

# THE FEDERAL CIRCUIT AND THE GSBCA: REVIEW OF PROTEST DECISIONS

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## INTRODUCTION

The Competition in Contracting Act of 1984 (CICA),<sup>1</sup> an amendment to the Brooks Act,<sup>2</sup> made the General Services Administration Board of Contract Appeals (GSBCA or Board) a bid protest forum.<sup>3</sup>

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1. Pub. L. No. 98-369, 98 Stat. 1175 (codified at 40 U.S.C. § 759(f) (1988)).

2. Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified as amended at 40 U.S.C. § 759 (1988)), *amended by* Pub. L. No. 99-145, §§ 961(c), 1304(c)(1), 99 Stat. 583, 703, 742 (1985); Pub. L. No. 98-369, § 2713, 98 Stat. 1175, 1182 (1984); Pub. L. No. 99-500, §§ 821(b)(1), 822-25, 100 Stat. 3341-335, 3341-342, 3341-344 (1986); Pub. L. No. 100-235, § 4, 101 Stat. 1724, 1728 (1988).

3. Pub. L. No. 98-369, § 2713, 98 Stat. 1175, 1182 (1984) (codified as amended at 40 U.S.C. § 759(f) (1988)), *amended by* Pub. L. No. 99-500, § 824, 100 Stat. 1783-335, 1783-344

Presently, there are three primary bid protest forums: the United States Claims Court, the General Accounting Office (GAO), and the GSBCA. The United States Court of Appeals for the Federal Circuit reviews the decisions of the Claims Court and the GSBCA. For some time, the general perception has been that GSBCA protest decisions enjoy rough handling at the Federal Circuit. This Article examines the Federal Circuit's treatment of appeals of GSBCA protest decisions and explores the ways in which the GSBCA and the Federal Circuit have disagreed.

Between January, 1985 and December, 1990, the Federal Circuit heard sixteen appeals from GSBCA bid protest decisions.<sup>4</sup> Of those decisions, the Federal Circuit reversed the GSBCA in nine cases, or 56.25% of the time.<sup>5</sup> The Federal Circuit ruled against GSBCA ju-

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(1986); Pub. L. No. 99-591, § 824, 100 Stat. 3341-335, 3341-344 (1986); Pub. L. No. 99-591 was a corrected version of Pub. L. No. 99-500. See statement of President Ronald Reagan upon signing H.J. Res. 738, 22 WEEKLY COMP. PRES. DOC. 196 (Nov. 3, 1986) (explaining that Pub. L. No. 99-500 had omitted text due to clerical error and President's signing of amended provisions made them law). The GSBCA protest jurisdiction was originally designated for codification at 40 U.S.C. § 759(h). Pub. L. No. 98-369, § 2713, 98 Stat. 1175, 1182 (1984). It was redesignated at 40 U.S.C. § 759(f). Pub. L. No. 99-500, § 821(b)(1), 100 Stat. 1783-335, 1783-342; Pub. L. No. 99-591, § 821(b)(1), 100 Stat. 3341-335, 3341-342 (1986).

Since the creation of this protest jurisdiction in 1985, the GSBCA has interpreted its protest authority as co-extensive with that of the GSA Administrator under the Brooks Act, including within its jurisdiction protests regarding automated data processing (ADP) support services. *SMC Information Sys., Inc.*, 85-3 B.C.A. (CCH) ¶ 18,388 at 92,231 (1985).

4. For purposes of the analysis, this Article considers only appeals that were pursued through decision and that resulted in a reported decision. Rule 47.8 decisions are not considered unless otherwise noted. Rule 47.8(c) of the Rules of Practice before the United States Court of Appeals for the Federal Circuit states in relevant part: "[u]npublished opinions and orders are those unanimously determined by the panel as not adding significantly or usefully to the body of law and not having precedential value." FED. CIR. R. 47.8(c) (1990). As of January 22, 1991, the language of Rule 47.8 has been revised to read in pertinent part: "[o]pinions and orders which are designated as not citable as precedent are those unanimously determined by the panel at the time of their issuance as not adding significantly to the body of law." FED. CIR. R. 47.8(b) (1991).

5. See *Data Gen. Corp. v. United States*, 915 F.2d 1544, 1547-48, 1551-52 (Fed. Cir. 1990) (finding that Board erred in its interpretation of agency solicitation provision and by imposing own assessment of agency data processing needs on agency); *Vion Corp. v. United States*, 906 F.2d 1564, 1566-68 (Fed. Cir. 1990) (finding Board's dismissal of bid protest as frivolous improper because Board's determination that protestor's motive was not genuine does not make protest frivolous); *United States v. International Business Machs. Corp.*, 892 F.2d 1006, 1010-11 (Fed. Cir. 1990) (reversing Board's decision that IBM had standing to file protest by finding that Brooks Act definition of "interested party" is narrowly confined to disappointed bidders with direct economic interest); *United States v. Citizens & S. Nat'l Bank*, 889 F.2d 1067, 1069-70 (Fed. Cir. 1989) (holding that Board did not have jurisdiction because transaction was not procurement contract); *United States v. Electronic Data Sys. Fed. Corp.*, 857 F.2d 1444, 1446-47 (Fed. Cir. 1988) (holding that Board's determination that it had jurisdiction over Postal Service procurements of ADPE under Brooks Act was erroneous); *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279-80 (Fed. Cir. 1987) (finding that Board abused its discretion in refusing to dismiss protest following settlement by parties); *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1579-80, 1582-83 (Fed. Cir. 1986) (holding Board does not have jurisdiction every time procurement "should have been" conducted under Brooks Act but that its jurisdiction is limited to where procurement "was" conducted under Act); *United States v. Amdahl*

jurisdiction, by either overturning GSBCA decisions asserting GSBCA jurisdiction<sup>6</sup> or by affirming GSBCA decisions limiting its own jurisdiction,<sup>7</sup> in seventy-five percent of the appeals it decided. The Federal Circuit expanded the GSBCA's expression of its own jurisdiction in only one case.<sup>8</sup>

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Corp., 786 F.2d 387, 395-98 (Fed. Cir. 1986) (finding that Board does not have authority to settle rights of terminated contractor and reversing Board's finding statutory section, protecting contractors who have performed under contract later rescinded by Board, inapplicable).

6. See *Data Gen. Corp. v. United States*, 915 F.2d 1544, 1551-52 (Fed. Cir. 1990) (stating that Board has no jurisdiction to assess independently agency's judgment of its own data processing needs); *United States v. International Business Machs. Corp.*, 892 F.2d 1006, 1010-11 (Fed. Cir. 1990) (finding Board's interpretation of "interested party" as those with ability to protest as too broad thereby limiting number of protests Board can consider); *United States v. Citizens & S. Nat'l Bank*, 889 F.2d 1067, 1069-70 (Fed. Cir. 1989) (holding that Board does not have jurisdiction to hear protest regarding Dept. of Treasury's selection of bank as financial agent of government, even though services rendered would involve use of ADPE); *United States v. Electronic Data Sys. Fed. Corp.*, 857 F.2d 1444, 1446-47 (Fed. Cir. 1988) (holding that Board does not have jurisdiction over Postal Service procurements of ADPE); *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279-90 (Fed. Cir. 1987) (finding that Board abused its discretion in refusing to dismiss protest where parties agreed to settlement); *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1579-80 (Fed. Cir. 1986) (stating that Board's jurisdiction is limited to procurements conducted under Brooks Act, not to procurements that "should have been conducted" under Act); *United States v. Amdahl Corp.*, 786 F.2d 387, 395-96 (Fed. Cir. 1986) (finding that Board does not have authority to settle rights of terminated contractor vis-a-vis government or to force government to "undo" services or goods delivered and accepted).

7. See *SMS Data Prods. Group, Inc. v. United States*, 900 F.2d 1553, 1557-58 (Fed. Cir. 1990) (affirming Board's denial of two protests because Board properly gave broad discretion to soliciting agency's determination of whether bid was materially imbalanced and deferred to agency's conclusion of which bid represented lowest cost to government); *Electronic Sys. Assocs., Inc. v. United States*, 895 F.2d 1398, 1402 (Fed. Cir. 1990) (affirming Board's dismissal by finding that contract aiding fulfillment of military mission fell under Warner Amendment limitation of GSBCA protest jurisdiction); *MCI Telecommunications Corp. v. United States*, 878 F.2d 362, 363 (Fed. Cir. 1989) (affirming Board's dismissal for lack of jurisdiction because subcontractor was not interested party with standing); *Cyberchron Corp. v. United States*, 867 F.2d 1407, 1408-09 (Fed. Cir. 1989) (affirming Board's denial of protest for lack of jurisdiction over cases involving military procurement of ADPE); *Pacificorp Capital, Inc. v. United States*, 852 F.2d 549, 551 (Fed. Cir. 1988) (affirming Board's dismissal of protest because it lacked jurisdiction over Department of Defense procurement critical to military mission). Three of these cases, *Electronic Sys. Assocs.*, *Cyberchron*, and *Pacificorp Capital* involved application of the Warner Amendment. The Amendment excludes from GSBCA's protest jurisdiction any Department of Defense procurement of ADPE that either involves equipment that is an integral part of a weapons system or is critical to fulfilling a military mission, provided the equipment is not used for routine administrative tasks. 40 U.S.C. § 759(d)(3) (1988). There has been no disagreement between the Federal Circuit and the GSBCA about the scope of this limitation.

8. See *SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1555 & n.\*, 1556 (Fed. Cir. 1988). The court reversed the Board's denial of SMS' protest, finding that the Board failed to consider changes in "acceptance test" in its analysis of reprourement process. *Id.* This failure, the court explained, reflected the Board's concern that it would be making a de facto determination of an issue outside its CICA jurisdiction. *Id.* Such a determination was unmerited because implicit in the Board's authority to rule on bid protests concerning ADPE is the power to make all findings of fact and conclusions of law necessary for its decision, regardless of whether a particular finding may relate to controversies outside the Board's jurisdiction. *Id.* The court also acknowledged that the amendment to the Brooks Act recently expanded the Board's jurisdiction. *Id.*

The Federal Circuit's treatment of appeals from the twelve boards of contract appeals has been quite different.<sup>9</sup> The Federal Circuit affirmed, in whole or in part, almost eighty percent of those boards' decisions including all GSBCA decisions.<sup>10</sup> This wide disparity suggests that the Federal Circuit seriously disagrees with the GSBCA's handling of protest decisions in general, and, in particular, with the GSBCA's assessment of its own jurisdiction.

## I. SUBJECT MATTER JURISDICTION

### A. *Brooks Act: Procurements Conducted "Under" or "Subject To"?*

Under the Brooks Act,<sup>11</sup> agencies do not have general procurement authority to acquire automated data processing equipment (ADPE); rather, the Administrator of General Services has exclusive authority to coordinate the purchase, lease, and maintenance of ADPE resources.<sup>12</sup> The General Services Administration (GSA) exercises its exclusive procurement authority by directly conducting ADPE procurements or by delegating procurement authority for individual procurements, as well as by "awarding requirements-type contracts and multiple award schedule contracts for general purpose ADPE, software, and maintenance services."<sup>13</sup> The CICA, in amending the Brooks Act, gave the GSBCA jurisdiction to hear pro-

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9. The boards of contract appeals include those of the Armed Services, Corps of Engineers, General Services Administration, National Aeronautics and Space Administration, Postal Service, and the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs.

10. H. MARKEY, *THE FIRST TWO THOUSAND DAYS: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1982-1988*, at 27 (1989). In this report, Chief Judge Howard T. Markey reveals that, from October 1, 1982 through June 30, 1988, the Federal Circuit affirmed 77% of boards of contract appeals decisions. *Id.* Of the remaining decisions that it heard, the Federal Circuit modified 12%, reversed 7%, and vacated 4%. *Id.* From July 1, 1988 to June 30, 1989 the Federal Circuit affirmed 80% of the boards of contract appeals decisions that it heard. H. MARKEY, *THE SEVENTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1988-1989*, at 13 (1989). From July 1, 1989 to June 30, 1990, its affirmance rate of boards of contract appeals decisions climbed to 81%. H. MARKEY, *THE EIGHTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1989-1990*, at 15 (1990).

11. Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified as amended at 40 U.S.C. § 759 (1988)).

12. 40 U.S.C. § 759(a), (b) (1988). Based on guidelines of the National Bureau of Standards (now the National Institute of Science and Technology), the Secretary of Commerce provides standards relating to ADPE to assure the efficient operation and security of federal computer systems. *Id.* § 759(d). This exercise of authority by both the Administrator and the Secretary of Commerce is subject to direction by the President and to fiscal and policy control by the Office of Management and Budget. *Id.* § 759(e).

13. Address by C. Phillips, Administrative Judge, GSBCA, *The GSBCA & Automated Data Processing Equipment Protests*, presented to Judge Advocate General's School, United States Army, 1985 Government Contract Law Symposium, *quoted in* *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1577-78 (Fed. Cir. 1986).

tests regarding ADPE procurements.<sup>14</sup>

The Federal Circuit, in *Electronic Data Systems Federal Corp. v. General Services Administration Board of Contract Appeals*,<sup>15</sup> addressed the interaction between the GSA Administrator's authority under the Brooks Act and the GSBCA's protest jurisdiction. The Federal Circuit, strictly interpreting the Brooks Act, concluded that GSBCA jurisdiction extends only to procurements *actually* conducted under the Brooks Act, not to procurements which *should* have been conducted under it.<sup>16</sup> This case arose out of a Government Printing Office (GPO) procurement for integrated printing and publishing services to prepare, print, and distribute Army technical and training manuals.<sup>17</sup> The GPO awarded a contract to Electronic Data Systems Federal Corporation (EDS).<sup>18</sup> The disappointed offerors protested to the GSBCA.<sup>19</sup> Another offeror, the GSA on behalf of the protestors, and EDS intervened in the proceeding.<sup>20</sup> The protestors asserted that the GPO contract was for ADPE, which should have been procured under the Brooks Act. The GPO moved to dismiss on the ground that the GSBCA lacked jurisdiction because the procurement was not conducted under the Brooks Act.<sup>21</sup> Because the dispute involved an agency and the GSA regarding the Brooks Act's applicability, the GPO invoked another provision of the Brooks Act, and thereby called upon the Office of Management and the Budget (OMB) to resolve the interagency dispute.<sup>22</sup>

The GSBCA denied the GPO motion to dismiss for lack of GSBCA jurisdiction.<sup>23</sup> EDS filed suit in the United States District

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14. Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2713, 98 Stat. 1175, 1182 (codified as amended at 40 U.S.C. § 759(f) (1988)). For a list of amendments to CICA, see *supra* note 3. Originally, the GSBCA's protest jurisdiction was to last only until January 15, 1988. Pub. L. No. 98-369, § 2713(b), 98 Stat. 1184 (1984).

15. 792 F.2d 1569 (Fed. Cir. 1986).

16. See *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1578 (Fed. Cir. 1986). The Federal Circuit also held that it has jurisdiction to entertain appeals from GSBCA interlocutory orders granting injunctions. The court proclaimed that "[i]njunctive orders from any tribunal within our exclusive appellate jurisdiction fall within the jurisdiction granted to this court by § 1292(c)(1)." *Id.* at 1575.

17. *Id.* at 1572.

18. *Id.* at 1573.

19. *Id.*

20. *Id.* The offeror who intervened in the GSBCA proceeding also filed a protest with the General Accounting Office (GAO). The GAO, however, dismissed the protest, deferring to the GSBCA, and stated that the offeror could refile if the GSBCA concluded that it lacked jurisdiction. *Id.*

21. *Id.* The GPO asserted that the contract was not for ADP equipment or services but was merely for printed materials and that the use of ADPE did not bring the procurement under the Brooks Act. *Id.*

22. *Id.* (citing 40 U.S.C. § 759(g) (1982) (current version at 40 U.S.C. § 759(e) (1988)) which provides that when GSA and agency cannot reach mutual agreement, OMB shall review and resolve dispute).

23. *Id.* (citing *Xerox Corp. & Volt Information Sciences, Inc.*, Nos. 8333-P, 8336-P, slip

Court for the District of Columbia seeking a temporary restraining order and a preliminary injunction against the GSBCA and the GSA on the grounds that the GSBCA acted beyond its jurisdiction.<sup>24</sup> The District Court granted the restraining order, and, then, deciding that it lacked jurisdiction, transferred the case to the Federal Circuit pursuant to 28 U.S.C. § 1631.<sup>25</sup>

The Federal Circuit reversed the decision of the GSBCA, holding that the GSBCA had no jurisdiction.<sup>26</sup> The GSBCA and the Federal Circuit's disagreement regarding the scope of the Board's jurisdiction resulted from their differing interpretations of the Brooks Act and CICA.<sup>27</sup> The GSBCA rejected the restrictive reading of CICA that excludes from GSBCA jurisdiction any case in which an agency had not sought delegation under the Act.<sup>28</sup> The Board stressed that such an interpretation would allow an agency to bypass the Brooks Act's requirements and thereby circumvent the Board's jurisdiction.<sup>29</sup> The GSBCA pointed to the Act's language mandating that the GSA Administrator, directly or by delegation, coordinate the acquisition of ADPE for federal agencies to support its position that an agency's violation of the statute by failing to obtain authority to procure ADPE does not lessen or restrict the Act's reach.<sup>30</sup> In essence, the Board asserted that for its protest jurisdiction to have any substance, those procurements that should have been conducted under the Brooks Act fall within its jurisdiction.

The Federal Circuit disagreed with the Board's analysis and concluded that the GSBCA exceeded its jurisdiction in hearing the protests.<sup>31</sup> The Federal Circuit stated that although CICA's amendment to the Brooks Act expanded the GSBCA's jurisdiction,

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op. at 13 (GSBCA Feb. 4, 1986)). The GSBCA reasoned that it, like other tribunals, had the authority to determine its own jurisdiction and stated that it would determine whether the contract should have been a Brooks Act contract. *Id.* The GSBCA suspended the contract between the GPO and EDS pending resolution of the protest. *Id.*

24. *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, No. 86-0353 (D.D.C. Feb. 21, 1986).

25. *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1574 (Fed. Cir. 1986). When a civil action, on appeal from such an action, or a petition for review of an administrative action is filed in a court without jurisdiction, that court must transfer the action or appeal to the appropriate court. 28 U.S.C. § 1631 (1988).

26. *Electronic Data Systems*, 792 F.2d at 1578-83.

27. *Id.*

28. *See id.* at 1579 (finding that such interpretation is "tenuous at best") (quoting *Xerox Corp. and Volt Information Sciences, Inc.*, GSBCA Nos. 8333-P, 8336-P, slip op. at 14 (Feb. 4, 1986)).

29. *See id.* (stating that "[f]rom a practical standpoint, this interpretation would permit an agency to intentionally ignore the requirements of the Brooks Act only to foist the argument upon this Board that we lack jurisdiction despite a clear and unmistakable statutory violation").

30. *Id.*

31. *Id.* at 1577.

it did not grant the Board jurisdiction over protests of procurements that had not been conducted under the Act.<sup>32</sup> To support this conclusion, the court emphasized that the statute's language gives the GSBCA protest jurisdiction over the "'procurements conducted' under the Brooks Act, not those which *should have been conducted* under the Act."<sup>33</sup> The Federal Circuit found the GSBCA's proposed interpretation facially unreasonable because it created uncertainty in procurement.<sup>34</sup> The court further noted that because CICA's legislative history does not support the GSBCA's broad reading of the statute,<sup>35</sup> principles of statutory interpretation dictate that the words of the statute should control.<sup>36</sup>

The court found support for confining the scope of the GSBCA's protest jurisdiction in the Board's remedial authority.<sup>37</sup> A forum's authority to grant relief and its jurisdiction are necessarily interconnected.<sup>38</sup> Various statutory sections of CICA gave the GSBCA power to suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority in particular circumstances.<sup>39</sup> The court proceeded to explain, however, that these remedies are meaningless where the Administrator neither exercised his or her procurement authority nor delegated any authority that the Board could suspend, revoke, or revise.<sup>40</sup> A forum cannot grant relief in those circumstances where it does not have jurisdiction. As the GSBCA's power to grant remedies can only be exercised where the Administrator or a delegated agency has conducted a procurement under the Brooks Act, the

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32. *Id.* at 1578.

33. *Id.* (emphasis in original). The court asserted that this "unambiguous" and "literal reading fits with the overall structure of the statutory scheme for settling ADPE disputes." *Id.*

34. *See id.* at 1580 (maintaining that Board's belief that its jurisdiction extends to procurements that should have been conducted under Brooks Act would result in agencies not knowing "until after the fact, even with a ruling in advance by OMB, that they had 'conducted' a Brooks Act procurement").

35. *See id.* at 1581 (presenting excerpts from various committee reports stating "[t]his provision applies only to those . . . procurements conducted under the Brooks Act" to emphasize that legislative history of CICA is consistent with Federal Circuit Court's literal reading).

36. *Id.* at 1578-79 (citing *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

37. *Id.* at 1580.

38. *See id.* (stating that forum's remedial authority and its jurisdiction are "two sides of the same coin. Thus, the remedy power expressly granted is a persuasive indication of its jurisdiction as well").

39. *Id.* (citing 40 U.S.C. §§ 759(h)(2), (3), (5)(B) (Supp. II 1984) (current version at 40 U.S.C. §§ 759(7)(h)(2), (3), (5)(B) (1988))).

40. *Id.* The court concluded that in those circumstances where the Administrator had not exercised procurement authority under the Brooks Act, "no statutorily authorized remedy can be effected by the Board." *Id.* (citing *United States v. Amdahl Corp.*, 786 F.2d 387, 390 n.3 (Fed. Cir. 1986)).

GSBCA's protest jurisdiction is limited to those circumstances.<sup>41</sup>

In addition to limiting the GSBCA's protest jurisdiction to procurements actually conducted under the Brooks Act, the Federal Circuit in *Electronic Data* reiterated that the OMB, not the GSBCA, has the authority to resolve interagency disputes over whether a procurement is subject to the Act.<sup>42</sup> The court proclaimed that "an irreconcilable conflict" would result from recognizing a dual authority by the GSBCA and the OMB to determine when the Brooks Act applies.<sup>43</sup> The GSBCA and the OMB, the court explained, would potentially reach different resolutions because a GSBCA decision finding the Brooks Act applicable could not take into consideration the various discretionary factors on which the OMB may rely.<sup>44</sup> Such GSBCA authority would override and essentially nullify the OMB's dispute resolution authority—a result, the court points out, that Congress had no intention of achieving by enacting CICA.<sup>45</sup> The Federal Circuit highlighted these problems to support its literal reading of the statute, and thereby restricted the reach of the GSBCA.<sup>46</sup>

In *Electronic Data*, the Federal Circuit invited Congress to revisit the issue of GSBCA jurisdiction if it was not satisfied with the result in this case.<sup>47</sup> The court noted that the statute only provided the GSBCA with protest jurisdiction for three years, ending January 15,

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41. See *id.* (asserting that "[t]o find an implied power to grant relief from an inferred grant of jurisdiction exceeds the bounds of permissible 'interpretation' of the statute before us").

42. *Id.* at 1581. The court relied on the Brooks Act's language giving the OMB this specific dispute resolution role. *Id.* (citing 40 U.S.C. § 759(g) (1982) (current version at 40 U.S.C. § 759(e) (1988))).

43. *Id.* at 1582.

44. *Id.*

45. See *id.* (quoting House Report on CICA indicating that "[w]ith regard to OMB's authorities under the Brooks Act, the bill does not alter the current procedures for resolving conflicts between procuring agencies and the GSA's procurement office").

46. See *id.* (stating that conflict that would result from finding that GSBCA has authority to determine whether procurements are subject to Brooks Act, "itself counsels against stretching the statutory language").

The Federal Circuit's decision in *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986) may have presaged its thinking in *Electronic Data*. The court in *Amdahl* twice noted that the government was not challenging the GSBCA's determination that the contract had been illegally awarded. *Amdahl*, 786 F.2d at 389, 398. In the decision below, however, the Treasury Department argued that the GSBCA lacked jurisdiction, because Treasury had procured a computer from the Federal Home Loan Mortgage Corporation pursuant to the Economy Act, 31 U.S.C. § 1535. *Id.* at 390, 391 n.4. In response, the GSBCA held that where the interagency transfer involves ADP equipment, the Brooks Act preempts the Economy Act, thus, giving the GSBCA jurisdiction. *Id.* at 391 n.4.

Under its reasoning in *Electronic Data*, the Federal Circuit might have ruled that the procurement conducted under the Economy Act in *Amdahl* was beyond the GSBCA's jurisdiction. Even if this supposition is correct, however, the *Amdahl* result is likely still good law in view of the 1986 amendments to the Brooks Act affecting GSBCA jurisdiction discussed below.

47. *Electronic Data Sys. Fed. Corp.*, 792 F.2d at 1583.

1988, and that Congress must review the matter if it deemed that GSBCA protest jurisdiction should continue.<sup>48</sup> The court further maintained that “only by [Congress] wholesale re-writing of the statute” could the GSBCA have jurisdiction to hear challenges to procurements that *should have* been conducted under the Brooks Act.<sup>49</sup>

Congress accepted the Federal Circuit’s invitation and amended the GSBCA’s statutory protest jurisdiction through the Paperwork Reduction Reauthorization Act of 1986 (PRRA), an amendment to the Brooks Act.<sup>50</sup> The PRRA ended the three year limitation and made the GSBCA’s protest jurisdiction permanent.<sup>51</sup> In direct opposition to the Federal Circuit’s holding in *Electronic Data*, Congress expanded the GSBCA’s jurisdiction by providing the GSBCA with jurisdiction over protests involving procurements “subject to” the Brooks Act, not only those “conducted under” the Act.<sup>52</sup> By giving the GSBCA the authority to determine which procurements were subject to the Brooks Act, the amendment essentially granted the Board the power to determine its own jurisdiction.<sup>53</sup> The amendment also ended interlocutory appeals from Board protest decisions.<sup>54</sup>

Although this amendment was aimed at legislatively repealing *Electronic Data*, Congress did not address certain issues which, in the Federal Circuit’s view, were necessary to resolve the GSBCA’s jurisdictional problems. In particular, it did not discuss the GSBCA’s remedial powers. Under the court’s logic in *Electronic Data*, the GSBCA does not have the authority to use its remedial power to effect a procurement conducted outside the Brooks Act.<sup>55</sup> A con-

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48. *Id.*

49. *Id.* (emphasis in original).

50. Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-342 to -344, 1783-355; Pub. L. No. 99-591, §§ 821(b)(1), 822-25, §§ 821(b)(1), 822-25, 100 Stat. 3341-335, 3341-342 to -344 (codified at 40 U.S.C. § 759 (1988)).

51. Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 824, 100 Stat. 1783-335, 1783-344; Pub. L. No. 99-591, § 824, 100 Stat. 3341-335, 3341-344 (codified at 40 U.S.C. § 759(f)(1) (1988)).

52. *Id.*

53. *See id.* (stating “[t]he authority of the board to conduct such review shall include the authority to determine whether any procurement is subject to this section and the authority to review regulations to determine their consistency with the applicable statutes. A proceeding, decision, or order of the board pursuant to this subsection shall not be subject to interlocutory appeal or review.”).

The PRRA provided that although the GSBCA may request and consider decisions, opinions, or statements of the OMB regarding the applicability of the Brooks Act to a particular procurement, the GSBCA is not bound by such OMB determinations. *Id.* (codified at 40 U.S.C. § 759(f)(5)(A) (1988)).

54. *Id.*

55. *See supra* notes 38-41 and accompanying text (explaining that GSBCA’s remedial powers and its jurisdiction reflect each other and that because GSBCA remedies are to re-

trary result would require reading an implied power to grant relief into the amendment's provision giving the GSBICA "the authority to determine whether any procurement is subject to this section."<sup>56</sup> The amendment invites the type of conflict between the GSBICA and the OMB envisioned by the Federal Circuit because it confers on the GSBICA the authority to make implicit executive branch policy decisions previously reserved for the OMB and the President.<sup>57</sup> Neither of these issues have been presented in subsequent appeals; they remain for future resolution.

### B. *Brooks Act: Who is Covered?*

Since the PRRA's amendment to CICA, the Federal Circuit has had several opportunities to address application of the Brooks Act. In *United States v. Electronic Data Systems Federal Corp. (Perot Systems)*,<sup>58</sup> the Federal Circuit addressed the threshold question of which agencies are subject to the Brooks Act. The controversy in that case involved the Postal Service's award of a contract involving ADPE studies to Perot Systems.<sup>59</sup> The contract granted Perot Systems the exclusive right to implement recommendations of the studies for a five year period.<sup>60</sup> Electronic Data Systems and Planning Research Corporation (PRC) filed protests with the GSBICA, challenging the award.<sup>61</sup> Motions by the United States and Perot Systems for a stay pending review brought the case before the Federal Circuit.<sup>62</sup> Thereafter, the GSBICA issued a final decision, finding the contract void for violations of the Brooks Act and Postal Service regulations,

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solve, suspend, or revise Administrator's procurement authority, it is logically necessary that Administrator or delegated agency exercised that authority under Brooks Act in order for GSBICA to remedy violations of such authority).

56. *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Appeals*, 792 F.2d 1569, 1580 (Fed. Cir. 1986) (quoting Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 824, 100 Stat. 1783-335, 1783-344; Pub. L. No. 99-591, § 824, 100 Stat. 3341-335, 3341-344 (codified at 40 U.S.C. § 759(f)(1) (1988))).

57. *Compare* Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 824, 100 Stat. 1783-335, 1783-344; Pub. L. No. 99-591, § 824, 100 Stat. 3341-335, 3341-344 (codified at 40 U.S.C. § 759(f)(1), (5)(A) (1988)) (stating that GSBICA has authority to determine which procurements are subject to Brooks Act without being bound by OMB determinations concerning Brooks Act applicability) *with* 40 U.S.C. § 759(e) (1988) (providing OMB with authority to resolve disputes between agencies and Administrator and stating that Administrator's authority under Brooks Act is subject to President's direction and OMB's fiscal and policy control).

58. 857 F.2d 1444 (Fed. Cir. 1988).

59. *United States v. Electronic Data Sys. Fed. Corp. (Perot Systems)*, 857 F.2d 1444, 1445 (Fed. Cir. 1988).

60. *Id.*

61. *Id.* After Perot Systems intervened in the proceedings, the Postal Service moved to dismiss for lack of GSBICA jurisdiction. The Board, however, determined it had jurisdiction to hear the protest. *Id.* at 1445-46.

62. *Id.* at 1446.

allowing the Federal Circuit to treat the matter as an appeal.<sup>63</sup>

The sole issue was whether, pursuant to the Brooks Act, the GSBCA has protest jurisdiction over Postal Service procurements of ADPE.<sup>64</sup> Relying on the language of the Postal Reorganization Act of 1970,<sup>65</sup> the court concluded that the GSBCA lacked jurisdiction.<sup>66</sup> Under the Act, the Postal Service became the successor to the Post Office Department.<sup>67</sup> Intending that the Postal Service be run more like a business than its predecessor,<sup>68</sup> Congress exempted the Postal Service from all but specifically enumerated federal procurement laws.<sup>69</sup> The Federal Circuit concluded that the GSBCA's jurisdiction did not reach these Postal Service procurements for ADPE, because the GSBCA has protest jurisdiction over only those procurements subject to the Brooks Act, which was not one of the specifically enumerated laws applicable to the Postal Service.<sup>70</sup>

The Federal Circuit found the GSBCA's reasoning and conclusion that it had jurisdiction unpersuasive.<sup>71</sup> The GSBCA asserted that any exemption from the Brooks Act would be explicitly noted in the Act itself, as demonstrated by the Brooks Act's specific exclusion of Central Intelligence Agency and certain Department of Defense ADPE procurements.<sup>72</sup> The Federal Circuit rejected this reasoning and proclaimed that no specific exemption for Postal Service procurements was necessary in the Brooks Act because, in the Postal Reorganization Act of 1970, Congress had already excluded the Postal Service from the Brooks Act's requirements.<sup>73</sup> The Federal Circuit has yet to resolve which other agencies or quasi-agencies are

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63. *Id.* This distinction between consideration of an appeal from a final decision and of an interlocutory appeal is important because the PRRA specifically barred any interlocutory appeals or reviews from GSBCA bid protest decisions. 40 U.S.C. § 759(f)(1) (1988).

64. *Perot Systems*, 857 F.2d at 1446.

65. Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified as amended at 39 U.S.C. §§ 101-5605 (1988)).

66. *Perot Systems*, 857 F.2d at 1446-47. The court vacated the Board's decision and remanded with instructions to dismiss the protests for lack of jurisdiction. *Id.* at 1447.

67. *Id.* at 1446 (citing Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended at 39 U.S.C. §§ 101-5605 (1988))).

68. *Id.* (citing *Loeffler v. Frank*, 108 S. Ct. 1965, 1969-70 (1988) (quoting Franchise Tax Bd. of Cal. v. United States Postal Serv., 467 U.S. 512, 520 (1984))).

69. See Pub. L. No. 91-375, § 410(a), 84 Stat. 719, 725 (1970) (codified at 39 U.S.C. § 410(a) (1988)) (stating that "[e]xcept as provided by subsection (b) of this section, and except as otherwise provided in this title . . . no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, . . . shall apply to the exercise of the powers of the Postal Service").

70. See *Perot Systems*, 857 F.2d at 1446 (stating that neither subsection (b) of 39 U.S.C. § 410, which enumerates those provisions that shall apply to Postal Service, nor any other section of Title 39 provides for application of Brooks Act to Postal Service).

71. *Id.* at 1447.

72. *Id.* (citing *Federal Sys. Group, Inc.*, 88-2 B.C.A. (CCH) ¶ 20,771, at 104,961-62 (1988)).

73. *Perot Systems*, 857 F.2d at 1446-47.

exempt from the Brooks Act, and therefore, beyond the GSBCA's jurisdiction. For instance, the Office of the Comptroller of the Currency (OCC) has resisted the GSBCA's jurisdiction.<sup>74</sup> The GSBCA ruled that it had Brooks Act jurisdiction over the OCC; this decision was not appealed.<sup>75</sup> In another context, the GSBCA had an opportunity to address the federal agency status of the Federal Home Loan Mortgage Association; however, it did not ultimately reach a conclusion.<sup>76</sup> The continuing conflict between the Federal Circuit's and the GSBCA's statutory interpretation makes the scope of GSBCA's jurisdiction under the auspices of the Brooks Act unclear.

### C. *Brooks Act: What is Covered?*

In *United States v. Citizens & Southern National Bank*,<sup>77</sup> the Federal Circuit addressed the issue of what constitutes a procurement for the acquisition of ADPE within the meaning of the Brooks Act.<sup>78</sup> In

74. See *Rocky Mountain Trading Co.*, 87-2 BCA (CCH) ¶ 19,840, at 100,406 (1987) (stating that OCC filed motion to dismiss, arguing that as entity using non-appropriated funds, it is not subject to Brooks Act as amended by CICA). Three separate protests were filed by Rocky Mountain Trading Company, Morton Management Incorporated, and Automated Business Systems and Services and the court consolidated the protests. *Id.*

75. See *id.* at 100,406-07 (holding in favor of protestors that respondent, OCC, and thus this procurement, is subject to Brooks Act). The court concluded that the OCC is a "Federal Agency" for purposes of the application of the Brooks Act and CICA. *Id.* Furthermore, the OCC's use of non-appropriated funds does not exempt it from the Brooks Act. *Id.* Thus, the procurement process and the resultant contract to Texas Instruments are unauthorized and contravene applicable law. *Id.*

76. See *United States v. Amdahl Corp.*, 786 F.2d 387, 398 (Fed. Cir. 1986) (holding that section 759(h)(6)(B) does not apply, and that Federal Home Loan Mortgage Association is entitled to compensation equaling initial payment by Treasury of 1.2 million dollars). In this case, the Department of Treasury purchased a used mainframe computer and certain related equipment from the Federal Home Loan Mortgage Association under authority of the Economy Act, 31 U.S.C. § 1535, which authorizes transactions between government agencies. The question of whether the Federal Home Loan Mortgage Association was an agency was litigated in the protest but not decided by the Board. *Amdahl Corp. GSBCA No. 7859-P* (May 16, 1985). *Amdahl* successfully protested the award. *Amdahl*, 786 F.2d at 389. The GSBCA held that the award was contrary to the statute and revoked Treasury's DPA. *Id.* On appeal, the Treasury did not seek to overturn the merits of the protest, but argued that the remedy which GSBCA granted was contrary to section 759(h)(6)(B) of the statute. *Id.* There was no discussion evaluating the federal agency status of the Federal Home Loan Mortgage Association by the Federal Circuit. *Id.* at 387-98.

77. 889 F.2d 1067 (Fed. Cir. 1989).

78. *United States v. Citizens & S. Nat'l Bank*, 889 F.2d 1067, 1070 (Fed. Cir. 1989) (holding that Board had no jurisdiction because transaction was not procurement of ADPE within meaning of Brooks Act).

In a prior decision, *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, the Federal Circuit anticipated the problem of what qualifies as a procurement for the acquisition of ADPE. *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1582 (Fed. Cir. 1986). The court commented that:

[w]ith the pervasiveness of ADP equipment and services and the imagination of the bar, one could foresee a challenge before GSBCA to the bulk of government contracts on the ground that the procurement should have been under the Brooks Act. Indeed, in this case, it is asserted that the Brooks Act is implicated because *the contractor* will utilize ADPE in its performance.

this case, the Department of the Treasury's Financial Management Service (FMS) selected the Riggs National Bank to serve as a "Lead Concentrator Bank" in FMS's proposed new cash concentration and reporting system, "U.S. Cash-Link."<sup>79</sup> The GSBCA determined, in a protest filed by Citizens & Southern National Bank, that the agreement with Riggs was defective because it was not conducted pursuant to the Brooks Act.<sup>80</sup> The services to be performed permitted the concentration of monies owed the government that were originally collected at thousands of different locations.<sup>81</sup> Furthermore, they allowed for the compilation and distribution of detailed records of these manifold transactions.<sup>82</sup> FMS issued a Request for Proposals (RFP) to initiate the selection process.<sup>83</sup> The RFP included significant detail concerning the level and types of services FMS was seeking.<sup>84</sup> According to the Federal Circuit, this led the GSBCA to characterize incorrectly the agency agreement as one within the scope of the Brooks Act.<sup>85</sup> At the outset, the Board assumed that the agreement between Riggs and FMS was an ADPE procurement contract. Therefore, the Board focused on the ADPE requirements of the RFP and rejected the argument that the agreement might be classified as an appointment of a depository and financial agent pursuant to the National Bank Act.<sup>86</sup>

The Federal Circuit, however, disagreed and determined that the FMS contract was not a procurement contract.<sup>87</sup> Rather, it was an exercise of the Treasury's authority, pursuant to the National Bank Act, to designate a financial institution to act in its stead.<sup>88</sup> This designation was akin to the appointment of public employees, which is not a contract.<sup>89</sup>

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*Id.*

79. *Citizens & S. Nat'l Bank*, 889 F.2d at 1068.

80. *Id.* The GSBCA denied the protest, but determined that the agreement was subject to the Brooks Act. *Id.* at 1069. Therefore, it directed FMS not to proceed until it appointed a contracting officer and received a delegation of procurement authority from the GSA Administrator. *Id.*

81. *Id.* at 1069.

82. *Id.* at 1068.

83. *Id.*

84. *See id.* at 1068 (stating that RFP notified eligible commercial financial institutions to submit proposals for development and implementation of new cash concentration and deposit reporting system "U.S. CA\$H-LINK"). FMS determined that the adoption of the new electronic technology could significantly improve the efficiency of the existing systems when combined with the new CA\$H-LINK system. *Id.*

85. *Id.* at 1069.

86. *Id.*

87. *Id.* at 1070.

88. *Id.* The National Bank Act authorizes the appointment of depositories and financial agents. National Bank Act, 12 U.S.C. §§ 90, 265 (1988).

89. *See Citizens & S. Nat'l Bank*, 889 F.2d at 1070 (stating that Treasury's action was not contract even when terms and conditions guided employment relationship).

The *Southern National Bank* holding is, on the one hand, extremely narrow, offering little practical utility in other procurements, because the court addresses the issue within the confines of the facts specific to this case. The analysis involved agency versus procurement which, in the Federal Circuit's opinion, creates special circumstances that permit the actions taken to fall outside the Brooks Act and, as a result, outside the GSBCA's jurisdiction.<sup>90</sup> It is, on the other hand, possible to interpret *Southern National Bank* in a broader context. The Federal Circuit opinion seems to suggest that the incidental use of ADPE will not automatically bring a procurement within the scope of the Brooks Act. Unfortunately, the opinion fails to clarify what constitutes a procurement over which the GSBCA can exercise jurisdiction.

#### D. Ancillary Jurisdiction

Another jurisdictional question that arises in GSBCA protest cases is whether the Board has jurisdiction over the ancillary issues—those which are related to the protest but are not strictly within the scope of the protest. In *United States v. Amdahl Corp.*,<sup>91</sup> the Federal Circuit ruled that the GSBCA's jurisdiction was limited to resolving those issues strictly within the scope of the protest; it did not extend to those issues related to a protest decision.<sup>92</sup> In *Amdahl*, the GSBCA attempted to determine the respective rights of the government and the contractor in a contract the Board determined to be void *ab initio*.<sup>93</sup> The Federal Circuit overruled the GSBCA, to hold that the GSBCA does not convene to determine the rights of a terminated contractor in relation to the government.<sup>94</sup> These matters should not be litigated in a bid protest decision and are not within the limited jurisdiction of the GSBCA.<sup>95</sup> Rather, the contrac-

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90. *Id.* at 1069. The court stated:

Congress recognized that it is more efficient for Treasury to act through national banks like Riggs and Citizens & Southern in fulfilling its statutory mandate of managing the nation's money than it is for the federal government alone to develop and maintain a banking system for this purpose. When commercial national banks act under the agreements that necessarily embody this congressionally sanctioned relationship, they do so as 'special agent[s] for the particular purpose required. . . .' *Branch v. United States*, 12 Ct. Cl. 281, 287 (1876), *aff'd*, 100 U.S. 673 (1880).

Therefore, Treasury's designation of banks as depositories and financial agents pursuant to sections 90 and 265 of the National Bank Act does not constitute a 'procurement' of property and services within the meaning of the Federal Property and Administrative Services Act of 1949, as amended by the Brooks Act.

*Id.*

91. 786 F.2d 387 (Fed. Cir. 1986).

92. *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986).

93. *Id.* at 396.

94. *Id.*

95. *Id.*

tor's claim should be litigated in their traditional forums.<sup>96</sup> Thus, a contractor is entitled to his or her day in court, and any GSBCA determination that a contract is void *ab initio* or voidable in a protest hearing is neither enforceable nor conclusory in the contractor's suit.<sup>97</sup>

A more recent Federal Circuit ruling, however, cast doubt on this rule. In *SMS Data Products Group, Inc. v. United States*,<sup>98</sup> the court overturned the GSBCA's dismissal of a protest.<sup>99</sup> The Department of Health and Human Services (HHS) awarded a contract for computer services to SMS.<sup>100</sup> Initially, C3, Inc. protested the award and in the settlement of the protest, HHS agreed to compel SMS to conduct a new, more stringent, acceptance test.<sup>101</sup> SMS failed the new test, and its contract was terminated for default.<sup>102</sup> As stipulated, the contract would be awarded to the next lowest bidder, and SMS would be barred from participating in the new round of competition.<sup>103</sup> SMS protested the denial, the GSBCA denied the protest, and SMS appealed.<sup>104</sup> The Federal Circuit, reversing the GSBCA, directed that the contract be terminated with respect to the portion that was not already performed.<sup>105</sup> In its analysis, the court wrote that the GSBCA's jurisdiction is more expansive than the *Amdahl* holding suggests.<sup>106</sup> The court noted that the GSBCA was concerned that it would be reaching beyond its jurisdiction by rendering a de facto determination of the validity of SMS's termination for default. The Federal Circuit, however, remarked that this concern was unjustified because "subject matter jurisdiction is a matter

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96. *Id.*

97. *Id.*

98. 853 F.2d 1547 (Fed. Cir. 1988).

99. *SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1556 (Fed. Cir. 1988).

100. *Id.* at 1549.

101. *Id.* The acceptance test was to include, at a minimum, certain items stated in an attachment to the document. *Id.* If SMS failed the enhanced acceptance test, it was to be placed in default and the contract awarded to the next lowest bidder without further negotiation, discussion, or opportunity for best final offers. *Id.*

102. *Id.* at 1550. SMS failed the new acceptance test because its equipment did not meet the mandatory requirements of the contract. *Id.*

103. *Id.* at 1551.

104. *Id.* at 1552-53.

105. *Id.* at 1556.

106. *Id.* at 1555. The court stated:

The board's approach may also have been colored by the fact that, in the past, this Court had construed Congress' grant of jurisdiction to the board narrowly. *Electronic Data Sys. Fed. Corp. v. General Servs. Bd. of Contract Appeals*, 792 F.2d 1569 (Fed. Cir. 1986). The board's jurisdiction, however, has recently been expanded by an amendment to the Brooks Act [citation omitted]. The Conference report makes clear that expanded authority has been placed in the Board, whose jurisdiction and functions shall be broadly construed so as to effectuate the purposes underlying the original grant of protest jurisdiction to it.

*Id.* at 1555 n.\*.

which relates to the power of a tribunal to adjudicate a particular controversy."<sup>107</sup> Furthermore, the court stated that the GSBCA maintains the power to decide bid protest controversies and to make "all findings of fact and conclusions of law necessary to reach a reasoned decision."<sup>108</sup> Thus, the holding in *SMS* can be viewed as a retraction of the Federal Circuit's previous interpretation of the GSBCA's subject matter jurisdiction in *Amdahl*.<sup>109</sup> As one commentator concluded:

[I]f the awardee is a party to the protest, as is usually the case, a ruling by the Board either that the contract is void *ab initio* or that it should be terminated for convenience would necessarily determine the extent of recovery by the awardee on that contract, as a matter properly within the Board's protest subject matter jurisdiction.<sup>110</sup>

While this is a reasonable reading of the impact of *SMS*, it is also possible to interpret the case in a manner that effects the *Amdahl* holding less drastically. In *SMS*, a determination of the propriety of the default termination was central to the resolution of the protest.<sup>111</sup> In *Amdahl*, however, the ruling on the entitlement to funds paid on the contract the Board voided between the government and the contractor was ancillary to the determination of the propriety of the contract award.<sup>112</sup> Thus, *Amdahl* may still have validity in regard to GSBCA findings and conclusions that are beyond its direct protest jurisdiction and hence unnecessary for the resolution of the protest.

### E. Mootness

In *Pacificorp Capital, Inc. v. United States*,<sup>113</sup> the Federal Circuit announced a general rule concerning whether a protest is moot. The court held that the completed performance of a protested contract before the protest reaches the Federal Circuit does not render the appeal from the GSBCA moot.<sup>114</sup> The court explained that regardless of whether a procurement contract is completed, express authorization exists to allow the GSBCA to grant a successful

107. *Id.*

108. *Id.* The court stated "[t]hat a particular finding or conclusion may have some bearing on a different controversy outside the board's protest jurisdiction is irrelevant." *Id.*

109. Coburn & Simchack, *Federal Procurement in the Federal Courts 1987-1988: A Selective Review*, 19 PUB. CONT. L.J. 14, 51 (1989).

110. *Id.*

111. See *SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1550 (Fed. Cir. 1988) (discussing *SMS*' termination for default).

112. *United States v. Amdahl Corp.*, 786 F.2d 387, 389 (Fed. Cir. 1986).

113. 852 F.2d 549 (Fed. Cir. 1988).

114. *Pacificorp Capital, Inc. v. United States*, 852 F.2d 549, 551 (Fed. Cir. 1988).

protestor an award of protest and bid preparation costs.<sup>115</sup> It concluded that the "availability of such relief is enough to maintain this as a 'live' controversy."<sup>116</sup> In a subsequent case, *Federal Data Corp. v. United States*,<sup>117</sup> however, the court issued a caveat to this general rule. Should the protestor cease to be an interested party prior to the conclusion of the protest, the possibility of award of protest and bid preparation costs will not maintain the action as a live controversy.<sup>118</sup>

In *Federal Data Corp. v. SMS Data Products Group, Inc.*,<sup>119</sup> the mootness issue arose in a different context.<sup>120</sup> The Environmental Protection Agency (EPA) awarded a contract to Federal Data Corporation; SMS Data Products Group protested.<sup>121</sup> The parties before the Federal Circuit, including the original protestor, SMS, the respondent, EPA, and the intervener, Federal Data, requested that the court require the GSBCA to honor a settlement that was negotiated and accepted.<sup>122</sup> The settlement called for SMS to withdraw its protest in return for a substantial monetary payment from the EPA (akin to the practice referred to as Fedmail), and leave undisturbed the contract with Federal Data.<sup>123</sup> The GSBCA refused to dismiss the protest based on terms, stating that the public interest in maintaining the integrity of the procurement process overrode the interests of the parties in terminating the litigation.<sup>124</sup> The Federal

115. *Id.* at 550.

116. *Id.*

117. 911 F.2d 699 (Fed. Cir. 1990).

118. *Federal Data Corp. v. United States*, 911 F.2d 699, 704 (Fed. Cir. 1990).

119. 819 F.2d 277 (Fed. Cir. 1987).

120. *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 277 (Fed. Cir. 1987) (noting that interested party must have direct economic interest at time protest is filed).

121. *Id.* at 278.

122. *Id.*

123. *Id.* The body of the settlement agreement filed with the joint motion to dismiss states as follows:

This memorandum supports the joint motion of Protestor SMS Data Products Group, Inc. ("SMS"), Respondent the United States Environmental Protection Agency ("EPA") and Intervenor Federal Data Corporation ("FDC") to dismiss this protest with prejudice, reinstate EPA's Delegation of Procurement Authority and permit FDC to continue performance under the contract, provided that for the purpose of an award to SMS of its proposal preparation costs . . . , its costs of filing and pursuing its protest and attorney fees, SMS will be deemed to have prevailed and entitled to an award of such fees and costs.

*SMS Data Prods. Group, Inc.*, 87-1 B.C.A. (CCH) ¶ 19,637, at 99,402 (1987).

124. *Id.* at 99,400. The Board clarified its reasoning in the following statement:

The policy which strongly favors the settlement of cases so as to put an end to litigation does not require a tribunal to accept a settlement agreement when vacatur is not equitable and would contravene other important public policy considerations . . . . To permit such actions [settlements] would turn the Brooks Act procurement process on its head and would disregard specific congressional intent to protect the public interest by preventing agencies from running slipshod over statutes and regulations.

Circuit disagreed and noted that it is a firmly established custom that the courts favor the voluntary settlement of suits over court proceedings and judicial resolution.<sup>125</sup> Consequently, the Federal Circuit held that the Board abused its discretion by refusing to dismiss the protest.<sup>126</sup>

Thus, the Federal Circuit, in *Pacificorp Capital* and *Federal Data Corp.*, clarified the parameters of a moot cause of action. *Pacificorp Capital* suggests that a pending claim for proposal and protest costs is sufficient to avoid mootness. *Federal Data Corp.*, on the other hand, notes that a settlement among the parties to eliminate a protest will render the action moot. Although the Federal Circuit succeeded in illuminating the nature of the mootness issue and its relationship to procurement protests, it did so at the expense of the GSBGA, for it overruled each of the Board's decisions to arrive at its own conclusions.

#### F. Scope of Review

The standard of review employed by the GSBGA in an automatic data processing procurement question does not defer to the procuring agency's determinations of the case.<sup>127</sup> Furthermore, the GSBGA standard of review does not require the use of conventional standards previously employed in other types of protest forums.<sup>128</sup> Rather, the Board conducts its review of a protest by using the "standard applicable to review of contracting officer final decisions."<sup>129</sup> Thus, the Board determines *de novo* whether the agency violated statutes, regulations, or the delegation of procurement authority.<sup>130</sup>

While the standard permitting *de novo* review of protested procurement contracts is well established, the extent to which the Board should substitute its judgment for that of the contracting agency is unclear. As a result, the Board is beyond the boundaries

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*Id.*

125. *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279 (Fed. Cir. 1987). The court stated:

In *United States v. Munsingwear*, 340 U.S. 36, 39 (1950), the Supreme Court stated that: 'The established practice of the court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.'

*Id.*

126. *See id.* at 280 (stating that Board abused its discretion in light of settlement reached by parties).

127. *Lanier Business Prods., Inc.*, 85-2 BCA (CCH) ¶ 18,033, at 90,495-96 (1985).

128. *Id.*

129. *Id.*

130. *Id.*

of what is considered normal review procedures and has put itself in the place of the agency's deciding official.<sup>131</sup>

A recent Federal Circuit case, *Data General Corp. v. United States*,<sup>132</sup> focused on the issue of the GSBCA substituting its judgment for that of the implicated agency.<sup>133</sup> In this case, the GSBCA made little effort to disguise the fact that it was overstepping the accepted bounds of review. In fact, the blatant language of the GSBCA holding establishes *Data General* as a particularly recognizable example of the GSBCA's abuse of power seemingly sanctioned by the Brooks Act. In granting the protest, the Board commented, "[w]ouldn't it truly be 'incredibly stupid' to run back-ends on diskless workstations. . . ?"<sup>134</sup>

The Federal Circuit responded to this language in an exceptionally clear manner:

'Stupid' or not, the board has no warrant to question the agency's judgment or to revise its delegation of procurement authority to ensure that the agency's assessment of its 'true' needs is in harmony with the board's. The board has neither the authority nor the expertise to second-guess the agency.<sup>135</sup>

The court reversed the Board's decision and redirected the protested contract award to the original contractor.<sup>136</sup>

The Board has gone so far in inserting itself into the agency's decision making role as to conduct a mini, live test demonstration in the court room.<sup>137</sup> In substituting its judgment for that of the contracting agency, the GSBCA exceeded the limits of its authority and

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131. Madsen, *Considerations in Selection of a Protest Forum, The World of Bid Protests*, 1986 A.B.A. SEC. PUB. CONF. L. 7. The author comments that "[t]his is not to say the Board does not periodically appear to have stepped into the reviewing official's shoes and reevaluated a proposal. In *Systems Automation Corp.*, 86-1 BCA (CCH) ¶ 18,703, at 94,049 (1986), the Board appears to have reviewed the complete technical proposal as well as testimony submitted *in camera* in reaching its decision." *Id.*

132. 915 F.2d 1544 (Fed. Cir. 1990).

133. *Data Gen. Corp. v. United States*, 915 F.2d 1544, 1547 (Fed. Cir. 1990). The original bid solicitation was issued by the United States Geological Survey. *Id.* at 1545. The contract agreement spanned a seven-year period and specified that the government intended to purchase, primarily for its water resource division, in excess of \$125 million of ADPE. *Id.* Data General appealed the decision of the GSBCA granting the protest of SMS Data Products Group and Lockheed Missiles & Space Company. *Id.* at 1544.

134. *SMS Data Prods. Group, Inc.*, 90-2 B.C.A. (CCH) ¶ 22,799, at 14,497 (1990).

135. *Data Gen. Corp.*, 915 F.2d at 1552.

136. *Id.*

137. *Sysorex Information Sys., Inc., SMS Data Prods. Group, Inc., Falcon Microsystems, Inc.*, GSBCA Nos. 10642-P, 10644-P, 10656-P, 1990 BPD ¶ 193 (1990) (protest involving Treasury's award of ADPE contract to Sears Roebuck), *appeals docketed*, *Falcon Microsystems, Inc. v. United States*, No. 90-1500, 90-1502 (Fed. Cir. Sept. 6, 1990); *Sears Roebuck & Co. v. United States*, No. 91-1022 (Fed. Cir. Oct. 16, 1990); *SMS Data Prods. Group, Inc. v. United States*, No. 91-1060, 91-1061 (Fed. Cir. Nov. 5, 1990). Protesters alleged that a portable computer offered by Sears exceeded the RFP's weight limit. *Id.* Treasury and Sears had relied on literature from the computer's manufacturer for the product's compliance. *Id.* The

consequently conflicted with the Federal Circuit's definition of the correct standard of review.

## II. INTERESTED PARTY

The Brooks Act empowers the Board to hear protests of disappointed bidders who are "interested parties."<sup>138</sup> An interested party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."<sup>139</sup> Despite the Brooks Act's enunciation of this definition, there is a difference of opinion concerning its meaning. As a result, one of the most litigated points at the Federal Circuit concerning GSBCA protests is the issue of who is an interested party.

The Federal Circuit has addressed this issue in three cases. The first, *MCI Telecommunications Corp. v. United States*,<sup>140</sup> involved the GSA's massive procurement which was to replace the Federal Telecommunications System (FTS)—the government's entire long distance telephone system.<sup>141</sup> Three offerors responded to the government's solicitation, each with a variety of subcontractors.<sup>142</sup> Due to congressional concern that there would be one big "winner," GSA was instructed to split the award between two offerors.<sup>143</sup> The teams led by U.S. Sprint and AT&T Communications, Inc. were awarded the contract; the third team, led by Martin Marietta, was the sole loser.<sup>144</sup> MCI, a subcontractor to Martin Marietta, protested the award.<sup>145</sup> MCI conceded that it was not an actual offeror,<sup>146</sup> but contended that it was an interested party because it was a prospective offeror or bidder in the event of a resolicitation and its economic interest was directly affected by the award.<sup>147</sup> The GSBCA rejected this argument and dismissed the protest on the basis that MCI was not an interested party.<sup>148</sup>

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Board conducted a physical weighing of samples of the computer to determine compliance.  
*Id.*

138. Brooks Act, 40 U.S.C. § 759(f)(1) (1988).

139. 40 U.S.C. § 759(f)(9)(B).

140. 878 F.2d 362 (Fed. Cir. 1982).

141. *MCI Telecommunications Corp. v. United States*, 878 F.2d 362, 363 (Fed. Cir. 1982).

142. *See id.* (enumerating three contenders: AT&T Communications, Martin Marietta Corporation, and U.S. Sprint Communications Co.).

143. *Id.* at 364.

144. *Id.*

145. *Id.*

146. *See id.* (noting that MCI did not submit its own proposal at any time during proposal period).

147. *MCI Telecommunications Corp.*, GSBCA No. 9926-P, 1989 BPD, ¶ 60, at 2 (1989).

148. *Id.* at 6.

The Federal Circuit affirmed.<sup>149</sup> In doing so, it adopted the interested party standard applied to protests before the General Accounting Office (GAO).<sup>150</sup> Under this standard, an interested party is one who has either submitted a bid or proposal, or filed a protest, before the closing date of the solicitation.<sup>151</sup> It is irrelevant whether the protestor negligently missed the deadline for submission of proposals, or, as in the case of MCI, the corporation deliberately chose to be only a subcontractor and not an active participant in the bid solicitation.<sup>152</sup>

The Federal Circuit faced a variation of the *MCI* case in *Federal Data Corp. v. United States*,<sup>153</sup> its second important "interested party" case. In this case, Federal Data Corporation submitted a proposal but later withdrew from the competition.<sup>154</sup> The Health Care Financing Administration of HHS awarded a contract for ADPE to IBM.<sup>155</sup> Wang Laboratories, Inc. filed a protest which caused HHS to suspend performance and reopen negotiations.<sup>156</sup> Since the total price and certain technical information related to IBM had been released to the unsuccessful parties, HHS established that, as a condition precedent to participating in the new round of negotiations, the corporations must release certain proprietary information.<sup>157</sup> The purpose of this requirement was to place all vendors on an equal footing.<sup>158</sup> Federal Data refused to consent to HHS's demands and ultimately withdrew from the competition.<sup>159</sup> Subsequently, Federal Data protested to the GSBCA on a number of grounds, all of which were either dismissed or denied.<sup>160</sup>

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149. *MCI Telecommunications Corp. v. United States* 878 F.2d 362, 368 (Fed. Cir. 1982).

150. *Id.* at 365. The court stated:

Our view as to the plain meaning of section 759 (f)(9)(B) corresponds to the Ninth Circuit's construction of 31 U.S.C. § 3551(2) (Supp. IV 1986) in *Waste Management of North America, Inc. v. Weinberger*, 862 F.2d 1393 (9th Cir. 1988). Section 3351(2) defines an interested party for purposes of bringing a protest before the General Accounting Office (GAO) rather than the GSA board, but uses language identical to section 759 (f)(9)(B). Using what we view as persuasive reasoning, the court in that case determined that the would-be protestor, even though appearing to have a direct economic interest, was not an interested party because it neither bid nor protested before the close of the proposal period.

*Id.* (citing *Waste Management*, 862 F.2d at 1398).

151. *Id.*

152. *Id.*

153. 911 F.2d 699 (Fed. Cir. 1988).

154. *Federal Data Corp. v. United States*, 911 F.2d 699, 701 (Fed. Cir. 1988).

155. *Id.*

156. *Id.*

157. *Id.* The information to be released prior to the reopening of negotiations consisted of three elements: the identity of all offerors in competitive range, the total evaluated price of all offerors, and the total technical score of all offerors. *Id.*

158. *Id.*

159. *Id.*

160. *Federal Data Corp.*, 89-1 BCA (CCH) ¶ 21,414, at 107,932 (1988).

Federal Data then appealed to the Federal Circuit on a single count which asserted "that HHS's proposed remedy . . . violates FAR 15.610(d), in that the disclosure of the prices and scores of all offerors would constitute . . . an auction."<sup>161</sup> The Board had denied this count despite HHS's "violation of the letter of the FAR."<sup>162</sup> It reasoned that because HHS "endeavored to correct its admitted error in a way that affords equal treatment to all offerors on the re-opened procurement, and allows for the most competition available under the circumstances . . .," it is a practical exception to the FAR.<sup>163</sup>

Although the GSBCA denied the protest, it found that Federal Data was an interested party.<sup>164</sup> The GSBCA based its finding on Federal Data's status as a competitor prior to its withdrawal from the competition.<sup>165</sup> The Board concluded that Federal Data wanted to compete for the contract, but was forced to withdraw due to the government's violation of the FAR. Consequently, the GSBCA held that Federal Data did not relinquish its right to compete, was an interested party, and could pursue its complaint.<sup>166</sup>

On appeal, because it was no longer competing for award, Federal Data sought only its proposal preparation and protest costs.<sup>167</sup> As in *MCI*, the court determined that Federal Data was not an interested party.<sup>168</sup> The court explained that because Federal Data with-

161. *Id.* at 107,927. FAR 15.610 states:

(d) The contracting officer and Government personnel involved [in written and oral discussion in connection with negotiated procurements] shall not engage in -

- (1) Technical leveling (i.e., helping an offeror to bring its proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal);
- (2) Technical transfusions (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of competing proposal); or
- (3) Auction techniques; such as —
  - (i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;
  - (ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and
  - (iii) Otherwise furnishing information about other offeror's prices.

Federal Acquisition Regulation, 48 C.F.R. § 15.610(d) (1987).

162. Federal Data Corp., 89-1 B.C.A. (CCH) ¶ 21,414, at 107,930 (1988).

163. *Id.* at 107,932.

164. Federal Data Corp., GSBCA No. 9732-P, 1988 BPD ¶ 308, at 11 (1988), *rev'd*, 911 F.2d 699 (Fed. Cir. 1990).

165. *Id.*

166. *Id.*

167. *See* Federal Data Corp. v. United States, 911 F.2d 699, 704 (Fed. Cir. 1990) (noting that reasonable attorney's fees are included in "protest costs").

168. *Id.* at 703-04 (basing its decisions on *MCI Telecommunications Corp. v. United States*, 878 F.2d 362 (Fed. Cir. 1989)).

drew from the bidding process prior to filing its protest, it willingly conceded any chance of obtaining the contract.<sup>169</sup> Therefore Federal Data ceased to have the requisite "direct economic interest" in the contract.<sup>170</sup> In order to establish the requisite direct economic interest, the protestor must continue to compete for award at least until it files a protest with the GSBCA.<sup>171</sup> Federal Data's forced withdrawal prohibited continued competition for award and it did not seek enforcement of its protest.<sup>172</sup> Thus, contrary to the Board's decision, the Federal Circuit determined that Federal Data was not an interested party.<sup>173</sup> This case establishes that in addition to being an actual offeror or bidder (or filing the protest before the closing date of the procurement), the protestor must continue in that role at least until filing its protest.

The third Federal Circuit case analyzing the interested party question is *United States v. International Business Machines Corp. (IBM)*.<sup>174</sup> The dispute in *IBM* arose out of an invitation for bids issued by the GPO. IBM, the fourth lowest bidder in the competition, protested an award to Amdahl.<sup>175</sup> The Board held that IBM had standing as an interested party because it had a direct economic interest.<sup>176</sup> The GSBCA based this finding on the fact that IBM participated and expended resources in an effort to obtain the procurement.<sup>177</sup>

The Federal Circuit reversed and in doing so, carved out a firm rule for measuring whether a protestor, at least in a sealed-bid context, is an interested party.<sup>178</sup> The court held that in a publicly announced sealed-bid context, only the second-lowest bid has the requisite direct economic interest where every competitor offers essentially the same product or services so that bids differ materially only as to price; the solicitation process is not challenged, and there is no reason to believe that the second-lowest bid is unresponsive.<sup>179</sup> The court held that IBM could not qualify as an interested

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169. *Id.*

170. *Id.* (quoting 40 U.S.C. § 759(f)(9)(B)).

171. *See id.* at 704 (holding that action in controversy may be brought only by "interested party," i.e., one with "direct economic interest," who continued to compete without withdrawing prior to filing protest).

172. *Id.*; see 40 U.S.C. § 759 (1988) (stating that party seeking costs must have standing to enforce protest).

173. *Federal Data Corp.*, 911 F.2d at 704.

174. 892 F.2d 1006 (Fed. Cir. 1989), *reh'g denied*, (Jan. 17, 1990).

175. *International Business Machs. Corp.*, GSBCA No. 9703-P, 1988 BPD ¶ 257, at 10 (1988), *rev'd*, 892 F.2d 1006 (Fed. Cir. 1989).

176. *Id.*

177. *Id.*

178. *United States v. International Business Machs. Corp.*, 892 F.2d 1006, 1011 (Fed. Cir. 1989), *reh'g denied*, (Jan. 17, 1990).

179. *Id.*

party because its bid ranked fourth-lowest in a formally advertised, sealed-bid procurement, it did not challenge either the solicitation itself or the eligibility of the lower bidders, and every competitor offered the same hardware.<sup>180</sup>

*IBM*, however, invites future litigation concerning the scope of the new rule. The court suggests that the rule applies only in the sealed-bid context,<sup>181</sup> but other language in the opinion leaves open the possibility that the rule will apply to negotiated procurements as well.<sup>182</sup>

A recent GSBGA protest case<sup>183</sup> addressed a question concerning the scope of the *IBM* rule.<sup>184</sup> In this case, three firms protested the Treasury Department's award of a large personal computer contract to Sears.<sup>185</sup> Pursuant to the Federal Circuit's ruling in *IBM*, the Treasury Department and Sears moved for a dismissal of protests by all bidders with the exception of the bidder with the second-lowest offer.<sup>186</sup> A provision in the RFP stated that the Treasury Department would make an award based solely on price if its contracting officer determined that the offeror's products were essentially equivalent.<sup>187</sup> The award was made on price alone, the contracting officer having made a determination of equivalency.<sup>188</sup> The GSBGA held that the chance of further rounds of competition after a protest is a possibility; therefore, the *IBM* rule does not apply in negotiated procurements.<sup>189</sup> This is in direct conflict with the position taken by GAO, which has limited the zone of interested party to the second lowest offeror absent a challenge to the acceptability of that of-

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180. *Id.*

181. *Id.* The court referred to "formally [sic] advertised[,] sealed-bid procurements . . ." *Id.* The implication is that the rule the court fashioned applies only to non-negotiable procurements.

182. *Id.* The court noted that "[t]his is especially so when the solicitation invites sealed bids . . ." *Id.* The implication is that the rule does not apply exclusively to negotiated contests.

183. *Sysorex Information Sys., SMS Data Prods. Group, Inc., Falcon Microsystems, Inc.*, GSBGA Nos. 10642-P, 10644-P, 10656-P, 1990 BPD ¶ 153 (1990).

184. *Id.* at 6 (asserting that in negotiated context, lowest-priced fully compliant bid cannot be determined by price alone).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 5; see also *Planning Research Corp.*, GSBGA No. 10697-P, 1990 BPD ¶ 224 (1990) (reaching same conclusion that *IBM* rule applies only to sealed-bid solicitations). Administrative Judge Neill noted that a contrary rule would permit all disappointed bidders to claim standing because they had a direct economic interest in the contract. *Id.* at 2. This would erode the direct economic interest limitations until it imposed no limit on protests at all. *Id.* But see *Unit Data Serv. Corp.*, GSBGA No. 10775-P, 1990 BPD ¶ 281 (1990) (reaching contrary conclusion by applying *IBM* rule to a negotiated procurement without discussion).

feror's offer.<sup>190</sup> This is the *IBM* rule. The Federal Circuit has not yet ruled on this issue and a conflict between the Board and GAO remains. As noted above, the Federal Circuit has viewed the GAO position on the interested party issue favorably in a somewhat different context.<sup>191</sup>

The *IBM* decision enunciated an additional distinct element in determining whether the party is interested.<sup>192</sup> This element relates to the protestor's responsiveness to a solicitation for bids and is derived from the statutory requirement that an award can be made only to a bid conforming to the solicitation.<sup>193</sup> When a protestor's responsiveness is challenged, the Board must, as a preliminary jurisdictional inquiry, determine if the bid is indeed responsive.<sup>194</sup>

Technically, the responsiveness inquiry only applies to sealed-bid solicitations.<sup>195</sup> But, notwithstanding this general rule, the GSBCA occasionally applies a strict standard of conformance to bidders involved in negotiated procurements.<sup>196</sup> Because the same pass/fail test of conformance to RFPs is utilized in protest reviews of negotiated procurements as is applied in making a responsiveness determination in a sealed-bid contract, there seems to be little reason to suggest that the Federal Circuit would not apply the same interested party test to a negotiated procurement.

### III. SANCTIONS

In *Vion Corp. v. United States*,<sup>197</sup> the Federal Circuit limited the scope of the GSBCA's authority to dismiss a frivolous claim. Vion protested an Army acquisition of IBM-compatible computers.<sup>198</sup> The GSBCA denied the Army's motion to dismiss the protest as frivolous.<sup>199</sup> During discovery, the Army filed a motion for discov-

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190. Thermal Reduction Co., B-236724, 89-2 CPD ¶ 527 (1989); see CFS Air Cargo, Inc., B-238698.4, 90-1 CPD ¶ 315 (1990).

191. MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989).

192. International Business Machs. Corp. v. United States, 911 F.2d 1006, 1012 (Fed. Cir. 1989).

193. *Id.*; see 10 U.S.C. § 2305(b)(3) (1988) and 41 U.S.C. § 235b(c) (1988) (requiring that government contracts be awarded only to proposals "whose bid conforms to the solicitation").

194. *International Business Machs. Corp.*, 911 F.2d at 1012.

195. *Id.* at 1011; see also J. CIBINIC & R. NASH, FORMATION OF GOVERNMENT CONTRACTS 394 (2d ed. 1986) (arguing that conformity requirement applies to sealed-bid procurements pursuant to statutory mandate).

196. Sysorex Information Sys., Inc., SMS Data Prods. Group, Inc., Falcon Microsystems, Inc., GSBCA Nos. 10642-P, 10644-P, 10656-P, 1990 BPD ¶ 153, at 7 (1990) (applying strict standard of conformance to negotiated procurement in protest filed post-award).

197. 906 F.2d 1564 (Fed. Cir. 1990).

198. *Vion Corp. v. United States*, 906 F.2d 1564, 1568 (Fed. Cir. 1990).

199. *Vion Corp.*, GSBCA No. 10218-P, 1990 BPD ¶ 200, at 4 (1990), *rev'd*, 906 F.2d 1564 (Fed. Cir. 1990).

ery sanctions, alleging that Vion's responses exposed "a deliberate pattern of refusal to cooperate with the Board's [discovery] order."<sup>200</sup> The Board dismissed the protest for two reasons: (1) the protest was frivolous; and, (2) Vion failed to comply with the Board's discovery order.<sup>201</sup> On reconsideration, the GSBICA reaffirmed the dismissal, stating that it dismissed the action because the protest was frivolous; the dismissal was not intended as a discovery sanction.<sup>202</sup>

Congress authorized the GSBICA to dismiss a frivolous protest or a protest which on its face did not state a valid basis to protest.<sup>203</sup> The Federal Circuit, in *Vion*, held that Congress intended the word "frivolous" to have the common meaning used in other legal contexts.<sup>204</sup> A complaint well grounded in fact and law cannot be dismissed as frivolous.<sup>205</sup> The court further noted that conscious interference with or delay in the Board's management of a protest does not necessarily make the protest frivolous; bad faith does not make a claim frivolous.<sup>206</sup> The Federal Circuit went to some length to point out that the Board relied solely on the finding of frivolousness to make its decision, expressly disavowing discovery sanction as a basis for the dismissal.<sup>207</sup> The clear implication of the ruling is that the GSBICA lacks authority to dismiss any protest unless it is frivolous or it fails to state a valid basis. The unanswered question is whether the GSBICA has the authority to sanction a party for discovery abuse.<sup>208</sup>

A recent GSBICA opinion interprets *Vion* as refining the GSBICA's authority to dismiss frivolous claims, not as limiting its authority to impose discovery sanctions.<sup>209</sup> In that case, one of the protestors, in

200. *Vion Corp.*, 906 F.2d at 1565.

201. *Vion Corp.*, GSBICA No. 10218-P, 1990 BPD ¶ 200, at 3 (1990).

202. *Id.* at 2-3.

203. See 40 U.S.C. § 759(f)(4)(C) (1988) (empowering GSBICA to dismiss frivolous claims, but failing to define "frivolous").

204. *Vion Corp.*, 906 F.2d at 1566 (noting that claim is frivolous when utterly without merit; but not even colorable argument can be made in its behalf).

205. *Id.*

206. *Id.* at 1566-67.

207. *Id.*

208. *Id.* at 1568 n.5. The court noted that it did not have to address the issue of whether "Vion could be lawfully sanctioned for past discovery misdeeds, or whether dismissal might be justified for any future discovery transgressions." *Id.*

A previous Federal Circuit case involved a situation in which the GSBICA imposed discovery sanctions against a party that refused to comply with a discovery order. *United States v. Electronic Data Sys. Fed. Corp.*, 857 F.2d 1444, 1445 (Fed. Cir. 1988). The court, however, reversed on other grounds and, as in *Vion*, failed to rule on the propriety of the sanctions. *Id.*

209. *Sysorex Information Sys., Inc., SMS Data Prods. Group, Inc., Falcon Microsys., Inc.*, GSBICA Nos. 10642-P, 10644-P, 10656-P, 1990 BPD ¶ 153, at 6 (1990) (reading *Vion* narrowly to imply that the court did not intend to limit GSBICA authority to issue discovery sanctions).

order to assist in preparing its protest, paid the awardee's former consultant for privileged information concerning the awardee.<sup>210</sup> The protestor's conduct came to light during discovery when the protestor produced the awardee's privileged documents.<sup>211</sup> The opinion states that the GSBCA reads *Vion* as applicable "only to situations in which a dismissal is requested based on alleged bad faith."<sup>212</sup> The Board explained that *Vion*, if read too broadly, would deny the Board authority to manage its docket in an orderly fashion.<sup>213</sup> Thus, the GSBCA suggests that *Vion* does not alter its authority to employ discovery sanctions.

#### CONCLUSION

It certainly appears that, in the view of the Federal Circuit, the GSBCA has been overly expansive in interpreting its protest jurisdiction. While at times suggesting that its future review of the Board will be more favorable, the Federal Circuit consistently reverses the GSBCA on jurisdictional grounds. This places the GSBCA in the position of having to judge narrowly its protest jurisdiction, or to subject itself to reversals by the Federal Circuit. In other areas concerning bid protests, such as defining who is an interested party or determining the scope of the Board's authority to impose sanctions, the GSBCA awaits further clarification by the Federal Circuit.

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210. *Id.*

211. *Id.* at 8.

212. *Id.* at 6.

213. *Id.*

