 95 percent relative humidity have been upheld.<sup>207</sup> A specification for a disc drive with a cache feature has been determined permissible,<sup>208</sup> but insisting upon double density drives while rejecting a single density drive has been found objectionable.<sup>209</sup> Requirements for expansion slots,<sup>210</sup> an on-line printer,<sup>211</sup> and a 24-bit memory word length<sup>212</sup> have all withstood scrutiny. A recent GSBCA protest is illustrative of how exhaustive a protest can be. The protester asserted that twelve specific provisions of a solicitation were unduly restrictive. After a detailed examination of each allegation, the GSBCA determined that only one, a display status line, exceeded the agency's minimum needs.<sup>213</sup>

There also are some decisions that address software. For instance, an agency's speculative concern with whether a subcontractor might decline to provide software support is not justification to reject hardware.<sup>214</sup> Yet, alternatively, agencies can reduce the risk of not being able to obtain software maintenance by requiring a letter from the software subcontractor certifying support to the prime contractor for the anticipated term of the contract.<sup>215</sup> Also, requiring membership in a software user group is probably permissible.<sup>216</sup> Furthermore, higher order programming languages are not unduly restrictive since they ultimately enhance competition \*64 by allowing software transportability to other hardware configurations.<sup>217</sup>

With regard to maintenance, a solicitation for microcomputers can validly require vendors to agree to a seven year commitment to provide repair parts.<sup>218</sup> Moreover, a mandatory four hour response time for remedial maintenance is permissible where an agency can substantiate the requirement.<sup>219</sup> Nevertheless, an agency goes too far when it insists ADP service personnel not only have experience with the agency, but also with the unique software that networks a system of microcomputers.<sup>220</sup>

Although a survey of decisions addressing hardware, software and maintenance provides a modest insight into the nebulous concept of specifications being unduly restrictive, these decisions offer only limited precedence. Not only can the minimum needs of an agency change but also the needs can differ drastically among agencies. The relative unpredictability of whether a specification is unduly restrictive is typified by the confusion concerning specifications for new equipment.

The FAR expresses a preference for new equipment whereas the FIRMR requires that a specification for new equipment be specifically justified.<sup>221</sup> The GAO has held that new equipment is not required where the specifications do not call for it.<sup>222</sup> This position has been judicially repudiated. A Federal District Court has held that FAR 10.010 requires notification in the solicitation if nothing but new equipment will suffice.<sup>223</sup> Despite disfavoring specifications for new equipment, the GAO has upheld an Army requirement for new ADPE where the system was critical to supporting field troops. The GAO was swayed by the Army's insistence on an eight year system life. The decision appears to be premised on an uncontested assumption that new equipment is more reliable than remanufactured equipment.<sup>224</sup> The same underlying \*65 assumption occurred in a Navy procurement for a realtime flight test operations system. Notwithstanding there was a warranty by IBM that its remanufactured mainframe was the same as a new one, the GAO still accepted the Navy's postulate of risk reduction.<sup>225</sup> Probably the most elucidating GAO decision involves a NASA procurement of a new printer that was \$24,000 more expensive than a refurbished one. The protest was denied because NASA presented statistical data which substantiated the agency's experience that reconditioned printers had an unacceptable downtime record.<sup>226</sup> The GSBCA appears to be taking a different tack than the GAO with respect to requirements for new equipment. The GSBCA regards a new equipment specification as contrary to the Congressional mandate to maximize competition. In particular, the Board was unwilling to accept an unsupported assertion by the Navy that refurbished tape drives were not as reliable as new drives.<sup>227</sup>

Although industry associations zealously advocate standards, individual corporate members quickly sound a voice of dissent whenever a standard places them at a competitive disadvantage. If a standard is protested as unduly restrictive, the appropriate analysis depends on the type of standard being challenged. Because a FIPS is based on statutory authority, it is unlikely to be protested successfully.<sup>228</sup> Unlike FIPS, Federal standards or military standards lack explicit statutory authority but are binding on agencies through regulations.<sup>229</sup> Nonetheless, Federal and military standards are difficult to protest successfully because the FAR implicitly recognizes that savings through standardization can counterbalance restrictions on competition.<sup>230</sup> The GAO will review a standardization program to determine whether the agency's justification for standardization was clearly unreasonable or if another acceptable standard would have increased the likelihood of \*66 competition.<sup>231</sup> An example of improper standardization occurred when GSA adopted the IBM criterion of a fifteen inch carriage for electric typewriters. A protest was sustained because there was no evidence that anticipated savings from standardization would offset lower prices obtained through competition.<sup>232</sup>

The FAR also recognizes voluntary standards.<sup>233</sup> Voluntary standards are promulgated by a private sector body and are available for public use.<sup>234</sup> De facto industry standards such as MS-DOS and UNIX can not be considered voluntary standards because they have not been promulgated by a

private sector body.<sup>235</sup> It is the policy of the Government to rely on voluntary standards, both domestic and international, whenever feasible.<sup>236</sup> Therefore, the GAO will not question an agency's use of a voluntary standard unless the decision is wholly arbitrary and without substantial basis.<sup>237</sup>

### **C. Cliché Specifications**

There is a strong preference among the Federal agencies for commercially available, off-the-shelf and state-of-the-art products.<sup>238</sup> The terms commercially available and off-the-shelf are used interchangeably.<sup>239</sup> Because commercially available products already are designed and in production, they are generally less expensive than items which the Government must pay to have developed. Another advantage of commercially available products is that they are more likely to have spare parts and maintenance available at \*67 competitive prices. Furthermore, the Government avoids the risks that accompany an unproven prototype. The advantage of a state-of-the-art requirement is that it precludes a vendor from unloading his inventory of a defunct product line. Obtaining parts and maintenance for a defunct product line can become increasingly difficult in the latter years of the system's life.<sup>240</sup> In short, the use of 'cliché specifications' is a recognized way of reducing cost and technical risks to the Government.<sup>241</sup>

The major problem with cliché specifications is that they are rarely defined by the agency. For example, a requirement for a 'current production model' without further explanation resulted in the agency not being able to reject ADPE which the agency perceived was a prototype.<sup>242</sup> Moreover, there is considerable confusion about when a new system is deemed commercially available.<sup>243</sup> Possibilities include: at the time the product is announced in trade journals; at the time the product is offered in a commercial catalogue;<sup>244</sup> after a beta site has operated successfully;<sup>245</sup> or after a substantial quantity has been sold to the general public.<sup>246</sup> Comparable confusion can exist about when a product ceases to be commercially available. In *Amdahl Corp.*, the protester claimed that an IBM 3081-D did not meet the Army's specification because it was no longer commercially available.<sup>247</sup> IBM's sales literature indicated that, since the 3081-G was being marketed, the 3081-D was no longer being offered to the public. The Army asserted that the 3081-D was commercially available because IBM was continuing to offer them to governmental and educational institutions. \*68 The GAO solicited comments from the GSA. GSA advised that the purpose of seeking commercially available hardware was to obtain a product 'which will be maintained and supported for a longer period of time and not acquiring equipment which a manufacturer is phasing out for competitive and technological reasons.'<sup>248</sup> Since the Army and GSA could not agree on the meaning of commercially available, the GAO declared the term to be ambiguous. The protest was sustained. The term 'commercially available' is ambiguous in other ways as well. For example, if the Government is the only customer, is the product commercially available?<sup>249</sup> What is the status of an upgraded commercial product which is being marketed as a different model?<sup>250</sup> Can a vendor who is a technology leader offer an older product which is still state-of-the-art by industrial standards?<sup>251</sup>

Since ambiguities of cliché specifications are apt to ensnare agencies, these types of specifications should be avoided. There are alternatives to cliché specifications that can provide the same protection desired by an agency.

One alternative is to require specifically that an offeror have a comparable system in operation at the time of proposal submission.<sup>252</sup> Another approach is to require a list of customers who currently use the offered configuration.<sup>253</sup> NASA has successfully used a combination of these approaches to acquire a telecommunications systems.<sup>254</sup> The solicitation required the system components to be either specifically or generically field proven. To be specifically field proven, the RFP required installation of three or more field systems that had performed satisfactorily. To be generically field proven, the RFP required a currently marketed \*69 product that was an upgrade of a field-proven system.<sup>255</sup> Likewise, if the acquisition is for systems analysts services or software development, an agency may require that offerors have prior experience with similar projects.<sup>256</sup>

Another means of reducing the likelihood of an agency being ensnared by a cliché specification is to permit slightly modifiable commercial equipment.<sup>257</sup> An additional advantage to this approach is that it complies with a GAO decision which indicates that requiring only commercial products is improper if a modified commercial product will meet the needs of the Government.<sup>258</sup> Alternatively, even where the solicitation fails to mention commercial availability, the agency can still consider the subject as a matter of responsibility.<sup>259</sup> An excellent way for an agency to protect itself against unreliable prototypes is by conducting a thorough benchmark.<sup>260</sup> Finally, agency concerns about the availability of spare parts and maintenance can be alleviated by drafting the solicitation to obligate the contractor to support the hardware for the total life of the system.<sup>261</sup>

#### **D. The Single Vendor Syndrome**

In 1957 IBM signed a consent decree with the Justice Department to unbundle application software from its hardware.<sup>262</sup> An independent software industry began to flourish. Within a decade, small businesses began to thrive in areas of time-sharing data processing centers, independent maintenance contracting, peripherals, and systems integration. Over the years, there has been an erosion of the commonly held perception that a single vendor \*70 should provide all of a customer's information systems needs. This perception is known as the single vendor syndrome.

##### **1. 'Total Package' Procurements**

One of the most frequent ways that the single vendor syndrome appears is through the use of a total package procurement. Under a total package procurement, an agency consolidates all of its information systems requirements into a single acquisition. This precludes separate contracts being awarded to vendors who wish to provide only components rather than the complete system.

Recently, the GAO provided some detailed guidance on how to approach this complex problem: We recognize that procurements on a total package basis can restrict competition. Accordingly, we have objected to such procurements where a total approach did not appear to be necessary to

satisfy the agency's minimum needs. Thus, for instance, we have objected to a total package approach (1) undertaken for reasons of mere administrative convenience, (citations omitted) (2) where the agency's needs for subsystem compatibility—the agency's justification for a total package approach—did not extend to the bulk of the line items being procured (citation omitted) or (3) where the agency provided no justification for such approach (citations omitted).<sup>263</sup>

Notwithstanding that total package procurements can be restrictive, they need not be done on a sole source basis. A properly drafted specification should be able to generate reasonable competition among hardware manufacturers and integrators.<sup>264</sup> However, where the specification mixes components that are available from only one manufacturer with components that are available from more than one manufacturer, the GAO will closely probe the acquisition.<sup>265</sup> Furthermore, a requirement that the system be comprised only of hardware from a single manufacturer probably would not withstand GAO scrutiny.<sup>266</sup>

Determining whether an agency is justified in using a total package procurement rather than undertaking multiple awards involves, \*71 in essence, an analysis of risks.<sup>267</sup> If multiple awards would create unacceptable risks, a total package procurement is permissible.<sup>268</sup> Prior to CICA, reviews of total package procurements by the GAO were very limited. For example, where only AT&T and Western Union were permitted to bid on an acquisition for a digital data communications network, the Comptroller General remarked:

[W]hether to procure by means of a systems approach or by separate procurements of individual items is a determination for the contracting agency and such determination will not be disturbed by our Office in the absence of a clear showing that the determination lacked a reasonable basis.<sup>269</sup> However, in a post-CICA decision, the GAO retained the nominal pre-CICA standard of review, but sustained the protest after expressing skepticism of the agency's justification.<sup>270</sup> Another indication that the Comptroller General is less receptive to total package procurements was evinced in a post-CICA decision involving a solicitation for microcomputers. Essentially, the GAO held that an agency must make multiple awards where the solicitation fails to indicate the agency's intention to make a single, aggregate award.<sup>271</sup> The GSBCA has yet to announce any broad rules concerning total package procurements.<sup>272</sup>

## **2. Incumbents**

Another way in which the single vendor syndrome arises is where the agency seeks to expand an existing information system. Incumbents generally enjoy a competitive advantage where an existing \*72 system is to be expanded. Not only are incumbents knowledgeable about the agency's requirements, but also they frequently have technicians already servicing the site which affords the incumbent an economy of personnel. Despite the incumbent's favorable position, agencies are under no obligation to equalize the advantages unless they resulted from unfair action by the Government.<sup>273</sup> Expansions to an existing information system are especially advantageous to the

incumbent. Typically, expansions are validly constrained by compatibility limitations.<sup>274</sup> However, a mere aversion to a multiple vendor computer facility is not justification for restricting the expansion to a particular hardware manufacturer's product line.<sup>275</sup> For similar reasons, the GSBCA has disallowed an agency to obtain an expansion noncompetitively from an incumbent maintenance contractor.<sup>276</sup> Nowhere is the advantage of an incumbent greater than in telecommunications procurements. The amount of cabling for a large Government facility can be enormous. Often the Government does not have access to the detailed information about an existing cable system which potential offerors would like to have included in a solicitation. Protesters have not been successful in claiming that the lack of detailed information renders the solicitation defective.<sup>277</sup> Although an incumbent to a telecommunications system may have a strong advantage, the agency is still obligated to attempt a competitive acquisition.<sup>278</sup> A trilogy of protests by the ROLM Corporation provide insight into how the GAO approaches an agency relying solely upon the incumbent to expand or upgrade a private branch exchange (PBX).<sup>279</sup>

\*73 The first decision involved a Nuclear Regulatory Commission (NRC) award of a letter contract to an AT&T subsidiary to upgrade a PBX at an NRC regional office. The incumbent's technicians had persuaded NRC that interfacing devices would be required if non-AT&T equipment were used. The contracting officer also opined that, because NRC wanted maximum flexibility to augment the telephone system in the event of a nuclear accident, it was proper to select 'the largest and most sophisticated supplier of telecommunications equipment.'<sup>280</sup> The GAO observed that NRC had relied incorrectly on the AT&T technicians; the Federal Communications Commission had registered the equipment of thirty-four non-AT&T manufacturers as permissible to be placed on the public network without interface devices. The GAO acknowledged that AT&T was highly qualified to meet the NRC's emergency needs but further noted that other firms were capable of fulfilling the requirement. The protest was sustained.

The second protest in the ROLM trilogy concerned PBX expansions at two Navy facilities in Oakland, California. The Navy argued that since the incumbent 'owns or maintains all of the existing telephone equipment at the two facilities, compatibility problems would arise between new and existing equipment if a new vendor were awarded the contract.'<sup>281</sup> The Navy's argument was rejected because the GAO was not convinced that other firms could not fulfill the requirement. The GAO recommended that the PBXs be reprocured on a competitive basis.

The last decision in the ROLM trilogy involved a PBX for the Defense Intelligence Analysis Center (DIAC). DIAC required the installation of a secure telephone system for a new facility to coincide with an established building occupancy date. The secured system had to be approved by an FBI Inter-Agency Laboratory. DIAC was unwilling to wait the 8-12 months for the ROLM equipment to be tested by the laboratory. The GAO upheld the DIAC decision to make a noncompetitive award to the vendor that was already servicing the location of the new facility.<sup>282</sup> This trilogy of ROLM protests

attests that, before the Comptroller General will condone expanding or upgrading a telecommunications \*74 system through an incumbent, the agency's explanation better be more than unsubstantiated fears about compatibility.

### **3. IBM**

Many instances of the single vendor syndrome involve IBM. The predominant position of IBM in the computer industry has prompted the GSBCA to comment that 'The computer world may be divided into two parts: International Business Machines (IBM) and everybody else.'<sup>283</sup> A common characteristic of information systems managers in both the public and private sector is a preference for IBM equipment. Within the industry, there is a widely known adage that 'nobody was ever fired for recommending IBM.' Rarely does the favoritism for IBM blatantly exist in the form of a sole source. Even a novice contracting officer should recognize that an agency's 'preference for a certain item, even if it believes the item to be superior to other similar items, cannot support a sole source award unless only that item can satisfy the Government's needs.'<sup>284</sup>

An egregious example of favoritism for IBM has been documented in a GAO audit report. The Immigration and Naturalization Service (INS) awarded a \$61.3 million contract to IBM for a nationwide information system. The GAO report indicated that a 'late-night meeting' between INS and IBM personnel occurred after the best and final offers (BAFOs) had been received. IBM was allowed to reduce its bid by \$3.3 million and thereby became the lowest proposal by a mere \$2,713. Additionally, IBM was permitted to offer a distributed system despite the solicitation requiring a centralized system.<sup>285</sup>

Normally, favoritism for IBM is not as conspicuous as it was in the INS procurement. Favoritism can exist in several subtle ways besides a manipulated specification. Agencies can creatively aggregate requirements to justify IBM compatibility.<sup>286</sup> Requiring \*75 the offeror to have a branch office in the immediate vicinity can mask an IBM preference.<sup>287</sup> A preference might be manifested by relaxing a specification which had disadvantaged IBM.<sup>288</sup> Favoritism might be exhibited where a competitive range determination leaves only IBM to submit a BAFO or where an award is made on initial proposals to IBM without ascertaining whether BAFOs would result in lower prices.<sup>289</sup> Given the discretion available to a source selection authority in making his decision, a subtle preference for IBM can be especially difficult to detect.<sup>290</sup>

Allegations of favoritism for IBM are easy to make but difficult to prove.<sup>291</sup> The GAO would not attribute bias to agency personnel merely on inferences or supposition; allegations of bad faith must meet the heavy burden of 'well-nigh irrefragable proof.'<sup>292</sup>

### **4. The 'Wired' Specifications**

Much like allegations of favoritism for IBM, allegations of 'wired' specifications are easy to make but difficult to prove. The adjective 'wired' connotes a deliberate scheme to give a favored vendor an insuperable advantage. Whether a specification is wired essentially is a factual question that

impugns the subjective motive of agency personnel. There are very few protests which actually allege that a specification is wired. The major reason is the heavy burden of 'well-nigh irrefragable proof' to establish bad faith on the part of agency personnel.<sup>293</sup> It is not enough to establish that the specification is 'written around' a competitor's product line or even \*76 that the agency virtually copied a competitor's descriptive literature.<sup>294</sup> The protester must still establish that the paraphrased or copied specifications are not reasonably related to the agency's minimum needs.<sup>295</sup> Consequently, offerors who suspect an acquisition is wired face an easier task if they merely protest that the specification is unduly restrictive.

The absence of protests about wired specifications should not hasten a conclusion that wired specifications are rare.<sup>296</sup> At least one recognized expert on Federal information systems procurements believes wired specifications are common.<sup>297</sup> Another expert has stated, 'If you, as a prospective bidder, haven't influenced the content of the RFP, you might as well not bid at all.'<sup>298</sup> Contracting officers often fail to realize that agency technicians, in their zeal to assure that the system they prefer is procured, are not always impartial about how the specification is drafted.<sup>299</sup> The best way to guard against such abuses is for the contracting officer to have independent technical experts screen the specifications to detect potential bias.<sup>300</sup>

This article will be continued in Vol. 17, No. 2 of *Public Contract Law Journal*.

## Footnotes

a

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The views expressed in this article are those of the author and do not reflect the official policy or position of the Department of Defense or the United States Government.

1

[Misener Industries, Inc. v. United States, No. 83-2592, \(Bankr. M.D. Fla., Oct. 11, 1985\) 33 CCF 74,029.](#)

2

Management of Federal Information Resources, OMB Cir. A-130, ¶7 (1985).

3

Werbke, *The Federal ADP Marketplace*, MIL. BUS. REV. 10 (Jan/Feb 1986).

4

'It is conservatively estimated that lawsuits occur in one out of every ten transactions involving the acquisition or use of electronic data processing products or services.' B. BRICKMAN, LEGAL ASPECTS: ACQUIRING AND PROTECTING SOFTWARE 9 (1984).

5

See, e.g., 'At the conference, counsel for the protester stated that the protest was highly technical in nature and that he was therefore unwilling or unqualified to discuss the technical issues. . . .'

[Management Systems Designers, Inc., Comp. Gen. B-219601, Nov. 13, 1985, 85-2 CPD 546.](#)

6

'The acquisition of automatic data processing equipment is often characterized as the most difficult, frustrating and complex project for DOD managers to achieve successfully. This is because of the many rules attached to the acquisition process for data processing equipment.' Advisory Report On The Acquisition Of Data Processing Equipment, DOD Audit Report 84-122 at 1 (Aug. 21, 1984).

7

[Honeywell, Inc. v. Lithonia Lighting, Inc., 317 F.Supp. 406 \(N.D. Ga. 1970\).](#)

8

F. McFARLAN & J. McKENNY, CORPORATE INFORMATION SYSTEMS MANAGEMENT 16 (1983).

9

However, OMB Cir. A-130, *supra* note 2 at ¶6(d), offers the following definition: 'The term 'information system' means the organized collection, processing, transmission, and dissemination of information in accordance with defined procedures, whether automated or manual.'

10

See *generally*, Air Force Logistics Modernization Program Should Comply With Brooks Act, GAO/IMTEC-86-16, May 1986; Agreement Needed on DOD Guidelines For Exempting Certain ADP Equipment And Service Procurements From the Brooks Act, GAO/GGD-82-52, Mar. 17, 1982; DOD Automated Materials Handling Systems—Need To Standardize And Follow GSA ADPE Approval Process, GAO-80-49, Apr. 24, 1980.

11

Pub. L. No. 89-306, codified at [40 U.S.C. § 759\(a\)](#) (1982).

12

Evidence of such disagreements can be found in numerous GAO decisions including [PRC Computer Center, Inc., 55 Comp. Gen. 60, 75-2 CPD ¶ 35 \(1975\)](#); [Timeplex, Inc., Comp. Gen. B-197346, Apr. 13, 1981, 81-1 CPD ¶ 280](#), and [Plus Pendetur Corp., 65 Comp. Gen. \\_\\_\\_\\_, 86-1 CPD ¶107 \(1986\)](#).

13

See *generally*, letter from Ms. Wendy L. Gramm, Administrator for Information and Regulatory Affairs, OMB to Honorable Ralph E. Kenickell, Jr., Public Printer, GPO (Apr. 9, 1986).

14

The Paperwork Reduction Reauthorization Act of 1986 is Title VIII of the 1987 Omnibus Continuing Appropriation Act, [Pub. L. No. 99-500](#). Sec. 811 uses the term 'automatic data processing, telecommunications, and other information technologies.' For further explanation of how the new law impacts GSA's authority over software, maintenance, and support services, see the discussion that accompanies notes 49 *et seq.*, *infra*.

15

[40 U.S.C. § 481 \(1982\)](#).

16

A public utility enjoys a monopoly market, but, in return for that privilege, is regulated by a governmental body. See, 35A Words And Phrases (1963 ed. & Supp. 1982) at 'public utility.' Ironically, GSA's regulations, by directing that telecommunications requirements be acquired by 'full and open competition,' seemingly contradict that telecommunications is a public utility service. Federal Information Resources Management Regulation [hereinafter FIRMR] 201-11.001.

17

See generally, Weinstein, *Evolution of Contemporary Federal Telecommunications Procurement Laws*, 33 FED. BAR NEWS & J. 22 (1986).

18

The Department of Defense (DOD) does not accede to GSA's assertion of authority. [10 U.S.C. § 481\(a\)](#) states 'the Secretary of Defense may from time to time (unless the President shall otherwise direct) exempt the Department of Defense from action taken by the Administrator.' DOD and GSA have signed an inter-agency agreement which essentially provides that 'all communications facilities and services activities of the Department of Defense will be procured by the Department of Defense.' [15 Fed. Reg. 8225, ¶2\(f\)](#), Nov. 27, 1950. DOD acquires its telecommunications requirements with almost total autonomy from GSA. See DFARS Subpart 37.74, 'Communications Services.'

19

FIRMR 201-39.006.

20

Under FIRMR 201-2.001 'telecommunication services' include transmission, emission, or reception of signals, signs, writings, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, visual, or other electronic, electromagnetic, or acoustically coupled means. The term can include necessary equipment used for such modes of transmission as telephone, telegraph, teletypewriter, data, facsimile, telephotograph, video, audio, and such corollary items as distribution systems and communications security facilities.

21

[Pub. L. No. 96-511](#), codified at [44 U.S.C. § 3504 \(1982\)](#).

22

OMB Cir. A-71, Responsibilities for the Administration and Management of ADP Activities; OMB Cir. A-121, Cost Accounting, Cost Recovery and Inter-Agency Sharing of Data Processing Facilities; OMB Cir. A-130, Management of Federal Information Resources.

23

[40 U.S.C. § 759\(g\)](#) (1982).

24

[44 U.S.C. § 3504](#) (1982).

25

Allen, *Commercial Pricing Certificate: Guidelines for Compliance*, CONTRACT MANAGEMENT 10 (July 1986).

26

To avoid criticism that the DPA process is too great a delay to the acquisition process, the GSA has promulgated a rule that an agency may presume a DPA has been issued where 25 working days have expired since the Agency Procurement Request (APR) was submitted to GSA but no response has been received. FIRMR 201-23.107(b). Also DFARS 70.303 requires that a DPA be obtained before a solicitation is released where the acquisition falls within the Brooks Act.

27

[Control Data Corp., Comp. Gen. B-186501, Feb. 2, 1977, 77-1 CPD ¶ 83.](#)

28

This occurred in [Sanders Associates, Comp. Gen. B-186855, Jan. 3, 1977, 77-1 CPD ¶1](#), where the Army used specification that were more restrictive than approved by the GSA. The GSBICA has commented 'We expressly hold . . . the failure to obtain a specific DPA or act in accordance with a blanket DPA does not, per se, without more, make the resultant contract null and void.'

[Computervision Corp., GSBICA No. 8709-P, Dec. 16, 1986, 86-3 BCA \\_\\_\\_\\_.](#)

29

J. PETRILLO, GOVERNMENT ADP PROCUREMENT 24 (Fed. Pub. Inc. 1985). See *also* FIRMR 201-1.102-2(e).

30

For example, see GAO letter B-197338, Jan. 24, 1980, entitled 'Air Force Sole Source Computer Acquisition Not Warranted' to Chairman Brooks.

31

See *generally*, Problems In Developing The Advanced Logistics System, GAO/LCD-75-101, Jan. 17, 1976.

32

See *generally*, The Air Force Should Cancel Plans To Acquire Two Computer Systems At Most Bases, GAO/FGMSD-80-15, Oct. 26, 1979.

33

40 U.S.C. § 759(g) (1982).

34

*Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir. 1980). Query whether the Competition in Contracting Act has created a statutory basis for standing?

35

*Sperry Corp., et al.*, GSBCA Nos. 8208-P, 8210-P, 8266-P, 86-1 BCA ¶ 18,704. If the protest is to the GAO, the protester must also demonstrate he was prejudiced by the agency action. *Sperry Corp.*, Comp. Gen. B-224351, Sep. 26, 1986, 86-2 CPD ¶362.

36

GAO Bid Protest Regulation § 21.2 [4 C.F.R. § 21.2]. GSBCA R.P. 5(b)(3)(iii) [48 C.F.R. § 6101.5(b)(3)(iii)].

37

44 U.S.C. § 3506(c)(4) (1982).

38

Memorandum of Dep. Sec. Defense Thayer (Aug. 5, 1983). See 25 Gov't Contractor ¶295 (Oct. 3, 1983) and 40 Fed. Cont. Rep. 473 (1983).

39

*E.g.*, DOD Should Redirect Its Efforts To Automate Technical Data Repositories, GAO/IMTEC-86-7, Mar. 1986; Revised GSA Strategy For Microcomputer Purchases Can Improve Competition, GAO/IMTEC-86-20 May 1986; SBA Needs To Strengthen Management Of Its Computer Systems, GAO/IMTEC-86-28, Aug. 1986; SSA Should Limit ADP Procurements Until Further Testing Is Performed, GAO/IMTEC-86-31, Aug. 1986.

40

The majority of requests for reports on information systems are initiated by Congressman Brooks, Chairman of the House Committee on Government Operations. Evaluations can also be ordered by the Comptroller General on his own initiative or when either House of Congress orders an evaluation. 31 U.S.C. § 717 (1982).

41

See *generally*, OMB Cir. A-50, Audit Follow-up (1982).

42

*Diamond 'H' Inc.*, Eng. BCA No. 4141, 82-2 BCA ¶15,938 at 78,999.

43

Based on FY 1983 decisions rendered on the merits. 41 Fed. Cont. Rep. 284 (1984).

44

Based on FY 1985 decisions rendered on the merits. 45 Fed. Cont. Rep. 309 (1986).

45

[Interad, Ltd., Comp. Gen. B-210013, May 10, 1983, 83-1 CPD ¶497.](#)

46

Storage Technology Corp., Comp. Gen. B-171798(1), Aug. 18, 1971.

47

[Four-Phase Systems, Inc., Comp. Gen. B-201642, Jul. 22, 1981, 81-2 CPD ¶ 56.](#)

48

Four-Phase Systems, Inc., Comp. Gen. B-201642.2, Apr. 22, 1983, 83-1, CPD ¶430.

49

The Competition in Contracting Act of 1984, [Pub. L. No. 98-369 § 2713](#), codified at [40 U.S.C. § 758\(h\)](#) (Supp. III 1985). Jurisdiction was to cease on Jan. 15, 1988.

50

FED. COMPUTER MARKET REPORT, Mar. 22, 1985 at 3.

51

As of Mar. 4, 1986 the breakdown on the disposition of protests is as follows: 22 granted; 17 denied; 19 dismissed with prejudice in favor of protester; 43 dismissed with prejudice in favor of respondent; 19 dismissed without prejudice in favor of protester; 15 dismissed without prejudice in favor of respondent. Tolle, [A Review of the First Year of ADP Bid Protests at the GSBCA](#), 16 PUB. CONT. L.J. 120, 160 (1986).

52

*Id.*; Coburn, [The New Bid Protest Remedies Created by the Competition in Contracting Act](#), 19 NAT'L CONT. MGMT. J. 47 (Summer 1985); Crowell & Ralston, [The New Government Contracts Bid Protest Law](#), 15 PUB. CONT. L.J. 17 (1985); Allen, [Bid Protests At The General Services Board Of Contract Appeals](#), 45 FED. CONT. REP. 997-1014 (1986).

53

The Board may take longer if the Chairman determines that the specific and unique circumstances of the protest require additional time. [40 U.S.C. § 759\(h\)\(4\)\(B\)](#) (Supp. III 1985).

54

[40 U.S.C. § 759\(h\)\(2\)\(B\)](#) (Supp. III 1985).

55

[40 U.S.C. § 759\(h\)\(2\)\(B\)\(ii\)](#) and [759\(h\)\(3\)\(B\)](#) (Supp. III 1985). The GSBCA lacks authority to suspend procurement authority if the protest is not filed within ten calendar days of contract award.

*Id.*

56

40 U.S.C. § 759(h)(4)(A) (Supp. III 1985). See also, GSBICA R.P. 15-17, 48 C.F.R. §§ 6101.15 to 6101.17. It should be noted that there is no per se discovery before the GAO. Protesters rely heavily upon the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* The GAO may perform an in camera review of matters not released to a protester. Eaton-Kenway Corp., Comp. Gen. B-212575.2, Jun. 20, 1984, 84-1 CPD ¶649. Recently, the GAO has created a de facto form of discovery by demanding an agency include documents in its report that are harmful to the agency's position. Pacific Sky Supply, Inc., Comp. Gen. B-219749.2, Apr. 2, 1986, 86-1 CPD ¶312.

57

Lanier Business Products, Inc., GSBICA No. 7702-P, 85-2 BCA ¶ 18,033; Memorex Corp., GSBICA No. 7927-P, 85-3 BCA ¶18,289.

58

GSBICA Rules of Procedure, Rule 5(a)(3)(i), 48 C.F.R. § 6101.5(a)(3)(i).

59

40 U.S.C. § 759(h)(1) (Supp. III 1985).

60

Resource Consultants, Inc., 65 Comp. Gen. \_\_\_\_, 85-2 CPD ¶580 (1985).

61

Amdahl Corp., GSBICA 7859-P, 85-2 BCA ¶18,111.

62

SMC Information systems, Inc., GSBICA No. 8071-P, 85-3 BCA ¶ 18,296. This was an audacious decision because OMB had previously decided that the Brooks Act did not include ADP support services. See letter from OMB Deputy Director Paul H. O'Neill to GSA Administrator Jack Eckerd (Dec. 9, 1976).

63

Electronic Data Systems, GSBICA 8416-P, 86-2 BCA ¶18,898. This too was an audacious decision because it disregarded an administrative determination of the GSA that the acquisition was for telecommunications. On reconsideration, the protest was dismissed for lack of subject matter jurisdiction. 86-3 BCA ¶19,022. However, see discussion *infra* at notes 74-5.

64

This law states that the Brooks Act 'is not applicable to the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of the equipment or services—

- (1) involves intelligence activities;
- (2) involves cryptological activities related to national security;
- (3) involves the command and control of military forces;
- (4) involves equipment that is an integral part of a weapon or weapon system; or

(5) . . . is critical to the direct fulfillment of military or intelligence missions.'

These exclusions to the Brooks Act do not include 'routine administrative and business applications (including payroll finance, logistics, and personnel management applications). [10 U.S.C. § 2315 \(1982\)](#). It should also be noted that the Central Intelligence Agency is entirely exempt from the Brooks Act. [40 U.S.C. § 759\(a\)\(3\)\(D\) \(Supp. III 1985\)](#).

65

[Julie Research Laboratories, Inc., GSBCA No. 8070-P, 85-3 BCA ¶ 18,295 at 91,809.](#)

66

*Id.*, at 91,810.

67

*Id.*, 85-3 BCA ¶18,375.

68

[Xerox Corp. and Volt Information Sciences, Inc., GSBCA Nos. 8333-P & 8336-P, 86-1 BCA ¶18,725.](#)

69

*Id.*

70

*Id.*, 86-1 BCA 18,726.

71

Initially the suit was filed in the United States District Court for the District of Columbia. The District Court entered a temporary restraining order and transferred the case to the U.S. Court of Appeals for the Federal Circuit.

72

[Electronic Data Systems Federal Corp. et al. v. General Services Administration Board of Contract Appeals et al., No. 86-974 \(Fed. Cir., May 28, 1986\).](#)

73

*Id.*

74

*See supra*, note 14.

75

*Id.*, at sec. 824.

76

*Id.*

77

*Id.*, at sec. 831.

78

*E.g.*, Sperry Corp., Syssorex Information Systems, Inc., and M/A-Com Information Systems, Inc., GSBICA Nos. 8208-P, 8210-P & 8266-P, 86-1 BCA ¶ 18,704 where the Board addressed fault tolerant systems and a COBOL compiler. See *also*, Project Software and Development, Inc., GSBICA No. 8471-P, 86-3 BCA ¶19,082 which insightfully addresses a complex data base management system.

79

OMB Cir. A-130, ¶8(b).

80

*E.g.*, FIRMR Part 201-30, Management of ADP Resources and DOD Dir. 7740.1, DOD Information Resource Management Program.

81

The GSA Office of Software Development and Information Technology has published an excellent guide entitled Strategic Information Resources Management Planning Handbook, Report OIT/FPSP-85-001 (1985).

82

See *generally*, Non-Federal Computer Acquisition Practices Provide Useful Information For Streamlining Federal Methods, GAO/AFMD-81-104, Oct. 2, 1981. See *also*, ROCKHART, A PRIMER ON CRITICAL SUCCESS FACTORS (MIT Center For Information Systems Research 1982); Methodology For Determining A User's Information Technology Requirement (E50-700-501), Datapro Management Of EDP Systems (Feb. 1986).

83

FAR 10.004.

84

J. Hollowood, Information Systems: Tools and Techniques for Planning, Management and Decision-Making (June 1984) [Unpublished manuscript used for Harvard University, CSS Program]; Human Factors In Systems Development (E50-700-601), Datapro Management Of EDP Systems (Aug. 1985).

85

41 U.S.C. § 253a, and 10 U.S.C. § 2305 (Supp. III 1985).

86

Federal Regulations Need To Be Revised To Fully Realize The Purposes Of The Competition In Contracting Act of 1984, GAO/OGC-85-14, Aug. 21, 1985 at 33.

87

10 U.S.C. § 2304(f)(5), and 41 U.S.C. § 253(f)(5) (Supp. III 1985). See *also*, Federal Data Corp., GSBICA No. 8488-P, 86-3 BCA ¶19,068.

88

FIRMR 201-23.106-1. A proper software conversion study is especially important. See discussion on evaluation criteria, *infra*.

89

FRA Part 39. DOD has a separate approval process which is set forth in DOD Instruction 7920.2.

90

Computer System Acquisition Planning (E80-100-201), Data Pro Management Of EDP Systems (Oct. 1984).

91

See *generally*, FAR 7.104(a).

92

FIRMR 201-33.003-2(a).

93

FIRMR 201-33.003-1. Additionally, the GSA maintains a 'Want List.' DLA also maintains a mailing list of excess. The address is Director DLA; ATTN: DARO; Cameron Station; Alexandria, VA 22314.

94

See *generally*, Continued Use Of Costly, Outmoded Computers In Federal Agencies Can Be Avoided, GAO/AFMD-81-9, Dec. 15, 1980.

95

For the statutory authority to exchange similar items, see [40 U.S.C. § 481\(c\)](#) (1982). See *also*, DFARS 17.7004-1, Offering Property for Exchange and DFARS 70.322, Exchange/Sale of ADPE.

96

OMB Cir. A-121, Cost Accounting, Cost Recovery and Inter-Agency Sharing of Data Processing Facilities, at para. 4.

97

*Id.*, ¶3(b).

98

FIRMR Bulletin 8.

99

FIRMR 201-20.006.

100

For an excellent commentary, see Miller & Cohen, *ADPE Procurement Under Schedule Contracts*, Briefing Paper 79-4 (Aug. 1979).

101

[CMI Corp., Comp. Gen. B-210154, Sep. 23, 1983, 83-2 CPD ¶364](#). A legal purist would object to GSA schedules being referred to as contracts. ADP schedule contracts are actually only basic

agreements. [Math Box Inc., Comp. Gen. B-217098](#), Mar. 28, 1985, 85-1 CPD ¶371. A basic agreement is not a contract. FAR 16.703(a).

102

Are Prices Negotiated For Multiple Award Schedules Reasonable? [GAO/GGD-86-99BR](#), Jul. 1986.

103

D. BRANDON & S. SEGELSTEIN, [DATA PROCESSING CONTRACTS](#) (Van Nostrand Reinhold Co. 1983) at 5.

104

See generally, Kaufman, [What GSA Is Entitled To Know About A MAS Contractor's Commercial Discounts](#), 15 PUB. CONT. L.J. 244 (July 1985); Vacketta & Jaffe, [The 'Price Reduction' Clause](#), Briefing Paper 85-12 (Dec. 1985).

105

[Industry Denounces New GSA Multiple Award Schedule Requirements](#), 45 FED. CONT. REP. 86 (1986).

106

In FY 84, the annual spending on ADP schedule contracts was approximately \$1,844,000,000. [Federal Market Spending Analysis](#) (Int'l Data Corp. 1985) at 16.

107

[Kavouras, Inc., Comp. Gen. B-220058.2](#), Feb. 11, 1986, 86-1 CPD ¶ 148, reconsid. at 86-1 CPD ¶394.

108

[American Management Systems, Inc., Comp. Gen. B-216998](#), July 1, 1985, 85-2 CPD ¶3.

109

FIRMR 201-32.206(f); FAR Subpart 5.2. For DOD, see DFARS Subpart 5.2; DAC 86-1, Item XL.

110

FAR 5.203; [Harris Corp., Comp. Gen. B-217174](#), Apr. 22, 1985, 85-1 CPD ¶ 455.

111

FIRMR 201-32.206(g)(1).

112

[Information Management Associates, Comp. Gen. B-212972](#), Sep. 10, 1984, 84-2 CPD ¶266.

113

[International Systems Marketing, Inc., Comp. Gen. B-215174](#), Aug. 14, 1985, 85-2 CPD ¶166.

114

FIRMR 201-32.206(g)(2)(i).

115

[Spectrum Leasing Corp., Comp. Gen. B-205367](#), Mar. 4, 1982, 82-1 CPD ¶ 199.

116

FIRMR 201-32.206(g)(2)(i).

117

FAR 8.405-1(a)(2), (5).

118

For equipment capability, see FAR 8.405-1(a)(3) and [Lanier Business Products, Comp. Gen. B-212072, Jan. 23, 1984, 84-1 CPD ¶94](#). For availability of maintenance, see [National Micrographics Systems, Inc., Comp. Gen. B-220582, Jan. 9, 1986, 86-1 CPD ¶22](#).

119

FIRMR 201-32-206(g)(iii)(A). However, if the respondent's item can be traced to the respondent's GSA schedule contract, a delivery order can be placed against the respondent's schedule contract without re-advertising in the CBD. FIRMR 201-32.206(g)(2)(ii).

120

FIRMR 201-32.206(g)(iii)(B).

121

FIRMR 201-32.206(g)(iii)(A). See also articles cited in note 104, *supra*.

122

Buying Through GSA's Office of Technology Plus Store, GAO/IMTEC-86-2BR, Nov. 1985 at 3.

123

FIRMR Bulletin 6, ¶4(d)(2). Several agencies have circumvented this requirement by placing multiple orders. See GAO/IMTEC-86-2BR, *supra* note 122.

124

DOD, primarily through the Air Force Computer Acquisition Center, has let a series of requirements contracts for microcomputers which are binding on the Air Force, Navy and DLA. The Army and other agencies are non-mandatory parties to these contracts but use them pursuant to internal directives.

125

See GAO/IMTEC-86-2BR, *supra* note 122.

126

*Id.*

127

[Businessland, Inc., GSBICA No. 8586-P, 86-3 BCA ¶19,188 at 97,055](#).

128

See FAR 16.504.

129

FAR 16.4504(b); Comp. Gen. B-187881, Oct. 3, 1977.

130

The 'nominal quantity' requirement is to preclude a failure of consideration. FAR 16.504(b). *See also* [Ralph Const. Co. Inc. v. United States](#) 4 Cl. Ct. 727, 2 FPD ¶137 (1984).

131

*See generally*, [41 Comp. Gen. 682 \(1962\)](#). Offerors should consider calling this situation to the attention of the agency by providing information on economic order quantities. FAR 15.415.

132

*See note* 123, *supra*.

133

FAR 16.503(b).

134

[S&W Tire Services, Inc., GSBICA No. 6376, 82-2 BCA ¶16,048 at 79,617.](#)

135

[Crown Laundry & Dry Cleaners, Inc., ASBCA No. 28889, 85-2 BCA ¶ 18,003.](#)

136

FIRMR 201-32.102; DFARS 70.307(c).

137

FIRMR 201-32.102; DFARS 70.307(c).

138

Effective Management Of Computer Leasing Needed To Reduce Government Costs, GAO/IMTEC-85-3, Mar. 21, 1985.

139

*See generally*, D. Gallimore, *Legal Aspects of Funding Department of Army Procurements*, 67 MIL. L.REV. 87 at 142-51.

140

AFR 172-1, Vol. I, ¶10-65. The prudent conduct would have been for procuring activities to petition higher headquarters to exchange the funds to support the plan which offers the lowest overall life cycle costs. Recognizing that procurement activities have not always acted prudently, the Principal Deputy Assistant Secretary of Defense (Comptroller) has promulgated a Jan. 16, 1984 letter stating 'Make exceptions to the requirement for . . . outright purchase strategies only on a case-by-case basis. Justifications for exceptions do not include timeliness or lack of procurement appropriation funds.'

141

For a provocative commentary, see R. Hedlund; *Government Contract Contingent Liabilities, the Anti-Deficiency, and the Hobgoblin of Little Minds* (Sep. 1984) [unpublished L.L.M. thesis submitted to the National Law Center, George Washington University].

142

Intermen Corp., Comp. Gen. B-217378, Mar. 29, 1985, 85-1 CPD ¶ 378; Interscience Systems, Inc., 60 Comp. Gen. 331, 81-1 CPD ¶222 (1981).

143

See the Anti-Deficiency Act, 31 U.S.C. § 1350 (1982).

144

U.S. CONST., art. I, § 9.

145

See note 136, *supra*.

146

48 Comp. Gen. 494 (1969).

147

DFARS 70.310(c)(2)(ii).

148

Storage Technology Corp., Gen. B-182289, Apr. 25, 1975, 75-1 CPD ¶ 261.

149

Federal Data Corp., 60 Comp. Gen. 584, 81-1 CPD 531 (1981).

150

55 Comp. Gen. 1012 (1976).

151

Rockwell International Corp. v. United States, 4 Cl. Ct. 1, 2 F.P.D. ¶69 (1983); Advance Machine Co., Comp. Gen. B-219766, Nov. 5, 1985, 85-2 CPD ¶526.

152

Interscience Systems, Inc., Comp. Gen. B-205458, Mar. 9, 1982, 82-1 CPD ¶220.

153

Memorex Corp., GSBICA No. 7929-P, 85-3 BCA ¶18,289.

154

10 U.S.C. § 2305(a)(1)(C); 41 U.S.C. § 253(a) (Supp. III 1985).

155

10 U.S.C. § 2305(a)(1)(C); 41 U.S.C. § 253(a) (Supp. III 1985).

156

FIRMR 201-30.013.

157

40 U.S.C. § 759(h) (Supp. III 1985). Fleetwood Electronics, Comp. Gen. B-216947.2, Jun. 11, 1985, 85-1 CPD ¶664.

158

See DFARS 70.200.

159

[Bowne Time Sharing Inc., Comp. Gen. B-190038, May 9, 1978, 78-1 CPD ¶ 347.](#)

160

DFARS 70.200.

161

FAR 10.002(b).

162

For instance, where a protester argued that a 'generic' software package should be used, the GAO commented 'even if the specifications are design rather than functional in nature, this does not automatically render the invitation restrictive.' [Autologic, Inc., Comp. Gen. B-199015, Jan. 7, 1981, 81-1 CPD ¶ 141 at 4.](#)

163

A standard way of measuring the capability of a mainframe CPU is by millions instructions per second (MIPS).

164

For a list of FIPS PUBs, see FIRMR Part 201-8. For a discussion on FIPS, see the text accompanying notes 33-35.

165

[Honeywell Information Systems, Inc., Comp. Gen. B-215224, Oct. 9, 1984, 84-2 CPD ¶389.](#) See also, [Eaton-Kenway, Inc., Comp. Gen. B-211724.2, Jan. 14, 1985, 85-1 CPD ¶35.](#)

166

[International Business Machines Corp., Comp. Gen. B-187720, May 19, 1977, 77-1 CPD ¶349 at 5.](#) See also, [Auto-Trol Corp., Comp. Gen. B-192025, Sep. 5, 1978, 78-2 CPD ¶171.](#)

167

See [ITEL Corp., Comp. Gen. B-192139.7, Oct. 18, 1979, 79-2 CPD ¶ 268.](#)

168

[NCR Corp., Comp. Gen. B-215048, Dec. 26, 1984, 84-2 CPD ¶698.](#)

169

See *generally*, FIPS PUB 56, Managing Multivendor Plug-Compatible ADP Systems, Sep. 15, 1978. For a curious cacophony of hardware, see [TAB, Inc., GSB CA No. 8768-P, Dec. 8, 1986, 86-3 BCA](#)

—.

170

[Tele-Dynamics Division of Ambac Industries, Inc., Comp. Gen. B-187126, Dec. 17, 1976, 76-2 CPD ¶503.](#)

171

KET, Inc., 58 Comp. Gen. 38, 78-2 CPD ¶305 (1978).

172

Memorex Corp., Comp. Gen. B-195053, Apr. 7, 1980, 80-1 CPD ¶253.

173

FAR 10.004(b)(3).

174

Interscience Systems, Inc., Comp. Gen. B-197000, Aug. 8, 1980, 80-2 CPD ¶103.

175

Bell & Howell Co., Comp. Gen. B-203235.5, Apr. 26, 1982, 82-1 CPD ¶ 378.

176

*E.g.*, DFARS 52.210-7000.

177

Rocky Mountain Trading Co., Comp. Gen. B-221060, Jan. 24, 1986, 86-1 CPD ¶88; Sutron Corp., Comp. Gen. B-205082, Jan. 29, 1982, 82-1 CPD ¶69.

178

'We have held that the failure of the solicitation to list the salient characteristics of the desired item is an improper restriction on competition.' *Lista International Corp.*, 63 Comp. Gen. 447, 84-1 CPD ¶665 (1984). See *also*, *Connecticut Telephone & Electric Corp.*, Comp. Gen. B-217101, Feb. 25, 1985, 85-1 CPD ¶233. *But see*, *Squibb Vitatek Inc.*, Comp. Gen. B-208153, Mar. 29, 1983, 83-1 CPD ¶320 where failure to list salient characteristics was deemed academic because of inclusion of detailed design and performance specifications. Agency regulations include DFARS 10.004, NASA FAR Supp. 18-10.004-71, and GSA FAR Supp. 510.004-70.

179

DFARS 10.004.

180

AF FAR Supp. 10.004(a).

181

*Morton Management Inc.*, GSBCA No. 8419-P, 86-3 BCA ¶19,019 at 96,054.

182

*M/RAD Corp.*, Comp. Gen. B-199830, Feb. 27, 1981, 81-1 CPD ¶138.

183

*Bell & Howell Co., Datatape Div.*, Comp. Gen. B-204791, Mar. 9, 1982, 82-1 CPD ¶219.

184

*International Systems Marketing*, GSBCA No. 7860-P, 85-2 BCA ¶ 18,102.

185

*Tandem Corp.*, Comp. Gen. B-221333, Apr. 14, 1986, 86-1 CPD ¶362.

186

[Analytics Communications Systems, Inc., Comp. Gen. B-220615.3, Apr. 7, 1986, 86-1 CPD ¶335.](#)

187

[Bow Industries, Inc., Comp. Gen. B-196667, Mar. 25, 1980, 81-1 CPD ¶ 219.](#) *But see* [Magnaflux Corp., Comp. Gen. B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4](#) which permitted a 'minor deviation.'

188

[Cerberonics Inc., Comp. Gen. B-220910, Mar. 5, 1986, 86-1 CPD ¶ 221.](#)

189

[Lista International Corp., Comp. Gen. B-214231, Jun. 25, 1984, 84-1 CPD ¶665.](#)

190

[FAR 10.004\(b\)\(3\).](#)

191

[R. R. Mongeau Engineers, Inc., Comp. Gen. B-218356, Jul. 8, 1985, 85-2 CPD ¶29.](#)

192

[40 U.S.C. § 759\(i\) \(Supp. III 1985\).](#) *See also* [DFARS 70.200 and Ampex Corp., Comp. Gen. B-191132, Jun. 16, 1978, 78-1 CPD ¶439.](#)

193

[FAR Subpart 6.3](#) provides guidance on how to complete the document. Failure to have the document approved by the appropriate officials violates CICA. [Businessland, Inc., GSBICA No. 8586-P, 86-3 BCA ¶19,228.](#)

194

[Wang Laboratories, Inc., Comp. Gen. B-215589, Sep. 17, 1984, 84-2 ¶ 300; CPT Corp., Comp. Gen. B-200551, Dec. 29, 1980, 80-2 CPD ¶444.](#)

195

[M/A-Com Alanthus Data Inc., Comp. Gen. B-210415, Oct. 11, 1983, 83-2 CPD ¶429.](#)

196

Decisions that favor a subjective test include: [Bartlett Technologies Corp., Comp. Gen. B-218786, Aug. 20, 1985, 85-2 CPD ¶198; International Systems Marketing Inc., Comp. Gen. B-215174, Aug. 14, 1985, 85-2 CPD ¶166 at 5; Tom Shaw, Inc., Comp. Gen. B-214191, Aug. 27, 1984, 84-2 CPD ¶227; and Aydin Vector Division, Comp. Gen. B-194173, May 14, 1979, 79-1 CPD ¶345.](#) Decisions that favor an objective test include: [Federal Data Corp., 59 Comp. Gen. 283, 80-1 CPD ¶167 \(1980\); Non-Linear Systems, Inc., 55 Comp. Gen. 358, 75-2 CPD ¶219 \(1975\); and Kent Watkins, Inc., Comp. Gen. B-191078, May 17, 1978, 78-1 CPD ¶ 377.](#)

197

[10 Comp. Gen. 160 \(1930\).](#)

198

Memorex Corp., Comp. Gen. B-213430, Jul. 9, 1984, 84-2 CPD ¶22, recon. at 84-2 CPD ¶446.  
199

Bill Conklin Associates, Inc., Comp. Gen. B-210927, Aug. 8, 1983, 83-2 CPD ¶177.  
200

Cardion Electronics, Comp. Gen. B-218566, Aug. 15, 1985, 85-2 CPD ¶ 172; Rolm Corp., Comp.  
Gen. B-214052, Sep. 11, 1984, 84-2 CPD ¶280.

201

CMI Corp., Comp. Gen. B-216164, May 20, 1985, 85-1 CPD ¶572.

202

Philips Information Systems, Inc., Comp. Gen. B-208066, Dec. 6, 1982, 82-2 CPD ¶506.

203

National Micrographics Systems, Comp. Gen. B-211009.2, Nov. 14, 1983, 83-2 CPD ¶552.

204

Data Card Corp., Orbitran Div., Comp. Gen. B-202782, Oct. 8, 1981; 81-2 CPD ¶287; Memorex  
Corp., Comp. Gen. B-195053, Apr. 7, 1980, 80-1 CPD ¶253.

205

Siecor Corp., Comp. Gen. B-213981, Aug. 20, 1984, 84-2 CPD ¶196.

206

Bell Atlantic Mobile Systems, Comp. Gen. B-219468, Sep. 25, 1985, 85-2 CPD ¶337; CMI Corp.,  
Comp. Gen. B-216164, May 20, 1985, 85-1 CPD ¶ 572; Pitney Bowes, Comp. Gen. B-213122.2,  
May 25, 1984, 84-1 CPD ¶573. The GAO has also held that the burden of proving that an alternate  
proposal will satisfy the government's minimum needs rests with the protester. Furthermore, the cost  
of any necessary testing does not have to be paid by the government. [Bataco Industries, Comp.](#)  
Gen. B-212847, Feb. 13, 1984, 84-1 CPD ¶179.

207

Rolm Corp., Comp. Gen. B-214052, Sep. 11, 1984, 84-2 CPD ¶280. *See Also*, [Falcon Systems,](#)  
Comp. Gen. B-214562, Sep. 10, 1984, 84-2 CPD ¶270.

208

Memorex Corp., Comp. Gen. B-212660, Feb. 7, 1984, 84-1 CPD ¶153.

209

Memorex Corp., Comp. Gen. B-213430, Jul. 9, 1984, 84-2 CPD ¶22.

210

Small Business Systems, Comp. Gen. B-213009, Jul. 26, 1984, 84-2 CPD ¶ 114.

211

A.B. Dick Company, Comp. Gen. B-220144, Nov. 26, 1985, 85-2 CPD ¶606.

212

Digital Equipment Corp., Comp. Gen. B-181336, Sep. 13, 1974, 74-2 CPD ¶ 167.

213

Motorola Computer Systems, Inc., GSBCA No. 8596-P, 86-3 BCA ¶ 19,309.

214

ITT Courier Terminal Systems, Comp. Gen. B-218563, Aug. 8, 1985, 85-2 CPD ¶148.

215

Software City, Comp. Gen. B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475.

216

SMS Data Products Group, Comp. Gen. B-205360, Apr. 27, 1982, 82-1 CPD ¶ 390.

217

Burtek, Inc., Comp. Gen. B-217567, Aug. 16, 1985, 85-2 CPD ¶179; On-Line Systems Inc., Comp. Gen. B-193126, Mar. 28, 1979, 79-1 CPD ¶208.

218

North American Automated Systems Co., GSBCA No. 7864-P, 85-3 BCA ¶ 18,243, *recon.* at 85-2 BCA ¶18,280.

219

Data 100 Corp., Comp. Gen. B-182397, Feb. 12, 1975, 75-1 CPD ¶ 89.

220

Wagner Assoc. Inc., 65 Comp. Gen. 305, 86-1 CPD ¶166 (1986).

221

FAR 10.010 and FIRMR 201-32.206.

222

Wang Laboratories, Inc., Comp. Gen. B-190461, Mar. 13, 1978, 78-1 CPD ¶ 197.

223

Pitney Bowes Inc. v. United States, No. 85-0832 (D.D.C., Apr. 1, 1985), 27 Gov't Cont. ¶208.

224

Arwell Corp., Comp. Gen. B-210792, Dec. 14, 1983, 83-2 CPD ¶684.

225

IBM, Comp. Gen. B-198094, Nov. 18, 1980, 80-2 CPD ¶363.

226

CMI Corp., Comp. Gen. B-216164, May 20, 1985, 85-1 CPD ¶572.

227

Computer Marketing Corp., GSBCA No. 8131-P, 86-1 BCA ¶18,528, *recon.* at 86-1 BCA ¶18,592.

228

*Supra*, note 33.

229

FAR 10.006(a) addresses both federal standards and military standards. See *also* DOD Dir. 4120.3, Defense Standardization and Specification Program.

230

FAR 6.302-1(b)(4). For a good discussion on the advantages to standardization, see the Department of Defense's Standardization Program For Military Computers—A More Unified Effort Is Needed, GAO/LCD-80-69, Jun. 18, 1980.

231

Libby Corp., Comp. Gen. B-220392, Mar. 7, 1986, [86-1 CPD ¶227](#). See *also*, CPT Corp., Comp. Gen. B-211464, Jun. 7, 1984, [84-1 CPD ¶606](#).

232

Canon U.S.A. Inc., Comp. Gen. B-215493, Dec. 7, 1984, [84-2 CPD ¶ 638](#).

233

FAR 10.001.

234

*Id.*

235

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236

OMB Cir. A-119, Federal Participation In The Development And Use Of Voluntary Standards, ¶6(a).

237

Lake Shore Electronics Corp., Comp. Gen. B-143264, Aug. 23, 1960.

238

OMB Cir. A-130, ¶7(f) & 8(b)(8). See *generally*, Terex Corp., Comp. Gen. B-217053, Jul. 24, 1985, [85-2 CPD ¶76](#). 'Tried and true' is a similar cliché specification. See GTE Sylvania Inc., [57 Comp. Gen. 715, 77-2 CPD ¶ 422 \(1977\)](#). A preference for nondevelopmental items is also expressed in section 907 of the Defense Acquisition Improvement Act of 1986, Title IX of the DoD Appropriations Act of 1987, [Pub. L. No. 99-500](#).

239

ACCESS Corp., Comp. Gen. B-189661, Feb. 3, 1978, [78-1 CPD ¶100](#).

240

See Continued Use Of Costly, Outmoded Computers In Federal Agencies Can Be Avoided, GAO/AFMD-81-9, Dec. 15, 1980.

241

Fein-Marquart Associates, Inc., Comp. Gen. B-214652, Dec. 4, 1984, [84-2 CPD ¶616](#).

242

Hewlett-Packard Co., Comp. Gen. B-216125.2, May 24, 1985, 85-1 CPD ¶ 597.

243

Intermem Corp., Comp. Gen. B-188910, Dec. 15, 1977, 72-2 CPD ¶ 464.

244

Digital Equipment Corp., Comp. Gen. B-219435, Oct. 24, 1985, 85-2 CPD ¶ 456.

245

A beta site is a pilot center where the information system is attempted to be made operational in an existing data processing facility. B. BRICKMAN, *supra* note 4, at 43.

246

A parallel can be made to the definition of 'substantial quantities' found in FAR 15.804-3(c)(4) concerning the commercial items exemption to submitting certified cost or pricing data. Similarly, the term 'significant quantities' is defined in DFARS 27.401 concerning commercial computer software.

247

Amdahl Corp.; ViON Corp., Comp. Gen. B-212018, Jul. 1, 1983, 83-2 CPD ¶ 51 *recon.* on Dec. 19, 1983, 83-2 CPD ¶703.

248

*Id.* at 3.

249

Hicklin GM Power Company, Comp. Gen. B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153.

250

Wholesale Office Furniture, Inc., Comp. Gen. B-216081, Dec. 4, 1984, 84-2 CPD ¶618.

251

APEC Technology Limited Comp. Gen. B-220644, Jan. 3, 1986 (65 Comp. Gen. \_\_\_\_), 86-2 CPD ¶81; Honeywell Information Systems, Comp. Gen. B-191212, Jul. 14, 1978, 78-2 CPD ¶39.

252

Electronic Systems, USA, Comp. Gen. B-224471, Oct. 8, 1986, 86-2 CPD ¶ 410; Williams Electric Company, Comp. Gen. B-212987, Feb. 27, 1984, 84-1 CPD ¶ 236; System Development Corp. and Cray Research, Inc., Comp. Gen. B-208662, Aug. 15, 1983, 83-2 CPD ¶206.

253

Ampex Corp., Comp. Gen. B-212356, Nov. 15, 1983, 83-2 CPD ¶565.

254

Northern Telecom Inc. v. United States, Cl. Ct. No. 290-856, Jun. 27, 1985, 4 F.P.D. ¶20, 27 Gov't Cont. ¶251.

255

If the requirement for references is placed in Section M of the RFP rather than Section C, the agency has greater flexibility to relax the requirement. [Codex Corp., GSBICA No. 8186-P](#), Dec. 3, 1985, [86-1 BCA ¶ 18,590](#).

256

[GHL, Inc., Comp. Gen. B-223994](#), Nov. 18, 1986, [86-2 CPD ¶378](#).

257

[Gould Defense Systems Inc., Comp. Gen. B-199392](#), Aug. 8, 1983, [83-2 CPD ¶174](#); [Trojan Industries, Inc., Comp. Gen. B-220620](#), Feb. 10, 1986, [86-1 CPD ¶143](#).

258

[Davey Compressor Company, Comp. Gen. B-203781.2](#), May 10, 1982, [82-1 CPD ¶444](#).

259

*I.e.*, the offeror's capability to furnish an acceptable item. [Tenavision Inc., Comp. Gen. B-216274](#), Apr. 15, 1985, [85-1 CPD ¶427](#).

260

See the discussion on benchmarks, *infra*.

261

[North American Automated Systems Company, GSBICA No. 7864-P](#), [85-3 BCA ¶18,243](#).

262

B. BRICKMAN, *supra* note 4, at 6.

263

[The Caption Center, Comp. Gen. B-220659](#), Feb. 19, 1986, [86-1 CPD ¶174](#) at 4. See also, [Ampex Corp., Comp. Gen. B-191132](#), Jun. 16, 1978, [78-1 CPD ¶ 439](#).

264

Integrators design, install and maintain a complete information system. See generally, S. McCLELLAN, *THE COMING COMPUTER INDUSTRY SHAKEOUT* (John Wiley & Sons 1982).

265

[Interscience Systems Inc., 59 Comp. Gen. 438](#), [80-1 CPD ¶332](#) (1980) modified at [59 Comp. Gen. 332](#), [80-2 CPD ¶106](#) (1980); [Masstor Systems Corp., Comp. Gen. B-215046](#), Dec. 3, 1984, [84-2 CPD ¶598](#).

266

[Data Card Corp., Comp. Gen. B-202782](#), Oct. 8, 1981, [81-2 CPD ¶ 287](#).

267

There is nothing inherently wrong with drafting a solicitation to shift maximum risks to a contractor. [Capital Systems Inc., Comp. Gen. B-218295](#), Jul. 12, 1985, [85-2 CPD ¶44](#); [Tracor Jitco, Inc., Comp. Gen. B-220139](#), Dec. 24, 1985, [85-2 CPD ¶170](#). However, when confronting the single vendor syndrome, the GAO's concern is whether the shifting of risk unnecessarily limits competition.

268

See *generally*, Control Data Corp., 55 Comp. Gen. 1019, 76-1 CPD ¶ 276 (1976); Interscience Systems, Inc., Amperif Corp., Comp. Gen. B-201943, Aug. 31, 1982, 82-2 CPD ¶ 187.

269

General DataComm Industries, Comp. Gen. B-182556, Apr. 9, 1975, 75-1 CPD ¶ 218 at 2. See also, MASSTOR Systems Corp., Comp. Gen. B-211240, Dec. 27, 1983, 84-1 CPD ¶ 23; Interscience Systems Inc., Comp. Gen. B-211240, Mar. 9, 1982, 82-1 CPD ¶ 22; Secure Engineering Services, Inc., Comp. Gen. B-202496, Jul. 1, 1981, 81-2 CPD ¶ 2; Ampex Corp., Comp. Gen. B-191132, Jun. 16, 1978, 78-1 CPD ¶ 439.

270

Systems, Terminals & Communications Corp., Comp. Gen. B-218170, May 21, 1985, 85-1 CPD ¶ 578.

271

Talbott Development Corp., Comp. Gen. B-220641, Feb. 11, 1986, 86-1 CPD ¶ 152.

272

Technology Services, Inc., GSBCA No. 8178-P, 86-1 BCA ¶ 18,656.

273

Halifax Engineering, Inc., Comp. Gen. B-219178.2, Sep. 30, 1985, 85-2 CPD ¶ 559; Science Information Services, Inc., Comp. Gen. B-207149.2, Nov. 29, 1982, 82-2 CPD ¶ 477. An example of unfair agency action would be providing to the incumbent a draft of the solicitation long before it is publicly released. Williamette-Western Corp., 54 Comp. Gen. 375, 74-2 CPD ¶ 259 (1974).

274

Rocky Mountain Trading Company, Comp. Gen. B-220713, Feb. 3, 1986, 86-1 CPD ¶ 119; Sperry-Univac Corp., Comp. Gen. B-212914, Sep. 5, 1984, 84-2 CPD ¶ 255.

275

Amdahl Corp., Comp. Gen. B-198911, Mar. 27, 1981, 81-1 CPD ¶ 230.

276

COMDISCO, GSBCA No. 8561-P, Aug. 11, 1986, 86-3 BCA \_\_\_\_.

277

GTE Automatic Electronics Inc., Comp. Gen. B-209393, Sep. 19, 1983, 83-2 CPD ¶ 340; Telephonics Corp., Comp. Gen. B-194110, Jan. 9, 1980, 80-1 CPD ¶ 25.

278

FIRMR 201-11.001.

279

A PBX is a switching facility within an institution which also provides access to the public telephone network. THE DICTIONARY OF NEW INFORMATION TECHNOLOGY 145 (Random House 1983).

280

ROLM Corp. and Fisk Telephone Systems, Inc., Comp. Gen. B-202031, Aug. 16, 1981, 81-2 CPD ¶180 at 7.

281

ROLM Corp., Comp. Gen. B-210836, Oct. 25, 1983, 83-2 CPD ¶492 at 2.

282

ROLM Corp., Comp. Gen. B-213865, Jul. 9, 1984, 84-2 CPD ¶23.

283

Memorex Corp., GSBCA No. 7927-P 85-3 BCA ¶18,289 at 91,776. For an insightful identification of the major players in the computer industry, see S. McCLELLAN, THE COMING COMPUTER INDUSTRY SHAKEOUT, *supra* note 264.

284

Computer Election Systems Inc., Comp. Gen. B-195595, Dec. 18, 1979, 79-2 CPD ¶413.

285

ADP Acquisitions: Immigration and Naturalization Service Should Terminate Its Contract & Recompete, GAO IMTEC-86-5, March 1986.

286

Honeywell Information Systems, Inc. Comp. Gen. B-215224, Oct. 9, 1984, 84-2 CPD ¶389; Sperry-Univac Corp., Comp. Gen. B-212914, Sep. 5, 1984, 84-2 CPD ¶255.

287

See *generally*, CompuServe, Comp. Gen. B-188990, Sep. 9, 1977, 77-2 CPD ¶ 182.

288

Computer Consoles, Inc., GSBCA No. 8453-P, 86-2 BCA ¶18,941.

289

Falcon Systems, Comp. Gen. B-213661, Jun. 22, 1984, 84-1 CPD ¶ 658; Consolidated Bell, Inc., Comp. Gen. B-220425, Mar. 11, 1986, 86-1 CPD ¶ 238.

290

See discussion on source selection, *infra*. For a suspicious instance where a source selection authority allows an offeror to overcome a serious margin in technical points after learning that the offeror was an authorized value-added reseller for IBM, see SMS Data Products Group, Inc., GSBCA No. 8589-P, 86-3 BCA \_\_\_\_.

291

*E.g.*, TriCom, Inc., Comp. Gen. B-220590, Jan. 15, 1986, 86-1 CPD ¶47; Storage Technology Corp., Comp. Gen. B-215336, Aug. 17, 1984, 84-2 CPD ¶190; CMI Corp., Comp. Gen. B-209938, Sep. 2, 1983, 83-2 CPD ¶292; On-Line Systems Inc., Comp. Gen. B-193126, Mar. 28, 1979, 79-1 CPD ¶208.

292

Honeywell Inc., Comp. Gen. B-193177.2, Jan. 19, 1981, 81-1 CPD ¶ 26. See also Reliability Sciences, Inc., Comp. Gen. B-205754.2, Jun. 7, 1983, 83-1 CPD ¶612; Information Network Systems, Comp. Gen. B-208009, Mar. 17, 1983, 83-1 CPD ¶272.

293

Supre note 291.

294

Amray, Inc., Comp. Gen. B-208308, Jan. 17, 1983, 83-1 CPD ¶43; Data Card Corp., Comp. Gen. B-202782, Oct. 8, 1981, 81-2 CPD ¶287; Maryland Computer Services Inc., Comp. Gen. B-216990, Feb. 12, 1985, 85-1 CPD ¶187.

295

Precision Dynamics Corp., 54 Comp. Gen. 1114, 75-1 CPD ¶402 (1975); Tri-Com Inc., Comp. Gen. B-215575, Nov. 8, 1984, 84-1 CPD ¶512.

296

An acquisition where a procurement official admitted that a \$300 million ADP program was 'wired' is documented at 46 Fed. Cont. Rep. 558-560 (1986).

297

T. Miller, *Wired RFPs*, FED. COMPUTER MARKET REP. 1 (Apr. 13, 1984).

298

R. GREENLY, HOW TO WIN GOVERNMENT CONTRACTS 30 (Van Nostrand Reinhold Co. 1983).

299

A wired specification is almost always done either inadvertently or with an altruistic motive. Criminal wrongdoing is genuinely rare. However, see 45 Fed. Cont. Rep. 830 (1985) where two former postal service officials received more than seven year sentences for their roles in a bid rigging scheme involving large federal computer service contracts.

300

DOD contracting officers can seek the assistance of the organizations listed in DFARS 70.324. Contracting officers for civilian agencies do not have comparable organizations to assist them.