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## SPECIAL SUPPLEMENT

### Scorekeeping Bid Protests in Six Forums

*An Analysis by*

*Richard D. Lieberman*



# Scorekeeping Bid Protests in Six Forums

*Richard D. Lieberman\**

## Introduction



**Richard D. Lieberman**

The results of protests filed in five different forums of original jurisdiction during the past three years indicate that protesters are two to three times more likely to obtain relief (i.e., have their protests sustained or granted) at the General Services Board of Contract Appeals ("GSBCA"), the various U.S. District Courts or the Court of Federal Claims ("CFC"), than they are at the General Accounting Office ("GAO") or the U.S. Postal Service ("USPS"). Although the jurisdiction of these original protest forums varies, the sustain or grant rate of those cases resolved on the merits has remained relatively constant during the entire period for which data is available, averaging over 40 percent at the GSBCA, approximately 29 per cent in reported cases in the district courts and the CFC, but only 12-13 percent at the GAO and the USPS. On appeal, the circuit courts have granted relief to protesters in approximately 25 percent of the reported cases.

The significant difference in the sustain or grant rate in the different forums should be carefully considered by those in the bid protest community and the Congress who seek to "reinvent" the bid protest system by modifying or eliminating the jurisdiction of the various forums. The elimination of GSBCA or district court jurisdiction, which has been proposed by some observers, is likely to result in a substantial reduction in the number of protests sustained or granted, an outcome which may or may not be desired by those who seek to revise the system.

Protests considered in all six forums (original and appellate) can readily be grouped into seven major categories and a total of 16 major subcategories. More than two-thirds of all protests in these six forums are sustained or granted because of improper actions in the evaluation/selection and negotiation of negotiated procurements, acceptance of nonconforming proposals or nonresponsive bids (or not awarding to conforming or responsive ones), or improper restrictions on competition.

## I. Jurisdiction and Basis of Review in the District Courts, The Court of Federal Claims, and Circuit Courts of Appeals

### A. Original Jurisdiction Forums

Last year, the jurisdiction and basis of review of bid protests at the GAO, the GSBCA and the USPS was set forth in Lieberman, "Winning Bid Protests in Three Forums: A Statistical Analysis at the U.S.

\* Richard D. Lieberman is a partner in the Washington, D.C. office of Sullivan & Worcester. He concentrates on government contracts, including bid protests, claims and white collar criminal defense. Prior to entering private practice, he was Deputy Inspector General and Assistant Inspector General at the Defense Department, and a Professional Staff Member of the Senate Appropriations Committee.

Postal Service, the GAO and the GSBCA," 61 FCR Supp. 1 (Jan. 31, 1994) (the "1994 bid protest article"). In brief, the USPS considers protests of procurements conducted by the Postal Service, the GAO considers protests of procurements conducted by all "Federal Agencies" (primarily in the Executive Branch), and the GSBCA considers protests involving only certain automatic data processing ("ADP") or information technology ("IT") acquisitions under 40 U.S.C. §759 (the "Brooks Act"). All three forums use the failure of the agency to comply with a statute or regulation as the basis for sustaining or granting a protest. However, the USPS and the GAO generally question a contracting officials' determination only if it is unreasonable, arbitrary or capricious, without making a *de novo* review of all of the facts. The GSBCA, in contrast, reviews contracting officers' decisions in a *de novo* manner, pursuant to 40 U.S.C. §759(f)(1); the evidentiary record is more fully developed as the GSBCA permits greater discovery and opportunity for a hearing on the merits of the protest, if requested by any party.

In the district courts, disappointed bidders for government contracts may seek review of the agency action denying them a contract under the Administrative Procedure Act ("APA"), 5 U.S.C. §702. The holding of the D.C. Circuit in the seminal case of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F. 2d 859 (D.C. Cir. 1970), to the effect that district courts have jurisdiction to consider protests under the APA, was followed by similar holdings in the other 11 courts of appeals.

Under the APA, a district court may hold unlawful and set aside agency actions, findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. §706(2)(A). The disappointed bidder must show either (1) that the decision of the procurement official lacked a rational basis, or (2) that the decision involved a clear and prejudicial violation of applicable statutes or regulations. *Choctaw Mfg. Co. v. United States*, 761 F. 2d 609 (11th Cir. 1985); see also *Kentron Hawaii, Ltd. v. Warner*, 480 F. 2d 1166, 1169 (D.C. Cir. 1973).

Because of the language in the Federal Courts Improvement Act of 1982 granting the CFC "exclusive jurisdiction" on bid protests prior to award of a contract, (see next paragraph), the courts of appeals are split on whether the district courts continue to have jurisdiction over pre-award protests (e.g., those challenging the terms of a solicitation or the elimination of an offeror from the competitive range). The Fourth and Ninth Circuits have held that district courts do not have *Scanwell* jurisdiction before contract award, while the First and Third Circuits have held that the district courts do have such jurisdiction.<sup>1</sup>

The CFC has authority to issue injunctive relief and declaratory judgments in pre-award contract actions only. 28 U.S.C. §1491(a)(3). The Federal Courts Improvement Act of 1982 provides the CFC with the following authority:

To afford complete relief on any contract claim brought before the contract is awarded, the [CFC] shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.

28 U.S.C. §1491(a)(3). The CFC interprets this language to refer to an implied-in-fact contract theory on which declaratory and injunctive relief rests. *Big Bud Tractors, Inc. v. United States*, 2 Cl. Ct. 188, 193 (1983). The CFC further defines the implied-in-fact contract as "encompassing an implied contract on the part of the Government to fairly and honestly consider bids and proposals pursuant to an invitation for bids or solicitation for offers, a theory which mirrors the implied duty recognized by the U.S. Court of Claims by which the Government must fairly and honestly consider all bids and proposals." *Aerolease Beach & Satsuma Investment, Inc. v. United States*, 31 Fed. Cl. 342 (1994).

The standard used by the CFC is essentially the same as that of the district courts under the APA, namely, whether the procurement official had a rational or reasonable basis for the determination made in a procurement. *Croman Corp. v. United States*, 31 Fed. Cl. 741 (1994). A plaintiff must show the lack of a reasonable basis for the contracting officer's decision or that the procurement procedure involved a clear and prejudicial violation of an applicable statute or regulation. *Id.*

## B. Appellate Forums

The GSBCA's authorizing legislation specifically permits appeals of GSBCA protest decisions to be made to the Federal Circuit. 40 U.S.C. §759(f)(6)(A). Similarly, final district court decisions on bid protests may be appealed to the cognizant circuit court. 28 U.S.C. §1291. Although there is no specific appeal procedure for GAO bid protest decisions, many disappointed bidders whose protests are not sustained by the GAO refile the same general protest in a district court seeking relief. The district courts, however, do not review in an appellate manner the GAO determinations.

Appellate courts review the findings of facts made by trial courts for "clear error" and the legal conclusions of trial courts *de novo*. *Durasys, Inc. v. Leyba*, 992 F.2d 1465, 1471 (7th Cir. 1993); *Seal v. Knorp*, 957 F.2d 1230, 1234 (5th Cir. 1992); *Doe v. United States*, 941 F.2d 780 (9th Cir. 1991). When reviewing GSBCA decisions, the Federal Circuit treats the GSBCA's decision on questions of law as not final or conclusive, although its decision on a question of fact is final unless fraudulent, arbitrary, capricious, so grossly erroneous as to necessarily imply bad faith, or unsupported by substantial evidence. 41 U.S.C. §609(b); also *see, e.g., AT&T Communications v. Wiltel Inc.*, 1 F.3d 1201 (Fed. Cir. 1993). The GAO's decisions are not reviewed by appellate courts; however, indirect review occurs if taken to the district courts, whose decisions are then reviewed by appellate courts as described above.

## C. Conclusion

In conclusion, all forums examine a protested procurement for violations of law or regulation. Protests are sustained or granted where an agency decision directly violates a specific law or regulation, lacks a rational basis, or is found to be arbitrary or capricious.

# II. Historical Summary

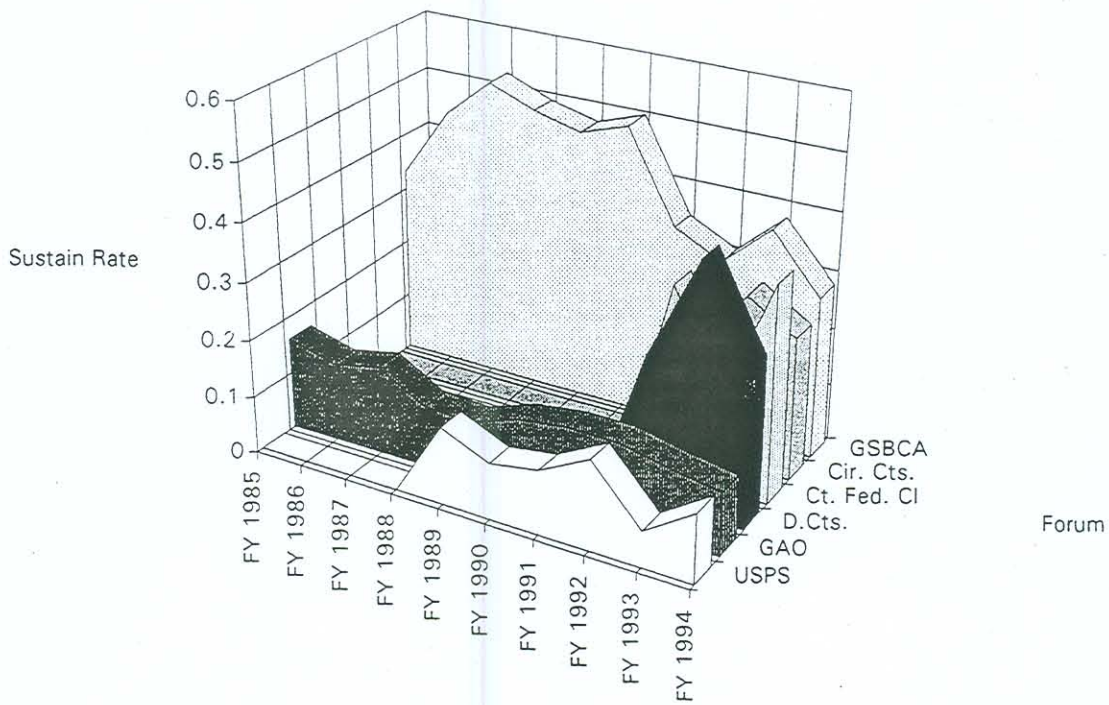
## A. Sustain/Grant Rate Trends in All Six Forums

The summary table and chart below indicate that the USPS and the GAO historically have sustained protests at a rate of about 12 to 13 percent, while the GSBCA has granted protests at a rate of about 42 percent. These figures consider only cases decided on the merits; dismissals and cost cases are not included. The GAO and GSBCA statistics cover the full ten years since the Competition in Contracting Act of 1984 ("CICA") was enacted, while the USPS statistics cover FY 1989-94. In the three court forums, the grant/sustain rates between FY 1992-94 are 28.6 percent for the district courts, 29.4 percent for the CFC and 25 percent for the appellate courts. The courts therefore sustain protests at about *twice* the rate as the GAO and the USPS, but at a rate about *half* that of the GSBCA. Most striking, however, is the comparison between the GSBCA and the GAO, where the former sustains about *three times* the percentage of protests granted by the latter.

SUSTAIN RATE TRENDS IN SIX DIFFERENT BID PROTEST FORUMS

	FY 1985	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	All Years
USPS					13.6%	9.9%	11.2%	15.7%	6.3%	12.0%	12.2%
GAO	16.1%	13.8%	15.5%	10.8%	10.5%	13.4%	14.5%	14.3%	12.4%	11.0%	13.2%
D.Cts.								25.0%	42.9%	27.3%	28.6%
Ct. Fed. Cl								33.3%	16.7%	37.5%	29.4%
Cir. Cts.								20.0%	30.0%	25.0%	25.0%
GSBCA	33.3%	45.5%	52.5%	49.3%	47.2%	50.0%	34.3%	30.2%	37.7%	28.2%	41.8%

SUSTAIN RATE TRENDS IN SIX DIFFERENT BID PROTEST FORUMS



The grant or sustain rate in each of the forums does not provide the complete story of the results that protesters are likely to achieve. In many cases, protests filed in the various forums never reach a formal decision on the merits, but are either summarily dismissed or settled and withdrawn prior to the decision. In many of the latter cases, the protester will have achieved some or all of its objectives in filing the protest. The only forum which tracks such protests is the GAO, which has developed the Protester Effectiveness Rate ("PER"). This rate includes all cases sustained by the GAO as well as those where GAO believed some corrective action was taken by the agency. The PER has ranged from

18 percent in FY 1985 to 42.6 percent in FY 1994, averaging 29.8 percent during the past ten years. Unfortunately, equivalent rates are not available for any of the other forums, although it is obvious that far more protesters receive some type of relief in all forums than is indicated by the raw grant/sustain rate. See also the next section on disposition by forum for a discussion of some of the other limitations in the data.

In summary, the GSBICA has the highest rate of granting or sustaining protests that are considered on the merits. The district courts, CFC and appellate courts all have relatively high sustain rates, averaging 25 percent or more over the period. The GAO and the USPS sustain rates are the lowest of all forums, averaging 12 percent and 13 percent, respectively.

**B. Disposition in All Forums—Historical Perspective**

The next four tables provide the protest history in all six forums, covering all post-CICA years at the GAO and the GSBICA, FY 1989-94 at the USPS, and FY 1992-94 for the courts.<sup>2</sup> All data at the USPS, the GAO and the GSBICA was obtained from the actual forum itself or a GAO audit report. All court data was obtained from a tally of reported cases.

At the USPS, data is available from FY 1989-94, and demonstrates a fairly consistent sustain rate of about 12 percent. The USPS sustain rate declined in 1993 to 6.3 percent, but returned to its historical rate in FY 1994.

**REPORTED PROTEST HISTORY AT THE U.S. POSTAL SERVICE**

	1989	1990	1991	1992	1993	1994	1989-94
Dismissed, Denied, Withdrawn & Closed 1/2/3/	76	64	79	75	30	44	368
Sustained & Sustained in Part	12	7	10	14	2	6	51
TOTAL	88	71	89	89	32	50	419
Percent Sustained/Sustained in part	13.6%	9.9%	11.2%	15.7%	6.3%	12.0%	12.2%
Source: U.S. General Accounting Office, "Postal Procurement - Information on Bid Protest Activities," GAO/GGD-93-79FS (April 29, 1993) and USPS Counsel.							
Information is available on a calendar year basis.							
Notes:							
1. Dismissed includes summarily dismissed, dismissed in part and denied in part.							
2. Denied includes summarily denied.							
3. Closed includes closed (protest moot) and closed (no action).							

At the GAO, the sustain rate varies between 10.5 percent and 16.1 percent between FY 1985-94, averaging 13.2 percent during the entire ten-year period. GAO considered the largest number of bid protests of all of the forums. The number of protests filed at the GAO rose to a high of 3,219 in FY 1993, and then declined about 17 percent to 2,669 in FY 1994. Over the entire 10-year period, GAO received an average of 2,700 protests per year.

It should be noted that the GAO uses a technique for counting "merit protests sustained" which somewhat overstates the number of procurement actions on which bid protests were sustained.

Specifically, the GAO counts within its number of sustained merit protests *all* relevant "B-numbers" that have been assigned to a given protest.<sup>3</sup> Where there are multiple B-numbers, the GAO will count the same procurement several times. This situation occurs where there are multiple protesters, or where the original protester submits a second, third, etc. ground of protest during the development of the protest. For example, in FY 1993, the GAO table indicates that there were 100 merit protests sustained, of which 87 were different procurements, and the other 13 were a second or third "B-number" within a given procurement. Similarly, in FY 1994, the GAO table indicates that 79 merit protests were sustained. This number consists of 63 different procurements, and 16 other protests where there was a second or third B-number within any given procurement.

REPORTED PROTEST HISTORY AT THE GENERAL ACCOUNTING OFFICE  
SINCE THE COMPETITION IN CONTRACTING ACT OF 1984

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY85-94
Initial Cases Closed 1/	2,370	2,520	2,624	2,573	2,653	2,507	2,805	2,875	3,219	2,669	26,815
Merit Protests: Total	657	731	786	834	860	856	799	824	805	716	7,868
--Sustained	106	101	122	90	90	115	116	119	100	79	1,038
--Denied	551	630	664	744	770	741	683	705	705	637	6,830
Per Cent Merit											
Protests Sustained	16.1%	13.8%	15.5%	10.8%	10.5%	13.4%	14.5%	14.4%	12.4%	11.0%	13.2%
Overall "Protester											
Effectiveness Rate" 2/	18.5%	24.3%	24.8%	21.5%	25.4%	35.2%	29.3%	33.9%	42.6%	42.6%	29.8%
Source: GAO Annual Reports to the Congress pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. 3554(e)(2) (1988).											
NOTES:											
1/ Initial cases closed excludes requests for reconsideration.											
2/ Protester Effectiveness Rate includes all cases sustained by GAO as well as those where GAO believed some corrective action was taken by the agency.											

At the GSBCA, the grant rate during the past ten years has varied between 28.2 percent and 52.5 percent. During this time period, the grant rate has averaged 41.8 percent. The highest grant rates were achieved at the GSBCA in the late 1980's and in 1990. The number of bid protests at the GSBCA declined from 295 in FY 1993 to 180 in FY 1994, a drop of 39 percent. The 28.2 percent grant rate at the GSBCA in FY 1994 was the lowest rate in GSBCA bid protest history. The Board statistics do not reflect protester success if the GSBCA did not issue a decision on the merits. This article does not attempt to develop a rate comparable to the PER used by the GAO.



REPORTED PROTEST HISTORY AT THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT  
APPEALS  
SINCE THE COMPETITION IN CONTRACTING ACT OF 1984

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY 85-94
Granted in Part	0	0	4	1	5	6	1	2	5	2	26
Granted	1	10	27	34	29	22	23	17	21	9	193
Denied	2	12	28	36	38	28	46	44	43	28	305
Subtotal-merit	3	22	59	71	72	56	70	63	69	39	524
Dismissed	5	101	139	140	219	205	206	202	226	141	1584
Total	8	123	198	211	291	261	276	265	295	180	2108
%Merit Granted	33.3%	45.5%	52.5%	49.3%	47.2%	50.0%	34.3%	30.2%	37.7%	28.2%	41.8%
Source: General Services Administration											

During FY 1992-94, the grant/relief<sup>4</sup> rates in the district courts and the CFC showed a surprising similarity, averaging 28.6 percent and 29.4 percent, respectively. In the appellate courts, the grant/relief rates were very similar, averaging 25 percent during the same three-year period.

There are numerous limitations in the court data. The statistics include only those decisions in the Westlaw Government Contracts Database as of Dec. 1, 1994. In all likelihood, many *Scanwell* actions either were not reported in Westlaw, or were the subject of memorandum opinions that are available only from the clerk of a particular court. Accordingly, the number of district court actions appears to be relatively small in each year, and likely is understated.

For purposes of this article, the author scored a court decision as sustained or "relief granted" wherever the court fashioned some kind of meaningful relief for the protester. In some cases this was a decision stating explicitly that the agency had violated law or regulation. In other cases, it was a decision granting injunctive relief, where there was no subsequent reported decision. The author believes that wherever the court granted some type of interim relief, the protester ultimately ended up with some meaningful relief, even if that cannot be explicitly ascertained from the published decisions in the database.

Finally, readers should be cautioned that appellate decisions are scored as sustained or relief granted where the *protester's* position was upheld by the appellate court, regardless of whether the lower court's decision was sustained or overruled. This approach was used to ensure consistency with the scorekeeping terminology used for other forums.

For purposes of completeness, since all sustained court decisions are discussed in Section III, *infra*, all court decisions where the protest was denied are set out in a note to this text.<sup>5</sup>

REPORTED BID PROTEST HISTORY IN U.S. DISTRICT COURTS,  
THE COURT OF FEDERAL CLAIMS AND CIRCUIT COURTS OF APPEALS  
FY 1992-94

	FY 1992	FY 1993	FY 1994	FY 92-94
<b>DISTRICT COURTS</b>				
Relief/granted	6	3	3	12
No Relief/denied	18	4	8	30
Total	24	7	11	42
Grant/relief Rate	25.0%	42.9%	27.3%	28.6%
<b>CT. FED. CLAIMS</b>				
Relief/granted	1	1	3	5
No Relief/denied	2	5	5	12
Total	3	6	8	17
Grant/relief Rate	33.3%	16.7%	37.5%	29.4%
<b>CIRCUIT COURTS</b>				
Relief/granted	2	3	2	7
No Relief/denied	8	7	6	21
Total	10	10	8	28
Grant/relief Rate	20.0%	30.0%	25.0%	25.0%
NOTE: Includes only bid protest (Scanwell-type) decisions and appellate decisions reported in the WESTLAW Government Contracts data base as of December 1994.				

In conclusion, within the limitations of the data that were explained above, the grant/sustain rate of 41.8 percent at the GSBICA is the highest of all forums, while the rate in the three different court forums averages between 25-29 percent. The GAO and the USPS have the lowest sustain rates of 13 and 12 percent, respectively.

### C. Protests Granted or Sustained by Category in All Forums, FY 1992-94

As noted in the 1994 bid protest article, bid protest decisions can be grouped into seven major categories and 16 major subcategories.<sup>6</sup> The following table sets forth all sustained or granted bid protest grounds in the six different forums by category and subcategory for FY 1992-94. Even the court decisions can readily be grouped into the same categories. The largest subcategory is an agency's failure to follow the evaluation criteria contained in the solicitation, accounting for 16.8 percent of all

sustained/granted protests. The second largest subcategory involves improper restrictions on competition, which accounts for 12.9 percent of all sustained/granted protests.

As indicated on the table, more than two thirds of all protests in these six forums are sustained or granted because of improper actions in the evaluation and negotiation of negotiated procurements, acceptance of nonconforming proposals or nonresponsive bids (or not awarding to conforming or responsive ones), or improper restrictions on competition.

COMPARISON OF SUSTAINED/GRANTED PROTEST GROUNDS IN SIX DIFFERENT FORUMS  
BY CATEGORIES AND SUBCATEGORIES  
FISCAL YEARS 1992-94

	USPS	GAO	GSBCA	D. Cts.	Ct. Fed Cl.	Cir. Cts.	Total All Forums	Per Cent All Forums
<b>A. Improper Actions in Evaluation and Negotiation</b>								
1. Failure to follow evaluation criteria in the solicitation	11	36	10	2	1	1	61	16.8%
2. Failure to conduct discussions properly	1	27	5	0	0	0	33	9.1%
3. Unreasonable cost realism analysis in cost-reimbursement contract	0	10	2	0	0	0	12	3.3%
4. Improper exclusion from competitive range	0	4	4	0	0	0	9	2.5%
5. Improper award based on initial proposals without discussions where award would not result in lowest overall cost to government	0	3	0	0	0	0	3	0.8%
6. Improper cost/technical tradeoff	1	10	5	0	0	0	16	4.4%
Subtotal	13	90	26	2	1	2	134	36.9%
<b>B. Improper Acceptance of Nonconforming Proposals or Nonresponsive Bids or Not Awarding to Conforming or Responsive Ones</b>								
1. Proposals not conforming to material requirement of solicitation	2	15	4	0	1	0	22	6.1%
2. Nonresponsive bids	1	29	5	0	0	1	36	9.9%
Subtotal	3	44	9	0	1	1	58	16.0%
<b>C. Improper Actions Involving Solicitations or Requirements</b>								
1. Defect in solicitation	3	12	0	1	0	0	16	4.4%
2. Improper action involving change in requirements or amendment or cancellation of solicitation	0	8	1	0	1	1	11	3.0%
3. Failure to provide bidder with material amendment to solicitation	0	2	0	0	0	0	2	0.6%
Subtotal	3	22	1	1	1	1	29	8.0%
<b>D. Improper Actions Involving Small Business</b>								
1. Improper use of other factors as surrogate for finding of nonresponsibility of small business	0	10	0	0	0	0	10	2.8%
2. Improper failure to set aside procurement for small business	0	10	1	0	0	0	11	3.0%
3. Other improper actions involving small business	0	6	0	1	0	0	7	1.9%
Subtotal	0	26	1	1	0	0	28	7.7%
<b>E. Improper Restrictions on Competition</b>								
1. Improper restrictions on competition-general	3	34	7	1	1	1	47	12.9%
2. Improper sole source award	1	8	2	0	1	0	12	3.3%
Subtotal	4	42	9	1	2	1	59	16.3%
<b>F. Other Improper Actions/No Reason/Protected</b>								
	6	31	9	5	0	2	53	14.6%
<b>G. Improper Agency Override of CICA Stay</b>								
	0	0	0	2	0	0	2	0.6%
<b>TOTAL</b>	29	255	55	12	5	7	363	100.0%

### III. Discussion of Sustained/Granted Protest Grounds In Three Nonjudicial Branch Forums in FY 1994 And Three Judicial Branch Forums in FY 1992-94

Sustained or granted protests in the three nonjudicial and judicial branch forums can all be grouped into similar categories, with the sole exception of improper overrides of CICA stays by agencies. This section discusses the major categories and subcategories of protest grounds granted or sustained during FY 1994 at the USPS, GAO and the GSBICA, and granted or sustained in the district courts, the CFC and the circuit courts of appeals during FY 1992-94. Because all of these categories and subcategories were discussed in some detail in the 1994 bid protest article, that discussion is not repeated here except where necessary.

#### A. Improper Actions in Evaluation and Negotiation

Significant differences of opinion frequently arise about the relative merits of proposals during the evaluation stage of negotiated procurements. These problems, which are unique to negotiated procurements, accounted for more than one-third of all sustained or granted protests in all six forums in FY 1992-94. The six bases of successful protests in this category are discussed by forum below.

##### 1. Failure to follow evaluation criteria in the solicitation:

At the USPS, two protests were sustained because the agency failed to follow the evaluation criteria contained in the solicitation. In *RKM Construction Co.*, P.S. Protest No. 94-04, March 18, 1994, the agency improperly deemed an offeror ineligible for award because that offeror failed to possess a license which the solicitation indicated was desirable but not mandatory. In *Cordant, Inc.*, P.S. Protest No. 94-08, June 23, 1994, the agency failed to consider an offeror's proposed award fee in evaluating price, which was required by the solicitation.

At the GAO, nine protests were sustained in this category. In three cases, required documentation was lacking: *DNL Properties, Inc.*, B-253614.3, Oct. 12, 1993, 93-2 CPD ¶301, where the technical evaluation was not adequately supported by the record which contained point scores but lacked contemporaneous narrative explanations of strengths, risks and weaknesses of each proposal; *Andrew M. Slovak*, B-253275.2, Nov. 2, 1993, 93-2 CPD ¶263, where the evaluation record provided no reasonable basis for the relative scores of the competitors in support of the award; and *DNL Properties, Inc.*, B-253614.5, B-253734, Oct. 12, 1993, 93-2 CPD ¶301, where the evaluation documents included only point scores representing the consensus of the entire evaluation board.

In two cases, the agency evaluated using its own criteria not in the solicitation: *KCA Corp.*, B-255115, Feb. 9, 1994, 94-1 CPD ¶94, where the agency mechanically applied its own estimate of minimum staff-hours not disclosed in a solicitation which resulted in no meaningful assessment of which offeror's staffing levels provided the greatest advantage to the agency; and *West Coast Copy, Inc.; Pacific Photocopy and Research Services*, B-254044.2, Nov. 16, 1993, 93-2 CPD ¶283, where a solicitation for an indefinite quantity of photocopy services included no basis for comparing quotations and the agency employed new criteria not contained in the solicitation.

GAO sustained four other protests in this category: *J.A. Jones Management Services, Inc.*, B-254941.2, March 16, 1994, 94-1 CPD ¶244, holding that an agency may not deviate from the evaluation scheme in a solicitation by repeatedly evaluating the substance of one factor, key personnel, under all other major evaluation factors; *Halter Marine, Inc.*, B-255429, March 1, 1994, 94-1 CPD ¶161, where the agency failed to consider the offeror's best and final offer and, in its previous evaluation, gave unreasonable emphasis to one evaluation factor by repeated consideration of that factor in conjunction with other major factors; *Foundation Health Federal Services, Inc.; QualMed*,

*Inc.*, B-254397.10, Dec. 20, 1993, 94-1 CPD ¶3, where the agency failed to follow the evaluation scheme for technical and cost proposals provided in a solicitation for managed health care services by failing to evaluate the effectiveness of the offeror's proposed approaches or the likely impact of their approaches on the total health care costs that would be incurred by the government; and *Colonial Storage Co., Paxton Van Lines, Inc.*, B-253501.5, Oct. 19, 1993, 93-2 CPD ¶234, where the agency departed from the evaluation scheme in the solicitation by failing to evaluate for and make separate awards for two types of services and by making award only to the lowest-priced offeror without conducting a reasonable technical evaluation consistent with the evaluation criteria or making a cost/technical tradeoff.

The GSBICA sustained two protests in this category: *Communication Network Systems, Inc. v. Department of Commerce*, GSBICA No. 12705-P, 94-2 BCA ¶26,843, because the agency failed to evaluate an offeror's complete proposal, in particular, ignoring a key appendix thereto; and *Sprint Communications Co. v. Defense Information Systems Agency*, GSBICA No. 12692-P, 94-3 BCA ¶26,966, where an agency failed to evaluate and score proposals based on the solicitation's commerciality and management provisions.

The district courts sustained two protests in this category. In *Ralvin Pacific Properties v. United States*, Civ. A. No. 93-0610, (D.D.C. April 12, 1994), the court held that GSA had improperly evaluated offers and relaxed requirements of a solicitation by selecting as awardee for a build/lease contract an offeror that intended to sell ("flip") the contract before award was made, in violation of the solicitation. In *Reeve Aleutian Airways, Inc. v. Rice*, 789 F. Supp. 417 (D.D.C. 1992), the court held that the Air Force had improperly evaluated offers for commercial air service to Alaska by failing to award to the offer which would result in the lowest cost to the government because the offer selected would have provided more service to Alaska via a non-appropriated fund activity, but such service would have directly resulted in a higher cost to the government.

The CFC sustained one protest in this category. In *Isratex, Inc. v. United States*, 25 Cl.Ct. 223, (1992), the court held that the Defense Logistics Agency ("DLA") failed to follow the evaluation criteria in a solicitation by rejecting a proposal that did not meet one of several evaluation subfactors for hydrostatic resistance, when DLA should have weighted all subfactors equally, and never stated in the solicitation that meeting all subfactors was mandatory. DLA had failed to specify the importance of each subfactor in the solicitation.

One appellate decision falls in this category. In *Latecoere International, Inc. v. United States*, 19 F.3d 1342 (11th Cir. 1994), reversing the district court, the appeals court held that the Navy Source Selection Advisory Council had improperly increased the awardee's ratings in four critical chapters of its proposal from marginal to acceptable without re-evaluating those chapters, and the selection official's use of cost as most important factor in selection was inconsistent with the solicitation. Furthermore, the evaluation was motivated by bias against a French company.

## 2. Failure to conduct discussions properly:

No protests at the USPS were sustained because of the agency's failure to conduct discussions properly.

GAO sustained three different types of protests where agencies did not properly conduct discussions: agency failure to conduct discussions at all, agency failure to conduct meaningful discussions, and agency conduct of prejudicially misleading discussions.

The first category (no discussions at all) includes: *Daun-Ray Casuals, Inc.*, B-255217.3, July 6, 1994, 94-2 CPD ¶42, where the agency failed to conduct required discussions concerning the protester's alleged poor past performance and there was a reasonable possibility of prejudice; *DHL Enterprises, Inc.*, B-256451, June 22, 1994, 94-1 CPD ¶376, where an agency failed to conduct discussions with an offeror whose offer varied from the "required delivery schedule" in the solicitation — the agency conducted discussions solely with the remaining offeror on the basis of a revised delivery schedule which also varied from the "required delivery schedule" in the solicitation; *Ashland Sales & Service, Inc.*, B-255159, Feb. 14, 1994, 94-1 CPD ¶108, where the agency failed to conduct discussions concerning two technical areas that were deemed deficient, and there was a reasonable possibility that the protester

was prejudiced as a result of that failure; *Paramax Systems Corp.*; *CAE-Link Corp.*, B-253098.5, Oct. 27, 1993, 93-2 CPD ¶1282, where, after receipt of best and final offers, the agency permitted only one offeror to submit additional information that made its proposal acceptable by stating that the firm agreed to a solicitation limitation on fees (i.e., the agency failed to conduct discussions with all offerors in the competitive range and did not permit all offerors to submit revised proposals); and *Telos Field Engineering*, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶1275, where an agency conducted extensive discussions with offerors but failed to permit them to revise proposals in response to discussions by requesting best and final offers.

In the second category, failure to conduct meaningful discussions, are *Price Waterhouse*, B-254492.2, March 4, 1994, 94-1 CPD ¶168, where an agency twice requested best and final offers without apprising an offeror that its proposed level of effort was considered unacceptable; and *Management HealthCare Products and Services*, B-251503.2, Dec. 15, 1993, 93-2 CPD ¶320, where the agency heavily downgraded a proposal for surgical packs because of numerous technical weaknesses, but did not inform the protester of the agency's concerns regarding those weaknesses.

GAO sustained protests in three cases because agencies conducted prejudicially misleading discussions. In *SRS Technologies*, B-254425.2, Sept. 14, 1994, 94-2 CPD ¶125, the agency failed to advise an offeror of a cost deficiency during discussions, i.e., instructing the offeror not to discount costs which would have resulted in the offeror's having the lowest evaluated costs; *Ranor, Inc.*, B-255904, Apr. 14, 1994, 94-1 CPD ¶258, where the agency repeatedly informed the protester that its price was well below the government estimate, and then made award to an offeror whose price was similarly below the government estimate; and *DTH Management Group*, B-252879.2, Oct. 15, 1993, 93-2 CPD ¶227, where an agency informed the protester that its initial price was too low when in fact the protester, which submitted the highest ranked technical proposal, did not receive the award because its price was considered by the agency to be too high.

The GSBCA sustained two protests in this category: *Communication Network Systems, Inc. v. Department of Commerce*, GSBCA No. 12705-P, 94-2 BCA ¶26,843, where the agency failed to advise an offeror that the agency could not locate a significant appendix which was needed for the evaluation of the proposal; and *Sprint Communications Co. v. Defense Information Systems Agency*, GSBCA No. 12692-P, 94-3 BCA ¶26,966, where an agency failed to advise an offeror during discussions that its technical approach was unacceptable in certain specific technical respects.

The courts sustained no protests on the basis of failure to conduct meaningful discussions.

### 3. Unreasonable cost realism analysis in cost-reimbursement contract:

No protests were sustained by the USPS, the GSBCA or the courts because of an unreasonable cost realism analysis in a cost-reimbursement contract.

The GAO sustained four protests in this category: *BNF Technologies, Inc.*, B-254953.3, March 14, 1994, 94-1 CPD ¶274, where the agency unreasonably adjusted an offeror's probable cost upward to reflect historical overhead and general and administrative rates without considering that the offeror's proposal contained an enforceable legal cap on those rates; *Versar, Inc.*, B-254464.3, Feb. 16, 1994, 94-1 CPD ¶230, where an agency's probable cost analysis was understated and not reasonable because it credited the awardee with the proposed "free" uncompensated overtime of its major subcontractor, even though the contract did not require the awardee to provide the benefit of this overtime to the government; *Sargent Controls & Aerospace*, B-254976, Feb. 2, 1994, 94-1 CPD ¶166, where an agency improperly excluded a private contractor from a "public/private" competition for repair of aircraft components under Section 9095 of the fiscal 1993 defense appropriations act, Pub. L. No. 102-396 on the basis of price, and where the agency failed to conduct a required cost realism analysis on the proposal of the only other offeror, a government component, and improperly relied on a qualified report of the Defense Contract Audit Agency which did not perform a cost realism analysis; and *Parsons Environmental Hanford, Inc.; Waste Management Environmental Services, Inc.*, B-252070.6, Oct. 12, 1993, 94-1 CPD ¶195, where the agency cost evaluation failed to adjust proposed costs for differing

approaches in management and support costs and the awardee assigned significant costs to an unevaluated environmental restoration effort, which costs were based on fund availability, not actual costs.

#### **4. Improper exclusion from competitive range**

Neither the USPS nor the GAO sustained any protests in this category.

The GSBCA granted one protest because of the improper exclusion of an offeror from the competitive range, *Integrated Systems Group, Inc. v. Department of Agriculture*, GSBCA No. 12552-P, 94-1 BCA ¶26,556, where the solicitation failed to reflect the true agency requirements which were not finalized prior to the issuance of the solicitation.

One protest in this category was sustained on appeal, *Birch & Davis International, Inc. v. Christopher*, 4 F.3d 970 (Fed. Cir. 1993), where the court reversed a GSBCA denial of a protest, and held that action by the Agency for International Development ("AID") in excluding the plaintiff from the competitive range, resulting in a competitive range of one offeror, violated the FAR because AID had failed to find that plaintiff had no reasonable chance of being selected for award.

#### **5. Improper award based on initial proposals without discussions where award would not result in lowest overall cost to government:**

None of the forums granted protests in this category.

#### **6. Improper cost/technical tradeoff:**

The USPS sustained no protests because of an improper cost/technical tradeoff.

The GAO sustained two protests because of improper cost/technical tradeoffs: *Litton Systems, Inc., Guidance & Control Systems Div.*, B-256709, July 21, 1994, 94-2 CPD ¶60, where the solicitation contemplated the possibilities of multiple awards based on a best value determination but the agency based its decision on misleading and inaccurate cost estimates which incorrectly stated price differences among competing award scenarios; and *TRW, Inc.*, B-254045.2, Jan. 10, 1994, 94-1 CPD ¶18, where an agency's selection under a best value procurement was unreasonable because the agency did not reasonably consider or resolve the significant discrepancies between the awardee's technical and cost proposals, and the agency could not reasonably determine which proposal represented the greatest value without first resolving these matters through negotiations.

The GSBCA also sustained two protests in this category: *Sprint Communications Co. v. Defense Information Systems Agency*, GSBCA No. 12692-P, 94-3 BCA ¶26,966; and *B3H Corp. v. Department of the Air Force*, GSBCA No. 12813-P, 94-3 BCA ¶27,068, appeal filed, No. 95-1042; 95-1043. In both cases, the agency failed to demonstrate that the added value of the awardee's technical approach was worth the higher price.

### **B. Improper Acceptance of Nonconforming Proposals or Nonresponsive Bids Or Not Awarding to Conforming or Responsive Ones**

In procurements awarded through sealed bidding, awards may only be made to a responsive bid, i.e., a bid that provides an unequivocal offer to tender the exact thing called for in the Invitation for Bids ("IFB"), such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. In negotiated procurements, any proposal that fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for award. In 16 percent of the cases in the six forums, protests were sustained or granted either because agencies accepted nonconforming proposals or nonresponsive bids, or failed to award to conforming or responsive ones.

## 1. Proposals not conforming to material requirement of solicitation:

The USPS and the GSBCA did not sustain or grant any protests because agencies awarded to proposals not conforming to material requirements of a solicitation.

The GAO sustained one protest in this category, *Container Products Corp.*, B-255883, Apr. 13, 1994, 94-1 CPD ¶255, where an agency treated offerors unequally by accepting a technically unacceptable proposal for a radioactive waste box compactor without similarly relaxing the specifications for other offerors.

The CFC sustained one protest in this category, *Aerolease Long Beach v. United States*, 31 Fed.Cl. 342 (1994), because a General Services Administration ("GSA") contracting officer improperly accepted the late submission of an initial proposal pursuant to GSAR 552.270-3(a), the late submission clause in the solicitation, which the court held improper since this GSAR clause violated CICA and the FAR.

## 2. Nonresponsive bids:

The USPS sustained one protest against a nonresponsive bid in *Sheffield Press P&L Inc.*, P.S. Protest No. 94-11, May 13, 1994, where award had been made to a nonresponsive bid because the identity of the bidder was not clear.

The GAO sustained five cases involving nonresponsive bids, three where agencies improperly rejected responsive bids and two where agencies failed to reject nonresponsive bids. Improper rejections of responsive bids occurred in *L&R Rail Service*, B-256341, June 10, 1994, 94-1 CPD ¶356, where the agency improperly rejected a bid as nonresponsive for failure to acknowledge a solicitation amendment even though the amendment had no material impact on certain requirements and imposed no additional obligation on the bidder; *Mid-South Metals, Inc.*, B-257056, Aug. 23, 1994, 94-2 CPD ¶78, where submission of multiple credit card accounts was responsive to a bid guarantee requirement and was a minor waivable informality where the solicitation allowed use of credit cards but prohibited bidders from offering multiple credit cards; *Weather Experts, Inc.*, B-255103, Feb. 9, 1994, 94-1 CPD ¶93, where an invitation containing four separate items that did not state that a single award in aggregate was contemplated permitted bids on single locations to be responsive, but also required the agency to make multiple awards where they would result in the lowest overall cost to government. Failure of an agency to reject nonresponsive bids occurred in *E&R, Inc.*, B-255868, March 29, 1994, 94-1 CPD ¶218, where the awardee's bid was nonresponsive because its bid guarantee was improper, and the agency could not allow a post-bid-opening cure of that faulty bid guarantee; and *FloorPro, Inc.*, B-254854, Jan. 24, 1994, 94-1 CPD ¶32, where an agency failed to reject a bid which did not include test data addressing testing methods and physical properties of certain floor material which the solicitation indicated were minimum requirements.

One case on appeal concerned the failure of an agency to accept a responsive bid: *American National Bank and Trust Co. v. Secretary of Housing and Urban Development*, 946 F. 2d 1286 (7th Cir. 1991), in which the court affirmed the district court's decision ordering the Department of Housing and Urban Development ("HUD") to process the only responsive bid that was received in response to a solicitation, where HUD had rejected this responsive bid and intended to solicit new bids.

## C. Improper Actions Involving Solicitations or Requirements

Agencies may not take improper actions in the solicitation process or in connection with the statements of the agencies' requirements. These include defects in the solicitation, improper changes in agency requirements, improper actions in amending or canceling a solicitation, or failure to provide a particular bidder with a material amendment to a solicitation.



## 1. Defect in solicitation:

The USPS sustained no protests in this category.

The GAO sustained four protests where the solicitations were defective: *Richard S. Cohen*, B-256017.4, June 27, 1994, 94-1 CPD ¶1382, where the agency failed to advise offerors in the solicitation of the evaluation factors and their relative importance; *Respiratory & Convalescent Specialties, Inc.*, B-255176, Feb. 14, 1994, 94-1 CPD ¶101, where the agency failed to include quantity estimates necessary for preparation of reasonable and intelligent bids in a solicitation for a requirements contract for home oxygen respiratory equipment and services; *Ramco Equipment Corp.*, B-254979, Feb. 2, 1994, 94-1 CPD ¶167, where the agency's specification for a cleaning chemical was impossible to meet and overstated the agency's needs because no such chemical existed; and *Nautica International, Inc.*, B-254428, Dec. 15, 1993, 93-2 CPD ¶321, where the agency's rejection of a quote for a boat was improper because the agency's description of its minimum needs was misleading and ambiguous, causing the protester to offer a more expensive model than the agency intended to purchase off of a schedule.

One district court decision concerned a solicitation defect, *Neeb-Kearney & Co. v. Department of Labor*, Civ. A. No. 91-2916 (E.D. La. Dec. 10, 1992), where the court held that the Department of Labor had improperly failed to hold a "substantial variance" hearing on a wage determination in a solicitation where the incumbent contractor had demonstrated that the nature of the work to be performed differed from the type of work used as the basis for the wage determination.

## 2. Improper action involving change in requirements or amendment or cancellation of solicitation:

There were no sustained USPS decisions in this category.

The GAO sustained two protests in this category, one involving overstatement of requirements and the other an improper cancellation. In *Haworth, Inc.; Knoll North America, Inc.*, B-256702.3, Sept. 9, 1994, 94-2 CPD ¶98, an agency overstated its requirements in a solicitation for furniture workstations, and made award to a vendor whose products did not comply with the solicitation's stated requirements, arguing that those requirements should not have been included in the solicitation. In *Canadian Commercial Corp./Ballard Battery Systems*, B-255642, March 18, 1994, 94-1 CPD ¶202, the agency did not have a compelling reason to cancel a solicitation after bid opening based on an alleged ambiguous price provision where there was only one reasonable interpretation when the solicitation was read as a whole.

One appellate decision involved the improper cancellation of a solicitation. In *Parcel 49C Ltd. Partnership v. United States*, 31 F.3d 1147 (Fed. Cir. 1994), affirming a decision of the CFC, the Federal Circuit held that the General Services Administration had improperly cancelled a solicitation for a new Federal Communications Commission ("FCC") headquarters building, that the government's justification for cancellation was irrational, pretextual and incredible, and that the FCC engaged in a campaign to cancel the procurement once it became clear that award of the contract would result in a move to a less desirable District of Columbia neighborhood than the FCC wanted.

## 3. Failure to provide bidder with material amendment to solicitation:

None of the forums sustained or granted any protests in this category.

## D. Improper Actions Involving Small Business

### 1. Improper use of other factors as surrogate for finding of nonresponsibility of small business:

The USPS, the GSBCA, and the courts did not sustain or grant any protests in this category.

The GAO sustained three protests where agencies used other factors as a surrogate for finding a

small business nonresponsible. These were *Docusort, Inc.*, B-254852, Jan. 25, 1994, 94-1 CPD ¶38, where an agency's rejection of a small business concern's proposal as technically unacceptable was improper without referral to the Small Business Administration ("SBA") because the rejection was based solely on that concern's failure to comply with a traditional responsibility factor, such as minimum management experience, without any relative assessment of proposals; *Peterson Accounting—CPA Practice*, B-257411, Sept. 21, 1994, 94-2 CPD ¶109, where the agency's rejection of a small business concern's bid as nonresponsive was improper where the bidder took no exception to the IFB and offered to perform in accordance therewith, but the agency deemed the bid nonresponsive because of the bidder's failure to furnish information in its bid demonstrating its understanding of the statement of work; and *Envirosol, Inc.*, B-254223, Dec. 2, 1993, 93-2 CPD ¶295, where an agency failed to refer an offeror to the SBA for a certificate of competency and improperly rejected a technically acceptable proposal from a small business because its fixed price was unreasonably low but the solicitation contained no evaluation criterion related to price realism and the determination that price on a fixed price contract is too low generally concerns the offeror's responsibility (i.e., the ability to perform contract successfully at the price offered).

## 2. Improper failure to set aside procurement for small business:

The USPS, the GSBCA, and the courts did not sustain or grant any protests in this category.

The GAO sustained three protests for failure to set aside procurements for small business. These were *Southeastern Chiller Services, Inc.*, B-254925, Jan. 28, 1994, 94-1 CPD ¶49, where the agency improperly failed to set aside for small business a small purchase of emergency air conditioning repair when its weekend staff did not use a small purchase source list; *Building Services Unlimited, Inc.*, B-254743, Jan. 14, 1994, 94-1 CPD ¶15, where an agency failed to investigate whether small disadvantaged bidders under a previous solicitation for the same services were interested in competing and the agency received expressions of interest from two small disadvantaged businesses prior to issuance of the solicitation; and *Adrian Supply Co.*, B-257261, Sept. 15, 1994, where, in a total small business set-aside, the elimination of a requirement that the small business offer only end items manufactured by small business concerns, based on an SBA waiver of that requirement, was improper because the procuring agency conducted an incomplete investigation that failed to correctly identify a manufacturer as a small business.

## 3. Other improper actions involving small business:

Neither the USPS nor the GSBCA sustained any protests in this category.

The GAO sustained three protests because of other improper actions involving small businesses: *D.H. Kim Enterprises, Inc.*, B-255199.3, Feb. 24, 1994, 94-1 CPD ¶144, where a joint venture did not qualify as a small disadvantaged business where the small disadvantaged venture participant did not legally have control of the management of the joint venture; *McNeil Technologies, Inc.*, B-254909, Jan. 25, 1994, 94-1 CPD ¶40, where the SBA unreasonably accepted into the 8(a) program a requirement for management support services without determining whether acceptance would have an adverse impact on other small business programs or individual small businesses; *Timothy S. Graves*, B-253813, Oct. 22, 1993, 93-2 CPD ¶244, holding that an agency could not contravene applicable SBA regulations by awarding a small business set-aside timber sale to a bidder which it knew had been declared not small and ineligible by the SBA, notwithstanding the bidder's certification otherwise, or change in the bidder's size after bid opening.

One district court and one CFC decision involved improper actions concerning small businesses. In *Y.S.K. Construction Co., v. United States*, 30 Fed.Cl. 449 (1994), the court held that the SBA failed to determine the small disadvantaged business ("SDB") status of a joint venture offeror, and that the Department of Defense had improperly made the determination even though only the SBA had statutory permission to make a § 1267 SDB determination concerning a joint venture. In *SRS Technologies v. United States*, 843 F. Supp. 740 (D.D.C. 1994), the district court held that an untimely

determination by the SBA that a contractor did not qualify as a small disadvantaged business could not be used by the DOD to assign work under the protested contract to another contractor.

## E. Improper Restrictions on Competition

Improper restrictions on competition, which undermine one of the basic goals of CICA, are the second largest category, amounting to 16.3 percent of the sustained and granted protests. These include both general restrictions and improper sole-source awards.

### 1. Improper restrictions on competition—general:

The USPS sustained two protests because of improper restrictions on competition: *Timekeeping Systems, Inc.*, P.S. Protest No. 93-29, March 24, 1994, where the agency's requirement in a solicitation that certain utility software be provided in order to achieve compatibility was unreasonable and restrictive of competition; and *Richard C. Gentry, Inc.*, P.S. Protest No. 94-33, Oct. 31, 1994, where the agency failed to solicit an incumbent contractor for emergency service following nonrenewal of the existing contract.

The GAO sustained five protests where solicitations unduly restricted competition. These were: *ViON Corp.*, B-256363, June 15, 1994, 94-1 CPD ¶373, where the solicitation requirement that upgraded central processing units have the same serial number as the initial processing units was unduly restrictive of competition because it did not clearly express the agency's minimum needs; *Falcon Industries, Inc.*, B-256419, June 3, 1994, 94-1 CPD ¶337, where a solicitation prohibiting the use of an alternate technical approach that met the agency's minimum needs for remediation of contaminated soil, based solely on cost considerations, was an improper restriction on competition; *Pipeliner Systems, Inc.*, B-254481, Dec. 21, 1993, 93-2 CPD ¶343, where the solicitation required the rehabilitation of sanitary sewers with a cured in-place pipe method without permitting use of an alternate method which could meet the agency's needs; *Shred Pax Corp.*, B-253729, Oct. 19, 1993, 93-2 CPD ¶237, where a solicitation restricted offerors to hydraulic shredders when electromechanical shredders could meet the agency's minimum needs; and *The Kohler Co.*, B-257162, Sept. 2, 1994, 94-2 CPD ¶88, where the solicitation permitted only 4-cycle diesel engines in power generators but 2-cycle diesel engines could also meet the agency's minimum needs, and the agency could have met its requirements by using functional specifications.

The GSBICA sustained two protests in this category: *Integrated Systems Group, Inc. v. NASA*, GSBICA No. 12603-P, 94-1 BCA ¶26,550 (1993), where a solicitation which provided design specifications requiring replacement of a computer motherboard was too restrictive because functional specifications permitting replacement of an entire computer or motherboard would fully meet the agency's requirements; and *Coastal Computer Consultants Corp. v. Department of Commerce*, GSBICA No. 12869-P, 94-3 BCA ¶27,151, where the agency restricted the buy to "new" equipment only on the basis that remanufactured equipment was less reliable, but this conclusion was unsupported and there was no indication that remanufactured equipment would fail to meet agency needs.

One district court case, one case at the CFC, and one appellate case involved improper restrictions on competition. In *Croman Corp. v. United States*, 31 Fed. Cl. 741 (1994), the court held that the Department of Agriculture's attempt to modify the bid in a sealed bid timber sale was improper because the sale had not been readvertised as required by the regulations. In *Rapides Regional Medical Ctr. v. Derwinski*, 783 F. Supp. 1006 (W.D. La. 1991), the court held that a Veterans Administration ("VA") sole-source contract for sharing of a medical diagnostic tool between the VA and a private hospital pursuant to the 1990 Advanced Technology Medical Equipment Shared Acquisition Program, 38 U.S.C. §8153, was subject to CICA, which required competitive bidding, since the 1990 Act was not an explicit exception to CICA's competition requirements. Finally, in *Executive Business Media, Inc. v. Department of Defense*, 3 F.3d 759 (4th Cir. 1993), reversing a district court decision, the Federal Circuit held that a settlement agreement by the Department of Justice on a DOD contract was

inconsistent with government regulation and that a fact-finder should determine if a particular contract modification was a cardinal change to a contract, thereby requiring that such a change be competitively bid.

## 2. Improper sole source award:

The USPS, the GAO and the GSBCA had no sustained or granted cases in this category.

There was one case in the CFC. In *Magnavox Elec. Systems Co. v. United States*, 26 Cl.Ct. 1373 (1992), the court held that the Army had improperly determined that only one responsible source could meet its needs for an electronics system and sole-sourced the requirement without performing any preaward survey of other interested and potentially responsible offerors.

## F. Other Improper Actions

The cases in this category are not readily classifiable into the above categories, or the opinions have been published in summary form only because the full opinion was issued under a protective order.

The USPS sustained two protests in this category: *Patriot Airlines, Inc.*, P.S. Protest No. 93-27, Jan. 5, 1994, where the determination of nonresponsibility was not reasonably based on substantial information where the agency accepted only postal service experience and rejected non-postal service experience; and in *Carla Jean Henderson*, P.S. Protest No. 94-45, Dec. 12, 1994, where the contracting officer's determination of nonresponsibility was deemed arbitrary and based on a flawed financial analysis which led to an unreasonable conclusion.

The GAO sustained 11 protests in this category. Three involved agency refusals to correct bids even where the bid remained low after correction: *Pipeline Construction, Inc.*, B-256799, July 13, 1994, 94-2 CPD ¶21, where the mistake was based on a transcription error and there was clear and convincing evidence of the intended bid; *J. Schouten Construction, Inc.*, B-256710, June 6, 1994, 94-1 CPD ¶353, where there was clear and convincing evidence of an error in addition; and *Precon Construction Co.*, B-255294.1, April 6, 1994, 94-1 CPD ¶239, where an agency failed to correct a bid upward where there was clear and convincing evidence of the mistake and the intended price could be ascertained within a narrow range of certainty. Two decisions involved unbalanced bids: *Rust International Corp.*, B-256886.2, Aug. 30, 1994, 94-2, CPD ¶84, where the agency improperly rejected a bid as front-loaded where the agency made an improper assumption about mobilization pricing and there was no reasonable doubt that award to the protester would result in the lowest overall cost to government; and *Eastex Maritime, Inc.*, B-256164, May 19, 1994, 94-1 CPD ¶340, where the agency improperly accepted a front-loaded, mathematically and materially unbalanced bid. Two decisions involved misrepresentation of personnel in proposals: *ManTech Advanced Systems International, Inc.*, B-255719.2, May 11, 1994, 94-1 CPD ¶326, where a non-incumbent offeror misrepresented the availability and commitment of the incumbent's personnel proposed in its proposal, and the agency relied upon that offeror's misrepresentations in the evaluation and award selection; and *Biospherics, Inc.*, B-253891.2, Nov. 24, 1993, 93-2 CPD ¶333, where the intended awardee's best and final offer misrepresented the commitments of its proposed personnel and such misrepresentations compromised the agency's evaluation of the proposed personnel.

Other protests sustained by the GAO in this category were *PLAN-Industriefahrzeug GmbH & Co. KG*, B-254517, Dec. 23, 1993, 93-2 CPD ¶338, where the agency administratively mishandled a bid submitted by registered mail and this was the sole reason that the bid was not received prior to bid opening; *El Paso Electric Co.*, B-254479, Dec. 22, 1993, 93-2 CPD ¶335, where the agency failed to seek a wage determination from the Department of Labor for a contract for electric utility services where it was required to do so by the Service Contract Act; *KPMG Peat Marwick*, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶272, where the agency improperly excluded the protester from a reopened competition where the protester obtained source selection information through a Freedom of Information Act

request filed after the initial award — the protester did not act improperly and the agency action violated the regulatory requirement that all contractors be treated impartially, fairly and equitably; and *R.J. Crowley, Inc.*, B-253783, Oct. 22, 1993, 93-2 CPD ¶257, where the agency improperly determined that the protester was ineligible for award by consulting an out of date list of ineligible contractors and failing to consult the available electronic update to the list.

The GSBICA granted four protests in this category: *Communication Network Systems, Inc. v. Department of Commerce*, GSBICA No. 12705-P, 94-2 BCA ¶26,843, where an agency disclosed the government's labor estimate to only one of the offerors; *Advanced Video Products, Inc. v. Department of Veterans Affairs*, GSBICA No. 12848-P, 94-3 BCA ¶27,066, where an agency lacked a delegation of procurement authority to proceed with the procurement of a medical archiving imaging system that was subject to the Brooks Act; *Stanley Computer Systems, Inc. v. Department of the Treasury*, GSBICA No. 12700-P, 94-2 BCA ¶26,715, where an offeror intentionally misrepresented in its proposal the availability of its key personnel; and *Computer Data Systems Inc. v. Department of Energy*, GSBICA No. 12824-P, July 15, 1994, where the protest was granted but no redacted version had yet been released by the Board.

Five district court and two appellate decisions fall into this category. In the district courts, the cases are: *Express One International Inc. v. U.S. Postal Service*, 814 F. Supp. 87 (D.D.C. 1992), *modified*, 814 F. Supp. 93, where the court held that an offer of employment by a subcontractor of an awardee to a U.S. Postal Service evaluator during the evaluation of offers was a conflict of interest because the agency failed to remove the evaluator and the evaluator did not reject the job offer; *Action Service Corp. v. Garrett*, 790 F. Supp. 1188 (D.P.R. 1992), in "reversing" a GAO decision, the court held that the Navy had failed to make an affirmative determination of responsibility before awarding an SBA 8(a) contract; *Solano Garbage Co. v. Cheney*, 779 F. Supp. 477 (E.D. Cal. 1991), in "reversing" a GAO decision, the court held that the Air Force had improperly awarded a garbage collection contract to a non-franchisee, even though the Resource Conservation and Recovery Act required the award of the contract to a city's exclusive franchisee; *MCI Constructors Inc. v. NASA*, Civ. A. No. 91-2618, (D.D.C. Nov. 12, 1991), where the court held that a NASA contracting officer's finding of nonresponsibility lacked a reasonable basis where the contracting officer, after receiving favorable performance evaluations, sought out unfavorable comments regarding the contractor's past performance; and *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633 (M.D. Ga., 1991), where the court held that the Air Force's award of a contract for an exclusive cable television franchise for a military base violated the First Amendment of the Constitution because the exclusive franchise did not serve an important or substantial governmental interest.

There were two appellate decisions, *CACI, Inc. v. Stone*, 990 F. 2d 1233 (Fed. Cir. 1993), where the Federal Circuit, reversing the GSBICA, held that the Army's failure to obtain a required Delegation of Procurement Authority from the GSA before contracting for data processing services rendered the resulting contract void; and *Planning Research Corp. v. United States*, 971 F. 2d 736 (Fed. Cir. 1992), where the Federal Circuit, sustaining the GSBICA, held that an offeror's post-award personnel substitutions compared with personnel offered in its proposal indicated that the offeror, during the solicitation phase, had misrepresented the personnel it intended to use on the contract.

### G. Improper Override of CICA Stay by Agency

This is a new category, added this year because of the inclusion of the district and appellate courts in the analysis as compared to that in the 1994 bid protest article. CICA was enacted, in part, to remedy "a major loophole in the longstanding GAO review procedure: By the time the GAO reviewed most bid protests, the protests had become moot because either the contract had been let or the contractor was engaged in performing under the contract." *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 878 (3rd Cir. 1986). Congress included certain stay provisions in an attempt to provide meaningful review of procurement challenges before the procurements became "faits accomplis." *Id.* at 879. It is

for this reason that the timely filing of a protest at the GAO automatically stays the award or performance of the challenged contract until (1) the GAO decides the protest on the merits or (2) the head of the procuring activity or agency certifies in writing that the statutory requirements for overriding the stay have been met. 31 U.S.C. §3553.

In order to override a pre-award protest stay, the head of a procuring activity must make "a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the [final GAO decision on the merits of the protest]." 31 U.S.C. §3553(c)(2). The automatic stay pertaining to post-award protests may be overridden, prior to a final GAO decision, only if the head of the procuring activity makes a written finding:

that performance of the contract is in the best interests of the United States; or that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the [GAO] concerning the protest. 31 U.S.C. §3553(d)(2).

Although the standard is similar in protests at the GSBICA, the GSBICA makes the determination with the agency bearing the burden of proof. When a protest is filed at the GSBICA prior to a contract award, at the request of an interested party, the Board will hold a hearing to determine whether it should suspend the agency's procurement authority until the GSBICA can decide the protest. 40 U.S.C. §759(f)(2)(A). The GSBICA suspends the procurement authority unless the federal agency concerned establishes that contract award is likely to occur within 30 days of the hearing absent GSBICA action and "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board." 40 U.S.C. §759(f)(2)(B). The GSBICA holds a similar suspension hearing where a protest is filed within ten days after a contract has been awarded. At the post-award hearing, the federal agency concerned bears the same burden of demonstrating urgent and compelling circumstances which significantly affect interests of the United States and will not permit waiting for the decision of the GSBICA "in order to prevent suspension." 40 U.S.C. §759(f)(3).

In order to comply with the requirements for overriding a pre-award stay once a protest is filed at the GAO, the agency must find: (1) the existence of urgent and compelling circumstances; (2) that those circumstances significantly affect the United States; and (3) that those circumstances are such as to preclude waiting for the procedure prescribed by the statute to run its course. *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993). The decision to override a stay "must be based on all three components set by the statute. If not, the [override finding] is defective." *Id.*

In many cases, courts have held that CICA requires the agency to explain why performance by a specific proposed contractor presents urgent and compelling circumstances, and it is not sufficient for an agency to rely solely on the fact that performance of a contract is urgent and compelling. *See, e.g., Dairy Maid Dairy, supra; Samson Tug & Barge Co. v. United States*, 695 F. Supp. 25 (D.D.C. 1988); *Universal Shipping Co. v. United States*, 652 F. Supp. 668 (D.D.C. 1987). Failure to comply fully with this requirement will result in a court's overruling of the stay override, and the issuance of temporary injunctive relief preventing the award of the contract, which essentially amounts to the partial sustain or granting of a protest, especially in those cases where there is no subsequent reported decision on the merits.

There were two decisions where the courts sustained protests because agencies had improperly overridden the CICA stay. These were *Dairy Maid Dairy v. United States, supra*, where the court held that the Army Determination and Findings ("D&F") failed to explain why award of the contract at issue could not wait for a GAO decision and the D&F ignored the availability of the incumbent contractor to extend performance; and *DTH Management Group v. Kelso*, 844 F. Supp. 251 (E.D. N.C., 1993), where the court held that the Navy D&F failed to explain why performance of the contract by the intended awardee was urgent and compelling when the incumbent contractor could have performed until the GAO decided the protest.

## IV. Recommendations for Changes in Jurisdiction Or Elimination of Forums

During the past two years, at least six different recommendations have been made to revise or eliminate bid protest forums, modify jurisdiction or modify the standard of review. Although a complete analysis of these recommendations is beyond the scope of this article, the scorekeeping discussed in this article raises serious questions about the potential ramifications of such changes. The scorekeeping reflects some of the more substantive differences between the forums — the different development of the record and the standard of review; no action should be taken based solely on the “scores.” Specifically, elimination of the GSBCA and/or *Scanwell* jurisdiction in the district courts is likely to result in a significant decline in the number and percentage of bid protests that are sustained or granted.

In January 1993, the Section 800 Report recommended (1) consolidating into a single judicial forum the bid protest jurisdiction of the CFC and the district courts; (2) the consideration of consolidating protests into a single non-judicial independent agency within the Executive Branch; and (3) establishing a single standard of review of agency actions which gives contracting officers the “presumption of regularity for their actions.”<sup>7</sup> Section 800 Report 1-208 — 1-218. This would basically eliminate the GSBCA’s *de novo* standard of review.

In September 1993, a report issued by Vice President Gore recommended that the standard of review at the GSBCA be changed “to conform to that used in the relevant courts.” Report of the National Performance Review, “Creating a Government That Works Better & Costs Less” (Sept. 7, 1993) 164, Recommendation PROC06. Once again, this would eliminate the GSBCA’s *de novo* standard and substitute a standard more deferential to the agency, *viz.*, simply determining if agency actions were unreasonable, arbitrary or capricious.

As introduced by Senator John Glenn (D-Ohio) on Oct. 26, 1993, S. 1587, which became the Federal Acquisition Streamlining Act of 1994 (“FASA”) would have made the CFC the sole judicial forum for bid protests, eliminating district court *Scanwell* jurisdiction. The Section of Public Contract Law of the American Bar Association opposed this section of FASA, and the House of Representatives subsequently deleted this consolidation in its consideration of the bill. In conference, the House position prevailed, and FASA, as enacted, did not eliminate *Scanwell* jurisdiction.

On Oct. 12, 1994, Sen. William S. Cohen (R-Maine), then the ranking minority member of the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee, released an investigative report titled “Computer Chaos: Billions Wasted Buying Federal Computer Systems.” Senator Cohen indicated that he would introduce legislation in 1995 to consolidate all Information Technology (“IT”) protests into one forum and eliminate the GSBCA *de novo* review standard. Cohen also implied that he would propose the total elimination of GSBCA’s bid protest jurisdiction. However, according to a congressional staff aide, Cohen’s thinking on these issues has evolved, and the focus of the bill will be on how agencies best ought to acquire and manage IT resources.

On Oct. 21, 1994, in a report prepared for the Administrative Conference of the United States, Professor William E. Kovacic of the American University recommended (1) consolidation of judicial protest authority in a single forum, perhaps in an “improved” CFC, or possibly the elimination of the protest jurisdiction of all federal courts below the appellate level; and (2) maintaining the GAO and the GSBCA as competing forums, and expanding GSBCA jurisdiction beyond IT procurements.

The most radical proposal of all was contained in a bill drafted by the DOD as a follow-on to FASA. In its “FASA II” draft bill, the DOD would eliminate the jurisdiction of the district courts to adjudicate protests, presumably consolidating judicial jurisdiction in the CFC, and create a single protest forum, which likely would be the GAO. This would presumably eliminate the GSBCA as a protest forum. See “DOD Draft Bill Seeks to Eliminate *Scanwell* Jurisdiction, Create Single Protest Forum, Impose Penalties for Frivolous Protests,” 63 BNA Fed. Contr. Rep. 51 (Jan. 16, 1995).

The outcome of these proposed changes is unclear at the present time, although legislative action is highly possible in the 104th Congress given the apparent interest in change. The likely result of most of the proposed changes would be a significant reduction in the number of protests in the forums most likely to sustain or grant protests, and an increase in the number of protests in the forums most likely to deny them.

Because of the significant reduction in sustained or granted bid protests that would result from the changes proposed in jurisdiction and elimination of forums, those who seek to change the system might accomplish their objectives more directly by eliminating all "independent" bid protest forums, both administrative and judicial. This would leave only the agency as a protest forum, which could be eliminated by regulation as well.<sup>8</sup>

Although the outward appearance of such a change might be greater efficiency, such actions could result in a serious undermining of the competitive bidding system which would go unchecked via the enforcement of a viable protest system. The elimination of protests could place agencies above statutes and regulations by eliminating independent review for compliance. If the protest avenue were eliminated completely, this might ultimately result in more allegations of, and more investigation and prosecution for violation of the various conflict of interest statutes. If the changes are perceived as resulting in an unfair system where no redress is possible, they also might result in a reduction in the number of contractors willing to bid on government contracts. Therefore, any organizational or jurisdictional changes should be carefully considered before enactment.

## V. Conclusion

Protesters are two to three times more likely to obtain relief (i.e., have their protests sustained or granted) at the GSBCA, the various district courts or the CFC as compared with protests filed at the GAO or the USPS. The sustain or grant rate has remained relatively constant during the last ten years at the GAO, GSBCA and USPS, and at the various courts during the past three years, averaging over 40 percent at the GSBCA, approximately 29 percent in reported cases in the district courts and the CFC, but only 12-13 percent at the GAO and the USPS. On appeal, the circuit courts have granted relief to protesters in approximately 25 percent of the reported cases, a rate that is consistent with the district courts.

Any tinkering or "reinvention" of the procurement protest system along the lines suggested by the administration and DOD should be carefully considered in light of the significant differences in sustain/grant rates at the forums. The elimination of GSBCA or district court bid protest jurisdiction is likely to result in a reduction in the percentage of protests sustained or granted on the merits, an outcome which may be desired by some but opposed by others.

Finally, protests considered by all six forums (original and appellate) can readily be grouped into seven major categories and a total of 16 major subcategories. More than two-thirds of all protests in these six forums are sustained or granted because of improper actions in the evaluation and negotiation of negotiated procurements (37 percent), acceptance of nonconforming proposals or nonresponsive bids (or not awarding to conforming or responsive ones) (16 percent), or improper restrictions on competition (16 percent). Protesters should carefully scrutinize any procurement process which shows evidence of any of these improper actions by agency officials, for protests of such procurements are more likely to be granted or sustained.

## Endnotes

<sup>1</sup> "Of those courts of appeals that have confronted the issue, two have held that jurisdiction over pre-award challenges is exclusive in the Claims Court, see *J.P. Francis & Assoc. v. United States*, 902 F.2d 740 (9th Cir. 1990); *Rex Systems, Inc. v. Holiday*, 814 F.2d 994, 997-98 (4th Cir. 1987); two have said as much in dicta, see *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1478 (Fed. Cir. 1983); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 721 n. 4 (2d Cir. 1983), and two have found concurrent jurisdiction in the district courts, see *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1057-58 (1st Cir. 1987) (district courts have 'concurrent power to award injunctive relief in pre-award contract cases'); *Coco Bros., Inc. v. Pierce*, 741 F.2d 675, 677-79 (3d Cir. 1984)." *Cubic Corp. v. Cheney*, 914 F.2d 1501, 1503 (D.C. Cir. 1990).



<sup>2</sup> The most recent three years was selected for analysis in the courts because of the number of bid protest decisions since 1970 (the year *Scanwell* was decided) and the difficulty of extracting them from a computerized database. The Report of the Acquisition Law Advisory Panel, "Streamlining Defense Acquisition Laws," January 1993 (the "Section 800 Report") indicated that no agency collects statistics on protests filed in the federal district courts, but provided information indicating that there are fewer than 100 such protests filed each year. Section 800 Report I-206 n.20.

<sup>3</sup> The B-Number is GAO's internal numbering scheme and is used as part of the case citation.

<sup>4</sup> "Relief/granted" refers to protests that were either sustained (granted) or where the court granted some meaningful relief to the protester.

<sup>5</sup> The following *Scanwell* actions and circuit court review of bid protest decisions were denied in FY 1992: *Joseph L. DeClerk Assoc. v. United States*, 26 Cl. Ct. 35 (1992); *Skytech Aero, Inc. v. United States*, 26 Cl. Ct. 251 (1992); *Saratoga Dev. Corp. v. United States*, 777 F. Supp. 29 (D.D.C. 1991); *Gisbert Constr. Co. v. Engeleiter*, No. 90 Civ. 5803 (S.D.N.Y. Nov. 15, 1991); *Neeb-Kearney & Co. v. Department of Labor*, 779 F. Supp. 841 (E.D.La. 1991); *Information Ventures, Inc. v. Sullivan*, Civ. A. No. 91-7314 (E.D.Pa. Dec. 24, 1991); *Geo-Con, Inc. v. United States*, 783 F. Supp. 1 (D.D.C. 1992); *TGS Technology, Inc. v. United States*, Civ. A. No. 92-0062 (D.D.C. Jan. 14, 1992); *Technology for Communications Int'l, Inc. v. Garrett*, 783 F. Supp. 1446 (D.D.C. 1992); *Stellacom, Inc. v. United States*, 783 F. Supp. 647 (D.D.C. 1992); *Professional Bldg. Concepts, Inc. v. City of Central Falls Hous. Auth.*, 783 F. Supp. 1558 (D.R.I. 1992); *Westernworld Services, Inc. v. United States*, Civ. A. No. 91-2152 (D.D.C. Feb. 28, 1992); *GE Gov't Services, Inc. v. United States*, 788 F. Supp. 581 (D.D.C. 1992); *Neeb-Kearney & Co. v. Department of Labor*, Civ. A. No. 91-2916 (E.D.La. May 4, 1992); *Single Screw Compressor, Inc. v. United States Dep't of Navy*, 791 F. Supp. 7 (D.D.C. 1992); *Ward v. Resolution Trust Corp.*, 796 F. Supp. 256 (S.D.Tex. 1992); *Goodway Graphics v. United States*, Civ. A. No. 92-0791 (D.D.C. June 23, 1992); *Logistic Management Services, Inc. v. United States*, 794 F. Supp. 147 (E.D.Pa. 1992); *Harvard Interiors Mfg. Co. v. United States*, 798 F. Supp. 565 (E.D.Mo. 1992); *Northern Management Services, Inc. v. United States*, Civ. A. No. 92-2104 (D.D.C. Sept. 30, 1992); *Information Sys. & Networks Corp. v. United States*, 946 F.2d 876 (Fed. Cir. 1991); *Contractors Eng'rs Int'l, Inc. v. United States Dep't of Veterans Affairs*, 947 F.2d 1298 (5th Cir. 1991); *Kiewit Network Technologies v. United States*, No. 91-1262 (Fed. Cir. Jan. 31, 1992); *Newport News Shipbuilding v. General Dynamics Corp.*, 960 F.2d 386 (4th Cir. 1992); *Andersen Consulting v. United States*, 959 F.2d 929 (Fed. Cir. 1992); *Compliance Corp. v. United States*, No. 91-5048 (Fed. Cir. March 26, 1992); *Professional Bldg. Concepts, Inc. v. City of Central Falls Hous. Auth.*, 974 F.2d 1 (1st Cir. 1992); *Rapides Regional Medical Ctr. v. Secretary, Dep't of Veterans Affairs*, 974 F.2d 565 (5th Cir. 1992).

The following *Scanwell* actions and circuit court review of bid protest decisions were denied in Fiscal Year 1993: *Magellan Corp. v. United States*, 27 Fed. Cl. 446 (1993); *Durable Metals Products, Inc. v. United States*, 27 Fed. Cl. 472 (1993); *YRT Services Corp. v. United States*, 28 Fed. Cl. 366 (1993); *Shields Enterprises, Inc. v. United States*, 28 Fed. Cl. 615 (1993); *Tonya, Inc. v. United States*, 28 Fed. Cl. 727 (1993); *Washington Tour Guides Ass'n v. National Park Service*, 808 F. Supp. 877 (D.D.C. 1992); *Veda, Inc. v. United States*, Civ. A. No. 93-0518 (D.D.C. April 13, 1993); *Peirce-Phelps, Inc. v. Johnson*, No. Civ. A. 93-3922 (E.D.Pa. Aug. 12, 1993); *Foundation Health Fed. Services v. United States*, No. 93-1717 (D.D.C. Sept. 23, 1993); *Elcon Enterprises, Inc. v. Washington Metro. Area Transit Auth.*, 977 F.2d 1472 (D.C. Cir. 1992); *S. J. Amoroso Constr. Co. v. United States*, 981 F.2d 1073 (9th Cir. 1992); *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172 (Fed. Cir. 1993); *Motorola, Inc. v. United States*, 988 F.2d 113 (Fed. Cir. 1993); *Ward v. Resolution Trust Corp.*, 996 F.2d 99 (5th Cir. 1993); *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993); *Lockheed Missiles & Space Co. v. Bentsen*, 4 F.3d 955 (Fed. Cir. 1993).

The following *Scanwell* actions and circuit court review of bid protest decisions were denied in Fiscal Year 1994: *Domagala v. United States*, 30 Fed. Cl. 149 (1993); *VMS Hotel Partners v. United States*, 30 Fed. Cl. 512 (1994); *Guardian Moving & Storage Co. v. United States*, 31 Fed. Cl. 645 (1994); *Finley v. United States*, 31 Fed. Cl. 704 (1994); *Capital Boulevard Partners v. United States*, 31 Fed. Cl. 758 (1994); *Abyss Oil Co. v. United States*, Civ. A. No. 93-0987 (D.D.C. Oct. 29, 1993); *Alliant Techsystems, Inc. v. United States Dep't of the Navy*, 837 F. Supp. 730 (E.D.Va. 1993); *60 Key Centre, Inc. v. Administrator of General Services Admin.*, No. 93 CIV. 0154A (W.D.N.Y. Jan. 25, 1994); *Halifax Technical Services, Inc. v. United States*, 848 F. Supp. 240 (D.D.C. 1994); *Superior Services, Inc. v. Dalton*, 851 F. Supp. 381 (S.D.Cal. 1994); *Geo-Con, Inc. v. United States*, 853 F. Supp. 537 (D.D.C. 1994); *Orbas & Assoc. v. Secretary of the Navy*, 863 F. Supp. 1186 (E.D.Cal. 1994); *Corporate Air, Inc. v. Federal Reserve Bank of Boston*, Civ. A. No. 91-30275-Z (D.Mass. Aug. 25, 1994); *Enplanar, Inc. v. Marsh*, 11 F.3d 1284 (5th Cir. 1994); *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044 (Fed. Cir. 1994); *Saratoga Dev. Corp. v. United States*, 21 F.3d 445 (D.C. Cir. 1994); *Tonya, Inc. v. United States*, 31 F.3d 1176 (Fed. Cir. 1994); *GBA Assoc. v. General Services Admin.*, 32 F.3d 898 (4th Cir. 1994); *Delta Chemical Corp. v. West*, 33 F.3d 380 (4th Cir. 1994).

<sup>6</sup> The 1994 bid protest article employed six categories and 16 subcategories. The addition of the courts in this article required the addition of a seventh category pertaining to overrides of CICA stays. See Section III.G., *infra*.

<sup>7</sup> This recommendation would essentially eliminate the *de novo* review standard at the GSBICA pursuant to 40 U.S.C. §759(f)(1). See 1994 bid protest article 4-5 for a discussion of the significance of this GSBICA standard.

<sup>8</sup> Although no government-wide information is available on the sustain or grant rate for agency protests, the author surmises that it is substantially lower than any of the forums because the deciding official, in most cases, is the very contracting officer who initially made the decision which has been protested.